ESSAY

SELECTIVE ASSISTANCE AS AN EVIDENTIARY PROBLEM IN GENOCIDE CASES

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ABSTRACT

This Essay investigates the question of the assessment of evidence in cases of genocide when the perpetrator can make a believable claim that the consistency of a relevant pattern of his behavior has not been demonstrated. Cases of this kind have arisen in the international criminal tribunals in particular where questions of so-called "selective assistance" were concerned (i.e., claims by the defense that genocidal intent could not have existed, as the defendant had in fact helped certain members of the group). It is a claim that has led to widely differing responses in the international criminal tribunals: in Kayishema, the International Criminal Tribunal for Rwanda found that the fact that the defendant may have helped Tutsi children had "little direct bearing" on the question whether he possessed the relevant mens rea; but in Jelisić, the International Criminal Tribunal for the former Yugoslavia considered that the defendant, who had killed Bosnian Muslim prisoners and had voiced his hostile feelings towards Bosnian Muslims as a group, but had also allowed some members of the group to leave his prison camp, had committed his acts arbitrarily rather than "with a clear intention to destroy a group". This Essay suggests a solution to the existing problem by highlighting the temporal dimension of the relevant, seemingly contradictory strands of evidence and by focusing in particular on the principle of simultaneity as a method of resolving cases of seemingly contradictory evidence.

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I. INTRODUCTION

In August 1994, after the killings of the Tutsis in Rwanda had come to an end, François Karera gave an interview from his exile in Zaire (now the Democratic Republic of Congo). In his statements, the former Hutu prefect of Kigali-Rural did not show himself as a friend of the Tutsis. In his eyes, they were "originally bad" and "murderers." On the atrocities of the past months, Karera commented: "If the reasons are just, the massacres are justified."[1]

Seven years later, Karera, now in Kenya, was arrested and transferred to the detention facility of the International Criminal Tribunal for the Former Rwanda (ICTR).[2] In its 2005 indictment, the Prosecution charged him with genocide (alternatively, with complicity in genocide) and crimes against humanity with regard to his role in the massacres in Rwanda.[3]

During the Karera trial, the Defense presented a picture of the accused that was, in some regards, surprising. The Trial

1. Jane Perlez, *Under the Bougainvillea, A Litany of Past Wrong*, N.Y. TIMES (Aug. 15, 1994), https://www.nytimes.com/1994/08/15/world/under-the-bougainvillea-a-litany-of-past-wrongs.html [https://perma.cc/4BGZ-7QWK].
2. Prosecutor v. Karera, ICTR-01-74-T, Judgment and Sentence, annex I, ¶ 1 (Dec. 7, 2007) [hereinafter *Karera* (Trial Chamber)].
3. Prosecutor v. Karera, ICTR-01-74-I, Amended Indictment (Dec. 19, 2005).

Chamber heard that Karera had in fact saved Tutsi civilians[4] and had protected moderate Hutus too—among them, Vincent Munyandamutsa, a member of the moderate wing of the Hutu-led Mouvement Démocratique Républicain (MDR, or Republican Democratic Movement) party.[5] Where the Prosecution referred to meetings in which Karera incited members of the Hutu civilian population to target Tutsi civilians,[6] the Defense spoke of "pacification meetings" in which Karera urged the population to stop looting and killing and called on them to "understand each other and live harmoniously."[7] In May 1994, he allegedly declared that his mission was to pacify Kigali, and condemned the massacres.[8]

It was not a particularly successful strategy. The Trial Chamber found Karera guilty of genocide and crimes against humanity (murder and extermination) and sentenced him to life imprisonment.[9] On February 2, 2009, the Appeals Chamber found that the Trial Chamber had committed no errors as far as the evaluation of the pacification meetings,[10] the alleged saving of Tutsis,[11] and protection of Munyandamutsa was concerned,[12] and upheld Karera's sentence of life imprisonment.[13]

If the submissions of the Defense were accepted, the case of Karera would be far removed from the common perception of a *génocidaire* who pursues his destructive aim with unwavering resolve. But Karera's case is not an isolated incident. In several genocide trials before international tribunals, certain inconsistencies in the conduct of the defendant have been alleged—commonly in the form of "selective assistance"[14] to members of the targeted group.

4. *Karera* (Trial Chamber) ¶ 582.
5. *Id.* ¶¶ 360, 374.
6. *Id.* ¶ 378.
7. *Id.* ¶¶ 393, 396, 397.
8. *Id.* ¶ 399.
9. *Id.* ¶¶ 569, 585.
10. *See* Prosecutor v. Karera, ICTR-01-74-A, Judgment, ¶ 286 (Feb. 2 2009) [hereinafter *Karera* (Appeals Chamber)].
11. *Id.* ¶¶ 387–90.
12. *Id.* ¶¶ 276–78.
13. *Id.* ¶ 398. The Appeals Chamber did however allow certain other grounds of appeal. *Id.*
14. A term used in JENNIFER TRAHAN, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 24 (2010).

The Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR have not dealt with these instances in a uniform way. In some cases, they have been rather more accepting of the importance of inconsistent behavior. In the Jelisić case, evidence of this kind did indeed lead to an acquittal on the charge of genocide.[15] The international criminal tribunals must therefore accept part of the responsibility if "holes in the pattern" of the defendant's conduct play an increasing part in Defense strategies.[16]

This Essay examines the role of inconsistent conduct in genocide trials before the international criminal tribunals. In Part I, it considers cases in which the tribunals had to deal with situations of that kind and outlines the conclusions which the tribunals reached with regard to their assessment. In Part II, it takes a closer view at contradictory evidence by examining inter alia the role of motives which diverge from specific intent and the role of the principle of simultaneity. Part III provides a critical assessment of strands of evidence (including exculpatory evidence) that have been considered by the international criminal tribunals for a finding of genocide.

