

## The Crime of Genocide under International Law

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### Abstract

The article sets out the nature, the history and the general structure of the crime of genocide and provides a comprehensive analytical commentary of the elements of the crime. Against the current trend of the international case law to expand the boundaries of the definition at the risk of the crime's trivialization this article develops a strict construction even if the results may appear politically unattractive. The article starts from the premise that, for all practical purposes, the occurrence of a crime of genocide entails a collective destructive act. This collective act forms the objective point of reference of the required intent to destroy a protected group in whole or in part; the vain hope of an individual to contribute, by way of commission of one of the underlying offences, to the destruction of a group falls short of this concept of a realistic genocidal intent. The article rejects a purely subjective definition of the various categories of protected groups and cautions against the conversion of the crime of genocide into an unspecific crime of massive human rights violations based on discriminatory motive. At the same time, it is submitted that not every campaign of so-called "ethnic cleansing" is to be considered as the infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Regarding the mental elements of the crime it is held that, contrary to a widespread belief, it is the interpretation of the terms "destroy" and above all "part" (of a group) that determines the general scope of the crime to a much greater extent than the construction of the word "intent". The predominant narrow interpretation of the word "destroy" in its physical and biological meaning is supported while it is noted that the most recent *ICTY* case law reveals an inclination of re-introducing the concept of social group destruction through the backdoor of the words "in part". The extension of those words to comparatively small regional communities is probably the most conspicuous aspect of the general trend to over-expand the crime's definition. Conversely, the reference to the particularly heinous character of genocide is not good enough an argument to accept the many flaws of the prevailing purpose-based approach to the word "intent". The article suggests instead that the word "intent" means that the perpetrator commits the prohibited act with the knowledge to further thereby a campaign targeting members of a protected group with the realistic goal of destroying that group in whole or in part.

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## 1. Introduction

In one of the first judgments of an international criminal court on the crime of genocide, in *Prosecutor v. Kambanda*, a Trial Chamber of the *ICTR* stated:

“The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent ‘to destroy in whole or in part, a national ethnic, racial or religious group as such; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.’”<sup>1</sup>

Soon after, *William Schabas* called genocide the crime of crimes in the subtitle of his ground-breaking monograph “Genocide in International Law”.<sup>2</sup> Whatever the merits of this categorization as “crime of crimes” in a technical legal sense<sup>3</sup>, the formula appropriately conveys the idea that a particular stigma is attached to any conviction for this crime. As the *ICTY* Appeals Chamber put it in *Prosecutor v. Krstic*:

“Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium.”<sup>4</sup>

Certainly, this special condemnation and opprobrium has a lot to do with the prime historic example behind the international criminalization of genocide: the “extermination of eight million persons, primarily because of their race, religion or ethnicity”<sup>5</sup> by the German Nazis. The recent experience with the situation in Sudan (Darfur) confirms how much the idea of specific stigmatization continues to be the prevailing perception: The public interest in the outcome of the work of the *Commission of Inquiry to investigate reports of international humanitarian law and human rights law in Darfur, Sudan* (the *Darfur Commission*), was so much focussed on the question whether or not the Commission would consider the Sudanese Government responsible for a genocidal policy that the Commission, having found in the negative, hastened to add that “[i]nternational offences such as the crimes against humanity and

<sup>1</sup> *Prosecutor v. Kambanda*, Judgment and Sentence, ICTR-97-23-S, 4 September 1998, para. 16.

<sup>2</sup> Cambridge, Cambridge University Press, 2000.

<sup>3</sup> Subsequently, the *ICTR* Appeals Chamber denied the existence of a hierarchy of crimes in *Prosecutor v. Kayishema and Ruzindana*, Judgment (Reasons), ICTR-95-1-A, June 2001, para. 367.

<sup>4</sup> *Prosecutor v. Krstic*, Judgment, IT-98-33-A, 19 April 2004 [hereafter *Krstic Appeal*], para. 36.

<sup>5</sup> *Thomas Franck* in his oral pleading before the *ICJ* in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), CR 2006/5, 1 March 2006.

war crimes may be no less serious and heinous than genocide".<sup>6</sup> This statement may have gone somewhat too far, at least in so far as war crimes are concerned. At the same time, it was to be welcomed in stressing the similarly grave nature of genocide and crimes against humanity.<sup>7</sup> This should not be misunderstood, however, as lending support to what is not only a doctrinal tendency but also an unfortunate trend in the international case law to expand ever more widely the concept of genocide at the risk of trivializing the "crime of crimes".<sup>8</sup>

## 2. Protected Values

The elevation of genocide to the "crime of crimes" contrasts with the *Nuremberg* categorization of waging a war of aggression as the "supreme crime under international law".<sup>9</sup> This contrast reflects the tendency of the more recent case law of international criminal courts to "supplant a State-sovereignty-oriented approach by a human-being-oriented approach".<sup>10</sup> Waging a war of aggression necessarily and directly violates international peace and security within the strict meaning of the term. A crime of genocide, however, may well remain confined within the borders of a State and will then only *threaten* international peace and security in view of the "international disturbances"<sup>11</sup> which may result from it. Whether the *Nuremberg* pronouncement still holds true would thus seem to depend on whether or not international peace and security continues to be the value *primarily* protected by the international legal order.

In *Prosecutor v. Akayesu* the *ICTR* Trial Chamber held that "the crime of genocide exists to protect certain groups from extermination or attempted extermination".<sup>12</sup> The idealistic philosophy underlying this statement can be

<sup>6</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Annex to U.N. Doc. S/2005/60, 1 February 2005 (hereafter: Darfur Report).

<sup>7</sup> For a similar view, see *Peter Quayle*, *The Legislative Limitations of the Genocide Convention*, 5 *International Criminal Law Review* (2005), 364 et seq.

<sup>8</sup> For similar a word of caution, see *Freda Kabatsi*, *Defining or Diverting Genocide: Changing the Comportment of Genocide*, 5 *International Criminal Law Review* (2005), 399.

<sup>9</sup> Judgment of the *International Military Tribunal* for the Trial of German Major War Criminals, *Nuremberg* 30th September and 1st October 1946, London, Her Majesty's Stationery Office, 1946, p. 13.

<sup>10</sup> *Prosecutor v. Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction, IT-94-1-AR72, 2 October 1995, para. 97.

<sup>11</sup> *Raphael Lemkin* already stressed the possibility of international disturbances as a consequence of the commission of genocide; *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944), p. 93.

<sup>12</sup> *Prosecutor v. Akayesu*, *ICTR-96.4.T*, Judgment, 2 September 1998, para. 469.

traced back to *Raphael Lemkin's* monumental study "Axis Rule in Occupied Europe" in which he wrote:

"The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world".<sup>13</sup>

The same thought received its classic formulation in G.A. resolution 96 (I) pursuant to which genocide results "in great losses to humanity in the form of cultural or other contributions".<sup>14</sup> The question remains whether, as the *Akayesu* judgment suggests<sup>15</sup>, the survival of certain groups of human beings is the *only* value protected by the crime of genocide. On the one hand, it would seem premature to disconnect entirely the criminalization of genocide from the value of international peace and security as this value may well continue to be an overarching point of reference for the existing international criminal legal order.<sup>16</sup> At the same time, the legitimate interest of the world community in the survival of certain *groups* should not detract altogether from the fact that a crime of genocide also infringes upon *individual* rights on a massive scale.<sup>17</sup> In this context, it should also be borne in mind that it is the perspective of the *perpetrators* that "individuals are important not per se but only as the members of the group to which they belong"<sup>18</sup>, and that this perspective must not be confused with the protective goal of the international legal order. The perspective of this legal order is much better captured by *Lemkin's* statement:

"Moreover, such destruction offends our feelings of morality and justice in much the same way as does the criminal killing of a human being; the crime in the one case as in the other is murder, though on a vastly greater scale."

<sup>13</sup> Axis Rule in Occupied Europe, p. 91.

<sup>14</sup> U.N. Doc. A/96 (I), 11 December 1946.

<sup>15</sup> See also German *Bundesgerichtshof*, Judgment of 30 April 1999, 45 Amtliche Sammlung der Entscheidungen des Bundesgerichtshofs in Strafsachen (2000), p. 81.

<sup>16</sup> Cf. the title Code of Crimes against Peace and Security of Mankind chosen by the *ILC* for its important 1996 draft (Yearbook of the International Law Commission 1996 II 2, p. 386) and see the prominent reference to "peace and security of the world" in the third preambular consideration of the *ICC* Statute (while not ignoring the somewhat lofty additional reference to the "well-being").

<sup>17</sup> *Pieter N. Drost*, *The Crime of State. Book II: Genocide* (Leyden: A. W. Sythoff, 1959), p. 124.

<sup>18</sup> *Nehemiah Robinson*, *The Genocide Convention. A Commentary* (New York: Institute of Jewish Affairs, 1960), p. 58.

A view that incorporates all three values<sup>19</sup> would thus seem to reflect best the complex protective thrust behind the criminalization of genocide.

### 3. History

*Jean-Paul Sartre's* point may be true that the “fact of genocide is as old as humanity”<sup>20</sup>, but as an international legal concept the crime of genocide is a rather recent arrival. At the time of the *Armenian case*, which is nowadays widely seen as an early incident of a *genocidal* campaign<sup>21</sup>, genocide was still “a crime without name” as *Winston Churchill* would later say.<sup>22</sup> Accordingly, the governments of France, Great Britain and Russia, in their joint declaration of 28 May 1915, denounced the Turkish campaign “merely” as “crimes against humanity and civilization”.<sup>23</sup> In the context of international criminal law, the term genocide was coined only in 1944 by the Polish jurist *Raphael Lemkin*<sup>24</sup> who then became a main driving force behind the international criminalization of genocide. *Lemkin's* wide concept of genocide, including cultural genocide by way of destruction of the cultural prerequisites of life as a group, was not directly reflected in the Statutes of the Tribunals of Nuremberg and Tokyo but was already alluded to within the context of crimes against humanity.<sup>25</sup>

The emancipation of genocide as a distinct crime under international law began with G.A. resolution 96 (I) by which the U.N. Economic and Social

<sup>19</sup> *Claus Kреб*, § 220a/§ 6 VStGB, in: *Wolfgang Joecks/Klaus Mierbach*, eds., *Münchener Kommentar zum Strafgesetzbuch*. Band 3 (München: Verlag C. H. Beck, 2003), p. 639.

<sup>20</sup> On Genocide, in: *Richard Falk/Gabriel Kolko/Robert Jay*, eds., *Crimes of War* (New York: Random House, 1971), p. 534.

<sup>21</sup> It would not seem, though, that the international debate on the point has reached a conclusive point; see, on the one hand, *Vahakn N. Dadrian*, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 *The Yale Journal of International Law* (1989) 221; *Taner Akcan*, *Armenien und der Völkermord* (Hamburg: Hamburger Edition, 2004), *passim*; but see, on the other hand, the controversial recent study by *Guenter Lewy*, *The Armenian Massacres in Ottoman Turkey. A Disputed Genocide* (Salt Lake City: The University of Utah Press, 2005), p. 250 et seq.

<sup>22</sup> Quoted after *Leo Kuper*, *Genocide*. Its political use in the Twentieth Century (New Haven: Yale University Press, 1981), p. 12.

<sup>23</sup> *United Nations War Crimes Commission*, ed., *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: Her Majesty's Stationery Office, 1948), p. 35.

<sup>24</sup> *Supra* n. 11, p. 79 et seq.

<sup>25</sup> In particular, the Nuremberg Indictment used the term in this context; for a more detailed account, see *United Nations War Crimes Commission*, *supra* n. 23, p. 148; cf. also *Trial of Hauptsturmführer Goeth, Supreme National Tribunal of Poland*, 7 LRTWC (1948), 7; *U.S. v. Greifelt*, 13 LRTWC (1949), 1.

