

# The Crime of Genocide and Contextual Elements

A Comment on the ICC Pre-Trial Chamber's  
Decision in the *Al Bashir* Case

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## Abstract

*The Pre-Trial Chamber correctly held that the formulation of the last (common) element in the Elements of Crimes on Genocide does not purport to amend the crime's definition but provides for a welcome clarification. The contextual elements should not, however, be seen as an addition to the crime's actus reus but as an objective point of reference for the determination of a realistic genocidal intent. The Chamber's requirement of a 'concrete threat' is unfortunately worded because it suggests an unduly stringent contextual threshold.*

## 1. The Definition of the Crime of Genocide

This comment deals exclusively with the issue of whether the conduct of the individual perpetrator of the crime of genocide must be part of an overall genocidal campaign, i.e. 'a genocidal context'? This question is fundamental to the proper construction of the crime's definition and it thus rightly received the Pre-Trial Chamber's special attention.

Pursuant to Article 7 of the International Criminal Court (ICC) Statute and customary international law, crimes against humanity require the existence (or at least, the emergence<sup>1</sup>) of a widespread or systematic attack directed against any civilian population. It is thus clearly established that crimes against humanity will, except perhaps for the most exceptional circumstances, have a systemic character. The customary definition of genocide, as contained in Article II of the Genocide Convention and reflected in Article 6 of the ICC Statute, reads conspicuously different. It neither contains an explicit objective contextual element, nor does the special intent requirement explicitly allude

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1 See the last sentence of § 2 of the Introduction to the ICC Elements of Crimes on Crimes against Humanity (ICC-ASP/1/3).

to a collective genocidal activity. As a consequence, the crime of genocide, other than crimes against humanity, appears to be drafted from the perspective of the 'lone individual seeking to destroy the group as such'.<sup>2</sup>

## 2. The ICC Elements of Crimes

The ICC Elements of Crimes on genocide significantly qualify the impression conveyed by a first reading of the crime's definition. They stipulate a last common Element, which reads as follows:

The conduct [killing, causing serious bodily or mental harm etc.] took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>3</sup>

This is complemented by the following explanations in the Introduction of the Elements of Crimes on Genocide:

With respect to the last element listed for each crime:

The term "in the context of" would include the initial acts in an emerging pattern;

The term "manifest" is an objective qualification;

Notwithstanding the normal requirement for a mental element provided for in article 30 and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court of a case-by-case basis.<sup>4</sup>

## 3. The Position of the Pre-Trial Chamber in *Al Bashir*

In his application for an arrest warrant, the Prosecutor took for granted the requirement of a genocidal context and applied the first alternative of the common element stipulated in the Elements of Crimes on Genocide:

The Prosecution must show that, as to each genocidal *actus reus*, the conduct took place in the context of a manifest pattern of similar conduct directed against each target group. The magnitude, consistency and planned nature of the crimes detailed in this Application unequivocally demonstrate that the alleged acts of genocide took place in the context of a manifest pattern of similar conduct, in furtherance of Al Bashir's plan to destroy in substantial part each of the targeted groups.<sup>5</sup>

The Chamber took a more scrupulous approach to the matter. It recognized a possible divergence of the Elements of the Crimes on Genocide from the crime's definition and noted that 'there is certain controversy as to whether

2 ICTY, Judgment, *Jelisić* (IT-95-10-T), 14 December 1999, § 100.

3 Introduction to the ICC Elements, *supra* note 1.

4 *Ibid.*

5 Situation in Darfur, The Sudan, Public Redacted Version of the Prosecutor's Application under Article 58 (ICC-02/05), 14 July 2008, § 209; cf. also § 76 of the same document.

this contextual element should be recognised'.<sup>6</sup> In the end, however, the Chamber did not find the contextual elements stipulated in the Elements in 'irreconcilable contradiction' to the definition.

The Chamber interpreted the contextual elements as follows:

In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide — as an *ultima ratio* mechanism to preserve the highest values of the international community — is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.<sup>7</sup>

In the Chamber's view this is not an amendment to the crime's definition but rather the articulation of an implicit element of the latter:

[T]he Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or part thereof, is (i) not *per se* contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22 (2) of the Statute that the definition of the crimes "shall be strictly construed and shall not be extended by analogy" and "in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted"; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the "crime of crimes".<sup>8</sup>

In her Separate and Partly Dissenting Opinion, Judge Usačka explicitly refrains from deciding the question of contextual elements and questions the Majority's reasoning to the extent that it is based on Article 22 of the ICC Statute.<sup>9</sup> More specifically, Judge Usačka disagrees with the Majority's view that a 'concrete threat' was required to satisfy the contextual elements.<sup>10</sup>

## 4. Comment

This commentator shares the Chamber's view that the formulation of the last (common) Element does not purport to amend the crime's definition but provides for a welcome clarification of the latter (*infra* sub A). It is respectfully submitted, though, that the contextual elements should not be seen as an addition to the crime's *actus reus* but as an *objective point of reference* for the determination of a *realistic* genocidal intent (*infra* sub B).<sup>11</sup> Finally, it is thought that the requirement of a 'concrete threat' is unfortunately worded because it suggests an unduly stringent threshold.

