INTERNATIONAL CRIMES

Law and Practice

GUÉNAËL METTRAUX

VOLUME I: GENOCIDE

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À toi, Nino, pour faire avancer ce que tu as commencé.
Et à toi, John, qui croyais tant à la justice.

Foreword

Professor William A Schabas, OC MRIA

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948. In the compendium of Multilateral Treaties Deposited with the Secretary General of the United Nations, it is classified under 'Human Rights' rather than under 'Penal Matters', which is where the Rome Statute of the International Criminal Court is to be found. The Convention was negotiated in the Sixth Committee of the General Assembly and not in the Third Committee, which would normally have been the place for a human rights treaty. Indeed, while the negotiations of the Genocide Convention were underway in the Sixth Committee, the Third Committee was occupied with the text of the Universal Declaration of Human Rights. There was even some interaction. For example, many members of the Sixth Committee thought that acts of 'cultural genocide' involving persecution of national minorities were better dealt with in the Universal Declaration. The two documents were adopted by the Plenary General Assembly within a day of each other.

Today, the Genocide Convention is thought of as an international criminal law treaty. Although it is the first on the Secretary-General's list of human rights treaties, when reference is made to the major United Nations treaties in the area of human rights the Genocide Convention is rarely mentioned. Its profile within the corpus of human rights deserves to be enhanced. In particular, there are great affinities with the International Convention on the Elimination of All Forms of Racial Discrimination.

The original vision of the condemnation of genocide, credited to Raphael Lemkin in his book, *Axis Rule in Occupied Europe*, was of a concept that destined to fill a gap in the international legal protection of minorities. Lemkin traced the origin of the concept to the crime of 'denationalization', one of the thirty-two violations of the laws and customs of war listed in the report of the 1919 Commission on Responsibilities. However, he was rather dismissive of the Hague Conventions of 1899 and 1907, saying they dealt with 'the sovereignty of a state' but were 'silent regarding the preservation of the integrity of a people'. Lemkin acknowledged that since the pre-First World War era of codification there had been an 'evolution of international law'. He pointed to the minorities treaty regime developed at the Paris Peace Conference in such instruments as the Treaty of Versailles and the so-called *Little Versailles* treaty that affirmed Polish independence. Lemkin understood genocide as a development of this body of law where the focus was placed upon national minorities. He proposed that the crime of genocide be developed in order to address various forms of persecution of national minorities. It was a vision that is closer in many respects to the modern-day definition of crimes against humanity found in Article 7 of the Rome Statute of the International Criminal Court than it is to that of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

It is important to fix Lemkin's personal role in the development of the crime of genocide properly. Many historians and sociologists tend to exaggerate the importance of his influence, as if he was the author of a doctrine whose personal vision colours all subsequent interpretation. They may not fully appreciate the autonomy of the making of international law, where competing views are reconciled in ways that do not reflect the perspectives of those who launched the process at all. Lemkin's broad concept of genocide encountered serious challenges when he attempted to move it from an academic platform to the centre stage of international law-making. His initial effort was at the United Nations General Assembly, sitting in its first session in 1946. Lemkin was severely disillusioned by the judgment of the International Military Tribunal because it failed to condemn Nazi crimes perpetrated prior to the outbreak of the War. That was a consequence of the emasculated definition of crimes against humanity adopted at the London Conference and endorsed by the judges at Nuremberg. The judgment linked crimes against humanity to aggressive war, thereby ensuring the guilt of the Germans but insulating the four Great Powers who created the Tribunal from any international criminal liability for atrocities perpetrated against their own civilian populations.

'The Tribunal condemned war-time genocide but left peace-time genocide unpunished', Lemkin complained in the lobby of Nuremberg's Grand Hotel following issuance of the judgment. In reality, the judgment didn't even use the word 'genocide', but these remarks show that Lemkin was more concerned with content than with form. Had the International Military Tribunal convicted the defendants of 'peace-time crimes against humanity', Lemkin might well have been satisfied and turned his attention to other matters. Instead he set about changing the fact of international law, rushing back to New York where the General Assembly was about to resume its first session.

It was countries of the global south, what we used to call the 'third world', who embraced Lemkin's proposed General Assembly resolution recognizing genocide as an international crime that could be perpetrated in time of peace as well as in time of war. What became Resolution 96(I) of the General Assembly, entitled 'The Crime of Genocide', was presented by Cuba and co-sponsored by India and Panama. As it was being debated, Saudi Arabia contributed a draft convention, intended as the starting point of a negotiation process. The Resolution offered a summary definition of the crime that resembles the final version in the 1948 Convention, although there are some significant differences, but the final text of the Convention was in one respect far more restrictive than anything Lemkin would have wanted. Article II required that the punishable acts be committed with 'intent to destroy' a national, racial ethnic, or religious group. Acts of persecution had generally been grouped under the rubric of 'cultural genocide', and they were quite explicitly excluded from the Convention's scope.

It would be many more years before the General Assembly would endorse any other definitions of atrocity crimes. Although it adopted two definitions of the crime of genocide, in the 1946 Resolution and the 1948 Convention, it resisted giving its blessing to any definition of crimes against humanity. The first session of the General Assembly, in Resolution 95(I), authorized a 'general codification of offences against the peace and security of mankind'. It also affirmed 'the principles recognized in the Charter

of the Nürnberg Tribunal and in the judgment of the Tribunal', but the International Law Commission's definition of crimes against humanity, which was generally consistent with the judgment at Nuremberg, met with controversy in the 1950 session of the General Assembly and was ultimately never accepted.

What to make of this confused situation? In the Charter of the International Military Tribunal the four great powers, the United States, the United Kingdom, France, and the Soviet Union had devised a notion of atrocity crime committed against civilians that could only be committed in the context of an international armed conflict. Disappointed with this definition of crimes against humanity, Lemkin offered a competing vision, a crime of genocide. It had marked similarities with crimes against humanity but could be committed in peacetime as well as in time of war. The four great nations who had so cynically limited the notion of crimes against humanity in 1945, in order to shield themselves from responsibility were not going to agree, in 1948, to a more or less similar concept just because the name of the offence had been changed. They insisted that if genocide could be punishable when committed in peacetime, then it had to be limited in other respects. First, it was confined to national, ethnic, racial, and religious groups, a restriction with which Lemkin and many others were in agreement. Second, genocide involved the deliberate destruction of a group rather than the broader notion of persecution. This restriction was a big disappointment to Lemkin, and many others, at the time and indeed to the present day.

Over the decades that followed, the narrow definition of genocide proved a source of great frustration and angst. It seemed that most of the terrible atrocities perpetrated by regimes against their own populations did not fit neatly with the terms of Article II of the 1948 Convention. Crimes against humanity, as defined at Nuremberg, would often have been far more suitable as a legal characterization, were it not for the nexus with armed conflict. Moreover, unlike genocide, there was no convention on the prevention and punishment of crimes against humanity.

Different solutions were proposed. One was to encourage a liberal and dynamic interpretation of the Genocide Convention. The other was to call for its amendment. However, when international criminal law underwent its great revival, in the 1990s, neither of these two options was followed. Judges tended to adopt relatively strict interpretations of the terms of Article II of the Convention. In particular, they resisted extending the punishable acts in such a way as to encompass those involving persecution rather than outright destruction. This was not because they were particularly conservative by nature. International judges, beginning with the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, were prepared to make audacious leaps in the interpretation of war crimes and crimes against humanity. Such legal creativity persists in decisions and judgments of the International Criminal Court.

Moreover, when given the opportunity lawmakers showed no desire to amend the text of Article II of the Genocide Convention. The Rome Conference of 1998 was in so many respects an orgy of progressive legal development. With few objections, the armed conflict nexus in crimes against humanity and the confinement of war crimes to international armed conflict disappeared. On the other hand, isolated efforts to amend the definition of genocide did not resonate with delegates at all. Article 6 of

the Rome Statute quite faithfully reproduces the text of Article II of the Genocide Convention, adopted half a century earlier.

It may seem a paradox that crimes against humanity and war crimes have undergone such dynamic development over the past twenty-five years while the crime of genocide has remained stable, indeed almost stagnant, stubbornly resisting incessant appeals that it be enlarged. For whatever reasons, those who make and develop international law have opted to address an inadequate legal regime in terms of protection of civilian populations by enlarging two categories and leaving the third relatively untouched. The result is entirely satisfactory, in terms of delivering justice and addressing the entitlements of victims. Yet for many there remains great disappointment with the narrow scope of the crime of genocide. In the past, prior to the 1990s, there were no alternatives in the face of a failure to meet the terms of Article II of the Genocide Convention. If an atrocity did not fall within the ambit of the Convention, international criminal law was ill-equipped to address it.

That situation is now totally changed. Today, describing an atrocity as a crime against humanity rather than as genocide has little or no significance, at least in terms of its legal consequences. The International Criminal Court, like the ad hoc tribunals, has jurisdiction over both categories of crime. The penalties, the modalities of participation, and the available excuses and justifications are, for all practical purposes, about the same. At a more political level, the doctrine of the responsibility to protect applies to both genocide and crimes against humanity (as well as to war crimes and ethnic cleansing).

Yet the importance of genocide as a label for atrocities, regardless of any practical legal significance, remains acute. Genocide is a word of immense rhetorical value, to which victims and their advocates attach huge importance. In 2005, the Fact-Finding Commission on Darfur established pursuant to a Security Council resolution, and chaired by a great jurist, Antonio Cassese, tried to address this phenomenon. With genuine rigour, it concluded that there was credible evidence of crimes against humanity but not of genocide. While acknowledging that 'genocide bears a special stigma', the Commission stated that 'one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma'. Since then the cautious wisdom of the Commission has not always been heeded, however. In 2009, after a Pre-Trial Chamber of the International Criminal Court issued an arrest warrant against President Bashir for crimes against humanity and war crimes, yet rejected the application for a charge of genocide, the Prosecutor persisted and appealed the decision. More recently, commissions of inquiry established by the Human Rights Council have used the word 'genocide' to describe situations in Syria and in Myanmar. Adopting what was in practice a broad understanding of the crime of genocide, their reports do not reflect a careful analysis of case law from such authoritative bodies as the International Court of Justice, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, and the Grand Chamber of the European Court of Human Rights. If the Sudan, Syria, and Myanmar cases every come to trial, and if the legal precedents are followed, charges of genocide will flounder in all likelihood, and yet use of the term is not without great impact outside the courtroom. It is certainly easier to be convicted of genocide in the Human Rights

Council, in national parliaments, and in the media than it is in a properly constituted criminal court.

Strict construction of the definition of genocide does not render the concept entirely inert. The crime has been prosecuted frequently in the past few decades. It has been studied and interpreted by several of the world's great courts and tribunals, at both the national and the international levels. Enigmas persist within the terms of Article II of the Convention. Further legal development, along the lines advocated by so many reformers over the decades, seems unlikely although it cannot be ruled out. It is essential that the crime of genocide be studied not in isolation but within a broader context, where its synergies with crimes against humanity and war crimes can be fully appreciated. It is not very helpful to treat these crimes in a hierarchical manner, where one is viewed as a bronze medal, another as silver, and a third (guess which one) as gold. Rather, the three categories comprise a package. What is important is to ensure the absence of significant gaps in the package taken as a whole. This goal is not advanced by treating them as competitors.

Preface

This book builds upon years of practice in the field of international criminal justice. Experiencing international criminal law from within meant being exposed to the fact that this body of law is not some abstract truth waiting to be revealed but a malleable set of norms heavily reliant on its actors to give it shape and colours. In *Tadić*, for instance, the concept of 'nationality' was interpreted to mean 'allegiance' so that Bosnian-Serbs and Bosnian-Muslims, who were fellow Bosnian nationals, could nevertheless be said to be of two different nationalities and so that the latter would be protected under the grave breaches regime of the Geneva Conventions.[1] In *Kunarac*, the requirement of 'state official', which had long been an element of the notion of torture under human rights law, was whipped out of the definition of this offence and the accused, Dragoljub Kunarac, a local thug-*cum*-military, was convicted for it without regard for his status.[2] In these and many similar instances, international criminal law was being made not just revealed. Jurisprudence in this field does not therefore simply help flesh out and clarify the law. In many cases, it determines its content so that there can be no understanding of the law without a solid grasp of the related judicial practice.

The purpose of this book and of the associated volumes is to offer a detailed overview of the law and relevant practice pertaining to the four international core crimes—genocide; crimes against humanity; war crimes; and aggression—so as to help practitioners and scholars navigate the complex and sometimes turbulent waters of international criminal law. To that end, consideration was given to the various contributors to the law of international crimes—international and internationalized criminal tribunals,[3] domestic courts, the UN Security Council and General Assembly, the International Law Commission, scholars, and a variety of other institutions—and to their respective normative output. Once collected, this raw material was approached with three interpretative principles in mind. The first of these is that the past is generally relevant to understanding the present. A sound understanding of the law of international crimes, therefore, demands cognizance of its history and of the factors that helped shape it.

Second, the practice of tribunals which have dealt with international crimes is a good place in which to anchor the study of international criminal law. Their practice provides a degree of collective wisdom, which helps identify relevant legal principles,

[1] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Opinion and Judgment, 15 July 1999, paras 164ff, in particular, paras 166–169.

[2] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-T, Judgment, 22 February 2001, paras 488ff.

[3] Particular attention was paid to these: the IMT; the IMTFE; Control Council Law No. 10 tribunals; ICTY; ICTR; SCSL; ICC; ECCC; East Timor Panels; UNMIK Panels; the State Court of Bosnia-Herzegovina; STL; the Extraordinary African Chambers; the KSC; the African Court of Justice and Human Rights under the Malabo Protocol; and the Special Criminal Court in the Central African Republic.

their origin and interpretation. It also offers a valuable soundboard against which to check individual preferences as well as scholarly opinions.

Third, the various components of that law are to be approached and evaluated with a degree of deference but also with a critical mind. The jurisprudence of international crimes is replete with suggestions that certain pronouncements reflect customary law or constitute an accepted understanding of the law. Judicial decisions are of course entitled to some degree of deference. However, deference is earned and conditioned by the courts having made a credible case for their conclusions. The precedential value of a judicial decision is therefore a *relative*, rather than *absolute*, thing. Similarly, one cannot approach the Rome Statute or the ICC's *Elements of Crimes* as 'gospel' lest one loses the ability to conduct a critical assessment of their content, raison d'être, and value. Therefore, the study of the law of international crimes necessarily implies a readiness to investigate, accumulate, compare, critique, and test the various pieces that make up that body of law. In some respects, it also involves the expression of interpretative preferences where the law leaves room for it.

The idea for this project was inspired by two men, both friends and great jurists. Antonio ('Nino') Cassese infected those around him with the same zeal that drove him through life and with that perhaps naïve belief that law can serve the ends of justice even in the most challenging of places. This book is a modest contribution to a construction that he started. Judge David A. Hunt, a judge at the International Criminal Tribunal for the former Yugoslavia (ICTY), patiently mentored a keen but green lawyer and opened the door for him to a new, fascinating, legal culture. From this experience came an understanding that criminal law is ultimately about the effectiveness of its enforcement and about the quality of the justice that implements it. Law, he thought, is of little value to man if not applied fairly and credibly. To both of these men, I will forever be indebted.

This book could not have been written without the help and support of many people who generously gave their time to contribute to this endeavour and push it across the finish line. Particular thanks go to a group of talented individuals who helped make the project a reality: Sarah Bafadhel, Bettina Spilker, Lina Baddour, Dermot Groome, Andrea Knežević, Sam Gaunt, Daphne Yuqing Liu, and Sarah E Hunter. Professor Bill Schabas was also instrumental to the creation of this book through his writings, friendship, and support.

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Towards a Universal Law of International Crimes

General Introduction

1.1 What Are International ('Core') Crimes?

International crimes are violations of international law that engage the individual criminal responsibility of the perpetrator as a direct result of international law.[1] These crimes share certain features that give them their particular normative identity and help distinguish them from other types of crimes. First, they are all intended to sanction the violation of important interests of the international community. War crimes and crimes against humanity thus criminalize acts that violate or threaten the fundamental rights and interests of individuals. Genocide goes one step further by protecting groups whose existence and preservation is of interest to humanity as a whole.[2] Aggression, for its part, represents the penal response of the international community to the disturbance of international peace caused by wars of aggression.

Second, all international crimes are characterized by the severity of the harm that the commission of such crimes would cause and by the extent to which they depart from accepted norms of civilization. The gravity of these acts is reflected, in particular, in the sentences typically imposed for their commission and in the fact that broad jurisdictional competence exists over such crimes.[3]

Third, the criminal character of these acts is determined by international law and the commission of an international crime engages the responsibility of its perpetrator as a direct result of international law. This distinguishes international core crimes from other types of *internationalized* criminality such as terrorism or piracy, which are of international concern and are regulated in part by international instruments but for which criminal responsibility is incurred as a result of domestic law rather than international law.

[1] See also *Prosecutor v. Kallon & Kamara*, Case No. SCSL-2004-15/16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 (hereafter *Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision), para. 68 (footnotes omitted):

> A crime against international law has been defined as 'an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act would probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state.' In *re List and Others*, the US Military Tribunal at Nuremberg defined an international crime as: 'such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.' However, not every activity that is seen as an international crime is susceptible to universal jurisdiction.

[2] See, *infra*, 8.4.1. [3] See, *infra*, 3.5.

The characterization of a particular conduct as an international core crime has a number of legal consequences, including in regard to the scope of jurisdictional competence over such acts,[4] the applicability of immunities and amnesties,[5] the availability of particular defences,[6] the existence of certain obligations to prevent and punish such acts,[7] and whether suspects are entitled to refugee status.[8]

1.2 A Brief History of International Crimes

Until the mid-nineteenth century and, bar a few anecdotal cases, there was no clear and general appreciation that international law could regulate an individual's conduct and his criminal responsibility. In that first era, the laws of war were instrumental to the process of making international law relevant to men and not just states. They provided a basic set of norms binding on individuals involved in war and operated beyond state sovereignties as a way to protect the interests of those who were not or were no longer involved in the hostilities.

The idea that individuals could engage their criminal responsibility as a direct result of international law became a concrete reality during the second era of international criminal law in the aftermath of the Second World War. The Nuremberg Tribunal determined that international crimes 'are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[9] The legal regime that developed from this basic proposition was as simple as it was necessary. At its core, it consisted of four international crimes recognized and prohibited by international law: crimes against peace, also known as aggression or aggressive war; crimes against humanity; war crimes; and, later, genocide. Associated with these was a nascent body of international rules and principles regulating the circumstances under which an individual could be held criminally responsible for participating in any of these crimes.

The next important stage of development of the law of international crimes began with the establishment of new enforcement mechanisms in the early 1990s, namely, the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda, soon followed by other international and hybrid tribunals, and culminating with the creation of the International Criminal Court (ICC). The multiplication of judicial venues with competence over international crimes made the threat of prosecution significantly more credible, although not entirely satisfactory. This also helped generate jurisprudence that rendered the law of international crimes a great deal more accessible and foreseeable.

International criminal law has now entered its fourth era, one characterized by the diminished relevance of international criminal justice and by a significant degree of cynicism towards international law. Many of the advances of the past decades have been eroded or rolled back, with states withdrawing from the ICC, or threatening to,

[4] See, *infra*, Chapter 4. [5] See, *infra*, Chapter 6. [6] See, *infra*, 3.3.3.2.
[7] See, *infra*, Chapter 5. [8] See, *infra*, 3.8.
[9] 'Judgment' in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1 (International Military Tribunal 1947) (hereafter IMT Judgment), 223.

international prosecutions slowing down to a meagre trickle, and entire institutions having to question their own relevance. These challenges will not be overcome by just a small group of like-minded judicial institutions but will require the *re*-commitment of states to the idea of international justice. That process will be aided by domestic and international courts articulating a clear, uniform, and credible body of rules regulating the prosecution of international crimes and through their enforcing those more actively, more forcefully, and more universally than they have done in recent years.

1.3 The Making of the Law of International Crimes

The law of international crimes comes from different sources. Elements of the law are rooted in treaties: The Hague and Geneva Conventions, for instance, were central to the development of the law of war crimes; the Treaty of Paris was said to constitute the normative foundation of the crime of aggression; and the law of genocide arose out of the 1948 Genocide Convention. The statutory instruments of international(ized) criminal tribunals as well as national laws and a variety of *soft law* instruments similarly contributed to shaping the law of international crimes. That law is also, to an unusual extent, judge-made law. From its origins, courts of law—national, international, and hybrid—have been instrumental to the life and development of international criminal law. In the Charter of the Nuremberg Tribunal, for instance, crimes against humanity and aggression were little more than labels accompanied by perfunctory descriptions. It thus fell to the Nuremberg Tribunal to turn these abstract notions into specific criminal offences. Subsequent tribunals built upon this legacy to refine and expand the reach of the law. The jurisprudence of the *ad hoc* Tribunals is particularly important in that respect because it purports to reflect customary international law.[10] However, when applying what they said amounted to customary international law, these jurisdictions did much more than just reveal a pre-existing legal reality. They were, in truth, part of the legislative construction of these norms, acting as 'customary law midwives' which shaped the definition and substance of international crimes.[11]

[10] See, generally, UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993 (hereafter UN Secretary-General Report on ICTY), paras 29 and 34. See also Larry D Johnson, 'Ten Years Later: Reflections on the Drafting' (2004) 2 Journal of International Criminal Justice 368 (hereafter Johnson, 'Ten Years Later'), 370; Ralph Zacklin, 'Some Major Problems in the Drafting of the ICTY Statute' (2004) 2 Journal of International Criminal Justice 361 (hereafter Zacklin, 'Major Problems Drafting ICTY Statute'), 363. For illustrations, see: *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002 (hereafter *Vasiljević* Trial Judgment), para. 202; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 March 1999 (hereafter *Kordić & Čerkez* Articles 2 and 3 Jurisdiction Decision), para. 20; *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (hereafter *Hadžihasanović et al.* Command Responsibility Appeal Decision), paras 55, and 35, 44–46 (regarding the notion of command responsibility); *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003 (hereafter *Ojdanić* Joint Criminal Enterprise Decision), paras 9 (regarding the mode of liability of joint criminal enterprise), 10–11, 17, 22, 26, and 30; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 (hereafter *Blaškić* Appeal Judgment), paras 110, 139, and 141.

[11] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) (hereafter Mettraux, *Ad Hoc Tribunals*), 14. The question of whether findings of the *ad hoc* Tribunals that a norm or prohibition

1.4 Towards a Nascent Universal Law of International Core Crimes

A careful review of the judgments and decisions of domestic and international tribunals pertaining to international crimes reveals a number of important features that attach to that body of jurisprudence. First, the quality of the judicial product can vary significantly from one jurisdiction to another. Particularly challenging from that point of view are *historical* decisions, most of which come from the Second World War, which sometimes provide contradictory precedents and holdings that are often far from fully reasoned. It is also true that not all decisions necessarily carry the same authority. For example, the precedential value of the *Nuremberg* Judgment cannot be compared to the Judgment of the *Tokyo* Tribunal, the latter being generally regarded as problematic from the point of view of the fairness of its proceedings and because of doubts regarding the *quality* of its judicial product.[12] Extracting relevant principles from historical decisions is therefore an exercise not entirely devoid of difficulties.

Second, the law has not always been consistent across time and jurisdictions. To pin it down at any one point in time requires consideration of forces and influences that have affected its contours and evolution. The law is a living instrument and the law of international crimes has proved particularly lively and adept at adapting to new situations.

The third observed jurisprudential trend is the increasingly consistent rendition of the law of international crimes across jurisdictions. With the qualified exception of war crimes, the law of international crimes grew from a common root traceable to Nuremberg and Tokyo. From this common root, the law of international crimes has developed into an increasingly coherent and detailed regime. This is apparent, *inter alia*, from the fact that international(ized) criminal tribunals frequently cite each other's decisions as authority, which stands as evidence of the dialogue taking place across jurisdictions concerned with international crimes. The willingness of courts to find authority in the decisions of otherwise foreign jurisdictions clearly establishes international criminal law as a joint venture whose building blocks reach across jurisdictional lines.

The adoption of the Rome Statute of the International Criminal Court was another important step in the process of 'codification' of the law of international crimes. The

formed part of customary international law should always be taken at face value is, as with any such exercise, at times open to reasonable dispute. It is generally accepted that some of their determinations on that point were accompanied by a degree of legislative *coup de pouce* on the part of these jurisdictions. See, generally, André Nollkaemper, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia' in Thomas AJA Vandamme and Jan-Herman Reestman (eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems* (Europa Law Publishers 2001) (hereafter Nollkaemper, 'Legitimacy of International Law'); Göran Sluiter, '"Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals' in Leilya N Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011) (hereafter Sluiter, 'Chapeau Elements of CAH'), 110ff.

[12] Regarding the jurisprudential value of the Tokyo trial, see, generally, Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) (hereafter Boister & Cryer, *Tokyo International Military Tribunal*).

Statute largely mirrored the state of customary international law at the time of its adoption. However, the process of drafting the Rome Statute was not merely codificatory in nature. It also reflects: (i) certain normative progress (e.g., the addition of a number of gender crimes to the list of crimes against humanity); (ii) expansion of the law (e.g., regarding the list of discriminatory grounds relevant to the crime of persecution); (iii) retractions (e.g., the absence of the inchoate offences of direct and public incitement and conspiracy to genocide); (iv) instances of departure from customary law (e.g., the reformulation of the definition of the crime against humanity of torture); and (v) significant legislative developments (in particular, in relation to the definition of the crime of aggression). Whether the law and jurisprudence of the ICC will help consolidate a unified law of international crimes or remain the law of that particular jurisdiction remains to be seen. Many states have already adopted domestic laws that track the terms of the Rome Statute whilst others continue to apply regimes at variance with it, thereby suggesting that the pulling force of ICC law remains, at best, qualified.

1.5 Conclusions

This law of international core crimes is not yet an entirely uniform and fixed body of law. However, there is much more today that is clear and certain about the law of international crimes than there is that is still in dispute. This book is an attempt to take stock of this nascent universal law of international crimes. Whilst acknowledging that conflicts and contradictions still exist in relation to various aspects of the law, the book eschews the temptation of the narcissism of small legal and jurisdictional differences to focus on what is now common and settled and what has been achieved over a century in respect of the regulation of international crimes. This body of rules and principles now fills thousands of pages of judgments and entire libraries of legal scholarship. That heritage is what this book and associated volumes propose to explore.

2

A Short History of the Crime of Genocide

2.1 Birth of the Notion of Genocide

Attacks on groups of human beings have a long and painful history. However, until the Second World War, international law failed to address this type of criminality. The crimes committed by the Nazi regime provided the necessary impetus for the recognition of a new category of crimes that would address this particular category of atrocities.[1] It came to be known as genocide.

The expression 'genocide' is attributable to Raphaël Lemkin, a Polish Professor and former prosecutor. Whilst Lemkin was not the first to postulate that international law should protect groups of individuals, he coined the phrase 'genocide'—an amalgamation of the ancient Greek term '*genos*' (race, tribe) and the Latin '*cide*' (killing)—to describe attacks aimed at the destruction of a group or nation.[2] Lemkin was also perhaps the first to articulate the general parameters of this notion. He understood genocide to be a crime directed against a national group and referring to actions and policies aimed at the annihilation of the essential foundations of the life of a group.[3] To this day, this understanding remains at the core of the notion of genocide: a crime aimed at the physical destruction of a group through violence directed at its members.

2.2 Genocide at Nuremberg

The notion of 'genocide' did not play a significant part in the prosecution of the crimes of the Second World War.[4] Early in the negotiations of the Charter of the International

[1] UN Ad Hoc Committee on Genocide, Summary Record of the Seventh Meeting, UN Doc. E/AC.25/SR.7, 20 April 1948 (hereafter UN Doc. E/AC.25/SR.7), (Mr Ordonneau, France) ('The movement in world opinion which had lately laid particular stress on the problem of genocide unquestionably arose out of the last war. That movement had doubtless been preceded by the work of leading jurists who had examined the problem before the war, but it was the excesses committed by the Nazis and Fascists which had awakened the world's conscience.').

[2] Henry T King Jr, Benjamin B Ferencz, and Whitney R Harris, 'Origins of the Genocide Convention' (2008) 40 Case Western Reserve Journal of International Law 13 (hereafter King, Ferencz, & Harris, 'Origins of Genocide'), 15 (footnote omitted) ('Genocide was not invented by Lemkin. He merely invented the term.').

[3] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals For Redress* (Carnegie Endowment for International Peace 1944) (hereafter Lemkin, *Axis Rule in Occupied Europe*), 79; Raphaël Lemkin, 'Genocide: A Modern Crime' (1945) 4 Free World 39 (hereafter Lemkin, 'Genocide: A Modern Crime'). See also United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 7 (HM Stationery Office 1948) (hereafter UNWCC, *LRTWC* vol. 7), 7–8; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) (hereafter UNWCC, *LRTWC* vol. 13), 37. For an interesting insight into Lemkin's views, see Douglas Irving-Erickson, *Raphaël Lemkin and the Concept of Genocide* (University of Pennsylvania Press 2017) (hereafter Irving-Erickson, *Lemkin and Genocide*).

[4] See generally UNWCC, *LRTWC* vol. 7 (n 3) 7–8, 24–26; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 15 (HM Stationery Office 1949) (hereafter UNWCC, *LRTWC*

Military Tribunal at Nuremberg, an American draft considered the possibility of providing the Tribunal with jurisdiction over '*genocide* or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labor; (5) working them in inhumane conditions'.[5] Despite this proposal, the reference to 'genocide' disappeared from later drafts. Instead, the drafters of the Charter favoured and adopted the notion of 'persecution' to address crimes committed against members of particular groups on discriminatory grounds.[6]

The absence of genocide from the Charter was not entirely unexpected considering the nascent and still ambiguous nature of that notion. The absence of group-based criminality within the Charter also reflected the Allies' reluctance to turn the trial of major Nazi war criminals into a patchwork of cases dealing separately with the victimization of different groups.[7] In particular, the Allies considered that focusing on the fate of groups rather than individual victims could create an impression that these groups were using the trial as a vehicle to achieve collective retribution against their tormentors.[8] Therefore, at Nuremberg, the victims of Nazi crimes were individuals and not groups, as such.

vol. 15), 122–23. In recounting the Nuremberg Trial, the United Nations War Crimes Commission noted: '[t]he Nuremberg Tribunal, although it dealt in great length with the substance of the charge of genocide, did not use this term or make any reference to the conception of genocide. It left it to the future developments, which were soon to come, and to the subsequent labours of international bodies and jurists to define the notion of this new, and already generally recognized, crime under international law.' UNWCC, *LRTWC* vol. 7 (n 3) 8 (citing International Military Tribunal, *Judgment of the International Military Tribunal for the Trial of Major German War Criminals: Cmd. 6964* (HM Stationery Office 1946) (hereafter IMT Judgment), 50–52, 60–64; UN General Assembly, Resolution 96(I): The Crime of Genocide, UN Doc. A/RES/96(I), 11 December 1946 (hereafter UN Doc. A/RES/96(I)), 188).

[5] *Planning Memorandum Distributed to Delegations at Beginning of London Conference*, art. 9(a) (June 1945) (reprinted in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Department of State 1945) (hereafter *Planning Memorandum from London Conference*), 68) (emphasis added).

[6] See Charter of the International Military Tribunal annexed to Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280 (hereafter Nuremberg Charter), art. 6(c). In a memorandum submitted to the United Nations General Assembly, the United Nations Secretary-General noted the similarity between persecution and genocide: 'This category of crimes against humanity [i.e. persecution] is apparently closely related to the crime of genocide.' UN Secretary-General, The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, UN Doc. A/CN.4/5 (1949) (hereafter UN Doc. A/CN.4/5), 68. See also, *infra*, 12.3.3 and 11.4.3.3.

[7] This particular concern was sometimes combined with a degree of reluctance to see international law concern itself with events occurring exclusively within the sovereign boundaries of a state. In the context of the activities of the United Nations War Crimes Commission, for instance, the question arose as to the Commission's responsibility and mandate over crimes committed by the Nazi regime against Jews and stateless persons in Germany. In June 1944, the British government, which was consulted on that point, took the view that the Commission should not consider this matter but that it might collect evidence on the policy of extermination carried out in the occupied territories. See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) (hereafter UNWCC, *History of the UNWCC*), 140.

[8] This same concern also resulted in the Allies refusing to let Jews lead or participate in certain parts of the prosecution case—in particular, in relation to crimes committed against that community. See Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and*

Despite the omission of genocide from the Tribunal's Charter, the indictment alleged that the defendants had 'conducted *deliberate and systematic genocide*, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gypsies and others'.[9] Oddly, this passage appeared under Count 3 of the indictment, which dealt with allegations of war crimes.[10] By relying on the notion of genocide, the Prosecution attempted to introduce and establish a new type of international crime.[11] Prosecutors—first among them Robert H. Jackson—were all too aware that the trial at Nuremberg was a unique normative opportunity that would help shape the law of the future. Mentioning a concept that did not feature in the Charter and over which the Tribunal had no

Memory (Oxford University Press 2001) (hereafter Bloxham, *Genocide*), 67–69, 75. During the discussion on the adoption of the 1950 Israeli *Law on the Doing of Justice to Nazis and their Collaborators*, one member of the Israeli parliament recounted an incident which he said had taken place during the preparation of the prosecution case in Nuremberg:

> When the war crime tribunal was established at Nuremberg, we appeared before the American prosecutor general and asking to call this journalist, who saw all the Nazi atrocities in all their forms at various concentration camps, over a period of eight years, to testify before the war crime tribunal at Nuremberg. The American prosecutor general told us: 'yes, I agree, but on one condition: that this journalist should not appear as a Jew and should not appear in the name of the Jewish nation, but should speak only of the destruction of millions of human beings.' At that moment we felt the pain of our nation, which had no spokesman even after the great disaster.

Report of Discussions of the Knesset, 25 March 1950 (on file with the author).

[9] 'Indictment presented to the International Military Tribunal, The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Göring et al.' in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (International Military Tribunal 1947) (hereafter '*Göring et al.* Indictment'), 43–44 (emphasis added). The notion of genocide had been mentioned earlier by Justice Jackson in a planning memorandum prepared for the preparation of the trial, which was distributed to the other three involved nations. See John Q Barrett, 'Raphael Lemkin and "Genocide" at Nuremberg, 1945–1946' in Christoph JM Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010) (hereafter Barrett, 'Lemkin and Genocide at Nuremberg'), 35, at 39–40.

[10] See also United Nations War Crimes Commission, 'Trial of Hauptsturmführer Amon Leopold Göth: Notes on the Case' in *Law Reports of Trials of War Crimes*, vol. 7 (HM Stationery Office 1948) (hereafter UNWCC, Notes on Trial of Göth), 7–9 (discussing the tenor of the Nuremberg Indictment). Whilst at Nuremberg, Lemkin had been persistent in seeking the inclusion of the notion of 'genocide' in the text of the indictment. See Barrett, 'Lemkin and Genocide at Nuremberg' (n 9) 35, 44–45; Harlan B Phillips (ed), *The Reminiscences of Sidney S. Alderman* (Columbia University Oral History Research Office 1955) (hereafter Phillips, *Reminiscences of Alderman*), 818.

[11] As noted by the United Nations War Crimes Commission, '[b]y inclusion of this specific charge [i.e. genocide] the Prosecution attempted to introduce and to establish a new type of international crime.' UNWCC, *History of the UNWCC* (n 7) 197. See also John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave Macmillan 2015) (hereafter Cooper, *Lemkin and the Struggle for the Genocide Convention*), 72 (recording Lemkin's reaction to this inclusion in those terms). Letter from Raphael Lemkin to Trygve Lie, Secretary-General of the United Nations, 20 May 1946:

> [Justice Jackson] accepted my idea of formulating genocide as a crime and has included the charge of genocide in Count 3 of the Nuremberg Indictment. Thus a solid foundation in recognizing genocide as an international evil has been laid in Nuremberg. By formulating genocide as a crime, the principle has been proclaimed that a national, racial or religious group as an entity has the right to exist, analogously as the recognition of homicide as a crime proclaims the principles that an individual has a right to live. A precedent will be set for the intervention in internal affairs of other countries on behalf of persecuted minorities.

jurisdiction was thus not foolish ignorance of the law. It was instead a step towards the intended recognition and establishment of the notion of genocide.[12] References to genocide also cropped up throughout the proceedings. British Prosecutor Sir David Maxwell-Fyfe referred to it in his cross-examination of the accused, von Neurath.[13] In his closing speech for the British prosecution, Sir Hartley Shawcross suggested that genocide was not restricted to the extermination of Jews or Gypsies, but had occurred in different forms in Yugoslavia against local communities, in Alsace-Lorraine vis-à-vis non-Germans, in the Low Countries, and in Norway.[14] The technique varied from nation to nation, he said, but '[t]he long-term aim was the same in all cases', namely, the annihilation of entire groups of individuals.[15]

Despite the prosecution's reliance on the notion of genocide, no Nuremberg defendant was convicted of that crime and the word genocide went unmentioned in the

[12] It has been pointed out that the understanding of genocide put forward by the Prosecution at Nuremberg was a rather cautious and conservative interpretation of that notion. The UNWCC thus pointed out quite accurately that the Nuremberg Prosecution's understanding of the notion of 'genocide' was narrowly framed and focused on the 'physical and biological connotations' of that notion:

> [T]he Prosecution, when preferring against the defendants the charge of genocide, adopted this term and conception in a restricted sense only, that is, in its direct and biological connotation. This is evident not only from the definition of genocide as stated in the Indictment and from the inclusion of this charge under the general count of murder and ill-treatment, but also from the fact that all other aspects and elements of the defendants' activities, aiming at the denationalisation of the inhabitants of occupied territories, were made the subject of a separate charge.

UNWCC, *History of the UNWCC* (n 7) 197.

[13] 'One Hundred and Sixty-third Day, Tuesday, 25 June 1946: Afternoon Session' in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 17 (International Military Tribunal 1948) (hereafter 'Day 163 of the Trial at Nuremberg'), 61:

> Now, Defendant, you know that in the Indictment in this Trial we are charging you and your fellow defendants, among many other things, with genocide, which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, 'a co-ordinated 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.' What you wanted to do was to get rid of the teachers and writers and singers of Czechoslovakia, whom you call the intelligentsia, the people who would hand down the history and traditions of the Czech people to other generations. These were the people that you wanted to destroy by what you say in that memorandum, were they not?

[14] Sir Hartley Shawcross, 'Speeches at the Close of the Case against the Individual Defendants' (1946) 3 The Trial of German Major War Criminals 33 (hereafter Shawcross, 'Closing Speech'), 81–84, 93.

[15] Shawcross, 'Closing Speech' (n 14) 84. Shawcross further noted that:

> The methods followed a similar pattern: first a deliberate programme of murder, of outright annihilation. This was the method applied to the Polish intelligentsia, to gypsies and to Jews. The killing of millions, even by the gas chambers and mass shootings employed, was no easy matter. The defendants and their confederates also used methods of protracted annihilation, the favourite being to work their victims to death.

Ibid. Another Prosecutor, the French Auguste Champetier de Ribes, similarly relied upon the notion of genocide when he described the crimes as 'so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, that the term "genocide" had to be coined to define it.' M. Champetier de Ribes, 'Speeches at the Close of the Case against the Individual Defendants' (1946) 3 The Trial of German Major War Criminals 111 (hereafter de Ribes, 'Closing Speech'), 112. This crime, he said, was 'the greatest crime of all, genocide'. Ibid., 138. See also 'One Hundred and Thirty-ninth day, Monday, 27 May 1946' in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 14 (International Military Tribunal 1948) (hereafter 'Day 139 of the Trial at Nuremberg'), 551 (French Deputy-Prosecutor, Charles Dubost). See also Barrett, 'Lemkin and Genocide at Nuremberg' (n 9) 35, 47ff.

Tribunal's judgment.[16] Instead, when dealing with the substance of the charges which the prosecution had described as genocidal in character, the Tribunal used phrases and expressions such as 'extermination', 'mass murders', and 'annihilation' of groups or 'populations'.[17] Thus, whilst the Tribunal did not make use of the word genocide, it described, in the broadest of terms, the contours of what this notion would eventually encompass.[18]

Genocide continued to play a limited role in subsequent prosecutions of that period.[19] Its secondary role reflected a clear tension between the need to create penal instruments capable of confronting a new sort of criminality and the need to protect the integrity and credibility of the law as a set of universal and pre-existing legal

[16] The charge of genocide did not appear in the indictment against the major war criminals from the Far East. Nor was there any reference to genocide in the body of the Judgment of the Tokyo Tribunal. See R John Pritchard and Sonia M Zaide (eds), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East*, vol. 1 (Garland 1981) (hereafter Pritchard & Zaide, *Tokyo War Crimes Trial* vol. 1).

[17] 'Judgment' in *Trial of the Major War Criminals Before the International Military Tribunal 14 November 1945–1 October 1946*, vol. 1 (International Military Tribunal 1947) (hereafter IMT Judgment), 229, 235–37.

[18] See, also, United Nations War Crimes Commission, 'Trial of Ulrich Greifelt and Others: Notes on the Case' in *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) (hereafter UNWCC, 'Notes on Trial of Ulrich Greifelt'), 37–38 (footnote omitted):

> The concept of Genocide was used at the trial of the Nazi Major War Criminals before the International Military Tribunal at Nuremberg. The Prosecution charged the defendants with having 'conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups.' This fact was recognised by the International Military Tribunal in its Judgment in the following terms:
>
> > 'In Poland and the Soviet Union these crimes (i.e., war crimes and crimes against humanity) were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonisation by Germans.'
> >
> > Reference was also made to mass deportations, slave labour and the hampering of the native biological propagation.

See also UNWCC, Notes on Trial of Göth (n 10) 1–10, and 8 (footnotes omitted) ('The Nuremberg Tribunal, although it dealt in great length with the substance of the charge of genocide, did not use this term or make any reference to the conception of genocide. It left it to the future developments, which were soon to come, and to the subsequent labours of international bodies and jurists to define the notion of this new, and already generally recognized, crime under international law.').

[19] The notion of genocide appeared in a number of other Second World War proceedings. See, in particular, UNWCC, *LRTWC* vol. 15 (n 4) 122, n 5 ('Genocide was also charged as such in the *Einsatzgruppen* Trial.'); UNWCC, *LRTWC* vol. 13 (n 3) 36–38; UNWCC, Notes on Trial of Göth (n 10) 1–10; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 6 (HM Stationery Office 1948) (hereafter UNWCC, *LRTWC* vol. 6), 32, 48, 75, and 99–100 (exemplifying how the notion of genocide was used to signify a type of crime against humanity which may be committed either by enemy nationals against enemy nationals or by enemy nationals against Allied nationals); 'The *Justice* Case: Opinion and Judgment' in *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. 3 (Government Printing Office 1951) (hereafter '*Justice* Case Opinion'), 983 (making reference to genocide as a type of crime against humanity), 1128 (in relation to the accused Lautz, finding that '[h]e was an accessory to, and took a consenting part in, the crime of genocide'), and 1156 (in relation to the accused Rothaug, finding that '[h]e participated in the crime of genocide'); *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 ILR 5 (D Ct Jerusalem 1961) (hereafter *Eichmann* District Court Judgment) (relying upon and applying the notion of 'crimes against the Jewish People,' which is in effect a derivation of the broader notion of genocide). See also Kevin J Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) (hereafter Heller, *Nuremberg Military Tribunals*), 249–50.

prohibitions. Thus, at the end of the Nuremberg era, the crime of genocide was still very much a concept in need of recognition and further specification.

2.3 Recognition of Genocide as a Crime under International Law: Resolution 96(I) and the Genocide Convention

On 11 December 1946, less than two months after the Judgment of the Nuremberg Tribunal, the General Assembly of the United Nations adopted a resolution providing that 'genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings'[20] and affirming that it was a crime under international law.[21] At the same time, the General Assembly directed the Economic and Social Council to undertake the studies necessary to draft and adopt a convention devoted to that crime.[22]

Nearly two years later, on 9 December 1948, the General Assembly of the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[23] The Convention confirmed that genocide was a crime under international

[20] UN Doc. A/RES/96(I) (n 4) 188.

[21] Ibid., 189:

> *The General Assembly, therefore,*
>
> *Affirms* that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable.

That resolution and its reference to genocide as being 'a denial of the right of existence of entire human groups as homicide is a denial of the right to live of individual human beings', was cited by the Tribunal in the *Justice* case in the context of its use of the notion of genocide. See UNWCC, *LRTWC* vol. 6 (n 19) 48; UN Doc. A/RES/96(I) (n 4) 189.

[22] By Resolution 47 (IV) of 28 March 1947, the Economic and Social Council instructed the Secretary-General to prepare, with the assistance of experts, a draft Convention on the crime of genocide. The Secretariat's draft was prepared with the assistance of three renowned experts in the field: Raphael Lemkin; Henri Donnedieu de Vabres, a French Law Professor and former Judge of the Nuremberg Tribunal; and Vespasian V Pella, a Romanian Law Professor and diplomat. On 7 July 1947, in accordance with the instruction of the Economic and Social Council, the Secretary-General transmitted the draft Convention to Member Governments for their comments and which, together with the comments received, was then submitted to the second regular session of the General Assembly. By Resolution 180 (II) of 21 November 1947, the General Assembly reaffirmed its former resolution on the crime of genocide and requested the continuation of the work begun by the Economic and Social Council, including the study of the draft Convention prepared by the Secretariat. The Economic and Social Council established an ad hoc Committee, composed of representatives of seven Member States and tasked to draw up a draft Convention on genocide for consideration at the next session of the Council. The ad hoc Committee met from 5 April– 20 May 1948 and prepared a report containing a draft Convention on genocide: UN Doc. E/794. The draft then went from the Economic and Social Council to the General Assembly and from there to the Sixth Committee. The text of the draft Convention was examined by the Sixth Committee between 5 October and 1 December 1948 before making it back to the General Assembly for adoption. See UN General Assembly, Genocide: Draft Convention and Report of the Economic and Social Council, UN Doc. A/760, 3 December 1948 (hereafter UN Doc. A/760). See also William A Schabas, 'Origins of the Genocide Convention: From Nuremberg to Paris' (2008) 40 Case Western Reserve Journal of International Law 35 (hereafter Schabas, 'Origins of the Genocide Convention'), 35–55. (hereafter Schabas, *Origins of the Genocide Convention*).

[23] UN General Assembly, Resolution 260(III): Prevention and Punishment of the Crime of Genocide, UN Doc. A/810, 9 December 1948 (hereafter UN Doc. A/810). The Convention entered into force on 12 January 1951. Regarding the merits and shortcomings of the Genocide Convention, see also Antonio Cassese, 'Genocide' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of*

law and laid out the basic legal architecture intended to assist in the prevention and punishment of this crime.[24] The Convention included a general definition of genocide, a list of protected groups, various categories of offences, and modes of participation prohibited under that general umbrella. Article IV of the Convention further sanctioned the view, already apparent at Nuremberg, that no man responsible for such acts should be permitted to evade his responsibility because of his role, function, or title.[25]

Paradoxically, the absence of 'genocide' in the Charter and Judgment of the Nuremberg Tribunal may have provided the necessary incentive for states to adopt a convention dealing specifically with this crime.[26] This temporary normative hiatus also helped shape genocide as a criminal offence. During the preparatory period of

the International Criminal Court: A Commentary (OUP 2002 vol. 1) (hereafter Cassese, 'Genocide'), 336. See also Yuval Shany, 'The Road to the Genocide Convention and Beyond' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Shany, 'Road to the Genocide Convention'), 3; Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 Boston University International Law Journal 1 (hereafter Lippman, 'Drafting of the 1948 Convention').

[24] Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951, 78 UNTS 277 (hereafter Genocide Convention), art. I (emphasis added) ('The Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law [...].'), and Preamble (emphasis added, footnote omitted) ('*Having considered* the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that *genocide is a crime under international law* [...].'). See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion of 28 May 1951) [1951] ICJ Rep 15 (hereafter ICJ, Reservations to the Genocide Convention), 23 ('[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.'). Regarding the process of drafting and adopting of the Convention, see generally Hirad Abtahi and Philippa Webb, 'Secrets and Surprises in the *Travaux Préparatoires* of the Genocide Convention' in Margaret M DeGuzman and Diane M Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018) (hereafter Abtahi & Webb, 'Secrets and Surprises'), 299.

[25] Article IV reads: 'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.' Genocide Convention (n 24) art. IV. See also, *infra*, 3.3.3.

[26] Noticeably, the preamble of the *Draft* Convention prepared by the ad hoc Committee contained the following reference to the International Military Tribunal and to its Judgment: '[H]aving taken note of the fact that the International Military Tribunal at Nuremberg in its Judgment of 30 September–1 October 1946 has punished under a different legal description certain persons who have committed acts similar to those which the present Convention aims at punishing'. This acknowledgment was eventually removed as a result of Resolution 180(II) of the UN General Assembly which foresaw that the principles recognized in the Charter and in the Judgment of the Nuremberg Tribunal would be subject to a separate instrument. See Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1949) (hereafter Robinson, *Genocide Convention*), 54–55. Schabas has also remarked:

> It was [the Nuremberg Tribunal's] failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at codifying the crime of genocide. Had Nuremberg recognized the reach of international criminal law into peacetime atrocities, we might never have seen a genocide convention. Raphael Lemkin would probably be no more than an obscure and eccentric personality, as Henry King remembered him in the Grand Hotel in Nuremberg, rather than the distinguished 'Father of the Genocide Convention.'

Schabas, *Origins of the Genocide Convention* (n 22) 36–37. See also Abtahi & Webb, 'Secrets and Surprises' (n 24) 301–02; William A Schabas, 'Genocide in International Law and International Relations Prior to 1948' in Christoph Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010) (hereafter Schabas, 'Genocide Prior to 1948'), 20–21 (suggesting that the adoption of Resolution 96(I) and Genocide Convention can be understood as a reaction to the Nuremberg Judgment and that the IMT's failure to recognize genocide 'prompted the first initiatives at codifying the crime of genocide'), and 33; King, Ferencz, & Harris, 'Origins of Genocide' (n 2).

the Genocide Convention, the type of conduct which could constitute a crime against humanity had become much clearer thanks to the prosecutions of the previous years. This, in turn, affected the definition of genocide in two conflicting ways. On the one hand, genocide and crimes against humanity were still generally understood to have common historical roots, with the former often described as a sub-category of the latter.[27] This common filiation is apparent in that most of the underlying acts that constitute genocide would also generally amount to crimes against humanity.[28] At the same time, the drafters of the Convention were aware that genocide's value as a distinct criminal offence depended on its ability to capture conduct that was not already entirely criminalized under the broader notion of crimes against humanity.[29] Thus, symbolically, references to Nuremberg disappeared from the text of the Convention to make clear that the law of genocide was normatively distinct from the Nuremberg process and the statutory offences relevant to that process. As a result, the drafters created a definition for genocide which focused on the protection of groups rather than individuals, and which was thus distinguishable from the notion of crimes against humanity.

Compared to Resolution 96(I), the Convention reflects a certain retraction of international ambitions for the notion of genocide. First, it narrows the range of protected groups, abandoning any reference to *political* groups.[30] Second, the Convention's list of protected groups is exhaustive rather than illustrative. Thus, the Convention also closes the door on the notion of *cultural* genocide, which was hinted at by the Resolution.[31] The drafters of the Convention also walked away from the Resolution's call for universality of repression and, instead, provided only for one *compulsory* sort of domestic penal jurisdiction (that of the territorial state) as well as competence for a would-be, but still non-existent, international penal jurisdiction.[32]

Despite the rolling back of some of the most ambitious aspects of this notion, genocide truly became 'a *delictum iuris gentium*', an offence against the whole of humanity,

[27] Harlan B Phillips (ed), *The Reminiscences of Robert H. Jackson* (Columbia University Oral History Research Office 1955) (hereafter Phillips, *Reminiscences of Jackson*), 1641 (describing crimes prosecuted at Nuremberg as 'these crimes against humanity, such as genocide').

[28] See, *infra*, 12.3.1.

[29] During the negotiations of the Convention, the Representative from Venezuela noted that what was being regulated was not exactly the same sort of criminality that had been the subject of proceedings before the Nuremberg Tribunal: 'The acts prohibited by the Charter of the Nuremberg Tribunal did not correspond exactly to those which the United Nations intended to prevent and to make punishable through the convention on genocide; consequently there was no reason to include in the convention on genocide a reference to the judgment of the Tribunal.' UN General Assembly, Continuation of the Consideration of the Draft Convention [E/794]: Report of the Economic and Social Council [A/633], UN Doc. A/C.6/SR.109, 17 November 1948 (hereafter UN Doc. A/C.6/SR.109), 489–90. The US Representative to the Sixth Committee, Mr Maktos, agreed with this suggestion and noted that such an omission would prevent confusion between the concept of crimes against humanity and that of genocide. He also pointed out that since the Nuremberg Tribunal had given no definition of genocide, its decision could not be regarded as a precedent in connection with genocide. Ibid., 490. See also Schabas, *Origins of the Genocide Convention* (n 22).

[30] Robinson, *Genocide Convention* (n 26) 54, 59.

[31] Shany, 'Road to the Genocide Convention' (n 23) 3, 8–9.

[32] Robinson, *Genocide Convention* (n 26) 31 (pointing out that it was the opinion of the Secretary General of the United Nations and of the experts involved that universality of repression seemed to have been the intention of the General Assembly's Resolution 96 (I)).

with the adoption of the Convention.[33] Whilst the Tokyo and Nuremberg processes had primarily focused on the protection of individuals and the prosecution of crimes committed against them, the Genocide Convention expanded the reach of international law to include the protection of groups as such. In so doing, it provided a new legal notion and a set of basic penal instruments that would, over the years, be used and refined to sanction one of the gravest crimes known to mankind. In that sense, the Convention was a momentous advance for international law and for those it seeks to protect.

2.4 International Criminal Tribunals and the Advancement of the Law of Genocide

Although it was formally recognized as a crime under international law by the General Assembly's Resolution 96(I), for some time genocide remained an unfulfilled crime of paper. Only with the advent of the Yugoslav and Rwanda Tribunals did it gain concrete practical significance. The Statutes of both tribunals—soon to be joined by the Law of the Cambodian Extraordinary Chambers,[34] the Statute of the International Criminal Court (ICC),[35] the Law of the East Timor Serious Crimes Panels,[36] the statutory law of the Central African Special Court,[37] and the *Malabo* Protocol of the African Court of Justice and Human Rights[38]—gave the tribunals jurisdiction over the crime of genocide and replicated some of the core provisions of the Genocide Convention.[39] With

[33] UNWCC, *LRTWC* vol. 13 (n 3) 41.

[34] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Doc. NS/RKM/1004/006, 27 October 2004 (hereafter ECCC Statute).

[35] Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 3 (hereafter ICC Statute or Rome Statute), arts 5(1)(a), (6).

[36] UN Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (hereafter East Timor Serious Crimes Panels Statute), s 4.

[37] See Republique Centrafricaine, Loi organique No. 15-003, portant création, organisation et fonctionnement de la cour pénale spéciale (3 June 2015) (hereafter Special Criminal Court in Central African Republic Statute), art. 3 (giving the special court jurisdiction over serious violations of human rights and humanitarian law, including: genocide, crimes against humanity, and war crimes).

[38] African Union, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 2014 (hereafter *Malabo* Protocol), art. 28B. Genocide also forms part of the jurisdiction of the Chambre Africaine Extraordinaire. Chambre Africaine Extraordinaire, Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1 décembre 1990 (2013) (hereafter Extraordinary African Chambers Statute), arts 4–5. See also *Procureur Général c. Hissein Habré*, Judgment (Chambre Africaine Extraordinarie D'assaises D'Appel 27 April 2017) (hereafter *Hissein Habré* Trial Judgment), para. 39.

[39] See UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 (hereafter ICTY Statute), art. 4; UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, 8 November 1994 (hereafter ICTR Statute), art. 2. One peculiarity of Article 4 of the Law on the Extraordinary Chambers in the Courts of Cambodia (ECCC), which regulates the Chambers' jurisdiction over the crime of genocide, is that it only provides for three types of culpable contribution to the commission of such an act (in addition to genocide itself): (i) attempts to commit acts of genocide; (ii) conspiracy to commit acts of genocide; and (iii) participation in acts of genocide. ECCC Statute (n 34) art. 4. Furthermore, whilst the Statutes of the ICTY and ICTR reflect both Articles II and III of the Convention, other statutory instruments listed above only replicate Article II of the Convention. These

these statutes, the crime of genocide had found judicial homes where the law could thrive and develop.

The contribution of these tribunals to the law of genocide has been significant. First, their jurisprudence has played a crucial role in providing specificity and foreseeability to a body of law previously characterized by a high degree of uncertainty and generalization. The tribunals thus helped refine various elements of the notion of genocide—its *dolus specialis*, or special intent, its punishable acts, inchoate offences, and modes of liability—and provided essential guidance regarding the manner in which these elements could be proven. Second, from a historical point of view, the application of the notion of genocide to a variety of different factual contexts—Rwanda, Bosnia-Herzegovina, Cambodia, Darfur—might have done a great deal to liberate the notion of genocide from the historical circumstances in which it was born. With their pronouncements, these Tribunals—and a number of domestic jurisdictions—have turned genocide from paper into a concrete reality.[40] They also transformed what could have become a one-off historical occurrence into a universal normative standard capable of bringing events separated by time and place under a single, unified, legal umbrella.

statutory instruments also add a jurisdiction-specific requirement of individual criminal responsibility to Article II of the Convention. See, e.g., Rome Statute (n 35) arts 6, 25, 28. This is discussed in much greater details in subsequent chapters.

[40] See Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/49/342, 29 August 1994 (hereafter UN Doc. A/49/342), para. 196 ('The United Nations, which over the years has accumulated an impressive corpus of international standards enjoining States and individuals to conduct themselves humanely, has now set up an institution to put those standards to the test, to transform them into living reality. A whole body of lofty, if remote, United Nations ideals will be brought to bear upon human beings: all the individuals found guilty of rape, torture and massacre will be severely punished for their unacceptable disregard of the dignity of other human beings. Through the Tribunal, those imperatives will be turned from abstract tenets into inescapable commands. Similarly, the United Nations, which over many years has solemnly adopted, at the hortatory level, international standards on the treatment of detainees by Member States, will, through the Tribunal, make those standards binding in the first international prison for detainees under the control and supervision of the United Nations.').

3

Genocide under General International Law

3.1 Scope of Application—General Considerations

Unlike war crimes and crimes against humanity, the definitions of which have evolved incrementally over time, the definition of genocide has remained extremely stable since its inception. This is due to a combination of factors. First, the Genocide Convention provides for a rather clear and detailed account of the type of conduct which the notion of genocide was intended to cover.[1] No comparable, general, treaty definition was adopted for war crimes or crimes against humanity. Instead, the concept of crimes against humanity evolved primarily through statutory acknowledgments and associated judicial pronouncements, whilst the notion of war crimes evolved through layers of successive normative regimes rather than from a single, general, definition.

The second factor explaining genocide's normative stability pertains to the particular *currency* of that crime. Genocide not only reflects the most serious type of criminality of concern to the international community but it also carries the memory of the crimes that called for its creation: Nazi atrocities. Any blanket application of genocide to any and all sorts of criminal events would risk undermining the perceived gravity of that crime and its historical significance. The preservation of genocide's history and identity explains why its application has been uncharacteristically conservative and cautious in a field of law which is otherwise characterized by a great deal of normative dynamism and judicial creativity.

3.2 Peace and War

The law of genocide applies in times of peace and war.[2] When an act of genocide is committed in an armed conflict, its criminal character does not depend on any

[1] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (hereafter Genocide Convention).

[2] See, generally, Genocide Convention (n 1) art. I ('[G]enocide, whether committed in time of peace or in time of war, is a crime under international law'); 'Relations Between the Convention on Genocide on the one hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the other, Note by the Secretariat', 2 April 1948, UN Doc. E/AC.25/3, 5 ('the condemnation of genocide contained in General Assembly Resolution 96 (I) of 11 November 1946 is not accompanied by any conditions, and') and 6 ('In adopting Resolutions 96 (I) and 180 (II) the General Assembly had in mind a convention which would enable genocide to be punished in whatever circumstances it was committed.'); UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) ('Yugoslavia'), UN Doc. S/1994/674, 27 May 1994 (hereafter UN Commission of Experts Report on Yugoslavia), para. 91 ('Genocide is a crime under international law regardless of "whether committed in time of peace or in time of war" (art. I). Thus, irrespective of the context in which it occurs (for example, peace time, internal strife, international armed conflict or whatever the general overall situation) genocide is a punishable international crime.'). See also UN Security Council, Final Report of the

material connection to the conflict.[3] Furthermore, where genocide occurs in an armed conflict, the applicability of the law of genocide and the obligations to prevent and punish genocide are not affected by the nature—international or non-international—of the conflict.[4] The law of genocide is not, however, entirely indifferent to the existence of an armed conflict where acts of genocide occur in such context. When a conflict exists alongside acts of genocide, the determination of whether a particular conduct was legally permissible or whether it might constitute an act of genocide could, in some cases, be aided by the relevant standards of humanitarian law applicable to that conflict.[5]

Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) ('Rwanda'), UN Doc. S/1994/1405, 9 December 1994 (hereafter UN Commission of Experts Report on Rwanda), para. 156 ('It should be recalled that the Genocide Convention applies in time of war or peace and that therefore its provisions apply to the situation in Rwanda regardless of the existence and status of any armed conflict there.') (citations omitted); *Munyaneza v. R*, 2014 QCCA 906 (Can Ct App) (hereafter *Munyaneza* Appeal Judgment), para. 130 ('[G]enocide does not require the existence of an armed conflict and thus may be committed during peace time.'); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 153. See also references, *infra*, 3.2.

[3] *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T Judgment, 22 January 2004 (hereafter *Kamuhanda* Trial Judgment), paras 652, 743 (convicting Kamuhanda of genocide despite that, in its assessment of war crimes charges, the Court found that 'insufficient evidence has been established to enable a finding that there is a nexus between any crimes committed by the Accused and any conflict [...].'); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 21 May 1999 (hereafter *Kayishema & Ruzindana* Trial Judgment), paras 603, 623 (allegations 'show only that the armed conflict had been used as pretext to unleash an official policy of genocide' but no nexus was determined to exist—the court nevertheless entered a verdict for genocide (but not for war crimes)); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugoslavia*) (Preliminary Objections Judgment), [1996] ICJ Rep 595 (hereafter Preliminary Objections Judgment), para. 31.

[4] Preliminary Objections Judgment (n 3) para. 31:

> The Court sees nothing in this provision which would make the applicability of the Convention subject to the condition that the acts contemplated by it should have been committed within the framework of a particular type of conflict. The contracting parties expressly state therein their willingness to consider genocide as 'a crime under international law', which they must prevent and punish independently of the context 'of peace' or 'of war' in which it takes place. In the view of the Court, this means that the Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict, provided the acts to which it refers in Articles II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical.

[5] See, e.g., ICJ *Croatia-Serbia* 2015 Judgment (n 2) para. 153:

> The Court is called upon here to decide a dispute concerning the interpretation and application of that Convention, and will not therefore rule, in general or in abstract terms, on the relationship between the Convention and international humanitarian law. In so far as both of these bodies of rules may be applicable in the context of a particular armed conflict, the rules of international humanitarian law might be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the Convention.

3.3 States and Individuals

3.3.1 General considerations

The prohibition on genocide is general in character and is binding on both states and individuals, though not to the same extent. An act of genocide could thus engage the individual criminal responsibility of the perpetrator as well as the responsibility of a state where such acts can be attributed to a state.[6] This is true both as a matter of customary law[7] and under the Genocide Convention.[8]

However, as discussed in 3.3.2, the rules applicable to determining the responsibility of a state and those applicable to individuals are not identical. The responsibility of an individual for acts of genocide is, as a matter of international law, *penal* in character. In contrast, the responsibility of a state is *civil* in nature in the sense that it would oblige a state found responsible for such acts to provide reparation.[9] This difference

[6] See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), paras 163, 166–167, 172–178; ICJ *Croatia-Serbia* 2015 Judgment (n 2); Preliminary Objections Judgment (n 3) para. 32; American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States § 702, (1986), 163 (noting that a 'state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide.'). See also Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461 (hereafter Kreß, 'Crime of Genocide under International Law'), 468:

> 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. In 1996, the ICJ supplemented this early determination by attributing to the prohibition an effect *erga omnes*. Finally, the ICJ recognized in 2006 that the prohibition of genocide amounts to *jus cogens*. (citations omitted).

[7] Ibid.

[8] See Genocide Convention (n 1) art. IX; Karim Azkoul, Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794 (24 May 1948) (hereafter UN Doc. E/794) (noting that the Committee agreed unanimously that the authors of genocide should be punished, 'whatever their status'); UN Ad Hoc Committee on Genocide, Commentary on the Articles Adopted by the Committee (Continuation), UN Doc. E/AC.25/W.1/Add.1 (27 April 1948) (hereafter UN Doc. E/AC.25/W.1/Add.1) (to the same effect); UN Ad Hoc Committee, Summary Record of the Seventh Meeting, UN Doc. E/AC.25/SR.7 (20 April 1948) (hereafter UN Doc. E/AC.25/SR.7). UN Secretary-General, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947) re-printed in Harid Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (Martinus Nijhoff 2008 vol. 2) (hereafter Secretary-General, Draft Convention with Commentary), 241 ('The perpetration of genocide can indeed be the act of statesmen, officials or individuals. The heaviest responsibility is that of statesmen or rulers in the broad sense of the word, that is to say, heads of state, ministers and members of legislative assemblies, whose duty it is to abstain from organizing genocide personally and from provoking it and to prevent its commission by others.'). Regarding the circumstances of the introduction of the 'compromissory clause' in Article IX of the Genocide Convention, see Yuval Shany, 'The Road to the Genocide Convention and Beyond' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Shany, 'Road to the Genocide Convention'), 10.