Council was instructed to formulate a draft convention on the crime of genocide. The *U.N.-Secretary-General* and an Ad Hoc Committee of the Economic and Social Council submitted early drafts<sup>26</sup> which both reflected the wide concept suggested by *Lemkin*. Only the subsequent deliberations within the G.A. Sixth Committee<sup>27</sup> led to the elimination of the cultural component of the crime. The Committee's work resulted in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (the Genocide Convention), which entered into force on 12 January 1951.<sup>28</sup> The newly established crime of genocide was then repeatedly the subject of discussions within the U.N.; special mention is due to the reports submitted by *Ruhashyankiko* (1973)<sup>29</sup> and *Whitaker* (1985)<sup>30</sup> and to the work undertaken by the ILC resulting in Article 17 of the 1996 Draft Code of Crimes against Peace and Security of Mankind.<sup>31</sup> Article II of the Genocide Convention was incorporated *tel quel* into the Statutes of the *ICTY* (1993) and the *ICTR* (1994). On 2 September 1998, the *ICTR*, in *Prosecutor v. Akayesu*, rendered the first international conviction ever for genocide and until now the *ICTR* remains the international criminal jurisdiction with the most elaborate case law on the crime of genocide. Again without any change, Article II of the Genocide Convention was transposed into Article 6 of the *ICC* Statute. The Elements of Crimes of the *ICC*<sup>32</sup> contain a number of important indications as to the more specific content of the crime.

#### **4. Crime under International Law and Violation of a *jus cogens* Prohibition for States *erga omnes***

G.A. resolution 96 (I) categorized genocide as a "crime under international law" and the Genocide Convention reiterates this formulation. As a result of the application of the international rules by the *ICTY* and the *ICTR* and the uncontroversial incorporation of the rule into Article 6 of the *ICC* Statute, it

<sup>26</sup> U.N. Doc. E/447 and E/794, both repr. in *Schabas*, supra n. 2, p. 553, 559.

<sup>27</sup> These deliberations are exhaustively documented in the important Summary Records of the meetings of the Sixth Committee of the General Assembly, U.N. GAOR, 6th Committee, 3th session, 1948.

<sup>28</sup> 78 UNTS, p. 277.

<sup>29</sup> Study on the question of the prevention and punishment of the crime of genocide, U.N. Doc. E/CN.4/Sub.2/416, 4 July 1973.

<sup>30</sup> Revised and updated report on the question of the prevention and punishment of the crime of genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, 2 July 1985.

<sup>31</sup> Supra n. 16.

<sup>32</sup> *ICC-ASP/1/3*.

is now beyond question that genocide is a crime under general customary international law.<sup>33</sup>

Genocide is not only a crime under general international law but is also the subject of an international legal prohibition imposed *on States*. Already in 1951 the ICJ considered the prohibition of genocide as customary in nature.<sup>34</sup> In 1996, the ICJ supplemented this early determination by attributing to the prohibition an effect *erga omnes*.<sup>35</sup> Finally, the ICJ recognized in 2006 that the prohibition of genocide amounts to *jus cogens*.<sup>36</sup>

It is possible, that the ICJ will soon be offered an important opportunity to elaborate on the concept of genocide as an internationally wrongful act by a State in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) which, at the time of writing, has concluded the oral pleadings stage.

## 5. Relationship to Crimes Against Humanity and War Crimes

In the technical sense (and using the *ICTY* terminology) the relationship between the crime of genocide and the crime against humanity under Art. 7 of the *ICC Statute* is *not* one of *unilateral speciality*.<sup>37</sup> This definitively<sup>38</sup> follows from the fact that *stricto sensu* genocide, other than a crime against humanity under Art. 7 of the *ICC Statute*, does *not* require the existence of a

<sup>33</sup> For a very interesting reference to the possible role of general principles in the genesis of the criminalization under general international law, see *Payam Akhavan*, *The Crime of Genocide in the ICTR Jurisprudence*, 3 *Journal of International Criminal Justice* (2005), p. 990 et seq.

<sup>34</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 23.

<sup>35</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Yugoslavia*), Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996 (II), p. 616.

<sup>36</sup> Case concerning Armed Activities on the Territory of Congo, Jurisdiction of the Court and Admissibility of the Application (*Democratic Republic of Congo v. Rwanda*), Judgement of 3 February 2006, para. 64; see generally *Jan Wouters/Sten Verhoeven*, *The Prohibition of Genocide as a Norm of Jus Cogens and Its Implications for the Enforcement of the Law of Genocide*, 5 *International Criminal Law Review* (2005), 401 et seq.

<sup>37</sup> On the use of the concepts of “unilateral” and “reciprocal or bilateral” speciality in the *ICTY* case law, see recently *Fulvio Maria Palombina*, *Should Genocide Subsume Crimes Against Humanity?*, 3 *Journal of International Criminal Justice* (2005), 780.

<sup>38</sup> A more difficult question, on which we shall not attempt to give an answer in this study, would be whether, *a part from* the *policy* issue, the existence of the intent to destroy a protected group in whole or in part implies the emergence of a systematic or widespread attack on any civilian population, i.e. the common contextual element of crimes against humanity.



State or organizational policy.<sup>39</sup> Thus the relationship between the crimes of genocide and against humanity is one of “reciprocal or bilateral” speciality.<sup>40</sup> The technical difference between both crimes is further emphasized if the protective thrust of the criminalization of genocide is reduced to group interests and if it is held, by contrast, that crimes against humanity violate (primarily) individual rights.<sup>41</sup> The broader protective scope of the crime of genocide preferred in this study makes it easier not to lose sight of the common historic roots of genocide and crimes against humanity as is evidenced by the *Armenian* case and by the first appearances of the concept in *Nuremberg*. As will be shown in more detail below there is not only no compelling reason to disregard these common roots when interpreting the crime of genocide; nor are there grounds to overemphasize the technical differences between the definitions that both crimes have been given over time. This emphasis on the similarities of both crimes does not, however, imply a positive answer to the controversial question as to whether a conviction for genocide should “subsume” a crime against humanity<sup>42</sup>: The latter problem is conceptually distinct and forms part of the evolving international criminal law on multiplicity of offences (*concursum delictorum*).<sup>43</sup> The correct solution here

<sup>39</sup> In *Prosecutor v. Kunarac et al.*, IT-96-23&IT-96-23/1-A, 12 June 2002, para. 98, the ICTY Appeals Chamber held that “[t]here was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a policy or plan to commit these crimes.” One can only note with the greatest measure of astonishment that such an extremely far-reaching judicial statement has not been supported by the most careful and complete legal reasoning in the text of the judgment itself but simply by a list of texts and cases put together in a footnote without any further explanation. It is submitted that the future case law in international criminal law should not attribute undue authority to *such unreasoned* judicial pronouncements.

<sup>40</sup> Cf., however, the solution chosen by the French legislator to define genocide as a subcategory of crimes against humanity in the *technical* sense (Article 211–1 of the *Nouveau Code Pénal*).

<sup>41</sup> For such view, see *Alicia Gil Gil*, Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs, 112 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2000), p. 396 s. with references to the controversy in Spain in footnote 65.

<sup>42</sup> For a stimulating recent analysis, see *Palombina*, supra n. 37, 786 et seq.; in the case law of the ad hoc Tribunals, it would seem to have been settled that cumulative convictions are not only possible but even required; see *Prosecutor v. Musema*, ICTR-96-13-A, Judgment, 16 November 2001, para. 366; *Krstic* Appeals, supra n. 4, para. 227; for the contrary view, see *Prosecutor v. Krstic*, Judgment, IT-98-33-T, 2 August 2001 [hereafter: *Krstic* Trial Chamber Judgment], para. 686.

<sup>43</sup> The best study of the problem this author has come across is *Carl Friedrich Stuckenberg*, Multiplicity of Offences: Concursum Delictorum, in: *Horst Fischer/Claus Kreß/Sascha Rolf Lüder*, eds., *International and National Prosecution of Crimes Under International Law* (Berlin: Berlin Verlag Arno Spitz GmbH, 2001), p. 559 et seq.

depends on whether or not the applicable *general principles of law* allow one crime to be subsumed by another *beyond* the realm of the universally accepted rule of unilateral speciality (*lex specialis derogat leges generales* or *in toto jure genus per speciem derogatur*).<sup>44</sup>

A clear demarcation line exists between genocide and war crimes because only the latter category presupposes the existence of an armed conflict. Furthermore, while genocide typically falls within the category of *systemic* criminality, the same cannot be said for war crimes. This is not to say, however, that genocide may not be committed within the context of an armed conflict. Where the goal of a military campaign is to exterminate civilians on a massive scale the threshold to genocide will be passed where the targeted civilians form (at least a) part of a group protected by the rule against genocide and are targeted as members of the group concerned.<sup>45</sup>

## 6. Basic Structure

Apart from exceptional circumstances which are conceivable more in theory than in practice, a single human being is not capable of destroying one of the groups protected by the rule against genocide in whole or in part. For all practical purposes, the occurrence of a crime of genocide thus entails a collective activity aimed at the destructive goal. *Lemkin* has expressed this fact as follows:

“[Genocide] is intended [. . .] to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”<sup>46</sup>

The individual act which forms the basis for a conviction of genocide is thus typically part of systemic criminality. For this reason, the *District Court of Jerusalem* inquired into the overall genocidal campaign as masterminded by

<sup>44</sup> For an affirmative response, see *Stuckenberg*, supra n. 43, p. 604; *Palombina*, supra n. 37, 789.

<sup>45</sup> Cf. in this context *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 14; *Case Concerning Legality of Use of Force (Yugoslavia v. Belgium)*, Request for the Indication of Provisional Measures, ICJ Order of 2 June 1999, para. 40; for a more detailed analysis, see *Kreß*, supra n. 19, p. 662 s.

<sup>46</sup> Supra n. 11, p. 79; for an important recent statement in line with the quotation from *Lemkin* and the following text, see *William Schabas*, *Darfur and the ‘Odious Scourge’: The Commission of Inquiry’s Findings on Genocide*, 18 *Leiden Journal of International Law* (2005), 877; “The theory that an individual, acting alone, may commit genocide is little more than a sophomoric *hypothèse d’école*, and a distraction for judicial institutions.”

the Nazi leadership.<sup>47</sup> For the same reason the *ICTR* Chambers, from the beginning, concerned themselves with the question as to whether or not there was a “nationwide” genocide in Rwanda in 1994<sup>48</sup>, and similarly the *ICTY* Trial Chamber, in its ground-breaking judgment in *Prosecutor v. Krstic*, made a determination regarding the overall “criminal enterprise”.<sup>49</sup> Finally, the *ICC* Elements of Crimes, describe the *typical* case of genocide in the *first* alternative of the element common to all forms of genocide as a scenario where the *individual* conduct (*killing* of one of more members of a protected group etc.) takes place “in the context of a manifest pattern of similar conduct directed against that group”.<sup>50</sup>

Yet the *definition* of the crime does not express this characteristic interplay between individual and collective act. The collective act is not an objective contextual element (as is the case with crimes against humanity); nor does the special intent requirement contained in the definition explicitly allude to a collective activity.<sup>51</sup> Instead, the definition appears to be drafted from the exceptional perspective of the “lone individual seeking to destroy the group as such”<sup>52</sup> and disposing of the means to do so.

This raises the question how the typical interplay between individual and collective act can be brought in line with the definition of the crime. One solution would be to deny the *legal* importance of the overall genocidal campaign and to reduce it to the *historical* background of the crime. This recently suggested<sup>53</sup> approach is, however, fundamentally misconceived because it ignores the specificity of the crime of genocide as a systemic crime, trivializes the crime’s horrendous destructive potential and thus fails to capture the *raison d’être* of genocide’s status as a crime under international law as it is clearly reflected in the Genocide Convention’s *travaux préparatoires*.

The key to reconcile the approach taken in *Eichmann*, by the *ICTR* and *ICTY*, and in the *ICC* Elements of Crimes, with the definition of the crime

<sup>47</sup> Attorney-General of the Government of Israel v. *Eichmann*, District Court of Jerusalem, Judgment of 12 December 1961, 36 I.L.R. (1968), p. 79 *et seq.* [hereafter: *Eichmann District Court Judgment*].

<sup>48</sup> *Akayesu*, supra n. 12, paras. 78 *et seq.*, 112 *et seq.*

<sup>49</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 549.

<sup>50</sup> With a good sense of realism, the same common element mentions the theoretical case of “conduct that could itself effect such destruction” only in the second place.

<sup>51</sup> But see the *Belgian* proposal to draft the intent requirement with a direct reference to the collective act; U.N. Doc. A/C.6/217, 5 October 1948.

<sup>52</sup> *Prosecutor v. Jelusic*, Judgment, IT-95-10-T, 14 December 1999 [hereafter: *Jelusic* Trial Chamber Judgment], para. 100.

