# The Hague Tribunal and Srebrenica

The purpose of this text[1] is to compare certain claims made in an article by Jasenko Selimović[2] with the content of documents of the ICTY. It will become apparent that Selimović is unable to correctly reproduce the reasoning and opinions of the Tribunal.

## Why did the Srebrenica Massacre happen?

In *Eine winterliche Reise,* [*A Journey to the Rivers*] Peter Handke refers to the massacre in Srebrenica and asks, perplexed, how it could happen. In an article in Dagens Nyheter,[3] quoting Handke, a comment is added: "No massacres of that magnitude had occurred before and there were no real military reasons". Selimović responds:

> "This too is untrue, of course, reasons are explicitly stated in the document describing six" Strategic Goals "(see pages 147–148 in Radovan Karadžić's judgment) where the third goal is the establishment of a land corridor to Serbia along the Drina valley, some sort of lifeline to the "motherland" Serbia, as the tribunal has established in several judgments ".

In the pages 147 – 148 of the judgment there is no reference whatsoever to military reasons for the attack on Srebrenica. The text does not deal with Srebrenica at all, but discusses what happened in 1992. What the Court is referring to is a) the military plan, at the beginning of the war, to create a continuous Serbian territory in Bosnia, which led to b) the expulsion of non-Serbs.

> The Trial Chamber found that ethnic separation and the creation of a largely ethnically homogenous territorial entity were some of the core aspects of the Strategic Goals and that Karadžić and the Bosnian Serb leadership planned the military implementation of these goals through the take-over of territory and the forcible movement of the non-Serb population
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> The Trial Chamber further found that the Serb forces and the Bosnian Serb Political and Governmental Organs forcibly displaced Bosnian Muslims and Bosnian Croats from their residences to other locations in Bosnia and Herzegovina or other countries, which resulted in the change of the ethnic composition of the Overarching JCE Municipalities. (Karadžić 2019, p. 148)

In his zeal Selimović does not realize that he undermines his own argument when referring to military reasons. If Srebrenica is the result of military considerations, it is a matter of war crimes, not genocide, since the aim is not to destroy a people or group. Which , after all, is pointed out by the Court:

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[1] This is an English version of an unpublished text in Swedish. In the footnotes Swedish titles have been translated.

[2] Selimovic, Jasenko. 2019. "Rebecka Kärde lacks knowledge on Srebrenica." *Expressen* (2019-10-23). In the text an article in Dagens Nyheter is severely criticized: Magnusson, Kjell. 2019. ”Handke does not deny the massacre in Srebrenica”." *Dagens Nyheter* (2019-10-17).

[3] cf. note 1

> The Trial Chamber notes that Article 4 (genocide) demands proof of elements not required by Article 5 (crimes against humanity). Article 5 offences demand proof that they have been perpetrated in an armed conflict, as part of a widespread or systematic attack upon a civilian population. (Krstić 2001, p. 240)

## Annihilation

Selimović further states that "The Hague Tribunal has shown that there was an intention to wipe out [Bosnian Muslims] , see the Krstić judgment". He gives no page references and cannot do so, since the statement is incorrect. None of the judgments against Krstić (2001, 2004), or any other judgment in The Hague, claims that a total destruction occurred. It is a case of linguistic and factual misunderstanding.

The tribunal makes a distinction between *extermination* and *genocide*. Extermination is not the same as "extinction", as one may believe, but a specific legal term which, according to the court, means "killing a large number of people".

> The *actus reus* of extermination consists of "the act of killing o n a large scale". This involves "any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals" (Karadžić 2016, p. 185).

The Tribunal discusses the issue in some detail.[4] The term extermination refers to crimes against humanity and is used in contexts where the Genocide Convention is *not* applicable. In Swedish, one would speak about "mass murder". The Court emphasizes that extermination does not have to mean "a comprehensive plan for collective murder":

> There is no requirement to establish that there was a "vast scheme of collective murder. (Karadžić 2016, p. 185)

Moreover, the judgement against Karadžić shows that the court explicitly rejected the prosecutor's argument that the 1992 offensive – the one Selimović incorrectly refers to as related to Srebrenica – would constitute genocide:

> In other words, the evidence does not support a conclusion that the only reasonable inference is that the Accused or any of the alleged members of the Overarching JCE had the intent to physically destroy the Bosnian Muslim and/or the Bosnian Croat groups in the Count 1 Municipalities as such. (Karadžić 2016, p. 1006.)

