

THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF GENOCIDE

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I. INTRODUCTION

The crime of genocide holds the first and thus a particularly prominent place in the list of crimes enshrined in Article 5(1) of the Rome Statute¹ (hereinafter, the Statute) which sets out the crimes within the jurisdiction of the International Criminal Court (hereinafter, the ICC). The first sentence of Article 5(1) of the Statute clarifies that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The fact that Article 5 of the Statute then lists the crime of genocide along with crimes against humanity, war crimes and the crime of aggression confirms that also the crime of genocide is indeed a crime of such concern. As is well known, none of the crimes listed in Article 5 of the Statute were ‘invented’ by the drafters of the Statute. Rather, they all have strong foundations in international law and international humanitarian law, which often go back more than 50 years. This is true in particular with regard to the crime of genocide which was recognised in the Convention on the Prevention and Punishment of the Crime of Genocide² (hereinafter, the Genocide Convention) of 1948.

The definition of the crime of genocide which was provided for in the Genocide Convention is literally the same as the one we can now find in Article 6 of the Statute. However, the General Assembly resolution which approved the conventional text had already called on the International Law Commission to ‘study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.’³ This suggestion was echoed in Article VI of the Genocide Convention, which states that ‘[p]ersons charged

¹ Rome Statute of the International Criminal Court, text circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, 2187 UNTS p. 90. The Statute entered into force on 1 July 2002.

² Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS p. 277. The Convention entered into force on 12 January 1951.

³ General Assembly, UN Doc. A/RES/3/260 (9 December 1948).

with genocide ... shall be tried by a competent [national tribunal], or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' With the establishment of the ICC in 2003, this 'international penal tribunal' is now finally in existence.

On 14 July 2008, Mr Luis Moreno-Ocampo, the Prosecutor of the ICC (hereinafter, the Prosecutor), submitted an application for a warrant of arrest against Mr Omar Hassan Ahmad Al Bashir (hereinafter, Omar Al Bashir), the current President of the Republic of the Sudan. The same day, the Prosecutor issued a public summary⁴ of his application showing that the application contained three counts of genocide. On 4 March 2009, Pre-Trial Chamber I (hereinafter, the Chamber), composed of Judge Kuenyehia from Ghana, Judge Steiner from Brazil and Judge Ušacka from Latvia, issued a warrant of arrest⁵ against Omar Al Bashir for crimes against humanity and war crimes. Yet, the Majority of the Chamber, Judge Ušacka dissenting, (hereinafter, the Majority) found that the materials provided by the Prosecutor in support of the application failed to establish reasonable grounds to believe that the government of Sudan (hereinafter, the GoS) acted with *dolus specialis* (specific intent) to destroy in whole or in part the Fur, Masalit and Zaghawa groups. Consequently, the counts concerning the crime of genocide are not included in the warrant of arrest against Omar Al Bashir. On 6 July, the Prosecutor submitted an appeal⁶ against the decision of 4 March 2009 in which he seeks to reverse the decision of the Chamber not to confirm the counts concerning the crime of genocide in the warrant of arrest against Omar Al Bashir. This appeal is still pending. To date, these are the first instances in which the crime of genocide has become relevant in concrete judicial proceedings and decisions of the ICC.

It is against this background that this contribution will, in its first part, recall once again the origin and essential content of Article 6 of the Statute. Likewise, as the crime of genocide was dealt with and elaborated further in the Elements of Crimes pursuant to Article 9 of the Statute, it seems appropriate to include in this first part some observations pertaining to these Elements of Crimes. In the second part of this article, it will be outlined how the situation in Darfur, the Sudan, was referred to the Prosecutor of the ICC by Security Council Resolution 1593 in 2005.⁷ This will then lead to a summary of the applications submitted by the Prosecutor and the Chamber's decision of 4 March 2009 in the concrete case against Omar Al Bashir. Thirdly and finally, it seems appropriate to conclude this article with some observations on the general significance of the inclusion of the crime of genocide in the Statute and jurisdiction of the ICC.

⁴ ICC, *Public Summary of Prosecutor's Application under Article 58*, ICC-02/05-152, 14 July 2008.

⁵ ICC, *Warrant of Arrest for Omar Hassan Ahmad Al Bashi*, ICC-02/05-01/09-1, 4 March 2009.

⁶ ICC, *Prosecution Document in Support of Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'*, ICC-02/05-01/09-25, 6 July 2009.

⁷ Security Council, UN Doc. S/RES/1593, 31 March 2005.

