

# NOTES

## IN WHOLE OR IN PART: GROUP RIGHTS, THE INTENT ELEMENT OF GENOCIDE, AND THE “QUANTITATIVE CRITERION”

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*In the 1990s, in the wake of large-scale massacres, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). The statutes of these courts adopted the definition of genocide from the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which requires an “intent [by the accused] to destroy, in whole or in part, a national, ethnical, racial or religious group” to prove genocide. In practice, the tribunals have struggled to apply the intent requirement. The ICTR, in its first genocide conviction, ruled that intent may be inferred from certain presumptions of fact, including the general context of the acts in question and the nature and scale of atrocities. Later, the ICTY applied a “quantitative criterion” by ruling that any inference of genocidal intent requires that the accused’s actions affect a great number of people. In this Note, David Alonzo-Maizlish argues that, as a threshold for genocidal intent, the “quantitative criterion” contradicts the object and purpose of the definition of genocide in the Genocide Convention. By reviewing the theory and history of group rights and the Genocide Convention, Alonzo-Maizlish demonstrates that the quantitative element is incompatible with the group-held right to exist on which the concept of genocide is premised. He concludes that the “quantitative criterion” is an obstacle to the development of a meaningful intent standard.*

### INTRODUCTION

On December 9, 1948, the General Assembly of the United Nations adopted the Convention on the Prevention and Punishment of

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the Crime of Genocide (Genocide Convention or Convention).<sup>1</sup> The Convention defines genocide,<sup>2</sup> requires states to prevent and punish genocidal acts,<sup>3</sup> and contemplates both domestic and international jurisdiction over the crime.<sup>4</sup> However, for forty-two years after the Convention entered into force, the world community failed to create an international tribunal with jurisdiction over the crime of genocide.<sup>5</sup>

<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention or Convention]. The Convention entered into force on January 12, 1951, and has been joined by 133 parties. For ratification and reservation status, see United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, at <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm> (last modified Oct. 9, 2001). For drafting history of the Genocide Convention and commentary on each article, see generally William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2000).

<sup>2</sup> See Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280; see also *infra* notes 8-9 and accompanying text.

<sup>3</sup> See *id.* art. 1, 102 Stat. at 3045-46, 78 U.N.T.S. at 280 ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."); *id.* art. 5, 102 Stat. at 3045-46, 78 U.N.T.S. at 280 ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide . . .").

<sup>4</sup> *Id.* art. 6, 102 Stat. at 3045-46, 78 U.N.T.S. at 280-81 ("Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."). The General Assembly adopted the Convention alongside a resolution calling for an international criminal court. See 2 United Nations Resolutions 238, 241 (Dusan J. Djonovich ed., 1973) (reprinting Study by the International Law Commission of the Question of an International Criminal Jurisdiction, G.A. Res. 260 (III) (B) (1948)).

<sup>5</sup> Article 1 of the Genocide Convention established genocide as a discrete and justiciable crime "under international law" in the immediate memory of World War II. Genocide Convention, *supra* note 1, art. 1, 102 Stat. at 3045-46, 78 U.N.T.S. at 280. Although there were no international tribunals with criminal jurisdiction over genocide, there were important domestic trials concerning genocide during this period. See, e.g., *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985) (finding Demjanjuk extraditable to Israel for crimes committed during World War II); *Cr.A. 336/61, Att'y Gen. v. Eichmann*, 16 P.D. 2033, in 36 I.L.R. 277 (convicting Eichmann for crimes against "the Jewish people").

Prior to adoption of the Convention, the Allies prosecuted several defendants at Nuremberg for what was undeniably genocide, a crime against humanity. *France et al. v. Goering et al.*, in 22 Trial of Major War Criminals Before the International Military Tribunal 527 (photo. reprint 1995) (1948) (convicting Goering because, *inter alia*, he persecuted Jews in Germany and in other countries, sought Jewish property to force Jews out of European economic life, and directed slave labor program). At the outset of this case, widely referred to as the "Trial of the Major War Criminals," the prosecutor included within the indictment the charge of "deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles, and Gypsies and others." International Military Tribunal Indictment No. 1, in 1 Trial of Major War Criminals Before the International Military Tribunal, *supra*, at 43-44. However, the court could not consider genocide as an independent charge without running afoul of the prohibition against *ex post*

During the 1990s, the United Nations Security Council established two international tribunals with jurisdiction over genocide: the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>6</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>7</sup>

*facto* laws. Similarly, the statute of the International Military Tribunal did not include "genocide." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 286-88. For an overview of the relationship between genocide and the experience of Nuremberg, see Schabas, *supra* note 1, at 30-50. After the Trial of the Major War Criminals, the United States Military Tribunal charged and convicted Nazi war criminals with genocide under Control Council Law No. 10. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), in 1 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at xvi-xix (photo. reprint 1997) (1949) [hereinafter Trials of War Criminals]. For examples of genocide cases prosecuted under Control Council Law No. 10, see United States v. Alstötter et al. (Dec. 4, 1967) (Mil. Trib. III 1951), in 3 Trials of War Criminals, *supra*, at 1128 (Justice Case) (finding that defendant Ernst Lautz had participated in war crimes and crimes against humanity); United States v. Greifelt et al. (Mar. 10, 1948), in 13 Law Reports of Trials of War Criminals 1, 1-3, 28 (RUSHA Case) (charging and convicting defendants with "systematic programme of genocide"); see generally Roger S. Clark, Nuremberg and Tokyo in Contemporary Perspective, in The Law of War Crimes: National and International Approaches 171-87 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997) (describing legacy of Nuremberg and Tokyo as cementing in legal consciousness proposition that certain crimes are international).

<sup>6</sup> S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., Supp. for Jan.-Mar. 1993, at 2, U.N. Doc. S/RES/808 (1993) (establishing International Criminal Tribunal for Former Yugoslavia); Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 [hereinafter ICTY Statute], reprinted in 32 I.L.M. 1159 (1993), available at [http://www.un.org/icty/basic/statut/statute\\_con.htm](http://www.un.org/icty/basic/statut/statute_con.htm).

<sup>7</sup> Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), <http://www.icttr.org/wwwroot/ENGLISH/Resolutions/955e.htm> (establishing International Criminal Tribunal for Rwanda). Compare Statute of the International Tribunal for Rwanda, *supra*, with Rome Statute for the International Criminal Court, U.N. Doc. A/Conf.183/9 (1998) (establishing International Criminal Court). For analysis of important differences between the Tribunals and the Rome Statute for the International Criminal Court (ICC Statute), see Otto Triffterer et al., Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Otto Triffterer ed., 1999). Although the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991 (ICTY Statute) predates the Statute of the International Tribunal for Rwanda (ICTR Statute) by one year, the first complete prosecution for genocide under these statutes was in front of the International Criminal Tribunal for Rwanda (ICTR). See Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T (Int'l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998), <http://www.icttr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>. Shortly thereafter, the ICTR sentenced former Rwandan Prime Minister Jean Kambanda to life in prison for, *inter alia*, genocide following the latter's guilty plea. Prosecutor v. Kambanda, Judgment and Sentence, Case No. ICTR-97-23-S (Int'l Crim. Trib. Rwanda, Trial Chamber, Sept. 4, 1998), <http://www.icttr.org/wwwroot/ENGLISH/cases/Kambanda/judgement/kambanda.html>.

In their respective statutes, both tribunals define genocide with language taken verbatim from the Convention.<sup>8</sup> The definition of genocide is straightforward. Article 2 of the Convention states:

[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.<sup>9</sup>

Each tribunal has struggled to apply the law of genocide.<sup>10</sup> In order to convict, the statutes require that the accused have "intent to

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<sup>8</sup> Compare Statute of the International Tribunal for Rwanda, *supra* note 7, art. 2, and ICTY Statute, *supra* note 6, art. 4, reprinted in 32 I.L.M. at 1172-73, with Genocide Convention, *supra* note 1, arts. 2, 3(b), 102 Stat. at 3045, 78 U.N.T.S. at 280, and Rome Statute for the International Criminal Court, *supra* note 7, art. 6. Hereinafter this Note utilizes "the Statute" or "the genocide statute" when referring to the common language of the tribunals.

<sup>9</sup> Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280. The Convention distinguishes between the prohibited acts of Article 2 and forms of liability in Article 3, which establishes that "[t]he following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide." *Id.* art. 3.

<sup>10</sup> Because genocide prosecutions before international tribunals are such a recent development, there have been relatively few cases. As of this writing, the ICTR has convicted five defendants for genocide after full trial. See *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13-T (Int'l Crim. Trib. Rwanda, Trial Chamber, Jan. 27, 2000), <http://www.ictr.org/wwwroot/ENGLISH/cases/Musema/judgement/index.htm>; *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3-T (Int'l Crim. Trib. Rwanda, Trial Chamber, Dec. 6, 1999), <http://www.ictr.org/wwwroot/ENGLISH/cases/Rutaganda/judgement/index.htm>; *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T (Int'l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999), <http://www.ictr.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>; *Akayesu*, Judgment, ICTR-96-4-T. The ICTR also has sentenced three defendants for genocide after accepting guilty pleas. See *Prosecutor v. Ruggiu*, Judgment and Sentence, Case No. ICTR-97-32-I (Int'l Crim. Trib. Rwanda, Trial Chamber I, June 1, 2000), <http://www.ictr.org/wwwroot/ENGLISH/cases/Ruggiu/judgement/rug010600.htm>; *Prosecutor v. Serushago*, Judgment, Case No. ICTR-98-39-S (Int'l Crim. Trib. Rwanda, Trial Chamber, Feb. 5, 1999), <http://www.ictr.org/wwwroot/ENGLISH/cases/Serushago/judgement/os1.htm>; *Kambanda*, Judgment and Sentence, ICTR-97-23-S. There has been one acquittal for genocide at the ICTR. *Prosecutor v. Bagilishema*, Judgment and Sentence, Case No. ICTR-95-1A-T (Int'l Crim. Trib. Rwanda, Trial Chamber, June 7, 2001), <http://www.ictr.org/wwwroot/ENGLISH/cases/Bagilishema/judgement.htm>. There are many other current indictments for genocide. See International Criminal Tribunal for Rwanda, Cases in Progress, at <http://www.ictr.org/wwwroot/ENGLISH/cases/inprogress.htm> (last visited July 17, 2002).

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has had fewer cases and, as of this writing, only one conviction for genocide. On August 2, 2001, Radislav

destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>11</sup> The courts have demonstrated confusion over the proper proof necessary for this “intent element.”<sup>12</sup> The first international conviction for genocide occurred in the *Akayesu* case at the ICTR in 1998.<sup>13</sup> In *Akayesu* the ICTR announced, “in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.”<sup>14</sup> Both tribunals have affirmed this holding but have not clarified the evidentiary requirements neces-

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Krstic became the first defendant to be convicted for genocide by the ICTY. Prosecutor v. Krstic, Judgment, Case No. IT-98-33-T (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>. There also have been two controversial acquittals, see Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>; Prosecutor v. Jelusic, Judgment, Case No. IT-95-10-T (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>; *infra* Parts II.B, II.C. There are presently five cases of genocide concerning ten defendants at various stages in proceedings: Blagojevic, Obrenovic, Jokic, and Nikolic (for complicity); Stakic; Krajisnic and Plavsic; Brdjanin and Talic; and, of course, Milosevic. See Amended Joinder Indictment, Prosecutor v. Blagojevic et al., Case No. IT-02-60-PT (Int'l Crim. Trib. Yugoslavia, May 27, 2002), <http://www.un.org/icty/indictment/english/nik-ai020527e.htm>; Fourth Amended Indictment, Prosecutor v. Stakic, Case No. IT-97-24-PT (Int'l Crim. Trib. Yugoslavia, Apr. 10, 2002), <http://www.un.org/icty/indictment/english/sta-4ai020410e.htm>; Amended Consolidated Indictment, Prosecutor v. Krajisnik & Plavsic, Case No. IT-00-39 & 40-PT (Int'l Crim. Trib. Yugoslavia, Mar. 7, 2002), <http://www.un.org/icty/indictment/english/kra-cai020307e.htm>; Corrected Version of Fourth Amended Indictment, Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-PT (Int'l Crim. Trib. Yugoslavia, Dec. 10, 2001), <http://www.un.org/icty/indictment/english/brd-4ai011210e.htm>; Indictment, Prosecutor v. Milosevic, Case No. IT-01-50-I (Int'l Crim. Trib. Yugoslavia, Oct. 8, 2001), <http://www.un.org/icty/indictment/english/mil-ii011008e.htm>; see also Indictment, Prosecutor v. Milosevic, Case No. IT-01-51-I (Int'l Crim. Trib. Yugoslavia, Nov. 22, 2001), <http://www.un.org/icty/indictment/english/mil-ii011122e.htm>; Prosecutor v. Milosevic et al., Case No. IT-99-37-PT (Int'l Crim. Trib. Yugoslavia, Oct. 16, 2001), <http://www.un.org/icty/indictment/english/mil-2ai011029e.htm>. Several important indictments for genocide have not been served yet on defendants currently at large, most notably: Meakic, Karadzic, and Mladic. See Indictment, Prosecutor v. Karadzic and Mladic, Case No. IT-95-5-I (Int'l Crim. Trib. Yugoslavia, July 1995), <http://www.un.org/icty/indictment/english/kar-ii950724e.htm>; Amended Indictment, Prosecutor v. Meakic et al., Case No. IT-95-4-I (Int'l Crim. Trib. Yugoslavia, July 18, 2001), <http://www.un.org/icty/indictment/english/mea-ai010718e.htm>.