Thus, Selimović's claims in these respects are both misleading and irrelevant.

## Preparation - Decision on Genocide

Selimović believes that a genocide in which 8,000 men are murdered in seven days must be carefully prepared. This is, actually, in his view, one of the proofs that Srebrenica does constitute a genocide. On this matter as well, the Court has a

[4] Cf. Karadžić 2016, p. 170–209

different view. Unlike Selimović, the Hague Tribunal argues that a decision could be made very quickly:

> Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period.1277 It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation. (Krstić 2001, 201)

The judgement concerning Srebrenica emphasizes, in addition, that it is not possible to determine exactly when the decision to kill the men of military age was made, but that the shootings beginning July 13, 1995, are part of a systematic plan.

> The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan. (Krstić, 2001, p. 201)

The Court thus states in the first judgments (2001, 2004) that it is not possible to establish with certainty when the decision on mass murder was made. It is also pointed out that it is impossible to determine whether there was already a plan to execute men of military age when the troops entered Srebrenica.

> The Trial Chamber is not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potočari were also an agreed upon objective among the members of the joint criminal enterprise. (Krstić 2001, p. 218).

However, this is of less importance, according to the Court. Regardless of who made the decision, and when, Krstić must have realized at some point that there was a risk of serious crimes being committed, and therefore, he is considered guilty of genocide.

> General Krstić may not have devised the killing plan or participated in the initial decision to escalate the objective of the criminal enterprise from forcible transfer to destruction of Srebrenica's Bosnian Muslim military-aged male community, but there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men (Krstić 2001, p. 225).

This is formulated somewhat differently a few pages later. Krstić did not plan the massacre and did not personally participate in the killings, but as a commander he should have realized what might happen.

> General Krstić did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign. In particular, at a stage when his participation was clearly indispensable, General Krstić exerted his authority as Drina Corps Commander and arranged for men under his command to commit killings. He thus was an essential participant in the genocidal killings in the aftermath of the fall of Srebrenica. In sum, in view of both his

> mens rea and actus reus, General Krstić must be considered a principal perpetrator of these crimes ( Krstić 2001, p. 228).

In an interesting remark, the Court believes that the crimes were a foreseeable consequence of the ethnic cleansing carried out by the Bosnian Serb army. The formulation is significant, not only for the question whether the murders in Srebrenica were planned in advance, but also, as we shall see, for the nature of the crime.

> However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed, General Krstić must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. (Krstić 2001, p. 218)

We may thus conclude that Selimović is not able to support his claims about the cause of events in Srebrenica. It was not a massacre being planned in advance, but rather , if we are to believe the court, a situation that went out of hand (cf. below), which partly answers Handke's question.

Incidentally, in the second judgement against Krstić, the court downplayed his role and having rejected the prosecutor's arguments, condemned the general *for aiding and abetting* genocide.[5]

In the cases against Karadžić and others prosecuted after Krstić, the Tribunal to a great extent uses the concept of JCE, *Joint Criminal Enterprise*. There are various such JCEs, concerning different contexts or categories of crime, where membership is partly overlapping, but the most important is Srebrenica. The Court has difficulties specifying individual responsibilities, although one gets the impression in the judgment against Karadžić 2016 that General Ratko Mladić is considered to have played a more active role than Karadžić. In addition, it is found that the joint criminal enterprise Srebrenica comes into existence only in July 1995.

> In relation to the Srebrenica component, the Chamber found that the Srebrenica JCE came into existence as Srebrenica fell in July 1995. Its common purpose was to eliminate the Bosnian Muslims in Srebrenica—first through the forcible removal of the women, children, and the elderly, and later through the killing of the men and boys—and was shared by the Accused, Ratko Mladić, Ljubiša Beara , and Vujadin Popović ( Karadžić 2016, p. 2449).

