

The Prosecution of the Crime of Genocide in the ICTY: The Case of Radislav Krstic

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Introduction

Srebrenica, a small town in the northeastern corner of Bosnia-Herzegovina, represents to many the turning point in the war in Bosnia. Declared a “safe haven” by a United Nations Security Council Resolution in 1993, Srebrenica became a focal point of controversy and collective guilt when it was overrun by the Serb Army in July 1995, an event which ultimately led to the massacre of thousands of Muslim men and boys during nine days of horror after its occupation by the Serbs.¹ It is widely acknowledged that United Nations policies on the ground during the Bosnian conflict represented moral and strategic failure on the part of the international community; the battleground after the Dayton Accords of 1995 shifted to the courtroom.² On August 2, 2001, Trial Chamber 1 of the International Criminal Tribunal for the former Yugoslavia (ICTY) rendered its judgement in *Prosecutor v. Radislav Krstic*. The Trial Chamber found Krstic guilty of genocide, war crimes, and crimes against humanity. This was the first conviction of the crime of genocide rendered by the ICTY, and Krstic is the highest-ranking person to be charged and convicted to date for events surrounding the fall of Srebrenica. His conviction for genocide is therefore a landmark in international humanitarian and human rights law, and has already had great implications for subsequent ICTY proceedings, notably the case against Slobodan Milosevic. The fall of Srebrenica and its aftermath, the case against Krstic, and the implications of this case for the future of international humanitarian law are the subjects of this paper.

The Genocide Convention and the Jurisprudence of the ICTY

The International Criminal Tribunal for Yugoslavia (ICTY), established in 1993 by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.³ It has the authority to prosecute persons for grave breaches of the Geneva

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Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. It has the power to prosecute persons who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” as referred to in the 2-5th articles of the Statute of the Court. These persons are held individually responsible for the crime.⁴ Article 7, Section 1 notes that “a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”⁵ Article 7, Section 3 of the Statute discusses the principle of “superior responsibility”: “The fact that any of the acts referred to in article 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”⁶

The Statute of the ICTY takes its definition of the crime of genocide directly from the Convention on the Prevention and Punishment of the Crime of Genocide.⁷ Article I of the Genocide Convention provides that the contracting parties confirm that genocide “whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.” Article II specifies the following acts, which constitute genocide when they are “committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group”:

- (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.

Article III states that the following acts shall be punishable:

- (a) Genocide
- (b) Conspiracy to commit genocide
- (c) Direct and public incitement to commit genocide
- (d) Attempt to commit genocide
- (e) Complicity in genocide

Article VI notes that international tribunals, duly constituted, as well as competent national tribunals of the territory wherein the crimes have been committed,

may try these persons. The Statute of the ICTY states that it shall have the power to prosecute person committing genocide in its Article 4 (1).

The ICTY was expected to be an important instrument in the prosecution of the crime of genocide.⁸ However, in fact, it was the International Criminal Tribunal for Rwanda, created in 1994 by the United Nations Security Council in response to the atrocities in that country during the spring of 1994, that first handed down a conviction on genocide in the landmark *Akayesu Case*.⁹ The Judgment in the *Akayesu Case* indicated that the Court was satisfied that the Tutsi were indeed a distinct ethnic group, that there was an intent to eliminate in whole or in part the Tutsi population, and that Jean-Paul Akayesu, as mayor of the Taba commune, had a position of superior authority in which his commands were generally followed. Therefore, the Court held that he was individually criminally responsible for the crime of genocide. Subsequent to the Akayesu decision, the ICTR has both indicted and convicted additional persons for the crime of genocide.

The ICTY, however, only recently has contributed substantially to the jurisprudence on genocide. The most important steps taken prior to the Krstic conviction came in the indictments of Radovan Karadzic, the political leader of the Bosnian Serbs, and Ratko Mladic, the highest ranking Serb Military leader. Because of the higher standards of evidence required for conviction of the crime of genocide and the necessity to demonstrate a *special intent* to eliminate, in whole or in part, a distinct group as defined by the Statute of the ICTY and the Genocide Convention, prosecutors generally chose to indict on charges of war crimes and crimes against humanity, rather than genocide.¹⁰

Radislav Krstic was indicted on November 2, 1998. The indictment was originally sealed, to prevent him from avoiding detention. He was detained by SFOR (Security Forces) in December 1998 and transferred to The Hague to await trial. The indictment was amended on October 27, 1999. The trial was delayed for a period of two years while Krstic's medical condition was evaluated; he previously had suffered the loss of a portion of his leg due to a landmine.

The Krstic case is also referred to as the "Srebrenica" case, and is numbered IT-98-33.¹¹ The amended indictment generally alleged that in July 1995, units of the Drina Corps of the Bosnian Serb Army (VRS) shelled the Srebrenica "safe area" and attacked Dutch-manned UN observation posts. VRS forces subsequently entered Srebrenica. By July 18, 1995, those forces had either expelled or killed most of the members of the Bosnian Muslim population of the Srebrenica enclave. By the end of July, the VRS forces had virtually eliminated the presence of any Bosnian Muslims in the Srebrenica enclave area, thus continuing the ethnic cleansing campaign which had begun in the spring of 1992.¹² From October 1994, until July 12, 1995, Radislav Krstic was the Chief of Staff/Deputy Commander of the VRS Drina Corps. He was promoted to the rank of General in June 1995, and assumed command of the Drina Corps on July 13, 1995. An estimated 7,000-7,500 Bosnian Muslim men and boys were killed in Srebrenica and its aftermath.