[9] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 167 (pointing out that state responsibility in this context was 'quite different in nature from criminal responsibility') and para. 170. See also Anja Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention'), 360; Marko Milanović, 'State Responsibility for Genocide' (2006) 17 European Journal of International Law 553 (hereafter Milanović, 'State Responsibility for Genocide').

in the type of responsibility affects the standard of proof applicable in each context. Whilst proof of material facts relevant to the criminal prosecution of an individual for genocide must be established beyond reasonable doubt,[10] the International Court of Justice has said that in establishing the responsibility of a state for such acts, the applicable standard is 'evidence that is fully conclusive'.[11]

Finally, whilst customary international law does not presently provide for the responsibility of companies or other legal persons in respect of acts of genocide, neither does it exclude or prohibit such a possibility, as may be provided for in domestic legal systems.[12]

[10] See, generally, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Judgment, 16 October 2007 (*Halilović* Appeal Judgment), paras 125–28; *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Judgment, 12 November 2009 (hereafter *D. Milošević* Appeal Judgment), para. 21 (referring with approval to *Prosecutor v. D. Milošević*, Case No. IT-98-29-T, Judgment, 12 December 2007, para. 8); *Prosecutor v. Martić*, Case No. IT95-11-A, Judgment, 8 October 2008 (hereafter *Martić* Appeal Judgment), para. 55; *Prosecutor v. Ngudjolo Chui*, (Judgment) [2012] ICC-01/04-02/12 (hereafter *Ngudjolo Chui* Trial Judgment), para. 35; *Prosecutor v. Lubanga*, (Judgment) [2012] ICC-01/04-01/06 (hereafter *Lubanga* Trial Judgment), para. 92; *Prosecutor v. Taylor*, SCSL-03-1-T, Judgment, 18 May 2012 (hereafter *Taylor* Trial Judgment), para. 159.

[11] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 209. See also Corfu Channel (*UK v. Albania*) (Judgment) [1949] ICJ Rep 244 (hereafter *Corfu Channel*), 17.

[12] For instance, in the French legal order, a company could in principle be held responsible for the commission of such an act. See, generally, Penal Code (FR) arts 121–122. Thus, the Franco-Swiss cement company *Lafarge* was placed under formal investigation ('mise en examen') for *inter alia* complicity to crimes against humanity and financing of terrorism for allegedly making payments to ISIS to guarantee safe passage for employees and supply its plant (*Le Monde*, 'Syrie: l'entreprise Lafarge mise en examen pour "complicité de crimes contre l'humanité".' 28 June 2018, <https://www.lemonde.fr/societe/article/2018/06/28/financement-du-terrorisme-lafarge-sa-mise-en-examen-pour-complicite-de-crimes-contre-l-humanite_5322647_3224.html>, accessed 19 August 2018); *Abagninin v. AMVAC Chemical Corp* 545 F 3d 733 (9th Cir 2008) (hereafter *Abagninin* Appeal Judgment), 740 (finding in a civil lawsuit against a company that liability would require proof of genocidal intent and that mere knowledge of someone else's intent would not suffice); *Almog v. Arab Bank, Public Ltd Comp*, 471 F Supp 2d 257 (E D N Y 2007) (hereafter *Arab Bank* Trial Judgment), para. 93 (finding that the Arab Bank could be held liable for genocide and crimes against humanity through an aiding and abetting theory); *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F Supp 2d 689 (N D Ill 2011) (hereafter *Holocaust Victims* Trial Judgment); *Presbyterian Church of Sudan v. Talisman Energy, Inc*, 453 F Supp 2d 633 (S D N Y 2006) (hereafter *Presbyterian Church of Sudan* Trial Judgment). See also African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 2014 (hereafter '*Malabo* Protocol'), art. 46(C) (providing that '[f]or the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States'). At the time of the adoption of the Genocide Convention, the view that a company could be held responsible for such crime was far from accepted. See UN Economic and Social Council, Continuation of the Consideration of the Draft Convention on Genocide, UN Doc. A/C.6/SR.93, 6 November 1948 (hereafter UN Doc. A/C.6/SR.93) (Mr Chaumont, France) (noting that the 'French idea of penal responsibility applied to individuals only, for only individuals could commit crimes; it could not apply to corporate bodies or to abstract communities'). This explains that many of the negotiating states expressed the view that the Genocide Convention should not regulate the question of corporate liability for acts of genocide. See, generally, Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (Martinus Nijhoff 2008) (hereafter Abtahi & Webb, *Travaux Préparatoires*), 1222, 1595, 1617, 1662, 1694, 1799–814 (variously rejecting the suggestion that the Convention should regulate the case of legal persons, corporate bodies or abstract communities). See also Johan D van der Vyver, 'Prosecution and Punishment of the Crime of Genocide' (1999) 23 Fordham International Law Journal 286, 290 (noting that the language of the Convention is 'indicative of an intention to confine liability under international law for acts of genocide to natural persons only'); Michael J Kelly, 'The Parameters of Vicarious Corporate: Criminal Liability for Genocide under International Law' in Andrew Bynes *et al.* (eds), *International Law in the New Age of Globalization* (Martinus Nijhoff 2013), 321 (hereafter Kelly, 'Parameters of Vicarious Corporate Criminal Liability) (advancing the more ambitious argument that the Genocide Convention is neutral on the question of corporate liability).

3.3.2 Conditions of liability

3.3.2.1 Different regimes of liability

The type of conduct which may render a state and an individual responsible for genocide and the relevant rules applicable in making such a determination are not identical. First, a number of duties and obligations are provided under the terms of the Genocide Convention that are binding only on states and, if breached, would thus only be relevant to the responsibility of a state.[13] For example, whilst both states and individuals could, in principle, be held responsible for their part in acts listed in Articles II and III of the Convention,[14] only states, not individuals,[15] are bound by the dual obligations to prevent and to punish acts of genocide and only states could be held responsible for failing to fulfil those duties.[16]

Second, the normative reach of state and individual responsibility is not determined by the same set of rules and principles. For individual perpetrators, the Convention provides for a number of inchoate offences and modes of liability relevant to establishing their responsibility.[17] In addition, the law of the jurisdiction before which a suspect is brought may provide for additional modes of liability relevant to his responsibility.[18] In contrast, the responsibility of states for acts of genocide is determined by the general rules on state responsibility in association with the duties and obligations specific to the law of genocide.[19] To hold a state responsible for acts of genocide, the general principles regarding the attribution of acts of state organs to the state and the *Nicaragua* standard of 'effective control' regarding the acts of third parties would therefore apply and set the outer limits of the responsibility that states may incur in relation to acts of genocide.[20] For the responsibility of a state to be engaged, it

[13] See, e.g., Genocide Convention (n 1) arts V, VI, VII, and IX.

[14] See, generally, Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' (n 9). See also Jens D Ohlin, 'State Responsibility for Conspiracy, Incitement, and Attempt to Commit Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009), 374 (hereafter Ohlin 'State Responsibility for Conspiracy, Incitement, and Attempt to Commit Genocide'); Paolo Palchetti, 'State Responsibility for Complicity in Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009), 381 (hereafter Palchetti, 'State Responsibility for Complicity in Genocide').

[15] Military or civilian superiors would bear a duty to prevent and punish genocidal acts in relation to their subordinates. However, this duty arises as the consequence not of a specific obligation under the law of genocide but as a consequence of the general duty to prevent or punish crimes of subordinates under the doctrine of superior responsibility. See, generally, Guénaël Mettraux, *The Law of Command Responsibility* (OUP 2009), (hereafter Mettraux, *Command Responsibility*).

[16] Regarding the meaning and scope of these obligations, see *infra*, Chapter 5. See also Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' (n 9) 353–54.

[17] See, *infra*, Chapter 11. [18] See, *infra*, 11.7. [19] *Infra*, 3.3.

[20] See, ICJ *Bosnia-Serbia* 2007 Judgment (n 6) paras 399–424, and in particular 401 ('Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.'), and 417 (finding that proof of a such a fact had not been made in relation to the Former Republic of Yugoslavia in relation to acts of genocide committed in Bosnia-Herzegovina by Bosnian-Serb forces); Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*) (Merits) [1986] ICJ Rep 3 (hereafter *Nicaragua v. USA*), para. 115. See also Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5 Journal of International Criminal Justice 829 (hereafter Spinedi, 'Non-Attribution of Bosnian Serbs' Conduct'). For a critical assessment of this aspect of the

must first be established that a crime has been committed with the requisite genocidal *mens rea* and that this act is in turn attributable to the state.[21]

The third main difference between state and individual responsibility for acts of genocide pertains to the element of *mens rea*. In respect of individuals, the commission of any of the acts listed in Articles II and III of the Convention requires proof that the perpetrator acted with genocidal intent.[22] In contrast, state responsibility pertaining to such acts might be engaged even where the state itself does not share that intent. State responsibility for a failure to prevent or punish genocide could be engaged where the state is aware, or should have been aware, of the serious risk that acts of genocide had been committed or would be committed and, with that knowledge, it failed to prevent or punish genocidal acts.[23] State responsibility for complicity in genocide and,

Judgment, see Richard Goldstone and Rebecca Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 Leiden Journal of International Law 95 (hereafter Goldstone & Hamilton, 'Lessons from the Encounter'). Regarding the question of 'effective control' over troops re-subordinated to the United Nations in a genocidal context, see: *HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, 10 September 2008, Decision No. LJN: BF0181, ILDC 1092 (NL 2008) (The Hague, District Court) (hereafter *HN v. Netherlands* First Instance Judgment); *Nuhanović v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, 5 July 2011, Decision No. LJN:BR5388, ILDC 1742 (NL 2011) (The Hague, Court of Appeals) (hereafter *Nuhanović v. Netherlands* Appeal Judgment); and *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Nuhanović*, 6 September 2013, Decision No. ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013) (NH Supreme Court) (*Netherlands v. Nuhanović* Supreme Court Judgment). See also Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harvard International Law Journal 113 (hereafter Dannenbaum, 'Translating the Standard of Effective Control'); André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Removal of Individuals from the Compound of Dutchbat' (2011) 9 Journal of International Criminal Law 1143 (hereafter Nollkaemper, 'Dual Attribution'); SHARES Project: <http://www.sharesproject.nl/>, accessed 24 September 2018 (hereafter SHARES Project).

[21] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 6) paras 373 ('The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.') and 376 (regarding the *mens rea* of the perpetrators of the crimes). See, also, James Crawford and Simon Olleson, 'Responsibility, State' in Dinah Shelton (ed), *Encyclopedia of Genocide and Crimes against Humanity* (Thompson Gale 2005) (hereafter Crawford & Olleson, 'State Responsibility'), 909 (suggesting that the Genocide Convention operates as *lex specialis* in relation to the generally applicable international law rules regarding state responsibility and that 'at least one person, if not more' for whose acts the state is held responsible will have to be shown to have possessed the requisite special intent for genocide). Establishing the responsibility of a state for act carried by individuals does not require that the perpetrator of the acts must first have been found guilty of the crime in question. ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 182 ('State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.'). See also Christian Tams *et al.* (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag CH Beck 2014) (hereafter Tams *et al.*, *Genocide Convention Commentary*), art. I, para. 72; Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' (n 9) 370. It is significant in that regard to note that Serbia-Montenegro was found responsible before the ICJ for failing to cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) because it did not arrest and transfer Ratko Mladić, an individual who, by that point, had been charged with, but not convicted for, genocide. See discussion, *infra*, 3.3.2.

[22] See, *infra*, 8.1.1–8.1.3 and 10.1.3.

[23] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 6) paras 231–318 and 376.

arguably, for all other culpable conduct listed in Article III,[24] would require proof of 'full knowledge' of relevant facts on the part of the state.[25] This implies that:

> there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts.[26]

The International Court of Justice (ICJ) determined that this requires proof of near certainty that acts of genocide have been or would be committed,[27] but that it does not require proof that the state in question *shared* the perpetrators' genocidal intent.[28] Serbia-Montenegro was thus found responsible for failing to prevent and punish acts of genocide committed by Bosnian-Serb forces and officials without the Court having established that it possessed the requisite genocidal intent.[29]

[24] See *infra*, 3.3.2.3 and, *infra*, 11.6.2.4.

[25] ICJ *Bosnia-Serbia* 2007 Judgment (n 6), specifically, para. 432, and paras 151, 421, 424, and 436.

[26] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 432. See also Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 J International Criminal Justice 875 (hereafter Cassese, 'Use of Criminal Law Notions'), 883 (taking issue with the standard). The Court found that proof of that level of knowledge had not been established in relation to the FRY in regards to crimes committed in Bosnia-Herzegovina. See ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 422 ('[I]t is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied—and continued to supply—the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.'), and para. 423 ('It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.').

[27] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 436, ('[T]he Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: para. 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.'), and paras 424 and 438.

[28] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) paras 421 ('[T]he question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity.'), and paras 422–424, and 432. See also, Bruno Simma, 'Genocide and the International Court of Justice' in Christoph Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010) (hereafter Simma, 'Genocide and the ICJ'), 266–67 (pointing out that the general criterion for attributing state responsibility applied in this case and that 'adding a component where genocidal intent on the part of the state would have to be established [...] *alongside* the genocide intent already demonstrated by a state official or state organ, would have made it much more difficult to attribute state responsibility for genocide').

[29] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 6) paras 186–189, 196, 202, 242, 277, 295, 297, 328, 354, 372, 376 (finding explicitly that the Applicant did not establish the existence of the genocidal intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent), paras 413, 421–422, 431, and 438.

3.3.2.2 *Modes of participation and inchoate offences specific to genocide*

The text of Article III of the Convention does not suggest that the definition of any of the notions listed in that provision would vary depending on whether they are relied upon for the purpose of assigning state or individual responsibility. Nor would the *travaux* appear to provide support for such a disjunctive approach. For this reason, when determining the meaning of the notions foreseen in this article, the ICJ has recourse to general principles of criminal law for the purposes of assigning state responsibility.[30] However, the ICJ did not adhere entirely to the penal definitions of these notions. For instance, in defining 'complicity', the Court approached this concept more narrowly than would have been permitted by criminal law. In particular, the Court limited complicity to 'positive actions', thus seemingly excluding complicity by omission which would have been authorized as a matter of international customary (criminal) law.[31] The absence of authorities cited by the Court in support of its restrictive approach suggests that it might have defined that concept more narrowly

[30] See, in particular, ICJ *Bosnia-Serbia* 2007 Judgment (n 6) paras 167, 180, 419 (suggesting that the notion of 'complicity' is similar to a category found among the customary rules constituting the law of State responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State), para. 420 (referring to Article 16 of the ILC's Articles on State Responsibility in regards to that particular notion), and para. 422. See also Shany, 'Road to the Genocide Convention' (n 8) 23 (supporting the Court's reliance on Article 16 of the ILC Articles on State Responsibility); Cassese, 'Use of Criminal Law Notions' (n 26) 875–87 (pointing to the confusion in the Court's reasoning between notions taken from criminal law and concepts borrowed from the field of state responsibility and expressing doubts and misgivings about the Court's import of criminal law concepts in relation to issues of state responsibility). Another indication of the Court's reliance on notions of criminal law lies in its reliance on the case law of the ICTY to define some of the relevant notions. The Court's reliance on criminal law notions to define the boundaries of state responsibility may also have been necessary in light of the fact that the law of state responsibility does not provide for certain modes of participation or inchoate offences relevant to the notion of genocide (e.g., direct and public incitement; or conspiracy). Regarding the notion of 'incitement', see also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (November 2001) (hereafter, ILC, 'Draft Articles on State Responsibility'), art. 15(9) (footnotes omitted, referring specifically in relation to the last proposition to Article III (c) of the Genocide Convention):

> The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State. However, there can be specific treaty obligations prohibiting incitement under certain circumstances.

[31] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 432; *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Judgment, 3 April 2007 (hereafter *Brdanin* Appeal Judgment), para. 274; *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgment, 3 July 2008 (hereafter *Orić* Appeal Judgment), para. 43; *Prosecution v. Mrkšić & Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009 (hereafter *Mrkšić & Šljivančanin* Appeal Judgment), paras 49, 81–82, 154; *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017 (hereafter *Mladić* Trial Judgment), para. 3567; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 (hereafter *Blaškić* Appeal Judgment), para. 48; *Prosecutor v. Simić et al.*, Case No. IT-95-9-A, Judgment, 28 November 2006, (hereafter *Simić et al.* Appeal Judgment), para. 85; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, 9 May 2007 (hereafter *Blagojević & Jokić* Appeal Judgment), para. 127; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007 (hereafter *Nahimana et al.* Appeal Judgment), para. 482. See also Cassese, 'Use of Criminal Law Notions' (n 26); Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 European Journal of International Law 669 (hereafter Milanović, 'A Follow-Up'). The approach taken by the Court also seems to fall short of accepted standards regarding state responsibility. See, generally, Draft articles on Responsibility of States (n 30), art. 2(4), making it clear that conduct attributable to the State can, in principle, consist of actions or omissions.

than was permitted under the Convention and, certainly, more narrowly than was permitted as a matter of customary law.[32] This interpretation appears to have been favoured by the Court as a way to draw a clear distinction between the situation where a state is complicit in genocide and one where it fails to fulfil its duties to prevent or punish such acts.

3.3.2.3 *Different* mens rea

State and individual responsibility for acts of genocide are distinguishable at the *mens rea* level.[33] Whilst the ICJ dealt with the question of a state's failure to prevent and punish genocide as well as with the notion of state complicity in genocide, it did not expressly resolve the question of whether other modes of participation and inchoate offences listed in Article III of the Convention would require that the state itself should share the specific genocidal intent or whether it would be enough that such intent was present among the perpetrators of the acts for whose actions a state is held responsible. The Court did, however, leave a number of clues helpful to answering that question. First, the ICJ made it clear that less than genocidal intent is sufficient to hold a state responsible for complicity in genocide.[34] This suggests a standard of *mens rea* in relation to that particular mode of liability that is lower for state responsibility than would be required for the purpose of assigning individual criminal responsibility under that particular mode of liability.[35]

Second, according to the Court, state responsibility for a failure to prevent or punish genocide does not require proof that the state itself possessed that special intent. It is enough that those who perpetrated the acts for which it is held responsible acted with such intent.[36] This further highlights that, under the Convention, it is the (underlying) acts listed under Articles II and III of the Convention, that is, the acts of the perpetrators for which the state is held responsible, which must be committed with genocidal 'intent'.[37] On this basis, the Convention provides that a state could be held responsible for acts of genocide even where it does not share the perpetrators' special intent.

Third, the Convention draws no distinction regarding the standard of *mens rea* relevant to and required for the various modes of participation and inchoate offences provided for under Article III of the Convention. This is true as a matter of establishing individual criminal responsibility[38] and would *a priori* also be the case for the purpose of assigning state responsibility. This conclusion is further supported by paragraph 419 of the ICJ's 2007 *Bosnia-Serbia* Judgment, where the Court distinguished between a situation where the State is directly responsible for acts of genocide and the situation where it is an accomplice thereto. According to the Court, where it can be established that a genocidal act has been committed on the instructions or under the direction of a state, the necessary conclusion would be that the genocide is attributable to the state

[32] See, *infra*, 11.6. [33] See, *supra*, 3.3.2.3. [34] See *supra*, 3.3.2.3 and, *infra*, 11.6.2.4.
[35] See *infra*, 11.6.2.4 and 11.6.3, making it clear that individual criminal responsibility for complicity in genocide requires proof that the accomplice possessed the requisite genocidal intent.
[36] See *supra*, 3.3.2.3. [37] See also *infra*, 8.1.1 and 8.1.3.
[38] See *infra*, 8.1.3 and 11.1.1, making it clear that special intent is required for each and all of the modes of liability and inchoate offences listed in that provision.

and the state is directly responsible for it.[39] This suggests, albeit implicitly, that the distinction between, on the one hand, the commission of genocide and, on the other, complicity in genocide for the purpose of attributing state responsibility is drawn exclusively at the *actus reus* level. No suggestion was made by the Court that a supplementary distinction can be drawn between the two scenarios at the *mens rea* level. If correct, the view outlined above would mean that the level of *mens rea* applicable to 'complicity' (i.e., 'full knowledge of the facts') would also apply for the purpose of attributing state responsibility to all other modes of liability and inchoate offences listed in Article III, and that in no case is proof of genocidal intent *on the part of the state* a necessary element of state responsibility.

3.3.2.4 No additional element of policy

The commission of acts of genocide is often the result of the implementation of a policy or plan devised by the officials of a state or members of violent organizations. Whether this element constitutes a condition of a state's responsibility under international law has been suggested in one instance by the UN *Commission of Inquiry on Darfur*,[40] but has otherwise been systematically rejected.[41] The latter position appears

[39] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 419:

> First, the question of 'complicity' is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

[40] UN International Commission, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc. S/2005/60, 25 January 2005 (hereafter UN Report on Darfur), paras 518–522 (seemingly requiring an element of policy for the purpose of establishing the responsibility of the State of Sudan but providing little independent authority to support its proposition). For support in the literature, see also Paola Gaeta, 'On What Conditions Can a State be Held Responsible for Genocide?' (2007) 18 European Journal of International Law 631 (suggesting that a 'policy' constitutes an element of the definition of genocide when state responsibility is at stake and basing her argument on the view that genocide is normally committed by state officials pursuant to a state policy); Antonio Cassese, 'The Policy Element in Genocide: When is it Required by International Rules?' in Christoph Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (Asser Press 2010) (hereafter Cassese, 'The Policy Element of Genocide'), 133 (suggesting that an element of policy must be proved in relation to some, but not all, of the acts provided for in Article II of the Convention).

[41] A requirement of 'policy' or plan has been rejected as an element of the definition of genocide under customary law. See, e.g., *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004. (hereafter *Krstić* Appeal Judgment), para. 225; *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (hereafter *Popović et al.* Appeal Judgment), paras 427–450, in particular, paras 426, 430, 434, 440, and 468; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment), paras 828–830; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment), paras 47–48; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 1 June 2001 (hereafter *Kayishema & Ruzindana* Appeal Judgment), para. 138; *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-T, Judgment, 17 January 2005 (hereafter *Blagojević et al.* Trial Judgment), para. 656; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016

preferable in light of the fact that the Genocide Convention does not provide for such an element and the case law of the ICJ reflects the view that no such element of policy has developed outside the Convention.[42] The presence of a policy underlying the commission of acts of genocide thus appears to be a *possible*, rather than a *necessary*, basis of attribution of such acts to a state. Such an approach ensures that the definition of genocide is one and the same whether the contested responsibility is that of a state or an individual.[43] Furthermore, the introduction of such a requirement as a condition of state responsibility would undermine the preventive effect of the Convention and would significantly narrow the scope of application of the associated duties to prevent and punish acts of genocide.

3.3.3 No category of individuals excluded

3.3.3.1 General application of the prohibition

3.3.3.1.1 Status, rank, and position irrelevant

The prohibition on genocide is binding upon all individuals and is applicable irrespective of the private or official capacity in which the crime is committed.[44] Status,

(hereafter *Karadžić* Trial Judgment), para. 550; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001 (hereafter *Sikirica et al.* Judgment on Defense Motions to Acquit), para. 62; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (hereafter *Tolimir* Appeal Judgment), para. 246; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98 bis.1, Judgment, 11 July 2013 (hereafter *Karadžić* Appeal Judgment on Rule 98*bis* Motion for Judgment of Acquittal), paras 80, 99; *Hategekimana v. Prosecutor*, Case No. ICTR-00-55B-A, Judgment, 8 May 2012 (hereafter *Hategekimana* Appeal Judgment), para. 133; *Munyaneza v. R.*, 2014 QCCA 906, 7 May 2014 (Can. Ct. App.) (hereafter *Munyaneza* Appeal Judgment), para. 179. The rejection of that requirement in the definition of genocide is discussed, *infra*, at 7.1.2 and 12.3.2.6. See, also Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' (n 9) 368; Shany, 'Road to the Genocide Convention' (n 8) 18–19 (questioning the legal validity of the position of the *Darfur* commission on that point); William Schabas, 'State Policy as an Element of International Crimes' (2008) 98 Journal of Criminal Law and Criminology 953 (hereafter Schabas, 'State Policy as an Element'), in particular, 981.

[42] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 6), in particular, paras 190, 320, 344, and 367. It is telling in that regard that the ICJ did not establish that Serbia-Montenegro acted pursuant to a policy before finding it responsible for acts of genocide. See also Ademola Abass, 'Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur' (2008) 31 Fordham International Law Journal 871.

[43] See, *infra*, 7.1.2.

[44] Genocide Convention (n 1) art. 4 ('Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'); Secretary-General, Draft Convention with Commentary (n 8) 241. For an illustration, see *Kadić v. Karadžić* 70 F 3d 232 (2d Cir 1995) (hereafter *Kadić v. Karadžić* Appeal Judgment), 241. See also Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 1 July 2002 (hereafter ICC Statute or Rome Statute), art. 27 ('Irrelevance of Official Capacity'); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 (hereafter ICTY Statute) art. 7(2); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, 8 November 1994 (hereafter ICTR Statute), art. 6(2); Law On The Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea, Doc. NS/RKM/1004/006, 27 October 2004 (hereafter ECCC Statute), art. 29; Statute of the Special Court for Sierra Leon, 16 January 2002 (hereafter SCSL Statute), arts 6(2) and (4); UN Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (hereafter East Timor Tribunal Statute), s 15; Law on Specialist Chambers and Specialist Prosecutor's Office,

rank, and position are no bar to criminal responsibility under international law. Even 'constitutionally responsible rulers' are under a duty to not commit genocidal acts and, if they violate this duty, they can be held criminally responsible for their actions.[45] In particular, liability could attach to a *de jure* leader as well as a *de facto* leader as the prohibition is of relevance to anyone culpably involved in the commission of such a crime.[46]

Genocide is not, however, a *leadership* crime—meaning that it can also be committed by perpetrators outside and without the support of a state,[47] or, where a state is involved, at any level of the state apparatus.[48]

3.3.3.1.2 Monarchs

The expression initially used in the draft of what would become Article IV of the Genocide Convention was that of 'rulers' ('gouvernants' in the French version),[49] later replaced by the phrase 'heads of state' or 'chefs de l'État'.[50] The initial formulation ('rulers') was later reverted to with the addition of the phrase 'constitutionally responsible'.[51] Nehemiah Robinson explains that this was done to exclude the possibility of prosecuting monarchs, who, under certain domestic regimes, could not be brought to justice.[52] Robinson's

Law No.05-L/053 (3 August 2015, Kosovo) (hereafter Kosovo Law No. 05-L/053), arts 16(1)(b) and (d); *Malabo* Protocol (n 12) arts 46B(2) and (4) (however, note that Article 46A*bis* excludes in principle the possibility of legal action being taken against a sitting 'AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'); International Conference on the Great Lakes Region, Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, 29 November 2006 (hereafter Great Lakes Protocol), art. 12. For an illustration, see also *Prosecutor v. Al Bashir*, (Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir), [2017] ICC-02/05-01/09, Minority Opinion of Judge Marc Perrin De Brichambaut (hereafter *Al Bashir* Decision under Article 87(7), Brichambaut Minority Opinion), para. 23.

[45] Genocide Convention (n 1) art. IV.

[46] A Syrian proposal for an amendment of the draft Convention which would have included an express reference to '*de facto* heads of state' and persons having usurped authority was rejected as it was felt that such persons already came within the scope of that provision. See, generally, UN General Assembly, Genocide: Draft Convention and Report of the Economic and Social Council, UN Doc. A/760 (3 December 1948) (hereafter UN Doc. A/760); UN General Assembly, Draft Convention on the Crime of Genocide: Syria: Amendment to Article V of the Draft Convention on Genocide (E/794), UN Doc. A/C.6/246 (26 October 1948) (hereafter UN Doc. A/C.6/246).

[47] See UN Ad Hoc Committee on Genocide, Summary Record of the Fifth Meeting, UN Doc. E/AC.25/SR.5 (16 April 1948) (hereafter UN Doc. E/AC.25/SR.5); UN GAOR, 3rd Sess, 79th mtg, UN Doc. A/C.6/SR.79 (20 October 1948) (hereafter UN Doc. A/C.6/SR.79); UN GAOR, 3rd Sess, 80th mtg, UN Doc. A/C.6/SR.80 (21 October 1948) (hereafter UN Doc. A/C.6/SR.80) (regarding the rejection of a French suggestion to add a requirement of state participation or involvement in the crime).

[48] See Secretary-General, Draft Convention with Commentary (n 8) 35 (where former Nuremberg Judge, Henri Donnedieu de Vabres, pleaded, unsuccessfully, for genocide to be recognized as a leadership crime with lesser perpetrators to be prosecute for homicide); UN General Assembly, Draft Convention on the Crime of Genocide: Communication Received by the Secretary-General, UN Doc. A/401 (27 September 1947) (hereafter UN Doc. A/401).

[49] Secretary-General, Draft Convention with Commentary (n 8)

[50] UN Doc. E/794 (n 8) 24.

[51] UN GAOR, 3rd Sess, 95th mtg, UN Doc. A/C.6/SR.95 (8 November 1948) (hereafter UN Doc. A/C.6/SR.95). See also Tams *et al.*, *Genocide Convention Commentary* (n 21) 191; William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) (hereafter Schabas, *Genocide in International Law*), 371–74.

[52] Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation* (The Institute of Jewish Affairs 1949) (hereafter Robinson, *The Genocide Convention*), 70–71:

suggestion that the Convention should be read as excluding monarchs from the scope of the Convention must be given closer attention.

On a literal reading, the Convention does not exclude *any* category of individuals so that the suggestion that monarchs fall outside its realm is not supported by the text of the Convention. Second, the *travaux* provide evidence of different views on that issue. A number of constitutional monarchies expressed concerns about the use of the expression 'heads of state', as this could have required them to arraign their monarch and amend their laws to allow for that possibility.[53] The representative of Siam (Thailand) therefore proposed the use of the more neutral phrase 'constitutionally responsible rulers', a formulation intended to assuage the concerns of those monarchies.[54] The proposed formulation was adopted by nineteen votes to none, with twenty-two abstentions.[55] Several delegates interpreted this wording as excluding monarchs from the reach of the convention,[56] although this was not a unanimously held position. For instance, following the vote, the representative of Luxembourg expressed his understanding that the Committee had decided that *all individuals*, whether they were constitutionally responsible rulers, public officials, or private individuals, would be held responsible where they contributed to the commission of an act of genocide.[57] Therefore, whilst some delegations thus understood the Convention as inapplicable to constitutional monarchs, others understood the Convention as being of general application. Nonetheless, general agreement was held amongst delegates in relation to

> The inclusion of 'constitutionally responsible rulers' among those responsible for Genocide explicitly excludes the usual plea of 'acts of state.' It excludes monarchs, as stated above, but does include all other heads of state. It would be illogical to assume that a dictator, who is not responsible to anyone under the basic law which he himself has promulgated, should be immune from prosecution for crimes of Genocide. None of these heads of state may advance the plea of 'acts of state'.

[53] UN Doc. A/C.6/SR.95 (n 51) 340–42 (in particular, the delegate from the Netherlands pointed out that the reason why certain delegations were opposed to the mention of heads of State in the categories of persons liable to punishment was that, according to the constitutions of the States concerned, heads of State were not responsible for the actions of the Government. They could thus not be held responsible for such actions on the international plane, and it should be stated, in some way or other, that the provisions of Article V did not apply to constitutional monarchs), 342 (emphasizing on behalf of the United Kingdom 'the difficulties which the existing wording of Article V raised for constitutional monarchies. It had been said, in support of that amendment, that constitutions should be modified with a view to bringing them into line with the convention. But it was not easy to introduce modifications into a constitution, especially on questions of that kind.'). See also See also UN Doc. A/C.6/SR.79 (n 47); UN GAOR, 3rd Sess, 92nd mtg, UN Doc. A/C.6/SR.92 (5 November 1948) (hereafter UN Doc. A/C.6/SR.92) (regarding the position of Sweden suggesting that were its king to be accused of genocide, he could not be brought to trial before Swedish courts or the national courts of another state; and the position of Pakistan, suggesting that the effectiveness and preventive effect of the prohibition on genocide would be greatly undermined should certain categories of individuals be excluded from its realm); UN Doc. A/C.6/SR.93 (n 12) (in particular, regarding the position of the United Kingdom that its king could not be brought before court and that '[i]t was constitutionally impossible to introduce legislation to alter that situation' and the Belgian representative referring to such constitutional challenge as 'insurmountable'); UN Doc. A/C.6/SR.95 (n 51) (in particular, regarding the position of the Philippines opposing an exception for monarchs); Schabas, *Genocide in International Law* (n 51) 371.

[54] Schabas, *Genocide in International Law* (n 51) 343.

[55] Ibid.

[56] Ibid., 341 (Mr Spiropoulos, representative of Greece, recalled that *most* delegations appeared to have reached an agreement to include a note in the report, exempting constitutional monarchs from responsibility, thus providing a complete solution of the problem).

[57] Ibid., 349.

the view that constitutional leaders who have no real and effective power or authority but only pro forma constitutional authority could not, on that basis alone, be held accountable by reason of their position.[58]

When interpreting the terms of the Convention on that point, it is also significant to note that the linguistic allowance to constitutional monarchies which was made in the English version of Article IV, and reflected in Article V of the Convention,[59] was not included in the French, 'equally authentic',[60] text of Article IV.[61] This would suggest that the linguistic amendment in the English version of the Convention did not have the effect of modifying the substance of the Convention or of exempting any category of 'gouvernants' from the scope of the Convention. It can be understood, instead, as an allowance made to constitutional monarchies to maintain, under their own laws, their constitutional arrangement regarding the legal status of their monarchs.

Furthermore, bracketing off monarchs from the reach of the Convention would have left an important gap of accountability in direct contradiction with the object and purpose of that instrument. Writing to a friend in 1949, Egon Schwelb, who had acted as legal counsel to the United Nations War Crimes Commission, commented cynically on Article IV:

> If Hitler and his gang started all over again, he would be able to claim that he was not a 'constitutionally responsible ruler' (Article IV of the Convention) and he would probably succeed with this plea because he would be arraigned before the Strafkammer of the Landgericht in Berlin. (Article VI of the Convention).[62]

Therefore, instead of providing an exception to accountability for monarchs, Article IV is better understood as applying to *any* person, *including* constitutionally responsible rulers, public officials, or private individuals.[63] This provision would thus capture

[58] See, e.g., UN Doc. A/C.6/SR.93 (n 12).

[59] Genocide Convention (n 1) art. 5 ('[I]n accordance with their respective Constitutions').

[60] Article X of the Convention reads: 'The present Convention, of which the Chinese, French, English, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.'

[61] Article IV of the French text of the Convention reads: 'Les personnes ayant commis le génocide ou l'un quelconque des autres actes énumérés à l'article III seront punies, qu'elles soient des gouvernants, des fonctionnaires ou des particuliers.' Article IV of the Spanish text of the Convention reads: 'Las personas que hayan cometido genocidio o cualquiera de los otros actos enumerados en el artículo III, serán castigadas, ya se trate de gobernantes, funcionarios o particulares.' See also UN Doc. A/C.6/SR.95 (n 51), 343, fn 1 ('Les mots "constitutionnellement responsables" n'ont ete ajoutes que dans le texte anglais.'). This echoes the view of the USSR representative, Mr Morozov, that the expression 'responsible rulers' could not be interpreted otherwise than as 'constitutionally responsible rulers' so that his delegation would abstain from voting on the word 'constitutionally' (ibid., 343). See also UN GAOR, 3rd Sess, 128th mtg, UN Doc. A/C.6/SR.128 (29 November 1948) (hereafter UN Doc. A/C.6/SR.128); UN General Assembly, Genocide: Draft Convention and Report of the Economic and Social Council (E/794) Report of the Drafting Committee, UN Doc. A/C.6/288 (23 November 1948) (hereafter UN Doc. A/C.6/288, Report of the Drafting Committee) (pointing out that considering the expressions 'gouvernants' and 'constitutionally responsible rulers' had been adopted by the Sixth Committee only after prolonged debates it would not be possible for the drafting Committee to make or to agree on a drafting change on that point which would give satisfaction to all members).

[62] Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime & Punishment, 1919–1950* (OUP 2014) (hereafter Lewis, *Birth of the New Justice*), 224 (citing Schwelb's correspondence to Dr TW Brugel, 6 September 1949 at the UN Archives, Geneva, SOA 318/2/01(4)).

[63] See, e.g., Minority Opinion of Judge Marc Perrin De Brichambaut in *Al Bashir* Decision under Article 87(7), Brichambaut Minority Opinion (n 44) para. 23 (emphasis added) (pointing out that Article IV 'imposes an obligation on States to punish *all persons* committing genocide, *including* "constitutionally

the case of a monarch who possessed actual powers and authority and who contributed through those (or otherwise) to the commission of an act of genocide, but it would not concern itself with monarchs whose position was not matched by any actual power or authority by which he could have contributed to the commission of an act of genocide.

Furthermore, even if one were to read into the Convention an implied exemption of monarchs, it is doubtful that such an exception would now be recognized as forming part of customary international law. Customary international law provides for a general and unqualified principle of responsibility for *all* those who culpably contribute to the commission of an international crime. This is reflected, *inter alia*, in Principle I of the Nuremberg Principles which provides that '[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment'.[64] Furthermore, the ILC *Commentary* to Principle I made it clear that '[t]he general rule underlying [this principle] is that international law may impose duties on individuals directly without any interposition of internal law'.[65] Therefore, from the point of view of customary international law, the fact that an individual might have enjoyed constitutional immunities under his or her own domestic law would not exempt him or her from responsibility as a matter of international law.[66] Resolution 96(I), from which the Genocide Convention descends, similarly made no exception to the possibility of penal responsibility for any category of individuals and instead affirmed that liability for genocide should extend to 'principals and

responsible rulers"') and para. 37 (pointing out that Contracting Parties to the Genocide Convention have an obligation pursuant to Article IV to punish 'all perpetrators of genocide, including incumbent "constitutionally responsible rulers"').

[64] The Nuremberg Principles are now an accepted reflection of customary international law. See Antonio Cassese, 'Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I)' (UN Audiovisual Library of International Law 2018) <http://legal.un.org/avl/ha/ga_95-1/ga_95-1.html> (hereafter Cassese, 'Affirmation of the Principles of International Law'). See also *Attorney General v. Eichmann*, 36 ILR 277 (Israel Supreme Ct. 29 May 1962) (hereafter *Eichmann* Supreme Court Judgment):

> [I]f there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law 'since time immemorial,' such doubt has been removed by two international documents. We refer to the United Nations Assembly resolution of 11.12.46 which 'affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal, and the judgment of the Tribunal,' and also to the United Nations Assembly resolution of the same date, No. 96 (1) in which the Assembly 'affirms that genocide is a crime under international law'.

UN Security Council, Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993 (hereafter UN Doc. S/25704), para. 35; *Prosecutor v. Tadić*, Case No. IT-94-1-AR-2, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereafter *Tadić* Jurisdiction Decision on Interlocutory Appeal), para. 141; *Prosecutor v. Tadić*, Case No. IT-94-I-T, Opinion and Judgment, 7 May 1997 (hereafter *Tadić* 1997 Judgment), para. 623. See also Hans-Heinrich Jescheck, 'The Development of International Criminal Law after Nuremberg' in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2009) (hereafter Jescheck, 'ICL after Nuremberg'), 411.

[65] *Yearbook of the International Law Commission 1950*, vol. II, UN Doc. A/1316 (1950) (hereafter ILC 1950 Yearbook II), 374, para. 99.

[66] Principle II of the Nuremberg Principles notes: 'The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.' ILC 1950 Yearbook II (n 65).

accomplices—whether private individuals, public officials or statesmen'. A principle of general, unqualified, responsibility for all in relation to international crimes, including genocide, is also reflected in a variety of international instruments, including the Nuremberg Charter (Article 7), Control Council Law No. 10 (Article II(4)(a)), the ICTY Statute (Article 7(2)[67]),[68] the ICC Statute (Article 27) and throughout relevant case law since Nuremberg.[69] By the end of the Second World War, the impunity once enjoyed by the leaders of nations, including kings and queens, was all but gone and the principle that anyone could in principle be held accountable under international law for participating in international crimes was unambiguously asserted:

> Nor should such a defense [pursuant to which an accused would be shielded from liability based on rank or status] be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the Law'.[70]

It is therefore apparent that both under the Convention and customary law, a monarch could be held responsible for genocide if he or she contributes to the commission of such an act and his or her constitutional standing at the domestic level would provide no defence or exception to this principle.

3.3.3.1.3 Nationality of perpetrator and victim

The ethnic, religious, racial, or national identity of the perpetrator is not material to the question of responsibility for acts of genocide.[71] Perpetrators and victims could

[67] See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Preliminary Motions, 8 November 2001 (hereafter *Milošević* Preliminary Motion Decision), in particular, para. 30.

[68] See also ICC Statute (n 44) art. 27 ('Irrelevance of Official Capacity'); ICTY Statute (n 44) art. 7(2); ICTR Statute (n 44) art. 6(2); ECCC Statute (n 44) art. 29; SCSL Statute (n 44) art. 6(2); East Timor Tribunal Statute (n 44) s 15; Kosovo Law No. 05-L/053 (n 44) art. 16(1)(b); Art. 1 of the ILC's 1954 Draft Code; Art. 2 of the ILC's 1996 Draft Code.

[69] See, generally, Schabas, *Genocide in International Law* (n 51) 376–80. See also Guénaël Mettraux, John Dugard, and Max DuPlessis, 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa' (2018) 18 International Criminal Law Review 577 (hereafter Mettraux *et al.* 'Immunities').

[70] 'Report to the President by Mr Justice Jackson, June 6, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (London, 1945), 46. See also Henri Donnedieu de Vabres, 'The Nuremberg Trial and the Modern Principles of International Criminal Law' in Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (OUP 2009) (hereafter Donnedieu de Vabres, 'Nuremberg Trial'), 265.

[71] See, e.g., In the City of Westminster Magistrates' Courts, *The Government of the Republic of Rwanda v. Vincent Bajinya et al.*, 6 June 2008. Counsel for the accused had argued that the Rwandan government's approach was to assume that all Hutus were complicit in the genocide and that, in contrast, no Tutsis nor members of the Rwanda Patriotic Front were prosecuted for crimes committed during the relevant period (para. 112). When addressing these arguments, the court effectively set aside the suggestion that the nationality or group membership of the perpetrator would be any bar to their responsibility for acts of genocide: 'By its very nature and definition, genocide involves the mass killing of one particular group

share the same nationality[72] and could belong to the same group.[73] In this regard, genocide is no different from crimes against humanity, which may be committed by members of a given group or nation against fellow members.[74]

3.3.3.2 Superior orders

3.3.3.2.1 The Convention and customary international law

Up until the Second World War, the validity of a defence based on the existence of superior orders had remained ambiguous and there were good reasons for defence counsel at Nuremberg to raise it as a defence to the charges. However, Article 8 of the Charter provided that the fact that a defendant acted pursuant to order of the Government or of a superior 'shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires'.[75] When dealing with the defence challenges on this issue, the Nuremberg Tribunal held that Article 8 of its Charter was 'in conformity with the law of all nations':

> That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[76]

Whilst Article 8 of the Charter allowed for the possibility of orders being considered in mitigation of sentences, the Tribunal took the view that this was not warranted in

by another, whether that grouping is based on racial, ethnic or other factors. Therefore, if prosecution and punishment of the perpetrators is to follow, then those so accused must, inevitably, be members of the slaughtering group. They are, therefore, prosecuted not because they are members of a particular racial or ethnic group, but because they were members of the killing group, and their racial or ethnic background is incidental.' (ibid., para. 115). See, *contra*, unreasoned, *Scilingo Manzorro (Adolfo Francisco) v. Spain*, Judgment, Case No. 798, (Spain Supreme Ct 1 October 2007), <http://opil.ouplaw.com/view/10.1093/law:ildc/1430es07.case.1/law-ildc-1430es07?rskey=baUnMw&result=86&prd=ORIL> (hereafter *Manzorro* Appeal Judgment) (where the Court held, with one judge dissenting, that genocide could not be established because victims and perpetrators shared the same nationality).

[72] Secretary-General, Draft Convention with Commentary (n 8) 232 (noting that 'it makes no difference whether the victims of genocide *are nationals or aliens*').

[73] See, *infra*, 8.4.4.4.1.4.

[74] *Prosecutor v. KAING Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010 (hereafter *Duch* Trial Judgment), para. 312 (and references cited) (regarding the immateriality of the nationality and ethnicity of the targeted population for the purpose of crimes against humanity). For illustrations, see *Attorney-General v. Ternek*, Israel, District Court of Tel-Aviv, 14 December 1951, in 5 Pesakim Mehoziim (1951–52), 142; *Attorney-General v. Enigster*, Israel, District Court of Tel-Aviv, 4 January 1952, 5 Pesakim Mehoziim (1951–52), 152 (Jewish capos being prosecuted for crimes committed against other Jews in Nazi camps).

[75] Nuremberg Charter (Charter of the International Military Tribunal), 8 August 1945 (hereafter Nuremberg Charter), art. 8.

[76] *France et al. v. Göring et al.*, Judgment and Sentence, [1946] 22 IMT 203 (hereafter *France v. Göring*), 221. For illustrations of the application of that principle in later proceedings, see also, e.g., *The Trials of War Criminals*, vol. 15 (.HM Stationery Office 1949) (hereafter *Trial of War Criminals*, vol. 15), 157ff; *Attorney General v. Eichmann*, (Cr. C.40/61) Israel, District Court of Jerusalem, 11 December 1961, (1968) 36 Intl L Rev 18 (hereafter *Eichmann* District Court Judgment), paras 216–226; *Eichmann* Supreme Court Judgment (n 64) para. 15.

relation to any of the defendants considering the extreme gravity of their crimes.[77] The standard laid out by the Nuremberg Charter and Judgment was subsequently encapsulated in Principle IV of the Nuremberg Principles, as adopted by the UN General Assembly and which now reflects customary international law: 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.'[78] The qualified exclusion of the defence of superior order was later replicated in other international instruments.[79]

Whilst the exclusion of the defence of superior orders is now unquestionably part of customary law, the core focus of that exclusion has moved away from the question of 'moral choice' (which remains relevant to a defence of duress or moral coercion[80]) and redefined itself around the question of whether the order in question

[77] 'Judgment of the International Military Tribunal for the Trial of German Major War Criminals' in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (International Military Tribunal 1947) (hereafter IMT Judgment), 309 ('There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.').

[78] See ILC, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries 1950, Yearbook of the International Law Commission, 1950, vol. II. For reference to the customary status of these principles, see, *supra*, n 64. For relevant legal literature, see also Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (OUP 2012); Alexander Zahar, 'Superior Orders' in Antonio Cassese *et al.* (eds), *Oxford Companion to International Criminal Justice* (OUP 2008) (hereafter Zahar, 'Superior Orders'), 525–27; Ilias Bantekas, 'Defences in International Criminal Law' in Dominic McGoldrick *et al.* (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004) (hereafter Bantekas, 'Defences'), 263.

[79] See, in particular, Charter for the International Military Tribunal for the Far East, 19 January 1946 (hereafter Tokyo Charter), art. 6; Control Council Law No. 10 (20 December 1945) (hereafter Control Council Law No. 10), art. II, s 4(b); ICTY Statute (n 44) art. 7(4) ('The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.'), ICTR Statute (n 44) art. 6(4); ICC Statute (n 44) art. 33; SCSL Statute (n 44) art. 6(4); Statute of the Special Tribunal for Lebanon, UN Security Council, Resolution 1757: Attachment: Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757 (30 May 2007) (hereafter STL Statute), art. 3(3); East Timor Tribunal Statute (n 44) s 21; ECCC Statute (n 44) art. 29; Kosovo Law No. 05-L/053 (n 44) art. 16(1)(d); *Malabo* Protocol (n 12) art. 46(B)(4); UN International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1954) (hereafter ILC Draft Code 1954), art. 4; UN International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1991) (hereafter ILC Draft Code 1991) art. 11; UN International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1996) (hereafter ILC Draft Code 1996) art. 5.

[80] *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997 (hereafter *Erdemović* Judge Cassese Dissent), para. 15; ('Superior orders and duress are conceptually distinct and separate issues and often the same factual circumstances engage both notions, particularly in armed conflict situations. We subscribe to the view that obedience to superior orders does not amount to a defence per se but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.'). See also *Prosecutor v. Erdemović*, Case No. IT-92-22-T*bis*, Judgment, 5 March 1998 (hereafter *Erdemović* Sentencing Judgment), paras 17, 19–20; *Prosecutor v. Bralo*, Case No. IT-95-17-S, Judgment, 7 December 2005 (hereafter *Bralo* Sentencing Judgment), para. 53; 'The I.G. Farben and Krupp Trials' in *The Trials of War Criminals*, vol. 10 (.HM Stationery Office 1949) (hereafter 'I.G. Farben and Krupp Trials'), 54 ('Thus the I.M.T. recognised that while an order emanating from a superior officer or from the government is not, of itself, a justification for the violation of an international law (though it may be considered in mitigation), nevertheless, such an order is a complete defence where it is given under such circumstances as to afford the one receiving it no other moral choice than to comply therewith.').

was *manifestly unlawful*.[81] Under customary international law, the defence of superior orders may thus be available where an order is not manifestly unlawful

[81] *Dithmar & Boldt*, German Supreme Court (*Reichsgericht*) at Leipzig, 16 July 1921, reprinted in [1922] AJIL 674 (hereafter *Llandovery Castle* case), 722 ('It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law.'); United Nations War Crimes Commission, 'The German High Command Trial, Trial of Wilhelm Von Leeb and Thirteen others, 28 October 1948' in *Law Reports of the Trial of War Criminals*, vol. 12 (HM Stationery Office 1949). (UNWCC, '*High Command* case') ('illegal on its face'); *Erdemović* Judge Cassese Dissent (n 80) para. 15 ('[I]f the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance.'); *Eichmann* District Court Judgment (n 76) para. 218; '*Einsatzgruppen case*', Subsequent Nuremberg Proceedings, Case No. 9, Judgment, 9 April 1948 (hereafter *Einsatzgruppen* case), 473 ('To plead superior orders one must show an excusable ignorance of their illegality.'). See also 'The Belsen Trial' in *The Trial of German Major War Criminals at Nuremberg*, vol. 2 (.HM Stationery Office 1947) (hereafter 'The Belsen Trial'), 118–19 (recounting the Judge-Advocate's summation regarding the plea of superior orders); 'The *Peleus* Trial' (*Eck et al.*), British Military Court for the Trial of War Criminals, 20 October 1945 (hereafter 'The *Peleus* Trial'), 12 (summarizing the Judge-Advocate) ('It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done; but is it not fairly obvious to you that in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?'); 'Stalag Luft III Case', *Trial of Max Wielen and 17 Others*, British Military Court for the Trial of War Criminals, 3 September 1947 (hereafter *Stalag Luft III* case), 39–40 (summarizing the Judge-Advocate's submissions). See also 'Rule 155' (*International Committee of the Red Cross IHL Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule155> (hereafter ICRC Rule 155) ('Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered.'); 'Rule 154' (*International Committee of the Red Case IHL Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule154> (hereafter ICRC Rule 154) ('Every combatant has a duty to disobey a manifestly unlawful order.'); US Department of the Army, 'FM 27-10, The Law of Land Warfare' (US Department of the Army, 18 July 1956) (hereafter US Army Field Manual 1956), para. 509 ('The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.'); *Sergeant W. case*, Le Conseil de Guerre, 16 May 1966 (Belgium) ('Attendu que dans l'interprétation donnée en pratique par le prévenu à cet ordre, à savoir le droit ou même le devoir de tuer une personne désarmée se trouvant en son pouvoir, l'ordre était manifestement illégal; que le droit d'exécuter ou de faire exécuter sans jugement préalable régulier une personne suspecte ou même rebelle, tombée au pouvoir des militaires de son Bataillon, sortait évidemment des pouvoirs du major O. et que pareille exécution constituait manifestement un homicide volontaire; que l'illégalité de l'ordre ainsi interprété n'était pas douteuse et que le prévenu devait refuser de l'exécuter'); *Ofer, Malinki and Others case*, Israel, District Military Court for the Central Judicial District, 13 October 1958 cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law*, vol. 2 (CUP 2005) (hereafter *Ofer et al. case*), 3833 ('The rule is that obedience to an officer's order, which by law a soldier is bound to obey, constitutes justification for the act, that is, exempts him from criminal responsibility. The exemption is that a manifestly illegal order does not constitute justification for the soldier's actions; a soldier need not ... obey a manifestly illegal order, and if he does obey it, he must bear ... criminal responsibility for his actions.') and 3833 (affirming the ruling and adding that these rules 'impose a moral and legal responsibility on every soldier, irrespective of rank.'). See generally, Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law* (CUP 2005 vol. 2) (hereafter Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*), 3814ff. See also Green LC, 'Superior Orders and the Reasonable Man' 8 Canadian Year Book of International Law, 61 1970; Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012) (hereafter Sliedregt, *Individual Responsibility*).

as a matter of international law,[82] and the individual to whom it is given could reasonably regard the order as lawful.[83] Even where the defence is determined to be inapplicable, the existence of such an order *could* constitute a mitigating factor in sentencing.[84]

In contrast to these developments, the Genocide Convention contains no provision regarding the defence of superior orders. The *travaux* suggest that there were conflicting views among states regarding the permissibility of an absolute exclusion of the defence, with a number of states of position that the defence could not be excluded in all cases whilst others suggested that the matter should be left to judges to decide.[85] A proposed (Soviet) amendment for a provision built along the terms of Article 8 of the Nuremberg Charter was rejected,[86] which reflected the continuous evolution and uncertainty of

[82] The legality of the conduct under municipal law would not free the perpetrator from liability to punishment if those acts otherwise constitute an international crime such that the plea of having acted upon orders which were legal under municipal law would fail to constitute a defence in such a case. For an illustration of the application of this principle, see *Trial of War Criminals*, vol. 15 (n 76) 157 and 160–61 and references cited therein.

[83] The situation where an order is given to commit a crime should be distinguished from the question of an order having been given to carry out an operation in the context of which crimes are committed. See, generally, *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-A, Judgment, 19 May 2010 (hereafter *Boškoski* Appeal Judgment), para. 51 (footnotes omitted) ('The Appeals Chamber finds that even if a lawful governmental order had existed to conduct the operation in Ljuboten, Tarčulovski would still incur criminal responsibility for statutory crimes committed in the course of this operation. The fact that a State is acting in lawful self-defence (*jus ad bellum*) is irrelevant for a determination as to whether a representative of this State has committed a serious violation of international humanitarian law during the exercise of the State's right to self-defence which constituted part of an armed conflict (*jus in bello*). Consequently, the Trial Chamber did not err in attributing criminal liability to Tarčulovski without making a finding on whether an order was lawfully given by the President of the FYROM to carry out a self-defence operation against domestic "terrorists".').

[84] The possibility of superior orders being relevant as mitigating circumstances to sentencing is now generally accepted under international law. See, generally, ICTY Statute (n 44) art. 7(4); ICTR Statute (n 44) art. 6(4); SCSL Statute (n 44) art. 6(4); STL Statute (n 79) art. 3(3); Section 21 East Timor Tribunal Statute (n 44) s 15; Kosovo Law No. 05-L/053 (n 44) art. 16(1)(d); *Malabo* Protocol (n 12) art. 46(B)(4); ILC Draft Code 1996 (n 79) art. 5; UN Doc. S/25704 (n 64) para. 57; UN Commission of Experts Report on Rwanda (n 2) para. 175. For illustrations, see also, e.g., *Prosecutor v. Mrda*, Case No. IT-02-59-S, Judgment, 31 March 2004 (hereafter *Mrda* Judgment), paras 65 ('[S]uperior orders may be pleaded in mitigation independently of duress, and vice versa.') and 67 ('[T]here is no evidence that the orders were accompanied by threats causing duress. Moreover, the orders were so manifestly unlawful that Darko Mrda must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity. The fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment.'); *Erdemović* Sentencing Judgment (n 80) paras 15, 17, 47–56; *Bralo* Sentencing Judgment (n 80), paras 53–56; *Trials of War Criminals*, vol. 15 (n 76) 158–59 (and references cited), in particular, *Trial of Gozawa Sadaichi and others*, 4 February 1946 in *Law Reports of the Trial of War Criminals*, vol. 15 (HM Stationery Office 1949) (hereafter *Sadaichi Trial*), 159. See also 'Judge Biddle's Report to the President, 9 November 1946' in US Department of State Bulletin, 24 November 1946 (hereafter Judge Biddle's Report), 956 ('The official position of defendants in their government is barred as a defense. And orders of the government or of a superior do not free men from responsibility, though they may be considered in mitigation.'); US Army Field Manual 1956 (n 81) para. 509. Some States do, however, exclude mitigation of punishment for violations committed pursuant to manifestly unlawful orders. See ICRC Rule 155 (n 81) (specifically commentary and references cited therein).

[85] See, generally, Schabas, *Genocide in International Law* (n 51) 381ff. The Secretariat Draft had foreseen a provision on superior orders. See Secretary-General, Draft Convention with Commentary (n 8) draft art. 5 ('Command of the law or superior orders shall not justify genocide.'), and pp. 214 and 242 (for the commentary associated with this draft provision).

[86] UN Doc. A/C.6/SR.92 (n 52) (with twenty-eight states in favour, fifteen against, and six abstentions). See also *High Command* case (n 81) 72:

the law on the issue at that point in time. As such, the absence of a provision in the Convention 'neither confirms nor rejects the status of superior orders as a defence'.[87]

In sum, under customary international law, what determines the availability of the defence of superior orders in a given case, including in relation to genocide, is whether the order was manifestly unlawful under international law and whether the perpetrator was or should have been aware of that fact. Considering that in order to be held responsible for a genocidal offence, the accused must, at the very least, have known of the principal's genocidal *mens rea*,[88] it is difficult to envisage situations whereby such knowledge, if established, would not have the effect of rendering the order manifestly unlawful and the defence of superior orders inapplicable.[89]

3.3.3.2.2 Article 33 ICC Statute

Article 33, paragraph 1, of the ICC Statute provides a qualified exclusion of the defence of 'superior orders' for crimes within the jurisdiction of the Court, including genocide.[90] This paragraph may be said to reflect customary international law.[91]

> The rejection of the defence of superior orders without its being incorporated in Control Council Law No. 10 that such defence shall not exculpate would follow of necessity from our holding that the acts set forth in Control Council Law No. 10 are criminal not because they are therein set forth as crimes but because they then were crimes under International Common Law. International Common Law must be superior to and, where it conflicts with, take precedence over National Law or directives issued by any national governmental authority. A directive to violate International Criminal Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.

[87] Schabas, *Genocide in International Law* (n 51) 388.

[88] See, *infra*, Chapters 8 and 11. For illustrations, see, e.g., *Krstić* Appeal Judgment (n 41) paras 140 and 142; *Prosecutor v. Ntakirutimana et al.*, Case Nos ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004 (hereafter *Ntakirutimana et al.* Appeal Judgment), para. 500; *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005 (hereafter *Semanza* Appeal Judgment), para. 369.

[89] See also *Einsatzgruppen* case (n 81) (in relation to charges of war crimes and crimes against humanity) 158:

> [T]he doer may not plead innocence to a criminal act ordered by his superiors if he is in accord with the principle and intent of the superior ... In order successfully to plead the defence of Superior Orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defence of Superior Orders is closed to him.

See, also, Schabas, *Genocide in International Law* (n 51) 388 (suggesting that 'an order to commit genocide or to participate in the crime in whatever fashion, must be deemed manifestly illegal' and adding that superior orders alone in the absence of duress is no plea to a charge of genocide).

[90] Article 33(1) reads as follows:

> The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
> (b) The person did not know that the order was unlawful; and
> (c) The order was not manifestly unlawful.

For a commentary to that provision, see, generally, S Bock, 'Article 33: Superior Orders and Prescription of Law' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck 2016) (hereafter Bock, 'Article 33: Superior Orders and Prescription of Law'), 1182–96.

[91] Hilaire McCoubrey, 'From Nuremberg to Rome: Restoring the Defence of Superior Orders' (2001) 50 International and Comparative Law Quarterly 386 (hereafter McCoubrey, 'Restoring the Defence

The second paragraph of Article 33 goes one step further and provides that 'orders to commit genocide or crimes against humanity are manifestly unlawful'.[92] In other words, it creates a legal presumption which removes the judges' fact-finding competencies in relation to the availability and effect of a superior orders defence related to charges of genocide or crimes against humanity. Such an approach, which could not be said to reflect existing customary law, is normatively questionable as it seeks to do away with a universe of complex factual considerations and might deprive an individual of an otherwise valid defence.[93] This provision should therefore be understood as merely creating a rebuttable presumption rather than an unqualified exclusion of the possibility of a superior orders defence when charges involve allegations of genocide or crimes against humanity.

of Superior Orders'); James Grayson, 'The Defence of Superior Orders in the International Criminal Court' (1995) 64 Nordic Journal of International Law 243 (hereafter Grayson, 'Defence of Superior Orders in the ICC'); William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) (hereafter Schabas, *Commentary on the Rome Statute*), 507 and, in particular, 512 (suggesting that the definition in Article 33(1) of the ICC Statute is consistent with customary international law); Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) 836 International Review of the Red Cross 785 (hereafter Garraway, 'Justice Delivered or Justice Denied'); Andreas Zimmermann, 'Superior Orders' in Antonio Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* vol. 1 (OUP 2002) (hereafter Zimmerman, 'Superior Orders'), 957. See, *contra*, Paola Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 European Journal of International Law 172 (hereafter Gaeta, 'The Defence of Superior Orders') (suggesting that there exists under customary international law an 'absolute' exclusion of superior orders as a defence).

[92] Bing Bing Jia, 'The Two Approaches to the Superior Orders Plea' in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (CUP 2016) (hereafter Jia, 'The Two Approaches to the Superior Order Plea'), 248, at 270 (footnote omitted):

> Article 33(2) [...] excludes the commission of genocide and crimes against humanity, as defined in the Rome Statute from the defence of superior orders. This exclusion had not been familiar heretofore in either international jurisprudence or national military law, except in the Rome Conference's Preparatory Committee—although its incorporation into Article 33 seems to have been less controversial than the incorporation of Article 33(1).

[93] Schabas, *Commentary on the Rome Statute* (n 91) 507, 513 (describing Article 33(2) of the ICC Statute as 'one of the more incoherent examples of the process of compromise and negotiation that resulted in the *Rome Statute*' and suggesting that this provision is 'not explained by legal logic or intellectual consistency'). See also ICRC Rule 155 (n 81) (providing for an accurate rendition of the customary law prohibition of the defence of superior order: 'Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered.'). See also *Llandovery Castle* case (n 81) 722:

> According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, *including also the accused*, to be without any doubt whatever against the law. This happens only in rare and exceptional cases.

(emphasis added); and Robert Cryer, 'Dithmar and Boldt (*Llandovery Castle case*)' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009), 644 (hereafter Cryer, '*Llandovery Castle case*') (discussing that case and noting that the 'manifestly unlawful' test 'is an evidential test designed to probe the mind of the defendant').

Finally, the Rome Statute does not expressly specify whether the presence of superior orders could operate as a mitigating factor in case of conviction. However, Article 78(1), in combination with Rule 145 of the Court's Rules of Procedure and Evidence, would suggest that such consideration could come within the scope of a Chamber's discretion when considering an adequate sentence.[94]

3.4 Temporal and Territorial Framework

3.4.1 Temporal scope of application

The elements of genocide consist of the commission of one of the punishable underlying crimes with the requisite special, genocidal, intent.[95] Once the two elements are satisfied, the time of commission of the offence extends to the entire period during which acts falling within the terms of Article II of the Convention are committed or acts of assistance under Article III are provided.[96]

Regarding the obligations of states to prevent and punish acts of genocide, the International Law Commission has pointed out that the 'intertemporal principle', whereby a transaction must be interpreted or characterized according to the law applicable at the time, does not apply to the Convention which, in accordance with its first Article, is declaratory in nature.[97] Thus, the obligation to punish relates to acts of genocide whenever committed and is not limited to the time after which a state became bound by the Convention.[98] The same would be true of the duty to prevent. A state is therefore bound to act to prevent acts of genocide from the moment it acquires knowledge of the risk of commission of such acts by state agents or individuals

[94] See Bock, 'Article 33: Superior Orders and Prescription of Law' (n 90) 1188–89.

[95] See, *infra*, 8.1.

[96] ILC, 'Draft Articles on State Responsibility' (n 30) 62, Article 15, ILC Commentary para. 3 (footnote omitted):

> Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.

[97] Ibid., fn 258:

> The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (footnote 54 above), 617, para 34.

See also Preliminary Objections Judgment (n 3) 615–17, paras 31 and 34; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) (hereafter Crawford, *The International Law Commission's Articles on State Responsibility*), 242–43 (footnote omitted):

> At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that 'the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*': this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

[98] ILC, 'Draft Articles on State Responsibility' (n 30) 62 (Article 15 commentary at para. 3, fn 258).

over which it possesses the requisite influence.[99] It continues to require action on its part for as long as such a risk continues to exist.[100] However, the responsibility of a state for a failure to prevent or to punish acts of genocide can only be engaged if and where genocide has actually been committed.[101]

3.4.2 Geographical scope of application

The prohibition on genocide is applicable to all locations so that genocide can in principle be committed anywhere.[102] The associated duties of states to prevent and punish genocide are similarly not limited to the territory of that state, although the territorial state has specific responsibilities in that regard.[103] As discussed further below, these obligations may operate in relation to perpetrators acting outside the territory of a given state as long as the state concerned has the ability to influence them.[104]

3.5 Gravity of the Crime

Genocide is widely recognized as 'a crime against all of humankind',[105] the gravity of which is apparent from a number of

[99] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 430:

> Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.

[100] ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 431:

> In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.

[101] See, *infra*, 5.1.1.1 and 5.2.1.1. See, in particular, ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 431.