II. SELECTIVE ASSISTANCE IN THE DELIBERATIONS OF THE AD HOC TRIBUNALS

In its most significant role, inconsistent behavior affects the one element of genocide which the International Law Commission highlighted as the "distinguishing characteristic" of the crime[17] : the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[18] Intent, however, is

15. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 108 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) [hereinafter *Jelisić* (Trial Chamber)].

16. For the situation before the International Criminal Tribunal for Rwanda (ICTR), see TRAHAN, *supra* note 14, at 24, 315–17. *Cf.* Prosecutor v. Karadžić (Radovan), Case No. MICT-13-55-A, Judgment, ¶ 629 (MICT Appeals Chamber Mar. 20, 2019).

17. *Article 17, Crime of Genocide*, [1996] 2(2) Y.B. INT'L L. COMM'N 44, ¶ 5, U.N. Doc. A/C.4/SER.A/1996/Add.1.

18. Genocide Convention art. II, Dec. 9, 1948, 78 U.N.T.S. 277; S.C. Res. 827(establishing the International Criminal Tribunal for the former Yugoslavia) (May 25, 1993), in conjunction with Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) S/25704 (May 3, 1993), Annex, Statute of the International Tribunal, art. 4, ¶ 2; S.C. Res. 955, art. 2, ¶ 2 (Nov. 8, 1994) (establishing

notoriously difficult to prove, and the acceptance of suitable elements of evidence has therefore been of crucial importance to the adjudication of the crime.[19] It is in this context that inconsistent behavior makes its appearance. The fact that the accused has, for example, helped members of the targeted group, demonstrates, in the eyes of the Defense, that he could not have acted with the required intent. To the Prosecution, selective assistance to members of the targeted group will usually not detract from the general finding that the defendant had the intent to destroy the group as such.

In other instances, a reference to inconsistent behavior has been employed to make a case for factors which should be considered in mitigation; the "holes in the pattern" are therefore used for their potential impact on the level of sentencing rather than on the assessment of the substantive criminal law.

The conclusions of the Trial Chambers and Appeals Chambers reflect the respective variations. Three main strands can be distinguished: There are cases in which the question is considered whether inconsistent behavior could count as exculpatory evidence. Secondly, there are cases in which inconsistent behavior is considered as a potentially mitigating factor. The third category is formed by cases in which the Chamber did not accord any weight to inconsistent behavior—often, because it had doubts about the evidence which the Defense presented.

The case of Jelisić is the most prominent example for the first category of cases. Jelisić, a former farm mechanic, had become a

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the International Criminal Tribunal for Rwanda, Annex, Statute of the International Criminal Tribunal for Rwanda); Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 3.

19. *See* Matthew Lippman, *Genocide: The Crime of the Century*, 23 HOUS. J. INT'L L. 467, 506 (2001). The ad hoc tribunals have looked to a variety of strands of evidence to establish genocidal intent. For a summary, see David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 314(2003); *see also* Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 24 (2002); David Alonzo-Maizlish, Note, *In Whole or in Part: Group Rights, the Intent Element of Genocide, and the "Quantiative Criterion"*, 77 N.Y.U. L. REV. 1369, 1386–90 (2002); *cf.* CAROLINE FOURNET, INTERNATIONAL CRIMES 90 (2006).

guard at the Luka prison camp in Northern Bosnia.[20] His indictment encompassed forty-four counts, of which forty-three dealt with crimes against humanity and violations of the laws and customs of war.[21] The first count was a charge of genocide, for the systematic killing of Bosnian Muslims, inter alia at the Luka Camp. The evidence against him seemed overwhelming. Jelisić, a man who called himself the "Serbian Adolf" (and presented himself as "Adolf" at his initial hearing), had made in his time at the camp statements which appeared to cast little doubt on his intentions: he "hated Muslim women . . . wanted to sterilise them all in order to prevent an increase in the number of Muslims but . . . before exterminating them he would begin with the men in order prevent any proliferation."[22] He kept a tally of the Muslims he had killed.[23] He claimed he had to execute "twenty to thirty persons before being able to drink his coffee each morning."[24]

But Jelisić also gave—"against all logic," as the Tribunal observed—*laissez-passers* to some detainees, including one Muslim who was first forced to play Russian roulette with him, and another detainee who had first been beaten by Jelisić .[25]

What makes the Jelisić case unusual is that the Trial Chamber accorded considerable weight to the existence of contradictory evidence. Having referred to the fact that Jelisić had let some detainees go free, it stated that he had killed arbitrarily rather "than with the clear intention to destroy a group;" and in view of this uncertainty, the Chamber found that "[t]he benefit of the doubt must always go to the accused and,

20. *Bosnian Serb gets 40 Years for War Crimes*, SEATTLE TIMES, Dec. 14, 1999; *Jelisić* (Trial Chamber), ¶ 123. On the background of Jelisić, compare Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure and Recent Cases*, 3 J. APP. PRAC. & PROCESS 589, 638 (2001) and Kelly D. Askin, *Judgments Rendered in 1999 by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 6 ILSA J. INT'L & COMPAR. L. 486, 499 (2000).

21. Prosecutor v. Jelisić, Case No. IT-95-10-T, Second Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 19, 1998).

22. *Jelisić* (Trial Chamber) ¶ 102.

23. *Id.* ¶ 103.

24. *Id.* ¶ 103.