The amended indictment charged Krstic on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) or in the alternative, superior criminal responsibility (Article 7(3) of the Statute) with:

(a) Genocide (Article 4 of the Statute of the Tribunal- genocide; alternatively, complicity to commit genocide),

(b) Crimes against humanity (Article 5 – extermination; murder; persecutions on political, racial and religious grounds; deportation; alternatively, inhumane acts),

(c) Violations of the laws or customs of war (Article 3 – murder).¹³

Krstic pleaded “not guilty” to all counts and was represented by defense attorneys. The trial started on March 13, 2000 and lasted for 98 days. The Prosecution tendered approximately 910 exhibits and the Defense tendered approximately 183 exhibits. The Prosecution called 65 witnesses, and the Defense called 12 witnesses. Additionally, 2 witnesses were called by the Trial Chamber. The Trial Chamber judges were Judge Almiro Rodrigues, Portugal (Presiding), Judge Fouad Riad, Egypt, and Judge Patricia Wald, United States of America.

On August 2, 2001, the Trial Chamber found Radislav Krstic guilty of genocide; persecution, cruel and inhumane treatment, terrorizing the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians; and murder as a violation of the Laws and Customs of War. The Court imposed a sentence of imprisonment for 46 years, the longest sentence imposed to date by the ICTY.

Subsequent to the Krstic case, there have been four cases (not counting the Milosevic indictment) that involve the events of Srebrenica, in which genocide or complicity in genocide was charged. These involve the Obrenoci, Blagojevic, and Joxic cases, which, as of this writing, are in the pre-trial phase. The fourth indictment is of Vinko Pandurevic, the Lt. Commander of the Zvornik Brigade of the Drina Corps, that has been implicated in mass executions following the fall of Srebrenica. An arrest warrant has been issued for Pandurevic, but he is not yet in custody, as of this writing.¹⁴

Srebrenica: The Fall of a “Safe Area”

On July 11, 1995, Srebrenica fell to the Bosnian Serb Army. General Mladic, accompanied by Radislav Krstic and others, triumphantly entered the city. Camcorders and Serb film crews recorded the event for posterity, and one film clip shows General Mladic stating that, remembering the massacre of Serbs by Turks, the time had come to take revenge on the Muslims.¹⁵

Srebrenica’s population of approximately 9,000, prior to the onset of war in 1992, was approximately 75% Muslim. The city’s economy was based on factories, nearby mines, and some spas that occasionally drew tourists. However, after the advent of the war and the ethnic cleansing policies of the Serbs, who desired to remove Muslims and Croats from designated areas through terror, deportation and extermination, Srebrenica became the focus of Serb attention. Because it was located so close to the Serbian border, its elimination as a Muslim enclave became an important Serbian objective in the consolidation of Serb territory. In essence, the town was held hostage for three years, as Serbs surrounded it, shelled it, and prevented aid from reaching its citizens. The population of the city swelled, as the surrounding countryside became more and more

dangerous and unstable, and as Muslims were “cleansed” from other areas. In 1995, the population of Srebrenica was approximately 37,000 -- 73% Muslim and 25% Serb.¹⁶

Remnants of the 28th Division of the Army of Bosnia-Herzegovina (ABiH) were present in Srebrenica. One of the more prominent Muslim leaders, Naser Oric, was reported to be headquartered in Srebrenica, and his men, although poorly equipped, conducted raids on nearby Serb villages. Notably, one of these raids was conducted on Christmas Day against the town of Kravica. Undoubtedly crimes against the civilian population of this Serb village were committed, and fueled the desire of the Serbs to take Srebrenica and eliminate what remained of the Muslim forces in the city.

By 1993, the plight of the civilians living in Srebrenica had come to the attention of the international community, and pressure was mounting in the United Nations to “do something” to alleviate their suffering. On April 16, 1993, the Security Council of the UN adopted Resolution 819, in which it demanded that all parties to the conflict in the Republic of Bosnia and Herzegovina treat Srebrenica and its surroundings as a “safe area” which was to be free from any armed attack or any other hostile act.¹⁷ In 1993, General Philippe Morillon entered Srebrenica with a small United Nations peacekeeping contingent and declared the city under the protection of UN forces.

From the beginning, the mandate of the UN forces was problematic. They were to keep the peace, but not to enforce it. In June, the Security Council passed Resolution 836,¹⁸ stating that UN peacekeepers were to “deter” attacks on the safe areas. Section 9 of Resolution 836 authorized UNPROFOR to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.” Section 10 stated that member states, acting nationally or through regional organizations (e.g. NATO), may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas . . . to support UNPROFOR in the performance of its mandate.¹⁹ Thus, the United Nations Security Council had conceded that air strikes might be utilized in certain contingencies.

The Special Representative of the Secretary-General in Bosnia was Yasushi Akashi; the Bosnian military commander of UNPROFOR was a French General Bernard Janvier, who was headquartered in Sarajevo. Peacekeeping troops rotated into Srebrenica about every six months. In 1995, a Dutch contingent arrived, known familiarly as DutchBat (for Dutch Battalion). Commanded by Dutch Colonel Ton Karremans, these 450 men and women set up several observation posts around the town and installed themselves in a former factory about three miles north of Srebrenica, called the Potocari camp.

