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## Understanding Serious Bodily or Mental Harm as an Act of Genocide

Nema Milaninia

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# Understanding Serious Bodily or Mental Harm as an Act of Genocide

*Nema Milaninia\**

## ABSTRACT

*What is genocide? The typical answer immediately brings to mind incidents of large-scale killings like those in World War II, Rwanda, and Srebrenica. The same images, however, create an incomplete and potentially misleading picture of the crime. Genocide is a far broader concept than mass executions. The crime was deliberately designed to capture the variant and innumerable ways individuals or organizations might try to destroy racial, ethnic, religious, or national groups. And while certain acts, like rape and other acts of sexual violence, never formed part of the crime's initial understanding, these acts are now accepted as tools of destruction and part of our understanding on how genocides have and may occur.*

*How we understand these issues and genocide largely depends on our exploration of the underlying act of serious bodily or mental harm. The reason being that no other underlying act is as broad and potentially limitless. By its very terms, the actus reus captures any conduct capable of causing the requisite level of harm of "seriousness." And this breadth has given international courts flexibility to further our understanding of genocide, including the relationship between sexual violence, displacement crimes, and the ways génocidaires attempt to destroy the protected groups.*

*Despite the central importance of the underlying act to understanding genocide, academics and commentators have largely failed to discuss the direct issues explored in relation to serious bodily or mental harm.*

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\*The author is a trial attorney with the Office of the Prosecutor of the International Criminal Court. The views expressed herein are those of the author alone and do not necessarily reflect the views of the Office of the Prosecutor or the ICC in general. In 2016, a version of this paper was awarded the Morris Prize for the Best Dissertation by Oxford University. The author would like to thank Peter Kremer, Michelle Jarvis, Patricia Sellers, Todd Schneider, Ingrid Elliot, Giulia Pinzauti, Matthew Cross, Grace Harbour, and Gabriela Santana for their wisdom and contributions that went into this Article.

*This Article attempts to fill that gap by conducting an extensive study and analysis of the UN Convention on the Prevention and Punishment of the Crime of Genocide's legislative history and judicial decisions by international courts and tribunals. Through that analysis, this Article evaluates emerging controversies and jurisprudential problems about the act and tries to resolve them in a manner that accords with the Convention's spirit and a faithful reading of subsequent judicial decisions. In that analysis, it shows there exists a tension between jurists who evaluate the act by strictly looking at its broad, but plain, terms and those who interpret the act in view of its context, namely as an act that must be capable of fulfilling the crime's destructive aims. In these regards, the act takes on a character beyond its simple terms, and engages the very issue of what genocide means and entails.*

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## I. INTRODUCTION

The historic understanding of genocide immediately alludes to the repositories of egregious acts perpetrated on a large scale. The mass execution of European Jews in World War II. Their starvation and torture. The destruction of Jewish homes, artifacts, and businesses in Eastern Europe. The demeaning and hateful rhetoric of Nazi leaders. The mass and systematic slaughter of Tutsis in Rwanda in 1994—roughly eight hundred thousand in the first six weeks of the conflict alone. The separation, torture, coordinated killing, mass burial, and disguised reburial of over eight thousand Bosnian Muslim men and boys from Srebrenica in just over two weeks.

Invariably, we think about circumstances where thousands of individuals were killed, mistreated, and abused, and all with the intention of destroying the larger religious, racial, national, or ethnic group to which they belonged. And while these cases are without doubt examples of genocide, they also inspire misconceptions in the popular understanding of the crime. In law, genocide does not require mass killings, let alone one killing. Genocide simply requires the commission of one of the underlying acts of genocide coupled with the specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. Genocide need not occur over a short period or during war. Genocide need not be systematic or coordinated. Genocide does not require hate speech. Instead, genocide is a far more dynamic and multifaceted crime: one deliberately designed to capture the variant ways individuals or organizations might seek to destroy a protected group.

This more dynamic and broad understanding is exemplified by genocide being committed through the commission of any act resulting in serious bodily or mental harm—Article II(b) of the Genocide Convention (Convention). For instance, in Srebrenica, genocide was not just committed against the men and boys killed, but also against the women, children, and elderly who survived but were subject to mental and physical abuse. Similarly, in Rwanda, the victims of genocide included the men and women raped, the individuals beaten and tortured, and those who had no option but to leave the country.

Serious bodily or mental harm is not defined in the Convention or any treaty that includes the crime. The phrase is inherently vague and inherently broad. Unlike the other enumerated acts of genocide—killing members of the group, forcibly transferring children, creating conditions of life deliberately calculated to bring about the destruction of the group, and putting into place measures intended to prevent births—the *actus reus* of serious bodily or mental harm is not a discrete or individual act in and of itself. Rather, it encompasses a

category of acts, namely *any* act causing the predicate level of harm (“serious”), including those neither stipulated nor discussed in the legislative history and those deliberately excluded by the Convention’s framers. How we understand genocide, its breadth and scope, largely depends on how we understand the limits and contours of serious bodily or mental harm, for no other *actus reus* of genocide is as potentially limitless.

Despite the significance of the *actus reus*, there is little comprehensive scholarly discussion on Article II(b). Most commentaries relating to “serious bodily or mental harm” concentrate on the origin of the provision and its relationship to the Nazi torture and medical experimentation regime, or more recently to including sexual violence. Many commentaries simply outline the jurisprudence on the *actus reus* without exploring its origin, effects, or problems.

This Article attempts to fill that gap by comprehensively defining the *actus reus* of “serious bodily or mental harm” by looking at its constituent elements. The analysis *first* evaluates the mental element specific to the *actus reus* (Part II). *Second*, it defines “bodily” and “mental” harm (Part III). *Last*, it defines the threshold requirement of “serious” (Part IV). In each Part, this Article draws from the primary sources of international law, as summarized in Article 38(1) of the Statute of the International Court of Justice (ICJ). For each Part, this Article outlines the relevant legislative history and judicial decisions and emerging controversies and jurisprudential problems. It tries to resolve those issues in a manner which accords with the Convention’s spirit and a faithful reading of subsequent judicial decisions, particularly by those international courts and tribunals who addressed the law on genocide.

## II. THE MENTAL ELEMENT REQUIRED FOR SERIOUS BODILY OR MENTAL HARM

Genocide is a crime with two mental elements.<sup>1</sup> There is the specific intent (*dolus specialis*)—the defining feature of the crime<sup>2</sup>—that requires any genocidal act be committed with the intent to destroy, in whole or in part, a group protected by the Convention.<sup>3</sup> A detailed explanation of the *dolus specialis* deserves far more space

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1. Kai Ambos, *What Does ‘Intent to Destroy’ in Genocide Mean?*, 91 INT’L REV. RED CROSS 833, 834 (2009).

2. See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 66 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) (explaining that the *mens rea* is what distinguishes the crime of genocide from other crimes).

3. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 187 (Feb. 27).

than that available in this Article and distracts from the Article's narrower focus, thus the author directs the reader's attention to the sources identified in the accompanying footnote.<sup>4</sup>

Besides the *dolus specialis*, the general intent requirement applies to the objective elements (*actus reus*) of the offense. It requires that serious bodily or mental harm be the product of a volitional act or omission that intentionally, or knowingly, produces the relevant harm. As summarized in the ILC's commentary to the *Draft Code of Crimes against the Peace and Security of Mankind*,

[t]hese are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, 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.<sup>5</sup>

This requirement was confirmed by the ICJ<sup>6</sup> and the two *ad hoc* tribunals, the ICTY and the ICTR.<sup>7</sup> As noted by Paola Gaeta, the jurisprudence of these courts "[a]ccord[s] to the general standards of liability."<sup>8</sup> In practical terms, the general intent requirement precludes responsibility for harms produced by negligent or reckless conduct, or those the result of involuntary acts. On the other hand, it permits responsibility for harms that a person is aware are

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4. See generally Ambos, *supra* note 1 (explaining that the "intent to destroy" requirement in the crime of genocide is traditionally viewed as a specific intent); Roberta Arnold, *The Mens Rea of Genocide Under the Statute of the International Criminal Court*, 14 CRIM. L.F. 127 (2003) (analyzing issues of clarity of *mens rea* requirements); David Nersessian, *The Contours of Genocidal Intent*, 37 TEX. INT'L L.J. 231 (2002) (analyzing the current definition of genocide with particular focus on the intent requirements); William A. Schabas, *The Jelisić Case and the Mens Rea of the Crime of Genocide*, 14 LEIDEN J. INT'L L. 125 (2001) (analyzing the decision in *Prosecutor v. Jelisić*); Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT'L L. 399 (2001) (explaining the necessary components of the crime of genocide).

5. Int'l Law Comm'n, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, at 44 (1996) [hereinafter Int'l Law Comm'n].

6. See *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. 4, ¶¶ 186–88 (highlighting the required elements of the crime of genocide).

7. The ICTY refers to the International Criminal Tribunal for the Former Yugoslavia, and the ICTR to the International Criminal Tribunal for Rwanda. See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (stating that a crime done with the intent to destroy a social group of people can be genocide, even if not a physical destruction); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, ¶ 59 (June 7, 2001) (stating that serious harm requires more than minor impairment).

8. Florian Jessberger, *The Definition and the Elements of the Crime of Genocide*, in THE UN GENOCIDE CONVENTION 87, 97 (Paola Gaeta ed., 2009).

consequences that would ordinarily occur in the course of events because of his or her conduct.<sup>9</sup>

### III. WHAT CONSTITUTES “BODILY” OR “MENTAL” HARM

The *actus reus* of serious bodily or mental harm self-evidently concerns only two types of harm: bodily and mental. This Part evaluates those two types (Part III.A and III.B) and identifies some general evidentiary principles that apply to proving either one (Part III.C). For these purposes, some brief comments on how the Convention was drafted are necessary.

In 1946, the United Nations General Assembly tasked the United Nations Economic and Social Council (ECOSOC) with drafting a genocide treaty.<sup>10</sup> ECOSOC delegated the responsibility of preparing a first draft to the United Nations Secretary-General, who in turn appointed John Humphrey, Director of the UN Division of Human Rights, to fulfill that task.<sup>11</sup> Humphrey was assisted by Raphael Lemkin, a Polish-Jewish lawyer responsible for coining the word “genocide”; Henri Donnedieu de Vabres, a judge in the Nuremberg trials; and Vespasian V. Pella, the former President of the Committee on Legal Questions of the League of Nations. Together, the four prepared the Convention’s first draft, also known as the “Secretariat Draft.”<sup>12</sup>

In 1947, the Secretariat Draft was reviewed by a seven-state *ad hoc* committee appointed by ECOSOC,<sup>13</sup> which, in May 1948, produced a new draft of the Convention.<sup>14</sup> The UN General Assembly referred the *ad hoc* committee draft to its standing committee for legal issues, the Sixth Committee, comprising of a representative from each United Nations member state.<sup>15</sup> Finally, on December 2, 1948, the Sixth Committee produced a text of the Convention,<sup>16</sup> which was ratified by states and entered into force in 1951.

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9. See Ambos, *supra* note 1, at 834–36 (analyzing the general and specific intent requirements of the crime of genocide).

10. G.A. Res. 96 (LV), at 189 (Dec. 11, 1946).

11. ESCOR Res. 47, U.N. Doc. E/437 (1947).

12. ESCOR Draft Convention on the Crime of Genocide, U.N. Doc. E/447 (June 26, 1947) [hereinafter Draft Convention].

13. See ESCOR, Ad Hoc Comm. on Genocide, Rep. of the Comm. and Draft Convention Drawn Up by the Comm. (Dr. Karim Azkoul (Rapporteur)), U.N. Doc. E/794, at 3 (May 24, 1948) [hereinafter Azkoul] (providing the seven-person committee and their task).

