authority of Rome. The Italian city-states, however, retained a great degree of influence over its activities. The Roman Inquisition aimed at eradicating Protestantism throughout Italy, although by the end of the sixteenth century, it primarily dealt with crimes of witchcraft, magic, clerical discipline and Judaizing.

Between 1534–1540, King João II of Portugal worked with Rome to bring the Inquisition to his realm. Modeled on the Spanish institution, the Portuguese Inquisition aimed its prosecutions at *conversos*, many of whom had been forcibly converted with the expulsion of the Jews in 1496, but also investigated cases of witchcraft, blasphemy, bigamy, and sodomy. The Portuguese Inquisition had tribunals in Lisbon, Évora, Coimbra, Lamego, and Tomar in Portugal, and in Goa in Portuguese India. It was abolished in 1821.

The Inquisition as Myth

From their creation, the Early Modern Inquisitions were seen as perpetrators of great crimes against humanity, a view that has persisted into the twenty-first century. Associated with indiscriminate arrests, overzealous use of torture, and reliance on false witnesses, all surrounded in a veil of secrecy and leading to certain death, the Inquisition was seen as a great miscarriage of justice. This view is particularly linked with the Spanish Inquisition, which popular legend described as an institution built on fear, terror and violence.

In fact, historical evidence demonstrates that after the initial harsh prosecutions of *conversos* in the late fifteenth and early sixteenth centuries, the Spanish Inquisition was much less vicious than imagined. This is particularly true if it is examined in comparison to other courts of its time. By the beginning of the seventeenth century, when secular courts in areas such as the Holy Roman Empire were burning thousands of suspected witches, the Spanish Inquisition rarely produced a sentence of death and instead handed out relatively mild punishments. Much of the myth surrounding the Spanish Inquisition was created in the seventeenth and eighteenth centuries by European Protestants who used it as an example to demonstrate the evils of Catholicism. Although often accused of horrific crimes, the centralized nature of the early modern Inquisitions worked rather to keep abuses in check, something severely lacking in localized secular courts.

SEE ALSO Cathars

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Intent

The anatomies of international crimes tend to include material elements (relevant to conduct), mental elements (relevant to state of mind) and contextual or circumstantial elements (relevant to the context or pat-

tern within which the criminal conduct occurs). Each of these elements must be established beyond a reasonable doubt—within the context of international criminal jurisdictions—if a criminal conviction is to be sustained. In addition, one must establish beyond a reasonable doubt the appropriate mode of liability or form of participation by the accused in the relevant crime, such as individual perpetration, superior responsibility, complicity, or common purpose. Legal definitions of modes of liability have both subjective and objective requirements.

Intent describes a specific state of mind, proof of whose existence is required in the establishment of some of the abovementioned mental elements of crime. The distinction between the scope and degree or quality of requisite intent is valuable in international criminal law in the same way as it is in many national jurisdictions. There is a logical distinction to be made between the intensity of intent (i.e., its degree or quality) and the result, consequence, or other factor that such intent is alleged to have engendered (i.e., its scope). Intent may be described in relative terms, as lesser in degree (at the level of premeditation) or greater in degree (rising to the level of recklessness, or *dolus eventualis*).

This article examines the degree or quality of intent that is requisite to a finding of guilt with regard to the international crime of genocide. The definition of genocide in international law includes specific intent (*dolus specialis*) as a distinctive mental element of the crime; namely, the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. However, the degree of that specific intent is not articulated explicitly in the relevant international treaties. Thus, a close analysis of case law coming out of the two ad hoc international criminal tribunals—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—is in order. Also relevant are other sources of international criminal law (including the work of the United Nations (UN) International Law Commission), national case law, and commentaries by some publicists in the field. The state of international criminal law is critically appraised, with particular reference made to the Judgment of the ICTY Appeals Chamber in *Prosecutor v. Goran Jelisić* and other related cases.

