"WITH INTENT TO DESTROY, IN WHOLE OR IN PART": GENOCIDE, ETHNIC CLEANSING, AND A LOST HISTORY

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Even though international law no longer attaches much formal importance to the question of whether or not a particular mass atrocity amounts to the crime of genocide, disputes about genocide continue to command outsized importance as a question of historical memory and as a source of political conflict. While the law itself is not entirely to blame, international courts have exacerbated the problem by providing unclear and even arbitrary guidance on the interpretation and application of the crime of genocide, unwittingly playing into the hands of atrocity deniers who are happy to focus the conversation on contested legal nuances rather than irrefutable facts.

In particular, a perennial source of conflict—from Turkey, to Bosnia, to Sudan, and Myanmar, among other places—has focused on the question of so-called ethnic cleansing. Do such acts reflect the requisite genocidal "intent to destroy, in whole or in part, a national, ethnical racial, or religious group, as such" when the overarching intent appears to be the displacement rather than the physical annihilation of a targeted group? The jurisprudence of the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia have provided especially mixed signals on this question. The cases have made determinations of genocide only with respect to the 1995 Srebrenica massacre, but not with respect to other mass killings which collectively claimed even more lives in pursuit of the plan to carve an ethnically Serb state out of Bosnian territory.

Drawing upon original research into the *travaux préparatoires* of the 1948 Genocide Convention, this Article advances several claims that complicate the standard account according to which genocide must entail a purpose to physically destroy at least a substantial part of a protected group. The core of the Article closely explores the words "intent," "destroy," and

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https://doi.org/10.59015/wlr.WGSQ7508

"in part," showing how international authorities have settled on a received and largely uninterrogated wisdom regarding the meaning of these terms, one which is supported neither by the drafting history of the Genocide Convention, nor even by the actual results of the judicial decisions that purport to apply these requirements. In addition, this Article defends an alternate interpretation according to which the genocide label extends to acts of mass killing whose ultimate goal is displacement rather than comprehensive extermination.

Ultimately, any attempt to delineate the genocide/not genocide distinction will involve an indeterminate and somewhat arbitrary line. While acknowledging that limitation, this Article defends its approach as the most consistent with the lost history of the Genocide Convention and also as one that is normatively preferable.

INTRODUCTION

For decades, the town of Višegrad in Bosnia and Herzegovina was known primarily as the setting of Nobel Prize winning novelist Ivo Andrić's most famous work, *The Bridge on the Drina*.[1] But during the

1. IVO ANDRIĆ, THE BRIDGE ON THE DRINA (George Allen & Unwin Ltd. trans., Univ. of Chicago Press ed. 1977) (1945).

spring and summer of 1992, Višegrad became the site of some of the Bosnian war's most notorious atrocities as Serb forces systematically murdered as many as 3,000 Bosniaks (Bosnian Muslims) out of a pre-war population of 14,000.[2] On a daily basis, the perpetrators shot truckloads of victims on the town's famous sixteenth-century bridge, throwing their bodies into the river.[3] In two separate incidents, perpetrators locked scores of men, women, and children in a house and burned them alive.[4] A local spa was converted into a torture center where perpetrators sexually assaulted and murdered hundreds of women and girls.[5] The details of these events are documented extensively in the judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) which convicted several defendants of crimes against humanity and war crimes in Višegrad.[6]

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2. Ehlimana Memišević, Opinion, *Višegrad's Rape Camps: Denial and Erasure*, AL JAZEERA (Oct. 17, 2020), https://www.aljazeera.com/opinions/2020/10/17/visegrads-rape-camps-denial-and-erasure [https://perma.cc/KR4B-7LPD]. News reports commonly cite a statistic of 3,000 victims. *See, e.g.*, *id.*; Željkjo Debelnogić, *Muslims Buried in Bosnia Town, Serb Veterans March*, REUTERS, https://www.reuters.com/article/idUSBRE84P0D2/ (May 26, 2012, 11:33 AM); Julian Borger, *War Is Over – Now Serbs and Bosniaks Fight To Win Control of a Brutal History*, GUARDIAN (Mar. 23, 2014, 9:43 AM), https://www.theguardian.com/world/2014/mar/23/war-serbs-bosniaks-history-visegrad [https://perma.cc/RVJ8-CVSG] ("The estimates of the total number of victims in the Višegrad municipality range from 1,600 to 3,000.").

3. *See* Blaine Harden, *Refugee 'Witnessed Massacres Every Day' at the Bridges on the Drina*, WASH. POST (Aug. 6, 1992, 8:00 PM), https://www.washingtonpost.com/archive/politics/1992/08/07/refugee-witnessed-massacres-every-day-at-the-bridges-on-the-drina/0cf84120-26bc-4e8f-adf1-51672bc8c762/ [https://perma.cc/MQ8Q-ADQS].

4. *See* Memišević, *supra* note 2.

5. *Id.*; Emma Graham-Harrison, *Back on the Tourist Trail: The Hotel Where Women Were Raped and Tortured*, GUARDIAN (Jan. 28, 2018, 3:00 AM), https://www.theguardian.com/world/2018/jan/28/bosnia-hotel-rape-murder-war-crimes [https://perma.cc/3GUR-FYEU].

6. *See, e.g.*, *Prosecutor v. Lukić*, Case No. IT-98-32/1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012), https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/acjug/en/121204_judgement.pdf [https://perma.cc/3DCF-JYLY]; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002), https://www.icty.org/x/cases/vasiljevic/tjug/en/ [https://perma.cc/C3C6-ZMAV]; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004), https://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf [https://perma.cc/8BQZ-ZE7P]; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-00-39/JUD160R0000170982.TIF [https://perma.cc/AUU2-GEMV]; *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009), https://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf

Pursuant to the 1995 Dayton Peace Agreement, Višegrad today belongs to Bosnia's Serb-governed entity, the Republika Srpska.[7] In the town's Muslim cemetery, survivors erected a monument "[t]o all killed and missing Bosniak men, women, and child victims of genocide in Višegrad."[8] Declaring the monument to be illegally built, town authorities deployed a team of workers under police guard to the cemetery, not to remove the monument, but instead to sandblast a single word from the inscription: "genocide."[9] As the town mayor explained: "Regardless of the fact that we had every right to tear down the memorial, since it was built without previous approval, I decided we would be tolerant. We have no problem with the memorial, but the problem is with the word genocide."[10]

This example provides just one illustration of a common phenomenon. The perpetration of international crimes and serious human rights abuses often brings with it accusations of genocide, and that question of genocide then assumes an outsized importance in debates over the appropriate legal characterization. In Bosnia itself, the question of genocide has proven to be perhaps the single most divisive national issue. A string of precedents by the International Court of Justice (ICJ), the ICTY, and the ICTY's successor, the Mechanism for International Criminal Tribunals (MICT), have made findings of genocide in connection with only one incident—the massacre of 8,000 Bosniak men and boys at Srebrenica in July 1995—while refusing that label for broader acts of ethnic cleansing perpetrated throughout the war in other parts of

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[https://perma.cc/GGQ2-GNG9]; *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), https://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf [https://perma.cc/3UK5-M4Q2]; *Prosecutor v. Karadžić*, Case No. MICT-13-55-A, Judgement (Mar. 20, 2019), https://www.irmct.org/sites/default/files/casedocuments/mict-13-55/appeals-chamber-judgements/en/190320-judgement-karadzic-13-55.pdf [https://perma.cc/8CCK-NCJ7].

7. General Framework Agreement for Peace in Bosnia and Herzegovina, Nov. 21–Dec. 14, 1995, U.S. DEP'T ST. DISPATCH, Mar. 1996, at 1 [hereinafter Dayton Peace Agreement]. *See also Dayton Agreement, 24 November 1995 : [Bosnia and Herzegovina]*., LIBR. CONG. (1995), https://www.loc.gov/item/2009584228/ [https://perma.cc/WV4S-NT6S].

8. Gianluca Mezzofiore, *Bosnian Serbs Remove 'Genocide' from Bosniaks' Visegrad Memorial [Video]*, INT'L BUS. TIMES: U.K. (Jan. 24, 2014, 11:42 AM), https://www.ibtimes.co.uk/bosnian-serbs-remove-genocide-bosniaks-visegrad-memorial-video-1433658 [https://perma.cc/E5X5-NT2P].

9. *Id.*

10. Denic Džidić & Denis Dzidic, *Bosnian Serbs Delete 'Genocide' from Visegrad Memorial*, BALKAN INSIGHT: BALKAN TRANSITIONAL JUST. (Jan. 23, 2014, 3:17 PM), https://balkaninsight.com/2014/01/23/visegrad-authorities-remove-genocide-from-monument/ [https://perma.cc/UWJ2-5ULZ].

Bosnia, such as Višegrad.[11] This distinction has proven deeply divisive in the former Yugoslavia for decades. When Bosnia brought its claim against Serbia and Montenegro before the ICJ, it accused the state of supporting a broader genocide that took place throughout Bosnia.[12] Serbian and Bosnian Serb authorities, meanwhile, have steadfastly rejected the genocide label for all cases, even when acknowledging the crimes themselves.[13] In 2022, Serb opposition to a Bosnian law

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11. *See Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 471 (Feb. 26); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9]; *Prosecutor v. Popović*, Case No. IT-05-88-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015), https://www.icty.org/x/cases/popovic/acjug/en/150130_judgement.pdf [https://perma.cc/HF4B-FUMB]; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015), https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf [https://perma.cc/D8JS-KYN9]; *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007), https://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf [https://perma.cc/7WEM-DQBQ]; *Karadžić*, Case No. MICT-13-55-A; *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Judgement (June 8, 2021), https://www.irmct.org/sites/default/files/case_documents/210608-appeal-judgement-JUD285R0000638396-mladic-13-56-en.pdf [https://perma.cc/GAE7-QM5Y].

12. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 370.

13. In 2013, for instance, Serbia's then-president, Tomislav Nikolić, appeared on Bosnian television to say, "I kneel and ask for forgiveness for Serbia for the crime committed in Srebrenica," while pointedly refusing to utter the word "genocide." *Serbian President Apologizes for Srebrenica 'Crime,'* BBC (Apr. 25, 2013), https://www.bbc.com/news/world-europe-22297089 [https://perma.cc/4AKC-LEWE]. *See also* Jelena Dureinovic, *Memory Politics: Serbia's Genocide Denial*, FAIR OBSERVER (May 24, 2021, 10:35 AM), https://www.fairobserver.com/region/europe/jelena-dureinovic-aleksandar-vucic-serbia-srebrenica-genocide-denial-icty-human-rights-news-10333/ [https://perma.cc/VTC4-2HHS] ("No government [of Serbia] since the fall of Milosevic in 2000 has recognized what happened in Srebrenica as a genocide. The official stance has always been genocide denial – not contesting that the killings actually took place but refusing to accept the ICTY ruling the events a genocide, as well as denying any responsibility on behalf of Serbia."). In March 2023, Bosnian prosecutors filed charges against Bosnian Serb leader Milorad Dodik for his own persistent denial of genocide at Srebrenica. *See* RFE/RL's Balkan Service, *Prosecutor Files Case Against Bosnian Serb Leader Dodik for Genocide Denial*, RADIO FREE EUR. RADIO LIBERTY (Mar. 6, 2023), https://www.rferl.org/a/bosnia-dodik-genocidedenial/32305177.html [https://perma.cc/MR2A-397M]. In 2020, a commission established and funded by the Republika Srpska and headed by Israeli historian Gideon Greif released an 1,100-page report dedicated to the denial of genocide at Srebrenica. *See* INDEP. INT'L COMM'N OF INQUIRY ON SUFFERING OF ALL PEOPLE IN THE SREBRENICA REGION BETWEEN 1992 & 1995, CONCLUDING REPORT (2020), https://incomfis-srebrenica.org/wp-content/uploads/2021/07/Srebrenica%20Commission%20report%20-%20English%20lan.pdf [hereinafter CONCLUDING REPORT]. *See also* Menachem Z.

prohibiting genocidal denial threatened to bring Bosnia to the brink of civil war once more.[14]

Recent years have also focused attention on other disputed genocides. On April 24, 2021, President Joseph Biden formally recognized the mass killing of Armenians in Ottoman-era Turkey as a genocide, breaking with the tradition set by prior U.S. presidents who have avoided using the term in deference to the government of Turkey.[15] While Turkey has acknowledged many of the atrocities over the years, characterizing these events as genocide can still bring criminal charges.[16]

At the International Criminal Court (ICC), Sudan's former president is wanted on charges of genocide in connection with atrocities in Sudan's Darfur region in the 2000s. During the presidency of George W. Bush, the U.S. government recognized those atrocities as genocide,[17] but a United Nations Commission of Inquiry found the evidence of genocidal intent too uncertain to affirm that conclusion.[18] In March 2009, an ICC pre-trial chamber issued an arrest warrant against Omar al-Bashir for war crimes and crimes against humanity while rejecting the prosecution's

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Rosensaft, *Deceptive Report Escalates Srebrenica Denial Campaign*, JUST SEC. (July 29, 2021), https://www.justsecurity.org/77628/deceptive-report-escalates-srebrenica-genocidedenial-campaign/ [https://perma.cc/5HBC-LV4W]. In addition to challenging established facts about the Srebrenica massacre, the report also dedicates substantial space to contesting the legal finding of genocide. CONCLUDING REPORT, *supra*, at 55–88.

14. *See* Andrew Higgins, *In the Tinderbox of Bosnia, a Serb Nationalist Lights a Match*, N.Y. TIMES, https://www.nytimes.com/2022/01/02/world/europe/bosnia-war-putin.html (Jan. 6, 2022).

15. Katie Rogers & Carlotta Gall, *Breaking with Predecessors, Biden Declares Mass Killings of Armenians a Genocide*, N.Y. TIMES, https://www.nytimes.com/2021/04/24/us/politics/armenia-genocide-joe-biden.html (Sept. 29, 2021).

16. *See* Alexis Demirdjian, *A Moving Defence: The Turkish State and the Armenian Genocide*, 16 J. INT'L CRIM. JUST. 501, 502–03 (2018); *Dink v. Turquie*, Eur. Ct. H.R. (Sept. 14, 2010), https://hudoc.echr.coe.int/eng?i=001-100384 (finding inter alia that Turkey had violated its human rights obligations by prosecuting a journalist for recognizing genocide against Armenians).

17. *The Crisis in Darfur: Hearing Before the S. Foreign Rels. Comm.*, 108th Cong. (2004) (statement of Colin L. Powell, United States Secretary of State), https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm [https://perma.cc/RY5T-Y37Y].

18. Rep. of the Int'l Comm'n of Inquiry on Darfur to the Sec'y-Gen. (2005), transmitted by Letter dated 31 January 2005 from the Sec'y-Gen. Established Pursuant to Resolution 1564 (2004) Addressed to the President of the Security Council, ¶ 518, U.N. Doc. S/2007/611 (Jan. 25, 2005) ("Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.").

attempt to pursue genocide charges.[19] The following year, the chamber reversed course and issued an additional warrant for genocide after receiving further guidance from the appeals chamber on the burden of proof at the arrest warrant stage.[20] But whether the prosecution can actually procure a genocide conviction following an eventual trial remains highly uncertain for reasons that the pre-trial chamber explored in its original decision.[21] As with Turkey and Bosnia, controversy surrounding the word "genocide" has commanded an outsized degree of attention even as the basic facts of the underlying atrocities remain well established.[22]

The U.S. State Department has also announced findings of genocide with respect to Myanmar's persecution of the Rohingya community[23] and China's persecution of Uyghurs.[24] The former situation is also the subject of an ongoing dispute between The Gambia and Myanmar at the International Court of Justice (ICJ).[25] And in April 2022, President Biden

19. *Prosecutor v. Bashir* (*Bashir I*), Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF [https://perma.cc/FX59-QD8L].

20. *Prosecutor v. Bashir* (*Bashir II*), Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF [https://perma.cc/G6VW-TRMV].

21. *Bashir I*, Case No. ICC-02/05-01/09, ¶¶ 117–208.

22. *See, e.g.*, David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 305–06 (2006) (noting global newspaper headlines emphasized rejection of genocide by the International Commission of Inquiry on Darfur and arguing that the Darfur report, "together with the resulting news reports, made the struggle for Darfur intervention more difficult by undercutting efforts by Darfur action groups to mobilize public support" and may have "directly deflated the Bush administration's commitment to Darfur action").

23. Antony J. Blinken, Sec'y of State, Remarks at the Holocaust Memorial Museum on the Genocide and Crimes Against Humanity in Burma (Mar. 21, 2022), https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/ [https://perma.cc/7YYU-6FMF] [hereinafter Sec'y of State on Genocide in Burma]. *See also* U.S. DEP'T OF STATE, DOCUMENTATION OF ATROCITIES IN NORTHERN RAKHINE STATE (2018), https://www.state.gov/wp-content/uploads/2019/01/Documentation-of-Atrocities-in-Northern-Rakhine-State.pdf [https://perma.cc/594S-4ZSC].

24. Press Release, Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/ [https://perma.cc/JCT7-3N26].

25. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Gam. v. Myan.*), Order, 2020 I.C.J. 3 (Jan. 23); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Gam. v. Myan.*), Judgment, 2022 I.C.J. 477, ¶¶ 1, 115 (July 22).

joined Ukranian President Volodymyr Zelensky in accusing Russia of genocide in Ukraine, a claim resisted by many experts.[26] The question of genocide in Ukraine, including Russia's own spurious invocation of genocide to justify its aggression, is also now before the ICJ.[27] In 2023, yet another genocide dispute arrived at the ICJ when South Africa accused of Israel of genocide in connection with its military actions in Gaza.[28]

That the word "genocide" has elicited substantial controversy is not inherently remarkable. Dispute over the interpretation and application of legal categories is an inevitable feature of legal systems. And atrocity denial is a depressingly routine phenomenon. But the debate over genocide also reveals deeper instabilities, calling into question the success of the legal project that gave us the term and defined it as a crime under international law. The problem is a result of several factors.

As a consequence of international criminal law's evolution in recent decades, the question of genocide has, in one sense, never been less relevant than it is today: Almost any conceivable case of genocide will also involve the commission of crimes against humanity and perhaps other offenses for which international law assigns individual criminal responsibility.[29] One could delete the word "genocide" from the lexicon of international law with little practical consequence for the persons tried and sentenced by international tribunals. Yet all the same, many attach enormous importance to the word. It is a word that everyone knows and

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26. Tyler Pager, *Biden Calls Russia's War in Ukraine a 'Genocide*,*'* WASH. POST, https://www.washingtonpost.com/politics/2022/04/12/biden-calls-russias-warukraine-genocide/ [https://perma.cc/2YHB-JURJ] (Apr. 12, 2022, 7:14 PM).

27. *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukr. v. Russian Federation*), Order, 2022 I.C.J. 211, ¶¶ 1–2 (Mar. 16).

28. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*S. Afr. v. Isr.*), Application Instituting Proceedings (Dec. 29, 2023), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*S. Afr. v. Isr.*), Order, ¶¶ 1–2 (Jan. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf.

29. The international legal definition of "crimes against humanity" has evolved over time. As defined by the International Criminal Court, crimes against humanity today involve the commission of any one in a list of defined acts (including murder) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute of the International Criminal Court, art. 7, ¶ 1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002) [hereinafter Rome Statute]. The Rome Statute definition also includes a policy requirement, specifying that the attack in question must involve the "multiple commission of [listed] acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." *Id.* art. 7, ¶ 2.

has some sense of its meaning, whether or not their conception corresponds to legal sources. Although international law does not formally rank crimes by gravity, to many, genocide remains the "crime of crimes,"[30] the offense that captures the worst evils that humanity is capable of inflicting. For countless victims, genocide is the label that describes the gravity of their suffering, as if any other word would diminish it. There is also substantial professional investment in the concept of genocide. Genocide studies has evolved as a distinct academic discipline with its own professional societies such as the International Association of Genocide Scholars.[31] And it is a discipline that stretches well beyond legal academia. Indeed, 2010's *The Oxford Handbook on Genocide Studies* contains only a single chapter dedicated to the law of genocide, and that chapter is grouped among several others under the label "Interdisciplinary Perspectives."[32]

The result is that the concept of genocide operates primarily at the descriptive and expressive level. It provides a language to categorize atrocity and inform historical memory. Unfortunately, it is precisely at this level that the law has proven the most problematic. Among international crimes, the definition of genocide has proven uniquely difficult to interpret and apply, with adjudication of the crime involving an extraordinary degree of hair splitting in which international judges announce standards that can be almost impossible to prove in practice and then apply those standards inconsistently. Moreover, the case law has drawn distinctions that appear arbitrary both as a matter of moral responsibility and of advancing the values that the crime of genocide ostensibly embraces. In particular, the courts have struggled to maintain a coherent distinction between acts of so-called ethnic cleansing that rise to the level of genocide and those that do not. The unfortunate result is that the law of genocide has often become a tool of atrocity denial. As with Serbia and Turkey, those seeking to deflect attention from past atrocities can and do invoke plausible legal arguments to counter accusations of genocide, happily shifting the conversation from underlying facts to complexities of legal characterization.