The Court thus adheres to the original version that the decision to deport women and execute the men was made *after* the capture of Srebrenica, and that the role of Karadžić is unclear in the sense that he is not alleged to have been the initiator. But, as in the case of Krstić, he should have realized what might happen, which, in

[5] Krstić 2004, p. 76–87

addition to his leading position, makes him an accomplice:

> The Chamber found above that the Accused learned of the expansion of the plan to eliminate such that it involved killing the Bosnian Muslim men and boys of Srebrenica sometime before he spoke to Deronjić at approximately 8 p.m. On 13 July. Further, the Chamber recalls its finding that Deronjić specifically informed the Accused about the Kravica Warehouse killings at least by the time they met alone prior to a meeting with a larger group from Srebrenica on 14 July. The Chamber is therefore satisfied that the Accused knew of the large scale Kravica Warehouse killings by the day after they were committed. Considering that, at a minimum, this news put the Accused on notice that members of the Bosnian Serb Forces had killed hundreds of Bosnian Muslim detainees who had been in their custody following the fall of the Srebrenica enclave, the Chamber finds that the Accused possessed sufficiently alarming information to justify further inquiry into whether other unlawful acts had been committed. Of particular interest is that the court believes that what was originally intended as an expulsion of Muslims from Srebrenica and its surroundings develops into murder and mass murder, and that Karadžić was aware of this by July 13. (Karadžić 2016, p. 2449).

Of particular interest is that the court believes that originally the idea was to expel the Muslims from Srebrenica and surrounding areas, an undertaking which later develops into murder and mass murder, and that Karadžić was aware of this by July 13.

> The Chamber found that the original scope of the common plan involved the commission of inhumane acts (forcible transfer) and persecution, and that the expanded scope of the common plan also involved the commission of murder and extermination. The Chamber also found that the Accused shared the intent for these crimes and that he agreed with the expanded common purpose, i.e., the killing of the men and boys, on the evening of 13 July 1995. (Karadžić 2016, p. 2513-2514)

An aggravating circumstance is that Karadžić failed to intervene and to punish those who were guilty of the murder. .

> The Chamber finally found that, by virtue of his actions and omissions, the Accused significantly contributed to the furtherance of the common purpose of the Srebrenica JCE. In addition, the Chamber found that the Accused, as a superior exercising effective control over his subordinates, failed to punish the killings and the related acts of persecution that occurred prior to the evening of 13 July 1995, which he either knew or had reason to know. (Karadžić 2016, p. 2513–2514)

The fact that, after many years of investigation, including the use of military telephone interception from 1992 to 1995, the court does not succeed in obtaining more conclusive evidence on who is ultimately responsible, but discusses in terms of a collective JCE does not mean that the massacre is not a serious crime, or did not occur. Decisions of this kind are rarely made in writing, but the course of events established by the court is of great importance for the question of "intent" according to the Genocide Convention. In any case, the court does not refer to a Wannsee conference, which Selimović implicitly suggests. As far as the course of the war is concerned, the

description is broadly similar to that given in standard works on the war in Bosnia.[6]

For the sake of clarity, it may be added that the Court discusses cases of murders and minor massacres taking place in Srebrenica before decisions at higher levels had been made, and states that Karadžić, cannot be considered guilty of those. [7]

## Systematics

Selimović argues that it is " thoroughly proven in several judgments in The Hague" that what happened in Srebrenica is characterized by a high degree of systematics. It is true that in the judgment against Karadžić there is great interest in the aspect of systematics. First, the concept itself is discussed at length, as well as its relevance to the issues the court has to decide on. Then different types of crimes in the Tribunal's statute are dealt with and concrete procedural points are addressed. Much space is devoted to the Municipalities, i.e. the violence and the displacement that characterized Bosnian Serb attempts to unite Serbian-dominated areas at the beginning of the war, and where the prosecutor in eight cases has charged the accused with genocide (see above). The Court notes that these are systematic acts involving crimes against humanity (cf. Karadžić 2016, p. 960, p. 962, p. 967, p. 988) but, after a discussion of conditions in detention camps, it concludes that this is not a matter of genocide.