25. *Id.* ¶ 106.

consequently, Goran Jelisić must be found not guilty on this count."[26]

There is a marked difference between this finding and the conclusions reached by the Appeals Chamber in the case of Kayishema and Ruzindana. Clément Kayishema had been prefect (the highest local government representative) of the Kibuye prefecture at the time of the atrocities in Rwanda[27]—by training, he was a medical doctor.[28] The evidence against Kayishema was again formed in part by incriminating utterances. The defendant had referred to Tutsis as "Tutsi dogs" and "Tutsi sons of bitches" and had exhorted attackers to "get down to work"—which in this particular context was understood to mean to begin to kill Tutsis.[29]

But in this case, too, the Defense referred to holes in the pattern. At the Appeals stage, the Defense maintained that the Trial Chamber had not properly taken into account that Kayishema had also rescued "72 Tutsi children, who had survived the massacre at Home St Jean Complex"[30] and who were brought to Kibuye hospital (where Kayishema used to work).[31] The Defense was not successful on this ground; although it appears that the Appeals Chamber also indicated some doubt as to the veracity of the claims, noting that, "in light of the overall evidence, the fact that the 72 children may have been taken to the hospital pursuant to Kayishema's instructions has little direct bearing on the question whether he possessed the requisite mens rea."[32] More recently, the Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (IRMCT) in the 2019 *Karadzić* case similarly felt that "evidence of limited and selective assistance to a few individuals does not preclude a trier of fact

26. *Id.* ¶ 108; *see also* Kriangsak Kittichaisaree, *The NATO Military Action and the Potential Impact Of the International Criminal Court*, 4 SING. J. INT'L & COMPAR. L. 498, 513 (2000). The Appeals Chamber expressed a very critical opinion on this finding (see *infra* Section IV).

27. *Rwanda; Profile of a Genocide Convict*, AFRICA NEWS/INTER NEWS (TANZANIA), 21 May 1999.

28. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 7 (May 21, 1999) [hereinafter *Kayishema* (Trial Chamber)].

29. *Id.* ¶ 539.

30. Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment, ¶ 147 (June 1, 2001) [hereinafter *Kayishema* (Appeals Chamber)].

31. *See Kayishema* (Trial Chamber) ¶ 310.

32. *Kayishema* (Appeals Chamber) ¶ 149.

from reasonably finding the requisite intent to commit genocide."[33]

On other occasions, international criminal tribunals did consider instances of selective assistance as a relevant mitigating factor, but did not discuss them in their evaluation of genocidal intent.

The case of Georges Ruggiu, a Belgian journalist (the only European to be tried by the ICTR) falls in that category. Ruggiu stood accused of incitement to genocide in connection with his broadcasts for the Radio Télévision Libre des Milles Collines (RTLM).[34] On May 15, 2000, Ruggiu pleaded guilty to the counts of the indictment, having signed a plea agreement with the Prosecution.[35] Ruggiu admitted that there was a link between his broadcasts and the deaths of victims in Rwanda.[36] The phrase "go to work" makes its appearance in his case, as it had been used by him in public broadcasts; the Trial Chamber found that with "the passage of time, the expression came to mean 'go kill the Tutsis and Hutu political opponents of the interim government.'"[37]

Ruggiu had, however, also "personally assumed responsibility" for the hiding and transport of Tutsi children in his jeep to a mission, to keep them protected.[38] It was alleged that the feeding of a group of farmers and refugees in Kigali, including Tutsis, was also carried out under his responsibility—and these points were not disputed by the Prosecution.[39] On this occasion, the ICTR Trial Chamber accepted selective assistance as a mitigating factor.

The Karera case on the other hand is an example for the third category of cases, in which the tribunal simply did not consider the presented evidence credible. The Trial Chamber voiced doubts about the saving of Tutsis by Karera[40] and the protection of the moderate Hutu politician Munyandamutsa.[41] It

33. *See supra* note 16.

34. Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment, ¶ 44 (Int'l Crim. Trib. for Rwanda Jun. 1, 2000) [hereinafter *Ruggiu* (Trial Chamber)].

35. *See id.* ¶ 10.

36. *See id.* ¶ 45.

37. *See id.* ¶ 44.

38. *See id.* ¶ 73.

39. *See id.* ¶¶ 73–74.

40. *Karera* (Trial Chamber) ¶ 582.

41. *See id.* ¶ 374.

was somewhat less dismissive about the pacification meetings, although it declared it "surprising that meetings chaired by military and civil defence leaders were aimed at contributing to reconciliation and pacification,"[42] and it concluded that it was at any rate established that Karera had at certain meetings made statements "which explicitly or by implication encouraged looting or killing of Tutsis."[43]

It would therefore appear that the ad hoc tribunals have adopted widely differing approaches when they were faced with the task of evaluating contradictory evidence in the context of genocidal intent. This is partly based on the way in which the Defense invited the court to consider these holes in the pattern of the defendant's conduct (as exculpatory evidence or as a mitigating factor). But the differences in the way in which the Trial Chambers dealt with contradictory evidence—in particular in view of their role in the assessment of specific intent—create a situation which allows for little legal certainty and provides inadequate guidance for future cases of this kind.

III. A SYSTEMATIC APPROACH TOWARDS EVIDENTIARY INCONSISTENCIES

A. The Establishment of Inconsistencies

Not every situation in which prima facie evidence of genocidal intent is joined by other pieces of evidence leads by necessity to a contradictory outcome. There are cases where the actus reus of genocide was based on a variety of reasons without eliminating the determinative specific intent to destroy a group in whole or in part.