Much of the interpretive debate surrounding genocide has focused on the crime's demanding mens rea standard, namely the provision that

30. *See, e.g.*, WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 11 (2d ed. 2009) (quoting *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, ¶ 16 (Sept. 4, 1998), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-97-23/MSC14050R0000529818.PDF [https://perma.cc/4LBF-K6WQ]).

31. *See* INT'L ASS'N GENOCIDE SCHOLARS, https://genocidescholars.org/ [https://perma.cc/HTY5-KYMF].

32. William A. Schabas, *The Law and Genocide*, *in* THE OXFORD HANDBOOK OF GENOCIDE STUDIES 123 (Donald Bloxham & A. Dirk Moses eds., 2012).

genocide entails an "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such."[33] And much of the confusion in the current law is the result of international legal authorities' inability to provide a coherent account of this standard. This Article argues that both the text and drafting history of the Genocide Convention support a more straightforward understanding of genocide than the one adopted by international legal authorities. According to this understanding, the targeted mass killings of people based on their group membership will more readily reveal itself as genocide, irrespective of whether the ultimate goal is the physical eradication of the group or its displacement. Further, there are powerful normative reasons to support this approach as an alternative to the statements often found in the international case law and other legal authorities.

So stated, this thesis conveys the story of a path not taken, one in which legal authorities have pursued one direction and—perhaps too quickly—abandoned another. But the story is a more complicated one, because the law itself is more unsettled than it might at first appear. At the level of international case law, the disposition of actual cases reflects both reasoning and results that are hard to square with the general statements of law contained in the very same cases and that, indeed, line up better with the interpretive approach advanced in this Article. The law in action, it would seem, follows a different path, one that reflects other criteria or perhaps simply the intuitive impulses of the adjudicators. Whatever one's views might be on particular interpretive questions, this discrepancy itself highlights the need for reform—especially considering the substantial public investment in the concept of genocide and the debates that the word has provoked.

This Article proceeds in five parts. Part I introduces the concept of genocide and considers how the genocide label has come to command so much investment and attention as the "crime of crimes," even as it no longer retains much practical legal significance. This Part also introduces the basic interpretive puzzle at the heart of genocide: the word itself trades off a powerful but inherently imperfect analogy to the crime of homicide, and it provides no simple way to translate that analogy into an applied legal concept.

Parts II, III, and IV provide the heart of this Article's interpretive analysis, with each focusing on a different aspect of genocidal mens rea. These three parts present common threads. In each instance, international legal authorities present a certain received wisdom: namely, that genocide entails acts committed with a conscious desire to destroy groups

33. Convention for the Prevention and Punishment of the Crime of Genocide, art. II, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

such that mere awareness of the resulting consequences is not enough, that the intended destruction must be "physical" or "biological" in nature and not merely "cultural," and that genocide can involve intent to destroy a group "in part" provided that the part in question is a significant or substantial part of the group. In each case, moreover, the received wisdom rests upon an idealized and simplified account of the Genocide Convention's text and drafting history. Although superficially coherent, this account collapses upon serious scrutiny, which also reveals hidden normative shortfalls when confronted with actual cases. And, in the end, the received wisdom fails to provide a reliable guide for predicting how courts will reach determinations of genocide in particular disputes.

Part II focuses on the meaning of "intent." It defends and expands upon the knowledge-based approach to genocidal mens rea that is advanced in my previous scholarship. Part III focuses on the word "destroy," and presents new research into the drafting history of the Genocide Convention to contradict the oft-repeated claims about the convention's limited focus on physical and biological destruction. Likewise, Part IV focuses on the meaning of "in part" and details how legal authorities have nominally settled upon a significance requirement whose strictest interpretation finds little support in the historical materials. Although recent case law has adopted a broader approach significance, the turn to open-ended, non-numerical criteria (such as the symbolic importance of a particular victim sub-group as compared to other sub-groups) has led instead to arbitrary distinctions according to which some mass killings are labeled genocide and others not depending on such morally irrelevant criteria as the amount of media attention afforded to the sub-part of the group in question.

Part V defends the interpretive approach to genocide that flows from the foregoing discussion: the perpetration of mass killings based on group membership should generally be considered genocide, including in cases of ethnic cleansing where the ultimate goal is the dislocation of the group.[34] Although this approach does not address all of the interpretive problems raised by crime of genocide—nor even all the questions raised by this Article—it provides guidance for some of the most commonly discussed and debated cases. In the end, there can be no single right answer to how we do or should use the word "genocide." The debate

34. *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 191 (Feb. 26) (observing that the expression "ethnic cleansing" is "in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area'" (quoting Interim Rep. of the Comm'n of Experts (1993), transmitted by Letter dated 9 February 1993 from the Sec'y-Gen. Established Pursuant to Resolution 780 (1992) Addressed to the President of the Security Council, ¶ 55, U.N. Doc. S/25274 (Feb. 10, 1993))).

over genocide today is principally one about how to label atrocity, rather than one focused on more tangible questions such as whether to prohibit particular conduct under international law in the first place. Labels can serve an important expressive and denunciatory function, but inevitably cannot capture all the differences in harm and culpability that distinguish one offender's actions from another's. Any account of genocide will inevitably lump together crimes of differing nature, scale, and gravity under the same label, while also making distinctions that, at the margins at least, will seem arbitrary. One takeaway from this Article is that labels can only do so much, and the risk of over-emphasizing genocide to the exclusion of other serious crimes will remain a persistent problem irrespective of the various definitional questions.

At the same time, this Article defends an interpretation that presents a normatively superior alternative to the status quo. In particular, it corresponds with standard ways of framing the unique harm of genocide while also offering a distinction between genocide and other atrocities that is more observable—and less deniable—based on established facts. And to the extent that this account of genocide does require indeterminate judgments—for example, when do multiple killings become a mass killing?—it does so in ways that are already familiar to the law and that are already intrinsic to any account of genocide.

I. GENOCIDE IN LANGUAGE AND LAW

The puzzle of genocide begins with the word itself. A neologism coined by Polish jurist Raphael Lemkin,[35] the term presents a seemingly straightforward analogy to homicide. It is an analogy that appears front and center in the opening words of the U.N. General Assembly's landmark 1946 resolution setting the path to the adoption of the Genocide Convention: "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings . . . ."[36]

The power of the word and its resonance within the public imagination no doubt derives in part from the simplicity with which it conveys this analogy. "Genocide" is a word that presents a literal meaning, one that conveys horrors of extraordinary gravity.

But the analogy is a flawed one. The legal definition of the offense—codified in the Genocide Convention and reproduced verbatim in the

35. *Stories from the UN Archive: The Man Who Defined Genocide*, UNITED NATIONS (Dec. 7, 2023), https://www.ungeneva.org/en/news-media/news/2023/12/88277/stories-un-archive-man-who-defined-genocide [https://perma.cc/GMM8-9X7J].

36. G.A. Res. 96 (I), at 188 (Dec. 11, 1946).

statutes of the ICC and other international criminal tribunals—is both more specific and more elusive than the word itself conveys. The Genocide Convention defines the crime as follows:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[37]

In certain ways, this definition conceives of the offense more loosely than the analogy to homicide would convey. Homicide entails the actual death of a human being. It doesn't cover non-fatal injuries, even permanent ones. Yet the convention definition of genocide encompasses group destruction both "in whole or in part," and, even in cases of partial destruction, the perpetrators need not succeed.[38] It is sufficient to commit one of the enumerated acts "with intent" to destroy in whole or in part.[39] Hence, the crime of genocide includes cases of attempted but unsuccessful group destruction.

The necessity of defining genocide in these broader strokes becomes readily apparent if one reflects on the implications of a strict analogy, one that defines genocide as the complete elimination of a protected group. It would become a crime almost impossible to commit: not even the Holocaust—the paradigmatic case that inspired the Genocide Convention—would qualify.

Although the General Assembly's 1946 resolution predates the final definition of genocide reached in 1948, even this early text avoids the most literal analogy to homicide. The resolution does not say that "genocide is the killing of a group, as homicide is the killing of individual of human beings." It speaks instead more broadly of a "denial of the right of existence."[40] Framed in these terms the analogy is apt, intuitively

37. Genocide Convention, *supra* note 33, art. II.

38. *Id.*

39. *Id.*

40. G.A. Res. 96 (I), *supra* note 36, at 188.

capturing how mass atrocities such as the Holocaust deny the humanity of entire groups in the same way that homicide devalues individual lives.

Yet, in other ways, the definition of genocide narrows the analogy. Homicide is an umbrella term that captures the many different ways and degrees by which one can be criminally responsible for the loss of human life. There is, for instance, the crime of murder, which itself can cover both purposeful killings and those committed with some lesser mens rea, such as extreme recklessness.[41] And in most of the United States, the controversial felony murder rule persists, according to which culpability for murder can attach to felons acting with no homicidal mens rea whatsoever.[42] There are also lesser forms of homicide such as manslaughter or negligent homicide that assign culpability for deaths caused through recklessness or negligence.[43]

It is here where the analogy between genocide and homicide begins to break down in a more significant manner. Unlike homicide, the crime of genocide does not embrace the many ways in which one may be criminally culpable for acts that have destructive consequences for protected groups. Instead, the crime is limited to actors who possess the "intent to destroy" a group in whole or in part.[44] Moreover, it is only certain categories of defined protected groups that qualify.[45]

Already, this limitation marks a significant a break between the literal and the legal meanings of the word "genocide." A mass atrocity unleashes destruction upon an entire people. Victims and other observers who do not specialize in international criminal law may understand the offense as genocide in the most literal sense: the criminal destruction of a group. But that is just the beginning of the legal analysis which demands further inquiry into the specific mental state of the perpetrators. In other words, one may quite literally commit genocide without being responsible for the international crime of genocide. As David Luban has elaborated, the word "genocide" in this way becomes a linguistic "false friend," with the word having one meaning in ordinary discourse and another in legal terminology.[46]

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41. *See, e.g.*, MODEL PENAL CODE § 210.2(1) (AM. L. INST., Proposed Official Draft 1962) (defining "murder" as a criminal homicide "committed purposely or knowingly" or "committed recklessly under circumstances manifesting extreme indifference to the value of human life").

42. *See, e.g.*, Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004).

43. *See, e.g.*, MODEL PENAL CODE §§ 210.3–.4 (defining manslaughter and negligent homicide).

44. Genocide Convention, *supra* note 33, art. II.

45. *See id.* (limiting genocide to acts committed against "national, ethnical, racial or religious group[s]").

46. Luban, *supra* note 22, at 307.

But even to pose the question in those terms may understate the problem because this binary assumes that we at least know what genocide means in the legal sense. At a superficial level this assumption would appear well founded. A researcher of the international case law will find numerous statements in which judges elaborate on the elements of genocide and purport to clarify disputed interpretive questions.[47] An informed reader of the news media interested in allegations of genocide in Ukraine, Gaza, or elsewhere will readily find many articles in which informed experts explain what genocide is and why it can be very difficult to prove.[48] But the legal definition is in fact obscure on multiple levels that go beyond evidentiary burdens, and in ways that have decisive significance for contemporary debates about genocide. This obscurity complicates the genocide/not genocide question because it reveals that the matter is not simply one of comparative expertise, in which debates about the definition of genocide can be resolved by appealing to the authority of expert legal professionals to explain—or at least understand—what may not be apparent to the lay person. To the contrary, even legal experts may not have the authority one might assume when it comes to elucidating the the offense.

The following three Parts explore several interpretive puzzles that arise from the crime of the genocide. They focus in particular on three distinct, but interrelated questions: the meaning of the words "intent," "destroy," and "in part," concentrating both on the textual ambiguities presented by the language of the Genocide Convention and on the jurisprudence of international judicial decisions.

Although these Parts consider various genocide controversies, both real and hypothetical, they give special attention to the case law concerning Bosnia in the 1990s, and in particular the 1995 Srebrenica massacre when Bosnian Serb forces overran a UN-protected safe area and proceeded to systematically massacre approximately 8,000 Bosniak (or Bosnian Muslim) men and boys whom they deemed to be of military

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47. *See infra* Parts III–V.

48. *See, e.g.*, Paul LeBlanc, *Here's What 'Genocide' Means and Why It's So Hard To Prove*, CNN: POLITICS (Apr. 13, 2022, 5:36 PM), https://www.cnn.com/2022/04/13/politics/genocide-russia-invasion-ukraine-what-matters/index.html [https://perma.cc/J6T9-FMDK]; Tara Law, *Is Russia Committing Genocide in Ukraine? Here's What Experts Say*, TIME (Mar. 15, 2023, 10:12 AM), https://time.com/6262903/russia-ukraine-genocide-war-crimes/ [https://perma.cc/7YZY-JY5K]; George Wright, *Ukraine War: Is Russia Committing Genocide?*, BBC NEWS (Apr. 13, 2022), https://www.bbc.com/news/world-europe-61017352 [https://perma.cc/WA9H-T2PC]; Solcyré Burga, *Is What's Happening in Gaza a Genocide? Experts Weigh In*, TIME, https://time.com/6334409/is-whats-happening-gaza-genocide-experts/ (Nov. 14, 2023, 4:22 PM).

age.[49] The events in Bosnia are significant because they present one of the few contested genocides to receive sustained attention from international courts, both in the case law of the International Criminal Tribunal for the Former Yugoslavia[50] and that of the International Court

49. Sources reflect slightly varying estimates regarding the number of victims. ICTY judgments have estimated that the number of men executed following the takeover of Srebrenica is "likely to be within the range of 7,000-8,000 men." *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/VM58-L6B6]. S*ee also Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, ¶ 3007 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226.pdf [https://perma.cc/6UMY-X4ET] ("With regard to the number of victims, the Trial Chamber took judicial notice of Adjudicated Fact 1476 stating that between 7,000 and 8,000 Bosnian-Muslim men were systematically murdered."); *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 278 (Feb. 26) (accepting *Krstić* 's finding that thousands of "military-aged Bosnian Muslim men of Srebrenica" "were taken prisoner, detained in brutal conditions and then executed," and "[m]ore than 7,000 people were never seen again") (quoting *Krstić*, Case No. IT-98-33-T, ¶ 1). Not every ICTY judgment to address Srebrenica has provided an estimate of total victims. In *Karadžić*, for example, the trial chamber reached a finding of genocide based on the determination that "*at least* 5,115 men were killed by members of the Bosnian Serb Forces in July 1995 in Srebrenica." *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement, ¶ 5519 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) (emphasis added), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf [https://perma.cc/CT6S-WLTG]. The ICTY website, by contrast, reports that "more than 8,000 Bosnian Muslim men and boys were executed by Serb forces in an act of genocide." *The Conflicts*, U.N. INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, https://www.icty.org/sid/322 [https://perma.cc/3NEP-UL6Q]. According to the memorial center in Srebrenica that maintains both a museum dedicated to the genocide and a cemetery for the victims, the number also stands at more than 8,000. *See* MONICA HANSON GREEN, SREBRENICA-POTOČARI MEM'L & CEMETERY FOR THE VICTIMS OF THE 1995 GENOCIDE, SREBRENICA GENOCIDE DENIAL REPORT 2020, at 9 (Mirnes Sokolović, Amra Begić Fazlić & Šefika Đozić eds., Hasan Hasanović trans., 2020) (stating that Serb forces "executed over 8,000 Bosniak (Bosnian Muslim) men and boys" and citing a total "death toll of 8,372 victims of the Srebrenica genocide"). In addition to the mass execution of men and boys, there were also some killings of women, children, and the elderly. *Krstić*, Case No. IT-98-33-T, ¶ 504. Some Bosniaks attempting to escape the enclave died in combat with Bosnian Serb forces. *Id.* ¶¶ 546–47. Although ICTY prosecutors did not dispute the lawfulness of those killings, *id.* ¶ 163, one can also view these combatants as victims of genocide to the extent that fighting provided their only hope of avoiding mass execution.

50. *See, e.g.*, Cecile Tournaye, *Genocidal Intent Before the ICTY*, 52 INT'L & COMPAR. L.Q. 447, 447 (2003) (noting that "[t]he sudden intervention of judicial bodies in the field is likely to make the law evolve rapidly" and that "[t]his is particularly true of the ICTY jurisprudence" because "[t]he characterisation as genocide of the conflict in

of Justice in its most significant ruling on genocide to date.[51] Moreover, the outcome of these rulings—a finding of genocide in Srebrenica but nowhere else in Bosnia—establishes a fault line with critical significance for other contexts where the question of genocide arises.

Hence, the Bosnia cases present an especially useful case study for exploring whether international law has settled on a conception of genocide that is both doctrinally and morally coherent. As elaborated later, the answer is no. What emerges instead is a pattern of adjudicators committing themselves to an ostensibly strict conception of genocide, which they fail to elaborate with precision or apply consistently to the facts of cases. The result is ambiguity on some of the most central questions that arise in real life controversies concerning the crime of genocide.

II. THE INTENT TO DESTROY

One of the key questions concerns the meaning of the word "intent." In particular, how does one distinguish between cases in which perpetrators intend to destroy a protected group in whole or in part and those which may involve similar consequences but lack such intent?

A. Purpose and Knowledge

I previously confronted this question in an article that predates most of the international tribunal cases.[52] As that piece explored, both the text and drafting history of the Genocide Convention fail to resolve the meaning of genocidal intent.[53] I also proposed an interpretation of the convention that, in my view, best advances the treaty's purposes. Specifically, I argued:

Bosnia and Herzegovina, although regularly asserted in the political sphere, is not legally obvious").

51. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. 43.

52. Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999).

53. *See id.* According to authoritative rules of treaty interpretation, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31, ¶ 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Moreover, where the terms of a treaty are "ambiguous or obscure," "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." *Id.* art. 32.

> In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.[54]

Although this proposal received a favorable reception in the work of some scholars,[55] and also paralleled arguments advanced by the ICTY prosecutor,[56] the case law has at least nominally achieved consensus on

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54. Greenawalt, *supra* note 52, at 2288.

55. *See, e.g.*, Claus Kreß, *The Crime of Genocide Under International Law*, 6 INT'L CRIM. L. REV. 461, 492 n.157 (2006); Kai Ambos, *What Does 'Intent To Destroy' in Genocide Mean?*, 91 INT'L REV. RED CROSS 833, 840–41 (2009). *Contra* LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 126 (2010) ("My view is that Greenawalt supplies too meager an intent requirement for such an important crime as genocide. . . . It is indeed crucial that there be a plan that has as its purposes the destruction of protected group in whole or in substantial part."); Johan D. Van der Vyver, *The International Criminal Court and the Concept of* Mens Rea *in International Criminal Law*, 12 U. MIA. INT'L. & COMPAR. L. REV. 57, 85 (2004) ("Since special intent is an essential element of genocide and special intent will always require a certain manifestation of *dolus directus*, [Greenawalt's] proposed transformation of genocidal intent is way out of line."). Both Kreß and Ambos propose their own knowledge-based interpretation of genocidal mens rea. Their focus is on the problem posed by the fact that those who commit the actus reus of genocide—for example, by personally killing victims—are typically not those who have devised the genocidal plan. Hence, these principal perpetrators are generally incapable of formulating a plan to personally destroy a group, and whether or not they personally agree with the plans of their superiors seems immaterial. *See* Kreß, *supra*, at 496–97 ("The fundamental problem of the purpose-based approach thus consists in the combination of an *actus reus* list formulated from the perspective of the subordinate level with what is typically a leadership standard of *mens rea*."); Ambos, *supra*, at 846 ("As to . . . the easily interchangeable 'foot soldiers' of a genocidal campaign who normally lack the means to destroy a group on their own, it is neither necessary nor realistic to expect that they will always act with the purpose or desire to destroy. Indeed, it is possible to think of a collective genocidal campaign without any or only some individual (low-level) perpetrators acting with a destructive purpose or desire." (footnote omitted)). More critical is the question of whether they have chosen to commit crimes in pursuit of a genocidal plan of which they are aware. *See id.* at 854 ("[I]n the case of top- and mid-level participants a purpose-based intent is required, while in the case of low-level participants knowledge as to the genocidal context is sufficient."). Although this consideration does inform my own approach to genocidal intent as well, *see* Greenawalt, *supra* note 52, at 2280 (noting that, under the purpose-based approach, "a defendant might invoke superior orders to negate the genocidal intent required for the establishment of a prima facie case, irrespective of what excuses the defendant might invoke"), my knowledge-based framework also aims to address problems that arise at the higher level, *i.e.*, how to define and identify genocidal goals that typically arise at the leadership level. It is these latter problems of intent—the questions pertaining to what counts as a genocidal goal in the first place—that this Article investigates.