International Treaty Law on Degree or Quality of Genocidal Intent

International treaty law does not define the degree or quality of intent that is requisite to the international crime of genocide more precisely than is provided by its use of the word *intent*. The 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) simply states that the genocidal conduct must have been committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." This definition is, in the words of the International Law Commission, "widely accepted and generally recognized as the authoritative definition of this crime." The same wording is used in the Statutes of the ICTY, the ICTR, and the International Criminal Court (ICC). The chapeaux of Article 4, paragraph 2, of the ICTY Statute and Article 2, paragraph 2, of the ICTR Statute reiterate a portion of Article II of the Genocide Convention. Article 6 of the ICC does the same. This minimalist formulation of the requisite degree or quality of intent may have been of practical value to the declaratory function of the Genocide Convention and to national counterparts of the Convention, but it has proven to be somewhat vague, to the point where appellate litigation in the ICTY has been needed. *Prosecutor v. Goran Jelisić* provides an appropriate window on the problem.

International Case Law on Degree or Quality of Genocidal Intent

ICTY

The Judgment of the ICTY Appeals Chamber in *Prosecutor v. Goran Jelisić* sets forth the prevailing legal standard on the degree or quality of intent that must accompany the crime of genocide. In this case, the Prosecution appealed the Trial Chamber Judgment on the grounds that it "is ambiguous in terms of the degree or quality of the mens rea required under Article 4 for reasons articulated by the Trial Chamber itself." In its brief for the Appeals Chamber the Prosecution stated that the

> Trial Chamber erred in law to the extent it is proposing that the definition of the requisite mental state for genocide in Article 4 of the Statute only includes the *dolus specialis* standard, and not the broader notion of general intent [. . .].

The expression "to the extent it is proposing" suggests a caution or conditionality in this declaration of the grounds for the appeal; indeed, its written Appeals submission had suggested that the Trial Judgment was far from clear, left open the question of degree of intent, and used inconsistent terminology.

The Appeals Chamber astutely ruled, without any detailed discussion, that in order to convict an accused of the crime of genocide, he or she must have sought to destroy a group entitled to the protections of the Genocide Convention, in whole or in part. The mental state that corresponds to having sought the destruction of a group is referred to as *specific intent:*

> The specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.

The Appeals Chamber went beyond setting aside the arguments of the Prosecution. It stated that the Prosecution had based its appeal on a misunderstanding of the Trial Judgment. The Appeals Chamber stated that a "question of interpretation of the Trial Chamber's Judgment is involved," and that

> the question with which the Judgment was concerned in referring to dolus specialis was whether destruction of a group was intended. The Appeals Chamber finds that the Trial Chamber only used the Latin phrase to express specific intent as defined above [. . .].

In other words, because the Prosecution was judged to have misunderstood the Trial Chamber's singular use of the term *dolus specialis* in the Trial Judgment, the Appeals Chamber did not consider it necessary to take on the substance of the Prosecution's submissions. Rather, the Appeals Chamber ruled that the term *intent* (as it appears in the definition of genocide that is used in international law) means "specific intent," which again must be understood as an intent to seek the destruction of a group. The Prosecution's attempt to advance a broader interpretation of the term was dismissed as a mere misunderstanding of the Trial Chamber's Judgment.

The Appeals Chamber affirmed that insofar as its preferred term, specific intent, is concerned, it "does not attribute to this term any meaning it might carry in a national jurisdiction." In making this statement the Appeals Chamber could be seen to have characterized comparative analysis of domestic criminal law as having little significance in the development of ad hoc tribunal case law relating to the requisite quality or degree of genocidal intent.

The *Jelisić* Appeals Judgment was rendered on July 5, 2001. Less than five weeks later, in *Prosecutor v. Radislav Krstić*, an ICTY Trial Chamber—in a Judgment dated August 2, 2001—convicted General Krstic of genocide for his participation in genocidal acts following the fall of the "safe area" of Srebrenica in July 1995. The *Krstić* Trial Judgment is in keeping with the *Jelisić* Appeals Judgment with respect to the mental state requirement for the establishment of guilt for the crime of genocide:

> For the purpose of this case, the Chamber will therefore adhere to the characterization of genocide which encompasses only acts committed with the goal of destroying all or part of a group.
>
> The Trial Chamber stated that it is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognizes that, despite recent developments, customary international law limits the definition of genocide to those acts *seeking* [italics added] the physical or biological destruction of all or part of the group.

However, the *Krstić* Trial Chamber did not exclude the possibility that the definition of genocide is a portion of the international law on genocide that is evolving. The Judgment provides that "[s]ome legal commentators further contend that genocide embraces those acts whose foreseeable or probable consequence is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act."