> While the conditions in the detention facilities in the Count 1 Municipalities were dreadful and had serious effects on the detainees, the Chamber is not convinced that the evidence before it demonstrates that they ultimately sought the physical destruction of the Bosnian Muslims and Bosnian Croats. The Chamber is therefore not satisfied for the purpose of Article 4(2)(c) of the Statute that conditions of life calculated to bring about the physical destruction of the Bosnian Muslims and Bosnian Croats were deliberately inflicted on these groups in the Count 1 (Karadžić 2016, p.1000).

Regarding Srebrenica, the Court points out that the murder of men of military age, whether civilians or soldiers, is characterized by a high degree of systematic:

> The Chamber notes that the operation, which was carried out by the Bosnian Serb Forces who vigorously pursued the Bosnian Muslim males in the column, encompassed the killing of all Bosnian Muslim men in Bosnian Serb custody, irrespective of whether they were combatants or civilians and regardless of whether they were captured or had surrendered. The Chamber considers that this, combined with the manner as well as the systematic and highly organised nature of the killings, demonstrates a clear intent to kill every able-bodied Bosnian Muslim male from Srebrenica. (Karadžić 2016, p. 2365)

However, this does not support Selimović's reasoning. What the tribunal says is that the systematic killing of civilians and soldiers who surrendered indicates an intention to kill all men of military age in Srebrenica. This is one thing, and as we shall see,

[6] Burg, Steven L., and Paul S. Shoup. 1999. The War in Bosnia-Herzegovina. Ethnic Conflict and International Intervention. New York ; London : M.E. Sharpe. ; Bougarel, Xavier. 1996. Bosnie, anatomie d'un conflit. Paris : La Découverte.

[7] Karadžić 2016, p. 2444–2447

the Hague Tribunal has a different view than Selimović - and many others – on what is meant by the genocide in Srebrenica.

## The Genocide in Srebrenica

Most people would assume that the Tribunal has determined that the murder of 8,000 men of military age constitutes the genocide in Srebrenica. However, in the judgment against Radovan Karadžić something else is argued. First, the Court finds that at least 5,155 men killed in Srebrenica between July 12 and early August 1995, by their number, meet the criteria for *mass murder* (extermination).

> The Chamber finds that at least 5,115 Bosnian Muslims were killed in Srebrenica between 12 July and early August 1995 and that this satisfies the mass scale element of the killings for the purposes of extermination. Karadžić 2016, 2347

This is the court's conclusion. Nowhere is it alleged that the murders constitute genocide in terms of the Convention. As pointed out elsewhere,[8] the judgement does not use the wording of the Convention, "to destroy a group, in whole or in part, as such". Instead, a multi-stage reasoning ends in the ruling that murder *and* deportations together constitute a genocide.

To understand the reasoning of 2016, one must return to the judgment against general Krstić in 2001, i. e. the first time anyone was convicted of the genocide in Srebrenica.

### General Arguments

The Court points out at the outset that the concept of "destroying a group" may be interpreted in different ways:

> The physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community. (Krstić 2001, p. 201

Subsequently, the judges discuss Raphael Lemkin, the originator of the Genocide Convention, who emphasizes physical annihilation, but recalls, on the other hand, that a UN expert group discussing the persecution in South Africa had a wider interpretation:

> that viewed as genocidal any act which prevented an individual "from participating fully in national life", the latter being understood "in its more general sense" (Krstić 2001, p.201)

It is then stated that the idea of "cultural" destruction was rejected during the work on the convention because it differs too much "from the physical or biological destruction that motivated the Convention" (Krstić 2001, p. 202). In this context,

[8] Magnusson, Kjell. 2008. "Genocide as a Concept in Law and Scholarship : A Widening Rift ?" p. 157–80 in *Festskrift till Anders Fogelklou*, edited by Åke Frändberg, Stefan Hedlund and Torben Spaak. Uppsala: Iustus Förlag.

reference is made to the International Law Commission's (ILC) statement which affirms that the essence of the Genocide Convention is physical annihilation:

> As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense. (Krstić 2001, p. 203).