II. THE CRIME OF GENOCIDE AS DEFINED IN THE ICC'S LEGAL FRAMEWORK

II.1 The concept of genocide – from Lemkin to Article 6 of the Rome Statute

The term 'genocide' (Greek *genos* for race and Latin *caedere* for killing)⁸ was first coined by Raphael Lemkin, an American lawyer of Polish origin, during World War II to describe the crimes committed against the Jews by the Nazis.⁹

However, at that time, genocide was recognised in international law as a mere 'sub-class of crimes against humanity' and it was only with the adoption of the Genocide Convention that genocide became a category of crimes of its own, endowed with its own specific *actus reus* (material element) and *mens rea* (mental element).¹⁰

About half a century later, Article 6 of the Statute, which grants the ICC jurisdiction *ratione materiae* over the crime of genocide, then reproduced word for word the text of Article 2 of the Genocide Convention. This verbatim inclusion suggests that the drafters of the Statute considered this article as constituting 'an almost sacred document of international law that must not be touched in any form whatsoever'.¹¹

Yet, it should be noted that this faithful reproduction of the Genocide Convention's terms turned the conventional definition, which is generally also recognised as a definition under customary international law,¹² in a genuine statutory norm of modern international criminal law establishing individual criminal responsibility.

Genocide under the Statute requires the commission of one of the five acts specified in Article 6(a) to (e) of the Statute. In addition to the acts of killing or of causing serious bodily or mental harm to the members of a group, this article also includes acts against the physical or psychological integrity of members of a group or its existence or biological continuity as well as the act of forcibly transferring children of one group to another.

The material element of the crime strictly speaking does not require that the individual act be part of a systematic or widespread attack on a group as required for crimes against humanity pursuant to Article 7 of the Statute. Nonetheless, experience shows that the genocidal acts in question will quite regularly or typically be

⁸ R. Lemkin, *Axis Rule in Occupied Europe: laws of occupation, analysis of government, proposals for redress*, 2nd edn. (Lawbook Exchange 2008), p. 79.

⁹ G. Werle, *Principles of International Criminal Law* (Cambridge, Cambridge University Press 2005), p. 190.

¹⁰ A. Cassese, 'Genocide', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court* (Oxford, Oxford University Press 2002), p. 335 at p. 339.

¹¹ C. Kreß, 'The Crime of Genocide under International Law', in 6 *ICLR* (2006), p. 461 at p. 499.

¹² See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 8 April 1993, ICJ Rep. 1993, p. 3.

also crimes against humanity and thereby *ipso facto* contain this contextual element.¹³

As Article 6 demonstrates, the mental element of genocide requires ‘intent to destroy.’ Furthermore, the material elements of the crime must be committed with ‘intent and knowledge’ as referred to in Article 30 of the Statute. This article reads as follows:

- ‘1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.’

Yet, it is important to stress that this intent has been formulated in a specific manner in the Elements of Crimes which will be discussed below.

Finally, it has to be emphasised that deliberate acts taken with the intent of preventing members of a group from using their language, practicing their religion or carrying out the group’s cultural activities, sometimes referred to as ‘cultural genocide,’ do not fall as such within the Article 6 definition of genocide, unless the acts were also one of the five prohibited acts committed with the required intent. In this respect, it has been suggested that the act of forcibly transferring children of one group to another, enshrined in Article 6(e) of the Statute, is ‘situated at the border line with so-called cultural genocide.’¹⁴

Likewise, acts committed with the intention to disrupt or destroy the ecosystem in a particular area by attacks upon the environment, sometimes called ‘ecocide,’ have not been included in the definition, and would not constitute genocide, unless the attacks involved one of the five prohibited acts committed with the necessary intent.¹⁵

The first part of this article shall conclude by explaining the nature and role of the Elements of Crimes pursuant to Article 9 of the Statute, in particular those regarding genocide.

¹³ With regard to the relation of genocide and crimes against humanity see A. Cassese, et al., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (New York, Oxford University Press 2002), p. 339; O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd edn. (Munich, C.H.Beck 2008), p. 156.

¹⁴ C. Kreß, *supra* n. 11, at p. 484.

¹⁵ W.A. Schabas, ‘Genozid im Völkerrecht’ [Genocide in International Law] (Hamburg, Hamburger Edition 2003), pp. 266-267.

II.2 The concept of genocide as specified in the Elements of Crimes

The concept of Elements of Crimes was foreign to most legal systems prior to the Rome Conference. They were included on the strong demand of the United States and a small number of other states which apply this particular concept, albeit in a binding form. According to Article 9 of the Statute, however, the Elements of Crimes are not as such binding upon the judges. Rather, as the wording of Article 9(1) of the Statute indicates, the Elements of Crimes ‘shall assist the International Criminal Court in the interpretation and application of Articles 6, 7 and 8 [of the Statute].’

The Elements of Crimes nevertheless perform a useful role, insofar as they specify and narrowly define the individual elements of the offences of genocide, crimes against humanity and war crimes under Articles 6 to 8 of the Statute. This is done in full harmony with the general definitions and their international criminal law content. In other words, like the definitions of the crimes in the Statute itself, the Elements of Crimes were elaborated to be in full conformity with customary international law. Whether that quality makes them binding in their specific wording is a question which will have to be decided by the judges of the ICC. Indeed, the ultimate value of the Elements of Crimes can only be proven by the actual practice of the ICC judges.¹⁶

In this respect, the hope is that the Elements of Crimes will contribute to legal certainty and thereby to an increased fairness of the trials before the ICC.