The very consideration of motives behind the actus reus has met with criticism in the jurisprudence of the tribunals.[44] The *Kayishema* Appeals Chamber for instance noted that criminal intent "must not be confused with motive"—without, however, examining where, in the case of genocide, the dividing line is to

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42. *See id.* ¶ 416.
43. *See id.* ¶ 417.
44. On the whole problem, see Paul Behrens, *Genocidal Intent and the Question of Motives*, 10 J. INT'L CRIM. JUST. 501–23 (2012).

be drawn.[45] The problem with this view lies in the fact that by accepting a *dolus specialis*, the drafters of the Genocide Convention do call for the exploration of reasons behind the objective genocidal acts which go well beyond the simple volitional element which mirrors the actus reus. It is not enough that the perpetrator (for example) killed members of the group and wanted to do that; he must have possessed the intent to destroy the protected group, in whole or in part, as such. But if this is the case, then motives carry significance. The existence of particular motives may demonstrate that the reason behind the actus reus was not the destruction of the group and that therefore the *dolus specialis* is negated; while the existence of other motives may not be harmful to a finding of specific genocidal intent.[46]

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45. *Kayishema* (Appeals Chamber) ¶ 161; *see also* Prosecutor v. Jelisić, IT-95-10-A, Judgment ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia, Jul. 5, 2001) [hereinafter *Jelisić* (Appeals Chamber)]; Beth van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1128 (2004). In fact, the question whether "motive" forms part of the elements of the crime of genocide has caused one of the "major controversies" in the debate of this crime. George E. Bisharat, *Sanctions as Genocide*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 379, 416 (2001). Alonzo-Maizilish states that there was "great debate" during the drafting of the Genocide Convention on the question whether a "motive element" should be included. Alonzo-Maizlish, *supra* note 19, at 1382, n.58. Greenawalt points out that the record of the Ad Hoc Committee of ECOSOC which considered the draft of the Genocide Convention, does not reveal any discussions on the meaning of "intent" or "motive." Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV., 2259, 2275 (1999); David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEXAS INT'L L. J. 231, 267 (2002). Some authors refer to genocidal intent as a "purpose," Adil Ahmad Haque, *Group Violence and Group Vengeance: Towards a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273, 310 (2005), which adds to the approximation of "intent" and "motive." For a detailed discussion of the reasons in favor and against an inclusion of motives in the consideration of elements of a crime, see JONATHAN HERRING, CRIMINAL LAW. TEXT, CASES AND MATERIALS 193-94(10th ed. 2022) (with reference to English criminal law); WAYNE R. LAFAVE, CRIMINAL LAW 256–57 (4th ed. 2003) (with reference to American law).

46. *See* van Schaack, *supra* note 45, at 1128 (discussing the obscuring of "evidence for genocidal intent" if alternative explanations for the behaviour in question can be identified). *See also* Greenawalt, *supra* note 45, at 2285; Nersessian, *supra* note 19, at 315 (on motives which can indeed be considered as evidence for genocidal intent). It is interesting to note that the international criminal tribunals were able to accept the significance of motives in the context of the subjective element of the perpetrator relating to the policy element of crimes against humanity. There, it was found that the perpetrator must not have acted "for purely personal motives completely unrelated to the attack on the civilian population." Prosecutor v. Tadić , Case No. IT-94-1-T, Judgment, ¶ 658–59 (Int'l Crim. Trib. for the Former Yugoslavia May 4, 1997).

With regard to the latter alternative, the Appeals Chamber had occasion to note that the existence of personal motives,[47] economic benefits or political advantages[48] does not necessarily exclude the presence of genocidal intent.[49] The co-existence of these reasons is certainly in principle possible. The Defense, in the case of Ruzindana for instance—who stood accused of genocide before the ICTR—had claimed that it was the "elimination of business competitors" that had influenced his actions. It would be difficult to argue that it would be impossible for a perpetrator to appoint the destruction of a protected group as his goal while at the same time intending to gain economic benefits from this action.

However, there is reason to believe that every case will need to be examined on its individual merits. In the case of Ruggiu for instance, the journalist had at some stage drawn the attention of the Gikondo population to the fact that RPF members were in the area; a statement which resulted in the killing of many people, women and children among them. It seems, however, that Ruggiu had acted to warn one person in particular—the Editor-in-Chief of RTLM, who lived in this area. In a case like this it is at least conceivable that personal concerns rather than the desire to destroy a protected group had formed the intent of the perpetrator; additional evidence would be required to reach an appropriate assessment of this instance.

Two situations in particular, in which assumed genocidal intent may have been joined by another consideration, have proven to be cumbersome for the international tribunals.

The first concerns the potential co-existence of considerations of military or security concerns and genocidal intent. The case of Ruggiu may again serve as an illustration of the complexities of this situation. The language used in Ruggiu's broadcasts was frequently of a military nature: There was a move to encourage "civil defence;"[50] there were references to the

47. *Kayishema* (Appeals Chamber), ¶ 161.

48. *Jelisić* (Appeals Chamber), ¶ 49; *see also* Nersessian, *supra* note 45, at 268 (on acts motivated by "financial gain" and ideological motives); Nersessian, *supra* note 19, at 315.

49. *See also* Gunael Mettraux, *Current Developments*, 1 INT'L CRIM. L. REV. 279 (2001); Greenawalt, *supra* note 45, at 2288 (on "ideological or political motives").

50. *Ruggiu* (Trial Chamber) ¶ 44 (iv).

"enemy," the RPF and their allies.[51] It is significant that the Trial Chamber states that, as time went past, the exhortations to fight the RPF and their allies assumed the meaning of exhortations to kill Tutsis and oppositional Hutus.[52] The relationship between the perception of military advantages and the intent to destroy a protected group may therefore be very close. The situation is in so far similar to the assessment of a co-existence of economic or political benefits: it is not inconceivable that a perpetrator might desire the destruction of a group and see in this at the same time a military advantage.