14. See *id.* at 4–5 (detailing the proposals submitted in drafting the convention).

15. See JOHN B. QUIGLEY, THE GENOCIDE CONVENTION 24 (2006) (explaining the process of enacting the genocide treaty).

16. G.A. Res. 260 (CLXXIX), at 174 (Dec. 9, 1948).

### A. The Commission of Acts Resulting in Bodily Harm

Bodily harm first emerged in the *ad hoc* committee draft, whereupon recommendation from the French delegation the *actus reus* of “impairing the physical integrity of members of the group” was included.<sup>17</sup> During Sixth Committee deliberations, the phrase was changed to “bodily harm” upon suggestion by United Kingdom delegates who considered “physical integrity” to be too “vague.”<sup>18</sup> This change likely limited the ultimate ambit of the act. The civil law protection against *l'intégrité physique*, from where the French proposal probably originated, is a broader concept than the common law concept of “bodily harm.”<sup>19</sup> *L'intégrité physique* protects against any act that might violate the respect or dignity of a person's body, including conduct that fails to cause any physical or visible harm.<sup>20</sup> The phrase “bodily harm” remained in the final text of the Convention. However, neither the specific acts leading to, nor the harms encompassing, “bodily harm” were discussed during the Convention's deliberations.

The *ad hoc* tribunals have taken advantage of this lack of guidance to find that there is no exhaustive list of acts capable of causing bodily harm and that “serious bodily harm should be determined on a case-by-case basis, using a common sense approach.”<sup>21</sup> As a general rubric, the *Kayishema* Trial Chamber defined bodily harm as “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”<sup>22</sup> The *Seromba* Appeals Chamber

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17. Azkoul, *supra* note 13, at 13.

18. U.N. GAOR Sixth Committee, United Kingdom: Amendments to articles II and III of the draft convention on genocide, U.N. Doc. A/C.6/222 (Oct. 7, 1948); see also NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 65 (1960).

19. See, e.g., CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 211-1 (Fr.) (defining the *actus reus* for the crime of genocide).

20. Most civil law jurisdictions retain the phrase “*l'intégrité physique*” in their national laws on genocide. See, e.g., 1994 CONST. art. 78 (Belg.); Decreto No. 2.889, de 1 de Outubro de 1956, Diário Oficial da União [D.O.U.] de 2.10.1956 (Braz.); CODE PÉNAL art. 313 (Burkina Faso); CÓDIGO PENAL art. 101 (Colom.); CÓDIGO PENAL art. 116 (Cuba); *Id.*; CODE PÉNAL art. 30 (Mali); CODIGO PÉNAL PORTUGUÊS art. 239 (Port.); CODE PÉNAL SUISSE [CP] [Criminal Code] Dec. 21, 1937, SR 757, RS 311, art. 264 (Switz.). See also Elizabeth Santalla Vargas, *An Overview of the Crime of Genocide in Latin American Jurisdictions*, 10 INT'L CRIM. L. REV. 441, 451 (2010) (highlighting that the crime of genocide has been found even in the absence of evidence of a physical destruction of a group).

21. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 108 (May 21, 1999); see also Caroline Fournet, *The Actus Reus of Genocide*, in *ELEMENTS OF GENOCIDE* 53, 61 (Paul Behrens & Ralph Henham eds., 1st ed. 2012) (noting that the ICTR employs a case-by-case determination of serious mental harm).

22. Kayishema, Case No. ICTR-95-1-T, ¶ 10; see also Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgment, ¶ 487 (Sept. 12, 2006) (noting that the crime of



considered that “[t]he quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.”<sup>23</sup> Other acts found to result in bodily harm include inhumane<sup>24</sup> and degrading treatment,<sup>25</sup> deportation,<sup>26</sup> enslavement,<sup>27</sup> starvation,<sup>28</sup> persecution,<sup>29</sup> and interrogations combined with beatings.<sup>30</sup> In

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genocide’s requirement of serious bodily harm may include injuries that are not permanent or irremediable).

23. Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, ¶ 46 (Mar. 12, 2008); see Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment and Sentence, ¶ 664 (Feb. 25, 2004) (explaining that the term serious bodily harm refers to acts of physical violence that fall short of killing and that seriously injure the health, cause disfigurement, or cause any serious injury to the body).

24. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 503 (Sept. 2, 1998) (noting that serious bodily harm includes inhumane treatment); Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 646 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) (stating that inhuman[e] treatment may cause serious bodily injury); Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 812 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010) (holding examples of acts causing serious bodily or mental harm include inhumane treatment); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 51 (Dec. 6, 1999) (interpreting serious bodily harm to include acts of inhumane treatment).

25. See, e.g., Akayesu, Case No. ICTR-96-4-T, ¶ 504 (highlighting that acts of degrading treatment may cause serious bodily harm); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 690 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (explaining that causing serious bodily harm includes acts of degrading treatment); Popović, Case No. IT-05-88-T, ¶ 812 (including degrading treatment in acts that may cause serious bodily harm); Rutaganda, Case No. ICTR-96-3-T, ¶ 51 (interpreting serious bodily harm to include acts of degrading treatment); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 516 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003) (interpreting causing serious bodily harm to include acts of degrading treatment); see also Prosecutor v. Karadžić, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 1996) (citing evidence of degrading treatment causing serious bodily harm in genocide trial).

26. See Blagojević, Case No. IT-02-60-T, ¶ 646 (citing decisions that hold deportation to be among the acts that could cause serious bodily harm); Attorney General v. Eichmann, 36 I.L.R. 277, 340 (D.C. Jem. 1961) (holding that acts of genocide include acts of deportation that caused serious bodily harm).

27. See Eichmann, Judgment, 36 I.L.R. at 340 (stating that acts enslavement causing serious bodily injury were included in charges of genocide).

28. See *id.*

29. See, e.g., *id.* (citing acts of persecution causing serious bodily harm as evidence of the crime of genocide); Akayesu, Case No. ICTR-96-4-T, ¶ 504 (holding serious bodily harm to mean acts of persecution); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 156 (Jan. 27, 2000) (holding serious bodily harm to include acts of persecution); Rutaganda, Case No. ICTR-96-3-T, ¶ 51 (understanding serious bodily harm to include acts of persecution).

30. See, e.g., Blagojević, Case No. IT-02-60-T, ¶ 646 (highlighting that serious bodily harm is construed to include interrogations combined with beatings); Popović, Case No. IT-05-88-T, ¶ 812 (stating that acts causing serious bodily harm include interrogations combined with beatings).

contrast, “heavy bruising” has been rejected as qualifying as “bodily harm.”<sup>31</sup>

The benefit of such breadth is that it ensures a progressive understanding of the crime: one capable of capturing sophisticated criminal regimes aimed at eradicating protected groups. As noted by the *Krstić* Appeals Chamber, a *génocidaire* does not need to “choose the most efficient method to accomplish his objective of destroying the targeted part” and may even select a method that “will not implement the perpetrator’s intent to the fullest, leaving that destruction incomplete.”<sup>32</sup>

This breadth also means that acts rejected or omitted by the Convention’s drafters are acts of genocide if they result in serious bodily or mental harm. For instance, the *Akayesu* Trial Chamber became the first court to recognize rape and other acts of sexual violence as acts of genocide<sup>33</sup> by finding they “are . . . one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm.”<sup>34</sup> Similarly, although the displacement of populations was deliberately rejected by the Convention’s drafters as an underlying act of genocide—first in the Secretariat Draft<sup>35</sup> and again during Sixth Committee deliberations<sup>36</sup>—the ICTY has found that being forcibly transferred can cause serious bodily or mental harm. As noted by the *Krstić* Appeals Chamber, “forcible transfer [can] be an additional means by which to ensure the physical destruction of the [protected group].”<sup>37</sup> In relation to the Srebrenica

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31. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 743 n.1801 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

32. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 32 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

33. See Sherrie Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L L. 350, 351 (2003) (noting that the Rwandan Tribunal was the first international criminal tribunal to find an individual guilty of genocide on the basis of acts of rape); Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals*, 49 INT’L & COMP. L.Q., 578, 595–96 (2000) (highlighting that an aspect of the *ad hoc* Tribunal’s jurisprudence on genocidal acts is recognizing that sexual violence can be genocidal).

34. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 503 (Sept. 2, 1998); see also Prosecutor v. Rukundo, Case No. ICTR-2001-70-A, Partially Dissenting Opinion of Judge Pocar, ¶ 9 (Oct. 20, 2010) (noting that sexual violence is an act of comparable gravity to rape in terms of mental harm).

35. See Draft Convention, *supra* note 12, at 24 (excluding mass displacements of populations from acts constituting the crime of genocide).

36. See GAOR Sixth Committee, 88th Meeting, at 186–90, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948) (rejecting an amendment to include the forced transfer of children in the crime of genocide).

37. *Krstić*, Case No. IT-98-33-A, ¶ 31; see also Katherine Gallagher, *The Second Srebrenica Trial: Prosecutor v. Vidoje Blagojevic & Dragan Jokic*, 18 LEIDEN J. INT’L L. 523, 537–38 (2005) (explaining that forced transfers of population can constitute serious mental harm and result in the elimination of the population from an area).

genocide, “[t]he transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself.”<sup>38</sup> Similarly, the *Tolimir* Appeals Chamber recalled the impact “the loss of relatives and friends and the forcible transfer” of the Bosnian Muslims of Srebrenica had on the survivors, concluding that it met the required threshold for serious mental harm.<sup>39</sup> Altogether, the jurisprudence of the *ad hoc* tribunals underscores the broad reach of the act.

### B. *The Commission of Acts Resulting in Mental Harm*

Including mental harm as an act of genocide was a controversial issue during the Convention’s drafting, and its meaning was the subject of significant dispute. China’s delegate to the *ad hoc* committee was the first to propose its inclusion to capture Japan’s use of narcotics against the Chinese during World War II as an act of genocide.<sup>40</sup> This argument failed to gain traction and “mental harm” was omitted from the *ad hoc* committee’s draft. China’s delegate to the Sixth Committee, however, repeated the request,<sup>41</sup> arguing that “Japan had committed numerous acts of that kind of genocide against the Chinese population” and that “[i]f those acts were not as spectacular as Hitlerite killings in gas chambers, their effect had been no less destructive.”<sup>42</sup> China’s proposal to the Sixth Committee was rejected, but the inclusion of mental harm was eventually adopted as part of an amendment proposed by India’s delegate to the Sixth Committee.<sup>43</sup>

Two outstanding questions emerge from the Convention’s legislative history. The first, whose answer now seems settled, is whether mental harm was to be limited to harm caused by the use of narcotics. This was the position taken by Dr. Nehemiah Robinson in 1960, director of the World Jewish Congress Institute for Jewish Affairs and one of the foremost authorities on the Nazi Holocaust. In his view, a study tracing the history of the Convention “would have

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38. Krstić, Case No. IT-98-33-A, ¶ 31.

39. Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgment, ¶ 654 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

40. See U.N. ESCOR, Ad Hoc Comm. on Genocide, 28th mtg., at 6-7, U.N. Doc. E/AC.25/SR.28 (June 9, 1948). For these reasons, China’s delegate either abstained or voted against proposals on the act before the Ad Hoc Committee.

41. See U.N. GAOR, 6th Comm., 69th mtg., at 57, 59–60, U.N. Doc. A/C.6/SR.69 (Oct. 7, 1948) (proposing to expand genocide to include crimes of impairing the physical or mental health of members of the group); U.N. GAOR, 6th Comm., 81st mtg., U.N. Doc. A/C.6/SR.81 (Oct. 22, 1948) [hereinafter GAOR 81st Meeting] (requesting to include acts of genocide committed through narcotics).

