

CASE NOTES

PROSECUTOR V RADISLAV KRSTIĆ:*

ICTY AUTHENTICATES GENOCIDE AT SREBRENICA AND CONVICTS FOR AIDING AND ABETTING

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I INTRODUCTION

In mid-July 1995, members of the Bosnian Serb Army ('VRS') massacred between 7000 and 8000 Bosnian Muslim men. This massacre took place in the town of Srebrenica, located in eastern Bosnia and Herzegovina. The violence was all the more distressing because Srebrenica fell within a United Nations 'safe area'. The purpose of the 'safe area' was to protect civilians from the armed conflict that was occurring throughout Bosnia and Herzegovina at the time.¹

Radislav Krstić was a General-Major in the VRS. He also was a member of the VRS Main Staff. Radovan Karadžić, the President of the Republica Srpska and Supreme Commander of the VRS, assigned Krstić with command responsibility for the Drina Corps, a sub-unit of the VRS responsible for Srebrenica. VRS soldiers removed Bosnian Muslim women, children and the elderly from the Srebrenica enclave. The men who remained were systematically murdered. This was the plan devised by the VRS Main Staff.²

On 2 August 2001, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia convicted Krstić on a variety of charges, mainly related to his role in the Srebrenica tragedy.³ The UN Security Council established the ICTY in 1993 as an ad hoc body to investigate and prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁴ The Trial Chamber found Krstić guilty on several counts, including as a perpetrator of genocide based on his participation

* *Prosecutor v Krstić (Appeals Chamber Judgment)*, Case No IT-98-33-A (19 April 2004).

¹ See *Prosecutor v Krstić (Trial Chamber Judgment)*, Case No IT-98-33-T (2 August 2001) ('*Krstić Trial Chamber*') [1].

² See generally *Krstić Trial Chamber*, Case No IT-98-33-T (2 August 2001) [3], [31]–[37], [66]–[70].

³ *Krstić Trial Chamber*, Case No IT-98-33-T (2 August 2001). Krstić's trial began on 13 March 2000 and lasted approximately one year.

⁴ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, art 2, UN Doc S/RES/827 (25 May 1993) ('*ICTY Statute*'). These conflicts involved internecine fighting and violations of international criminal law among Serbs, Croats, Bosnian Muslims and Kosovo Albanians that resulted in approximately 250 000 deaths.

in a joint criminal enterprise to commit genocide.⁵ The Trial Chamber sentenced him to 46 years' imprisonment. Krstić and the Prosecution both filed appeals.⁶

On 19 April 2004, a five-member panel of the ICTY Appeals Chamber exercised its review powers and reversed the genocide conviction.⁷ The Appeals Chamber found insufficient evidence that Krstić possessed the specific intent required to be convicted as a direct perpetrator of genocide based on joint criminal enterprise.⁸ Instead, the Appeals Chamber substituted a conviction for secondary involvement and found Krstić guilty of aiding and abetting genocide.⁹ The Appeals Chamber found that Krstić's involvement in extermination and persecution (crimes against humanity) and murder (a war crime) was properly characterised as aiding and abetting, not as direct participation.¹⁰ The Appeals Chamber affirmed several other convictions entered by the Trial Chamber. It then substituted a single fixed sentence of 35 years' imprisonment.¹¹ In this regard, the Appeals Chamber was principally motivated by the fact that aiding and abetting is a form of individual criminal responsibility that calls for lower sentences than responsibility as a co-perpetrator or direct participant.

The *Krstić* Appeals Chamber decision makes two major contributions to international criminal law. It also provides a number of additional insights and clarifications.¹² In this case note, I will critically examine the two major

⁵ At trial, Krstić was also convicted of persecution, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property as crimes against humanity, and murder as a war crime.

⁶ The Prosecution appealed the sentence (it had requested a life sentence) and also appealed the Trial Chamber's conclusion that some of the convictions were impermissibly cumulative. Krstić appealed the genocide conviction on questions of fact and law, the disclosure practices of the Prosecution, various other alleged factual and legal errors, and the sentence.

⁷ The Appeals Chamber of the ICTY exercises review over errors of law and fact made by the Trial Chamber. The Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber: *Prosecutor v Krnojelac (Appeals Chamber Judgment)*, Case No IT-97-25-A (17 September 2003) [11]. The Appeals Chamber will only interfere in factual findings of the Trial Chamber where no reasonable trier of fact could have reached the same finding, or where the finding is wholly erroneous: at [12]. Moreover, it only will correct an error of fact if that error occasioned a miscarriage of justice: at [13].

⁸ *Prosecutor v Krstić (Appeals Chamber Judgment)*, Case No IT-98-33-A (19 April 2004) ('*Krstić Appeals Chamber*'). The majority comprised Judges Theodor Meron (presiding), Fausto Pocar, Mehmet Güney and Wolfgang Schomburg. Judge Mohamed Shahabuddeen dissented in part, finding the Trial Chamber was correct in convicting Krstić as a principal perpetrator based on joint criminal responsibility. Notwithstanding, he sided with the majority regarding the sentence to be handed down. Judge Shahabuddeen also agreed with the majority's finding that genocide had been committed in Srebrenica in 1995.

⁹ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [135]–[144].

¹⁰ *Ibid* [143].

¹¹ *Ibid* [275].