56. *Prosecutor v. Krstić*, Case No. IT-98-33-PT, Prosecutor's Pre-Trial Brief Pursuant to Rule 65 *ter* (E)(i), ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Feb.

a narrower standard: the collective consequence of total or partial group destruction must be the actual purpose for a crime to rise to the level of genocide. In its *Prosecutor v. Krstić*[57] judgment, an ICTY trial chamber confronted the issue directly with three sentences that present perhaps the most detailed analysis that the international case law has given this particular question. Citing to my article along with two other scholars, the court observed that "[s]ome legal commentators further contend that genocide embraces those acts whose foreseeable or probable consequence is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act."[58] The court then noted that "[w]hether this interpretation can be viewed as reflecting the status of customary international law at the time of the acts involved here is not clear," and it concluded that "[f]or the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompass only acts committed with the *goal* of destroying all or part of a group."[59] Other international judgments, although not always as precise, suggest a similarly stringent standard, often emphasizing that genocide involves a "specific intent" or "*dolus specialis*."[60]

25, 2000) ("The prosecution submits that the accused committed the acts with the requisite intent if he consciously desired the acts to result in the destruction, in whole or in part, of the group, as such; . . . or he knew that the likely consequence of his acts would be to destroy, in whole or in part, the group, as such.").

57. Case No. IT-98-33-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/ZLH6-DEPD].

58. *Id.* ¶ 571, at 201 & n.1276.

59. *Id.* ¶ 571, at 201.

60. *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, ¶ 187 (Feb. 26). *See also, e.g.*, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 498 (Sept. 2, 1998), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MSC15217R0000619817.PDF [https://perma.cc/E4RC-MPCT] ("Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged."); *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgement, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001), https://www.icty.org/x/cases/jelisic/acjug/en/jel-aj010705.pdf [https://perma.cc/M4JN-8QW5] ("This intent has been referred to as, for example, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent."); *id.* ¶ 46 ("[S]pecific intent requires that the perpetrator, by one of the prohibited acts . . ., seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group . . . ."); *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgement, ¶ 656 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), https://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf [https://perma.cc/DMX6-ATC9] ("[D]estruction . . . must be the aim of the underlying

Taken together, the cases would seem to present a binary choice. There is one position that interprets the crime of genocide in terms of a goal to destroy a group and another that includes forms of group destruction that may not reflect that deliberate goal. The case law has, rightly or wrongly, endorsed the former interpretation and has thereby provided clarity at least on how an international court will approach the question of genocidal intent. But the matter is both more complicated and murkier.

In the first place, note that the *Krstić* Trial Chamber contrasted its own goal-based interpretation with one that would assign liability based on a "foreseeable or probable consequence" of total or partial group destruction.[61] So phrased, the contrasting approach would assign liability based on negligence or even strict liability regarding the risk that one's actions would have the effect of destroying a group. While that is a possible position, it finds no support in the court's citation to my own work. Under my proposed interpretation, genocide would involve acts that target group members based on their group membership with actual awareness of the collective consequences for the group as a whole. By mischaracterizing that position, the tribunal failed to properly elucidate how, if at all, its own interpretation differs. What exactly, in other words, does it mean to act with a "goal" of group destruction?

B. Element Analysis

Consideration of this question quickly reveals that any binary distinction between specific intent or purpose versus knowledge, or intent versus negligence, is inadequate without further consideration of how mens rea labels apply to the distinct elements of offenses. In the United States, for example, the influential Model Penal Code revolutionized criminal law by discarding the offense-by-offense approach—according

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crime(s)."); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement, ¶ 549 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf [https://perma.cc/CT6S-WLTG]; *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, ¶ 3435 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226.pdf [https://perma.cc/LKU8-L82P]. *See also* Ambos, *supra* note 55, at 836 & n.15 (surveying the "terminological variety" in both ICTY and ICTR cases to describe genocidal intent, including "special intent," "dolus specialis," "genocidal intent," "specific intent," "specific genocidal intent," "exterminatory intent," and "specific intention"). Although defending his own distinct version of a knowledge-based requirement—one that would apply only to lower-level actors involved in genocide—Ambos agrees that the tribunals have settled on a purpose-based standard. *Id.* at 836–39 (surveying case law).

61. *Krstić*, Case No. IT-98-33-T, ¶ 571.

to which courts might imprecisely describe an entire offense in terms of intent, recklessness, etc.—in favor of an element-by-element approach, according to which one must possess the requisite mens rea for each aspect of the offense.[62] Consider the Model Penal Code's definition of "purpose," which is the strictest form of mens rea that the code defines.[63] The code provides that:

> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.[64]

According to this definition, a burglar convicted of "purposely breaking into a residence at nighttime" would have no defense that the choice of time was random. The prosecution would have to prove that the conduct involved a conscious object to break and enter, but the time of day would be a background fact, or "attendant circumstance." According to the code's formulation, it would be enough that the perpetrator was "aware" of the time of day.

Notwithstanding the code's effort at precision, ambiguities remain. Consider the case of a hypothetical murder statute that assigns heightened penalties for "purposefully killing a police officer." If one interprets "killing a police officer" as a single monolithic result element, then the Model Penal Code would demand that the perpetrator act with the deliberate goal of taking the life of a person who is police officer. But if instead, one treats the victim's employment status as background fact or attendant circumstance, then it would be sufficient to prove that the perpetrator deliberately killed a human being whom they knew to be a police officer.

The Genocide Convention, of course, is not governed by the rules of the Model Penal Code, and contains no such guidance. It does not define "intent," nor does it explain how the requirement of intent extends to the distinct elements of the offense.[65] The same holds for the statutes

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62. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

63. *See* MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST., Proposed Official Draft 1962).

64. *Id.*

65. Genocide Convention, *supra* note 33.

of the international criminal tribunals, such as the ICTY[66] and the ICTR,[67] that have prosecuted genocide cases, with the one prominent exception being the Rome Statute of the ICC, which does indeed provide a definition of "intent" with explanation of how that definition applies on an element-by-element basis.[68] And that definition of "intent" is looser than the Model Penal Code definition of "purpose." Article 30 of the Rome Statute states that "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge,"[69] and that

> [f]or the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence *or is aware that it will occur in the ordinary course of events*.[70]

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66. *See* S.C. Res. 827, ¶ 2 (May 25, 1993) (establishing the ICTY).

67. *See* S.C. Res. 955, ¶ 2 (Nov. 8, 1994) (establishing the ICTR).

68. Rome Statute, *supra* note 29, art. 30, ¶¶ 1–2.

69. *Id.* art. 30, ¶ 1.

70. *Id.* art. 30, ¶ 2 (emphasis added). Note that these rules apply only if not "otherwise provided." As the Rome Statute's definition of genocide reproduces verbatim the Genocide Convention's definition, the most reasonable interpretation is that the Rome Statue codifies the same mens rea standard as already exists under the convention. *Compare id.* art. 6, *with* Genocide Convention, *supra* note 33, art. II. The ICC's limited genocide jurisprudence to date reflects that view. *See, e.g.*, *Bashir I*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶¶ 140–42 (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF [https://perma.cc/FX59-QD8L] (citing the ICJ's interpretation of the Genocide Convention as an authority on the "*dolus specialis*" applicable under the Rome Statute). I do not argue, therefore, that Article 30 itself controls the interpretation of genocidal mens rea under the Rome Statute. My point instead is to emphasize that the Genocide Convention is itself ambiguous on the meaning of "intent" and that the approach offered by this Article provides a plausible approach to interpreting the convention itself.

Notably, there is one way in which the ICC's definition of genocide does arguably differ from the Genocide Convention. Although the Rome Statute itself reproduces the Genocide Convention's definition of the offense, the ICC's Elements of Crimes elaborates on the actus reus of genocide in various ways, including most significantly with its demand that the relevant "conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 113–15, U.N. Doc. ICC-ASP/1/3, U.N. Sales No. E.03.V.2 (2013) (imposing the identical requirement for each actus reus element in Article 6, Sections (a)(4), (b)(4), (c)(5), (d)(5), and (e)(7)). While acknowledging that the question had elicited some controversy, an ICC pre-trial chamber has ruled that this

Consider now some different possibilities for how element-by-element interpretive choices might affect the interpretation and application of genocidal intent. To begin, imagine a hypothetical Hitler-type figure who formulates his plans as follows: "I wish to destroy the Jewish population of Europe." That statement would seem to present a straightforward, paradigmatic example of genocidal intent. But what should happen when a court adjudicating this case turns to the "in whole or in part" aspect of genocidal intent? Suppose the court treats this as a case of partial destruction: an intent to destroy the European part of the global Jewish community. The case law, backed by many authorities, dictates that partial destruction must entail the destruction of a "substantial" part of the broader group, a requirement that this example would surely satisfy.[71] But what mens rea attaches to that question? Suppose the perpetrator were to explain as follows: "I am aware that the European Jewish population is a substantial part of the entire Jewish population, but the fact that this is the case is a matter of indifference to me rather than a matter of conscious desire."

According to a sufficiently strict definition of genocidal intent that requires purpose as to all elements, this mental state would be insufficient to support a conviction. Yet I am aware of no authority maintaining that responsibility for genocide requires purpose or conscious desire regarding how substantial the part of the group sought to be destroyed happens to be. Indeed, it would appear from the cases that no mens rea at all attaches to that requirement.[72]

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requirement is binding for purposes of the ICC. *Bashir I*, Case No. ICC-02/05-01/09, ¶¶ 123–28. Arguably, however, this requirement is already implicit in the pre-existing definition of "genocide." *See* Ambos, *supra* note 55, at 845–46 ("[W]hile the objective offence definition lacks – contrary to the definition in the ICC's Elements of Crimes – a context element, this element becomes part of the (subjective) offence definition by means of the 'intent to destroy' requirement as its 'carrier.'" (footnotes omitted)).

71. *See infra* Part IV.

72. This point is especially noteworthy considering that the international cases have rejected a purely numerical approach to substantiality. In a judgment followed by the ICJ and subsequent ICTY cases, the *Krstić* Appeals Chamber emphasized the emblematic status and strategic importance of Srebrenica as central to its finding on substantiality. *See, e.g.*, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶¶ 15–16 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9]; *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43, ¶ 296 (Feb. 26); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement, ¶ 5672 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf [https://perma.cc/CT6S-WLTG] (recalling that the *Krstić* "Appeals Chamber has found that . . . the enclave's seizure was of particular strategic importance due to its geographic proximity to Serbia, its symbolic stature as a refuge for Bosnian Muslims, and the fact

On the other hand, a purely knowledge-based approach to genocide—one that demands no purposive attitude at all toward the targeting of a group—is likewise implausible. For example, aerial attacks during World War II such as the fire-bombing of Dresden and Tokyo as well as the atomic bombing of Hiroshima and Nagasaki each predictably claimed more civilian lives than did the Srebrenica massacre. Even if one accepts that those attacks entailed war crimes,[73] the predictable loss of life among civilians belonging to a particular national group remains distinct from the more paradigmatic case in which the perpetrators target civilians for destruction on the basis of their group identity.[74]

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that its elimination despite its status as a safe area would be demonstrative of the potential fate of all Bosnian Muslims"). Despite some language referencing the goals of the Bosnia Serb forces, *see Krstić*, Case No. IT-98-33-A, ¶ 15 ("Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia . . . ."), the appeals' chamber's assessment of the substantiality requirement contains no explicit consideration or application of mens rea standards. *See id.* ¶¶ 16–23 (concluding that the Srebrenica massacre targeted a substantial part of a protected group, without analyzing mens rea regarding substantiality); *id.* ¶¶ 24–38 (analyzing intent to destroy without consideration of the substantiality requirement). *See also Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 296 (same).

73. *See, e.g.*, John Bennett, *Reaping the Whirlwind: The Norm of Reciprocity and the Law of Aerial Bombardment During World War II*, 20 MELBOURNE J. INT'L L. 305, 306–07 (2019) ("Scholars frequently condemn the Allied bombing of Germany during World War II — the city of Dresden in particular — as a 'war crime.'"); Katherine E. McKinney, Scott D. Sagan & Allen S. Weiner, *Why the Atomic Bombing of Hiroshima Would Be Illegal Today*, 76 BULL. ATOMIC SCIENTISTS 157, 161 (2020); David Welna, *Hiroshima Atomic Bombing Raising New Questions 75 Years Later*, NPR (Aug. 6, 2020, 5:01 AM), https://www.npr.org/2020/08/06/899593615/hiroshima-atomic-bombing-raising-questions-75-years-later [https://perma.cc/6QFM-W335] ("There is no question that a dropping of a large nuclear weapon amongst the civilian population is a war crime . . . . Under the current laws of war, if you know you are going to impact civilians, you must provide warning, and you must take precautions to avoid harming civilians to the extent possible. There is no doubt none of that was considered, and none of that was seriously weighed in reference to Hiroshima and Nagasaki." (quoting Professor Gabriella Blum, Harvard Law School)).

74. Even so, the line separating such cases might be blurrier than initially appears, to the extent that the tolerance of civilian casualties is in part a factor of who those civilians are. Take, for example, the current ICJ dispute concerning the Gaza conflict. Israel's position is that civilian deaths in Gaza reflect not an attack on the Palestinian national group itself, but instead unavoidable incidental harms resulting from defensive attacks on Hamas military targets. *See Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip* (*S. Afr. v. Isr.*), Order, ¶ 24 (Jan. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf. But one might accept that conclusion while also raising the concern that Israel's willingness to tolerate tens of thousands of civilian casualties hinges on the fact that Palestinian rather than Israeli lives are at stake. *See 25,000 Civilians Killed in Gaza War as Humanitarian Needs Go On Rising*, UN NEWS (Jan. 22, 2024), https://news.un.org/en/story/2024/01/1145742 [https://perma.cc/U76V-LTF2]. Although such a claim does not fit easily within the genocidal intent framework, it

As these examples reveal, the question of genocidal intent is not a simple matter of defining a word or making a binary choice between a purpose- or knowledge-based approach. Instead, there is a spectrum of possibilities depending on how the mens rea requirements map onto the distinct components of genocidal intent. And here, between the implausible extremes of a purely purpose-based approach and a purely knowledge-based approach, there exists a closer more nuanced question concerning what exactly it means, in the words of the *Krstić* judgment, to act with the "goal" of group destruction.[75] Is it genocide when perpetrators orchestrate the large-scale destruction of people belonging to a protected group because of who they are, or is there instead an extra step required, namely that the perpetrators conceive of the plan as one aimed at destroying a group in its collective sense?

The distinction may seem opaque, even semantic. Whether one views the Holocaust as a plan to destroy the individual Jewish people living in Europe versus one to destroy the group as a collective seems immaterial, and it is hard to imagine a court drawing a line between those two conceptions. But other cases present a clearer contrast. For instance, the severe, albeit lower, scale of the Srebrenica massacre more directly raises the question of whether and how the murder of 8,000 Bosniaks out of a pre-war population of roughly two million might have been calculated to impact the group as a whole.[76]

Consider also the atrocities commonly referred to as the Herero genocide, involving the extermination of approximately eighty percent of the Herero people by German colonizers in present-day Namibia.[77] Although these early twentieth-century crimes predate the Genocide Convention, Germany has formally acknowledged the killings as genocide and committed to $1.35 billion in payment to Namibia.[78] These

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nevertheless raises concerns that are at the heart of the Genocide Convention, namely that groups may face destruction because of who they are.

75. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 571 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/3644-D25R].

76. *See* GERARD TOAL & CARL T. DAHLMAN, BOSNIA REMADE: ETHNIC CLEANSING AND ITS REVERSAL 4 (2011) (noting that pre-war Bosnia was "home to three 'constituent peoples' (the legalese adopted by Yugoslavia in 1971): Bosnian Muslims (1,902,956 people according to the 1991 census), Bosnian Serbs (1,366,104), and Bosnian Croats (760,852)").

77. *See, e.g.*, MATTHIAS HÄUSSLER, THE HERERO GENOCIDE: WAR, EMOTION, AND EXTREME VIOLENCE IN COLONIAL NAMIBIA (Elizabeth Janik trans., Berghahn Books 2021) (2018); JEREMY SARKIN, GERMANY'S GENOCIDE OF THE HERERO: KAISER WILHELM II, HIS GENERAL, HIS SETTLERS, HIS SOLDIERS 137 (Cindy Taylor ed., 2011).

78. Normitsu Onishi & Melissa Eddy, *A Forgotten Genocide: What Germany Did in Namibia, and What It's Saying Now*, N.Y. TIMES,

mass atrocities are also recognized as genocide in many sources, including the influential Whitaker Report released in 1985 by the U.N. Special Rapporteur on the Prevention and Punishment of the Crime of Genocide Benjamin Whitaker.[79] The history is striking both for the barbarity of the German actions and—in a foreshadowing of the Holocaust—for the paper trail that the colonizers left behind. There is, in particular, the infamous "extermination order," a letter written by German General Lothar von Trotha directly to the Herero people.[80] The brief document reads as follows:

> I, the great General of the German troops, send this letter to the Herero people.
>
> The Herero are no longer German subjects. They have murdered and stolen, they have cut off the ears, noses and other body-parts of wounded soldiers, now out of cowardice they no longer wish to fight. I say to the people: Anyone who delivers a captain will receive 1000 Mark, whoever delivers [the chief] Samuel [Maherero] will receive 5000 mark. The Herero people must however leave the land. If [they] do not do this I will force them with the [artillery]. Within the German borders every male Herero, with or without a gun, with or without cattle, will be shot. I will no longer accept women and children, I will drive them back to their people or I will let them be shot at.
>
> These are my words to the Herero people.
>
> The great General of the mighty German Kaiser.[81]

The Whittaker Report presents the order as conclusive evidence of genocidal intent, and considering in particular the deaths that followed, it is easy to see why.[82] But according to the stricter interpretation

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https://www.nytimes.com/2021/05/28/world/europe/germany-namibia-genocide.html (May 29, 2021).

79. Benjamin Whitaker (Special Rapporteur on the Question of the Prevention and Punishment of the Crime of Genocide), *Revised & Updated Rep. on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) [hereinafter *Whitaker Report*] ("The Nazi aberration has unfortunately not been the only case of genocide in the twentieth century. Among other examples which can be cited as qualifying are the German massacre of Hereros in 1904 . . . .").

80. Jan-Bart Gewal, *The Great General of the Kaiser*, 26 BOTS. NOTES & RECS. 67, 67 (1994).

81. *Id.* at 68 (translating the order).

82. *See, e.g.*, *Whitaker Report*, *supra* note 79, ¶ 24 n.12; ISABEL V. HULL, ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY 57 n.55 (2005) ("With Trotha's enunciation of intent to make all Herero

suggested by the genocide case law, the letter actually provides evidence *against* genocidal intent. While confirming that German forces deliberately targeted to the point of destruction an indigenous people whom they considered to be subhuman, the letter suggests that group destruction was not in fact the goal. Instead, the expressed goal was to eradicate the Herero people from the lands governed by Germany through some combination of displacement and murder. Paraphrased, the order seems to suggest the following attitude on the part of the German authorities:

> We wish to displace the Herero people from German-governed land in Africa. We assign no value to their lives as human beings and we are willing to kill anyone who does not leave. We are aware that this plan will likely entail the destruction of the Herero people in whole or in substantial part, but we are indifferent as to whether that happens or not. All that matters to us is that they no longer live on our land.

C. The Bosnia Cases

As a descriptive matter, the genocide case law to date is profoundly ambiguous about whether it would in fact exclude such cases on the basis of insufficient mens rea. The ICJ's decision in *Bosnia & Herzegovina v. Serbia & Montenegro*[83] provides a case point. The decision reflects the court's only finding of genocidal intent to date: the ICJ found that Bosnia Serb forces committed genocide in Srebrenica and that Serbia and Montenegro bore state responsibility under the Genocide Convention not for the genocide itself, but for having failed in their obligations to prevent genocide.[84] In the key paragraphs addressing mens rea, the judgment quotes first from the ICTY's trial judgment in *Krstić* for the proposition that "a plan" was "devised and implemented . . . to execute as many as possible of the military aged Bosnian Muslim men present in the enclave."[85] It then quotes from the ICTY appeals judgment for the conclusion that, "[b]y seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide."[86] Yet the ICJ decision devotes no explicit attention to the question of whether there is a

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disappear from SWA, together with his far-reaching accomplishment in fulfilling this goal, he meets the qualifications many authors have set for 'genocide.'").

83. *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43 (Feb. 26).

84. *Id.* ¶¶ 413–15, 417, 424, 428–38.

85. *Id.* ¶ 292.

86. *Id.* ¶ 293.

difference between these two propositions, a fact that is all the more striking considering the court's earlier pronouncement in the same decision that "[i]t is not enough that the members of the group are targeted because they belong to that group . . . . Something more is required. The acts . . . must be done with intent to destroy the group in whole or in part."[87] Was the decision to kill those 8,000 Bosniak men and boys ipso facto a decision to destroy a part of the group, or does a finding of genocidal intent require more information about the perpetrator's attitude regarding the collective impact of the plan on the group as a whole?

The question is hardly hypothetical in the case of Srebrenica, considering there are multiple possible reasons why the Bosnian Serb forces might have acted as they did. It could be that the planners of the atrocity acted with an explicit conscious goal to destroy the Srebrenica community, and that they conceived of the plan in collective terms—*i.e.* "It is our goal to destroy this particular part of the Bosniak people and we will pursue that goal through the following means." But one might also imagine the attack reflecting a different sort of plan. It might be, as the defense argued, that the perpetrators acted instead out of a desire to deter future attacks by Srebrenica-based forces,[88] or for reasons of revenge.[89] Of course, these possibilities are not mutually exclusive, especially considering the long-established (albeit often blurry)

87. *Id.* ¶ 187.

88. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 593 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/3644-D25R] ("The Defence contends that the facts instead prove that the VRS forces intended to kill solely all potential fighters in order to eliminate any future military threat."). *See also* William A. Schabas, Essay, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 46 (2001) ("Can there not be other plausible explanations for the destruction of 7,000 men and boys in Srebrenica? Could they not have been targeted precisely because they were of *military* age, and thus actual or potential combatants? Would someone truly bent upon the physical destruction of a group, and cold-blooded enough to murder more than 7,000 defenseless men and boys, go to the trouble of organizing transport so that women, children, and the elderly could be evacuated?"); Katherine G. Southwick, Note, *Srebrenica as Genocide? The* Krstić *Decision and the Language of the Unspeakable*, 8 YALE HUM. RTS. & DEV. L.J. 188, 202 (2005) ("[O]ne cannot assume that the killing of the military-aged men was necessarily or primarily intended to afflict the rest of the Srebrenica community even if the perpetrators were aware of such a result. In the context of an armed conflict over territory, it is logical to infer that the most immediate goal is to weaken or eliminate the military opponent.").

89. *Krstić*, Case No. IT-98-33-T, ¶ 593 ("The Defence concludes that the killings were committed by a small group of individuals within a short period of time as a retaliation for failure to meet General Mladić's demand of surrender to the VRS of the BiH Army units in the Srebrenica area.").

distinction between intent and motive in criminal law.[90] It is always possible that a desire for revenge or deterrence might provide the motive for a plan that deliberately plots the destruction of a group in its collective sense.[91] But the point is that this need not be the case. It is equally possible to plan the large-scale destruction of people based on their group membership without any deliberate attention to how the plan will affect the group in its collective sense.

To the extent the Srebrenica case law does confront this distinction, the answers are murky but in fact cut against the strict interpretation of genocidal intent in favor of a knowledge-based standard. Consider the following passage from the *Krstić* appeals judgment—excerpted prominently also in the ICJ's analysis of mens rea:

> By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate

90. *See, e.g.*, 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 320 (1986) ("[I]ntent relates to the means and motive to the ends, but . . . where the end is the means to yet another end, then the medial end may also be considered in terms of intent. Thus, when *A* breaks into *B*'s house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive." (footnote omitted)).

91. *See* Southwick, *supra* note 88, at 204 (noting "that all these characterizations of the VRS forces' 'true intent' by both the defense and Schabas actually relate to the Bosnian Serbs' motives"). During the drafting of the Genocide Convention, states debated whether the definition of genocide should include an enumeration of motives. They considered and ultimately rejected proposed language specifying that genocide involves intent to destroy a protected group "on grounds of the national or racial origin, religious belief, or political opinion of its members." *See* Greenawalt, *supra* note 52, at 2274–79. States also disagreed on whether the final language of the convention retained a motive requirement with its specification that genocide involves an intent to destroy, in whole or in part, a protected group "as such." *Id.* at 2277–79.

> terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide.[92]

The logic of the passage seems straightforward: Bosnian Serb forces murdered the male prisoners of Srebrenica and were "aware" of the harm this would cause to the larger group. The combination of those two elements, it would seem, is sufficient to establish genocidal intent. A similar perspective appears in the trial judgment which the appeals chamber upheld and the ICJ likewise quoted approvingly.[93] In a telling part of that decision, the trial chamber addressed the selective nature of the Srebrenica atrocities as follows:

> Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they 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.[94]

Once again, the focus is not on purpose strictly defined but on what the Bosnian Serb forces "could not have failed to know," what they "had to be aware of," and what they "knew."[95]

It is tempting based on these passages to conclude that the international case law has settled on a knowledge-based understanding of

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92. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶ 37 (Int'l Tribunal for the Former Yugoslavia Apr. 19, 2004); *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 293 (quoting approvingly the *Krstić* Appeals Chamber).

93. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 292 (quoting and citing approvingly the *Krstić* Trial Chamber's findings of genocidal intent at paragraphs 571–73 and 591–98).

94. *Krstić*, Case No. IT-98-33-T, ¶ 595 (footnote omitted).

95. *Id.*

genocidal intent, one corresponding to my own proposed interpretation which the *Krstić* Trial Chamber purported to reject.[96] Indeed, I would argue, that interpretation provides a superior framework both for understanding the Srebrenica massacre as genocide and for understanding how the ICTY and the ICJ arrived at that conclusion. At the same time, however, presenting it that way suggests a neatness and coherence that is not always present in the judicial reasoning.

In the first place, the case law contains statements suggesting that the type of genocidal awareness identified in *Krstić* is perhaps not itself genocidal purpose, but instead merely circumstantial evidence of that further purpose. For instance, the ICTY Appeals Chamber noted that

> [t]he finding that some members of the VRS Main Staff devised the killing of the male prisoners with full knowledge of the detrimental consequences it would have for the physical survival of the Bosnian Muslim community in Srebrenica further supports the Trial Chamber's conclusion that the instigators of that operation had the requisite genocidal intent.[97]

But even if this phrasing formally reconciles the chamber's findings with a more purpose-based approach, the effect is simply to equate knowledge with purpose. Circumstantial evidence and inferences certainly can provide persuasive evidence of intent in some cases, but it is hard to see given the facts of this case how a court committed to the strictest understanding of genocidal mens rea could conclude—as both

96. Katherine Southwick reaches the same conclusion, arguing that "[t]hrough this reasoning, the chamber is effectively equating knowledge, a lower level of intent, with purpose, the highest standard of intent, which, as Cecile Tournaye points out, inheres in genocide's intent requirements." Southwick, *supra* note 88, at 201. While I agree with the assessment, I do not share Southwick's view that a purpose-based standard "inheres in genocide's intent requirements." Tournaye's otherwise informative article is not an especially helpful source for this claim as Tournaye's analysis of the issue does little more than cite to tribunal case law for this proposition without engaging any arguments—including those relating to text and drafting history—that point the other way. *See* Tournaye, *supra* note 50, at 450–53. Tournaye also repeats the *Krstić* Trial Chamber's error in citing my work for the proposition that "genocide should comprise those acts whose foreseeable or probable consequence is the total or partial destruction of the group." *Id.* at 450 n.15. Proceeding from that assumption, Tournaye argues that a purpose-based standard "permits a distinction between genocide and war crimes resulting in massive destruction." *Id.* at 451. Consequently, whether Tournaye would agree or disagree with the actual argument I advance—one that does maintain that distinction—remains unclear.

97. *Krstić*, Case No. IT-98-33-A, ¶ 29.

the ICTY and ICJ have—that genocidal purpose was the only reasonable inference from the facts.[98]

Then there is the fact that both the ICJ and the ICTY have rejected a finding of genocide with respect to any of the other massacres committed against Bosniaks during the war.[99] This is a striking fact considering in particular that while Srebrenica remains singular for its scale, the victims at Srebrenica still represent a minority of the Bosniak civilians who lost their lives to the campaign of ethnic cleansing.[100] Over the course of several judgments the ICTY drew a sharp distinction between the use of killing as part of an intent to destroy a community versus an intent to displace a community. Consider *Prosecutor v. Mladić*,[101] for instance, which presents the ICTY and MICT's last word on the question of genocide. The trial chamber convicted the accused—the military leader of the Bosnia Serb forces—of genocide in Srebrenica, while rejecting the prosecution's allegations of genocide in several other municipalities.[102] The trial chamber ruled that Mladić was indeed part of a joint criminal enterprise (JCE) lasting from 1991 to 1995 "with the objective of permanently removing the Bosnian Muslims and Bosnian Croats from Bosnian-Serb-claimed territory in Bosnia-Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and deportation."[103] But it declined to conclude that the JCE

98. *See, e.g.*, Carsten Stahn, *ICTY and the New Law in Genocide*, *in* NEW CHALLENGES TO INTERNATIONAL LAW 126 (Steven van Hoogstraten ed., 2018); *id.* at 136 ("Formally, the ICTY sought to distinguish intent from personal motives of perpetrator. But this distinction is often difficult to draw. The subjective intent to destroy is *de facto* shown with reference to objective genocidal acts."). Indeed, it was this very prospect—that distinguishing between genocidal purpose and awareness would be too challenging in concrete cases—that partly informed my original proposal for a knowledge-based interpretation. *See* Greenawalt, *supra* note 52, at 2281 ("The danger of adhering to a specific intent standard in such situations is not merely that culpable perpetrators will escape liability for genocide, but perhaps more ominously that the evidentiary problems will compel courts to squeeze ambiguous fact patterns into the specific intent paradigm.").

99. *See* cases cited *supra* note 11 and accompanying text.

100. The Research and Identification Center has recorded 62,013 Bosniak war deaths, of which 31,107 are civilians. *See* MIRSAD TOKAČA, THE BOSNIAN BOOK OF THE DEAD: HUMAN LOSSES IN BOSNIA AND HERZEGOVINA 1991-1995, at 130 (Senada Kreso, Linda Popić & Selma Islamović trans., 2012). Note these data do not specify what percentage of these deaths—whether civilian or military—are the result of murders or other crimes.

101. Case No. IT-09-92-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226.pdf [https://perma.cc/Z3EG-B9F2].

102. *Id.* ¶¶ 4232–37, 5130–31.

103. *Id.* ¶ 4232.

reflected an intent to destroy protected groups as opposed to taking actions aimed at "ethnic separation and division."[104] Tellingly, the court did not take the further step of asking the question posed by the Srebrenica case law, namely whether Mladić might have been simultaneously "aware" that these actions would have the type of destructive effect contemplated by the crime of genocide.[105]

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104. *Id.* ¶ 4235. Other cases have rested on similar reasoning when rejecting accusations of genocide outside Srebrenica. *See, e.g.*, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement, ¶ 2624 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf [https://perma.cc/CT6S-WLTG] ("The total number of Bosnian Muslims and Bosnian Croats displaced . . . does not satisfy the Chamber that the only reasonable inference is that there existed an intent to destroy the Bosnian Muslim and/or the Bosnian Croat groups in the Count 1 Municipalities as such. Rather, the Chamber considers that a reasonable inference to be drawn from the pattern described above is that the intent behind those crimes was to ensure the removal of members of the Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities."); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, ¶ 553 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), https://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf [https://perma.cc/E5EF-5AYG] ("[T]here is insufficient evidence of an intention to . . . destroy[] in part the Muslim group. The Trial Chamber believes that the goal was rather to eliminate any perceived threat, especially by Muslims, to the overall plan and to force non-Serbs to leave the Municipality of Prijedor. Security for the Serbs and protection of their rights seems to have been the paramount interest."); *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgement, ¶ 976 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), https://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf [https://perma.cc/3UN8-LZ6S] ("The extremely high number of Bosnian Muslim and Bosnian Croat men, women and children forcibly displaced from the ARK in this case, particularly when compared to the number of Bosnian Muslims and Bosnian Croats subjected to the acts enumerated in Article 4(2)(a), (b) and (c), does not support the conclusion that the intent to destroy the groups in part, as opposed to the intent to forcibly displace them, is the only reasonable inference that may be drawn from the evidence."); *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, ¶ 372 (Feb. 26) ("Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership—to create a larger Serb State, by a war of conquest if necessary—did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion."). The ICJ took a similar position in a later dispute between Croatia and Serbia involving reciprocal claims of genocide. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croat. v. Serb.*), 2015 I.C.J. 3 (Feb. 3). With respect to Serbian ethnic cleansing, the ICJ held that "[t]here is no evidence before the Court enabling it to conclude that the forced displacement was carried out in circumstances calculated to result in the total or partial physical destruction of the group." *Id.* ¶ 376. Regarding the alleged Croatian genocide, the ICJ noted that "[e]ven if there was a deliberate policy to expel the Serbs from the Krajina, it has in any event not been shown that such a policy was aimed at causing the physical destruction of the population in question." *Id.* ¶ 480.

105. Unlike the *Krstić* Court, the *Mladić* Trial Chamber did not employ knowledge-based language in its finding of genocidal intent at Srebrenica. However, it elided the difference by describing the plan's primary purpose being to "eliminate[] the Bosnian Muslims in Srebrenica," through a combination of killing and forcible

D. Moral Coherence

Separate from the question of whether the best reading of the ambiguous and contradictory case law *does in fact* line up in favor of a more restrictive purpose-driven interpretation of genocidal intent, there is another question: Does the distinction created by this interpretation have sufficient moral coherence to justify the existence of genocide as a distinct international crime, one which is commonly viewed as the most serious of all international crimes?

My consideration of German atrocities against the Herero already presents some skepticism in this regard: when a colonizing power deliberately exterminates the members of an indigenous people whom it considers subhuman, we start to lose the forest for the trees if the question of genocide must further turn on the question whether this group destruction was a conscious goal versus merely the foreseen result of an attempt to clear territory.

The case of Darfur provides another instructive example of how these interpretive difficulties risk morally arbitrary distinctions that are themselves often impossible to draw with sufficient precision in real-life circumstances. In 2009, an ICC Pre-Trial Chamber approved an arrest warrant against Sudan's then-president, Omar al-Bashir, on charges of war crimes and crimes against humanity, but declined to issue a warrant for genocide against the Fur, Masalit, and Zaghawa peoples.[106] The chamber maintained there was insufficient evidence of a plan to destroy the groups in question, and it drew a parallel between the crimes in Darfur and to the patterns of mass killings, mass rapes, deportations and other crimes in Bosnia which the ICJ declined to view as genocide.[107] As

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displacement. *Mladić*, Case No. IT-09-92-T, ¶ 4987. The court did not explain how this type of genocidal intent differs from what the court had earlier described as a non-genocidal "objective of permanently removing the Bosnian Muslims and Bosnian Croats from Bosnian-Serb-claimed territory in Bosnia-Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and deportation." *Id.* ¶ 4232.

106. *Compare Bashir I*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶¶ 223–36 (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF [https://perma.cc/FX59-QD8L] (finding al-Bashir criminally responsible for war crimes and crimes against humanity), *with id.* ¶ 201 ("[T]he existence of reasonable grounds to believe that [Al Bashir] acted with genocidal intent is not the only reasonable conclusion of the alleged commission . . ., in a widespread and systematic manner, of the particularly serious war crimes and crimes against humanity."). *See generally Bashir II*, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF [https://perma.cc/G6VW-TRMV].

107. *Bashir I*, Case No. ICC-02/05-01/09, ¶¶ 194, 202–06.

part of this analysis, the pre-trial chamber also rejected the possibility of genocide committed against a negatively defined "non-Arab"[108] Darfurian population on the ground that genocidal intent is a "matter of who the targeted people are, not who they are not."[109] In accord with other authorities, the court thereby rejected the concept of a so-called "negative genocide."[110]

To understand the degree of hairsplitting that the cases appear to demand, consider the following hypothetical conversation between a political leader and a military leader which is inspired by the pre-trial chamber consideration of the Bashir warrant:

1. Political Leader: It is time to crush the rebellion once and for all. I have determined that we must exterminate the non-Arab population of our country.
2. Military Commander: To be clear, this will entail the destruction of three ethnic groups: the X, the Y, and the Z.
3. Political Leader: Yes, I am aware of that.
4. Military Leader: Shall we then proceed with the destruction of those three ethnic groups?
5. Political Leader: Yes, we must destroy the X, the Y, and the Z.[111]

The evolution of how the political leader frames the plan may seem to be purely a matter of semantics, but only the fifth statement presents clear evidence of genocidal intent according to the standard elaborated by the case law. The first statement does not suffice because the negatively defined population is not itself a national, ethnic, racial, or religious group. The third statement comes closer because now the political leader has manifested awareness that proceeding with a campaign of negative genocide will entail the positive destruction of three distinct ethnic groups, but the stricter interpretation of the international case law tells us that awareness is not enough. Only the fifth statement

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108. *Id.* ¶ 106.

109. *Id.* ¶ 135.

110. *Id. See also, e.g.*, *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶¶ 191–96 (Feb. 26) (rejecting the "negative approach" to genocide); *Prosecutor v. Stakić*, Case No. IT-97-24-T, ¶ 512 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), https://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf [https://perma.cc/E5EF-5AYG] ("[T]he Trial Chamber does not agree with the 'negative approach' taken by the Trial Chamber in *Jelisić*.").

111. This hypothetical dialogue was previously presented in a review of a book by Larry May. *See* Alexander K.A. Greenawalt, Book Review, 105 AM. J. INT'L. L. 852, 856 (2011) (reviewing LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT (2010)).

describes the criminal plan in language clearly reflecting a goal to destroy the groups.

A central problem with this purpose-driven account is the absence of any identifiable moral justification for distinguishing between the three mental states manifested by this hypothetical political leader. Indeed, the leader would be unlikely to acknowledge or even perceive a shift in intentions with the progression from first to fifth statements. Both the basic plan and the destructive effect on one or more protected groups—all targeted because of who they are—is the same regardless of how the leader semantically frames the plan behind closed doors. A robust defense of the purpose-based approach to genocide therefore requires more attention to these ambiguities than the existing literature and case law has given it.

III. DESTRUCTION

A related set of questions focuses on the word "destroy." What exactly does it mean to "destroy" a group in whole or in part? Does destruction necessarily entail the physical extermination of group members, or might the Genocide Convention embrace other types of destruction such as the loss of identity caused by forced displacement or cultural assimilation? Much like the definition of "intent," the meaning of the word "destroy" also has significant implications for the reach of the Genocide Convention.

On this point as well, authorities appear to have settled on a clear answer: the definition of genocide is limited to "physical" and "biological" destruction and excludes cases of so-called "cultural genocide."[112] For those familiar with the history of the Genocide

112. *See, e.g*, *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, 5lst Sess., Supp. No. 10 at 45–46, U.N. Doc. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n (Part 2) 1, U.N. Doc. A/CN.4/SER.A/1996/Add.l (Part 2) [hereinafter *ILC Report*] ("[T]he destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group."); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9] ("The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group."); *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 344 (citing *ILC Report*, *supra*; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 593 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/3644-D25R]); Kreß, *supra* note 55, at 486 (arguing that this "predominant view is essentially correct"); David

Convention, this conclusion might seem unimpeachable. While the text of the convention does not itself define the word "destroy," the distinction between "physical," biological," and "cultural" genocide received extensive attention throughout the drafting history. The U.N. secretary general's original draft both included, and distinguished among, all three types of genocide.[113] So did a subsequent draft produced by an ad hoc committee of the Economic and Social Council.[114] When the Sixth Committee of the U.N. General Assembly then undertook the further revisions which produced the final text of the convention, it rejected the ad hoc committee's draft article on cultural genocide.[115] By contrast, it revised and adopted the ad hoc committee's draft article on "physical and biological genocide," and it is that revised article (albeit without the accompanying label) that enshrines international law's definition of genocide under Article II of the Genocide Convention.[116]

As with much about the Genocide Convention, the received wisdom does not survive closer investigation. In the first place, the prevailing, narrow view of genocide destruction is incompatible with the actual text of the convention. Alongside the acts of "physical and biological genocide" identified in the ad hoc committee draft, the Sixth Committee added another genocidal act whose origins trace to the secretary general's provisions on cultural genocide: the forced transfer of children from one group to another.[117] Although this addition may seem at most a curious footnote,[118] its very inclusion confirms that the word "destroy" has a more capacious meaning. It indicates that it is possible to commit to genocide without physical harm to anyone.

Nersessian, *A Modern Perspective: The Current Status of Cultural Genocide Under International Law*, *in* CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS 62, 66 (Jeffrey S. Bachman ed., 2019) ("[E]ven though cultural genocide often accompanies physical and biological genocide, cultural destruction is not directly covered by the Genocide Convention or treated as a criminal offense in and of itself." (footnote omitted)); Leora Bilsky & Rachel Klagsbrun, *The Return of Cultural Genocide?*, 29 EUR. J. INT'L L. 373, 379 (2018) ("Currently, international law limits genocide to physical or biological extermination.").

113. U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, at 25–26, U.N. Doc. E/447 (June 26, 1947) [hereinafter *Secretariat Draft*].

114. *See* Karim Azkoul (Special Rapporteur on Genocide), *Rep. of the Comm. and Draft Convention Drawn Up by the Comm.*, at 13, 17, U.N. Doc E/794 (May 24, 1948) [hereinafter *Ad Hoc Committee Draft*].

115. *See infra* Section III.A.4.b.

116. *See infra* Section III.A.4.a.

117. *See infra* Section III.A.4.a.

118. *See, e.g.*, Bilsky & Klagsbrun, *supra* note 112, at 374 ("Only a distant echo to this attempt [to prohibit cultural genocide] is present in the Genocide Convention, where it prohibits the forced transfer of children.").

There is also a second important textual clue regarding the meaning of the word "destroy." The Genocide Convention prohibits "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[119] The need to include in this provision—but no other—a distinct mens rea requirement limited to "physical destruction" indicates that this limitation does not flow already from the umbrella mens rea language that applies to all genocidal acts.