<sup>11</sup> Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280; Statute of the International Tribunal for Rwanda, *supra* note 7, art. 2; ICTY Statute, *supra* note 6, art. 4, reprinted in 32 I.L.M. at 1172-73.

<sup>12</sup> The *mens rea* for genocide most likely includes both the intent element and a knowledge element. See Finalized Draft Text of the Elements of Crimes, art. 6, in Preparatory Comm'n for the Int'l Criminal Court, Report of the Preparatory Commission for the International Criminal Court, addendum pt. 2, U.N. Doc. PCNICC/2000/1/Add.2 (2000), [http://www.un.org/law/icc/statute/elements/english/1\\_add2e.pdf#page=bookmarks](http://www.un.org/law/icc/statute/elements/english/1_add2e.pdf#page=bookmarks); M. Cherif Bassiouni, The Law of the International Criminal Tribunal for the Former Yugoslavia 524 (1996) (explaining differences between intent and motive as element of genocide); Schabas, *supra* note 1, at 207 (discussing role of knowledge in mental element of offense).

<sup>13</sup> *Akayesu*, Judgment, ICTR-96-4-T.

<sup>14</sup> *Id.* ¶ 523.

sary to make such an inference.<sup>15</sup> Recently, two cases from the ICTY have required that the alleged acts for which a defendant stands trial affect a “reasonably substantial number of the group relative to its total population”<sup>16</sup> prior to making any inference of the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.”<sup>17</sup> In *Sikirica*, the ICTY referred to this as a “quantitative criterion.”<sup>18</sup>

As a threshold requirement, the “quantitative criterion”<sup>19</sup> is incompatible with the group-held right to exist on which the concept of

<sup>15</sup> The ICTR has affirmed the inferability of intent. See *Musema*, Judgment, ICTR-96-13-T ¶¶ 153, 166; *Rutaganda*, Judgment, ICTR-96-3-T ¶¶ 48, 61; *Kayishema and Ruzindana*, Judgment, ICTR-95-1-T ¶¶ 93, 531-45. The ICTY also affirmed *Akayesu* in *Sikirica*, Judgment, IT-95-8-T ¶ 61. The Appeals Chamber common to both the ICTR and ICTY upheld the inferability of intent in *Prosecutor v. Jelusic*, Appeal, Case No. IT-95-10-A ¶ 47 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>. See also Schabas, *supra* note 1, at 222-25.

<sup>16</sup> *Sikirica*, Judgment, IT-95-8-T ¶ 66. The term “substantial” reproduces the language of the controversial understanding announced by the United States Senate Foreign Relations Committee pursuant to U.S. ratification of the Genocide Convention:

That the U.S. Government understands and construes the words “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such,” appearing in article II to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such manner as to affect a substantial part of the group concerned.

*S. Exec. Rep. No. 94-23*, at 1-2, 6, 18 (1976). See generally Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 Am. J. Int’l L. 369 (1984) (describing complicated history of ratification in United States).

The ratification history in the United States provides context necessary for understanding the school of thought that led to the ICTY’s holdings. President Truman signed the Genocide Convention on December 11, 1948. The Senate ratified it almost forty years later on November 25, 1988, subject to two reservations, five understandings, and a declaration. See 132 Cong. Rec. 2349-50 (1986) (reproducing text of U.S. reservations, understandings, and declarations); see also Restatement (Third) of Foreign Relations Law § 303 cmt. d (1986) (outlining difference between reservations and understandings, asserting that “[t]he Senate often has given its consent subject to conditions. Sometimes the Senate consents only on the basis of a particular understanding of the meaning of the treaty, or on condition that the United States obtain a modification of its terms or enter a reservation to it”); *id.* § 314 & cmts. a, d (1986) (describing difference between reservations and understandings).

Several states party to the Convention have objected to the U.S. reservations, notably Denmark, Estonia, Finland, Greece, Ireland, Italy, Mexico, the Netherlands, Norway, Sweden, and the United Kingdom. Schabas, *supra* note 1, at 349. For the background rules on treaty reservations and objections, see Vienna Convention on the Law of Treaties, May 23, 1969, arts. 19-25, 1155 U.N.T.S. 331, 336-39.

<sup>17</sup> *Sikirica*, Judgment, IT-95-8-T ¶¶ 57, 67-75 (analyzing genocidal intent of defendant under ICTY Statute, *supra* note 6, art. 4, reprinted in 32 I.L.M. at 1172-73); see also *Prosecutor v. Jelusic*, Judgment, IT-95-10-T ¶¶ 66-77 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999) (same), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>; *infra* Parts II.B, II.C.

<sup>18</sup> *Sikirica*, Judgment, IT-95-8-T ¶ 76.

<sup>19</sup> The *Sikirica* Chamber used the obligatory-sounding term “criterion.” *Id.*

genocide is premised.<sup>20</sup> Although the tribunals may look to the quantity of victims when inferring genocidal intent, the emerging doctrine of the ICTY risks undermining the object and purpose of the Genocide Convention on which the former's statute is based.<sup>21</sup> Furthermore, the quantitative criterion is unmanageable with regard to the development of a meaningful intent standard. Unfortunately, the tribunal has misplaced the quantitative requirement within the intent element by interpreting the "in whole or in part" language in increasingly absolute terms. Moreover, to reach this point the tribunal has drawn on extrastatutory policy considerations,<sup>22</sup> including an effort to avoid trivializing the genocide concept and an effort to reserve genocide to the most egregious and widespread atrocities.<sup>23</sup>

Part I examines the genocide statute in light of the right to exist enjoyed by national, ethnic, racial, and religious groups. Part II traces the development of the international tribunals' jurisprudence regarding the intent element of the genocide statute. Part III critiques the "quantitative criterion" announced by the ICTY in light of the group-rights theory outlined in Part I. Finally, Part IV acknowledges the value of extrastatutory considerations that inform the "quantitative criterion," but concludes that they rightly remain outside of the formal intent element of the crime.

## I GROUP RIGHTS

This Part argues that the prohibition against genocide is premised upon an internationally recognized group right to exist. Judicial interpretation and application of the intent element within the genocide statute therefore should not undermine the right served by the criminal prohibition itself.<sup>24</sup>

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<sup>20</sup> See *infra* Part III.

<sup>21</sup> Article 31(1) of the Vienna Convention on the Law of Treaties, *supra* note 16, 1155 U.N.T.S. at 340, states as the "General Rule of Interpretation" that "[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."

<sup>22</sup> See *infra* note 111 and accompanying text.

<sup>23</sup> See Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 *Hous. J. Int'l L.* 467, 526-30 (2001) (criticizing hesitant application of Convention).

<sup>24</sup> Although the Convention does not refer explicitly to the group right to exist, the first United Nations efforts to define and criminalize genocide provide support for this perspective. One earlier General Assembly resolution refers to genocide as the "denial of the right of existence of entire human groups." G.A. Res. 96 (I), U.N. Doc. A/64/Add.1, at 188 (1946), reprinted in 1 *United Nations Resolutions*, *supra* note 4, at 175. That this right forms the legal obligations on both individuals and states described in the Convention has been affirmed both as customary international law and by the statutes of the international

The international human rights system<sup>25</sup> recognizes both individual human rights and limited group rights.<sup>26</sup> The boundaries between

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criminal tribunals. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 240 (July 8) (determining that United Nations intended genocide, which involves denial of right to life of groups, to be crime under international law); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (May 28) (finding right to life and right not to be deprived of life arbitrarily exist even in times of hostility).

Although critical of the overzealous creation of novel group rights that lack strong legal foundations, Philip Alston succinctly describes the Genocide Convention as a "major development" during the first phase of the growth of group rights in international human rights law. Philip Alston, *Peoples' Rights: Their Rise and Fall* [hereinafter Alston, *Peoples' Rights*], in *Peoples' Rights* 259, 261 (Philip Alston ed., 2001). Alston critiques other group rights, including the right to self-determination, minority rights, indigenous peoples' rights, the right to peace, the right to a clean environment, and the right to development. Notably, he is otherwise silent about the right to exist, except for describing it as having been "established." Philip Alston, *Introduction to Peoples' Rights* [hereinafter Alston, *Introduction*], in Alston, *Peoples' Rights*, *supra*, at 1.

<sup>25</sup> There is extensive literature describing the international human rights systems. For general overview, see generally Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2d ed. 2000). For a helpful collection of the most fundamental human rights documents, see generally Ctr. for the Study of Human Rights, *Columbia Univ., Twenty-Five Human Rights Documents* (1994).

<sup>26</sup> Group rights are also known as "peoples'" or "collective" rights. For the treaty basis for group rights, see *International Covenant on Civil and Political Rights*, Dec. 19, 1966, art. 1, 6 I.L.M. 368, 369, 999 U.N.T.S. 171, 173 [hereinafter ICCPR] ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); *International Covenant on Economic, Social and Cultural Rights*, Dec. 19, 1966, art. 1, 6 I.L.M. 360, 360, 993 U.N.T.S. 3, 5 (same); see also ICCPR, *supra*, art. 27, 6 I.L.M. at 375-76, 999 U.N.T.S. at 179 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."). The African (Banjul) Charter on Human and Peoples' Rights represents the high-water mark of group rights. *Organization of African Unity: Banjul Charter on Human and Peoples' Rights*, June 27, 1981, arts. 19-24, 21 I.L.M. 59, 62-63, OAU Doc. CAB/LEG/67/3/Rev.5 (listing, *inter alia*, peoples' rights to equality; freedom from domination, colonization, and oppression; existence; self-determination; assistance from states against foreign domination; free dispossession of resources; economic, social, and cultural development; national and international peace and security; and "generally satisfactory environment").

On group rights, see generally *Peoples' Rights*, *supra* note 24; *The Rights of Peoples* (James Crawford ed., 1988); Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. Miami Inter-Am. L. Rev. 387 (1996-1997). The group right to exist is remarkably understudied and is notably absent from the extensive bibliography on peoples' rights in Alston, *Peoples' Rights*, *supra* note 24, at 295-319. The bibliography of *The Rights of Peoples*, thirteen years earlier than Alston's work, notes thirty-seven bibliographical entries under the "Right to Existence," a quick glance at which suggests close proximity between the right to exist and the prohibition against genocide. *The Rights of Peoples*, *supra*, at 222-23. There is vast literature on the right to self-determination, which Alston refers to as the "single most important and most frequently invoked" group-held right. Alston, *Introduction*, *supra* note 24, at 2. The relative silence on the right to exist should not diminish its fundamental



group rights and individual rights are not always clear. The purpose of this Part, however, is not to describe the extent or implications of the group-rights concept, but to suggest that without a theory of group rights, the distinction between “genocide” and other crimes makes little, if any, sense.<sup>27</sup>

At a minimum, the prohibition against genocide<sup>28</sup> affirms that specified groups possess the right to exist<sup>29</sup> and that states are bound to prevent and punish violations of that right.<sup>30</sup> The right to exist is a

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importance to other group rights, including the right to self-determination. Certainly the group right to exist is ontologically prior to the group right to self-determination.