¹² For instance, the Appeals Chamber explored the disclosure practices of the Prosecution, whether these violated Krstić's right to a fair trial and, in specific instances where such a violation was found, the nature of the appropriate remedies: *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [152]–[214]. The International Criminal Tribunal for Rwanda has also rendered some judgments that examine the effects on sentences of human rights infractions committed during the trial process: See, eg, *Prosecutor v Semanza (Trial Chamber Judgment)*, Case No ICTR-97-20-T (15 May 2003) [580] ('*Semanza Trial Chamber*'), which reduced a sentence by six months in light of the accused having not been informed of the charges against him until 36 days into his detention. *Krstić* also explores the ICTY's approach to cumulative convictions. Part III of this case note raises this aspect of the case, and also discusses sentencing.

contributions. Firstly, *Krstić* authenticates that genocide was in fact perpetrated against the Bosnian Muslims of Srebrenica. This serves an important didactic purpose. Srebrenica is the only incidence of genocide the ICTY has found amidst the pervasive violence that roiled the former Yugoslavia. Secondly, *Krstić* narrows the scope of joint criminal enterprise as a mechanism to attribute individual criminal liability for acts perpetrated by groups acting collectively. At the same time, it ensures that individuals are held responsible for collective violence through the secondary theory of aiding and abetting. Both of these contributions are germane to practitioners who may have occasion to invoke international criminal law in litigation before national, regional, or international courts. They are also of great importance to scholars of mass atrocity. On a less antiseptic note, the *Krstić* decision will have repercussions among victims, bystanders, and perpetrators in the former Yugoslavia, and accordingly may play some role in the essentially political process of peace and reconciliation in the wake of the endemic violence that has occurred there.

II THE GENOCIDE OF SREBRENICA'S BOSNIAN MUSLIMS

The Appeals Chamber unanimously found that genocide was committed in Srebrenica in 1995 by Bosnian Serb forces whose leadership (referred to as the Main Staff) had genocidal intent.¹³ The Appeals Chamber propounded a purposive approach to genocide under international criminal law, insofar as it found that the killing of only males of a specific ethnic group in a local community with the intent to destroy that group would constitute genocide. The Appeals Chamber did not conclude that the genocidal enterprise extended beyond the Muslims of Srebrenica. In fact, it was careful to focus only on those Bosnian Serb forces given responsibility over Srebrenica.¹⁴ Therefore, it would be improper to conclude (as overly exuberant media may well have) that, in *Krstić*, the Appeals Chamber found the broader policy of ethnic cleansing launched against the Bosnian Muslims by the leadership of the Republica Srpska or the Federal Republic of Yugoslavia ('FRY') to constitute genocide. Rather, the decision is limited to the specific conduct in Srebrenica. The Srebrenica massacre, therefore, was a genocidal enterprise that took place within a broader series of campaigns for which the ICTY has thus far returned convictions for crimes against humanity and war crimes.¹⁵

The definition of genocide in the *ICTY Statute* follows that of the *Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁶ According to art 4(2) of the *ICTY Statute*, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious

¹³ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [35].

¹⁴ *Ibid* [24].

¹⁵ Crimes against humanity are any of a number of acts (murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts) when committed in armed conflict, whether international or internal in character, and directed against any civilian population: *ICTY Statute*, above n 4, art 5.

¹⁶ Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

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;
- (e) forcibly transferring children of the group to another group.¹⁷

Therefore, in order to prove the crime of genocide, the prosecutor must establish a number of elements. These include establishing that the act occurred; the existence of a national, ethnical, racial, or religious group; and the intent to destroy that group, in whole or in part.¹⁸

The Trial Chamber determined that Bosnian Muslims were a specific, distinct national group.¹⁹ This was not challenged on appeal. Instead, Krstić argued that the particular group of Bosnian Muslims that he was found to have intentionally destroyed was too narrow.²⁰ The Trial and Appeals Chambers had dismissed this argument. The Appeals Chamber noted that ‘[i]t is well established that where a conviction for genocide relies on the intent to destroy a protected group “in part”, the part must be a substantial part of that group’ (the substantiality requirement).²¹ Genocide is a mass crime and, consequently, the violent act must be directed toward the destruction of the group beyond the destruction of individuals. The Appeals Chamber suggested some guidelines it found useful in ascertaining substantiality.²² These include:

- The numeric size of the targeted part, which the Appeals Chamber identified as the ‘necessary and important starting point’,²³ to be evaluated ‘not only in absolute terms, but also in relation to the overall size of the entire group’;²⁴
- The prominence of the targeted part within the overall group;²⁵ and
- The area of the perpetrators’ activity and control (for example, the Nazis intended to eliminate only Jews in Europe and the genocidal Rwandan government intended to eliminate only those Tutsi present in Rwanda; nonetheless, in both cases the targeted part was considered a substantial part).

The Appeals Chamber affirmed the Trial Chamber’s conclusion that the targeted part of the Bosnian Muslim population was the Bosnian Muslims of Srebrenica, estimated to number 40 000.²⁶ The Appeals Chamber recognised that

¹⁷ *ICTY Statute*, above n 4, art 4(3), further provides that the following acts shall be punishable: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

¹⁸ *Ibid* art 2(4).

¹⁹ *Krstić Trial Chamber*, Case No IT-98-33-T (2 August 2001) [6].

²⁰ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [5].

²¹ *Ibid* [9].

²² *Ibid* [14].

²³ *Ibid* [12].

²⁴ Although numeric size is the necessary starting point of the substantiality analysis, it is ‘not in all cases the ending point of the inquiry’: *Ibid* [12].

²⁵ ‘If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial’: *Ibid* [12].