<sup>53</sup> Cf. *Neelanjana Maitra*, A Perpetual Possibility? The International Criminal Tribunal for Rwanda’s Recognition of the Genocide of 1994, 5 *International Criminal Law Review* (2005) p. 573.

lies in the *interpretation of the concept of genocidal intent*. This intent must be *realistic* and must thus be understood to require *more than a vain hope*. It follows that it must, for all practical purposes, have an *overall genocidal campaign as an objective point of reference*. On that premise, what may first appear to be a major structural difference between genocide and crimes against humanity turns out to be an *essentially technical variation*. This variation lies in the fact that the collective activity constitutes an objective contextual element in the case of crimes against humanity while it forms an objective point of reference of the intent requirement in the case of genocide.

On a closer look this technical difference proves less important than the substantial congruence between the two systemic crimes. There should not even be a difference in the legal appraisal of individual conduct which forms part of the *initial steps* in the execution of a plan to attain the collective goal of destroying a protected group or of attacking any civilian population. In the case of genocide it is clear – and has been usefully confirmed by the *ICC Elements of Crimes*<sup>54</sup> – that those steps may form the basis for conviction of a completed and not only an attempted crime of genocide, as the collective activity serves as the point of reference in determining genocidal intent.<sup>55</sup> In the case of crimes against humanity, although the collective activity (the widespread and systematic attack against any civilian population) constitutes an objective contextual element, the legal result would appear to be the same. Again the *ICC Elements of Crimes*<sup>56</sup> usefully, if less clearly, indicate that an initial step within the context of an emerging collective attack may well form the basis of a conviction for a *completed* crime against humanity.

In one – perhaps unfortunate – respect, already the definitions of genocide and crimes against humanity concur in their basic structure. *None* of them is drafted *from the perspective of the leadership level* of a criminal regime, i.e. from the perspective of those persons who direct the overall collective activity from behind, and who are considered to be most responsible for the commission of the crimes and therefore the primary if not the exclusive targets

<sup>54</sup> *Supra* n. 32, Article 6 Genocide, Introduction, third indent: “The term ‘in the context of’ would include the initial acts in an emerging pattern.”

<sup>55</sup> This view appears to have been endorsed in the *Krstic* Trial Chamber Judgment, *supra* n. 42, para. 584; concurring *Joe Verhoeven*, *Le crime de genocide. Originalité et ambiguïté*, 24 *Révue Belge de Droit International* (1994), p. 18; *Stefan Glaser*, *Droit International Pénal Conventionnel* (Bruxelles: Établissements Émile Bruylant, 1970), p. 112; for attempted genocide, however, *Hans Vest*, *Genozid durch organisatorische Machtapparate* (Baden-Baden: Nomos 2002), p. 115.

<sup>56</sup> *Supra* n. 32, Article 7 Crimes against Humanity, Introduction, second paragraph, last sentence: “In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.”

of international prosecutions.<sup>57</sup> Instead, the prohibited acts within the definition of genocide as much as those within the definition of crimes against humanity describe the *typical conduct of those who execute the overall plan*.<sup>58</sup> This structure must be borne in mind in particular when ascertaining the precise meaning of genocidal intent.

## 7. Material Elements (*actus reus*)

### 7.1. Perpetrators

The commission of the crime of genocide does not presuppose the holding of a certain position within a State or quasi-State organizational structure; a proposal submitted by *France* in the Sixth Committee to formulate genocide as a State crime *stricto sensu* did not meet with general approval. Nor is the crime of genocide a leadership crime as is the crime of aggression<sup>59</sup>; as we already have seen, the prohibited acts are even formulated from the perspective of the subordinate perpetrator rather than from that of the controller/director of the overall genocidal plan. Finally, and contrary to the suggestion of some<sup>60</sup>, even a member of the targeted group may commit the crime.<sup>61</sup>

### 7.2. Protected Groups

#### 7.2.1. *Concept of Group and List of Categories*

The list of protected groups (national, ethnic, racial or religious) in the definition of the crime is exhaustive. In the course of the deliberations within the Sixth Committee a conscious decision was made *not* to include *political*

<sup>57</sup> For a first statement to that effect and a summary of the pertinent case law, see Situation of the Democratic Republic of Congo in the Case of the *Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, para. 50 *et seq.*

<sup>58</sup> *Claus Kress*, The Darfur Report and Genocidal Intent, 3 *Journal of International Criminal Justice* (2005) 575.

<sup>59</sup> This is uncontroversial within the Assembly of States Parties' Special Working Group on the Crime of Aggression which is in the process of formulating a draft definition of the crime for inclusion into the ICC Statute at the upcoming Review Conference.

<sup>60</sup> *Schabas*, *supra* n. 2, p. 119 s.; for the view espoused in the above text, see *Whitaker*, *supra* n. 30, para. 31.

<sup>61</sup> For an interesting historic account in that context, see *Orna Ben-Naftali/Yogev Tuval*, Punishing International Crimes Committed by the Persecuted, 4 *Journal of International Criminal Justice* (2006) 128.

groups in the list.<sup>62</sup> This decision has not been overruled by the subsequent practice to the Convention despite some national digressions.<sup>63</sup> As a consequence, the interpretation of the attributes listed in the definition of the crime cannot be left to the perpetrators of the crime but must at least to a certain extent be based on *objective* criteria. A subjective approach would not only circumvent the drafters' decision to confine the protection to *certain* groups, but would convert the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive. The *ICTR* Trial Chamber in *Prosecutor v. Jelusic*, however, advocated precisely such a subjective approach:

“[I]t is more appropriate to evaluate the status of national, ethnical, or racial group today using from the point of view of those persons who wish to single that group out from the rest of the community.”<sup>64</sup>

The Chamber has even gone so far to suggest the possibility of adopting what it called a “subjective approach by negation”, i.e. to consider as a protected group “by exclusion” all individuals *rejected by the perpetrators* of the crime. In *Prosecutor v. Stakic*, the *ICTY* Appeals Chamber rejected this rather obvious departure from the wording and purpose of the Genocide Convention for essentially the reasons stated above. At the same time the Chamber's reasoning appears to imply doubts regarding a “positive subjective approach” which would leave it to the perpetrators to define the protected group.<sup>65</sup>

The guiding idea of the drafters of the Genocide Convention when devising the list of protected groups was to cover only stable groups into which human beings are born without an (easy) way out.<sup>66</sup> The protection of such groups seemed of particular importance to the international community in light of the possible cultural contributions of such groups; at the same time the inescapable membership within such a group made the individuals concerned particularly vulnerable. It is not possible, however, to conclude from this that *any* group meeting the necessary degree of stability can be considered as a group protected under the definition of genocide. The contrary view espoused by the *ICTR* Trial Chamber in *Prosecutor v. Akayesu*<sup>67</sup> exceeds the

<sup>62</sup> U.N. GAOR, 3rd session, 6th Committee, p. 664.

<sup>63</sup> Cf., in particular, the French solution in Article 211-1 Nouveau code pénal.

<sup>64</sup> *Prosecutor v. Jelusic*, Judgment, IT-95-10-T, 14 December 1999, para. 70.

<sup>65</sup> *Prosecutor v. Stakic*, Judgment, IT-97-24-A, 2 March 2006 [hereafter: *Stakic* Appeals Judgment], para. 20 et seq.

<sup>66</sup> *Brasil*, U.N. GAOR, 3rd session, 6th Committee, p. 57; *Venezuela*, id., p. 58; *United Kingdom*, id., p. 58; *Egypt*, id., p. 59; *Norway*, id., p. 61; *Sowjet-Union*, id., p. 105; *Iran*, id., p. 108; *Poland*, id., p. 111.

<sup>67</sup> *Akayesu*, supra n. 12, para. 701.

limits of the wording of the definition and has no reliable basis in the subsequent international practice.<sup>68</sup>

The general concept of protected group does not include a requirement of a mutual feeling of belonging together; nor needs a protected group be a minority within a State. Furthermore, the group members need not live within one defined territory. Quite to the contrary, protected groups will, in many instances, extend beyond the territory of a State. This is certainly the case as regards racial and religious groups, but it may well be true also for national and ethnic groups. It has been suggested that the territorial components should be considered as *parts* of the larger group, which alone would thus constitute the protected group within the meaning of the genocide definition.<sup>69</sup> However, such distinction between the group as a whole and its parts would appear to be overly rigid. It is clear from the record of the Sixth Committee that the drafters of the Genocide Conventions considered minorities within a State as entire groups, provided they meet certain minimum prerequisites regarding numerical strength and stability.<sup>70</sup> The Armenians in the Ottoman Empire of 1915 are thus as much a protected group as the Albanians in the Kosovo, to take only two examples.

In the absence of internationally agreed definitions of the four attributes their respective delimitation poses significant problems. There is a clearly discernible tendency to refrain from any such delimitation effort because of the sparsity of the *travaux préparatoires* and the overlaps within the list. In *Prosecutor v. Krstic*, the Trial Chamber put this view as follows:

“The preparatory work of the [Genocide] Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as national minorities, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate between each of the named groups of the basis of scientifically objective criteria would thus be inconsistent with the object and the purpose of the Convention.”<sup>71</sup>

This approach is certainly attractive for its pragmatism. However, it is hardly reconcilable with the internationally recognized rule of interpretation that each word used in a legal text carries its distinct meaning.<sup>72</sup> And the view of

<sup>68</sup> For the same view, see *Akhavan*, supra n. 33, p. 1000 et seq.; *Quayle*, supra n. 7, 367.

<sup>69</sup> *Schabas*, supra n. 2, p. 235.

<sup>70</sup> *Egypt*, UN GAOR, 3rd session, 6th Committee, p. 99 et seq.; *Belgium*, id., p. 117.

<sup>71</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 556, using similar language as can be found in *Schabas*, supra n. 2, p. 112.

<sup>72</sup> *Anglo-Iranian Oil Co. Case*, Judgment, Preliminary Objection, 22 July 1952, ICJ Reports 1952, p. 105.

the *Krstic* Trial Chamber about the object and purpose of the Convention was reached without the extensive and detailed corroboration from the *travaux préparatoires* that one would expect. In light of all this, the (admittedly cumbersome) efforts undertaken by the *ICTR*, starting with the *Akayesu* judgment,<sup>73</sup> to identify the distinct meanings of the four categories constitute the preferable approach.

### 7.2.2. *National and Ethnical*

A common culture, history, way of living, language or religion may form the common denominator of those concepts, though these elements need not be present cumulatively. One of them may suffice if it forms the basis for a sufficiently developed group identity.<sup>74</sup> The constitutional recognition of the group as people or minority may be an indicative factor.<sup>75</sup> Conversely, not every common distinctive feature enjoyed by a group will qualify it for recognition as a protected national group.<sup>76</sup> Such a loose approach would circumvent by way of interpretation the conscious choice of an exhaustive list of protected groups.

It is not required that members of a protected national or ethnic group within the definition of genocide have the nationality of the State in which they live. It is sufficient, and also necessary, that the group of human beings is large in number and continuously lives in the territory of the State concerned.

Is there a distinction between national and ethnic groups? In *Prosecutor v. Akayesu* the concept of national group was confined to the *nationals of a State*.<sup>77</sup> In *Prosecutor v. Krstic*, the Trial Chamber appears to have based its categorization of the Bosnian Muslims as a national group on the fact of the Bosnian Muslim's recognition as a "nation" by the Yugoslav Constitution of 1963.<sup>78</sup> It seems preferable, though, to extend the concept of national group to those minorities who belong to a nation which in *another* State forms the majority group. This criterion is not only of relevance in the current debate

<sup>73</sup> Paras. 512 to 515; concurring, in principle, *Darfur Report*, para. 494.

<sup>74</sup> For a similar approach, see the Capatori report on the concept of minority; U.N. Doc. E/CN.4/Sub. 2/384/Rev.1, para. 568.

<sup>75</sup> *Akayesu*, supra n. 12, para. 702; *Krstic* Trial Chamber Judgment, supra n. 42, para. 559.

<sup>76</sup> The contrary view, which has not been appreciably supported in the subsequent practice, has been held on several occasions by the Spanish *Audiencia Nacional*; the more recent Spanish jurisprudence appears to move towards the correct legal position; see *Alicia Gil Gil*, *The Flaws of the Scilingo Judgment*, 3 *Journal of International Criminal Justice* (2005), p. 1083 et seq.

<sup>77</sup> Supra n. 12, para. 512 et seq.