On the whole, in *Prosecutor v. Radislav Krstić*, the Trial Chamber's discussion of genocidal intent was unusually event-dependent. The discussion of the elements of genocide never strayed from the facts of the case. (In this way a Trial Chamber may try to shelter its legal findings and prevent them from being overturned on appeal.) The Trial Judgment did, however, give more space to its finding on the mental state requisite to the crime of genocide than the corresponding (and very brief) discussion in the *Jelisić* Appeals Judgment. The *Krstić* Appeals Chamber held that the Trial Chamber "correctly identified the governing legal principle" and "correctly stated the law," but "erred in applying it."

The *Jelisić* Appeals Chamber standard (with respect to genocidal intent), as reinforced by the *Krstić* Trial Chamber, has been upheld by later decisions of the ad hoc tribunals.

ICTY Trial Chamber III, in *Prosecutor v. Duško Sikirica et al.*, issued a "Judgment on Defense Motions to Acquit" (September 3, 2001), in which it engaged in an elaborate and frank discussion of the law of genocide. The Prosecution's response to the half-time challenges submitted by the Defense, as well as the oral hearing before the *Sikirica* Trial Chamber, predated the *Jelisić* Appeals Judgment. In other words, the Prosecution had not adjusted its statements on the question of intent so as to encompass the *Jelisić* Appeals Judgment. It had, however, formulated these statements so as to be in line with the revised position advanced by the Prosecution during the oral argument in the *Jelisić* appeal.

Hence, the Prosecution proposed that three different mental state standards be part of the mental state requirement of the genocide provision in the ICTY Statute (Article 4):

1. The accused consciously desired the genocidal acts to result in the destruction, in whole or in part, of the group, as such;
2. The accused, having committed his or her genocidal acts consciously and with will to act, knew that the genocidal acts were actually destroying, in whole or in part, the group, as such; or
3. The accused, being an aider and abettor to a manifest, ongoing genocide, knowing that there was such an ongoing genocide and that his or her conduct of aiding and abetting was part of that ongoing genocide, knew that the likely consequence of his or her conduct would be to destroy, in whole or in part, the group, as such.

The Trial Chamber's response to this proposition is, although cursory, unmistakably clear. The Chamber stated that Article 4 of the ICTY Statute, "expressly identifies and explains the intent that is needed to establish the crime of genocide. This approach follows the 1948 Genocide Convention and is also consistent with the ICC Statute. [. . .]." The Chamber also noted that, "[a]n examination of theories of intent is unnecessary in construing the requirement of intent in Article 4(2). What is needed is an empirical assessment of all the evidence to ascertain whether the very specific intent required by Article 4(2) is established."

The Trial Chamber adopted a purely textual approach in its interpretation of genocidal intent, and refused to "indulge in the exercise of choosing one of the three standards identified by the Prosecution"—because, in its opinion, the wording of the ICTY Statute (and hence, the Genocide Convention) expressly provides and explains the applicable standard. The fact that the word *intent* does not reveal the degree of intent that is required suggests that the Trial Chamber wished to defuse the notion of quality or degree of intent (as opposed to its scope) in the context of the international crime of genocide.

The half-time Decision in *Prosecutor v. Milomir Stakić* provides some clarification. It was a Decision pursuant to a Defense challenge to dismiss the Prosecution's case on the grounds that there was insufficient evidence to sustain a conviction prior to the Defense's presentation of its evidence (in accordance with Rule 98*bis* of the ICTY Rules of Procedure and Evidence). The *Stakić* Trial Chamber had observed that genocide is "characterized and distinguished by the aforementioned surplus intent." Genocidal conduct, it held, is only elevated to the crime of genocide

> when it is proved that the perpetrator not only wanted to commit those acts but also intended to destroy the targeted group in whole or in part as a separate and distinct entity. The level of this specific intent is the dolus specialis. The Trial Chamber observes that there seems to be no dispute between the parties on this issue.

At the time of this Decision (October 2002), the ad hoc tribunal Prosecution had for more than one year accepted the mental state requirement as set forth in the *Jelisić* Appeals Judgment and the subsequent *Krstić* Trial Judgment. The emphasis of the *Stakić* Rule 98*bis* Decision was therefore not the quality or degree of genocidal intent, but rather the mental state requirement for accomplices. The *Stakić* Trial Judgment, not surprisingly, confirmed *Jelisić* and *Krstić* and its own half-time Decision. The Trial Chamber observed that the crime of genocide is "characterized and distinguished by a surplus of intent." The perpetrator must not only have "wanted to commit those acts but also intended to destroy the targeted group in whole or in part as a separate and distinct entity. The level of this intent is the *dolus specialis* or *specific intent*—terms that can be used interchangeably."