6 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Omar Hassan Ahmad Al Bashir* ('Al Bashir') (ICC-02/05-01/09), 4 March 2009, § 125.

7 *Ibid.*, § 124.

8 *Ibid.*, § 133.

9 *Ibid.*, Separate and Partly Dissenting Opinion of Judge Anita Usačka, §§ 16 and 20.

10 *Ibid.*, § 19, fn 26.

11 See already, C. Kreß, 'The Crime of Genocide under International Law', 6 *International Criminal Law Review* (2006) 461–502, at 471 *et seq.*

### A. Considerations in Support of the Contextual Elements

It should be noted at the outset that the Elements of Crimes do not exclude the scenario of the lone *génocidaire* altogether. The second alternative of the common element explicitly provides for this possibility. It requires, however, that such a lone *génocidaire* must be in possession of the means to effect the destruction of the targeted group in whole or in part.<sup>12</sup>

Obviously, this latter qualification is of great practical importance. As it is extremely difficult to conceive of a single perpetrator who is in a position to destroy a (substantial part of a) protected group on his own, it is the first alternative of the common element that will be applicable in practice (as it is the case in the *Al Bashir* case), except for the most exceptional circumstances, which William A. Schabas aptly described as ‘little more than a sophomoric *hypothèse d’école* and a distraction for judicial institutions.’<sup>13</sup> Yet, it is important to fully appreciate what the common element of the crime of genocide essentially suggests: that this crime presupposes a real danger for the targeted group and that this, for all practical purposes, entails the need for a planned genocidal campaign.

#### 1. Strict Interpretation

Judge Usačka is correct that it would be too easy to simply rely on Article 22(2) of the ICC Statute to resolve our question because the application of this statutory rule of interpretation requires the existence of an ambiguity. At the same time, however, Article 22(2) of the ICC Statute carries its full weight if a reasonably strong case — based on other considerations — can be made in support of the narrow construction of the crime’s definition. As it will now be shown, such considerations can be formulated.

#### 2. The Original Concept of the Crime of Genocide and the Travaux Préparatoires of the Genocide Convention

The idea of a genocidal campaign is not a recent arrival. Quite to the contrary, it lies at the heart of the original concept of the crime. In his groundbreaking study on the subject, Raphael Lemkin had the following to say:

[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>14</sup>

12 R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 177 *et seq.*; W. Rückert and G. Witschel, ‘Genocide and Crimes Against Humanity in the Elements of Crimes’ in H. Fischer, C. Kreß and S.R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin: Berlin Verlag, 2001), 66.

13 W.A. Schabas, ‘Darfur and the ‘Odious Scourge’: The Commission of Inquiry’s Findings on Genocide’, 18 *Leiden Journal of International Law* (2005) 871–885, 877.

14 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government: Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944), 79.

As is well known, Lemkin's otherwise rather broad concept of genocide was significantly narrowed as a result of the deliberations in the General Assembly's Sixth Committee. This, in itself, makes it rather unlikely that States, at the same time, decided to fundamentally broaden the crime's scope of application to cases where no real danger for (part of) a group exists. This is confirmed by a reading of the debates within the Sixth Committee. It must of course be conceded that, the drafters of the crime's definition did not wish to categorically exclude the scenario of the lone *génocidaire*, and rejected suggestions that would have had that effect.<sup>15</sup>

On the other hand, and crucially, at no point do the *travaux préparatoires* reveal that the drafters seriously contemplated the definition encompassing conduct not posing a real danger to the protected value.<sup>16</sup>

Historical background and genesis thus both point to a narrow construction of the crime's definition.