<sup>78</sup> *Krstic Trial Chamber Judgment*, supra n. 42, para. 559, alluding to the alternative to consider the Bosnian Muslims as a religious group.



about the international protection of minorities<sup>79</sup>, but it also comes closest to the understanding based upon which the Swedish delegate in the Sixth Committee asked for the inclusion of national groups in addition to ethnic groups.<sup>80</sup>

The situations in Rwanda and Sudan (Darfur) have confronted the international community with difficult border-line cases of the concept of ethnic group.<sup>81</sup> In both situations the groups under attack are *not* characterized by such distinctive features as a language, culture or religion.<sup>82</sup> The *Darfur Commission* has confronted the issue directly and appears to have placed decisive emphasis on a concurrence between the self-perception of the targeted group and perception by the perpetrators. The Commission took into account that

“collective identities, and in particular ethnicity, are by their very nature social constructs, imagined identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts.”<sup>83</sup>

The Commission has based its approach on essentially three arguments: the conformity with the “object and scope of the rules on genocide”, the fact that the interpretation does not “substantially depart from the text of the Genocide Convention and the corresponding customary rules” and “finally, and perhaps most importantly” the fact that “this broad interpretation has not been challenged by States.”<sup>84</sup>

In fact, it would seem that the last argument, which is based on the subsequent practice in the form of a widespread international acquiescence with regard to the case law of the *ICTR*, carries most weight. Conversely, the alleged conformity of the new approach with the original object of the Genocide Convention to protect stable groups which are likely to enrich world civilization by their cultural contributions is equally open to doubt as the purported non-departure from the widely shared understanding of the word “ethnic”. In light of this, the Commission was well advised to couch its new approach in the careful words that “the subjective test may usefully supplement and develop, or at least elaborate upon, the standard laid down

<sup>79</sup> Sarah Pritchard, *Der völkerrechtliche Minderheitenschutz* (Berlin: Duncker & Humblot, 2001), p. 39.

<sup>80</sup> UN GAOR, 3rd session, 6th Committee, p. 115.

<sup>81</sup> The similarity of the problem has been well expressed in the Darfur Report, *supra* n. 6, para. 498.

<sup>82</sup> For the group of the *Tutsi* in the Rwandan situation, see *Akayesu*, *supra* n. 12, paras. 81 *et seq.*; for the tribal groups under attack in Darfur, see Darfur Report, *supra* n. 6, para. 508.

<sup>83</sup> Darfur Report, *supra* n. 6, para. 499.

<sup>84</sup> Darfur Report, *supra* n. 6 para. 501.

in the 1948 Convention and the corresponding rules on genocide”.<sup>85</sup> In any event, it should be clear that the entity directing the attack cannot by its own perception transform a group of human beings with, say, the same political attitude into a group protected under the rule against genocide; nor are the victims of the attack a protected group merely because they perceive themselves as such. Additional objective factors such as the distinct living conditions imposed upon the Rwandan groups by the Belgian colonizers with a lasting effect and the equivalent objective demarcation lines that evolved over time between the “African” and “Arab” tribes in Sudan are required.<sup>86</sup>

### 7.2.3. *Racial*

An international definition of this attribute does not exist. During the deliberations within the Sixth Committee some delegates used the word as meaning the same as “ethnic” but a proposal not to specifically mention “racial” based on that understanding did not prevail.<sup>87</sup> While the term may be criticised as being “outmoded or even fallacious”,<sup>88</sup> some effort of interpretation must be made. According to the almost unanimously held view, racial groups comprise individuals sharing some hereditary physical traits or characteristics.<sup>89</sup> An individual cannot escape from the racial group as so defined, and this understanding therefore reflects most directly the idea of the specific vulnerability of the group members.

### 7.2.4. *Religious*

In the Sixth Committee the inclusion of the category “religious” was controversial, partly because it is possible voluntarily to leave a religious group and partly because religious groups are not as such under threat, but only if they

<sup>85</sup> *Id.*, para. 500.

<sup>86</sup> For a similar word of caution against exclusive reliance on perceptions, see *Akhavan*, supra 33, p. 1002 et seq.; see, however, *Schabas*, supra n. 46, 879 et seq. who seems to essentially endorse a (positive-)subjective approach.

<sup>87</sup> See the explicit opposition voiced by *Sweden*, U.N. GAOR, 3rd session, 6th Committee, p. 116.

<sup>88</sup> Darfur Report, supra n. 6, para. 494.

<sup>89</sup> *Akayesu*, supra n. 12, para. 514; Darfur Report, supra n. 6, para. 494; Section 1093 (6) U.S. Genocide Convention Implementation Act 1987; Schweizer Botschaft über das Römer Statut des Internationalen Strafgerichtshofs, das Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof und eine Revision des Strafrechts of 15 November 2000, *Bundesblatt der Schweizerischen Eidgenossenschaft* 2000, p. 495.

form a national group at the same time.<sup>90</sup> The proposal to mention “religious” only in the form of a bracketed addition to “national” was however rejected. It was felt, in particular, that a religious group was appreciably more stable than a political group.<sup>91</sup> It may thus be concluded from the *travaux préparatoires* that a religious group is not necessarily a national group at the same time but that its meaning should also not be construed too broadly, to ensure a degree of similarity vis-à-vis the other protected groups. The term “religious” refers to a transcendental point of reference in the form of belief in the existence of one or more divinities or spiritual powers; whether or not such belief and guidance is based on one of the traditional religions or a “world religion” is irrelevant.<sup>92</sup> A religious group must, however, be distinguished from an atheist group and from a group united by a common philosophy of life. While international human rights law appears to evolve towards a convergent treatment of all those groups<sup>93</sup>, this tendency cannot simply be transposed into the context of the international criminal rule against genocide where it is more difficult to depart from the wording and where the *travaux préparatoires* of the Genocide Convention reflect the drafters’ feeling that a common religious belief may be particularly conducive to the formation of stable groups. The practice subsequent to the Genocide Convention does not point to a broadening of the attribute “religious” in the direction discussed. Subdivisions of a society do not form religious groups within the genocide definition even if their existence is based on religious belief as in the case of the Indian castes. The religious group need not be organized in a specific manner, but it must exist in a lasting and essentially stable manner. Those criteria should be kept in mind when considering the status of recently separated or formed religious communities. Further, the quality as protected religious group becomes the more dubious the more the focus of the group’s activity lies in the secular sphere. Accordingly, the *U.N. Human Rights Committee* rejected the quality of a self-styled “church” the main activity of which consisted in drug trafficking.<sup>94</sup>

<sup>90</sup> *United Kingdom*, U.N. GAOR, 3rd session, 6th Committee, p. 60; *Sovjet-Union*, id., p. 105.

<sup>91</sup> *Norway*, U.N. GAOR, 3rd session, 6th Committee, p. 61.

<sup>92</sup> For the time being, the international case law offers no more than tautologies: in *Akayesu*, supra n. 12, para. 515, a religious group is defined as “one whose members share the same religion, denomination or mode of worship”; the Darfur Report, supra n. 6, para. 133, “defines” a religious group as “sets of individuals having the same religion, as opposed to other groups adhering to a different religion”.

<sup>93</sup> General Comment 22 of the U.N. Human Rights Committee of 30 July 1993, para. 2; repr. in: *Sarah Joseph/Jenny Schultz/Melissa Castan*, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary* (Oxford: Oxford UP, 2nd edition 2005), p. 502.

<sup>94</sup> Decision of 25 April 1994; CCPR/C/50/D/570/1993.

### 7.3. Prohibited Acts (“Underlying Offences”<sup>95</sup>)

#### 7.3.1. Killing

Killing means causing the death of another person. Causing the death of *one* member of a protected group suffices.<sup>96</sup>

#### 7.3.2. Causing Serious Bodily or Mental Harm

In *Prosecutor v. Kayishema and Ruzindana* the Trial Chamber considered the words “serious bodily harm” as largely self-explanatory but added the useful understanding that what is required is harm that “seriously injures the health, causes disfigurement or causes serious injury to the external, internal organs or senses”.<sup>97</sup>

The alternative “serious mental harm” has, on occasions, received an overly wide definition in the international practice.<sup>98</sup> In *Prosecutor v. Akayesu*, the ICTR Trial Chamber, drawing upon the District Court’s judgment in *re Eichmann*<sup>99</sup>, included not only the causing of “inhuman suffering”, but appeared to consider degrading treatment and the deprivation of rights as a form of causing serious mental harm.<sup>100</sup> The ICC Elements of Crimes use similarly loose language in saying that the prohibited conduct “may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.”<sup>101</sup> Especially by including “degrading treatment” this language risks departing from the ordinary meaning of the terms without sufficient support from the subsequent practice<sup>102</sup>; national jurisdictions adhering to the requirement of a strict statutory construction may face difficulties in going along with it. This is not to favour an unduly restrictive understanding of the prohibited act in question. The Trial

<sup>95</sup> Darfur Report, *supra* n. 6, para. 491.

<sup>96</sup> ICC Elements of Crimes, *supra* n. 32, Genocide by Killing, first element and footnote 2; on the case law of the ICTR, see most recently para. 6, footnote 2, of the Separate Opinion of Judge Shahabuddeen in *Sylvestre Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Judgment of 7 July 2006; it is readily conceded to Karim A.A. Khan, Rodney Dixon and Adrian Fulford, eds., *Archbold International Criminal Courts* (London: Sweet & Maxwell, 2nd ed. 2005), 13–32, that the use of the plural “members of the group” tends to suggest otherwise. Such an interpretation, however, makes little sense and the subsequent practice has not followed it as is evidenced, most recently, by the wording of the ICC Elements of Crimes (*supra* n. 32).

<sup>97</sup> *Prosecutor v. Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, 21 May 1999, para. 109.

<sup>98</sup> *Prosecutor v. Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, 21 May 1999, para. 113, opines against any effort to construe the terms in the abstract and argues instead for an interpretation “on a case-by-case basis in light of the relevant jurisprudence”.

<sup>99</sup> *Eichmann District Court Judgment*, *supra* n. 47, p. 340.

<sup>100</sup> *Akayesu*, *supra* n. 12, para. 503.

<sup>101</sup> *Supra* note 32, Genocide by Causing Serious Bodily or Mental Harm, first element, footnote 3.

<sup>102</sup> For the same view, *Akhavan*, *supra* n. 33, p. 1004.

Chamber in *Prosecutor v. Akayesu* was correct to state that the harm inflicted need not be permanent or irremediable,<sup>103</sup> contrary to the suggestion in the 1987 U.S. Genocide Convention Implementing Act that mental harm meant permanent impairment of the mental faculties brought on through drugs, torture or techniques similar thereto.<sup>104</sup> An appropriate threshold has instead been formulated by the Trial Chamber in *Prosecutor v. Krstic* by disregarding such “attacks on the dignity of the human person not causing lasting impairment” and by requiring “a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.<sup>105</sup> Finally, the causing of harm to *one* member of the protected group suffices as in the case of killing.

### 7.3.3. *Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about its Physical Destruction in Whole or in Part*

This prohibited act is distinct in that the described conduct must be extended beyond *one* member of the protected group. What this means is not, however, entirely clear as the sentence makes reference to the *group* at the beginning and to *part of it* at the end. In light of the fact that the sentence’s emphasis is on the capability of the conduct to bring about physical destruction, it would seem that it is sufficient for this prohibited act to target *part* of a group.

The word “calculated” may suggest that a mere *intention* of the perpetrator to bring about at least part of the group’s physical destruction suffices. It is preferable, though, to interpret “calculated” in an objective manner to mean “*capable* of bringing about . . .”. This interpretation, which has been adopted by the *German* legislation,<sup>106</sup> better reflects the minimum requirements of genocidal conduct as an objectively dangerous course of action and it allows a harmonious distinction between the different material elements as described by the prohibited acts and the common intent requirements.

The precise meaning of “physical destruction” is a matter of controversy. The suggestions reach from the equation with death<sup>107</sup> to the dissolution of the group as a social entity.<sup>108</sup> In *Prosecutor v. Akayesu*, the *ICTR* Trial Chamber paved the way towards the preferable interpretation when it held:

“that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

<sup>103</sup> *Akayesu*, supra n. 12, para. 502.

<sup>104</sup> S. 1091(a)(3).

<sup>105</sup> *Krstic* Trial Chamber Judgment, supra n. 42, paras. 510, 513; cited with approval in *Prosecutor v. Vidoje Blagojevic et al.*, IT-02-60-T, Judgment, 17 January 2005 [hereafter: *Blagojevic* Trial Chamber Judgment], para. 645.