ICTR

Several decisions of the ICTR in effect confirm that there is a specific intent requirement for the international crime of genocide. In *Prosecutor v. Jean-Paul Akayesu* the Trial Judgment clearly states that a "specific intention" is required, a dolus specialis; however, the Judgment is rather unclear when it attempts to describe what this means. The Judgment suggests that the significance of this "specific intention" is that the perpetrator "clearly seeks to produce the act charged." Accordingly, the object of the seeking is "the act charged," and not the complete or partial destruction of the group, as such. In other words, the ordinary meaning of the formulation used in the Judgment would suggest that the "specific intention" referred to by the *Akayesu* Trial Chamber actually concerns the genocidal conduct or *actus reus,* and not the aim of destruction.

Furthermore, in *Prosecutor v. Clément Kayishema and Obed Ruzindana,* the Trial Judgment states that a "distinguishing aspect of the crime of genocide is the specific intent (dolus specialis) to destroy a group in whole or in part." The Trial Chamber then opined that, "for the crime of genocide to occur, the mens rea must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent."

The expression "done in furtherance of the genocidal intent" is to a certain extent helpful in addressing the relationship between the genocidal conduct and the

genocidal intent. The genocidal conduct must be undertaken in the service of the broader intent to destroy a group in whole or in part. The expression suggests the presence of both a cognitive component and volition as part of the mental state. It is difficult to imagine how one can do something to further the realization of an intention without knowing about and wanting the intended result. Doing something in furtherance of a specific intent would seem to imply a conscious desire.

Prosecutor v. Alfred Musema also includes a consideration of genocidal intent. In this case, the Trial Chamber stated that the crime of genocide is distinct from other crimes "because it requires a dolus specialis, a special intent." The Trial Chamber then tried to elucidate what it meant by dolus specialis by positing that the "special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged." This language expressly identifies result as the object of the perpetrator's intent or mental state. The specific intent does not refer to the conduct of destroying, but rather the result of at least partial destruction of the group. In this sense, it may be illustrative to use the term *subjective surplus* (of intent).

However, the *Musema* Trial Judgment refers to the result "charged." Identifying the result of destruction as pivotal (in the assignment of guilt), rather than the conduct that contributes to or brings about that destruction, would seem to be based on the assumption that the result of destruction is an integral part of the crime of genocide. Regrettably, paragraph 166 of the *Musema* Trial Judgment reinforces this assumption:

> The dolus specialis is a key element of an intentional offense is characterized by a psychological nexus between the physical result and the mental state of the perpetrator.

The word *nexus* is not particularly descriptive in this context; neither is the reference to physical result. The very notion of subjective surplus presupposes a broader intent that goes beyond the actus reus and includes a further objective result or factor that does not correspond to any objective element of crime. That is why this intent requirement amounts to a "surplus." International case law suggests that there has been no recognition of an objective contextual element (such as actual physical destruction) for genocide in international treaty law. It is certainly difficult to locate such an objective contextual element in the wording of the Genocide Convention.

The Musema decision draws on the earlier *Rutaganda* Trial Judgment (*Prosecutor v. Georges Anderson Nderubumwe Rutaganda*). The latter asserts that the distinguishing feature of the crime of genocide is the requirement of "dolus specialis, a special intent." It also uses the expression "clearly intended the result charged"—as well as "encompass the realization of the ulterior purpose to destroy"—both of which have been discussed in preceding paragraphs.

Finally, the International Court of Justice itself *insisted* (borrowing the word of the *Krstić* Trial Judgment), in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, that specific intent to destroy is required for the international crime of genocide, and it indicated that "the prohibition of genocide would be pertinent in this case [possession of nuclear weapons] if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above." The *Krstić* Trial Chamber noted that some of the dissenting opinions criticized the Advisory Opinion "by holding that an act whose foreseeable result was the destruction of a group as such and which did indeed cause the destruction of the group did constitute genocide."