It should, however, also be noted that there were cases in which the international tribunals were content to accord greater weight to the military intention and to even allow it to exclude genocidal intent. Thus, the Trial Chamber in *Brđanin* agreed that the fact that the greater part of the detainees in camps had been of military age

> could militate further against the conclusion that the existence of genocidal intent is the only reasonable inference that may be drawn from the evidence. There is an alternative explanation for the infliction of these acts on military-aged men, and that is that the goal was rather to eliminate any perceived threat to the implementation of the Strategic Plan in the ARK and beyond.[53]

In *Krstić*, on the other hand, the Appeals Chamber pointed out that the male Muslim prisoners who had been selected had been killed on the basis of their identity only; the victims had included civilians, old and young men.[54] The evaluation of the co-existence of military motives and genocidal intent therefore becomes a question of a case-by-case analysis. If it can be proven that the perpetrator directed his acts solely against those members of the protected group who posed a military threat and

51. *Id.* ¶ 44 (i).
52. *Id.* ¶ 44 (iv).
53. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 979 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) [hereinafter *Brđanin* (Trial Chamber)].
54. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) [hereinafter *Krstić* (Appeals Chamber)].

left other parts of the group unharmed, the finding for a specific genocidal intent will be much more difficult to support.[55]

Perhaps the most complicated case of co-existence of intentions is that of the ethnic cleanser. The international tribunals—in particular the ICTY—have long struggled to evaluate the phenomenon of ethnic cleansing in the context of genocide. The Appeals Chamber in *Krstić* adopted the view that the forcible transfer of Bosnian Muslims from Srebrenica eliminated "even the residual possibility that the Muslim community in the area could reconstitute itself."[56] The Trial Chamber in *Brđanin* spelled it out: "forcible displacement," in its view, "could be an additional means to ensure the physical destruction."[57] In the case of *Blagojević*, Trial Chamber I of the ICTY accepted that "intent to destroy" means the physical or biological destruction of the group, but it also found that physical or biological destruction was the likely outcome of a forcible transfer if the group could no longer reconstitute itself.[58]

Not everybody agrees with this assessment. The Trial Chamber in *Stakić* saw a clear difference between the "mere dissolution" of a group and physical destruction.[59] In this context, it went back to the *travaux préparatoires* and pointed out that a proposal to include "measures intended to oblige members of a group to abandon their homes" had been rejected by the drafters of the Genocide Convention.[60] In the 2007 *Genocide Case*, the International Court of Justice was similarly critical and found that

> [n]either the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes

55. It should be noted that the assertion that the perpetrator acted to avert a military threat, causes further complications. One may ask if child soldiers and human shields may be embraced by the definition of a "military threat." If that were the case, then the difference between "military considerations" and the intention to destroy a protected group may be considerably diminished.

56. *Krstić* (Appeals Chamber) ¶ 31.

57. *Brđanin* (Trial Chamber) ¶ 976.

58. Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, ¶ 666 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) [hereinafter *Blagojevic* (Trial Chamber)].

59. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 519 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003) [hereinafter *Stakić* (Trial Chamber)].

60. *Id.*

> genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.[61]

Nor could it be said that academic opinion unequivocally supports a view of genocidal intent which encompasses the intent of the ethnic cleanser. Schabas went so far as to say that "[Ethnic cleansing] is intended to displace a population, [genocide] to destroy it. The issue is one of intent and it is logically inconceivable that the two agendas coexist."[62]

A co-existence of motives in this regard is perhaps not entirely "inconceivable." If the perpetrator expels a protected group into a territory where certain death awaits its members—a desert for instance, or another region unfit for human existence—then it would appear entirely possible that genocidal intent and the intent of "ethnic cleansing" share a place in the mind of the author of the act.[63] One example was provided in the Prosecutor's appeal against the decision of the ICC Pre-Trial Chamber not to include genocide in the arrest warrant against the Sudanese President Bashir. On this occasion, the Prosecutor pointed out that "the harshness of the terrain in Darfur, to which the victims were forcibly displaced," had not been considered by the Pre-Trial Chamber.[64] In the majority of cases however, the assessment of the Trial Chamber in Stakić appears more convincing. Including the removal of a group in the definition of "physical or biological destruction" puts a considerable linguistic strain on the phrase in question. "Destruction" carries a distinct notion of permanence which does not inhabit the concept of "expulsion": the group still exists, and it cannot even be said with

61. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 ¶ 190 (Feb. 26) [hereinafter 2007 Genocide Case].

62. *Brdanin* (Trial Chamber) n.2456 (quoting WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 200 (1st ed. 2000)).

63. The ICJ did accept that acts of ethnic cleansing "may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts." *See* 2007 Genocide Case 43 ¶ 190.

64. Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09, ¶ 27 (Mar. 10, 2009).

certainty that it will never again re-form on its accustomed territory.

B. The Impact of Simultaneity on the Assessment of Inconsistencies

If the apparent conflict between evidence in support of genocidal intent and evidence to the contrary cannot be resolved by the assumption of co-existence of the two strands of evidence, then a real situation of contradictory evidence may exist. That, however, can only ever be assumed if the two strands of evidence exist at the same time.

The principle of simultaneity (or contemporaneity), which is well known to major legal systems in the world[65] must claim its validity in the realm of international criminal law as well. It is mandatory that the mens rea extends to the period in which the actus reus is performed. In other words, if a perpetrator kills a victim because he bore him personal animosity, and later develops a general desire to destroy the entire group to which the victim belongs, it would be inapposite to apply this desire to the act in question; it comes too late. On the other hand, if a perpetrator once intended to destroy a protected group in whole or in part, repents his views, and then kills a member of the group for personal reasons, his views before the performance of the actus reus will not matter; they no longer exist at the crucial time.

