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## JUSTICE AND GENOCIDE IN BOSNIA: AN UNBRIDGEABLE GAP BETWEEN ACADEME AND LAW?

Gregory Kent<sup>1</sup>

### Abstract:

The 1992-95 war in Bosnia was the worst war on the European continent since WWII. The massive and systematic human rights violations were the worst in Europe since the Holocaust. This article proposes, based on a provisional review of non-legal, mainly social science and humanities literature on the Yugoslav crisis, and on a focused analysis of genocide jurisprudence, that there is a gulf between, on the one hand, academic interpretations of these human rights violations as constituting genocide – with some notable exceptions - and on the other, judicial decisions regarding cases brought at the International Criminal Tribunal for the former Yugoslavia (ICTY) (and partly the International Criminal Tribunal for Rwanda - ICTR). A key issue in the determination of genocide has been where and when such crimes were committed. There is provisional agreement between academe and the law on the case of the massacres at Srebrenica amounting to genocide, but the earlier period of the war, in the spring/summer of 1992 in eastern and northern Bosnia, often seen by analysts as the key period of systematic and massive violence constituting genocide, has been largely avoided or dismissed by the international judicial effort. By examining the key case of Jelisic, this article highlights in detail some issues of interpretation or misinterpretation in the evolving jurisprudence on genocide.

**Keywords:** genocide, accountability for war crimes, human rights violation, , Srebrenica massacres, Case of *Jelisic*

### Introduction

The war in Bosnia represented the worst case of massive and systematic human rights violations in Europe since WWII. How international actors responded to the challenge the breakup of Yugoslavia posed has been widely discussed and studied with a strong sense coming out of the literature that international efforts, on the whole, failed. The UN, tasked with peace-keeping in a war zone, was arguably doomed to failure by its guiding masters on the Security Council. But its failures, from failing to protect besieged and threatened civilians while protecting and delivering to them humanitarian aid, to having no answer to the attack on the UN Safe Area of Srebrenica despite NATO preparedness to take action, have been rightly in part recognised by itself and accepted.<sup>2</sup> Individual major state actors, most notably France and especially Britain displayed a ‘pusillanimous realism’ which helped to stymie

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<sup>2</sup> Report to the Secretary-General pursuant to General Assembly resolution 35/53, ‘The Fall of Srebrenica’ at [www.un.org/peace/srebrenica.pdf](http://www.un.org/peace/srebrenica.pdf).

efforts to take more effective action. The US, if we can forgive the anachronism, 'led from behind' having offered the rising EU the chance to solve a crisis in its own backyard.

The manner in which the wars were reported by international media, according to at least two important studies, had a significant influence on policy reaction to these atrocities, limiting understanding of both politicians and publics, creating confusion about a case of aggression, war and genocide.<sup>3</sup> The focus of this article is not, however, these institutions; rather it examines in a comparative manner, how non-state elements – on the one hand international legal actors, primarily the tribunal established by the Security Council as a concrete response to the atrocities in the wars, and on the other, academic actors located in civil society institutions such as universities and think tanks – tackled the vexed issue of responsibility for the crime of genocide.

Academia was no doubt affected by the labelling choices, false balancing and other features of the reporting of the wars but it seems to be the case that those who looked closely at the crisis in their work, whether as historians, area specialists, genocide theorists or war and policy experts, better understood events than most other professionals.<sup>4</sup> Can the same be said of the law? Specifically how have the international judiciary tasked with trying those accused of war crimes and genocide understood the crisis and how has this affected their judgments? There has been considerable discord sown in the Balkans over a number of the Tribunal's judgements, most recently in Serbia over the Gotovina case.<sup>5</sup>

This article is not meant to be read as a harsh critique of the ICTY itself – much has been accomplished through its formation and operation and it would be hard to imagine the region as stable and relatively prosperous as it is today without its difficult and challenging case work. That said, here we focus on the most serious crime, genocide, considering the record of the main judicial bodies and contrasting this with academic perspectives. The discussion moves to an analysis of the key aspects of an important case, *Jelisić*, in relation to what the author identifies as omissions in the judicial reckoning provided by, in particular, the Yugoslav Tribunal (ICTY): the failure to convict the direct perpetrators of the crimes which constitute the actus reus of genocide, and the failure to recognise genocide as having taken

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<sup>3</sup> See Brendan Simms, *Unfinest Hour. Britain and the destruction of Bosnia* (Allen Lane: London, 2001) and Gregory Kent, *Framing War and Genocide. British policy and media reaction to the war in Bosnia* (Hampton Press: Creskill, NJ, 2005).

<sup>4</sup> No doubt some scholars would take issue with this representation of the degree of agreement within debate on the wars and genocide that took place on the territory of former Yugoslavia. See note 9 below for examples of diverse views on the crisis.

<sup>5</sup> Marko Milanovic, 'The Gotovina Omnishambles' in Pescanik at <http://pescanik.net/2012/11/the-gotovina-omnishambles/> 20 November 2012

place outside of the municipality of Srebrenica.<sup>6</sup> Underpinning this critique the article offers a brief summary history of one of the early episodes of the war which convinced many international observers of the essentially genocidal nature of the conflict.

The aim of this article therefore is to raise legal issues of inconsistency drawing on the author's own knowledge of the conflict, developed as a journalist and academic prior to, during and after the crisis and from previous legal research and dissenting judicial opinion.

## 1 War and Genocide in Bosnia?

In a sense, Yugoslavia, in particular Bosnia, wrong-footed international actors. During the Cold War, atrocities had been carried out, but strategic imperatives meant the media rarely took an independent line and fully reported major war crimes and human rights atrocities.<sup>7</sup> The delayed recognition of the widespread failure of member states and the UN system is amply demonstrated by Kofi Annan's depiction of the actual nature of the crisis, never expressed at the time, in the UN's own scathing report on the Bosnia crisis:

As part of the larger ambition for a "Greater Serbia", the Bosnian Serbs set out to occupy the territory of the enclaves... The civilian inhabitants of the enclaves were not the incidental victims of the attackers; their death or removal was the very purpose of the attacks upon them. The tactic of employing savage terror, primarily mass killings, rapes and brutalization of civilians, to expel populations was used to the greatest extent in Bosnia and Hercegovina...<sup>8</sup>

The war in Bosnia, the third conflict (after Slovenia and Croatia) in the Yugoslav breakup, surpassed all expectations of brutality and predictions of carnage. It was 'more discussed and analysed on almost all levels while it was still in train than any other conflict.'<sup>9</sup> As a result of such saturated exposure the war scored itself on European and wider global consciousness like no other.<sup>10</sup> But as one historian has remarked, the crisis remains 'undoubtedly one of the most misunderstood of modern history.'<sup>11</sup> This raises an obvious question:

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<sup>6</sup> Strictly speaking it is important to note that the December 2012 decision in the Tolimir case, in which Muslim Bosnians – a small number of leaders - from the neighbouring town of Zepa were also considered to have been targeted as part of the *actus reus* of genocide.

<sup>7</sup> Martin Shaw, *Media and Civil Society in Global Crises* (Pinter: London, 1996)

<sup>8</sup> Report of the Secretary-General to the General Assembly pursuant to resolution 53/35. The Fall of Srebrenica. November 1999 at <http://www.un.org/peace/srebrenica.pdf> para 45

<sup>9</sup> James Gow, *Triumph of the Lack of Will. International Diplomacy and the Yugoslav War* (Hurst and Co.: London 1997) p.v.