Other Relevant Sources on the Requisite Quality or Degree of Genocidal Intent

Even if international case law were unequivocal vis-à-vis the question of the requisite quality or degree of genocidal intent, it is also useful to consider additional sources of international law.

International Law Commission

Notably, the International Law Commission stated in its commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind that "the definition of the crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law." The Commission further observed that

> [a] general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act."

Caution should be observed in relying on the *travaux préparatoires* (preparatory work, or works) of the Genocide Convention, insofar as it is often difficult to establish the prevailing thinking of the negotiating states at the time. One can find support for widely differing positions on the same issues in the preparatory work. However, the *Krstić* Trial Judgment invoked the preparatory work for its position, claiming that it "clearly shows that the drafters envisaged genocide as an enterprise whose goal, or objective, was to destroy

a human group, in whole or in part." The Chamber continued:

> The draft Convention prepared by the Secretary-General presented genocide as a criminal act which aims to destroy a group, in whole or in part, and specified that this definition excluded certain acts, which may result in the total or partial destruction of a group, but are committed in the absence of an intent to destroy the group.

National Case Law

A few recent cases presented in German courts may be relevant to this discussion (although there is little evidence of other relevant national case-law). The Federal Supreme Court of Germany observed in its review of a 2001 case that genocidal acts "only receive their imprint of particular wrong by their combination with the intent [Absicht] required by section 220a(1) to destroy, in whole or in part, a group protected by this norm as such, keeping in mind that the desired goal, i.e., the complete or partial destruction of this group, does not have to be accomplished." The German term *Absicht* signifies *dolus directus* in the first degree—or, in more familiar terminology, conscious desire. The Court added, with an encouraging degree of precision:

> However, this goal has to be included within the perpetrator's intent as a subjective element of the crime that does not have an objective counterpart in the actus reus. This intent, which really characterizes the crime of genocide and distinguishes it, presupposes that it is the objective of the perpetrator, in the sense of a will directed towards a specific goal, to destroy, in whole or in part, the group protected by section 220a.

In another case that went before the German Federal Supreme Court, the judges provided further elaboration of the same conscious desire standard that was upheld by the *Jelisić* Appeals Chamber:

> The desired result, i.e., the complete or partial destruction of the group as such, does not have to be accomplished; it suffices that this result is comprised within the perpetrators intent [Absicht]. It is through this subjective element that, figuratively speaking, "anticipates" the desired outcome in the subjective sphere, that the crime of genocide [. . .] as such and thus its full wrong is determined.

Commentaries

Antonio Cassese, a widely recognized authority on international criminal law, observes that genocidal intent "amounts to dolus specialis, that is, to an aggravated criminal intention, required in addition to the criminal intent accompanying the underlying offense [. . .]." He states that it "logically follows that other categories of mental element are excluded: recklessness (or dolus eventualis) and gross negligence." He correctly points out the ad hoc tribunals have contributed greatly to the elucidation of the subjective element of genocide.

William A. Schabas, an expert on the law of genocide, commenting on Article 6 (concerning genocide) of the ICC Statute, mentions "the special or specific intent requirement," "this rigorous definition," and the "very high intent requirement" without describing what the standard set out in the Genocide Convention and the ICC Statute actually is. It would seem that Schabas does not recognize the concept of degree or quality of mental state. He reiterates that the "offender must also be proven to have a 'specific intent' or dolus specialis," but without elaboration of what this phrase or the language of the intent formulation in the Genocide Convention actually means. He does observe that a "specific intent offense requires performance of the actus reus but in association with an intent or purpose that goes beyond the mere performance of the act." He also suggests that the chapeau of Article II of the Genocide Convention actually defines the specific intent via the formulation "with intent to destroy, in whole or in part."

German legal scholar Albin Eser's brief but sophisticated treatment of specific intent in a contribution to Cassese's three-volume commentary on the Rome Statute of the ICC is instructive. He observes that "with special intent particular emphasis is put on the volitional element." Or, more specifically on genocide:

> In a similar way, it would suffice for the general intent of genocidal killing according to Article 6(a) of the ICC Statute that the perpetrator, though not striving for the death of his victim, would approve of this result, whereas his special "intent to destroy" in whole or in part the protected group must want to effect this outcome.

This overview of the positions taken by leading specialists on the issue of degree or quality of genocidal intent shows that there are no significant discrepancies between principal and secondary sources of international law with respect to the requisite degree or quality of intent for the international crime of genocide.