<sup>27</sup> This refers only to the acts enumerated in the statute and not to the controversial claim that certain crimes against humanity also may be “lesser included offenses” within the “greater” crime of genocide. See *Prosecutor v. Sikirica*, Judgment, Case No. IT-95-8-T ¶ 58 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001) (introducing discussion of genocide as “species of the genus” of crimes against humanity), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>. Statutes on crimes against humanity prohibit enumerated acts “when committed as part of a widespread or systematic attack directed against any civilian population.” Statute of the International Tribunal for Rwanda, *supra* note 7, art. 3, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994); Rome Statute for the International Criminal Court, *supra* note 7, art. 7 (same); ICTY Statute, *supra* note 6, art. 5, reprinted in 32 I.L.M. at 1173-74 (containing similar language). Genocide, by contrast, applies only to “national, ethnical, racial or religious” groups. Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280.

<sup>28</sup> See *supra* notes 8-10 and accompanying text for statutory prohibitions on genocide. The tribunals have noted the apparent simplicity of the language of the statutes on genocide, most recently in *Sikirica*: “In contradistinction to the manner in which many crimes are elaborated in treaties[,] . . . Article 4 [of the ICTY Statute] expressly identifies and explains the intent that is needed to establish the crime of genocide.” *Sikirica*, Judgment, IT-95-8-T. ¶ 58; see *id.* ¶ 60 (introducing analysis of intent element with reference to Vienna Convention on Law of Treaties and explaining that “[t]he first rule of interpretation is to give words their ordinary meaning where the text is clear”); see also Vienna Convention on the Law of Treaties, *supra* note 16, arts. 31-33, 1155 U.N.T.S. at 340 (explaining rules of treaty interpretation).

<sup>29</sup> See G.A. Res. 96 (I), *supra* note 24, at 188 (“Genocide is a denial of the right of existence of entire groups . . .”); see also James Crawford, *The Rights of Peoples: “Peoples” or “Governments”?*, in *The Rights of Peoples*, *supra* note 26, at 55, 59-60 (analyzing Genocide Convention and group right to exist); Patrick Thornberry, *International Law and the Rights of Minorities* 59-85 (1991) (analyzing history and construction of Genocide Convention and “right of existence”); Lippman, *supra* note 23, at 469-70 (describing early UN recognition of right to exist).

<sup>30</sup> See Genocide Convention, *supra* note 1, arts. 1, 3, 102 Stat. at 3045-46, 78 U.N.T.S. at 280. The prohibition extends both to states and individuals. See *id.* arts. 3-4, 102 Stat. at 3045-46, 78 U.N.T.S. at 280 (providing for individual criminal liability); *id.* arts. 8-9, 102 Stat. at 3045-46, 78 U.N.T.S. at 282 (providing remedies for states before United Nations and International Court of Justice for violations of prohibition on genocide). Compare Rome Statute for the International Criminal Court, *supra* note 7, art. 25(4) (providing only for individual criminal liability) with Statute of the International Tribunal for Rwanda, *supra* note 7, art. 2(3) (same), and ICTY Statute, *supra* note 6, art. 4(3), reprinted in 32 I.L.M. at 1173 (same); see also *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13-T ¶¶ 886-87 (Int’l Crim. Trib. Rwanda, Trial Chamber, Jan. 27, 2000) (describing theory of complicity liability for genocide), <http://www.icttr.org/wwwroot/ENGLISH/cases/Musema/judgement/index.htm>.

fundamental right<sup>31</sup> that has been upheld universally by the world community.<sup>32</sup> "Genocide" is the criminal violation of the group right to exist and is distinct from the right itself. At present, while other groups may possess legal personality under international law,<sup>33</sup> protection under the statute extends only to national,<sup>34</sup> ethnic,<sup>35</sup> racial,<sup>36</sup> and religious<sup>37</sup> groups.<sup>38</sup>

The group rights that form the core of the genocide concept emerged from the post-World War II political climate.<sup>39</sup> The explica-

<sup>31</sup> "Fundamental" rights are distinguishable from "secondary" or "tertiary" rights inasmuch as observance and protection of the former is a necessary precondition for observance and protection of the latter, but not vice versa.

<sup>32</sup> Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28). The Final Report of the Commission of Experts for the ICTY stated: "[The Convention's] objectives are to safeguard the very existence of certain human groups and to affirm and emphasize the most elementary principle of humanity and morality. In view of the rights involved, the legal obligations to refrain from genocide are recognized as *erga omnes*." Bassiouni, *supra* note 12, at 523 (quoting Final Report of the Commission of Experts Submitted Pursuant to Security Council Resolution 780 (1992), Annex 1, ¶ 88, U.N. Doc. S/1994/674 (1994)).

<sup>33</sup> Groups based on, *inter alia*, gender, culture, linguistic classification, political affiliation, sexuality, age, and disability all have clear legal personality. International recognition and protection of these group personalities varies widely and is unfortunately beyond the scope of this Note. See generally William A. Schabas, Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, 6 ILSA J. Int'l & Comp. L. 375 (2000).

<sup>34</sup> That national groups have legal personality in international law is without controversy. For an extensive history of the group-rights concept beyond the personality of nation states in international law, see Ian Brownlie, The Rights of Peoples in Modern International Law, in The Rights of Peoples, *supra* note 26, at 1.

<sup>35</sup> Among the many other sources that acknowledge ethnicity as a basis for group rights, see ICCPR, *supra* note 26, arts. 1(1), 27, 6 I.L.M. at 369, 375-76, 999 U.N.T.S. at 173, 179.

<sup>36</sup> See *id.* See generally International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 47-52, U.N. Doc. A/6014 (1965) (entered into force January 4, 1969), reprinted in 10 United Nations Resolutions 143 (Dusan J. Djonovich ed., 1974); United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII), U.N. GAOR, 18th Sess., 1261st plen. mtg., Agenda Item 43, U.N. Doc A/Res/1904 (XVIII) (1963), reprinted in 9 United Nations Resolutions, *supra*, at 224.

<sup>37</sup> Religious groups have a long history of having legal personality. See, e.g., ICCPR, *supra* note 26, art. 27, 999 U.N.T.S. at 179; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/6 (1982), reprinted in 20 United Nations Resolutions 401 (Dusan J. Djonovich ed., 1986).

<sup>38</sup> Genocide Convention, *supra* note 1, arts. 2, 3(b), 102 Stat. at 3045-46, 78 U.N.T.S. at 280; Rome Statute for the International Criminal Court, *supra* note 7, art. 6; Statute of the International Tribunal for Rwanda, *supra* note 7, art. 2; ICTY Statute, *supra* note 6, art. 4, reprinted in 32 I.L.M. at 1172-73.

<sup>39</sup> The drafting of the Convention's Preamble provides evidence of this. See Schabas, *supra* note 1, at 71-81. The Venezuelan draft Preamble, around which debate centered, omitted references to the Nuremberg Trials. Instead the Venezuelans reasoned that "geno-

tion of "genocide" was not simply an international response to Nazi atrocities, though the link between the two is undeniable.<sup>40</sup> Rather, group rights—and the recognition that particular groups suffered risk of destruction by other groups—have their modern roots in the interwar period.<sup>41</sup> The prehistory of the Genocide Convention thus consisted of a "web of treaties, bilateral and multilateral," developed in recognition of "the need for special protection of national minorities" during the years following the First World War.<sup>42</sup> After atrocities committed against national minorities during World War I went largely unpunished,<sup>43</sup> the international legal community initiated numerous bilateral agreements and unilateral declarations in an effort to establish minority protections premised, at least implicitly, on the group right to exist.<sup>44</sup>

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cide had existed long before the rise of fascism and Nazism." *Id.* at 76-77 & n.201 (citing U.N. GAOR 6th Comm., 3d Sess., 109th mtg. at 489, U.N. Doc. A/C.6/SR.109 (1948) (statement of Pérez-Perozo)). The Soviet Union counterproposed an amendment that included the language "while recent events provide evidence that genocide is organically bound up with fascism-nazism and other similar race 'theories' which preach racial and national hatred, the domination of the so-called higher races and the extermination of the so-called lower races." *Id.* at 77 & n.204 (quoting U.N. GAOR 6th Comm., 3d Sess., ¶ 1, U.N. Doc. A/C.6/273 (1948)). Several states, including Venezuela, Egypt, and the United States, rejected such historical specificity on the grounds that genocide was not "organically bound up with fascism-nazism." *Id.* at 77-78; see also *id.* (quoting Egyptian representative Raafat as saying that "[i]nstances of genocide were to be found in the far more distant past, instances which had no connection at all with theories of racial superiority").

<sup>40</sup> Schabas, *supra* note 1, at 26-30.

<sup>41</sup> See *id.*; see also Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 *Tulsa J. Comp. & Int'l L.* 45, 50-51 (1994) (ascribing significance to interwar minority treaties and Permanent Court of International Justice Advisory Opinions); Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 *Ariz. J. Int'l & Comp. L.* 415, 421-23 (1998) (describing League of Nations minority-protection system). For an example of an advisory opinion on minority rights issued during the interwar period, see Advisory Opinion No. 64, *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64, at 4 (Apr. 6).

<sup>42</sup> Schabas, *supra* note 1, at 16; see also *id.* at 16-24.

<sup>43</sup> See Lippman, *supra* note 41, at 417-21 (relating "indifference" toward Turkish genocide against Armenian people and failed Allied attempts to punish German atrocities).

<sup>44</sup> Specifically, see Treaty Concerning the Protection of Minorities in Poland, June 28, 1919, art. 2, 225 Consol. T.S. 412, 416 ("Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion."). Other minority-protection treaties after World War I included almost identical language. See Treaty Concerning the Protection of Minorities in Greece, Aug. 10, 1920, art. 2, 28 L.N.T.S. 243, 254; Treaty Concerning the Protection of Minorities in Romania, Dec. 9, 1919, art. 2, 5 L.N.T.S. 335, 339; Treaty Concerning the Protection of Minorities in Czechoslovakia, Sept. 10, 1919, art. 2, 226 Consol. T.S. 170, 173; Treaty Concerning the Protection of Minorities in the Serb-Croat-Slovene State, Sept. 10, 1919, art. 2, 226 Consol. T.S. 182, 185. The peace treaties of the era also included provisions protecting minorities, again with almost identical language. See Treaty of Lausanne, July 24, 1923, art. 38, 28 L.N.T.S. 11, 31; Treaty of Trianon, June 4, 1920, art. 55, 12 Martens

The Convention thereafter emerged in light of the failings of the interwar period to protect minority rights. Accordingly, the drafters of the Convention recognized that certain human groupings have value within the world community in and of themselves.<sup>45</sup> Therefore, the Convention was premised on a theory that destruction of such groups harms the entirety of humanity.<sup>46</sup> The oft-repeated language that the victim is the group itself<sup>47</sup> is thus necessary but insufficient to convey the extent of the harm and the depth of the crime.

The statute stands for the principle that no one may decide the fate of a protected group<sup>48</sup> without risk of criminal punishment.<sup>49</sup> It is therefore the step from murder to genocidal murder that matters. As far as the group right to exist is concerned, the harm has occurred once a perpetrator forms the intent to destroy a group and commits one of the acts enumerated in the Convention.<sup>50</sup> It does not matter at all whether the genocidal intent was part of a plan, perpetrated by a state or by private parties, successful or reasonably likely to succeed, vast in scope or small in the number of victims.<sup>51</sup> When accompanied

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Nouveau Recueil (ser. 3) 423, 438; Treaty of Saint-Germain, Sept. 10, 1919, art. 63, 226 Consol. T.S. 8, 29; Treaty of Neuilly, Nov. 27, 1919, art. 50, 226 Consol. T.S. 332, 343; see also Schabas, *supra* note 1, at 16-24 (describing evolving system of minority-protection after World War I); Lippman, *supra* note 41, at 421-23 (same); Asbjørn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 *Notre Dame L. Rev.* 1311, 1316-19 (1991) (cataloging interwar treaties governing minority rights and obligations).

<sup>45</sup> The extensive debate as to the basis and sufficiency, or insufficiency, of the four categories (national, ethnic, racial, and religious) is beyond the scope of this Note. See *supra* note 33.