<sup>106</sup> *Bundestags-Drucksache* 2/162, p. 4.

<sup>107</sup> Cf. Section 321 (1) of the Austrian Criminal Code.

<sup>108</sup> *Otto Triffterer*, in *Otto Triffterer*, ed., *StGB Kommentar. System und Praxis* (Wien: Verlag Orac, loose-leaf: February 2001), Section 321, p. 34.

should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”<sup>109</sup>

This approach may be broadened beyond measures of slow death to measures capable of bringing about serious bodily or mental harm within the meaning of the second prohibited act. The destructive results of the two preceding prohibited acts would thus serve as the point of reference for the interpretation of the term “physical” within the meaning of the third prohibited act, thus furthering the internal coherence of the lists of prohibited acts. Examples of the prohibited act as so defined are confining the group members under extremely unhygienic or otherwise inhuman conditions, subjecting them to a subsistence diet, reducing essential medical services available to the group below minimum requirements<sup>110</sup>, or destroying collectively worked fields or harvests, leaving (part of) the group without food.<sup>111</sup>

Does a campaign of so-called “ethnic cleansing” constitute “inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”? The response will depend on the precise form the campaign takes. The issue has been succinctly dealt with by the *ICTY* Trial Chamber in *Prosecutor v. Stakic* as follows:

“It does not suffice to deport a group or part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of the group. The expulsion of a group or part of a group does not in itself suffice for genocide. As Kreß has stated, ‘this is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation.’ In this context, the Chamber recalls that a proposal by Syria in the Sixth Committee to include ‘(i)mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ as a separate sub-paragraph of Article II of the Convention against Genocide was rejected . . .”<sup>112</sup>

This does not however exclude the possibility of a forcible deportation campaign being conducted *under such conditions or accompanied by such measures* that it can be said to be calculated to bring about the physical destruction

<sup>109</sup> *Akayesu*, supra n. 12, para. 503.

<sup>110</sup> *Akayesu*, supra n. 12, para. 504.

<sup>111</sup> Guatemala. Memory of Silence, Report of the *Commission of Historical Clarification*. Conclusions and Recommendations, para. 116.

<sup>112</sup> *Prosecutor v. Stakic*, Judgment, IT-97-24-T, 31 July 2003, para. 519; referred to with approval in *Krstic Appeal*, supra n. 4, para. 33, and not challenged in *Prosecutor v. Stakic*, Judgment, IT-97-24-A, 2 March 2006, para. 46.

of at least part of the group.<sup>113</sup> Forcible deportation as such, however, is insufficient. The reference to “systematic expulsion from homes” in the *ICC Elements of Crimes*<sup>114</sup> will have to be interpreted in that light.

#### 7.3.4. *Imposing Measures Intended to Prevent Births within the Group*

This prohibited act describes the so-called biological variant of genocide aimed at destroying the reproductive capacity of the group. In *Prosecutor v. Akayesu*, the Trial Chamber construed the terms so as to include “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”<sup>115</sup> The words “intended to” suggest that the mere subjective tendency to prevent births suffices. Yet an interpretation more in line with the overall character of genocide and with the other types of prohibited acts would require that the measures imposed are also *objectively* capable of preventing births.

*Imposing* a measure requires that the planning stage has been left and at least an order has been made. At the same time, the wording does not require that the intended result of birth prevention has actually been achieved in some cases. It is thus not necessary for the completion of the crime that at least part of a protected group is already suffering from the effects of the measures imposed.

The word “imposing” might further be understood to mean that the (principal) perpetrator of this prohibited act must hold a position of at least factual authority. If this interpretation were followed, however, the prohibited act in question would have a structure clearly distinct from that of all other prohibited acts, a result which should not be supported without compelling reason. As the ordinary meaning of the term “imposing” would appear to include both the order to take a birth control measure and the order’s implementation by a subordinate, the term should be construed so as to encompass the two forms of action. The formulation “[t]he person imposed certain measures *upon one or more persons* [emphasis added]” in the *ICC Elements of Crimes*<sup>116</sup> goes even further in suggesting that only the conduct of the subordinate directly vis-à-vis the victim is covered by the definition of the prohibited

<sup>113</sup> German *Bundesgerichtshof*, Judgment of 21 February 2001, 54 *Neue Juristische Wochenschrift* (2001), p. 2733; *Schabas*, *supra* n. 2, p. 196.

<sup>114</sup> *Supra* n. 32, Genocide by deliberately Inflicting Conditions of Life Calculated to Bring About Physical Destruction, fourth element, footnote 4.

<sup>115</sup> *Akayesu*, *supra* n. 12, para. 507; the following passage of the judgment contains a confusion of the prohibited act in question with forced pregnancy as is correctly observed by *Akhavan*, *supra* n. 33, p. 1005.

<sup>116</sup> *Supra* n. 32, Genocide by Imposing Measures Intended to Prevent Births, first element.

act. This formulation also reveals an international consensus that here again the violation of only one victim forms a complete *actus reus*.

### 7.3.5. *Forcibly Transferring Children of the Group to Another Group*

This prohibited act is situated at the border line with so-called cultural genocide.<sup>117</sup> It may, however, also be seen as a more subtle form of biological genocide by eliminating the group's reproductive capacity.<sup>118</sup> The *ICC Elements of the Crime* define a child as a person under the age of 18 years<sup>119</sup>, and this conforms with Article 1 of the U.N. Convention on the Child<sup>120</sup> and is probably a correct statement of the law. The prohibited act in question is completed if at least one child has been distanced from the group to which it belongs. This result may be achieved by confining the child to a location outside the realm of the group from which it comes; it is not required that the child concerned is introduced into a different group, for example by way of adoption. The *ICC Elements of Crimes* suggest that the term "forcibly" should "not be restricted to physical force, but may include threat of force or coercion".<sup>121</sup>

## 8. The Mental Elements (*mens rea*)

Two distinct mental elements must be satisfied for a conviction for genocide: the *general* intent requirement which pertains to the material elements and the *special* intent requirement pursuant to which the perpetrator must act with the *special* intent to destroy, in whole or in part, a protected group as such. Whether or not the concept of special intent in the case of the (principal) perpetrator differs from that in the case of the accessory will be dealt with *infra* sub 8.2.3.1).

### 8.1. The *General* Intent Requirement

The text of the definition explicitly mentions a mental standard in the case of two of the prohibited acts: the inflicting of living conditions must be done *deliberately* while the birth prevention must be *intended* which, in light of the

<sup>117</sup> For such categorization, see *Draft Convention of the Crime of Genocide*, U.N. Doc. E/447, 1947, p. 6 *et seq.*

<sup>118</sup> For such categorization, see *the International Law Commission*, U.N. Doc. A/51/10, p. 91.

<sup>119</sup> *Supra* n. 32, Genocide by Forcibly Transferring Children, fifth element.

<sup>120</sup> *General Assembly* U.N. Doc. A/RES/44/25 (12 December 1989), Annex.

<sup>121</sup> *Supra* n. 32, Genocide by Forcibly Transferring Children, first element, footnote 5.



words “*visant à*” used in the French version, is probably to be construed as meaning “*aimed at*” which is an aggravated form of *dolus*. Apart from this, the mental requirement regarding the material elements is not specified in the definition.

It would seem to follow that under the *ICC* Statute the rather high threshold of Article 30 (2) (b) applies with regard to the “consequences” of “death of one or more member of a group” and “serious bodily or mental harm to one or more members of a group”.<sup>122</sup> This is in conformity with the case law of *ICTR* and *ICTY* to the extent that the latter Tribunals reject the application of a negligence standard.<sup>123</sup> It does not however appear to have been definitively settled in the jurisprudence of *ICTR* and *ICTY* whether or not a recklessness standard might be applied to the “underlying offences” of killing and causing serious bodily or mental harm.<sup>124</sup>

The *ICC* Elements of Crimes pose a problem in that they introduce a *negligence* standard with regard to the age of the person in the case of forcibly transferring children.<sup>125</sup> It is impossible to reconcile this standard with Article 30 (1) of the *ICC* Statute so that the question arises as to whether the deviation can be justified on the basis of the words “unless otherwise provided” in Article 30 (1) of the *ICC* Statute. As there is no “colourable support” for the deviation in prior case law<sup>126</sup> the answer would appear to depend on whether the *ICC* Elements of Crime can *by themselves* “provide otherwise”. It is submitted that they cannot, though a sentence in the Elements’ “General introduction”<sup>127</sup> may be read so as to suggest the contrary.

## 8.2. The Intent to Destroy, in Whole or in Part, a Protected Group as Such

As has been explained above<sup>128</sup>, the requirement of the intent to destroy, in whole or in part, a protected group as such marks the specificity of the crime and explains, if correctly interpreted, its status as crime under international

<sup>122</sup> For the same view, see *Roger S. Clark*, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 *Criminal Law Forum* (2001), p. 324 et seq. (esp. the text in footnote 117).

<sup>123</sup> *Akayesu*, supra n. 12, para. 501.

<sup>124</sup> The *Krstic* Trial Chamber Judgment, supra n. 42, clearly goes in the direction of a recklessness standard in paras. 543 in conjunction with para. 485, without, however, being forced to enter into a more detailed discussion of the matter.

<sup>125</sup> Supra n. 32, *Genocide by Forcibly Transferring Children*, sixth element.

<sup>126</sup> On this test, see *Clark*, supra n. 122, p. 321.

<sup>127</sup> Supra n. 32, *General introduction*, paragraph 2, last sentence: “Exceptions to the article 30 standard, based on the Statute, including applicable law under its provisions, are indicated below.”

<sup>128</sup> Sub VI.

law. The considerable complexity of the special genocidal intent requirement results from the fact that all its components raise difficult issues of interpretation which are now dealt with in turn. It should be stressed from the outset, though, that contrary to a widespread belief it is the interpretation of the terms “destroy” and above all “part” (of a group) that determines the general scope of the crime even more than the construction of the word “intent”.

### 8.2.1. *The Meaning of the Word “destroy”*

In this context the word “destroy” can be understood either to relate to the dissolution of the group as a social entity or to relate to the physical destruction of the members of the group. Recent *German* case law, including a decision of the Constitutional Court, has espoused the *social* concept of group destruction.<sup>129</sup> The case law of the ad hoc Tribunals, however, points to the *physical* concept of the term. The issue has come up most clearly in *Prosecutor v. Krstic* where the Trial Chamber, after consideration of the German case law, stated that it

“recognizes that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group.”<sup>130</sup>

This view has been endorsed by the Appeals Chamber<sup>131</sup> and has also been followed by the *Darfur Commission*.<sup>132</sup>

The predominant view is essentially correct. The starting point of the interpretation leading to a social concept of destruction is, however, a readily understandable one. If it is – as we have seen above<sup>133</sup> – the primary goal of the international rule against genocide to protect the existence of certain groups in light of their contributions to world civilization, a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal. The social concept of the term “destroy” is thus more in line with the most basic object of the rule against genocide. It may also be wondered whether the social concept of group destruction may be supported by an argument *e contrario* based on the explicit use of the word “*physical*” as an

<sup>129</sup> *Rissing-van Saan*, *The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia*, 3 *International Criminal Justice* (2005), p. 398 et seq; the decisive passage is quoted in the form of an English translation in *Krstic* Trial Chamber Judgment, supra n. 42, para. 579.

<sup>130</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 580.

<sup>131</sup> *Krstic* Appeals, supra n. 4, para. 26.

<sup>132</sup> *Darfur Report*, supra n. 6, paras. 515, 517, 518, 520.

<sup>133</sup> Sub II.

attribute of destruction *only* within the *actus reus* context of *one* of the prohibited acts. Finally, the words “as such” could be read so as to support the social concept.

However, the *social* concept of destruction conflicts with the deliberate decision made by the drafters of the Genocide’s Convention (for better or worse) to protect the existence of the specified groups not comprehensively but only against an exhaustive list of prohibited acts. As we have already seen, cultural genocide was intentionally not included.<sup>134</sup> But if a person kills one member of a protected group or causes serious bodily or mental harm to him or her, thereby furthering an *overall* campaign which, as our perpetrator knows, is directed to the dissolution of the group as such “merely” by the systematic destruction of the cultural latter’s heritage, the perpetrator would have to be convicted for genocide on the basis of the social concept of destruction. This would be contrary to the more modest aspiration which lies at the origin of the international rule against genocide and which has not been superseded by subsequent developments.