The Nature of the Prosecution's Third Ground of Appeal in *Prosecutor v. Goran Jelisić*

Against the background of such strong and consistent arguments coming out of primary and secondary sources of international criminal law, it is necessary to inquire whether the Prosecution's third ground of appeal (pertaining to genocidal intent) in the *Jelisić* case was completely without merit, and whether it was misinterpreted by the Appeals Chamber.

The essence of the Prosecution's argument was: (1) that the Trial Chamber had erroneously held that the requisite quality or degree of intent for genocide is dolus specialis; (2) that the Trial Chamber had erroneously construed dolus specialis as being confined to consciously desiring complete or partial destruction; and (3) that the Trial Chamber had erred in not including the following two mental states in the scope of the requisite genocidal intent: knowledge that one's acts were destroying, in whole or in part, the group, as such; and that described by the case in which an aider and abettor commits acts knowing that there is an ongoing genocide which his acts form part of, and that the likely consequence of his conduct would be to destroy, in whole or in part, the group as such.

The Appeals Chamber held that the Prosecution's first assertion in the foregoing sequence was wrong and based on a misunderstanding, and that as a consequence it was rejecting the Prosecution's third ground of appeal. The Appeals Chamber proceeded to interpret the word *intent* as requiring that the perpetrator was seeking the result of destruction, which in reality amounts to a requirement of conscious desire. In other words, the Appeals Chamber did not address whether the Trial Chamber had held that the genocide provision of the ICTY Statute requires conscious desire (the Prosecution's second assertion in the foregoing sequence), but the Appeals Chamber itself held that conscious desire in the form of seeking the destruction of the group is required under the Statute. The concern that underlay the Prosecution's third ground of appeal was of course the level of the requisite intent, not whether or not it was called dolus specialis.

The Prosecution had advanced the two additional mental states (described above) that it claimed fell within the scope of the requisite genocidal intent—the first referring to the perpetrator of genocidal conduct, the second referring exclusively to accomplice liability. By insisting that the point of departure of the Prosecution's argument had been based on a misunderstanding, the Appeals Chamber chose not to discuss the merits of the Prosecution's second and third assertions with respect to the Trial Chamber's putative failings. As a consequence, there does not seem to be a recorded consideration by the Appeals Chamber of the possible merit of the Prosecution's material propositions.

This omission is noteworthy, not only against the background of the extensive briefing on this issue by the parties in the *Jelisić* appeal, but also in light of recent case law coming out of the same ad hoc tribunal.

Concluding Considerations

The relevant sources in international criminal law provide a firm legal basis for the conclusion that conscious desire is the special intent requirement for the international crime of genocide.

It would seem that findings by the ICTY *Jelisić* Appeals Chamber and the *Krstić* Trial Chamber of the requisite quality or degree of genocidal intent remain sound. It is difficult to see how one can avoid requiring that the perpetrator of genocide has sought at least partial destruction of the group, or had such destruction as the goal of the genocidal conduct. It is reasonable to assert that the mental state must be composed both of a cognitive and emotive or volitional component. The perpetrator consciously desires the result of destructive action if that is what he or she seeks or harbors as the goal. The idea that one can seek a result with a mind bereft of volition as regards this result seems to be an abstraction not in conformity with practical reality. Consciousness of the result of action undertaken to further the destruction of the group, of the process leading to the destruction of the group, or of how one's conduct is an integral part of this process is not the same as wanting, desiring, or hoping for the destruction to occur. Desiring the destruction itself, with no awareness of a process to bring it about, of one's own contribution to such a process, or of the ability of one's conduct to bring about partial destruction would amount to a mental state that lacks the resolve that characterizes the intent to undertake action with a view to that action's ensuring at least the partial destruction of the targeted group.

It is unlikely that the state of the law will evolve significantly in the milieu of the ad hoc Tribunals, which are expected to be in operation until sometime between 2008 and 2010. The ICTY Appeals Chamber did not leave sufficient room for the Trial Chambers to attempt to expand the scope of the applicable standard for genocidal intent. The *Krstić* Trial Judgment is courageous in this respect, insofar as it suggests that customary international law could have moved on this question but had not done so by 1995.