In the spring of 1995, the Serbs tightened their stranglehold on Srebrenica, cutting off the aid convoys into the city that the UN peacekeepers were attempting to safeguard. Because of the lack of available fuel, the UN troops were soon unable to use many of their vehicles, and had to resort to patrolling on foot. As the bombardment of the city intensified, NATO considered air strikes on Serb positions. This highly controversial issue divided the ranks of NATO; The Europeans maintained that the safety of their nationals, who made up the bulk of the peacekeeping forces, would be compromised by

air strikes. Indeed, around Sarajevo, many UN peacekeepers had been seized as hostages by the Serbs, and efforts were underway to secure their safe release.

On Sunday, July 9, 1995, thirty Dutch peacekeepers were taken hostage by the Serbs, as they took control of some of the outlying UN observation posts. On Monday, July 10, Col Karremans filed his first official request for air support. Although he announced to town leaders that air support was imminent, the jets never materialized; he allegedly was told that he had submitted his request on the wrong form.²⁰ This was the first of several requests, all of which were blocked by General Janvier with the exception of that for close air support on the day Srebrenica fell.²¹

The role of the Dutch peacekeepers in the fall of Srebrenica has been nothing short of a national tragedy in the Netherlands, and the Dutch government has ordered a dispassionate report from the Institute for War Documentation, which until now has concentrated on WWII. The results of the study will be available to the public when it is released. The role of French General Janvier has been singled out for censure by many observers. In April 2001, two Dutch officers allegedly testified at a closed French Parliamentary inquiry that the French UNPROFOR commander had repeatedly refused requests for air strikes, thus leaving the Serbs unchallenged as they sought to overrun the “safe area,” which was supposedly protected under a UN mandate.²² The Secretary-General’s report on Srebrenica carefully documented the fall of the town, and included an assessment of what went wrong:

The fall of Srebrenica is also shocking because the enclave’s inhabitants believed that the authority of the United Nations Security Council, the presence of UNPROFOR peacekeepers and the might of NATO airpower, would ensure their safety. Instead, the Serb forces ignored the Security Council, pushed aside the UNPROFOR troops, and assessed correctly that air power would not be used to stop them. They overran the safe area of Srebrenica with ease, and then proceeded to depopulate the territory within 48 hours. Their leaders then engaged in high-level negotiations with representatives of the international community while their forces on the ground executed and buried thousands of men and boys within a matter of days.²³

The report candidly assesses the reports that the Dutch battalion did little or nothing to prevent the Serbs from overrunning the town; in addition, they even forced those 5,000 persons who had sought refuge in the Potocari camp to leave the camp. The report notes that the DutchBat did not report fully the scenes that were unfolding around them, and that this was a failure of intelligence sharing. Further, the report notes accusations that the Bosniacs did not fully demilitarize and did not do enough themselves to defend the town. However, it notes that they were ill-equipped, demoralized, afraid, and hungry.²⁴ When it became apparent that Srebrenica would fall, the Bosniacs requested that the weapons that they had surrendered upon the initial demilitarization be returned to them; UNPROFOR commanders denied their requests.²⁵

The report also addresses the question of why NATO air power was not brought to bear upon the Serbs. Among the stated reasons were that there was deep reluctance to use air power due to a desire not to appear to “take sides,” fear for peacekeepers taken hostage, disruption of the primary mission of UNPROFOR, and fear of losing control of

the operation. The report concludes with a seemingly deeply felt assumption of some responsibility for the Srebrenica massacres: “The United Nations experience in Bosnia was one of the most difficult and painful in our history Through error, misjudgement and an inability to recognize the scope of the evil confronting us, we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder.”²⁶

Srebrenica: The Aftermath of the Fall

Shortly after Mladic entered Srebrenica triumphantly, a series of meetings was conducted between Mladic and other top Serb officials, Col Karremans, and some Bosnian Muslim representatives at the Hotel Fontana in Bratunac.²⁷ At the three meetings, top commanders of the Drina Corps, which had been responsible for the Srebrenica campaign, were present. Krstic was present at the latter two. In these meetings, Mladic demanded that the Bosniacs surrender and disarm, and he asserted that, if this were accomplished, they would be unharmed. The evacuation (deportation) of women and children from Srebrenica was discussed, and it was decided that the Serb Army would provide buses, but the UN would provide fuel. Mladic asserted that “military aged men” would be “screened for war crimes.”²⁸

Because Srebrenica had fallen, the population at Potocari began to swell. After approximately 5000 refugees were in the camp, UN peacekeepers limited further entrants to women with infants, only. About 20,000-25,000 of the displaced were in and around the camp on the night of July 11. Throughout the night, the Serbs propagated a campaign of terror, and conditions in and around Potocari were deplorable. Food, water, and sanitation were virtually nonexistent, and shells bombarded the area. The following day, buses arrived, and the deportation, overseen by the Drina Corps, commenced. As huge masses of Bosnian Muslims prepared to enter the buses, men and boys were separated from the women; the buses left, carrying thousands of women, children, and the elderly, and were frequently stopped at checkpoints manned by Serb soldiers, who checked for hidden men and boys. If they were found, they were taken from the buses. Most were never seen again, and are assumed to have been murdered. Approximately 23,000 women and children were deported over the next few days. Those men and boys separated out were taken to a “white building,” allegedly to be screened for war crimes. There, they were forced to leave all their belongings, including their identity cards. These piles of belongings were later burned by Serbs. Most of these men and boys were summarily executed.