At first glance, such changes in the mindset of a suspected *génocidaire* might not seem a likely occurrence. But the "intent to destroy" which the Genocide Convention requires, need not be the same as a long-standing, unshakeable conviction. The commander of a concentration camp might have the intent to destroy the ethnic population of the camp and yet change his views very quickly after learning of an advancing military force whose objective is the liberation of the camp. His intent might be replaced by the opportunistic desire to show that he was also

65. For a discussion of the principle of contemporaneity in various domestic jurisdictions, see Alan R. White, *The Identity and Time of the Actus Reus*, 1977 CRIM. L. REV. 148; Geoffrey Marston, Note*, Contemporaneity of Act and Intention in Crimes*, 86 L.Q. REV. 208–238 (1970); G. R. Sullivan, *Cause and Contemporaneity of Actus Reus and Mens Rea*, 52 CAMBRIDGE L.J. 487–500 (1993); CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL. *Band 1, Grundlagen. Der Aufbau der Verbrechenslehre*, 588–89 (2006); ADOLF SCHÖNKE ET AL., STRAFGESETZBUCH: KOMMENTAR 269 (2006); HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS 294 (1996).

responsible for some positive acts towards the inmates of the camp.

The findings of both the Trial Chamber and the Appeals Chamber in relation to François Karera's "pacification meetings" indicates that the ICTR is (on occasion) careful to distinguish between different stages in the defendant's behavior. In reviewing the reasoning of the Trial Chamber, the Appeals Chamber stated: "It is implicit from the Trial Judgement that the Trial Chamber considered the fact that the Appellant held these 'so-called pacification meetings' was not irreconcilable with the fact that he participated in other meetings in Rushashi"[66] and found that Karera had not made the case that attendance at the pacification meetings "is incompatible with evidence that he was involved in the killings in Rushashi and Nyamirambo."[67]

As far as specific intent is concerned, a clear division of this kind does, however, necessitate sufficiently precise evidence for the existing intent of the perpetrator at the time of the actus reus. This appears easy enough when the author of the act accompanied the material part of the crime with utterances which revealed his intention. But it is a fair assumption that in the majority of cases the best evidence that is available leads only to an approximation of the intent as it existed at the time of the act.

In Jelisić's case for instance, it would be reasonable to see his remarks on the number of Muslim victims he had killed in the context of his most recent victims, even though the utterances were apparently made after the act.[68] But there are cases in which no such statements existed—neither a confession by the perpetrator before the tribunal nor any other piece of evidence that could be convincingly linked to a particular act at a particular time. Instead, a number of evidential strains may exist, referring to roughly the same, more general, timeframe. In situations of this kind, the phenomenon of contradictory evidence may indeed emerge; and it is then of importance to accord a value to the various forms of evidence that an international criminal tribunal may accept.

66. *Karera* (Appeals Chamber) ¶ 284.
67. *Id.* ¶ 286.
68. *Jelisic* (Trial Chamber) ¶ 103.

IV. OF PRESENCE AND ABSENCE: EVALUATING EVIDENTIARY STRANDS FOR GENOCIDAL INTENT

The jurisdiction of the international criminal tribunals provides a certain guidance as to the elements of human behavior which can appropriately be considered in the determination of incriminating evidence.[69] The tribunals are less clear about the evaluation of exculpatory evidence—evidence that negates the existence of genocidal intent. However, the principles of international criminal law are clear on situations which, after all due care has been taken to assess the relevant evidence, still present an insoluble evidentiary conflict pertaining to the mens rea of the perpetrator: if reasonable doubt attaches to the existence of his intent, it is to be resolved in favor of the defendant.[70]

Among the elements of evidence accepted by the international tribunals, two seem to merit particular attention in this respect: the existence or otherwise of an action and the existence or otherwise of a statement by the alleged genocidal perpetrator.

The ad hoc tribunals have for a long time accepted that the acts of the defendant themselves allow an inference of his intent at the time of commission.[71] This position, however, may require qualification. If specific intent is indeed to be considered the "distinguishing characteristic" of genocide[72] and if it is this intent that distinguishes it from certain crimes against humanity (extermination, persecution), it would appear strange and contradictory to assume genocidal intent exclusively from the existence of, e.g. killings. The view expressed by some Trial

69. For an overview of evidence accepted by the ad hoc tribunals in the case of genocide, see Bisharat, *supra* note 45, at 414; *see also* Nina H. B. Jørgensen, *The Definition of Genocide*, 1 INT'L CRIM. L. REV. 285, 297 (2001) (with references to the *Report of the Commission of Experts on the Former Yugoslavia* and the 1985 *Whitaker Report*).

70. *Cf. Jelisić* (Trial Chamber) ¶ 108; *see also Kayishema* (Appeals Chamber), ¶ 148 ("On the basis of such evidence, it found that it had been established beyond reasonable doubt that the requisite *mens rea* was present.").

71. ICTR (Trial Chamber), Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 313 (May 15, 2003) [hereinafter *Semanza* (Trial Chamber)]; earlier ICTR (Trial Chamber), Case No. ICTR-96-4-T, Prosecutor v. Jean-Paul Akayesu, Judgment, ¶ 523 (Sept. 2, 1998)) [hereinafter *Akayesu* (Trial Chamber)].

72. *See supra* text accompanying note 17; *cf. Jelisić* (Trial Chamber), ¶ 66.