<sup>46</sup> The Commission of Experts for the ICTY referred to this as the "civilizing" purpose of the Convention. See Bassiouni, *supra* note 12, at 523 (citing Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex 1, ¶ 88, U.N. Doc. S/1994/674 (1994)).

<sup>47</sup> *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T ¶ 521 (Int'l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998), <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>; cf. G.A. Res. 96 (I), *supra* note 24, at 188-89 (emphasizing genocide's impact on entire human family).

<sup>48</sup> See Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280 (listing protected groups).

<sup>49</sup> *Id.* art. 5, 102 Stat. at 3045-46, 78 U.N.T.S. at 280 (obliging states to provide criminal sanctions for genocide).

<sup>50</sup> *Id.* arts. 2-3, 102 Stat. at 3045, 78 U.N.T.S. at 280. Of course, satisfaction of the formal elements of crime does not end all inquiry into the moral and criminal culpability of a perpetrator. Not all genocides are equal, and factors such as the scope and brutality of the acts are relevant. In this latter regard, the ultimate number of punishable acts is of great relevance.

<sup>51</sup> Schabas, writing between the *Jelisić* trial judgment and the judgment of the Appeals Chamber, claimed that "[t]he cases support the requirement of a plan" and that "the plan or circumstances of genocide must be known to the offender." Schabas, *supra* note 1, at 208-09; see also *id.* at 208 n.10 (asserting that "the *Jelisić* judgment confirms the requirement of a plan as an evidentiary matter even if this is not explicitly part of the definition within the Convention"); *Prosecutor v. Jelisić*, Judgment, Case No. IT-95-10-T ¶ 66 (Int'l

by one of the enumerated acts, the intent to destroy the group defines the crime.

The acts prohibited in the Convention further illustrate that the group right to exist is at the core of the genocide statute. Stripped of genocidal intent, the prohibited acts independently stand as punishable criminal acts by most if not all of the legal systems of the world.<sup>52</sup> The crime of genocide thus is not distinguished by the enumerated acts; otherwise genocide merely would restate previously recognized crimes such as murder, torture, rape, persecution, or extermination. The “intent to destroy in whole or in part” a protected group therefore transforms a killing or rape<sup>53</sup> into a genocidal act, war-time persecutions into genocide, or an otherwise legal population-control policy into genocidal practices, punishable by international law under the Convention and the statutes.<sup>54</sup>

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Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>. For an analysis of the *Jeliscic* Judgment, see *infra* Part II.B. Eighteen months later, the Appeals Chamber roundly rejected the requirement of a plan:

[T]he existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.

Prosecutor v. *Jeliscic*, Appeal, Case No. IT-95-10-A ¶ 48 (Int'l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001) (citing International Criminal Tribunal for Rwanda, Prosecutor v. Kayishema and Ruzindana, Appeal, Oral Decision, Case No. ICTR-95-1-A (Int'l Crim. Trib. Rwanda, Appeals Chamber, June 1, 2001), <http://www.icty.org/wwwroot/ENGLISH/cases/KayRuz/appeal/index.htm>), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>. Beyond the now-resolved controversy over whether or not a “plan” was ever required to prove genocidal intent, it is not clear how any such a judge-made “evidentiary requirement” could dislocate the explicit will of the Convention's and statute's drafters in light of the context, object, purpose, and plain language of both instruments.

<sup>52</sup> The notable exception may be the prohibition in the various genocide statutes against imposing measures intended to prevent births, which is not necessarily criminal in and of itself. See *supra* note 9 and accompanying text.

<sup>53</sup> Although rape is not mentioned explicitly, the genocide statute clearly contemplates rape as a potentially genocidal act. See Genocide Convention, *supra* note 1, art. 2(b), 102 Stat. at 3045, 78 U.N.T.S. at 280 (including in definition of genocide conduct “causing serious bodily or mental harm to members of group”). The ICTR has outlined an inclusive and contextual definition of rape as a crime against humanity. See Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T ¶¶ 596-98, 685-88, 731-34 (Int'l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998) (finding Akayesu guilty of genocide on basis of extensive evidence of “sexual violence, mutilations and rape”), <http://www.icty.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>. Here again the same acts, if accompanied with the intent to destroy a protected group, could constitute genocide.

<sup>54</sup> Of course violation of the right to exist is not *ipso facto* proof of genocide. At the International Criminal Court, future prosecution of genocide may require that “[t]he 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.” Finalized Draft Text of the Elements of Crimes, *supra* note 12, art. 6(a)(4); see also *id.* arts. 6(b)(4), 6(c)(4), 6(d)(4),

In the first international conviction for genocide, the Rwanda Tribunal famously noted that “the victim of the crime of genocide is the group itself.”<sup>55</sup> Over fifty years earlier, the jurist Raphael Lemkin<sup>56</sup> laid the groundwork for that assertion, defining genocide as “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”<sup>57</sup> Lemkin’s conception of genocide was much broader than the Convention’s eventual definition. While the Convention is silent on the question of genocidal motive,<sup>58</sup> Lemkin de-

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6(e)(4) (repeating identical language in each article). Although the ICC’s Elements of Crimes do not bind the extant tribunals and will be of an advisory nature for future judges at the ICC, this language will protect against including isolated hate crimes or instances where “a single crazed individual formed the necessary genocidal intent in his or her own mind, and committed an isolated murder.” Int’l Criminal Court, Elements of Crimes and Rules of Procedure and Evidence 45 (Roy S. Lee ed., 2001) [hereinafter Int’l Criminal Court, Commentary]. However, this formulation will still allow prosecution for a single act “if the requisite context was present.” *Id.* The specter of the application of the Convention to discriminatory or racist crimes informed several of the U.S. Senators’ forty-year resistance to ratification. See *supra* note 16.

<sup>55</sup> *Akayesu*, Judgment, ICTR-96-4-T ¶ 521; see also Draft Code of Crimes Against the Peace and Security of Mankind, in Int’l Law Comm’n, Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 88, U.N. Doc. GA A/51/10 (1996) [hereinafter ILC Draft Code of Crimes] (“The group itself is the ultimate target or intended victim of this type of massive criminal conduct. . . . [T]he intention must be to destroy the group ‘as such’, meaning as a separate and distinct entity.”); United Nations, Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, U.N. Doc. E/AC.25/3/Rev.1 (1948) (“The victim of the crime of genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason but a group as such.”), quoted in *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T ¶ 552 n.1222 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>, and Schabas, *supra* note 1, at 231; Nehemiah Robinson, *The Genocide Convention: A Commentary* 58 (1960) (

The main characteristic of Genocide is its object: the act must be directed toward the destruction of a *group*. Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not per se but only as members of the group to which they belong.).

<sup>56</sup> Lemkin is widely regarded as the inventor of the term “genocide.” He was a tireless advocate for the Convention both in the United States and abroad. His work, *Axis Rule in Occupied Europe*, popularized the notion that genocide is a distinct crime under international law. See generally Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944). For a brief biographical account of Lemkin, see Schabas, *supra* note 1, at 24-30.

<sup>57</sup> Lemkin, *supra* note 56, at 79.

<sup>58</sup> During the drafting of the Convention, there was great debate on whether or not to include a motive element. For analysis of the difference between “intent” and “motive” in this context, see *Prosecutor v. Jeliscic*, Appeal, Case No. IT-95-10-A ¶ 49 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001) (“The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>.

finer "[t]he objectives of [genocide as the] disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."<sup>59</sup> However, Lemkin's approach clearly contemplated the crime in terms of groups' very existence: "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 the national group."<sup>60</sup>

Of note here is not simply that Lemkin catalogs the many ways in which national<sup>61</sup> groups may be targeted for destruction, but that killing represents one manifestation of genocidal intent.<sup>62</sup> Thus the *sine qua non* of genocide is the intent to destroy the group and not the act of killing itself.<sup>63</sup>

## II

### DEVELOPMENT OF THE "QUANTITATIVE CRITERION"

This Part traces the International Criminal Tribunals' jurisprudence of the intent element and examines in detail three judgments of the ICTY: the *Sikirica*,<sup>64</sup> *Jeliscic*,<sup>65</sup> and *Krstic*.<sup>66</sup> In order to focus on the "in whole or in part" language of the statute, this Note purposefully avoids the fact-specific differences between these cases.<sup>67</sup> This allows the Note to argue that the number of victims is significant only as evidence of intent and not as a criterion or prerequisite to the

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<sup>59</sup> Lemkin, *supra* note 56, at 79.

<sup>60</sup> *Id.*

<sup>61</sup> Schabas explains that at the time of Lemkin's work, "national group" was an expansive concept that contained ethnic groups as understood today. Schabas, *supra* note 1, at 24-30.

<sup>62</sup> By stating that perpetrators' objectives include "the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups," Lemkin clearly suggests that "killing" is but one among other unspecified acts that may constitute genocide. See *supra* note 59 and accompanying text.

<sup>63</sup> But cf. Thomas W. Simon, *Defining Genocide*, 15 *Wis. Int'l L.J.* 243, 244-47 (1996) (proposing killing as critical element in definition of genocide).

<sup>64</sup> *Prosecutor v. Sikirica*, Judgment, Case No. IT-95-8-T (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>.

<sup>65</sup> *Prosecutor v. Jeliscic*, Judgment, Case No. IT-95-10-T (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>.

<sup>66</sup> *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krst-tj010802e.pdf>.

<sup>67</sup> For judicial treatment of the facts in *Sikirica*, *Krstic*, and *Jeliscic*, see *Sikirica*, Judgment, IT-95-8-T ¶¶ 50-103 ("Camp Conditions"); *Krstic*, Judgment, IT-98-33-T ¶¶ 6-477 ("Findings of Fact"); *Jeliscic*, Judgment, IT-95-10-T ¶¶ 18-23 ("Historical Background").

formation of intent itself.<sup>68</sup> Recently, two decisions of the ICTY read into the intent element a “quantitative criterion” requirement based on the “in whole or in part” language.<sup>69</sup> This interpretation associates the moral magnitude of genocide with a presumption that the crime only exists when large numbers of people have been killed.<sup>70</sup> How-

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<sup>68</sup> Of course the twelve murders for which Jelisić was found guilty cannot otherwise compare with the atrocities at Srebrenica for which Krstić is likely to spend the rest of his life in jail. Although the courts must deal only with the facts of particular cases, they presumably cannot remain unaware of the difference in scale between one case and another.

<sup>69</sup> Namely *Sikirica*, Judgment, IT-95-8-T ¶¶ 78-83, and *Jelisić*, Judgment, IT-95-10-T ¶¶ 78-83. Both decisions dismissed genocide charges pursuant to 98 *bis* rulings after prosecutors finished presenting their cases in chief. Motions under 98 *bis* for “Judgment of Acquittal” may be raised by the defendant within seven days of the close of the prosecutor’s case in chief or may be entered *sua sponte* by the tribunal “if it finds that the evidence is insufficient to sustain a conviction on that charge.” ICTY Rules of Procedure and Evidence, art. 98 *bis*, IT/32/REV.22 (amended Dec. 13, 2001). As such, neither decision stands as a complete judgment on the merits, but both challenge the intent doctrine of previous rulings. The Appeals Chamber overruled the *Jelisić* Judgment on its ultimate holding but did not comment clearly on the latter’s intent analysis, other than to state that the absence of a “plan” to commit genocide does not eliminate *ipso facto* the defendant’s intent to commit genocide. See Prosecutor v. Jelisić, Appeal, Case No. IT-95-10-A ¶ 48 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>; supra note 51 and accompanying text (citing text of *Jelisić*, Appeal). The tribunal also discusses the proper standard of review under a 98 *bis* motion. See *id.* ¶¶ 30-40; see also *Sikirica*, Judgment, IT-95-8-T ¶¶ 7-10.