Against this powerful textual evidence, the international cases have instead relied upon a misreading of the drafting history that found its way into oft-cited U.N. reports in the years following the adoption of the Genocide Convention. Recovering the lost history of the convention requires a deeper inquiry than the one that international judges have attempted to undertake. It necessary to move beyond the summaries of secondary sources and to revisit the *travaux préparatoires* themselves.

In particular, my own reading of that drafting history reveals a different conclusion than that reached by William Schabas's comprehensive treatise on the Genocide Convention, a work whose nuanced and careful consideration of the question already marks a significant advance as compared to the analysis contained in official sources.[120] Schabas acknowledges that the "words of the Convention can certainly bear" an interpretation according to which genocide could include "killing members of a group with the intent to destroy the group, even though the intent is not to destroy the group by killing."[121] But he concludes that the "*travaux préparatoires* of the Convention do not, however, sustain this construction," and that "the spirit of the discussions resists extending the concept of destruction beyond physical and biological acts."[122] Hence, Schabas maintains that any argument for the broader view must instead rely on other interpretive techniques such as "dynamic reinterpretation of legal instruments that protect human rights."[123]

As the remainder of this Part explores, the drafting history reveals several surprising conclusions that complicate Schabas's finding. While the history reflects that some voices did indeed advocate a view of genocide limited to physical and biological destruction, those delegates did not carry the day. In the Sixth Committee in particular, those voices added to the tally that rejected the ad hoc committee's article on cultural genocide, but they were insufficient to preclude inclusion of the provision

119. Genocide Convention, *supra* note 33, art. II(c).
120. *See* SCHABAS, *supra* note 30, at 270–72.
121. *Id.* at 271.
122. *Id.*
123. *Id.*

on the forced transfer of children. Equally decisive were those arguments that followed different paths. For example, a dominant theme was the concern that punishing acts of "cultural genocide," such as the suppression of language and destruction of cultural objects, involved a lower level of gravity than murder, and would also invite troubling interpretive ambiguities. Similar arguments also accompanied the rejection of a proposal to prohibit the forced displacement of groups as a genocidal act. The power of these arguments—focused on specific punishable acts at the perpetrator level—is itself agnostic as to the type of group destruction envisioned at the broader mens rea level. Indeed, the dominant arguments for including the forced transfer of children as its own genocidal act did not—as some sources falsely suggest—maintain that forced transfer was conceptually a form of biological genocide in any formal sense, but instead maintained that the transfer of newborn children was *morally* indistinguishable from acts of biological genocide such as compulsory abortion.[124] And at least one delegate recognized—without contradiction by any other delegate—that the inclusion of forced transfer of children confirmed a broader conception of group destruction than that captured by a strict distinction between the physical and the cultural.[125]

In sum, while it is true that the drafters of the Genocide Convention ultimately rejected the ad hoc committee's article on cultural genocide, the complex and nuanced drafting history is inconsistent with a simplistic conclusion that genocidal mens rea necessarily contemplates a form of group destruction that is "physical" or "biological" in some formal sense. Nor, in the end, does the international case law adhere to this distinction. Remarkably, the very international authorities that have most prominently pronounced a narrow interpretation of genocidal destruction have abandoned that interpretation in the disposition of cases. From the *Krstić* trial forward, both the ICTY and the ICJ findings of genocide at Srebrenica rest on a theory of genocidal intent according to which the perpetrators committed genocidal acts—namely, killing—with intent to destroy the Srebrenica community as a whole through a *combination* of selective killing and forced dislocation.[126] This theory—consistent with both the text and drafting history of the Genocide Convention—stands in stark contrast to the atextual and ahistorical description of genocidal intent contained in the very same cases.

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124. *See* U.N. GAOR, 6th Comm., 3d Sess., 82d mtg. at 188, U.N. Doc. A/C.6/Sr.61-140 (Oct. 23, 1948) [hereinafter 82d mtg.].

125. *Id.* at 188–90.

126. *See infra* Section III.C.

A. The Drafting History

1. LEMKIN

To untangle the connected questions related to destruction, forced displacement, and cultural genocide, it helps to start from the beginning. When Lemkin initially presented the concept of genocide in his seminal work, *Axis Rule in Occupied Europe*, he distinguished among seven types of genocide: political, social, economic, biological, physical, religious, and moral.[127] This catalog ostensibly adopts a far broader view of genocide than that ultimately endorsed by international law, but from the start Lemkin's account presented an ambiguity: were these seven different types of genocide, each of which could in theory be committed without the other, or were these simply different types of acts typically committed in combination as part of a single type of genocide that ultimately entails the complete annihilation of a group?[128] There is text in Lemkin's book to support both interpretations. Favoring the second, stricter interpretation he writes that the word "genocide" "is intended . . . to signify a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[129] But there is also language favoring the first, broader interpretation. For example, Lemkin includes the Nazi prohibition on the French language as a form of cultural genocide, but he does not appear to suggest that Nazi Germany sought the extermination of all French people.[130] And in describing Hitler's genocidal plan he distinguishes between the groups marked for physical destruction on account of perceived biological inferiority and those "deemed worthy of being Germanized."[131] Perhaps the answer might lie somewhere in the middle, with Lemkin's account supporting a prophylactic conception. The destruction of language and cultural objects, on this view, might be punishable as genocide not because such acts are sufficient to destroy a group, but because they so often

127. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 82–90 (Lawbook Exchange, 2d. ed. 2008) (1944).

128. For a similar point, see Bilsky & Klagsbrun, *supra* note 112, at 378 ("There is, however, an ambiguity in Lemkin's treatment of cultural genocide. Sometimes he refers to it as a potential step towards genocide, sometimes as an aspect of the crime of genocide (one of its techniques) and, yet, at other times as representing the unique aim of the crime – to destroy the group's essence. This may explain, as we later show, why it became possible for lawyers to view cultural genocide in separation from genocide.").

129. LEMKIN, *supra* note 127, at 79.

130. *Id.* at 84.

131. *Id.* at 82.

accompany or prefigure more comprehensive destruction. The protection of groups, therefore, might justify the prosecution of acts that risk destruction even if not sufficient to destroy on their own.

2. THE SECRETARIAT DRAFT

Whatever the answers to these questions might be, the evolution of the Genocide Convention progressively narrowed the range of punishable acts. Following resolutions by the general assembly and the economic and social council, respectively, the task of drawing up a draft convention fell to the U.N. secretary-general, who in turn delegated the task to the Director of the Secretariat's Human Rights Division, John P. Humphrey, with assistance to be provided by Lemkin and two other experts.[132] Although the resulting document was titled a "Draft Convention on the Crime of Genocide," the accompanying commentary makes clear that the purpose was not to provide a secretariat-endorsed definition of the crime but instead, "as far as possible, to embrace all the points likely to be adopted, it being left to [the competent U.N.] organs to eliminate what they wished."[133] Along these lines, the commentary explains that the draft includes three forms of genocide, what Lemkin has called "'physical' genocide (destruction of individuals), 'biological' genocide (prevention of births), and 'cultural' genocide (brutal destruction of the specific characteristics of a group)."[134] But the commentary also makes clear that the inclusion of cultural genocide in particular was in doubt, and that one general question to be decided was whether "all these three notions [should] be accepted or only the first and second?"[135]

As it ended up, the final convention drew from all three of the secretariat groupings. It is true that the Genocide Convention severely restricts the scope of cultural genocide by excluding all other forms of cultural genocide identified by the secretariat except for the transfer of children.[136] Gone from the list are the exile of culturally important individuals, the prohibition of language, the destruction of books, and the destruction of cultural objects.[137] At the same time, however, the final

132. *See Secretariat Draft*, *supra* note 113, at 15.

133. *Id.* at 16.

134. *Id.* at 17–18.

135. *Id.* at 17. In a foreshadowing of the final convention, the experts did all agree, however, that "[f]orced transfer of children to another human group" should be punishable as genocide. *Id.* at 27 ("The experts were agreed that this point should be covered by the Convention on genocide, but their agreement did not go further than that.").

136. *Compare* Genocide Convention, *supra* note 33, art. II, *with Secretariat Draft*, *supra* note 113, art. I.II.(3).

137. *See Secretariat Draft*, *supra* note 113, art. I.II.3(b)–(e).

convention also narrows the scope of physical genocide, which, in the secretariat's broadly worded draft, would have included such acts as "confiscation of property," "looting," and "curtailment of work" with the effect of "injuring [the] health or physical integrity" of members of the group.[138]

The secretariat draft also adopted a broader conception of genocidal intent than does the final convention, specifying that genocide entails the commission of one of the listed acts either "with the purpose of destroying [a protected group] in whole or in part, or of preventing its preservation or development."[139] Notably, the list of protected groups at this stage also included political groups, a decision about which Lemkin "voiced some doubts" and which the final convention would reverse.[140]

3. THE AD HOC COMMITTEE DRAFT

The drafting of the convention next fell to an ad hoc committee of the U.N. Economic and Social Council which produced a new draft that the Sixth Committee of the General Assembly later revised into the text of the final convention as it exists today.[141]

The ad hoc committee draft preserved the concept of cultural genocide while narrowing the list to just two types of acts: those suppressing the language of a group and those targeting its places of worship, cultural institutions, and cultural objects.[142] Critically, this draft presented cultural genocide not simply as a distinct type of act, but also as a qualitatively different type of destruction. Article II—labeled "physical and biological genocide"—resembles the final convention with its requirement that the perpetrator act with "intent to destroy" a protected group.[143] By contrast, Article III—dedicated to cultural

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138. *Id.* art. I.II.1(d).

139. *Id.* art. I.II.

140. *Id.* at 22; Genocide Convention, *supra* note 33, art. II.

141. *See Ad Hoc Committee Draft*, *supra* note 114.

142. *Id.* at 17.

143. *Id.* at 13. The full text of the draft Article II reads as follows:

> In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members;
>
> 1. killing members of the group;
>
> 2. impairing the physical integrity of members of the group;
>
> 3. inflicting on members of the group measures or conditions of life aimed at causing their deaths;
>
> 4. imposing measures intended to prevent births within the group.

Id.

genocide—includes a different mens rea standard according to which cultural genocide would not require intent to destroy a group itself, but instead merely the intent to destroy the "language, religion, or culture" of a group.[144]

The decision to include the article passed by a vote of 6-1 in the ad hoc committee.[145] States advocating this approach emphasized that destruction of a group did not require killing its members. Venezuela argued that "[i]t was possible to wipe out a human group . . . by destroying its cultural heritage, while allowing the individual members of the group to survive."[146] Lebanon similarly maintained that

> certain higher considerations led world conscience also to revolt at the thought of the destruction of a group, even though the individual members survived. One of those considerations was the loss likely to be suffered by humanity if it were deprived of the possible or actual cultural contribution of the group destroyed.[147]

The United States was the outlier, issuing a declaration opposing the inclusion of cultural genocide, emphasizing that the "act of creating the new international crime of genocide is one of extreme gravity and the United States feels that it should be confined to those barbarous acts directed against individuals which form the basic concept of public opinion on this subject" and that "[t]he acts provided for in these

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144. *Id.* at 17. The full text of the draft Article III reads as follows:

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as:
>
> 1. prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
>
> 2. destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

Id.

145. U.N. ESCOR, 7th Sess., 5th mtg. at 8, U.N. Doc. E/AC.25/SR.5 (Apr. 16, 1948).

146. *Id.* at 2. Venezuela had similarly argued at a previous meeting that "[i]t would be a mistake to think that genocide was bound up with the physical disappearance of members of the group. The life of individuals could continue after the group as such had been killed off." U.N. ESCOR, 7th Sess., 4th mtg. at 7, U.N. Doc. E/AC.25/SR.4 (Apr. 15, 1948).

147. U.N. ESCOR, 7th Sess., 2d mtg. at 4, U.N. Doc E/AC.25/SR.2 (Apr. 6, 1948).

paragraphs [concerning cultural genocide] are acts which should be dealt with in connection with the protection of minorities."[148]

The statement is noteworthy because it highlights an ambiguity that pervades the discussion of cultural genocide during and after the drafting: the concept of cultural genocide has implications both for the actus reus of genocide—*i.e.*, which types of acts should give rise to criminal culpability?—and for the question of what it means to destroy a group—*i.e.*, can one destroy a group without physically annihilating its members? One view presupposes a connection between these two questions: if the actus reus of genocide is limited to so-called physical and biological genocide, then the mens rea must also involve intent to destroy the group in a physical or biological sense.[149] But the United States's declaration to the ad hoc committee focused only on the first of these questions, that is on the question of which acts should be punishable.[150] It did not address or contradict the claims of other states that cultural destruction could provide one means of destroying a group nor did it address the scenario raised by the practice of ethnic cleansing in which violence against individuals is deployed to effect other types of destruction.

4. THE SIXTH COMMITTEE

This same ambiguity pervades the subsequent decisions of the U.N. General Assembly's Sixth Committee, which provide some of the most central material on the question of genocidal destruction. In a series of meetings over several months in 1948, the Sixth Committee worked off the ad hoc committee draft, revising it into the final text of the Genocide Convention.[151] It was during these meetings that the committee rejected the draft Article III on cultural genocide, but equally—if not more—relevant for these purposes were the discussions about Article II.

a. Draft Article II

An especially consequential meeting took place on October 23, 1948, when the Sixth Committee considered two proposed amendments to Article II: a Syrian proposal to include forced displacement as a form of genocide and a Greek proposal to include the forced transfer of children from one group to another.[152] Both of these proposals had their

148. *Ad Hoc Committee Draft*, *supra* note 114, at 18 n.*.
149. *See ILC Report*, *supra* note 112, at 45–46.
150. *See Ad Hoc Committee Draft*, *supra* note 114, at 18 n.*.
151. *See* SCHABAS, *supra* note 30, at 79–90.
152. 82d mtg., *supra* note 124, at 184, 188.

origins in the secretariat's original account of cultural genocide before the ad hoc committee narrowed the list to the two categories reflected in Article III of its draft.[153] Yet the Syrian and Greek proposals sought to include these acts within the article that the ad hoc committee had dedicated to physical and biological genocide.[154] The idea, then, was that these acts could provide a way of destroying a group, and not merely the culture of a group. The Sixth Committee rejected the Syrian proposal to punish "[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment."[155] It then considered and approved the Greek proposal that became Article II(e) of the Genocide Convention[156]: "Forcibly transferring children of the group to another group."[157]

The fact that the final Genocide Convention draws from all three of the secretary-general's original categories—not only physical and biological genocide but also cultural genocide—is a point that receives relatively little attention in the literature.[158] But the inclusion is significant. By specifying that transferring children to new families is one way of destroying a group, the provision confirms that destruction itself does not necessitate the physical eradication of a group in the most obvious sense. Through the transfer of children, perpetrators could instead destroy a group by preventing future generations from inheriting the group identity.

The connection between forced transfer and cultural genocide was not lost on the drafters of the Genocide Convention, and the matter prompted illuminating discussions in the Sixth Committee. When debating the respective Syrian and Greek proposals, some delegates opposed one or both of the proposed amendments on the ground that

153. *See Secretariat Draft*, *supra* note 113, art. I.II.3.; *Ad Hoc Committee Draft*, *supra* note 114, at 17.

154. *See* 82d mtg., *supra* note 124, at 186–87.

155. U.N., Gen. Assemb., 6th Comm., Genocide - Draft Convention (E/794) and Report of the Economic and Social Council, Amendment to Article II Submitted by Syria, U.N. Doc. A/C.6/234 (Oct. 15, 1948) [hereinafter Syrian Amendment]. *See also* 82d mtg., *supra* note 124, at 185–86 (rejecting the Syrian Amendment).

156. U.N., Gen. Assemb., 6th Comm., Genocide -- Draft Convention and Report of the Economic and Social Council, Amendment to the Enumeration in Article II of the Draft Convention (E/794) Submitted by Greece, U.N. Doc. A/C.6/242 (Oct. 20, 1948); 82d mtg., *supra* note 124, at 188–90.

157. Genocide Convention, *supra* note 33, art. II(e).

158. One exception is William Schabas, who accurately traces the provision to the secretariat draft, which, he notes, "quite logically proposed that 'forced transfer of children to another human group,' be considered an act of cultural genocide." SCHABAS, *supra* note 30, at 201. Schabas does not, however, draw any broader implications from this inclusion for what it means to "destroy" a group within the meaning of the convention. *See supra* notes 120–23 and accompanying text.

genocide entailed physical extermination.[159] Other states supported both proposals along with the other draft provisions on cultural genocide.[160] Neither position prevailed in the final text.

The most interesting comments came from the states that sought to distinguish the transfer of children from other types of cultural genocide. Contrary to the received wisdom reflected in later sources, the delegates did not draw a strict line between different types of genocidal destruction. France, for example, "was, in principle, opposed to the inclusion of cultural genocide,"[161] but emphasized that

> its opposition would surely not extend to the special case of the forced transfer of children, an act far more serious and indeed more barbarous than the other acts enumerated in the first draft convention under the heading of cultural genocide, such as the prohibition of the use of a national language, the destruction of books or of historical or religious monuments.[162]

The focus here is not on the nature of group destruction. The statement is entirely consistent with the view that acts of genocide might destroy a group in a cultural, non-physical sense. The critical point instead, is that the actus reus itself must involve acts of special gravity. And the perceived problem with cultural genocide as elaborated by the secretary-general and ad hoc committee was that the punishable acts were not sufficiently barbarous.

Greece, by contrast, directly appealed to the concept of physical genocide in defense of its proposal, but its argument likewise focused on the actus reus rather than the nature of destruction. It noted that "[t]he forced transfer of children had not only cultural, but also physical and biological effects since it imposed on young persons conditions of life likely to cause them serious harm or even death."[163] According to this view, the distinction between physical and cultural genocide would appear to rest on the type of harm suffered by individual victims. But the question of whether or not transferred children suffer physical harms does not alter the more basic point that such transfers threaten the group at the level of identity. Indeed, the loss of identity by future generations would have similar destructive impact even in cases where transferred

159. *See* 82d mtg., *supra* note 124, at 184–90.

160. *See id.*; U.N. GAOR, 6th Comm., 3d Sess., 83d mtg. at 193–206, U.N. Doc. A/C.6/Sr.61-140 (Oct. 25, 1948) [hereinafter 83d mtg.].

161. *See* 82d mtg., *supra* note 124, at 186.

162. *Id.*

163. *Id.*

children are assimilated into other groups without suffering physical harms.

On this point, a number of states focused on the similarity between the transfer of children, which did not appear in the ad hoc committee draft, and the prevention of births within the group, which did.[164] The U.S. delegate, for instance, asked rhetorically "what difference there was from the point of view of the destruction of a group between measures to prevent birth half an hour before the birth and abduction half an hour after the birth."[165] The point has undeniable power: the ultimate effect on the group in both instances—the elimination of future generations who have inherited and maintain the group's identity—is indeed similar.[166] But the persuasiveness of the observation draws not from the distinction between physical and cultural genocide, but instead from the erasure of that distinction. The prevention of a birth one half hour prior necessitates the taking of life and is more directly analogous to the *murder* of a baby one half hour after birth. The transfer of children, by contrast, is horrific in ways that do not involve the taking of life or necessitate physical harm in the most obvious sense.

Reflection on this example reveals how the very distinction between physical and cultural genocide is itself somewhat artificial.[167] Whether the perpetrators operate by means of mass extermination or transferring children, the end goal is similar: the physical absence of human beings who maintain the identity of the group. Taken together, the drafters' choices do not embrace a sharp division between physical and cultural destruction. Instead, they reflect a decision to focus on more definitive threats to group identity. Whereas group identity is likely to survive the destruction of language or suppression of language, the transfer of children at sufficient scale poses a more existential threat.

The Syrian proposal would have included among the list of genocidal acts the act of "[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat

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164. *See id.* at 186–88.

165. *Id.* at 187.

166. The U.S. delegate also expressed that "in the eyes of the mother, there was little difference between the prevention of a birth by abortion and the forcible abduction of a child shortly after its birth." *Id.* at 189. Greece likewise argued that "[t]here could be no doubt that that act also constituted an effective means of committing genocide, since there was no difference between sterilization, abortion and abduction." *Id.* at 188.