Chambers that the "scale of the atrocities"[73] and the "manner of killing"[74] can allow an inference of genocidal intent is particularly unsatisfactory. Crimes against humanity can be committed in an equally cruel fashion and are indeed, because of the requirement of a "widespread or systematic attack,"[75] likely to result in large scale atrocities.

That does not mean that the facts of a case are without any value at all for the determination of specific intent; but an assessment of intent which relies on only one of the above mentioned elements can easily yield misleading results. The opinion of the *Akayesu* Trial Chamber, which favored a more contextual view, is more convincing in this regard.[76]

There is, however, one element on the material side of the crime which may carry greater weight in the assessment of genocidal intent than the others. On some occasions, the defendant had adopted a process of selection before proceeding with the genocidal act. Thus, Semanza at one stage "instructed soldiers to separate Hutu from Tutsi, who were then killed by gunfire and grenades."[77] In the *Bagambiki* case, the Trial Chamber made reference to massacres committed on a football field; on the eve of the atrocities, soldiers had come to the field and had "asked the refugees whether they were all Tutsis."[78]

If a perpetrator separates members of a protected group from other persons, he certainly does engage in an act of discrimination. If he then proceeds to kill the members he had thus selected, he will, by this act, have created a strong assumption

73. "[L]arge number of victims," Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, Judgment, ¶ 689, (Feb. 25, 2004) [hereinafter *Ntagerura* (Trial Chamber)]. *See also* Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369, 382 (1984); Nersessian, *supra* note 45, at 267; Nersessian, *supra* note 19, at 314; Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the* Ad Hoc *Tribunals*, 49 INT'L & COMPAR. L.Q. 578, 586 (2000). The "scale of the atrocities" was mentioned in *Jelisić* (Appeals Chamber), ¶ 47. For a critical assessment of these strands of evidence, see Jørgensen, *supra* note 69, at 298.

74. The "manner in which the soldiers killed the refugees," *Ntagerura* (Trial Chamber) ¶ 689.

75. *Cf.* Rome Statute of the International Criminal Court, *supra* note 18, art. 7.

76. *Akayesu* (Trial Chamber) ¶ 523 ("The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group . . . .").

77. *Semanza* (Trial Chamber) ¶ 429.

78. *Ntagerura* (Trial Chamber) ¶ 435.

that his action had indeed been based on an intent to destroy, in whole or in part, a protected group as such.

It may be more difficult to decide whether the lack of a particular action—in those cases where the perpetrator had the opportunity to act—can be taken as evidence for a lack of genocidal intent.

This situation has not received uniform treatment by the Trial Chambers. In the *Krstić* case, for instance, the Appeals Chamber did not accept the possibility that the perpetrator could have done more to effect genocide, as an argument against the assumption of genocidal intent. "Ineffectiveness" did not militate against the existence of specific intent.[79] In the case of Stakić on the other hand, the Trial Chamber adopted a more accepting approach towards exculpatory evidence of this kind. With regards to killings in the Prijedor area, the Chamber found: "Had the aim been to kill *all* Muslims, the structures were in place for this to be accomplished,"[80] and it pointed out that, while 23,000 people had passed through the Trnopolje Camp, the killings in Prijedor were limited to about 3,000 persons.[81]

In a similar vein, the Trial Chamber in *Brđanin* pointed to the fact that the Bosnian Serbs in the Autonomous Region of Krajina (ARK) had the logistical resources to displace "tens of thousands of Bosnian Muslims and Bosnian Croats . . . resources which, had such been the intent, could have been employed in the destruction of all Bosnian Muslims and Bosnian Croats of the ARK."[82]

Context is again of great importance if the accurate value of the omission of a fact is to be ascertained. The omission of the destruction of a group when the perpetrator had the means at his disposal to proceed, may serve as a prima facie negation of genocidal intent. However, the consideration of contextual factors may change the picture. Thus, the Appeals Chamber in *Krstić* pointed out that the international attention which the situation in Srebrenica had attracted, may well have prevented

79. *Krstić* (Appeals Chamber) ¶ 32.
80. Emphasis added by the Trial Chamber, *see Stakić* (Trial Chamber) ¶ 553.
81. *Id.* ¶ 553.
82. *Brđanin* (Trial Chamber) ¶ 978.

the perpetrators from adopting a more "efficient way" of implementing a genocidal plan.[83]

Of more importance for the determination of genocidal intent may in fact be the second piece of evidence which is frequently invoked by the international tribunals—the existence of utterances at the commission of the actus reus of genocide. The various statements by Jelisić, Kayishema and Ruggiu have been mentioned above.[84] In the case of Jelisić in particular, it is difficult to dismiss—as the Trial Chamber did—the importance of his utterances for the assessment of genocidal intent; one may assume that there could hardly be clearer evidence of such an intent than the phrase that the perpetrator hated all members of the group and wanted to kill them all.[85]

The lack of utterances, on the other hand, appears not to have been seen as greatly significant in the determination of genocidal intent.[86] A contextual view may again yield different results—in situations, where a statement had been expected of, but was denied by, the defendant (such as the refusal to take an oath on a genocidal leader), the omission of utterances might allow an insight into his mind and may cast doubt on the existence of genocidal intent.

Apart from these two elements of evidence, the international tribunals have in the past considered the existence of a genocidal plan,[87] the existence of a pattern (a systematic targeting of members of a group)[88] and the repetition of particular acts[89] as relevant for the assessment of the defendant's intent. However, there is reason to approach these factors, like the scale of the atrocities mentioned above, with a measure of caution. The decisive factor has to be the personal involvement of the

83. *Krstić* (Appeals Chamber) ¶ 32.