<sup>10</sup> Mary Kaldor, Bosnia-Herzegovina: 'A Case Study of the New Type of Warfare'. Unpublished chapter from *New Wars and Old: Organised Violence in a Global Era*. Unpublished manuscript (1999).

<sup>11</sup> Attila Hoare in *Bosnia Report*, no.18, The Bosnian Institute July-Sept.2000.

One might ask what there could be to misunderstand in the sickening brutality and appalling suffering of the above mentioned stories. There may have been a universal comprehension of suffering but in moving beyond the fundamental, to more specific issues of causation and responsibility, and more precise definition of the nature of the war, a debate began in which the most basic language was contested. This is the paradox of the representation of the Bosnian war. Its product appears to have been sympathy with regard to mediated suffering but at the same time, confusion in relation to most meaningful questions about the war.<sup>12</sup>

A fundamental question of the war relates to the methods used by Belgrade-backed forces in the conflict. Arguably most Bosnians and a majority of scholars on the issue understand the fundamental feature of the conflict to be its genocidal character.<sup>13</sup> Specifically the systematic and organised attack on Bosnian civilians by Serbian forces merits the descriptor genocide. The author takes the view, as many of the international judiciary concur, that the systematic nature of the attacks provides compelling evidence of the intent to destroy.<sup>14</sup> This research focuses on the perceived gap between historical and social scientific analyses of war and genocide on the one hand, and law and its interpretation - mainly at the ad hoc International Criminal Tribunal for former Yugoslavia (ICTY) – on the other. Such a gap must in part be seen as a product not purely of the institutional imperatives and discourses that dominated in the period but also of a wider cultural understanding of genocide which perhaps already has faded from view. Genocide is a term that in the early 1990s seemed to belong to an earlier period, the era of WWII and the Holocaust. Indeed scholars have identified a school of thought which proposes ‘Holocaust exclusivity’ or ‘uniqueness’. Jurisprudence on genocide has developed considerably since the formation of the ad hoc tribunals in response to the Yugoslav and Rwandan crises, there having been little test of the Genocide Convention until the commencement of cases at these two tribunals in 1997.

Underlying this research is a question about the ability of those who interpret law regarding what most consider to be the ‘crime of crimes’, mainly international criminal judges, to remain beyond influence of media representations in the societies in which we all live and work. Like academics, judges are presumed to analyse evidence in a detached manner, methodically and in great detail. There is no doubt an expectation that the international judiciary would conduct its work largely free from the influence of the media. Such a presumption may be overly optimistic. This is not a study however of how judges ‘receive’

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<sup>12</sup> Kent, *Framing War and Genocide* at p.3.

<sup>13</sup> This assertion is based on the author’s personal experience of Bosnia and its people, across ethnic groups, and scholarly works on Bosnian opinion, for example, Orentlicher’s excellent 2012 study of Bosnians and the ICTY. Diane F. Orentlicher, *That Someone Guilty Be Punished. The impact of the ICTY in Bosnia*. (Open Society Justice Initiative, International Center for Transitional Justice, 2010)

<sup>14</sup> Judge Mohamed Shahabudeen at the ICTY and Judge Awn Shawkat al-Khasawneh at the ICJ are pre-eminent examples.

and interpret media messages but it has a more modest aim of raising questions about the interpretation of law relating to genocide in Bosnia given the apparent mismatch between judicial findings regarding genocide at the ICTY and the views of many, arguably most, Balkans history scholars, war and strategic studies academics, policy experts, and genocide theorists.<sup>15</sup> This difference is important because such a gulf between the perspectives of elements of the international judiciary and relevant experts (let alone individual members of the societies to which these judgments pertain) could undermine the legitimacy of international criminal justice in the long term.

Social scientists and humanities scholars have written extensively about the Bosnia crisis. Martin Shaw, a leading genocide scholar, argued in the mid-1990s that Serbian actions in Bosnia amounted to genocide, a position shared by most scholars in this field.<sup>16</sup> Norman Cigar, a military analyst, author of 'Genocide in Bosnia', described the specific nature of the attacks and ideology of ethnic purity underpinning Serbian actions.<sup>17</sup> The US critical sociologist, Stjepan Mestrovic, described a 'postemotional' genocide in Bosnia.<sup>18</sup> Philosophers including Jean Baudrillard and Alain Finkelkraut and especially Bernard Henri Levi argued with some passion for the crisis to be understood in these terms.<sup>19</sup> The Balkans historian Marko Hoare has argued trenchantly against the narrow interpretation of the Genocide Convention by ICTY judges.<sup>20</sup> Other scholars, including the historians Brendan Simms and Noel Malcolm and the war analysts Jane Sharp and James Gow, implicitly support such an understanding of the nature of the conflict. Others from a range of

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<sup>15</sup> These writers include Mark Almond, Christopher Bennett, Tone Bringa, James Gow, Marco Hoare, Quintin Hoare, Branka Magas, Noel Malcolm, Mark Mazower, Mark Thompson and journalists including Roy Gutman, Peter Maas, Laura Silber and Alan Little, David Rieff, Chuck Sudetic, and Marcus Tanner. There are of course, a number of exceptions including the anthropologist Xavier Bourgarel, from strategic studies, John Zametica, regional and economic specialist Susan Woodward, historian John Lampe, from journalism the leading Balkans correspondent Misha Glenny and many academics of Serbian background. The critical bibliographical work 'Books on Bosnia. A Critical Bibliography of Works Relating to Bosnia-Herzegovina Published Since 1990 in Western European Languages' edited by Quintin Hoare and Noel Malcolm. Bosnian Institute Publications: 1999, Quintin Hoare and Noel Malcolm is an outstanding guide to the varying perspectives of those claiming authority to write on the conflict.

<sup>16</sup> Shaw, *Civil Society and Media in Global Crises*.

<sup>17</sup> Norman Cigar, *Genocide in Bosnia: the policy of 'ethnic cleansing'* (College Station: Texas A&M University Press, 1995).

<sup>18</sup> Stjepan Mestrovic (ed.), *Genocide After Emotion: The Post-Emotional Balkan War*. London: Routledge, 1996. See also Thomas Cushman and Stjepan Mestrovic, *This Time We Knew. Western Responses to Genocide in Bosnia*. (New York University Press 1996)

<sup>19</sup> A French public intellectual, Bernard Henri Levi's greatest statement on the crisis was the film 'Bosna' Bosnia/France 1994.

<sup>20</sup> Marko Hoare, 'Genocide in Bosnia and the failure of international justice' Working Paper Series No.8. April 2008 at <http://fass.kingston.ac.uk/downloads/helen-bamber-working-paper-08.pdf>

disciplines have taken the view that Serbia and its proxies, did indeed attempt, and partly succeeded in carrying out an expansionist project underpinned by genocidal methods.<sup>21</sup>

Despite the critique of the media suggested above, many journalists led the development of this understanding of the crisis as genocide.<sup>22</sup> Through reports on the Omarska camp by Ed Vulliamy, Penny Marshall and Ian Williams, the tireless campaigning journalism of Maggie O'Kane and especially the contribution of Roy Gutman (author of 'Witness to Genocide') who led the way in the spring and early summer of 1992 in describing the massacres and mass forced deportation of Bosnians as genocide, genocide was certainly represented in the media by some reporters. Chuck Sudetic, David Rieff and David Rohde, developed similar portrayals of events during 1992-95.