### 3. Systematic Considerations

While the crime of genocide received a proper definition before crimes against humanity did, the former crimes have grown out of the latter.<sup>17</sup> This historic fact cautions against a disconnection of the common roots of both crimes under international law.<sup>18</sup> As was highlighted above, there can be no doubt that crimes against humanity imply a real danger for the target civilian population because of the requirement of a(n emerging) widespread or systematic attack. In light of the historic development, it would be rather odd if the crime of genocide had been given a fundamentally broader scope of application. The Chamber is right to also emphasize that it would be hard to reconcile such a broad construction with the widely accepted consideration of the crime of genocide as the 'crime of crimes'.

Construing the crime of genocide without the requirement of a real danger for the targeted group would also place this crime in a peculiar position relative to other crimes under international law. For not only crimes against humanity, but also war crimes and the crime of aggression require a real danger to the internationally protected value. In the case of war crimes, this danger stems from the fact that an armed conflict must exist. Consequently, the commission of any war crime entails the real risk of escalating already existing violence and of posing an obstacle to the conclusion of a genuine peace. Correspondingly, a crime of aggression under customary international law presupposes an actual use of force by a state in contravention of the international

15 For such suggestions, see UN Doc. A/C.6/211, 1 October 1948 (France); UN Doc. A/C.6/217, 5 October 1948 (Belgium).

16 For the same view, see W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., Cambridge: Cambridge University Press, 2009), 244 *et seq.*

17 Cryer *et al.*, *supra* note 12, at 167.

18 C. Kreß, 'The Darfur Report and Genocidal Intent', 3 *Journal of International Criminal Justice (JICJ)* (2005) 562–578, at 575 *et seq.*

prohibition on the use of force. This is even more than a real threat to international peace and security. All this demonstrates the need to pass a high threshold to reach the realm of the international community's *jus puniendi*. Indeed, the Chamber formulates a useful word of caution against tendencies to trivialize international criminal law *stricto sensu* when it stresses that this body of law constitutes the '*ultima ratio* mechanism to preserve the highest values of the international community'. From a standpoint of systematic coherency within the existing body of international criminal law *stricto sensu*, it would hardly be convincing to construe the crime of genocide in a manner that would legitimize international intervention through criminal law without the need to pass a similarly high threshold.

#### 4. *The Elements of Crimes as Evidence of the Opinio Juris of States*

According to Article 9 of the ICC Statute, the Elements of Crimes shall assist in the interpretation of Article 6 of the ICC Statute and they shall be consistent with it. While these legal requirements cannot exclude the possibility of an irreconcilable conflict between an Element and the statutory definition, they nonetheless caution against too hasty an assumption that such a contradiction exists. The Elements of Crimes should first be evaluated as what they are, i.e. the expression of a 'consensus by the international community'<sup>19</sup> that a certain crime should be interpreted in a certain way. This must also apply in the case of the last common Element on the crime of genocide. There is no compelling indication that the drafters of the last common Element intended to amend the well-entrenched definition of the crime of genocide. While there were differences as to the precise language and the best analytical way to capture the underlying idea, there was no fundamental disagreement on the substance. As one observer has rightly noted:

Because genocide is universally recognized as an extremely serious crime, it was generally agreed that the context of the crime requires that there be a certain scale or other real threat to a group.<sup>20</sup>

The Elements of Crimes thus support the systematic considerations by way of subsequent practice.

#### 5. *The Prior Case Law*

The formulation of the last common Element is not without support within the case law of the ICTY. In fact, it is identical to a statement made by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia

<sup>19</sup> Cryer *et al.*, *supra* note 12, at 178 *et seq.*

<sup>20</sup> V. Oosterveld, 'The Context of Genocide' in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational Publishers, 2001), 45; for a similar observation, see Rückert and Witschel, *supra* note 12, at 66.

(ICTY) in *Krstić*.<sup>21</sup> The ICTY Appeals Chamber, however, was hostile to the Trial Chamber's view:

The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements of genocide. While a perpetrator's knowing participation in an organized and extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw the inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population. In reasoning otherwise, the Trial Chamber relied on the definition of genocide in the Elements of Crimes adopted by the ICC. This definition, stated the Trial Chamber, "indicates clearly that genocide requires that the conduct took place in the context of a manifest pattern of similar conduct". The Trial Chamber's reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite. As already explained, the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention and was not mandated by customary international law. Because the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time *Krstić* committed his crimes, it cannot be used to support the Trial Chamber's conclusion.<sup>22</sup>

This is a rather strong judicial pronouncement on an important point of law. Deplorably, the pronouncement is not supported by equally strong reasoning.<sup>23</sup> The only argument contained in the above cited passage is that the Genocide Convention does not contain an explicit contextual element. The further statement that the Elements of Crimes 'did not reflect customary international law' remains a mere assertion.