Apparently feeling that their best chance for survival lay in fleeing the Srebrenica environs for the hills, with the hope of eventually reaching Muslim controlled areas, between 10,000 and 15,000 men and boys began a march out of the city and into the hills. Among them were the remaining elements of the 28th Division of the Bosnian Army. Once aware of the departure of this column of men into the hills, the Drina Corps and paramilitaries began a focused pursuit. Thousands of Bosnian Muslims surrendered, were killed by the shelling, or were captured. In some cases, Muslims were tricked into surrendering through the use of stolen UN equipment. The largest groups were captured on July 13, 1995. Of those taken alive, very few survived – and those only through sheer luck, although one small segment of the column was actually permitted by one group of Serbs to proceed to Tuzla. Those captured were sometimes combined with those

separated from the buses. Hundreds were taken to warehouses, where they were exterminated with gunshots and grenades. Other sites of the mass executions were dams, schools, and fields.²⁹ Bodies were buried in mass graves; some of those graves were dug up, and the corpses were placed in secondary graves by the Serbs, apparently to try to disguise the evidence.³⁰

Exhumations by war crimes investigators found evidence that prisoners had often been blindfolded, their wrists tied with wire, and shot in the back of the head. Aerial photographs of mass graves were provided by the United States, and exhibited by US Ambassador Madeleine Albright at the United Nations. Survivors of the massacres described Ratko Mladic addressing the prisoners at some of the sites.³¹

Radislav Krstic: Trial and Judgment

Having established beyond a reasonable doubt on the basis of eyewitness reports and extensive forensic evidence that the population of Srebrenica had been terrorized, the safe area violated, women and children deported, and that mass executions of unarmed prisoners and civilians had taken place, the court turned to the culpability of General Krstic. Radislav Krstic was implicated in the events surrounding the fall of Srebrenica in his role as Chief of Staff/Deputy Commander of the VRS Drina Corps, and then Commander of the Drina Corps, the primary unit of the VRS in the Srebrenica area. The judgment in the case states that “one of the central issues in this case is the role that one man, General Krstic, played in the criminal acts and whether he is legally responsible for conduct that amounts to war crimes, crimes against humanity or genocide.”³²

There were several key issues concerning criminal responsibility and command authority in the Krstic case. The first involved the date on which Krstic assumed command of the Drina Corps. The second concerned his argument that his attention was in fact consumed by events in Zepa, and that he did not know that mass executions of civilians were taking place.

Krstic’s position in the chain of command was clear, but the Defence debated the question of his presence in Srebrenica at critical moments and the precise time at which he had taken command of the Drina Corps. The Armed Forces of Republika Srpska (AFRS) were composed of the Army (VRS) and units of the Ministry of the Interior. The Commander-in-Chief of the AFRS was Radovan Karadzic, whose headquarters was in Pale. The Main Staff of the VRS was commanded by General Ratko Mladic. The VRS was divided into 6 geographically-based corps, one of which was the Drina Corps, composed of approximately 15,000 soldiers, and originally divided into 3 subunits. General Krstic was Chief of Staff/Deputy Commander of the Drina Corps commencing in October 1994; according to the Prosecution, he was designated Commander of the Drina Corps on July 13, 1995.³³ Throughout the proceedings, General Krstic maintained that he did not become Commander of the Drina Corps until 20 or 21 July 1995, that he had no involvement in the deportations from Potocari, and that he had no knowledge of the Bosnian Muslim column until the evening of 12 July 1995.³⁴ He also alleged that he only became aware of the killings of Muslims in late August or September. He alleged that having been informed of the involvement of VRS staff in the executions, he tried to have the responsible officer removed, to no avail; fearing for the safety of his family, because

the executions had apparently come from the General Staff of the VRS, he allegedly attempted no further action in response to the killings.

The prosecution established, through eyewitness accounts, that members of the Drina Corps had been involved in deportations, had in fact, provided buses for civilian transports, and that General Krstic had been present at two of the Hotel Fontana meetings. Although eyewitnesses also mentioned “Rambo-style” killers and looters and indicated the presence of paramilitaries (some commanded by the notorious Arkan) in the events, the prosecution was able to establish that the Drina Corps had been present at checkpoints, that Gen. Mladic himself had been seen at massive gatherings of prisoners prior to summary executions, and that it would have been impossible for General Krstic not to have known of the events taking place. Radio intercepts clearly established links between General Krstic and the movements of members of the Drina Corps.

General Krstic repeatedly stressed that as a career military officer, he had respected the laws of war. Eyewitnesses called by the Defense testified that he treated civilians in a humanitarian manner, and that he called for strict compliance with the Geneva Conventions by his troops. In addition, he claimed that, while he was involved with the taking of Srebrenica, he did not personally draw up the plans for the operation to take Srebrenica (Krivaja 95); he alleged that the operation was designed simply in response to military activities being conducted by the ABiH in the area.

In weighing the evidence and considering the arguments of the Defense, the Court determined that even though the exact date and time at which Gen. Krstic assumed command of the Drina Corps was disputed, he was undeniably Commander in September and early October, 1995, “when the bodies of executed Bosnian Muslim men were removed from primary graves to more remote secondary mass gravesites.”³⁵ The Court concluded that from early July 1995, Gen. Krstic began to assume more and more *de facto* responsibility within the Drina Corps, and that, as of 13 July 1995, he “operated as Drina Corps Commander and the entire Corps recognized him as such.”³⁶

Regarding the deportations that occurred from Potocari on July 12 and 13, 1995, Gen. Krstic alleged that he had been totally preoccupied with the Zepa campaign. However, the Court felt that the Prosecution established through overwhelming evidence that Gen. Krstic had played a significant role in the removal of Bosnian Muslim civilians from Potocari, through his involvement in the Hotel Fontana meetings, the organization of the buses, and his presence in Potocari on July 12.