167. Claudia Card makes a similar point, arguing that the "the term 'cultural genocide' is probably both redundant and misleading—redundant, if the social death present in all genocide implies cultural death as well, and misleading, if 'cultural genocide' suggests that some genocides do not include cultural death." Claudia Card, *Genocide and Social Death*, HYPATIA, Winter 2003, at 63, 63.

of subsequent ill-treatment."[168] Although some states spoke in favor of the proposal, the Sixth Committee overwhelmingly rejected it.[169] The records reveal only a brief discussion in which several states expressed their views summarily.[170] One senses from the brief discussion that many delegates simply felt that forced displacement—without more—did not rise to a sufficient level of gravity. India, for instance, objected that the proposal "went too far: abandonment of homes under the threat of ill-treatment and not even the threat of genocide should not be considered genocide."[171] The United States objected that it "deviated too much from the original concept of genocide," and the United Kingdom likewise observed that the problem of displacement was a "serious one" that "did not fall within the definition of genocide."[172]

Critically, however, none of these states addressed the question of whether mass murder might be punishable as genocide when committed as part of a plan to displace a population. The rejected proposal focused only on forced displacement as an actus reus of genocide, not as a component of the intent to destroy. There were nevertheless at least two states who argued that forced displacement involved the wrong type of destruction. Cuba objected to the proposal on the grounds that genocide was "essentially, the destruction of a group," and Egypt explained that the "amendment went beyond the accepted idea of genocide in that it did not concern the destruction of human groups."[173]

b. Draft Article III

The Sixth Committee's next meeting focused on the ad hoc committee's proposed Article III on cultural genocide. The meeting concluded with the committee rejecting the proposed article, but once again, the discussion presented a range of perspectives that resist easy conclusions about the definition of genocide.[174]

As before, some states favored a narrower conception that strictly distinguished physical and cultural genocide. Brazil, for example, argued that "[t]he concept of genocide implied only the physical destruction of

168. Syrian Amendment, *supra* note 155. Notably, the secretariat draft had included a form of displacement—"[f]orced and systematic exile of individuals representing the culture of a group"—as part of its cultural genocide category, *Secretariat Draft*, *supra* note 113, art. I(I)(3), but the Syrian proposal would have included forced displacement under Article II, which the ad hoc committee had labeled physical genocide.

169. *See* 82d mtg., *supra* note 124, at 185–86.

170. *See id.* at 184–86.

171. *Id.* at 184.

172. *Id.* at 185.

173. *Id.*

174. 83d mtg., *supra* note 160, at 193–206.

a group,"[175] while Canada maintained that the "idea of genocide should be limited to the mass physical destruction of human groups."[176] Yet such statements must be taken with a grain of salt given the tension between their account of genocide and the decisions already taken by the drafters. By this point in the deliberations, the drafters had rejected the view that genocide must involve either the total destruction of a group or even the total intended destruction of a group. Instead, they had approved the mens rea standard extending culpability for genocide to acts committed with intent to destroy in whole or in part.[177] Moreover, they had also included transfer of children within the list of genocidal acts, confirming that destruction need not involve physical destruction, at least not in the most obvious sense.[178]

This was a point that the Venezuelan delegate made persuasively when he noted both that "[t]he definition given in Article II did not specifically lay down that the destruction of a group had to be physical destruction," and that by including forced transfer of children in the list, the committee had "implicitly recognized that a group could be destroyed although the individual members of it continued to live normally without having suffered physical harm."[179] Notably, Venezuela's broad understanding of the word "destroy" did *not* lead it to join the sixteen states that voted for the proposed Article III.[180] Although "favouring the inclusion of cultural genocide," Venezuela objected that the particular draft provisions under consideration were both "an ill-assorted mixture of heterogenous elements and abstract conceptions lacking in precision," and also "vague and too general to form the substance of a document to win the support of the States which would ratify the convention."[181]

Other states raised similar objections that, like Venezuela's, did not hinge on a categorial distinction between physical and cultural destruction. For instance, New Zealand's expressed concerns about a slippery slope: it noted that the U.N. Trusteeship Council had criticized tribal structures as obstacles to group development and asked whether that position might amount to cultural genocide.[182] And South Africa asked whether draft Article III would require states to protect cannibalism as a social practice.[183] China, for its part, voted in favor of the proposed

175. *Id.* at 197–98.
176. *Id.* at 200.
177. *See infra* Section IV.A.
178. *See supra* Section III.A.4.a.
179. 83d mtg., *supra* note 160, at 195.
180. *Id.* at 206.
181. *Id.* at 196–97.
182. *See id.* at 201.
183. *See id.* at 202.

Article III while allowing that it addressed acts that seemed "less brutal" than those prohibited by Article II.[184] Once again, these concerns focused more on gravity considerations than on categorical distinctions based on the type of group destruction.

In voicing its own objections, the Netherlands summarized four distinct arguments against the proposed language: (1) the "essential difference between cultural genocide and genocide as defined in article II"; (2) that cultural genocide fell "within the sphere of the protection of human rights or of the rights of minorities"; (3) that "cultural genocide was too vague a concept to admit of precise definition and delimitation"; and (4) that "inclusion of cultural genocide . . . might give rise to abuses by reason of the vagueness of the concept."[185]

Of these, only the first argument might have implications for the interpretation of Article II destruction, although even here the statement does not specify exactly what the "essential difference" is—whether it has something to do with the nature of destruction or perhaps the gravity of the prohibited acts. And the last two reasons in particular provide entirely different types of reasons to reject the draft Article III.

B. Post-Enactment Authorities

As with the other aspects of the Genocide Convention, however, these nuances became progressively lost in the work of later authorities. A key chapter is Special Rapporteur Nicodème Ruhashyankiko's 1978 study, which presents the United Nations's first major report on genocide following the drafting.[186] Reviewing the deliberations on the forced transfer of children, the study summarized the Sixth Committee's reasoning as follows:

> Since measures to prevent births had been condemned as an act of genocide, there was reason also to condemn measures intended to destroy a new generation, such action being connected with the destruction of a group, that is to say with physical genocide (or, according to the classification in the Secretary-General's draft, with biological genocide).[187]

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184. *Id.* at 198.

185. *Id.* at 203.

186. Nicodème Ruhashyankiko (Special Rapporteur on the Question of the Prevention and Punishment of the Crime of Genocide), *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978) [hereinafter *Ruhashyankiko Report*].

187. *Id.* at 23.

That some delegates saw a connection between the transfer of children and the prevention of births is, of course, a fact.[188] But the preceding discussion reveals that it is misleading to suggest—as the report appears to do—that the Sixth Committee saw the forced transfer of children as itself a form of physical or biological genocide. Instead, states presented a variety of viewpoints, some directly contradicting this position and none explicitly endorsing it.

Eighteen years later, this error found its way into the International Law Commission's 1996 commentary on its *Draft Code of Crimes against the Peace and Security of Mankind*.[189] Here, the ILC dedicated two sentences to the matter, stating as a matter of fact—and without citation—that

> the Sixth Committee . . . did not include the concept of "cultural genocide" contained in the [Secretariat and Ad Hoc Committee] drafts and simply listed acts which come within the category of "physical" or "biological" genocide. Subparagraphs (*a*) to (*c*) of the article list acts of "physical genocide", while subparagraphs (*d*) and (*e*) list acts of "biological genocide".[190]

This inaccurate revision of the drafting history might be insignificant to the extent the issue was merely one of assigning the correct label to the transfer of the children, but the ILC's point is in fact a broader one. It cites this history as alleged proof that the word "destroy" itself has a limited meaning for mens rea purposes:

> As clearly shown by the preparatory work for the Convention on the Prevention and Punishment of the Crime of Genocide, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense.[191]

188. *See supra* notes 165–66 and accompanying text.
189. *ILC Report*, *supra* note 112, at 44–47.
190. *Id.* at 46 (footnote omitted).
191. *Id.* at 45–46.

C. The Bosnia Cases

This misreading of the drafting history then found its way into the case law. When an ICTY trial chamber considered the question of destruction in *Krstić*, it did not undertake its own review of the *travaux* but instead cited exclusively to the ILC Commentary to conclude that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group."[192] In this vein, the court dismissed as merely a "recent development[]"[193] a 1992 General Assembly resolution which condemned the "abhorrent policy of 'ethnic cleansing'" in Bosnia as a "form of genocide."[194] The appeals chamber later affirmed this interpretation of the convention,[195] as did the ICJ in *Bosnia v. Serbia*.[196]

This juridical consensus does include one notable outlier. In his partial dissent to the *Krstić* appeals judgment, Judge Mohamed Shahabuddeen defended a broader conception of genocidal destruction. Allowing that "[t]he proposition that the intended destruction must always be physical or biological is supported by much in the literature," he objected that "the proposition overlooks a distinction between the nature of the listed 'acts' and the 'intent' with which they are done."[197] While acknowledging (albeit incorrectly according to my preceding analysis) that "the listed (or initial) acts must indeed take a physical or biological form," he argued that "the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character."[198] Thus, he argued, in the case of Srebrenica, a finding of genocide could proceed from a determination

192. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 580 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/VM58-L6B6].

193. *Id.* ¶¶ 578, 580.

194. G.A. Res. 47/121, at 2 (Dec. 18, 1992).

195. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9] ("The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group." (citing *ILC Report*, *supra* note 112, at 90–91 (detailing an account of the *travaux préparatoires*))).

196. *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, ¶ 344 (Feb. 26) (citing *ILC Report*, *supra* note 112, at 45–46; *Krstić*, Case No. IT-98-33-T, ¶ 580).

197. *Krstić*, Case No. IT-98-33-A, ¶ 48 (Shahabuddeen, J., partially dissenting).

198. *Id.* (Shahabuddeen, J., partially dissenting).

that the perpetrators killed members of the group with "an intent to destroy [the] group in a non-physical or non-biological way."[199]

Arguing along these lines, Judge Shahabuddeen also rejected the appellant's argument that Srebrenica involved group displacement rather than destruction.[200] While noting that "mere displacement does not amount to genocide,"[201] he observed that Srebrenica involved more than that: "The killings, together with a determined effort to capture others for killing, the forced transportation or exile of the remaining population, and the destruction of homes and places of worship, constituted a single operation which was executed with intent to destroy a group in whole or in part . . . ."[202]

Notably, the Shahabuddeen partial dissent rested primarily on the text of the Genocide Convention rather than a deep consideration of the drafting history. With respect to the *travaux*, he expressed that he was "not satisfied that there is anything in them which is inconsistent with this interpretation of the Convention," and that, in any event, "the interpretation of the final text of the Convention is too clear to be set aside by the *travaux préparatoires*."[203] As my own research into the drafting history reveals, there is in fact much there to support his position.

Moreover, the majority's strict reading of the law evaporates in the actual disposition of cases. In fact, in their respective findings of genocide at Srebrenica, both the ICJ and the ICTY embraced reasoning that contradicts their own reliance on the ILC Report and instead more closely resembles Judge Shahabuddeen's approach to genocidal destruction. And once again, the key language—quoted and endorsed by both the ICJ and the ICTY Appeals Chamber—appears in the *Krstić* Trial Chamber ruling.

According to the trial chamber, the Srebrenica massacre as standalone genocide reflected an intent to destroy the Bosniak group "in part."[204] In other words, the court did not conclude—and did not need to conclude—that this one episode of mass murder contributed to a broader

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199. *Id.* ¶ 49 (Shahabuddeen, J., partially dissenting).

200. *Id.* ¶¶ 55–57 (Shahabuddeen, J., partially dissenting).

201. *Id.* ¶ 57 (Shahabuddeen, J., partially dissenting).

202. *Id.* (Shahabuddeen, J., partially dissenting).

203. *Id.* ¶ 52 (Shahabuddeen, J., partially dissenting).

204. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 598 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/VM58-L6B6] ("The Chamber concludes that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as a genocide.").

plan to destroy the Bosniak national group in its entirety. Instead, the court found that the perpetrators both intended to destroy—and in fact did destroy—a geographically defined part of the group: namely, "all of the Bosnian Muslims in Srebrenica as a community."[205]

This way of describing the genocide at Srebrenica rests on a different theory of destruction than the one conveyed both by the court's general statements about physical and biological destruction and by its more specific observation that genocide could involve "the killing of all members of the part of a group located within a small geographical area."[206] At Srebrenica, the Bosnian Serb forces did not even attempt to kill all the members of the group within the geographical area. Instead, the murders targeted only a portion of the population—mostly the men and boys deemed to be of military age who failed to escape—while the remaining population was forcibly displaced.[207] How then did the trial chamber "conclude[] from the evidence that the VRS forces sought to eliminate *all* of the Bosnian Muslims in Srebrenica as a community?"[208]

The trial chamber's explanation is suffused with references to cultural harm. The opinion emphasizes that while "only the men of military age were systematically massacred . . . it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way."[209] It notes, moreover, that "their death precluded any effective attempt by the Bosnian Muslims to recapture the territory."[210] And it further remarks that the "Bosnian Serb forces knew, by the time they 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."[211] This last sentence, in particular, makes especially clear that, notwithstanding its purported focus on physical genocide, the tribunal did not actually see the intended elimination of all the Srebrenica Bosniaks in strictly physical terms. It was not mass murder alone that advanced the genocidal plan, but "the combination of those killings with the forcible transfer of the women, children and elderly."[212] Moreover, the result of the plan was not the total physical extermination of the Srebrenica community, but

205. *Id.* ¶ 594 ("The Trial Chamber concludes from the evidence that the VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica as a community.").

206. *Id.* ¶ 590.

207. *Id.* ¶ 595.

208. *Id.* ¶ 594 (emphasis added).

209. *Id.* ¶ 595.

210. *Id.*

211. *Id.*

212. *Id.*

"the physical disappearance of the Bosnian Muslim population *at Srebrenica*."[213] Displacement, in other words, was a key aspect of the community's destruction. The implication is that destruction is not merely a matter of lives lost in some physical or biological sense, but also encompasses the loss of communal life and identity in a broader sense.[214]

Granted, the court did not endorse the idea of a purely cultural genocide in the sense that the drafters of the Genocide Convention both considered and rejected. It did not rule, for instance, that a group might be destroyed solely through the loss of its language or cultural institutions, or through physical dislocation alone. But the ruling does suggest that physical violence—in this case mass murder—may combine with other techniques to affect destruction that has a substantial cultural component.

Perhaps even more striking, the type of cultural destruction contemplated by the tribunal does not entail a total loss of group identity. Unlike the forced transfer of children, which might prevent the victims from ever inheriting a sense of group membership, the displacement of the Srebrenica community to other parts of Bosnia did not ostensibly threaten their identity as Bosniaks or their ability to remain within the larger Bosniak community. Nor did the events ostensibly threaten to reduce the size of the total Bosniak community in any significant sense.

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213. *Id.* (emphasis added). As Kreß notes, "[a]lthough the use of the word 'physical' suggests otherwise, to consider the lasting expulsion of the Bosnian Muslim group from Srebrenica as its *destruction* simply does not conform with the general concept of 'physical/biological' destruction as explained before and adhered to in *abstracto* by the *ICTY*." Kreß, *supra* note 55, at 492.

214. On appeal, the appeals chamber rejected the defense's objection "that the Trial Chamber erroneously enlarged the term 'destroy' in the prohibition of genocide to include the geographical displacement of a community." *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶¶ 5, 24–38 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9]. Nevertheless, it embraced the trial chamber's reasoning wholesale, including the trial chamber's explanation that "forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. 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." *Id.* ¶ 31 (citing *Krstić*, Case No. IT-98-33-T, ¶ 595). The appeals chamber also maintained that "physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction." *Id.* ¶ 28. While this way of framing the crime fits more closely to the paradigm of physical and biological genocide, it does not depend on the effects of the forcible transfer and does not take account of the fact that the children were spared. *See id.* ¶ 31. Hence, in both the trial chamber and the appeals chamber rulings, the most plausible reading is that the finding of genocide did indeed inherently rest on an account of destruction that is broader than the narrow view focused only on physical and biological destruction.

Instead, the combination of mass murder and mass displacement threatened to destroy the Srebrenica community itself as a distinct community within the Bosniak group.[215]

This approach to genocide has two major ramifications for the prosecution of genocide under international law. First, it suggests that the consistent finding of genocide at Srebrenica by both the ICTY and the ICJ rests on a conception of destruction that complicates the case law's formal insistence that genocide exclusively involves physical and biological destruction rather than cultural destruction. Indeed, the outcome of the Srebrenica case law is more consistent with Judge Shahabuddeen's partially dissenting opinion in the *Krstić* appeals judgment than it is with the majority's stated rejection of that approach.[216]

The second ramification of the Srebrenica case law is that it that rests on a theory of genocide that conflicts with the finding of Srebrenica as a standalone genocide separate from the broader campaign of ethnic cleansing that victimized the Bosniak community throughout years of war. The combination of mass murder with physical dislocation—and alongside other crimes such as mass rape, torture, and property destruction—was a consistent feature of the campaign by Bosnian Serb forces to carve out an ethnic state occupying roughly seventy percent of Bosnia's territory.[217] Although the Srebrenica massacre remains unique for its systematic targeting of every military age male, from the standpoint of genocidal harm, the difference would seem to be more one of degree than of kind. In both cases, mass murder combined with other techniques to affect the permanent disappearance of communities.[218]

This discrepancy is especially apparent in the ICJ's *Bosnia v. Serbia* judgment. To support its finding of genocide at Srebrenica, the court

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215. Notably, however, the trial chamber's finding of genocide at Srebrenica rested on a different theory of destruction than the one posed by this passage with its reference to "the killing of all members of the part of a group located within a small geographical area." *Krstić*, Case No. IT-98-33-T, ¶ 590.

216. *See supra* notes 197–203 and accompanying text. Schabas also makes this same point in an article critiquing *Krstić*. Schabas, *supra* note 88, at 45–46 ("And yet the alleged intent of the perpetrators—this is really unchallenged in the judgment—was to 'ethnically cleanse' the region of Muslims, not to destroy the group in a physical sense."). I agree with Schabas that the reasoning of *Krstić* is incompatible with the narrower view of genocidal destruction. *See id.* Unlike Schabas, I believe that the broader view actually embraced by *Krstić* presents a faithful interpretation of the convention's text and drafting history. *See supra* notes 120–23 and accompanying text.

217. *See generally* TOAL & DAHLMAN, *supra* note 76.

218. *See* EDINA BEĆIREVIĆ, GENOCIDE ON THE DRINA RIVER 15 (2014) ("Identifying the only genocide in Bosnia as the one that took place in Srebrenica simply because the density of the killing was the greatest there overlooks the *social aims* that the state of Serbia—by means of its Bosnian Serb agents and the military power of the Yugoslav army—wanted to achieve through the war.").

relied expressly on the above-quoted passages from the *Krstić* trial judgment, which emphasize the combination of killing and other crimes aimed at displacing the community.[219] Yet when confronting Bosnia's claim that the pattern of atrocities across Bosnia amounted to genocidal destruction, the court drew a sharp line between destruction and expulsion:

> Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership—to create a larger Serb State, by a war of conquest if necessary—did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion.[220]

IV. "IN WHOLE OR IN PART"

This Part turns to the requirement that genocide involve an intent to destroy a group "in whole or in part."[221] In one sense, this element adds an additional hurdle for the prosecution. According to the theory embraced by the ICTY and ICJ, it was necessary to find both that Bosnian Serb forces intended to destroy the Srebrenica community, and that the destruction of that community would entail the destruction "in part" of the Bosniak national group within the meaning of the Genocide Convention.[222] But there is another sense in which the "in part" requirement could provide an alternative theory in typical cases of ethnic cleansing. One might observe that the thousands of victims targeted for execution at Srebrenica themselves constitute a part of the Bosniak national group, and hence that the plan to kill those individuals itself reflected an intent to destroy a protected group in part, irrespective of the impact on the Srebrenica community as a whole. Following that train of thought, it becomes possible to describe the Srebrenica massacre as genocide even according to the narrower view of destruction. After all, the perpetrators clearly intended the physical destruction of that particular subgroup of the Srebrenica community.

Of course, this logic is open to further expansion. Even a single member is one part of a group. Might a single homicide motivated by

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219. *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, ¶ 294 (Feb. 26).

220. *Id.* ¶ 372.

221. Genocide Convention, *supra* note 33, art. II.

222. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶¶ 19–20 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9]; *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶¶ 293–94.

anti-group hatred without further plans qualify as genocide on the ground that the perpetrator acted with intent to destroy a one-person part of the group? Intuitively, the answer is no. Genocide involves the targeting of groups in some collective sense, not merely the targeting of an individual. The crime rests on an analogy to homicide, and it is not simply another word for murder. But between the two extremes—a plan to destroy an entire group and one to target a single person—what exactly is entailed in by the intent to destroy "in part"?

The drafters of the Genocide Convention grappled with this exact question and, perhaps surprisingly, they did not make much progress in resolving it. Most states, at least, seemed to take for granted that genocide necessitated the targeting of some larger group of persons, but at least one delegate objected unsuccessfully to the "in part" language precisely because it, in his view, collapsed the distinction between genocide and homicide.[223] Otherwise, the drafting history provides little, if any, guidance on what threshold the words "in part" convey.[224]

Subsequent authorities have addressed the question by maintaining that the perpetrator must at least possess the intent to destroy a "substantial" part of the group.[225] While some authorities have suggested a relative high threshold of substantiality, recent cases have taken a more expansive yet simultaneously less coherent approach. In ruling that the Srebrenica massacre constituted genocide, the case law suggests that the numbers alone are not determinative, but instead that the determination may turn on various qualitative factors (such as the degree to which a particular community may or may not have been "emblematic") that are hard to square with the basic concept of genocide itself.

A. The Drafting History

The idea that genocide can involve the partial destruction of a group appears in the general assembly's 1946 resolution, which remarked that "[m]any instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part."[226] That concept then carried over into the secretariat draft's mens rea standard which speaks of the "purpose of destroying [a group] in whole or in part,"[227] although the accompanying commentary devotes no

223. *See infra* notes 234–39 and accompanying text.