Upon a closer look, it would appear that the drafters of the Elements of Crimes captured the prior case law more accurately than the ICTY Appeals Chamber. This is confirmed by the excellent summary of the prior practice in the leading monograph on the subject by William A. Schabas:

Although there have been convictions for crimes against humanity in the absence of a plan or policy, there is nothing similar in the case law concerning genocide. In practice,

21 Judgement, *Krstić* (IT-98-33-T), 2 August 2001, § 682; cf. also the following wise statement of the ICTY prosecution: '[I]n the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation. Indeed, it should be reserved only for acts of exceptional gravity and magnitude which shock the conscience of humankind and which, therefore, justify the appellation of genocide as the "ultimate crime": *Karadžić and Mladić* (IT-95-5-R61), Transcript of Hearing before the Trial Chamber, 27 June 1996, 15 *et seq.*

22 Judgement, *Krstić* (IT-98-33-A), 19 April 2004, § 223 *et seq.*

23 For the same view, see Schabas, *supra* note 16, at 245. The same author is also correct in criticizing the Appeals Chamber of the ICTY for a similarly poor reasoning with respect to the plan or policy requirement of crimes against humanity: The ICCSt's retention of the policy requirement in Art. 7(2)(a) is evidence for the fact that the judicial pronouncements of the ICTY advocated for a legal development too far ahead of what states were prepared to accept. See C. Kieß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 148.



although the jurisprudence often says that it is inquiring into whether “the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part of the group as such”, judges invariably discuss the existence of the organized plan or policy, and conclude as to the existence of the “intent” of the accused based on knowledge of the circumstances.<sup>24</sup>

It should also be noted that even the ICTY Appeals Chamber in *Jelisić* has made an important concession to the more narrow construction of the crime because it has held that ‘in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases’.<sup>25</sup>

The Chamber was thus correct to attribute more weight to the *opinio juris* that States expressed through the Elements of Crimes, than to the view expressed by the Appeals Chamber of the ICTY in *Krstić* on the state of customary international law.

### ***B. The Genocidal Campaign and a Realistic Genocidal Intent***

Despite all the considerations mentioned above in support of a narrow construction of the crime of genocide, the literal argument remains that the wording of the objective elements (the *actus reus*) of the crime in its statutory definition does not provide for a basis to introduce a contextual element. While this argument is hard to refute, it does not challenge a different approach to reflect the typical interplay between individual and collective conduct in the crime’s definition. The key to reconcile the approach taken in the Elements of Crimes with the definition of the crime lies in the interpretation of the concept of genocidal intent. All the considerations listed above (*supra* A) support the view that this intent must be realistic and must thus be understood to require more than the vain hope of a single perpetrator of hate crimes to destroy (a part of) the hated group. On the basis of such a realistic concept of intent, which is fully compatible with the wording of the legal term, a coherent explanation of the last common Element is possible: The individual perpetrator will act with the realistic intent to destroy (a part of) the targeted group if his conduct is in itself capable to effect this destruction. In almost all cases, however, this will not be the case. Therefore, for all practical purposes, a perpetrator’s realistic intent requires that his conduct takes place ‘in the context of a manifest pattern of similar conduct directed against that group’. Under this approach, the last common Element constitutes the objective point of reference of genocidal intent. There is only a fine analytical nuance between this construction of genocidal intent and the widespread judicial

24 R. Cryer *et al.*, *supra* note 12, at 246 *et seq.*; for the same view, see C. Kreß, *supra* note 11, at 470 *et seq.*

25 Judgement, *Jelisić* (IT-95-10-A), 5 July 2001, § 48; in the same case, the Trial Chamber went even further and stated that ‘it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organization or system: Judgement, *Jelisić* (IT95-10-T), 14 December 1999, § 101.



practice to regard the genocidal campaign as 'only the evidentiary basis from which the fact-finder may draw the inference'<sup>26</sup> that a genocidal intent exists.

While it is true that the last common Element is worded in the form of an objective circumstantial element, it is submitted that the concept of realistic intent constitutes the preferable way to capture the substance of what the drafters of the Elements had in mind. First, this concept conforms to the wording of the Genocide Convention. Second, it has the advantage of avoiding the debate about an additional mental requirement. The drafters of the Elements were aware of this problem but were unable to solve it within the short negotiation time given to them. This is readily apparent from the evasive passage in the Introduction to the Elements of Crimes on Genocide.<sup>27</sup> If, however, the planning of a genocidal campaign is seen as the objective point of reference for a realistic genocidal intent, it is clear that the individual perpetrator must be aware of this plan to form such an intent.