[102] See, for instance, UN War Crimes Commission, 'The Trial of Ulrich Greifelt and Others' in *Law Reports of the Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) (hereafter 'The Trial of Ulrich Greifelt'), 37–38 (discussing the application of the notion of genocide in the context of occupied territories).

[103] See, *infra*, 5.1.1.5 and 5.2.1.4. Preliminary Objections Judgment (n 3) 595, 615–16 at para. 31.

[104] See, again, *infra*, 5.1.1.5 and 5.2.1.4.

[105] *Krstić* Appeal Judgment (n 41) para. 36. See also *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998 (hereafter *Kambanda* Trial Judgment), para. 16 (referring to it as 'the crime of crimes'); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (hereafter *Stakić* Trial Judgment), para. 502; *Prosecutor v. Semanza*, Case No. ITCR-97-20-T, Judgment, 15 May 2003 (hereafter *Semanza* Trial Judgment), para. 556 (referring to genocide and extermination as crimes 'of the most serious gravity, which affect the very foundations of society and shock the conscience

features.[106] First, the prohibition on genocide seeks to protect not just individuals but also *groups*.[107] The focus on groups means that the interests protected by the prohibition of genocide are not limited to an accumulation of individual interests; it also encompasses and protects the distinct and overarching interest of the international community in protecting groups as such.

Second, the particular *currency* of genocide as 'the crime among crimes' is also reflected in the manner in which the prohibition is interpreted and applied as well as the stringent requirements necessary before a conviction can be entered under that label.[108] The importance of maintaining the integrity of this notion was already apparent during

of humanity'). During the negotiations of the Convention, the representative of the USSR, Mr Pavlov, suggested that the perpetration of genocide 'violated the principles of the United Nations, and was condemned [sic] by the whole domestic world.' See UN Economic and Social Council, Official Records, Continuation of the Discussion on the Draft Convention on the Crime of Genocide, UN Doc. E/SR.219, (26 August 1948) (hereafter UN Doc. E/SR.219).

[106] See generally *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgment, 9 July 2004 (hereafter *Niyitegeka* Appeal Judgment), para. 53 (referring to genocide as the 'crime of crimes'). *Kambanda* Trial Judgment (n 105) para. 16; *Prosecutor v. Trbić*, No. X-KR-07/368, First Instance Verdict, 16 October 2009 (hereafter *Trbić* Trial Judgment), para. 794 (describing genocide as 'the crime among crimes' and suggesting that '[d]espite the magnitude of the crime, it is committed by ordinary men. Ordinary men are capable of committing the most extraordinary evil given the right set of circumstances. It is the product of unexamined and unchecked hatred.'). See also UN Report on Darfur (n 40) para. 505 (noting that it has widely been held that genocide is the most serious international crime); and UN War Crimes Commission, 'Trial of Hauptsturmführer Amon Leopold Goeth. Supreme National Tribunal of Poland, (27th–31st August and 2nd–5th September, 1946)' in *Law Reports of Trials of War Criminals*, vol. 7 (HM Stationery Office 1948) (hereafter UNWCC, 'Notes on the Trial of Goethe'), 7 (noting that, in this case, the Prosecution had referred to genocide as '*a crimen læsæ humanitatis*').

[107] See, *infra*, 8.4.1 and 8.5.1.

[108] See, e.g., *Krstić* Appeal Judgment (n 41) para. 37:

> The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements—the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part—guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name.

Prosecutor v. Jević, No. X-KR-09/823-1, First Instance Verdict, 25 May 2012 (hereafter *Jević et al.* Trial Judgment), para. 967 ('Genocide is the gravest criminal offense codified under the Criminal Code of BiH and one of the worst crimes known to the humankind, and its gravity is reflected in the stringent requirement of specific intent.'). See also *Vasiliauskas v. Lithuania*, App. No. 35343/05, 20 October 2015 (hereafter *Vasiliauskas* Judgment), para. 180, where the European Court of Human Rights noted the following:

> Consistently with the ICJ in the case of *Bosnia and Herzegovina v. Serbia* and *Montenegro*, the Court considers that the gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements—the proof of specific intent and the demonstration that the protected group was targeted for destruction in its entirety or in substantial part—guard against a danger that convictions for this crime will be imposed lightly (see paragraph 112 above). Noting the Lithuanian courts' arguments in the instant case, the Court is not persuaded that the applicant's conviction for the crime of genocide could be regarded as consistent with the essence of that offence as defined in international law at the material time and thus could reasonably have been foreseen by him in 1953.

Ibid., para. 185. See, however, warning against the risk of exaggerating this aspect of the offence: *Krstić* Appeal Judgment (n 41), Partial Dissenting Opinion of Judge Shahabuddeen (hereafter *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent) para. 95 (footnote omitted) ('Genocide is the "crime of crimes". The Appeals Chamber has said, correctly, that it "is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent." But, with respect, the stringency

the negotiation of the Convention.[109] It is also perceptible from the general attitude adopted by tribunals when interpreting it, a task which has generally been approached with a degree of caution and humility intended to protect and maintain the particular features of that offence.[110] The particular stigma attached to that crime has also made judges reluctant to accept that genocide charges could be 'bargained away' too readily as part of a plea agreement.[111] In addition, the standing of the offence has prevented in one case the transfer of an individual to a third party's jurisdiction where his suspected acts of genocide could not have been prosecuted under that particular legal label.[112]

should not be overrated; to suggest that the requirement of proof of specific intent was not observed by the Trial Chamber in this case is not plausible.').

[109] In its Commentary to the Secretariat Draft, the Secretary-General described genocide as 'the deliberate destruction of a human group'. Secretary-General, Draft Convention with Commentary (n 8) 230. 'This literal definition', he said, 'must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc.' Secretary-General, Draft Convention with Commentary (n 8) 223. During the discussion of the draft Convention, the UK representative, Mr Phillips, similarly warned the ECOSOC to 'beware of condoning too wide a definition of genocide, which would render the whole concept meaningless and result in a highly controversial convention' Summary Record of the 419th Meeting, UN Doc. A/CN.4/SR.419 (17 June 1957) (hereafter UN Doc. E/SR.419).

[110] See, e.g., *Stakić* Trial Judgment (n 105) para. 502 ('Like in its Decision on Rule 98 *bis* Motion for Judgment of Acquittal, the Trial Chamber will, whilst interpreting Article 4 restrictively and with caution, always be guided by the unique nature of the crime of genocide.'); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002 (hereafter *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal), para. 22 (pointing out that Article 4 of the Statute needs to be interpreted 'restrictively and with caution' and stresses the 'exclusivity' of the crime of genocide); *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment, Wald Dissent), para. 2 ('Some learned commentators on genocide stress that the currency of this "crime of all crimes" should not be diminished by use in other than large scale state-sponsored campaigns to destroy... groups, even if the detailed definition of genocide in our Statute would allow broader coverage.'). See also Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd edn, OUP 2001) (hereafter Ratner & Abrams, *Accountability for Human Rights Atrocities*), 42–44.

[111] See, in particular, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, Judgment, 2 December 2003 (hereafter *Nikolić* Trial Judgment), para. 65 ('Once a charge of genocide has been confirmed, it should not simply be bargained away. If the Prosecutor make a plea agreement such that the totality of an individual's criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions will inevitably arise as to whether justice is in fact being done. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record.') and para. 78 ('Having considered the factors in favour of accepting Momir Nikolić's guilty plea, the Trial Chamber found it necessary to consider the request by the Prosecution to withdraw the remaining charges and particularly the charge of genocide. As a starting point, the Trial Chamber considered that the Prosecution was in the best position to assess its case. The Trial Chamber found it significant that the Prosecution did not seek to withdraw any of the factual allegations outlining Momir Nikolić's criminal conduct. The Trial Chamber therefore found that the totality of Momir Nikolić's criminal conduct is reflected in the charge of persecutions, a crime against humanity. The Trial Chamber considered that its discretion in sentencing was linked not to the specific crime charged, but rather to the gravity of the offence, as is discussed below. As to whether Momir Nikolić may have had the requisite *mens rea* to satisfy the specific intent requirement for the crime of genocide, in addition to establishing the remaining elements for genocide, the Trial Chamber deferred to the discretion of the Prosecution on this matter. Accordingly, the Trial Chamber found that the acceptance of the guilty plea pursuant to the Amended Plea Agreement was appropriate in this case, and on 7 May 2003 accepted the guilty plea of Momir Nikolić and entered a conviction thereupon.').

[112] See, generally, *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006 (hereafter *Bagaragaza* Rule 11 *bis* Decision), para. 16:

Finally, the crime's intrinsic gravity explains why sentences handed out for genocide have typically been severe.[113] Nonetheless, acts characterized under other legal

> In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (*ratione materiae*) over the crimes as charged in the confirmed Indictment. In addition, the Chamber recalls that the crimes alleged—genocide, conspiracy to commit genocide and complicity in genocide—are significantly different in term of their elements and their gravity from the crime of homicide, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber's view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza's alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed.

The holding was upheld on appeal. See *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-a AR11*bis*, Decision on Rule11*bis* Appeal, 30 August 2006 (hereafter *Bagaragaza* Rule11*bis* Appeal Decision), in particular, para. 17:

> Norway's proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the 'ordinary crime' of homicide. [...] Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.

Norway has since amended its Penal Code thereby permitting its courts to exercise jurisdiction over genocide, crimes against humanity and war crimes. See Amendment to the General Civil Penal Code, LOV-2005-05-20-28, entered into force on 7 March 2008; 'National Implementation of International Humanitarian Law: Biannual Update on National Legislation and Case Law July–December 2008', (2008) 91 International Review of the Red Cross 185.

[113] See generally *Kambanda* Trial Judgment (n 105). In *Kambanda*, the ICTR noted:

> Regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge. 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', as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.

Kambanda Trial Judgment (n 105) para. 16. See also *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Judgment, 5 February 1999 (hereafter *Serushago* Trial Judgment). Sentences handed out for acts of genocide have typically been lengthy. The practice of international(ized) criminal tribunals suggest that sentences for acts of genocide (which in some cases also encompassed convictions for crimes against humanity and/or war crimes) have ranged from six (Serugendo) and eight (Bagaragaza) years of imprisonment to life imprisonment (e.g., Karemera, Gacumbitsi, Mladić, Popović, Beara, Tolimir), and have commonly revolved around the twenty to forty years mark. It should be noted, however, that as a matter of international sentencing practice, sentences are decided based primarily on the gravity of the underlying conduct attributable to the accused and on the nature of his contribution to the crime. See, e.g., *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001 (hereafter *Čelebići* Appeal Judgment), para. 731; *Blaškić* Appeal Judgment (n 34) para. 683; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998 (hereafter *Čelebići* Trial Judgment), para. 1225; *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000 (hereafter *Kupreškić* Trial Judgment), para. 852; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001 (hereafter *Kvočka et al.* Trial Judgment), para. 701; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000 (hereafter *Aleksovski* Appeal Judgment), para. 182; *Stakić* Trial Judgment (n 105) paras 903 and 910; *Prosecutor v. Naletilić &Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003 (hereafter *Naletilić & Martinović* Trial Judgment), para. 718; *Prosecutor v. Plavšić*, Case No. IT-00-39 & 40/1-S,

labels (in particular, crimes against humanity) could be just as grave and could result in equally harsh sentences.[114] In this respect, it is of significance that the crimes of the Nazi regime were tried at Nuremberg not as acts of genocide but as crimes against humanity, war crimes, and crimes against peace.[115] An appropriate sentence, therefore, depends not on 'comparing and ranking the crimes in the abstract' but on the facts of each case and the gravity of the conduct attributable to the accused.[116]

3.6 Normative Status

3.6.1 Customary law status

Genocide's importance as a legal prohibition is reflected in its particular normative status. First, the prohibition on genocide is now unquestionably part of customary international law,[117] as are the principles and duties attaching to that

Judgment, 27 February 2003 (hereafter *Plavšić* Trial Judgment), para. 25; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (hereafter *Krnojelac* Trial Judgment), para. 522. The legal labelling attached to that conduct will, in principle, only be a secondary consideration. See, e.g., *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001 (hereafter *Krstić* Trial Judgment), para. 700 ('Assessing the seriousness of the crimes is not a mere matter of comparing and ranking the crimes in the abstract.'). Several Chambers have underlined, however, the per se gravity of genocide as a starting point in the process of determining an adequate sentence for someone convicted for that crime. See, e.g., *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgment, 21 February 2003 (hereafter *Ntakirutimana* Trial Judgment), para. 881 ('Both Accused have been found guilty of genocide and crimes against humanity. These crimes are of an utmost gravity; they are shocking to the conscience of mankind, in view of the fundamental human values deliberately negated by their perpetrators and the sufferings inflicted. These crimes threaten not only the foundations of the society in which they are perpetrated but also those of the international community as a whole.'); *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, 27 January 2000 (hereafter *Musema* Trial Judgment), para. 1001; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, 6 December 1999 (hereafter *Rutaganda* Trial Judgment), paras 451–452, 468; *Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Sentence, 21 May 1999 (hereafter *Kayishema & Ruzindana* Sentence), para. 9. High sentences for genocide are justified by the gravity of the underlying conduct capable of amounting to genocide (killings; serious harm; etc.) and by the presence of the genocidal intent, which operates as a sort of aggravating factor for the purpose of sentencing.

[114] See, generally, UN Report on Darfur (n 40) para. 506 (footnote omitted):

> It is indisputable that genocide bears a special stigma, for it is aimed at the physical obliteration of human groups. However, one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma. In fact, the Appeals Chamber of the ICTR reversed the view that genocide was the 'crime of crimes'. In *Kayishema and Ruyindana*, the accused alleged 'that the Trial Chamber erred in finding that genocide is the "crime of crimes" because there is no such hierarchical gradation of crimes'. The Appeals Chamber agreed: 'The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are "serious violations of international humanitarian law", capable of attracting the same sentence.'

[115] See, *supra*, 2.2.

[116] *Krstić* Trial Judgment (n 113) para. 700 ('Genocide embodies a horrendous concept, indeed, but a close look at the myriad of situations that can come within its boundaries cautions against prescribing a monolithic punishment for one and all genocides or similarly for one and all crimes against humanity or war crimes.').

[117] *Popović et al.* Trial Judgment (n 41) para. 807:

> The crime of genocide is punishable under Article 4 of the Statute, which adopts the definition of genocide and list of punishable acts in Articles II and III of the Genocide Convention.

prohibition, which remain binding on states even in the absence of any conventional obligations.[118]

> These articles of the Genocide Convention are widely accepted as customary international law. Genocide was therefore a punishable offence under customary international law at the time of the acts alleged in the Indictment.

Prosecutor v. Sikirica et al., Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001 (hereafter *Sikirica et al.* Motion for Acquittal Decision), para. 55; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (hereafter *Akayesu* Trial Judgment), para. 495; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, 27 January 2000 (hereafter *Musema* Trial Judgment), para. 151; *Rutaganda* Trial Judgment (n 113) para. 46; *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 110), para. 20; *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999 (hereafter *Jelisić* Trial Judgment), paras 60–61; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (hereafter *Tolimir* Trial Judgment), para. 733 (footnotes omitted):

> The definition of the crime of genocide under Articles 4(2) and (3) mirrors the definition of genocide in Articles II and III of the Genocide Convention. These provisions of the Genocide Convention are widely accepted as customary international law rising to the level of *jus cogens*; and genocide as defined in the Statute, was a punishable offence under customary international law at the time of the acts alleged in the Indictment.

Krstić Trial Judgment (n 113) para. 541; *Stakić* Trial Judgment (n 105) para. 500; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004 (hereafter *Brdanin* Trial Judgment), para. 680 (footnotes omitted):

> The Trial Chamber must apply Article 4 of the Statute in accordance with the state of customary international law at the time relevant to the Indictment. To this end, the main source is the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 and in force as of 12 January 1951 ('Genocide Convention'). Its Articles II and III are reproduced in Article 4(2) and (3) of the Statute. It is widely recognised that these provisions of the Genocide Convention reflect customary international law and that the norm prohibiting genocide constitutes *jus cogens*.

Blagojević et al. Trial Judgment (n 41) para. 639; *Kayishema & Ruzindana* Trial Judgment (n 3) para. 88; *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, Case 002/02 Judgement, 27 March 2019, paras 784ff (finding that genocide was established as a crime under customary international law by 1975); *Jević et al.* Trial Judgment (n 108) paras 904–906; *Trbić* Trial Judgment (n 106) paras 171–72; *Prosecutor v. Vuković & Tomić*, No. X-KR-06/180-2, Verdict, 22 June 2012 (hereafter *Vuković & Tomić* Appeal Judgment), paras 403–405; *Prosecutor v. Stupar et al.*, No. X-KR-05/24, First Instance Verdict, 13 January 2009 (hereafter *Stupar et al.* Trial Judgment), 53; *Prosecutor v. Ivanović*, No. SI 1 K 003442 14, Second Instance Verdict, 1 July 2014 (hereafter *Ivanović* Appeal Judgment), paras 17, 20; *Prosecutor v. Mitrović*, No. X-KR-05/24-1, First Instance Verdict, 4 February 2009 (hereafter *Mitrović* Trial Judgment), 44; ICJ *Bosnia-Serbia* 2007 Judgment (n 6) paras 142, 161; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15 (hereafter ICJ Reservations to the Convention 1951); *Mugesera v. Canada*, [2005] 2 SCR 100 (Can.), para. 82; Arab Bank Trial Judgment (n 12) 271 (finding that intra-national offences such as torture, extra-judicial killings, and genocide constitute violations of customary international law because 'such wrongs are of mutual concern and capable of impairing international peace and security'). See also UN Doc. S/25704 (n 64) para. 45.

[118] See, generally, Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*) (Judgment) [2006] ICJ Rep 911 (hereafter *Congo v. Rwanda*), 31–32, para. 64:

> The Court will begin by reaffirming that 'the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation' and that a consequence of that conception is 'the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention)' (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports* 1951, 23). It follows that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31).'

Mugesera v. Canada, [2005] 2 SCR 100 (Can.), para. 82 ('In addition to treaty obligations, the legal principles underlying the *Genocide Convention* are recognized as part of customary international law.').

There is some uncertainty as to the exact time when genocide came to form part of customary international law. The suggestion in Article I of the Genocide Convention that it merely confirmed a pre-existing prohibition on genocide and judicial statements to the same effect is better understood as a necessary response to suggestions of *post facto* criminalization.[119] However, absent clear indications of the existence of such a prohibition in the practice of states prior to the Convention, these claims do not stand up to scrutiny.[120] It is more likely that genocide gained customary

[119] Pursuant to Article I of the Genocide Convention, contracting parties thus 'confirm' that genocide is a crime under international law. See also, generally, *Eichmann* District Court Judgment (n 76) para. 21 (suggesting that genocide was 'already part of customary international law when the [Nazi's] dreadful crimes were perpetrated, which led to the United Nations Resolution and the drafting of the [Genocide] Conventions') and para. 19 ('[T]here is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, *ex tunc*; that is to say: The crimes of genocide committed against the Jewish People and other peoples were crimes under international law. It follows, therefore, in the light of the acknowledged principles of international law, that the jurisdiction to try such crimes is universal.'). As noted above, this view would appear to be supported by the UN General Assembly's Resolution 96(I) of 11 December 1946, which 'affirmed' that genocide '[was] a crime under international law' by that stage already. UN General Assembly, Resolution 96(I): The Crime of Genocide, UN Doc. A/RES/96(I) (11 December 1946), 189. See also *In re* Peter Egner, No. Ki.V.8/08, Judgment (D Ct Belgrade 7 May 2009) (regarding crimes allegedly committed during the Second World War). The District Court of Belgrade suggested that the concept of genocide might have existed as a 'general principle of law recognised by civilised nation' even prior to the adoption of the 1948 Convention. Relying on Article 15(2) ICCPR and 7(2) ECHR, the District Court held:

> In other words, this means that regardless of the fact that the crimes that the accused is charged with in the decision to conduct an investigation were not prescribed by law at the time when they were committed, it is possible to initiate proceedings with regard to these events since they are considered to be acts of genocide, or war crimes, which according to the Court were criminal according to the general principles of law recognised by civilised nations.

Such a view might be true to the limited extent that the international community might have regarded such conduct as criminal even prior to the Second World War.

[120] UN Commission of Experts Report on Rwanda (n 2) para. 150 ('Before the Genocide Convention was adopted in 1948, genocide was not specifically prohibited by international law except in laws of war.'). See also *Polyukhovich v. Commonwealth*, (1991) 172 CLR 501 (Australia) (hereafter *Polyukhovich* Judgment). In his separate opinion Judge Brennan noted:

> The crime of genocide, which the Tribunal described as the 'prime illustration of a crime against humanity attracting punishment, did not acquire the status of an international crime until after the Second World War ... The weight of opinion and international practice as evidenced by the drafting of Art.6(c) of the Nuremberg Charter show that genocide was not a crime under international law until after the Second World War, and the history of the drafting of Art.6(c) shows that crimes against humanity were not clearly established as crimes in international law independent of war crimes when the Nuremberg Charter was drafted ... Thus I come to the same conclusion as that expressed in the Hetherington Report whose summary I would adopt (par. 6.44) mutatis mutandis as applicable to Australia:
>
> > To summarise, by 1939, before the offences which this Inquiry is required to investigate were allegedly committed, violations of the customs and uses of war, or war crimes as they were later called, were internationally recognised as crimes, both Britain and Germany being among the signatories of the Hague Conventions which confirmed them as such. The Nuremberg judgment also held that such acts were also recognised as crimes under customary international law, which bound even those nations which had not become party to the Conventions. Genocide was not so recognised until 1948 and we find the position of what were subsequently called crimes against humanity to be unclear. Under customary law belligerents had the right to try before military courts war criminals who fell into their hands, and also to provide for the surrender of others in the terms of the armistice or the

law status immediately upon the adoption of the Genocide Convention, or shortly thereafter.[121]

3.6.2 *Jus cogens*

Genocide is recognized as a peremptory norm, or *jus cogens*, that allows for no exception and which supersedes any international law norm that does not share that status.[122] So are, arguably, the associated duties to prevent and punish

> peace treaty. Legal opinion then held that jurisdiction existed over such crimes and that a state had the right to legislate to incorporate that jurisdiction into its national domestic law. Therefore it can be argued that enactment of legislation in this country to allow the prosecution of "war crimes" in British courts would not be retrospective: it would merely empower British courts to utilise a jurisdiction already available to them under international law since before 1939, over crimes which had been internationally recognised as such since before 1939 by nations including both the United Kingdom and Germany. We are less certain that a similar stance can be adopted with regard to crimes against humanity. To legislate now for offences of genocide committed during the Second World War would, in our view, constitute retrospective legislation.

Polyukhovich Judgment, Opinion of Brennan, J, para. 65.

[121] The case law of the ECCC suggests that genocide was already part of customary international law by 1975. See *Prosecutor v. Ao An*, Case File No. 004/07-09-2009-ECCC/OCIJ, Closing Order, 16 August 2018 (hereafter *Ao An* Closing Order), para. 85 (holding that Articles II and III of the Convention were part of customary international law by 1975); *Prosecutor v. Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC/OCIJ, Decision on Appeal by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011 (hereafter *Nuon Chea* Appeal Decision), para. 108 (to the same effect). A case from the European Court of Human Rights suggests that the offence was recognized as a part of customary international law even earlier and no later than 1953. See *Vasiliauskas* Judgment (n 108) para. 168 ('[T]he Court finds that the crime of genocide was clearly recognised as a crime under international law in 1953.'); *Vasiliauskas* Judgment (n 108) paras 172 ('[G]enocide was already a crime under international customary law') and 178. In *Munyaneza*, the Canadian Court of Appeals suggested that the prohibition had formed part of customary law 'since long before 1994':

> As for genocide, this crime has been recognized under customary international law since long before 1994, as attested by the *Convention on the Prevention and Punishment of the Crime of Genocide* ... coming into force: 12 January 1951, signed by Canada and Rwanda on September 3, 1952, and April 16, 1975, respectively. It has also been recognized in international jurisprudence: *Prosecutor v. Jean-Paul Akayesu* (2 September 1998), Case No. ICTR-96-4-T (ICTR, Trial Chamber) at para. 495, aff'd by the Appeals Chamber (1 June 2001), Case No. ICTR-96-4-A, and in commentary: Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford UP, 2005)at 199 et seq.'

Munyaneza v. R, 2014 QCCA 906 (Can Ct App) (hereafter *Munyaneza* Appeal Judgment), paras 26 and 162 ('*The Genocide Convention* is the codification of customary international law.').

[122] See generally ICJ Reservations to the Convention (n 117) 23; *Congo v. Rwanda* (n 118) para. 64; ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 161. See also *Jelisić* Trial Judgment (n 117) para. 60; *Kayishema & Ruzindana* Trial Judgment (n 3) para. 88; *Kupreškić* Trial Judgment (n 113) para. 520; *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 110) para. 20; *Tolimir* Appeal Judgment (n 41) para. 733; *Tolimir* Trial Judgment (n 117) para. 733; *Brđanin* Trial Judgment (n 117) para. 680; *Stakić* Trial Judgment (n 105) para. 500; *Blagojević et al.* Trial Judgment (n 41) para. 639; *Akayesu* Trial Judgment (n 117) para. 495; *Rutaganda* Trial Judgment (n 113) para. 46; *Karadžić* Trial Judgment (n 41) para. 539; UN Commission of Experts Reports on Rwanda (n 2) para. 152 (citations omitted):

> Even if Rwanda had not ratified the Genocide Convention, it would be bound by the prohibition of genocide which has, since 1948, developed into a norm of customary international law. Moreover, it is universally recognized by the international community that the prohibition of genocide has attained the status of *jus cogens*. It therefore has a peremptory status. For these reasons, the prohibition of genocide as expressed in the Genocide Convention applies to all members of the international community rather than merely to parties to the Convention.

In re Jorgić (A Bosnian Serb), 2 BvR 1290/99, Individual Constitutional Complaint (German Constitutional Ct 12 December 2000) (hereafter *Jorgić* Constitutional Decision), para. 17; *Nulyarimma v. Thompson*,

genocide.[123] Were these obligations less than absolute in nature, they could effectively be rendered meaningless through the contracting of exceptions to those obligations.[124]

As a consequence of that normative status, a state cannot dispense another from the obligation to comply with this peremptory norm.[125] It also means that circumstances

Appeal Decision, [1999] FCA 1192 (hereafter *Nulyarimma* Appeal Judgment), para. 18 (finding that the prohibition of genocide was a peremptory norm of customary international law, which led to a non-derogable obligation by each state to the international community, independent of the Convention); *The Queen v. Munyaneza (Désiré)*, 2009 QCCS 2201, (Quebec Superior Ct 22 May 2009) (hereafter *Munyaneza* Trial Judgment). See also Patrick Thornberry, *International Law and the Rights of Minorities* (OUP 1991) (hereafter Thornberry, *International Law*), 96–100 (and references cited therein), and specifically 96 fns 47–49 (citing International Law Commission, 'Summary Records of the Eighteenth Session 4 May–19 July 1966' in *Yearbook of the International Law Commission 1966*, vol. 2, UN Doc. A/CN.4/SER.A/1966/Add.1 (United Nations 1967) (hereafter ILC, 'Summary Record of the 18th Sess'), 52–53).

[123] *Stakić* Trial Judgment (n 105) para. 500 (citations omitted) ('It is widely accepted that the law set out in the Convention forms part of customary international law and constitutes *jus cogens*.'); *Krstić* Trial Judgment (n 113) para. 541. See also ICJ Reservations to the Convention (n 117) 23 (pointing to the universal character of *both* the condemnation of genocide and of the cooperation required to liberate mankind of this scourge and noting that the Genocide Convention was intended to be universal in character); Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), (Judgment of 14 February 2002, Dissenting Opinion of Judge Al-Khasawneh) [2002] ICJ Rep 3 (hereafter ICJ *DRC-Belgium* 2002 Judgment, Al-Khasawneh Dissent), para. 7 (suggesting that the effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance). For an illustration, see also *Nulyarimma* Appeal Judgment (n 122) para. 18 (finding that customary law provides for a peremptory and non-derogable obligation to prosecute acts of genocide). See also Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) (hereafter Brownlie, *Principles of PIL* 2003), 488–90 (describing 'the law of genocide' and not just the prohibition of genocide as *jus cogens*); Orna Ben-Naftali, 'The Obligations to Prevent and to Punish Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Ben-Naftali, 'Obligations to Prevent and Punish'), 36 ('The prohibition on genocide is a *jus cogens* obligation. The peremptory nature of the norm attached to the obligation to prevent, for otherwise the normative status of the prohibition—and its legal implications—would be rendered meaningless.'); Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 European Journal of International Law 815 (hereafter Akande & Shah, 'Immunities of State Officials'), 834ff (considering the issue but coming to no firm conclusion on that point). *Contra*, Manuel J. Ventura, 'The Prevention of Genocide as a *Jus Cogens* Norm? A Formula for Lawful Humanitarian Intervention' in Charles C Jalloh and Olufemi Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (Brill Nijhoff Publishers 2015) (hereafter Ventura, 'Prevention of Genocide as a *Jus Cogens*?'), 289 (suggesting that there is insufficient practice to arrive at the conclusion that the duty to prevent genocide is *jus cogens*).

[124] *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), 3 November 2011 (hereafter *Nuon Chea et al.* Decision on Ieng Sary Objections), paras 38 and 39 (holding that the Genocide Convention imposes an 'absolute duty to prosecute' genocide and finding that Cambodia is, as a result, under 'an absolute obligation to ensure the prosecution or punishment' of perpetrators of acts of genocide). See also Ben-Naftali, 'Obligations to Prevent and Punish' (n 123) 36. One would have to reserve the case where the prosecution of such allegations might conflict with another norm of *jus cogens*, such as the prohibition on torture. See, generally, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998 (hereafter *Furundžija* Trial Judgment), paras 144, 153–157. See, also, *infra*, 5.3.2.5.2 (Non-surrender agreements).

[125] See ILC, 'Draft Articles on State Responsibility' (n 30) p. 85, para. 6 (ILC Commentary to Article 26, referring also to paragraph (4) of its commentary to article 45 of the *Draft* Articles). The peremptory character of the prohibition on genocide does not exclude the possibility of reservations to the Genocide Convention. See ICJ Reservations to the Convention 1951 (n 117) 22ff; *Congo v. Rwanda* (n 118) para. 66:

> The Court notes, however, that it has already found that reservations are not prohibited under the Genocide Convention [...]. This legal situation is not altered by the fact that the Statute of the International Criminal Court, in its Article 120, does not permit reservations to that

normally precluding wrongfulness do not authorize or excuse any derogation from such a norm. For example, acts of genocide could not justify a counter-genocide.[126] The plea of necessity likewise could not excuse the breach of such a peremptory norm.[127] That status also provides support for the suggestion that the obligations of states attaching to the prohibition on genocide, in particular the duties to prevent and punish these crimes, are absolute in character.[128]

The *jus cogens* and *erga omnes* status of genocide could also serve to support the view that non-state actors, which have the capacity to prevent or punish acts of genocide, are bound by the duties to prevent and punish such acts.[129] The *jus cogens* feature of that prohibition has also been cited to suggest that an obligation to extradite or prosecute (*aut dedere aut judicare*) arguably exists in relation to individuals suspected of committing genocide[130] and in support of the position that a national court could not be prohibited from investigating and prosecuting genocidal acts.[131]

In *ex parte Pinochet*, it was suggested that the *jus cogens* status of the crime of torture would imply that universal jurisdiction attach to it as a matter of international law.[132] The claim is doubtful for a number of reasons. First, the *jus cogens* status of

> Statute, including provisions relating to the jurisdiction of the International Criminal Court on the crime of genocide. Thus, in the view of the Court, a reservation under the Genocide Convention would be permissible to the extent that such reservation is not incompatible with the object and purpose of the Convention.

[126] ILC, 'Draft Articles on State Responsibility' (n 30) art. 26, para. 4; Application of Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims (*Bosn. & Herz. v. Yugoslavia*) (Order) [1997] ICJ Rep 243 (hereafter ICJ 1997 Counter-Claims Order), para. 35 ('[I]n no case could one breach of the Convention serve as an excuse for another [...].'). See also Andreas Zimmermann, 'The Obligation To Prevent Genocide: Towards A General Responsibility To Protect?' in Ulrich Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011), 629.

[127] Ibid.

[128] See also Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell International Law Journal 507, 516 (footnote omitted) ('Like the Geneva Conventions, the Genocide Convention provides an absolute obligation to prosecute persons responsible for genocide as defined in the Convention.').

[129] See, *infra*, 5.1.2.3. [130] See, *infra*, 5.3.2.6 (Duty to transfer or extradite suspects).

[131] See, in particular, *Jorgić* Constitutional Decision (n 122) para. 16 (partially reprinted in 2001 *Neue Zeitschrift für Strafrecht* 240, suggesting that a customary law prohibition on universal jurisdiction for acts of genocide would be contrary to and defeat the purpose of this *jus cogens* prohibition. See also *Furundžija* Trial Judgment (n 124) para. 156 (regarding the crime of torture):

> [A]t the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.

Regarding this issue, see also, *infra*, 4.2.

[132] In *R v. Bartle* [1999] 2 WLR 827 (HL), Lord Browne-Wilkinson stated that 'the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed.' Ibid., 837–38. In the same case, Lord Millet held that 'crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Second, they must be so serious and on such a scale that they can justly be regarded as an attack

a norm is one that affects its status or hierarchical standing among international law norms. It does not as such provide for a grant of jurisdiction.[133] Second, when it comes to genocide, the suggestion that the prohibition on genocide would provide for universal competence over that offence is also in direct contradiction with the rejection of such expansive jurisdictional competence by the Genocide Convention's drafters.[134] Such a claim would also conflict with the practice of many states that restrict their jurisdiction over *jus cogens* crimes to narrower jurisdictional confines.[135] However, as discussed below, it is correct to suggest that the combined effect of the *jus cogens* and *erga omnes* nature of the prohibition on genocide means that a state would be *permitted* under international law to exercise extra-territorial (including universal) jurisdiction over such acts.[136] This is not the same as suggesting that international law itself provides for a general, universal, grant of jurisdiction over *jus cogens* offences.

Finally, as outlined in 6.2.2, the *jus cogens* nature of the prohibition is a factor of relevance, though not a conclusive factor, in support of the suggestion that amnesties are impermissible in relation to acts of genocide.[137]

on the international legal order.' Ibid., 911–12. See also, Steven Ratner *et al.* (eds), *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd edn, OUP 2009) (hereafter Ratner, *Accountability for Human Rights Atrocities* 3rd edn), 179–81 (suggesting, but providing little support for the claim, that where the offence relates to an *erga omnes* obligation or a *jus cogens* norm, the argument that all states have the power to assert jurisdiction over the offence is 'even stronger' and suggesting that 'it is likely that genocide carries universal jurisdiction under customary international law').

[133] *Nulyarimma v. Thompson* (n 122) para. 20 (finding that the peremptory norm of customary international law did not, without the federal Parliament enacting legislation, lead to a person being tried for genocide before an Australian court).

[134] See, *infra*, 4.2. [135] See, again, *infra*, 4.2..

[136] *Jorgić v. Germany* App. No. 74613/01 ECtHR (European Court of Human Rights), 12 July 2007) (hereafter *Jorgić* ECtHR Judgment). In particular, the court noted:

> In determining whether the domestic courts' interpretation of the applicable rules and provisions of public international law on jurisdiction was reasonable, the Court is in particular required to examine their interpretation of Article VI of the Genocide Convention. It observes, as was also noted by the domestic courts (see, in particular, paragraph 20 above), that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article (compare paragraphs 20 and 54 above). However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing). Having thus reached a reasonable and unequivocal interpretation of Article VI of the Genocide Convention in accordance with the aim of that Convention, there was no need, in interpreting the said Convention, to have recourse to the preparatory documents, which play only a subsidiary role in the interpretation of public international law.

Ibid., paras 68. See also Antonio Cassese, *International Criminal Law* (OUP 2003) (hereafter Cassese, *ILC* 2003), 294–95 (suggesting that states are *authorized*, but not required, by international law to prosecute extra-territorial genocidal acts). See also, *supra*, 6.2.

[137] See, *infra*, 6.2.2.

3.6.3 *Erga omnes*

The prohibition on genocide and associated obligations are binding upon all and are held in relation to the international community as a whole, or *erga omnes*.[138] In turn, this means that each and every member of the international community has a 'legal interest' in the observance of this prohibition and associated obligations and consequently a legal entitlement to demand compliance therewith.[139]

The *erga omnes* status impacts upon a number of features associated with genocide, including the scope of permissible jurisdiction over that crime,[140] the validity and effect of amnesties,[141] as well as the scope and reach of the associated obligations to prevent and punish acts of genocide.[142] The *erga omnes* character of the prohibition and associated duties is also relevant to establishing the scope of the ICJ's jurisdiction over disputes pertaining to the Convention pursuant to Article IX.[143]

[138] See generally Case concerning the Barcelona Traction, Light and Power Co. (*Belgium v. Spain*) (Judgment) [1970] ICJ Rep 3 (hereafter *Barcelona Traction* Judgment), para. 34; ICJ Reservations to the Convention 1951 (n 117) 23 (pointing to 'the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" '); Preliminary Objections Judgment (n 3) para. 31 ('[T]he rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*.'); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Provisional Measures Order, Separate Opinion by Judge Lauterpacht) [1993] ICJ Rep 325 9 hereafter ICJ *Bosnia-Serbia* Provisional Measures, Lauterpacht Separate Opinion), paras 98–102; Application of The Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment of 26 February 2007, Separate Opinion by Judge Ranjeva) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment, Separate Opinion by Judge Ranjeva), para. 4

> If the international solidarity which underlies the duty to prevent genocide is to be ensured, it is hard to see the conventional obligation of this instrument as a series of bilateral relations between the States parties; the Convention would fail to meet its objective if it gave rise to a group which lacked a common understanding of the rules to be applied. This may explain why the duties established by the Convention have been characterized as *erga omnes* obligations 'even without any conventional obligation' (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). The binding nature of the obligation does not arise from the individual commitment of the State, but from the value attributed to that duty by the law.

Eichmann District Court Judgment (n 76) paras 11–16; *Jorgić* ECtHR Judgment (n 136) paras 68–69; UN Commission of Experts Report on Yugoslavia (n 2) para. 88:

> The Convention was manifestly adopted for humanitarian and civilizing purposes. Its objectives are to safeguard the very existence of certain human groups and to affirm and emphasize the most elementary principles of humanity and morality. In view of the rights involved, the legal obligations to refrain from genocide are recognized as *erga omnes*.

[139] *Kupreškić* Trial Judgment (n 113) para. 519. See also *Barcelona Traction* Judgment (n 138) para. 33 ('[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.') and para. 34 ('Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.').

[140] See reference, *supra*, in fn 136 to the *Jorgić* Constitutional Decision (n 122). See also, *infra*, 4.2.

[141] See, *infra*, 6.2.2. [142] See, *infra*, 5.1.1.4.

[143] Shabtai Rosenne, *The Law and Practice of the International Court* (Sijthoff 1965 vol. 2) (hereafter Rosenne, *Law and Practice*), 520 and 552ff. (pointing out that, in respect of *erga omnes*

3.7 Principles of Interpretation

3.7.1 Between strict and humanitarian approaches to interpretation

The interpretation of the notion of genocide and of its elements reflects a profound conflict between the *penal* character of the prohibition and its *humanitarian* purpose. The need to protect the offence's currency is pulling the interpretative process in one direction whilst the goal of securing the Convention's stated purpose is pulling it in another. This tension is reflected in the rules of interpretation adopted to define genocide. On the one hand, the jurisprudence of international criminal tribunals reflects calls to adhere to a strict, penal approach to interpretation in order to protect the offence's integrity and the fundamental rights of defendants.[144] On the other, one also finds indications of a less stringent approach to the process of interpretation that focuses on the prohibition's ultimate civilizing purpose. Such an approach has the practical effect of expanding the reach of the law of genocide and ensuring the broadest possible protection from such conduct.[145] For instance, such a broad and permissive approach was adopted by the ICJ when interpreting the nature and scope of states' obligations under

obligations, any state has a legal interest that can be invoked against any other state including as ground to invoke the compromissory clause against any other party to the Convention in relation to a point of interpretation or application of said Convention); Robert Kolb and Sandra Krähenmann, 'The Scope *Ratione Personae* of the Compulsory Jurisdiction of the ICJ' in Paola Gaeta (ed), *UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Kolb, 'Scope *Ratione Materiae*'), 425, at 428–29 (referring to this authority and pointing out that when *erga omnes* obligations are at stake, 'the applicant is considered to possess such a legal interest [relevant to the admissibility of a jurisdictional request] even if his own legal rights were not infringed' and thus effectively broadens the notion of '*locus standi*' in relation to such norms); Tams *et al.*, *Genocide Convention Commentary* (n 21) art. 9, 293, 307–08.

[144] See, e.g., *Stakić* Trial Judgment (n 105) para. 502 ('Like in its Decision on Rule 98 *bis* Motion for Judgment of Acquittal, the Trial Chamber will, whilst interpreting Article 4 restrictively and with caution, always be guided by the unique nature of the crime of genocide.') and fn 1069; *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 110), in particular, para. 22 (pointing out that Article 4 of the ICTY Statute, which prohibits genocide, needs to be interpreted 'restrictively and with caution' and stresses the 'exclusivity' of the crime of genocide).

[145] See, e.g., UN Report on Darfur (n 40) para. 494 ('[T]he principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects.') and paras 498–501; ICJ Reservations to the Convention (n 117) 23:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

See also *Vasiliauskas* Judgment (n 108) para. 156.

Article I of the Convention,[146] and in regard to the question of jurisdictional competence under Article VI.[147]

These conflicting approaches do not only reflect the fact that genocide is at once criminal law and treaty law and, thus, subject to different rules of interpretation. They also reflect a fundamental tension between the desire to protect the core identity of the notion of genocide whilst making it broadly relevant and effective in preventing and punishing such acts. A rather strict approach to its interpretation has thus generally prevailed when interpreting the words of the Convention and the intentions of the drafters.[148] This is apparent from the view taken that the list of protected groups and the list of underlying crimes under the Convention are exhaustive.[149] It is also apparent from the view that the notion of 'destruction' is limited to physical or biological destruction, that 'a part' of the group must mean a *substantial* part, and that for an act to come within the scope of the listed genocidal offences it must be capable of making a contribution to the intended goal of destruction of the group or part thereof.[150] In contrast, a more liberal approach to the process of interpretation has been adopted where the Convention has left normative ambiguities or uncertainties that the interpretative process can co-opt to expand the reach of the law. For instance, such normative uncertainties enabled international criminal tribunals to take

[146] The humanitarian and civilizing purposes of the Genocide Convention was material to the conclusion of the International Court of Justice that Article I of the Convention creates obligations (to prevent and punish genocide) distinct from those appearing in subsequent articles. See ICJ *Bosnia-Serb* 2007 Judgment (n 6) para. 162:

> Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I—the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. [...] Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

See also Shany, 'The Road to the Genocide Convention and Beyond' (n 8) 3, 15.

[147] See ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 445 ('[I]t would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter.').

[148] See, for an illustration, *Blagojević & Jokić* Trial Judgment (n 41) para. 663, citing UN Commission of Experts Report on Yugoslavia (n 2) para. 94:

> The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.)

The ECtHR has pointed out, however, that states are not prevented by the international law to adopt a definition broader in scope than the one provided for in the Genocide Convention. See, generally, *Vasiliauskas* Judgment (n 108) para. 181 ('The Court accepts that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in 1948 Genocide Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively.').

[149] See, *infra*, 8.4.4.6. See also *Prosecutor v. Paulov* (Karl-Leonhard), Case No. 3-1-1-31-00, Cassation Judgment (Estonian Supreme Court, 21 March 2000).

[150] See *infra*, respectively 8.2.2, 8.3.3.1.1, and 10.1.2.

the view that modes of participation and inchoate offences provided for in Article III of the Convention were not exhaustive in character, and that a culpable contribution could be made to the commission of acts of genocide in ways and manners not expressly foreseen by the Convention.[151] This also enabled international criminal tribunals to adopt the view that genocidal intent was not a prerequisite for all modes of participation in an act of genocide and that certain modes of liability not foreseen in the Convention (e.g., aiding and abetting or command responsibility) could entail individual criminal responsibility without proof of genocidal intent on the part of the accused.[152] A similarly liberal approach also allowed for an interpretation of the jurisdictional provisions of the Convention that did not foreclose the possibility for national courts to exercise their jurisdiction over acts of genocide beyond the confines of the territorial competence foreseen by the Convention.[153]

3.7.2 Interpreting the notion of genocide at the ICC

The crime of genocide raises particular problems of interpretation before the International Criminal Court (ICC). As with other crimes under the Court's jurisdiction, the interpretation of the crime of genocide is subject to the requirement of strict interpretation provided for in Article 22(2) of the Rome Statute.[154] However, strict adherence to Article 22(2) has not been all that apparent when it comes to the crime of genocide. This is perhaps most evident in the approach adopted by the Court in the *Bashir* proceedings. The question arose in this case about the consistency and compatibility of the definition of genocide found in the Statute and the distinct definition foreseen in the ICC's *Elements of Crimes*. The *Elements* are deemed to serve as interpretative guidance of the terms of the Statute. However, instead of bringing clarity to the definition of genocide contained in Article 6 of the Statute, it brings its own ambiguity and interpretative challenges, not least in its visible inconsistencies with the Statute.[155] Therefore, when seeking to establish the definition of genocide for the purpose of its proceedings, the Pre-Trial Chamber in the *Bashir* case was forced first to interpret its own interpretative aid in order to then interpret its Statute in a manner deemed consistent with the *Elements*.[156] This went far beyond what could reasonably be understood as the required strict construction and instead resulted in reshaping the notion of genocide away from the terms of the Statute and away from the definition of that crime under customary law.[157]

[151] See, e.g., *Akayesu* Trial Judgment (n 117) para. 546; *Krstić* Appeal Judgment (n 41) paras 138–139. See also, *infra*, 11.1.1 and 11.7.

[152] See, *infra*, 11.1.3. [153] *Infra*, 4.1.2 and 4.2.

[154] See also *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Judgment on Appeal Against 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9', 15 June 2017 (hereafter *Ntaganda* Appeal Decision on Jurisdiction), para. 48, fn 112, citing Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996, UN Doc. A/AC-249/1 (8 May 1996), 9: 'There was general agreement that the crimes within the jurisdiction of the court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality.'

[155] See, *infra*, 7.2.

[156] *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), paras 117–147.

[157] See *infra*, 7.2.2.

The interpretation of the crime of genocide before the ICC is also complicated by the fact that, in the application of that regime, three sets of provisions will be relevant to identifying the applicable *mens rea* of participants in the commission of such acts: Article 6, Articles 25/28, and Article 30. This is the result of the drafters' decision (i) not to adopt a provision similar to Article III of the Convention, (ii) to multiply the modes of liability relevant to ICC proceedings (including a dual regime of command responsibility), and (iii) to adopt a residual provision (Article 30) dealing specifically with the question of the 'mental element' of statutory crimes. This regime complicates the process of interpretation of the crime of genocide and creates uncertainties about the applicable level of *mens rea* required for certain forms of participation in genocidal offences.[158]

3.8 Exclusion from Refugee Status

It is generally accepted that genocide suspects are not entitled to refugee status.[159] In relation to the events of Rwanda, the UN Security Council thus noted that:

[158] See *infra*, 7.2.3 and 11.7.2.8.4.

[159] UNHCR Standing Committee, Note on the Exclusion Clauses, UN Doc. EC/47/SC/CRP.29, 30 May 1997 (hereafter UN Doc. EC/47/SC/CRP.29) (suggesting that genocide can be said to be covered and implied by Article 1(F)(a) of the 1951 Refugee Convention); UNHCR, Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, UN Doc. HCR/GIP/03/05, 4 September 2003 (hereafter UN Doc. HCR/GIP/03/05) (to the same effect); Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art. 1(F)(a) (referring explicitly only to war crimes and crimes against humanity); Lawyers Committee for Human Rights, 'Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Projects and a Lawyers Committee for Human Rights Perspective' (2000) 12 International Journal of Refugee Law 317 (hereafter Lawyers Committee for Human Rights, 'Safeguarding the Rights of Refugees'), 322; Canada, Immigration and Refugee Protection Act (2001, as amended), s 35; Uruguay, Law on the Cooperation with the ICC (2006), art. 6; *Nikuze v. Canada (Minister of Citizenship and Immigration)*, Case No. 2013 FC 33, Reasons for Judgment and Judgment of 15 January 2003 (hereafter *Nikuze* Federal Court Judgment), paras 37–42; *Canada (Minister of Public Safety and Emergency Preparedness) v. Habinshuti*, Case No. TB2-11256, Reasons and Decision of 9 April 2013 (hereafter *Habinshuti* Immigration and Refugee Board Decision); UN General Assembly, Resolution 3074 (XXVIII): Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity (3 December 1973) (hereafter UNGA, Principles of International Cooperation), para. 7 (regarding war crimes and crimes against humanity); UN General Assembly, Resolution 2312 (XXII): Declaration on Territorial Asylum (14 December 1967) (hereafter UNGA, Declaration on Territorial Asylum). For legal literature, see also Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters Publishing 2012); Schabas, *Genocide in International Law*, 482 fn 479; Ben Saul, 'The Implementation of the Genocide Convention at the National Level' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Saul, 'Implementation of Genocide'), 58, at 71–72 (pointing out that states are entitled in principle to legislate to exclude suspected génocidaires from protection from 'persecution' as refugees in accordance with Article 1(F) of the 1951 Refugee Convention); D Orentlicher, Report of the Independent Update the Set of Principles to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 of 8 February 2005, principle 25 ('Under article 1, paragraph 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967, and article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law.'); Yao Li, *Exclusion from Protection as a Refugee: An Approach to Harmonizing Interpretation in International Law* (Brill 2017) (hereafter Li, *Exclusion from Protection as a Refugee*), 319. See *contra*, Andreas Zimmermann and Philipp Wennholz, 'Article 1 F 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) (hereafter Zimmermann &

those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice [and] that persons involved in such acts cannot achieve immunity from prosecution by fleeing the country and notes that the provisions of the Convention relating to the status of refugees do not apply to such persons.[160]

Wennholz, 'Article 1 F'), 594 (noting that Article 1(F)(a)'s exclusion does not expressly refer to genocide but entertaining the possibility that genocidal acts could, in some cases, come within the scope of Article 1(F)(b) or (c) of the Refugee Convention or qualify as war crimes or crime against humanity for purposes of Article 1(F)(a)).

[160] UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/1994/59, 14 October 1994 (hereafter UN Doc. S/PRST/1994/59), 2.

4

Jurisdiction to Investigate and Prosecute Acts of Genocide

4.1 Jurisdictions Foreseen by the Convention

4.1.1 General considerations

The Genocide Convention provides for three jurisdictional venues of relevance for the enforcement and implementation of its terms. The first two are competent to prosecute and punish acts of genocide attributable to individual perpetrators. According to Article VI, they consist of: the competent jurisdictions of the state in which acts of genocide have been committed (i.e., the territorial state) and an 'international penal tribunal'. In addition, Article IX of the Convention provides that disputes between Contracting Parties 'relating to the interpretation, application or fulfilment' of the Convention can be submitted to the International Court of Justice (ICJ) at the request of any of the parties to the dispute.[1]

4.1.2 Two penal jurisdictions expressly foreseen

Article VI of the Genocide Convention provides that '[p]ersons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.[2] The Convention thus expressly mentions only two jurisdictions as enforcement mechanisms of its penal provisions.[3] This dual jurisdictional competence does not create a

[1] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (hereafter 'Genocide Convention'), Article IX.

[2] Article VI of the Genocide Convention.

[3] Regarding the meaning of the notion of 'international penal tribunal', the ICJ has noted the following:

> [It] must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to 'those Contracting Parties which shall have accepted [the] jurisdiction' of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of 'international penal tribunal' restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such

right for a suspect to *choose* between these jurisdictions.[4] Instead, it provides for two jurisdictions potentially competent under the Convention to hear and prosecute allegations of genocide.

4.1.3 No exclusion of other penal jurisdictions

During negotiations, states discussed, but ultimately rejected, the possibility of expanding the jurisdictional reach of the Convention including through the adoption of *universal* jurisdiction.[5] The rejection, however, did not reflect an intention on their part to exclude the possibility for other jurisdictions to prosecute acts of genocide.[6]

> a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), para. 445. There is little doubt that the International Criminal Court would similarly qualify. See, e.g., *Prosecutor v. Al Bashir*, Decision under Article 87(7) of the Rome Statute on Non-Compliance by South Africa with Request by the Court for the Arrest and Surrender of Al-Bashir, Minority Opinion of Judge Marc Perrin de Brichambaut, ICC-02/05-01/09, 6 July 2017 (hereafter *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion), paras 11–13.

[4] See, e.g., *Special Prosecutor v. Hailemariam (Mengistu) et al.*, Case No. 1/87, Preliminary Objections (Ethiopia Fed High Ct 9 October 1995) (hereafter *Hailemariam et al.* Preliminary Objections) (unsuccessfully raising the argument that Article VI of the Convention would give a defendant a choice between the two categories of jurisdictions foreseen by the Convention).

[5] The first draft of the Secretariat envisaged the following formulation: 'The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.' UN Secretary-General, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947) (hereafter Secretary-General, Draft Convention with Commentary), 38. An Iranian proposal would have explicitly provided for universal jurisdiction. It was voted down by a majority of states, including the Great Powers. See *Jorgić v. Germany*, App. No. 74613/01, Judgment (ECtHR 2007) (hereafter *Jorgić* ECtHR Judgment), para. 68; William A Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948* (United Nations 2018) (hereafter Schabas, *Convention on Genocide, Paris 1948*); William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) (hereafter Schabas, *Genocide in International Law*), 84, 410–16, 426ff; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) (hereafter Reydams, *Universal Jurisdiction*), 47–53 (providing a detailed account of the drafting history of the Convention's jurisdictional provision); Vanessa Thalmann, 'National Criminal Jurisdiction over Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Thalmann, National Jurisdiction over Genocide), 231, at 233ff (discussing the successive mentions of the idea of universal jurisdiction for acts of genocide during the negotiation of the Genocide Convention); Ben Saul, 'The Implementation of the Genocide Convention at the National Level' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Saul, 'Implementation of Genocide'), 68.

[6] This possibility was already foreseen during the negotiation of the Convention. See, e.g., UN GAOR, 3rd Sess, 131st mtg, UN Doc. A/C.6/SR.131 (1 December 1948) (hereafter UN Doc. A/C.6/SR.131); UN GAOR, 3rd Sess, 134rd mtg, UN Doc. A/C.6/SR.134 (2 December 1948) (hereafter UN Doc. A/C.6/SR.134); UN General Assembly, Genocide: Draft Convention and Report of the Economic and Social Council, UN Doc. A/760 (3 December 1948) (hereafter UN Doc. A/760), para. 24 (regarding the introduction in the report of the drafting committee of the substance of proposed Indian and Swedish amendments stating the Convention did not affect the right of any state to bring its own nationals to trial before its own tribunals for acts committed outside the state and crimes committed against nationals outside the state's territory). The following explanatory note was thus adopted by twenty votes in favor, with eight against, and six abstentions:

> The first part of article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.

The Convention's limited jurisdictional reach merely reflects the fact that, besides the territorial state, negotiating nations could not agree at the time that any other state would be *required* under the Convention to prevent and punish acts of genocide.[7] In contrast, the Convention did not purport to regulate

UN Doc. A/760 para. 24. See also *Jorgić* ECtHR Judgment (n 5) para. 68 (suggesting that the national courts' reasoning that the Genocide Convention did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered 'as reasonable (and indeed convincing)'); ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 442 ('Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.'); *In re* Adolfo Francisco, Case No. App 84/1998, 1998/22604 (Nat'l High Ct Spain 4 November 1998) (hereafter *Francisco* Appeal Judgment) (noting that Article VI foresees jurisdictional competence over acts of genocide by an international court or by the courts of the state where the crimes of genocide were committed does not exclude the possibility that other jurisdictions might also be competent to preside over such crimes, including in the exercise of universal jurisdiction; acknowledging a principle of jurisdictional subsidiarity whereby states would refrain from exercising their jurisdiction over acts of genocide which might be prosecuted by the courts of the country in which these acts occurred or by an international criminal court); *In re* Augusto Pinochet, Case No. App 173/1998, 1998/22605 (Nat'l High Ct Spain 3 November 1998) (hereafter *Pinochet* Appeal Judgment) (to the same effect); *In re* Dusko Cvjetković, Case No. 15Os99/94, Judgment (Austria Supreme Ct. 13 July 1994) (hereafter *Cvjetković* Supreme Court Judgment) (unofficial translation):

> Article 6 of the Genocide Convention, according to which persons accused of genocide or other acts covered by Article 3, shall be brought before a competent court of the country on whose territory the acts were carried out, or before the international criminal court, which is competent for all the parties to the treaty that have recognised its jurisdiction, assumes in its inherent fundamental conception that the administration of criminal justice is functioning in the state where the crime took place (thus providing the possibility of judicially proper extradition of a suspect to this state). Since otherwise—at the time the [...] Convention was drafted no international criminal court existed—this would lead to a result diametrically opposed to the intentions of the Convention, that is, if there is no functioning administration of criminal justice in the state in which the crime took place, and in the absence of an international criminal court (or the failure of a treaty-state to recognise its jurisdiction) there can be no prosecution whatsoever of persons suspected of genocide or other acts covered by Article 3 of the Convention. This premise, which takes for granted the functioning administration of criminal justice in the state where the crime took place, obviously also lies at the basis of the arguments of Ermadora (*Handbuch der Grundfreiheiten und Menschenrechte*/Manual of Basic Freedoms and Human Rights 213) and Liebscher (WK Article 321 Rz, on which the complainant believes he can rely.

See also Thalmann, National Jurisdiction over Genocide (n 5) 232 (making it clear that whilst Article VI of the Convention obliges the territorial state to exercise its jurisdiction over such acts, national legislations may provide for broader jurisdictional reach), and 241–42; Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) (hereafter Robinson, *Commentary on the Genocide Convention*), 82–84 ('On the basis of Article VI, the States are thus obliged to punish persons charged with the commission of acts coming under the Convention insofar as they were committed in their territory. They could, however, provide for punishment of other persons (provided no extradition request is pending) since the rule of the competence of the State where a crime was committed is not an exclusive one either in domestic or in inter-national law.').

[7] See, e.g., *Attorney General v. Eichmann*, No. 40/61, Judgment (D. Ct. Jerusalem 11 December 1961) (hereafter *Eichmann* District Court Judgment), paras 23–25; *In re* Jorgić, Bundesgerichtshof, Decision of 11 December 1998 (reprinted in part in [1999] *Neue Zeitschrift für Strafrecht*, 236) (hereafter *Jorgić* 1998 Decision) (finding that a prohibition on the exercise of universal jurisdiction could not be inferred from Article VI of the Genocide Convention and that the absence of mention of this possibility in the Convention is the result of the fact that a few countries were opposed to it); *In re* Jorgić (A Bosnian Serb), 2 BvR 1290/99, Individual Constitutional Complaint (German Constitutional Ct 12 December 2000) (hereafter *Jorgić* Constitutional Decision), paras 14–16 (upholding the view of the lower court on that point and holding that the Convention does not regulate the question of jurisdiction over acts of genocide exhaustively and that German courts could exercise universal jurisdiction over such acts that endanger the legal interests of the international community as a whole). See also *Eichmann* District Court

situations where a state or an international(ized) tribunal would be *permitted* to prosecute such acts.[8] The Convention cannot therefore be read as prohibiting any jurisdiction—domestic, international, or hybrid—from prosecuting acts of genocide besides the two that are foreseen in that treaty.[9] As an illustration of that fact, national jurisdictions have relied on a variety of jurisdictional bases—including in some cases the notion of universal jurisdiction[10]—to prosecute acts

Judgment (n 7) para. 25 ('On the other hand, in the Convention for the Prevention and Punishment of Genocide, Member States of the United Nations did not reach quite so far-reaching an agreement, but contented themselves with the determination of territorial jurisdiction as a compulsory minimum.'). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht) [1993] ICJ Rep 325 (hereafter ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion), para. 110 (noting that the intended purpose of Article I of the Genocide Convention is 'to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide').

[8] See also, again, *Jorgić* 1998 Decision (n 7); *Jorgić* Constitutional Decision (n 7) paras 14–16 (noting that the fact that the Convention makes no mention of the notion of universal jurisdiction only means that contracting parties are not *obliged* to prosecute in such cases whilst they may choose to do so subject to their national laws and practices).

[9] Antonio Cassese, *International Criminal Law* (OUP 2003) (hereafter Cassese, *ICL* 2003), 294–5, 303 (suggesting that there is no customary law or treaty-based jurisdictional limitation on the power of states to try and punish crimes against humanity and other crimes perpetrated at home or abroad by nationals or foreigners); Guy S Goodwin-Gill, 'Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute' in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) (hereafter Goodwin-Gill, 'Crime in International Law'), 206–07, 213, and 220; Kai Ambos and Steffen Wirth, 'Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts' in Horst Fischer, Claus Kreß, and Sascha Rolf (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Verlag Arno Spitz 2001) (hereafter Ambos & Wirth, 'Genocide and War Crimes in Yugoslavia'), 769. See also UN International Law Commission, Draft Code of Crimes against Peace and Security of Mankind with commentaries, 1996 <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf> (hereafter ILC, Draft Code 1996), art. 8(8) (noting that Article VI of the Genocide Convention restricts national jurisdictions to the territorial state, but taking the position that universal jurisdiction over such crime is entirely justified 'in view of the character of the crime of genocide as a crime under international law'); *Eichmann* District Court Judgment (n 7) paras 23–25, in particular, paras 23 ('[E]ven within the ambit of the contractual application of the Convention, it cannot be assumed that Article 6 is designed to limit the jurisdiction of countries to try genocide crimes by the principle of territoriality.'), and 25 ('It is clear that the reference in Article 6 to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive, and every sovereign state may exercise its existing powers within the limits of customary international law, and there is nothing in the adherence of a state to the Convention to waive powers which are not mentioned in Article 6. It is in conformity with this view that the Law for the Prevention and Punishment of Genocide, 5710-1950, provided in section 5 that "any person who committed an act outside of Israel which is an offence under this law may be tried and punished in Israel as though he committed the act inside Israel".').

[10] See, for an illustration, *Attorney General v. Eichmann*, 36 ILR 277 (Israel Supreme Ct. 29 May 1962) (hereafter *Eichmann* Supreme Court Judgment), para. 12; *Eichmann* District Court Judgment (n 7), (exercising universal jurisdiction over Eichmann's crimes, including his 'genocidal' acts against the Jewish people, and noting that international law did not prohibit the exercise of universal jurisdiction over such crimes) and Cassese, *ICL* 2003 (n 9), 293–94 (pointing to the 'extremely significant' fact that no state protested against the exercise of universal jurisdiction by the Israeli courts). See also *United States v. Yunis*, 681 F Supp 909 (D DC 1988) (hereafter *Yunis* Appeal Judgment), 918–20; 1977 US Dist LEXIS 2262, at 903; *Demjanjuk v. Petrovsky*, 776 F 2d 571 (6th Cir 1985) (hereafter *Demjanjuk* Appeal Judgment), 582 (referring to Section 404 of the Restatement), 581–82 (finding that extradition to Israel could proceed on the basis of the principle of universal jurisdiction for 'crimes against the Jewish people', i.e., acts of genocide, crimes against humanity, and war crimes), and 582–83 ('When proceeding [under the premise of universal jurisdiction], neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being

of genocide committed outside of their territory.[11]

so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.'); *United States v. Yousef*, 327 F 3d 56 (6th Cir 2003) (hereafter *Yousef* Appeal Judgment), 105–08; *Cvjetković* Supreme Court Judgment (n 6) (finding jurisdiction over acts of genocide committed in Bosnia-Herzegovina based on both domestic and international law and finding the notion of 'universal jurisdiction' over such crimes compatible with both the text and purpose of the Genocide Convention); *Prosecutor v. Rwabukombe*, Case No. 5-3 StE 4/10-4-3/10, Judgment (18 February 2014) (hereafter *Rwabukombe* Trial Judgment); *Prosecutor v. Rwabukombe*, 71 JZ (2016) 103, Judgment (21 May 2015) (hereafter *Rwabukombe* Appeal Judgment); *Prosecutor v. Ntuyahaga*, Case No. ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999) (hereafter *Ntuyahaga* Decision on Motion to Withdraw the Indictment), 5 ('[I]n line with the General Assembly and the Security Council of the United Nations, that [the Tribunal] encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law.'); *Jorgić* 1998 Decision (finding that German courts were not prohibited by international law to exercise universal jurisdiction over the genocidal acts of the accused and coming to the view that the absence of mention of the possibility of universal jurisdiction in the Convention only means that state parties are not obliged to exercise such jurisdiction but can do so as no international law norm prohibits the exercise of jurisdiction over such crimes beyond the limits set by the Convention); *Jorgić* Constitutional Decision, paras 14–16 (upholding the view that genocide could be subject to universal jurisdiction under German law); *In re* Sokolović, Bundesgerichtshof, Docket No. 3 StR 372/00, Decision of 21 February 2001 (hereafter *Sokolović* High Court Decision); Order of the Criminal Chamber of the National Court Confirming the Jurisdiction of Spain to Hear the Crimes of Genocide and Terrorism Committed during the Chilean Dictatorship, Case No. 173/98 (Spain Penal Chamber 5 November 1998) (hereafter Spain Confirmation of Genocide Jurisdiction) (translated and reprinted in Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law 2000) (hereafter Brody & Ratner, *Pinochet Papers*), 98) (taking the view that the—universal—jurisdiction of Spanish courts over allegations of genocide was not constrained or restricted by the terms of the Genocide Convention); *In re Menchú Tum v. Montt*, Audiencia Nacional, Order of 27 March 2000 (hereafter *Tum* 2000 Order) (accepting the possibility of universal jurisdiction of Spanish courts over acts of genocide, but suggesting that the competence of Spanish courts would be *subsidiary* to that of the courts of the territorial state) (discussed in Reydams, *Universal Jurisdiction* (n 5) 188–89); Decision Regarding Allegations of Genocide in Guatemala (Spain Supreme Ct 25 February 2003) (hereafter Spain Genocide in Guatemala Decision) (finding that the Genocide Convention neither provides for nor excludes the possibility of universal jurisdiction over such acts (discussed in Thalmann, National Jurisdiction over Genocide (n 5) 251); *Fundación Casa del Tibet v. Jiang (Zemin)*, Case No. App 196/05, Judgment on Admissibility (Nat'l High Ct Spain 10 January 2006) (hereafter *Zemin* Appeal Judgment on Admissibility). See also Kai Ambos, 'The German *Rwabukombe* Case: National Prosecution of International Crimes' (2016) 14 Journal of International Criminal Justice 1221 (hereafter Ambos, German *Rwabukombe* Case), 1224 (pointing out that German courts have relied on the principle of universal jurisdiction as a basis on which to ground their competence).