<sup>70</sup> For example, Malcolm Shaw believes that “[t]he offence can only retain its awesome nature if the strictness of its definitional elements is retained and not in any way trivialized.” Malcolm N. Shaw, *Genocide and International Law*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 797, 806 (Yoram Dinstein ed., 1989). This lends support to the idea that “in part” refers to “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.” See Benjamin Whitaker, *Whitaker Report: Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/1985/6, ¶¶ 29-30 (1985); see also Robinson, supra note 55, at 63 (limiting genocide to “substantial” number of “persons of the same group”). Similarly, Raphael Lemkin stated that “the destruction must be of such a kind as to affect the entirety.” Letter from Raphael Lemkin to Dr. Kalijarvi, Senate Foreign Relations Committee, in 2 Executive Sessions of the Foreign Relations Committee 370 (1976), cited in Schabas supra note 1, at 238 & n.171; supra note 16 (summarizing history of ratification in United States). The U.S. implementation legislation further defines “substantial part” as “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.” 18 U.S.C. § 1093(8) (2001). Likewise, the International Law Commission stated that “the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.” ILC Draft Code of Crimes, supra note 55, at 89; see also *infra* Part III.C.



ever, neither the plain language nor the purpose<sup>71</sup> of the statute supports any such quantitative requirement in the intent element.<sup>72</sup>

Debate as to the existence of a quantitative requirement within the intent element has a long history. During its lengthy ratification process in the United States, opponents balked at a perceived overbreadth to Article 2 fearing application of the Convention to isolated lynchings and hate crimes, and these fears led to a declaration by the Senate that genocidal intent could lie only when a “substantial number” of victims had been killed.<sup>73</sup>

Such an interpretation requires a strained reading of Article 2. On its face, the article presents a syntactical puzzle.<sup>74</sup> The preparatory materials from the Convention interpret “any of the following acts committed with intent to destroy, in whole or in part” to refer to situations where an accused intends to destroy either the whole group or part of the group.<sup>75</sup> However, the restrictive “substantial number” interpretation originally understood “in whole or in part” to be limited to situations in which perpetrators intend to destroy the group as a whole, but target only a part of the group.<sup>76</sup>

When President Truman submitted the Convention to the Senate for advice and consent, Dean Rusk, then Deputy Under Secretary of

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<sup>71</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide 1951 I.C.J. 15, 23 (May 28) (noting humanitarian and civilizing purpose of Convention).

<sup>72</sup> See Schabas, *supra* note 1, at 233-34 (“Even a small number of actual victims is enough to establish the material element. The actual quantity killed or injured remains a material fact, but what is really germane to the debate is whether the author of the crime intended to destroy the group ‘in whole or in part.’”).

<sup>73</sup> See *supra* note 16 and accompanying text.

<sup>74</sup> Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280 (“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .”).

<sup>75</sup> See Schabas, *supra* note 1, at 230-40 (discussing legislative history for “in whole or in part”).

<sup>76</sup> The puzzle is thus whether “in whole or in part” modifies “destroy” or “group.” The difference is immense. If intent exists only when an accused intends to destroy the whole group, then factual limits on the ability of a perpetrator to succeed at genocide—such as a geographic or territorial limitation—could *a fortiori* defeat the intent element itself. For example, as addressed in *Krstic*, the Srpska forces at Srebrenica intended to destroy neither all Bosnians nor all Muslims, but rather those Bosnian Muslims within the area. Application of the restrictive interpretation categorically would exclude the possibility that the Srebrenica massacres qualify as genocide. See William A. Schabas, 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, 40-47 (2001) (describing confusion over “in whole or in part” component and analyzing *Krstic*); cf. *infra* notes 94, 122-26 and accompanying text.

State, advanced the latter interpretation.<sup>77</sup> This interpretation would have restricted the intent element greatly but apparently assuaged certain senators' concerns that the Convention might otherwise apply to individual murders and lynchings.<sup>78</sup> Although construing the intent element in this fashion did not correspond with the purposes of the Convention as understood by its drafters,<sup>79</sup> it unfortunately "laid the foundation for confusion in the Senate" that persisted for decades.<sup>80</sup>

Part II.A presents the jurisprudence of the intent element as defined by the successful prosecutions for genocide at the ICTR and ICTY. Part II.B examines in detail the ICTY case *Prosecutor v. Jelusic*, which built the foundation for the "quantitative criterion." Part II.C describes *Prosecutor v. Sikirica*, in which the Trial Chamber announced the "quantitative criterion" as such.

### A. Inferable Intent

In order for courts to find a defendant guilty of genocide, prosecutors must demonstrate that the accused performed one or more of certain enumerated acts<sup>81</sup> with a culpable mental state. According to

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<sup>77</sup> See Executive Order: The International Convention on the Prevention and Punishment of the Crime of Genocide: Hearing Before a Subcomm. of the Senate Comm. on Foreign Relations, 81st Cong. 12 (1950).

<sup>78</sup> A 1947 State Department internal memorandum stated: "The possibility exists that sporadic outbreaks against the Negro population in the United States may be brought to the attention of the United Nations, since the treaty, if ratified, would place this offense in the realm of international jurisdiction . . ." Schabas, *supra* note 1, at 238 n.169 (quoting Ernest Gross and Dean Rusk, Memorandum to Robert A. Lovett, US Commentary on Secretariat Draft Convention on Genocide, Sept. 10, 1947, National Archives 501.BD-Genocide, 1945-49). The American Bar Association interpreted "in whole or in part" according to its ordinary meaning but vigorously opposed ratification for several years. LeBlanc, *supra* note 16, at 373. At one point the ABA "distorted the issue by raising all sorts of questions about what constitutes part of a group. Strained examples were used to illustrate the concern, including murder of a single individual and 'driving five Chinamen out of town.'" *Id.*

<sup>79</sup> Schabas concludes that "[e]ven a summary review of the *travaux préparatoires* shows that Rusk's assessment was a grievous misunderstanding." Schabas, *supra* note 1, at 238.

<sup>80</sup> LeBlanc, *supra* note 16, at 373.

<sup>81</sup> Rome Statute for the International Criminal Court, *supra* note 7, art. 6 (repeating language from Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280; *supra* note 9 and accompanying text); cf. Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280 (same); Statute of the International Tribunal for Rwanda, *supra* note 7, art. 2(2), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994) (same); ICTY Statute, *supra* note 6, art. 4(2), reprinted in 32 I.L.M. at 1172-73 (same). Article 3 of the Genocide Convention enumerates five punishable "acts" that have been integrated into Articles 2(3) and 4(3) of the ICTR and ICTY statutes, respectively. See Genocide Convention, *supra* note 1, art. 3, 102 Stat. at 3045, 78 U.N.T.S. at 280; *supra* note 9. The ICC Statute dropped this second list of punishable acts from its article defining genocide under the "Jurisdiction, Admissibility and Applicable Law" section and reincorporated it with substantial changes into Article 25, "Individual Criminal Responsibility," under part 3 of the statute, "General Principles of Criminal

Article 30 of the statute establishing the International Criminal Court, criminal responsibility for genocide should attach only if the defendant possessed both “intent and knowledge” when committing specified acts.<sup>82</sup> Intent will be found “[i]n relation to conduct” where “that person means to engage in the conduct”<sup>83</sup> and “[i]n relation to a consequence [where] that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>84</sup>

In each case on the short list of international prosecutions for genocide, courts have struggled to define the proper approach to the intent element. Recognizing that few factual records produce explicit avowals of the intent to destroy a protected group in either conduct or consequence, the ICTR established in *Akayesu*<sup>85</sup> that “in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.”<sup>86</sup> Attempting to describe how judges may extrapolate from the factual record, the court held it “possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.”<sup>87</sup> The court then proceeded to list other factors that could assist in the inference of the requisite intent, including “the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups.”<sup>88</sup>

In an earlier ruling, the ICTY described factual sources that could lead to the inference of genocidal intent.<sup>89</sup> Rather than listing particular acts necessary to make this inference, the tribunal prescribed a more subtle analysis of context including “the general political doc-

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Law.” Kai Ambos, Article 25: Individual Criminal Responsibility, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, supra note 7, at 475.

<sup>82</sup> Rome Statute for the International Criminal Court, supra note 7, art. 30.

<sup>83</sup> Art. 30(2)(a).

<sup>84</sup> Art. 30(2)(b).

<sup>85</sup> *Akayesu* was the first complete trial and conviction for genocide at either of the two international tribunals. See *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T (Int’l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998), <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

<sup>86</sup> Id. ¶ 523.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> See *Prosecutor v. Karadzic and Mladic*, Case Nos. IT-95-5-R61 and IT-95-18-R61, in 1 *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia 1993-1998*, at 679 (André Klip & Göran Sluiter eds., 1999).

trine which gave rise to the acts . . . or the repetition of destructive and discriminatory acts.”<sup>90</sup> Further, the court explained that acts which “violate, or which the perpetrators themselves consider to violate, the very foundation of the group” may give rise to the inference.<sup>91</sup>

Later, the ICTR refined this list of sources in the case *Kayishema and Ruzindana*:

The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of the victims from the group is also important.<sup>92</sup>

The *Kayishema and Ruzindana* court convicted both defendants after inferring specific intent in each context. In *Kayishema and Ruzindana*, the tribunal analyzed the number of victims, the methodology and “persistent pattern of conduct,” the weapons used in the massacres, and Kayishema’s utterances during the period.<sup>93</sup> It bears emphasis here that, although the court viewed the number of killings as important, it did not consider it to be determinative.<sup>94</sup> However, the court did affirm language by Professors Morris and Scharf, stating that “it is virtually impossible for the crime of genocide to be committed without some direct or indirect involvement on the part of the State given the magnitude of this crime.”<sup>95</sup> That given, the tribunal unequivocally asserted that “both proportionate scale and total number are relevant,”<sup>96</sup> without defining the quantitative problem further.<sup>97</sup>

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<sup>90</sup> Id. ¶ 94, at 711.

<sup>91</sup> Id.

<sup>92</sup> Prosecutor v. Kayishema and Ruzindana, Judgment, Case No. ICTR-95-1-T ¶ 93 (Int’l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999) (internal citations omitted), <http://www.ictor.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>.

<sup>93</sup> Id. ¶¶ 531-40.

<sup>94</sup> Id. ¶ 93. This has been overlooked by the ICTY. See *infra* notes 122-26 and accompanying text.

<sup>95</sup> *Kayishema and Ruzindana*, Judgment, ICTR-95-1-T ¶ 94 (citing 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 168 (1998)).

<sup>96</sup> Id. ¶ 96.

<sup>97</sup> The ICTR has addressed the intent element further in other contexts. Notably, the *Musema* court affirmed that the *mens rea* for accomplice liability did not require the special intent for genocide *per se*. See Prosecutor v. Musema, Judgment, Case No. ICTR-96-13-T ¶¶ 180-83 (Int’l Crim. Trib. Rwanda, Trial Chamber, Jan. 27, 2000), <http://www.ictor.org/wwwroot/ENGLISH/cases/Musema/judgement/index.htm>. Because the court convicted Musema of genocide and acquitted him for complicity, this ruling was more of an advisory nature. For other discussions on mental element, see Prosecutor v. Bagilishema,

In the first full trial and conviction for genocide at the ICTY, the *Krstic* court<sup>98</sup> asserted its “margin of discretion”<sup>99</sup> to interpret the “in part” language of the intent element.<sup>100</sup> The tribunal ultimately held that “in part” simply “means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it.”<sup>101</sup> Thus, “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.”<sup>102</sup>

The *Krstic* court therefore correctly understood that quantitative considerations occur in relation to the geographically circumscribed location in which genocidal acts are alleged to have taken place. The court explained: “Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.”<sup>103</sup> So equipped, the court examined the political events surrounding the massacres in question, the foreseeable effects of the killings in light of the forced transfers of the surviving members of the community, the culturally specific implications of having the target population removed from the group, the targeting of homes and religious buildings for destruction, and the concealment of mass graves, “thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors.”<sup>104</sup> With such materials before it, the *Krstic* court concluded that the defendant’s forces “sought to eliminate all the Bosnian Muslims in [the geographic location] as a community”<sup>105</sup> even though “only the men of military age were systematically

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Judgment and Sentence, Case No. ICTR-95-1A-T ¶¶ 60-71 (Int’l Crim. Trib. Rwanda, Trial Chamber, June 7, 2001), <http://www.icttr.org/wwwroot/ENGLISH/cases/Bagilishema/judgement.htm>; Prosecutor v. Rutaganda, Judgment, Case No. ICTR-96-3 ¶¶ 59-63 (Int’l Crim. Trib. Rwanda, Trial Chamber, Dec. 6, 1999), <http://www.icttr.org/wwwroot/ENGLISH/cases/Rutaganda/judgement/index.htm>; Prosecutor v. Kambanda, Judgment and Sentence, Case No. ICTR-97-23-S ¶ 16 (Int’l Crim. Trib. Rwanda, Trial Chamber, Sept. 4, 1998), <http://www.icttr.org/wwwroot/ENGLISH/cases/Kambanda/judgement/kambanda.html>.