Law, or at least the international judiciary which staffs the ICTY, it is argued here, is to some extent out of step with the Bosnian victims and with many western journalists who became involved in the reporting of the wars during its over three and a half years of violence. What then, has been the record to date, of the international effort to prosecute the crime of genocide at the ICTY?

Four mid-to-senior level army officers have been convicted of genocide or genocide related crimes. Drina Corps Commander during the Srebrenica massacres, General-Major Radislav Krstic, was the first person to be convicted of genocide at the ICTY, the first in Europe in fact. On appeal his sentence was reduced from 46 to 35 years having been found guilty of the lesser charge of aiding and abetting genocide. Drago Nikolic, a Second Lieutenant was also found guilty of this form of responsibility for genocide. Ljubisa Beara, Head of Security of the Army of Republika Srpska (VRS) Main Staff and Vujadin Popovic, Lieutenant-Colonel, have been found guilty of genocide and conspiracy to commit genocide, again relating to Srebrenica in July 1995. Eleven of the 15<sup>23</sup> genocide indictees escaped conviction; two (Milosevic and Kovacevic) died before completion of trials, three (Nikolic, Obrenovic and Plavsic) engaged in plea-bargaining, each settling for a crimes against humanity conviction, three indictees relating to Srebrenica (Blagojevic, Pandurevic and Borovcanin) were found not guilty. Three were found not guilty (Jelusic, Krajisnik and Stakic) relating to northern and

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<sup>21</sup> Some, including for example, James Gow, have tended not to use 'genocide' as a conceptual tool, while implicitly acknowledging its existence. Other academic writers who take an approach that acknowledges the genocidal nature of the attack on Bosnia include: Michael N. Barnett, Brad Blitz, Philip J. Cohen, Daniele Conversi, Tom Gallagher, Branka Magas, Srdja Popovic, Igor, Primorac, Sabrina Ramet, Vesna Nikolic-Ristanovic, Mark Thompson, Paul Williams,

<sup>22</sup> See Kent, *Framing War and Genocide* for a more in-depth exposition of the role of media in this conflict.

<sup>23</sup> Processed, three are in process or awaiting.

eastern Bosnian massacres at earlier periods of the conflict.<sup>24</sup> Bosnians have been 'disappointed in the Tribunal's failure to sustain genocide-related charges in the few cases where genocide was charged and which resulted in a verdict.'<sup>25</sup>

The aim of this article as noted above is to raise legal issues of inconsistency. As already noted, most serious scholars argue that genocide occurred in Bosnia but so far only four men have been convicted of that crime at The Hague, and only for crimes specifically relating to the series of massacres at Srebrenica in July 1995. As one legal scholar has proposed, the emerging doctrine of the ICTY 'risks undermining the object and purpose of the Genocide Convention'.<sup>26</sup>

A key issue in the genocide identified by Bosnian writers and international experts is the legal focus on Srebrenica as the single moment of genocide compared to other atrocities committed at early times in other regions of Bosnia. As Emir Suljagic argues: 'This whole thing started as genocide in Bosnia and it ended with genocide in Srebrenica and it's so unfair to those tens of thousands of people who were slaughtered by Serbian forces early in the war'.<sup>27</sup> As Diane Orentlicher put it, 'their extermination is left outside the ICTY's [first] judgment of genocide in *Krstic*' and the same can be said of the other recent genocide judgments.<sup>28</sup> Hoare makes a similar point in his critique of Tribunal indictments policy.<sup>29</sup> He notes that the ICTY and ICJ acknowledged the Belgrade-controlled Yugoslav People's Army directly commanded all Serbian forces operating in Bosnia until 19 May 1992. Given that most of the atrocities in the war were carried out in the spring and early summer of 1992, Belgrade 'was directly responsible for the largest phase of mass killing' in the war.<sup>30</sup> Indeed the ICJ acknowledged that Serbian forces were in 1992, 'guilty of systematic massive killings and massive mistreatment of the Bosnian Muslims that bore all the characteristics of genocide – except that genocidal intent had not been proven.'<sup>31</sup> The pattern of killing, involving the murder of thousands of civilians, massive forcible deportation and cultural destruction was not sufficient to prove genocidal intent in the judgment of the ICTY judiciary.

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<sup>24</sup> Three further, and important genocide indictees are at The Hague either awaiting or at trial: top level leaders Radovan Karadzic and General Ratko Mladic, and Zdravko Tolimir, assistant commander in the VRS Main Staff. Jelusic, who had pleaded guilty, was found guilty of murder as a crime against humanity.

<sup>25</sup> Diane F. Orentlicher, *That Someone Guilty Be Punished. The impact of the ICTY in Bosnia* (Open Society Justice Initiative, International Center for Transitional Justice, 2010) pp.66-71.

<sup>26</sup> David Alonzo-Maizlish, 'In Whole or in Part: Group Rights, the Intent Element of Genocide and the "Quantitative Criterion"' (2002) *New York University Law Review* 1375.

<sup>27</sup> Emir Suljagic in Orentlicher, *That Someone Guilty Be Punished* at p.67.

<sup>28</sup> *Ibid.*

<sup>29</sup> Marko Hoare 'Victors' justice is the only kind' at

<http://www.henryjacksonsociety.org/stories.asp?pageid=49&id=933> 28<sup>th</sup> December 2008.

<sup>30</sup> Hoare, 'Genocide in Bosnia and the failure of international justice' at p.11.

<sup>31</sup> *Ibid* p.14.



To date no complete historical narrative of the events of the opening weeks of the genocide in eastern Bosnia exists. Below, for readers not familiar with the nature of these events, an edited summary of such a history is provided using a range of sources including testimony from survivors compiled by human rights NGOs, journalists and photographers.<sup>32</sup> So what was the nature of the attack on Bosnia?<sup>33</sup> The account below demonstrates that the attack on Eastern Bosnia was systematic and massive. It had, therefore, to have been organised, that is planned in advance. Such characteristics demonstrate a strong sense of intentionality that the judges at the ICTY seem to have ignored.

## 2 Eastern Bosnia, April-May 1992

Despite the region's non-Serb Bosnian majority and the intermingled nature of society there, the people of eastern Bosnia were the first in Bosnia to experience the genocidal assault of Belgrade-backed forces determined on radically transforming the demography of the region. Human Rights Watch produced a summary that documented a fraction of the picture in August 1992. It reported that 'civilians are being summarily executed as part of an "ethnic cleansing" campaign which is being implemented by Serbian forces.'<sup>34</sup> In Bijeljina on 1 April,

a gang of Serb gunmen led by a contract killer for Milosevic's police ministry raced across the border from Serbia and attacked Bijeljina. Burly gunmen in black balaclavas and jackboots stomped through Bijeljina... [they] went from house to house searching out and executing Muslims with education, influence or money. Young Muslim men were dragged from their homes, shot in the head, and left to rot in the streets. Old women were killed inside their homes.<sup>35</sup>

There were two significant features about this attack. Firstly, non-local Serbian forces deliberately polarised the situation; secondly a strategy of terror in 'which rumour was as important as actual murder' began in this town.<sup>36</sup>

On 4 April Serbian forces began shelling the village of Jelec. After three days they entered and began killing men, women and children. On 6 April Serbian forces targeted Visegrad but

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<sup>32</sup> Kent, *Framing War and Genocide*.

<sup>33</sup> Summarised and extracted from Kent, *Framing War and Genocide* at pp.90-95.