42. GAOR 81st Meeting, *supra* note 41.

43. See *infra* Annex.

made it absolutely clear that ‘mental harm,’ within the meaning of the Convention, can be caused *only* by the use of narcotics.”<sup>44</sup>

Several arguments, however, militate against his limited reading of “mental harm.” *First*, the text of the Convention is not limited to mental harm caused by using narcotics. *Second*, the Chinese delegation itself did not intend to limit mental harm to its own historical experience. To the contrary, the Chinese delegation to the Sixth Committee emphasized the need to create a Convention of “universal scope” and, in that respect, cover harms of the “type” they faced during World War II.<sup>45</sup> Delegates from the Soviet Union equally emphasized this, noting that the acts “were designed to serve only as examples; they had been chosen on the basis of historical considerations, being the acts most frequently committed by the Nazis in the recent past.”<sup>46</sup> *Third*, attempts to limit the definition of “mental harm” to that caused by using narcotics for purposes of genocide prosecutions before the International Criminal Court (ICC)<sup>47</sup> were rejected by the Preparatory Committee establishing the ICC.<sup>48</sup> *Finally*, the *ad hoc* tribunals, principally the ICTY, have concluded this restrictive interpretation is incorrect.<sup>49</sup> While noting that the “[r]eference to serious mental harm . . . appears to have been restricted originally to the injection of pharmacological substances

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44. NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* ix (1960) (emphasis added).

45. GAOR 81st Meeting, *supra* note 41.

46. *Id.* at 176.

47. See U.S. Delegation, Proposed Article on Genocide with Proposed Elements: Article 20*bis*, 26 March 1996 (proposed addition to United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277), <https://www.legal-tools.org/doc/d11788/pdf> [<https://perma.cc/33SK-58FX>] (archived Sept. 18, 2018) (stating that mental harm means permanent impairment of mental faculties through drugs, torture, or similar techniques); U.S. Delegation, For Annex to Statute: Elements Related to Article on Genocide, 26 March 1996 (proposed addition to United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277), <https://www.legal-tools.org/doc/bb89ae/pdf> [<https://perma.cc/85NB-55WQ>] (archived Sept. 18, 2018) (stating that mental harm means permanent impairment of mental faculties through drugs, torture, or similar techniques).

48. See Decisions Taken by the Preparatory Committee at its Session Held From 11 to 21 February 1997, U.N. Doc. A/AC.249/1997/L.5 at 3 n.4 (Mar. 12, 1997) (noting that mental harm means more than minor or temporary impairment of mental faculties).

49. See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 510 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (disagreeing with restrictive view of mental harm); *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, ¶ 204 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015) (disagreeing with restrictive definition of serious mental harm as an act of genocide).

occasioning the serious impairment of mental facilities,” the *Krstić* Trial Chamber refused to limit mental harm as such.<sup>50</sup>

The second question emerging from the legislative history is whether mental harm must manifest physically. On this issue, the perspectives of the Convention’s drafters are less clear. Many of the Sixth Committee delegates believed that including mental harm would be redundant, as it was covered by bodily harm. This suggests those delegates saw an overlap between the two concepts without room for mental harm absent any physical manifestation. For instance, Egypt’s delegate noted that “the expression ‘physical integrity’ could be interpreted as implying mental integrity as well.”<sup>51</sup> The delegate from the United Kingdom argued that “[i]f there were no repercussions on physical health, it could not be said that a group had been physically destroyed, that was to say that the crime of genocide had been committed.”<sup>52</sup> The delegate from the United States, while voting in favor of including mental harm, similarly noted “that physical integrity also included mental integrity.”<sup>53</sup> From this record, at least one commentator has concluded that “[t]hose who voted against the inclusion of mental harm did so, not because they had not considered acts seriously affecting mental integrity of a given group as genocide, but because they thought physical integrity also included mental integrity.”<sup>54</sup>

This was also the conclusion of many states during domestic ratification debates. For instance, during hearings before the U.S. Senate Committee on Foreign Relations, Charles Tillott, Chairman of the American Bar Association Section on International and Comparative Law, claimed that “[t]he meaning that the negotiators intended to express was evidently pretty close to ‘causing serious bodily harm or mental incapacity.’”<sup>55</sup> This notion was repeated by Edgar Turlington, then Treasurer of the American Society of International Law, “[i]t is quite clear from the negotiations” that “mental harm” is meant as “mutilation or disintegration of the

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50. *Krstić*, Case No. IT-98-33-T, ¶¶ 510–13 (Aug. 2, 2001) (holding that multiple acts of genocide are among those that may cause serious mental harm).

51. GAOR 81st Meeting, *supra* note 41, at 178.

52. *Id.*

53. *Id.* at 179.

54. See Stephen Gorove, *The Problem of “Mental Harm” in the Genocide Convention*, 1951 WASH. U. L.Q. 174, 180 (1951) (discussing the meaning of mental harm in the crime of genocide).

55. *The Genocide Convention: Hearings on Exec. O Before a Subcomm. of the S. Comm. on Foreign Relations*, 81st Cong. 247 (1950) (statement of Charles Tillott, Chairman, Am. Bar Ass’n Section on Int’l & Comparative Law). See generally LAWRENCE LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 99–104 (1991) (discussing the Committee of Foreign Relation’s debate over the meaning of mental harm in the convention).

mind”<sup>56</sup> and Adrian Fisher, the U.S. State Department’s legal advisor, who expressed

[i]t is clear from the legislative history of this language that what was meant was not just embarrassment or hurt feelings, or even the sense of outrage that comes from such action as racial discrimination or segregation, however, horrible these may be. What was meant was permanent impairment of mental faculty.<sup>57</sup>

As noted by Lawrence LeBlanc, “[i]n general the proponents of ratification at the 1950 Senate hearings . . . were prepared to accept ratification with an understanding concerning ‘mental harm.’”<sup>58</sup> This the United States did. By Robert Cryer, “[o]wing to its concerns about the possible breadth of the *mental* harm aspect of genocide,”<sup>59</sup> the United States filed an “understanding” that mental harm “means permanent impairment of mental faculties through drugs, torture or similar techniques.”<sup>60</sup> The Canadians took an even narrower view. By Nehemiah Robinson, “[t]he understanding of the (then) Canadian Minister of Foreign Affairs, Lester B. Pearson, was that ‘mental harm’ could not mean any-thing but physical injury to mental faculties of the members of the group.”<sup>61</sup>

Several arguments undermine this limited understanding of mental harm. *First*, again, nothing in the Convention limits mental harm to that which manifests physically. *Second*, the Convention expressly delineates between acts causing bodily harm versus those causing mental harm. As noted by Gaeta, “[t]he wording of the definition . . . places the two modalities of conduct on an equal footing.”<sup>62</sup> Requiring mental harm to manifest physically would render meaningless its very inclusion since it would be covered by the protection against bodily harm. *Third*, the *ad hoc* tribunals have indirectly rejected this limitation. For example, the *Blagojević* Trial Chamber concluded that individuals who survived the mass

56. *The Genocide Convention, Hearings on Exec. O Before a Subcomm. of the S. Comm. on Foreign Relations*, 81st Cong. 250 (1950) (statement of Edgar Turlington, Treasurer, Am. Soc’y of Int’l Law).

57. *Id.* at 263–64 (statement of Adrian Fisher, Legal Advisor, State Dep’t).

58. LEBLANC, *supra* note 55, at 102; *see generally* Lawrence LeBlanc, *The United States and the Genocide Convention: The Sovereignty Package in Perspective*, in *THE GENOCIDE CONVENTION: THE LEGACY OF 60 YEARS* 173 (H.G. van der Wilt et al. eds., 2012) (discussing the United States’ understanding of the crime of genocide).

59. ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 215 (2d ed. 2010).

60. *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December 2003*, U.N. Doc. ST/LEG/SER.E/22, 126 (2003); *see also* 18 U.S.C. § 1091.

61. ROBINSON, *supra* note 44, at 65 n.32.

62. Jessberger, *supra* note 8, at 98.

executions around Srebrenica were subjected to acts causing serious mental harm, despite making no finding that the harm manifested physically. The Chamber reasoned that “[t]he fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends’ safety as well as for their own safety, is a traumatic experience from which one will not quickly—if ever—recover.”<sup>63</sup> The Chamber also noted that the same men suffered mental harm when “having their identification documents taken away from them, seeing that they would not be exchanged as previously told, and when they understood what their ultimate fate was.”<sup>64</sup> Again, no showing that the harm manifested physically was required.

As compared to “bodily harm,” there is far less jurisprudence dedicated to defining the contours of mental harm. Eliav Lieblich reasons that

[a] plausible explanation for this tendency is that in practice, tribunals virtually always deal with cases that involve bodily harm, and therefore do not find it necessary to address mental harm independently. Not unlike the notion of ‘terror’ under IHL, mental harm has been treated, if at all, as an extension of physical harm, which relieved tribunals of the need to discuss it extensively.<sup>65</sup>

Leiblich also notes that “rather than elaborating on the essence of mental harm, tribunals generally prefer to enumerate acts that might *cause* such harm, which are unsurprisingly, acts that can also cause physical harm.”<sup>66</sup>

The *ad hoc* tribunals have noted that the list of acts capable of resulting in serious mental harm is nonexhaustive and determined “on a case-by-case basis.”<sup>67</sup> As a general rubric, mental harm need not be “permanent or irremediable”<sup>68</sup> and “is understood to mean more than the minor or temporary impairment of mental faculties.”<sup>69</sup> There

63. Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 647 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005).

64. *Id.*

65. Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law*, in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES* 207 (Jackson Nyamuya Maogoto & Derek Jinks eds., 2014).

66. *Id.*

67. Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment, ¶ 738 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012).

68. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 510 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); see Prosecutor v. Kalimanzira, Case No. ICTR-05-88-T, Judgment, ¶ 159 (June 22, 2009); Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgment, ¶ 317 (Dec. 13, 2006).

69. Rep. of the Preparatory Comm. on the Establishment of an Int’l Criminal Court, Part 2, Jurisdiction, Admissibility and Applicable Law, U.N. Doc. A/CONF.183/Add.1, at 11 n.3 (Apr. 14, 1998); see also Blagojević, Case No. IT-02-60-T, ¶ 645; Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶ 291 (June 17,

is also a distinction between “[s]erious mental harm” and “emotional or psychological damage or attacks on the dignity of the human person not causing lasting impairment.”<sup>70</sup> The difference is that serious mental harm must involve “some type of impairment of mental faculties or harm that causes serious injury to the mental state of the victim.”<sup>71</sup>

With respect to specific types of acts recognized by courts as causing mental harm, they include threats of death and knowledge of impending death;<sup>72</sup> acts causing intense fear or terror;<sup>73</sup> surviving killing operations;<sup>74</sup> forcible displacement;<sup>75</sup> and “mental torture.”<sup>76</sup> Acts that result in bodily harm have also been recognized as causing mental harm. As noted by Roger O’Keefe, “[m]any of the sorts of acts that one might expect to be prosecuted under the rubric of genocide will qualify as both serious bodily harm and serious mental harm.”<sup>77</sup> This is particularly true regarding acts of sexual violence. As explained by the Quebec Superior Court in its *Munyaneza* Judgment, “[r]ape and sexual violence constitute serious bodily or mental harm to a person.”<sup>78</sup> Gaeta agrees: “[t]he destructive psychological effects of crimes of sexual violence are . . . granted the same importance as the physical consequences of the acts.”<sup>79</sup> In contrast, yelling and threatening words have been found not to subject the victim to serious mental harm, absent evidence that the victim was any more

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2004); *Prosecutor v. Renzaho*, Case No. ICTR-97-31-T, Judgment, ¶ 762 (July 14, 2009); *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, ¶¶ 321–22 (May 15, 2003).

70. *Krstić*, Case No. IT-98-33-T, ¶ 510.

71. *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment, ¶ 502 (Apr. 28, 2005).

72. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. 43, ¶¶ 290–91; *Tolimir*, Case No. IT-05-88/2-A, ¶ 206.

73. *R. v. Munyaneza*, 2009 QCCS 2201, para. 89 (Can. Que.).