However, the predominant view that physical destruction is intended, however, needs to be clarified in one respect. The meaning of the word “destroy” cannot be reduced to the physical destruction of the members of the group as it exists at the time of the overall genocidal campaign, but must extend to all possible results of overall campaigns which take the form of a *pattern* of one or more of the prohibited acts. This idea is expressed by the Trial Chamber in *Krstic* by referring to physical *or biological* destruction and the latter term must then be construed so as to include the forcible transfer of children on a mass scale. This careful broadening of the concept of “destroy” beyond mere physical destruction makes sense also from the systematic perspective because it attributes a different meaning to the word “destroy” within the context of genocidal *intent* in comparison with the meaning of “physical destruction” within the context of the prohibited act concerned. Hence the argument *e contrario* mentioned above in support of the social concept of the word “destroy” is refuted.

Although it would seem that this interpretation is in line with the view taken by the *ICTY* Appeals Chamber in *Prosecutor v. Krstic*, there are some important judicial pronouncements to the contrary. They relate directly to the vexed question whether the specific form of “ethnic cleansing” which appears to have been the most important goal of the Bosnian Serbs’ general attack against the protected group of Bosnian Muslims constitutes per se a *genocidal* campaign. The specific form of “ethnic cleansing” in question may be summarized as “displacement with the goal of the group’s dissolution as

<sup>134</sup> Sub III.

a social entity”. On the basis of the interpretation developed so far the answer must be in the negative because such ethnic cleansing does not follow the goal of destroying the protected group as a result of a *generalized* commission of one or a combination of the prohibited acts.

In his partial dissenting opinion on the *ICTY Appeals Chamber Judgment in Prosecutor v. Krstic*, Judge Shahabuddeen has, however, explicitly challenged this view and has spoken in favour of drawing a “distinction between the nature of the ‘listed’ acts and the ‘intent’ with which they are done” and has concluded that

“provided that there is a listed act [. . .], the intent to destroy a group as a group is capable of being proved by evidence of an intent to cause the non-physical destruction of the group in whole or in part [. . .]”,

meaning its dissolution as a group.<sup>135</sup> Drawing largely on this opinion, the *ICTY Trial Chamber in Prosecutor v. Blagojevic* stated:

“[T]he physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members.”<sup>136</sup>

The use of the words “physical and biological” in this citation is misleading and perhaps intended to conceal the substantial digression from the concept of physical/biological group destruction espoused by the Trial Chamber in *Prosecutor v. Krstic* and upheld on appeal (with Judge Shahabuddeen dissenting). The fact that the approach advocated in *Prosecutor v. Blagojevic* is crucially different from the one in *Prosecutor v. Krstic* becomes fully apparent from the extensive quotes of precisely that *German* case law by the *Blagojevic* Trial Chamber that the one in *Krstic* felt bound to disregard. This difference of opinion is also evidenced by the fact that *Bosnia and Hercegovina* has relied with conspicuous selectivity on the judgment in *Prosecutor v. Blagojevic* in its oral pleadings before the *ICJ*.<sup>137</sup> In fact, should that reasoning be followed by the Court, the decision that a genocide by ethnic cleansing has occurred in that country would seem to be inescapable. On the basis of the decision in *Prosecutor v. Krstic*, however, the question whether or not there has been a genocide in *Bosnia and Hercegovina* is a more complicated matter.

There can be no doubt that the categorization as genocide of the forcible displacement of a protected group with the goal of the latter’s dissolution

<sup>135</sup> *Krstic Appeals*, supra n. 4, paras. 48 in conjunction with 55.

<sup>136</sup> *Blagojevic Trial Chamber Judgment*, supra n. 105, para. 666.

<sup>137</sup> *ICJ*, CR 2006/5, 1 March 2006, paras. 22 et seq (*Thomas Franck*).

conforms with *Lemkin's* original intention and with the overall goal of the Genocide Convention to preserve the existence of certain groups to ensure that they may continue to enrich world civilization by their cultural contributions. And there can be no doubt, either, that genocide could be defined in a manner which would cover the phenomenon of intended "group dissolution by the massive and forcible displacement of its members" without at the same time criminalizing all forms of so-called cultural genocide. The solution would be to add one more prohibited act to the list such as "deporting members of the group". Yet precisely that proposal was rejected by delegates in the Sixth Committee.<sup>138</sup> Circumventing that decision through a broad construction of the term "destroy" in reliance on the social concept of the term may seem politically attractive, but it is difficult to see how such an approach could be portrayed as remaining within the confines of an existing customary rule of international *criminal* law.

### 8.2.2. *The Meaning of the Words "in part"*

Those words make it plain that the intention need not be "the complete annihilation of a group from every corner of the globe".<sup>139</sup> Beyond that point, the realm of uncertainty begins. At a late stage in the debate, the Belgian delegate observed that "it had not been explained what a 'part' of group meant".<sup>140</sup> Odd as it may seem in light of the fundamental importance of the word "part" for the general scope of the crime, this statement correctly summarizes the result of the deliberations within the Sixth Committee. If nothing else, the debates reveal a clearly prevailing understanding that the inclusion of the words "in part" cannot have as a consequence that the execution of one prohibited act with the intent to destroy an insignificant number or even just a single member of the group as such constitutes a crime of genocide.<sup>141</sup>

Some statements in the *travaux préparatoires* have even led to profound confusion in that they have suggested that the words "in part" could form part of the *material* elements and require the actual occurrence of the destruction of part of a group with the intent of complete destruction. In

<sup>138</sup> U.N. GAOR, 3rd session, 6th Committee, p. 176 (proposal); p. 186 (negative vote).

<sup>139</sup> Para. 8 of the commentary on Article 17 of the Code of Crimes against Peace and Security of Mankind, supra n. 16.

<sup>140</sup> U.N. GAOR, 3rd session, 6th Committee, p. 122.

<sup>141</sup> See the statements by the *USA*, *Egypt* and the *United Kingdom* in U.N. GAOR, 3rd session, 6th Committee, p. 92; concurring *Alexander Greenawalt*, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation* (1999), 99 *Columbia Law Review*, p. 2290.

*Prosecutor v. Krstic* the Trial Chamber identified such a construction as fallacious, in line with the plain wording of the definition.<sup>142</sup>

A fairly clear cut interpretation of the concept of “partial group” would be to confine it to the territorial components of such groups whose members live in a number of States.<sup>143</sup> However, and quite apart from the fact that such a concept would be hardly practicable, it has been explained above<sup>144</sup> why such a territorial component, in the relevant cases, must be considered as an entire group and not only a part thereof.

In the international case law it would now seem to be well settled that “the part must be a *substantial* part of the group [emphasis added]”.<sup>145</sup> But what precisely is a “substantial part of a group”? There appears to be a general reluctance to set an absolute quantitative minimum threshold and to emphasize a *qualitative* meaning, i.e. the importance of the “part” for the continued existence of the “whole”.<sup>146</sup> In *Prosecutor v. Krstic*, the ICTY Appeals Chamber has given the following indications which reflect a growing international consensus on the matter:

“The determination of when the targeted part is substantial enough [. . .] may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration.”<sup>147</sup>

The application of these considerations to the depressing case of Srebrenica in *Prosecutor v. Krstic* must serve as an illustration of the considerable difficulties that remain. Those difficulties stem from the unresolved and, arguably, genuinely inextricable tension between the interpretation of the word “destroy” in the narrow *physical/biological* way and the emphasis on a *qualitative* interpretation of the words “in part” referring, by necessity, to the entire group as a social entity.

In the case of Srebrenica, the Bosnian Muslims were identified as the protected group targeted by the genocidal campaign. The Bosnian Muslims of Srebrenica were considered as the relevant part of that group in the qualitative sense comprising a number of up to 42.000 human beings. The problem was

<sup>142</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 74.

<sup>143</sup> Cf. the list of examples in *Schabas*, supra n. 2, p. 235.

<sup>144</sup> Sub 7.2.1.

<sup>145</sup> *Krstic* Appeals, supra n. 4, para. 8.

<sup>146</sup> *Prosecutor v. Gacumbtsi*, ICTR-2001-64-T, Judgment, 17 June 2004, para. 253; *Krstic* Appeals, supra n. 4, para. 12.

<sup>147</sup> *Krstic* Appeals, supra n. 4, para. 12.

that the take over of the “safe area” of Srebrenica and the accompanying campaign of the attackers aimed – on the basis of the evidence before the Chambers – at the *physical* destruction “only” of the men of military age while the rest of the Bosnian Muslims of Srebrenica were “only” to be forcibly transferred. The Trial Chamber concluded that the overall goal of destroying the partial group of Bosnian Muslims in Srebrenica existed because, for a variety of reasons, the community of the Bosnian Muslims in Srebrenica would in all likelihood “[n]ever re-establish itself on that territory” and such was the goal behind the campaign.<sup>148</sup> This analysis has been upheld by the Appeals Chamber which concluded its reasoning emphatically as follows:

“[T]he law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide.”<sup>149</sup>

Horrific as the attack against the Bosnian Muslims in Srebrenica has been, the legal reasoning advanced by the *ICTY*’s Chambers to characterize the overall campaign as genocidal in nature is open to at least two objections of a more general nature in light of which the correctness of the result does not appear to be beyond question.

The first critique pertains to the identification of the Bosnian Muslims of Srebrenica, i.e. about 2.9 percent of the entire group, as a *partial* group within the meaning of the definition of genocide. It is true that an early commentator has suggested that a small geographical sub-division of a group like a “single community” may be considered as its part, “provided the number is substantial”.<sup>150</sup> Yet such interpretation reduces the crime’s overall quantitative threshold in a manner which is hardly acceptable if the widely shared general statements about the very particular heinousness of genocide<sup>151</sup> are to be taken seriously.<sup>152</sup> The Trial Chamber in *Prosecutor v. Stakic* has expressed the same doubts while feeling bound to follow the expansive case law.<sup>153</sup> In *Prosecutor v. Krstic* the Chambers may have seen the problem and may for this reason have stressed – and perhaps somewhat strained – the strategic importance of the existence of the Bosnian Muslim community in Srebrenica for the “continued survival of the Bosnian Muslim people”.<sup>154</sup>

<sup>148</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 597.

<sup>149</sup> *Krstic* Appeals, supra n. 4, para. 37.

<sup>150</sup> *Robinson*, supra n. 18, p. 63.

<sup>151</sup> *Supra* I.

<sup>152</sup> For a similarly critical assessment, see *Quayle*, supra n. 7, 369; *Schabas*, supra n. 46, 874.

<sup>153</sup> *Stakic* Trial Chamber judgment, supra n. 112, para. 523.

<sup>154</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 590. By posing the requirement that the targeted “part” must constitute a “distinct entity”, the Trial Chamber in *Krstic* has, in fact, introduced a purely qualitative approach to the definition of the words “in part”. This is unconvincing. Why should a “campaign resulting in the killings, in different places spread over a broad geographical

The second critique relates to the way in which the *ICTY* Chambers dealt with the fact that only “part of a part” of the protected group concerned, namely the men of military age, were physically destroyed. In that respect, the Chambers placed decisive emphasis on the fact that this would bring about the “physical disappearance of the Bosnian Muslim population at Srebrenica”.<sup>155</sup> Although the use of the word “physical” suggests otherwise, to consider the lasting expulsion of the Bosnian Muslim group from Srebrenica as its *destruction* simply does not conform with the general concept of “physical/biological” destruction as explained before and adhered to in *abstracto* by the *ICTY*. And even if one assumes that it was the overall goal of the campaign to prevent the “distinct Bosnian community in Srebrenica” to continue to exist as such anywhere else, reliance on that goal comes dangerously close to precisely that *social* concept of destruction which the *ICTY* Chambers were – as we have seen – at pains to reject.

There remains one way to distinguish the reasoning in *Prosecutor v. Krstic* from an introduction of the social concept of group destruction through the backdoor of the words “in part”. The Chambers have highlighted the fact that the “physical destruction of the men [. . .] had severe procreative implications for the Muslim community, potentially consigning the community to extinction”.<sup>156</sup> So perhaps the killing of the men and the deportation of the women, if taken together, can be seen as a generalized “imposition of measures intended to prevent births within the group”. This would justify qualifying the case of Srebrenica as the (intended) destruction of a partial group within the biological meaning. However, the Chambers have failed to spell out such line of reasoning in all clarity as they have not relied on the prohibited act in question when dealing with the *actus reus*.