With regard to genocide, the Elements of Crimes require three fundamental components in order to define a specific act as amounting to an act of genocide. These elements include the existence of a victimised group, the perpetrator’s intent to destroy in whole or in part the targeted group and finally a prohibited conduct having taken place ‘in the context of a manifest pattern of similar conduct directed against that group [or a] conduct that could itself effect such destruction.’¹⁷

The victimised group requirement entails that the act has to be committed against an identifiable group, commonly referred to as ‘protected group,’¹⁸ namely a national, ethnic, racial or religious group. This list is exhaustive and the drafters of the Statute clearly rejected attempts to enlarge the scope of the list. In this regard, it is interesting to note that political, economic and social groups were deliberately excluded as potential targets of the crime of genocide.¹⁹ The protected groups therefore share the common aspect that group membership is ‘determined by birth and of a permanent and stable nature.’²⁰ This common element might help to explain

¹⁶ See H.Y. Hebel, ‘The Making of the Elements of Crimes’, in R.S. Lee & H. Friman, *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, New York, Transnational Publishers 2001), p. 3.

¹⁷ ICC, *Elements of Crimes*, Arts. 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7), *Dokumentenbezeichnung*.

¹⁸ See for example W.A. Schabas, ‘Article 6 – Genocide’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd edn. (Munich, C.H.Beck 2008), p. 143 at p. 149.

¹⁹ *Ibid.*, p. 149.

²⁰ G. Werle, *Principles of International Criminal Law* (Cambridge, Cambridge University Press 2005), p. 194.

the limitation of the scope of genocide insofar as these groups' members are in greatest need of protection since, at least in the case of national, racial or ethnic groups, they cannot 'separate themselves from the group by merely distancing them from the group.'²¹ Thus, as one author puts it, 'the fate of the individual is indissolubly linked with the fate of the group.'²²

The definition is furthermore narrowed down by the requirement that the acts be targeted at the group 'as such.' Indeed, this formula means that the victim of the crime of genocide is the group itself and not the individual.

The second fundamental component relates to the specific intent or *dolus specialis* which needs to be proven in order to qualify an act as genocide.

Indeed, in addition to the Article 30 'general intent requirement,' *dolus specialis* has to be proven, showing that the crimes were planned with that specific intention of destroying a particular group, as such.

The Elements of Crimes list the specific intent requirement as the third component under each category of genocide and they consistently define the specific intent as follows: 'The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.'²³

With regard to this 'specific intent requirement,' it has been proposed in the literature that this concept be envisaged according to either a knowledge-based or a purpose-based approach.²⁴ The difference between the two is said to reside in the fact that the purpose-based approach, by contrast to the knowledge-based approach, requires the individual intent to mirror the collective goal in the form of a personal desire, aim, goal or purpose. However, the purpose-based approach has been considered to be flawed inasmuch as it requires 'a combination of an *actus reus* formulated from the perspective of the subordinate level with what is typically a leadership standard of *mens rea*.'²⁵

The third common element, often referred to as 'the contextual element,' is defined in the Elements of Crimes as the requirement that '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'²⁶ However, as will be demonstrated below, this element has not yet been clarified by established jurisprudence and there is no unanimity regarding the question of whether or not it should be recognised.

²¹ Ibid., p. 198.

²² *Idem*.

²³ See ICC, *Elements of Crimes*, Art. 6(a)(3); Art. 6(b)(3.); Art. 6(c)(3); Art. 6(d)(3); Art. 6(e)(3).

²⁴ For a more detailed elaboration of this concept see C. Kreß, *supra* n.11, at pp. 496-497.

²⁵ Ibid., pp. 496-497.

²⁶ See ICC, *Elements of Crimes*, Art. 6 (a)(4); Art. 6(b)(4); Art. 6(c)(5); Art. 6(d)(5); Art. 6(e)(7).

III. THE CRIME OF GENOCIDE AS APPLIED IN THE ICC'S RECENT PRACTICE

III.1 Procedural and historical background

On 14 July 2008, the Prosecutor of the ICC submitted an application for a warrant of arrest against Omar Al Bashir.²⁷

As regards the background of this application, it should be recalled that already in September 2004, international attention regarding the situation in Darfur had heightened as a consequence of a statement²⁸ by the United States' (hereinafter, the US) Secretary of State Colin Powell to the Senate Foreign Relations Committee, affirming that genocide was occurring in Darfur and that the GoS and the Janjaweed bore responsibility. This assertion was based on data collected from a field investigation in 2004, the 'Darfur Atrocities Documentation Project',²⁹ which was sponsored by the US State Department.