The role of General Krstic in the executions was the most critical question concerning the charge against him of genocide and complicity in genocide. The Prosecution established that after Gen. Mladic demanded that men of military age be screened for involvement in war crimes; Bosnian men were not screened in accordance with accepted military practice. Their identification papers were seized, and there were reports that men were often summarily executed behind the “white house.”

The Trial Chamber found that General Krstic was in Potocari on July 12 and must have been aware of activities at the white house and also that the men were not being deported with the women, children and elderly. The Trial Chamber was satisfied that “General Krstic must have realized, as did all the witnesses present in and around the compound that day, that there was a terrible uncertainty as to what was going to happen to the men who had been separated.”³⁷

Intercepted conversations established that Gen. Krstic gave orders to the Drina Corps to secure some of the roads out of Srebrenica. At these checkpoints, men hiding in the buses were removed and transported to holding areas, after which they were executed.

Very important in the Krstic case were records in the case of Drazen Erdemovic, who had been convicted on November 29, 1996, in the “Pilica Farm” case, of crimes against humanity (Article 5 – murder) or violation of the laws or customs of war (Article 3 - murder). According to the indictment, after the fall of the UN safe area of Srebrenica, bus loads of Bosnian Muslim civilian men between the ages of approximately 17 and 60 years, were transferred to, among other places, a farm near Pilica (in the zone of responsibility of the Drina Corps). On arrival at the farm, the Bosnian Muslim men were removed from each bus in groups of about 10 and taken by members of the 10th Sabotage Detachment of the Bosnian Serb army to a nearby field, where they were summarily executed. As a member of that detachment, Erdemovic was charged for his participation in the killing of hundreds of unarmed Bosnian Muslim men on or about July 16, 1995. Erdemovic pleaded guilty to the count of murder as a crime against humanity, and was sentenced to 10 years imprisonment. In an appeal and second sentencing judgement, on March 5, 1998, Erdemovic was sentenced to 5 years imprisonment.³⁸

Gen. Krstic’s involvement in the Serb actions regarding the column of Muslims moving toward Tuzla from Srebrenica was a matter of particular attention. General Krstic was included in the chain of command regarding a series of communications concerning the movement of the column. The Trial Chamber found that “General Krstic was fully informed of developments relating to the movement of the Bosnian Muslim column and that he knew, by the evening of 13 July 1995, that thousands of Bosnian Muslim men from the column had been captured by Bosnian Serb forces within his zone of responsibility.”³⁹

Although the Court found no evidence that General Krstic himself had been present at any of the execution sites, it found that the Drina Corps Command must have known about the plan to execute all of the military aged Bosnian Muslim men, must have known of the involvement of the Drina Corps and other actors in the executions, and that indeed, Krstic had supplied additional troops to assist in the executions and subsequent burials. Although it was clear that some armed combat had occurred between military members of the column and the Serbs, aerial photographs and evidence gathered from forensic experts clearly indicated that most of the dead did not die in combat; most had been killed in mass executions of large numbers of noncombatants or captured persons and subsequently buried in mass graves.

The Trial Chamber found that General Krstic was regularly in contact with individuals who appear to have been involved in the Srebrenica crimes. “This contact is relevant because it refutes the assertion made by General Krstic that he was completely isolated from events in Srebrenica due to his position as Commander of the Zepa operation and played no role in the crimes committed in the aftermath of the take-over of Srebrenica.”⁴⁰ The Court noted that the parties agreed that General Mladic was the primary figure behind the executions. The Trial Chamber also noted the reburial activities took place within the zone of responsibility of the Drina Corps over a two-month period and found that these activities could not have escaped Gen. Krstic’s notice.

Most damaging to Gen. Krstic's defense was the fact that he failed to take any steps to punish men who had participated in the executions, even though he must have known of their involvement. To all appearances, he remained consistently loyal to General Mladic

The Prosecution's case was based on circumstantial evidence and direct evidence, finally convincing the Court that General Krstic had been fully aware of the combat operations with the Muslim column and the problems of coping with thousands of prisoners detained throughout his zone of responsibility.

General Krstic and the Charge of Genocide

In accordance with the provisions of the ICTY Statute, the Court needed to determine whether Radislav Krstic was responsible for crimes "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." First, in cases of joint participation, where several protagonists are involved in the perpetration of the crime, the intent to destroy, in whole or in part, the group "must be discernible in the criminal act itself..." Then it would be necessary to establish whether the accused being prosecuted for genocide had "shared the intention that a genocide be carried out."⁴¹

The Trial Chamber recognized that existence of Bosnian Muslims as a protected group. It considered that the transfer of women and children, the confinement and subsequent death of thousands of Bosnian Muslim civilian and military men, most of whom had clearly not died in combat, "demonstrated that a purposeful decision had been taken by the Bosnian Serb forces to target the Bosnian Muslim population in Srebrenica, by reason of their membership in the Bosnian Muslim group." The question remained as to whether there was intent to destroy the group in whole or in part. Referring to the Jelisic Judgement, the Court decided that a plan need not have been formed, and that even if such a plan existed, it was "not indispensable for time to have passed between its conception and implementation."⁴²

Another critical issue concerned the understanding of "in part," in the definition of genocide. What percentage of a population needs to be killed to qualify an act as constituting genocide? How many persons, targeted on the basis of their membership in a group, qualify as "in part?" Referring to two Judgements of the ICTR, the Court decided that the destruction sought must target a "considerable" number of individuals, or at least a substantial part of the group.⁴³ This part should be a distinct part of the group, not isolated individuals.