It is then pointed out that there are those who have taken a different position, e.g. The United Nations General Assembly, which in 1992 regarded ethnic cleansing as a form of genocide (Krstić 2001, p. 203) and which in 1988 designated the murder of 800 people in Shabra and Shatila as genocide. Similarly, the German Constitutional Court, has a very wide interpretation

> The Federal Constitutional Court of Germany said in December 2000 that: the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group [...] the intent to destroy the group [...] extends beyond physical and biological extermination [...] The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group (Krstić 201, p. 203).

Finally, the judges choose an interpretation which is less than satisfactory. On the one hand, it is pointed out that the common interpretation in international law holds that genocide means physical or biological destruction of a group. At the same time, cultural dimensions may indicate an intention to destroy the group:

> The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group. (Krstić 2001, p. 203)

## The Judgment against Krstić 2001

Respecting the view put forward by US law professor M Cherif Bassiouni, whose work was the basis of the Hague Tribunal,[9] the court assumes that the destruction of

[9] Magnusson, Kjell. 2008. "Genocide as a Concept in Law and Scholarship : A Widening Rift ?", p. 165-167.

a group could mean the destruction of only part of the population in a geographical area inhabited by a part of a people or group. The physical annihilation of a part of a subgroup is thus sufficient to "destroy" the group as a "distinct entity" in a given area:

> Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out. (Krstić 2001, s . 208)

It is recalled that the prosecutor wanted to define the victims as Bosnian Muslims in Srebrenica or Bosnian Muslims in eastern Bosnia

> In the Indictment, as in the submission of the Defence, the Prosecution referred to the group of the Bosnian Muslims, while in the final brief and arguments it defined the group as the Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia. (Krstić 2001, p. 208)

The reason for this were specific cultural features, which separated the Muslims of Srebrenica / Eastern Bosnia from others and made it justified to regard them as a group within the meaning of the Convention**.**

> 592 It was common knowledge that the Bosnian Muslims of Eastern Bosnia constituted a patriarchal society in which men had more education, training and provided material support to their family. The Prosecution claims that the VRS troops were fully cognisant that by killing all the military aged men, they would profoundly disrupt the bedrock social and cultural foundations of the group. The Prosecution adds that the mass executions of the military aged men must be viewed in the context of what occurred to the remainder of the Srebrenica group. The offensive against the safe area aimed to ethnically cleanse the Bosnian Muslims1313 and progressively culminated in the murder of the Bosnian Muslim men as well as the evacuation of the women, children and elderly.1314 In the Prosecution's view, the end result was purposeful, as shown by the longstanding plan of Republika Sprska to eliminate the Bosnian Muslims from the area (Krstić 2001, p. 208)

The defense, on the other hand, claimed that the assassination of 7,500 Bosnian Muslims in Srebrenica cannot be regarded as genocide, as it does not constitute a destruction of the Bosnian-Muslim population as such, and that the Srebrenica Muslims' share of the total population of Muslims in Bosnia is very small. Neither were women and children murdered.

> The Defence argues in rejoinder that, "although the desire to condemn the acts of the Bosnian Serb Army at Srebrenica in the most pejorative terms is understandably strong", these acts do not fall under the legal definition of genocide because it was not proven that they were committed with the intent to destroy the group as an entity….First, the killing of up to 7,500 members of a group, the Bosnian Muslims, that numbers about 1,4 million people, does not evidence an intent to destroy a "substantial" part of the group. To the Defence, the 7,500 dead are not even substantial when compared to the 40,000 Bosnian

> Muslims of Srebrenica.[10] The Defence also points to the fact that the VRS forces did not kill the women, children and elderly gathered at Potočari but transported them safely to Kladanj, as opposed to all other genocides in modern history, which have indiscriminately targeted men, women and children. (Krstić 2001, p.208–209)

Although the court considers that the people referred to are Bosnian Muslims, the text is ambiguous and partly takes over the prosecutor's version. The judges conclude that the murders of 7,000-8,000 men of military age, together with the deportation of about 25,000 women, children and old people, constitutes an attempt to eliminate the Bosnian-Muslim *community* in Srebrenica. The death of the men means the end of the area's specific patriarchal culture.