In September 2004, the United Nations Security Council (hereinafter, the UNSC) passed Resolution 1564,³⁰ which called for an 'international commission of inquiry on Darfur' to assess the Sudanese conflict. This resolution specifically directed the commission, which was to be chaired by Professor Antonio Cassese, to 'determine ... whether or not acts of genocide have occurred'.³¹

In January 2005, the United Nations (hereinafter, the UN) released the commission's report which stated that, while there were mass murders and rapes, they could not label this conduct as genocide because 'the crucial element of genocidal intent appear[ed] to be missing'.³²

In this report, the commission further recommended that the UNSC should refer the situation in Darfur to the ICC, pursuant to Article 13(b) of the Statute.³³

Indeed, it was stated that the crimes committed in Darfur fell within the jurisdiction of the Court.³⁴ Furthermore, the commission emphasised that the Sudanese justice system had demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes,³⁵ a statement which quite obviously constituted a reference to the complementarity principle enshrined in Article 17 of the Statute.

²⁷ See ICC, *Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008*, ICC-02/05-157, 12 September 2008.

²⁸ Voice of America. Text of Colin Powell Testimony to Senate Foreign Relations Committee (September 2009) available at www.voanews.com.

²⁹ S. Totten, 'The Darfur Atrocities Documentation Project', in 68 *Social Education* (2004).

³⁰ Security Council, UN Doc. S/RES/1564 (18 September 2004).

³¹ *Ibid.*, para. 12.

³² Report of the International Commission of Inquiry on Darfur to the Secretary-General – Pursuant to Security Council Resolution of 18 September 2004, UN Doc. S/2005/60 (1 February 2005), para. 640.

³³ *Ibid.*, para. 584.

³⁴ *Ibid.*, paras. 583-616.

³⁵ *Ibid.*, para. 640.

In March 2005, the UNSC followed suit and referred, with Resolution 1593,³⁶ the situation in the Sudan, Darfur, to the Prosecutor.

In July 2008, the Prosecutor submitted an application for a warrant of arrest against Omar Al Bashir, which included three counts of genocide, specified in paragraph 62 of the 'Public Summary of Prosecutor's Application'.³⁷ These three counts respectively referred to Article 6(a), (b) and (c) of the Statute, i.e., '[g]enocide by killing members of each target group,' '[g]enocide by causing serious bodily or mental harm to members of each target group,' as well as '[g]enocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction'.³⁸

For each individual count, it was alleged that Omar Al Bashir had committed the respective crimes 'through other persons ... against the Fur, Masalit and Zaghawa ethnic groups in Darfur, the Sudan, by using the state apparatus, the Armed Forces and Militia/Janjaweed to commit acts ... with intent to destroy the groups as such, in part, in violation of Arts. 6(a) and 25(3)(a) of the Rome Statute'.³⁹

In December 2008, the Chamber requested the Prosecutor to provide additional information and supporting materials pursuant to Regulation 28(1) of the Regulations of the Court.⁴⁰

On 4 March 2009, the Chamber issued a warrant of arrest against Omar Al Bashir for war crimes and crimes against humanity.⁴¹ However, in its 'Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Al Bashir'⁴² (hereinafter, the Decision), the Majority, Judge Ušacka dissenting, declined to include the counts concerning the crime of genocide in the warrant of arrest. This outcome was based on the Majority's finding that the materials provided by the Prosecutor in support of his application failed to provide 'reasonable grounds to believe' that the GoS had acted with specific intent (*dolus specialis*) to destroy in whole or in part the Fur, Masalit and Zaghawa groups.

In spite of this outcome, the Decision provides a first important illustration of the Chamber's actual application of the ICC's legal framework relating to the crime of genocide.

III.2 The Majority's decision not to include the charges of genocide in the warrant of arrest

The Majority first undertook an interpretation of the Elements of Crimes concerning genocide. For that purpose, it distinguished between the contextual element of the crime of genocide on the one side and specific elements on the other.

³⁶ Security Council, UN Doc. S/RES/1593 (31 March 2005).

³⁷ ICC, *supra* n. 5, ICC-02/05-152, at para. 62.

³⁸ *Ibid.*, para. 62.

³⁹ *Idem.*

⁴⁰ ICC, *Decision Requesting Additional Information and Supporting Materials*, ICC-02/05-166 (9 December 2008).

⁴¹ ICC, *supra* n. 5, ICC-02/05-01/09-1.

⁴² ICC, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3 (4 March 2009).

III.2.a *The contextual element*

As outlined above, the Elements of Crimes require a contextual element in order to qualify an act as amounting to genocide. Yet, the Majority pointed to the existing difference of view concerning the question of whether or not such a contextual element should be recognised.

Indeed, the Majority observed that the definition of the crime of genocide in the Genocide Convention does not expressly require any contextual element. Moreover, it acknowledged that the Genocide Convention definition had been interpreted in the case-law of the International Criminal Tribunal for the former Yugoslavia (hereinafter, the ICTY) and the International Criminal Tribunal for Rwanda (hereinafter, the ICTR) as excluding any type of contextual element, such as a genocidal policy or plan. Thus, the *ad hoc* tribunals' jurisprudence emphasised that the protection offered to the targeted groups was dependent on the existence of an intent to destroy, in whole or in part, the targeted group. As soon as such intent exists and materialises in an isolated act against a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence of the group in whole or in part.