²⁶ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [7].

this only constituted a small percentage of the overall Muslim population of Bosnia and Herzegovina. However, the Appeals Chamber affirmed the approach taken by the Trial Chamber which recognised Srebrenica's 'immense strategic importance to the Bosnian Serb leadership'.²⁷

One of the difficult aspects of this case was that the VRS did not kill all the Bosnian Muslims of Srebrenica. They limited the killing to Bosnian Muslim men and boys, largely of military age. They had previously removed the elderly, women, and children. Therefore, the question arose whether it was more appropriate to characterise the group targeted for destruction as the Srebrenica Bosnian Muslim males of military age. This led to the suggestion that this target group may have fallen short of the substantiality requirement. The Trial Chamber eschewed this characterisation of the target group.²⁸ It did not accept that the men of military age were a smaller part for the purposes of the elements of the genocide charge. Although it chided the Trial Chamber for using imprecise language in places, the Appeals Chamber endorsed this approach.²⁹

The focus of the killings on the male population of Srebrenica also affected the closely commingled determination as to whether the VRS (and its Main Staff) had the requisite intent to destroy the Srebrenica Bosnian Muslim population in whole or in part. The Trial Chamber held that 'the intent to kill the men [of military age] amounted to an intent to destroy a substantial part of the Srebrenica Bosnian Muslim group'.³⁰ The Appeals Chamber upheld the Trial Chamber's conclusion. In this regard, the Appeals Chamber placed considerable emphasis on four important findings.

Firstly, that the killings were of an indiscriminate nature. In executing Bosnian Muslim men, the VRS did not differentiate between men of military status and civilians; moreover, the VRS also killed severely handicapped men unlikely ever to have been combatants.³¹

Secondly, that the term 'men of military age' was a misnomer. Although the Appeals Chamber referred to the victims as 'men of military age', it recognised

²⁷ Ibid [15]–[16]. The Appeals Chamber explained this 'strategic importance' as follows at [15]:

Without Srebrenica, the ethnically Serb state of Republika Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted. The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent.

Furthermore, the designation by the UN Security Council of Srebrenica as a 'safe area' augmented its strategic value, at [16], insofar as '[t]he elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces'.

²⁸ *Krstić Trial Chamber*, Case No IT-98-33-T (2 August 2001) [546].

²⁹ Ibid [22]–[23].

³⁰ *Krstić Trial Chamber*, Case No IT-98-33-T (2 August 2001) [634].

³¹ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [26].

that ‘the group killed by the VRS included boys and elderly men normally considered to be outside that range’.³²

Thirdly, that the Trial Chamber was entitled to consider the long-term relational impact between the murders of the men and the survival of the community. The Appeals Chamber affirmed the finding that, given the ‘patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would “inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”’.³³ To this it added that ‘[t]he physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction’.³⁴

Fourthly, that the forcible transfer by the VRS of the women, elderly, and children of Srebrenica could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. According to the Appeals Chamber, ‘the transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself’.³⁵ That said, forcible transfer (other than that of children from one group to another group) does not explicitly constitute a genocidal act for the purposes of the *ICTY Statute*. Nevertheless, the Appeals Chamber found that this act does constitute evidence from which genocidal intent can be inferred.³⁶

Genocide, which international tribunals have called the ‘crime of crimes’,³⁷ cannot be established without ‘demanding proof’ of special intent.³⁸ The international tribunals have grappled with how the prosecution must establish this intent: must the defendant make direct statements of intent to destroy a protected group? Must the defendant be part of a cabal in which other members have made direct statements of an intent to destroy? The international tribunals have not limited themselves to this kind of direct, self-incriminating evidence. Proof of genocidal intent may be inferred from the factual circumstances of the case. This methodology was employed in *Krstić*.³⁹ Furthermore, ‘the inference that a particular atrocity was motivated by genocidal intent may be drawn ... even where the individuals to whom the intent is attributable are not precisely defined’.⁴⁰ Therefore, the determination that the Srebrenica massacre

³² Ibid [27]. The Appeals Chamber took note of the argument that some of the non-military men who were killed posed a threat of becoming military men. It did not give much force to this contention, remarking that although these men ‘could still be capable of bearing arms, the Trial Chamber was entitled to conclude that they did not present a serious military threat, and to draw a further inference that the VRS decision to kill them did not stem solely from the intent to eliminate them as a threat’: at [27].

³³ Ibid [28].

³⁴ Ibid [28].

³⁵ Ibid [31].

³⁶ Ibid [33].

³⁷ William Schabas, *Genocide in International Law: The Crimes of Crimes* (2000) 9. There are various reasons why international criminal law singles out genocide for special condemnation. In particular, as noted in *Krstić*, ‘[t]hose who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide’. See *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [36].

³⁸ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [37].

³⁹ Ibid [34].

⁴⁰ Ibid.

demonstrated genocidal intent on the part of the VRS Main Staff was established inferentially through circumstantial evidence. The fact that evidence of this genre constitutes ‘demanding proof’ demonstrates the difficulties that can inhere in locating direct inculpatory evidence of genocidal intent.

The Appeals Chamber adopted the Trial Chamber’s dynamic and fluid approach to the construction of genocidal intent, the categorisation of the target group, and the manner in which the killing of a demographic subset of a group can bear upon the extinction of the group as a whole.⁴¹ It found a causal connection between the murder of 7000 men and the intent to destroy the Srebrenica Bosnian Muslims; it then found a further causal link between the intended destruction of the Srebrenica Bosnian Muslims as a target group and the intended destruction of the protected group, namely Bosnian Muslims as a national whole. This methodology places limited priority on stringent quantitative criteria (how many people need to have been killed) and complex value judgments (how important may one or another strata be to the survival of the entire group). This may be of some concern to purists, insofar as the term genocide has been made applicable, through judicial interpretation, to situations that differ from the ideal type of systematised and massive group destruction, namely the Holocaust, which initiated the concept of genocide.