[11] Pieter N Drost, *The Crime of State*, vol. 2 (Sythoff 1959); (hereafter Drost, *The Crime of State* vol. 2), 101–02, 131. See also Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (October 2012); REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU: A Study of the Laws and Practice in the 27 Member States of the EU* (December 2010), 16; Council of the European Union, No. 8672/09, The AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009. For illustrations, see Feuille de motivation, Cour d'Assises de Paris statuant en première instance, Affaire Octavien Ngenzi and Tite Barahirwa; Feuille de motivation, Cour d'Assises du Département de la Seine Saint Denis statuant en appel, Section 1, 3 December 2016, Affaire Pascal Senyamuhara Safari; Cour d'Assises de Paris, 2e section statuant en premier ressort, N° 13/0033, Arrêt Criminel, 14 March 2014, Affaire Pascal Senyamuhara Safari. The jurisdictional basis for the prosecution before French courts of acts of genocide committed in Rwanda and neighbouring countries was based on the law of 22 May 1996. Loi n° 96-432 du 22 May 1996 (implementing the UNSC Resolution 955 regarding the creation of the ICTR and providing for a regime of universal jurisdiction over such acts). After the adoption of the ICC Statute, the French Penal Code was amended to provide for broad jurisdictional competence over crimes within the jurisdiction of the Court, including genocide. Article 689-11. Proceedings before Belgian jurisdictions involving allegations of genocide proceeded on the basis of Belgian law,

Conversely, the above cannot be interpreted as a suggestion that customary law recognizes a right for any state to prosecute acts of genocide.[12] Rather, it merely excludes the suggestion that the law of genocide restricts jurisdictional competence over such acts to the jurisdictions expressly foreseen by the Convention.[13] Aside from the territorial state, the legal entitlement of national courts to exercise jurisdictional competence over acts of genocide is thus determined, not by the Convention or general international law, but by the domestic law of the state that is considering exercising its competence over allegations of genocide.[14]

which provided (at the time) for universal jurisdiction over such acts. See, generally, Philippe Meire and Damien Vandermeersch, *Génocide Rwandais: le récit de quatre procès devant la cour d'assises de Bruxelles* (La Charte 2011) (hereafter Meire & Vandermeersch, *Génocide Rwandais*). In the United Kingdom, acts of genocide were initiated criminalized under the Genocide Act 1969, which was repealed in September 2001. It was replaced by the International Criminal Court Act 2001, which provides that UK nationals and UK residents can now be prosecuted for genocide committed anywhere in the world. See International Criminal Court Act 2001, Part 5: Offences Under Domestic Law (hereafter ICC Act 2001), ss 67–68. At the conclusion of the first *Rwanda Five* extradition case in 2009, when consideration was being given to trying these accused in the United Kingdom, there was some concern as to whether a trial for genocide committed before 1 September 2001 could in fact take place in the United Kingdom. Consequently, section 70 of the Coroners and Justice Act 2009 supplemented the ICC Act 2001 so that international crimes, including genocide, committed on or after 1 January 1991 could be tried in the United Kingdom. Coroners and Justice Act 2009, Section 70: Genocide, Crimes Against Humanity, and War Crimes; ICC Act 2001 (n 6) section 65A. See also Ambos & Wirth, 'Genocide and War Crimes in Yugoslavia' (n 9), discussing the jurisdictional basis relied upon by German courts to prosecute a number of Bosnian Serbs on genocide charges.

[12] See also, Reydams, *Universal Jurisdiction* (n 5) 224 (noting that a customary law right to exercise such jurisdiction has arguably not (yet) materialized). *Contra* Andreas Zimmermann, 'The Creation of a Permanent International Criminal Court' (1998) 2 Max Planck Yearbook of United Nations Law 169 (hereafter Zimmermann, 'Creation of a Permanent ICC'), 208–09 (suggesting that such universal competence could be said to arise directly from customary international law).

[13] See, again, references in fn 6, *supra*.

[14] In *Niyonteze*, for instance, Swiss courts declined to entertain allegations of genocide in light of the fact that Switzerland had not, by then, ratified the Genocide Convention so that they were said to lack competence *ratione materiae* and *loci* to adjudicate upon this category of crime. *In re* Niyonteze, Decision of 30 April 1999 (Tribunal militaire, Division 2) (hereafter *Niyonteze* Trial Judgment). In relation to that case, see also Luc Reydams, 'International Decisions: Niyonteze v. Public Prosecutor' (2002) 96 AJIL 231 (hereafter Reydams, 'International Decisions: Niyonteze'); Andreas R. Ziegler, Stefan Wehrenberg, and Renaud Weber (eds), *Kriegsverbrecherprozesse in der Schweiz: Procès de Criminels de Guerre en Suisse* (Schulthess 2009) (hereafter Ziegler, Wehrenberg, & Weber, *Procès de Criminels de Guerre en Suisse*), 359ff. See also *Netherlands v. Rwandan*, 21 October 2008, Decision No. ECLI/NL/HR/2008/BD6568 (NL 2008) (NL Supreme Court) (hereafter *Rwandan* Decision on Jurisdiction) where the Supreme Court of the Netherlands found in relation to acts of genocide committed in Rwanda by a Rwandan that Dutch courts were not jurisdictionally competent to adjudicate on allegations of genocide absent a legal basis in the Genocide Convention, in other conventions ratified by the Netherlands or in Dutch law. Dutch law was later amended to allow for this possibility. Wet Internationale Misdrijven (Law on International Crimes), arts 2, 21(4) (entered into force on 1 April 2012). Regarding the question of jurisdictional competence *in absentia*, see also, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans, & Buergenthal) [2002] ICJ Rep 3 (hereafter ICJ *DRC-Belgium* 2002 Judgment, Higgins, Kooijmans, & Buergenthal Separate Opinion), para. 44; Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (Judgment of 14 February 2002, Separate Opinion of Judge Guillaume) [2002] ICJ Rep 3 (hereafter ICJ *DRC-Belgium* 2002 Judgment, Guillaume Separate Opinion), para. 15; Reydams, *Universal Jurisdiction* (n 5) 227–31.

4.1.4 The International Court of Justice

Article IX of the Genocide Convention provides that disputes between contracting parties 'relating to the interpretation, application or fulfilment' of the Convention, 'including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the ICJ at the request of any of the parties to the dispute'.[15] The Court's competence pursuant to Article XI may thus cover issues of interpretation of the Convention, issues linked to its application (or non-application) and to the fulfilment of obligations provided for in the Convention (including those foreseen in Articles II, III, V, VI, and VII), such as disputes pertaining to the responsibility of a state for any of the acts prohibited under the Convention.[16] It requires proof of the existence of a dispute between contracting parties regarding any of the aforementioned matters.[17] A dispute is to be understood as 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations'.[18] For instance, in the case between Bosnia and Herzegovina and the Former Republic of Yugoslavia, the ICJ determined that Yugoslavia's rejection of Bosnia and Herzegovina's complaints[19] fell within the terms of Article IX of the Genocide Convention.[20] The ICJ took the view that the Parties disputed the facts of the case, questioned whether these facts could be imputed to other individuals, and challenged whether the provisions of the Convention applied to the facts. Moreover, the ICJ noted that the parties disagreed with respect to the meaning and legal scope of several provisions of the Convention, including Article IX.[21] Therefore, the ICJ concluded that a dispute existed between the

[15] See Robinson, *Commentary on the Genocide Convention* (n 6) 100 ('Article IX may well be considered as one of the most important in the Convention: it establishes compulsory jurisdiction of the International Court of Justice in all cases relating to the Convention, in contradistinction to Article 36 of the Statute of the Court, which ordinarily provides for the jurisdiction of the Court only in cases that States, parties to a dispute, refer to it. [...] Thus Article IX is a declaration within the meaning of Article 36 of the Statute and imposes upon all States, parties to the Convention, the "obligation" to refer all disputes enumerated therein to the International Court of Justice.'). Regarding the drafting history of that provision, see generally Robert Kolb, 'The Compromissory Clause of the Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Kolb Compromissory Clause), 407.

[16] Robinson, *Commentary on the Genocide Convention* (n 6) 101. See also ibid., 103–04 (discussing whether the responsibility of a state could be engaged in relation to its own nationals or only in relation to the nationals of another state); Robert Kolb, 'The Scope *Ratione Materiae* of the Compulsory Jurisdiction of the ICJ' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Kolb, 'Scope of the Compulsory Jurisdiction'), 451ff.

[17] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugoslavia*) (Preliminary Objections Judgment of 11 July 1996) [1996] ICJ Rep 595 (hereafter ICJ *Bosnia-Serbia* Preliminary Objections Judgment), para. 29; Mavrommatis Palestine Concessions (*Greece v. Great Britain*) (Preliminary Objections Judgment of 30 August 1924) [1924] PCIJ (ser. A) No. 2 (Aug 30) (hereafter PCIJ *Greece-UK* Preliminary Objections Judgment), 11. Regarding the notion of 'dispute', see also Kolb Compromissory Clause (n 15) 443ff.

[18] ICJ *Bosnia-Serbia* Preliminary Objections Judgment (n 17) para. 29 (citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion of 30 March 1950) [1950] ICJ Rep 65 (hereafter ICJ *Bulgaria, Hungary & Romania* First Phase Advisory Opinion), 74).

[19] ICJ *Bosnia-Serbia* Preliminary Objections Judgment (n 17) para. 29 (citing East Timor (*Portugal v. Australia*) (Judgment of 30 June 1995) [1995] ICJ Rep 90 (hereafter ICJ *Portugal-Australia* Judgment), para. 22).

[20] Christian J. Tams *et al.* (eds) *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag CH Beck 2014), 312–14.

[21] ICJ *Bosnia-Serbia* Preliminary Objections Judgment (n 17) para. 33.

two contracting parties relating to the interpretation, application, or fulfilment of the Convention—including the responsibility of a state for genocide—in accordance with Article IX.[22]

Under Article IX, the Court's remedial powers include issuing binding decisions regarding a state's compliance with its obligations under the Convention. Where a state fails to comply with those obligations, the Court can also determine which measures are required to repair the harm caused.[23] Importantly, the Court is not competent to establish that anyone—a State or an individual associated therewith—is criminally responsible for the commission of acts of genocide.[24]

4.2 Universal Jurisdiction

There is some suggestion that customary international law provides for 'universal' jurisdiction over acts of genocide.[25] Under the most extreme version of that proposition, any state would per force be jurisdictionally competent to investigate and prosecute acts of genocide regardless of the place where the crimes were committed and regardless of the nationality of the perpetrators and victims.[26] Putting aside difficulties

[22] ICJ *Bosnia-Serbia* Preliminary Objections Judgment (n 17) para. 33 (citing Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion of 26 April 1988) [1988] ICJ Rep 12 (hereafter Arbitration Obligation Advisory Opinion), 27–32). See also ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 121–152, 159, and 166–182.

[23] Robinson, *Commentary on the Genocide Convention* (n 6) 106.

[24] Bruno Simma, 'Genocide and the International Court of Justice' in Christoph Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010) (hereafter Simma, 'Genocide and the ICJ'), 259.

[25] See, e.g., Restatement (Third) of the Foreign Relations Law of the United States (2 vols, 1986) § 403, 254–55 (suggesting that universal jurisdiction over, *inter alia*, genocide is 'a matter of customary law'), and 256 (adding that '[u]niversal jurisdiction to punish genocide is widely accepted as a principle of customary law'). See also Amnesty International, *International Law Commission: The Obligation To Extradite Or Prosecute (Aut Dedere Aut Judicare)* (2009); Princeton Project on Universal Jurisdiction, *The Princeton Principles On Universal Jurisdiction* (Stephen Macedo ed, 2001); and *supra*, 4.1.3. For legal literature regarding this question, see generally: Antonio Cassese, 'Is the Bell Tolling for Universality: A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 589 (hereafter Cassese, 'Is the Bell Tolling for Universality?'); Cristina Hoß and Russel A Miller, 'German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence' (2001) 44 German Yearbook of International Law 576 (hereafter Hoß & Miller, 'Liberalizing Germany's Genocide Jurisprudence'); Ruth Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia' (2005) 3 Journal of International Criminal Justice 381 (hereafter Rissing-van Saan, 'The German Court and Yugoslavia Crimes'); Reydams, *Universal Jurisdiction* (n 5) (providing a detailed review of national cases involving consideration of universal jurisdiction); Thalmann, National Jurisdiction over Genocide (n 5) 237ff and 244ff (in relation to universal jurisdiction) (and cases cited therein); Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005) (hereafter Inazumi, *Universal Jurisdiction in Modern International Law*), 155.

[26] See, *supra*, 3.6.2, fn 132, referring to the holdings of Lord Millet and Lord Browne-Wilkinson in the *Pinochet* case. See also *Prosecutor v. Kallon & Kamara*, Case No. SCSL-2004-15/16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 (*Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision), para. 70 ('One consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes.').

associated with defining the notion of universal jurisdiction,[27] such a sweeping claim is hard to accept.

The fact that a large number of states and international(ized) criminal tribunals now have jurisdiction over acts of genocide cannot be read as reflecting the view that customary international law grants universal jurisdiction to any nation over acts of genocide.[28] Nor does state practice suggest that there now exists a generally recognized customary law *obligation* to prosecute suspected perpetrators of acts of genocide on the basis of universal jurisdiction.[29] In this regard, practice is too contradictory and too jurisdiction-specific for such claims to be entirely convincing.[30] Nor can the Statute of the International Criminal Court be read as creating universal jurisdiction over international crimes for state parties.[31] Instead, the possibility for a state to

[27] See, generally, Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 735 (hereafter O'Keefe, 'Universal Jurisdiction'), 735–60. See also G de la Pradelle, 'La compétence universelle' in Hervé Ascensio *et al.* (eds), *Droit International Pénal* (Pédone 2000) (hereafter Pradelle, 'La competence universelle'), 905 para. 1 ('La competence pénale d'une jurisdiction nationale est dite 'universelle' quand [...] un tribunal que ne désigne aucun des critères ordinairement retenus—ni la nationalité d'une victim ou d'un auteur presume, ni la localization d'un élément constitutive d'une infraction, ni l'atteient portée aux intérêts fondamentaux de l'État—peut, cependant, connaître d'actes accomplish par des étrangers, à l'étranger ou dans un espace échappant à toute souveraineté.') and Reydams, *Universal Jurisdiction* (n 5) 5 ('Negatively defined, [universal jurisdiction] means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.').

[28] See Thalmann, National Jurisdiction over Genocide (n 5) 244ff (and authorities cited therein); Inazumi, *Universal Jurisdiction in Modern International Law* (n 25) 155. But see, *contra*, Orna Ben-Naftali, 'The Obligations to Prevent and to Punish Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Ben-Naftali, 'Obligations to Prevent and Punish'), 47–51 (arguing that a duty to prosecute on universal jurisdiction ground could be arrived at based on a purposive or teleological approach to interpreting the terms of the Convention, in particular Article VI).

[29] *Jorgić* Constitutional Decision (n 7). See also Kai Ambos, 'Case Note to the Decision of the Federal Court of Justice' [1999] Neue Zeitschrift für Strafrecht 396, 404–6; *Nulyarimma v. Thompson*, Appeal Decision, Whitlam Concurring Opinion [1999] FCA 1192 (hereafter *Nulyarimma* Appeal Judgment, Whitlam Concur), paras 49–52 (finding that universal jurisdiction did not provide, by itself, a source of jurisdiction for domestic courts to try international crimes and that universal jurisdiction conferred by the principles of international law was an element of sovereignty and how this was exercised would depend on each law country's particular constitutional arrangement). See also Douglas Guilfoyle, '*Nulyarimma v Thompson*: Is Genocide a Crime at Common Law in Australia?' (2001) 29 Federal Law Review 1 (hereafter Guilfoyle, 'Is Genocide a Crime in Australia?'); Kristen Daglish, 'The Crime of Genocide: *Nulyarimma v Thompson*' (2001) 50 International and Comparative Law Quarterly 404 (hereafter Daglish, 'Crime of Genocide'); *Eutimio v. Adriano*, Case No. 297/2015, Judgment (Spain Supreme Ct 8 May 2015) (hereafter *Eutimio* Supreme Court Judgment).

[30] See, generally, Reydams, *Universal Jurisdiction* (n 5). See also Inazumi, *Universal Jurisdiction in Modern International Law* (n 25); Maximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction' (2015) 13 Journal of International Criminal Justice 245 (hereafter Langer, 'Universal Jurisdiction is Not Disappearing'), 245–56.

[31] Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (Judgment of 14 February 2002, Dissenting Opinion of Judge Van Den Wyngaert) [2002] ICJ Rep 3 (hereafter ICJ *DRC-Belgium* 2002 Judgment, Van Den Wyngaert Dissent), para. 66 ('The Rome Statute does not establish a *new* legal basis for third States to introduce universal jurisdiction. It does not prohibit it but does not authorize it either. This means that, as far as crimes in the Rome Statute are concerned (war crimes, crimes against humanity, genocide and in the future perhaps aggression and other crimes), pre-existing sources of international law retain their importance.'). See also William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) (hereafter Schabas, *Commentary on the Rome Statute*), 45 (pointing out that Rome Statute is neutral on the question of universal jurisdiction over core international crimes).

exercise *universal* jurisdiction over acts of genocide—and the conditions under which this can be done—is determined not by customary law but by the law of the state in question which might provide for such a possibility.[32] International law would not prevent a state from exercising universal jurisdiction over acts of genocide where its laws provide for it.[33]

[32] See references, *supra*, n 10.

[33] ICJ *DRC-Belgium* 2002 Judgment, Higgins, Kooijmans, & Buergenthal Separate Opinion (n 14), para. 27. See also references in n 6–8 and 14 *supra*.

5

Duties to Prevent and to Punish Genocide

5.1 General Considerations

5.1.1 The duties to prevent and punish in the Genocide Convention and under customary international law

5.1.1.1 Two distinct duties

The prevention and punishment of genocide are stated objectives of the Genocide Convention.[1] Article I of the Convention demands contracting parties to prevent and punish acts of genocide in order 'to liberate mankind from such an odious scourge'. In so doing, the Convention made preventing and punishing acts of genocide obligatory and not just optional.[2]

Whilst the two obligations are connected and are mutually supportive, they are legally distinct.[3] A state could therefore be held responsible for failing to comply with either or both of these obligations.[4]

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 149. In a 1946 draft protocol concerning genocide, Saudi Arabia had already suggested that states parties should 'make effective use of every means at their disposal, acting separately or in co-operation to prevent and penalize genocide'. UN General Assembly, Sixth Committee Delegation of Saudi Arabia: Draft Protocol for the Prevention and Punishment of the Crime of Genocide, UN Doc. A/C.6/86, 26 November 1946 (hereafter Saudi Proposal on Draft Genocide Protocol), art. II.

[2] UN Economic and Social Council, Ad Hoc Committee on Genocide: Relations Between the Convention on Genocide on the one hand and the Formulation of the Nürnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the other: Note by the Secretariat, UN Doc. E/AC.25/3, 2 April 1948 (hereafter UN Doc. E/AC.25/3), 8 ('The very purpose of the convention on genocide [...] is to make it obligatory for States which have signed the convention to punish the crime of genocide. It is desired to make what was simply optional for States into an imperative international obligation.').

[3] Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951, 78 UNTS 277 (hereafter Genocide Convention), art. I. See, generally, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), para. 425 ('Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.'), paras 426–427.

[4] See, e.g., ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 450 ('It follows from the foregoing considerations that [Serbia and Montenegro] failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the [Genocide] Convention, and that its international responsibility is thereby engaged.'); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht) [1993] ICJ Rep 325 (hereafter ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion), para. 110 ('The statement in Article I that the Contracting Parties undertake "to prevent and to punish" genocide is comprehensive and unqualified. The undertaking establishes two distinct duties: the duty "to

5.1.1.2 Customary law status of duties

The duties to prevent and punish genocide are now part of customary international law and are therefore binding even without any conventional obligation.[5] As a result, they are binding on all states,[6] including states that are not a party to

prevent" and the duty "to punish". Thus, a breach of duty can arise solely from failure to prevent or solely from failure to punish, and does not depend on there being a failure both to prevent and to punish.').

[5] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion of 28 May 1951) [1951] ICJ Rep 15 (hereafter ICJ, Reservations to the Genocide Convention), 23 (emphasis added) ('The first consequence arising from this conception [that the crime of genocide is a crime of concern to all of humanity] is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, *even without any conventional obligation*. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.'); Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*) (Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006) [2006] ICJ Rep 6 (hereafter ICJ *Congo-Rwanda* Jurisdiction Judgment), para. 64; UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993 (hereafter UN Secretary-General Report on ICTY), para. 45 (footnote omitted) ('The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951.'). See also *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100 (hereafter *Mugesera* Judgment), para. 82 ('In addition to treaty obligations, the legal principles underlying the Genocide Convention are recognized as part of customary international law: see International Court of Justice, Advisory Opinion of May 28, 1951, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, at p. 15.').

[6] See, e.g., UN General Assembly, Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups, UN Doc. A/HRC/28/18, 27 March 2015 (hereafter UN Doc. A/HRC/28/18), para. 73:

> All States are required to determine how to implement their obligations to ensure respect for international humanitarian law, especially in the framework of their obligation to investigate and prosecute allegations of war crimes and genocide. The Government of Iraq has a duty to investigate all allegations, which concern ISIL, ISF and affiliated armed groups, as well as other armed militias and to prosecute perpetrators, including responsible commanders and other superiors.

UN General Assembly, Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005 (hereafter General Assembly Resolution 60/147), Principle 4:

> In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.

UN General Assembly, 2005 World Summit Outcome: Resolution adopted by the General Assembly, UN Doc. A/RES/60/1, 24 October 2005 (hereafter General Assembly 60/1), para. 138; UN Security Council, Security Council Resolution 2150 (2014) on Prevention and Fighting Against Genocide and Other Serious Crimes under International Law, UN Doc. S/RES/2150(2014), 16 April 2014 (hereafter Security Council Resolution 2150); UN Security Council, Statement by the President of the Security

the Genocide Convention.[7]

Council, UN Doc. S/PRST/2013/4, 15 April 2013 (hereafter UN Doc. S/PRST/2013/4); Office of the Special Adviser on the Prevention of Genocide, *Information Brochure* (UN Department of Public Information 2010), 4 ('The duty to prevent and halt genocide and mass atrocities lies first and foremost with the State, but the international community has a role that cannot be blocked by the invocation of sovereignty.'); UN Security Council, Security Council Resolution 1674 (2006) on Protection of Civilians in Armed Conflict, UN Doc. S/RES/1674(2006), 28 April 2006 (hereafter Security Council Resolution 1674), para. 4; UN Security Council, Security Council Resolution 2250 (2015) on Youth, Peace and Security, UN Doc. S/RES/2250(2015), 9 December 2015 (hereafter Security Council Resolution 2250), para. 8 ('[R]eaffirms that each state bears the primary responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'); UN Security Council, Security Council Resolution 2220 (2015) on Small Arms, UN Doc. S/RES/2220(2015), 22 May 2015 (hereafter Security Council Resolution 2220), 2:

> *Recognizing* that the misuse of small arms and light weapons has resulted in grave crimes, expressing its strong opposition to impunity for serious violations of international humanitarian law and serious violations and abuses of human rights and emphasizing in this context the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law is consistent with their obligations under international law.

UN Security Council, Security Council Resolution 2171 (2014) on Prevention of Armed Conflicts, UN Doc. S/RES/2171(2014), 21 August 2014 (hereafter Security Resolution 2171), 1 ('reaffirming the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity'); UN Security Council, Security Council Resolution 2117 (2013) on Small Arms, UN Doc. S/RES/2117(2013), 26 September 2013 (hereafter Security Council Resolution 2117). See also UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2015/23, 25 November 2015 (hereafter UN Doc. S/PRST/2015/23), 28 ('reaffirming the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity'); UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2014/5, 21 February 2014 (hereafter UN Doc. S/PRST/2014/5), 3 ('[T]he Council emphasizes the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide and crimes against humanity in order to prevent these crimes'); UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2014/3, 12 February 2014 (hereafter UN Doc. S/PRST/2014/3), 1:

> The Security Council recalls that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law and reaffirms the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2013/8, 17 June 2013 (hereafter UN Doc. S/PRST/2013/8), 3:

> The Security Council stresses that ending impunity and holding perpetrators accountable is a crucial element in halting and preventing violations and abuses committed against children and recalls the primary responsibility of States in that regard, including to hold accountable those responsible for genocide, crimes against humanity, war crimes and other egregious crimes perpetrated against children.

UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2013/2, 12 February 2013 (hereafter UN Doc. S/PRST/2013/2); UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2011/18, 22 September 2011 (hereafter UN Doc. S/PRST/2011/18), 1 ('reaffirms the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity').

[7] A number of resolutions of the Security Council thus provide for the application of these obligations in relation to states that are not contracting parties to the Genocide Convention. In relation to South Sudan, see e.g., UN Security Council, Security Council Resolution 2241 (2015) on Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 December 2015, UN Doc. S/RES/2241(2015), 9 October 2015, 2:

What a state might be required to do in a given case to fulfil those obligations will depend on the specific circumstances of that case and in particular, whether the state is the territorial state or another state and what relationship it has with the perpetrators.[8]

5.1.1.3 *Timeliness and diligence in fulfilment*

The requirement that a state takes steps to prevent or punish genocide obligates that state to act in a timely and diligent fashion in order to preserve the interest of the international community to prevent and punish such crimes.[9] A state is therefore expected

> Further condemning harassment and targeting of civil society, humanitarian personnel and journalists, and emphasizing the importance of accountability for those responsible for violations of international humanitarian law and violations and abuses of human rights and that the Government of South Sudan bears the primary responsibility to protect its populations from crimes against humanity, war crimes, ethnic cleansing, and genocide

UN Security Council, Security Council Resolution 2223 (2015) on Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 30 November 2015, UN Doc. S/RES/2223(2015), 28 May 2015 (hereafter Security Council Resolution 2223), 1–2 ('[E]mphasizing [...] that the Government of South Sudan bears the primary responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity'); UN Security Council, Security Council Resolution 2206 (2015) on the Situation in South Sudan, UN Doc. S/RES/2206(2015), 3 March 2015 (hereafter Security Council Resolution 2206), 1 ('[E]mphasizing [...] that the Government of South Sudan bears the primary responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity'). In relation to the Central African Republic, see also: UN Security Council, Security Council Resolution 2196 (2015) on Renewal of Measures on Arms, Transport, Finance and Travel Against the Central African Republic and Extension of the Mandate of the Group of Experts Established Pursuant to Resolution 2127 (2013) until 29 February 2016, UN Doc. S/RES/2196(2015), 22 January 2015 (hereafter Security Council Resolution 2196) (recalling its 'primary responsibility' to protect all populations within its territory from genocide, war crimes, ethnic cleansing, and crimes against humanity); UN Security Council, Security Council Resolution 2399 (2018) on Renewal of Measures on Arms, Transport, Finance and Travel Against the Central African Republic until 31 January 2019 and Extension of the Mandate of the Panel of Experts Established Pursuant to Resolution 2127 (2013) until 28 February 2019, UN Doc. S/RES/2399(2018), 30 January 2018 (hereafter Security Council Resolution 2399); UN Security Council, Security Council Resolution 2387 (2017) on Extension of the Mandate of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) until 15 November 2018, UN Doc. S/RES/2387(2017), 15 November 2017 (hereafter Security Council Resolution 2387); UN Security Council, Security Council Resolution 2339 (2017) on Renewal of Measures on Arms, Transport, Finance and Travel Against the Central African Republic until 31 January 2018 and Extension of the Mandate of the Panel of Experts Established Pursuant to Resolution 2127 (2013) until 28 February 2018, UN Doc. S/RES/2339(2017), 27 January 2017 (hereafter Security Council Resolution 2339); UN Security Council, Security Council Resolution 2301 (2016) on Extension of the Mandate of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) until 15 November 2017, UN Doc. S/RES/2301(2016), 26 July 2016 (hereafter Security Council Resolution 2301); UN Security Council, Security Council Resolution 2262 (2016) on Renewal of Measures on Arms, Transport, Finance and Travel Against the Central African Republic and Extension of the Mandate of the Group of Experts Established Pursuant to Resolution 2127 (2013) until 28 February 2017, UN Doc. S/RES/2262(2016), 27 January 2016 (hereafter Security Council Resolution 2262); UN Security Council, Security Council Resolution 2217 (2015) on Extension of the Mandate of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) until 30 April 2016, UN Doc. S/RES/2217(2015), 28 April 2015 (hereafter Security Council Resolution 2217); UN Security Council, Statement of the President of the Security Council, UN Doc. S/PRST/2016/17, 16 November 2016 (hereafter UN Doc. S/PRST/2016/17).

[8] See, *infra*, 5.1.2.3–5.1.2.4.

[9] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430 ('In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance.'). See, also, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) (Judgment of 20 July 2012) [2012] ICJ Rep 422 (hereafter ICJ *Belgium-Senegal* Judgment), paras 114, 115, 117 (in relation to acts of torture).

to fulfil these obligations as soon as it acquires information pertaining to commission or risk of commission of such acts by agents of that state or of an individual over whom it has influence. The state must then act in a manner commensurate to the gravity of the crimes and must do so effectively, so as to fulfil the dual purposes of the Convention. Practical considerations, such as financial limitations, would not, in principle, provide a justification for a failure to act.[10] Nor could a state evade its obligations to prevent and punish by referencing its own internal laws or institutional practices.[11] Instead, pursuant to Article V of the Convention, contracting parties are required to enact the legislation necessary to give effect to the Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in the Convention.[12]

The two obligations—to prevent and to punish genocide—must be interpreted within the broader framework of international law so that the fulfilment of these obligations would not authorize a state to violate other international obligations.[13] In other words, a state is not authorized to violate international law in order to fulfil those obligations. Within that general framework, states enjoy some discretion regarding the way in which they fulfil their obligations to prevent and punish genocide.[14]

5.1.1.4 Erga omnes *obligations*

These obligations are held *erga omnes* so that each state has an interest in compliance.[15] By virtue of its membership in the international community, every state has a

[10] See, e.g., ICJ *Belgium-Senegal* Judgment (n 9) para. 112 (in relation to torture).

[11] ICJ *Belgium-Senegal* Judgment (n 9) para. 113, the ICJ found that Article 27 of the Vienna Convention on the Law of Treaties reflects customary law and prevented Senegal from justifying its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007. The same principle would apply, *mutatis mutandis*, to the prohibition on genocide.

[12] See also UN General Assembly, The Crime of Genocide, UN Doc. A/RES/96(I), 11 December 1946 (inviting the Member States of the United Nations to enact the necessary legislation for the prevention and punishment of genocide).

[13] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430:

> The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.

See also UN General Assembly, Report of the International Law Commission, Sixty-Ninth Session (1 May–2 June and 3 July–4 August 2017), UN Doc. A/72/10, 50. See also, *infra*, 5.2.2.3.6 and 5.3.2.9 regarding countermeasures.

[14] See, e.g., A/HRC/28/18 (n 6) para. 73:

> All States are required to determine how to implement their obligations to ensure respect for international humanitarian law, especially in the framework of their obligation to investigate and prosecute allegations of war crimes and genocide. The Government of Iraq has a duty to investigate all allegations, which concern ISIL, ISF and affiliated armed groups, as well as other armed militias and to prosecute perpetrators, including responsible commanders and other superiors.

[15] ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 86. See also, *supra*, 3.6.3. See also ICJ *Belgium-Senegal* Judgment (n 9) para. 68; Barcelona Traction, Light and Power Company, Limited (*Belgium v. Spain*) (Second Phase, Judgment of 5 February

legal interest in ensuring respect for these obligations and an associated legal entitlement to demand and, if necessary, to seek to impose respect for them.[16] As noted by the International Law Commission, this must *per force* reflect a broader conception of the notion of state responsibility as it implies a right and obligation held towards the international community as a whole.[17] In that sense, the obligations to prevent and to punish genocide are held not by states individually as their own interest, but *collectively* as the common interest of all.[18] They are also generally understood to be *absolute* in character.[19]

1970) [1970] ICJ Rep 3 (hereafter ICJ *Barcelona Traction* Judgment), paras 32–33; Christian J Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2005).

[16] ICJ *Barcelona Traction* Judgment (n 15) paras 32–34. See also ICJ, Reservations to the Genocide Convention (n 5) 23 ('In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention.'); ICJ *Belgium-Senegal* Judgment (n 9) paras 68–69 (in relation to the crime of torture). See also UN General Assembly, Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10, 23 April–1 June and 2 July–10 August 2001, Chapter IV.E.1 (hereafter ILC Draft Articles on State Responsibility), art. 48, in particular, paragraph 1, which provides:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (b) the obligation breached is owed to the international community as a whole.

See also UN General Assembly, Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10, 23 April–1 June and 2 July–10 August 2001, Chapter IV.E.2 (hereafter ILC Commentary on Draft Articles on State Responsibility), commentary (9) to art. 48 (noting that the ICJ placed among the prohibitions relevant what is now Article 48(1)(b) of the Draft Articles the outlawing of acts of genocide).

[17] ILC Commentary on Draft Articles on State Responsibility (n 16) commentary (4) to art. 1. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugoslavia*) (Preliminary Objections Judgment of 11 July 1996) [1996] ICJ Rep 595 (hereafter ICJ *Bosnia-Serbia* Preliminary Objections Judgment), paras 31–32; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, para. 151 (regarding the crime of torture):

> [T]he prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, 14 January 2000, para. 519, regarding the 'Absolute Character of Obligations Imposed by Fundamental Rules of International Humanitarian Law':

> As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather—as was stated by the International Court of Justice in the Barcelona Traction case (which specifically referred to obligations concerning fundamental human rights)—they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations.

See also UN General Assembly, Second Report on the Content, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles) by Mr Willem Riphagen, Special Rapporteur, UN Doc. A/CN.4/344, 1 May 1981 (Second Riphagen Report), part. 1, 79, at 86.

[18] ICJ, Reservations to the Genocide Convention (n 5) 23. See also, ICJ *Belgium-Senegal* Judgment (n 9) para. 68 (in relation to the crime of torture and referring in this context to the provisions of the Genocide Convention).

[19] *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011

As noted, *supra*, at 3.6.2, there is also support for the view that these duties are of *jus cogens* nature so that an exception could only be made to them pursuant to a norm of the same standing.

5.1.2 Those bound by the duties

5.1.2.1 States but not individuals

The obligations to prevent and punish genocide are primarily, but not necessarily exclusively, those of states. In contrast, these obligations are not binding on individuals, whose responsibility under the Convention is separately regulated in Articles II and III of the Convention.[20]

5.1.2.2 Which states?

These duties are binding on all states, though not necessarily in the same way for all of them, as will be made clear. What is required of a state in a given case is dependent on the circumstances of that case and whether the state in question is the territorial state or not. The duty to prevent acts of genocide is not limited to the territorial state. Instead, when there is a serious risk that genocide will be committed, the duty applies to any state that knows or should have known of that risk and that has the power to influence the perpetrators of such acts.[21] This would include any state that 'has it in its power to contribute to restraining in any degree the commission of genocide'.[22]

Regarding the duty to punish, two different sub-elements of that duty must be distinguished. In its strictest sense—the exercise of jurisdiction to *prosecute* such an act—the duty to punish, is binding under the Convention and customary law only on the territorial state.[23] In its broader sense, which encompasses non-prosecutorial

(hereafter *Nuon Chea et al.* Decision on Ieng Sary Objections), paras 38–39 (holding that the Genocide Convention imposes an 'absolute duty to prosecute' genocide and finding that Cambodia is, as a result, under 'an absolute obligation to ensure the prosecution or punishment' of perpetrators of acts of genocide).

[20] This is not to be understood as a suggestion that an individual could not be held responsible for a failure to prevent or punish acts of genocide. This could be the case, in particular, under the doctrine of command responsibility which provides for express duties of a superior to prevent and punish crimes committed by subordinates. See, generally, Guénaël Mettraux, *The Law of Command Responsibility* (OUP 2009) (hereafter Mettraux, *Command Responsibility*), in particular, 229ff (discussing the duties attaching to the doctrine of command responsibility to prevent and punish crimes of subordinates). See also *infra*, 11.7.2.6 for a discussion of the application of that doctrine in relation to genocide.

[21] Bruno Simma, 'Genocide and the International Court of Justice' in Christoph Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010) (hereafter Simma, 'Genocide and ICJ'), 262 (pointing out that the 'capacity to influence' which operates as core parameter to decide upon a state's duty to prevent genocide is not conditioned upon any threshold criterion of application nor upon a requirement of jurisdictional competence over such acts—thereby creating 'differentiated' standards for states depending on their actual ability to do something about the prevention of such acts). See also, *supra*, 5.2.1.5.

[22] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 461.

[23] See, *supra*, 5.1.1.2 and, *infra*, 5.3.2.4. This does not exclude the possibility that the domestic law of a non-territorial state could provide for such an obligation as a matter of domestic law.

obligations to contribute to the punishment of acts of genocide, the duty to punish might also have implications for a non-territorial state that has influence over the perpetrators and, due to this influence, can contribute to the punishment of acts of genocide. That was the case, for instance, in relation to Serbia-Montenegro; the International Court of Justice (ICJ) found that Serbia-Montenegro failed to comply with its obligation to punish because it failed to cooperate with an international penal tribunal to arrest an individual for acts of genocide committed by its political and military allies in neighbouring Bosnia-Herzegovina.[24]

5.1.2.3 Non-state armed groups

5.1.2.3.1 The Convention

There is no question that members of non-state armed groups are bound *individually* to refrain from any act listed in Articles II and III of the Convention and could be held criminally responsible if they violate those prohibitions. However, the Convention does not specify whether the groups themselves are bound by the duties to prevent and punish genocide. As a treaty of the 1940s, the absence of a provision to that effect is not surprising and reflects the general focus of international instruments of that time on states.[25] But like other instruments of that era, there are good reasons to think that the law may have evolved and that non-state armed groups are now required to prevent and punish acts of genocide committed by their members.

5.1.2.3.2 Customary international law

The suggestion that customary international law might require certain categories of non-state armed groups to prevent and punish acts of genocide by their members or by those over whom they have influence is supported by a number of considerations. First, the effectiveness of the prohibition on genocide would be greatly diminished if international law failed to require non-state actors to prevent and punish genocide by their members.[26] Conversely, requiring such groups to abide by these obligations

[24] See, *infra*, 5.3.2.7.1.

[25] Common Article 3 of the 1949 Geneva Conventions provides a qualified and important exception to that trend.

[26] See, generally, UN Doc. A/HRC/28/18 (n 6) (finding that ISIS/Daesh and members of that organization might have committed acts of genocide). See also European Parliament, Joint Motion for a Resolution on the Systematic Mass Murder of Religious Minorities by the so-called 'ISIS/Daesh' (2016/2529(RSP), 4 February 2016 (hereafter European Parliament, Motion for Resolution on ISIS), acknowledging the genocidal character of crimes committed by ISIS/Daesh against Christians and Yazidis, and other religious and ethnic minorities and demanding that action be taken for it to be recognized as genocide by the UN Security Council. The Resolution also urged Contracting Parties to the Genocide Convention and to other relevant international agreements to prevent war crimes, crimes against humanity, and genocide within their territory and urged the competent authorities of countries—and their nationals—which are in any way supporting, cooperating in, or funding, or are complicit in, these crimes, to wholly fulfil their legal obligations under the convention and such other international agreements and in particular to desist from such actions (ibid.). Tomuschat suggests, for instance, that international organizations are bound by *jus cogens* norms so that states cannot evade their responsibilities and so that these norms are not rendered ineffective: 'If states could evade this central rule of today's legal order by founding an international organization, it would soon totally lose its practical impact.' Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 Recueil des Cours (hereafter Tomuschat, 'International Law on the Eve of New Century'), 135–36.

would constitute a significant disincentive to the commission of crimes by their members and thus serves an important preventive function. Policy considerations of effectiveness are not, however, sufficient on their own to warrant a conclusion that those norms are now binding on non-state actors.

Second, these two obligations are peremptory norms binding on all and in respect of all, that is, *erga omnes*. Their binding force derives not from the individual commitment of states but from the value which the international community attaches to the underlying protected interests, in particular, the protection of groups from attempts to destroy them.[27] The concern of the international community for the effective protection of these interests does not, therefore, depend on the identity of those threatening them.[28] To convince oneself of the validity of that view, one only needs to consider the alternative: not requiring non-state armed groups to be bound by the duties to prevent and punish genocide would effectively authorize genocide by their members and would allow these groups to maintain a state of general impunity in relation to such crimes within their ranks.[29] The creation of such a normative vacuum would plainly be contrary to the goals of the Convention. It also would be demonstrably contrary to relevant legal principles arising from the law of command responsibility. Command responsibility is a doctrine recognized by customary international law, pursuant to which a superior—military or civilian—may be held criminally responsible if he culpably fails to take necessary and reasonable measures to prevent or punish crimes of subordinates.[30] These obligations apply to a superior whether he is a *de jure* or *de facto* superior and whether he belongs to a legally recognized structure or not.[31] As part of the requirement that commanders must adopt measures to prevent and punish crimes of subordinates, the law of command responsibility provides that to fulfil these duties, a superior can rely upon the structures and organs of the entity to which he belongs. Thus, for instance, where the superior is not himself competent to investigate

[27] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Judgment of 26 February 2007, Separate Opinion of Judge Ranjeva) [2007] ICJ Rep 276, para. 4.

[28] For an illustration, albeit one from the realm of human rights law, see UN General Assembly, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/19/69, 22 February 2012 (hereafter Syria Commission 2012 Report), para. 106. In its Report, the Commission of Inquiry on Syria addressed the issue of armed non-state actors' responsibility in situations where humanitarian law is not applicable. The Commission noted that in February 2012, the Free Syrian Army did not exercise any effective control over territory and the Commission considered that humanitarian law was thus not yet applicable in this context, leaving human rights law to apply. In its Report, the Commission said on that point that 'at a minimum, human rights obligations constituting peremptory international law (*jus cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *jus cogens*—for instance, torture or enforced disappearances—can never be justified.' See also Tilman Rodenhäuser, 'Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example' (2012) 3 Journal of International Humanitarian Legal Studies 263.

[29] It has also been argued that the 'responsibility to protect' is defined sufficiently broadly to encompass non-state actors, which would thus share with states the responsibility to ensure the protection of populations affected by their activities. See, e.g., Gentian Zyberi, 'The Role of Non-State Actors in Implementing the Responsibility to Protect' in Cedric Ryngaert and Math Noortmann (eds) *Human Security and International Law: The Challenge of Non-State Actors* (Intersentia 2014).

[30] See, generally, Mettraux, *Command Responsibility* (n 20) in particular, 229ff.

[31] Ibid., 139ff and references cited.

allegations of crimes, his duty to punish obliges him to submit the matter to the competent investigative authorities of that structure.[32] This highlights the fact that there is a legally sanctioned expectation that the organs and resources of a state or non-state entity to which the superior belongs will be made to contribute to the fulfilment of his obligations to prevent and punish crimes by members of that state or entity. This, in turn, may be read as an acknowledgment that any group whose members are involved in the commission (or risk of commission) of international crimes, including genocide, bears an implied responsibility to contribute to the prevention and punishment of such crimes.

Third, one can draw an analogy here to the way in which certain norms of international humanitarian law and human rights law came to be regarded as applicable to and binding upon non-state actors. The International Committee of the Red Cross (ICRC) Commentary to common Article 3 of the Geneva Convention notes that the exact process by which common Article 3 came to bind entities that are not High Contracting Parties to the Geneva Conventions is the subject of some debate.[33] Whilst the theories have indeed varied in explanation of that expansion (e.g., delegation of sovereign authority; applicability through domestic law; third-party legal obligation created by treaty; doctrine of implied consent; doctrine of legislative jurisdiction), the principle that this provision is binding on non-state actors is now beyond dispute.[34]

[32] See, e.g., J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law, vol. 1: Rules* (CUP 2005) (hereafter ICRC, *Customary IHL: Rules*), 563; *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-A, Judgment, 22 April 2008, para. 154; *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Judgment, 15 March 2006, paras 1052–1055, 1061–1062; *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-A, Judgment, 19 May 2010, paras 259–260; *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, 10 July 2008 (hereafter *Boškoski & Tarčulovski* Trial Judgment), paras 418, 529–536; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, paras 302, 734; *Prosecutor v. Delić*, Case No. IT-04-83-T, Judgment, 15 September 2008, paras 74–75; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 72; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, para. 316; *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgment, Separate and Partially Dissenting Opinion of Judge Schomburg, 3 July 2008, para. 12. See also Mettraux, *Command Responsibility* (n 20) 250–52 and references cited therein; Per Saland, 'International Criminal Law Principles' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999), 204.

[33] Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, vol. 1 (ICRC 1952) (hereafter *ICRC 1952 Commentary to Geneva Convention I*), commentary to common Article 3. See, generally, Eve La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008) (hereafter La Haye, *War Crimes*); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012), 238–42; Jann Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 International Review of the Red Cross 443; Lindsay Moir, *The Law of Internal Armed Conflict* (CUP 2002), 52–58; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014), 173–99 and 63–73; Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20 Journal of Conflict and Security Law 101.

[34] *ICRC 1952 Commentary to Geneva Convention I* (n 33) commentary to common Article 3. See also *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereafter *Tadić* Jurisdiction Decision on Interlocutory Appeal), paras 97–99; *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004 (hereafter *Norman* Jurisdiction Decision), para. 22; Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*) (Merits, Judgment of 27 June 1986) [1986] ICJ Rep 14 (hereafter ICJ *Nicaragua* Merits Judgment), paras 218–220, 255 (regarding the applicability of Common Article 3 to the conflict between the contras' forces and those of the Government of Nicaragua). See also August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005); Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations'

The underlying justification for such expansion revolves around two key considerations: (i) the rules and principles reflected in common Article 3 (and Additional Protocol II) are fundamental humanitarian principles; and (ii) their effective protection requires strict compliance by all those capable of violating them.[35] These same core considerations would of course apply to the prohibition on genocide and would militate in favour of the view that this prohibition and the associated obligations also apply to these groups. The same conclusion could be reached by considering the way in which human rights norms migrated from states to non-state actors, in particular in regards to conduct that may otherwise constitute international crimes.[36]

These considerations lead to the reasonable conclusion that certain non-state actors could, therefore, be bound by the duties to prevent and punish acts of genocide. In *Kadić v. Karadžić*, for instance, the United States Court of Appeals for the Second Circuit thus held (albeit in a civil case) that the law on genocide was equally binding on state and non-state actors.[37] Echoing the same general position, the United Nations and others have issued repeated official statements effectively confirming that Daesh was responsible for acts of genocide against certain communities in Iraq and Syria.[38]

(2006) 88 International Review of Red Cross 491 (hereafter Clapham, 'Human Rights Obligations of Non-State Actors'); Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 International and Comparative Law Quarterly 416.

[35] *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 34) paras 97–98, 117, 126, 134; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001 (hereafter *Čelebići* Appeal Judgment), para. 143; *Prosecutor v. Fofana*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction: Nature of the Armed Conflict, 25 May 2004 (hereafter *Fofana* Jurisdiction Decision), paras 21–27. See also, generally, François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (ICRC, Macmillan 2003), 336 (arguing that the binding force of Common Article 3 'derives from the fundamental nature of the rules it contains and from their recognition by the entire international community as being the absolute minimum needed to safeguard vital humanitarian interests. It also derives from international custom, the laws of humanity and the dictates of public conscience.'). See also Sandesh Sivakumaran, 'The Addressees of Common Article 3' in Andrew Clapham *et al.* (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015), 424.

[36] Clapham, 'Human Rights Obligations of Non-State Actors' (n 34); Christian Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in Horst Fischer *et al.* (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag 2004); Nigel Rodley, 'Can Armed Opposition Groups Violate Human Rights' in Katheleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Nijhoff 1993), 297–318; Geneva Academy of International Humanitarian Law and Human Rights, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council* (Geneva Academy of International Humanitarian Law and Rights 2016) (hereafter Geneva Academy, *Human Rights Obligations of Non-State Actors*).

[37] *Kadić v. Karadžić*, 70 F 3d 232 (2d Cir 1995) (hereafter *Kadić v. Karadžić* Appeal Judgment), 242 (noting that 'from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors'). See also *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 (hereafter *Tadić* Trial Judgment), para. 655.

[38] UN Doc. A/HRC/28/18 (n 6) paras 16–17 and 78, discussing acts which may amount to genocide under the heading 'Violations perpetrated by ISIS' and referring to '[e]thnic and religious groups *targeted by ISIL*' and 'the intent *of ISIL* to destroy the Yezidi as a group'; A Concurrent Resolution Expressing the Sense of Congress that Those who Commit or Support Atrocities Against Christians and Other Ethnic and Religious Minorities, Including Yezidis, Turkmen, Sabea-Mandeans, Kaka'e, and Kurds, and who Target them Specifically for Ethnic or Religious Reasons, are Committing, and are hereby Declared to be Committing, 'War Crimes', 'Crimes Against Humanity', and 'Genocide' (114th Cong 2015–2016 2nd Sess, S.Con.Res.33); US Secretary of State John Kerry, 'Remarks on Daesh and Genocide', 17 March 2016 (hereafter US Secretary of State Remarks on Daesh and Genocide) ('My purpose in appearing before you today is to assert that, in my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims.').

However, the issue turns on whether all, or only some non-state actors would be bound to prevent and punish acts of genocide. Common Article 3 only applies to those (non-state) entities involved as *parties* in a non-international armed conflict. Additional Protocol II sets even stricter requirements of territorial control and organization for such a group to be subject to its terms;[39] the law of command responsibility only becomes relevant to a *de facto* organization if and when (i) control can be exercised hierarchically through that structure, and (ii) members of that entity commit or are about to commit crimes. In all these cases, the *ratio* for the application of legal prohibitions to non-state actors is the real risk that violations of the law may otherwise be committed by members of the organization or group in question and that there is in place, within that organization or group, the means to control the actions of its members to prevent or punish such acts. Adopting that same logic here, it is arguable that the obligations to prevent and to punish genocide would only apply to those non-state armed groups which are sufficiently organized so that hierarchical control can be exercised through its ranks to enforce discipline and punish crimes of its members.[40]

The value of these obligations applying to non-state armed groups would be first and foremost preventative in nature as there would be little remedy to hold such organizations accountable for failing to prevent or punish the genocidal acts of their members.[41]

5.1.2.4 *International organizations*

The peremptory nature of the offence of genocide and of its associated duties to prevent and punish militate in favour of the view that those duties are binding in principle on international organizations. Addressing this issue in general terms, the International Law Commission noted that 'despite a personality which is in some respects different from that of the States Parties to such treaties [establishing an international organization], [international organizations] are nonetheless the creations of those States. And it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization.'[42] The application of this view to the peremptory

[39] See, e.g., *Boškoski & Tarčulovski* Trial Judgment (n 32) para. 197. See also Anthony Cullen, 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)' (2007) 12 Journal of Conflict and Security Law 419.

[40] Geneva Academy, *Human Rights Obligations of Non-State Actors* (n 36) 26–30 (and references cited therein).

[41] James Crawford and Simon Olleson, 'Responsibility, State' in Dinah Shelton (ed), *Encyclopedia of Genocide and Crimes against Humanity* (Macmillan Reference 2005), 904 (hereafter Crawford & Olleson, 'State Responsibility'), 906. See also ILC Draft Articles on State Responsibility (n 16) art. 10 (regarding insurrectional movements).

[42] UN General Assembly, Report of the International Law Commission to the General Assembly on the Work of its Thirty-Fourth Session, UN Doc. A/37/10, 3 May–23 July 1982 (hereafter UN Doc. A/37/10), 117–18, commentary (2) to art. 53. See also Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 Harvard International Law Journal 325 (hereafter Daugirdas, 'How and Why International Law Binds International Organizations'), 346 (suggesting that *jus cogens* norms bind international organizations because states cannot, by treaty, establish international organizations that are authorized to violate *jus cogens* norms); UN General Assembly, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi,

duties to prevent and punish genocide would, on that view, lead to the conclusion that international organizations are bound by those duties and must enforce them where they could influence the perpetrators.[43] This logic underlies the suggestions made by a number of official bodies that the United Nations failed in its duty to prevent genocide in Rwanda though being able and, per force, required to do so.[44]

5.1.2.5 The UN Security Council and the UN General Assembly

5.1.2.5.1 The UN Security Council

The practice of the United Nations Security Council testifies to the fact that the commission of serious violations of human rights and humanitarian law, of which genocide is a particularly egregious expression, could constitute a threat to international peace and security.[45] It has been convincingly argued that where international peace

UN Doc. A/CN.4/L.682, 13 April 2006, para. 346 ('If United Nations Member States are unable to draw up valid agreements in dissonance with *jus cogens*, they must also be unable to vest an international organization with the power to go against peremptory norms.'); Tomuschat, 'International Law on the Eve of New Century' (n 26) 135–36.

[43] See Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Gaja, 'UN Role in Genocide Prevention'), 405 (suggesting that an international organization might be subject to the same duty to act as is applicable to a contracting state when seized of information that genocide is being committed or likely to be and that it has the capacity to influence the conduct of the perpetrators and that the UN Security Council would be required to act if and where acts of genocide present a threat to international peace and security). For a seemingly broader view, see also Daugirdas, 'How and Why International Law Binds International Organizations' (n 42). For a more conservative view of the issue, see also José E Alvarez, *'International Organizations and Their Exercise of Sovereign Powers.* By Dan Sarooshi' (2007) 101 American Journal of International Law 674, in particular, 677–78.

[44] See, e.g., UN General Assembly, Third Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/553, 13 May 2005, para. 10 (footnotes omitted):

> The same type of obligation may well exist for an international organization also under a rule of general international law. As an example, one may take the failure on the part of the United Nations to prevent genocide in Rwanda. Assuming that general international law requires States and other entities to prevent genocide in the same way as the Convention on the Prevention and Punishment of the Crime of Genocide, and that the United Nations had been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations.

The failure of the UN to adequately respond to genocide in Rwanda was also flagged in the report of the independent inquiry into the actions which the UN took at the time of the genocide in Rwanda in 1994. See UN Security Council, Letter dated 15 December 1999 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/1257, 16 December 1999 (hereafter Independent Inquiry Report into UN actions in Rwanda Genocide), 35–39.

[45] See *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 34) paras 30–40 (regarding the range of measures envisaged under Chapter VII of the UN Charter and whether the establishment of an international criminal tribunal can be regarded as a measure under Chapter VII). For illustrations, see UN Secretary-General Report on ICTY (n 5), expressing alarm at reports of widespread violations of international humanitarian law in the former Yugoslavia and determining that this situation constituted a threat to international peace and security; UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 (hereafter ICTY Statute) (to the same effect); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, 8 November 1994 (hereafter ICTR Statute) (expressing its grave concern at the reports indicating that genocide and other systematic, widespread, and flagrant violations of international humanitarian law have been committed in Rwanda and determining that this situation continues to constitute a threat to international peace and security); Security

and security is being threatened by the (possible) commission of such acts, the Council is under a legal duty pursuant to Article 24 of the UN Charter to take reasonable steps to prevent the commission of such acts and is thus authorized to adopt legally binding enforcement measures.[46] Any such situation, which represents a threat to peace under Article 30 of the Charter, would trigger the primary responsibility of the Security Council under Article 24 for the maintenance of international peace and security, and its ensuing duties under paragraphs (1) and (2) of that provision.[47] It is in such situations of threats to peace resulting from the commission, or risk of commission, of genocide, crimes against humanity, and/or war crimes that the Security Council would have, as Article 24(2) of the Charter puts it, an obligation to 'discharge its duties' by adopting adequate measures to respond to those.[48]

Council Resolution 1674 (n 6) para. 26 ('[T]he commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict, may constitute a threat to international peace and security'). See also Jochen Frowein and Nico Krisch, 'Article 39' in Bruno Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, vol. 1 (2nd edn, OUP 2002), marginal notes 7 and 19ff; Andreas Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' in Ulrich Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) (hereafter Zimmermann, 'Obligation to Prevent Genocide'), 638 (footnote omitted):

> It is therefore safe to assume that it is by now well settled that the commission of genocide, crimes against humanity, and/or the large-scale commission of war crimes does constitute, at least under certain circumstances, a situation within the meaning of Article 39 and thus, at the very least, a threat to the peace.

Fred Grünfeld, 'Human Rights Violations: A Threat to International Peace and Security' in Monique Castermans-Holleman *et al.* (eds), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* (Kluwer Law International 1998) (hereafter Grünfeld, 'Human Rights Violations'), 427ff. See also Gaja, 'UN Role in Genocide Prevention' (n 43) 401–02 (noting that during the negotiations of the Genocide Convention, views were expressed that genocide would necessarily constitute a threat to international peace and security or, more commonly, that was act was likely to present such a threat).

[46] Zimmermann, 'Obligation to Prevent Genocide' (n 45) 629ff, in particular, 638ff.

[47] Ibid., 639.

[48] Ibid. This is evidenced, for instance, by the creation by the UN Security Council (Bosnia-Herzegovina/ICTY and Rwanda/ICTR) or with the assistance of the UN (Cambodia/ECCC; and East Timor/Serious Crimes Panels) of international criminal tribunals where genocide was believed to have been committed (Bosnia-Herzegovina and Rwanda). See also UN Security Council, Security Council resolution 1593 (2005) on Referring the Situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court, UN Doc. S/RES/1593(2005), 31 March 2005 (hereafter Security Council Resolution 1593); UN Security Council, Security Council resolution 2379 (2017) on Establishment of an Investigative Team to Support Domestic Efforts to Hold the Islamic State in Iraq and the Levant Accountable for Its Actions in Iraq, UN Doc. S/RES/2379(2017), 21 September 2017 (hereafter Security Council Resolution 2379). Professor Zimmermann suggests that a similar obligation must also attach, as a result, to the individual members of the Security Council, in particular its permanent members. See Zimmermann, 'Obligation to Prevent Genocide' (n 45) 641, 644. See also Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8 International Organizations Law Review 1 (hereafter Peters, 'Security Council's Responsibility to Protect'). Zimmermann further suggests, responsibility could be incurred if a member of the Security Council, manifestly failed to support or even put off possible Security Council measures aimed at preventing genocide and ensuring respect for the Geneva Conventions, which might have contributed to preventing such acts, including in the context of a request of a regional organization pursuant to Article 53(1) of the UN Charter. As an illustration, one can look to Article 4(h) of the Constitutive Act of the African Union, which authorizes the African Union 'to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. See Constitutive Act of the African Union, 26 May 2001, 2158 UNTS 3 (hereafter Constitutive Act of the African Union), art. 4(h). See also Christian Walter, 'Regional Arrangements and the United Nations Charter' in Rüdiger Wolfrum (ed),

The relevant legal regime necessarily implies that a great deal of discretion is given to the Council to decide which measures would be appropriate in such circumstances.[49] However, it would forbid inaction by the Council and, arguably, would regard measures which are clearly and evidently incapable of preventing or punishing acts of genocide as insufficient to meet those obligations.

Its practice suggests that where the Council is made aware of the real risk of commission of acts of genocide, it is empowered and required, *at the very least*, to condemn such acts, to remind the authorities concerned of their responsibility to protect their population from such crimes, and to request those authorities to desist from such conduct.[50] Where such acts have already been committed, that duty would also arguably require the Council to put into place an accountability mechanism to prevent impunity for such acts, in particular where the territorial states fails to act.[51] It may also authorize the use of United Nations resources for the purpose of investigating such crimes.[52] Ultimately, where justified, the commission of acts of genocide would permit the Council to use force to fulfil its obligation to prevent or stop such acts.[53]

The Max Planck Encyclopedia of Public International Law, vol. 8 (OUP 2013) (hereafter Walter, 'Regional Arrangements and UN Charter'); Zsuzsanna Deen-Racsmány, 'A Redistribution of Authority Between the UN and Regional Organizations in the Field of the Maintenance of Peace and Security?' (2000) 13 Leiden Journal of International Law 297.

[49] See also Zimmermann, 'Obligation to Prevent Genocide' (n 45) 641–43.

[50] See references, *supra*, in fn 7. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 136 (hereafter ICJ *Wall* Opinion), para. 163(E), where the Majority of the Court determined that when faced with violations of the Geneva Conventions, the 'Security Council, should consider what further action is required to bring to an end the [relevant] illegal situation'.

[51] This is reflected, for instance, in the Security Council's establishment of the ICTY and ICTR, both of which were given jurisdiction over acts of genocide, although it is not readily apparent from the relevant UNSC resolutions that these tribunals were created out of a sense of a legal duty to do so. It is also reflected, arguably, in Security Council Resolution 2379 (n 48), which asks the Secretary-General to establish an independent investigative team to support domestic efforts to hold ISIL accountable for its actions in Iraq with the task to collect, preserve, and store evidence of acts that may amount to war crimes, crimes against humanity, and genocide committed by the terrorist group in Iraq. Interestingly, echoing the findings of the UN Commission on Syria, the text of the resolution makes explicit reference to the fact that acts of genocide are believed to have been committed by ISIL/Daesh: '*Further recognising* that the commission of such acts which may amount to war crimes, crimes against humanity or genocide, is part of the ideology and strategic objectives of ISIL (Da'esh), and used by ISIL (Da'esh) as a tactic of terrorism [...]'). See Security Council Resolution 2379 (n 48) 1. The Resolution also includes several other references to the notion of genocide. Ibid. See also UN Doc. A/HRC/28/18 (n 6) para. 79:

> *Urge* the Security Council to remain seized of and to address, in the strongest terms, information that points to genocide, crimes against humanity and war crimes, and call on the Security Council to consider referring the situation in Iraq to the International Criminal Court.

[52] See, e.g., Security Council Resolution 2379 (n 48) para. 11:

> *Underlines* that another Member State in whose territory ISIL (Da'esh) has committed acts that may amount to war crimes, crimes against humanity, or genocide, may request the Team to collect evidence of such acts, but only with the approval of the Security Council which may request the Secretary-General to submit separate Terms of Reference with regards to the operation of the Team in that State[.]

[53] See, generally, Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol. 5 (OUP 2013).

5.1.2.5.2 The UN General Assembly

The position and responsibility of the UN General Assembly (UNGA) is more complex in this respect. There are indications that the General Assembly would have the *competence* and authority to intervene to try to prevent or punish genocidal acts if and when the Security Council fails to fulfil its primary responsibilities in relation to the maintenance of peace and security.[54] This is apparent already from the 'Uniting for Peace' resolution of the UNGA.[55] This resolution effectively acknowledged the General Assembly's alternative and residual competence in matters of maintenance of international peace and security when the Security Council is not fulfilling its primary responsibilities under Article 24 of the Charter.[56] The resolution led to the establishment of a 'peace observation commission' to report on the situation in any area where

[54] The Security Council has *primary* but not *exclusive* responsibility for the maintenance or restoration of international peace and security under the UN Charter. See, generally, Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion) [1962] ICJ Rep 151 (hereafter ICJ *UN Expenses* Opinion), 163; ICJ *Wall* Opinion (n 50) para. 26.

[55] UN General Assembly, Uniting for Peace, UN Doc. A/RES/377 (V), 3 November 1950 (hereafter General Assembly Resolution, Uniting for Peace).

[56] Ibid., part A:

> *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations[.]

The resolution's *constitutional* underpinning is to be found in Articles 10–12 of the UN Charter. See also Juraj Andrassy, 'Uniting for Peace' (1956) 50 American Journal of International Law 563; Dominik Zaum, 'The Security Council, the General Assembly, and War: The Uniting for Peace Resolution' in Vaughan Lowe *et al.* (eds), *The United Nations Security Council and War: The Evolution of ought and Practice since 1945* (OUP 2008), 154ff; Zimmermann, 'Obligation to Prevent Genocide' (n 45) 639; Andrew J Carswell, 'Unblocking the UN Security Council: The *Uniting for Peace* Resolution' (2013) 18 Journal of Conflict and Security Law 453, 459 (suggesting that '[t]aken as a whole, the resolution is designed to allow the General Assembly to step as far as possible into the space left by a stagnant Security Council, employing a patchwork of measures designed to mirror the structure of Chapter VII of the UN Charter *mutatis mutandis*'). At the September 1950 annual session of the General Assembly, the US delegation had requested the inclusion of an item to the Assembly's agenda, accompanied by the following note:

> The Charter gives the General Assembly important functions to perform in the field of international peace and security, including the right to discuss any question relating to this field and the right to make recommendations. The experience of the United Nations in the five years since the Charter came into force has demonstrated the value of the Assembly's role. In the view of the United States, the Assembly's contribution can be enhanced both with respect to the avoidance of conflicts and with respect to the restoration of peace if need arises.
>
> The General Assembly should be enabled to meet on very short notice in case of any breach of international peace or act of aggression if the Security Council, because of lack of unanimity of the permanent members, is unable to discharge its primary responsibility for the maintenance of peace and security. To this end, the United States proposes that the Assembly should make provision for emergency special sessions to be convoked in 24 hours [...].