Yet, the Elements of Crimes require a so-called contextual element which was interpreted by the Majority as implying that the crime of genocide was only completed when the relevant conduct presented a concrete threat to the existence of the targeted group, or part thereof.

Regarding the question of whether or not this additional element should be recognised, the Majority considered that the Elements of Crimes must be applied 'unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand and the Statute on the other hand.'⁴³ Only such an irreconcilable contradiction would require the provisions contained in the Statute to prevail.

In the present case, the Majority did not observe any irreconcilable contradiction between the definition of the crime of genocide provided for in Article 6 of the Statute and the contextual element provided for in the Elements of Crimes.

It considered, on the contrary, that

'the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or a part thereof, [was] (i) not *per se* contrary to article 6 of the Statute; (ii) fully respect[ed] the requirements of article 22(2) of the Statute that the definition of the crimes "shall be strictly construed and shall not be extended by analogy" and [that] "[i]n case of ambiguity, the definition sh[ould] be interpreted in favor of the person being investigated, prosecuted or convicted"; and (iii) [was] fully consistent with the traditional consideration of the crime of genocide as the "crime of the crimes."⁴⁴

⁴³ ICC, *supra* n. 42, ICC-02/05-01/09-3, at para. 128.

⁴⁴ *Ibid.*, paras. 117-132.

Therefore, the Majority considered that the Elements of Crimes should be applied.

III.2.b *The specific elements*

Having recognised the applicability of the contextual element, the Majority proceeded by elaborating upon the two specific elements, i.e., the existence of a protected group and the presence of a specific intent.

III.2.b.1 Existence of a protected group

Regarding the requirement of the existence of a protected group, the Majority was of the opinion that there must be a positive definition of the targeted group while a negative definition would not suffice for the purpose of Article 6 of the Statute.

It was held that there were no *reasonable grounds to believe* that distinct national, racial or religious groups had been targeted but that there were *reasonable grounds to believe* in the existence of three distinct ethnic groups as a target. Indeed, it was considered that each of the three ethnic groups – the Fur, the Masalit and the Zaghawa – had its own language, its own tribal customs and its own traditional links to its lands.⁴⁵

III.2.b.2 The specific intent requirement

The second specific element relates to the specific intent or *dolus specialis* which needs to be proven in order to qualify an act as amounting to genocide.

Indeed, as outlined above, the Elements of Crimes for genocide endow each of the five categories of genocidal act with a third element that consistently defines the specific intent as follows: ‘The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.’⁴⁶

The Majority deduced from these provisions that the crime of genocide included two subjective elements:

‘a general subjective element that must cover any genocidal act provided for in article 6(a) to (e) of the Statute, and which consists of article 30 intent and knowledge requirement [and] an additional subjective element, normally referred to as “*dolus specialis*” or specific intent, according to which any genocidal acts must be carried out with the “intent to destroy in whole or in part” the targeted group.’⁴⁷

The Majority went on in applying the law on the proof by inference to the Article 58 evidentiary standard in relation to the alleged GoS’s genocidal intent.

First, it noted that the Prosecutor admitted that he relied exclusively on proof by inference to substantiate his allegations concerning Omar Al Bashir’s reported responsibility for genocide.

⁴⁵ Ibid., paras. 135-137.

⁴⁶ See ICC, *Elements of Crimes*, Art. 6(a)(3); Art. 6(b)(3); Art. 6(c)(3); Art. 6(d)(3); Art. 6(e)(3).

⁴⁷ ICC, *supra* n. 42, ICC-02/05-01/09-3, at para. 139.

Before engaging in the actual evaluation of evidence, the Majority pointed out that it seemed appropriate to refer to 'the GoS's genocidal intent' as opposed to 'Omar Al Bashir's genocidal intent.'

It was underscored that, according to the Prosecutor, Omar Al Bashir was in full control of the 'apparatus' of the State of Sudan which he used to carry out a genocidal campaign against the Fur, Masalit and Zaghawa groups.

Consequently, the Majority considered that, if the materials provided by the Prosecutor supported his allegations in this regard, the existence of reasonable grounds to believe that Omar Al Bashir had a genocidal intent would automatically lead to the conclusion that there were also reasonable grounds to believe that a genocidal campaign against the Fur, Masalit and Zaghawa groups was a core component of the GoS's counter-insurgency campaign.

However, it was emphasised that the situation would be different if the materials provided by the Prosecutor showed reasonable grounds to believe that Omar Al Bashir shared the control over the 'apparatus' of the State of Sudan with other high-ranking Sudanese political and military leaders. In this situation, the Majority was of the view that the existence of reasonable grounds to believe that one of the core components of the GoS's counter-insurgency campaign was a genocidal campaign against the Fur, Masalit and Zaghawa groups would be dependent upon the existence of reasonable grounds to believe that those who shared the control of the 'apparatus' of the State of Sudan with Omar Al Bashir agreed that the GoS's counter-insurgency campaign would, *inter alia*, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.⁴⁸