In parts, the *Krstić* decision is written with a view to serve a broader pedagogical function for the international community. The Appeals Chamber goes out of its way to underscore that the ‘proper name’ for the massacre at Srebrenica is genocide.⁴² This is unsurprising, given that the ICTY prosecutor has been under political pressure to secure a genocide conviction.⁴³ The expressive denunciation that attaches to a perpetrator of genocide is weighty, to say the least. Genocide evokes greater condemnation in the pantheon of evil than do crimes against humanity or war crimes. This semantic reality may help explain why there is such a push to criminalise the behaviour of the Khmer Rouge, who massacred 1.7 million Cambodians, as genocide instead of *only* crimes against humanity or war crimes. For the most part, the Khmer Rouge attacks targeted political and social groups, neither of which constitute a protected group under the definition of genocide. Still, it seems to disappoint

⁴¹ The ICTR has also engaged in fluid reasoning. In a series of initial decisions, it held that the Tutsi were an ethnic group for the purposes of inclusion as a protected group: *Prosecutor v Kayishema and Ruzindana (Trial Chamber Judgment)*, Case No ICTR-95-1-T (21 May 1999); *Prosecutor v Akayesu (Trial Chamber Judgment)*, Case No ICTR-96-4-T (2 September 1998). The ICTR reached this conclusion despite the fact that there are no meaningful linguistic and cultural differences between Hutu and Tutsi. The ICTR recognised that ethnicity could be constructed by political forces and could be made immutable through those same forces. For example, Hutu and Tutsi, which previously were somewhat malleable categories since a Hutu could ‘become’ a Tutsi through intermarriage or economic success, became immutable when Belgian colonial authorities introduced mandatory ethnic identity cards and obliged each Rwandan to carry one.

⁴² *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [37].

⁴³ William Schabas, ‘Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia’ (2001) 25 *Fordham International Law Journal* 23, 24–6 (discussing use by journalists and the Security Council of the term genocide to describe the violence in Bosnia and Herzegovina); *The Situation in Bosnia and Herzegovina*, GA Res 47/121, UN GAOR, 47th sess, 91st plen mtg, Annex, 2 (1992), which was adopted by a vote of 102 for, zero against, and 57 abstentions. The resolution states that ‘ethnic cleansing’ in the former Yugoslavia is ‘a form of genocide’.

common sense that, owing to legalistic definitional limits, an atrocity of this magnitude could avoid characterisation as genocide.

Krstić is the ICTY's first and, thus far, only genocide conviction. Genocide charges against certain other indicted defendants have been dropped by the prosecution, dismissed by the ICTY, or led to acquittals.⁴⁴ However, judicial recognition that what happened at Srebrenica constituted genocide shall affect upcoming cases, including the ongoing (and repeatedly delayed) proceedings against Slobodan Milošević, the former leader of the FRY. Of the three sets of indictments against Milošević, the only one charging him with the crime of genocide relates to atrocities committed during the Bosnian Wars of 1992–95.⁴⁵ This specific indictment includes the Srebrenica massacre. If the prosecutor can establish Milošević's involvement in Srebrenica (for example, based upon liability theories such as command responsibility), then he may well be found guilty as a principal perpetrator of genocide. The ICTY is incrementally building a detailed factual record. For example, in the earlier decision in *Prosecutor v Tadić* (*Trial Chamber Judgment*), it found the VRS to be under the overall control of the FRY.⁴⁶

The ICTY's conclusion that genocide took place in Srebrenica also has implications for the international legal system at large. The ICTY is not the only judicial institution concerned with adjudicating wrongdoing in the former Yugoslavia. The International Court of Justice, which resolves disputes among states, is also involved. A number of civil lawsuits have been filed with the ICJ, inter alia, for declaratory relief and reparations arising out of alleged violations of the *Genocide Convention*. Bosnia and Herzegovina has filed suit against the FRY (now Serbia and Montenegro).⁴⁷ The ICJ has not ruled yet on the merits of this case. It has dealt with extensive preliminary challenges to the lawsuit. However, these have not been successful in derailing the litigation and, therefore, it looks like the ICJ eventually will issue a judgment on the merits. This begs the

⁴⁴ *Prosecutor v Milošević*, Case No IT-01-50-I (8 October 2001) (the indictment did not charge genocide even though the Prosecutor had previously pledged that genocide charges would be brought regarding the violence in Croatia). See also Schabas, above n 37, 28. See also *Prosecutor v Jelisić* (*Trial Chamber Judgment*), Case No IT-95-10-T (14 December 1999), where the Trial Chamber issued an acquittal on the genocide charge by way of summary judgment — this was affirmed on appeal: *Prosecutor v Sikirica* (*Trial Chamber Judgment*), Case No IT-95-8-T (3 September 2001), where the Trial Chamber granted the defence a motion to dismiss the genocide charges; *Prosecutor v Stakić* (*Trial Chamber Judgment*), Case No IT-97-24-T (31 July 2003), where the Trial Chamber acquitted Stakić on the genocide charge, but convicted him on other charges and sentenced him to life imprisonment; *Prosecutor v Brđjanin* (*Trial Chamber Judgment*), Case No IT-99-36-T (1 September 2004), where the Trial Chamber acquitted Brđjanin of genocide for killings of Bosnian Muslims and Croats in a variety of municipalities.

