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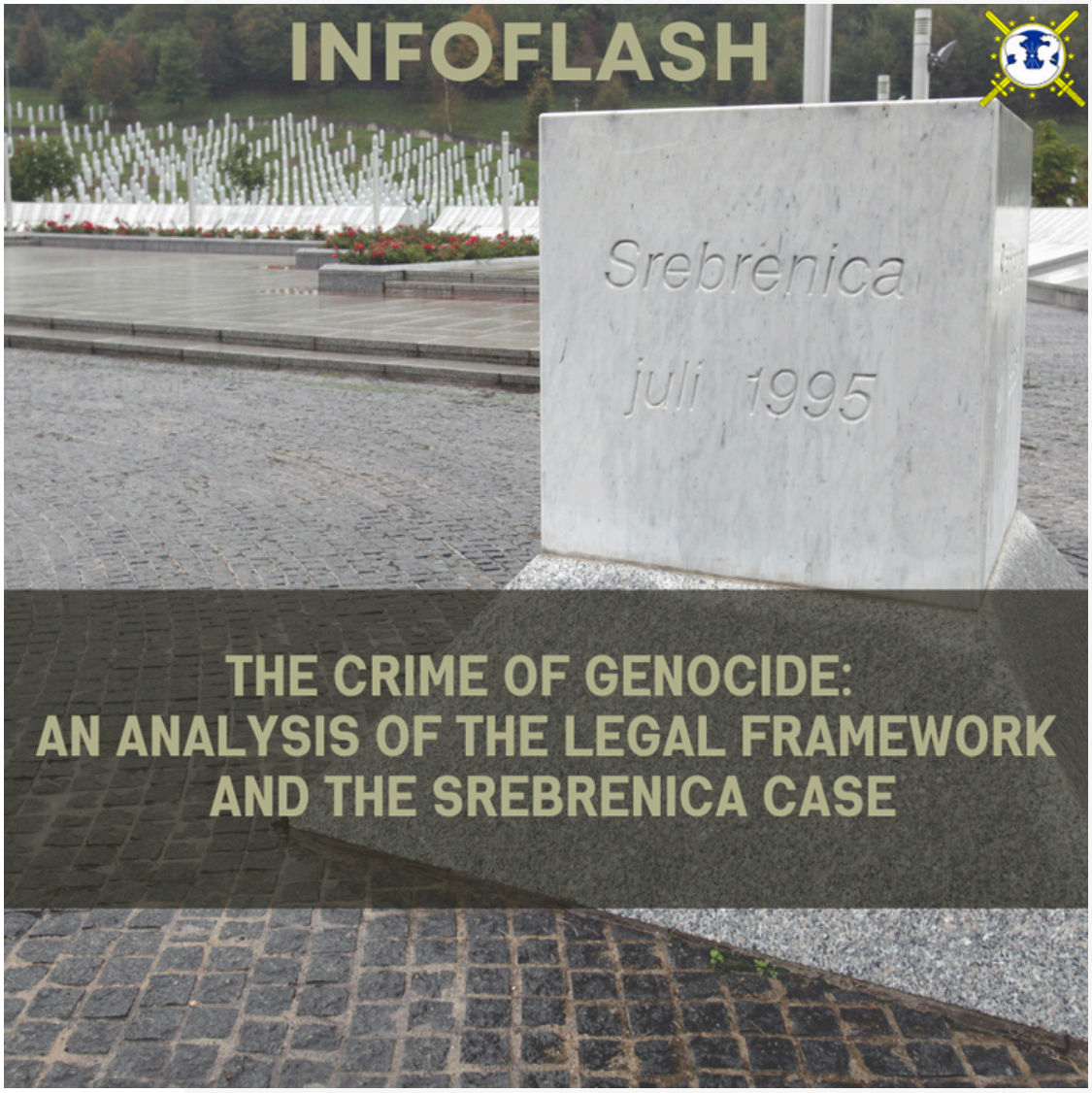

THE CRIME OF GENOCIDE: AN ANALYSIS OF THE LEGAL FRAMEWORK AND THE SREBRENICA CASE

WRITTEN BY
MEAVE BUCHIGNANI &
MARTA CERAFOGLI

EDITED BY
PAOLA NADAL

SUPERVISED BY
RICCARDO ANGELO GRASSI

Introduction

In light of the horrific events of the Holocaust, which lacked a legal definition and regulation, the International Community and therefore the Nuremberg Tribunal recognised the urgent need of finding an adequate solution to this legal vacuum. Following several attempts of codification, finally in 1948 the United Nations General Assembly unanimously adopted the Genocide Convention. Said Convention defined genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” (Art. II, Genocide Convention, 1948). The Rome Statute of the International Criminal Court (1998) replicated the definition, but prosecuting the perpetrators of said actions and proving the required factual and mental element still poses challenges.
After a brief overview of the International and European Community’s inadequate response to the Bosnian War (1992-1995) and the outcome of said inadequacy, the paper will analyse the relevant legal framework of genocide, focusing on the crime's codification and challenges in proving the intent above. Finally, the paper will present Ratko Mladić’s case before the International Criminal Tribunal for the former Yugoslavia, which led to the individual's prosecution and life sentence for the crime of genocide in the Srebrenica massacre.