In applying the law on the proof by inference to the Article 58 evidentiary standard in relation to the existence of a GoS's genocidal intent, the Majority agreed with the Prosecutor in that such a standard would be met only if the materials provided showed that the *only* reasonable conclusion to be drawn was the existence of reasonable grounds to believe in the existence of a GoS's specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.⁴⁹

The Prosecutor listed nine different factors from which to infer the existence of a GoS's genocidal intent. These factors were classified by the Majority into three different categories, namely the alleged existence of a GoS strategy to deny and conceal the crimes allegedly committed in the Darfur region against the members of the Fur, Masalit and Zaghawa groups; some official statements and public documents, which, according to the Prosecutor, provided reasonable grounds to believe in the (pre) existence of a GoS genocidal policy; as well as the nature and extent of the acts of violence committed by GoS forces against the Fur, Masalit, and Zaghawa civilian population.⁵⁰

After having analysed the materials provided by the Prosecutor, the Majority concluded that the existence of *reasonable grounds to believe* that the GoS acted

⁴⁸ Ibid., paras. 148-151.

⁴⁹ Ibid., para. 158.

⁵⁰ Ibid., para. 164.

with a specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups was not the only reasonable conclusion that could be drawn.⁵¹

However, the Majority emphasised that, 'if, as a result of the ongoing Prosecutor investigation into the crimes allegedly committed by President Al Bashir, additional evidence on the existence of a GoS's genocidal intent [was] gathered, the Majority's opinion in this decision would not prevent the Prosecutor from requesting, pursuant to Article 58(6) of the Rome Statute, an amendment to the Warrant of Arrest against Omar Al Bashir in order to include the crime of genocide.'⁵²

III.3 Judge Ušacka's 'Separate and Partly Dissenting Opinion'

Judge Ušacka agreed with the Majority as to the outcome of the decision, i.e., the issuance of the warrant of arrest, but she expressed a 'Separate and Partly Dissenting Opinion'⁵³ pertaining to the crime of genocide, particularly inasmuch as the alleged genocidal intent and the alleged criminal responsibility of Omar Al Bashir were concerned. Indeed, by contrast to the Majority, she was of the opinion that there were 'reasonable grounds to believe' that Omar Al Bashir had committed the crime of genocide.

This conclusion resulted mainly from a different construction of the standard of proof required to establish the existence of 'reasonable grounds to belief.' Indeed, Judge Ušacka had a different opinion regarding the issue of whether or not the Prosecutor must demonstrate at this stage of the proceedings that the *only* reasonable inference from the evidence was that of genocidal intent.

Judge Ušacka highlighted that the evidentiary threshold increases at each stage of the proceedings, i.e., the warrant of arrest/summons to appear stage, the confirmation of charges stage and finally the conviction stage. In her view, the evidentiary threshold at the warrant of arrest stage had the lowest level in comparison to the other stages. On this basis, Judge Ušacka examined the evidence provided by the Prosecutor in regard to the three counts of genocide.

She first analysed the three common elements of the different counts. She considered that the contextual element was met, regardless of whether or not it should be applied.⁵⁴ In this regard, she disagreed with the Majority's view that a concrete threat was required to satisfy the contextual elements.

Inasmuch as the protected group was concerned, she disagreed with the Majority's findings leading to the recognition of three separate groups and defined the victimised group as constituting a 'single ethnic African group of the African tribes, which consists of smaller groups, namely the Fur, Masalit and Zaghawa.'⁵⁵

As regards the contentious element of the specific intent, Judge Ušacka's analysis of the evidence led her to the conclusion that the possession of genocidal intent

⁵¹ Ibid., para. 205.

⁵² Ibid., para. 207.

⁵³ ICC, *supra* n. 42, *Separate and Partly Dissenting Opinion of Judge Ušacka*, ICC-02/05-01/09-3.

⁵⁴ Ibid., para. 20.

⁵⁵ Ibid., para. 26.

was one of the reasonable inferences which could be drawn from the available evidence.

In her view, this inference did not need to be the only reasonable inference at this stage of the proceedings.⁵⁶ Although she admitted that a different conclusion could be reached under a stricter evidentiary threshold, she clarified that this could not be considered at the warrant of arrest stage.⁵⁷

In addition, Judge Ušacka argued that the Prosecutor presented no evidence which would conclusively exclude the reasonable inference of a genocidal intent.⁵⁸

While the Majority noted that during the attacks most of the members of the targeted group had been neither killed nor injured, Judge Ušacka stated that the means of the genocidal destruction 'need not be the most efficient.'⁵⁹

As a conclusion, Judge Ušacka was satisfied that there were *reasonable grounds to believe* that Omar Al Bashir possessed genocidal intent.⁶⁰

Judge Ušacka went on to assess the evidence provided with regard to the three counts of genocide and came to the conclusion that there were reasonable grounds to believe that each had been committed.⁶¹

Finally, she disagreed with the Majority on the question of the mode of liability. Failing to find any evidence which would address the issue of the 'locus of control,' she was unable to decide whether such control rested fully with Omar Al Bashir, or whether it was shared by others. As a result, she did not find any reasonable grounds to believe that Omar Al Bashir was responsible through co-perpetration and she would thus have based the warrant of arrest only on the mode of indirect perpetration.⁶²