<sup>34</sup> Christopher Greenwood, 'International Humanitarian Law and the Tadic case', (1998) *European Journal of International Law* at [www.ejil.org/pdfs/7/2/1365.pdf](http://www.ejil.org/pdfs/7/2/1365.pdf) p.40, notes The Hague Tribunal Trial Chamber [in Nikolic, and Karadzic and Mladic] commented on 'ethnic cleansing' as a practice which could 'amount to the actus reus of genocide.'

<sup>35</sup> Chuck Sudetic, *Blood and Vengeance. One family's Story of the War in Bosnia*. (New York, WW Norton, 1998) p.96. A Western photographer witnessed these events, capturing these scenes. They were published in *Paris Match*, *Time* and *The European* newspaper in April 1992. *The Times* 20 April 1992 estimated that nearly 100 Muslims were killed; now it is thought that 'at least 500' were killed. See Magas, Band Zanic, I, 2000, *The War in Croatia and Bosnia-Herzegovina 1991-1995*. Unpublished manuscript.

<sup>36</sup> Mark Mazower, *The War in Bosnia. An Analysis* (Action for Bosnia: London, 1992) p.11.

the slaughter there began in earnest in May. Serbian forces soon moved on nearby Foca, the military take-over began on 7 April:

the take-over was a co-ordinated effort between Serb irregulars from Serbia proper and Montenegro, and paramilitary forces of [Serbs from Bosnia] ... What took place in the Foca municipality after the Bosnian Serbs were firmly in control was beyond anyone's worst nightmare... they began rounding up all non-Serb civilians from the surrounding villages, separating the men from the women, and imprisoning them in numerous detention facilities. The Foca police worked closely with the Serb military forces occupying the municipality and played primary and direct roles in the arrest, expulsion, detention, rape, torture, and murder of the non-Serb population of the town.<sup>37</sup>

According to the ICRC at least 588 non-Serbs are missing from the Foca municipality and the ICTY has publicly indicted nine individuals for rape as a war crime and genocide.<sup>38</sup>

The following day Belgrade-backed units massed outside of the town of Zvornik. They began shelling the Serb minority town of 80,000 without pretext.<sup>39</sup> The UNHCR's most senior official in Yugoslavia had to pass through the town in order to get back to Sarajevo. This is what he saw:

I was detained for two hours. I realized I was at serious risk. I could see trucks full of dead bodies. I could see militiamen taking more corpses of children, women and old people from their houses and putting them on trucks. I saw at least four or five trucks full of corpses. When I arrived the cleansing had been done. They were looting, cleaning up the city after the massacre. I was convinced they were going to kill me.<sup>40</sup>

The official was Jose-Maria Mendiluce. He later told more of the story:

I saw kids put under the treads of tanks, placed under there by grown men, and then run over by other grown men... Everywhere people were shooting. The fighters were

<sup>37</sup> Human Rights Watch, *Bosnia and Hercegovina*, (1998), 10/6(D), 'A Closed, Dark Place: Past and Present Human Rights Abuse in Foca', p.3.

<sup>38</sup> *The Guardian*, 18 April 1992 reported that 'UNHCR official Fabrizio Hoschild said up to 60 people had been estimated to have been killed but feared that there were 'scores of bodies lying in side streets that have so far been impossible to get to.'

<sup>39</sup> Laura Silber and Alan Little, *The Death of Yugoslavia* (Penguin: London, 1995) p.245.

<sup>40</sup> Ibid at 246. See *The Independent*, 11 April 1992 to compare to Steve Crawshaw's bad but not quite as dramatic account of the same incident. He mentions Mendiluce's discovery of thousands of fleeing civilians but quotes a Western witness who saw 10-15 bodies including those elderly civilians 'loaded on to trucks'. Crawshaw has confirmed to the author that this was Mendiluce, protecting his mission, but how do we account for the discrepancy. Both accounts mention 'trucks', implying large numbers of dead, but *The Independent* article limits the dead to 10-15. Crawshaw could not remember any more details. Also see Sudetic, *Blood and Vengeance* at 100: 'The bloodbath that followed went on for days... Stairwells in the dingy high-rises along the Drina were slippery with blood... Jose Maria Mendiluce... witnessed Serb gunmen putting children under the treads of tanks and running them over. Several thousand Muslims were killed in the assault on Zvornik; about 42,000 driven from their homes.' Emphasis added.

moving through the town, systematically killing all the Muslims they could get their hands on.<sup>41</sup>

He was released and further from the town he found those who had survived this onslaught: 5,000 people sheltering in a narrow valley.

When I arrived in the car I was surrounded by 1,000 people. They were all over me, begging "Save us! Save us!" with such despair that I stayed there for an hour trying to calm them down. There were lots of dead people, wounded children on the floor looking terrified - absolutely terrified - and we could hear the sound of mortar fire approaching.<sup>42</sup>

These terrible events were described as genocide at the time by Bosnian President Izetbegovic who called on the international community to intervene.<sup>43</sup> The Bosnian Commission for Missing Persons later discovered 69 bodies in Grbavci. They were thought to be part of a group of 750 Bosnians from the eastern town of Zvornik who were taken by Serbian forces and killed in the nearby village of Karakaj in June 1992.<sup>44</sup>

The slaughter escalated in May. A UN memorandum which surfaced only on 7 August 1992 showed that UN peacekeepers had uncovered a 'calculated strategy' by Serbian militias of summary executions of Muslims, deportations, shootings and house burnings. The document, dated 8 July, reported the policy intensified at the start of May.<sup>45</sup> During the attack on the village of Kosman on 4 May, men were taken away and never seen again, a house was packed with people from three families and burned to the ground. The remaining houses were burned to the ground. On May 7 the village of Skelani fell to Serbian forces. Vahida Selimovic spent the night in her basement. The following day:

The Cetniks surrounded [the remaining non-Serb] houses and tank and mortar shells were fired at the homes. There were seven men, four women and 11 children hiding in our basement but the Cetniks found us and shot and killed all the men in front of us, including our husbands. Then they cursed us, called us Turks and threatened to kill us.<sup>46</sup>

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<sup>41</sup> David Rieff, *Slaughterhouse. Bosnia and the Failure of the West* (Vintage: London, 1992) pp.82-86.

<sup>42</sup> See also I. Kajan, 'Is this not Genocide?' in R. Ali and L. Lifschutz (eds.) *Why Bosnia? Writing on the Balkan War* (Pamphleteer Press, Stony Creek, CT, 1993) pp.88-9. See also Mazower, *The War in Bosnia* at p.12, who reports that, 'one American reporter was told by frightened civilians on 10 or 11 April of the existence of a mass grave outside the city'.

<sup>43</sup> *The Independent*, 11 April 1992.

<sup>44</sup> *Central Europeonline*, 20 October 2000.

<sup>45</sup> It was not forwarded to UN headquarters, being exposed by Bosnia's UN ambassador. The UN appears to have had some idea of intensity with which 'the policy' had been implemented both before and after May.

<sup>46</sup> Helsinki Watch, *War Crimes in Bosnia-Herzegovina:1* (Human Rights Watch: New York,1992) p.61.