In understanding the reasoning of the Court, the following paragraph from the Judicial Supplement to the Krstic Judgement is crucial:

The Trial Chamber considered that the Bosnian Serb forces had known by the time they had decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.⁴⁴

The Trial Chamber concluded that “the intent to kill all the Bosnian Muslim men of military age in Srebrenica constituted an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 of the Statute and therefore must be qualified as a genocide.”⁴⁵ Therefore, at some point, the ethnic cleansing policies of the Serb Army, combined with the executions of Bosnian men and boys of military age, became, in the eyes of the Court, genocide.⁴⁶

The Trial Chamber concluded that General Krstic had effective control of the Drina Corps during the time period in which the acts of genocide took place, and that he had knowledge of these acts. His criminal responsibility for the crimes of Srebrenica was most appropriately determined under Article 7 (1) of the Statute. He was a member of the “joint criminal enterprise” to kill the military aged men, and thus had “incurred responsibility for genocide...”⁴⁷

In the determination of General Krstic’s sentence, his occupation of the highest level of VRS Corps commander was considered to be an aggravating factor. The Chamber’s assessment was that General Krstic was a professional soldier who “would not likely, on his own, have embarked on a genocidal venture: however, he had allowed himself, as he had assumed command responsibility for the Drina Corps, to be drawn into the heinous scheme, and to sanction the use of Corps assets to assist with the genocide.”⁴⁸ The Trial Chamber stated that it was “convinced beyond any reasonable doubt that a crime of genocide had been committed in Srebrenica and that General Radislav Krstic is guilty of genocide.”⁴⁹

During the sentencing, General Krstic was asked to rise, after which the following words were pronounced:

The Trial Chamber does not dispute that you are a professional soldier who loves his work. The Trial Chamber can accept that you would not of your own accord have taken the decision to execute thousands of civilians and disarmed persons. Someone else probably decided to order the execution of all the men of fighting age. Nonetheless, you are still guilty, General Krstic . . . Knowing that the women, children and old people of Srebrenica had been transferred, you are guilty of having agreed to the plan to conduct mass executions of all the men of fighting age. You are therefore guilty of genocide, General Krstic . . . In July, 1995, General Krstic, you agreed to evil. This is why the Trial Chamber convicts you today and sentences you to 46 years in prison.⁵⁰

The Milosevic Indictment

Slobodan Milosevic was initially indicted, along with four high-ranking Serb officials, on May 24, 1999. The initial indictment did not include charges involving the crime of genocide.⁵¹ However, the initial indictment was amended on October 29, 2001, and indictments for crimes committed in Croatia and Bosnia respectively were added on November 22, 2001. In the Bosnia indictment, Milosevic is charged with genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war.⁵² Chief Prosecutor Carla Del Ponte and the Prosecution team in the Milosevic case will seek to prove connections between Serb security forces and the Serb government and Serbs fighting in Bosnia. To do this, they will attempt to

show financial and organizational links between Milosevic and Radovan Karadzic and Ratko Mladic's operations in Bosnia, including the 43 month siege of Sarajevo from 1992-1995, during which snipers targeted children, markets, funeral processions, and other civilians.

The siege and fall of Srebrenica and its aftermath will also figure prominently, particularly in light of the conviction of Krstic. Now that the groundwork has clearly been established regarding the sense of the ICTY that the massacres of unarmed men and boys in the environs of Srebrenica did indeed constitute genocide, the Prosecution must clearly demonstrate that Milosevic provided logistical, financial, and political support, and therefore was in a position of superior authority, over the troops of the VRS who executed the Bosnian Muslims.

Comments and Questions Concerning the Krstic Conviction

After a close examination of the proceedings leading to the conviction of General Krstic on the charge of genocide, several major areas of concern arise. The first involves the question of *intent* to eliminate all or part of a protected group, so necessary to the definition of the crime of genocide. The Court chose to anchor its argument on intent to the fact that, given the deportation of women, children, and elderly from Srebrenica, the plan to execute all of the Bosnian men of military age, of necessity implied an intent to wipe out the entire Bosnian Muslim population of Srebrenica (a substantial part of the Bosnian Muslim population as a whole). Thus, according to the Court, ethnic cleansing became genocide.⁵³

The relationship between ethnic cleansing and genocide has long been belabored by scholars in their study of the Bosnian wars. Most argue that ethnic cleansing, in itself, does not constitute genocide – rather it is the removal or deportation of a distinct group to make one area more ethnically homogenous. One could argue that the deportation of the Muslims from Srebrenica was ethnic cleansing, and that the executions of the Bosnian men constituted crimes against humanity and violation of the laws and customs of war. This would imply that the executions were carried out not primarily with the intent to exterminate the group in whole or in substantial part, but for expediency, reprisal, or to eliminate potential military retaliation against the Serbs. Thus, if this interpretation were accepted, the events after the fall of Srebrenica would not rise to the level of the ultimate crime of genocide, but rather would be considered heinous violations of the laws of war, grave breaches of the Geneva Conventions, or violations against civilian populations during armed conflict. The fact that intent is so very difficult to prove and the fact that the level of evidence required to prove the crime of genocide is so high inhibited the ICTY from prosecuting genocide in previous cases.⁵⁴ However, the conviction of Krstic for genocide will provide strong arguments and judicial precedent for subsequent cases in which the crime of genocide is alleged to have occurred.