UN General Assembly, United Action for Peace. Note Dated 20 September 1950 from the Chairman of the United States Delegation to the Secretary-General, UN Doc. A/1377, 20 September 1950 (hereafter UN Doc. A/1377), 3.

there existed international tension and a 'collective measures committee' to advise on appropriate measures to be used to maintain and strengthen international peace and security.[57] The General Assembly followed that precedent in a number of other situations where acts of aggression, rights abuses or violations of the laws of war were at stake and where the Security Council was unable or unwilling to act.[58] Particularly interesting in the present context is UN General Assembly resolution 71/248 (2016) establishing an investigative mechanism for crimes committed in Syria since March 2011. The mechanism was specifically tasked to collect, consolidate, preserve, and analyse evidence of violations of international humanitarian law and human rights and prepare files in order to facilitate and expedite fair and independent criminal proceedings.[59] It is perhaps the clearest expression of the UNGA's subsidiary and residual competence in matters of accountability for international crimes, including genocide.[60] Whether this course was taken by the General Assembly as a result of a sense of legal obligation or out of practical necessity is unclear.[61] However, these precedents

[57] The Assembly has recommended action inclusive of military force only once, in the context of the Korean conflict as it continued into 1951. See UN General Assembly, Intervention of the Central People's Government of the People's Republic of China in Korea, UN Doc. A/RES/498(V), 1 February 1951. The 'Uniting for Peace' resolution was also relied upon to convene a number of emergency special sessions of the General Assembly.

[58] See, generally, UN General Assembly resolutions in relation to the Soviet invasion of Hungary and making various requests upon the UN system and urging members states to adopt a variety of steps in response to Soviet's actions: UN General Assembly, Resolution 1004 (ES-II), UN Doc. A/RES/1004(ES-II), 4 November 1956; UN General Assembly, Resolution 1005 (ES-II), UN Doc. A/RES/1005(ES-II), 9 November 1956; UN General Assembly, Resolution 1006 (ES-II), UN Doc. A/RES/1006(ES-II), 9 November 1956; UN General Assembly, Resolution 1007 (ES-II), UN Doc. A/RES/1007(ES-II), 9 November 1956. See also UN General Assembly, Protection of the Palestinian Civilian Population: Draft Resolution by Algeria, Turkey and State of Palestine, UN Doc. A/ES-10/L.23, 11 June 2018 (hereafter UN Doc. A/ES-10/L.23), demanding that Israel should refrain from such actions and fully abide by its legal obligations under the Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War and calling for compliance with basic requirements of humanitarian law. The content of this draft resolution was vetoed by the United States as a Security Council resolution on 1 June 2018. The emergency meeting of the General Assembly which resulted in the adoption of the above-mentioned resolution was held in accordance with the so-named Uniting for Peace procedure. See UN News, 'UN General Assembly Urges Greater Protection for Palestinians, Deplores Israel's "Excessive" Use of Force', 13 June 2018.

[59] UN General Assembly, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011: Resolution Adopted by the General Assembly, UN Doc. A/RES/71/248, 11 January 2018 (hereafter General Assembly Resolution 71/248).

[60] Tellingly, the Mechanism described its mandate as pertaining to the investigation and prosecution of the most serious crimes under international law, including genocide. See Terms of Reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (hereafter Syrian IIIM Terms of Reference), para. 4 ('The Mechanism assists in the investigation and prosecution of the most serious crimes under international law, in particular the crime of genocide, crimes against humanity and war crimes, as defined in relevant sources of international law.').

[61] See, in particular, General Assembly Resolution 71/248 (n 59) para. 1 (emphasis added):

> [T]*he need to ensure accountability for crimes involving violations of international law*, in particular of international humanitarian law and international human rights law, some of which may constitute war crimes or crimes against humanity, committed in the Syrian Arab Republic since March 2011 through appropriate, fair and independent investigations and prosecutions at the domestic or international level, and *stresses the need to pursue practical steps towards this goal to ensure justice for all victims and to contribute to the prevention of future violations.*

provide at the very least support for the proposition that where the Security Council fails to meet its obligations under Article 24 of the Charter and that such crimes are about to be committed or have been committed, the UN General Assembly would be authorized under the terms of the Charter to intervene to seek to prevent and punish those crimes.

5.1.2.6 Prosecutors

The obligation to punish does not create an independent international obligation binding on national (or international) prosecutors to prosecute acts of genocide where evidence of their commission exists. Prosecutors have, in most legal systems, a great deal of discretion in deciding whether or not to initiate a criminal investigation or to commence prosecution.[62] The law of genocide does not affect that discretion. However, a state would fail to fulfil its international obligations where its prosecutors systematically or demonstrably exercise their discretion in an unreasonable fashion in order to evade its responsibility to punish and thereby contributes to creating impunity for acts of genocide.

5.1.3 Duty to punish under the ICC regime

Paragraph 6 of the Preamble of the Rome Statute *recalls* that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[63] Some have interpreted this as an acknowledgement of a pre-existing legal obligation to punish all relevant categories of international crimes.[64] Instead, putting aside the

[62] See *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, Judgment, 2 December 2003, para. 65 (finding that 'the principle of mandatory prosecutions is not part of the Tribunal's Statute'). See also Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 3 (hereafter ICC Statute), arts 13, 15. See also Matthew R Brubacher, 'Prosecutorial Discretion within. The International Criminal Court' (2004) 2 Journal of International Criminal Justice 71; Hassan B Jallow, 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 Journal of International Criminal Justice 145; William A Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Criminal Justice 731. Regarding the discretionary authority of domestic prosecutors, see also REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU: A Study of the Laws and Practice in the 27 Member States of the EU* (December 2010) (hereafter REDRESS/FIDH, 'Extraterritorial Jurisdiction in EU'), in particular, 27ff.

[63] See also ICC Statute (n 62) Preamble, fourth paragraph (providing that 'effective prosecution [of the most serious crimes of concern to the international community as a whole] must be ensured by taking measures at the national level and by enhancing international cooperation').

[64] See the decision of the Paris Court of Appeal in the *Gadhafi* case, in which the French court pointed to the Preamble of the Rome Statute to suggest that states Parties were required to exercise their competence over categories of crimes provided under the Statute: '[it] is the intent of the international community to prosecute the most serious facts, even though perpetrated by heads of State in the exercise of their functions, whenever they amount to international crimes, contrary to the demands of universal conscience'. *Gaddafi* Case, Chambre d'accusation, Decision of 20 October 2000, No. 1999/05921, RGDIP (2001), 475ff. That decision was later quashed by the French Cour de Cassation, albeit on other grounds. See *Gaddafi* Case, Arrêt n° 1414 du 13 mars 2001 Cour de cassation—Chambre criminelle, 13 March 2001 (translated and reprinted in (2001) 125 ILR 456) (hereafter *Gaddafi* French Court of Cassation Decision). See also Otto Triffterer *et al.*, 'Preamble' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck, Hart, Nomos 2016) (hereafter Triffterer *et al.* 'Preamble') 11:

case of genocide, it is better characterized as a contribution to an evolving principle that is yet to crystallize fully for other international crimes.[65] The preambular statement does not create a jurisdictional authorization upon which state parties can rely to prosecute the statutory crimes.[66] Nor, *stricto sensu*, does it create a legal obligation in the sense that a failure to act would engage that state's responsibility. The Rome Statute must be read as expressing a general, collective, commitment to seeing that these crimes are punished and enjoining every state party to take steps to contribute to that common purpose.[67] If, however, a state fails to exercise its (primary) jurisdiction over International Criminal Court (ICC) crimes that fall within its competence, the consequence of this would be that the Court could then seize itself of the matter in accordance with its (subsidiary) competence.[68]

> The purpose of paragraph 6 is to recall that there is a class of 'crimes under international law' for which States have an obligation to prosecute even if these crimes do not fall within the jurisdiction of the Court. As regards these crimes the only dispute was whether there is an obligation to proceed on the basis of universal jurisdiction or on the basis of more traditional jurisdictional links. The paragraph was deliberately left ambiguous.

[65] See also Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large, and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer-Verlag 2009), 29 (noting that it was 'controversial' before the adoption of the Rome Statute whether and to what extent an obligation to prosecute international crimes might have existed); William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) (hereafter Schabas, *Commentary on the Rome Statute*), 45.

[66] Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (Judgment of 14 February 2002, Dissenting Opinion of Judge Van Den Wyngaert) [2002] ICJ Rep 3 (hereafter ICJ *DRC-Belgium* 2002 Judgment, Van Den Wyngaert Dissent), para. 64 ('The preamble, which unequivocally states the objective of avoiding impunity, does not allow this inference [pursuant to which the Statute would prohibit the exercise universal jurisdiction by states]. In addition, the *opinio juris* as it appears from United Nations resolutions, focuses on impunity. individual accountability and the responsibility of all States to punish core crimes.') and para. 66. Cf *National Commissioner of the South African Police Service and Another v. Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30 (Constitutional Ct South Africa) (hereafter *CC* Judgment), para. 32.

[67] See, e.g., *Prosecutor v. Katanga & Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213-tENG, 18 June 2009, para. 79:

> The Chamber recalls, in this respect, that, according to paragraph 6 of the Preamble, 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. However, if a State considers that it is more opportune for the Court to carry out an investigation or prosecution, the State will still be complying with its duties under the complementarity principle, if it surrenders the suspect to the Court in good time and cooperates fully with the Court in accordance with Part IX of the Statute.

See also Situation in the Democratic Republic of the Congo, (Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', Separate and Partly Dissenting Opinion of Judge Georghios M Pikis) ICC-01/04-169, 12 July 2006, para. 16 (footnote omitted) ('The Rome Statute makes no distinction between persons liable to the jurisdiction of the courts of States Parties and the International Criminal Court. The Court has, subject to complementarity, jurisdiction over every crime punishable under the Statute. In the Preamble of the Statute, it is proclaimed that every State Party must "exercise its criminal jurisdiction over those responsible for international crimes", i.e. the crimes penalized by the Statute. States Parties are enjoined to exercise the jurisdiction trusted to them. If they do not, a corresponding duty is cast upon the Court to investigate, prosecute and try the persons liable for the commission of one or more crimes punishable under the Statute.') and para. 31.

[68] See ICC Statute (n 62) art. 17. See also Payam Akhavan, 'Whither National Courts? The Rome Statute's Missing Half: Towards an Express and Enforceable Obligation for the National Repression of International Crimes' (2010) 8 Journal of International Criminal Justice 1245; Anja Seibert-Fohr,

5.2 Duty to Prevent

5.2.1 General considerations

The duty to prevent genocide is perhaps the more fundamental of the two duties foreseen by the Convention. It requires states to take all necessary steps to try to avoid or stop the commission of such crimes.[69] The overarching goal of prevention built into the Convention is apparent not just from this obligation, but also from the criminalization of a number of preparatory acts that fall short of genocide.[70]

5.2.1.1 Genocide as precondition

A state can be held responsible for breaching its obligation to prevent genocide only if an act of genocide has actually been committed.[71] Lest the very purpose of that duty be defeated, this does *not* mean, however, that a state is not required to act until such crimes have actually been committed.[72] Nor does it mean that a requirement of

'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 Max Planck Yearbook of United Nations Law 553, 560 (footnotes omitted):

> [I]t is not the objective of the Rome Statute, which is concerned with international prosecution and not with the international enforcement of state obligations, to deal with prosecuting duties by the State parties. Though there is a duty to surrender perpetrators to the ICC and though a State party may avoid surrender by instituting domestic prosecution, there is no genuine duty to prosecute in the Statute because it sets up an entirely different system distinct from the obligation of *aut dedere aut iudicare*. The *aut dedere aut judicare* principle is based on the idea that the prosecution of perpetrators is ultimately secured by obliging all states to either try or extradite perpetrators. Under the Statute, however, there is no need for a duty of states to prosecute because it is based on the idea that if domestic prosecution on which it primarily relies fails, the ultimate safeguard is through international prosecution anyway. The ICC is therefore meant to supplement—not to enforce—domestic prosecution.

[69] See, *infra*, 5.2.2.3.2.

[70] UN Doc. E/AC.25/3 (n 2) 8:

> This prevention [of genocide which was an intended goal of the yet-to-be-adopted Convention] may involve making certain acts punishable which do not themselves constitute genocide, for example, certain material acts preparatory to genocide, agreements or plots with a view to committing genocide, or systematic propaganda inciting to hatred and thus likely to lead to genocide.

[71] See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 431:

> [A] State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs.

[72] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 431:

> This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III

causality must be established between the failure to act and the commission of acts of genocide. Instead, such a duty exists and must be effectively enforced as soon as the state is on notice of the real possibility that acts of genocide might be committed or, in the terms of the ICJ, 'at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'.[73] The failure of a state to do so after it was put on such notice might trigger its responsibility, even if time then elapses before crimes are committed. That duty continues to exist as long as acts of genocide continue to be committed or when there is a real risk of their being committed. Responsibility for a failure to prevent genocide could not arise, however, unless acts of genocide are actually committed. In other words, the law of genocide does not provide for any sort of inchoate state responsibility.

The duty to prevent requires a state to prevent not just genocide *stricto sensu*, but any kind of punishable acts listed in Article III of the Convention.[74] The failure on the part of a state to prevent any of these acts could, therefore, engage its responsibility, if all other conditions are met.

> of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

[73] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 431. See also, ibid., para. 432 (regarding the distinct level of knowledge required for responsibility attaching to a failure to prevent as opposed to acts of complicity), paras 437–438.

[74] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 166–167, 431 (emphasis added) ('It is at the time when commission of the prohibited act (genocide *or any of the other acts listed in Article III of the Convention*) begins that the breach of an obligation of prevention occurs.'), 461 (emphasis added) (using the generic phrase 'preventing the commission of *acts of genocide*'). But see Christian Tams *et al.*, *Convention on the Prevention and Punishment of the Crime of Genocide: Commentary* (Beck, Hart, Nomos 2014), Chapter I, p. 44, fn 42, suggesting, based on a strict reading of Article I of the Convention, that the duty to prevent only pertains to genocide itself (Article III(a)) and excludes other punishable acts listed in Article III of the Convention. If correct, this view would mean that a state would not be obliged to prevent or punish other punishable acts of genocide listed in Article III of the Convention. Such a narrow understanding of the scope of a state's duty to prevent and punish genocide appears inapposite. First, as is apparent from the title of the Convention that the expression 'genocide' is to be understood normatively as referring to all acts of genocide listed in Article III, not just the crime of genocide per se. Second, the acts listed in Article III all constitute steps towards the commission of genocide. As such, they must be prevented to reduce or exclude the chance of genocide actually occurring. The suggestion that these are not relevant to the duty to prevent would mean that a state would be permitted to remain idle until a conspiracy or attempt to commit genocide actually morphs into actual commission of genocide. Such an understanding would greatly undermine the deterrent value of the duty to prevent. Instead, the duty to prevent applies to any situation where there is a serious risk of genocide occurring. An attempt to commit genocide, incitement to commit genocide, or a conspiracy to commit such crime would clearly qualify as creating such a risk and would engage the responsibility if it has culpably failed to prevent those. Furthermore, Article IX, which regulates the competence of the ICJ over the issue of state responsibility, makes reference to 'the responsibility of a State for genocide *or for any of the other acts enumerated in article III*' (emphasis added), thereby making it clear that this responsibility could be incurred not only where it failed to prevent (or punish) genocide as such but also any of the other punishable acts listed in Article III of the Convention. See also Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) (hereafter Robinson, *Commentary on the Genocide Convention*), 101 (to the same effect). It is, therefore, logical that the ICJ should have taken the view that the obligation to prevent genocide as foreseen in Article I of the Convention 'requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide *or any of the other acts mentioned in Article III*.' See reference, *supra*.

5.2.1.2 *Who is bound by the obligation to prevent?*

The obligation to prevent genocide is binding on the territorial state but not only on that state.[75] It would also bind, in a given case, any state that is 'in a position of influence' vis-à-vis the perpetrators of such acts, that is, any state with 'the capacity to influence effectively the action of persons likely to commit, or already committing, genocide'.[76] This capacity to influence in turn depends on a number of factors, which might include, for instance: (i) the geographical distance of the State concerned from the scene of the events; (ii) the strength of the political links with the relevant entity; (iii) links of other kinds between the authorities of that State and the main actors in the events; (iv) the particular legal position of that state vis-à-vis the situations and persons facing the danger of genocide; (v) the military, intelligence, and logistical support provided by the state to that other actors; (vi) the alignment and overlap of their political and military agendas; (vii) the strength of the political, military, and financial links between the two states; and (viii) other factors that might reflect a capacity to restrain those intent on committing acts of genocide.[77] The case between Bosnia-Herzegovina and the Federal Republic of Yugoslavia (FRY) before the ICJ offers a clear illustration of how that evaluation is to be carried out. In its Order of 8 April 1993, the Court stated that although unable at that stage in the proceedings to make 'definitive findings of fact or of imputability', it determined that the FRY was required to ensure 'that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide'.[78] This language, the Court explained, makes it clear that the duty to prevent may reach beyond those whose conduct could be attributed to the state in question.[79]

Therefore, the presence of information suggesting the commission (or the risk of commission) of genocidal acts combined with the capacity to restrain and influence

[75] ICJ *Bosnia-Serbia* Preliminary Objections Judgment (n 17) para. 31; ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 185, 368–369; ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 114. See also, *infra*, 5.1.2.1–5.1.2.2.

[76] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 430, 434, 461 (referring to a state that 'has it in its power to contribute to restraining in any degree the commission of genocide'). See also, Simma, 'Genocide and ICJ' (n 21) 262.

[77] See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 430, 434, 435, 438, 461.

[78] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Request for Indication of Provisional Measures, Order of 8 April 1993) [1993] ICJ Rep 3 (hereafter ICJ *Bosnia-Serbia* Provisional Measures April 1993 Order), paras 44, 52(A)(2).

[79] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 435:

> The Court's use, in [paragraph 52(A)(2) of Order of 8 April 1993], of the term 'influence' is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

those planning, preparing, or perpetrating such acts would require a state to take steps to prevent such acts.[80] Where that capacity has been established, the nature, extent, and depth thereof will in turn be relevant to the question of reparation insofar as it requires a determination of that state's contribution to the wrongful act of genocide.[81]

5.2.1.3 An obligation of means

The obligation to prevent genocide is an obligation of *means* rather than result.[82] For a state to be held responsible for breaching that obligation, it does not therefore need to be proven that the state concerned could actually have prevented the genocide or that its failure to act was causally linked to the commission of an act of genocide. It is sufficient that it had the means to contribute to that goal and that it manifestly refrained from using them.[83] Where established, the causal relationship between the state's failure to act and genocidal acts would be relevant, however, to the question of the nature and extent of reparation borne by a state as a result of its wrongful conduct.[84]

5.2.1.4 Duty to prevent whose actions?

As noted by Judge Lauterpacht, the duty to prevent is an obligation 'that rests upon all parties and is a duty owed by each party to every other. This network of duties is matched by a network of correlative rights [...]'.[85] The duty to prevent genocide therefore exists not just in relation to state officials, organs of the state, or entities whose conduct could be attributed to the state but also in relation to all those with whom the state maintained close links and on which it could exert influence and who threaten to commit acts of genocide.[86] Furthermore, the responsibility to

[80] Ibid., paras 438, 461. [81] Ibid., para. 462.

[82] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430:

> [I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.

See also Simma, 'Genocide and ICJ' (n 21) 262 (describing the obligation as 'one of objective "due diligence" and conduct').

[83] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 438.

[84] See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 461–462:

> The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.

[85] ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 86.

[86] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 434–435 (referring to ICJ *Bosnia-Serbia* Provisional Measures April 1993 Order (n 78), para. 44). See also ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 87:

prevent is not limited to the actions of nationals of the state in question or to its officials.[87] It is general in character and restricted only by the ability of the state in question to influence the perpetrators of acts of genocide or those threatening to commit such acts.

5.2.1.5 *Geographical scope of application*

The obligations of states to prevent (and to punish) the crime of genocide is not territorially limited by the Convention.[88] Stated differently, there is an obligation to prevent genocide that extends beyond the jurisdiction of a contracting state. It can therefore apply extra-territorially.[89] The 2007 ICJ judgment in the *Bosnia v. Serbia* case provides an illustration of the extra-territorial effect of that obligation. The Court found that Serbia-Montenegro had breached its obligation to prevent genocide through a failure to intervene with its ally, Bosnian Serb authorities and forces in the neighbouring state of Bosnia-Herzegovina, in order to exercise influence over them to stop and prevent acts of genocide.[90] The judgment therefore stands as precedent for the view that the obligation to prevent can apply beyond and regardless of the borders of a state. The limits to that obligation are set, not by borders, but by the actual capacity of the state in question to influence the perpetrators of acts of genocide.[91]

> There can be no doubt that the Court may require the Respondent in general terms not to commit genocide and to take measures to prevent the commission of genocide, whether directly by itself or indirectly by others who may be directed, controlled or supported by it.

See also ICJ *Croatia-Serbia* 2015 Judgment (n 1), para. 441.

[87] As an illustration, in the *Bosnia-Serbia* case, the ICJ made findings regarding Serbia's failure to prevent the genocidal acts of individuals of Bosnian nationality (albeit of Serb ethnicity).

[88] ICJ *Bosnia-Serbia* Preliminary Objections Judgment (n 17) para. 31 (pointing out that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes* and that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention); ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 185, 368–369. See also Mark Toufayan, 'The World Court's Distress When Faced with Genocide: A Critical Commentary on the *Application of the Genocide Convention Case (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*' (2005) 40 Texas International Law Journal 233; Orna Ben-Naftali, 'The Obligations to Prevent and to Punish Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Ben-Naftali, 'Obligations to Prevent and Punish'), 37.

[89] See also ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 114:

> Obviously, an absolutely territorial view of the duty to prevent genocide would not make sense since this would mean that a party, though obliged to prevent genocide within its own territory, is not obliged to prevent it in territory which it invades and occupies. That would be nonsense. So there is an obligation, at any rate for a State involved in a conflict, to concern itself with the prevention of genocide outside its territory.

[90] See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 153–154, 430.

[91] See also Zimmermann, 'Obligation to Prevent Genocide' (n 45) 633–34 (noting that '*all* States, depending on their capacity effectively to influence the actual perpetrators of genocide, have, according to the Court, to employ all means reasonably available both *de facto* and *de jure* to them, so as to prevent genocide so far as possible').

5.2.2 Elements of the duty to prevent

5.2.2.1 Punishment no alternative to prevention

The duty to prevent is an independent and distinct obligation that attaches to the general prohibition on genocide.[92] As such, it cannot be reduced to a requirement of punishment as a way to deter and prevent future crimes.[93] Punishing the perpetrators is therefore no alternative to the duty to prevent and a state could be held responsible for a failure to fulfil its duty to prevent even where it later punished perpetrators of such acts.

5.2.2.2 Duty of diligence

The duty to prevent genocide requires the state to act diligently in the fulfilment of that obligation.[94] The extent of this diligence is dependent on the particular circumstances of the case and, most importantly, on the capacity of the state in question effectively to influence the action of persons likely to commit, or already committing, genocide.[95] This capacity will in turn be determined by a number of the aforementioned factors.[96] It is irrelevant whether the state whose responsibility is at stake claims, or even proves,

[92] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 427:

> [I]t is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty.

See also, ibid., paras 425–426, 450.

[93] See also *Prosecutor v. Al Bashir*, Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, Minority Opinion of Judge Marc Perrin de Brichambaut, ICC-02/05-01/09-302-Anx, 6 July 2017 (hereafter *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion), para. 34 (footnote omitted):

> [T]he duty to prevent genocide is not merely a component of the duty to punish. It is a stand-alone obligation and an objective to be pursued in its own right, not only through punishment. In fact, as far as international crimes such as genocide are concerned, retribution may have only a limited deterrent effect. Since punishment occurs after the events have taken place it may achieve 'too little, too late'. In creating a specific obligation to prevent, the Genocide Convention addresses this unfortunate reality.

[94] See, in particular, ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430 ('In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance.').

[95] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430:

> Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide.

[96] See *supra*, 5.2.1.2. See also ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430:

> This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.

that even if it had employed all means reasonably at its disposal, these means would not have prevented the commission of genocide.[97] This is because its responsibility is based not on a failure to succeed, but on a failure to try.

5.2.2.3 *Content of duty*

5.2.2.3.1 Duty to refrain from contributing to acts of genocide

What the duty to prevent requires in concrete terms is not entirely clear from the Convention[98] or the *travaux*.[99] The jurisprudence offers better guidance. First, and at its most basic, the duty to prevent genocide includes an obligation to refrain from any sort of assistance or support to the commission of acts of genocide.[100] As noted by the ICJ

[97] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430 ('[T]he obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible').

[98] See, generally, *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 93) para. 33 (footnotes omitted):

> The meaning of 'prevention' is 'to hinder or preclude; to stop or intercept the approach, access, or performance of a thing'. Within the ordinary meaning of the term, prevention has two prongs: (i) the prevention of future acts; and (ii) putting a stop to ongoing acts. The text of the Convention reflects these two prongs. Article VIII, although not imposing any obligations on States, specifically speaks of 'the *prevention and suppression* of acts of genocide' (emphasis added). More importantly, article III criminalises, *inter alia*, three inchoate crimes: conspiracy to commit genocide (article III(b)); incitement to commit genocide (article III(c)); and attempt to commit genocide (article III(d)). These acts cover preliminary stages of genocide and reveal that prevention was not conceived by the drafters to be limited to deterrence through punishment. Rather, the drafters envisaged the possibility of intervening at initial stages before a full genocidal campaign unfolds. The *travaux préparatoires* further confirm that the duty to prevent and the duty to punish are distinct obligations. The findings of the ICJ in its 2007 judgment in the *Bosnia and Herzegovina v. Serbia and Montenegro* case are telling: 'it is not the case that the obligation to prevent has no separate legal existence of its own; that is, as it were, absorbed by the obligation to punish'. Finally, the title of the Convention itself also shows that the obligation to prevent is not subsidiary to the obligation to punish.

[99] See, generally, William A Schabas, 'Prevention of Crimes against Humanity' (2018) Journal of International Criminal Justice, (footnote omitted):

> [T]he Genocide Convention provides little in the way of guidance as to the scope of the duty to prevent genocide. The Convention concentrates on criminal prosecution of genocide. Prevention seems to be contemplated in an exceedingly narrow sense, whereby the crime is prevented by prosecuting the perpetrators. Arguably, the existence of the Convention may also provide some measure of deterrence, which contributes to prevention. Over the decades following the adoption of the Genocide Convention, little attention was devoted to fulfilment of the obligation to prevent the crime. For example, the most significant study of the Convention within the United Nations, issued by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1985, acknowledged the issue of prevention but did not offer much in terms of concrete proposals. It urged the establishment of a mechanism to provide 'early warning' although there was no guidance on what would be done in the event of serious concerns that the crime might actually be committed.

[100] See, e.g., ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) paras 102–103 (regarding the UNSC-ordered arms embargo on Bosnia-Herzegovina):

> 102. Now, it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what has happened here. On this basis, the inability of Bosnia-Herzegovina sufficiently strongly to

> [i]t would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.[101]

The duty to prevent genocide also requires a state to ensure that any military, paramilitary, or irregular armed units which may be directed or supported by that state, as well as any organizations and persons which may be subject to its control, direction, or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide.[102]

5.2.2.3.2 Duty to adopt *all* measures

The duty to prevent genocide requires a state to adopt *all* measures as are within its power that could reasonably contribute to preventing the genocide.[103] In

> fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.
>
> 103. What legal consequences may flow from this analysis? One possibility is that, in strict logic, when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation against Bosnia-Herzegovina; and that Members of the United Nations then became free to disregard it. Even so, it would be difficult to say that they then became positively obliged to provide the Applicant with weapons and military equipment.

Ibid., para. 104. In October 1978, for instance, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda. Uganda Embargo Act, Public Law 95–435 of 10 October 1978, United States Statutes at Large 1978, vol. 92, part 1 (United States Government Printing Office, 1980), 1051–53. The legislation recited that '[t]he Government of Uganda [...] has committed genocide against Ugandans' and that the 'United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide'. Ibid., ss 5(a) and (b). See also Section 5(b) of the Act to amend the Bretton Woods Agreement Act, 92 Stat. 1052 (1978) which declared that 'the sense of the Congress that the Government of the United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide' (22 U.S.C. § 2151). See also Ben-Naftali, 'Obligations to Prevent and to Punish Genocide' (n 88) 31ff; Simma, 'Genocide and ICJ' (n 21) 264; *Mukeshimana-Ngulinzira v. Belgium*, Case No. RG No. 04/4807/A, 07/15547/A, First Instance Judgment, ILDC 1604 (2010) (regarding the responsibility of Belgium regarding its alleged failure to prevent genocide in Rwanda, in particular, in relation to its failure to act and in relation to its decision to pull out Belgian members of the UN protection force in Rwanda).

[101] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 166. See also, ibid., para. 167:

> The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III.

And, ibid., paras 186, 432.

[102] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 435; ICJ *Bosnia-Serbia* Provisional Measures April 1993 Order (n 78) para. 52(A)(2).

[103] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430:

> A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to

other words, the state is expected to do its best to prevent the commission of such crimes.[104]

5.2.2.3.3 Referring of issue to the UN is insufficient

The duty to prevent genocide is not limited to referring an issue of concern to the competent organs of the United Nations, as is possible under Article VIII of the Convention.[105] Thus, even when UN organs have been called upon to intervene by a state, that state is not relieved of its obligation to take all such measures as are within its competence to prevent acts of genocide.[106] In other words, when under a duty to act to prevent genocide, that duty is not extinguished by a referral to the United Nations.

5.2.2.3.4 Duty to stop and suppress

When a state is required to act because it has influence over the perpetrators, the duty to prevent would imply an obligation to suppress any ongoing acts of genocide, in particular by suppressing such acts and, for the territorial state, arresting and prosecuting suspects if it is in a position to do so.[107] That duty also encompasses a general

> prevent genocide which were within its power, and which might have contributed to preventing the genocide.

See also ICJ *Bosnia-Serbia* Provisional Measures April 1993 Order (n 78) para. 45 (holding that Article I of the Convention imposes 'a clear obligation' on contracting parties 'to do all in their power to prevent the commission of any such acts in the future').

[104] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 432 ('[T]he duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.').

[105] See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 427:

> It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

In accordance with Article VIII of the Convention, a contracting party could seek the assistance of the UN ('Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.'). Article VIII of the Convention reads: 'Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.'

[106] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 427.

[107] *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 93) para. 35:

> [T]he duty to prevent encompasses a duty to suppress ongoing acts of genocide. The measures that States can take to prevent and suppress acts of genocide may be varied, but one of them is the arrest and prosecution of persons suspected of committing, conspiring, inciting or attempting to commit genocide. If one reads the provisions of the Convention having in mind this dimension of the obligation to prevent, the tension between prevention and personal immunities becomes apparent. In the framework of the Convention, courts play two roles towards prevention: (i) punishing perpetrators with a view to deterring future crimes; and (ii) prosecuting and trying persons charged with, inter alia, genocide or conspiring, inciting or attempting to commit genocide with a view to preventing or suppressing the ongoing commission of crimes. Viewed in this light, personal immunities appear to be incompatible with the scope of the Convention. How can the Contracting Parties have, on the one hand, committed themselves to preventing and suppressing genocide and, on the other hand, upheld

obligation to refrain from conduct that would inhibit the ability of another state to prevent genocide or to resist it if its population is being targeted.[108]

5.2.2.3.5 Duty to protect one's population

As apparent from the practice of the UN Security Council, the duty to prevent genocide requires a state to take all necessary measures to protect its own population and any member thereof from the risk of genocide.[109]

5.2.2.3.6 Unilateral countermeasures

Any state other than the injured state is entitled to invoke the responsibility of another state provided the obligation is owed to the international community as a whole, that is, an *erga omnes* obligation such as the duty to prevent (and punish) genocide. It is less clear whether, in the fulfilment of its obligation to prevent genocide, a state could resort to unilateral countermeasures in the collective interest of the international community.[110] Considering the gravity of the acts, the absolute character of the duty to prevent genocide, and the fact that the interests at stake could hardly be repaired by a *post facto* finding of responsibility on the part of the state concerned, there are good grounds to argue that international law would allow a state to adopt unilateral countermeasures to prevent acts of genocide. A different view would effectively sanction a right of inaction on the part of states in the face of genocide and, worse, could create a clear incentive not to act. The position seems all the more appropriate that the ICJ has made it clear that a state carries a duty to prevent genocide in relation to those over which it may exert influence and the Court made no exception for the case where the latter are state officials or where that influence can be exercised through countermeasures. In that sense, countermeasures taken in such a situation would ultimately be directed at those who make use of the state apparatus and its resources to commit acts of genocide. The possibility of adopting countermeasures—whether characterized as 'lawful measures' under Article 54 of the ILC Draft Articles or as countermeasures not regulated by that provision—would only be permitted under that view where there is a serious risk of genocide being committed or about to be committed, that is, where there are real and concrete indications that such a risk exists. Finally, as noted earlier,

the personal immunities for their 'constitutionally responsible rulers' as they are committing genocide?

Ibid., para. 37 ('The territorial State has an obligation, *inter alia*, to arrest and prosecute the perpetrator in question with a view to suppressing the commission of crimes and preventing their future commission.').

[108] See ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 87 (pointing out that this was the duty of Serbia, as deriving from its general duty to prevent genocide, to both prevent genocide and 'to refrain from conduct that inhibits the ability of the Applicant itself to prevent genocide or to resist it').

[109] See references in, *supra*, fn 6.

[110] See A Zimmermann, 'The Obligation To Prevent Genocide: Towards A General Responsibility To Protect?' in U Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011), 637 (suggesting that under the current *lex lata*, States fulfilling any obligation to prevent may not (yet) resort to unilateral countermeasures).

a state could not adopt countermeasures which in effect involve or amount to acts of genocide.[111]

5.2.2.3.7 A duty *à géometrie variable*

The obligation to prevent genocide is an obligation *à géometrie variable*, whose nature and scope depends ultimately on the demonstrated ability of a state in question to dissuade, pressure, or demand of others, the perpetrators or would-be perpetrators of acts of genocide, to refrain from doing so. The greater the influence, the more expansive the obligation. The law does not specify which sort of measures should be adopted in any particular case. It is certain, however, that to be regarded as sufficient, the steps taken would have to reflect the gravity of the matter sought to be prevented and the urgency implied in the need to prevent the commission of acts of genocide. Furthermore, as highlighted by the Court, within the range of possible measures, the state is required to employ '*all* means reasonably available' and 'take *all* measures' which are within its power and which might contribute to preventing acts of genocide.[112]

5.2.2.4 Compliance with the duty

A state's compliance with the duty to prevent genocide will be measured against three primary factors: first, does a state have the capacity to influence effectively the action of persons likely or about to commit acts of genocide?[113] The verification of the presence of such capacity in a given case will depend on a variety of factors outlined earlier.[114] Second, within the scope of its proven capacity to influence others, the state is expected to adopt *all* measures in its power that are reasonably capable of preventing genocide or causing the perpetrators to refrain from such conduct. The state will be held responsible where it 'manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide'.[115] Third, as noted earlier, a state can be held responsible for breaching the obligation to prevent genocide only if genocide or one of the other prohibited genocidal acts was actually committed. It is at the time when a prohibited act is committed that the breach of an obligation of prevention formally occurs where the state with the power to influence the perpetrators had sufficient prior notice of the risk of commission of such act.[116]

5.2.2.5 A right to inaction?

It has been suggested that inactivity might be a permissible course of action where third parties threaten to commit acts of genocide.[117] Such a view is questionable. First,

[111] See, *infra*, 5.3.2.9. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Counter-Claims, Order of 17 December 1997) [1997] ICJ Rep 243 (hereafter ICJ *Bosnia-Serbia* 1997 Order), para. 35.

[112] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430. [113] Ibid. [114] See, *supra*, 5.2.2.2.

[115] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430. [116] Ibid., para. 431.

[117] See ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 115.

if applied universally to all states, it would effectively render the duty entirely inoperative. Second, such practice cannot be taken as reflecting a permissible way to comply with the obligation to prevent, but instead as a failure to do so. Third, under the test devised by the ICJ, the factor that determines a state's obligation to take steps to prevent (or punish) acts of genocide is its ability to influence the perpetrators. In other words, where that power exists, it *must* be used with a view to preventing the commission of such acts.[118] Lastly, as an *erga omnes* obligation, any state has a right to demand of all others—that is, those with the ability to influence the perpetrators—to take steps to prevent such crimes where they are in a position to do so. A state cannot, therefore, fulfil its obligation to prevent by doing nothing where it has the ability to influence the perpetrators of the acts.

5.2.3 Duty to prevent and 'responsibility to protect'

The duty to prevent genocide should not be mistaken for the concept of 'responsibility to protect' or with the notion of humanitarian intervention.[119] Unlike these, the duty to prevent does not purport to provide an exception to state sovereignties or to the general principles regulating the lawful use of force.[120] Furthermore, the duty to prevent genocide is limited to those states, entities, and individuals which a state is able to influence. Substantively, the duty to prevent is also limited to the prevention of acts of genocide rather than providing for a generic responsibility to protect communities from any sort of violence, crimes, or humanitarian threats.[121] Finally, unlike the duty to prevent genocide, it is questionable whether the notion of responsibility to protect is recognized under customary law and whether it generates any legal rights and obligation on the part of individual states.[122] In any case, unlike the duty to prevent genocide, which is a binding legal obligation of states, the 'responsibility to protect' is not (yet) a justiciable issue that could engage the responsibility of a state.

[118] The Court expressly referred to 'the corresponding duty to act' which arises from the moment that a state acquires knowledge of the existence of a serious risk of genocide. See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 431.

[119] See also Zimmermann, 'Obligation to Prevent Genocide' (n 45) 633 (expressing reservations about the suggestion that a new norm of international law providing for a *generalized*, customary duty to prevent the occurrence of serious breaches of peremptory norms of international law, such as the prohibition of genocide, crimes against humanity, or war crimes; he concludes that the general concept of responsibility to protect, at least when it comes to individual States, has not yet ripened into a norm of *customary* international law). See also Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 American Journal of International Law 99 (hereafter Stahn, 'Responsibility to Protect'), 110.

[120] For a discussion of the concept of 'responsibility to protect', see UN General Assembly, Letter dated 26 July 2002 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General, UN Doc. A/57/303, 14 August 2002.

[121] See UN General Assembly, United Nations Millennium Declaration: Resolution Adopted by the General Assembly, UN Doc. A/RES/55/2, 13 September 2000, para. 26.

[122] For a discussion of the notion of 'responsibility to protect', see Stahn, 'Responsibility to Protect' (n 119) and references cited therein.

5.2.4 Duty to prevent and complicity in genocide

The duty to prevent genocide must be distinguished from the obligation binding on a state not to be complicit to the commission of such an act.[123] First, according to the ICJ, responsibility for complicity in genocide requires a *positive* act of aid or assistance on the part of an organ of the state in question, whilst responsibility for a failure to prevent may result from a mere failure to act on the part of the state.[124] For reasons outlined earlier, that limited understanding of the notion of complicity is questionable and it is unclear whether a difference can validly be drawn between the two situations on that basis.[125] Second, state responsibility for complicity in genocide would require a higher threshold of knowledge (i.e., 'full knowledge of the facts') than would be necessary for a finding of failure to prevent (i.e., requiring that 'the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed').[126] Finally, responsibility for a failure to prevent (and punish) does not require proof of the attributability of the underlying genocidal act to the state in

[123] Simma, 'Genocide and ICJ' (n 21) 263–64.

[124] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 432:

> [T]he Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention—and those to be satisfied in order for a State to be held responsible for 'complicity in genocide'—within the meaning of Article III, paragraph (*e*)—as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.
>
> In the first place, as noted, *supra*, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

[125] See *infra*, 5.2.3 and 11.7. The basis of the Court's reasoning is apparent from the academic writings of one of its members. See Simma, 'Genocide and ICJ' (n 21) 263. Judge Simma explains the distinction by reference to the fact that Article III of the Convention places the state under a 'negative obligation' (not, directly or indirectly, to support the commission of genocide) whereas the duty to prevent involves 'positive obligations' (to act and take steps to prevent the commission of such acts). This reasoning appears to mistake two elements of the notion of complicity: one, underlying the prohibition against complicity, that entails an obligation not to support the commission of a crime; and one that pertains to the manner in which this obligation could be violated. The fact that the obligation is fundamentally *negative* in nature does not mean that it can only be violated by a positive act. Instead, where otherwise under a duty to act, a culpable failure to do so could constitute an act of complicity. The reasoning of the Court, if accurately reflected in Judge Simma's writings, would appear to have mixed two separate elements of the notion of complicity and to have thus unduly restricted the notion of complicity for the purpose of assigning responsibility to a state in relation to acts of genocide.

[126] Simma, 'Genocide and ICJ' (n 21) 263. See also ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 436:

> [T]he Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.

question. It only requires proof of the ability on the part of the state to influence the perpetrators and a failure on the part of the state to take all measures in its power to prevent such acts.[127] In contrast, where complicity is alleged, the relevant act of assistance will need to be attributed to the state itself.

5.3 Duty to Punish

5.3.1 General considerations

5.3.1.1 Genocide as precondition

As is the case with the duty to prevent, the responsibility of a state for a failure to punish acts of genocide could only be engaged if and when such acts have actually been committed. A state could not evade its obligation to punish, however, by denying that acts of genocide have been committed. In that respect, an international tribunal finding that such acts have been committed, a commission of inquiry's determinations to the same effect, a court's provisional measures, a Security Council resolution alerting a state to the fact that acts of genocide might have been committed or other credible indications to that effect would put the state on sufficient notice of its obligation to act.[128]

The duty to punish acts of genocide does not require a state to prosecute such acts specifically under the genocidal label.[129] However, a state is required fully and effectively to investigate and punish conduct that could reasonably be said to amount to genocide. Within that general obligation, however, the competent investigative and prosecutorial authorities of the state concerned have some discretion as to the best way to characterize these acts in accordance with applicable laws. A state could therefore fulfil its obligation to punish acts of genocide by prosecuting those acts under other appropriate legal labels—international (e.g., as crimes against humanity) or domestic (say, murder).[130] In such a case, a state could not be said to have violated its obligation to punish acts of genocide merely because it has done so outside the normative framework of the law of genocide.

[127] See also Crawford and Olleson, 'State Responsibility' (n 41) 905 (noting that liability is incurred for a failure to punish acts of genocide in accordance with Article V of the Convention not because of the acts of the perpetrators are attributed to the State but because of the state's failure to comply with its own, self-standing, obligation to prevent and punish such acts).

[128] See also Simma, 'Genocide and ICJ' (n 21) 264 (suggesting that provisional measures orders made against Serbia by the Court did not create special obligations on the part of that state, but reduced the evidentiary burden on Bosnia-Herzegovina to establish that Serbia was or should have been aware of the great likelihood that genocide might occur).

[129] See also REDRESS/FIDH, 'Extraterritorial Jurisdiction in EU' (n 62) 13ff (describing the various manners in which domestic legal regimes have internalized the concept of genocide for the purpose of their legal order).

[130] In the *Niyonteze* case, for instance, a Rwandan national was prosecuted for what, in essence, were acts of genocide under the legal notion of war crimes after it was determined by local courts that the crime of genocide did not form part of the Swiss legal order at the time. *In re* Niyonteze, Decision of 30 April 1999 (Tribunal militaire, Division 2). See also *infra*, 5.3.2.2.

5.3.1.2 *An obligation of means*

Like the duty to prevent, the duty to punish is a duty of means. It does not require the state in question to succeed in prosecuting and punishing the crimes, but to try and use all available means to do so.[131]

5.3.1.3 *Duty to punish whose actions?*

In regards to the territorial state, the obligation to punish applies in relation to anyone responsible for the commission of a crime on its territory. In addition, in relation to both the territorial state and non-territorial states (and, arguably, certain non-state entities[132]), that obligation accrues not only in relation to officials of that state (or entity) but also in relation to any individual that the state (or entity) in question is in a position to influence—directly or through the organization to which he belongs.[133]

The duty to punish is otherwise universal in its reach. Where the requirements are met in a particular case in relation to a given state, it imposes an obligation upon that state to punish all those whom it is able to punish regardless of their rank or position, including heads of states and other state officials.[134] It also applies regardless of the nationality of the perpetrator.[135]

[131] See, e.g., *Nuon Chea et al.* Decision on Ieng Sary Objections (n 19) para. 38 (footnote omitted) ('Under the Genocide Convention, states parties undertake to prevent genocide, and to try and punish its perpetrators.').

[132] See, *supra*, 5.1.2.3. [133] See, *supra*, 5.3.1.3.

[134] See, generally, *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 93) para. 23 (pointing out that Article VI 'imposes an obligation on States to punish all persons committing genocide, including "constitutionally responsible rulers" '). See also, *supra*, 5.3.1.3.

[135] *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 93) para. 27:

> When articles IV and VI are read in conjunction, it appears that a Contracting Party to the Convention has a duty to prosecute all persons who commit genocide on its territory, including nationals of a foreign State. In other words, the Contracting Parties have consented to the exercise of jurisdiction over any of their nationals committing genocide by the courts of a foreign State, when the crime is committed on the latter's territory. Such consent also extends to incumbent 'constitutionally responsible rulers' by virtue of article IV of the Genocide Convention.

Ibid., para. 24:

> The crucial question that follows is which States have such a duty to punish? If the obligation falls only on the State of which the official is a national, immunities under international law do not arise. A systematic interpretation of article IV reveals however that the duty to punish is broader than this and supports a literal reading of article IV according to which immunities are removed.

Ibid., para. 30:

> [A]rticle IV of the Genocide Convention imposes an obligation on the Contracting Parties to punish perpetrators of genocide, including incumbent 'constitutionally responsible rulers'. Such an obligation may be borne, *inter alia*, by a State that is not the State of nationality of the perpetrator, if the crimes are committed on its territory. It follows that, by consenting to such exercise of jurisdiction by a foreign State over their 'constitutionally responsible rulers' committing genocide, the Contracting Parties have implicitly waived their personal immunities. This conclusion is further supported by the object and purpose of the Convention.

As discussed further, *infra*, 5.3.2.4, this does not mean that non-territorial states thereby have an obligation (or the ability and competence) to *prosecute* such a person as a matter of international law, although it might have that responsibility as a matter of domestic law. For a non-territorial state, the duty to punish might imply other, non-prosecutorial forms of actions material to the goal of bringing genocide suspects to justice.[136]

5.3.1.4 Geographical scope of application

In its Judgment of 11 July 1996 on Preliminary Objections, the ICJ stated that the rights and obligations enshrined in the Convention are held *erga omnes* and that the obligation of every State to punish genocide is not territorially limited by the Convention.[137] In its Judgment on the Merits, the ICJ further specified that Article VI of the Convention only obliges the Contracting Parties to institute and exercise its *territorial* jurisdiction over such acts.[138] The two holdings are not contradictory; rather, both touch upon different aspect of the general obligation to punish. The duty to punish is not limited to a duty to exercise jurisdiction over such crimes and to *prosecute* suspects. That particular aspect of the duty to punish is, under the Convention and customary international law, binding only on the territorial state, that is, the state in which the crimes were committed.[139] Where the state concerned—a state with an obligation to punish arising from its ability to influence the perpetrators—is not the territorial state, the duty to punish will not require it to prosecute the perpetrators in its own courts but will require it to participate in other ways in the effort to hold them accountable. In the *Bosnia-Serbia* case, for instance, the ICJ thus recalled that an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts could not be deduced from Article VI of the Convention as Serbia-Montenegro was not the territorial state.[140] It determined, however, that Serbia-Montenegro could be held responsible for failing to cooperate with the Yugoslav Tribunal, a distinct and separate element of the general duty to punish.[141]

Ibid., para. 37:

> [T]he Contracting Parties to the Genocide Convention have an obligation pursuant to article IV to punish all perpetrators of genocide, including incumbent 'constitutionally responsible rulers'. This obligation may extend to a foreign State, other than the State of nationality of the perpetrator, when the crimes have been committed on its territory. The territorial State has an obligation, inter alia, to arrest and prosecute the perpetrator in question with a view to suppressing the commission of crimes and preventing their future commission.

See, also, *supra*, 5.3.1.3. States other than the territorial state would not be prevented by international law from drawing their competence more narrowly and to restrict it, for instance, to their nationals only.

[136] This was the case, for instance, with the obligation and failure of Serbia-Montenegro to cooperate with the ICTY to bring Ratko Mladić to justice. See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 448–449.

[137] ICJ *Bosnia-Serbia* Preliminary Objections Judgment (n 17) para. 31.

[138] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 442.

[139] Other states might be bound by a similar obligation, but as a matter of domestic law, treaty obligation (e.g., for ICC State Parties) or UN Security Council resolutions.

[140] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 442.

[141] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 443–450, and 471(6) (finding that that Serbia violated its obligations under the Convention by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the ICTY and thus having failed to cooperate fully with that Tribunal).

5.3.2 Elements of duty to punish

5.3.2.1 General considerations

Like the duty to prevent, the duty to punish genocide leaves some discretion to the states concerned to decide how to best fulfil their obligation. However, their discretion in that regard is not absolute or unqualified. First, whilst a state can generally determine how to go about fulfilling that obligation, it must make that determination and act when confronted with a situation demanding it to act. Therefore, a state cannot opt to do nothing in such a situation.[142] This will have implications for a state which has custody of suspects but which is not the territorial state.

Second, the duty to punish has a particular meaning for the territorial state, which is required under the terms of the Convention to exercise its jurisdiction to prosecute such crimes where it is in a position to do so. This, in turn, subsumes a series of related obligations for that state, in particular: to adopt the requisite legal instruments to exercise that competence; to investigate credible allegations of acts of genocide; to arrest suspects; and to bring them to justice.

Third, the standard required of all states under a duty to punish acts of genocide is for a state to take *all* measures to ensure that those crimes are duly punished.[143] In turn, what this might imply in a given case will largely depend upon the circumstances of the case and, in particular, the nature and extent of its control or influence over the perpetrators and its ability to arrest or transfer a suspect or to take other relevant steps towards punishment. Thus, where it has the ability to do so (practically and jurisdictionally), the state in question will be expected and required to take adequate measures to see to it that perpetrators are made accountable for their actions. What form this might take in a particular case is discussed, *infra*, 5.3.2.2–5.3.2.9.

Finally, where an international penal tribunal is competent to prosecute acts of genocide, the general obligation to punish genocide will mean that a state with the ability to influence the perpetrators could be held responsible for a failure to punish where it has a duty to cooperate with that tribunal and fails to adopt the necessary means to cooperate with that tribunal with a view to ensuring that suspects are brought to justice.[144] This is the basis on which Serbia-Montenegro was said to be responsible for failing to assist in the arrest and transfer of genocide suspect, Ratko Mladić, to the International Criminal Tribunal for the former Yugoslavia (ICTY).

5.3.2.2 Duty to adopt the requisite legal framework

One of the core elements of a state's duty to punish genocide is the requirement to enact the necessary legislation to give effect to that obligation. This was already reflected in UNGA Resolution 96(I), which invited states to enact the necessary legislation for the prevention and punishment of this crime. Subsequently, it was formally sanctioned in

[142] See, *supra*, 5.2.2.5. [143] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430.
[144] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 443–450.

Article V of the Genocide Convention.[145] This requirement is logical considering that a state cannot excuse its own failure to act by reason of the shortcomings of its own laws.[146] This general normative obligation does not imply, however, that a state must necessarily integrate the notion of genocide into its own legal order, although many states have opted to do so.[147] Instead it means that a state must have the legal, procedural, and institutional tools necessary to effectively investigate, combat, and, as the case may be, prosecute such acts when under an obligation to do so, even if under other legal labels.[148]

5.3.2.3 Duty to do no harm

The general duty to punish genocide imports an obligation to refrain from taking any steps or to adopt measures that could negatively affect the overarching purpose of

[145] Article V of the Convention reads:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

See also American Law Institute, 'Restatement (Third) of the Foreign Relations Law of the United States' (1986), s 403:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

See also Ben Saul, 'The Implementation of the Genocide Convention at the National Level' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Saul, 'Implementation of Genocide Convention'), 58.

[146] See, *supra*, 5.3.2.2.

[147] See, generally, Case Matrix Network, *Implementing the Rome Statute of the International Criminal Court* (Centre for International Law Research and Policy 2017), in particular, s 4.2 on genocide; National Implementing Legislation Database <https://demo.hrlc.net/en/>. See also, Amnesty International, Universal Jurisdiction: A Preliminary Survey of Legislation Around the World (Amnesty International 2012) (hereafter Amnesty International, *Universal Jurisdiction Survey*), in particular Annexes I and II. In this study, Amnesty International noted that as of 1 September 2012, at least 118 (approximately 61.1%) UN Member States included genocide as a crime under national law and at least 94 (approximately 48.7%) UN Member States provided for universal jurisdiction over genocide. See also Dagmar Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2001) 5 Max Planck Yearbook of United Nations Law 249; Jann K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 Journal of International Criminal Justice 86; Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 Journal of International Criminal Justice 421; Morten Bergsmo *et al.* (eds), *Importing Core International Crimes into National Law* (TOAEP 2010). See also REDRESS/FIDH, 'Extraterritorial Jurisdiction in EU' (n 62) 13ff (describing the various manners in which domestic legal regimes have domesticated the concept of genocide for the purpose of sanctioning it in their respective legal order).

[148] See, *supra*, 5.3.1.1. See also REDRESS/FIDH, 'Extraterritorial Jurisdiction in EU' (n 62) 13ff. In 2005, EU Member States replaced the prior extradition system applicable between them with the European Arrest Warrant. The new framework decision requires national judicial authorities to recognize, with minimum formalities, requests for the surrender of persons made by the judicial authority of another Member State. Under the Framework Decision establishing the European Arrest Warrant, crimes with the jurisdiction of the ICC are specifically mentioned as crimes for which a double criminality requirement may not apply. See Council of the European Union, Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002/584/JHA, 13 June 2002 (hereafter EU Council Framework Decision on Arrest and Surrender), art. 2(2).

bringing perpetrators of acts of genocide to justice.[149] For instance, taking actions to prevent others from investigating or bringing to justice genocide suspects would fall into the category of prohibited conduct.[150]

5.3.2.4 *Duty to investigate and prosecute*

Pursuant to Article VI of the Convention, the territorial state is required to exercise its jurisdictional competence over genocide suspects and to prosecute them where it is able.[151] In relation to that state, a duty to investigate and prosecute therefore arises from the Convention itself and from customary law.[152] This is a duty of means, not of result, but *all* relevant means must be used by the territorial state to achieve that goal. Therefore, where the territorial state is not in physical custody of a genocide suspect, it would have the right and duty to seek the transfer or extradition of a suspect if that individual is not being investigated and prosecuted in the jurisdiction in which he is located.

Furthermore, while the Convention and customary international law do not *oblige* any other state to prosecute such acts, it does not *forbid* any of them from doing so.[153] It is also

[149] See, generally, UN General Assembly, Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UN Doc. A/RES/3074(XXVIII), 3 December 1973, Preamble and Principle 8:

> States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

[150] ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 87 (by analogy, regarding the duty to prevent).

[151] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 442. See also, *supra*, 5.3.1.4.

[152] See, generally, *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 93) para. 21:

> A plain reading of the text reveals that article IV is formulated in a mandatory manner, employing the phrase '*shall* be punished' (emphasis added). The provision imposes an obligation on States to punish perpetrators of genocide. In this regard, it makes no exception and clearly states that all persons committing genocide are liable for punishment, 'whether they are constitutionally responsible rulers, public officials or private individuals'.

See generally, ibid., para. 37 ('The territorial State has an obligation, *inter alia*, to arrest and prosecute the perpetrator in question with a view to suppressing the commission of crimes and preventing their future commission.'). For an illustration, see also UN Doc. A/HRC/28/18 (n 6) para. 73:

> All States are required to determine how to implement their obligations to ensure respect for international humanitarian law, especially in the framework of their obligation to investigate and prosecute allegations of war crimes and genocide. The Government of Iraq has a duty to investigate all allegations, which concern ISIL, ISF and affiliated armed groups, as well as other armed militias and to prosecute perpetrators, including responsible commanders and other superiors.

[153] See, *supra*, 4.1.3 and 4.2. See also Antonio Cassese, *International Criminal Law* (OUP 2003) (hereafter Cassese, *ICL 2003*), 293–5, 303; REDRESS/FIDH, 'Extraterritorial Jurisdiction in EU' (n 62) 6; Amnesty International, *Universal Jurisdiction: Duty of State* (n 147), Chapter One (Definitions), 11–12; Kenneth C Randall, 'Universal Jurisdiction under International Law' (1988) 66 Texas Law Review 785. See also *Case of the S.S. 'Lotus'* (Judgment of 7 September 1927) [1927] PCIJ (ser. A) No. 10 (Sep 7), 19:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is

apparent from the practice of states that an increasing number of countries have taken the view that the duty to punish acts of genocide attaches not just to the territorial state but also to states on the territory of which a suspect is found. Several non-territorial states have thus claimed to be acting not merely out of a possibility given to them by international law but out of a duty to prosecute genocide suspects found on their territory.[154] Such practice could one day crystallize into customary law and expand the customary law duty to prosecute beyond the territorial state, but this has yet to reach that status.

Where more than one state including the territorial state claims jurisdictional competence over suspected acts of genocide, the territorial state would enjoy no jurisdictional primacy as a matter of international law. Certain domestic systems will, however, provide for such an ordering of jurisdictional competences.[155]

> only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), (Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans, & Buergenthal) [2002] ICJ Rep 3 (hereafter ICJ *DRC-Belgium* 2002 Judgment, Higgins, Kooijmans, & Buergenthal Separate Opinion), paras 59–60, 79–85.

[154] See, e.g., *T v. Danish Prosecution Service*, Case No. 105/2013, ILDC 2140 (DK 2013), Supreme Court Appeal Judgment, 6 November 2013 (hereafter Demark 105/2013 Appeal Judgment) (basing its decision to investigate a suspect on Article I of the Convention, and later extraditing him to Rwanda); *Nulyarimma v. Thompson*, Appeal Decision [1999] FCA 1192 (hereafter *Nulyarimma* Appeal Judgment), para. 18 (finding that the peremptory obligations imposed by customary law on each state was to extradite or prosecute any person, found within its territory, who appeared to have committed any of the acts cited in the Convention's definition of genocide).

[155] See, e.g., Decision Regarding Allegations of Genocide in Guatemala (Spain Supreme Ct 25 February 2003) (placing a restrictive interpretation on universality, emphasizing that universal jurisdiction may only be exercised as a subsidiary principle, namely if another relevant state (e.g., the territorial or national state) fails to act upon an offence, and provided that there is a link between the foreign offence); Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 589, 590; *In re Adolfo Francisco*, Case No. App 84/1998, 1998/22604 (Nat'l High Ct Spain 4 November 1998). See also REDRESS/FIDH, 'Extraterritorial Jurisdiction in EU' (n 62) 3 ('A new concept of "subsidiarity" has been developed by certain states such as Belgium, Germany, France and Spain to give priority jurisdiction to courts of the territorial state or the nationality of the offender and/or international tribunals ahead of extraterritorial investigations or prosecutions.') and 25 (concerning the reliance by certain national jurisdictions upon the notion of 'subsidiarity' in the exercise of their jurisdiction). International law does not exclude the possibility of the competing jurisdictions being organized in a particular way or subject to an order of priority. In that sense, the UN Security Council was entirely permitted in the exercise of its Chapter VII competence to grant jurisdictional primacy to the *ad hoc* Tribunals for the former Yugoslavia and Rwanda over domestic courts. See, generally, *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 34) paras 49–64. Proceedings in the territorial state might be preferable for practical and evidential reasons, although such considerations do not reflect a legal right or entitlement on the part of that state or those concerned. See, generally, *Government of the Republic of Rwanda v. Vincent Brown and others*, Westminster Magistrate's Court Judgment, 21 December 2015 (hereafter *Rwanda v. Brown et al.* 2015 Judgment), para. 655:

> A final point that he raises is that the failure to allow the CPS to prosecute VB in the United Kingdom in relation to these genocide allegations is an abuse of the process of the court. The allegations arise in Rwanda and the prosecution witnesses live there, there is more of a connection to that country than this. I do not find an abuse.

Brown et al. v. Government of the Republic of Rwanda [2009] EWHC 770 (Admin) (hereafter *Brown et al. v. Rwanda* 2009 Judgment), para. 139:

> If the legal system of Rwanda had offered VB the prospect of a fair trial it would have been not merely proportionate, but plainly the most sensible course to extradite him to the country

5.3.2.5 *Duty to punish, delegation of competence, and non-surrender agreements*

5.3.2.5.1 Punishment through others

Does the duty to punish require the territorial state to always and necessarily exercise its *own* jurisdiction to investigate and prosecute a genocide suspect or can it be permitted to delegate that responsibility to a third party, for instance to the state of nationality of the suspect? A few preliminary observations are in order to try to answer that question: first, the duty stated in the Convention to punish acts of genocide is unqualified. This suggests that the territorial state cannot wash its hands of this responsibility and it must in fact take concrete steps to fulfil it where required and in a position to do so. At the same time, nothing in the Convention provides for a particular way in which that obligation must be fulfilled. The obligation to punish is one of *means* and therefore grants a degree of discretion to the territorial state regarding the manner of fulfilment of its obligation.[156] This would tend to suggest that the territorial state could, in principle, agree to another state investigating and punishing an individual suspected of committing an act of genocide on its territory without violating its obligation where there are credible assurances that the expectation of punishment is not thereby rendered meaningless or ineffective. This possibility might actually promote the goal of accountability where, for instance, the suspect is located in a third state (which might be unable or unwilling to extradite him) or where evidence relevant to his prosecution (including witnesses) might be located in that other state.[157]

5.3.2.5.2 Non-surrender agreements

A number of states have entered into agreements pursuant to which they have agreed to grant another state primary—or exclusive—competence over certain categories of individuals (generally, nationals of a state or its officials). In particular, so-called Article 98(2) agreements have been signed by the United States of America with ICC state parties which provide that absent the expressed consent of the party concerned, 'persons of one party' (i.e., officials and nationals) present in the territory of the other contracting state shall not be surrendered or transferred to the ICC for any purpose, or be surrendered, transferred, or expelled to any other third country, for the purpose of surrender to or transfer to the ICC. Would such an agreement be valid where the individual concerned is suspected of committing acts of genocide?

First, it is generally accepted that such agreements are not per se unlawful merely because they seek to ensure that suspects are tried in one jurisdiction rather than in

where the alleged offences were committed and where most of the potential witnesses still live whether or not there was also jurisdiction to try him in the UK.

[156] See, *supra*, 5.3.1.2.

[157] An illustration of that possibility may be found in the cooperation agreements signed by national prosecutors in the successor states of the former Yugoslavia, which provide for a system of mutual assistance and information sharing in regards to the prosecution of war crimes, crimes against humanity, and genocide committed on each other's territory. See Prosecutor's Office of Bosnia and Herzegovina and the Office of the War Crimes Prosecutor of the Republic of Serbia a Protocol on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide (31 January 2013); Agreement on Co-operation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity, and Genocide between War Crimes Prosecutors of Croatia and Serbia (13 October 2006).

another. However, where the underlying conduct involves acts of genocide, the validity of such an agreement would be conditioned by a number of factors. First, should it purport to qualify, reduce, or exclude the peremptory obligation of the territorial state to punish acts of genocide committed on its territory,[158] such an agreement would be invalid, at least in respect of any of the clauses that purport to restrict a state's duty to punish. The territorial state could not, therefore, validly agree not to fulfil its peremptory obligation to punish acts of genocide committed on its territory if the alternative is a transfer to a state in which there is no credible prospect of punishment. Consistent with this, surrender of a genocide suspect by the territorial state to another jurisdiction would only be permissible where the state to which that individual is transferred is committed to investigate effectively and, as the case may be, prosecute him.

Second, where the custodial state is not the territorial state, it does not have an international law obligation to prosecute such acts in its own courts. However, the prohibition on genocide and the associated duty to punish such crimes is held *erga omnes*. As such, it is in the interest of all states that such acts be punished and that interest is held by any state in relation to all others.[159] The custodial state cannot therefore—through action or inaction—contribute to shielding an individual suspected of genocide from accountability.[160] A state would, therefore, violate its obligation under the Convention (and under customary law) should it transfer a genocide suspect to a jurisdiction where there is no credible prospect of punishment. In the exercise of its decision to extradite or surrender such an individual, the transferring state thus acts as the custodian of the *erga omnes* interest of the international community to see to the punishment of acts of genocide and must ensure that this interest is not negatively affected by its decision.

Third, what of the situation where a genocide suspect is held by an ICC state party and is wanted by both the ICC and by a third state with which the custodial state has entered into an Article 98(2) non-surrender agreement? Non-surrender agreements are not per se invalid under the ICC regime.[161] Also, the Statute does not exclude the

[158] See, *supra*, 3.6.2, 5.1.1.4, and 5.3.1.4.

[159] See, *supra*, 3.6.3 and 5.1.1.4.

[160] This principle led the ICJ to conclude that Serbia, as a non-territorial state, had violated its duty to punish when it failed to cooperate with the ICTY in arresting and transferring Ratko Mladić to the custody of that tribunal. ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 443–450, 448, 465, 471(6) (disposition).