<sup>98</sup> Prosecutor v. *Krstic*, Judgment, Case No. IT-98-33-T (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>.

<sup>99</sup> *Id.* ¶ 590.

<sup>100</sup> See ICTY Statute, *supra* note 6, art. 4, reprinted in 32 I.L.M. at 1172-73 (delineating parameters of “Individual Criminal Responsibility”).

<sup>101</sup> *Krstic*, Judgment, IT-98-33-T ¶ 590.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* ¶¶ 595-96.

<sup>105</sup> *Id.* ¶ 594.

massacred.”<sup>106</sup> The manner in which the court reached this inference stands in direct contrast to *Jeliscic* and *Sikirica*, the two decisions analyzed in the following Subparts.

### B. Prosecutor v. Jeliscic

The *Jeliscic* case stands for the uncomfortable proposition that a man who publicly stated that he wanted to kill all Muslims<sup>107</sup> did not have the necessary *mens rea* to convict for genocide.<sup>108</sup> Jeliscic was charged with committing and aiding and abetting genocide.<sup>109</sup> The judges of the Trial Chamber terminated proceedings after the prosecutor completed her case and ruled that “without even needing to hear the arguments of the Defense, the accused could not be found guilty of the crime of genocide.”<sup>110</sup> Curiously, the court so ruled even though the accused was preparing two affirmative defenses to the genocide charge: “seriously diminished psychological responsibility” and superior orders “under hierarchical duress.”<sup>111</sup> The Appeals Chamber, in what may be described as a very peculiar ruling, stated that the Trial Chamber erred in dismissing the genocide charge but did not remand the case for retrial.<sup>112</sup>

*Jeliscic* unfortunately raises more problems than it solves. The Trial Chamber acknowledged that the defendant had appeared to target Muslims as such and noted that at relevant times and places “the Serbian offensive targeted the non-Serbian population” and that “Serbs were separated from the Muslims and Croats.”<sup>113</sup> The court further observed that lists were drawn up that may have targeted lead-

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<sup>106</sup> Id. ¶ 595.

<sup>107</sup> See Prosecutor v. Jeliscic, Judgment, Case No. IT-95-10-T ¶ 102 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>.

<sup>108</sup> See id. ¶ 107.

<sup>109</sup> Jeliscic also pled guilty to and was convicted of thirty-one counts of war crimes and crimes against humanity. He was sentenced to forty years in prison. Id. ¶¶ 24, 138-39.

<sup>110</sup> Id. ¶ 15.

<sup>111</sup> Id. ¶ 12.

<sup>112</sup> See Prosecutor v. Jeliscic, Appeal, Case No. IT-95-10-A ¶¶ 68-77 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>. The decision turned on matters of judicial economy and the fact that the unwell Jeliscic had been sentenced to forty years in prison for crimes against humanity. See id. sec. IV(4) (stating in case’s “Disposition” that “the Appeals Chamber by majority . . . considers that, in the circumstances of this case, it is not appropriate to order that the case be remitted for further proceedings, and declines to reverse the acquittal”). Judges Mohamed Shahabuddeen and Patricia M. Wald dissented on this point. Judge Wald addressed the failure to remand at length, and concluded: “I do not believe it falls within the judicial function to veto a retrial on ‘practical’ or ‘policy’ grounds.” Id. sec. VII, ¶ 14 (Wald, J., dissenting in part). Rather, she would have left it to the prosecutor’s discretion whether or not to retry Jeliscic. See id.

<sup>113</sup> *Jeliscic*, Judgment, IT-95-10-T ¶ 21.

ers of the Muslim community and that Jelusic acted with “discriminatory intent” when murdering and torturing Muslims.<sup>114</sup> Jelusic also introduced himself to the court as “Adolf” and had presented himself as the “Serbian Adolf” during the times in which he committed the acts for which he was charged.<sup>115</sup> In one passage the court described the full force of Jelusic’s hatred:

Goran Jelusic remarked to one witness that he hated the Muslims and wanted to kill them all, whilst the surviving Muslims could be slaves for cleaning the toilets but never have a professional job. He reportedly added that he wanted “to cleanse” the Muslims and would enjoy doing so, that the “balijas” had proliferated too much and that he had to rid the world of them. . . . [He] purportedly said that he hated Muslim women, that he found them highly dirty and that he wanted to sterilize them all in order to prevent an increase in the number of Muslims but that before exterminating them he would begin with the men in order [to] prevent any proliferation.<sup>116</sup>

In its analysis of the intent element, the court characterized the defendant’s acts as discriminatory in nature and discussed the proximity between genocide and persecution, a crime against humanity.<sup>117</sup> There is, of course, no reference to “discrimination” in the genocide statute, but presumably this bears on the “as such” wording of Article 4(2).<sup>118</sup> The court made a point to establish that the defendant acted with “discriminatory intent,” asserting that “an individual knowingly acting against the backdrop of widespread and systematic violence being committed against only one specific group could not reasonably deny that he chose his victims discriminatorily.”<sup>119</sup> The court then acknowledged that “[g]enocide . . . differs from the crime of persecution in which the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such.”<sup>120</sup> The underlying point is well established: A discriminatory murder is not proof of genocidal intent.<sup>121</sup>

However, the court also placed a burden on the prosecution to demonstrate that the defendant had acted in accordance with a “wider

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<sup>114</sup> Id. ¶¶ 67-77.

<sup>115</sup> Id. ¶ 102.

<sup>116</sup> Id. (citations omitted). “Balijas” is a particularly offensive anti-Muslim term.

<sup>117</sup> See id. ¶¶ 67-68.

<sup>118</sup> Compare this with *Sikirica*’s analysis of discrimination in the relationship between genocide and persecution. Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T ¶ 89 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgment/010903r98bis-e.pdf>.

<sup>119</sup> *Jelusic*, Judgment, IT-95-10-T ¶¶ 73-77.

<sup>120</sup> Id. ¶ 79.

<sup>121</sup> See Schabas, *supra* note 1, at 230-38 (discussing quantitative elements in determining requisite intent); see also Bassiouni, *supra* note 12, at 523 (reiterating necessity of intent).

plan” prior to satisfying the intent element.<sup>122</sup> Ultimately *Jeliscic* turned on this point: “[T]he Trial Chamber considers that, in this case, the Prosecutor has not provided sufficient evidence allowing it to be established beyond all reasonable doubt that there existed a plan to destroy the Muslim group . . . within which the murders committed by the accused would allegedly fit.”<sup>123</sup>

Although the court considered the lack of a plan fatal to the intent element, it further divided “in whole or in part” into two possible forms. “In part” first refers to “desiring the extermination of a *very large number* of the members of the group” and/or secondly to “the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group.”<sup>124</sup>

The reasoning by which the court reached the first category, “a very large number,” does not bear scrutiny. The tribunal acknowledged that “in whole or in part” could refer to a geographically limited “part” of the group,<sup>125</sup> but it posed the quantitative question: “[W]hat proportion of the group is marked for destruction and beyond what threshold could the crime be qualified as genocide?”<sup>126</sup> Beginning with the premise that “it is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group,”<sup>127</sup> the court maintained that the ICTR “appears to go even further by demanding that the accused have the intention of destroying a ‘considerable’ number of individual members of a group.”<sup>128</sup>

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<sup>122</sup> *Jeliscic*, Judgment, IT-95-10-T ¶ 79. The court did not cite any sources for this requirement and the Appeals Chamber explicitly overruled the Trial Chamber on the final point, stating that “[t]he Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime.” *Prosecutor v. Jeliscic*, Appeal, Case No. IT-95-10-A ¶ 48 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001) (citing oral decision, whose text is unpublished, of *Prosecutor v. Kayishema and Ruzindana*, Appeal, Oral Decision, Case No. ICTR-95-1-A (Int’l Crim. Trib. Rwanda, Appeals Chamber, June 1, 2001), <http://www.ictr.org/wwwroot/ENGLISH/cases/KayRuz/appeal/index.htm>), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>; see also *supra* note 51 and accompanying text.

<sup>123</sup> *Jeliscic*, Judgment, IT-95-10-T ¶ 98. The decision is thin on support, see *id.* ¶ 82 n.110 (citing, *inter alia*, Genocide Convention, *supra* note 1, art. 2, 102 Stat. at 3045, 78 U.N.T.S. at 280; S. Exec. Rep. No. 94-23, at 22 (1976); ILC Draft Code of Crimes, *supra* note 55, at 89).

<sup>124</sup> *Jeliscic*, Judgment, IT-95-10-T ¶¶ 81-82 (emphasis added).

<sup>125</sup> See *id.* ¶ 98 (suggesting that defendant could have been convicted of genocide if shown to have harbored plan to destroy all Muslims in Brcko).

<sup>126</sup> *Id.* ¶ 80. The court did not examine the presumed requirement of threshold quantity in and of itself. See *id.*

<sup>127</sup> *Id.* ¶ 82.

<sup>128</sup> *Id.* (citing *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T ¶ 97 (Int’l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999), <http://www.ictr.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>).



This is simply inaccurate. The *Kayishema and Ruzindana* court did not so “demand,” but rather merely “opine[d]” therefore, that “in part” requires the intention to destroy a considerable number of individuals who are part of the group.”<sup>129</sup> Moreover, the *Kayishema and Ruzindana* court mentioned the number of victims but did not consider it necessary to its ruling on intent.<sup>130</sup> It also should be noted that it is by no means evident that “considerable” is distinguishable, let alone more restrictive, than “substantial” in this context.<sup>131</sup> *Kayishema and Ruzindana* made no such claim, nor do the plain meanings of the two terms suggest any great difference. On the contrary, “substantial” arguably suggests a greater number of victims, as a single killing is not a substantial number but a considerable one.<sup>132</sup>

The *Jelisić* court’s second interpretation of the intent element analyzed “in part” in “qualitative” terms.<sup>133</sup> The latter could be satisfied if the accused targeted “the most representative members of the target community,” which would include “the total leadership of a group,” consisting of “political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others . . . regardless of the actual numbers killed.”<sup>134</sup> In this regard, the *Krstić* approach to “in part” is much more workable. *Krstić*, as noted, stands for the principle that “in whole or in part” means plainly that “any act committed with the intent to destroy a part of a group, as such, consti-

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<sup>129</sup> See *Kayishema and Ruzindana*, Judgment, ICTR-95-1-T ¶ 97 (emphasis added). Unfortunately this misquote has worked its way into the case law. The *Sikirica* court similarly misstates the *Kayishema and Ruzindana* holding, omitting the verb “opines” and thereby suggesting that the “holding” was more than dicta. See Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T ¶ 64 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>. The *Krstić* court further embeds the mistake: “The *Kayishema and Ruzindana* Judgment stated that the intent to destroy a part of a group must affect a ‘considerable’ number of individuals.” Prosecutor v. Krstić, Judgment, Case No. IT-98-33-T ¶ 586 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>.

<sup>130</sup> See *Kayishema and Ruzindana*, Judgment, ICTR-95-1-T ¶¶ 531-40 (examining defendant’s methodology, persistent pattern of conduct, and utterances in addition to number of victims when considering “in whole or in part” element). In the corresponding section of codefendant Ruzindana’s judgment, no specific mention is made of the numbers of victims. See id. ¶¶ 541-45; see also *supra* notes 85-91 and accompanying text.

<sup>131</sup> The *Sikirica* court makes a similar semantic assumption that “considerable” is more restrictive than “substantial.” See *Sikirica*, Judgment, IT-95-8-T ¶ 65.

<sup>132</sup> Unless of course the court “considers” the number of killings in proportion to the population of the targeted group “in whole or in part.” See id. ¶¶ 68-69.

<sup>133</sup> See Prosecutor v. Jelisić, Judgment, Case No. IT-95-10-T ¶ 81 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>.

<sup>134</sup> Id. ¶ 82 (quoting Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex 1, ¶ 94, U.N. Doc. S/1994/674 (1994)).

tutes an act of genocide within the meaning of the Convention.”<sup>135</sup> This allows the court to understand “in part” in terms of geographically limited areas<sup>136</sup> and in terms of victims selected according to criteria other than the vague category of “leadership” contemplated by *Jeliscic*.