I. Security Context in the Bosnian War and its Legal Implications

The Bosnian War (1992-1995), characterised by ethnic violence and a slow commitment to action by the International Community, exposed the limitations of European collective security. Before the conflict, the then-European Community lacked a common military structure, heavily relying on NATO. The consequences of the European inadequacy led to the development of the European Common Security and Defence Policy (CSDP), which enabled the Union to adopt a coherent approach when addressing security challenges. The Bosnian War remains a stark reminder of the challenges that Europe faces in ensuring its security and the importance of a solid and unified response to future conflicts (Helly & Flessenkemper, 2013).

The weak European response to the critical events breached the so-called “duty to prevent”, derived from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (henceforth the Genocide Convention). Articles I, IV and V establish for the State Parties the obligation to take measures to prevent and to punish the crime of genocide, including enacting relevant legislation and punishing perpetrators, “whether they are constitutionally responsible rulers, public officials or private individuals” (Genocide Convention, 1948, Article IV). That obligation and the prohibition of committing genocide have been considered norms of international customary law and, therefore, binding on all States of the International Community, whether or not they have ratified such Convention (United Nations Office on Genocide Prevention and the Responsibility to Protect, 2024).

Following the inactivity of the International and the European Community in the Balkans, in September 1999, UN Secretary General Kofi Annan reflected upon "the prospects for human security and intervention in the next century" and urged the Member States to "find common ground in upholding the principles of the Charter, and acting in defence of common humanity" (United Nations Secretary General, 1999). As a result, at the 2005 high-level UN World Summit meeting, Member States finally committed to the principle of the responsibility to protect by including it in its final declaration (United Nations General Assembly, 2005).

In short, the Bosnian War highlighted the need for a more robust European security structure with the ability to prevent and respond to tragic and unlawful events like genocide. The legal relevance of such events makes it worthwhile to consider the legal framework and the subsequent jurisprudence on the crime of genocide.

II. Legal Framework of the Crime of Genocide

The first codified recognition of genocide as a legal matter can be found in United Nations General Assembly resolution 96(I) of 11 December 1946 (United Nations Office on Genocide Prevention and the Responsibility to Protect, 2024). Genocide is here defined as "a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings (...)" (UNGA, 1946). It marked the first time that genocide was established as a crime under international law and, therefore, punishable before the whole International Community. The resolution called for international cooperation and the creation of national legislation to facilitate the prevention and punishment of the crime (UNGA, 1946).

The Genocide Convention (1948) then explicitly regulated genocide. Article II frames the crime as

> "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" (Genocide Convention, 1948).

The provision requires a mental element (*mens rea*) and a factual element (*actus reus*). Whilst the second one is easily detectable, the first one is harder to determine because there must be a proven intent to destroy on the part of perpetrators, which is often unavailable. Therefore, the characteristic element that differentiates genocide from any other crime under international law is this *dolus specialis*. In addition, in some instances, case law has associated such criterion with the existence of a specific State or organisational plan or policy, even if the definition of genocide does not include that element (International Court of Justice, 2015).
The International Court of Justice affirmed that the Convention embodies principles of general customary international law and, more importantly, that the prohibition of genocide is a peremptory norm of international law (or *ius cogens*). Consequently, no derogation is allowed (International Court of Justice, 1970). As evidence, the Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity (1968) and its European counterpart, the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974), determine that no statutory limitation shall apply to genocide as a specific crime against humanity.

Article VI of the Genocide Convention recognises the territorial jurisdiction of the State where the act occurred and the jurisdiction of an international criminal tribunal, which did not exist then. This core concept of granting jurisdiction to a non-state tribunal marked the beginning of sporadic work that would eventually lead, half a century later, to the establishment of the International Criminal Court (ICC) (Schabas, 2008).

The Rome Statute, in Article 6, replicates verbatim the definition already provided by the Genocide Convention (International Criminal Court, 1998). However, even if genocide is one of the four crimes falling under the jurisdiction of the ICC, only one of the 32 active cases before the Court involves genocide charges (International Criminal Court, 2024). Prosecutors have to show the existence of a group protected under the Genocide Convention, genocidal acts and an intent to destroy at least part of the group. To avoid such difficulties with the risk of leaving the perpetrator of the crime unpunished, the ICC relied on the remaining jurisdiction *rationae materiae* of crimes against humanity, war crimes, and crimes of aggression.