### 8.2.3. *The Meaning of the Word “intent”*

#### 8.2.3.1. Purpose-based versus Knowledge-based Approach

Is it sufficient that the perpetrator knows that the objective of a campaign is the destruction of the group in whole or in part (the knowledge-based approach)<sup>157</sup> or is it necessary that he should act with the purpose or desire to contribute to the overall destructive result? After an initial period of some uncertainty, the jurisprudence of *ICTR* and *ICTY* now seem to concur in the

area, of a finite number of members of a protected group” (Krstic Trial Judgment id.) not qualify as genocidal in nature if the number of victims is enormous? *Krstic Appeals*, supra n. 4, para. 37.

<sup>155</sup> *Krstic Trial Chamber Judgment*, supra n. 42, para. 595; confirmed in *Krstic Appeals*, supra n. 4, para. 28.

<sup>156</sup> *Krstic Appeals*, supra n. 4, para. 28.

<sup>157</sup> The knowledge-based approach has received its first elaborate exposition by *Greenawalt* in his brilliant study, supra n. 141.



view that a perpetrator of the crime of genocide must act with the aim, goal, purpose or desire to destroy part of a protected group.<sup>158</sup> This proposition, which is shared by a number of recent national judicial pronouncements<sup>159</sup>, is summarized in the Darfur Report as follows:

“This [. . .] element is an aggravated criminal intent, or *dolus specialis*; it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such [. . .].”<sup>160</sup>

To fully appreciate the purpose-based approach in its practical effects two accompanying legal propositions must be born in mind.

First, the fact that there is no desire to destroy does not exclude individual criminal responsibility for genocide altogether; it merely excludes the categorization of the individual concerned as a *principal* perpetrator.<sup>161</sup> The purpose-based approach thus essentially implies a subjective demarcation line between the two basic modes of participation in the crime.<sup>162</sup> There is a potentially important qualification. Where the applicable law specifies a purpose requirement for aiding and abetting, as is – strangely – the case in Article 25(3)(c) of the ICC Statute, there may be no criminal responsibility for genocide at all where the prohibited act is committed in knowledge of the overall genocidal campaign but without sharing the overall goal of group destruction.

Second, the desire to destroy (or more precisely, to help destroying) may be inferred from the facts where the accused person does not confess to his or her mental state and there are no prior statements expressing that desire.

<sup>158</sup> *Akayesu*, supra n. 12, para. 498 (which is, however, inconsistent with para. 520 of the same judgment); *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, 26 May 2003, para. 524; *Krstic Appeals*, supra n. 4, para. 134.

<sup>159</sup> German *Bundesgerichtshof*, Judgment of 21 February 2001, 54 *Neue Juristische Wochenschrift* (2001), p. 2733; the Dutch *Rechtbank's-Gravenhage*, Judgment of 23 December 2005, sub 6.5.1 (an English translation of the judgment is available under [http://zoeken.rechtspraak.nl/zoeken/dtluitspraak\\_print.asp?u\\_ljn=AX6406&u\\_hlquery=](http://zoeken.rechtspraak.nl/zoeken/dtluitspraak_print.asp?u_ljn=AX6406&u_hlquery=)).

<sup>160</sup> Darfur Report, supra n. 6, para. 491.

<sup>161</sup> *Krstic Appeals*, supra n. 4, para. 134 et seq. is crystal clear in this respect.

<sup>162</sup> Where to draw the borderline between those two basic modes of participation falls outside the scope of this study and may vary in detail from one (international) criminal jurisdiction to another; for the rather odd distinction which is drawn in precisely that respect between *aiding and abetting* of genocide and *complicity* in genocide in the case law of the ICTR, see the summary provided by *Akhavan*, supra n. 33, p. 993 et seq.; equally outside the scope of this study is the – extremely interesting – current controversy within the two ad hoc Tribunals whether to (continue to) apply a doctrine of joint criminal enterprise or whether to introduce one of commission by control including co-perpetratorship and indirect perpetratorship; on the latter subject, see most recently – and in the context of the crime of genocide – *Sylvestre Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Judgment of 7 July 2006, Separate Opinion of Judge *Shahabuddeen*, paras. 28 et seq. vs. Separate Opinion of Judge *Schomburg*, paras. 14 et seq.

This may create the temptation to “squeeze ambiguous fact patterns into the [purpose-based] intent paradigm”<sup>163</sup> on the basis of a relaxed evidentiary standard such as the one formulated in *Prosecutor v. Akayesu*:

“The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding members of other groups, can enable the Chamber to infer intent of a particular act.”<sup>164</sup>

This statement is highly informative in two respects. First, it demonstrates in what manner the overall genocidal campaign becomes relevant to the determination of the genocidal intent of the individual perpetrator. Second, it reveals the potential to introduce a knowledge-based approach to genocidal intent through the evidentiary backdoor.

The two arguments that have been advanced by the *ICTR* and the *ICTY* in support of the purpose-based approach do not withstand closer scrutiny. The *ICTR* Trial Chamber in *Prosecutor v. Akayesu* has asserted that the *dolus specialis* as meaning aim, goal, purpose or desire “is a well-known criminal law concept in the Roman-continental systems”. This statement quite considerably underestimates the complexity of the matter. Neither the “Roman-continental systems” nor the legal family of the common law can be relied upon for a clear cut and uniform concept of *dolus specialis* (“*dol special*”, “*specific intent*”, “*Absicht*”/“*erweiterter Vorsatz*”, “*dolo específico*”, “*oogmerk op*”, “*amos dolos/skopos*” etc.) as meaning aim, goal, purpose or desire.<sup>165</sup> It is thus highly improbable whether a valid comparative law argument could be developed in support of the assertion put forward in *Akayesu*. But apart from this, the definition of genocide does not use any of those terms, but simply the word “intent” which leaves the necessary room to have due regard to genocide’s specific interplay between individual and collective acts.

The *ICTY* Trial Chamber in *Krstic* relies on the *travaux préparatoires* of the Genocide Convention and on the purported lack of a clear subsequent practice supporting the knowledge-based approach.<sup>166</sup> However, the *travaux*

<sup>163</sup> *Greenawalt*, supra n. 141, p. 2281.

<sup>164</sup> *Akayesu*, supra n. 12, para. 523; for a most recent confirmations see *Sylvestre Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Judgment of 7 July 2006, paras. 40 et seq.

<sup>165</sup> For some references, see *Kress*, supra n. 58, p. 567 et seq.

<sup>166</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 571.

*préparatoires* of the Genocide Convention do not reveal the “drafters’ intent” that the individual perpetrator of the crime of genocide must aim at, have the goal, or must act with the purpose or desire to help destroying a protected group.<sup>167</sup> Nor is it sound methodology to assert that the knowledge-based approach is incorrect for want of a sufficiently solid basis of *customary* international law. The precise construction of the word “intent” and the resulting delineation between principal and accessory participation in the case of genocide does not fall in the exclusive realm of customary international law but must, within the confines of the ordinary meaning of the term, be developed with due regard to the structure of the crime as discussed above.<sup>168</sup>

The Trial Chamber in *Prosecutor v. Krstic* captured this structure when it stated:

“As a preliminary, the Chamber emphasises the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and scale of the crime of genocide ordinarily presume that several protagonists were involved in its preparation. Although the motive of each participant may differ, the objective of the enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators.”

This statement correctly underscores the need to distinguish between a “collective” and an “individual” intent for the typical case of genocide. The collective intent can best be defined as the goal or the objective behind a concerted campaign to destroy, in whole or in part, a protected group.<sup>169</sup> Such goal or objective may well have originated from the *desire* of one or more individual directors but it will then acquire an impersonal, objective

<sup>167</sup> For a meticulous demonstration of the openness of the *travaux préparatoires*, see *Greenawalt*, supra n. 141, p. 2270 et seq.

<sup>168</sup> Supra VI.

<sup>169</sup> In his ground-breaking study, supra n. 141, 2288, *Greenawalt* appears to allow for an exception from the requirement of a collective goal to destroy. He formulates the relevant test as follows: “In cases where the perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part”. Here, the “manifest [destructive] effect” amounts to an equivalent to a collective *goal*. Such a view would not seem inconceivable, but the description of the collective activity as a “campaign *targeting* members of a protected group (emphasis added)” harmonizes much better with the existence of a collective destructive *goal*. On the targeting requirement see infra sub 8.2.4.

existence (most usefully referred to as the “overall genocidal plan”)<sup>170</sup> and may well be inferred from precisely those fact patterns referred to in *Prosecutor v. Akayesu* where the plan does not exist in written form or can not be presented as a conclusive piece of evidence to the competent court.

The difference between the knowledge-based approach and the purpose-based approach as developed in *Prosecutor v. Krstic* consists in the fact that pursuant to the former the individual intent need not mirror the collective goal in the form of a personal desire, aim, goal or purpose. Instead, it suffices that the individual perpetrator furthers the concerted campaign by the commission of a prohibited act with the *knowledge* of the collective goal. This interpretation remains within the confines of the ordinary meaning of the word “intent”, avoids straining accepted standards of evidence, takes due regard of the common roots with the crimes against humanity, and reflects, above all, the fundamental structure of the definition of genocide which has been devised in conformity with *Lemkin’s* preference to include in the crime’s definition the “persons who *order* genocide practices, as well as [. . .] persons who *execute* such orders”.<sup>171</sup> And those persons will often act without being “personally imbued with [the collective] intention” to use the formulation of the District Court of Jerusalem in the *Eichmann* case which still offers the most impressive illustration for what *Hannah Arendt* has coined the both famous and controversial words “Banality of the Evil”.<sup>172</sup>

Whether or not one agrees with *Lemkin’s* policy suggestion to also hold liable subordinate participants in a genocidal campaign for the crime of genocide, it cannot be disputed that his suggestion has not only been followed by the drafters of the Genocide Convention but that it has received (a perhaps rather unwise) emphasis by the fact that the list of prohibited acts in the definition is formulated from the perspective of the subordinate rather than from the leadership level.<sup>173</sup> The fundamental problem of the purpose-based approach thus consists in the combination of an *actus reus* list formulated from the perspective of the subordinate level with what is typically a leadership standard of *mens rea*. This confronts the purpose-based approach with several technical problems in construing the criminal responsibility as accessories of those many subordinates who act without a desire of destroying

<sup>170</sup> A very clear exposition of this view can be found in *Hans Vest*, ‘Humanitätsverbrechen, Herausforderung für das Individualstrafrecht?’, 113 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2001), p. 486;

<sup>171</sup> *Supra* n. 11, p. 93.

<sup>172</sup> In: *Eichmann in Jerusalem: A Report on the Banality of the Evil* (New York: Viking, 1965; repr. 1994), *passim*.

<sup>173</sup> Sub VI.

(part of) the group, and in construing the criminal responsibility as principals of those mid-level superiors who give the killing orders to such accessories with a destructive desire.<sup>174</sup> These problems may, no doubt, be overcome by generous recourse to complicity or joint criminal enterprise doctrines, but to create the need for such “technical rescue operations” in the first place can only be considered as a significant flaw of the purpose-based approach to genocidal intent.

Should the purpose-based approach nevertheless be maintained because only its stringent requirement adequately expresses the fact that genocide “is one of the worst crimes known to humankind”?<sup>175</sup> The difference between a personal desire to see the goal of a collective criminal campaign attained on the one hand and mere knowledge of such a goal on the other should be duly reflected in the sentence. Yet it is not such a desire of an individual that hallmarks genocide as the horrible crime it is. It is the dimension of the collective genocidal goal that every individual participant takes the conscious decision to further. The laudable intention not to distort the character of genocide as “one of the worst crimes known to humankind” by an unduly generous interpretation is thus better served by a stringent construction of the words “destroy” and “in part” than by insisting on a flawed understanding of genocidal intent.

#### 8.2.3.2. The Need for a Second Knowledge-Requirement in the Form of Foresight

In its definition of genocidal intent, the *Darfur Commission* has coupled its requirement of personal desire, which we have just discussed, with the additional mental requirement that the perpetrator must know “that his acts would destroy, in whole or in part, the group as such”. If reformulated into the more precise formula of “knowledge that the campaign furthered by his acts would destroy, in whole or in part, the group as such” this part of the definition offered by the *Darfur Commission* raises a pertinent question which has not yet received much attention. The question is also relevant on the basis of the knowledge-based approach because one may legitimately ask whether the perpetrator should not only know of the existence of the collective goal to destroy but also expect its actual realization. On the basis of the view expressed in this article<sup>176</sup>, that the concept of genocidal intent must exclude

<sup>174</sup> For full exposition of those problems, see *Kress*, supra n. 58, p. 573 et seq.; see also *Harmen van der Wilt*, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat case*, 4 *Journal of International Criminal Justice* (2006), 242.