[161] *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute*, Joint Opinion of James Crawford, Philippe Sands, and Ralph Wilde, 5 June 2003 (hereafter Crawford–Sands–Wilde Joint Opinion); Harmen van der Wilt, 'Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?' (2005) 18 Leiden Journal of International Law 93 (hereafter Van der Wilt, 'Bilateral Agreements'). Such agreements have, nevertheless, been criticized as being contrary to the spirit of the Statute or as a misuse of Article 98(2) of the Statute. See, e.g., Joint Parliamentary Assembly of the Partnership Agreement concluded between the members of the African, Caribbean, and Pacific group of States, of the one part, and the European Community and its Member States, of the other part—Resolution on the International Criminal Court (ICC), ACP-EU 3560/03/fin, 31 March–3 April 2003 (hereafter ACP-EU Agreement on ICC); European Parliament, European Parliament Resolution on the International Criminal Court, P5_TA(2002)0449, 24 October 2002 (hereafter European Parliament, Resolution on ICC); Internal Opinion of the Legal Service of the EU Commission, 'Effective functioning of the International Criminal Court (ICC) undermined by Bilateral Immunity Agreements as Proposed by the U.S.' (2002) 23 Human Rights Law Journal 158 (hereafter EU Commission, 'ICC and Bilateral Immunity Agreements'), 158–9; Council of Europe, Council Conclusions, International Criminal Court (ICC), Annex: EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the

possibility for a state party to have surrender obligations towards a third party as a result of a treaty or agreement. This is readily apparent from the terms of Article 98 of the Rome Statute, which entertains the possibility of other international obligations standing in the way of a state party's ability of a state party to surrender of a suspect to the Court. This provision does not, however, grant state parties a blank cheque regarding the surrender of ICC suspects to the Court. First, Article 98(2) only applies to individuals *sent* by a state to another state in which they were detained.[162] This would imply that the individual in question was present in the custodial state at the behest and on behalf of the sending state.[163] Whilst this would arguably encompass state officials and military personnel sent to another state for official purposes, it would not apply merely as a result of their nationality or for reasons of convenience.[164] Furthermore, this would seem to imply that the 'receiving' state was aware of the fact that the individual in question had been sent by its state, so that *post facto* claims to that effect by the 'sending' state would in principle be ineffective.[165] In addition, the Preamble of the Rome Statute makes it clear that one of the fundamental purposes of the Court is to contribute to ending impunity for international core crimes.[166]

United States Regarding the Conditions to Surrender of Persons to the Court (hereafter CoE Guiding Principles on ICC Surrender Arrangements) (finding that '[e]ntering into US agreements as presently drafted would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties'); Council of Europe, Council Decision on the International Criminal Court and Repealing Common Position 2003/444/CFSP, 2011/168/CFSP, 21 March 2011; Amnesty International, *International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crime* (Amnesty International 2002).

[162] See, CoE Guiding Principles on ICC Surrender Arrangements (n 161) ('Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute.'). See also Claus Kreß and Kimberly Prost, 'Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck, Hart, Nomos 2016) (hereafter Kreß & Prost, 'Article 98'), 2143–44.

[163] For an even narrower view, see also EU Commission, 'ICC and Bilateral Immunity Agreements' (n 161) 158–9 (suggesting that any such agreement could only apply to members/personnel of a military force stationed abroad in the context of a military assignment).

[164] See Crawford–Sands–Wilde Joint Opinion (n 161) paras 41–45, suggesting that Article 98(2) does not permit a State party to enter into or apply an Agreement which provides for the return to a third State of any person who cannot objectively be treated as having been 'sent' by that State. The three scholars also suggested (ibid., para. 43) that:

> In our view the key factor requiring a nexus to the third State is not the status of the person or the activity he or she is performing, but rather the circumstances leading to his or her presence on the territory of the requested State Party. Such nexus would be assumed for persons who enjoy a certain status and are performing a particular activity, such as officials of the third State, e.g. a government minister or an ambassador or a soldier, who is in the territory of the requested State with the consent of that State to engage in official business of the sending State.

Van der Wilt, 'Bilateral Agreements' (n 161) 105–08; David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 Journal of International Criminal Justice 333. The Council of Europe's Guidelines also suggest that surrender as referred to in Article 98 of the Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3, of the Statute. See CoE Guiding Principles on ICC Surrender Arrangements (n 161).

[165] Markus Benzing, 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties' (2004) 8 Max Planck Yearbook of United Nations Law 181 (hereafter Benzing, 'US Non-Surrender Agreements and Article 98'), 210.

[166] See, in particular, ICC Statute (n 62) Preamble, fifth paragraph.

Therefore, all statutory provisions, including Article 98(2), must be interpreted in a way that does not contradict this overarching purpose and result in creating accountability gaps in relation to such crimes.[167] Thus understood, a non-surrender agreement could only come within the scope of Article 98(2) where it provides for an alternative route to accountability, that is, where it adds a willing, able, and competent jurisdiction (that of the sending state) to the existing jurisdictions of the custodial state and of the ICC.[168] In other words, the possibility for a state party to extradite an ICC suspect to a third party would only ever be permissible if surrender is sought (and granted) for the purpose of that individual being investigated and prosecuted in that state.[169] Surrender to a third party as an escape route from accountability would, therefore, not be permissible, even when performed pursuant to a non-surrender agreement binding on a state party. This is the approach seemingly adopted by the Supreme Court of the Philippines which determined that a non-surrender agreement between the United States and the Philippines was valid insofar as it did not result in creating a state of impunity for (potential) surrendered individuals but instead added a third competent jurisdiction (that of the United States) in addition to its own and that of the ICC to which the Philippines could send a suspect for the purpose of investigation

[167] See also EU Commission, 'ICC and Bilateral Immunity Agreements' (n 161):

> [T]he *raison d'etre* of the Rome Statute is to put an end to immunity for the perpetrators of the most serious crimes [...]. To allow contracting Parties to the Statute to become safe havens for such perpetrators by simply contracting out of their obligation to bring them to justice defeats the very object and purpose of the Statute. Therefore, in order to be consistent with the object and purpose of the Statute, Article 98(2) should be read not only to apply exclusively to Status of Forces Agreements, but even to apply to these only where they are concluded between Parties to the Statute.

Such a view, whilst perhaps a laudable attempt to limit the potentially prejudicial effect of such agreements, does not appear to be supported by the text of Article 98(2).

[168] CoE Guiding Principles on ICC Surrender Arrangements (n 161):

> [A]ny solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and where there is sufficient evidence— prosecution by national jurisdictions concerning persons requested by the ICC.

See also Crawford–Sands–Wilde Joint Opinion (n 161) paras 46–52 (drawing a distinction between new and pre-existing agreements). These authors also suggested that:

> It is inconsistent with the object and purpose of the ICC Statute for a State party to enter into or to apply a bilateral non-surrender agreement if purpose or effect of doing so would be to provide impunity to a person credibly suspected of having committed a crime within the jurisdiction of the ICC.

Ibid., para. 3. See also Kreß & Prost, 'Article 98' (n 162, 2nd edn) 1616–18, suggesting that Article 98(2) only applies to agreements existing at the time of adoption of the Statute and suggesting that a state adopting a new, i.e., post-Rome Statute, non-surrender agreement 'maneuvers itself into a potential conflict of treaty obligation which will materialize in the case of an actual ICC request for surrender and the assertion of its treaty right to non-surrender by the non-State Party'.

[169] See also Van der Wilt, 'Bilateral Agreements' (n 161) 103 (footnote omitted):

> If it should turn out that a bilateral agreement effectively impedes criminal investigations of core crimes on a national and international level and thus sustains impunity, the state party incurs responsibility for a breach of the Statute towards the other states parties.

and prosecution.[170] This decision reflects the view that for an agreement reached by a state party to come within the terms of Article 98(2), it must be compatible with the overarching accountability purposes of the Rome Statute and cannot create an exception thereto.[171]

Furthermore, Article 98 can only serve as a procedural objection to the surrender of an individual to the ICC. It cannot operate as a defence to the charges nor as a bar to jurisdiction of the Court. In other words, the existence of a conflicting obligation arising for a state party from an international agreement does not render the ICC incompetent. It merely places the state bound by such an obligation in a position of having to arbitrate between conflicting international obligations.[172] There is some dispute in regards to whether it is for the state party concerned or for the ICC to determine which of that state's international obligations should prevail in a given situation.[173] Whilst the ICC has taken the view that it is its own responsibility to make that determination,[174] a number of national courts have taken the opposite view.[175] Regardless of whether it is for the custodial state or for the ICC to decide this matter, the resolution of this conflict would be affected by the fact that the underlying charges pertain—partly or exclusively—to acts of genocide. First, as the obligation to punish is held *erga omnes*, the custodial state would have to ensure that the suspect is transferred to the custody of a jurisdiction where there is a reasonable prospect of investigation and, as the case may be, prosecution of that individual.[176] Where this is not the case or where the prospect of this happening is remote, transfer to such a jurisdiction

[170] See *Bayan v. Romulo, Muna v. Romulo and Ople*, Petition for Certiorari, Mandamus, and Prohibition, GR No. 159618, ILDC 2059 (PH 2011), 1 February 2011 (hereafter Philippines *Romulo* Supreme Court Judgment), paras 40, 44, 48–50.

[171] The question of (bilateral and multilateral) agreements that existed prior to the entry into force of the Rome Statute for the relevant state party is not addressed here. For a discussion of that issue, see Crawford–Sands–Wilde Joint Opinion (n 161). Despite the suggestion made by some commentators that Article 98(2) would only apply to pre-existing agreements (e.g., Kreß & Prost, 'Article 98' (n 162); Hans-Peter Kaul and Claus Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 Yearbook of International Humanitarian Law 143, 164–65), it is apparent that the plain text of this provision does not in fact support such a view. See also Van der Wilt, 'Bilateral Agreements' (n 161) 101 (rejecting the suggestion that Article 98(2) would only apply to pre-existing agreements).

[172] See *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development*, Case No. 27740/2015, Judgment, [2015] ZAGPPHC 402 (High Ct South Africa); *Minister of Justice and Constitutional Development v. Southern Africa Litigation Centre*, Case No. 867/15, Judgment, [2016] ZASCA 17 (Supreme Ct of Appeal South Africa); *Attorney General v. Kenya Section of the International Commission of Jurists*, Civil App No. 105/2012 & Crim App No. 274/2011, Judgment of the Court, 16 February 2018.

[173] See Guénaël Mettraux, John Dugard, and Max du Plessis, 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa' (2018) 18 International Criminal Law Review 577 (arguing that this determination must be done by the state of custody). See, *contra*, Crawford-Sands-Wilde Joint Opinion (n 161); Benzing, 'US Non-Surrender Agreements and Article 98' (n 165) 199.

[174] See, e.g., *Prosecutor v. Al-Bashir*, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the ICC Statute, ICC-02/05-01/09-290, 17 March 2017; *Prosecutor v. Al-Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, 12 December 2011.

[175] See references in *supra*, fn 174.

[176] This view is reinforced and corroborated by the principle pursuant to which ICC states parties have an obligation to each other not to act in such a way as to 'deprive' the treaty of its object and purpose, or to undermine its spirit. See hereafter ICJ *Nicaragua* Merits Judgment (n 34) paras 275–276.

would be barred by the custodial state's *erga omnes* obligation to punish. Second, the obligation to punish acts of genocide is *jus cogens* so that it can only be overridden by a norm of the same standing.[177] A mere contractual obligation held towards another state as a result of a treaty could not therefore circumvent or qualify that obligation. Third, as a result of Article VI of the Convention, an international penal tribunal that is willing and able to handle the case should have priority over a non-territorial state because there exists in relation to the former a conventional and customary legal obligation to prosecute the suspect that does not exist in relation to the latter. This obligation being held *erga omnes*, that is, by all and in relation to all, one could argue that such an obligation would demand priority be given to such an international penal tribunal over a jurisdiction in relation to which a treaty-based obligation of lesser normative standing might exist. Finally, as noted earlier, if the surrendering state is the territorial state, such an agreement could not have the effect of qualifying or undermining its conventional and customary law obligation to punish acts of genocide.[178] Therefore, it could not oblige the territorial state to renounce exercising its own competence over such acts although it could leave the door open for that state to opt to seek punishment of such acts through a third party jurisdiction where this is possible and provides a credible course of action to ensure accountability for such acts.

5.3.2.6 Duty to transfer or extradite suspects

5.3.2.6.1 An implied duty to transfer/extradite

Unlike other international instruments, the Genocide Convention does not explicitly provide for a duty to extradite as an alternative to prosecution.[179] Such an obligation could be implied, however, from the terms of the Convention. Professor Schabas

[177] See, *supra*, 3.6.2.

[178] See Philippines *Romulo* Supreme Court Judgment (n 170) para. 57 (preserving the jurisdiction of courts of the Philippines as those of the territorial state in the context of a non-surrender agreement with the United States).

[179] See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 UNTS 85 (hereafter Torture Convention), arts 3, 5, 8; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 21 October 1950, 75 UNTS 31 (hereafter Geneva Convention I), art. 49(2); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 21 October 1950, 75 UNTS 85 (hereafter Geneva Convention II), art. 50(2); Geneva Convention Relative to the Treatment of Prisoners of War, 21 October 1950, 75 UNTS 135 (hereafter Geneva Convention III), art. 129(2); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 21 October 1950, 75 UNTS 287 (hereafter Geneva Convention IV), art. 146(2) (regarding grave breaches of these conventions); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 7 December 1978, 1125 UNTS 3 (hereafter Additional Protocol I), art. 88(2); International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 20 October 2011, 2163 UNTS 75 (hereafter UN Mercenary Convention), art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, 23 December 2010, 2716 UNTS 3 (hereafter Convention on Enforced Disappearance), art. 13; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 11 November 1970, 754 UNTS 73, art. 3. The Secretariat Draft of the Genocide Convention had foreseen a provision regarding extradition. See UN Economic and Social Council, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947) (hereafter Draft Genocide Convention with Commentary), commentary to draft art. VIII, second paragraph ('The High Contracting Parties pledge themselves to grant extradition in cases of genocide.').

has thus suggested that 'a modern reading' of Article V might view this provision as equivalent to the *aut dedere aut judicare* duty.[180] Article VII reinforces that view insofar as it regulates certain aspects of the extradition process, although it does not expressly provide for an obligation to extradite.

In addition, there are strong indications that such a duty could be inferred from the general obligation to punish and that a duty to transfer or extradite a genocide suspect might be binding as customary law where the state holding the suspect cannot or will not prosecute that suspect. This is apparent already from incidents of state practice to the effect that such an obligation is indeed part of customary law.[181] For instance, the Federal Court of Australia determined, in cases concerning the Native Title Amendment Act 1998 and the Arabunna People, that the obligation *aut dedere aut judicare* was part of customary law in regard to the peremptory prohibition against

[180] See Schabas, *Commentary on the Rome Statute* (n 65) 45; John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in Antonio Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (OUP 2002), 699 (suggesting that an obligation to prosecute or extradite exists in relation to acts of genocide); Saul, 'Implementation of Genocide Convention' (n 145) 68–9. See also Robert Roth, 'The Extradition of Génocidaires' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009), 309 (suggesting that basing a duty to extradite on Article VII of the Genocide Convention is 'rather weak'). See also William A Schabas, 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes?" ' (2003) 1 Journal of International Criminal Justice 39.

[181] See, e.g., Statement by Argentina before the GA Sixth Committee, 2007:

> The principle of extraditing or prosecuting cannot be considered in a uniform way, because its eventual customary status could be proved in a case-by-case analysis, depending on each given category of crimes. From this perspective, we believe in the existence of an *opinio iuris* regarding the more serious crimes against international law, namely the genocide and the crimes against humanity.

Argentina's statement was referred to in: Amnesty International, *International Law Commission: The Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare) (Amnesty International Publications 2009) (hereafter Amnesty International, *ILC on Aut Dedere aut Judicare*), 5. See also UN General Assembly, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*): Comments and Information Received from Governments, UN Doc. A/CN.4/599, 30 May 2008 (hereafter UN Doc. A/CN.4/599), paras 47–55 (Russian representative), in particular, paras 54–55:

> 54. [...] We do not yet see such convincing evidence of the existence of a customary rule *aut dedere aut judicare*.
>
> 55. The question of the establishment of an obligation *aut dedere aut judicare* in customary international law with respect to a small number of criminal acts that arouse the concern of the entire international community merits separate analysis. This concerns primarily genocide, war crimes and crimes against humanity

See also Demark 105/2013 Appeal Judgment (n 154); *Nulyarimma* Appeal Judgment (n 154) para. 18; UN General Assembly, Preliminary Report on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur, UN Doc. A/CN.4/571, 7 June 2006 (hereafter Preliminary Galicki Report), para. 40:

> [A] large and growing number of scholars joins the opinion supporting the concept of an international legal obligation '*aut dedere aut judicare*' as a general duty based not only on the provisions of particular international treaties, but also on generally binding customary norms, at least as it concerns certain categories of crimes.

But see the (un-supported and un-reasoned) assertion by the United States that '[t]he United States does not believe that there is a general obligation under customary international law to extradite or prosecute individuals for offences not covered by international agreements containing such obligation'. UN General Assembly, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*): Comments and Information Received from Governments: Addendum, UN Doc. A/CN.4/579/Add.2, 5 June 2007, para. 2.

genocide.[182] Similarly, when responding to a refusal by Guatemala to grant five extradition requests pertaining to genocide suspects, an investigating judge in Madrid asserted that the *aut dedere aut judicare* obligation is based not only on conventional law but also on customary international law and arises out of the *jus cogens* character of the prohibition of genocide and crimes against humanity.[183] That view may also be inferred from the reasoning of the ICJ in the *Bosnia-Serbia* case. Having found that Serbia-Montenegro was not required under the terms of the Convention to prosecute the underlying acts in question (Serbia-Montenegro not being the territorial state), the Court took the view that it nevertheless had outstanding obligations arising from its obligation to punish as regards the transfer to the ICTY of persons accused of genocide (in particular, General Ratko Mladić), in order to comply with its obligations under the Genocide Convention.[184] The view that the requirement forms part of customary law is further supported by the growing amount of state practice in the form of domestic legislations criminalizing acts of genocide and providing for the possibility of prosecution of a person in the custody of a state if extradition or surrender is not possible to another competent (international or national) jurisdiction.[185] Finally, the view that there exists a customary law obligation to extradite or surrender genocide suspects where they cannot be tried in the custodial state is consistent with the object and purpose of the Convention to ensure accountability for such crimes. A different view could result in creating accountability loopholes where a state does not prosecute and declines to extradite a suspect leaving that him unpunished and unconcerned by justice.[186]

[182] *Nulyarimma* Appeal Judgment (n 154) paras 18–19:

> [T]he prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogatable obligation by each nation State to the entire international community. This is an obligation independent of the Convention on the Prevention and Punishment of the Crime of Genocide. It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. I accept, also, that the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention. It is generally accepted this definition reflects the concept of genocide, as understood in customary international law.
>
> [...]
>
> It follows from the obligation to prosecute or extradite, imposed by international customary law on Australia as a nation State, that it would be constitutionally permissible for the Commonwealth Parliament to enact legislation providing for the trial within Australia of persons accused of genocide, wherever occurring.

[183] See Amnesty International, *ILC on Aut Dedere aut Judicare* (n 181) 27–28 and references cited therein.

[184] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 448, 465.

[185] See, generally, Amnesty International, *ILC on Aut Dedere aut Judicare* (n 181) pp. 15 (regarding South Korea), 18 (regarding Argentina), 19 (regarding France), 20 (regarding Portugal and Switzerland), and 21 (regarding Uruguay). See also Article 9 of the 1996 ILC Draft Code against the Peace and Security of Mankind ('Obligation to extradite or prosecute'), which sets out the *aut dedere aut judicare* obligation relation to, *inter alia*, the crime of genocide: 'Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual.' International Law Commission, 'Report of the International Law Commission on the Work of its Forty-Eighth Session' in [1996 vol. 2 pt 2] *Yearbook of International Law Commission*, (United Nations 1998).

[186] See references, *supra*. See also Redress/African Rights, *Extraditing Genocide Suspects from Europe to Rwanda Issues and Challenges*, 1 July 2008; International Conference on the Great Lakes

Thus understood, the duty of all states to punish acts of genocide may be said to include and to subsume an obligation to transfer or extradite genocide suspects to a competent jurisdiction as an alternative to prosecution—*aut dedere, aut judicare*—where the custodial state is unable or unwilling to try the suspect.[187] Extradition would of course only be possible where the state in question has physical custody of the suspect[188] and where the applicable requirements for extradition or transfer are met.[189]

The application, in a domestic legal system, of statutory limitations regarding the underlying acts in question would not per se exclude the possibility of transfer of a suspect to such a jurisdiction if these have not yet lapsed and when the authorities have enough time to prosecute the suspect under the time remaining before the statutory limitation period expires.[190]

5.3.2.6.2 Genocide is not a political crime

Article VII, paragraph 1, of the Genocide Convention makes it clear that genocidal acts shall not be considered political crimes for the purpose of extradition. This, arguably, now reflects a general principle of international law.[191]

Region, Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, 29 November 2006 (hereafter Great Lakes Protocol), arts 14–16, in particular, art. 14(1) ('Crimes within the field of application of this Protocol shall be extraditable. Member States shall include these crimes in any extradition treaty applicable to them.').

[187] In practice, this scenario reflects the state of affairs in France where, unable or unwilling to extradite Rwandan nationals back to Rwanda, France has taken upon itself to prosecute them. See also *Rwanda v. Brown et al.*, 2015 Judgment (n 155) para. 648 (noting that if the two suspects are not extradited they could be tried in this jurisdiction).

[188] See ICJ *DRC-Belgium* 2002 Judgment, Higgins, Kooijmans, & Buergenthal Separate Opinion (n 153) para. 57:

> There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario so as to exclude* a voluntary exercise of a universal jurisdiction.

[189] Regarding the requirement of double criminality and what legal basis might meet that requirement, see *X v. Public Prosecutor*, Appeal Judgment, No. 13-87888, ILDC 2718 (FR 2014), 26th February 2014, France; Court of Cassation [Cass] Criminal Division. But see Demark 105/2013 Appeal Judgment (n 154).

[190] See, e.g., *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, 17 November 2006, paras 39, 42; *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, 17 May 2005, para. 41 (noting the fact that in the countries to which transfer was being considered—Serbia-Montenegro and Bosnia-Herzegovina—domestic law would provide for a bar to prosecution after a lapse of twenty-five years from the commission of a criminal act under consideration). In both cases, the ICTY took the view that this did not exclude the possibility of the suspect's referral to those jurisdictions as there remained enough time to undertake their prosecution at the domestic level.

[191] *In re Duško Cvjetković*, Case No. 15Os99/94, Judgment (Austria Supreme Ct. 13 July 1994) (unofficial translation):

> The Convention on the Prevention and Punishment of Genocide (the Genocide Convention) of 9 December 1958, BGBl/Federal Official Gazette/ 91/1958 (to which Yugoslavia also acceded—377—encl. Nr. 8 GP 7) provides in Article 7 that genocide and the other actions mentioned in Article 3 shall *not* be considered political crimes for the purposes of extradition. It therefore follows that neither the nature or character of the crimes ascribed to Duško CVJETKOVIĆ not precludes his extradition to his home country, but only, as described, the fact that no 'proper administration of criminal justice' is presently possible there.

5.3.2.6.3 Where prosecution and extradition are not possible

A situation could arise where a state is not permitted to extradite a suspect under its own laws (e.g., because he is a non-extraditable national or because of fair trial concerns in the requesting state) and where he is, at the same time, not competent or unable to prosecute that suspect. Can that state be held responsible for failing to fulfil its duty to punish in such a case? First, it must be noted that a state cannot excuse its failure to fulfil its international obligations by reason of the shortcomings of its own internal laws. The fact that a state failed to enact legislation to give effect to this prohibition would thus provide no valid justification for its failure to act. Where extradition is not possible for reasons unrelated to the custodial state, that state would be expected to ensure that its legislation provides for the broadest possible jurisdictional competence over such acts so as to prevent any accountability gap. In the first proceedings of their kind, courts in the Netherlands determined that Dutch law, as existed at the time, did not provide for their competence over acts of genocide committed by a Rwandan in Rwanda in 1994 and who at the time resided in the Netherlands.[192] The law was later amended to provide for the possibility of prosecution in Dutch courts of persons found on Dutch territory and who committed one of the listed international crimes (including genocide) outside the Netherlands.[193] Furthermore, where at a given time extradition is not possible, a state would be expected to review the possibility of extradition regularly if circumstances change.[194] In addition, where the law of the state does not allow for the prosecution of the acts as genocide, it must at least ensure that suspects are prosecuted under appropriate domestic equivalents.[195] Second, as a norm of *jus cogens*, the duty to punish such crimes could only be qualified by a competing international law norm of the same standing. Extradition might be impossible in a given case where, for instance, immunities,[196] or human rights considerations,[197] would prohibit it.[198]

In the City of Westminster Magistrates' Court between The Government of the Republic of Rwanda v. Vincent Bajinya et al., 6 June 2008, para. 127:

> This was at a time when if a court was satisfied that a crime had been committed for political reasons, this was a bar to extradition. The exception contained in the Convention makes it clear that genocide is a crime of such horrific proportions that a defendant should not be allowed to shelter behind such a bar.

Demark 105/2013 Appeal Judgment (n 154) para. 48.

[192] *Netherlands v. Rwandan*, 21 October 2008, Decision No. ECLI/NL/HR/2008/BD6568 (NL 2008) (NL Supreme Court) (hereafter *Rwandan* Decision on Jurisdiction).

[193] See art. 21, para. 4 of art. 2 Wet Internationale Misdrijven (Law on International Crimes) which entered into force 1.4.2012 (<https://zoek.officielebekendmakingen.nl/stb-2012-15.html en>; <http://wetten.overheid.nl/BWBR0015252/2017-01-01/0/Paragraaf6/Artikel21/informatie#Wijzigingen>).

[194] Such a process has been ongoing before English courts in relation to Rwandan suspects, who have been found to be un-extraditable on grounds of fair trial concerns in Rwanda. See references, *supra*, in fns 157 and 193.

[195] See, again, *In re* Niyonteze, Decision of 30 April 1999 (Tribunal militaire, Division 2) (where the accused was prosecuted for what amounted in effect to acts of genocide as war crimes in the absence of a necessary legal basis to do so under the genocide label).

[196] See, *infra*, 6.2.2.2.

[197] See, e.g., *Brown et al. v. Rwanda* 2009 Judgment (n 155) (rejecting the extradition of genocide suspect to Rwanda on the basis of concerns for his fundamental rights).

[198] A state might also be unable to extradite in a given case not as a result of international law, but as a consequence of its own domestic laws as with a state that is constitutionally prohibited to extradite its

These demands reflect the fact that the Convention implies a general prohibition on accountability sanctuaries for genocide suspects.[199] A state that is required to punish acts of genocide which fails to take all reasonable measures to ensure that such individuals are brought to justice—legislative, investigative, or prosecutorial—could thus engage its responsibility. However, the obligation to punish is an obligation of means, not of result, so that a state that has taken all necessary steps to try to secure the punishment of such individual but is unable to achieve that goal cannot for that reason alone be held responsible.

5.3.2.7 Duty to cooperate

5.3.2.7.1 Duty to cooperate with the territorial state and with an international penal tribunal

The Preamble of the Genocide Convention states that, in order to liberate mankind from such an odious scourge, international cooperation is required.[200] This echoes the terms of Resolution 96(I), which recommended 'international co-operation be organized between States with a view of facilitating the speedy prevention and punishment of the crime of genocide'. Such cooperation reflects the general interest of the international community not to leave acts of genocide unpunished.[201]

An underlying obligation to cooperate with competent jurisdictions under the Convention to investigate and prosecute acts of genocide is now part of customary law. The Convention does not provide for a general and explicit obligation to cooperate for the purpose of preventing or punishing genocidal acts. Instead, such an obligation has been inferred as a necessary element of the duty to punish. The ICJ has thus held that the FRY was required by the terms of the Convention to cooperate with the ICTY, a tribunal which it said constitutes an 'international penal tribunal' under the Convention and which was competent to punish the crimes in question.[202] On the

nationals or where a valid legal basis is unavailable. See, e.g., *Factor v. Laubenheimer*, 290 US 276 (1933), 287 (reflecting the position of the United States that extradition must be based on a treaty).

[199] *National Commissioner of the South African Police Service and Another v. Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 30 October 2014, par 32 and par 80 ('We dare not be a safe haven for those who commit crimes against humanity.').

[200] The Preamble reads: 'Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.' See also Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 Journal of International Criminal Justice 875 (Cassese, 'Criminal Notions and State Responsibility for Genocide'), 876; Yuval Shany, 'The Road to the Genocide Convention and Beyond' Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 11 (pointing to the Preamble of the Convention as *raison d'être* of the Convention, which seeks to coordinate the international response to the threat or commission of genocide).

[201] *CC* Judgment (n 66) para. 37 (footnotes omitted):

> Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order'.

See also John Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011), 157ff.

[202] See ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 443:

> It is thus to the obligation for States parties to co-operate with the 'international penal tribunal' mentioned in the above provision that the Court must now turn its attention. For it is

facts of the case, the Court held that the FRY had not cooperated fully with the ICTY and pointed, in particular, to the fact that it had failed to arrest and transfer ICTY genocide indictee, Ratko Mladić.[203] The same reasoning could have applied, *mutatis mutandis*, in relation to a failure to cooperate with the territorial state had it sought to exercise jurisdiction over that suspect. The Court's reasoning suggests that, under the terms of the Convention, an obligation to cooperate is not binding only on the territorial state and is thus not dependent on that state being competent to prosecute the crime. This is the logical consequence of the *erga omnes* nature of the obligations arising from the law of genocide: such an obligation exists in relation to *all* states and for the benefit of all. Under the terms of the Convention, an obligation to cooperate can therefore attach to any state with power over the perpetrators but it would only exist vis-à-vis or in relation to the territorial state and/or a penal international tribunal which are competent under the Convention to prosecute such crimes.[204] An obligation

> certain that once such a court has been established, Article VI obliges the Contracting Parties 'which shall have accepted its jurisdiction' to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory—even if the crime of which they are accused was committed outside it—and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

Ibid., paras 445, 448, 449:

> The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the 'international penal tribunal', the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have 'accepted [the] jurisdiction' of that 'international penal tribunal'; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty.

Ibid., para. 465. At paragraph 445 of its Judgment, the Court further found that '[t]he nature of the legal instrument by which such a court is established is without importance in this respect'. The ICJ then relied upon FRY's signing of the *Dayton* Peace Agreement that committed the country to cooperating with the ICTY and its membership in the United Nations as evidence of its having 'accepted its jurisdiction' in accordance with Article VI of the Convention. See ibid., paras 447, 449. The notion of 'international penal tribunal' would no doubt also apply, *inter alia*, to the ICC. See, e.g., *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 93) para. 9 ('Pursuant to article VI of the Convention, such immunities are removed for the purposes of prosecution, *inter alia*, before an "international penal tribunal". This Court constitutes exactly such an international penal tribunal.'), and para. 16 (suggesting, not quite convincingly, that as a consequence of having 'accepted [the] jurisdiction' of the Court, both Sudan and South Africa have an obligation to cooperate with the Court on the basis of article VI of the Genocide Convention and adding that this obligation runs parallel to South Africa's and Sudan's other obligations arising from the Statute and UN Security Council Resolution 1593 respectively); *Request Under Regulation 46(3) of the Regulations of the Court*, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18, 6 September 2018, para. 40 (footnotes omitted):

> After the entry into force of the UN Charter, States committed themselves to establishing an 'international penal tribunal' in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which is an instrument of quasi-universal participation nowadays. It was anticipated that this 'international penal tribunal' would have similar competences and working principles as the ICC, which was established fifty years later.

[203] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 448–449.

[204] See also ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) para. 86 (by analogy, regarding the duty to prevent).

to cooperate with any other state or hybrid jurisdiction cannot be inferred from the terms of the Convention.[205]

5.3.2.7.2 Duty to cooperate with other jurisdictions?

The practical effect of the ICJ Judgment in the *Bosnian* case is that the duty to punish imports a limited obligation on the part of states to cooperate.[206] Under the terms of the Convention, such an obligation is limited to providing cooperation to either of the two sorts of jurisdictions foreseen by it—the territorial state or an international penal tribunal. Can the view be taken that customary law now reaches beyond these two sorts of jurisdictions and that an obligation to cooperate would exist in relation to any jurisdiction that take over the responsibility of punishing such crimes? One view would posit that the purpose of the Convention demands that all states should cooperate to achieve punishment for such acts and that such a duty exists regardless of the jurisdiction that seeks that cooperation. Another interpretation would be that an obligation is foreseen by the Convention only where the jurisdiction seeking cooperation is one competent under its terms (i.e., the territorial state or an international penal tribunal). In its 1951 Advisory Opinion, the ICJ appeared to lean in favour of the former view when describing the cooperation required under the Convention as one intended 'to liberate mankind from such an odious scourge' and being of universal character.[207] Such a general obligation to cooperate would also be consistent with Article 1(3) of the UN Charter pursuant to which one of the purposes of the United Nations is to 'achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect

[205] Such a duty might, however, be expressly provided under the applicable normative regime. See, e.g., Great Lakes Protocol (n 188) arts 13, 20, 21–25. See also 5.3.2.7.2.

[206] See, in particular, ICJ *Bosnia-Serbia* 2007 Judgment (n 3) paras 448, 465.

[207] ICJ, Reservations to the Genocide Convention (n 5) 23:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention).

See also Cassese, *ICL 2003* (n 153) 301 (rejecting the suggestion that general customary rules would require states to exercise their jurisdiction on any grounds and regardless of the nature of the international crime in question), and 302–3 (suggesting, however, that an obligation to cooperate exists in relation to the punishment of acts of genocide):

> [I]t cannot be denied that at least with regard to the most odious international crimes such as genocide and crimes against humanity, there exists a general obligation of international *co-operation* for their prevention and punishment. This general obligation, clearly referred to with regard to genocide by the ICJ in 1951 in *Genocide* (at 23) and restated in 1996 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (at § 31) may among other things entail for States the general duty to set up appropriate judicial mechanisms or procedures for the universal repression of those crimes.

for human rights and for fundamental freedoms for all'.[208] Preventing and punishing genocide would squarely fall within the scope of such problems. A number of semi-official or soft law statements similarly call for or support the view that such a general obligation may exist, although the practice and authorities on which these claims are made are often thin or not readily apparent.[209]

Whilst the practice of states reveals a growing awareness of the need and desirability for greater cooperation among states to achieve the stated goals of the Convention,[210] it is doubtful that a general and mutual obligation to cooperate on the part of all states towards one another in relation to acts of genocide has now crystallized under customary law.[211] Whilst an obligation to cooperate may be said to exist in relation to the two jurisdictions foreseen by the Convention—the territorial state and international penal tribunals—it is perhaps too early to talk of a general, jurisdiction-neutral, obligation to cooperate with any state or court that takes upon itself the responsibility to punish acts of genocide. This, of course, does not prevent states from agreeing to be bound by such an obligation in relation to one or more states or for such an obligation to be provided explicitly in the regulatory regime of a hybrid or international criminal tribunal.[212] Nor would the Convention *prohibit* a state from volunteering to provide

[208] Moreover, Articles 55 and 56 of the Charter pledge all Members States to take joint and separate action in cooperation with the Organisation for the achievement of certain purposes, including 'universal respect for, and observance of, human rights and fundamental freedoms for all'.

[209] See, e.g., UN Economic and Social Council, Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005, para. 38:

> In larger perspective, the general obligation of States to ensure prosecution of individuals responsible for serious crimes under international law entails a duty not only to institute proceedings against suspects in a State's jurisdiction if the suspects are not handed over for trial by another court, but also, when applicable, to provide appropriate forms of cooperation to other States, international tribunals, and internationalized courts in connection with their criminal proceedings.

European Parliament, Motion for Resolution on ISIS (n 26). With this motion, the European Parliament called for the punishment of acts of genocide by 'enhancing international cooperation and through the International Criminal Court and international criminal justice'. The European Parliament also stated that genocide, crimes against humanity, and war crimes 'are of concern to all EU Member States, which are determined to cooperate with a view to preventing such crimes and putting an end to the impunity of their perpetrators, in accordance with Council Common Position 2003/444/CFSP of 16 June 2003' (ibid). See also ILC Draft Articles on State Responsibility (n 16) arts 40, 41(1). When read together, these provisions suggest that States shall cooperate to bring to an end, through lawful means, any gross and systematic breaches of peremptory norms of international law, which would include the prohibition of genocide. But see ILC Commentary on Draft Articles on State Responsibility (n 16) commentary (3) to art. 41 (concluding that '[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation' and suggesting that the obligation to cooperate to bring an end to serious breaches of international law, as reflected in the draft provisions 'may reflect the progressive development of international law'). See also Guy S Goodwin-Gill, 'Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute' in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999), 220 (suggesting that an obligation to cooperate with relevant authorities and to exchange information with them could be inferred from a general duty to punish *erga omnes* crimes).

[210] See, e.g., Council of the European Union, Council Decision on the Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes, 2003/335/JHA, 8 May 2003 (hereafter EU Council Decision on Core Crimes).

[211] See also Zimmermann, 'Obligation to Prevent Genocide' (n 45) 633.

[212] See, e.g., ICTY Statute (n 45) art. 29 and resolution para. 4; ICTR Statute (n 45) art. 28; ICC Statute (n 62) art. 86.

assistance and support to a non-territorial state or jurisdiction that seeks to punish acts of genocide.

5.3.2.7.3 Content of the duty to cooperate

As is apparent from the Judgment of the ICJ in the *Bosnia-Serbia* case, the duty to co-operate can require a state to arrest and transfer a genocide suspect where a state is in a position to do so in relation to either of the penal jurisdictions provided for under the Convention.[213] This might also imply other forms of assistance relevant and necessary 'to liberate mankind from such an odious scourge'. The Court also held in the *Bosnia-Serbia* case, that 'it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide'.[214] According to the Court, '[a]s well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce'.[215] The fact that the collective actions of states might have been better suited or more effective in a particular case to achieve that goal and that a single state's actions might not have been able to achieve it on its own thus provide no justification for a failure to act.

5.3.2.8 Duty not to give legal effect to such acts

As reasoned by the ICJ in the *Wall* case, given the character and the importance of the rights and obligations involved, it may be said that all states are under an obligation neither to recognize nor to give effect to an illegal situation resulting from the commission of acts of genocide.[216] The common interest in compliance with the relevant obligations under the Convention would also imply that every state is entitled to make a claim concerning the cessation of an alleged breach by another state party involved in the commission of acts of genocide.[217]

[213] See, in particular, ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 443:

> It is thus to the obligation for States parties to co-operate with the 'international penal tribunal' mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties 'which shall have accepted its jurisdiction' to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory—even if the crime of which they are accused was committed outside it—and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

[214] ICJ *Bosnia-Serbia* 2007 Judgment (n 3) para. 430. [215] Ibid.

[216] ICJ *Wall* Opinion (n 50) para. 159. It has been suggested that acts adopted in violation of this *jus cogens* prohibition could not acquire legal force or would lose any such force if and where carried out in violation of those norms. See ICJ *Bosnia-Serbia* Provisional Measures September 1993 Order, Lauterpacht Separate Opinion (n 4) paras 102–104 (arguing that Security Council resolution 713 (1991) which placed an embargo on weapons to Bosnia-Herzegovina might have contributed unwittingly to the commission of genocidal acts by Bosnian-Serb forces and ceased to be valid and binding for Members of the United Nations at the point where it would have required them to contribute to genocidal activities).

[217] See, by analogy in relation to the crime of torture under the 1984 Convention, ICJ *Belgium-Senegal* Judgment (n 9) para. 69.

5.3.2.9 *Countermeasures and plea of necessity*

The prohibition against genocide is absolute in character and does not permit any derogation.[218] A state taking countermeasures could not therefore derogate from that general prohibition by adopting measures amounting to or involving acts of (counter-)genocide.[219] Thus, in no case could a breach of the Convention serve as an excuse for another.[220] The plea of necessity likewise could not excuse the breach of this peremptory norm.[221]

[218] See, e.g., *Nuon Chea et al.* Decision on Ieng Sary Objections (n 19) paras 38–39.

[219] ILC Commentary on Draft Articles on State Responsibility (n 16) commentary (4) to art. 26 (footnote omitted):

> It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide.

[220] ICJ *Bosnia-Serbia* 1997 Order (n 111) para. 35.

[221] See ILC Commentary on Draft Articles on State Responsibility (n 16) commentary (4) to art. 26.

6

Immunities, Amnesties, and Statutes of Limitation

6.1 Immunities

6.1.1 Immunities under the Convention

There is some dispute as to whether Article IV of the Genocide Convention has the effect, explicitly or implicitly, of setting aside immunities in relation to acts of genocide.[1] General Assembly Resolution 96(I) made it clear that the 'principal offenders and associates, whether private individuals, public officials or statesmen' should be punished for the commission of acts of genocide. No exception to that general principle

[1] *Prosecutor v. Al Bashir*, Decision under Article 87(7) of the Rome Statute on Non-Compliance by South Africa with Request by the Court for the Arrest and Surrender of Al-Bashir, ICC-02/05-01/09, 6 July 2017 (hereafter *Al Bashir* Decision on South Africa's Non-Compliance), para. 109 (whereby the majority of the Chamber concluded that it was unable to conclude that the Convention rendered immunities inapplicable to the crime of genocide); *Prosecutor v. Al Bashir*, Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, Minority Opinion of Judge Marc Perrin de Brichambaut, ICC-02/05-01/09-302-Anx, 6 July 2017 (hereafter *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion), paras 2, 8–9, and 20–38 (suggesting that the combined effect of Articles IV and VI of the Genocide Convention renders personal immunities inoperative in relation to acts of genocide and suggesting that the exclusion applies *inter alia* to the question of arrest and transfer of a sitting head of state). Different views have similarly been advanced in the academic literature about the effect of the Genocide Convention upon the availability of state immunities. See, generally, Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 Journal of International Criminal Justice 333 (hereafter Akande, 'Security Council Referrals'), 350–51 (suggesting that Article IV of the Genocide Convention 'must be taken as removing any procedural immunities, as the availability of any such immunities would [mean] that the persons mentioned in Article IV are not punished'); Goran Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8 Journal of International Criminal Justice 365 (hereafter Sluiter, 'Using the Genocide Convention'), 378 (taking the view that the cooperation regime of the Genocide Convention contains no explicit ground for refusal and no immunity-based exception); Matthew Gillet, 'The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court' (2012) 23 Criminal Law Forum 63 (hereafter Gillet, 'Call of Justice'), 91–95; Björn Schiffbauer, 'Article IV', in Christian Tams et al. (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag CH Beck 2014) (hereafter Schiffbauer, 'Article IV'), 202–11 (suggesting that immunities are effectively set aside by the effect of Articles IV and VI of the Convention and suggesting that a contrary argument would conflict with the duty to ensure punishment of perpetrators provided for in the Convention). For the opposite view suggesting that immunities can stand including in relation to genocide, see Paola Gaeta, 'Immunities and Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Gaeta, 'Immunities and Genocide'), 317–20; William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) (hereafter Schabas, *Genocide in International Law*), 370; Dov Jacobs, 'The Frog that Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) (hereafter Jacobs, 'Frog that Wanted to Be an Ox'), 296–99.

was foreseen. This principle was in turn incorporated in Article IV of the Convention.[2] However, despite the fact that both Resolution 96(I) and the Convention provide that anyone, regardless of rank or position, can in principle be held responsible for acts of genocide, the conclusion that immunities would perforce be inoperative in relation to such crime does not necessarily follow from these provisions alone. However, Article VI of the Convention further provides that persons charged with genocide shall be tried by a competent tribunal of the state in the territory of which the act was committed or by an international penal tribunal. This obligation is absolute in nature, of *jus cogens* standing and held *erga omnes*.[3] Immunities could not therefore provide an exception to that obligation that is unforeseen by the Convention and which would conflict with its absolute and unqualified character. To the extent that they purport to have that effect, immunities would thus be invalid under the terms of the Convention.

6.1.2 Immunities under customary law

6.1.2.1 Inapplicability of immunities as defence or bar to jurisdiction

A significant issue to address is whether the exclusion of immunities for genocide is limited to the two jurisdictions provided for under the Convention or whether it has broader application. One domestic court has suggested that immunities were only to be set aside in domestic proceedings where the court's competence over acts of genocide is expressly provided for under the Convention, that is, if the court concerned is that of the state in the territory of which the crime was committed.[4] That view is unconvincing for a number of reasons. First, it conflates the question of jurisdictional competence and that of immunities. The Convention's exclusive reference to the territorial state only reflects the fact that a consensus could not be reached among negotiating nations that would have obliged other states to punish acts of genocide.[5] This was not intended and did not have the effect of restricting the principle of universal accountability arising from Article IV.[6] Nor was it intended to exclude the possibility of other jurisdictions being competent to punish such crimes.[7] It cannot therefore be inferred from the text or from the *travaux* that the drafters intended to let immunities operate in relation to jurisdictions not expressly foreseen in the Convention.

Second, as made clear by the International Court of Justice (ICJ), the duty to punish acts of genocide is now binding on *all* states under customary international law,

[2] See, *supra*, 3.3.3.1. [3] See, *supra*, 3.6.2 and 3.6.3, and, *infra*, 5.1.1.4.

[4] *HSA et al. v. SA et al.*, (Decision Related To The Indictment of Ariel Sharon, Amos Yaron And Others) 42 ILM 596 (2003) (hereafter *HSA* Decision Related to Indictment), 10–11 ('Qu'il ressort de la combinaison de ces deux dispositions que l'immunité de juridiction est exclue en cas de poursuite devant les juridictions identifiées à l'article VI précité mais ne l'est pas lorsque la personne accusée est traduite devant les tribunaux d'un Etat tiers s'attribuant une compétence que le droit international conventionnel ne prévoit pas').

[5] See, generally, William A Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948* (United Nations 2008) (hereafter Schabas, *Convention on Genocide, Paris 1948*). See, also, *supra*, 4.1.3.

[6] See, *supra*, Chapter 3. [7] See, *supra*, 4.1.3 and 4.2.

although it has particular implications for the territorial state.[8] To the extent that they would constitute an exception to that *erga omnes* and *jus cogens* international obligation,[9] immunities must be regarded as impermissible and invalid under customary law, just as they are under the Convention.

Third, the practice of states since the First World War suggests that customary law excludes immunities as a possible defence and as a bar to jurisdiction for *all* core international crimes, including genocide.[10] This is apparent from relevant practice pertaining to these crimes,[11] as well as from the jurisprudence of international

[8] See, *supra*, 5.1.1.4 and 5.1.2. See, in particular, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15 (hereafter ICJ, Reservations to the Genocide Convention), 23.

[9] See, *supra*, 3.6.2 and 3.6.3.

[10] Guénaël Mettraux, Max du Plessis, and John Dugard, 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa' (2018) 18 International Criminal Law Review 577 (hereafter Mettraux, du Plessis, & Dugard, 'Immunities'), 577–622 (and references cited therein).

[11] See generally Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference' (1920) 14 American Journal of International Law 95 (hereafter Preliminary Peace Conference Report), 116 ('The Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States.'), and 117; Treaty of Versailles (adopted 28 June 1919, entered into force 10 January 1920), art. 227; United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) (hereafter UNWCC, *History of the UNWCC*), 19–20, 263–74 (and references cited therein), 268–69 ('The principle that such administrators, including heads of States and members of Governments, could not shelter under the cloak of immunity, was clearly established by the majority of the Commission's members. [...] [T]he Commission and its Committee on Facts and Evidence adopted the rule of placing such persons on war criminals lists, and consequently of rejecting as irrelevant the doctrines of immunity of heads of State and members of Government, and of acts of State. Upon charges presented by various nations, Hitler was placed on the Lists of War Criminals on several occasions, and so were other high State administrators, such as Mussolini. The number of such accused persons increased in the course of time, and separate Lists of major or arch criminals were issued to deal exclusively with State administrators and other high officials.'), and 271 ('[W]ithin the sphere of crimes covered by the two [Nuremberg and Tokyo] Charters [crimes against peace; crimes against humanity; and war crimes], the doctrines of acts of State and of immunity of heads of State and State administrators were no longer relevant or operative as a basis for freeing the individuals concerned from penal responsibility.'); Charter of the International Military Tribunal (8 August 1945) (hereafter Nuremberg Charter), art. 7; Charter of the International Military Tribunal for the Far East (19 January 1946) (hereafter Tokyo Charter), art. 6; 'Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945' (1946) 3 Official Gazette Control Council for Germany 12 (hereafter Control Council Law No. 10), 50–55; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 7 (HM Stationery Office 1948) (hereafter UNWCC, *LRTWC* vol. 7), 50, 60–61; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) (hereafter UNWCC, *LRTWC* vol. 13), 117; 'Report to the President by Mr. Justice Jackson, June 6, 1945' in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (US Government Printing Office 1949) (hereafter Justice Jackson, 'Report to the President'), 46; UN General Assembly, Resolution 488(V): Formulation of the Nürnberg Principles (12 December 1950) (hereafter UNGA, Formulation of Nuremberg Principles); International Law Commission, 'Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal' (1950) 2 Yearbook of the International Law Commission (hereafter ILC, 'Principles of Int'l Law'), Principle III ('The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.'); UN International Law Commission, Draft Code of Crimes against Peace and Security of Mankind with commentaries, 1996 (hereafter ILC, Draft Code 1996), arts 7 and 8 (providing for the exclusion of immunities as a defence or bar to jurisdiction in relation to international crimes regardless of the domestic or international character of the jurisdiction concerned); Report of the International Law

criminal tribunals, which purport to reflect that practice.[12] Writing to the President of the United States after the Nuremberg trial, the principal American Judge, Justice

Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10 (1996) (hereafter UN Doc. A/51/10); UN Security Council, Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, 3 May 1993 (hereafter UN Doc. S/25704), paras 29, 34–35, and 57–58; UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 (hereafter ICTY Statute), art. 7(2); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, 8 November 1994 (hereafter ICTR Statute), art. 6(2); Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 1 July 2002 (hereafter ICC Statute or Rome Statute), art. 27; Statute of the Special Court for Sierra Leon, 16 January 2002 (hereafter SCSL Statute); Republic of Kosovo, Law No. 05/L-053, On Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) (hereafter Law on Specialist Chambers for Kosovo), art. 16(1)(b); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Doc. NS/RKM/1004/006, 27 October 2004 (hereafter ECCC Statute), art. 29(2) ('The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment'). See also UN Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (hereafter East Timor Tribunal Statute), section 15 (labelled 'Irrelevance of official capacity').

[12] See, generally, *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (International Military Tribunal 1947) (hereafter *Trial of Major War Criminals*), 223; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998 (hereafter *Furundžija* Trial Judgment), para. 140 (holding that Article 7(2) of the ICTY Statute, which provides for the exclusion of immunities as defence and bar to jurisdiction, 'are indisputably declaratory of customary international law'); In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić and Mićo Stanišić, Case No. IT-95-5-D, Decision, 16 May 1995 (hereafter *Karadžic, Mladić, & Stanišić* Decision on Deferral Proposal), para. 24 ('The official capacity of an individual even *de facto* in a position of authority—whether as military commander, leader, or as one in government—does not exempt him from criminal responsibility and would tend to aggravate it.'); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008 (hereafter *Karadžić* Decision on Immunity), paras 17 and 25 (considering it well established that any immunity agreement in respect of an accused indicted for genocide, war crimes, and/or crimes against humanity before an international tribunal would be invalid under international law); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadzic's Appeal of Trial Chamber's Decision on the Alleged Holbrooke Agreement, 12 October 2009 (hereafter *Karadžić* Appeal Decision on Holbrooke Agreement), para. 52 (footnotes omitted) ('The Appeals Chamber recalls that one of the fundamental aims of international criminal courts and tribunals is to end impunity and ensure that serious violations of international humanitarian law are prosecuted and punished. Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution. The Appeals Chamber considers that the facts that allegedly gave rise to the Appellant's expectations of immunity do not constitute an exception to this rule.'); *Prosecutor v. Milošević*, Case No. IT-02-54, Decision on Preliminary Motions, 8 November 2001 (hereafter *Milošević* Preliminary Motion Decision), paras 28, 26–34 ('There is absolutely no basis for challenging the validity of Article 7, paragraph 2, [ICTY Statute] which at this time reflects a rule of customary international law.'); *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004 (hereafter *Taylor* Immunity Decision), paras 47 (where the Appeals Chamber of the Special Court for Sierra Leone determined that since Nuremberg, the principle that sovereign immunities are not available as a defence to international crimes 'became firmly established'), and 52–53; *Prosecutor v. Blaškić*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 (hereafter *Blaškić* Judgment on Croatia Request for Review), para. 41; *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998. (hereafter *Kambanda* Trial Judgment); *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 1) paras 21–38; *Prosecutor v. Al Bashir*, Corrigendum to Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr, 15 December 2011 (hereafter *Al Bashir* Corrigendum to Decision on Malawi's Failure), para. 43 ('[T]he Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes.').

Francis Biddle, noted that by that point in time '[t]he official position of defendants in their government is barred as a defense'.[13] This general exclusion applies whether the competent jurisdiction is domestic, international, or hybrid.[14] From the point of view of international law, the determinative factor with regard to the availability of

[13] 'Prosecution of Major Nazi War Criminals: Report from Francis Biddle to President Truman' (1946) 15 Department of State Bulletin 954 (hereafter 'Francis Biddle Report to Truman'). See also Justice Jackson, 'Report to the President' (n 11) 46 ('Nor should such a defense [pursuant to which the accused could be shielded from liability based on his immunity] be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the Law".'); UNWCC, *History of the UNWCC* (n 11) 274 (noting that 'the trial of all these high officials is conducted on the basis of the rule that they do not enjoy immunity and cannot claim impunity on account of having acted in the course of their official functions').

[14] See, in particular, Control Council Law No. 10 (n 11) 50–55 (applicable to domestic courts); Law on Specialist Chambers for Kosovo (n 11) art. 16(1)(b) (the Kosovo Specialist Chambers being a domestic court); Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951, 79 UNTS 277 (hereafter Genocide Convention), arts IV and VI (applicable to both an international and a domestic court); ILC, Draft Code 1996 (n 11) arts 7 and 8 (intended to apply to both international and domestic tribunals); UN General Assembly, Resolution 95(I): Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, UN Doc. A/RES/1/95 (11 December 1946) (hereafter UN Doc. A/RES/1/95); UNGA, Formulation of Nuremberg Principles (n 8) Principle III. See also *Blaškić* Judgment on Croatia Request for Review (n 12) para. 41 (emphasis added) ('The general rule under discussion [protecting in principle the internal organization of each sovereign State] is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity *from national or international jurisdiction* even if they perpetrated such crimes while acting in their official capacity.'); *Milošević* Preliminary Motion Decision (n 9) paras 32–33; *Regina v. Bartle*, Opinions of the Lords of Appeal for Judgment in the Cause, 25 November 1998 (hereafter *Bartle* House of Lords Opinion), in particular, the opinion of Lord Slynn of Hadley; *Al Bashir* Corrigendum to Decision on Malawi's Failure (n 12). See also Mettraux, du Plessis, & Dugard, 'Immunities' (n 10) 591–98. See, *contra*, a number of national decisions that suggest that immunities could remain relevant to the prosecution of international crimes: *In re* Mofaz, [2004] ILDC 97 (UK District Court) (*Mofaz* First Instance Judgment); Gaddafi Case, Arrêt n° 1414 du 13 mars 2001 Cour de cassation—Chambre criminelle, 13 March 2001 (translated and reprinted in (2001) 125 ILR 490 (hereafter *Gaddafi* French Court of Cassation Decision) (unreasoned and un-sourced); *Tatchell v. Mugabe*, (2004) 136 ILR 572 (UK Magistrate Court) (hereafter *Mugabe* Magistrate Court Decision); *Vallmajo I Sala v. Kabarebe*, Case No. 3/2008, Indictment, [2008] ILDC 1198 (Nat'l Ct Spain) (hereafter *Kabarebe* Nat'l Ct Spain Indictment), para. 4; *Tachiona v. Mugabe*, 169 F Supp 2d 25 (SDNY 2001) (hereafter *Tachiona-Mugabe* Appeal Judgment); *In re* Fidel Castro, Case No. 1999/2723, [1999] ILM 596 (Nat'l Ct Spain) (hereafter *Castro* Nat'l Ct Spain Decision) (cited in Antonio Cassese, *International Criminal Law* (OUP 2003) (hereafter Cassese, *ICL* 2003), 292 fn 31 (where the Spanish *Audiencia nacional* rules that, as an incumbent head of state, Fidel Castro enjoyed immunities from prosecution in Spain including in relation to international crimes). In 2008, Spanish courts again refused to try the incumbent president of Rwanda, Paul Kagame, for his involvement in acts of genocide, crimes against humanity, war crimes, and terrorism on the basis that he benefited from head of state immunities. See, generally, Amnesty International, *España: La lucha contra la impunidad a través de la juridicción universal* (2008) (hereafter Amnesty International, *España*), 29. See also Council of the European Union, No. 8672/09, The AU-EU Expert Report on the Principle of Universal Jurisdiction (16 April 2009) (hereafter AU-EU Expert Report); Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill-Nijhoff 2013) (hereafter Pedretti, *Immunity of Heads of State*); Colin Warbrick, 'Immunity and International Crimes in English Law' (2004) 53 ICLQ 769 (hereafter Warbrick, 'Immunity in English Law'), 769–74.

immunities as a defence or a bar to jurisdiction is, therefore, not the character of the *tribunal* hearing the case but the nature of the *offence*.[15] Accordingly, for acts of genocide, immunities would be excluded as a defence and a bar to jurisdiction under customary law regardless of the domestic or international character of the competent tribunal.[16]

Based on the above, one might conclude that where a tribunal is competent to prosecute acts of genocide, immunities cannot validly operate as a defence or as a bar to jurisdiction in relation to such acts.[17] However, this does not necessarily mean that immunities are entirely inapplicable in all circumstances where allegations of genocide are at stake.[18]

[15] See, e.g., *Milošević* Preliminary Motion Decision (n 9) 32–33. See also *Bartle* House of Lords Opinion (n 11) in particular, the holding of Lord Slynn of Hadley ('[T]here is [...] no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before an international tribunal.') Significantly, Control Council Law No. 10 and its exclusion of immunity-based defence applied to proceedings before national, but not international, tribunals. In the same way, national jurisdictions have formally acknowledged the applicability of that principle in the context of their domestic proceedings. See also *Trial of Major War Criminals* (n 9) 22 ('The principle of international law which, under certain circumstances, protects the representatives of a State [...] cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment.'). See also, *supra*, 3.3.3.

[16] *Special Prosecutor v. Hailemariam (Mengistu) et al.*, Case No. 1/87, Preliminary Objections (Ethiopia Fed High Ct 9 October 1995) (hereafter *Hailemariam et al.* Preliminary Objections) (finding that the grant of immunities to the head of state would have been against international law and hence void, as genocide was an international crime and international law did not allow for the absolution of a head of state); *Blaškić* Judgment on Croatia Request for Review (n 12) para. 41 (in relation to charges of war crimes and crimes against humanity). See, *contra*, decisions of the Spanish National Court: *Kabarebe* Nat'l Ct Spain Indictment (n 14) (suggesting that Rwandan President, Paul Kagame, was immune from prosecution for genocide, crimes against humanity, crimes of war, torture, and terrorism); *Castro* Nat'l Ct Spain Decision (n 14) (to the same effect regarding immunities said to be enjoyed by the Cuban president, Fidel Castro); *Hassan II*, Order of Central Examining Magistrate No. 5 (Nat'l Ct Spain 1998) (hereafter *Hassan II* Order of Central Examining Magistrate) (regarding the King of Morocco).

[17] *Al Bashir* Decision on South Africa's Non-Compliance, Brichambaut Minority Opinion (n 1) paras 21 ('Grammatically, the phrase "whether they are constitutionally responsible rulers [or] public officials" is written in the present tense. This suggests that the obligation to punish extends even to "constitutionally responsible rulers" while they are still in office. This is the first indication that personal immunities may not attach to the official capacity of a person committing genocide.'), and 24 (suggesting that the use of the present tense in article IV of the Convention suggests that the obligation to punish covers incumbent State officials). In the application of these principles, both South African and Kenyan courts concluded that, whilst the immunities of President Al Bashir of Sudan were still applicable and relevant to the resolution of the ICC's request for arrest and surrender, South Africa and Kenya's obligations to cooperate with the ICC as state parties in relation to allegations of genocide (war crimes and crimes against humanity) required the two countries to give precedence to those obligations and to arrest and surrender him to the Court. Neither of them directly addressed the effect of the nature of the genocide charge upon their conclusion. However, the Kenya court pointed to the *jus cogens* nature of the underlying crimes as a factor of relevance to its conclusions and, having taken notice of Article IV of the Genocide Convention, found that an exception to immunities exists when the underlying crimes constitute crimes against humanity. *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development*, Case No. 27740/2015, Judgment, [2015] ZAGPPHC 402 (High Ct South Africa) (hereafter *South Africa Litigation Centre* High Ct Judgment); *Minister of Justice and Constitutional Development v. Southern Africa Litigation Centre*, Case No. 867/15, Judgment, [2016] ZASCA 17 (Supreme Ct of Appeal South Africa) (hereafter *SCA* Judgment); *Attorney General v. Kenya Section of the International Commission of Jurists*, Civil App No. 105/2012 & Crim App No. 274/2011, Judgment of the Court, 16 February 2018 (hereafter *Kenya International Commission of Jurists* High Ct Judgment).

[18] See, *infra*, 6.1.2.2 (Immunities and judicial cooperation) and 6.1.2.3 (Immunities and civil proceedings).

6.1.2.2 *Immunities and judicial cooperation*

The customary law exclusion of immunities as a defence and bar to jurisdiction for genocide and other international core crimes does not mean that immunities are irrelevant when international crimes are at stake. A similar exclusion does not yet exist in the context of judicial cooperation, where immunities remain relevant.[19] Thus, where a state or international tribunal seeks the arrest or transfer of a national of another state who enjoys state immunities, those immunities remain applicable in principle but their effect upon the possibility of judicial cooperation is ultimately decided by the law of the jurisdiction whose assistance is being sought, including any international obligation that might be binding upon that state.[20] As noted earlier, where the request for assistance involves allegations of genocide, the requested state will have to account for the fact that it has an *erga omnes* and absolute duty to take necessary steps to ensure that such crimes do not go unpunished and to refrain from any action that would undermine that goal.[21] This greatly restricts the possible circumstances where a state could give priority to competing legal obligations.

6.1.2.3 *Immunities and civil proceedings*

Existing practice suggests that as of yet, there is no customary law exclusion of immunities with respect to *civil* suits against states,[22] even when the underlying cause of

[19] Mettraux, du Plessis, & Dugard, 'Immunities' (n 10) 597–602. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, Dissenting Opinion of Judge Shahabuddeen, 1 July 2003 (hereafter *Krstić* Subpoena Application Decision, Shahabuddeen Dissent), para. 11 ('[T]here is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts.'). See also Liu Daqun, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?' in Morten Bergsmo and Yan Ling (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl 2012) (hereafter Daqun, 'Non-Immunity for Heads of State'), 55, 64, and 67–68.

[20] The matter is discussed in full in Mettraux, du Plessis, & Dugard, 'Immunities' (n 10). See *Blaškić* Judgment on Croatia Request for Review (n 12) paras 39–45; *South Africa Litigation Centre* Supreme Ct Judgment (n 17) para. 84; Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), (Judgment of 14 February 2002) [2002] ICJ Rep 3 (hereafter ICJ *DRC-Belgium* 2002 Judgment), paras 58, 61, and 51.

[21] Regarding the *erga omnes* nature of its obligations, see, *supra*, 3.6.3 and 5.1.1.4. This state of affairs is apparent, for instance, from proceedings before South African and Kenyan courts pertaining to the ICC's efforts to arrest President Al Bashir of Sudan on charges involving allegations of genocide. In both cases, it was determined that, whilst relevant and applicable, the head of state immunities of President Bashir did not provide an absolute exception to the possibility of arrest and transfer, but required these states to weigh their competing international obligations in accordance with their own legal order and normative hierarchy. This ultimately led the courts of both countries to determine, based on their own laws, that President Bashir should have been arrested and transferred to the custody of the ICC. *South Africa Litigation Centre* Supreme Ct Judgment (n 17); *Kenya International Commission of Jurists* High Ct Judgment (n 17) 40. See also Mettraux, du Plessis, & Dugard, 'Immunities' (n 10) 597–602 (and authorities cited therein).

[22] See, e.g., *Al-Adsani v. United Kingdom*, App. No. 35763/97, 21 November 2001 (hereafter *Al-Adsani* Judgment), para. 61; *Kalogeropoulou v. Greece & Germany*, App No. 59021/00, 12 December 2002 (hereafter *Kalogeropoulou* Judgment), 417; Jurisdictional Immunities of the State (*Germany v. Italy: Greece Intervening*) (Judgment of 3 February 2012) [2012] ICJ Rep 99 (hereafter *Germany-Italy* 2012 Judgment), paras 90–104.

the suit arguably involves allegations of genocide.[23] The applicability of immunities in such cases is not excluded by international law and the question of what effect they could have on the proceedings will depend on the circumstances of the case, the law of the jurisdiction concerned as well as the way in which that legal order ranks competing international obligations.[24]

6.1.3 Immunities and the ICC

6.1.3.1 Interplay between Articles 27 and 98 of the Rome Statute

As far as the International Criminal Court (ICC) is concerned, immunities are regulated by two provisions of the Rome Statute: Article 27 and Article 98. The interplay of these provisions has given rise to much, and contradictory, jurisprudence from the Court. The purpose and effect of Article 27 is twofold: its first paragraph excludes immunities as a defence and thus, for the purpose of establishing liability, eliminates any privilege that might have resulted from that person's role or function.[25] Article 27(2) makes it clear that the official capacity in which an individual acted does not constitute a jurisdictional bar to his or her prosecution before the Court.[26] In effect, Article 27 prevents an ICC defendant from evading liability by reason of his official role or function and sets aside any potential immunity claims. This provision thus reflects the customary law exclusionary principle that an official position and its related immunities offer no defence and no procedural bar to a court's jurisdiction over an individual who is charged with committing a core international crime.[27] As a jurisdictional provision, Article 27 only deals with the

[23] *Stichting Mothers of Srebrenica and Others against The Netherlands*, App No. 65542/12, 11 June 2013, para. 158 ('However, unlike *Jorgić*, the present case does not concern criminal liability but immunity from domestic civil jurisdiction. International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*. In respect of the sovereign immunity of foreign States this has been clearly stated by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, §§ 81–97. In the Court's opinion this also holds true as regards the immunity enjoyed by the United Nations.').