84. *See also* Margaret A. Lyons, *Hearing the Cry Without Answering the Call: Rape, Genocide and the Rwandan Tribunal*, 28 SYRACUSE J. INT'L L. & COM. 99, 119 (2001).

85. *Jelisić* (Trial Chamber) ¶ 102 ("Goran Jelisic remarked to one witness that he hated the Muslims and wanted to kill them all . . . .").

86. "The Defence also argues that the record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica. The absence of such statements is not determinative." *Krstić* (Appeals Chamber) ¶ 34.

87. *Jelisić* (Appeals Chamber) ¶ 48.

88. *Id.* ¶ 47 ("a pattern of purposeful action"); *see also Kayishema* (Trial Chamber), ¶ 93.

89. *Jelisić* (Appeals Chamber) ¶ 47.

defendant. A consideration which focuses on a pattern, on repeated acts or on a plan that was agreed by other perpetrators, may also catch the opportunist murderer who exploits the existing context of genocidal acts to get rid of isolated personal enemies within the group, without ever making the group "as such" the target of his intention.

Finally, there are strands of evidence which have been dismissed by the international tribunals in the past. The Trial Chamber in *Jelisić* had, among other considerations, relied on the "disturbed personality," the "anti-social" and "narcissistic" elements of his character, which had led him to commit the crime.[90] The Appeals Chamber rejected this line of reasoning and referred to the fact that no defense of insanity had been employed by counsel for Jelisić .[91]

It seems a preferable view. What must count in the assessment of criminal responsibility is whether the perpetrator is capable of forming intent. A disturbed personality may allow a finding that this ability did not exist and that therefore criminal responsibility cannot be assumed. But once the Trial Chamber is convinced that the perpetrator is capable of forming intent, the remaining disorders in his personality cannot serve to negate the finding of the requisite mens rea.

The Appeals Chamber also rejected the argument that Jelisić had killed his victims at random[92], and the Chamber concluded that a "reasonable trier of fact could have discounted the few incidents where he showed mercy as aberrations in an otherwise relentless campaign against the protected group."[93] This, however, requires further qualification. In view of the great significance that the absence of genocidal acts can carry,[94] it seems particularly unsatisfactory that the Appeals Chamber would permit a "discounting" of such an important element of evidence.[95] The preferable question would be one about the underlying motive to which the "aberrations" seem to point.

90. *Jelisić* (Trial Chamber) ¶ 105.

91. *Jelisić* (Appeals Chamber) ¶ 70.

92. *Id.* ¶ 71. See, on a discussion of the Appeals Chamber's judgment in the *Jelisić* case, FOURNET, *supra* note 19, at 87; *cf.* Kittichaisaree, *supra* note 26, at 513.

93. *Jelisić* (Appeals Chamber) ¶ 71.

94. *See supra* text accompanying notes 79–82.

95. See, however, the interpretation of the Appeals Chamber's judgment in Guenael Mettraux, *Current Developments,* 1 INT'L CRIM. L. REV. 261, 284, at 282 (2001).

The motive, it will be found, was, in the case of Jelisić, far from altruistic. Giving *laissez-passers* to a victim whom Jelisić had at first beaten and to another, who had been forced to engage in a game of Russian roulette, is hardly the ephemeral moment of kindness that seems to be suggested in the judgment of the Appeals Chamber. His motive seems more likely rooted in the fact that he had become master of life and death and in the enjoyment of an exercise of power that was made possible only by the dehumanization of his victims. As such, it was entirely compatible with the specific intent required for the crime of genocide.

V. CONCLUSION

From the above examination it appears that the problem of specific intent and the impact of inconsistencies in the behavior of the perpetrator is a problem of evidence as much as of material law. Its particular difficulty lies in the proper evaluation of evidentiary elements which may point to other, possibly contradictory motives behind the actus reus. To simply disregard this evidence or to state that motives are "irrelevant"[96] is an unsatisfactory approach: the more so, as (as the case of Stakić has shown) a particular motive (ethnic cleansing) may be held to deny the existence of genocidal intent.

The preferable view is an approach which would allow a detailed examination of evidence both in support of and against the assumption of genocidal intent. In some cases, it will be found that evidence for a different reason behind the acts of the perpetrator (e.g. economic, political or military advantages) may in fact co-exist with the specific intent required for genocide. In other cases (as in the majority of cases of ethnic cleansing), the motive thus established militates against a finding of specific genocidal intent.

Even if contradictory evidence has been found to exist, a strict application of the principle of simultaneity may help to resolve the difficulty. A motive which denies genocidal intent, but arises at a point in time different from that of the genocidal act, is irrelevant and cannot enter into the consideration of the *dolus specialis*.

96. *Kayishema* (Appeals Chamber) ¶ 161; *Jelisić* (Appeals Chamber) ¶ 49. For a different approach regarding crimes against humanity, see also *Tadić*, ¶¶ 658–59.

There are finally factors which may aid in the determination of genocidal intent or of the existence of a different motive. The existence and omission of facts, the existence and omission of statements, a plan or a pattern, repetitive acts and the independence of the perpetrator's decision have been mentioned above. The value of other factors however—the "disturbed personality" of a perpetrator or the "randomness" of his actions, has been disputed by the international tribunals.

The *dolus specialis* of genocide retains its position as one of the most complex phenomena with which international criminal courts and tribunals have been confronted. The inconsistent judicial treatment which contradictory evidence and the apparent co-existence of several motives has received, gives little room for confidence in the future of its adjudication. There is little doubt that, based on the judgments up to this date and the different strands of opinion they represent, it will continue to haunt the evaluation of the crime and will continue to be the cause of difficulties in genocide cases before the International Criminal Court.