To prove the *dolus specialis,* the prosecutor can explore different investigation strategies involving circumstantial evidence. First, it is essential to note that mere incidental harm to a protected group is insufficient to constitute genocide. Accordingly, the preliminary step is to demonstrate that victims were targeted based on their actual or perceived membership in one of the four protected groups under the Genocide Convention: national, ethnical, racial, or religious. Secondly, the prosecution must establish a causal link between the acts and the intended outcome: the acts must be the so-called "substantial cause" of the destruction of the targeted group. Within the operative investigation of the ICC, the acts of and associated with genocide must be committed "in the context of a manifest pattern of similar conduct" directed against a targeted national, ethnical, racial or religious group, or that the conduct itself could cause the destruction of the group (International Criminal Court, 2013). For instance, the prosecutor could obtain evidence of orders made by the defendant or their superior within the chain of command. Another strategy would be to show a clear pattern of actions that would inevitably destroy the targeted group. Relevant instances of such actions could involve the siege of a civilian populated area or the shelling of the civilian population (International Institute for Criminal Investigations, 2024).

Another international court that includes genocide amongst its jurisdiction is the International Criminal Tribunal for the former Yugoslavia (ICTY), a judiciary body formally established by Security Council resolution 827 (United Nations Security Council, 1993). The Tribunal has the authority to prosecute and try individuals for four categories of offences: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity (United Nations Security Council, 1993a).
Mirroring the method of the Rome Statute, the definition of genocide in Article 4 of the Statute of the Tribunal perfectly incorporates the one proposed by the Genocide Convention.

Recalling the difficulties mentioned above in proving the intent of genocide, ICTY jurisprudence elaborated that "it is permissible to infer the existence of genocidal intent based on all the evidence, taken together, as long as this inference is the only reasonable [one] available on the evidence" (International Criminal Tribunal for the Former Yugoslavia, 1998). Therefore, this Court underlined the necessity of considering other possible indicators of the intent, even if they are not formal elements of the crime. The following section will analyse the reasoning of the Court in genocide judgments referring to a landmark case.

In light of the foregoing, it would be beneficial for the ICC and other international Tribunals to rely on a standard different from or revised from the *dolus specialis* criterion due to the prosecutors' difficulty in proving the perpetrator's responsibility.

III. A Case Study: Prosecutor v. Mladić

On 23 May 2024, the UN General Assembly (UNGA), adopting Resolution A/78/L.67/Rev.1, established 11 July as the "International Day of Reflection and Commemoration of the 1995 Genocide in Srebrenica" and condemned any denial of the Srebrenica genocide (UNGA, 2024). In said landmark resolution, which comes almost thirty years after the events which occurred in Srebrenica during the Bosnian War, the UNGA recalled several judgements pronounced by the ICTY where the acts committed in Srebrenica were recognised as constituting the crime of genocide (UNGA, 2024). Among said judgements, the Assembly mentioned the judgement pronounced by the ICTY Appeals Chamber against Ratko Mladić. Given the resolution mentioned above, this paragraph will briefly analyse the *Mladić* case before the ICTY and the conviction of Ratko Mladić for genocide.

On 16 November 1995, the ICTY announced the indictment against Ratko Mladić, a Commander of the Bosnian-Serb Army (VRS), charging him with genocide for the actions committed in Srebrenica as well as other crimes (*Prosecutor of the Tribunal v. Karadzic et Mladic*, 1995). Following the issue of his arrest warrant, the former Commander was arrested in Serbia in 2011 and put under the Tribunal's custody.

The trial started on 16 May 2012, and the evidence hearing lasted for over four years, until December 2016, as the Trial Chamber had to receive the evidence of 592 witnesses and 10,000 exhibits and take judicial notice of nearly 2,000 adjudicated facts.

In April 2014, in the early stages of the proceedings, the Trial Chamber I of the ICTY rejected the Defence's arguments for acquittal proposed under Rule 98 bis of the Tribunal's rules, which required the Trial Chamber to assess "whether there is evidence capable of supporting a conviction on every count of the indictment". According to the judges, there was evidence proving the acts of genocide and the mens rea, the genocidal intent, required for that crime (ICTY, 2014).
On 22 November 2017, following a five-year trial, the Trial Chamber gave the verdict on Mladić's case. In the 2527-page sentence, the Chamber reviewed all the collected evidence and condemned Mladić for the crimes committed (*Prosecutor v. Mladić,* 2017).