[24] See, e.g., Court of Appeal At Nairobi, Civil Appeal, No. 105 of 2012 consolidated with Criminal Appeal No. 274 of 2011, Between the Attorney General *et al* and The Kenya Section of International Commission of Jurists, 16 February 2018.

[25] It also makes it clear that, as has been the case since Nuremberg, an official position offers no ground in mitigation of sentencing. See also Mettraux, du Plessis, & Dugard, 'Immunities' (n 10) 610 fn 103.

[26] Professor de Wet has rightly noted that Article 27(2) would supersede and set aside immunities arising from both domestic and international law. See Erika de Wet, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 Journal of International Criminal Justice 1049 (hereafter de Wet, 'Al-Bashir's Visit to South Africa'), 1055 (pointing to the fact that Article 27(2) refers to immunities and special procedural rules 'under national or international law').

[27] See generally *Prosecutor v. Ruto & Arap Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11-777, 18 June 2013 (hereafter *Ruto* Decision on Excusal), paras 66–71. See also *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), paras 41–51; *Prosecutor v. Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09, 9 April 2014 (hereafter *Al Bashir* DRC Cooperation Decision), paras 21–30. *See also SCA* Judgment (n 17) para. 59. It would be wrong therefore to suggest that whilst an accused before the ICC loses the benefit of his immunities as defence and as bar to jurisdiction as a result of Article 27, he would still enjoy those as a matter of customary international law. Article 27 reflects and tracks customary international law on that point. See *supra*, at 6.1.2.1. Therefore, a defendant

effect (or, rather, the *absence* of effect) of an official position and related immunities on the jurisdiction of the Court *itself*.[28] It does not regulate, nor purport to regulate, the effect of these immunities on the jurisdiction of any other court.

The second provision of relevance is Article 98 of the Statute. Pursuant to Article 98's first paragraph, the Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, that is, a state that is not a state party. Article 98 thus provides a *blocking* mechanism that sets a limit on the ability of the ICC to demand cooperation from a state in relation to the surrender of a suspect or other forms of assistance where such cooperation would affect the sovereign immunities of a *third state*. Therefore, the ICC Statute does not give state parties express or implied authority to disregard the immunities of a state which is not a state party. Instead, it expressly reminds the state party that its statutory obligations must be interpreted *in light of* and must accommodate its other international obligations, including those arising from another state's sovereign immunities. When seised of a request for assistance from the Court, it is for the requested state to determine whether the implementation of a request for surrender or assistance under Article 98 would result in a violation of its other international obligations. This may be subject to a review by the Court only exceptionally where the interpretation offered by the state or by one of its organs is manifestly incorrect.[29] Where the state is of the view that the implementation of a request would result in a violation of its international obligations, it must notify the Court in order to trigger the procedure provided by Article 98.[30] The Court can step in and impose its own interpretation only when the position taken

appearing before the ICC would not be more entitled to his immunities before the ICC than he would before a court of law that would apply customary international law. *See contra* Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13 Journal of International Criminal Justice 1027 (hereafter Tladi, 'Duty on South Africa'), 1037.

[28] See ICC Statute (n 11) art. 27(2).

[29] *See, e.g., Marković v. Italy,* App No. 1398/03, 14 December 2006, para. 95. *See also,* James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) (hereafter Crawford, *Principles of Public Int'l Law*), 53–54 (citing Case Concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*) (Judgment of 30 November 2010) [2010] ICJ Rep 639 (hereafter ICJ *Diallo* 2010 Judgment), para. 70; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/03/25, (Annulment Proceeding) Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 (hereafter ICSID *Frankfurt Airport-Philippines* Annulment Decision), paras 236, 242). The Pre-Trial Chamber in the *Bashir* case took the view that this responsibility belongs to the Court rather than the state seised with the request for assistance. *Prosecutor v. Al Bashir,* Prosecution's Submissions in Advance of the Public Hearing for the Purposes of a Determination under Article 87(7) of the Statute with Respect to the Republic of South Africa in the case of *The Prosecution v. Omar Hassan Ahmed AL BASHIR,* ICC-02/05-01-09, 17 March 2017 (hereafter *Al Bashir* Prosecution Submissions for Article 87(7) Hearing), para. 60 ('In terms of the application of article 98, rule 195 of the Rules confirms that when a requested State raises a problem in respect of article 98, while it must provide relevant information to the Court, this is "to assist the Court in the application of article 98." As such, it emphasises that it is for the Court to determine whether the conditions in article 98(1) or (2) are met. Should the Court determine they are not, it may proceed with the cooperation request and the requested State Party must comply.').

[30] *SCA* Judgment (n 17) para. 78. Article 98(1) of the ICC Statute does not oblige the requested State to take any step to resolve that tension. It is also apparent from the text of Article 98(1) that if the Court

by the state is manifestly incorrect.[31] Pursuant to Rule 195, where a state has taken the view that the request is incompatible with its other international obligations for reasons related to the immunities of a third state, the state would have to provide any information relevant to assist the Court in its application of Article 98. In this regard, the Court may seek a waiver of immunities from the state concerned and, arguably, conduct the 'manifestly incorrect' review of the requested state's determination. Absent such waiver, and perhaps short of the situation where the position of the state is manifestly unfounded, the ICC would lack the authority to order or force a State party to act in violation of the immunities of a state which is not a party to the ICC.[32]

6.1.3.2 Waiver of immunities

By joining the ICC, state parties have renounced the right to raise immunities as ground for non-cooperation with the Court in relation to their own nationals. This implied waiver of immunity has a collective effect because a state party could not refuse to arrest or transfer an official from another state party on the basis that she or he enjoys immunities.[33] Immunities, therefore, only operate before the ICC as exception to an obligation to cooperate when they are those of officials from a third state—that is, officials from a non-state party.

With regard to officials from a non-state party, a loss of immunity could occur when the Security Council refers a situation to the ICC and *explicitly* waives those

fails to obtain a waiver of immunities from the third State, this would in turn preclude a finding of non-cooperation on the part of the requested State pursuant to Article 87(7). Under that provision, the requested state's failure to comply with the Court's request would not be 'contrary to the provisions of this Statute' but in accordance therewith. See ICC Statute (n 11) art. 93(6) ('If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.'). See also ibid., art. 99 (regarding the modalities of implementation of a request for assistance—'unless prohibited by such law').

[31] To the extent that one would imply that the Court has power to review the decision of the state concerned, international law principles would limit that authority to verifying the compatibility of the interpretation given by domestic courts of their own laws in light of that state's international obligations towards the Court. See generally Certain German Interests in Polish Upper Silesia (*Germany v. Poland*), (Merits), [1925] PCIJ (ser. A) No. 6 (Aug 25) (hereafter PCIJ *Germany-Poland* Merits Judgment), 19; *Garcia Ruiz v. Spain*, App No. 30544/96, 21 January 1999. (*Garcia Ruz* Judgment), para. 28. Compare Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands v. Sweden*) (Judgment of 28 November 1958, Separate Opinion of Lauterpacht) [1958] ICJ Rep 55 (hereafter ICJ *Netherlands-Sweden* 1958 Judgment, Separate Opinion of Lauterpacht), *with* Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands v. Sweden*) (Judgment of 28 November 1958, Separate Opinion of Quintana) [1958] ICJ Rep 55 (hereafter ICJ *Netherlands-Sweden* 1958 Judgment, Separate Opinion of Quintana). In accordance with this standard, it would therefore be for the state concerned to interpret its own laws in the first place. Crawford, *Principles of Public Int'l Law* (n 28), 53–54 (citing ICJ *Diallo* 2010 Judgment (n 24) para. 70; Panevezys-Saldutiskis Railway Case (*Estonia v. Lithuania*), (Judgment), [1939] PCIJ (ser. A/B) No. 76 (Feb 28) (hereafter PCIJ *Estonia-Lithuania* 1939 Judgment). See also Mettraux, du Plessis, & Dugard, 'Immunities' (n 10) 611–16.

[32] See also ICC Statute (n 11) art. 93(3).

[33] See, e.g., *Kenya International Commission of Jurists* High Ct Judgment (n 17) 40:

> By virtue of Article 27 [of the ICC Statute], all States Parties through ratification of the Rome Statute consent to waive any immunity under international law. This is the statutory basis for the requested State Party to arrest and surrender the wanted foreign Head of State of another State Party. Secondly and of more significance because Article 27(2) codifies rules of customary international law, it is our considered view that it applies even to Heads of State and officials of non-States Parties in situations envisaged under Article 87(5)(a)(b) under that Article the Court may invite any non-State Party to provide assistance on the basis of

immunities.[34] A state can also directly waive its own immunities.[35] The existence of the Rome Statute does not automatically waive third parties' immunities.[36] However, the Court has sometimes relied on what it says is a customary law exclusion of immunities to set aside third parties' claims of immunity.[37] The position of the Court on that point fails to distinguish between immunities as defence or bar to jurisdictions, which are indeed ineffective in relation to international core crimes under customary international law (as reflected in Article 27 of the Statute) and immunities in the context of situations of judicial assistance where they can remain operative. The ICC Chambers in these cases did not muster any evidence of state practice or *opinio juris* to support its suggestion that immunities are always and necessarily effective in such context.[38]

6.2 Amnesties

6.2.1 Amnesties and international crimes

6.2.1.1 No general exclusion of amnesties for all international crimes

It is sometimes suggested that international law provides for a general prohibition on amnesties for international crimes.[39] The reality of the matter is much more nuanced.

> an *ad hoc* arrangement or agreement. As a matter of fact, where a non-State Party fails to comply with requests made pursuant to any such arrangement or agreement, the Court is permitted to inform the Assembly of States Parties or the Security Council just as it would do in the case of a State Party's failure.

See also Paola Gaeta, 'Official Capacity and Immunities' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) (hereafter Gaeta, 'Official Capacity and Immunities'), 992.

[34] See, e.g., *Blaškić* Judgment on Croatia Request for Review (n 12) paras 38, 41–42. For an illustration of such waiver, see UN Doc. S/25704 (n 11) para. 55. In a number of decisions, the ICC has suggested or implied that immunities are inapplicable in cases of referrals by the UN Security Council by reason of an *implicit* waiver of immunities. See, e.g., *Al Bashir* DRC Cooperation Decision (n 26) paras 26–32; *Prosecutor v. Al Bashir*, Decision Following the Prosecutor's Request for an Order further Clarifying that the Republic of South Africa is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir, ICC-02/05-01/09-242, 13 June 2015 (hereafter *Al Bashir* Decision on South Africa's Obligation to Arrest), paras 6–9. The *travaux* do not indicate any intention on the part of the drafters to waive immunities; in fact, the *travaux* indicates the contrary. See UN Security Council, Reports of the Secretary General on the Sudan, UN Doc. S/PV.6887, 13 December 2012 (hereafter UN Doc. S/PV.6887), 16; UN Security Council, Reports of the Secretary-General on the Sudan and South Sudan, UN Doc. S/PV.7080, 11 December 2013 (hereafter UN Doc. S/PV.7080); Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98' (2013) 11 Journal of International Criminal Justice 199 (hereafter Tladi, 'ICC Decisions on Chad and Malawi'). Considering the firm practice of the Council to waive immunities explicitly when intended, the ICC's decisions suggesting that implicit waivers are acceptable are unconvincing. See also Mettraux, du Plessis, & Dugard, 'Immunities' (n 10) 603–08.

[35] ICC Statute (n 11) art. 98(1).

[36] de Wet, 'Al-Bashir's Visit to South Africa' (n 25) 1056 (footnote omitted) ('Nothing in the ICC Statute can remove the immunity belonging to non-State Parties as that would create obligations for third states in violation of the *pacta tertiis* rule and also render Article 98 meaningless.').

[37] See *Al Bashir* Corrigendum to Decision on Malawi's Failure (n 12) paras 34, 36–43; *Prosecutor v. Al Bashir*, Decision Pursuant to Article 87(7) of the ICC Statute on the Refusal by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, 13 December 2011 (hereafter *Al Bashir* Decision on Chad's Refusal to Comply), paras 13–14.

[38] See Mettraux, du Plessis, & Dugard, 'Immunities' (n 10) 602–03.

[39] The practice of the United Nations provides many illustrations for such a claim. See, e.g., UN Security Council, Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and

International instruments dealing specifically with international crimes rarely addressed the issue of amnesties. The Charters of the Nuremberg and Tokyo Tribunals did not do so. Nor did the Genocide Convention or the statutory instruments of the *ad hoc* Tribunals or the Rome Statute. In contrast, Control Council Law No. 10, which regulated war crimes trials in occupation zones, suggested that for any prosecution undertaken under this legislation, the accused would not be entitled to the benefits of any immunity, pardon, or amnesty granted under the Nazi regime and clarified that these would not be admitted as a bar to trial or punishment.[40] The Statute of the Special Court for Sierra Leone similarly excluded the application of amnesties to its proceedings,[41] whilst the matter was left to the discretion of the tribunal at the Extraordinary Chambers in the Courts of Cambodia.[42] Article 6(5) of Additional Protocol II to the Geneva Conventions also addresses the question of amnesties and conditionally allows for the possibility of amnesties in relation to certain categories of crimes and criminals.[43]

Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004 (hereafter UNSG Report on Transitional Justice in Conflict), paras 10 and 64(c) (recommending that the Security Council should ensure that peace agreements and its resolutions and mandates 'reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, [... and] that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court' and stating that amnesties cannot be granted for international crimes such as genocide, crimes against humanity or other serious violations of international humanitarian law); UN Security Council, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000 (hereafter UNSG Special Court for Sierra Leone Report), paras 22 ('While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.') and 23. In 2004, the UN Secretary-General recommended that it be ensured that 'peace agreements and Security Council resolutions and mandates [...] reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any UN-created or assisted court.' UNSG Report on Transitional Justice in Conflict (n 36) para. 64(c). Professor Scharf recalls, however, that the United Nations 'pushed for, helped negotiate, and/or endorsed the granting of amnesty as a means of restoring peace and democratic government' with respect to Cambodia, El Salvador, Haiti, and South Africa. Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell International Law Journal 507 (hereafter Scharf 'Amnesty Exception'), 507ff. In 1994, the UN and the Organisation of African States were negotiating a broad amnesty as part of the Governors Island Agreement in Haiti. The Security Council approved the agreement and commented on multiple occasions that it constituted 'the only valid framework for the solution of the crisis in Haiti'. Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 International & Comparative Law Quarterly 91 (hereafter Gavron, 'Amnesties in Light of Int'l Law Developments'), 106 (and references cited therein).

[40] Control Council Law No. 10 (n 11) art. III(5).

[41] SCSL Statute (n 11) art. 10 (stipulating that an amnesty granted for the crimes falling under the Court's jurisdiction 'shall not be a bar to prosecution'). See UN Security Council, Resolution 1315(2000), UN Doc. S/RES/1315(2000), 14 August 2000 (hereafter UNSC Resolution Establishing SCSL), 2–3 (establishing the Special Court for Sierra Leone). See also UNSG Special Court for Sierra Leone Report (n 36) paras 22–23.

[42] ECCC Statute (n 11) art. 40 ('[T]he Government of Cambodia 'shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in [the relevant articles of this law]. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers').

[43] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 7 December 1978, 609 UNTS 1125

Amnesties have been applied at the domestic level in a variety of cases involving allegations of international crimes.[44] However, there is evidence of a growing reluctance to give effect to amnesties in relation to international core crimes.[45] For instance, in *Finta*, the defendant raised an objection to the competence of Canadian courts to try him as he had already been tried in Hungary in his absence and convicted of 'crimes against the people'. Sometime later, the punishment of former gendarmerie commander Imre Finta in that country became statute-barred and, in 1970, the Presidential Council of the Hungarian People's Republic issued a general amnesty which applied to Finta. In Canada, where Finta faced subsequent prosecution, the

(hereafter Additional Protocol II), art. 6(5) ('At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detailed.'). The International Committee of the Red Cross (ICRC) Commentary to that provision specifies the following: 'Amnesty is a matter within the competence of the authorities. [...] The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided.' International Committee of the Red Cross, Commentary of 1987: Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 6, 8 June 1977 (hereafter ICRC Commentary on Art. 6 of Protocol II), paras 4617–4618. See also Law on Specialist Chambers for Kosovo (n 11) art. 18.

[44] See Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013) (hereafter *Belfast Guidelines*), 41–43. See also Louise Mallinder, 'Amnesties' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) (hereafter Mallinder 'Amnesties'), 420 (noting that amnesties were also granted in relation to the crimes of the Second World War). On Christmas Eve 1946, General Joseph T. McNarney, European Theater Commander, announced an amnesty for 800,000 'lesser' Nazis to 'encourage those who come under its terms to seek the ways of democracy'. A number of counsel who represented defendants in Control Council Law No. 10 proceedings themselves benefited from this amnesty. See, generally, Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (US Government Printing Office 1949) (hereafter Taylor, *Final Report to Secretary of the Army*), 300ff.

[45] See, e.g., *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), 3 November 2011 (hereafter *Nuon Chea et al.* Decision on Ieng Sary Objections), paras 47 (footnotes omitted) ('The establishment of several international and hybrid criminal tribunals in the last two decades, including the ECCC, is further evidence of states' determination to ensure that international crimes do not go unpunished. The Statutes of the ICTY and ICTR, adopted unanimously by the Security Council, evidence the types of crimes for which prosecution and punishment are considered imperative, and the Statutes of the SCSL and the Special Tribunal for Lebanon specifically provide that amnesties granted to persons falling within the jurisdiction of each respective court shall not be a bar to prosecution.') and 52–53; *Prosecutor v. Kallon & Kamara*, Case No. SCSL-2004-15/16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 (hereafter *Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision), paras 12 ('The establishment of the Special Court was thus an implementation of the determination of the Security Council to bring those responsible for serious violations of international humanitarian law to justice.') and 82, 84 ('The submission [...] that there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law is amply supported by materials placed before this Court. [...] It is accepted that such a norm is developing under international law."); *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, 25 May 2004 (hereafter *Kondewa* Lomé Accord Amnesty Jurisdiction Decision), paras 8, 57 (arguing, but providing no support for the suggestion, that Article 10 of the Statute 'reflects customary international law which nullifies amnesty given to persons accused of bearing great responsibility for serious breaches of international law'). See also *Belfast Guidelines* (n 41) 39 ('[E]ven among the international and hybrid courts, there are divergent positions on the existence of a prohibition on amnesty for international crimes under customary international law.').

trial judge found that the amnesty did not, either in its own terms or by operation of Hungarian law, constitute a pardon, and determined that the Hungarian trial and conviction of Finta were nullities under Canadian law. As a result, he concluded that Finta was not entitled to plead *autrefois convict* or pardon.[46] The same general approach underlies the annulment process of amnesties in other jurisdictions.[47]

State practice on that point allows for three basic conclusions. First, practice is too contradictory to allow for a general suggestion that customary law excludes the possibility of amnesties for all international crimes in all circumstances.[48] Second, it is apparent from that practice that the validity of such amnesties is subject to increasingly strict conditions.[49] Third, two sorts of amnesties are regarded by international law as entirely impermissible and therefore as invalid: (i) those concerned with acts of genocide, torture or grave breaches of the Geneva Conventions;[50] and (ii) blanket,

[46] *R v. Finta*, 1994 1 SCR 701 (hereafter *Finta* Supreme Ct Judgment).

[47] See, e.g., *Gelman v. Uruguay*, (Merits and Reparations, Judgment), [2011] Inter-Am. Ct. H. R. (ser. C), No. 221 (Feb. 24) (hereafter InterAmCtHR *Gelman-Uruguay* 2011 Judgment) para. 241 and p. 61 (noting that a number of automatic and unconditional immunities for gross human rights violations were annulled in Argentina, Peru, and Uruguay).

[48] In 2003, for instance, having conducted an analysis of state practice in this respect, Cassese said the following:

> [Innovative manifestations of international practice] are not yet so widespread as to warrant the contention that a customary rule has crystallized, the more so because [...] no customary rule having a general purport has yet emerged imposing upon States the obligation to prosecute and punish the alleged author of any international crime. Indeed, if any such a rule could be held to have taken shape, on could infer from it that granting amnesty would conflict with such a rule. Perhaps the current status of international practice, in particular its inconsistency combined with the more and more widespread *opinio juris* in the international community that international crimes should be punished, could be conceptualized as follows: There is not yet any general obligation for States to refrain from enacting amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless, if the courts of another State having in custody persons accused of international crimes decide to prosecute them although in their national state they would benefit from an amnesty law, such courts would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States.

Cassese, *ICL* 2003 (n 11) 315ff. See generally Sarah Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone' (2005) 5 Human Rights Law Review 271 (hereafter Williams, 'Amnesties in Int'l Law'); Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014) (Cryer *et al.*, *Intro to ICL*), 570–72; Scharf 'Amnesty Exception' (n 36); Mallinder 'Amnesties' (n 41) 422; Diane Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005) (hereafter Orentlicher Report on Principles to Combat Impunity), 14 (putting force a restrictive view of permissible amnesties for core, international, crimes).

[49] *Belfast Guidelines* (n 41) 9–10, 32–33.

[50] The applicability of amnesties in relation to acts of genocide is addressed *infra*, 6.2.2. Regarding the crime of torture, see generally UN International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev 1, 29 July 1994 (hereafter UNHRC General Comments 1994), 30 (General Comment 20: Article 7, 44th Session, 1992). Concerning torture under Article 7 of the Covenant, the Human Rights Committee held that '[a]mnesties are generally incompatible with the duty of States to investigate such acts [torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.' UNHRC General Comments 1994 (n 47) 30 (reiterated in the UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Chile, UN Doc. CCPR/C/79/Add.104, 30 March 1999 (hereafter UNHRC Chile Concluding

self-granted, amnesties.[51] Aside from these two categories, the validity of amnesties concerned with international crimes will be determined by the competent tribunal based on a number of considerations pertaining to their content, the process by which they were adopted, their compliance with general requirements of human rights law, and their general effect upon the pursuit of truth, reconciliation, and accountability.[52]

6.2.1.2 *No acquired rights under international law*

International law does not endow national amnesties with legal force. Nor does it create enforceable rights for its beneficiaries that would arise from international law. Instead, international law provides for a number of basic criteria that national amnesties need to satisfy lest they be regarded as *invalid* from the point of view of international law.[53]

Observations 1999), para. 7). Regarding 'grave breaches' of the Geneva Convention, see, *infra*, 12.2.2.5.3 (and references cited).

[51] See, generally, *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, Separation Opinion of Justice Robertson, 25 May 2004 (hereafter *Kondewa* Lomé Accord Amnesty Jurisdiction Decision, Robertson Separate Opinion), para. 30 (taking issue with the validity of blanket amnesties and suggesting that these are 'in general' contrary to international law); *Nuon Chea et al.* Decision on Ieng Sary Objections (n 42) paras 40–55, and in particular 49 (pointing to the fact that 'state practice regards blanket amnesties for serious international crimes to be in breach of international norms' but not prohibiting them altogether); Communication 431/12, *Thomas Kwoyelo v. Uganda*, African Commission on Human and Peoples' Rights, Decision of 24 August 2018, ACHPR/COMM/431/12/UG/1512/18, paras 292–293. See also Cassese, *ICL* 2003 (n 11) 315ff ('One might add that, in light of the current trends of the international community, one may find much merit in the distinction suggested, at least for minor defendants, by a distinguished judge and commentator, between amnesties granted as a result of a process of national reconciliation, and blanket amnesties.'); Naomi Roht-Arriaza, 'Special Problems of a Duty to Prosecute: Derogations, Amnesties, Statutes of Limitations and Superior Orders' in Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (OUP 1995) (hereafter Roht-Arriaza, 'Special Problems of a Duty to Prosecute'), 59–60 (and references cited therein); UN Economic and Social Council, Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations, Prepared by Mr Guissé and Mr Joinet pursuant to Sub-Commission Resolution 1992/23, UN Doc. E/CN.4/Sub.2/1993/6, 19 July 1993 (hereafter Guissé & Joinet, UN Report on Impunity of Perpetrators), paras 105–118.

[52] *Belfast Guidelines* (n 41) 62–63 (describing the role of international courts).

[53] See, generally, John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (OUP 2002) (hereafter Dugard, 'Possible Conflicts of Jurisdiction'), 699; Cassese, *ICL* 2003 (n 11) 315; Roger O'Keefe, *International Criminal Law* (OUP 2015) (hereafter O'Keefe, *ICL*), 477; Williams, 'Amnesties in Int'l Law' (n 45). For illustration, see e.g., *Nuon Chea et al.* Decision on Ieng Sary Objections (n 42) para. 50; *Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision (n 42) paras 71, 67, and 84; *Fédération Internationale des Ligues des Droits de l'Homme et al. v. Ould Dah*, No. 195 du 23 Octobre 2002 Cour d'Appel de Montpellier (hereafter *Ould Dah* Court of Appeal Decision); *Ould Dah v. France*, App No. 13113/03, Decision on Admissibility, 17 March 2009 (hereafter *Ould Dah* Decision on Admissibility). In *Pinochet*, the Spanish court held that Chile's 1978 Decree-Law on General Amnesty did not preclude the exercise of universal jurisdiction by Spanish courts. See *In re* Augusto Pinochet, Case No. App 173/1998, 1998/22605 (Nat'l High Ct Spain 3 November 1998) (hereafter *Pinochet* Appeal Judgment); see also *Prosecutor v. F*, 25 June 2007, Decision No. LJN:BA9575, ILDC 797 (NL 2007) (The Hague, District Court) (hereafter *Prosecutor v. F* District Court Judgment) (affirming the exercise of universal jurisdiction over war crimes charges despite the alleged existence of an amnesty in Afghanistan); *Case of Gallieri*, Orden de prision provisional incondicional de Leopoldo Fortunato Galtieri por delitos de asesinato, desaparicion forzosa y genocidio (Nat'l High Ct Spain 5 March 1997) (holding that Argentina's amnesty laws were contrary to Argentina's international treaty obligations). See also Sean D. Murphy, Third Report on Crimes Against Humanity, UN Doc. A/CN.4/704 (23 January 2017) (hereafter Murphy, Third Report on CAH), paras 297 and 291 (footnote omitted)

Therefore, domestic amnesties cannot create a legitimate expectation for potential beneficiaries that they will definitely be free of the possibility of prosecution for violations of international law.

6.2.1.3 No extra-territorial effect of amnesties

The legal effect of national amnesties is limited to the country in question. A national amnesty carries no direct legal effect in the jurisdiction of another state or before an international tribunal[54] and would not bar prosecution before a foreign or international jurisdiction with concurrent prescriptive jurisdiction.[55]

('In considering the effect of an amnesty, a distinction might be drawn between the ability of an amnesty to affect a prosecution in the State where the amnesty was issued, and its ability to affect a prosecution before the courts of other States or a prosecution before an international or "hybrid" court. With respect to prosecution before the courts of other States, it is generally accepted that the granting of amnesty by one State has no direct effect on prosecutions in a different State.'); *Belfast Guidelines* (n 41) 23 ('Although amnesties bar criminal proceedings within the states that enacted the amnesty, they cannot bar international, hybrid or foreign courts from exercising jurisdiction. Such courts may decide under their own jurisdiction whether to recognise an amnesty.').

[54] See, generally, Dugard, 'Possible Conflicts of Jurisdiction' (n 50) 699 (noting that other states or international tribunals are not required to recognize grants of amnesty as these have no extra-territorial effect and pointing to the *Pinochet* case as an illustration of that fact); Cassese, *ICL* 2003 (n 11) 315 ('There is not yet any general obligation for States to refrain from enacting amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless if the courts of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States.'); O'Keefe, *ICL* (n 50) 477. See also *Belfast Guidelines* (n 41) 23 (stating that amnesties cannot bar international, hybrid, or foreign courts from exercising jurisdiction).

[55] *Nuon Chea et al.* Decision on Ieng Sary Objections (n 42) para. 50; *Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision (n 42) paras 71 and 67 (footnote omitted) ('Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.'), and 84. Whilst its conclusion is correct, the reasoning adopted by the *Kallon* Chamber to conclude the irrelevance of national amnesties to a third party is not persuasive. The Chamber mixes the issue of jurisdiction and obligation to prosecute, infers the impermissibility of somethings (amnesties) from an unrelated matter (jurisdictional competence), and fails to explain the basis upon which it could claim that 'universal jurisdiction' exists over any crime as a matter of international law. For a critical discussion of that decision and, in particular, the court's failure to establish that the crimes in question are subject to universal jurisdiction, see Simon M Meisenberg, 'Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone' (2004) 86 International Review of the Red Cross 837 (hereafter Meisenberg, 'Legality of Amnesties'), 843ff. See also Williams, 'Amnesties in Int'l Law' (n 45). In the case of Ely Quid Dah, French courts declined to apply the Mauritanian amnesty law as a bar to their jurisdictional competence. See *Ould Dah* Court of Appeal Decision (n 50) (in relation to the crime of torture) (finding that a law of amnesty only has effect on the territory of the state concerned and cannot be opposed to third countries). The European Court of Human Rights (ECtHR) subsequently approved this finding. *Ould Dah* Decision on Admissibility (n 50) (considering that amnesty laws are generally incompatible with the duty of States to investigate acts of torture). The ECtHR also found that the Mauritanian Amnesty Law could not prevent the applicability of French Law before the French Courts seised the case because of their universal jurisdiction. Ibid. In *Pinochet*, the Spanish court held that Chile's 1978 Decree-Law on General Amnesty did not preclude the exercise of universal jurisdiction by Spanish courts. See *Pinochet* Appeal Judgment (n 50); see also *Prosecutor v. F* District Court Judgment (n 50) (affirming the exercise of universal jurisdiction over war crimes charges despite the alleged existence of an amnesty in Afghanistan); *Gallieri* Provisional Order (n 50) (holding that Argentina's amnesty laws were contrary to Argentina's

However, another jurisdiction may exercise its discretion and choose to give effect to a foreign amnesty,[56] but it has no legal obligation under international law to do so.[57] One may need to reserve the situation where the setting aside of an amnesty would be required to prevent an abuse,[58] or where it would constitute a grave infringement of the fundamental human rights of the individual concerned.[59] In such cases, a tribunal might have to weigh the competing interests at stake before deciding whether to disregard or give effect to such an amnesty.

6.2.2 Amnesties and genocide

Certain normative features of the crime of genocide suggest that amnesties cannot apply to that crime.[60] An amnesty which purports to apply to acts of genocide would therefore be null and void as a matter of international law. First, in relation to acts of genocide, there exists a treaty-based and customary law obligation to punish these crimes.[61] However, this alone is not enough to conclude that amnesties would be invalid.[62]

international treaty obligations). See also Murphy, Third Report on CAH (n 50) paras 297, and 291 (footnote omitted) ('In considering the effect of an amnesty, a distinction might be drawn between the ability of an amnesty to affect a prosecution in the State where the amnesty was issued, and its ability to affect a prosecution before the courts of other States or a prosecution before an international or "hybrid" court. With respect to prosecution before the courts of other States, it is generally accepted that the granting of amnesty by one State has no direct effect on prosecutions in a different State.'). See also *Karadžić* Appeal Decision on Holbrooke Agreement (n 12) paras 42–55 (rejecting the suggestion that disregarding a purported agreement not to prosecute did amount to an 'abuse of the process' in this case).

[56] *Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision (n 42) paras 71, 82, 84 ('[T]his court is entitled in the exercise of its discretionary power to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and convention the purpose of which is to protect humanity.'); *Nuon Chea et al.* Decision on Ieng Sary Objections (n 42) paras 53–55 ('Although state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them, this practice demonstrates at a minimum a retroactive right for third States, internationalised and domestic courts to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms.').

[57] *Belfast Guidelines* (n 41) 23 ('Although amnesties bar criminal proceedings within the states that enacted the amnesty, they cannot bar international, hybrid or foreign courts from exercising jurisdiction. Such courts may decide under their own jurisdiction whether to recognise an amnesty.'). See also O'Keefe, *ICL* (n 50) 477; *Ould Dah* Decision on Admissibility (n 50) 438.

[58] In both *Karadžić* and *Kallon*, an 'abuse of process' exception to the jurisdiction of the court was advanced on the basis of claims of immunities or amnesties. Whilst the courts entertained the challenges in both cases, they were ultimately unsuccessful on the facts of the case. See *Karadžić* Appeal Decision on Holbrooke Agreement (n 12); *Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision (n 42). Regarding the doctrine of 'abuse of process' in the international law context, see also Sarah Bafadhel, 'Abuse of Process Doctrine in International Criminal Proceedings' in David Young *et al.*, *Abuse of Process in Criminal Proceedings* (4th edn, Bloomsbury 2014) (hereafter Bafadhel, 'Abuse of Process Doctrine').

[59] In that category, one could think, for instance, of the situation where an individual has agreed to provide incriminatory information on the premise and understanding that he would benefit from an amnesty if he did so only to be prosecuted based on that information.

[60] See, *supra*, references in fn 47. [61] See in particular, *supra*, 5.1.1.2 and 5.3.

[62] *Belfast Guidelines* (n 41) 36–37; Murphy, Third Report on CAH (n 50) para. 289 (footnotes omitted) ('Many treaties that address crimes at the national level impose an obligation on States parties to submit certain offences to prosecution (unless the person is extradited or surrendered to another authority capable of doing so) and sometimes obligate States parties to provide victims with reparations [...]. Some commentators, treaty bodies, and courts have found that such provisions implicitly preclude amnesties. It is noted, however, that such treaties do not require prosecution; they require that the matter be

Second, genocide is recognized as a norm of *jus cogens*, that is, a peremptory prohibition which cannot be derogated from.[63] On its own, this is again insufficient to conclude that amnesties pertaining to such acts are necessarily invalid.[64] This is because an amnesty has no direct bearing on the legal validity of an act (*jus cogens* or not).[65] An amnesty simply signifies a state's renunciation of its competence to enforce its laws with regard to certain categories of crimes or criminals. Such renunciation could result in the state engaging its responsibility if a duty to punish attaches to the crimes in question and, if that state is a party to the ICC Statute, it may trigger the Court's complementarity competence over such crimes.[66] But these considerations

submitted to prosecution, which leaves intact prosecutorial discretion. Further, such treaties typically provide that when the offence is submitted to prosecution, the national authorities shall decide whether to prosecute in a similar manner as they would for ordinary offences of a serious nature.'). But see, *Nuon Chea et al.* Decision on Ieng Sary Objections (n 42) paras 38–39; Cassese, *ICL* 2003 (n 11) 314 ('To pass and apply amnesty laws to alleged authors of any such crimes would run counter to those treaty obligations.'). See also *Kallon & Kamara* Lomé Accord Amnesty Jurisdiction Decision (n 42) para. 73 (suggesting that there is an incompatibility between a treaty obligation to prosecute or extradite and a grant of amnesties); William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) (hereafter Schabas, *UN International Tribunals*), 338 (calling the suggestion 'far-reaching' and with 'only limited support in treaty law or state practice').

[63] See, *supra*, 3.6.2 (and references cited therein). See also UNHRC General Comments 1994 (n 47) 30 (General Comment No. 20 replaced General Comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)) and 33 para. 15 ('The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'); *Barrios Altos v. Peru*, (Merits, Judgment), [2001] Inter-Am. Ct. H. R. (ser. C), No. 75 (Mar. 14) (hereafter InterAmCtHR *Altos-Peru* 2001 Judgment), paras 41–44 (where the Inter American Court of Human Rights (InterAmCtHR) found that amnesties for serious violations of human rights were incompatible with the Convention); *Ould Dah* Decision on Admissibility (n 50) 16–17 (where the ECtHR found that amnesties are generally incompatible with the duty of states to investigate acts of torture); Cassese, *ICL* 2003 (n 11) 313 (arguing that states' general obligation to ensure the enjoyment of fundamental rights is incompatible with impunity or blanket amnesties for international crimes).

[64] See, however, *Furundžija* Trial Judgment (n 12) para. 155 (in relation to the *jus cogens* crime of torture):

> The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would [...] not be accorded international legal recognition. [...] [P]erpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminal responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle.

[65] Roger O'Keefe has thus noted that 'the hypothetical peremptory status of an international criminal prohibition has no logical implications for the international legality of a statute of limitations or amnesty in respect of that crime'. See O'Keefe, *ICL* (n 50) 476. See also Murphy, Third Report on CAH (n 50) fn 503. By analogy, in relation to the applicability of immunities, see *Germany-Italy* 2012 Judgment (n 22) paras 92–93. But see Cassese, *ICL* 2003 (n 11) 316 ('It should be added that whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe.').

[66] See references, *infra*, in fn 76.

would not necessarily mean that the amnesty is invalid. The *jus cogens* character of genocide is, however, an important consideration when a tribunal exercises its discretion whether to recognize the effect of a particular amnesty as this normative status reflects the importance of that norm and the heightened interest of the international community to guarantee compliance with it.[67]

Third, and most importantly, genocide and the associated duty to punish have *erga omnes* status.[68] As such, it creates rights and obligations for states not just in their mutual relationship, but towards the international community as a whole.[69] The obligation to punish such acts therefore exists in relation to all states, as does the right to ensure the punishment of such crimes, which belongs to every state. Granting legal force to an amnesty covering such a prohibition would have the effect of depriving other states of their legal entitlement to their punishment of those crimes. It cannot therefore carry any legal force in relation to such crimes.

These three attributes combined—obligation to punish, *jus cogens*, and *erga omnes* status—suggest that amnesties pertaining to acts of genocide would have no legal effect under international law.[70] The fact that, as outlined earlier, the prohibition on genocide reflects the common interest of the international community as a whole rather than the sovereign interests of one state, and that one of the primary interests of that community is the punishment of these crimes, suggests that one nation could not validly deprive other nations of their right and interest in having these crimes punished.[71] Domestic amnesties pertaining to acts of genocide might have legal effect under a state's own national order, but they would be null and void as a matter of international law and would have no legal effect in relation to other states or jurisdictions. In particular, such an amnesty could not affect or qualify that state's duty to punish acts of genocide.[72] In addition, the state concerned could engage its responsibility if the implementation of an amnesty results in a violation of that duty.

6.2.3 Amnesties and the ICC

The Statute of the ICC does not regulate the question of the applicability, or otherwise, of amnesties for the purpose of proceedings before the Court. This is because agreement could not be reached on that point during the negotiation of the Statute.[73]

[67] See, *supra*, 3.6.2. [68] See, *supra*, 3.6.3 and 5.1.1.4.

[69] *Nuon Chea et al.* Decision on Ieng Sary Objections (n 42) fn 81 (citing Barcelona Traction, Light and Power Co. (*Belg. v. Spain*) (Judgment) [1970] ICJ Rep 3 (hereafter ICJ *Barcelona Traction* Judgment), para. 34 (ruling that all States must enforce the prohibition against genocide as an obligation *erga omnes*)).

[70] See also Mallinder 'Amnesties' (n 37) 420–41.

[71] See also Dugard, 'Possible Conflicts of Jurisdiction' (n 50) 698–99 (suggesting that although international law does not—yet—prohibit the granting of amnesty for international crimes, 'it is clearly moving in this direction', but suggesting that such amnesties could not be given for acts of torture, grave breaches of the Geneva Convention or, basing himself on Article 4 of the Genocide Convention, for acts of genocide, where states are obliged to prosecute or extradite). As an illustration, see also UN Security Council, Resolution 1325, UN Doc. S/RES/1325, 31 October 2000 (hereafter UN Doc. S/RES/1325) (emphasizing the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes, including those relating to sexual and other violence against women and girls, and in this regard stressing the need to exclude these crimes, where feasible, from amnesty provisions).

[72] See, *supra*, 5.2.2.8. See also *Nuon Chea et al.* Decision on Ieng Sary Objections.

[73] This is one illustration of a broader pattern pursuant to which amnesty provisions fail to be included in multilateral treaties. See also, generally, Mallinder 'Amnesties' (n 37) 420; Ronald C Slye, 'The Legitimacy of

Although amnesties were discussed during meetings of the Preparatory committee,[74] and again at the Rome Conference. Ultimately, the issue of amnesties was too controversial to generate a consensus among negotiating nations. Some delegations felt that the Court should not intervene in the administrative (parole) or political (pardons, amnesties) decision-making of a state.[75] Others were concerned that, given the resistance to the idea of amnesties, it would involve revisiting the question of complementarity. Some others argued that there was already room in the Statute to address this issue.[76] In August 1997, the US delegation circulated a memorandum to the Preparatory Committee suggesting that in circumstances where there was an amnesty in place, the desirability of prosecuting international offenders should be weighed against the interest of national reconciliation and the facilitation of transitions to democratic government.[77] A suggestion to provide, explicitly, for the exclusion of amnesties as grounds for inadmissibility in the ICC Statute was rejected.[78] Ultimately, negotiations on the issue were abandoned and a direct reference to amnesties was omitted from the Statute.[79]

Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 Virginia Journal of International Law 173 (hereafter Slye, 'Legitimacy of Amnesties').

[74] See UN General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1: Proceedings of the Preparatory Committee during March-April and August 1996, UN Doc. A/51/22, Supp No. 22 (1996) (hereafter Preparatory Committee Report on ICC), 40 para. 174; UN Doc. A/CONF. 283/2/Add.1 (14 April 1998), art. 19. See also Ruth Wedgwood, 'The International Criminal Court: An American View' (1999) 10 European Journal of International Law 93 (hereafter Wedgwood, 'American View of ICC'), 96 (pointing out that the US delegation had circulated a 'non-paper' suggesting that a responsible decision by a democratic regime to grant an amnesty should be taken into consideration when deciding the question of admissibility before the Court); Scharf 'Amnesty Exception' (n 36).

[75] See, generally, José E Alvarez, 'Alternatives to International Criminal Justice' in Antonio Cassese *et al.* (eds) *The Oxford Companion to International Criminal Justice* (OUP 2009) (hereafter Alvarez, 'Alternatives to Int'l Criminal Justice'), 37; Slye, 'Legitimacy of Amnesties' (n 70) 215–19; Wedgwood, 'American View of ICC' (n 71); Scharf 'Amnesty Exception' (n 36); Mahnoush H Arsanjani, 'Reflections on the Jurisdiction and Trigger Mechanism of the ICC' in Herman AM von Hebel et al. (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press 1999) (hereafter Arsanjani, 'Reflections on ICC Jurisdiction'), 57–76; Gerhard Hafner *et al.*, 'A Response to the American View as Presented by Ruth Wedgwood' (1999) 10 European Journal of International Law 108 (hereafter Hafner, 'Response to the American View'); John Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' (1999) 12 Leiden Journal of International Law 1001 (hereafter Dugard, 'Dealing with Crimes of a Past Regime').

[76] See Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (1998) (hereafter HRW, *Justice in the Balance*), section (E); John T Holmes, 'The Principle of Complementarity' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) (hereafter Holmes, 'Complementarity'), 59–65; Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Routledge 2011) (hereafter Jurdi, *ICC and National Courts*).

[77] Commenting on that document, Professor Scharf reports that '[a]ccording to the US text, the policies favouring prosecution of international offenders must be balanced against the need to close "a door on the conflict of a past era" and "to encourage the surrender or reincorporation of armed dissident groups" and thereby facilitate the transition to democracy'. Scharf 'Amnesty Exception' (n 36) 508 (suggesting that the Rome Statute contains several ambiguous provisions which could be interpreted as codifying the US proposal).

[78] See UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (hereafter Draft Statute for the International Criminal Court), 46.

[79] Gavron, 'Amnesties in Light of Int'l Law Developments' (n 36) 107ff. According to Philip Kirsch, who became the Court's first President, 'the issue was not definitively resolved during the Diplomatic

However, the absence of an express provision regarding amnesties in the Statute of the Court is not insignificant. First, under the Statute, exceptions to the jurisdiction of the Court and defences applicable in its proceedings are provided explicitly in the Statute. Given that this is not the case for amnesties, an inference of their inapplicability as defences and bar to jurisdiction before the Court could be drawn on such basis. Second, the question of admissibility of a case or situation before the Court is to be determined by the Court itself and cannot be decided by a state, including through national amnesties. Instead, an amnesty would not carry any extra-jurisdictional effect that would prevent the Court from exercising its competence upon acts that have been amnestied as a matter of domestic law.[80] Furthermore, Articles 10 and 21(1) require that the Statute should be interpreted in accordance with existing standards of international law. This would mean that amnesties pertaining to acts of genocide would, in any case, be null and void and without legal effect before the Court. This would also mean that the ICC Prosecutor would not be permitted to give effect to an amnesty covering acts of genocide in the exercise of his or her discretion under Article 53, paragraph 1(c), when deciding whether to initiate an investigation as may otherwise be possible for categories of amnesties which are not invalid under international law.[81] The possibility for state parties to adopt national amnesties in relation to the other crimes provided for in the Statute (war crimes, crimes against humanity, and aggression, with the exception of grave breaches and torture[82]) has not been rendered impermissible or invalid by the entry into force of the Statute.[83] Their effect upon the Court's jurisdiction, if any, is to be determined by the Court itself in light of the principles outlined earlier.

Conference. Rather, the provisions that were adopted reflect "creative ambiguity" which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the Court.' Scharf 'Amnesty Exception' (n 36) 522. See also Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 Journal of International Criminal Justice 695 (hereafter Stahn, 'Complementarity and Amnesty'), 718.

[80] See, *supra*, 6.2.1.3.

[81] Dugard, 'Possible Conflicts of Jurisdiction' (n 50) 693; Arsanjani, 'Reflections on ICC Jurisdiction' (n 72) 57; Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 European Journal of International Law 481 (hereafter Robinson, 'Serving the Interests of Justice'); Gavron, 'Amnesties in Light of Int'l Law Developments' (n 36) 110; Stahn, 'Complementarity and Amnesty' (n 76) 698; Scharf 'Amnesty Exception' (n 36) 524; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) (hereafter Schabas, *Commentary on the Rome Statute*), 663–65. Regarding the position of the Office of the Prosecutor of the ICC towards amnesties in general, see *Draft Regulations of the Office of the Prosecutor* (ICC-OTP 3 June 2003) (hereafter ICC 2003 *Draft Regulations*), 47; International Criminal Court, *Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the UN Security Council pursuant to UNSC 1593 (2005)* (13 December 2005) (hereafter ICC Prosecutor, *Second Report UNSC 1593*); International Criminal Court—Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013) (hereafter ICC-OTP 2013 *Policy Paper on PEs*), paras 47 and 48.

[82] See, *supra*, 6.2.1.1 and reference in fn 47, *supra*.

[83] For an illustration, see, e.g., Communication 431/12, *Thomas Kwoyelo v. Uganda*, African Commission on Human and Peoples' Rights, Decision of 24 August 2018, ACHPR/COMM/431/12/UG/1512/18, paras 190–192 (finding that the adoption of the Rome Statute and its domestication into Ugandan law and the presence in its Preamble of an obligation to punish statutory crimes did not provide sufficient grounds for Uganda to deny the benefit of an amnesty to the complainant despite the fact that he was suspected of committing war crimes and crimes against humanity).

6.3 Statutes of Limitation

6.3.1 The Genocide Convention and the customary law exclusion of statutory limitations

The question of the applicability of statutes of limitations in relation to international crimes has not been systematically regulated. The Charters of the Nuremberg and Tokyo Tribunals did not address that issue.[84] In contrast, Control Council Law No. 10 expressly excluded statutes of limitations for crimes provided in that instrument.[85] For its part, the Genocide Convention failed to address the question.[86] This issue became urgent when domestic statutes of limitation threatened to affect the possibility of continued prosecution of crimes committed during the Second World War. As a result, a number of states amended their laws to exclude expressly the application of statutory limitations in relation to such crimes and, on 26 November 1968, the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* was adopted. This treaty provided that war crimes, crimes against humanity, and genocide are not subject to any sort of statutory limitation.[87] But because

[84] The French Cour de Cassation in the *Barbie* case explained that the Charter of the Nuremberg Tribunal did not need to address the question of applicability of statutory limitations to the crimes within its jurisdiction since it was a temporary jurisdiction that sat shortly after the commission of the crimes under its jurisdiction. See *Prosecutor v. Barbie*, Arrêt n° 83-94425, 24 January 1984, Cour de cassation—Chambre criminelle (hereafter *Barbie* Supreme Court Judgment).

[85] Article II(5) of the Law provided: 'In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of *any* statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.' Control Council Law No. 10 (n 11) art. II(5). A commentator has read the reference to the period between 30 January 1933 and 1 July 1945 as an indication that the prohibition on statutes of limitation was not intended to apply in general but only in relation to that period. Such a reading is questionable. It seems, rather, to reflect the scope of jurisdictional competence provided for under Law No. 10, i.e., crimes committed during that period. See, generally, Taylor, *Final Report to Secretary of the Army* (n 41) 6, 244–45 (containing the Draft Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders), 262, and 264 (Annex 5). The starting date—30 January 1933—is the date on which Adolf Hitler was named Chancellor. See Helmut Kreicker, 'Statute of Limitations' in Antonio Cassese *et al.* (eds) *The Oxford Companion to International Criminal Justice* (OUP 2009) (hereafter Kreicker, 'Statute of Limitations'), 523–24.

[86] Professor Schabas points to a minor and inconclusive reference to the issue during the negotiation of the Convention. See Schabas, *Genocide in International Law* (n 1) 486 (citing UN Economic and Social Council, Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention prepared by the Secretariat, UN Doc. E/623/Add.2, 19 April 1948 (hereafter UN Doc. E/623/Add.2)).

[87] See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 11 November 1970, 754 UNTS 73, art. 1(b). Pursuant to that Convention, crimes coming under its terms can—in principle—be prosecuted regardless of the period of time that has elapsed since their commission. One would have to qualify this statement to account for situations where the statute's limitations had already expired by the time the rule on non-application of these limitations came into force. For an illustration, see *Spring v. Swiss Confederation*, Judgment of 21 January 2000, (Tribunal Fédéral) (published in (2000) 126 Arrêts du Tribunal Fédéral 145) (hereafter *Spring* 2001 Judgment) (regarding civil proceedings for damage concerning acts of alleged complicity to genocide). See also *Prosecutor v. Echeverria (Luis) & Moya-Palencia (Mario)*, 15 June 2005, App. No. 1/2004-PS & 8/2004-PS, ILDC 76 (MX 2005) (hereafter *Echeverria & Moya-Palencia* Supreme Ct Judgment) (making the 1968 convention on statutory limitations applicable only to acts that occurred after its entry into force for Mexico (13 June 2002)). See also Ruth A Kok, *Statutory Limitations in International Criminal Law* (TMC Asser Press 2007) (hereafter Kok, *Statutory Limitations*), p. 237 paras 295–296; Summary and

the Convention applied to crimes committed *before* 1968 and not just to those committed after its entry into force, only fifty-five states ratified it with many other states objecting to its retroactive effect.[88]

The issue therefore turns on whether or not the exclusion of statutes of limitations for international crimes, including genocide, is now considered to form part of customary law. In addressing this point, the first thing to note is that none of the relevant international instruments provide for the possibility of international crimes being prescribed in the first place.[89] It is therefore possible to argue that statutory limitations have never been considered to be available *as a matter of international law* in relation to international core crimes. However, such a proposition would have to account for the fact that the practice of states has not been entirely consistent on that point, reflecting a degree of resistance in some countries to a blanket exclusion of statutory limitations for international crimes. Nevertheless, a number of factors militate in favour of the view that the exclusion of statutes of limitations for genocide has now crystallized into a customary law principle. First, the exclusion contained in the 1968 Convention is now echoed in a number of other international instruments. This is the case, for instance, in the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974)*, which provides for a similar and unqualified exclusion of statutory limitations for the three core international crimes.[90] An exclusion of statutory limitations is also provided explicitly in the statutory instruments of a number of international(ized) tribunals with jurisdiction over genocide, not least the ICC.[91] Particularly significant is Article 4 of the

Grounds for Punishment, Decision No. LJN:BZ5728, 1 March 2013 (Rechtbank 's-Gravenhage) (hereafter NL Summary and Grounds for Punishment), Chapter 3 (regarding the applicability of statutory limitation to certain crimes which had reached the statutory limit prior to the entry into force of the domestic prohibition on genocide). For a different approach to the issue, see Gábor Halmai and Kim L Scheppel, 'Living Well is the Best Revenge: The Hungarian Approach to Judging the Past' in A James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997) (hereafter Halmai & Scheppel 'Living Well'), 155.

[88] Christine van den Wyngaert and John Dugard, 'Non-Applicability of Statute of Limitations' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) (hereafter van den Wyngaert & Dugard, 'Non-Applicability'), 887 (emphasis in the original).

[89] See, generally, UN General Assembly, Resolution 2338 (XXII): Question of the Punishment of War Criminals and of Persons Who have Committed Crimes Against Humanity (18 December 1967) (hereafter UNGA, Question of the Punishment of War Criminals) ('*Noting* that none of the solemn declarations, instruments or conventions relating to prosecution and punishment for war crimes and crimes against humanity makes provision for a statute of limitations.'). See also Kreicker, 'Statute of Limitations' (n 82) 522 (suggesting that there is no customary international law rule establishing a limitation period so that there is no need for a rule in the statutes of international criminal tribunals declaring these inapplicable and thus positing that Article 29 of the ICC Statute was redundant).

[90] European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 25 January 1974, ETS No. 082, art. 1(1) (specifying that genocide comes within the scope of the Convention). It should be noted that only eight states have thus far ratified this convention. See also International Conference on the Great Lakes Region, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination* (29 November 2006) (hereafter Great Lakes Region Conference, *Protocol for Prevention and Punishment*), art. 11 (Statutory Limitation) ('The prosecution of persons alleged to have committed the crime of genocide, war crimes, and crimes against humanity, shall not be limited by time.').

[91] See, e.g., ICC Statute (n 11) art. 29; UN Human Rights Commission, Resolution 2005/81: Impunity, UN Doc. E/CN.4/RES/2005/81, 21 April 2005 (hereafter UN Doc. E/CN.4/RES/2005/81) (adopted without a

Law of the Extraordinary Chambers in the Courts of Cambodia (ECCC), which creates the normative framework for the prosecution of acts committed more than two decades before their creation and which expressly excludes the application of statutory limitations for acts of genocide committed during that period.[92] Also, whilst the statutory instruments of other international criminal tribunals did not provide expressly for a similar exclusionary rule, no defendant has ever objected to their jurisdiction on grounds of statutory limitations. Significantly, there are indications that the possibility of statutory limitations for core international crimes was regarded as *impliedly* excluded in those jurisdictions.[93] Furthermore in relation to crimes against humanity and war crimes, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) explained that these are 'crimes of a seriousness justifying their exclusion from statutory limitation', and that the importance of international prosecution of such serious crimes diminishes only slightly over the years, if at all.[94] This holding would perforce also apply, *mutatis mutandis*, to genocide.

vote at its 60th Meeting). See UN Human Rights Commission, Draft Report of the Commission: Chapter XVII—Promotion and Protection of Human Rights, UN Doc. E/CN.4/2005/L.10/Add.17, 22 April 2005 (hereafter Draft Report Chapter XVII), 4 (acknowledging the content of that provision and urging states to remove any remaining statutory limitations on such crimes). See also ECCC Statute (n 8) art. 4; East Timor Tribunal Statute (n 8) s 17(1); Statute of the Iraqi Special Tribunal, 10 December 2003 (hereafter Iraqi Tribunal Statute), art. 17(d); Statute of the Extraordinary African Chambers within the Senegalese Judicial System for the Prosecution of International Crimes Committed on the Territory of the Republic of Chad between 7 June 1982 and 1 December 1990 (2011) (hereafter Senegalese Extraordinary African Chambers Statute), art. 9. A prohibition on statutory limitations was already foreseen in Article II(5) of Control Council Law No. 10 in relation to crimes provided for in that document (i.e., war crimes; crimes against humanity; aggression; and membership in a criminal organization): 'In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of *any* statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.' Control Council Law No. 10 (n 11) art. II(5) (emphasis added).

[92] See, again, ECCC Statute (n 8) art. 4 ('Acts of genocide [...] have no statute of limitations [...].').

[93] See, e.g., Press Release, Kosovo: Statement by the President of the ICTY, Gabrielle Kirk McDonald (31 March 1999) (hereafter Statement by ICTY President 1999) ('I wish to be very clear. The Tribunal has jurisdiction over violations of the laws and customs of war, grave breaches of the Geneva Conventions, crimes against humanity and genocide. There is no statute of limitations on these crimes. Persons indicted by the Tribunal thus remain indicted until they are brought to trial. While the situation on the ground may change, the law does not. Crimes will be investigated. Where appropriate, persons will be charged and tried.'). In 1977, the United States stated the following in response to a question from the Embassy of France:

> It is the view of the United States Government that neither the [1945 London Agreement], with the [1945 IMT Charter (Nuremberg)] annexed, nor [the 1945 Allied Control Council Law No. 10] ... contain any provisions setting a time limit for prosecution or punishment. The United States further regards [the 1945 Allied Control Council Law No. 10] as revoking the benefits of any statute of limitation in respect of the period specified; and in light of the absence of any provision to the contrary, the offenses covered in these instruments are considered not to be subject to limitation concerning their prosecution and punishment. United States Federal law contains no statute of limitations on war crimes and crimes against humanity.

'Statutes of Limitation' in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol. 2 (CUP 2005) (hereafter ICRC, *Customary IHL* vol. 2) para. 860 (citing US Department of State, Note Addressed to the Embassy of France, 19 May 1977, Department of State File No. P77 0090-522 (reprinted in John A Boyd, *Digest of United States Practice in International Law, 1977* (US Department of State Publication 8960, 1979) 927)).

[94] *Prosecutor v. Mrda*, Case No. IT-02-59-S, Sentencing Judgment, 31 March 2004 (hereafter *Mrda* Sentencing Judgment), paras 103–04. This was also interpreted as an indication that courts will not readily

Second, a growing number of domestic legislations provide for the express exclusion of statutory limitations for genocide[95] and other core international

accept the mere passing of time as a factor in mitigation of sentencing. Ibid., para. 104 (finding that in light of the gravity of the crimes in question, a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation).

[95] See, e.g., Argentina, *Law on the Implementation of the 1998 ICC Statute* (2006), art. 11; Armenia, Penal Code (2003), art. 75(6) (when read in conjunction with Article 393); Australia, Penal Code (2003), art. 75(6); Austria, Penal Code (1974, as of 2016), art. 57(1) (when read in conjunction with Article 321(1)); Belarus, Penal Code (1999), art. 85; Belgium, *Law Concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols* (1993 as of 1999), art. 21 (when read in conjunction with Article 1(1)); Belgium, Penal Code (1867 as of 2006), art. 136*quinquies* (when read in conjunction with Article 136*bis*); Bolivia, Code of Criminal Procedure (2001), art. 34; Bosnia & Herzegovina, Criminal Code (2003 as of 2015), art. 19; Burkina Faso, Penal Code (1996), art. 317; Burundi, *Law on Genocide, Crimes against Humanity and War Crimes* (2003), art. 27; Burundi, Penal Code (2009), arts 150, 155; Cameroon, *Droits des conflits armés et droits international humanitaire, Manuel d'instructeur en vigueur dans les forces de défense, Ministère de la Défense, Présidence de la République, Etat-Major des Armées* (2006), 296; Central African Republic, Penal Code (2010), art. 162 (when read in conjunction with Article 152); Central African Republic, Penal Procedure Code (2010), arts 7(c), and 10; Chile, Code of Criminal Procedure (2002), art. 250; Republic of the Congo, Act No. 8 (1988); Republic of the Congo, Fundamental Act (1997) art. 8; Croatia, Penal Code (2011), art. 81(2); Czech Republic, Penal Code (1997), art. 67(a); Democratic Republic of Congo, Military Judiciary Code (2002), art. 204; Democratic Republic of Congo, Military Penal Code (2002), art. 10; Denmark, *Act Implementing the International Criminal Court*, No. 342/2001 (2001); Ecuador, Political Constitution (2008), art. 80; Ecuador, Organic Integral Criminal Code (2014), art. 75; El Salvador, Penal Code (1997 as of 2008), art. 99; Estonia, Penal Code (2017), art. 5(4); Ethiopia, Constitution (1994), art. 28(1); Finland, *Act of Parliament on the Implementation of the Provisions of a Legislative Nature of the Rome Statute of the International Criminal Court and on the Application of the Statute*, No. 1284/2000 (2000); Finland, *Act on the Amendment of the Penal Code*, No. 1285/2000 (2000); France, Penal Code (2016), art. 213-5 (when read in the context of the sub-title on crimes against humanity, which includes genocide as its first chapter); Georgia, Penal Code, art. 71(5); Germany, Code of Crimes against International Law (2002), s 5 (when read in conjunction with Section 6—Genocide); Germany, Penal Code, art. 78; Iceland, *Act Implementing the International Criminal Court* (2001); Ireland, *International Criminal Court Act* (2006); Israel, *Crime of Genocide (Prevention and Punishment) Law* (1950), s 6 (when read in conjunction with Criminal Code Ordinance (1936)); Israel, *Act on Nazis and Nazi Collaborators Punishment Law* (1950), arts 12, and 12b (as amended by the 1966 *Act on Crimes Against Humanity and Abolition of Prescription Law*); Kenya, *International Crimes Act* (2008), art. 7; Kosovo, Penal Code (2012), art. 111; Latvia, Penal Code (1998), art. 56; Republic of Lithuania, Criminal Code (2015), art. 95(1)(9)(1); Former Yugoslav Republic of Macedonia, Penal Code (1996), art. 112; Mali, Penal Code (2001), art. 32; Republic of Moldova, Penal Code (2002), art. 60(8); Montenegro, Penal Code (2003), art. 129; The Netherlands, *Act Declaring the Non-Applicability of Statutory Limitations* (1971); The Netherlands, *International Crimes Act* (2003, as amended in 2005), art. 13; Niger, Penal Code (as amended in 2003), art. 208.8; Norway, *Act No. 65 Relating to the Implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law* (2001), art. 13; Paraguay, Constitution (1992 as of 2011), art. 5; Peru, *Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas, Resolución Ministerial No. 049-2010/DE/VPD* (21 May 2010), 111–12; Portugal, *Act Implementing the ICC Statute* (2004), art. 7; Republic of Korea, *ICC Act* (2007), art. 6; Romania, Criminal Code (2012), art. 153; Russian Federation, Criminal Code (1996), art. 78(5); Rwanda, *Act on the Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity* (1996), art. 37; Samoa, *International Criminal Court Act* (2007), art. 15; Senegal, *Loi no. 2007-2 du 12 février 2007 modifiant le Code pénal*, art. 431-6; Serbia, Penal Code (2005), art. 108; Slovakia, Penal Code (2002), art. 100; Slovenia, Penal Code (1995), art. 116; South Africa, *Act Implementing the Rome Statute of the International Criminal Court* (2002), art. 29; Spain, Penal Code (1995 as amended in 2003), arts 131(2), and 133(4); Switzerland, Penal Code (as amended in 2010), art. 101; Switzerland, Military Criminal Code (as amended in 2010), art. 59; East Timor Tribunal Statute (n 8) s 17(1); Uganda, *International Criminal Court Act* (2010), art. 19; Ukraine, Penal Code (as of 2010), art. 49(5); United States, 18 USC § 1091(e) (2018); Uruguay, *Implementing Legislation for the ICC* (2006), art. 7 (when read in conjunction with Title I, Article 16); Uzbekistan, Penal Code (1994), arts 64 and 69. In addition, other jurisdictions implicitly exclude statutes of limitations for the crime of genocide. See, e.g., Canada, *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (2000); Sweden, *Act on*

crimes.[96] This has been matched by judicial practice to the same effect,[97] which has borne witness to the weakening of objections in many states to the exclusion

Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (2014:406); Tunisia; United Kingdom, *International Criminal Court Act* (2001). Neither Tunisia or the United Kingdom provide for statutory limitations in respect of genocide (or other crimes delineated therein).