> The Trial Chamber concludes from the evidence that the VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica as a community…. Within a period of no more than seven days, as many as 7,000- 8,000 men of military age were systematically massacred while the remainder of the Bosnian Muslim population present at Srebrenica, some 25,000 people, were forcibly transferred to Kladanj. (Krstić 2001, p. 211)

> Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. (Krstić 2001, p. 212)

> The Chamber concludes that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as a genocide. (Krstić 2001, p. 212)

It is clear that the verdict, through its formulations and specific use of terms such as *elimination, destroy, community, group,* and in the light of the court's own quotation of interpretations of the Convention (according to Lemkin and ILC), constitutes a departure from a previous understanding of the concept of genocide, both among lawyers and researchers in the humanities and social sciences.[11] It may be noted that the judgments do not refer to the Convention's wording about *destroying* a people group as such, in whole or in part. Instead, it is written that this is a case of

[10] The victims would be equivalent to 17,5 percent of the population in Srebrenica. In comparison, 17 % of the Serbs, 9 % of the Bosnian Muslims, 6 % of the Croats, and 77 % of the Jews lost their lives in Bosnia/Croatia during WW II. The percentages refer to the *whole* population of a given group, not to a limited area. The proportion of killed in Bosnia during 1992-1995 amounts to 3,4 % of the Muslims/Bosniaks, 1,6 % of the Serbs, and 1 % of the Croats. Cf. Magnusson 2019 and Magnusson 2008:165.

[11] Magnusson, Kjell. 1999. "Holocaust and Genocide Studies: Survey of Previous Research." Pp. 8-54 in *Research Agenda. The Uppsala Programme for Holocaust and Genocide Studies*, edited by Harald Runblom. Uppsala: Uppsala University, Centre for Multiethnic Research.

*eliminating* a Bosnian-Muslim *society* "as such".

There is a significant slippage in the reasoning. The court first claims that the purpose was to "eliminate" the Bosnian-Muslim "society" in Srebrenica by killing the men. It is then alleged that this means that the Bosnian-Muslim group has been "partially" destroyed.

This is even more clear from the summary of the judgment:.

> Finally, the Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica. In this respect, the intent to kill the men amounted to an intent to destroy a substantial part of the Bosnian Muslim group. Having already played a key role in the forcible transfer of the Muslim women, children and elderly out of Serb-held territory, General Krstić undeniably was aware of the fatal impact that the killing of the men would have on the ability of the Bosnian Muslim community of Srebrenica to survive, as such (Krstić 2001, p.226)

The strange thing is that the court cannot refrain from expressions which undermine its own arguments. As a reason for the killing, military strategic considerations are given, which is hardly consistent with the meaning of the convention.

> The strategic location of the enclave, situated between two Serb territories, may explain why the Bosnian Serb forces did not limit themselves to expelling the Bosnian Muslim population. By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory. (Krstić 2001, p. 212

It should be noted that the verdict is controversial among researchers and lawyers. The world's leading expert on genocide law, Professor William Schabas has challenged the verdict and believes that what was happening in Bosnia were massacres and ethnic cleansing.[12]

## The Judgment against Karadžić 2016

The judgment against Karadžić is based on the judgment against Krstić but differs in several respects. There is the same view on the background to the genocide, that it is unclear when the decision is made and by whom, even in terms of a Joint Criminal Enterprise.

[12] Schabas, William A. 2009. *Genocide in International Law : The Crime of Crimes.* Cambridge: Cambridge University Press; Schabas, William A. 2008. *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability.* London: Cameron May; Schabas, William A. 2001. "Was Genocide Committed in Bosnia and Herzegovina - First Judgments of the International Criminal Tribunal for the Former Yugoslavia The Balkans Region: Legal Perspectives and Analyses." *Fordham International Law Journal* (1):23–53.

As the indictment against Karadžić concerns the war in Bosnia as a whole, Srebrenica is situated in a wider context, taking into account political, military and other aspects. An example is that the events in July 1995 are related to the Bosnian Serb actions over a longer period. The court refers to the so-called Directive 7, which Selimović considered in an article in Göteborgs-Posten as evidence of a planned genocide in Srebrenica.[13]

The tribunal has a different opinion. It is argued that the directive, issued in March 1995, was aimed at creating an unbearable situation for the people of Srebrenica, which according to the Hague Tribunal showed that it intended to expel the Muslim population from the enclave.