74. *Tolimir*, Case No. IT-05-88/2-A, ¶ 207; *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. 43, ¶¶ 290–91.

75. *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶ 862 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); *Tolimir*, Case No. IT-05-88/2-A, ¶ 209.

76. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 504 (Sept. 2, 1998); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 51 (Dec. 6, 1999).

77. ROGER O’KEEFE, *INTERNATIONAL CRIMINAL LAW* 148 (2015).

78. *Munyaneza*, 2009 QCCS 2201, para. 94 (emphasis added); see also Fannie Lafontaine, *Canada’s Crimes Against Humanity and War Crimes Act on Trial: An Analysis of The Munyaneza Case*, 8 J. INT’L CRIM. JUST. 269, 278–80 (2010) (discussing analysis of serious bodily or mental harm which can be caused by sexual violence).

79. PAOLA GAETA, *THE UN GENOCIDE CONVENTION* 99 (Oxford Univ. Press 2009).



than frightened by the conduct.<sup>80</sup> Further, a “state of anxiety” was found not to be mental harm.<sup>81</sup>

Finally, the *Tolimir* Appeals Judgment requires that mental harm be “lasting.”<sup>82</sup> Where this requirement is derived from is unclear. Neither the prosecution nor Tolimir addressed this issue during their submissions on appeal. The *Tolimir* Appeals Chamber also fails to cite anything supporting the requirement. Judge Sekule’s dissenting opinion appears correct: “this is a new requirement which is not as such supported by the jurisprudence.”<sup>83</sup> The requirement also appears at odds with the principle that mental harm “need not be permanent and irremediable.”<sup>84</sup> Indeed, it is difficult to think of any harm that is “lasting” but “not permanent or irremediable.” Finally, as noted by Judge Sekule, “the definition of serious mental harm does not centre around the question of the duration of the harm, but the nature of the harm that is inflicted and whether it is such as to instill strong fear, terror, intimidation or threat, as set out in the applicable authorities.”<sup>85</sup> This is true. Until the *Tolimir* Appeal Judgment, the jurisprudence of the ICTY focused on the character of the harm and its effect on the victim, not its duration.

There is one way to reconcile the position of the *Tolimir* Appeals Chamber with the prior jurisprudence of the *ad hoc* tribunals. That is to view the term “lasting” as another way of framing the requirement that mental harm be “more than the minor or temporary impairment of mental faculties.”<sup>86</sup> This interpretation remains consistent with the principle that mental harm need not be permanent or irreparable. It also follows the *Krstić* Trial Judgment from where the term “lasting” appears to originate—despite the *Tolimir* Appeals Chamber’s failure to cite the case. In *Krstić*, the Trial Chamber differentiated between serious mental harm and mental damage “not causing *lasting* impairment.”<sup>87</sup> The Trial Chamber incorporated this distinction into its broader definition of “serious” harm (both for bodily and mental harm), namely that such harm causes “grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”<sup>88</sup>

80. Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Judgment, ¶ 261 (Feb. 27, 2009).

81. Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, ¶¶ 47–48 (Mar. 12, 2008).

82. Tolimir, Case No. IT-05-88/2-A, ¶ 203.

83. Tolimir, Case No. IT-05-88/2-A, Partially Dissenting Opinion of Judge Sekule, ¶ 8 (Apr. 8, 2015).

84. Tolimir, Case No. IT-05-88/2-A, ¶ 203.

85. *Id.*

86. See Seromba, Case No. ICTR-2001-66-A, ¶ 46.

87. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 510 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (emphasis added).

88. *Id.* ¶ 513.

### C. General Evidentiary Principles for Proving Bodily or Mental Harm

Several overarching evidentiary principles apply when proving bodily or mental harm. These are besides the specific rules on evidence unique to each international or national court. *First*, serious bodily or mental harm requires “proof of a result.”<sup>89</sup> This is in contrast with the underlying act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, which “does not require that a result was attained.”<sup>90</sup>

That result can be proved through eliciting direct evidence, such as medical records or the victim’s own statement, that the victim suffered bodily or mental harm. It can also, however, be established through circumstantial evidence. As the *Rukundo* Trial Chamber opined, a court “may draw inferences from the evidence presented.”<sup>91</sup> There, the Chamber acknowledged that it lacked direct evidence on the witness’s mental state following her sexual assault “apart from her testimony that she could not tell anyone about the incident.”<sup>92</sup> The Chamber, however, evaluated the circumstances surrounding the sexual assault and determined that the victim must have suffered serious mental harm due to her assault.<sup>93</sup> The Chamber noted that it was “necessary to look beyond the sexual act in question and . . . particularly important to consider the highly charged, oppressive and other circumstances surrounding the sexual assault.”<sup>94</sup> In that respect, the Chamber considered the victim’s sexual inexperience, her vulnerable position, and that she had sought protection from the accused for herself and her family because he was a “familiar and trusted person of authority and of the church,” and that the accused threatened the victim and carried a firearm.<sup>95</sup>

*Second*, in assessing whether bodily or mental harm was inflicted, the analysis is a “holistic” one.<sup>96</sup> Acts are not evaluated in a piecemeal fashion to determine whether each act, in isolation, causes the requisite bodily or mental harm. Rather, bodily or mental harm

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89. Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 811 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 514 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003).

90. Popović, Case No. IT-05-88-T, ¶ 811; Stakić, Case No. IT-97-24-T, ¶ 517.

91. Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Judgment, ¶ 388 (Feb. 27, 2009).

92. *Id.* ¶¶ 388–89.

93. *Id.*

94. *Id.* ¶ 388.

95. *Id.*

96. Prosecutor v. Tolimir, IT-05-88/2-A, Notice of Filing of Redacted Public Version of Prosecution Response to Zdravko Tolimir’s Appeal Brief, ¶ 78 (Mar. 10, 2014).

can arise from “all the relevant acts perpetrated”<sup>97</sup> (i.e., the totality of circumstances). For instance, in *Tolimir*, the Appeal and Trial Chambers found that the harm suffered by Bosnian Muslim women, children, and the elderly did not arise strictly from their forcible transfer, but from the entire experience causing that harm, including the “painful separation process from their male family members at Potočari, the fear and uncertainty as to their fate and that of their detained male relatives, and the appalling conditions of the journey to Muslim-held territory by bus and on foot” and “the continuation of their profound trauma [and] the financial and emotional difficulties they faced in their ‘drastically changed’ lives following the forcible transfer.”<sup>98</sup>

No court, however, has articulated the causal relationship required between the acts and the harm. Take the situation of Srebrenica in *Tolimir*. In assessing the mental harm inflicted upon the Bosnian Muslim women, children, and elderly displaced from Srebrenica, the Trial Chamber considered several acts and omissions by different actors taking place over a broad spectrum of time: the attack on Srebrenica, the separation at Potočari, the displacement itself, and the attending absence of the community’s fathers and sons killed.<sup>99</sup> It also considered the consequences of those acts, such as losing a permanent home and the emotional and financial support borne by killing the Bosnian Muslim men and boys, particularly given the patriarchal nature of the Bosnian Muslim society.<sup>100</sup> The Chamber concluded that it was the entirety of those acts and their consequences that subjected the Bosnian Muslim women, children, and elderly to serious mental harm.<sup>101</sup>

Without articulating any causal standard, the test implicitly endorsed by the Trial Chamber appears to be one that requires the accused’s acts, or those linked to the accused, be a direct and proximate cause of the bodily or mental harm. In Srebrenica, the conduct of the Bosnian Serb forces in and around Srebrenica was a “direct” cause of the mental harm suffered by the Bosnian Muslims as “but for” those acts the mental harms would not have occurred. The harms were also proximately caused by each act because they were all foreseeable consequences of the killing operation and the separation and displacement of the Bosnian Muslim women, children, and elderly. A requirement that the harm be a direct and proximate

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97. *Tolimir*, Case No. IT-05-88/2-A, ¶¶ 210–11; *see also* Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 647 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) (finding trauma and wounds suffered by those who managed to survive the mass executions does constitute serious bodily and mental harm).

98. *Tolimir*, Case No. IT-05-88/2-A, ¶ 210.

99. *Tolimir*, Case No. IT-05-88/2-T, ¶ 756.

100. *Id.* at ¶ 757.

101. *Id.* at ¶ 759.

result of the acts also ensures that individuals are not held responsible for harms divorced from the accused's conduct. It also comports with general standards of causation commonly accepted under international law.<sup>102</sup>

Finally, a victim's suffering prior to his or her killing may constitute serious bodily or mental harm, even if the victim's death is also treated as fulfilling the *actus reus* of killing. Doing so does not violate the principle of *ne bis in idem*<sup>103</sup> as both acts—the killing and serious bodily or mental harm—satisfy a single, not multiple, genocide charge. The *Tolimir* Appeals Chamber, for instance, rejected the defense's argument that mental harm suffered by the victims immediately before their deaths could not constitute a separate act of genocide.<sup>104</sup> The Chamber accepted the prosecution's position that "there is nothing to prevent a chamber from treating the harm suffered prior to murder as a separate *actus reus* of genocide and that it is proper to establish genocide under both [acts], since this establishes the full extent of the defendant's culpable conduct."<sup>105</sup>

#### IV. THE THRESHOLD REQUIRED FOR "SERIOUS" HARM

Not all acts causing bodily or mental harm fulfill the requirements of Article II(b) of the Convention. Only those acts causing "serious" bodily or mental harm are acts of genocide. It is that threshold—"seriousness"—that is the defining feature of the act and, as reflected below, the subject of greatest ambiguity, debate, and litigation—and for good reason. As reflected above, bodily and mental harm are broad concepts. They capture any act capable of causing that harm, be it minor cuts and lacerations or losing a limb. The benefit of that breadth is that it incorporates acts going beyond mass killing to more nuanced events, something envisaged by the Convention's drafters.

That same breadth, however, is difficult to reconcile with the Convention's purpose. Genocide is a crime aimed at the destruction of a group. The Convention's drafters deliberately attempted to narrow the acts causing genocide to those they believed could achieve that result. That intent is evident in the specificity of the other enumerated acts: killing, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in

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102. See PETRA VIEBIG, *ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT* 192 (2016).

103. The international criminal law equivalent of the double jeopardy doctrine.

104. *Tolimir*, Case No. IT-05-88/2-A, ¶¶ 194, 206.

105. *Id.* ¶¶ 198, 206.

whole or in part, imposing measures intended to prevent births, and forcibly transferring children of the group to another group. Minor cuts and lacerations, however widespread, could never achieve the desired destructive result to a group. It would also appear contrary to the aims of the Convention's drafters to, on one hand, be so specific about genocidal acts yet, on the other, include an act broad enough to subsume both enumerated and unenumerated acts of genocide. It would obviate the need for any other stipulated act since any of them could be subsumed into the contours of "serious bodily or mental harm."

This dilemma has motivated much of the recent jurisprudence on the act and how the threshold of "seriousness" is defined. For those who believe that an act of genocide must relate to the destructive nature of the crime, there is an incentive to make the threshold for "seriousness" more demanding. For others, the limitation is not in the act itself, but in the *dolus specialis* of the crime, obviating the need to superficially elevate the "seriousness" threshold *in lieu* of a reading comporting to the act's plain and ordinary meaning and without conflating the *actus reus* and *mens rea* elements.

To analyze these issues, this Part first reviews the Convention's legislative history as it relates to including the term "serious" (Part IV.A) and then evaluates how international courts have addressed this issue (Part IV.B).

### A. Legislative History of the Genocide Convention

None of the first proposals for the *actus reus* included a "seriousness" threshold for the apparent reason that they were limited to specific acts. For instance, the Secretariat Draft was limited to "mutilations and biological experiments imposed for other than curative purposes"<sup>106</sup> to comport with practices "current in Hitlerite Germany."<sup>107</sup> This obviated the need for a qualitative threshold.