By way of example, consider a murderous regime that terrorizes a national, ethnic, racial, or religious group into abandoning its home region through the systematic execution of seemingly random categories of victims within the group, such as the left-handed, the near-sighted, or those members of the group who own televisions. The *Jeliscic* model establishes a categorical rule under which judges will not consider such acts genocidal until either the number of deaths reaches a “very large number” or a “significant part” of the population.<sup>137</sup> Because neither standard is very clear, the rule provides little guidance. The *Krstic* model, however, accepts the possibility that actors under such a regime could demonstrate inferable intent and provides judges with the discretion to so determine.

### C. Sikirica and the Formation of the Quantitative Criterion

*Prosecutor v. Sikirica*<sup>138</sup> represents the hardening of the intent element and the judicial creation of a “quantitative criterion” in the “in whole or in part” language of the statute.<sup>139</sup> In *Sikirica*, the prosecution offered a nuanced theory of the intent element that would balance the objective and subjective evidence as a whole, drawing on a list of elements taken from prior cases.<sup>140</sup> The court recognized the inferability of genocidal intent and cited the *Jeliscic* Appeal for this

<sup>135</sup> *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T ¶ 584 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>.

<sup>136</sup> See *id.* ¶ 589.

<sup>137</sup> See *supra* notes 124-28 and accompanying text.

<sup>138</sup> *Prosecutor v. Sikirica*, Judgment, Case No. IT-95-8-T ¶¶ 86, 90 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>. The Trial Chamber acquitted the defendant pursuant to a Rule 98 *bis* motion. See *supra* note 69.

<sup>139</sup> See *Sikirica*, Judgment, IT-95-8-T ¶ 76.

<sup>140</sup> See *id.* ¶ 46 & n.124 (listing seven factors as being relevant to prove *mens rea* element) (citing *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T (Int’l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999), <http://www.ict.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>; *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T (Int’l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998), <http://www.ict.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>; *Prosecutor v. Jeliscic*, Appeal, Case No. IT-95-10-A ¶ 47 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>).

proposition.<sup>141</sup> However, the court held that “it is more appropriate to speak of a ‘reasonably substantial’ rather than a ‘reasonably significant’ number” and that “[t]his part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group.”<sup>142</sup>

The prosecution in *Sikirica* offered seven factors relevant to proving the defendant’s mental culpability for genocide.<sup>143</sup> Although the court acknowledged that the factors offered by the prosecution “are relevant,”<sup>144</sup> it did not address any of them.<sup>145</sup> Rather, the court declared that “it is unnecessary to have recourse to theories of intent”<sup>146</sup> and drew on Article 31(1) of the Vienna Convention on the Law of Treaties to determine the “ordinary meaning that should be given to the phrase ‘destroy in whole or in part’ in its context and in the light of the object and purpose of the 1948 Genocide Convention.”<sup>147</sup> The tribunal then supported its contention that the “ordinary meaning” of “in part” is “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” by citing merely one paragraph from one source.<sup>148</sup>

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<sup>141</sup> The court reasoned that “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, [and] the repetition of destructive and discriminatory acts” all contribute to the inference of intent. *Sikirica*, Judgment, IT-95-8-T ¶ 46 n.124 (citing *Jeliscic*, Appeal, IT-95-10-A ¶ 47).

<sup>142</sup> *Id.* ¶ 65; see also, Whitaker, *supra* note 70, ¶ 29 (differentiating, in determining intent, between massacre affecting only one-tenth of large group, versus attack affecting one half of small group or significant section of group such as its leadership).

<sup>143</sup> The seven factors, which apparently derived from the prosecutor’s brief before the Appeals Chamber in *Jeliscic*, were:

- (a) The general and widespread nature of the atrocities committed;
- (b) The general political doctrine giving rise to the acts;
- (c) The scale of the actual or attempted destruction;
- (d) Methodical way of planning the killings;
- (e) The systematic manner of killing and disposal of bodies;
- (f) The discriminatory nature of the acts;
- (g) The discriminatory intent of the accused.

*Sikirica*, Judgment, IT-95-8-T ¶ 46 & n.123.

<sup>144</sup> *Id.* ¶ 61.

<sup>145</sup> The Chamber perfunctorily considered the factors, see *id.* ¶¶ 91-97, but only *after* concluding that the intent to destroy in part the Bosnian Muslims or Bosnian Croats “cannot be inferred on the basis of the evidence, with reference either to the criterion of the intent to destroy a significant number of the group relative to its totality or to the intent to destroy a significant section of the group, such as its leadership.” *Id.* ¶ 85.

<sup>146</sup> *Id.* ¶ 60.

<sup>147</sup> *Id.* ¶ 63.

<sup>148</sup> *Id.* ¶ 65. The one paragraph cited was Whitaker, *supra* note 70, ¶ 29 (addressing extent to which destruction of group is necessary to be defined as genocide and suggesting that, in order not to dilute concept of genocide’s gravity by inflation of number of cases, relevant considerations should include both proportionate scale and total numbers).

The ICTY Chamber thereby announced its method. As with *Jeliscic*, the *Sikirica* court reasoned that “in part” may refer to “destruction of the group . . . in relation to [either] the . . . criteria of ‘substantial number’ [or] ‘significant section.’”<sup>149</sup> The court noted that “in part” could pertain to “only part of a group within a given geographical area: a country or a region or a single community.”<sup>150</sup> However, the court qualified this by asserting that “[w]hether the group belongs to a country or a region or a single community, it is clear that it must belong to a geographic area, limited though it may be.”<sup>151</sup> The *Sikirica* decision thus turned on the court’s reasoning that the proper geographic zone for inquiry into the “substantial number” was not the detention camp in which the relevant acts took place, but the municipality in which the detention was located.<sup>152</sup>

In other words, the court prepared an arithmetic exercise: Considering the entire camp population as victims, it calculated “a number of approximately 1000-1400 Muslims out of a total of 49,351 in the Prijedor municipality. This would represent between 2% and 2.8% of the Muslims in the Prijedor municipality and would hardly qualify as a ‘reasonably substantial’ part of the Bosnian Muslim group in Prijedor.”<sup>153</sup> Elsewhere the court deemed the 1000 to 1400 victims “negligible”<sup>154</sup> and ruled that when “considered along with other aspects of the evidence, it becomes clear that this is not a case in which the intent to destroy a substantial number of [the group] can properly be inferred.”<sup>155</sup>

*Sikirica* provides no instruction as to the ultimate number of victims required to infer intent. Rather the court would formalize the quantitative analysis as a preliminary question of fact prior to the balancing necessary to infer intent from the many and various sources.<sup>156</sup> Without clear guidance, however, the “quantitative criterion” risks becoming an insurmountable obstacle in all but the most obvious cases.

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<sup>149</sup> Id. ¶ 66.

<sup>150</sup> Id. ¶ 68.

<sup>151</sup> Id.

<sup>152</sup> See id.

<sup>153</sup> Id. ¶ 72.

<sup>154</sup> Id. ¶ 74. The court designated the entire camp population victims for the sake of argument, although the number of actual and alleged victims was lower. Id. ¶ 70.

<sup>155</sup> Id. ¶ 75.

<sup>156</sup> Of course if the accused is charged with acts other than killings, the quantitative analysis would bear on the number of victims of those acts and not killings per se. See id. ¶ 67 (contemplating total number of acts under articles 4(2)(a) (killings), 4(2)(b) (causing bodily and mental harm), and 4(2)(c) (inflicting conditions of life calculated to bring about destruction of group)).

## III

## CRITIQUE OF THE QUANTITATIVE CRITERION

The quantitative criterion for the intent element is both unworkable and incompatible with the core values established by the Genocide Convention. The number of victims attributable to a defendant can and should constitute one evidentiary factor—probably a very important factor—when a court infers intent. However, such a number remains merely one factor among many.

As a formal matter, then, *Jeliscic* and *Sikirica* unnecessarily introduce act requirements into the *mens rea* analysis by treating the quantity of killings as a threshold requirement. Killings are acts as defined by Article 4(2) of the ICTY Statute.<sup>157</sup> Redefining “killings” as both acts and intent requires judicial scholasticism: A court must determine whether a genocide has occurred as proof of whether a specific defendant *could* have had genocidal intent. This strains logic. While it may be desirable for policy reasons to limit finite judicial resources to only those genocides that fit a notion of massive and widespread atrocity,<sup>158</sup> small genocides are indistinguishable from large ones in the application of legal proof.

As a criterion, moreover, no court can establish satisfactorily the appropriate quantity of killings necessary to infer intent. Whether the criterion is expressed as a whole number or as a percentage of the greater group, it will fail to uphold the group right to exist. Any bright-line, whole-number approach radically would diminish protection for smaller groups. If one hundred members of a small protected group live in a large city, and an enemy group kills ten of those members in an attempt to eliminate the group from that city, then all of the substantive elements of the crime have been met, regardless of the “small” number of murders.<sup>159</sup> Proportionately, even one murder may be “reasonably significant” if the group is small enough and the intent has been satisfied otherwise. Were this not the case, a strict quantitative requirement would reach the perverse conclusion that the smallest, most vulnerable groups are categorically excluded from pro-

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<sup>157</sup> See ICTY Statute, *supra* note 6, art. 4(2), reprinted in 32 I.L.M. at 1172-73.

<sup>158</sup> Compare Prosecutor v. Jeliscic, Appeal, Case No. IT-95-10-A ¶¶ 73-75 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001) (refusing retrial on genocide based on policy matters), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>, with *id.* sec. VII, ¶ 2 (Wald, J., dissenting in part) (“Further, the resources of the Tribunal are stretched thin and there may well be reason to prioritise cases involving allegations of State-planned and executed crimes, rather than individualistic or opportunistic crimes.”). See discussion *supra* note 112.

<sup>159</sup> While so stretching the concept may appear a *reductio ad absurdum*, it heightens the impossibility of a strict whole-number, quantitative requirement in the intent element.

tection. This is clearly contrary to the object and purpose of the Convention.<sup>160</sup>

More important, it is not clear why two percent fails a “reasonably substantial” test. Would four percent? Does ten percent? The calculation appears somewhat grotesque and wholly dependent on further determinations of both the geographic scope of inquiry and the numbers of the total group. Take, for example, very large groups, such as the 150 million Muslims in India. If mass killings occur and other intent factors have been satisfied, it seems improbable that the arbitrary number of two percent, here three million people, would fail to pass the reasonably substantial test, even though presumably meeting the “very large number”<sup>161</sup> standard.<sup>162</sup>

Finally, a test hinging on the quantity of killings is contrary to—or at best inconsistent with—the right of human groups to exist. Such a test disserves the desideratum of the Convention to “liberate mankind from such an odious scourge”<sup>163</sup> and the instruction that states “undertake to prevent and punish”<sup>164</sup> the crime. The quantitative criterion would act to hinder the determination of genocide at its earliest appearance.<sup>165</sup> The International Criminal Court’s Elements of Crime address this concern by explicitly allowing for the punishment of “the initial acts in an emerging pattern.”<sup>166</sup> If such a pattern surfaces and then mercifully stops, genocide still has occurred.

Genocide is both morally and substantively distinguishable from murder, mass murder, or the crimes against humanity<sup>167</sup> of persecu-

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<sup>160</sup> The object and purpose of the Genocide Convention is clear from its preamble: “*Recognizing* that at all periods of history genocide has inflicted great losses on humanity; and *Being convinced* that, in order to liberate mankind from such an odious scourge, international co-operation is required.” Genocide Convention, *supra* note 1, pmbl., 78 U.N.T.S. at 280.

<sup>161</sup> See *Prosecutor v. Jelusic*, Judgment, Case No. IT-95-10-T ¶ 81 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>; *supra* note 124 and accompanying text (describing “very large number” language).

<sup>162</sup> See Whitaker, *supra* note 70, ¶ 29 (observing that “considerations . . . both of proportionate scale and of total numbers are relevant” to finding genocide); cf. Lippman, *supra* note 23, at 485-86 (rejecting proposal to modify intent element of genocide to “in whole or in substantial part”).

<sup>163</sup> Genocide Convention, *supra* note 1, pmbl., 78 U.N.T.S. at 280.

<sup>164</sup> *Id.* art. 1, 78 U.N.T.S. at 280.