When dealing with the intent requirement in its *Al Bashir* decision, the Chamber chooses an approach that comes very close to the concept of realistic intent. The Chamber draws a distinction between what it calls the 'genocidal intent of the Government of Sudan' and Al Bashir's genocidal intent<sup>28</sup> and it appears to hold the view that there can be no individual intent without a collective intent. If 'governmental intent' is translated into a 'plan to carry out a genocidal campaign',<sup>29</sup> it becomes clear that the Chamber is of the view that the overall genocidal plan amounts to an objective point of reference for Al Bashir's (realistic) intent.<sup>30</sup> On the basis of such a concept of genocidal intent, a separate mental requirement concerning an objective circumstance element is superfluous. The Chamber has thus come halfway in adopting the concept of realistic intent and it is suggested that it should fully endorse this idea when the next opportunity arises.

<sup>26</sup> See Krstić, *supra* note 22.

<sup>27</sup> Introduction to the ICC Elements, *supra* note 1.

<sup>28</sup> *Al Bashir*, *supra* note 6, § 147 *et seq.*, § 151.

<sup>29</sup> The Chamber recognizes that the 'collective' intent would follow from the 'individual' intent if Al Bashir were in full control of the State apparatus: *Al Bashir*, *supra* note 6, § 148 *et seq.*

<sup>30</sup> It is worth emphasizing that the concept of realistic intent is not prejudicial to the decision in the debate between a 'purpose-based' and a 'knowledge-based' approach to the individual intent: Pursuant to the 'purpose-based' approach, the individual perpetrator, in addition to his knowledge of the genocidal campaign, must act with the 'conscious desire' to contribute to the group's (partial) destruction. For the 'knowledge-based' approach, the individual perpetrator's knowledge of the realistic collective goal to destroy suffices. The Chamber refers to this controversy in § 139 (fn 154) of its decision (*Al Bashir*, *supra* note 6), but the treatment of the matter remains superficial. Certainly the complex legal issue cannot be decided by a simple 'literal interpretation', as the Chamber seems to suggest. For a detailed discussion of the question, see: A.K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', 99 *Columbia Law Review* (1999) 2259–2294, 2259; A. Gil Gil, *Derecho Penal Internacional: Especial consideracion del delito de genocidio* (Madrid: Editorial Tecnos, 1999), 259 *et seq.*; H. Vest, *Genozid durch organisatorische Machtapparate* (Baden-Baden: Nomos Verlagsgesellschaft, 2002), 104 *et seq.*; H. van der Wilt, 'Complicity in Genocide and International v. Domestic Jurisdiction', 4 *JICJ* (2006) 239–257, 242; C. Kreß, *supra* note 18, 565 *et seq.*; and most recently, Schabas, *supra* note 16, at xiv and 242 *et seq.*

### C. No Requirement of a Concrete Threat

In one respect, the Chamber appears to set too high a threshold for the commission of the crime of genocide. It interprets the last common Element to mean that the crime of genocide is only completed when 'the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical'.<sup>31</sup> The Chamber's precise understanding of 'concrete threat' is not entirely clear, but the term risks to be understood as posing too significant a hurdle to pass. As Judge Usačka rightly observes in her dissent, the precondition of a 'concrete threat' comes close to a 'result-based requirement', i.e. the requirement of a situation where the genocidal campaign has advanced up to a point where actual destruction may soon result.

None of the above-listed considerations (*supra* A) call for the introduction of so stringent a threshold and the same is true for the prior practice. Contrary to what the Chamber appears to hold, the last (common) Element does not require the occurrence of so dangerous a situation either. Under this Element's second alternative, it is sufficient that the conduct in question *can effect* the destructive result. Accordingly, it must suffice for the first alternative too, that the genocidal campaign is of nature *capable to bring about* the planned destruction. This interpretation is confirmed by the fact that the Introduction to the Elements of Crimes on Genocide underline that the 'term "in the context of" would include the initial acts in an emerging pattern'. This means that the crime of genocide is completed with the initial act of a genocidal campaign. At this moment in time, however, the threat to the targeted group as such, or a substantial part thereof, will not yet be *concrete*.

It follows that, for the typical case of genocide, no more should be required as the objective point of reference for the perpetrator's intent than the existence of a realistic collective goal to destroy the target group in whole or in part. The Court should clarify this point at the next occasion.

31 *Al Bashir*, *supra* note 6; for Judge Usačka's dissent, see *supra* note 9.