Deliberations before the *ad hoc* committee also began with discussions focused on specific acts. For instance, the United States proposed changing the language to "physical violence, mutilations or biological experiments"<sup>108</sup> to "take care of other possible forms of physical violence."<sup>109</sup> The French delegation proposed a version not tied to any specific act, so long as the act was "directed against the

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106. See *infra* Annex.

107. ESCOR, Draft Convention on the Crime of Genocide, 25, U.N. Doc. E/447 (June 26, 1947) [hereinafter ESCOR, Draft Convention].

108. See *infra* Annex.

109. GAOR, Draft Convention on the Crime of Genocide: Communications Received by the Secretary-General, U.N. Doc. A/401 (Oct. 18, 1947).

corporal integrity of members of the group.”<sup>110</sup> This proposal was adopted by the *ad hoc* committee, which emphasized the broad nature of the act in its comments: “[t]his formula covers any acts, other than killing, which have the common characteristic of including a direct attack on the person of members of the group. (Blows and wounds, torture, mutilation, harmful injections, biological experiments conducted with no useful end in view etc.).”<sup>111</sup> The text was modified to “any act impairing the physical integrity of members of the group” upon recommendation by the *ad hoc* committee chairman,<sup>112</sup> retaining the breadth provided by France’s proposal.

Discussions before the Sixth Committee similarly focused on more open-ended iterations of the act. Delegates from Belgium repeated the *ad hoc* committee’s proposal, recommending that the act cover those which “impair[] physical integrity.”<sup>113</sup> The Soviets similarly proposed a version containing no qualitative threshold: “the infliction of physical injury or pursuit of biological experiments.”<sup>114</sup> The Sixth Committee never seriously considered those recommendations as neither was actively debated nor discussed.

A threshold requirement only emerged towards the end of the Sixth Committee’s negotiations on the act with a proposal by the United Kingdom that the language be modified to “causing grievous bodily harm to members of the group.”<sup>115</sup> United Kingdom delegate Gerald Fitzmaurice reasoned, “[i]t would not be appropriate to include, in the list of acts of genocide, acts which were of little importance in themselves and were not likely to lead to the physical destruction of the group” and that the term “grievous” had a “precise meaning” in English law.<sup>116</sup> Upon recommendation by India’s delegate, the term “grievous” was changed to “serious.”<sup>117</sup> The change, however, appears inconsequential, as noted by India’s delegate: “the basic idea of the amendment could be retained if the word ‘serious’ were inserted.”<sup>118</sup>

Three conclusions arise from this history. First, members of the *ad hoc* committee and the Sixth Committee favored a formulation of the act broad enough to capture many acts, not just a select few. This is apparent from the comments accompanying the *ad hoc* committee

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110. See *infra* Annex.

111. ESCOR, Ad Hoc Comm. on Genocide, Commentary on Articles Adopted by the Committee, U.N. Doc. E/AC.25/W.1 (Apr. 26, 1948).

112. See *infra* Annex.

113. See *infra* Annex.

114. See *infra* Annex.

115. See *infra* Annex.

116. GAOR 81st Meeting, *supra* note 41, at 175, 178.

117. See *infra* Annex.

118. GAOR 81st Meeting, *supra* note 41, at 179.

draft, which was also the first to propose an open-ended iteration of the act not tied to specific conduct. Second, specifically because of this breadth, a threshold requirement was included to limit the act. Fitzmaurice's commentary is instructive—a threshold requirement was seen as bringing the act in line with the crime's *raison d'être* by ensuring that acts “not likely to lead to the physical destruction of the group” were not encompassed by the act. Third, despite the change from “grievous” to “serious,” this change was not intended to dilute or remove the threshold requirement recommended by Fitzmaurice.

Although the Convention's drafters intended a threshold of “seriousness” to ensure that acts meeting the requisite level of harm fell within the context of the crime, no further instruction was provided on what specifically that threshold was. Egypt's delegate to the Sixth Committee, Dr. Wahid Fikry Raafat, foreshadowed the consequences of this ambiguity, explaining that adding “the word ‘grievous’ to define the kind of impairments of physical integrity . . . might give rise to a great many difficulties of interpretation in the courts.”<sup>119</sup> Dr. Raafat could not have been more right. As illustrated in the next Part, international courts have struggled with how to define the term “serious,” often producing contradictory jurisprudence.

### B. *The Jurisprudence of the Ad Hoc Tribunals and the ICJ*

As reflected in Part III, in their earlier cases the *ad hoc* tribunals avoided precisely defining the term “serious,” opting instead to take a case-by-case approach. What “serious” means only recently became the subject of litigation and judicial interpretation, culminating in the April 2015 *Tolimir* Appeal Judgment. There, the *Tolimir* Appeals Chamber noted that this definition of “serious” was “consistent with the case law of the [*ad hoc* tribunals] and align[ed] with the letter and spirit of the Genocide Convention”:

[the harm] must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group; although it need not be permanent or irreversible, it must go “beyond temporary unhappiness, embarrassment or humiliation” and inflict “grave and long-term disadvantage to a person's ability to lead a normal and constructive life.”<sup>120</sup>

The purpose of this test is self-evident—it attempts to identify the minimal threshold required for the act by narrowing the bookends

119. *Id.* at 178.

120. *Tolimir*, Case No. IT-05-88/2-A, Judgment, ¶¶ 201–02 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); *see also* Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze & Anatole Nsengiyumva, Case No. ICTR-98-41-T, ¶ 2117 (Dec. 18, 2008).

of qualifying conduct. To better understand what this test means, each of its components are evaluated by this Article below.

### 1. Harm that Goes “Beyond Temporary Unhappiness, Embarrassment, or Humiliation”

The *Krstić* Trial Judgment was the first to hold that “serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation.”<sup>121</sup> A variation of this test was also endorsed in the *Baglishema* Trial Judgment, which held that “serious harm entails more than minor impairment on mental or physical faculties.”<sup>122</sup>

There is ambiguity on what “temporary unhappiness, embarrassment, or humiliation” entails and there is no jurisprudence elucidating the phrase. The test is likely limited to assessing whether *mental* harm is sufficiently serious, even though the *Krstić* Trial Chamber and later ICTY chambers have framed the test as also applying to bodily harm. This is because the test only concerns the psychological impact of certain acts, not their physical impact. The test appears to be deliberately designed to ensure that victims of PTSD meet the threshold of “serious mental harm.” At least one commentator has noted that “[t]he extent to which [this] definition[] resemble[s] the [APA]’s criteria for PTSD is striking.”<sup>123</sup> To the end, a reading of this provision that is most likely consistent with the judges’ intent is one where mental harm must be more than “temporary unhappiness, embarrassment, or humiliation,” but a showing of physical harm requires no demonstrable psychological impact.

### 2. Harm that Inflicts “Grave and Long-Term Disadvantage to a Person’s Ability to Lead a Normal and Constructive Life”

It was also the ICTY *Krstić* Trial Judgment that first determined that while the harm need not be permanent or irremediable, it must inflict “grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”<sup>124</sup> This analysis is entirely fact-dependent and depends on the evidence in the case. For instance, the

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121. Prosecutor v. *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 513 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

122. *Baglishema*, Case No. ICTR-95-1A-T, Judgment, ¶ 59 (June 7, 2001).

123. Lieblich, *supra* note 65, at 185, 208; *see also id.* at 205–06 (summarizing the diagnostic criteria for PTSD as established by the APA).

124. *Krstić*, Case No. IT-98-33-T, ¶ 513.



*Karadžić* Appeals Chamber concluded that Bosnian Muslim and Bosnian Croat camp detainees in 1992 were subject to serious bodily harm because the acts “resulted in serious injuries, including, *inter alia*, rib fractures, skull fractures, jaw fractures, vertebrae fractures, and concussions” and that the long-term effects included “tooth loss, permanent headaches, facial deformities, deformed fingers, chronic leg pain, and partial paralysis of limbs.”<sup>125</sup>

None of the *ad hoc* tribunals, however, have explained what a “normal and constructive life” means and how certain harms may impede that life. For instance, deportation and forcible transfer have been found to impact an individual’s ability to lead a normal and constructive life.<sup>126</sup> Yet, if the displaced individual can reconstruct their life in another location, then arguably there is no “grave and long-term disadvantage” to that person’s ability to “lead a normal and constructive life.” The same is true about an individual whose injuries can be medically remedied. This is not, however, how the *ad hoc* tribunals have conducted their analysis. Instead, the *ad hoc* tribunals largely pay lip-service to the above principle while accepting certain harms that have no obvious hindrance on a person’s ability to lead a normal and constructive life.

In addition, recent ICTY jurisprudence conflates two distinct concepts: the inability to lead a normal and constructive life and the physical destruction of the group. For instance, the *Tolimir* Appeals Chamber reasoned that the trauma and financial and emotional consequences caused to the Bosnian Muslim women, children, and elderly because of acts by the Bosnian Serb forces in and around Srebrenica was such that it prevented them from leading a normal and constructive life.<sup>127</sup> The Appeals Chamber added that the “grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life, so as to threaten the physical destruction of the group in whole or in part.”<sup>128</sup> The Appeals Chamber’s wording is problematic. The principle that the act threatens the physical destruction of the group is vested in the crime’s *dolus specialis*, not its *actus reus*. But the two are casually treated synonymously by the Appeals Chamber. Further, the position of the Appeals Chamber contradicts the requirement, explored further below, that the harm be so it only “tends to contribute” to the destruction of the group.

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125. Prosecutor v. Karadžić, Case No. IT-95-5/18-AR98bis.1, Reply Brief for Appeal of Decision on Remand, ¶ 35 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 13, 2013).

126. See Krstić, Case No. IT-98-33-T, ¶ 513.

127. See Tolimir, Case No. IT-05-88/2-A, Judgment, ¶ 211 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

128. *Id.* ¶ 212.

### 3. Harm that “Contribute[s] or Tend[s] to Contribute to the Destruction of All or Part of the Group”

The notion that the harm “must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group” is the most controversial and important aspect of recent jurisprudence by the *ad hoc* tribunals. The test originates from the International Law Commission’s (ILC) commentary to the *Draft Code of Crimes against the Peace and Security of Mankind*, wherein the ILC opined that the phrase “causing serious bodily or mental harm to members of the group” requires that “[t]he bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.”<sup>129</sup> The ILC fails to source the requirement or reference state practice, *opinio juris*, or the Convention’s legislative history. This becomes important as the ILC’s opinion is only a subsidiary means for determining international law<sup>130</sup>—legally persuasive only insofar as it assists in determining whether a rule of international law exists.

Presumably, the ILC was contextualizing serious bodily or mental harm by connecting it with the crime’s *raison d’être*: to protect against acts threatening the destruction of a group. The ILC must have known that serious bodily or mental harm serves as an underlying act for other international crimes, such as torture or inhumane treatment as a war crime or crime against humanity. So what then differentiates bodily or mental harm as an act of genocide versus an act of another international crime? It could be nothing. But the ILC’s commentary suggests there is a difference and that difference is context: the fact that genocide is defined by its *dolus specialis*.<sup>131</sup> Therefore, an act incapable of bringing about that destruction cannot, or at least should not, be an act of genocide.

The ILC test first finds reference in the jurisprudence of international courts in two 2003 ICTR trial judgments: the May 15, 2003 *Semanza* Trial Judgment and the December, 1 2003 *Kajelijeli* Trial Judgment. Neither case, however, endorses the ILC standard—despite later *ad hoc* chambers claiming otherwise. The *Semanza* Trial Chamber references the ILC standard to show why the standard under customary international law—as reflected in the ICTR’s

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129. Int’l Law Comm’n, *supra* note 5, at 46.

130. See Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, 38–56, ¶¶ 47, 50, 53, 79, 83 (Sept. 25) (explaining that the ILC opinion is merely a factor in determining international law).