⁴⁵ *Prosecutor v Milošević* (*Initial Indictment*), Case No IT-02-54-I (22 November 2001). On 16 June 2004, the ICTY dismissed a motion brought during trial to acquit Milošević of genocide for the Srebrenica massacre owing to an alleged lack of sufficient evidence. As regards Croatia, the prosecutor amended the initial indictments to drop the charges that genocide was committed against the Bosnian Croat population: See *Prosecutor v Milošević* (*Scheduling Order concerning Amending the Croatia and Bosnia Indictments*), Case No IT-02-54-T (17 September 2002).

⁴⁶ Case No IT-91-1-T (7 May 1997) [115] ('*Tadić Trial Chamber*').

⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) [1993] ICJ Rep 3.

question: to what extent is the ICJ bound to abide by the ICTY's finding that genocide took place in Srebrenica?

Clearly, the ICTY and ICJ operate in different contexts and for different ends. Whereas the ICJ adjudicates questions of state responsibility, the ICTY determines individual criminal responsibility. However, in determining Krstić's individual criminal responsibility, the ICTY had to settle the broader question of whether it believed genocide to have occurred in Srebrenica. Although it is unclear precisely how much weight the ICJ is to give to the jurisprudence of the ICTY, it would seem odd for the ICJ to ignore or disagree with the ICTY's finding of genocide. After all, the ICJ is to apply judicial decisions as subsidiary means to determine rules of law and, within this process of application, it seems eminently reasonable for decisions of the ad hoc criminal tribunals to be considered.⁴⁸ This triggers broader questions regarding the role of consistency and stability in international law. Although judicial enforcement in the international system remains decentralised, it does not seem too sensible for the ICTY — especially given its expertise — to view what happened as genocide and for the ICJ not to adhere to that finding.

The lack of formalised coordination between the ICTY and ICJ creates somewhat of a dilemma for Serbia and Montenegro which, in turn, operates as a disincentive to cooperation.⁴⁹ On the one hand, the international community insists that establishing the individual criminal guilt of a handful of people — including Milošević — is necessary for Serbia and Montenegro to transcend atrocity. On the other hand, there is a real risk that verdicts of individual criminal guilt by the ICTY could be used by the ICJ to establish legal elements of damage claims, which in turn means collective liability for all citizens of Serbia and Montenegro. Similarly, if Serbia and Montenegro provide official documents subpoenaed by the ICTY, these eventually might constitute evidence that would assist Bosnia and Herzegovina (or other states) before the ICJ. In this vein, Serbia and Montenegro's cooperation with the ICTY essentially increases the likelihood that it could be subject to successful lawsuits at the ICJ.⁵⁰

III FROM JOINT CRIMINAL ENTERPRISE TO AIDING AND ABETTING: THE INDIVIDUAL AMIDST ORGANIC VIOLENCE

Proof that genocide took place in Srebrenica does not establish Krstić's individual criminal responsibility. The evidence must implicate him personally in the overall genocidal enterprise. The Trial Chamber based Krstić's individual criminal liability on a theory of joint criminal enterprise.

⁴⁸ *Statute of the International Court of Justice* art 38(1)(d).

⁴⁹ In June 2004, Bosnia's Serbian leadership acknowledged responsibility for the Srebrenica massacre: See Nicholas Wood, 'Bosnian Serbs Admit Responsibility for the Massacre of 7000', *New York Times* (New York, United States), 12 June 2004. However it did not refer to the killings as genocide. Nor did it recognise the ICTY's use of the term or issue an official apology. The Bosnian Serb government is alone among requested states in not having transferred war crime suspects to the ICTY.

⁵⁰ In such a situation, would it be proper for the ICTY to acquire evidence but then issue restrictive orders regarding the other purposes for which it could be used? On a related note, could Serbia and Montenegro negotiate a discontinuance of the ICJ proceedings in exchange for enhanced cooperation with the ICTY in terms of documentary and testimonial evidence?

In *Prosecutor v Krnojelac (Trial Chamber Judgment)*,⁵¹ a Trial Chamber of the ICTY defined joint criminal enterprise as

an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement formed between them then and there to commit that crime.⁵²

In *Prosecutor v Tadić (Appeals Chamber Judgment)*, the ICTY held that joint criminal enterprise is an extended form of individual criminal responsibility that ‘embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design’.⁵³ Guilt is implicated to all members. In other words, ‘[i]f the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission’.⁵⁴

The Trial Chamber determined that Krstić shared the intent of joint criminal enterprise based on a variety of inferences that were themselves rooted in combined circumstantial evidence. These included: his knowledge about the situation facing the Bosnian Muslim civilians of Srebrenica in the wake of the VRS takeover; his interaction with the main participants of the joint criminal enterprise; and his knowledge that resources and soldiers under his command were used to facilitate the killings.⁵⁵ Basically, the Trial Chamber came to the conclusion that Krstić’s genocidal intent could be inferred circumstantially from proof that he was aware of the genocidal intent of other members of the Bosnian Serb Army but, notwithstanding this knowledge, did nothing to prevent the use of army resources and personnel under his command to facilitate the killings.⁵⁶

On appeal, the defence raised a variety of objections to Krstić’s individual criminal responsibility; many of these were highly technical and factual.⁵⁷ The Appeals Chamber carefully considered each of these. The most potent objection, which the Appeals Chamber accepted, related to the inferential use of this evidence to establish Krstić’s specific intent to perpetrate genocide through a joint criminal enterprise.⁵⁸

The Appeals Chamber noted that a conviction for genocide can be entered only where the specific intent of genocide has been unequivocally established.⁵⁹ In the case of a joint criminal enterprise, that intent must be shared by the co-perpetrators. The Appeals Chamber concluded that, on the facts, Krstić did

⁵¹ Case No IT-97-25-T (15 March 2002) (*Krnojelac Trial Chamber*).