In Skelani and Brezovo Polje people were taken from the village and never returned.<sup>47</sup> Until 16 May in Brcko, which was first attacked on 1 May, and taken over soon after, Serbian forces 'killed twenty-five to thirty people every night.' Out of 1,500 prisoners only 120 left alive, according to one of the survivors.<sup>48</sup> Lane and Shanker have observed that in late spring and early summer 1992, 3,000 Muslims in Brcko were murdered and that the US government 'had pictures of people on trucks, before and after' at burial sites near to the town.<sup>49</sup>

Much of the population of Visegrad fled when a column of Yugoslav Peoples' Army (JNA) troops and weaponry entered the town in early April. When the troops withdrew in May, local Serbian forces took over the municipal government. Paramilitary troops, police and local Serbian forces then began a brutal campaign of 'ethnic cleansing', according to the ICTY indictment. The destruction of the Muslim Bosnians actually began on 20 May. Hundreds of civilians were killed in random shootings. Every day, men, women and children were killed on a famous bridge spanning the Drina and their bodies were dumped into the river. 'Serb soldiers raped many women and beat and terrorised non-Serb civilians... Widespread looting and destruction of non-Serb homes and property took place daily and the two... mosques in town were destroyed,' the indictment reads. Prosecutors claim the Lukic cousins and Vasiljevic, on at least two occasions in June 1992, 'committed, planned, instigated, ordered, or otherwise aided and abetted the mass murder of approximately 135 Bosnian Muslim civilians.'<sup>50</sup> The killing went on for over two months: 'So many rotting bodies came floating down the river that Serb men in Bajina Basta gave up trout fishing in the river for the next three summers.' Out of approximately 12,000 Bosnians who had inhabited Visegrad before the war about 2,000 had been murdered. The rest had 'wound up in refugee camps throughout Europe and Turkey or were eking out an existence in Gorazde, Zepa, Sarajevo and other Bosnian towns and villages.'<sup>51</sup> Helsinki Watch interviewed survivors from Zaklopaca on June 5, 1992. Out of a population of approximately 200 people on 'May 16, 1992, at least 83 Muslims were summarily executed by Serbian paramilitaries.'<sup>52</sup> In early May Serbian forces searched the village for weapons but found nothing.

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<sup>47</sup> *The Times*, 13 August 1992.

<sup>48</sup> Helsinki Watch, *War Crimes in Bosnia-Herzegovina* at pp.95-96 and 98-99.

<sup>49</sup> C. Lane and T. Shanker, 'Bosnia: What the CIA Didn't Tell Us', *The New York Review of Books*, 5 September 1995. These are still unpublished.

<sup>50</sup> See *Tribunal Update* No.161. at [www.icty.org](http://www.icty.org)

<sup>51</sup> Sudetic, *Blood and Vengeance* at pp.124-5.

<sup>52</sup> This proportion of the inhabitants probably represented more than the entire male population of military age.

Helsinki reported that it had 'received reports that similar mass executions have occurred in the towns of Bijeljina, Foca, Visegrad and Bratunac ... [It] also is concerned that Serbs opposed to such methods of "ethnic cleansing" may also have been executed for treason by Serbian forces.'<sup>53</sup> On 27 May Marcus Tanner in *The Independent* reported that in 'Muslim towns seized by the Serbian forces, massacres and forced expulsions have taken place.' He added that Liberation's Jean Hatzfeld who travelled through the village of Nova Kasaba, near Zvornik, in eastern Bosnia earlier that week, had spoken of 'the bodies of 29 Muslims lying on the roadside, shot by Serbs in an execution.'<sup>54</sup>

In late May houses were destroyed and people murdered in the Muslim Bosnian villages of Zlatnik, Turjak, Zanozje and Smrijecj: 'In one incident six women were burned alive in one house. The Celik family was killed in the same way.'<sup>55</sup> Before the end of May non-Serb houses in the village of Kosterjerevo, near Zvornik were looted and burned and men and boys from that village and nearby Drinjaca were massacred. Women were raped and abused. People from the non-Serb villages of Sestici, Klisa, Djulici, Sjenokos, Kaludran, Celismanu, Lupe, and Bijeli Potok were almost certainly murdered in or near to the Serbian concentration camp at Karakaj near Zvornik from 1 to 10 June.<sup>56</sup> *Le Monde's* Yves Heller, reported on 10 June the testimony of Aida Hodic, aged 63, about a massacre that had taken place shortly before:

It was five in the afternoon when the policemen, accompanied by militia reservists, got out of their cars and started firing. Half an hour later a hundred and fifty villagers were dead or dying in pools of their own blood... the corpses of men, women and children lay where they had fallen for three days, until the Serbs buried them in a common grave.<sup>57</sup>

The systematic nature of these massacres - occurring continuously over a period of a few months - is beyond question. It is clear too that usually no opposing forces were fighting against Serbian forces in these towns and villages. The attacks were meant to drive non-Serbs from their homes and to destroy their villages.<sup>58</sup> There were no comparable acts against Serb populations in Bosnia prior to these events, or indeed, outside of isolated acts, afterwards.

The evidence presented above suggests that a significant proportion of the people of many small towns and villages were massacred or taken to another place to be killed. The work of

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<sup>53</sup> Helsinki Watch, *War Crimes in Bosnia-Herzegovina* at p.63.

<sup>54</sup> *The Independent*, 27 April 1992.

<sup>55</sup> Kajan, 'Is this not Genocide?' at pp.91-2.

<sup>56</sup> *Ibid*, at 92-3.

<sup>57</sup> *Le Monde*, 10 June 1992.

<sup>58</sup> Helsinki Watch, *War Crimes in Bosnia-Herzegovina* at pp.72-73.

Daniel Toljaga, based primarily on ICTY case judgments, suggests some 296 predominantly Bosnian (Muslim) villages in the region around Srebrenica (i.e., not the whole eastern Bosnia region) with at least 3,166 documented deaths, many victims being women, children or elderly.<sup>59</sup>

### 3 The Case of Jelusic

One case that seems emblematic of the ICTY's failure to indict, prosecute and convict perpetrators of genocide is the *Jelusic* case which is examined in more detail below. The case has significance because it appears to many, both legal and non-legal academics, and some judges, as about as clear-cut a case could ever be.

During May and June 1992 in the north-eastern Bosnian town and municipality of Brcko, Goran Jelusic, under the authority of the local police force, itself controlled by Serbian forces, committed a series of murders – he admitted to 13 - as well as other inhumane acts, as crimes against humanity (with similar crimes under the laws or customs of war). As the ICTY summarizes: 'He systematically killed Muslim detainees at the Laser Bus Co., the Brčko police station and the Luka camp'.<sup>60</sup> He held a position of authority at Luka camp, a makeshift prison facility in the town. As one legal scholar has recognised, *Jelusic*, 'stands for the uncomfortable proposition that a man who publicly stated that he wanted to kill all