131. See Claus Kress, *The Crime of Genocide Under International Law*, 6 INT’L CRIM. L. REV. 461, 471–72 (2006); Josef L. Kunz, *The United Nations Convention on Genocide*, 43 AM. J. INT’L L. 738, 743 (1994).

jurisprudence—is actually lower than that required by the ILC.<sup>132</sup> The *Kajelijeli* Trial Chamber is neutral, reciting the ILC test without opining one way or the other on whether it agrees with or endorses the test.<sup>133</sup> That recitation is also *obiter dicta* as the *Kajelijeli* Chamber decides not to “consider the question whether the Accused or his subordinates caused serious bodily or mental harm to members of the Tutsi population.”<sup>134</sup>

The first *ad hoc* chamber to accept the ILC’s approach (despite not referencing the ILC) is the *Krajišnik* Trial Chamber. In *Krajišnik*, the Trial Chamber observes that the prosecution’s indictment alleged serious bodily or mental harm both as an act of genocide and a crime against humanity.<sup>135</sup> The Chamber decides there must be a difference between the act depending on which crime it is used in, and that difference lies with the context of the crime. That “in the context of genocide the act must contribute, or tend to contribute, to the destruction of the protected group or part thereof.”<sup>136</sup> The Trial Chamber concludes this by noting that the four other underlying acts of genocide all contribute or tend to contribute to a group’s destruction. For instance, the underlying act of killing has the impact of tending to contribute to the destruction of the group. The Trial Chamber fails to explain why, but the logic appears obvious: killing results in the physical eradication of a group’s members. The *actus reus* of “inflicting on the group conditions of life calculated to bring about its physical destruction,” as the Trial Chamber reasons, “by its own terms must have, or tend to have, a destructive effect on the group or the part.”<sup>137</sup> The Trial Chamber also concludes, without explanation, that the acts of implementing measures to prevent births in the group and transferring children out of the group also contribute to a group’s destruction. Presumably, the Trial Chamber understood these acts destroy the group by undermining its future viability.<sup>138</sup>

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132. See Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 254 n.541 (May 15, 2003); see also L. J. VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 141 (2005) (stating in the *Semanza* judgment, the ILC uses a higher standard than its 1996 draft).

133. See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, ¶ 814 (Dec. 11, 2003).

134. *Id.* ¶ 844.

135. See Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment, ¶ 861 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006).

136. *Id.*

137. *Id.*

138. See Int’l Law Comm’n, *supra* note 5, at 46 (noting that the transfer of children would have serious consequences for the future viability of a group as such).

The Trial Chamber then reasons that

a fair and consistent construction of [serious bodily or mental harm] alongside the four other types of actus reus is that, in order to pass as the actus reus of genocide . . . the act must inflict such “harm” as to contribute, or tend to contribute, to the destruction of the group or part thereof.<sup>139</sup>

This method of interpretation follows Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which requires that the terms of a treaty be interpreted in “good faith” and “in accordance with the ordinary meaning to be given to the terms [of the treaty] in their context and in light of its object and purpose.”<sup>140</sup> The Trial Chamber finally concludes that “[h]arm amounting to ‘a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’ has been said to be sufficient for this purpose.”<sup>141</sup> In this sense, the Trial Chamber underlines that by adopting this test it does not intend to heighten or alter the requirements for serious bodily or mental harm from the previous jurisprudence of the *ad hoc* tribunals.

The test endorsed in *Krajišnik*, while similar to, is arguably different from the ILC test. This may explain why the *Krajišnik* Chamber omits any reference to the ILC’s commentary even though the similarity between the two tests suggests the *Krajišnik* Chamber was influenced by the ILC. A textual comparison of the two can be found in the Figure below.

*Figure 1: Comparison of ILC Commentary and Krajišnik Trial Judgment*

ILC test	<i>Krajišnik</i> test
The act must be of such a serious nature as to threaten its destruction in whole or in part.	The act must contribute, or tend to contribute, to the destruction of the protected group or part thereof.

The ILC test appears more demanding by suggesting that the harm must have actual or realized impact on the group. The *Krajišnik* test only requires that the act “tend to contribute,” not “threaten,” the group’s destruction. While the two tests are

139. *Krajišnik*, Case No. IT-00-39-T, ¶ 862.

140. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

141. *Krajišnik*, Case No. IT-00-39-T, ¶ 862 (quoting *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 513 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001)).

formulated differently, later ICTY and ICTR cases, as reflected below, conflate the two tests. Both tests are now treated as interchangeable iterations of the same standard applying the less demanding formula provided in the *Krajišnik* Trial Judgment.

Following the *Krajišnik* Trial Judgment, the ICTR revisited the issue in the *Seromba* Appeal Judgment. There, the Appeals Chamber adopted the ILC formulation of the test, concluding that “[t]o support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.”<sup>142</sup> Unlike the *Krajišnik* Trial Chamber, the *Seromba* Appeals Chamber never explains why it adopts this test. Instead, it cites three sources: the ILC Commentary, the *Kajelijeli* Trial Judgment, and the *Krajišnik* Trial Judgment.<sup>143</sup> However, the ICTR’s reliance on these sources is problematic. The ILC itself substantiated no legal support for the requirement and the *Kajelijeli* Trial Chamber never actually endorsed the test (and if it did, it was in *dicta*). Further, the *Krajišnik* Trial Chamber never references either the ILC test or the *Kajelijeli* Trial Judgment and proposes a test arguably different and more lenient.

The *Seromba* Appeals Chamber’s failure to address these issues or provide reasons for adopting the ILC test leaves much to be desired. The most important lesson from *Seromba* is its treatment of the ILC and *Krajišnik* tests as the same. Following *Seromba*, later ICTR and ICTY decisions endorsed the ILC/*Krajišnik* Trial Chamber test with greater frequency and, like *Seromba*, interchangeably.<sup>144</sup> The test is now the settled law of the *ad hoc* tribunals.

The ICJ also adopted the ILC/*Krajišnik* test in its *Croatia Genocide* Judgment. There the ICJ determined that support for the ILC/*Krajišnik* test comes from “the context of Article II, and in particular of its *chapeau*, and in light of the Convention’s object and

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142. Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, ¶ 46 (Mar. 12, 2008).

143. *Id.* at 19 n.117.

144. See generally Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgment, ¶ 584 (Mar. 31, 2011); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgment, ¶ 633 (Jan. 22, 2003); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-T, Judgment, ¶ 637 (Nov. 1, 2010); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Accused’s Application for Certification to Appeal Denial of Motion For Judgement of Acquittal Under Rule 98 BIS (Count 11), ¶ 7 (June 28, 2012); Prosecutor v. Karemer and Ngirumpatse, Case No. ICTR-98-44-T, Judgment, ¶ 1609 (Feb. 2, 2012); Prosecutor v. Nyiramasuhuko et. al., Case No. ICTR-98-42-T, Judgment, ¶ 5731 (June 24, 2011); Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 811 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010); Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Judgment, ¶ 259 (Feb. 27, 2009); Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment, ¶ 738 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012); Tolimir, Case No. IT-05-88/2-A, Judgment, ¶ 202 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

purpose.”<sup>145</sup> The court also found support in the Convention’s legislative history. Referencing much of the legislative history discussed above, the court noted that when proposing an amendment to insert a qualitative threshold that the harm be “grievous,” representatives from the United Kingdom noted that “[i]t would not be appropriate to include, in the list of acts of genocide, acts which were of little importance in themselves and were not likely to lead to the physical destruction of the group”<sup>146</sup> and that “the term ‘grievous’ was eventually replaced by the term ‘serious’ in the English version of the Convention [by the Indian delegation], without affecting the idea behind the proposal of the representative of the United Kingdom.”<sup>147</sup> The ICJ also references the ILC Commentary and *Krajišnik* Trial Judgment.<sup>148</sup>

The ICJ’s reasoning is compelling. It complies squarely with the rules on treaty interpretation provided for under Articles 31 and 32 of the VCLT and appears consistent with the jurisprudence of the *ad hoc* tribunals. Not surprisingly, therefore, that the ICJ’s conclusion and reasoning has since been adopted in the *Tolimir* Appeal Judgment, which found that “[the ICJ] is the competent organ to resolve disputes relating to the interpretation of [the Genocide Convention]. It is also the principal judicial organ of the United Nations and the community of nations at large.”<sup>149</sup>

Two issues arise from this discussion. First, why the sudden interest by the international courts on this issue? Note that the *Tolimir* Appeal Judgment and ICJ *Croatia Genocide* Judgment were issued within months of one another in 2015. And second, what does this all mean? The answer to the first question is relatively straightforward: it is a reaction to the earlier jurisprudence of the *ad hoc* tribunals which adopted a wide understanding of which acts may cause “serious bodily or mental harm,” including “a whole series of acts which were not initially covered by the conventional scope of the application.”<sup>150</sup> As confirmed by Payam Akhavan, “[t]he range of acts mentioned in the jurisprudence underscores that the legal definition of *genocide* is so broad (and indeterminate) that it is difficult to

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145. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 2015 I.C.J. Rep. 118, ¶ 157 (Feb. 3, 2015).

146. *Id.* (quoting GAOR 81st Meeting, *supra* note 41, at 175, 179).

147. *Id.*

148. *See id.* (referencing language such as “serious nature” and “serious harm”).

149. *Tolimir*, Case No. IT-05-88/2-A at 83 n.580.

150. CAROLINE FOURNET, GENOCIDE AND CRIMES AGAINST HUMANITY 92 (Hart Publishing 2013).

describe—notwithstanding the archetypal image of the Holocaust—what a typical genocide actually ‘looks like.’”<sup>151</sup>

The *Tolimir* Appeal Judgment and *Croatia Genocide* Judgment try to push back this breadth out of concern that such a wide understanding of the act dilutes the character of the act as noted by earlier worries by the Convention’s drafters. For instance, the drafters of the Secretariat Draft sought to create a “careful definition of the notion of genocide” out of fear that “there would be a tendency to include under genocide international crimes or abuses which, however reprehensible they may be, do not constitute genocide and cannot be regarded as such by any normal process of reasoning.”<sup>152</sup> The drafters of the Secretariat Draft also noted that a “literal definition” of genocide “must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc.”<sup>153</sup> In another note, the Secretariat expressed that “[t]he victim of the crime of genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason (execution of hostages) but a group as such.”<sup>154</sup>

On what this all means, the salient question is whether the test now endorsed by the ICJ, ILC, and *ad hoc* tribunals creates a *quantitative* or *qualitative* requirement. A *quantitative* requirement looks at whether the bodily or mental harm has an actual impact on the protected group. A *qualitative* test, however, looks to whether the harm is of the nature so it could “destroy” the group, without requiring proof of actual impact. For the reasons expressed below, the test is best understood as a *qualitative* assessment.

*First*, the text of the Convention requires no demonstrated impact on the protected group. By the *Kayishema* Trial Chamber, “causing serious bodily harm’ is self-explanatory.”<sup>155</sup> Commentators agree. As expressed by William Schabas, “[t]his interpretation [i.e., a quantitative test] goes beyond the plain words of the test, and is not supported by the *travaux préparatoires*.”<sup>156</sup> Kai Ambos and Gaeta concur, stating respectively that “[s]uch a restrictive interpretation is

151. PAYAM AKHAVAN, *REDUCING GENOCIDE TO LAW* 51–52 (Cambridge Univ. Press 2012).

152. ESCOR, Draft Convention, *supra* note 107, at 16.

153. *Id.*

154. ESCOR, Ad Hoc Comm. on Genocide, Relation Between the Convention on Genocide on the One Hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, at 6, U.N. Doc. E/AC.25/3/Rev.1 (Apr. 12, 1948).

155. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 109 (May 21, 1999).

156. WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 182 (2009).

not required by the plain wording of the provision"<sup>157</sup> and "there are no indications in the definition as to a requirement that the harm be of such a serious nature as to threaten the group with destruction."<sup>158</sup>

*Second*, nothing in the Convention's legislative history suggests that proof of impact was ever intended. The Sixth Committee considered and rejected a proposal by Soviet Union representatives to change the language from the then proposal of "[i]mpairing the physical integrity of members of the group" to "[t]he physical destruction in whole or in part of such groups."<sup>159</sup> That proposal was never seriously discussed and was criticized by representatives from Egypt for confusing the *mens rea* element of the crime with its *actus reus*.<sup>160</sup>

The only discussion weighing towards an impact requirement is the disagreement had by certain representatives on whether individual acts would meet the *actus reus* requirements for genocide. For instance, some Sixth Committee delegates suggested that individual acts would be genocidal if committed with the requisite intent, clearly suggesting they did not intend showing impact on the group. Representatives from Panama noted that the isolated killing of one individual "would . . . be genocide if committed with the intent to destroy a group."<sup>161</sup> The French agreed: "the crime of genocide existed as soon as an individual became the victim of acts of genocide. If a motive for the crime existed, genocide existed even if only a single individual were the victim."<sup>162</sup> As reasoned by France's delegate, Charles Chaumont, "[t]he group was an abstract concept; it was an aggregate of individuals; it has no independent life of its own; it was harmed when the individuals composing it were harmed."<sup>163</sup>

Representatives from the United States, Egypt, and the United Kingdom, however, disagreed with this position. The United States considered France's position to be overbroad,<sup>164</sup> although note that following the Convention's adoption, its own internal correspondence

157. KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: THE CRIMES AND SENTENCING 12–13 (2014) [hereinafter AMBOS TREATISE].

158. GAETA, *supra* note 79, at 9.

159. ESCOR, 3d Sess., Union of Soviet Socialist Republics: Amendments to Article II of the Draft Convention, at 1, U.N. Doc. A/C.6/233 (Oct. 7, 1948).

160. See U.N. GAOR, 3d Sess., 81st mtg. at 174, U.N. Doc. A/C.6/SR.81 (Oct. 22, 1948) (criticized on grounds that the first part was duplicative and that the second part of it singled out acts which were only an additional example of acts of physical destruction listed in the first part).

161. U.N. GAOR, 3d Sess., 69th mtg. at 62, U.N. Doc. A/C.6/SR.69 (Oct. 7, 1948).

162. U.N. GAOR, 3d Sess., 73d mtg. at 90, U.N. Doc. A/C.6/SR.73 (Oct. 13, 1948) [hereinafter GAOR 73d Meeting].

163. *Id.* at 91.

164. See *id.* at 92 (stating that the concept of genocide should not be broadened to cover cases where a single individual was attacked as a member of a group).



recognized that genocide could be committed against a single individual.<sup>165</sup> Representatives from Egypt noted that “the idea of genocide could hardly be reconciled with the idea of an attack on the life of a single individual.”<sup>166</sup> Similarly, the United Kingdom argued that “when a single individual was affected, it was a case of homicide, whatever the intention of the perpetrator of the crime might be.”<sup>167</sup> This disagreement, at most, shows contention between the drafters on whether individuals can be victims of genocidal acts. It does not, however, suggest there was majority, let alone plenary, acceptance of an impact requirement.

*Third*, none of the principal cases responsible for constructing this test—*Krajišnik*, *Kajelijeli*, and *Seromba*—ever conducted an impact assessment, a matter recently confirmed in the *Karadžić* Trial Judgment.<sup>168</sup> To the contrary, the *Krajišnik* Trial Chamber noted that the usual definition of “[h]arm amounting to ‘a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’ has been said to be sufficient.”<sup>169</sup> Neither in its formulation or application of this principle did the *Krajišnik* Chamber mention or require any impact on the ground. Rather, the Trial Chamber was concerned with placing the act of serious bodily or mental harm within the framework of the other genocidal acts. In this respect, it was strictly concerned with assessing the *quality* of the act, not its impact. The *Seromba* Appeals Chamber similarly recognized that individual acts can satisfy this requirement, noting that individual incidents of rape and torture “obviously constitute serious bodily or mental harm.”<sup>170</sup>

*Fourth*, except for the *Karadžić* Trial Chamber in its Rule 98 *bis* Judgment,<sup>171</sup> no other chamber endorsing the ILC or *Krajišnik* tests

165. See U.S. DEPT OF STATE, THE DEPARTMENT OF STATE BULLETIN VOL. XXI, No. 552 at 844, 846 (July 4, 1949) (drawing a distinction between homicide and genocide, but acknowledging that if “an individual is murdered by another individual, or by a group, whether composed of private citizens or government officials, as part of a plan or with the intent to destroy one of the groups enumerated in article 2, the international legal crime of genocide is committed as well as the municipal-law of homicide”).

166. GAOR 73d Meeting, *supra* note 162, at 92.

167. *Id.*

168. See Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 544 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) (stating no judgments had required a showing that the harm was such to threaten the group’s destruction).

169. Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment, ¶ 862 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006).

170. Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, ¶ 48 (Mar. 12, 2008).

171. See generally Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Accused’s Application for Certification to Appeal Denial of Motion For Judgement of Acquittal Under Rule 98 BIS (Count 11) (Int’l Crim. Trib. for the Former Yugoslavia July 18, 2012) (the Rule captures the ICTY’s equivalence of a “no case to answer”

has required proof that the physical or mental harm impact the protected group.<sup>172</sup> For instance, in finding that a victim of sexual assault had suffered serious mental harm, the *Rukundo* Trial Chamber never assessed the impact of the assault on the group.<sup>173</sup> Instead, it qualitatively analyzed the harm on the individual victim.<sup>174</sup> The Trial Chamber also found that the beating of two children had met the threshold required for serious bodily harm, despite no demonstrable impact on the group at large.<sup>175</sup>

This was also confirmed by the ICC. After surveying the jurisprudence of the *ad hoc* tribunals, a Pre-Trial Chamber of the ICC concluded that:

[under] the case law of the ICTY and the ICTR, the crime of genocide is completed by . . . causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs. As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.<sup>176</sup>

The *Karadžić* Trial Judgment recently reiterated this finding, noting “the majority of trial judgements rendered prior to and after the *Seromba* Appeal Judgement consistently reiterate the language of Article 4(2)(b) of the Statute without requiring a showing that the harm was such as to threaten the group’s destruction.”<sup>177</sup> Similarly, in the very last ICTY trial decision, the *Mladić* Trial Judgment concluded that the beatings and mistreatment of certain detainees “caused serious mental and physical suffering and injury” but were not “of such a serious nature as to contribute, or tend to contribute, to

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motion, wherein the defense seeks the accused’s acquittal following the conclusion of the prosecution’s case-in-chief on the basis that the evidence presented by the prosecution is substantively insufficient to engage the need for the defense to mount a case).

172. *See id.* ¶ 544 (noting Trial Chambers of the Tribunal and the ICTR have only examined seriousness of acts without referring to any showing that the harm was such as to threaten the group’s destruction).

173. *See Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Partially Dissenting Opinion of Judge Pocar, ¶¶ 388–89 (Oct. 20, 2010) (the Chambers focusing on the impact of sexual assault on the victim).

174. *Seromba*, Case No. ICTR-2001-66-A, ¶¶ 234–38 (the ICTR Appeals Chamber overturning the accused’s conviction for this crime, but on the lack of sufficient evidence demonstrating genocidal intent).

175. *See Rukundo*, Case No. ICTR-2001-70-A, ¶ 569 (finding the accused guilty on Count 1 of the Indictment).

176. *Prosecutor v. Al Bashir*, Case. No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 119 (Mar. 4, 2009).

177. *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 544 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

the destruction of the protected groups.”<sup>178</sup> The Chamber never assessed any actual impact on the group. The language, instead, was geared toward assessing the qualitative nature of the harm.

Two decisions, however, are worth exploring as they may be misinterpreted as adopting an impact assessment: the *Tolimir* Appeal Judgment and the ICJ’s *Croatia Genocide* Judgment. In *Tolimir*, an Appeals Chamber determined that the Trial Chamber had erred in finding that the acts inflicted against the Bosnian Muslim population of Žepa had resulted in serious mental harm as an act of genocide. After endorsing the ILC and *Krajišnik* tests,<sup>179</sup> the Appeals Chamber reasoned that “the emotional pain and distress inflicted upon Žepa’s Bosnian Muslims was irrefutably grave” but there was “no evidence of any long-term psychological trauma.”<sup>180</sup> The Chamber also reasoned that the Trial Chamber had “failed to point to any evidence on the record establishing that the mental harm suffered by that group tended to contribute to the destruction of the Muslims of Eastern [Bosnia] as such.”<sup>181</sup>

At first blush, the *Tolimir* Appeals Chamber adopts an impact requirement insofar as the Chamber treats the Trial Chamber’s failure to find evidence that the harm contributed to the group as an error besides the Trial Chamber’s failure to find that the harm met a qualitative threshold (i.e., the causing of long-term psychological trauma). The Appeals Chamber appears to adopt a similar distinction in another of its findings when it determines there was an “absence of findings or references to evidence of any long-term consequences of the forcible transfer operation . . . and of a link between the circumstances of the transfer operation in Žepa and the physical destruction of the protected group as a whole.”<sup>182</sup>

A holistic reading of the judgment, however, suggests that the Appeals Chamber was simply emphasizing the qualitative threshold required for the *actus reus* without adopting a quantitative requirement. Any other interpretation would render the Appeal Judgment incomprehensible and contradictory. The Appeals Chamber sustains findings by the Trial Chamber as meeting the ILC/*Krajišnik* test clearly about the quality of the harm and not its impact on the group. This includes the Trial Chamber’s conclusion that the forcible transfer of Bosnian Muslim women, children, and

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178. Prosecutor v. Mladić, Case No. IT-09-92-T, Judgment, ¶ 3450 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017).

179. Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment, ¶ 203 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012) (stating serious mental harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group).

180. *Id.* ¶ 215.

181. *Id.* ¶ 217.

182. *Id.*

elderly from Srebrenica with attendant circumstances caused serious mental harm because “the lives of the displaced population ‘drastically changed,’ while some women have been ‘so profoundly traumatized that they prefer to die.’”<sup>183</sup> Based on this finding, the Appeals Chamber concludes that the Trial Chamber “did make findings satisfying the requirement that the harm suffered be of such a nature that it tends to contribute to the destruction of the protected group as such.”<sup>184</sup> The Appeals Chamber did not require, or identify, any findings that those harms affected the group, suggesting that evidence of such impact is unnecessary.

A similar reading can be drawn from the ICJ’s *Croatia Genocide Judgment*. There, the ICJ endorsed a test similar to the ILC/*Krajišnik* test. However, the ICJ test contains one critical distinction, although likely indeliberate. The ILC/*Krajišnik* test is largely conceptual. The harm is sufficient if it “tends to contribute” to the group’s destruction. The ICJ omits this language suggesting that the harm to the group must be concrete; that the harm “contribute to the physical or biological destruction of the group.”<sup>185</sup> Despite this difference, there is no suggestion that the ICJ intended to create an impact requirement or depart from the ILC/*Krajišnik* test as interpreted by the *ad hoc* tribunals. This is evident from the fact that the ICJ relies upon the ILC Commentary and ICTY jurisprudence, “in particular . . . the *Krajišnik* case.”<sup>186</sup> The ICJ also references the Convention’s legislative history,<sup>187</sup> which equally omits any impact assessment but focuses on the quality of the harm. Further, like *Seromba*, the ICJ recognizes that individual acts can satisfy this requirement, noting that “rape and other acts of sexual violence are capable of constitut[ing] the *actus reus* of genocide within the meaning of Article II (b) of the Convention.”<sup>188</sup> Read as a whole, the ICJ test, while textually different from *Krajišnik*, was intended to comport with, not depart from, the jurisprudence of the *ad hoc* tribunals.<sup>189</sup>

*Fifth*, an impact requirement was rejected in the *Karadžić 98 bis* Appeal Judgment. In *Karadžić*, the Trial Chamber, at the no case to

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183. *Id.* ¶ 212.