224. *See infra* Section IV.A.

225. *See, e.g.*, *Prosecutor v. Popović*, Case No. IT-05-88-A, Judgement, ¶ 419 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015).

226. G.A. Res. 96 (I), *supra* note 36, at 189.

227. *Secretariat Draft*, *supra* note 113, art. I.II.

attention to clarifying what counts as a "part."[228] The ad hoc committee draft, by contrast, excludes any mention of intended partial destruction—it speaks instead of an "intent to destroy a . . . group."[229] The ad hoc committee's report likewise devotes no attention to the matter, which also received no discussion during the committee meetings.[230]

Much is striking about how the words "in whole or in part" then came to become part of the Genocide Convention. First, there is the speed with which this critical language became part of the law of genocide. The reintroduction of the "in whole or in part" language by the Sixth Committee came about after Norway made a one-sentence proposal on October 12, 1948: "Insert the words: 'in whole or in part' after the words: 'with the intent to destroy.'"[231] This proposal then became the subject of discussion at a three-hour meeting the following day at the end of which the Sixth Committee voted overwhelmingly to adopt the proposal while also rejecting a separate Soviet amendment considered at the same meeting.[232]

The fact that the Sixth Committee codified such a seemingly fundamental change to the definition of genocide following so little consideration of the question is surprising enough. But even more surprising is how little guidance the discussion gives to the meaning of the words "in part."

The records provide little explanation by the Norwegian delegation in support of the proposal, and it appears that the Norwegian delegate's remarks provoked some confusion as to whether Norway's rationale focused on the actus reus of genocide—the question of whether genocide entails the successful destruction of an entire group—rather than the more pertinent question of mens rea—whether the perpetrators, successful or not, must even intend to destroy an entire group in the first instance.[233]

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228. *Id.* at 20–24.

229. *Ad Hoc Committee Draft*, *supra* note 114, at 13. And while the ad hoc committee draft would also have separately prohibited cultural genocide, it defines "cultural genocide" not as a partial destruction, but instead as a qualitatively different type of total destruction, namely, the destruction of "the language, religion or culture of a national, racial or religious group." *Id.* at 17.

230. *See id.* at 13–16.

231. U.N., Gen. Assemb., 6th Comm., Draft Convention and Report of the Economic and Social Council, Amendment to Article II of the Draft Convention (E/794) Submitted by Norway, U.N. Doc. A/C.6/228 (Oct. 12, 1948).

232. U.N. GAOR, 6th Comm., 3d Sess., 73d mtg. at 89–97, U.N. Doc. A/C.6/SR.61-140 (Oct. 13, 1948) [hereinafter 73d mtg.].

233. Although the text of Norway's proposal clearly focuses on the question on intention—clarifying that perpetrators need not intend total destruction—some of the discussion focused on the separate issue of genocidal acts and whether genocide could occur without actually destroying an entire group. *See id.* at 92–93.

On the specific critical question of what counts as "part" of a group, the records are almost silent. The most significant discussion saw the delegates favorably contrast the Norwegian proposal with a French one suggesting that genocide could involve the intended destruction of only a

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Much of the confusion seems to relate to the simultaneous consideration of a proposed USSR amendment with more awkward phrasing. The USSR proposal would have defined genocide in terms of any of two types acts "aimed at the physical destruction of racial, national (or religious) groups." U.N., Gen. Assemb., 6th Comm., Draft Convention (E/794) and Report of the Economic and Social Council, Amendments to Article II of the Draft Convention Submitted by Union of Soviet Socialist Republics, U.N. Doc. A/C.6/223 (Oct. 7, 1948) [hereinafter USSR Amendment]. The first type of act would involve "the physical destruction in whole or in part of such groups." *Id.* Taken together this language would seem to suggest that genocidal culpability applies when one aiming to destroy an entire group succeeds in partial destruction. But then the proposal muddies the waters with the second category which elaborates that genocide can entail "[t]he deliberate creation of conditions of life for such groups as is aimed at their physical destruction in whole or in part." *Id.* The USSR proposal is thus ambiguous and perhaps self-contradictory on whether genocide must be at least aimed at the total destruction of groups.

For his part, Norway's delegate "stressed that his delegation's amendment was similar to the one put forward by the Soviet Union delegation in connexion with the second part of article II. He felt, however, that the words 'in whole or in part' would be better placed in the first sentence of the article." 73d mtg., *supra* note 232, at 92. From this statement it would appear that he understood that the Soviet proposal encompassed intended partial destruction and the Norwegian amendment would codify that idea more clearly.

But the records then note that

> [i]n reply to a question by Mr. Gross (United States of America), Mr. Wikborg (Norway) explained that his amendment was not intended to modify the sense of the second part of Article II. The Norwegian delegation simply wanted to point out, with regard to the first of the acts enumerated, that it was not necessary to kill all the members of a group in order to commit genocide.

Id. at 93. My own interpretation of this statement is that Wikborg was merely clarifying that the ad hoc committee draft on genocide already did not require the actual total destruction of a group, and that the Norwegian proposal focused on the issue of mens rea rather than the actual destruction achieved. Yet it appears that other delegates misunderstood him to be saying that the point of the Norwegian amendment itself was to make to that clear.

For instance, Uruguay's delegate noted that he "did not quite understand the purpose of the amendment submitted by Norway. The intent to destroy a group was implicit in all acts of genocide; it was clear that a whole group could not be destroyed in single operation." *Id.* at 94. And Mr. Reid of New Zealand

> supported the Norwegian amendment but for different reasons from those which had been expressed by the Norwegian representative himself. Mr. Reid considered that the adoption of the words 'in whole or in part' might give rise to the idea that genocide had been committed even where there had been no intention of destroying a whole group.

Id.

single person.[234] The United States, for instance, objected that the French proposal would "cover cases where a single individual was attacked as a member of a group" and urged that "the concept of genocide should not be broadened to that extent."[235] Egypt agreed, reasoning that, "the idea of genocide could hardly be reconciled with the idea of an attack on the life of a single individual" and "felt that the aim of the French amendment would be met if the Committee adopted the Norwegian proposal."[236] Likewise, the U.K. delegate observed "that when a single individual was affected, it was a case of homicide" and that "if it was desired to ensure that cases of partial destruction should also be punished, the amendment proposed by the Norwegian delegation would have to be adopted."[237]

The Norwegian delegate himself then confirmed that "his amendment did not go so far as the one submitted by the French delegation,"[238] after which the French delegate expressed his own agreement "with the views expressed by the representatives of Egypt, the United Kingdom, and the United States of America, and stated that, in a conciliatory spirit, he would withdraw his amendment in favour of the Norwegian amendment."[239]

Taken together, these statements affirm a basic point implied by the text itself: one does not destroy "part" of a group merely by attacking a single person. But the discussion establishes no more than that, leaving open a wide range of possibilities for what might count as an attack on a group "in part." To the extent one might read more into the drafting history, the implication is, if anything, that partial destruction need not involve an especially substantial number of victims.

For instance, after withdrawing his proposal, the French delegate later appeared to minimize the difference between the two proposals when he clarified that "the French delegation had withdrawn only that part of its amendment which was under discussion, namely, the phrase 'or against an individual as a member of a human group.'"[240] "That part of the amendment," France explained, "had been withdrawn in favour of

234. 73d mtg., *supra* note 232, at 91–92. Specifically, the French proposal would have provided that "genocide is an attack on life directed against a human group, or against an individual as a member of a human group, on account of the nationality, race, religion, or opinions of such group or individual." U.N., Gen. Assemb., 6th Comm., Draft Convention (E/794) and Report of the Economic and Social Council, Amendments to the Draft Convention Submitted by France, U.N. Doc. A/C.6/224 (Oct. 8, 1948).

235. 73d mtg., *supra* note 232, at 92.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 93.

240. *Id.* at 95.

the Norwegian amendment, which expressed the same fundamental idea."[241]

An impliedly broad interpretation of "in part" also appears in the discussion of the separate, ultimately unsuccessful, Soviet proposal to replace the "intent to destroy" mens rea standard with language specifying that genocide must be "aimed at the physical destruction" of a protected group.[242] Having understood the Soviet delegate to advocate a purely objective definition of genocide that would encompass actions which merely "result in . . . destruction," the United States objected that "the USSR amendment introduced a fundamental modification to the definition of genocide. It was, indeed, the intent to destroy a group which differentiated the crime of genocide from the crime of simple homicide."[243]

Responding to this statement, the Belgian delegate then clarified that that result did not flow from the Soviet proposal alone. It was in fact the combined effect of the Soviet language on mens rea and the Norwegian language on partial destruction that would merge genocide with homicide:

> He pointed out that, if the Committee were to accept the objective criterion proposed by the USSR, which ruled out the idea of special intent, and it added thereto the Norwegian amendment, which ruled out the idea of the destruction of a whole group, it would arrive at a definition which would make it impossible to draw a distinction between genocide and ordinary murder.[244]

Although this statement does not directly engage the meaning of partial destruction, it implies a broad interpretation of "in part" because that it is the only scenario in which the point is at all persuasive. If partial destruction were instead understood to involve the planned extermination of a very significant portion of a targeted group, then the Norwegian language would do little to collapse the distinction between genocide and ordinary murder. It is only when partial destruction might entail relatively small numbers that Belgium's concern becomes salient.

One might view this statement with some skepticism considering that the Belgian delegate spoke in opposition to both proposed amendments. Not only did Belgium share the majority's concerns about the Soviet mens rea language, it was also one of the only states to speak

241. *Id.*
242. USSR Amendment, *supra* note 233.
243. 73d mtg., *supra* note 232, at 96.
244. *Id.*

out against the Norwegian proposal, which ultimately passed by a vote of 41-8 with two abstentions.[245] It is no great stretch to imagine that a state opposing the very concept of intended partial destruction might also exaggerate the effects of the proposed language.

Yet on this point, the drafting history is just as notable for what it does not show as for what it does. To the extent some states might have embraced a contrary interpretation according to which the concept of partial destruction would entail some high threshold, none of the delegates voiced that understanding. Nowhere in the record, for example, does one find a statement opposing Belgium's slippery slope concern on the ground that Belgium has misunderstood the proposal, and that genocide perpetrated with intent to destroy in part would necessarily have to target a substantial or significant part of the group. Instead, the most one finds are the aforementioned statements opposing the idea that genocide could entail the targeting of only a single person.[246] That point, of course, leaves much for interpretation concerning what might count as destruction "in part."

B. Post-Enactment Authorities

The idea that "in part" includes a substantiality threshold emerges not from the Genocide Convention *travaux* but from subsequent authorities. In his 1978 report, Ruhashyankiko opined that the primary object of the Genocide Convention was to prevent and punish "genocide as an act committed with intent to destroy a large number of persons belonging to the groups specified or the group in its entirety."[247] Writing in 1985, Special Rapporteur Benjamin Whitaker urged "that considerations of both of proportionate scale and of total numbers are relevant," and that "'in part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership."[248] Finally, the 1996 ILC Report opines that "the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[249]

None of these sources provide extensive consideration of the "in part" requirement. Each appears to see a substantiality threshold as being self-evidently implicit in the idea of genocide. Echoing the Sixth Committee's discussion of the French and Norwegian proposals, both the

245. *Id.* at 94–97.
246. *See supra* notes 234–39 and accompanying text.
247. *Ruhashyankiko Report*, *supra* note 186, ¶ 54.
248. *Whitaker Report*, *supra* note 79, ¶ 29.
249. *ILC Report*, *supra* note 112, at 45.

Ruhashyankiko and Whitaker reports invoke the possibility of "individual genocide"—*i.e.*, genocide committed against a single person—to caution against an overly broad interpretation,[250] yet these analyses leave substantial room for interpretation as to the necessary threshold. In particular, both Ruhashyankiko's reference to "a large number of persons"[251] and the ILC's reference to a "substantial part" are rather vague and open ended.[252] By contrast, the Whitaker Report suggests a much more demanding standard when it asks whether "a massacre which affects only one tenth of a larger group of several million people" would amount to genocide.[253] Although the report takes no position on that hypothetical, it appears to treat the example—involving the targeted massacre of hundreds of thousands of people—as a borderline case, on the ground that ten percent may or may not be a large enough percentage to cross the implied significance threshold.[254]

C. The Bosnia Cases

Drawing upon these sources and others, the genocide case law of the last several decades has embraced the idea of a substantiality threshold while providing further guidance on how to assess that standard. The *Krstić* trial judgment, in particular, adds a geographical dimension to the "in part" requirement, reasoning that "intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it."[255] It then explains that, for these purposes, the geographical concentration of victims could outweigh consideration of total numbers:

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250. *Ruhashyankiko Report*, *supra* note 186, ¶ 54; *Whitaker Report*, *supra* note 79, ¶ 29. The discussion of this question is somewhat hard to follow because both reports appear to conflate the question of mens rea with that of actus reus. The quoted sources by Ruhashyankiko on "individual genocide" do not argue that a plan to destroy a single person could reflect intent to destroy a group in part. *See Ruhashyankiko Report*, *supra* note 186, ¶¶ 51–52. Instead, they argue that a person acting with intent to destroy a group in whole or in part (however defined), could become culpable for genocide after killing a single victim in pursuit of that plan. *Id.* The Whitaker Report, aside from noting that "even . . . such a minimalist interpretation requires evidence of more than one victim, since the plural is used consistently throughout Article II (a) to (e)," provides no additional analysis of "individual genocide" but instead merely cites back to the Ruhashyankiko Report. *Whitaker Report*, *supra* note 79, ¶ 29 & n.20.

251. *Ruhashyankiko Report*, *supra* note 186, ¶ 54.

252. *ILC Report*, *supra* note 112, ¶ 8.

253. *Whitaker Report*, *supra* note 79, ¶ 29.

254. *Id.*

255. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ¶ 590 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001),

> A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.[256]

In its decision upholding the trial chamber, the *Krstić* Appeals Chamber pursued a somewhat different analysis. Emphasizing that "the part targeted must be significant enough to have an impact on the group as a whole,"[257] it elaborated that

> [i]n addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. 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 . . . .[258]

Pursuing this line of reasoning, the appeals chamber looked not just to the geographical distinctness of Srebrenica but its importance, considering both the strategic relevance of the enclave to the Bosnian Serb military and the prominent attention it had received from the media and from its designation as a U.N.-designated "safe area."[259] As summarized by the MICT Appeals Chamber in its more recent *Mladić*

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https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF [https://perma.cc/VM58-L6B6].

256. *Id.*

257. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶ 8 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9].

258. *Id.* ¶ 12. Note that this way of characterizing destruction "in part" creates further tension with the idea that genocide is limited to physical destruction, as the question of whether or not a particular community is "emblematic" speaks more to cultural importance than to the extent of physical loss.

259. *Id.* ¶¶ 15–16.

decision, the ICTY case law emerging from *Krstić* presents four "non-exhaustive and non-dispositive" guidelines when determining whether the part of the group targeted is substantial enough."[260] These are: (i) "the numeric size of the targeted part of the group is the necessary starting point, . . . evaluated not only in absolute terms, but also in relation to the overall size of the entire group";[261] (ii) the targeted part's "prominence within the group";[262] (iii) whether the targeted part is "emblematic of the overall group or essential to its survival";[263] and/or (iv) "the area of the perpetrators' activity and control, as well as the possible extent of their reach."[264]

Although these guidelines provide nominally more direction than does the bare text of the Genocide Convention, the application of these standards once again calls into question both the coherence of the "in part" standard and the normative desirability of the tribunals' approach.

To start, there is a logic to the *Krstić* Trial Chamber's point that the annihilation of a geographically distinct entity might be viewed differently than the selective destruction of an equal or greater number of persons spread across a wider geographic area. Implicit in this distinction is the idea that the loss of an entire community is distinct from the loss of individuals belonging to a group. To the extent that the crime of genocide is uniquely focused on the preservation of collective identity and associated cultural traditions, the loss of entire communities directly implicates those interests.

The idea that intent to destroy in part must always target a distinct part of group is more problematic. For example, that conception could exclude cases in which the perpetrators seek to reduce the size of a group by exterminating a substantial portion or even a majority of members but without completely annihilating any particular sub-community.

Yet even with respect to attacks that do target a distinct community, the *Krstić* Trial Chamber's findings are complicated by the fact that Srebrenica did not involve the planned physical annihilation of a complete community. As already discussed, the finding of genocide focused on the combination of killing and displacement. It is consequently harder to

260. *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Judgement, ¶ 758 (June 8, 2021), https://www.irmct.org/sites/default/files/case_documents/210608-appeal-judgement-JUD285R0000638396-mladic-13-56-en.pdf [https://perma.cc/GAE7-QM5Y].

261. *Mladić*, Case No. MICT-13-56-A, ¶ 758 (citing *Krstić*, Case No. IT-98-33-A, ¶ 12).

262. *Id.*

263. *Id.*

264. *Id.*

maintain that the Srebrenica massacre targeted a group for partial destruction in a way that that other atrocities in Bosnia did not.

The *Krstić* Appeals Chamber's focus on the special importance of Srebrenica might seem to provide a further narrowing criterion, but if anything, that line of focus makes it harder to sustain the case law's finding of a Srebrenica-only genocide in Bosnia. Consider, for instance, the court's reflections on Srebrenica's "immense strategic importance to the Bosnian Serb leadership"[265]:

> Without Srebrenica, the ethnically Serb state of Republica 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. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.[266]

The argument, in essence, is that the elimination of the Srebrenica enclave in 1995 was essential to completing the political project of an ethnically cleansed Serb state. But that goal was merely the culmination of a project commenced—and largely completed—in 1992 when Serb forces embarked upon a campaign of mass murder and forced displacement that gave them control over approximately seventy percent of Bosnia's territory.[267] If the significance of the Srebrenica dead lies in the contribution to that project, then surely the murders that came before—collectively involving both larger numbers of victims and far greater territorial control—are even more significant. In a statewide campaign of ethnic cleansing, it makes little sense to say that only the

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265. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf [https://perma.cc/AB5J-TWL9].

266. *Id.*

267. TOAL & DAHLMAN, *supra* note 76, at 3–6.

final enclave—because it is the final enclave—reflects a significant part of the group.

The *Mladić* case, whose final appeal was decided in 2021, exemplifies the problems of this approach to significance.[268] In pursuing its case against the man who commanded the Bosnian Serb forces from 1992 to the end of the war in 1995, the prosecution once again argued that the ethnic cleansing of Bosniaks and Croats in the municipalities outside Srebrenica rose to the level of genocide.[269] And the tribunal once again rejected those arguments, entering a conviction for genocide in Srebrenica but nowhere else.[270] This time, however, the court did not rest its decision solely on the problematic claim that these other crimes merely involved an intent to displace rather than to destroy.

In fact, the tribunal found that some perpetrators (although not the accused) in some municipalities did in fact intend "to destroy the Bosnian Muslims in those . . . [m]unicipalities as a part of the protected group."[271] But the trial chamber nevertheless reasoned that these municipalities were not sufficiently substantial to support a finding of intent to destroy in part: First, "[t]he Bosnian Muslims targeted in each individual municipality formed a relatively small part of the Bosnian-Muslim population in the Bosnian-Serb claimed territory or in Bosnia-Herzegovina as a whole."[272] Second, there was "insufficient evidence indicating why the Bosnian Muslims in each of the above municipalities or the municipalities themselves had a special significance or were emblematic in relation to the protected group as a whole."[273] Critically, the first of these findings was insufficient to distinguish these municipalities from Srebrenica, considering in particular that the pre-war population of just one of those municipalities, Prijedor, included almost 50,000 Bosniaks, a population exceeding that of Srebrenica in 1995.[274] Hence, the key distinction centered on the more intangible claims regarding "special significance" and "emblematic" status.

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268. *Mladić*, Case No. MICT-13-56-A.

269. *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, ¶ 3527 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226.pdf [https://perma.cc/6UMY-X4ET].

270. *Id.* ¶¶ 3226–55.

271. *Id.* ¶ 3526.

272. *Id.* ¶ 3535.

273. *Id.*

274. *Id.* ¶¶ 3534–35, 3551 (finding that the population of Bosnian Muslims in Prijedor in 1991 formed 2.2 percent of Bosnia-Herzegovina's total population, while the population of Bosnian Muslims in Srebrenica in 1995 formed less than two percent of Bosnia-Herzegovina's total population).

At the outset, this distinction highlights the normative problem at the heart of the jurisprudence. The destruction of a 50,000-member community reflects the same part of the targeted group regardless of whether or not the community has special strategic importance or emblematic status. It therefore makes little sense that these considerations should prove so consequential for the question of genocidal intent. Certainly, the conclusion does not flow from the text of the Genocide Convention, which merely requires intent to destroy a group "in whole or in part."[275]

In addition, the tribunal's reasoning begs the question of why the analysis must proceed on a municipality-by-municipality basis, especially when considering the culpability of the Bosnian Serbs' highest level military leader who was charged with respect to multiple communities. To the extent that any particular municipality may not have individually had sufficient significance, surely the combined targeting of multiple communities belonging to the same group, and all in the pursuit of creating a single ethnically cleansed state, carries an aggregate significance not captured when viewing each municipality in isolation. Indeed, it is almost inherent in the concept of genocide that the commission of the crime entails the commission of many individual crimes whose impact on the group is cumulative rather than isolated in nature. The genocidal nature of Auschwitz, for instance, can hardly turn on whether the individual victims of the gas chambers hailed from local communities that were themselves sufficiently important or emblematic. On this point, the *Mladić* Trial Chamber fails at the most fundamental level. The problem is not that the tribunal implausibly denied the connection between these disparate attacks, but that it did not even consider or address the question of how these different attacks contributed to a single whole.