<sup>59</sup> Daniel Toljaga, 'Prelude to the Srebrenica Genocide: Mass murder and ethnic cleansing of Bosniaks in the Srebrenica region during the first three months of the Bosnian War' (April-June 1992) at <http://www.bosniak.org/prelude-to-the-srebrenica-genocide-mass-murder-and-ethnic-cleansing-of-bosniaks-in-the-srebrenica-region-during-the-first-three-months-of-the-bosnian-war-april-june-1992/> 23 November 2010. Ninety-three of the villages were located in the Srebrenica municipality alone (with proportion Bosnian Muslim/Bosniak) destroyed in 1992, they include Alimani (100%), Barakovići (100%), Begiči (100%), Beširovići (98.54%), Borbašiči (100%), Brezovice (87.61%), Bukovik (100%), Čičci (100%), Čivići (100%), Dimnići (100%), Donja Rijeka (100%), Donja Žgunja (100%), Donje Peći (100%), Donji Potočari (85.52%), Đurđevac (100%), Gladovići (99.62%), Glumci [Visošnjik] (100%), Gornja Rijeka (100%), Gornje Peći (100%), Gornji Potočari (100%), Gradina (100%), Grujčiči (100%), Hađiči (100%), Ivčiči (100%), Jovičiči (100%), Kadrići (100%), Kalići (100%), Kamenjača (100%), Karćino Brdo (100%), Karići (100%), Katanići near Tokoljak (100%), Klotjevac (97.07%), Knezovi near Sulica (100%), Kovačiči (100%), Kragljivoda (100%), Krnjići near Daljogošta (100%), Lasovac (100%), Liješće (71.94%), Likari (96.26%), Luka (98.66%), Ljeskovik (99.62%), Markovići (100%), Mala Daljogošta (90.65%), Mali Dobrak (100%), Mehmedino Polje (100%), Mehmedovići (100%), Miholjevine (97.29%), Močevići (100%), Nogačevići (64.73%), Ornica (100%), Osat (100%), Osatica (96.12%), Osmaće (99.26%), Oštrika (100%), Pećišta (92.65%), Petinići (100%), Podgaj (96.63%), Podkorijen (100%), Podševar (100%), Poljak (100%), Polje (100%), Porobići (100%), Poznanovići (99.33%), Predola (100%), Pribidoli (87.89%), Prohići (99.75%), Rabađiči (100%), Radovići (88.33%), Rađenovići (100%), Raušiči (100%), Rešagići (100%), Ritašiči (100%), Rulovci (100%), Sase (82.15%), Sejdinovići (100%), Sjedaće (100%), Skejići (100%), Skelani (84.59%), Skenderovići (100%), Studenac near Osat (100%), Sućeska (100%), Sulice (99.71%), Suljagići (100%), Šljivica (100%), Tihiči (100%), Tokoljaci (98.41%), Trubari (100%), Tursanovići (100%), Urisiči (99.69%), Vačići (100%), Vodice (100%), Velika Daljogošta (99.38%) and Veliki Dobrak (100%).

<sup>60</sup> ICTY case information sheet at [http://www.icty.org/x/cases/jelusic/cis/en/cis\\_jelusic.pdf](http://www.icty.org/x/cases/jelusic/cis/en/cis_jelusic.pdf)

Muslims did not have the necessary *mens rea* to convict for genocide'.<sup>61</sup> It is important to add a further factor in selection of this case for our attention: *Jelusic* was the first case to test the proposition that one of the foot-soldiers of genocide could be guilty of that crime. After *Jelusic*, there would be little point in the Tribunal Prosecutor indicting other low level but serious war criminals for genocide. In that sense, *Jelusic* represents a test case for genocide in several ways. For these reasons this case is the main focus of inquiry here, though other cases, where relevant are used. The overwhelmingly important focus here, however, is the question of intent. The Genocide Convention, Article II, states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Beginning with the Rwanda Tribunal, the development of the requirement for 'special intent' for genocide soon became established. It is argued below that this higher level requisite – special intent instead of mere intent - made it more difficult to convict the so-called 'small fish' such as *Jelusic* and others. The level of confusion created by the adoption of this test could be seen as damaging to the reputation of the Tribunal as argued by Akhavan.<sup>62</sup> The analysis then moves to evidential issues related to special intent. Here it is argued, by comparison between the evidential basis for intent in Rwanda cases and that cited in the judgment in *Jelusic*, that there is inconsistency in the interpretation of that evidence between the tribunals.

In the following section the issue of 'lone-perpetrator' genocide is examined. The main point of analysis relates to the existence of a plan to destroy the 'Muslims' of Brcko and whether *Jelusic* knew of such a plan, or as the judges in the case suggested, did the accused commit crimes as a 'lone-perpetrator'. The notion that in a context such as the Bosnia conflict an individual could separate themselves from the context might seem fanciful to many experts in the field. With tight military control of all movements in the zone of genocide, strong media propaganda 'informing' and directing action against the target group, the scope for 'individual' action, without knowledge of wider actions of state and society into which the

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<sup>61</sup> According to Alonzo-Maizlish, 'In Whole or in Part:' at p.1390: 'Curiously, the court so ruled even though the accused was preparing two affirmative defenses to the genocide charge: "seriously diminished psychological responsibility" and superior orders "under hierarchical duress."'

<sup>62</sup> Payam Akhavan, 'The crime of genocide in the ICTR jurisprudence' (2005) *Journal of International Criminal Justice*, p.992.

individual is embedded, appears miniscule. Equally the idea, in Bosnia at least, that a plan of action directed at the destruction of non-Serb groups needed further evidence to be proven beyond all reasonable doubt, would surprise most academic analysts. Final consideration is given to the judgment in the *Jelisić* case regarding what constitutes part. Here it is demonstrated how 'part' as per the Convention has become something quite beyond that text and beyond the intention of the drafters. Comparisons are made here with the one ICTY ruling that genocide took place, in Srebrenica.

An important legal development of the ICTR, was the establishment of the requirement for 'special intent'. The distinction of the crime of genocide lay not in entire destruction of a group, according to the court, but rather in the requirement that it embodies *dolus specialis*, that is a special intent, 'required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'.<sup>63</sup> This is an important issue because, according to Akhavan, it 'requires that the perpetrator "means to cause" a certain consequence "or is aware that it will occur in the ordinary course of events", whereas special intent requires that the perpetrator "clearly intended the result"'.<sup>64</sup> ICTR Trial Chambers have displayed a level of confusion about special and general intent: In *Akayesu*, for instance, the Chamber explained *dolus specialis* as meaning that 'the offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group'.<sup>65</sup> The 'knew or should have known' test is manifestly at variance with the 'clearly intended the result' test set forth by the Chamber elsewhere in the Judgment.<sup>66</sup> In Akhavan's view, the Rwanda Tribunal has not fully explored this 'qualitative hierarchy of intent'.<sup>67</sup> Schabas registers criticism of this development too.<sup>68</sup> Greenawalt argues that victims are 'already... singled out on the basis of their group membership' such that the 'requirement that broader group destruction be a desired rather than foreseen consequence may be overly strict'.<sup>69</sup> He proposes that:

In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was

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<sup>63</sup> The Chamber in *Prosecutor v Akayesu*, Case ICTR-96-4-T, para.518, explained that special intent is a concept common to Roman-law based systems and is a 'constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged.'

<sup>64</sup> Akhavan, 'The crime of genocide in the ICTR jurisprudence', p.992.

<sup>65</sup> *Ibid*, at para. 520.

<sup>66</sup> *Ibid*, paras. 517-520.

<sup>67</sup> *Ibid*.

<sup>68</sup> William A. Schabas, *Genocide in International Law* (Cambridge University Press, 2000) p.217 fn 63.

<sup>69</sup> Alexander K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', (1999) *Pace Law Faculty Publications*, Paper 338, 2288 at <http://digitalcommons.pace.edu/lawfaculty/338>



the destruction of the group in whole or in part'.<sup>70</sup>

This research also notes inconsistencies relating to Trial Chamber judgments regarding evidential questions with regard to special intent. While there is not space to fully consider these here, a brief comparison of the evidential basis for intent coming out of the Rwanda Tribunal and those cited in *Jelusic* is revealing. In the *Akayesu* case the Chamber found that:

acts of violence committed in Rwanda with the intent to destroy the Tutsi population is evident not only from the testimony cited above of [various international experts] but also from the witnesses who testified with regard to events in the commune of Taba.