184. *Id.*

185. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 2015 I.C.J. Rep. 118, ¶ 157 (Feb. 3, 2015) (emphasis added).

186. *Id.*

187. *Id.* (commenting on representatives’ viewpoints in the drafting process).

188. *Id.* ¶ 158.

189. See Caroline Fournet, *The Actus Reus of Genocide in the Croatia v. Serbia Judgment: Between Legality and Acceptability*, 28 LEIDEN J. INT’L L. 915, 919 (2015) (noting that the definition of “serious mental harm” was elaborated in the *ad hoc* tribunals).

answer stage (rule 98 *bis* of the ICTY Statute), observed there was evidence indicating that Bosnian Serb forces had caused serious bodily or mental harm to Bosnian Muslims and Bosnian Croats detained in detention facilities.<sup>190</sup> That evidence, as noted by the prosecution in its appeal and the *Karadžić* Appeals Chamber, demonstrated that Bosnian Muslims and Bosnian Croats were kicked, violently beaten with a range of objects, thrown down stairs, raped, and sexually assaulted.<sup>191</sup> The evidence also showed that because of these attacks, the victims suffered serious injuries, including bone fractures, concussions, tooth loss, permanent headaches, facial deformities, partial paralysis, chronic leg pain, and deformed fingers.<sup>192</sup> But the Trial Chamber concluded that it had “not heard evidence, even taken at its highest, which could support a conclusion by a reasonable trier of fact that the harm caused reached a level *where it contributed to or tended to contribute* to the destruction of the Bosnian Muslims and/or Bosnian Croats in whole or in part.”<sup>193</sup>

As argued by the prosecution on appeal, the Trial Chamber in effect imported an impact threshold by “requiring the serious bodily or mental harm to achieve a certain level of destructive impact on the protected group as a whole.”<sup>194</sup> While not explicitly addressing this specific argument, the *Karadžić* Appeals Chamber implicitly endorsed the prosecution’s position. The Appeals Chamber found that the evidence reviewed by the Trial Chamber “indicates that Bosnian Muslims and/or Bosnian Croats suffered injuries, including rape and severe non-fatal physical violence which are, on their face, suggestive of causing serious bodily harm.”<sup>195</sup> The Appeals Chamber never required or analyzed whether this harm impacted the protected group, a matter confirmed by the *Karadžić* Trial Chamber: “the Appeals Chamber in the Rule 98 *bis* Appeal Judgement simply recalled Article 4(2)(b) without indicating the existence of an additional requirement.”<sup>196</sup>

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190. See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Application for Certification to Appeal Denial of Motion for Judgment of Acquittal Under Rule 98 BIS (Count 11), ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia July 18, 2012) (further stating that UN personnel were rendered *hors de combat* by virtue of their detention by the Bosnian Serb forces and therefore became protected persons).

191. *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Reply Brief for Appeal of Decision on Remand, ¶¶ 35–36 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 13, 2013) (detailing violence towards Bosnian Muslims and Bosnian Croats).

192. See *id.* ¶ 35 (detailing injuries sustained by victims).

193. *Id.* ¶ 28 (emphasis added).

194. *Prosecutor v. Karadžić*, Case No. IT-95-5/19AR98bis.1, Prosecution Rule 98bis Appeal Brief, ¶ 28 (Sept. 24, 2012).

195. *Karadžić*, Case No. IT-95-5/18-AR98bis.1, ¶ 37.

196. *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 544 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

The Appeals Chamber also found that

[w]hile the commission of paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, including evidence of sexual violence and of beatings causing serious physical injuries, could have concluded that it was insufficient to establish the *actus reus* of genocide.<sup>197</sup>

The first half of the Appeals Chamber's reasoning is equivocal—the Appeals Chamber never explains “paradigmatic acts” or why they may be insufficient. The Chamber also cites to no authority supporting its proposition. Nor has that language been invoked where serious bodily or mental harm has been raised, including in the *Tolimir* Appeal Judgment, the *Croatia Genocide* Judgment, and the *Karadžić* Trial Judgment.

One reading could be that evidence of individual acts meeting the requisite level of harm would not meet the ILC/*Krajišnik* test. This would import an impact requirement of the nature adopted by the Trial Chamber. That would, however, render the Appeal Judgment internally inconsistent, given that the Appeals Chamber implicitly rejected an impact requirement, as illustrated above. Instead, a reading that comports with the Judgment when taken as a whole is that the Appeals Chamber is simply re-emphasizing the need to take caution before classifying individual acts as meeting the threshold required to be an act of genocide. This comports with the Appeals Chamber's conclusion that, generally, the “quintessential examples of serious bodily harm as an underlying act of genocide include torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.”<sup>198</sup>

*Sixth* and finally, an impact requirement conflates the *mens rea* of the crime with its *actus reus*. This is the primary criticism advanced by Schabas and Ambos. By Schabas, an impact requirement “indicates a confusion between the mental element of the chapeau and the material element of paragraph (b).”<sup>199</sup> Ambos agrees, an impact requirement “ignores the structure of genocide as a specific intent crime, which implies that the perpetrator's *mens rea* exceeds the *actus reus*.”<sup>200</sup>

Altogether, the above arguments support the conclusion recently drawn in the *Karadžić* Trial Judgment that “there is no additional requirement that the serious bodily or mental harm to members of

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197. *Karadžić*, Case No. IT-95-5/18-AR98bis.1, ¶ 37.

198. *Id.* ¶ 33.

199. SCHABAS, *supra* note 156.

200. AMBOS TREATISE, *supra* note 157, at 13.

the group be of such serious nature as to threaten the destruction of the group in whole or in part.”<sup>201</sup> Rather, “[t]he degree of threat to the group’s destruction may, however, be considered as a measure of the seriousness of the bodily or mental harm.”<sup>202</sup> That analysis comports perfectly with the analysis above and, uncoincidentally, the prosecution’s position throughout the *Karadžić* proceedings.<sup>203</sup>

## V. CONCLUSION

The object and purpose of the Convention is to prevent and to punish the crime of genocide, regardless of its form.<sup>204</sup> With this in mind, the Convention’s drafters ensured that the Convention not only covered acts emblematic of the genocide of European Jews during the Second World War, but to ensure that *any* conduct directed toward the destruction of one of the protected groups was prevented and punished. The *actus reus* of serious bodily and mental harm provided the greatest flexibility in this respect. It permitted international courts and tribunals to ensure a progressive understanding of the crime: one that captures acts of sexual violence and the forced displacement of populations, and acts over a broad spectrum of time.

Precisely because of this breadth, however, the act is under increasing scrutiny by advocates and jurists who wish to ensure that it fits within the overall parameters of the crime, namely to ensure against the physical or biological destruction of national, ethnic, religious, or racial groups. The preceding discussion comprehensively evaluates these issues and puts forward resolutions to some of the main criticisms and open questions in the jurisprudence. In doing so, it balances the Convention’s plain terms and the intent of its framers to narrow the act to only that conduct capable of bringing about the protected group’s destruction. But there are further questions requiring exploration that may further our understanding of serious

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201. *Karadžić*, Case No. IT-95-5/18-T, ¶ 544.

202. *Id.*

203. *See, e.g.*, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Application for Certification to Appeal Denial of Motion for Judgment of Acquittal Under Rule 98 BIS (Count 11), ¶ 24–28 (Int’l Crim. Trib. for the Former Yugoslavia July 18, 2012) 8 (recognizing “the long line of ICTY and ICTR cases which have followed the plain wording of Article 4(2)(b) without requiring any additional element of threatening the destruction of a protected group”).

204. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 2015 I.C.J. Rep. 118, ¶ 139 (Feb. 3, 2015) (stating a mission of “liberat[ing] mankind from such an odious scourge”); *see also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Rep. 15, at 12 (May 28, 1951) (stating that the “origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide”).

bodily or mental harm as an act of genocide. This includes determining whether there is a difference between serious bodily or mental harm as an act of genocide and as an underlying act for other international crimes.

As alluded to above, the *actus reus* of serious bodily and mental harm is not exclusive to the crime of genocide. As reflected in the ICC's Elements of Crimes, variations of the act also constitute underlying conduct for the war crimes of torture, cruel treatment, inhumane treatment, willful causing of great suffering, biological experiments, medical or scientific experiments, and mutilation<sup>205</sup> and crimes against humanity covering similar crimes.<sup>206</sup> Even though the underlying acts are ostensibly the same, it is entirely possible that certain harms may, for instance, amount to torture, but not meet the threshold required to be an act of genocide. Resolving such issues will provide greater clarity on the scope of the act, and help resolve the larger debate permeating much of the jurisprudence of whether genocidal acts should be viewed in light of their context, or by their terms *sensu stricto*.

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205. INT'L CRIMINAL COURT, ELEMENTS OF CRIMES arts. 8(2)(a)(ii)-1, (2)(a)(ii)-2, 8(2)(a)(ii)-3, 8(2)(a)(iii), 8(2)(b)(x)-1, 8(2)(b)(x)-2, 8(2)(e)(xi)-1, 8(2)(e)(xi)-2, 8(2)(c)(i)-3, 8(2)(c)(i)-4 (2002), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [https://perma.cc/KM7R-D5DV] (archived Sept. 18, 2018).

206. *Id.* arts. 7(1)(f), 7(1)(k).



ANNEX: Legislative History of "Serious Bodily or Mental Harm" in Chronological Form

Deliberations before the *Ad Hoc* Committee on Genocide

Secretariat Draft (E/447)	"Mutilations and biological experiments imposed with no curative purpose"	
Proposal by the US (A/401 & E/623)	"Physical violence, mutilations or biological experiments"	
Proposal by France (E/AC.25/SR.13)	"Any acts directed against the corporeal integrity of the members of a group."	Adopted by 5 votes to 1, with 1 abstention
Proposal by <i>Ad Hoc</i> Committee Chairman (E/AC.25/SR.24)	"Any act impairing the physical integrity of members of the group"	Adopted by 5 votes to 2
Proposal by China (E/AC.25/SR.28)	"Impairing the physical integrity or mental capacity of members of the group" or "Impairing the health of members of the group"	
Proposal by <i>Ad Hoc</i> Committee on Genocide (E/794 & E/AC.25/12)	"Impairing the physical integrity of members of the group"	Adopted by 5 votes to 1, with 1 abstention

Deliberations before the General Assembly's Sixth Committee

Proposal by the USSR (A/C.6/215/Rev. 1)	"The physical destruction in whole or in part of such groups"	
Proposal by Belgium (A/C.6/217)	"Impairing physical integrity"	
Proposal by China (A/C.6/221 & A/C.6/221/Corr.1)	"Impairing the physical or mental health of members of the group"	

Proposal by UK (A/C.6/222)	“Causing grievous bodily harm to members of the group”	With Indian amendment: Adopted by 24 votes to 10, with 7 abstentions
Proposal by the USSR (A/C.6/223 & A/C.6/223.Corr.1)	“The physical destruction in whole or in part of such groups; for example, [...] the infliction of physical injury or pursuit of biological experiments [...]”	
Proposal by China (A/C.6/232/Rev. 1)	“impairing the physical or <u>mental health</u> of members of the group”	Rejected by 17 votes to 10, with 13 abstentions  With Indian amendment: Adopted by 14 votes to 10, with 14 abstentions
Proposal by India (A/C.6/244)	“Causing serious bodily or mental harm to members of the group”	

Proposal by Sixth Committee (A/C.6/245)	“Causing serious bodily or mental harm to members of the group”
Adopted Text (A/C.6/289 and A/C.6/289/Corr.1)	“Causing serious bodily or mental harm to members of the group”

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