> On 8 March 1995, the Accused issued Directive 7, which included an order to the Drina Corps to " create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa ". The Chamber finds that such language clearly indicates an intent to force the Bosnian Muslim population to leave the enclave (Karadžić 2016, p. 2369).

The Court maintains that the plan to force the Bosnian Muslims of Srebrenica to leave, after the take-over of Srebrenica is changed into their "elimination" from Srebrenica. It happens in two steps;

> (A) The formation of a common plan to eliminate the Bosnian Muslims in Srebrenica by forcible removal
>
> 5724. On the basis of the totality of the evidence discussed above, the Chamber finds that, as Srebrenica fell, the long-term strategy aimed at removing the Bosnian Muslim population from Srebrenica, which had been devised in March 1995, began to be transformed into a concrete common plan to eliminate them. In the Chamber's view, this elimination operation first took the form of forcible removal of the Bosnian Muslim population. After receiving the Accused's order to take the town, the Bosnian Serb Forces under the command of Mladić and Krstić used heavy shelling to push the Bosnian Muslims northward, first towards the Bravo Company compound and then north to the UN Compound in Potočari. In the meantime, following an initial proposal that in exchange for being given safe passage out of the enclave the Bosnian Muslims would leave within 48 hours, Mladić ordered the Bosnian Serb Forces to proceed to Potočari.19449 This was followed by an order to Borovčanin's units to take over OP Papa before proceeding to the UN Compound (Karadžić 2016, p. 2391).

This is expressed, somewhat differently, in the following passage:

> 5816. The Chamber has already found above that the Accused knew of the concrete plan to eliminate the Bosnian Muslims in Srebrenica by forcibly removing the women, children, and elderly men as the long-term strategy aimed at removing the Bosnian Muslim population from Srebrenica began to be transformed into a concrete plan to eliminate them, as the enclave fell, and that he agreed to the further expansion of that plan so as to involve

[13] Selimovic, Jasenko. 2019. " The King should refuse to hand over the Nobel Prize to Handke." *GP* (2019-10-19).

> killings, at the latest during his conversation with Deronjić on the night of 13 July (Karadžić 2016, p. 2347).

The court further states that the prosecutor has regarded , referring to Karadžić's membership in the JCE, that the purpose of the murders and deportations was to ensure that the Muslim population disappeared from Srebrenica:

> common purpose of which was to "eliminate the Bosnian Muslims in Srebrenica by kill ling the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men from Srebrenica" (Karadžić 2016, p. 2367)

The judges share the view and believe that the combination of murder and displacement may be considered genocide.

> On the basis of the analysis set out above, the Chamber finds that—with the intent to destroy the Bosnian Muslims in Srebrenica, which constituted a substantial part of the Bosnian Muslim protected group—members of the Bosnian Serb Forces killed thousands of Bosnian Muslim males and caused serious bodily or mental harm to thousands of Bosnian Muslims in Srebrenica. The Chamber therefore finds that the acts described above constitute genocide within the meaning of Articles 4(2)(a) and 4(2)(b) of the Statute. (Karadžić 2016, p. 2367)

> Further, the Chamber has found that the acts described above amounted to genocide, as the only reasonable inference based on the pattern of the killings and the evident intent to kill every able-bodied Bosnian Muslim male from Srebrenica was that such killings were committed with the intent to destroy the Bosnian Muslims in Srebrenica. (Karadžić 2016, p. 2396, 2397

It may be noted, as before, that the Court uses certain terms in a way that differs from the Convention. On the one hand, mass murders and deportations are described as genocides. On the other hand, it is pointed out that the purpose of the murder was to "destroy the Bosnian Muslims in Srebrenica", which in other contexts is defined as the "elimination" of the Bosnian-Muslim "society" in Srebrenica. However, the term "destroy, in whole or in part" [a group] as such" is not used.