⁵² *Ibid* [80] (this conclusion was left undisturbed on Appeal).

⁵³ Case No IT-94-1-A (15 July 1999) [193], [220] (*Tadić Appeals Chamber*), where it was held that intent in joint criminal enterprise liability can be shown directly or as a matter of inference from the nature of the accused’s authority within the organisational hierarchy.

⁵⁴ *Krnojelac Trial Chamber*, Case No IT-97-25-T (15 March 2002) [82].

⁵⁵ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [42].

⁵⁶ *Ibid* [42], [83].

⁵⁷ *Ibid* [43].

⁵⁸ *Ibid* [42]–[43], [77].

⁵⁹ *Ibid* [134].

not share this intent. Although the massacres were perpetrated by the VRS, the Appeals Chamber noted that the Prosecution failed to prove the direct involvement of the Drina Corps.⁶⁰ Consequently, since Krstić only had command authority over the Drina Corps, his direct involvement in assisting the executions could not be established.⁶¹ Moreover, the Appeals Chamber questioned whether the facts revealed Krstić's knowledge of the genocidal intent of all members of the Main Staff (including the influential General Mladić),⁶² although it did find reasonable the conclusion that Krstić had knowledge of the genocidal intent of some of the members.⁶³ In the end, the Appeals Chamber held that the Trial Chamber had erred in inferring Krstić's genocidal intent from his knowledge of the Srebrenica executions and of the use of personnel and resources under his command to assist in the executions.⁶⁴ For the Appeals Chamber, 'knowledge ... without more, is insufficient to support the further inference of genocidal intent'.⁶⁵

Judge Shahabuddeen dissented on this point. He concluded that the Trial Chamber's assessment that the facts supported an inference of genocidal intent on the part of Krstić should be left undisturbed.⁶⁶ Judge Shahabuddeen was wise to point out that the majority revisited the Trial Chamber's review of the evidence based on a very subtle line between knowledge of intent on the one hand, and sharing of intent on the other.⁶⁷

However, the finding of the majority of the Appeals Chamber only relieved Krstić from conviction as a principal perpetrator of genocide based on his involvement in a joint criminal enterprise. The Appeals Chamber instead substituted a conviction for aiding and abetting genocide, which it deemed to be a less serious — and in fact secondary — level of criminal responsibility.⁶⁸ Instrumental in this regard is the Appeals Chamber's interpretation of the evidence as establishing the involvement of Drina Corps personnel and assets in facilitating the executions.⁶⁹ The mens rea for aiding and abetting is met with proof that an individual assists the commission of a crime with knowledge of the

⁶⁰ Ibid [77].

⁶¹ Ibid [77].

⁶² Ibid [98].

⁶³ Ibid [137].

⁶⁴ Ibid [129].

⁶⁵ Ibid [129].

⁶⁶ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) (Partially Dissenting Opinion of Judge Shahabuddeen) [95]–[96].

⁶⁷ Ibid [38].

⁶⁸ The *ICTY Statute* does not specifically proscribe the crime of aiding and abetting genocide. The Appeals Chamber read the prohibition of genocide in art 4 together with the *ICTY Statute's* definition of individual criminal responsibility in art 7(1), which includes aiding and abetting. It thereby distinguishes aiding and abetting genocide from complicity in genocide, which is specifically proscribed in art 4.

⁶⁹ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [78].

intent behind the crime.⁷⁰ An aider and abettor intends only to provide means by which the principal perpetrator(s) with genocidal intent can realise this intent. Moreover, ‘a defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified’.⁷¹

On a related note, the ICTY held that multiple convictions — in Krstić’s case for aiding and abetting — ‘entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other’.⁷² This means that in certain situations, the ICTY can issue multiple convictions (for example, for genocide, crimes against humanity and war crimes) for the same conduct (cumulative convictions). In this regard, the Appeals Chamber overturned, *inter alia*, the Trial Chamber’s finding that convictions for extermination as a crime against humanity and genocide were impermissibly cumulative.⁷³ The issue of cumulative convictions is part of a much broader picture. These convictions only become possible because the prosecutor concurrently brings charges on multiple counts. There are didactic advantages to proceeding on multiple counts insofar as this ensures that the totality of the accused’s conduct is narrated. There also are strategic advantages. For example, multiple charges set the stage for a stronger negotiation position in plea bargaining. Moreover, the existence of multiple charges can permit a conviction for *something* in the event that the onerous intent requirements for certain crimes against humanity, and especially genocide, are not satisfied. In a similar vein, there are times when mutually exclusive liability theories are alleged: this practice has percolated to the ICTR, where the prosecutor has charged defendants concurrently with direct involvement in genocide and complicity in genocide, which are mutually exclusive. On the other hand, the decision to proceed through multiple, and at times prolific, charges can induce the appearance of desperately piling on accusations, obfuscating facts through smoke-and-mirrors, and bootstrapping guilt by creating a sum that is