Witness JJ for example, whose home had been destroyed and whom herself had been driven away, had testified that a man sent by the bourgmestre had said he had been sent 'so that no Tutsi would remain on the hill that night'.<sup>71</sup> Other quite similar examples taken from other witnesses' (OO and V) testimonies led the court to conclude beyond reasonable doubt that acts of violence which took place in Rwanda at this time were 'committed with intent to destroy the Tutsi population' and that the acts of violence which were carried out in Taba during the period were part of this effort.<sup>72</sup> *Jelusic's* stated intentions during the period in which he murdered many Bosnians, seem even more convincing as to that perpetrator's 'genocidal' or 'specific' intent to destroy the group, as the two tribunals have ruled to be the test. *Jelusic*, a witness testified, said to the detainees at Luka camp that between five and ten percent would leave, in other words, 90 to 95 percent would be killed. Another testified that he said similarly – but using a different formulation – that 70 percent would be executed, most of the remainder badly beaten (presumably in the knowledge that many died in brutal assaults).<sup>73</sup> To another he stated that he hated Muslims and wanted to kill them all. Those who managed to survive would be slaves for whom the worst menial tasks would be reserved. Muslim women were considered filthy and should be sterilised in *Jelusic's* view. At this time he also boasted of having killed scores of Bosnians.<sup>74</sup> Such statements were dismissed by the bench in *Jelusic* as not constituting evidence of special intent. Whereas witness JJ's statement above leaves the possible interpretation that the Tutsi might one day return, *Jelusic's* statements – the validity of the evidence was not questioned by the judges - can more readily be seen as an expression of a state of mind bent on never allowing Bosnians to return as the vast majority would have perished.

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<sup>70</sup> Ibid.

<sup>71</sup> *Akayesu*, at para.168.

<sup>72</sup> Ibid, at para.169.

<sup>73</sup> *Prosecutor v. Jelusic*, IT-95-10-T 14 December 1999, para.102.

<sup>74</sup> Ibid, at para.103.

The ICTY in *Jelisić* raised, perhaps spuriously, the issue of so-called 'lone-perpetrator' genocide. In fact *Jelisić* was a test for the idea that the direct perpetrators of genocide or the foot-soldiers of genocide can bear criminal responsibility. In *Jelisić* the Chamber focused on the existence of a plan to destroy in part the 'Muslims' of Brcko and whether Jelisić knew of such a plan, or as the judges in the case suggested, did the accused commit his murders as a lone-perpetrator? This was a simple question to answer – one that the Appeals Chamber responded to appropriately.<sup>75</sup>

As noted above, to the historian, sociologist or political analyst of this conflict a likely question would be: could any individual separate themselves from the context of war and massacre in Bosnia? With tight military control of all movements in the zone of genocide, strong media propaganda 'informing' and directing action against the target group, the scope for such 'lone' perpetration, without knowledge of wider actions of state and society into which the individual is embedded, appears miniscule.<sup>76</sup> Equally the idea, in Bosnia at least, that a plan of action directed at the destruction of non-Serb groups needed further evidence to be proven beyond all reasonable doubt seems farcical to the victims and equally far-fetched to academic experts. Appeal judges concluded that this kind of evidence 'could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group in Brcko'.<sup>77</sup> In other words, this evidence was deemed capable in itself of demonstrating the required intent, it being, on this evidence, beyond reasonable doubt that genocidal intent was not present in Jelisić at the time of the murders he committed. One dissenting judge argued that evidence of systematic and organised killing – a refrigerated lorry removing 10 to 20 bodies a day - needed to be taken in conjunction with evidence that most of those killed belonged to a particular ethnic group against which Jelisić had discriminatory intent.<sup>78</sup>

In the Rwanda cases the huge numbers slaughtered made it unnecessary for the court to dwell too long on whether the requirement under the Convention of part of the group had been met. In Bosnia, the issue was it could be argued, the *key* issue, and is probably the ICTY's major contribution to genocide jurisprudence. Today 'part' as per the Convention has become something quite beyond that text and arguably beyond the intention of the drafters.

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<sup>75</sup> But did not consider the first such ruling on genocide worthy of either a retrial or continuation of the case (which was ended early by the bench).

<sup>76</sup> *Jelisić* at para.95. Indeed the Trial Chamber judges appeared confused about Jelisić's authority within Luka camp, stating at one point that it was 'de facto', then questioning later. Similar confusion was apparent about whether his killing was 'random' or selective.

<sup>77</sup> *Ibid* at para.68.

<sup>78</sup> *Prosecutor v Jelisić Appeal*, IT-95-10-A, 5 July 2001, Partial dissenting opinion of Judge Shahabudeen, para.16.

The question of whether it is possible to establish that there was a special intention to destroy a group in part is examined below comparing the statements of intent in *Jelisić* (as noted above) with what was considered ‘part’ of the protected group in the first case to attribute responsibility for genocide in Bosnia: *Krstić*.<sup>79</sup>

In *Kayishema*, the notion of at least a *substantial* part developed. The judges ruled that ‘in part’ implied ‘a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. Hence, both proportionate scale and total number are relevant’.<sup>80</sup> Given the imperative of ensuring that the crime of genocide is not debased or devalued, this ruling is difficult to contest in terms of the proportion in question. But with regard to intent, the tribunal in *Jelisić* saw ‘in part’ as either ‘desiring the extermination of a *very large number* of the members of the group’ or ‘the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group’,<sup>81</sup> - the quantitative or qualitative tests, respectively.<sup>82</sup> Both of these elements, in the view of this author having reviewed the facts, were satisfied. The reader will note that the Convention mentions neither ‘significant’ or ‘substantial’; nonetheless in *Jelisić* judges considered intent would be demonstrated by destruction of ‘either a *major* part of the group or a representative fraction thereof, such as its leaders’.<sup>83</sup> According to the bench ‘a large majority of the group in question’<sup>84</sup> where substantial normally means ‘of ample or considerable amount or size; sizeable, fairly large’.<sup>85</sup> Significant portion – commonly understood to mean ‘important, notable; consequential’<sup>86</sup>, was over-interpreted as a ‘major’ part. Viewing the ICTR as going ‘even further by demanding that the accused have the intention of destroying a “considerable” number of individual members of a group’<sup>87</sup> the judges seem to compound the error, as this term, also not from the Convention, suggests something ‘notable... worthy of consideration or regard; of consequence.. [or] worthy of consideration by reason of magnitude; somewhat large in amount, extent, duration etc; a good deal of’,<sup>88</sup> rather distinct from a major part, i.e., a majority.

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<sup>79</sup> This issue is given a full airing in G. Kent, ‘Genocidal Intent and Transitional Justice in Bosnia’ in the *East European Politics and Society* forthcoming (2013).

<sup>80</sup> *Prosecutor v Kayeshima*, ICTR-95-A-T 25 May 1999, para.96.

<sup>81</sup> *Ibid* para.82.

<sup>82</sup> *Jelisić* at para.81.

<sup>83</sup> *Ibid*.

<sup>84</sup> Or ‘the most representative members of the targeted community’. *ibid* para.82.

<sup>85</sup> *New Shorter Oxford English Dictionary*, 1993.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Jelisić* at para.82.

<sup>88</sup> *Ibid* para.96.