Instead, references are made to the Statute of the Tribunal[14] and paragraphs 4; 2 (a) and 4: 2 (b).[15] They refer to the *examples* the convention mentions as acts that may occur during genocide: such as (4.2 a): killing members of a group or (4.2b): causing serious bodily or mental harm to members of the group; According to the Convention, such acts do *not* in themselves constitute genocide unless they are committed "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such". On this vital point, the court is somewhat unclear.

It has been pointed out earlier that the judgments against Sikirica (the Prijedor case)

[14] *Updated statute of the International Criminal Tribunal for the Former Yugoslavia.* https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[15] Karadžić 2016, p. 2366–2367

and Krstić (Srebrenica) differed in argumentation and reasoning as to how the Genocide Convention should be interpreted. In the lawsuit concerning Prijedor, it was argued that between 2 and 2.8 percent of the population of Prijedor lost their lives in massacres or detention centers, which does not meet the criteria of the Genocide Convention. In the case of Srebrenica, there was no discussion on the meaning of the requirement "substantial" (part of the group).[16]

This shows that although the Genocide Convention, as Selimović writes, is included in the Tribunal's statute, it plays a secondary role in the Tribunal's considerations regarding Srebrenica. The important question about the proportion of victims (cf. the writing "in whole or in part") is left aside.

## Comments

The Hague Tribunal's treatment of the massacre in Srebrenica means that it cannot simply be argued that, "based on the Genocide Convention", the Court has ruled that a genocide has been committed. Second, it is not correct to say that "a massacre of men is consistent with the legal definition of genocide".[17] The Convention has not changed, and it can only be stated that the ideal-typical genocides of the 20th century, the Armenian disaster, the Holocaust and the genocide in Rwanda, meant that men, women and children were killed on a large scale, not infrequently 90 percent in a country or region. In the case of Srebrenica, an international court argues in a manner that intuitively contradicts the meaning of the word "destroy" as well as the very idea behind the Genocide Convention.

In fact, many people who believe that Srebrenica was a genocide implicitly regard the Holocaust as a model. Svante Weyler rightly points out in *Dagens Nyheter* that "genocide is its own cause". Genocide has no purpose other than to destroy a group of people.[18] However, this did not happen in the Balkans during the 1990s. The war in Bosnia was not a genocide in that sense. Neither historical research nor the review of the Tribunal confirms the image that dominates media and where the label itself gives rise to associations which may explain some of the outrage directed at Peter Handke.

In any case, this comparison shows that Jasenko Selimović in his article in Expressen has no basis for his claims. His views are not supported by the Tribunal and are either untrue, misleading, or irrelevant. Thus, his accusations of genocide denial, as well as the irony towards a young critic and member of the Nobel Committee, have no foundation.

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[16] Magnusson, Kjell. 2008. "Genocide as a Concept in Law and Scholarship"; for a comparison , see pp. 175–177.
[17] Andersson, Elisabet, Tomas Lundin, and Kurt Brunnberg. "Handke on Srebrenica: That's not what I meant " in *Svenska Dagbladet* (2019-10-26).
[18] Weyler, Svante. 2019. "Peter Handke´s Contempt for the Truth." *Dagens Nyheter* (2019-10-21).

If we return to the verdict against Karadžić in 2016, it is clear that, by linking the killings of men of military age to the deportation of the rest of the population, while pointing out that the genocide consists in the *elimination* of the Bosnian-Muslim *society* in Srebrenica, the court makes an interpretation that is hardly obvious. In addition, on the basis of its own terminology, it has been established that the shooting of the men is a case of extermination, in Swedish *mass murder*, i.e. a crime against humanity, *not* genocide.

> The Chamber finds that at least 5,115 Bosnian Muslims were killed in Srebrenica between 12 July and early August 1995 and that this satisfies the mass scale element of the killings for the purposes of extermination. ( Karadžić 2016, p. 2347)

In this perspective, one may wonder about the attacks on Peter Handke. When he speaks about a massacre, he actually relies on a judgment of the Tribunal in the Hauge, which defines the executions of the men in Srebrenica as mass murder.

Kjell Magnusson

Uppsala, 28 October 2019

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