⁷⁰ The Appeals Chamber grounded its analysis of the knowledge requirement for aiding and abetting in a review of municipal law, specifically French, German, Swiss, English, Canadian, Australian, and US precedents: *Ibid* [141]. This demonstrates sophisticated use of comparative legal methodology in ascertaining the substantive content of international criminal law. However, it assumes that the content of municipal legal systems, which for the most part criminalise deviant behaviour, is suitable for the fundamentally different context of mass atrocity, in which the impugned behaviour is often far from deviant. Rather, it is often a social norm or governmental order. In the case of Serbia, ‘as [Milošević’s] chief hateronger Vojislav Seselj was roaring to hysterical crowds, “We will kill Croats with rusty spoons because it will hurt more!”’; the Serb Orthodox Church blessed Milošević’s Serbian nationalism as a ‘new holy crusade’: See Amy Chua, *World On Fire* (2004) 173. That said, the Appeals Chamber added as specific precedent in support of its position the mens rea requirements for the crime of genocide as enacted under these various municipal legal systems: *Ibid* [141].

⁷¹ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [143]. The ICTY Appeals Chamber found an accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators: *Prosecutor v Vasiljević (Appeals Chamber Judgment)*, Case No IT-98-32-A (25 February 2004) [102] (*‘Vasiljević Appeals Chamber’*). The Appeals Chamber reduced Vasiljević’s sentence from 20 to 15 years based on its finding that certain convictions should have been for aiding and abetting (secondary perpetration) instead of for joint criminal enterprise (primary perpetration).

⁷² *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [218].

⁷³ *Ibid* [227].

larger than the individual parts. It also can further complicate an already lengthy trial process, as apparently has been the case with the Milošević prosecution. Multiple convictions also pose a dilemma for sentencing, especially in cases where a single sentence is imposed.⁷⁴

The Appeals Chamber reduced Krstić's sentence to a single fixed term of 35 years' imprisonment.⁷⁵ This conforms to the approach previously stated in *Vasiljević Appeals Chamber*,⁷⁶ which provides that 'aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator'.⁷⁷

Although the ICTY Appeals Chamber now appears to have cabined the potentially broad scope of joint criminal enterprise it had elucidated in *Tadić*, it continues to determine individual criminal responsibility based on collective liability theories such as aiding and abetting that, to some extent, awkwardly stretch traditional understandings of individual criminal responsibility in order to accommodate the peculiar context of mass atrocity. It is somewhat ironic that the Appeals Chamber itself noted that,

there was no evidence that Krstić ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them.⁷⁸

There is a need to adapt the essentially stringent modalities of evidentiary proof under the ordinary criminal law to the somewhat different context of mass atrocity. This context is one where gangs of perpetrators maul groups of victims; where survivors (assuming there are any survivors) hide in ceilings, latrines, and under dead bodies (often for weeks at a time); where mass graves present formidable forensic challenges; and where massacres may be incited by officials through a complex sequence of administrative orders and bureaucratic directives. Exactly proving which militant murdered which specific victim on whose order through corroborated eye-witness testimony is simply unrealistic. Therefore,

⁷⁴ For a more extensive discussion, see the commentary by the ICTY Appeals Chamber in *Prosecutor v Blaškić*, Case No IT-95-14-A (29 July 2004) [718]–[722].

⁷⁵ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [275].

⁷⁶ *Vasiljević Appeals Chamber*, Case No IT-98-32-A (25 February 2004).

⁷⁷ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [181]–[182]. The ICTR also has differentiated among principal perpetrators and secondary perpetrators for purposes of sentencing. See *Prosecutor v Kajelijeli (Trial Chamber Judgment)*, Case No ICTR-98-44A-T (1 December 2003) [963] ('*Kajelijeli Trial Chamber*'), where the ICTR Trial Chamber held that:

Principal perpetrators convicted of either genocide or extermination as a crime against humanity or both have been punished with sentences ranging from fifteen years to life imprisonment. Secondary or indirect forms of participation have generally resulted in a lower sentence.

For the ICTR, indirect forms of participation include aiding and abetting, and also complicity: See *Semanza Trial Chamber*, Case No ICTR-97-20-T (15 May 2003) [557].

⁷⁸ *Krstić Appeals Chamber*, Case No IT-98-33-A (19 April 2004) [144]. The Appeals Chamber made these comments with specific reference to Krstić's responsibility for crimes of extermination and persecution (crimes against humanity) and war crimes, but these observations also are apposite to the factual basis for Krstić's individual criminal responsibility for aiding and abetting genocide.

recourse to these more liberal liability theories permits the tribunals to ascribe individual guilt in cases where violence has many organic sources.

The ICTR has also availed itself of these liberal approaches to individual responsibility in situations of collective violence, drawing from conspiracy, complicity, and incitement.⁷⁹ For example, the ICTR recently convicted Eliézer Niyitegeka, a Rwandan broadcaster and former Minister of Information, on a number of charges, including conspiracy to commit genocide, and sentenced him to life imprisonment.⁸⁰ The ICTR ruled that both the existence of a conspiracy and the specific intent to commit genocide among the conspirators could be established circumstantially. It considered a broad array of evidence as relevant to proving specific intent to commit genocide. This evidence included Niyitegeka's participation in and attendance at meetings, planning of attacks, distribution of weapons to attackers, expression of support for the Rwandan Prime Minister, actions or inactions in failing to protect the victimised Tutsi population, and his general leadership role.⁸¹ As for the existence of a conspiracy, the ICTR held that the 'organized manner in which the attacks were carried out ... presupposes the existence of a plan'.⁸² In a subsequent case, *Nahimana, Barayagwiza, and Ngeze Trial Chamber*, the ICTR explicitly relied on the *Niyitegeka Trial Chamber* decision to support the inference of an agreement to commit conspiracy to commit genocide from circumstantial evidence.⁸³

Fundamentally, the ICTY and ICTR tweak individual criminal responsibility in a manner that permits this responsibility to attach to a greater number of individuals. This ensures that these individuals are held to account for their involvement in a genocidal whole, regardless of whether that whole would have existed with or without their individual involvement. This injects some degree of vicariousness into international criminal law that because, in certain cases, guilt may be impugned regardless of the actual extent of the defendant's personal culpability.