SEE ALSO Complicity; Convention on the Prevention and Punishment of Genocide; International Criminal Court; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the Former Yugoslavia; Superior (or Command) Responsibility; War Crimes

Morten Bergsmo

International Committee of the Red Cross

The International Committee of the Red Cross (ICRC), the founding agent of the International Red Cross and

Red Crescent Movement, is registered under the laws of Switzerland, where it has its headquarters, as a private association. At the same time, it is recognized in public international law and has signed a headquarters agreement with the Swiss federal authorities as if it were an intergovernmental organization. Although its professional staff has been internationalized since the early 1990s, its top policy-making organ, variously called the Committee or the Assembly, remains all-Swiss. The mandate of the ICRC has always been, and remains, responding to the needs of victims of conflict. The organization started with a focus on wounded combatants in international war, then progressively added a concern for: detained combatants in international war, all persons adversely affected by internal or civil war, those detained by reason of "political" events in domestic troubles and tensions, civilians in international war and occupied territory, and all those adversely affected by indiscriminate or inhumane weapons. The ICRC seeks both to provide services in-country, and to develop legal and moral norms that facilitate its fieldwork.

Historical Overview

In 1859 a Swiss businessman, Henry Dunant, witnessed the Battle of Solferino in present-day northern Italy, then the site of clashing armies from the French and Austro-Hungarian Empires. Dunant was appalled at the lack of attention given to wounded soldiers. At that time European armies provided more veterinarians to care for horses than doctors and nurses to care for soldiers. Dunant not only set about caring for the wounded at Solferino, with the help of mostly female locals, but also returned to Geneva determined to find a more systematic remedy for the problem.

The Original Vision

By 1863 Dunant helped create what has become the ICRC. Originally composed of Dunant and four other male volunteers from the Protestant upper and middle classes of Geneva, the Committee initially adopted a two-track approach to help victims of war. It tried to see that "aid workers" were sent to the field to deal firsthand with primarily medical problems arising from war. It also sought to develop international humanitarian law to guarantee the protection of human dignity despite what states saw as military necessity. An early example of the pragmatic track was the dispatch of observers to the war in Schleswig-Holstein (1864). An early result of the second track was the 1864 Geneva Convention for Victims of War, a treaty that encouraged medical attention to war wounded and neutralized both the wounded and medical personnel. The pragmatic and normative tracks were intended to carve out a humanitarian space in the midst of conflict, to set limits on military and political necessity in order to preserve as much humanity and human dignity as states would allow. This two-track approach remains, even though the ICRC's scope of action has been expanded in terms of geography covered, conflicts addressed, and victims helped.

At first Dunant and his colleagues on the Committee thought it would be sufficient for them to help organize national aid societies for the pragmatic humanitarian work. They set about promoting, later recognizing, aid societies in various countries. Other dynamic personalities, such as Clara Barton in the United States and Florence Nightingale in the United Kingdom, were also intent on doing something about the human tragedy stemming from war, and they were responsible for the creation of the American and British Red Cross Societies, respectively. These societies, and others, were loosely linked to the ICRC in a growing network that focused first on medical assistance in war.

The Ottoman Empire, the remnant of which is present-day Turkey, was the first Muslim authority to become a party to the 1864 Geneva Convention and create an official aid society primarily for medical assistance in armed conflict. However, Ottoman officials insisted on using the emblem of the Red Crescent rather than the Red Cross. The ICRC, not anticipating subsequent controversies over proliferating emblems and trying to play down the role of religion (Dunant was an evangelical Christian), deferred to this Ottoman fait accompli. In the early twenty-first century there are more than 180 national Red Cross and Red Crescent Societies. They have to be recognized by the ICRC, after meeting a set of conditions, including use of an emblem approved by states when meeting in diplomatic conference. States establish neutral emblems in war through treaty making.

By the 1870s Dunant had retired to the sidelines in the context of failed business ventures carrying the hint of scandal, something not tolerated in Calvinistic Geneva, and his leadership role was taken over by Gustave Moynier. Dunant was later "rehabilitated" and named a cowinner of the first Nobel Peace Prize in 1901. But it was the cautious lawyer Moynier who, with considerable organizational skills, decisively shaped the early ICRC.

A New Vision

The Committee initially overestimated the appeal of international or universal humanitarianism and underestimated the power of nationalism. The Franco-Prussian war of 1870 showed the limits of the original vision, as the French and Prussian aid societies helped only their