III.4 The Prosecutor's application for leave to appeal pursuant to Article 82(1)(d) of the Statute

On 10 March 2009, the Prosecutor submitted a public redacted version of his application for leave to appeal the Chamber's decision.⁶³

In this application, he sought leave to appeal three issues. First, he requested the Appeals Chamber to clarify whether the correct standard of proof in the context of Article 58 of the Statute required that the *only* reasonable conclusion to be drawn from the evidence was the existence of *reasonable grounds to believe* that the person had committed a crime within the jurisdiction of the Court. The second issue related to the question whether the Majority had considered specific extraneous

⁵⁶ Ibid., para. 32.

⁵⁷ Ibid., para. 85.

⁵⁸ Ibid., para. 83.

⁵⁹ Ibid., para. 78.

⁶⁰ Ibid., para. 86.

⁶¹ Ibid., paras. 91-102.

⁶² Ibid., paras. 103-104.

⁶³ ICC, *Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'*, ICC-02/05-01/09-12 (10 March 2009).

factors in assessing the existence of reasonable grounds to establish genocidal intent. Finally, he asked whether the Majority had failed to consider both separately and collectively specific critical factors in assessing the existence of reasonable grounds to establish genocidal intent.⁶⁴

The Chamber, in its decision,⁶⁵ only granted the Prosecutor's application in relation to the first issue and rejected the application in relation to the two other issues. It was stated that the first issue met the two cumulative criteria provided for in Article 82(1)(d) of the Statute, i.e., the existence of a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings on the outcome of the trial and the criterion that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

By contrast, the second and third issues were considered as consisting of a mere disagreement with the Majority's assessment of the evidence submitted by the Prosecutor to support his genocide-related allegations and were therefore not issues as defined by Article 82(1)(d) of the Statute.⁶⁶

Pursuant to this decision, on 6 July 2009, the Prosecutor submitted the public version of the 'Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"' which contains the Prosecutor's statements regarding the above-mentioned first issue.

As ground of appeal, the prosecutor submits that 'the Majority applied the wrong legal standard for drawing inferences for the purposes of Article 58'⁶⁸ and thereby imposed on the prosecutor an evidentiary burden that is inappropriate for the procedural stage at hand.

The Prosecutor's submission concerns the argument used by the Majority that, in order to establish 'reasonable grounds to believe' and to issue a warrant of arrest on genocide charges, the inference of specific genocidal intent must be the only reasonable inference available on the evidence.

The Prosecutor states that, by doing so, the Majority applied an erroneous evidentiary test, 'effectively equal to that of "beyond reasonable doubts" which is required at the trial stage for the conviction of the Accused.'⁶⁹

According to the Prosecutor, this standard is not applicable at the warrant of arrest stage. At this early stage, it is sufficient if the inference of genocidal intent drawn from the evidence is reasonable and there is no requirement that the inference be the only one available.

⁶⁴ Ibid., para. 13.

⁶⁵ ICC, *Decision on 'Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"'*, ICC-02/05-01/09-21 (24 June 2009).

⁶⁶ Ibid., pp. 8-9.

⁶⁷ ICC, *Prosecution Document in Support of Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'*, ICC-02/05-01/09-25 (6 July 2009).

⁶⁸ Ibid., para. 19.

⁶⁹ Ibid., para. 3.

The Prosecutor contends that the requirement of the ‘only reasonable inference available on the evidence’ is not contained in Article 58 of the Statute. Furthermore, this requirement cannot be considered as a consequence of the Prosecutor’s reliance on indirect evidence since the Statute provides no basis for creating or applying different standards of proof for direct evidence and indirect evidence.⁷⁰

According to the Prosecutor, the lower standard at the warrant of arrest stage is also consistent with the prior jurisprudence of international tribunals such as the ICC, the ICTY, the ICTR and the European Court on Human Rights as well as with the practice in national legal systems.⁷¹

Finally, it is affirmed that requiring such a high standard at the warrant of arrest stage, ‘when the suspect is still at large and when their detention may be required “to ensure that the person does not obstruct or endanger the investigation,” could well endanger the lives of prospective witnesses.’⁷²

In light of these considerations, the Prosecutor requests the Appeals Chamber to

‘overturn the Decision to the extent that it held the Prosecution had not established “reasonable grounds to believe” that President Omar Al Bashir had genocidal intent; set out the correct standard for drawing inferences under Article 58 of the Statute; and apply that correct standard to the facts found by the Pre-Trial Chamber, entering a finding that there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide under Articles 6(a), (b) and (c) of the Statute, and direct the Pre-Trial Chamber to issue a warrant of arrest on those counts; or in the alternative, remand the matter to the Pre-Trial Chamber to decide on whether there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide under Articles 6(a), (b) and (c) of the Statute, applying the correct standard.’⁷³

It remains to be seen whether and to which extent the Appeals Chamber will accept these submissions. It is likely that the Appeals Chamber will see these appeal proceedings as an opportunity to clarify some of the issues raised by the Prosecutor’s appeal.