Another general concern that occupies those concerned with the legal interpretation of the crime of genocide is the nature of protected groups. Critics worry that certain groups were left out of those named in the Genocide Convention – namely gender, political groups, and groups of those with specific sexual orientations. Of further interest is the nature of the “whole or in part” specification – or, as William Shabas questions, “Do Numbers Matter?”⁵⁵

The final comment concerns the wider political context in which the conviction of Krstic for genocide has occurred. While the ICTY deliberations remained a discreet legal venue for the discussion of the specific criminal responsibility of a specific individual for specific crimes, and while this venue is vital for the provision of justice for the victims of Bosnia, a greater culpability lies, in the views of this author, with an international community that guaranteed the people of Srebrenica their safety and their lives, and then delivered them up to those who meant them ill. While the intentions of those seated in New York, declaring safe areas under the protection of the United Nations, may originally have been pure, it is apparent to this author that their commanders on the ground in Bosnia ultimately traded the lives of a few peacekeepers for more than 7500 Bosnian men and boys. The governments represented on the Security Council were, in turn, irresponsible, ignorant, and incompetent, and should feel fully responsible for this ultimate betrayal of trust. They, along with Gen. Krstic, are guilty as well of the terrible tragedy of Srebrenica.

Notes

¹ United Nations Security Council, Security Council Resolution 824, 48th Session, 3208th mtg., UN Doc. S/RES/824 (93). This Resolution established Sarajevo, Tuzla, Zepa, Gorazde, Bihac, and Srebrenica as safe areas under the protection of the United Nations. There are many excellent accounts of the fall of Srebrenica. Among the best are David Rohde, *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II* (New York: Farrar, Straus and Giroux, 1997) and Jan Willem Honig and Norbert Both, *Srebrenica: Record of a War Crime* (New York: Putnam, 1997). See also *The Betrayal of Srebrenica: Why did the Massacre Happen? Will It Happen Again?* Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives, 105th Congress, Second Session, March 31, 1998.

² See for example, United Nations, *The Report of the Secretary-General Pursuant to GAR 53/35: Srebrenica Report*, UGAOR 5th Comm., 72nd mtg, UNDOC A/RES/53/35 98, available from <http://www.un.org/peace/srebrenica.pdf>; Internet; accessed 21 October 2002.

³ For an excellent overview of the ICTY, see Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 92 (2001): 7. See also the seminal works on the ICTY by Michael P. Scharf, including *Balkan Justice: the Story behind the First International War Crimes Trial since Nuremberg* (Carolina Academic Press, 1997) and Michel P. Scharf and Virginia Morris, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1995). See also Judge Gabrielle Kirk McDonald, "The International Criminal Tribunals: Crime and Punishment in the International Arena," *Nova Law Review* 25 (2001): 463. See also Roger S. Clark and Madeleine Sann, *The Prosecution of International Crimes* (New Brunswick: Transaction Publishers, 1996).

⁴ Rome Statute of the International Criminal Court, 17 July 1998, United Nations Treaty Collection (Doc. A/CONF.183/9), entered into force 1 July 2000.

⁵ Ibid, article 7(1).

⁶ Ibid.

⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N T.S. 277, entered into force on January 12, 1951.

⁸ For jurisprudence in the ICTY through 1998, see Sean D. Murphy, "Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia," *American Journal of International Law* 93 (1999): 57. See also G. Anthony Wolusky, "Prosecuting War Crimes in the Former Yugoslavia," 6 *USAFA Journal of Legal Studies* 6 (1995/96): 287 and Patricia M. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court," *Washington University Journal of Law and Policy* 5 (2001): 87.

⁹ “Prosecutor v. Jean-Paul Akayesu,” Judgement, No. ICTR-96-4-T (Sept. 2, 1998), available from <http://www.un.org/ict/english/judgements/akayesu.html>; Internet; accessed 27 November 2002.

¹⁰ For an excellent analysis of genocide and the ad hoc tribunals, see William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000). See also, by the same author, “Was Genocide Committed in Bosnia-Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia,” *Fordham International Law Journal* 25 (2001): 23. See also Matthew Lippman, “Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium,” *Houston Journal of International Law* 23 (2001): 467.

¹¹ All information on the Krstic case is available from <http://www.un.org/icty/ind-e.htm>. Internet; accessed 27 November 2002. For a brief summary of the case, see <http://www.un.org/icty/glance/krstic.htm>; Internet; accessed 27 November 2002.

¹² Theodor Meron, legal scholar and newly appointed Judge on the ICTY has noted that “the gravest atrocity, the Serb massacre of thousands of Muslims living in and around Srebrenica, happened in July 1995, when the tribunal was fully operational and Karadzic and Mladic had both been indicted.” Theodor Meron, “Answering for War Crimes: Lessons from the Balkans,” *Foreign Affairs*, (January-February 1997), 2.

¹³ Amended Indictment available from <http://www.un.org/icty/indictment/english/krs-1ai991027e.htm>; Internet; accessed 27 November 2002.

¹⁴ ICTY, “Indictments and Proceedings,” *International Criminal Tribunal for Former Yugoslavia* [home page on-line]; available from <http://www.un.org/icty/ind-e.htm>; Internet; accessed 27 November 2002.

¹⁵ *Srebrenica: A Cry from the Grave*, PBS film documentary, 1999.

¹⁶ Krstic Judgement, available from <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e-1.htm>; Internet; accessed 27 November 2002.

¹⁷ Ibid.

¹⁸ Available from <http://daccess-ods.un.org/TMP/5423204.html>; Internet; accessed 27 November 2002.

¹⁹ Ibid.

²⁰ *A Cry from the Grave*.