<sup>175</sup> *Krstic Appeals*, supra n. 4, para. 134.

<sup>176</sup> Sub VI.

a vain hope that a protected group may be destroyed, the *Darfur Commission's* proposition is to be commended. A difficult question remains to determine the precise standard of foresight. Perhaps it is somewhat unrealistic to require foresight of the goal's realization as a substantial certainty, as the *Darfur Commission's* formula would seem to suggest. A somewhat more realistic alternative standard may be the one of "all likelihood" which has been implicitly used by the Trial Chamber in *Prosecutor v. Krstic*<sup>177</sup> and which has been upheld on appeal.<sup>178</sup> The individual perpetrator must thus know of facts that make it sufficiently probable that the collective goal to destroy at least part of a protected group will be realized.

### 8.2.3.3. A Suggested Definition of Genocidal Intent

In a nutshell, the word "intent" means that the perpetrator committed the prohibited act with the knowledge to further thereby a campaign targeting members of a protected group with the realistic goal of destroying that group in whole or in part.<sup>179</sup>

### 8.2.4. *The Meaning of the Words "as such"*

The words "as such" express the idea of the targeting of the group through its members.<sup>180</sup> The requirement is that the perpetrators choose their individual

<sup>177</sup> *Krstic* Trial Chamber Judgment, supra n. 42, para. 597.

<sup>178</sup> *Krstic* Appeal, supra n. 4, para. 28.

<sup>179</sup> The recent "cross-legal family border" scholarly trend going broadly in this direction (while nuances remain) comprises *Greenawalt*, supra n. 141; *Alicia Gil Gil*, *Derecho penal internacional. Especial consideración del delito de genocidio* (Madrid: Editorial Tecnos, 1999), p. 259 *et seq.*; *Hans Vest*, *Genozid durch organisatorische Machtapparate* (Baden-Baden: Nomos 2002), p. 104; *Kress*, supra n. 38, p. 576 *et seq.*; *van der Wilt*, supra 141, p. 241 *et seq.*; for a recent doctrinal expression in favour of the purpose-based approach, see *John D. Van der Vyver*, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 *University of Miami International and Comparative Law Review* (2004), 85; deplorably, however, *Van der Vyver's* analysis of *Greenawalt's* article is confined to the following *petitio principii*: "Since special intent is an essential element of genocide and special intent will always require a certain manifestation of *dolus directus*, this proposed transformation [*Greenawalt's* suggested approach] is way out of line".

<sup>180</sup> For an exhaustive account of the discussion in the Sixth Committee, in which the words emerged as a somewhat ambiguous compromise between those who wanted the requirement of a special motive for genocide and those who did not, see *Schabas*, supra n. 2, p. 245 *et seq.*; the rather sterile debate on the motive requirement is revealing only in that it makes clear that contrary to what the wording of the definition may suggest at first reading, the words "as such" have not been used by the drafters to stress the group's nature as a social entity.

victims as members of the group targeted by the genocidal campaign. Lemkin has couched this view in the almost canonical formulation:

“Genocide is directed against a national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of a national group.”<sup>181</sup>

The implications are significant. A killing campaign may be aimed at the destruction of so high a number of members of a protected group that the threshold of the words “in part” is passed. Yet, the campaign will not be *genocidal* in nature (and thus the participants will not be responsible for genocide) if the victims are chosen not because they belong to one protected group but because of their, say, political opinions. This point may be of relevance in the context of the killing campaign of the Cambodian Pol Pot regime to the extent that it hit “a part” of Pol Pot’s own national group of the Khmer.<sup>182</sup> The final, most drastic consequence has been expressed by Lord Justice *McCowan* in *Hipperson and others v. DPP*<sup>183</sup> when he questioned whether the goal to destroy the whole world was genocidal in nature:

“[The appellant] submits that these weapons threaten the whole of human kind and that the [genocide] definition ought to read ‘any of the following acts committed with intent to destroy in whole or in part the human race’. But the point is that the definition does not so read.”

## 9. A Look Ahead

The commentary above has set out the international criminal law against genocide as it stands. This is not to be confused with a statement on what the international criminal law against genocide should be. Only the following lines will, in all brevity, touch upon the latter question. There is a strong case, of course, against the usefulness of any consideration *de lege ferenda* when it comes to the crime of genocide. For the negotiations on the ICC Statute furnish the latest evidence of the fact that most States consider Art. II of the Genocide Convention as an almost sacred document of international criminal law that must not be touched in any form whatsoever. It is thus

<sup>181</sup> *Supra* n. 11, p. 79.

<sup>182</sup> For a different view, see *Hurst Hannum*, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 *Human Rights Quarterly* (1989), p. 107 et seq.; for a different *reasoning* for the same result (denying the possibility that a perpetrator of genocide may be member of the targeted group), see *Schabas*, *supra* n. 2, p. 119 et seq.

<sup>183</sup> England, Divisional Court, Queens Bench Division, Judgment, 3 July 1996, 111 *International Law Reports*, p. 584, 588.

predictable that Art. 6 of the ICC Statute will not be on the agenda of the first Review Conference on the ICC Statute to be convened in 2009. Yet, this fact should not be the end of the matter as far as scholarly reflection is concerned. Such reflection should only have due regard of the widespread consensus of States against the need to change the law. Similarly, *William Schabas*' statement: "I understand the definition as it stands to be adequate and appropriate"<sup>184</sup> should be taken as a weighty word of caution against too hasty a submission of reform proposals.

No amendment of the definition of genocide should affect the latter's restrictive scope. The consequence that only very few atrocities will qualify as genocide under international criminal law is not only acceptable, it is one to be welcomed. Within the emerging system of crimes under international law, the crime of genocide "belongs at the apex of the pyramid".<sup>185</sup> There is no need to further expand the crime of genocide into the realm of crimes against humanity. Any such move would not only weaken the "terrible stigma associated with the crime"<sup>186</sup>, it would also add another difficulty to the already thorny area of *concursum delictorum*. For this reason, the often repeated suggestion to enlarge the list of protected groups so as to include "political" or other groups has less than little appeal to this author.<sup>187</sup> Thought could be given, however, to the question whether the pragmatic line taken by the evolving international case law on the definition of the concept of protected group<sup>188</sup> could receive a more solid textual basis. A much more fundamental question regarding the concept of protected group pertains to the subjective vs. objective approach controversy. Under the *lex lata*, the subjective approach is untenable.<sup>189</sup> But what about adhering to the subjective approach *de lege ferenda*? In that respect, Art. 211-1 of the French *Code pénal* could serve as a model by its reference, in addition to listing the internationally recognized protected groups, to "*un group déterminé à partir de tout autre critère arbitraire.*" The consequences of such a change of the law would be far reaching and whether they could count for progress is open to doubt. The French solution converts the crime of genocide into an aggravated case of persecution as a crime against humanity. This is a perfectly possible policy choice<sup>190</sup>, but it is one that would quite radically deprive the crime of

<sup>184</sup> *Supra* n. 2, p. 9.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> For the opposite view, see *Beth Van Schaack*, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 *The Yale Law Journal* (1997), 2259.

<sup>188</sup> *Supra* sub 7.2.1.

<sup>189</sup> *Supra* sub 7.2.1.

<sup>190</sup> It should be noted, that the French solution is entirely coherent as the *Code pénal* conceives of genocide as an aggravated case of crimes against humanity.



genocide of its distinctiveness within the system of crimes under international law. In the final analysis, if the subjective approach were to be adhered to, the crime of genocide should be incorporated into the list of crimes against humanity in much the same way as it has been done with the crime of apartheid in Art. 7 (1) (j) of the ICC Statute.

It should be part of any comprehensive future discussion about a *lex ferenda* against genocide to revisit the drafter's decision to exclude "cultural" genocide from the scope of the international criminalization. This commentary has highlighted<sup>191</sup> how much the current international case law struggles with this decision in the context of the phenomenon of so-called ethnic cleansing without yet having arrived at a satisfactory result. Doubts persist whether a fully coherent solution can at all be found on the basis of the law as it stands. Perhaps, a degree of incoherence is the price to pay for not opening the floodgates, but how serious the latter risk really is, appears worth reconsidering.

A third subject worthy of thorough discussion is whether the definition of genocide should be brought in line with that of crimes against humanity as regards the question of the contextual element. As has been explained in the commentary<sup>192</sup>, the definition as it stands is conspicuously silent in this regard. Thought could be given, should the opportunity ever arise, to set out the basic structure of the crime in a way similar to the *chapeau* of the crimes against humanity. Here, Art. 211–1 of the French *Code penal* certainly deserves closest attention when it requires the underlying offence to be committed "*en exécution d'un plan concerté tendant à la destruction totale ou partielle d'un group . . .*". A much more radical change would consist in reformulating not only the crime of genocide but also the crimes against humanity in the terms of leadership crimes. The ongoing discussion within the Assembly's Special Working Group on the Crime of Aggression offers ample material for reflection in this respect.<sup>193</sup> Obviously, this point can only be raised in this article. Suffice it to mention two points that justify a full discussion about crimes under international law as leadership crimes: First, the international trend to confine the prosecution of crimes under international law by international criminal courts to persons at the leadership level is now firmly entrenched and it would probably be somewhat too easy to say that national criminal jurisdictions are called upon to deal with all other

<sup>191</sup> *Supra* sub 8.2.1. and 8.2.2.

<sup>192</sup> *Supra* sub 6.

<sup>193</sup> For an effort to comprehensively set out the technical implications of a leadership crime approach within the context of the crime of aggression, see my sub-coordinator's Discussion paper 1 (ICC-ASP/4/32). The considerations included therein would, to a large extent, apply *mutatis mutandis* in the context of the crime of genocide and of crimes against humanity.

international criminals. Second, almost at the same time, scholars from different legal families have made detailed arguments in favour of moving towards a leadership crime approach.<sup>194</sup> These recent proposals are based on grounds of legal policy and legal philosophy that certainly deserve to be looked at closely.

The final note is situated at the border line between the *lex lata* and the *lex ferenda* and takes up the conclusion of Lord Justice *McCowan* in *Hipperson and others v. DPP* that the intention to destroy in whole or in part the human race does not constitute an expression of genocidal intent. This result does raise a question even for the present commentator who strongly believes that the body of crimes under international law should be kept narrow in scope. One reason for this question mark is a very simple one: Does it make sense that the “crime of crimes” does not cover the participation in a campaign with the realistic goal to destroy the human race? It is true, of course, that the participation in such a campaign would qualify as extermination as a form of a crime against humanity. But leaving the matter there would mean that the placement of the crime of genocide “at the apex of the pyramid” is open to question. But there is another reason to be puzzled which is more important than the one of international criminal law architecture. This reason starts from the premise that the fundamental goal underlying the law against genocide is to save humanity from the “loss of cultural and other contributions”<sup>195</sup> as a result of the destruction of one of the protected groups. Can this goal be fully realized on the basis of the “targeting requirement”<sup>196</sup>? It has been argued above that such a requirement results from the use of the words “as such”. If this interpretation, which would seem to be in line with both the original drafter’s intent and the current international case law, is, in fact, an inescapable one under the *lex lata*, the deletion of the words “as such” would be an option *de lege ferenda* calling for a closer analysis. The undertaking of a campaign with the manifest effect to destroy at least part of a protected group would then qualify as a *collective* genocidal intent. As a result, the definition of genocide would be freed of elements of group discrimination altogether; instead the law against genocide would operation as a comprehensive protection against the destruction of a limited number of those groups of human beings which form the most essential pillars of world civilization.

<sup>194</sup> *David J. Scheffer*, *The Future of Atrocity Law*, 25 *Suffolk Transnational Law Review* (2002), 399 *et seq.*; *Andreas Hoyer*, *Internationaler Strafgerichtshof und nationalstaatliche Souveränität*, 151 *Goltdammer’s Archiv* (2004), 331 *et seq.*

<sup>195</sup> *Supra* sub 2.

<sup>196</sup> *Supra* sub 8.2.4.