In *Krstic* it was decided that, ‘the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as a genocide’.<sup>89</sup> By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory.<sup>90</sup> It seems the judges erred here not in assuming that ‘killing all the military aged men’ displayed an intention to destroy the wider group but in assuming 7,500 out of 20,000 (i.e., the men at Srebrenica) rather than 7,500 out of 40,000 (the whole population) meets the standard required for ‘substance’ in the intent to commit the crime. Organised massacres of 20 percent of a group is a substantial, notable, considerable, significant proportion of that group.<sup>91</sup> But in *Jelusic*, the accused explicitly stated his intention to destroy a much larger proportion of the entire ‘Bosnia Muslim’ group than it was assumed was intended in Srebrenica.<sup>92</sup> Statements as to Jelusic’s intent suggest a special intention as strong, possibly considerably stronger, than those cited in *Akayesu*, and in terms of proportion or part of the protected group, considerably larger than the proportion considered relevant to the judgment of intent in *Krstic* regarding Srebrenica.<sup>93</sup>

Regarding the ‘a representative fraction thereof’ or qualitative test raised in *Jelusic*, the Commission of Experts which investigated crimes committed during the war, specified that,

if essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others – the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be *viewed in the context of the fate or what happened to the rest of the group*. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered

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<sup>89</sup> Ibid para.598.

<sup>90</sup> Ibid para.597.

<sup>91</sup> Of course, 20 percent is what was ‘achieved’. It is clear that Serbian forces attempted to kill more of this sub-group than this in ambushes of unarmed men fleeing to Bosnian-held territory. It must be added that the Appeal Court analysis on this issue clarified the Tribunal’s ‘imprecise language’ on the matter. It confirmed that killing the men of military age from the group of Bosnian Muslims of Srebrenica, amounted to killing a substantial part of the whole. Confusingly itself however the Appeals Chamber notes in conclusion of its deliberation on this matter that ‘the Trial Chamber’s overall discussion makes clear that it identified the Bosnian Muslims of Srebrenica as the substantial part in this case’.

<sup>92</sup> Very few perpetrators attempt to destroy an entire group, that is, the global population of a particular group. Historically even Nazi Germany allowed many Jews to leave parts of Europe it occupied for some time after systematic massacres began on Soviet territory.

<sup>93</sup> *Akayesu* at para.167.

in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.<sup>94</sup>

The Prosecutor in *Jelisić* tendered 'lists of names of persons who were reputedly killed at the time of the acts ascribed to the accused...[including] a list of thirty-nine persons who for the most part were either members of the local administrative or political authorities, well-known figures in town, members of the Muslim Youth Association, members of the SDA or simply SDA sympathisers.'<sup>95</sup> The Chamber concluded that it was 'not therefore possible to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of that community'.<sup>96</sup> In a relatively small community such as Brcko, it would not be unreasonable to argue that 39 community, religious and political leaders could be seen as a qualitatively substantial proportion of the group, particularly if taken in conjunction with the murders of significant numbers of ordinary Bosnians, expulsion of a vast number or proportion, destruction of homes, religious building and other cultural artefacts, not only in Brcko municipality but across most non-Serb parts of Bosnia. A legal scholar noted for his acceptance of a narrow interpretation of the Convention has argued that in 'systematically kill[ing] Muslim inmates... the victims were essentially all of the Muslim community leaders...'<sup>97</sup>

#### 4 A Note on Other Genocide Jurisprudence

Finally, it needs to be noted that other courts have adopted strikingly different interpretation of the Convention to that generally offered by judges at the ICTY. In *Jorgić v Germany* the European Court of Human Rights found that genocide had been committed in a case outside the Srebrenica municipality in the early months of the war (spring/summer 1992). Taking greater notice of scholarship on the war, it referenced the fact that, 'a considerable number of scholars were of the opinion that the notion of destruction of a group as such, in its literal meaning, was wider than a physical-biological extermination and also encompassed the *destruction of a group as a social unit*'.<sup>98</sup> The judges noted that the Trial Chamber in *Krstić* recognised that destruction of cultural and sociological characteristics of a human group

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<sup>94</sup> *Jelisić* at para.82

<sup>95</sup> *Ibid* at para.91.

<sup>96</sup> *Ibid* at para.93.

<sup>97</sup> Schabas, *Genocide in International Law*, p.382.

<sup>98</sup> citing, in particular, H.-H. Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, ZStW 66 (1954), p. 213; and B. Jähnke, in *Leipziger Kommentar, Strafgesetzbuch*, 10<sup>th</sup> edition, Berlin, New York 1989) (para.36). Emphasis added.

when allied to a wider physical or biological destruction, i.e., killing, it 'may legitimately be considered as evidence of an intent to physically destroy the group'.<sup>99</sup>

German courts have found that genocide took place in various regions of north and eastern Bosnia: in Foca municipality, in the Jorgic case in Doboj municipality, the Sokolovic case relating to acts committed in Kalesija municipality near Zvornik, and in Vrbanjci, north-central Bosnia, where Kusljic's acts were understood as genocide. All of these cases relate to acts carried out mostly in the early months of the war in 1992.

## **Conclusion**

There is a sense that not just legal institutions failed the test the Yugoslav crisis threw up in the early 1990s. The Cold War helped to inure actors or at least direct attention away from the war crimes and human rights horrors the world can throw up. The focus of this article has not been the individual states or international organisations. Neither is it civil society actors such as the international media that collectively failed to raise their game to address the particular challenge that was Bosnia. The focus has been the nascent international judiciary and it is clear that elements of the new international legal system may have developed in ways not unconnected to the wider failures to address the Yugoslav crisis in the most appropriate manner.

The substantial crimes committed in Bosnia and the many thousands of victims who perished in the planned operation to expand Serbian control of territory where previously mixed populations lived together in effect destroying defenceless communities on those territories, can be contrasted to the ICTY record of conviction: only five men (out of 18 indicted) for genocide, on charges relating only to one incident (out of many) of genocide. As noted above this record leaves many observers, from Bosnia and other neighbouring Balkan states, and from further afield, discontent with the justice offered by the Yugoslav Tribunal. The *Jelusic* case, as the detailed analysis above suggests, contributed to the narrowing interpretation of the Convention various other case decisions of both ad hoc tribunals have had. It seems plausible to argue, in this light therefore, the direction of the judiciary has been away from holding those who actually commit the crimes that constitute the actus reus of genocide responsible and arguably the effect has been to deny many thousands of victims and their surviving families – in particular regarding eastern Bosnia - the full sense of justice convictions for genocide arguably symbolise.

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<sup>99</sup> *Prosecutor v Krstic*, IT-98-33-T 2 August 2001, para.580.

From the above analysis it is possible to argue that a judicial chasm separates on the one hand the ad hoc tribunals and Bosnia's own War Crimes Chamber – which has to date followed the line taken in The Hague – and on the other, certain national courts, in particular the German regional courts and the European Court of Human Rights. In addition, the overall contribution of this jurisprudence seems to not only contradict expert opinion of academics across a range of relevant disciplines in the humanities and social sciences – inscribing a potentially significant trans-disciplinary fault line in relation to genocide, the crime of crimes – but arguably also specifically undermines the contribution of historians and the proceedings of the courts themselves to a consolidated, accurate narrative of the Yugoslav wars. That said it is important to remember that without such a Tribunal, the region would have been left with even less a sense of justice and order than exists, somewhat precariously, today.

This article raises questions for future research in law – on the specific legal conceptual and evidential issues discussed above – but in particular in relation to international judicial decision making in the development of case law: what factors have impacted, almost imperceptibly, on the methods, interpretive procedures and legal creativity of international judges? Precisely how does the media-driven sea of information (and the very language used to describe information) in which we all (including those remote figures, judges) swim, affect judicial appreciation of complex crises? In the light of the argument outlined above, such questions seem in need of urgent enquiry and response.