Before presenting the findings of the Court, this paragraph will highlight the critical events that occurred in Srebrenica to provide context. On 8 March 1995, Radovan Karadžić, former president of the Bosnian-Serb Republic during the Bosnian War, issued Directive number 7 ordering the VRS to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica" (*Prosecutor v. Mladić*, 2017, para. 2383). Ratko Mladić, who was in charge of the subsequent operation against the enclave, put into action this Directive. The operation followed the so-called Krivaya-95 plan, which aimed at eliminating the enclave itself, forcibly removing the Bosnian-Muslim population and making it Serbian territory (ICTY, 2017).

The attack began on 6 July, and by 12 July, almost 30,000 Bosnian-Muslim civilians had fled to Potočari, where the UN Protection Force (UNPROFOR) had created a safe compound. However, the situation was critical. The VRS, UNPROFOR officers and individuals representing the Bosnian Muslims agreed that the civilians in Potočari were going to be evacuated to Kladanj by the VRS and the Bosnian-Serb Republic police forces under UNPROFOR's supervision. However, during the transport of these people, Bosnian-Muslim men from the age of 12 to 60 years old were separated from other civilians. Said men, together with other individuals, were detained in temporary detention facilities, transferred to execution camps and insulted, threatened and beaten before being executed (ICTY, 2017). From 12 July, in one week, thousands of Bosnian Muslim men were massacred, tortured and killed (ICTY, n.d.).

As previously mentioned, the crime of genocide is framed as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (Genocide Convention, 1948). According to the Chamber, the evidence collected proved the *actus reus* required by Article 4 of the ICTY Statute. Specifically, the Chamber recalled the killing of over 3,700 males and that thousands of Bosnian Muslims in Srebrenica were subjected to severe bodily or mental harm by the VRS as well as by the members of the Ministry of Interior of the Bosnian-Serb (MUP), at the time under Mladić's control (Trial Chamber, 2017). Additionally, having recognised the targeted group as a protected group, the Chamber found that Bosnian Muslims in Srebrenica constituted a substantial part of the Bosnian-Muslim population in Bosnia-Herzegovina. This proved the factual element of the crime of genocide (*Prosecutor v. Mladić*, 2017, para. 5129).
Regarding the mens rea required by Article 4 ICTY Statute to prove Mladic's genocidal intent, the Trial Chamber's focus shifted to Mladić's command and control over the units operating in Srebrenica as well as his orders and statements, hence mainly circumstantial evidence. According to the collected evidence, the VRS and MUP units were indeed under Mladić's effective control during the Srebrenica operation and its aftermath (*Prosecutor v. Mladić,* 2017, para.5128); additionally, he issued orders to separate the Bosnian-Muslim men from the women, children and elderly from 12 July 1995. Moreover, the Chamber found that between July and August 1995, Mladić made statements and speeches stating that "it was time to take revenge, and threatened that the Bosnian Muslims of Srebrenica could either 'live or vanish', 'survive or disappear', that only the people who could secure the surrender of weapons would save the Bosnian Muslims from 'destruction'" (*Prosecutor v. Mladić*, 2017, para. 5130). Therefore, on 22 November 2017, the Trial Chamber found that "Mladić intended to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children, and some elderly men from Srebrenica, through the commission [...] of the crime of genocide" and Ratko Mladić was sentenced to life imprisonment (*Prosecutor v. Mladić,* 2017, para. 5130 and 5215).

The Mladić case officially ended on 8 June 2021, when the Appeals Chamber of the ICTY issued its judgement following Mladić's and the Prosecution's appeals. Said sentence dismissed both appeals and confirmed the judgement issued by the Trial Chamber, marking a crucial milestone in international criminal justice (*Prosecutor v. Mladić*, 2021).

Conclusions

The paper analysed the legal framework concerning genocide, recognised for the first time by the UNGA in 1946 and subsequently defined by the 1948 Genocide Convention and included in the 1996 ICTY Statute and the 1998 Rome Statute. After presenting how the Bosnian War demonstrated the need for a more robust European security structure, which led to the establishment of the European Common Security and Defence Policy (CSDP), the paper focused on the abovementioned instruments of international law. By focusing on the factual and mental elements required to prosecute individuals for the crime of genocide, the paper highlighted the relevant issues and challenges, concluding that international tribunals should implement a different or revised standard of the current dolus specialis criterion to prosecute and condemn perpetrators adequately. Finally, recalling the UNGA's recent Resolution A/78/L.67/Rev.1, which established 11 July as the "International Day of Reflection and Commemoration of the 1995 Genocide in Srebrenica" and condemned any denial of the Srebrenica genocide, the paper examined the *Prosecutor v. Mladić* case before the ICTY. In said specific case, which stands out as an example of how the genocidal intent has been proven in the past mainly through circumstantial evidence, both the Trial Chamber I and the Appeals Chamber of the ICTY concluded that the crime of genocide was indeed perpetrated in Srebrenica.

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