Remarkably, the *Mladić* Appeals Chamber went even further, ruling that a "reasonable trier of fact could also have found that the destruction of the Count 1 Communities, individually as well as cumulatively, was not sufficiently substantial to have an impact on the group's overall survival at the relevant time."[276] The statement is striking because it defers to a finding never made: the trial chamber did not consider the significance of the communities "cumulatively." And to the extent the appeals chambers's fleeting reference to cumulative impact might be interpreted to correct the trial chamber's myopic focus, the result is even

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275. Genocide Convention, *supra* note 33, art. II.

276. *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Judgement, ¶ 589 (June 8, 2021), https://www.irmct.org/sites/default/files/case_documents/210608-appeal-judgement-JUD285R0000638396-mladic-13-56-en.pdf [https://perma.cc/GAE7-QM5Y].

less justifiable. According to the appeals chamber, it would seem, the combined destruction of entire communities totaling over 128,000 people cannot constitute destruction "in part," absent additional special features such as those associated with the Srebrenica community.[277]

The end result evokes a game of telephone, in which the meaning of a phrase or sentence is lost as it passed along through whispers. The drafters of the convention required an intent to destroy "in part." Later authorities understood that language to imply at least a "substantial" part. The judicial decisions have then expanded on the concept of "substantial," looking to both qualitative and quantitative criteria to expand the crime of genocide beyond the stricter understanding of substantiality that appear in some earlier authorities. In so doing, they have arrived at a place of moral arbitrariness: The intended destruction of 100,000 people because of who they are may or may not genocidal intent. It all depends on intangible factors such as the media attention afforded the community and the strategic importance of its location. Only then, can we know whether a group has been destroyed "in part."

V. ETHNIC CLEANSING AS GENOCIDE

The discussion thus far has advanced several claims: that the international case law has nominally committed itself to a strict and normatively inadequate approach to defining genocide; that this approach rests in part on a misreading of the Genocide Convention's drafting history; that the case law has failed to adhere to this approach in the actual disposition of cases; and that all of this is a problem.

This Article has also presented the building blocks for an alternative, more straightforward approach according to which liability for genocide arises when perpetrators target protected groups for mass killing even if the ultimate goal is to displace rather than physically harm the larger group. My analysis of the words "intent," "destroy," and "in part"

277. *See id.* ¶ 759 (N'Gum & Panton, JJ., partially dissenting) ("In relation to the Count 1 Communities, the Trial Chamber noted that Bosnian Muslims constituted 47 per cent of the population in Sanski Most (amounting to 28,136 people), 51 per cent of the population in Foča (amounting to 20,790 people), 30 per cent of the population of Kotor Varoš (amounting to 11,090 people), 55 per cent of the population in Vlasenica (amounting to 18,727 people), and 44 per cent of the population in Prijedor (amounting to 49,700 people)." (citing *Mladić*, Case No. IT-09-92-T, ¶¶ 3530–34)).

Although the majority of these group members were forcibly displaced rather than murdered, neither the trial chamber's nor the appeals chamber's analysis turns on this question. Even the murder of all these persons with genocidal intent could not amount to genocide if the communities themselves were not—as the trial chamber held—a sufficiently substantial part of the larger Bosniak group. *Mladić*, Case No. IT-09-92-T, ¶¶ 3527–36.

provides both complementary and alternative paths to this conclusion. For example, the finding of genocide at Srebrenica may rest on a determination that the perpetrators targeted the victims for murder with awareness of the destructive consequences that the combination of murder, displacement, and other crimes would have for the community as a whole. This interpretation rests on a more expansive understanding of the word "destroy" than is captured by ILC's account of genocidal destruction necessarily being physical or biological in nature.[278] It also includes awareness of destructive consequences as sufficient for genocidal intent, provided the perpetrators have actually targeted a protected group for mass killing.[279]

Alternatively, one might describe the same events as genocide on the ground that the physical destruction of the murdered victims itself entailed the destruction of a group "in part." Under this interpretation, the idea of destruction "in part" involves a threshold of significance that will generally be met by mass killings that target a group.[280] This approach leads to same conclusion while permitting a narrower understand of the words "intent" and "destroy."

This way of thinking about genocidal intent also has direct implications for other atrocities. Consider the case of Myanmar, which currently stands accused of genocide against the Rohingya people in a case that has reached the International Court of Justice.[281] In a speech announcing the U.S. State Department's formal finding of genocide, Secretary of State Anthony Blinken observed that attacks in 2017 had "killed more than 9,000 Rohingya, and forced more than 740,000 to seek refuge in Bangladesh,"[282] a tally that added to the 100,000 that had fled the year before.[283] Seen from the perspective of existing precedents, these facts present a hard case. On the one hand, one might argue that these events suggest an intent to displace rather than destroy. There is language in the cases to back up that conclusion.[284] But then there is also the precedent of Srebrenica, which provides analogical support for a finding of genocide based on a combination of killing and forcible displacement.[285] And then there are other vexing questions. For example, could a court characterize the Myanmar atrocities as a single genocide? Or, would be it necessary to conduct a locality-by-locality analysis, as in

278. *See supra* Part III.
279. *See supra* Part II.
280. *See supra* Part IV.
281. *See supra* note 25 and accompanying text.
282. Sec'y of State on Genocide in Burma, *supra* note 23.
283. *Id.*
284. *See supra* notes 104, 220 and accompanying text.
285. *See supra* notes 204–14 and accompanying text.

the *Mladić* trial judgment, to determine whether the perpetrators targeted any especially emblematic communities—suggesting that some of the killing might have been genocidal while others not?

By contrast, this Article's proposed approach offers a simpler explanation: the Myanmar military attacked the Rohingya people as a whole in a campaign of ethnic cleansing that that involved mass killings. The proper word for those crimes is "genocide."

This Part builds upon the preceding discussion by further considering the normative implications of this approach. This Article does not claim that there is a single "right" approach to defining the crime of genocide, nor does it claim that any approach can avoid all interpretive puzzles of the kind explored here. Without attempting a comprehensive normative defense, this Part considers and addresses some predictable objections that might oppose understanding the crime of genocide in the way proposed here. It also advances reasons why the proposed approach is preferable to the status quo.

One commonly raised concern focuses on the risk of diluting the meaning of genocide. Many accounts of genocide highlight the special nature of the crime and express concern at the broadening effect of various interpretive moves. One might protest, for example, that atrocities such as the Holocaust occupy a unique place in history, and that a more expansive definition of genocide threatens to collapse the distinction between the Holocaust and other atrocities that are qualitatively quite different.[286] Or, relatedly, one might object that interpreting genocide in this way disturbs an implicit hierarchy of international crimes, eroding the difference between genocide and other international offenses such as crimes against humanity.[287]

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286. Schabas makes this point with respect to the Srebrenica massacres. *See* Schabas, *supra* note 88, at 47 ("The classic genocides of the twentieth century, those of European Jews and Rwandan Tutsis, are distinguished by the insistence upon killing the women and children, precisely to ensure that the group is effectively destroyed. . . . As 'crimes against humanity,' the atrocities of July 1995 in Srebrenica surely qualify. But categorizing them as 'genocide' seems to distort the definition unreasonably."). *See also* Southwick, *supra* note 88, at 217 ("[B]road applicability of the term genocide may place countries with larger scales of mass violence (or the threat of it) at a disadvantage, as it risks undervaluing the lives lost in those countries. It gives the impression that the loss of 8,000 lives (as in Srebrenica) is similar in gravity to the loss of 800,000 (as in Rwanda).").

287. *See* Kreß, *supra* note 55, at 500 ("The consequence that only very few atrocities will qualify as genocide under international criminal law is not only acceptable, it is one to be welcomed. Within the emerging system of crimes under international law, the crime of genocide 'belongs at the apex of the pyramid'. There is no need to further expand the crime of genocide into the realm of crimes against humanity. Any such move would not only weaken the 'terrible stigma associated with the crime', it would also add another difficulty to the already thorny area of *concursus delictorum*." (quoting WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 9 (2000))));

There is a certain degree of circularity to such arguments as they inevitably presuppose the answer to the question they seek to answer. One must begin with some sense of what genocide is before worrying that its meaning has become diluted. And this fact again returns us to the core problem. Genocide cannot mean anything whatsoever, but both the word itself and its formal legal definition are imprecise and leave significant room for interpretation. As with all legal labels, any definition will necessarily group together events of differing nature and gravity while drawing lines that may seem arbitrary. Some worry about the genocide label grouping together dissimilar events,[288] while others resist a rigid distinction between genocide and ethnic cleansing precisely in order to avoid artificial divisions.[289]

The interpretative approach explored by this Article presents a closer fit to the judicial finding of genocide Srebrenica than do the general summaries of the law that international judges have purported to follow. Thus, even if dilution is a serious concern, it is one already presented by existing practice. One might disagree with this trend and attempt to recapture some version of the offense that adheres to a narrower view of the elements. For example, one might insist on a more rigorous understanding of genocidal purpose or destruction. The preceding analysis explores some conceptual challenges with such a project, and

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Michael J. Kelly, "*Genocide"—The Power of a Label*, 40 CASE W. RSRV. J. INT'L L. 147, 149 (2008) ("On the question of definitional content, concerns coalesce around expanding or contracting the definition of genocide. If it is expanded to include cultural annihilation or political repression, then the crime becomes more akin to a crime against humanity—the category of internationally criminalized conduct from which it originally sprang. Purists want to keep genocide limited to the most extreme atrocities and retain it as a distinct crime." (footnote omitted)). *See also* Southwick, *supra* note 88, at 216 ("Without differentiation between genocide and ethnic cleansing, or between genocide and other forms of killing, the risk of distortion and relativism emerge, creating difficulties in the adherence to and enforcement of international humanitarian law.").

288. *See supra* note 286 and accompanying text. *See also* BEĆIREVIĆ, *supra* note 218, at 4 (surveying the "highly polemical" debate "between scholars who advocate for exclusivity of the Holocaust and those who argue that other cases of mass violence also fit the definition of genocide").

289. *See, e.g.*, Phillipe Sands, *What the Inventor of the Word 'Genocide' Might Have Said About Putin's War*, N.Y. TIMES, https://www.nytimes.com/2022/04/28/opinion/biden-putin-genocide.html (Apr. 28, 2022) (arguing that international courts have set an "impossibly high bar," and that "this has given rise to accusations of inconsistency and of putting the legal conception of genocide on a pedestal that Dr. Lemkin never intended"). In a recent book on genocide, Dirk Moses goes further, arguing that even the distinction between genocide and the civilian casualties that commonly result from military actions, such as bombing and drone strikes, is an artificial one because it obscures the ways in which all of these contexts devalue human life in the interest of "permanent security." A. DIRK MOSES, THE PROBLEM OF GENOCIDE: PERMANENT SECURITY AND THE LANGUAGE OF TRANSGRESSION (2021).

the failure of the case law to adhere to that approach may itself serve as a cautionary tale that the lines are not easily drawn.

Another reason not to draw such lines is that doing so is not necessary for—and may even contradict—a compelling normative account that captures the harms unique to the crime of genocide. While much may be elusive about the offense of genocide, the concept has rested from its start on the core understanding that genocide involves an attack not simply against a collection of individuals, but against the group to which the victims belong.[290] In its seminal resolution on the crime of genocide, the U.N. General Assembly identified one type of harm associated with the destruction groups, namely that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."[291] In her own influential account, philosopher Claudia Card has focused on a different, victim-centered type of harm: "It is social death," she argues, "that enables us to distinguish the peculiar evil of genocide from the evils of other mass murders."[292] As she elaborates, "[s]ocial vitality exists through relationships, contemporary and intergenerational, that create an identity that gives meaning to a life. Major loss of social vitality is a loss of identity and consequently a serious loss of meaning for one's existence."[293]

These are the kinds of unique harms that predictably accompany the mass killing of individuals because of their group identity, especially when mass murder takes place alongside other attacks on group identity. Critically, inflicting these harms does not require physically eradicating entire groups or totally destroying cultural traditions. As Card observes with respect to the Holocaust, the question "should be not simply whether the traditions survived but whether individual Jewish victims were able to sustain their connections to those traditions."[294] She elaborates that, although

> [m]any Jews . . . were able to maintain Jewish traditions, . . . many survivors were unable to do so. Some found family members after the war or created new families. Many did not. Many lost entire families, their entire villages, and the way of

290. LEMKIN, *supra* note 127, at 79 ("Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of a national group."); Kreß, *supra* note 55, at 499 (referencing Lemkin's "almost canonical formulation").

291. G.A. Res. 96 (I), *supra* note 36, at 189.

292. Card, *supra* note 167, at 63.

293. *Id.*

294. *Id.* at 75.

> life embodied in the *shtetl* (eastern European village). Some could not produce more children because of medical experiments performed on them in the camps. Many survivors lost access to social memories embodied in such cultural institutions as libraries and synagogues.[295]

As these examples illustrate, the loss of culture and identity can take place at various scales, and, at the individual level, to varying degrees. In situations where the targeted mass murder of group members is likely to produce these types of harms, it makes sense to call that crime genocide.

Some accounts, by contrast, have invoked more practical concerns to defend a narrow interpretation of genocide. Alex De Waal, for instance, warns that

> [t]he danger of the word "genocide" is that it can slide from its wider, legally specific meaning, to a branding of the perpetrators' group as collectively evil. In turn, this narrows the options for responding. Having labeled a group or a government as "genocidal," it is difficult to make the case that a political compromise needs to be found with them."[296]

Katherine Southwick, alternatively, highlights the duty to prevent and punish genocide, and worries that "applicability of the term 'genocide' to a wide variety of events may discourage contracting states' willingness to enforce the Genocide Convention."[297]

De Waal's point raises an empirical question: How much does the language of genocide threaten these negative effects in a way that other ways of describing atrocity do not? While the theoretical concern may exist, it lacks purchase in a world that has seen the ICC issue arrest warrants against sitting heads of state such as Sudan's Omar al-Bashir and Russia's Vladimir Putin.[298] To the extent that international criminal

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295. *Id.*

296. Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide*, 20 HARV. HUM. RTS. J. 25, 31 (2007).

297. Southwick, *supra* note 88, at 217.

298. *Bashir I*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF [https://perma.cc/FX59-QD8L]; *Bashir II*, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF [https://perma.cc/G6VW-TRMV]. *See also* Press Release, Int'l Crim. Ct., Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023) https://www.icc-

justice might threaten conflict, the very existence of such arrest warrants must matter far more than the particular labels used to describe the crimes. As for Southwick's concern about discouraging enforcement, the best supporting example is a shameful one: the Clinton Administration's initial refusal to label the Rwandan genocide as such for fear that doing so might create pressure for military intervention.[299] Since then, however, events have followed an opposite path. On the one hand, the recognition of an international responsibility to equally protect against genocide, war crimes, ethnic cleansing, and crimes against humanity renders the distinction between genocide and other crimes less critical from an interventionist perspective.[300] And then on the other hand, subsequent U.S. administrations have reached formal findings of genocide in several other contexts without accompanying military intervention.[301]

Another critique might focus on the indeterminacy of line drawing demanded by a broader interpretation of genocide. This Article has criticized various doctrinal rules for drawing arbitrary distinctions, but any interpretation will invariably impose imprecise lines. For instance, the interpretation set forth here would continue to distinguish between mass killings amounting to genocide and isolated, smaller scale events that do not. But there will of course always be borderline cases that resist clear distinctions.

Some degree of indeterminacy, of course, is an inevitable and pervasive aspect of legal interpretation, including with respect to genocide. This Article's critique of various international legal authorities focuses not simply on the fact of indeterminacy but on the arbitrary, even impenetrable, distinctions involved. For instance, Part II observes that certain formulations of the intent standard require determinations that would prove almost impossible to make in many cases and would also exclude seemingly paradigmatic cases such as the Herero genocide.[302]

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cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and [https://perma.cc/P7FC-Q8GM].

299. *See, e.g.*, SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 358–64 (Basic Books, 2013); Douglas Jehl, *Officials Told To Avoid Calling Rwanda Killings 'Genocide*,*'* N.Y. TIMES, June 10, 1994, at A8, https://www.nytimes.com/1994/06/10/world/officials-told-to-avoid-calling-rwanda-killings-genocide.html.

300. G.A. Res. 60/1, ¶ 139 (Oct. 24, 2005) (stating that "[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the [U.N.] Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity").

301. *See supra* notes 23–24 and accompanying text.

302. *See supra* notes 77–82 and accompanying text.

Part IV also critiques the judicial application of the "in whole or in part" on the ground that a finding of genocide should not turn on whether or not a particular victim community happens to be especially emblematic or not. And this Article argues that none of these distinctions flow from the text or history of the Genocide Convention.

By contrast, the idea that genocide must involve a certain scale of intended or actual destruction is already largely implicit in the idea that genocide involves an attack against a group as opposed to isolated individuals.[303] In particular, the idea that genocide involves intent to destroy a group "in part" necessitates that determinations of genocide will, in some cases, come down to indeterminate assessments of what constitutes a sufficient part. Such determinations are already familiar to other parts international criminal law. For instance, the primary criterion that distinguishes crimes against humanity, an international crime, from ordinary domestic offenses, is that crimes against humanity involve a "widespread or systematic attack directed against any civilian population."[304] Applying this standard will necessarily hinge, in some cases, on whether an attack has sufficient scale to be considered "widespread." But even in borderline cases, the reason why a case is borderline makes a difference. To say that a massacre lacked sufficient scale to qualify as genocide (or, for that matter, as a "crime against humanity") is the kind of a conclusion that may provoke disagreement without calling into question the basic point that considerations of scale are both necessary and inevitably imprecise. To say that a massacre did not qualify as genocide because the targeted community lacked strategic value or adequate media attention,[305] or because the perpetrator did not conceptualize the group in the right way,[306] is another matter entirely.

This last point highlights a key normative advantage of interpreting the Genocide Convention along these lines. The question of genocide is one that often receives special attention in public discourse, and the significance of the genocide label exists primarily at that expressive level rather than at the level of formal legal consequences.[307] For that reason especially, it is vital that genocide be defined in a way that is publicly accessible so that people might understand in plain language the reasons why a particular atrocity does or does not receive the label. The idea that mass killing on account of group identity amounts to genocide is one that is both intuitive and relatively straightforward. And the application of this standard will help predictably turn on identifiable facts.

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303. *See supra* notes 290–91 and accompanying text.
304. Rome Statute, *supra* note 29, art. 7(1).
305. See *supra* notes 258–77 and accompanying text.
306. *See supra* Section II.D.
307. *See supra* notes 29–32.

By contrast, the current state of affairs presents a more pernicious set of dynamics, one in which key questions require specialized legal knowledge, and in which courts have failed to articulate and apply a consistent set of principles or provide a coherent moral account. The result is a world in which the genocide label receives inordinate attention, yet no one really knows what it means. As the example of Bosnia grimly illustrates, this world is a breeding ground for atrocity denial, and specifically a form of denial that is immune to facts because deniers have plenty to work with within the realm of legal characterization alone.[308] It is easy to deny genocide when no one knows what it is or when the required assessment is simply too difficult to explain. And in this work, international legal authorities have become unwitting accomplices.

CONCLUSION

The emergence of genocide as an international crime after World War II has provided a powerful language to remember and condemn mass atrocity. But the success of this legal project has been a mixed one as the law of genocide has proven to be a deeply contested space, one in which genocide/not genocide debates have assumed outsized importance in public discourse, undermining the very goals that the codification of international crimes ostensibly serves to advance.

This Article has interrogated the role of international law in this state of affairs, and it has advanced several claims. In particular, it argues that international legal authorities have ostensibly settled on an undertheorized and normatively problematic account of genocidal intent that rests upon a misreading of the Genocide Convention's text and drafting history. It has also defended an alternate approach to genocidal intent, one that is in fact more consistent with the actual reasoning by which international courts have consistently reached a finding of genocide at Srebrenica.

The complexity of the debate over genocide may provoke one to question the continued value of a legal prohibition that has little practical role to play within the system of international criminal law. Should it really matter, for instance, whether the Srebrenica massacre is condemned as genocide, or "merely" as the crime against humanity of extermination? But, as the experience in Bosnia and elsewhere has repeatedly demonstrated, the question is indeed one of important social and political consequence. Future cases—including those currently pending before the ICJ[309]—present an opportunity to develop and clarify

308. *See supra* notes 6–11 and accompanying text.

309. *See supra* notes 25–28 and accompanying text.

the concept of genocide. This Article marks one contribution to that project.

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