IV. CONCLUSION

The fundamental importance of the crime of genocide pursuant to Articles 5(1)(a) and 6 of the Statute and the Court’s recent judicial proceedings regarding the crime of genocide may lead, in a quite natural way, to a number of questions:

What are some of the main implications and consequences of the inclusion of the crime of genocide in the Rome Statute? What is the significance of this evolu-

⁷⁰ Ibid., para. 38.

⁷¹ Ibid., paras. 43-50.

⁷² Ibid., para. 46.

⁷³ Ibid., para. 65.

tion of the prohibition of genocide, as stipulated in the Genocide Convention of 1948?

Obviously, these are questions of some complexity and importance to which an appropriate or even full answer is, at this stage, hardly possible. On the other hand, there are a number of elements and observations which merit a recapitulation in order to better understand and appreciate this recent legal development.

It is worth recalling as a first observation that during the codification process of the Statute, before and during the Rome Conference in 1998, the proposal to include the crime of genocide in the list of core crimes never met any opposition. Quite to the contrary, this proposal seemed so obvious to the international community that it enjoyed full support of the participating states. Furthermore, there was almost consensus that not only the concept as such but the wording of the Genocide Convention and the five forms of genocide as set out in this convention should as such be transferred to the future Rome Statute. This demonstrates that the prohibition of genocide was generally regarded, already at the end of the last century, as universally accepted customary international law and even as *jus cogens*. Also those states which later did not become States Parties to the Rome Statute never questioned the inclusion of this core crime in the future jurisdiction *ratione materiae* of the Court. Thus, current Article 6 of the Statute concerning the crime of genocide seems to be based on the free and unanimous consent of the international community. Article 6 of the Statute may, therefore, be regarded as a recent and strong reaffirmation of the prohibition of this international crime.

In the same manner, attention must again be drawn to the fact that, through Article 6 of the Statute, the existing obligation for States Parties of the Genocide Convention to prevent genocide and to punish the perpetrators – a matter of state responsibility – was turned into and consolidated in a genuine and general norm of international criminal law establishing individual criminal responsibility of perpetrators of this crime. As this is the case with general norms of criminal law, the previously existing general prohibition of genocide is through Articles 6 and 77(1) of the Statute now strengthened and ‘armed’ with an appropriate sanction. Article 77(1)(b) of the Statute provides that genocide may be punished with a penalty of up to a term of life imprisonment. Obviously, this amounts to a considerable strengthening of this prohibition.

Thirdly, many believe that the Elements of Crimes regarding genocide have, to some extent, clarified the five forms of genocide set out in Article 6 of the Statute. It is also safe to assume that the common and consensual elaboration of the Elements of Crimes regarding genocide in the ICC Preparatory Commission (1999-2001) probably has fostered a better understanding of the crime of genocide. Thus, the subsequent elaboration of the Elements of Crimes regarding genocide after the adoption of the Statute on 17 July 1998 may be regarded as a further consolidation and clarification of this crime. As the Elements of Crimes shall assist the Court in the interpretation of the core crimes, one may expect that also the Elements of Crimes regarding genocide will increase the chance for a better practical manageability of and more consistent solutions to the difficult issues related to genocide.

Finally, the inclusion of the crime of genocide in the Statute has acted as a catalyst for the introduction of national criminal law regarding genocide in quite a number of countries. This has had the far-reaching consequence that many States Parties have in their implementing legislation for the first time transferred the prohibition of genocide in their national criminal law.⁷⁴ While a small number of states had already before the adoption of the Statute national criminal norms regarding genocide,⁷⁵ the increasing adoption of such national criminal law, in the framework of implementing legislation, is obviously another avenue to strengthen this prohibition and the related awareness of this prohibition both internationally and nationally.

In sum, there is little doubt that the inclusion of the crime of genocide in the Statute adopted in 1998 has opened a new chapter. It has considerably strengthened this prohibition; it has also increased international awareness and universal rejection of and abhorrence regarding this crime as well as the commitment to investigate and prosecute crimes of genocide.

Needless to say, especially for a judge of the International Criminal Court, we all must hope that there is in the future no necessity to investigate or prosecute this crime.

⁷⁴ See for example Art. 6 *Völkerstrafgesetzbuch* [German Code of Crimes against International Law (CCAIL)], BGBl. 2002 I, p. 2144, which contains a *quasi verbatim* translation of Art. 6 of the Rome Statute; *Australian Implementation of the Rome Statute of the International Criminal Court Act* 27 of 18 July 2002.

⁷⁵ See for example the United Kingdom's Genocide Act passed in 1969, Art. 211-1 *Code pénal* [French criminal code] of 1994, Arts. 1 to 7 Lei N° 2.889 de 1° de outubro de 1965 [Brazilian Law No. 2.889 of 1 October 1965], Art. 281 of the Penal Code of the Empire of Ethiopia of 23 July 1957.