That said, the adaptation of the paradigm of individual guilt to account for the complexity of collective atrocity that has gained currency with the international criminal tribunals may be more cosmetic than structural. A full appreciation of the complexity of collective action requires more than just an extension of international criminal law's dominant discourse, which, when stripped to its essence, is an embrace of liberalism's understanding of the individual as the central unit of action. This understanding justifies the placing of blame squarely

⁷⁹ See, eg, *Semanza Trial Chamber*, Case No ICTR-97-20-T (15 May 2003), where the defendant was convicted of complicity to commit genocide and crimes against humanity and was sentenced to 25 years' imprisonment; *Prosecutor v Nahimana, Barayagwiza, and Ngeze (Trial Chamber Judgment)*, Case No ICTR-99-52-T (3 December 2003) ('*Nahimana, Barayagwiza, and Ngeze Trial Chamber*'), where the three defendants were convicted for conspiracy to commit genocide and direct and public incitement of genocide through the media.

⁸⁰ *Prosecutor v Niyitegeka (Trial Chamber Judgment)*, Case No ICTR-96-14-I (15 May 2003) ('*Niyitegeka Trial Chamber*'). This was affirmed in its entirety by the ICTR Appeals Chamber on July 9 2004.

⁸¹ *Ibid* [427].

⁸² *Ibid* [428].

⁸³ *Nahimana, Barayagwiza, and Ngeze Trial Chamber*, Case No ICTR-99-52-T (3 December 2003) [1046].

on selected guilty individuals. The ICTY and ICTR jurisprudence — as exemplified in the *Krstić* decision — does not examine the suitability of collective forms of accountability for collective violence.⁸⁴ Such an endeavour would exceed the statutory mandate of both the ICTY and the ICTR.

However, this mandate simply reflects an ideological preference. This preference conveniently lays blame for mass violence at the feet of selected savage individuals, instead of offering a fuller explication of the diverse political, economic, market-based, historical and colonial factors that facilitate and systematise violence. All despotic leaders are, to varying degrees, the products of these deeply globalised factors, which include acts and omissions of foreign governments and international agents.⁸⁵ By ignoring these acts and omissions, international criminal law fails to allocate blame according to degrees of responsibility. Whereas a tiny number of people may receive their ‘just desserts’, many acquiescent bystanders, passive participants, and interested parties (including powerful states and organisations) are absolved of any responsibility. Although international criminal law institutions appear as saviors, meting out justice amid the savagery of mass atrocity,⁸⁶ this appearance masks what may be the deep involvement of international agents and foreign governments in creating conditions conducive to violence and then failing to prevent the violence from taking place.

UN involvement in failed peacekeeping has prompted public inquiries in the case of Srebrenica. This soul-searching has also percolated to the national level: in the Netherlands, which was tasked with primary responsibility for peacekeeping in the Srebrenica enclave, the entire government resigned following the publication of a damning report.⁸⁷ That said, it would be sleight of hand to permit trials of select individuals deserving of punishment, such as General-Major Krstić, to obfuscate the structural, international and political influences that facilitated the Srebrenica massacre. Yet, to some extent such obfuscation arises from the *Krstić* judgment and, more broadly, the ICTY Prosecutor’s decision not to investigate the inaction of UN and Dutch officials and any connection this inaction may have to the Srebrenica tragedy.

IV CONCLUSION

Krstić memorialises the tragedy of Srebrenica and indelibly brands that tragedy as genocide. In this regard, it forms part of the tapestry of judgment which narrates the evil that gripped the former Yugoslavia. *Krstić* will resurface not only in the history books, but also more immediately in ICTY jurisprudence. It is somewhat ironic that this first ICTY genocide conviction is for the lesser

⁸⁴ International criminal law’s emphasis on individual responsibility may result from profound unease regarding collective responsibility, blame, or guilt.

⁸⁵ For a thorough discussion of the interplay between the foreign policy of the powerful and the crises of the weak, see Samantha Power, *A Problem from Hell: America and the Age of Genocide* (2002).

⁸⁶ Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201, 204.

⁸⁷ Agence France-Presse, ABC News Online, *Srebrenica Survivors to Sue the Netherlands* (2004) <<http://www.abc.net.au/news/newsitems/200406/s1140072.htm>> at 1 October 2004. The survivors are seeking reparations from the Dutch government for its alleged failure to stop the attacks in Srebrenica.

crime of aiding and abetting a genocidal enterprise when the primary perpetrators of that enterprise have not yet been tried. However, the *Krstić* judgment may serve the ICTY in expediting trials of these primary perpetrators. Furthermore, in the case of alleged perpetrators Radovan Karadžić and Ratko Mladić (who remain long-term fugitives from the ICTY's indictment), judicial notice that the 'crime of all crimes' was committed at Srebrenica may coax the Bosnian Serb government to finally take their capture more seriously.

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