²¹ David Rohde, *Endgame: The Betrayal and Fall of Srebrenica, Europe’s Worst Massacre Since World War II* (Boulder: Westview Press, 1998), 364-65.

²² Kirsten Grieshaber, *Dutch Peacekeepers*, available from http://www.columbia.edu/itc/journalism/nelson/rohde/peacekeepers_dutch.html; Internet; accessed 27 November 2002.

²³ *Report of the Secretary-General on Srebrenica*, section 468.

²⁴ Ibid, section 476.

²⁵ Ibid.

²⁶ Ibid, section 503.

²⁷ Krstic Judgement, sections 126-134. Several eyewitnesses described the first meeting with General Mladic, at which apparently a pig was slaughtered outside the meeting room, clearly audible to those present. They felt that the grisly sounds of the pig squealing as it was killed were a deliberate attempt to terrorize the Muslim participants. At these meetings, General Mladic made clear his demand that all members of the ABiH lay down their arms, and that if they did not, the survival of the Bosnian Muslim population would be in danger.

²⁸ Ibid, section 134.

²⁹ Ibid, sections 65-68.

³⁰ David Rohde, “Eyewitnesses Confirm Massacres in Bosnia,” *Christian Science Monitor*, 5 October 1993.

³¹ *Statement of David Rohde, Correspondent Christian Science Monitor, before the US Commission on Security and Cooperation in Europe, Washington, DC, December 6, 1995*. Available from http://www.fas.org/irp/congress/1995_hr/c951206r.htm. Internet; accessed 27 November 2002

³² Krstic Judgement, section 96.

³³ Information on the command structure of the VRS is available in the Initial Indictment. It can be obtained from <http://www.un.org/icty/indictment/english/krs-ii981102e.htm>; Internet; accessed 27 November 2002

³⁴ Krstic Judgement, sections 306 and 307.

³⁵ Ibid, section 311.

³⁶ Ibid, section 331.

³⁷ Ibid, section 367.

³⁸ Information on the Erdemovic case is available from <http://www.un.org/icty/glance/erdemovic.htm>; Internet; accessed 27 November 2002

³⁹ Krstic Judgement, section 377.

⁴⁰ Ibid, section 406.

⁴¹ *Judicial Supplement 27 to the Krstic Judgement*, Case No. IT-98-33-T, p. 8. Available from <http://www.un.org/icty/Supplement/supp27-e/index.htm>; Internet; accessed 27 November 2002.

⁴² *The Prosecutor v. Goran Jelusic (Brcko)*, Case No. IT-95-14/2-T, Trial Chamber III. Judgement, 26 February 2001.

⁴³ *Judicial Supplement No. 27*, 9. The cases referred to were *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-10-A, Trial Chamber 1, Judgement, 7 July 2001 and *Kayishema & Ruzindana Trial Chamber Judgement*, para. 223.

⁴⁴ *Judicial Supplement 27*, 8.

⁴⁵ Ibid, p. 10.

⁴⁶ For an excellent analysis of the policy of ethnic cleansing in the Bosnian conflict, see John Quigley, "State Responsibility for Ethnic Cleansing," *U.C. Davis Law Review* 32, (1999): 341.

⁴⁷ *Judicial Supplement 27*, 11.

⁴⁸ Ibid, 16.

⁴⁹ *Radislav Krstic Becomes the First Person to be Convicted of Genocide at the ICTY and is Sentenced to 46 Years Imprisonment*, Press Release, The Hague, 2 August 2001, OF/ P.I S./609e. Available from <http://www.un.org/icty/pressreal/p609-e.htm>; Internet; accessed 27 November 2002

⁵⁰ *Judicial Supplement 27*, 10 and 11.

⁵¹ For an analysis of the initial indictment, see Michael P. Scharf, "The Indictment of Slobodan Milosevic," *ASIL Insights*, (1999). For the relationship between the ICTY and the Kosovo conflict specifically, see Sonja Boelaert-Suominen, "The International Criminal Tribunal for the former Yugoslavia and the Kosovo Conflict," *International Review of the Red Cross* 837, no. 2 (2000): 217-252.

⁵² The complete texts of the indictments are available from <http://www.un.org/icty/ind-e.htm>; Internet; accessed 27 November 2002. For descriptions of the proceedings of the trial, see *New York Times*, 14 February 2002, A8.

⁵³ For an analysis of legal mechanisms to enforce the Genocide Convention and its relationship to ethnic cleansing, see Nicole M. Procida, "Ethnic Cleansing in Bosnia-Herzegovina, a Case Study: Employing United Nation Mechanisms To Enforce The Convention On The Prevention And Punishment Of The Crime Of Genocide," *Suffolk Transnational Law Review* 18 (1995): 655.

⁵⁴ The most detailed analysis of the requirements of the crime of genocide in the Bosnian conflict, prior to the Krstic conviction, occurred in the hearings of the Trial Chamber on the Karadzic and Mladic indictments. The genocide count was based on the treatment of prisoners in detention camps based on their group membership. Deprivation of food, torture, rape, and lack of medical care was considered. The number ultimately killed was not as important, according to the Chamber, as the intent to eliminate all or part of a specific protected group. The intent need not be explicit, it may be inferred. See Matthew Lippman, 504. See also Schabas for a review of the consideration of the crime of genocide in the ICTY. Of special note is his analysis of the Jelusic case, in which the Court decided that a special plan was not a requirement for genocide, but may be evidence of the intent required for genocide. In that case, the Court also decided that genocide may be committed by a single perpetrator.

⁵⁵ Schabas, 40.