<sup>165</sup> Int’l Criminal Court, Commentary, *supra* note 54, at 47.

<sup>166</sup> *Id.*

<sup>167</sup> The ICC Statute defines crimes against humanity as one of eleven enumerated acts “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Rome Statute for the International Criminal Court, *supra* note 7, art. 7. Genocide is not a crime against humanity so understood because it is not limited to civilian targets.

tion<sup>168</sup> and extermination.<sup>169</sup> Genocide is substantively different in that “the victim of the crime . . . is the group itself,”<sup>170</sup> a claim perhaps common only to the other international crimes of slavery and apartheid. The culpable acts that may constitute genocide are most likely all punishable as distinct crimes without any showing of genocidal intent.<sup>171</sup> The difference between a discriminatory and a genocidal murder depends on the mental state of the perpetrator. Therefore the content of the substantive difference between genocide and other crimes turns on genocidal intent, namely the intent to destroy the group “in whole or in part.”<sup>172</sup>

From a formal perspective, consequently, prosecution for genocide should be a matter of relatively easy factual findings and a straightforward determination of *mens rea*.<sup>173</sup> But genocide is also morally different from other atrocities, standing above and beyond them. That the victim is the group itself does not explain our revulsion toward the concept or toward the perpetrators of the crime. And in this regard each and every act of genocide victimizes and degrades all humankind.<sup>174</sup> Jurists manifest this sentiment by anxiously resisting expansive treatments that would “trivialize” or weaken the concept or by exalting its position as the “crime of crimes.”<sup>175</sup> Au-

<sup>168</sup> See art. 7(2)(g) (defining persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”). Unlike genocide, persecution is not confined to acts against national, ethnical, racial, or religious groups.

<sup>169</sup> See art. 7(2)(b) (describing extermination as “the intentional infliction of conditions of life . . . calculated to bring about the destruction of part of a population”).

<sup>170</sup> *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T ¶ 521 (Int’l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998), <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

<sup>171</sup> See *supra* note 52 and accompanying text.

<sup>172</sup> See *Prosecutor v. Jelusic*, Appeal, Case No. IT-95-10-A ¶ 46 (Int’l Crim. Trib. Yugoslavia, Appeals Chamber, July 5, 2001), <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>.

<sup>173</sup> This is, of course, not borne out in the cases. Only the *Sikirica* court has suggested that the determination of intent is a simple matter. See *Prosecutor v. Sikirica*, Judgment, Case No. IT-95-8-T ¶ 58 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001) (“In the Trial Chamber’s opinion, the submissions by the Prosecution on this question have for the most part complicated what is a relatively simple issue of interpretation of [the intent element of the ICTY Statute].”), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>.

<sup>174</sup> The preamble to the Genocide Convention is compatible with this understanding. See Genocide Convention, *supra* note 1, pmb., 78 U.N.T.S. at 278 (“Recognizing that at all periods of history genocide has inflicted great losses on humanity . . .”).

<sup>175</sup> Nor is this limited to the legal bibliography. Historians and sociologists, to name but two groups, describe genocide in similarly grand language. See, e.g., George J. Andreopoulos, Introduction: The Calculus of Genocide, in *Genocide: Conceptual and Historical Dimensions 1* (George J. Andreopoulos ed., 1994) (“No crime matches genocide in the moral opprobrium that it generates.”); Frank Chalk & Kurt Jonassohn, *The History*

thorities rely on the moral immensity of genocide to carefully resist efforts by others to expand the protections of the Convention and statute beyond those groups currently protected.

Scholars and jurists, however, have not been uniform in their belief in the value of conceiving genocide in such rarified light. While some criticize the statute for its limited scope,<sup>176</sup> others focus on the global realpolitik of enforcement and prosecution.<sup>177</sup> Still others emphasize the inability or unwillingness of the international system to prevent or punish genocide and assail the selective application of the term to the innumerable mass slaughters that bloodied the twentieth century.<sup>178</sup> And some see the Convention as a context-specific articulation of the world community's collective revulsion at the Nazi horror and an increasingly stunted metaphor for the genocide against European Jewry itself.<sup>179</sup>

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and *Sociology of Genocide: Analyses and Case Studies* 4 (1990) ("[W]e take it for granted that we are all against genocide . . .").

<sup>176</sup> For analysis of the literature criticizing the list of protected groups in the statute, see generally Schabas, *supra* note 33. One scholar rejects the group-rights approach to genocide and prefers to emphasize killings based on "negative group identity." Simon, *supra* note 63, at 244-47; see also Lippman, *supra* note 23, at 526-30 (cataloging inadequacies of Genocide Convention). The sociological literature remains critical of the legal framework for genocide. See, e.g., Steven T. Katz, *The Holocaust in Historical Context: The Holocaust and Mass Death Before the Modern Age* 131 (1994) (proposing alternative framework for genocide and defining it as "the actualization of the intent, however successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the perpetrator" (internal quotation and citations omitted)).

<sup>177</sup> See Lippman, *supra* note 23, at 485-87 (surveying proposed reforms of genocide statute); Lippman, *supra* note 41, at 472-89 (describing early frustrations of Convention enforcement); see also Marshall Harris, Introduction to Francis Boyle, *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide*, at xi (1996) (criticizing Clinton administration's "steadfast refusal" to identify Serbian attacks on Bosnians as genocide and decrying "political decision not only not to invoke the UN Genocide Convention, but also not to use the word 'genocide'").

<sup>178</sup> See Goldman, *supra* note 41, at 65-66 (critiquing implementation of existing protections for minority groups). See generally Lieutenant Commander Catherine S. Knowles, *Life and Human Dignity, the Birthright of All Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 *Naval L. Rev.* 152 (1998) (advocating creation of ad hoc tribunal, along lines of ICTR and ICTY, for Iraqi leaders responsible for genocide against Kurds).

<sup>179</sup> See Lippman, *supra* note 23, at 530 (concluding that Convention "remains a symbolic denunciation of Nazi deportations"); David Rieff, *An Age of Genocide: The Far-Reaching Lessons of Rwanda*, *The New Republic*, Jan. 29, 1996, at 35-36 (inquiring whether centrality of Holocaust to genocide definition may lead to exoneration of perpetrators elsewhere). Elsewhere Lippman describes the Convention as "a museum piece—a symbolic punishment and atonement for the past rather than a document designed to prevent and punish future acts"—and inquires whether or not the term is limited to those groups who can mobilize the international community to intervene. Lippman, *supra* note 41, at 511-12. But see Schabas, *supra* note 76, at 46, 52 (questioning ICTY Prosecutor's "mechanistic



Jurists rightly differentiate genocide from other crimes on both legal and moral grounds, but in doing so they risk importing ambiguous extralegal concepts into the prosecution of genocide that detract from the development of clear jurisprudence and precise interpretation of the requisite *mens rea*. This disserves the direct and indirect victims of genocidal atrocity and the global effort to prevent and punish perpetrators.

In the tribunals' defense, they do demonstrate doubts about the appropriateness of applying the full weight of a genocide conviction to those "small fish" defendants when compared to the immense atrocities at stake in, for example, *Krstic*.<sup>180</sup> The *Jeliscic* court notes that the prosecution only demonstrated that the "lists name just over a hundred people who died" and that "about sixty persons were killed in Brcko during May 1992 (of a total Muslim population of about 22,000 people. . .)." <sup>181</sup> If so, then this too may strain popular, nonlegal, concepts of the term "genocide."

Admittedly, the quantitative element—in both proportionate and whole number terms—carries important evidentiary weight for the determination of whether or not genocidal intent is inferable from a particular presentation of facts.<sup>182</sup> However, genocide's position at the pinnacle of moral condemnation has no necessary or logical role in this determination. On the contrary, the inference of intent concerns the single factual question of whether or not a defendant intended to destroy the group.<sup>183</sup>

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equation between concentration camps and genocide" and challenging *Krstic* court's "enormous deduction" that massacres of military-aged men and boys amounted to intent to destroy group "in whole or in part").

<sup>180</sup> "Because genocide is universally recognized as an extremely serious crime, it was generally agreed that the context of the crime requires that there be a certain scale or other real threat to a group." Int'l Criminal Court, Commentary, *supra* note 54, at 45. Schabas comments: "[I]t was not intended that the crime of genocide extend to isolated acts of racially-motivated violence. Thus, there is some quantitative threshold." William A. Schabas, Article 6: Genocide, in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, *supra* note 7, at 107, 109. Elsewhere Schabas argued against what he called the "Lee Harvey Oswald theory of genocide." Schabas, *supra* note 76, at 31.

<sup>181</sup> Prosecutor v. Jeliscic, Judgment, Case No. IT-95-10-T ¶ 91 n.128 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999) (parentheses in original), <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.pdf>.

<sup>182</sup> But see Lippman, *supra* note 23, at 473-75 (describing alternative proposals to "in whole or in part" language during drafting of Genocide Convention).

<sup>183</sup> Factual matters such as the context in which the individual defendant acted obviously will not rely solely on the defendant's actions and intentions. See Int'l Criminal Court, Commentary, *supra* note 54, at 44-49.

## CONCLUSION

It may be the case that a small number of killings (be it absolute or relative to a greater group) does not satisfy a widely held conception of genocide.<sup>184</sup> Notions that genocide is the “crime of crimes”<sup>185</sup> and the nadir of human evil pepper the scholarly and judicial literature and may inform the desire to “protect” genocide from trivialization.<sup>186</sup> If so, the statutory definition does not reflect such concerns. As such, judicial efforts to preserve genocide’s high status is misplaced within formal analysis of inferred intent. Adjudicating the intent element should continue as an exercise in the application of the plain meaning of the statute to the facts before a court.

If further entrenched, the quantitative criterion will severely restrict future prosecutions for genocide. Such a reading of the *mens rea* requirement appears to import a “viability” test into the analysis: Demonstrable individual intent to destroy a group remains merely “discriminatory” until such a defendant has viable means to achieve the genocidal goal.<sup>187</sup> Such a distinction between “hard” genocide, in which large numbers of perpetrators—presumably state or military actors—achieve some degree of success in a genocidal project, and “soft” genocide, in which individual intent must meet an additional

<sup>184</sup> Such a reading casts the *Sikirica* court’s assertion that 1000 to 1400 victims is “negligible” in a somewhat more comprehensible light. See *Prosecutor v. Sikirica*, Judgment, Case No. IT-95-8-T ¶ 74 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>; see also *supra* notes 153-55 and accompanying text.

<sup>185</sup> The ICTR first used the term “crime of crimes” in the *Kambanda* sentencing decision. See *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. ICTR-97-23-S ¶ 16 (Int’l Crim. Trib. Rwanda, Trial Chamber, Sept. 4, 1998) (“[T]he Chamber is of the opinion that genocide constitutes the crime of crimes.”), <http://www.ictor.org/wwwroot/ENGLISH/cases/Kambanda/judgement/kambanda.html>. The phrase was reasserted during the sentencing phase of *Prosecutor v. Akayesu*, Sentence, Case No. ICTR-95-1-T (Int’l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998) (statement of President Kama); see also Kayishema & Ruzindana, Sentence, Case No. ICTR-95-1-T ¶ 9 (Int’l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999), <http://www.ictor.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>. But see *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T ¶ 699-700 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Aug. 2, 2001) (cautioning against automatic moral hierarchy of crimes, including genocide), <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>. The phrase has stuck, however, and the assumption that genocide is the worst among known crimes seems to inform the literature at the most general level. By way of two anecdotal examples, one scholar begins his work with this assertion. See Andreopoulos, *supra* note 175. Secondly, the phrase itself appears in the very title of Professor Schabas’s work *Genocide in International Law: The Crime of Crimes*, *supra* note 1.

<sup>186</sup> See Shaw, *supra* note 70. For a compelling alternative explanation for “reluctance in the international community to admit to genocide,” see Lippman, *supra* note 23, at 526-30 (describing international reluctance to intervene against or prevent genocides).

<sup>187</sup> The Trial Chamber in *Sikirica* characterized the prosecutor’s theory of intent in such a way. See *Sikirica*, Judgment, IT-95-8-T ¶ 89.

criterion, may fit the popular notion that “it isn’t genocide until everyone gets killed,” but it does not fit within the language of the statutes, the *Akayesu-Krstic* line of cases, and the crime’s group-rights core.