[96] See, e.g., Switzerland, Criminal Code, art. 101; Switzerland, 1983/2002 Military Penal Code, art. 56*bis*; Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), s 12; Israel, *Crime of Genocide (Prevention and Punishment) Law* (1950), s 6; Israel, *Crimes Against Humanity (Abolition of Prescription) Act*, No. 5723 (1966); Argentina, Law *Concerning the Imprescriptibility of War Crimes and Crimes against Humanity* (1995); Armenia, Penal Code (2003), art. 75(6); Austria, Penal Code (1974), art. 57(1); Belgium, *Law Concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols* (as amended 1993), art. 8; Democratic Republic of Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), art. 14; Democratic Republic of Congo, Fundamental Act (1997), art. 8; Democratic Republic of Congo, Military Penal Code (2002), art. 10; Ecuador, Constitution (1988), art. 23 (1); Ecuador, *Organic Integral Criminal Code* (2014), art. 75; El Salvador, Code of Criminal Procedure (1996), art. 34; Iraqi Tribunal Statute (n 81) arts 10, 14, and 17(d); Latvia, Penal Code (1998), arts 56–57; Lithuania, Penal Code (2000), Chapter XII, art. 91(5); Mali, Penal Code (2001), art. 32; Montenegro, Penal Code (2003), art. 129; Croatia, Criminal Code (1997), arts 18(2), and 24; Ethiopia, Constitution (1994), art. 28(1); France, Penal Code (1994), art. 213(5); France, *loi d'adaptation du droit pénal français à l'institution de la CPI le 9 août 2010* (N°2010-930), art.7; Germany, 9th Amendment of Criminal Law Statute (4 August 1969); Germany, BGBL I 1065; Germany, Penal Code (1998), s 78(2); Germany, *Law Introducing the International Crimes Code* (2002), art. 1(5); Lithuania, Criminal Code (as amended 1961), art. 49; Netherlands, *International Crimes Act* (2003), art. 13; Niger, Penal Code (as amended 1961), art. 208; Rwanda, *Law on the Prosecution of the Crime of Genocide and Crimes Against Humanity* (1996) art. 37; Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), art. 92; Slovenia, Penal Code (1994), art. 116; Spain, Penal Code (1995), art. 133; United States, *Genocide Convention Implementation Act of 1987*, 18 USC § 1091(e) (providing that 'in the case of an offense under this section, an indictment may be found, or information instituted, at any time without limitation'); Armenia, Penal Code (2003), art. 75(6) ('Serious breaches of international humanitarian law during armed conflict or genocide are not subject to statutory limitations.'); Belarus, Penal Code (1999), art. 85; Belgium, *Act Concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols* (1999), art. 8 (providing for the 'non-applicability of statutory limitations to genocide and crimes against humanity'), Bolivia, Code of Criminal Procedure (2001), art. 34; Bosnia & Herzegovina, Penal Code (2003), art. 19; Burkina Faso, Penal Code (1996), art. 317; Chile, Code of Criminal Procedure (2000), art. 250; Czech Republic, Penal Code (1997), art. 67a; The Netherlands, *Act Declaring the Non-applicability of Statutory Limitations* (for acts of genocide as included in Articles 1 and 2 of the 1964 Act Implementing the Genocide Convention)(1971); Panama, Penal Code (2008), art. 120; Portugal, *Act Implementing the ICC Statute* (2004), art. 7; Moldova, Penal Code (2002), art. 60(8); Russia, Penal Code of the Russian Federation (1996), art. 78(5); Rwanda, Act on the Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity (1996), art. 37; Senegal, *Loi no. 2007-2 du 12 février 2007 modifiant le Code pénal*, art. 431-6; Republic of Serbia, Penal Code (2005), art. 108; Slovakia, Penal Code (2002), art. 100; Slovenia, Penal Code (1995), art. 116; Spain, Penal Code (1995 as amended in 2003), art. 131(4); Sweden, *Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes* (2014:406); The former Yugoslav Republic of Macedonia, Penal Code (1996), art. 112; Ukraine, Penal Code (2001), art. 49(5); Uzbekistan, Penal Code (1994), arts 64 and 69; Guatemala, National Reconciliation Act (1996), art. 8. See also REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU: A Study of the Laws and Practice in the 27 Member States of the EU* (December 2010) (hereafter REDRESS & FIPH, *Extraterritorial Jurisdiction*), 33 (regarding the practice of EU states); Kok, *Statutory Limitations* (n 84) 39ff, 64–65, 77 (conducting a detailed review of domestic legislations and suggesting that, at the time, the laws of fifty-two states were expressly providing for the imprescriptibility of genocide with nine others in the process of adopting such legislation); UN General Assembly, Report of the International Law Commission on the Work of its Sixty-Eighth Session, UN Doc. A/71/10, Supp No. 10 (2016) (hereafter ILC 2016 Report), 259 ('At present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.').

[97] See, e.g., *Attorney General v. Eichmann*, No. 40/61, Judgment (D. Ct. Jerusalem 11 December 1961) (hereafter *Eichmann* District Court Judgment), para. 53 ('The crimes attributed to the Accused in this case are offences against the Nazis and Nazi Collaborators (Punishment) Law which provides in Section 12 (a) that "the established laws of prescription" (with respect to ordinary offences) "shall not

of statutory limitations for such crimes.[98] Human rights bodies have similarly shown a growing reluctance for states to regard statutes of limitations as valid when there is a possibility that such a conclusion could affect the punishment of serious violations of human rights which, in many cases, also constitute international crimes.[99] The move towards a general rejection of statutory limitations with respect

apply to offences under this law." Because of the extreme gravity of the crime against the Jewish People, the crime against humanity and war crime, the Israeli legislator has provided that such crimes shall never prescribe, while the crime of membership in a hostile organization shall be prescribed on the lapse of twenty years.'); *Sepulveda* (*Sandoval Case*), Case No. 517/2004, Resolución 22267 (Chile Supreme Ct 17 November 2004) (hereafter *Sandoval Case* Appeal Judgment); María Barros Perelman, Resolución 24471 (Santiago Ct of Appeal 5 September 2005) (hereafter *Perelman* Appeal Judgment) (holding that the statutory limitations are not applicable to crimes against humanity and such exclusion has acquired the status of *jus cogens*); *Prosecutor v. Saddam Hussein Al Majeed*, Case No. 1/C Second/2006, Judgment (Iraq High Ct 5 November 2006) (hereafter *Hussein* High Court Judgment); *Barbie* Supreme Court Judgment (n 81) (regarding the inapplicability of statutes of limitations to crimes against humanity); *In re* Agent Orange Prod. Liab. Litig., 373 F Supp 2d 7 (EDNY 2005) (hereafter *Agent Orange* District Ct Judgment), 63 ('The principle of non-applicability of statutory limitations to certain violations of international law has been recognized in international instruments. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that "[n]o statutory limitations period shall apply" to war crimes and crimes against humanity, including genocide. Although the United States is not a signatory to either the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity or the Rome Statute, these instruments suggest the need to recognize a rule under customary international law that no statute of limitations should be applied to war crimes and crimes against humanity.') (citing Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (n 84) art. 1; ICC Statute (n 11) arts 5, 29 ('The crimes within the jurisdiction of the Court [(i.e., genocide, crimes against humanity, war crimes, and "the crime of aggression")] shall not be subject to any statute of limitations.')); *In re* Miguel Antel Cavallo (aka Ricardo Miguel Cavallo), 10 June 2002, Revision 140/2002, 42 ILM 884 (MX 2003) (hereafter *Cavallo* Supreme Ct Judgment); Guatemala Genocide Case, Decision No. 327/2003, 42 ILM 686 (Spain Supreme Ct 25 February 2003) (hereafter *Guatemala Genocide Case* Supreme Court Judgment), in particular, 10th consideration; *Mukeshimana-Ngulinzira v. Belgium*, Case No. RG No. 04/4807/A, 07/15547/A, First Instance Judgment, ILDC 1604 (2010) (hereafter *Mukeshimana-Ngulinzira* First Instance Judgment). Judicial practice has not been entirely consistent on that point at the national level, although there is a clear shift in recent years towards a rejection of statutory limitations for acts of genocide. For a detailed discussion, see Kok, *Statutory Limitations* (n 84) 180 (discussing the practice of Chilean courts), 237, and 365–66 (regarding the position of the Mexican Supreme Court suggesting that charges of genocide were time-barred based on the fact that prescription had already been reached prior to Mexico signing up to the 1968 Convention). In regards to the possible application of statutes of limitations in relation to war crimes, see also *Barbie* Supreme Court Judgment (n 81) (reprinted in 78 ILR 136) (accepting the possibility of statutes of limitation applying to war crimes); Sentencia que absuelve por crímenes de guerra y contra la humanidad, reconociendo la legalidad del golpe militar de 1973 (Chile, 4 August 2005) (rejecting the suggestion of non-applicability of statutes of limitations for war crimes and crimes against humanity in the absence of a domestic basis for it).

[98] For an illustration of that process, triggered in this case by the adoption of the Rome Statute, see also, Décision No. 98–408 DC du 22 janvier 1999, para. 34 and associated Loi constitutionnelle n 99–568 du 8 juillet 1999, art. 52 para. 2, cited in Olivier Barrat, 'Ratification and Adaptation: The French Experience' in Roy S Lee (ed), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) (hereafter O'Barrat, 'Ratification and Adaptation'), 60; William A Schabas, 'Article 29: Non-Applicability of Statutory Limitations' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (CH Beck 2016) (hereafter Schabas, 'Article 29'), 1110).

[99] See, e.g., UN General Assembly, Report of the Human Rights Commission on the Work of its Ninety-First through its Ninety-Third Session, UN Doc. A/63/40, Supp No. 40 (2008) (hereafter HRC 2008 Report), Chapter IV ('The statute of limitations on offences involving serious human rights violations should be abolished.'); UN General Assembly, Report of the Committee Against Torture on the Work of its Thirty-Seventh and Thirty-Eight Sessions, UN Doc. A/62/44, Supp No. 44 (2007) (hereafter Committee Against Torture 2007 Report), Chapter III (considering reports by States parties under

to international crimes is also apparent from the ICC Statute, which, in Article 29, provides for an unqualified exclusion of statutory limitations for crimes under the Court's jurisdiction.[100] This provision may be said to reflect the crystallization of a customary law principle.[101] The rejection of statutory limitations for core international crimes, including genocide, is also apparent in *soft law* instruments.[102]

article 19 of the Convention), 56 (where the Committee against Torture took the view that 'acts of torture cannot be subject to any statute of limitations'); Sean D. Murphy, Second Report on Crimes Against Humanity, UN Doc. A/CN.4/690 (21 January 2016) (hereafter Murphy, Second Report on CAH), para. 69; UN Economic and Social Council, Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance, UN Doc. E/CN.4/2004/59, 23 February 2004 (hereafter UN Doc. E/CN.4/2004/59), paras 43–46 and 56; UN Doc. E/CN.4/RES/2005/81 (n 81) s 4 (adopted without a vote); *Aslakhanova et al. v. Russia*, App Nos 2944/06 & 8300/07 & 50184/07 & 332/08 & 42509/10, 18 December 2012 (hereafter *Aslakhanova* Judgment), para. 237 ('Lastly, the application of the statute of limitations to the bulk of investigations of the abductions committed prior to 2007 has to be addressed. Bearing in mind the seriousness of the crimes, the large number of persons affected and the relevant legal standards applicable to such situations in modern-day democracies, the Court finds that the termination of pending investigations into abductions solely on the grounds that the time-limit has expired is contrary to the obligations under Article 2 of the Convention. The Court also notes that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events, since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.') (citing *Association 21 December 1989 et al. v. Romania*, App Nos 33810/07 & 18817/08, 24 May 2011 (hereafter *Association 21 December* Judgment), s 194; *Brecknell v. United Kingdom*, App No. 32457/04, 27 November 2007 (hereafter *Brecknell* Judgment), s 69); *Kononov v. Latvia*, App No. 36376/04, 17 May 2010 (hereafter *Kononov* Judgment); *Touvier v. France*, App No. 29420/95, Decision on Admissibility, 13 January 1997 (hereafter *Touvier* Decision on Admissibility), 161; *Papon v. France (no. 2)*, App No. 54210/00, 15 November 2001 (hereafter *Papon* Judgment); InterAmCtHR *Altos-Peru* 2001 Judgment (n 60) para. 41. See also The Inter-American Convention on Forced Disappearance of Persons (1994), art. VII ('Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.'). The International Convention for the Protection of All Persons from Enforced Disappearance does in fact provide for a statute of limitations. International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 UNTS 3, art. 8, para. 1(a). Furthermore, the setting aside of statutes of limitations for the purpose of prosecuting international crimes has quite systematically been regarded by human rights bodies as consistent with basic standards of human rights under international law. See, e.g., *Aslakhanova* Judgment (n 96) para. 237; *Brecknell* Judgment (n 89) para. 69; *Kononov* Judgment (n 96), paras 229–233 (finding in relation to war crimes charges that in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes and that neither have developments in international law since 1944 imposed any limitation period on the war crimes charges against the applicant); *Korbely v. Hungary*, App No. 9174/02, 19 September 2008 (hereafter *Korbely* Judgment), para. 76 (addressing the issue of statutory limitations for war crimes and crimes against humanity in relation to the question of the foreseeability of the prohibition); *Kolk & Kislyiy v. Estonia*, App Nos 23052/04 & 24018/04, 17 January 2006 (hereafter *Kolk & Kislyiy* Judgment); *Touvier* Decision on Admissibility (n 96) 161. See, however, Communication 431/12, *Thomas Kwoyelo v. Uganda*, African Commission on Human and Peoples' Rights, Decision of 24 August 2018, ACHPR/COMM/431/12/UG/1512/18, in particular, paras 156ff (finding that the denial of the benefit of an amnesty to the complainant amounted to a violation of the principle of equal protection under the law, although the underlying crimes attributed to him included allegations of war crimes and crimes against humanity) and paras 283–293 (seemingly qualifying its general finding and characterizing amnesties for gross violations of human rights as contrary to customary international law).

[100] See, e.g., Schabas, *Commentary on the Rome Statute* (n 78) 470–71.

[101] See, *infra*, 6.3.2.

[102] See, e.g., UN Economic and Social Council, Final Report on the Special Rapporteur, Mr M. Cherif Bassiouni, Submitted in Accordance with Commission Resolution 1999/33, UN Doc. E/CN.4/2000/62, 18 January 2000 (hereafter UN Doc. E/CN.4/2000/62) (suggesting that statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law); UN General Assembly, Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International

Third, certain attributes of the crime of genocide support the view that statutory limitations cannot apply to it. In *Furundžija*, the Trial Chamber suggested that one of the consequences arising from the *jus cogens* nature of the prohibition on torture was the fact that it could not validly be covered by a statute of limitation.[103] If correct, the same reasoning would perforce apply to the *jus cogens* prohibition on genocide and exclude the applicability of statutory limitations in relation to that crime.[104] Furthermore, considering that the obligation to punish genocide is held *erga omnes* and is absolute in nature, a state cannot rely on statutory limitations to unilaterally renounce punishment of a crime that is owed to all.[105] A temporal limitation that renders

Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (21 March 2006) (hereafter UN Doc. A/RES/60/147), paras 6 and 7 (suggesting that statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law); Orentlicher Report on Principles to Combat Impunity (n 45) principle 23 (suggesting in a somewhat circular fashion that '[p]rescription shall not apply to crimes under international law that are by their nature imprescriptible'); UN International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/L.459 [Corr. 1], 5 July 1991 (hereafter ILC, Draft Code 1991), art. 7 (entitled 'Non-applicability of statutory limitations') ('[N]o statutory limitation shall apply to crimes against the peace and security of mankind.') (although the 1996 version of that *Draft* Code dropped this provision due to the opposition of a number of states). See also UN Economic and Social Council, Revised Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 (hereafter UN Doc. E/CN.4/Sub.2/1997/20/Rev.1), principle 24 (suggesting that core international crimes are 'by their nature imprescriptible').

[103] *Furundžija* Trial Judgment (n 12) para. 157 (discussing the effect of the *jus cogens* nature of the prohibition on torture ('It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.').

[104] See also *Almonacid-Arellano v. Chile*, (Preliminary Objections, Merits, Reparations and Costs, Judgment), [2006] Inter-Am. Ct. H. R. (ser. C) No. 154 (Sept. 26) (hereafter *Almonacid-Arellano* 2006 Judgment), para. 153 (2006) ('[T]he non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it.'); *Almonacid-Arellano v. Chile*, (Preliminary Objections, Merits, Reparations and Costs, Judgment) (Concurring Opinion of Cancado-Trindade), [2006] Inter-Am. Ct. H. R. (ser. C) No. 154 (Sept. 26) (hereafter *Almonacid-Arellano* 2006 Judgment, Cancado-Trindade Concur) para. 26. See also *Prosecutor v. Priebke (Erich)*, Case No. P/457/XXXI, Ordinary Appeal Judgment, Request of Extradition, ILDC 1599 (AR 1995) (hereafter *Priebke* Supreme Court Extradition Judgment). See also Antonio Cassese, *International Criminal Law* (3rd edn, OUP 2013) (hereafter Cassese, *ICL*) 315 (stating in relation to genocide, crimes against humanity, and torture that 'customary rules render statutes of limitation inapplicable'); M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd rev'd edn, Kluwer Law International 1999) (hereafter Bassiouni, *Crimes Against Humanity*), 227 ('This provision [i.e., art. 29 of the ICC Statute] reinforces the position that "crimes against humanity", as well as war crimes and genocide are not subject to statute of limitations, because they are *jus cogens* crimes.'); van den Wyngaert & Dugard, 'Non-Applicability' (n 85) 887 ('There is support for the view that the prohibitions on these crimes (the core crimes of genocide, war crimes, crimes against humanity, and aggression) constitute norms of *jus cogens*, and that a necessary consequence of such a characterization is the inapplicability of statutory limitations.').

[105] Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) (hereafter Brownlie, *Principles of PIL* 2003), 567 (suggesting that, in principle, the *erga omnes* character of crimes against international law excludes the application of principles of limitation). See also UN Economic and Social Council, Resolution 1158 (XLI), 5 August 1966 (hereafter UNECOSOC Resolution 1158), s 1 (urging all states 'to prevent the application of statutory limitation to war crimes and crimes against humanity'); UN General Assembly, Resolution 3074 (XXVIII): Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity (3 December 1973) (hereafter UNGA, Principles of International Cooperation), preamble and s 8 (calling upon states not to take any legislative or other measures which may be prejudicial to the international

the possibility of prosecution or punishment impossible after a certain period of time could indeed be said to violate that duty.[106]

Based on all this, it may be concluded that a prohibition on statutory limitations has now crystallized into customary international law and excludes the possibility that there will be a time limit on the possibility of prosecuting acts of genocide.[107] A similar proposition can also reasonably be made in relation to war crimes[108] and crimes against humanity.[109] Statutory limitations provided for under domestic law in

obligations they have assumed in regard to the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity); UNGA, Question of the Punishment of War Criminals (n 86) preamble ('The application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes.'). By analogy, in relation to war crimes, see also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 (CUP 2005) (hereafter ICRC, *Customary Law Study*), Rule 160 ('[T]he operation of statutory limitations could prevent the investigation of war crimes and the prosecution of the suspects and would constitute a violation of the obligation to do so (see Rule 158).'); Consultative Commission of the Council of Europe, Doc. 1868, Recommendation on Statutory Limitations Applicable to Crimes Against Humanity, 19 January 1965 (hereafter Council of Europe, Statutory Limits), 14 (where the Consultative Commission of the Council of Europe suggested that the letter and spirit of the Genocide Convention prohibits the application of statutory limitations to the crime of genocide based on the foreseen duty to punish that crime).

[106] See also Schabas, *Genocide in International Law* (n 1) 486 (adopting a teleological interpretation of the Convention to suggest that a state that would have retained provisions allowing for statutory limitations would be in breach of Articles V, VI, and VII of the Convention). But see Kok, *Statutory Limitations* (n 84) 89 (questioning the co-relation between the two considerations); Kreicker, 'Statute of Limitations' (n 82) 523 (same).

[107] Kok, *Statutory Limitations* (n 84) (conducting a sweeping review of existing practice and taking the view that a general exclusion of statutes of limitation under customary international law can be traced back to the process of adoption and domestic implementation of the Rome Statute in 1998 and thereafter). For an illustration, see *Priebke* Supreme Court Extradition Judgment (n 101). But see Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1st edn, OUP 1997) (hereafter Ratner & Abrams, *Accountability for Human Rights Atrocities*), 126 (questioning that conclusion).

[108] See, e.g., ICRC, *Customary Law Study* (n 102) Rule 160 (and references cited therein). See also ibid., 615 ('The recent trend to pursue war crimes more vigorously in national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time-limits, has hardened the existing treaty rules prohibiting statutes of limitation for war crimes into customary law.'). For illustrations, see *X v. Federal Republic of Germany*, App. No. 1611/62, 25 September 1965 (hereafter *X-Germany* Judgment) ('[T]he rules of prescription do not apply to war crimes."); *X v. Federal Republic of Germany*, Decision, 6 July 1976 (hereafter *X-Germany* 1976 Decision), s 1; *In re* Hass and Priebke, No. 322, Judgment, 22 July 1997 (hereafter *Hass & Priebke* First Instance Military Tribunal Judgment); *Priebke* Supreme Court Extradition Judgment (n 101); *Mukeshimana-Ngulinzira* First Instance Judgment (n 94) paras 33–34.

[109] See, again, Kok, *Statutory Limitations* (n 84) (coming to a similar conclusion); Cassese, *ICL* 2003 (n 11) 319 ('[S]pecific customary rules render statutes of limitation inapplicable with regard to some crimes: genocide, crimes against humanity, torture.'); ILC 2016 Report (n 93) 259. For illustrations, see also *Barbie* Supreme Court Judgment (n 81):

> The judgment under appeal conforms with the official interpretation of the London Agreement given on 15 June 1979 by the Minister of Foreign Affairs, who was consulted on the occasion of other proceedings but whose opinion on questions relating to international public policy (order public international) is of general scope and binding on the judiciary. The Court held that "the only principle with regard to the statutory limitation of prosecution of crimes against humanity which is to be considered as deducible from the Charter of the International Military Tribunal is that prosecution of such crimes is not subject to statutory limitation". The Court of Appeal stated correctly that, within the meaning of Article 60 of the European Convention on Human Rights, "the right to benefit of statutory limitation of prosecution" cannot constitute a

relation to such crimes would therefore be invalid as a matter of international law, would not put an end to a state's duty to punish such crimes and would in principle have no effect in third party jurisdictions.

6.3.2 Statutory limitations and the ICC

Article 29 of the Rome Statute provides that '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'.[110] That provision may be said to codify and reflect the customary law rejection of statutory limitations outlined earlier. As a result of this provision, the Court is not prohibited from investigating or prosecuting a crime within its jurisdiction by reason of a domestic statute of limitation.[111]

Article 29 could also have a *rippling* effect in the jurisdiction of state parties. Under the principle of complementarity, which underlies the jurisdiction of the Court, Article 29 affects the possibility for a state party to rely on a domestic statute of limitations as justification for its failure to investigate and prosecute crimes within the Court's jurisdiction. Were a state party to do so, the Court could regard this as an indication of its inability or unwillingness on the part of that state to exercise its jurisdiction and the case as *prima facie* admissible before the Court.[112] For the same reason, a state party

> human right or fundamental freedom. The Court of Appeal then referred to Article 7(2) of the Convention, as well as to Article 15(2) of the [1966 ICCPR]. In fact, neither of these provisions give rise to any derogation or restriction on the rule that prosecution is not subject to statutory limitation. This rule is applicable to crimes against humanity by virtue of the principles of law recognized by the community of nations.

Referred to in *Prosecutor v. Tadić*, Case No. IT-94-I-T, Opinion and Judgment, 7 May 1997 (hereafter *Tadić* 1997 Judgment), para. 642. See also *Hass & Priebke* First Instance Military Tribunal Judgment (n 98); *In re* Hass and Priebke, Judgment, 7 March 1998 (hereafter *Hass & Priebke* Second Instance Military Tribunal Judgment); *In re* Hass and Priebke, Judgment, 16 November 1998 (hereafter *Hass & Priebke* Third Instance Military Tribunal Judgment); *Chile v. Arancibia Clavel (Enrique Lautaro)*, Case No. 259, A 533 XXXVIII, Appeal Judgment, ILDC 1082 (AR 2004) (hereafter *Enrique Lautaro* Appeal Judgment), para. 371; *Priebke* Supreme Court Extradition Judgment (n 94) paras 28, 32 (suggesting that a customary law and *jus cogens* exclusion of statutory limitations existed for war crimes and crimes against humanity before the 1968 Convention, which merely affirmed that exclusion); *Almonacid-Arellano* 2006 Judgment (n 101) paras 152–153. This does not exclude the possibility that domestic statutes of limitations could have an effect under domestic law. See, e.g., *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, 17 November 2006 (hereafter *Kovačević* Decision on Rule 11*bis* Referral), paras 39, 42; *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, 17 May 2005 (hereafter *Stanković* Decision on Rule 11*bis* Referral), para. 41 (regarding the potential application under domestic law of statutory limitations to individuals referred by the ICTY to domestic jurisdiction for the purpose of their prosecution).

[110] Regarding the history of this provision, see Schabas, 'Article 29' (n 95) 1107ff.

[111] *Ratione temporis*, the Court's jurisdiction is limited, however, to crimes committed after the Statute's entry into force. See ICC Statute (n 11) art. 11(1) ('The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.'). The Rome Statute entered into force on 1 July 2002. Pursuant to Article 11(2) of the Statute, if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12(3).

[112] ICC Statute (n 11) art. 17(1)(a). See, also, Schabas, *Commentary on the Rome Statute* (n 78) 470–71; Message relatif à la modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale international, 08.034, 23 April 2008, 3508 (Switzerland) (noting that whilst, formally, Article 29 only applies to proceedings before the Court, it could have an indirect effect in domestic regimes as a result of the principle of complementarity foreseen in Article 17 of the Statute).

would not be permitted, in principle, to rely on a domestic statute of limitations to refuse to transfer a suspect to the custody of the Court.[113]

6.3.3 Statutory limitations and civil actions

There is very little state practice which addresses the applicability of statutory limitations to civil actions connected to the commission of an international crime. Insofar as it exists, state practice would not necessarily support a suggestion that statutory limitations are invalid if they affect the possibility of civil actions linked to the consequences of international crimes, including genocide.[114]

[113] See, again, Schabas, 'Article 29' (n 95) 1110.

[114] In the *Mukeshimana-Ngulinzira* case, whilst the Brussels Court of First Instance determined that statutes of limitation could not apply to the penal aspects of the prosecution of international crimes (including genocide), it held that statutory limitations could affect certain aspects of the civil action against the Belgian state. *Mukeshimana-Ngulinzira* First Instance Judgment (n 94). See also *Spring v. Switzerland (Schweizerische Eidgenossenschaft)*, 21 January 2000, Administrative Action for Judicial Review, BGE 126 II 145, ILDC 351 (CH 2000) (hereafter *Spring* Administrative Action) (finding that the possibility of making the Swiss state responsible for alleged acts of complicity in genocide was time barred, but granting compensation for expenses for the amount sought as damage).

7

Contextual Element

7.1 The Convention and Customary International Law

7.1.1 No contextual element

Crimes against humanity and war crimes require proof of a so-called *chapeau* or contextual element. For crimes against humanity, the conduct in question must have been part of a widespread or systematic attack against a civilian population and the perpetrator must have acted whilst aware of that connection.[1] Proof of an armed conflict (or a state of occupation) and a sufficient connection or nexus between the acts of the perpetrator and that conflict ('nexus') are necessary elements of the definition of war crimes.[2] These contextual elements provide normative specificity to war crimes and crimes against humanity and distinguish them from other domestic and international crimes.

In contrast, the Genocide Convention does not provide for any such contextual element for the crime of genocide,[3] nor does customary international law.[4] Genocide thus requires no proof of an attack against a civilian population,[5] nor the existence

[1] *Prosecutor v. Kunarac*, Case No. IT-96-23-7 & IT-96-23/1-T, Judgment, 22 February 2001 (hereafter *Kunarac* Trial Judgment), para. 434; *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2001 (hereafter *Kunarac* Appeal Judgment), para. 102. See also Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) (hereafter Mettraux, *Ad Hoc Tribunals*), 173–4 (and references cited therein).

[2] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereafter *Tadić* Jurisdiction Decision on Interlocutory Appeal), paras 67–70; *Kunarac* Trial Judgment (n 1) para. 402; *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003 (hereafter *Naletilić & Martinović* Trial Judgment), para. 225 (and references cited therein, in particular in fn 596); *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 (hereafter *Stakić* Appeal Judgment), para. 342; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016 (hereafter *Karadžić* Trial Judgment), para. 441.

[3] *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (hereafter *Popović et al.* Appeal Judgment), paras 426–434 (noting that the tenor of the *travaux préparatoires* of the Genocide Convention appear to contradict or, at least, do not support the suggestion that a contextual element was implied in the definition of genocide); *Prosecutor v. Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) [2009] ICC-02/05-01/09-3 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), para. 117 (footnote omitted) ('The Majority observes that the definition of the crime of genocide in article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 ("the 1948 Genocide Convention") does not expressly require any contextual element.').

[4] *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-A, Judgment, 1 June 2001 (hereafter *Kayishema & Ruzindana* Appeal Judgment), para. 163; *Popović et al.* Appeal Judgment (n 3), paras 426–434; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 3) para. 119.

[5] See references cited, *supra*, in n 4. See, also, *Prosecutor v. Stupar*, No. X-KRŽ-05/24, Appellate Verdict, 9 September 2009 (hereafter *Stupar et al.* Appeal Judgment), para. 374 ('[T]he existence of a

of an armed conflict.[6] Further and in contrast to the International Criminal Court's *Elements of Crimes*,[7] a manifest or persistent 'pattern of conduct' does not constitute a legal ingredient of genocide under customary law.[8] However, the existence of such a pattern could be relevant to establishing the requisite genocidal intent.[9]

Therefore, as a matter of general international law, the specificity of the crime of genocide lies not in any contextual element that would attach to its definition, but in its protected interest (i.e., certain protected groups) and in the associated requirement that crimes committed against members of these groups must have been committed with the intent to destroy in whole or in part the group as such.[10]

7.1.2 No requirement of plan or policy

In line with Resolution 96(I) of the General Assembly, the Convention's definition foresees no requirement of a plan or policy as an element of the offence of genocide.[11]

widespread and systematic attack does not constitute an essential element of the criminal offense of Genocide [...].'); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 (hereafter *Krstić* Appeal Judgment), para. 223. See also, *Prosecutor v. Pelemiš & Perić*, No. S 11 K 003379 09 Krl, Verdict, 31 October 2011 (hereafter *Pelemiš & Perić* Trial Judgment), para. 112 ('Although existence of a widespread and/or systematic attack against civilians is not an element of the criminal offense of Genocide, for which the Prosecution pressed charges against the Accused, the Panel analyzed the circumstances under which the criminal offense from the description of facts presented in the Indictment was perpetrated. In that respect, the Panel believes that the presented evidence beyond a doubt confirms the Prosecution's argument about the existence of such an attack carried out by members of the VRS and RS MUP in the period between 10 July 1995 and 1 November 1995, as alleged in the Indictment.'); *Prosecutor v. Jević*, No. X-KR-09/823-1, Verdict, 22 August 2012 (hereafter *Jević et al.* Trial Judgment), para. 302; *Prosecutor v. Ao An*, Case No. 004/07-09-2009-ECCC-OCIJ, Closing Order, 16 August 2018 (hereafter *Ao An* 2018 Closing Order), para. 86 (citing *Krstić* Appeal Judgment (n 5) para. 223; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment), para. 48). See, also, *infra*, 12.3.2.3.

[6] Regarding the fact that genocide can be committed in an armed conflict or in peacetime, see, *supra*, 3.2. See also Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951, 79 UNTS 277, art. 1 (providing that genocide is a crime under international law 'whether committed in time of peace or in time of war'). See also, *infra*, 12.2.2.3.1.

[7] See, *infra*, 7.2.2.

[8] See, e.g., *Kayishema & Ruzindana* Appeal Judgment (n 4) para. 163 ('The Appeals Chamber notes that a "persistent pattern of conduct" is not a legal ingredient of the crime of genocide as defined in Article 2 of the [ICTR] Statute and that the Trial Chamber relied on this phrase for purely evidential purposes in examining the question whether Ruzindana possessed the requisite mental element under that provision. Accordingly, the Appeals Chamber can see no reason why the Trial Chamber would have been obliged to "legally define" it.'). See also *Jelisić* Appeal Judgment (n 5), paras 66–68; *Ao An* 2018 Closing Order (n 5) para. 86 ('There is no requirement that the alleged conduct took place in the context of a manifest pattern of similar conduct.'); *Popović et al.* Appeal Judgment (n 3) para. 436 (footnotes omitted) ('The Appeals Chamber recalls that reliance on the definitions of crimes provided in the ICC Elements of Crimes is inapposite, as these definitions are "not binding rules, but only auxiliary means of interpretation" of the ICC Statute. Nor is the ICC Statute itself, as a multilateral treaty, binding on the Tribunal. In any event, the Appeals Chamber is not convinced by Nikolić's argument that the reference in the ICC Elements of Crimes to genocide being committed within a "manifest pattern of similar conduct" provides "strong evidence that [State policy] is implicit in customary international law". The Appeals Chamber considers that a "manifest pattern of similar conduct" does not necessarily imply the existence of a State policy.').

[9] *Kayishema & Ruzindana* Appeal Judgment (n 4) para. 163. See also, *infra*, 9.4.1 and 9.4.7.6 (and references cited therein).

[10] See *supra*, 3.1, and, *infra*, 8.4.1 and 12.1.

[11] During the negotiations of the Convention, it was suggested to add a requirement that the acts had been conducted by or with the support of a state. The suggestion was regarded as unduly narrow and,

Similarly, customary international law does not require proof of the existence of a plan or policy.[12] A plan or policy is not, therefore, a legal ingredient of the definition of the

when put to a vote, was defeated. See, generally, UN Economic and Social Council, Ad Hoc Committee on Genocide: summary record of the 5th meeting, held at Lake Success, New York, Tuesday, 8 April 1948, UN Doc. E/AC.25/SR.5, 16 April 1948 (where the various views in support and in opposition to the suggestion were put forth; it was pointed out, on par in relation to such a requirement, which was seen by several delegations as too restrictive and pointing out that the UNGA Resolution 96(I) suggested a broader notion of genocide without necessary governmental participation or culpability); UN GAOR, 3rd Sess, 79th mtg, UN Doc. A/C.6/SR.79, 20 October 1948 (recording the support and objections for the suggestion of an additional element of necessary state involvement); UN GAOR, 3rd Sess, 80th mtg, UN Doc. A/C.6/SR.80, 21 October 1948 (French amendment to add such an element rejected by forty votes to two with one abstention).

[12] See generally, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment), paras 828–830; *Popović et al.* Appeal Judgment (n 3) paras 427–434 (considering the tenor of the *Travaux*, which appear to contradict or, at least, not support a suggestion that such an element was implied in the definition of genocide), 436, 440 (finding that Nikolić failed to demonstrate that State policy is an element of the crime of genocide), and 468; *Jelisić* Appeal Judgment (n 5) paras 47–48 ('[T]he existence of a plan or policy is not a legal ingredient of the crime.'); *Kayishema & Ruzindana* Appeal Judgment (n 4) para. 138 ('[A] genocidal plan is not a constituent element of the crime of genocide.'); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005 (hereafter *Blagojević & Jokić* Trial Judgment), para. 656 (pointing out that the existence of a plan or policy is not a legal requirement of the crime); *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999 (hereafter *Jelisić* Trial Judgment), paras 100–101 (pointing out that the commission of an act of genocide and the presence of genocidal intent does not require proof of the accused's association with others or with an organization); *Karadžić* Trial Judgment (n 2) para. 550; *Krstić* Appeal Judgment (n 5) para. 225; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001 (hereafter *Sikirica et al.* Judgment on Defense Motions to Acquit), para. 62; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (hereafter *Tolimir* Appeal Judgment), para. 246; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgment, 11 July 2013 (hereafter *Karadžić* Rule 98 *bis* Appeal Judgment), paras 80–99; *Hategekimana v. Prosecutor*, Case No. ICTR-00-55B-A, Judgment, 8 May 2012 (hereafter *Hategekimana* Appeal Judgment), para. 133; *Munyaneza v. R*, 2014 QCCA 906 (Can. Ct. App.) (hereafter *Munyaneza* Appeal Judgment), para. 179 ('Finally, while a genocidal policy or specific plan to carry it out may constitute a significant fact, it need not be proved.'); *Jević et al.* Trial Judgment (n 5) para. 984; *Prosecutor v. Vuković & Tomić*, No. X-KR-06/180-2, Verdict, 2 July 2010 (hereafter *Vuković & Tomić* Trial Judgment), paras 571–74; *Prosecutor v. Vuković & Tomić*, No. S1 1K 006124 11 Kžk, Verdict, 22 June 2012 (hereafter *Vuković & Tomić* Appeal Judgment), paras 455–61; *Prosecutor v. Trbić*, No. X-KR-07/368, First Instance Verdict, 29 April 2010 (hereafter *Trbić* Trial Judgment), para. 199; *Prosecutor v. Mitrović*, No. X-KR-05/24-1, First Instance Verdict, 4 February 2009 (hereafter *Mitrović* Trial Judgment), p. 96 ('There is no requirement under law that genocide involve a plan. Where such a plan exists, the extent to which the accused know of the plan is relevant to the question of genocidal intent, that is, as to whether they acted with the aim to destroy a protected group.'), p. 97 and p. 103; *Ao An* 2018 Closing Order (n 5) para. 86; *The Queen v. Munyaneza (Désiré)*, 2009 QCCS 2201 (Can. Superior Ct.) (hereafter *Munyaneza* Trial Judgment) paras 97–101; *Cvetković v. Attorney General*, No. A 6322/11, Judgment (Israel Supreme Ct. 29 November 2012) (hereafter *Cvetković* Appeal Judgment) (refraining from deciding the defence argument of the need for proof of a policy underlying acts of genocide, indicating that in any case there would be enough evidence of such a policy). Regarding the absence of requirement of a plan, see also, Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Jessberger, Definition and Elements of Genocide), 105–6; Matthew Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later' (1998) 15 Arizona Journal of International & Comparative Law 415 (hereafter Lippman, 'Convention on Genocide Fifty Years Later'), 455; Pieter Drost, *The Crime of State*, vol. 2 (Sythoff 1959) (hereafter Drost, *The Crime of State* vol. 2), 82. Regarding the absence of requirement of a 'policy' element, see also, Antonio Cassese, 'Is Genocidal Policy a Requirement for the Crime of Genocide?' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Cassese, 'Genocidal Policy Requirement?'), 128 (concluding that this requirement is not a necessary and indispensable legal element of the offence but a common *factual* feature thereof); and, *contra*, Alexander Greenawalt, 'Rethinking Genocide Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 Columbia Law Review 2259 (hereafter Greenawalt,

crime of genocide.[13] However, where the existence of a plan or policy to commit such crimes has been established, and the accused is shown to have been aware of it, that awareness would be a factor of relevance to establishing that he possessed the requisite genocidal intent.[14]

7.2 The ICC Regime

7.2.1 The Statute

Article 6 of the Rome Statute, which pertains to genocide, reads as follows:

> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

'Rethinking Genocidal Intent'); William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) (hereafter Schabas, *Genocide in International Law*), 243–55; Claus Kreß, 'The Darfur Report and Genocidal Intent' (2005) 3 Journal of International Criminal Justice 562 (hereafter Kreß, 'Darfur Report and Genocide').

[13] *Popović et al.* Trial Judgment (n 12), para. 830. Similarly, the Statutes of international(ized) criminal tribunals that adopted the definition of genocide contained in the Convention made no reference to such a requirement. So have most domestic jurisdictions. However, a limited number of them have adopted definitions of genocide that require proof of the existence of a plan or policy. See Olympia Bekou and Katerina Katsimardou Miariti, *Implementing the Rome Statute of the International Criminal Court: Ratification, Implementation and Co-operation* (Center for International Law Research and Policy 2017) (hereafter Bekou & Miariti, *Implementing the Rome Statute*), in particular, s 4.2.1, 28–29 (describing how France and Cape Verde require a 'concerted plan', Georgia requires 'an agreed plan' and Albania requires a 'premeditated plan'). Similarly, a number of scholars have pleaded in favour of the inclusion of such a requirement in the definition of genocide. See W Schabas, *Genocide in International Law* (CUP 2000), 208; A Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' 99 Columbia Law Review (1999) 2259. See also A Cassese, 'The Policy Element in Genocide: When is it Required by International Rules?' in C Safferlin and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010), 133 (suggesting a *disjunctive* approach to this issue whereby some of the genocidal acts listed in Article II of the Convention require proof of an element of policy whilst others do not).

[14] See again, generally, *Jelisić* Appeal Judgment (n 5) para. 48; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999 (hereafter *Kayishema & Ruzindana* Trial Judgment), paras 91, 94, 276, 528–545; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001 (hereafter *Krstić* Trial Judgment), para. 572; *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998 (hereafter *Kambanda* Trial Judgment), para. 16; *Mitrović* Trial Judgment, p. 97 (footnote omitted) ('[T]he existence of a plan or policy to commit genocide and the perpetrator's knowledge of that plan or policy is a highly relevant evidentiary consideration in determining intent.') and p. 103 ('The genocidal context from which evidence of intent can be derived is the existence of a genocidal plan and facts which confirm that the plan was in effect. Since the inquiry is as to the state of mind of the accused, the plan and its effectuation cannot be viewed in the abstract, but rather the relevant inquiry must be what the accused knew of the plan and what objective evidence was available to the accused to substantiate that the plan was being carried out.'); *Munyaneza* Appeal Judgment (n 12) para. 179. See, also, *infra*, 9.4.7.6 (and references cited therein).

This definition replicates in substance Article II of the Genocide Convention. In particular, this provision contains no contextual element, nor does it make any reference to a plan, policy, or pattern of crimes as necessary elements of that offence. *Prima facie*, the ICC's statutory regime is therefore consistent with customary international law.

7.2.2 The *Elements of Crimes*

Pursuant to Article 9(1) of the Court's Statute, the *Elements of Crimes* are intended to assist the Court in interpreting the definition of crimes within its jurisdiction.[15] Instead, Article 6 of the *Elements* appears to conflict with the terms of the Statute. According to that provision, to constitute an act of genocide under the International Criminal Court (ICC) regime '[t]he conduct [must have taken] place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.[16] This requirement, which was intended to introduce a jurisdictional threshold of sort,[17] does not appear in the Rome Statute and therefore lacks a clear statutory basis. A Pre-Trial Chamber of the ICC has suggested, however, that the *Elements* merely 'elaborate upon' the Statute and were therefore not incompatible with the terms of the Statute.[18] This proposition is questionable since the *Elements* are intended to *interpret* rather than *amend* or elaborate upon the terms of the Statute.[19] Therefore, the requirement of a 'manifest pattern' is arguably *ultra vires* of the Statute and inconsistent with customary law.[20] Consequently, it should be

[15] Article 9(1) of the ICC Statute reads: 'Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.' Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 3 (hereafter Rome Statute or ICC Statute), art. 9(1). Paragraph 3 of that same provision makes it clear that the *Elements* must be consistent with the Statute.

[16] The *Elements* also specify that the expression 'in the context of' would include the initial acts in an emerging pattern and that the term 'manifest' is an objective qualification of that pattern. Regarding the circumstances of the adoption of that requirement during the negotiations, see generally Schabas, *Genocide in International Law* (n 10) 250–1 (noting that the requirement originated in a US proposal intended to reflect the perceived necessity for some sort of 'plan' to commit the crime). See generally Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008); Roy S Lee, *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, and Results* (Kluwer Law International 1999); Roy S Lee, *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), 45–48.

[17] The addition of this requirement was primarily motivated by a concern that the notion of genocide might otherwise be unduly diluted and could end up applying to what was considered by some delegations as too broad a range of factual scenarios. See R Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001), 45–47.

[18] See *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 3) paras 121–146, in particular, paras 132–134.

[19] Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18, 6 September 2018, para. 56.

[20] See, *supra*, fn 8; *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009 (hereafter *Al Bashir* Decision on Warrant Application, Ušacka Dissent), paras 16–20 (questioning the approach of the majority of the Chamber in regard to the applicability of the contextual requirement introduced by the *Elements* and declining to settle the question of whether or not the contextual element is consistent with the statutory definition of genocide). See also Kai Ambos and Steffen Wirth, 'Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts' in Horst Fischer *et al.* (eds), *International and National Prosecution of Crimes*

regarded by the Court as merely a circumstance which, if proven, would be relevant to establishing the statutory elements of genocide, in particular the genocidal intent of the perpetrator.[21] Thus apprehended, the 'manifest pattern' of the *Elements* refers to a factual situation where crimes affecting members of a particular group are objectively driven by a common agenda or raison d'être.[22] Such an approach would be consistent with existing law and with the approach of other tribunals.[23] *A contrario*, adding an element to the definition of the offence through the *Elements* would result in an impermissible amendment of the terms of the Statute and would create a distinct and unnecessarily restrictive notion of genocide for the purpose of proceedings before the Court.[24]

Under International Law: Current Developments (Verlag Arno Spitz 2001) (hereafter Ambos & Wirth, 'Genocide and War Crimes in Yugoslavia'), 789–90 (critiquing the position taken by a German court in the *Jorgić* case, which adopted a contextual or quasi-contextual element for the crime of genocide and suggesting that the contextual requirement introduced by the ICC's *Elements of Crimes* might be *ultra vires* and thus void; the authors suggest that, at the most, this contextual element should be regarded as a consideration of relevance to the Prosecution's exercise of its discretion pursuant to Article 53(1)(c) of the Rome Statute).

[21] See also Jessberger, Definition and the Elements of Genocide (n 12) 95 (suggesting that this requirement should be understood as 'a merely procedural requirement related to the jurisdiction of the ICC rather than adding an additional material element to the definition of genocide'); Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press 2005) (hereafter Werle, *Principles of ICL*), 309–12.

[22] *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 19 (footnotes omitted) ('[T]he plain meaning of the term "manifest pattern" refers to a systematic, clear pattern of conduct in which the alleged genocidal conduct occurs. This interpretation is also consistent with the second introductory element of article 6 of the Statute, which states that the term 'manifest' is an objective qualification.'), and para. 20 (relying on the finding of the Chamber that there was a widespread and systematic attack on members of the Fur, Masalit, and Zaghawa population to suggest that this would fulfill the contextual element, if indeed applicable). See also Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., part II.B, UN Doc. ICC-ASP/1/3, 3–10 September 2002 (hereafter *Elements of Crimes*), art. 6(b) ('The term "manifest" is an objective qualification.') and art. 6(a) ('The term "in the context of" would include the initial acts in an emerging pattern.'). For academic literature on the subject see, Valerie Oosterveld and Charles Garraway, 'The Elements of Genocide' in Roy S Lee *et al.* (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001) (hereafter Oosterveld & Garraway, 'Elements of Genocide'), 47; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) (hereafter Schabas, *Commentary on the Rome Statute*), 124.

[23] *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003, para. 526 (referring to the relevance of a 'pattern of purposeful action'); *Kayishema & Ruzindana* Trial Judgment (n 14) para. 93; *Kayishema & Ruzindana* Appeal Judgment (n 4) para. 163; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, paras 969–971. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), paras 148, 413–418.

[24] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015, Separate Opinion of Judge Gaja) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment, Separate Opinion of Judge Gaja), para. 2:

> A restrictive approach to the definition of genocide may also be found in the 'Elements of Crimes', adopted by the Assembly of States Parties in order to 'assist' the ICC in the interpretation and application of the relevant provisions of the Rome Statute (Art. 9). According to these Elements, for genocide to be committed it is necessary that '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'. Since the adoption of the Elements of Crimes does not embody a "subsequent agreement between the parties regarding the interpretation" of the Genocide Convention according to Article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, it does not affect the extent of State responsibility for genocide.

7.2.3 Contextual element and *mens rea*

The *Elements of Crimes* also contain the following specification:

> 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 on a case-by-case basis.[25]

The meaning of this sentence is far from clear. Article 30(3) of the Statute specifies that '[f]or the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. If the contextual requirement introduced by the *Elements* is read into the Statute, a strict application of Article 30 of the Statute would mean that an accused charged under Article 6 of the Statute would have to possess the requisite knowledge of the contextual element.[26] It has been suggested, however, that as a 'jurisdictional' element, this contextual element need not be reflected in the *mens rea* element of the offense.[27] Such a reading is complicated by the terms of Article 30, which make no exception for *jurisdictional* elements.[28] The proposed interpretation is made even more improbable

[25] *Elements of Crime* (n 22) art. 6(c).

[26] The normative incoherence of this section of the *Elements* is explained by Professor Schabas in those terms:

> [A]fter considerable debate, the Preparatory Commission decided not to incorporate an additional description of the mental element. The sentence referring to the Court deciding on a case-by-case basis was included after the reference to the mental element had been dropped [from the draft provision], 'in order to ensure that the elimination of mental requirement language in the elements did not inadvertently preclude the Court from determining a general mental requirement (apart from the specific intent requirement) in a particular case where such a determination was needed'. The implausible result of this seems to be that despite the terms of article 30 of the *Statute*, the judges are at liberty to depart from its terms with respect to the crime of genocide.

Schabas, *Commentary on the Rome Statute* (n 22) 125–26 (footnote omitted).

[27] See generally Gerhard Werle and Florian Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 Journal of International Criminal Justice 35 (hereafter Werle & Jessberger, Article 30 of the ICC Statute), 51; Roger S Clark, 'The Mental Element in the International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Criminal Law Forum 291 (hereafter Clark, 'Mental Element in ICL'), 326–27 (pointing to his own position that the issue is merely jurisdictional in nature and to the fact that the Preparatory Commission agreed to leave this matter to be determined by the Court).

[28] See also Maria Kelt and Herman von Hebel, 'What Are the Elements of Crimes?' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001) (hereafter Kelt & von Hebel, 'What Are the Elements of Crimes?'), 13–18, in particular, 15:

> [T]here was considerable debate [during the negotiations of the elements of crimes] as to whether they [the contextual elements] really were 'material elements'—and if so whether they were (fully) covered by the mental element of article 30—or whether they formed a separate type of element. Some participants thought, for example, that there might be a category of elements that are neither material nor mental, but which should be considered 'jurisdictional' or 'merely jurisdictional'. Ultimately, however, an explicit decision as to whether these elements were 'material elements' became unnecessary, as for each contextual element some corresponding mental element [however, lower than that provided for under Article 30] was specified in most cases, which, as a result, [...] rendered the other question moot.

by the terms of Article 6(c) of the *Elements*, which leaves it to the Court to decide 'on a case-by-case basis' whether such an element of intent indeed applies. More convincing is the suggestion that the *Elements* cannot import or *legislate* new elements of the crimes provided for in the Statute and that, absent such a requirement in the Statute, the wording of the *Elements* do not constitute a necessary legal element of the offence, but are merely factual circumstances of potential evidential relevance to establishing the perpetrator's genocidal intent.[29]

[29] Such an interpretation would be consistent with the fact that this requirement is not one of general application but one to be determined on a case-by-case basis (in French: 'devra être considérée par la Cour dans chaque cas d'espèce').

8

Special Genocidal Intent/*Dolus Specialis*

8.1 General Considerations

8.1.1 Special intent as a characteristic feature of genocide

Under the Genocide Convention and customary international law, the definition of the crime of genocide consists of two core elements:[1]

(i) a prohibited act amounting to one of the listed offences in Article II of the Convention[2]

(ii) committed with the intent to destroy, in whole or in part, a (national, ethnical, racial, or religious) group, as such.

It is the ultimate purpose that the perpetrator intends to achieve, rather than the nature of the underlying act, which is central to crime.[3] By his

[1] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008 (hereafter *Bagosora et al.* Trial Judgment), para. 2115 (citing *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007 (hereafter *Nahimana et al.* Appeal Judgment), paras 492, 496, 522–523); *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgment, 9 July 2004 (hereafter *Niyitegeka* Appeal Judgment), para. 48; *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, 7 July 2006 (hereafter *Gacumbitsi* Appeal Judgment), para. 39; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004 (hereafter *Brdanin* Trial Judgment), paras 681, 695; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Judgment and Sentence, 2 February 2012 (hereafter *Karemera et al.* Trial Judgment), para. 1606 (footnotes omitted) ('In order to convict for the crime of genocide, it must be established that the accused committed at least one of the enumerated acts in Article 2(2) of the Statute with the specific intent to destroy, in whole or in part, a group, as such, that is defined by one of the protected categories of nationality, race, ethnicity or religion.'); *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Judgment and Sentence, 17 May 2011 (hereafter *Ndindiliyimana et al.* Trial Judgment), para. 2072; *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-T, Judgment and Sentence, 30 December 2011 (hereafter *Ndahimana* Trial Judgment), para. 803; *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, Judgment, 17 November 2009 (hereafter *Nsengimana* Trial Judgment), para. 831; *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgment and Sentence, 3 August 2010 (hereafter *Ntawukulilyayo* Trial Judgment), para. 450; *Prosecutor v. Gatete*, Case No. ICTR-00-61-T, Judgment and Sentence, 31 March 2011 (hereafter *Gatete* Trial Judgment), para. 582 (footnotes omitted) ('To find an accused guilty of the crime of genocide, it must be established that the accused committed any one of the enumerated acts in Article 2 (2) of the Statute with the specific intent to destroy, in whole or in part, a group, as such, that is defined by one of the protected categories of nationality, race, ethnicity, or religion.'); *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgment and Sentence, 13 December 2005 (hereafter *Simba* Trial Judgment), para. 412; *Prosecutor v. Seromba*, Case No. ICTR-01-66-T, Judgment, 13 December 2006 (hereafter *Seromba* Trial Judgment), para. 316; *Prosecutor v. Setako*, Case No. ICTR-04-81-T, Judgment and Sentence, 25 February 2010 (hereafter *Setako* Trial Judgment), para. 466; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgment, 18 December 2008 (hereafter *Zigiranyirazo* Trial Judgment), para. 397; *Blagojević & Jokić* Trial Judgment (n 18) para. 640. See also *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), para. 113.

[2] See Chapter 10, *infra*.

[3] For an illustration, see *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004 (hereafter *Milošević* Decision on Motion for Judgment of

conduct, the perpetrator must have intended to contribute to the destruction, in whole or in part, of a protected group.[4] This particular element of intent is what makes genocide a unique crime[5] and what triggers the application of the law of

Acquittal), para. 126 ('"The prohibition of genocide would be pertinent [...] if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such"; in order to determine whether the intent to commit genocide is present, "due account of the circumstances specific to each case" must be considered.') (referring to Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996) [1996] ICJ Rep 95 (hereafter ICJ, Legality of the Threat or Use of Nuclear Weapons), 18). See also *Prosecutor v. Jević*, No. X-KR-09/823-1, Verdict, 22 August 2012 (hereafter *Jević et al.* Trial Judgment), para. 959.

[4] *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001 (hereafter *Krstić* Trial Judgment), para. 549; *Jević et al.* Trial Judgment (n 3) para. 925; *Prosecutor v. Trbić*, No. X-KR-07/368, First Instance Verdict, 29 April 2010 (hereafter *Trbić* Trial Judgment), paras 186–202. The ICJ has noted:

> In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the 'intent to destroy, in whole or in part ... [the protected] group, as such'. It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or dolus specialist in the present Judgment it will usually be referred to as the 'specific intent (dolus specialis).' It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group.

Application of The Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), para. 187.

[5] *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (hereafter *Stakić* Trial Judgment), para. 520 ('Genocide is a unique crime where special emphasis is placed on the specific intent. The crime is, in fact, characterised and distinguished by a "surplus" of intent.'). See also *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgment and Sentence, 12 September 2006 (hereafter *Muvunyi* Trial Judgment), para. 478 (footnote omitted) ('Because of its element of *dolus specialis* (special intent), which requires that the crime be committed with the specific intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, genocide is considered a unique crime.'); *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999 (hereafter *Serushago* Sentencing Judgment), para. 15; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999 (hereafter *Rutaganda* Trial Judgment), para. 59; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (hereafter *Akayesu* Trial Judgment), para. 498 ('Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".'). It should be noted, however, that despite this statement, the *Akayesu* Trial Chamber found that knowledge of the principal's genocidal intent would in fact be sufficient to enter a conviction for complicity to genocide. See *Akayesu* Trial Judgment (*supra*) para. 540, 547. See also *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001 (hereafter *Sikirica et al.* Judgment on Defense Motions to Acquit), para. 89; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, 27 January 2000 (hereafter *Musema* Trial Judgment), para. 164; *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999 (hereafter *Jelisić* Trial Judgment), para. 66; *Jević et al.* Trial Judgment (n 3) para. 959 (footnote omitted) ('The foregoing evidently shows that the criminal offense of Genocide is distinct from other crimes inasmuch as it embodies a special intent, which in this concrete case constitutes an element of the crime, where it is necessary to clearly establish that the perpetrator sought to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such." Consequently, a person may be convicted of genocide only if he had a special intent to commit one of the underlying criminal offenses of genocide.'). *Trbić* Trial Judgment (n 4) para. 192; *Prosecutor v. Ivanović*, No. S1 1 K 003442 14, Second Instance Verdict, 1 July 2014 (hereafter *Ivanović* Appeal Judgment), para. 25 ('The essence and specific nature of the crime of

genocide.[6]

This special intent and the associated concern for the protection of certain groups are what give the crime of genocide its particular currency.[7] This requirement also distinguishes genocide from other international crimes,[8] including

genocide is that the crime of genocide requires proof of two separate criminal intents, namely the intent of the underlying act and the genocidal intent.'); *Prosecutor v. Kos et al.*, No. S1 1 K 003372 10 Krl, Verdict, 15 June 2012 (hereafter *Kos et al.* Trial Judgment), paras 605–606. The District Court of Jerusalem in the *Eichmann* case also noted:

> What is it that endows this crime with its special character in the criminal law of a State which adopts in its domestic legislation the definition of the crime of genocide? One would say, the all-embracing total form which this crime is liable to take. This form is already indicated by the definition of the criminal intention necessary in this crime, which is general and total: the extermination of members of a group as such, i.e., a whole people or part of a people. As the Supreme Court has said in the case of Pal (1952) 6 PD 489, 502 [(1951) 18 ILR 542]: 'Under section I of the Nazi and Nazi Collaborators (Punishment) Law, 1950, a person may also be found guilty of an offence which in fact he committed against specific persons, if the offence against those persons was committed as a result of an intent to harm the group, and the act committed by the offender against those persons was a kind of "part performance" of his willful intent against the whole group, be it the Jewish people or any civilian population.'

Attorney General v. Eichmann, No. 40/61, Judgment (D. Ct. Jerusalem 11 December 1961) (hereafter *Eichmann* District Court Judgment), para. 191. See also International Law Commission, 'Report of the International Law Commission on the Work of its Forty-Eighth Session' in [1996 vol. 2 pt 2] *Yearbook of International Law Commission*, (United Nations 1998) (hereafter ILC, 'Commentaries on Draft Code'), 44; Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10 (1996) (hereafter UN Doc. A/51/10), 87.

[6] The ICC Pre-Trial Chamber in the *Bashir* case thus noted:

> As a consequence, according to the case law of the ICTY and the ICTR, the protection offered to the targeted groups by the penal norm defining the crime of genocide is dependent on the existence of an intent to destroy, in whole or in part, the targeted group. As soon as such intent exists and materialises in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group.

Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest (n 1) paras 117, 120 (footnotes omitted).

[7] ICJ *Bosnia-Serbia* 2007 Judgment (n 4) paras 187–189 ('Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.'). See also *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment), para. 2. See, also, *supra*, 8.4.1 and 3.5.

[8] See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 (hereafter *Krstić* Appeal Judgment), para. 134; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment), para. 820 (footnote omitted) ('What distinguishes genocide is genocidal intent—the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".'); *Seromba* Trial Judgment (n 1) para. 319 ('Genocide is distinct from other crimes because it requires a special intent.'); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016 (hereinafter *Karadžić* Trial Judgment), para. 549; *Trbić* Trial Judgment (n 4) para. 192 ('Genocide is distinct from many other crimes because it includes a [...] specific intent, included as an element of the crime, which requires the perpetrator to clearly seek to produce the act charged. [...] A person may only be convicted of genocide if he/she committed one of the enumerated acts with the specific intent. The offender is culpable if he/she intended the act committed to extend beyond its actual commission, for the realization of an ulterior motive, which is to destroy, in whole or part, the group of which the victims are part of.'); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 132 ('The "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" is the essential characteristic of genocide, which distinguishes it from other serious crimes.'). For a historical understanding of the raison d'être of the offence, see United Nations War Crimes Commission, 'Notes on the Trial of Ulrich Greifelt and Others,' in *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) (hereafter UNWCC, 'Notes on Trial of Ulrich Greifelt'), 37.

other discrimination-based crimes such as the crime against humanity of persecution.[9]

The law of genocide does not require that an intent to destroy a group be the sole or primary purpose of the perpetrator.[10] In *Ntakirutimana*, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) rejected the accused's suggestion that the Trial Chamber had erred when finding that refugees were targeted 'solely' for their Tutsi ethnicity because the definition of genocide does not contain such a requirement and it was therefore immaterial whether the refugees were targeted *solely* on the basis of their ethnicity or whether they were targeted for their ethnicity *in addition to other reasons.*[11] A perpetrator could therefore be found guilty of genocide even if his personal motivation went beyond the criminal intent to commit genocide.[12]

[9] See *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 122 (footnotes omitted) ('Genocide is a discriminatory crime in that, for the crime to be established, the underlying acts must target individuals because of their membership of a group. The perpetrator of genocide selects and targets his victims because they are part of a group that he seeks to destroy. This means that the destruction of the group must have been sought as a separate and distinct entity.'); *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015 (hereafter *Nyiramasuhuko et al.* Appeal Judgment), 735 fn 4930 (regarding the distinction between genocide and the crime against humanity of extermination). See, also, *infra*, 12.3.3 and references cited.

[10] See *Bagosora et al.* Trial Judgment (n 1) para. 2115; *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Judgment, 27 November 2007 (hereafter *Simba* Appeal Judgment), paras 88, 268–269; *Prosecutor v. Ntakirutimana et al.*, Case Nos ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004 (hereafter *Ntakirutimana* Appeal Judgment), paras 302–304, in particular, para. 304; *Niyitegeka* Appeal Judgment (n 1) paras 48–54; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003 (hereafter *Krnojelac* Appeal Judgment), para. 102 (citing *Jelisić* Appeal Judgment (n 7) para. 49); *Gatete* Trial Judgment (n 1) para. 582 (footnote omitted) ('The perpetrator need not be solely motivated by a criminal intent to commit genocide, nor does the existence of personal motive preclude him from having the specific intent to commit genocide.'); *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Judgment and Sentence, 6 December 2010 (hereafter *Hategekimana* Trial Judgment), para. 668; *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Judgment, 1 November 2010 (hereafter *Kanyarukiga* Trial Judgment), para. 636; *Karemera et al.* Trial Judgment (n 1) paras 1579, 1606; *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, 7 December 2007 (hereafter *Karera* Trial Judgment), para. 534; *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, Judgment and Sentence, 5 July 2010 (hereafter *Munyakazi* Trial Judgment), para. 493; *Muvunyi* Trial Judgment (n 5) para. 479; *Ndahimana* Trial Judgment (n 1) para. 803; *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Judgment and Sentence, 20 December 2012 (hereafter *Ngirabatware* Trial Judgment), para. 1325; *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Judgment and Sentence, 19 June 2012 (hereafter *Nizeyimana* Trial Judgment), para. 1491; *Nsengimana* Trial Judgment (n 1) para. 831; *Ntawukulilyayo* Trial Judgment (n 1) para. 450; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Judgment and Sentence, 31 May 2012 (hereafter *Nzabonimana* Trial Judgment), para. 1702; *Setako* Trial Judgment (n 1) para. 466; *Simba* Trial Judgment (n 1) paras 412, 417; *Jelisić* Appeal Judgment (n 7) para. 49; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999 (hereafter *Kayishema & Ruzindana* Trial Judgment), para. 161; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 (hereafter *Tadić* Appeal Judgment), para. 269; *Karadžić* Trial Judgment (n 8) para. 554; *Stakić* Trial Judgment (n 5) para. 45; *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T, Judgment, 27 February 2009 (hereafter *Rukundo* Trial Judgment), para. 557; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 72 ('[T]he victims' membership in the protected group need not be the only reason for which they were targeted. [...] For example, a certain group may be targeted not solely because of its ethnicity, but also because of a perceived support for rebel groups. Such a perception, however, does not legitimize the targeting of a protected group as such.'); *Hipperson et al. v. Director of Public Prosecutions*, Queen's Bench Division, 3 July 1996, 1996 WL 1090678 (hereafter *Hipperson* Queen's Bench Judgment), 584–90; *The Queen v. Munyaneza (Désiré)*, 2009 QCCS 2201 (Can. Superior Ct.) (*Munyaneza* Trial Judgment), para. 107.

[11] *Ntakirutimana* Appeal Judgment (n 10) paras 302–304, in particular, para. 304.

[12] See, e.g., *Muvunyi* Trial Judgment (n 5) para. 479.

Evidence of unrelated motives explaining his actions will not preclude a finding that he also possessed the requisite genocidal intent.[13]

8.1.2 Meaning and content

The commission of an act of genocide requires an element of intent that is twofold: the perpetrator must have intended to commit the underlying act which forms the underlying basis of the charges (e.g., killings; causing serious bodily harm);[14] *and* he must have done so with the special intent to destroy the group to which the victim of his act belongs.[15] The first element, which attaches to the underlying conduct, will be

[13] *Gatete* Trial Judgment (n 1) para. 582 (footnote omitted) ('The perpetrator need not be solely motivated by a criminal intent to commit genocide, nor does the existence of personal motive preclude him from having the specific intent to commit genocide.'); *Karadžić* Trial Judgment (n 8) para. 554 (footnote omitted) ('Specific intent is distinguished from personal motive; however, the existence of a personal motive does not exclude the possession of genocidal intent.'); *Rukundo* Trial Judgment (n 10) para. 557 (footnote omitted) ('The perpetrator need not be motivated solely by a genocidal intent, and having a personal motive will not preclude such a specific intent.'); *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 72. See also *infra*, 8.1.5.

[14] In its Judgment in the *Bosnian Genocide* case, the ICJ defined the general subjective element that must cover the specific genocidal acts as follows: 'It is well established that the acts—[here the ICJ enumerates the acts]—themselves include mental elements. "Killing" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing"; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts.' ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 186. This holding was noted and seemingly approved by the ICC Pre-Trial Chamber in *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) fn 53. Regarding the first element of intent as far as applicable to the ICC, see *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007 (hereafter *Lubanga* Decision on the Confirmation of Charges), paras 113–117; *Prosecutor v. Katanga et al.* Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008 (hereafter *Katanga et al.* Decision on the Confirmation of Charges), paras 527–532.

[15] See *Jelisić* Appeal Judgment (n 7) paras 45, 50–55; *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Judgment, 12 March 2008 (hereafter *Seromba* Appeal Judgment), para. 174 (footnote omitted) ('The Appeals Chamber recalls that in addition to intent and knowledge as regards the material elements of the crime of genocide, the mental element of the crime also requires that the perpetrator have acted with the specific intent to destroy a protected group as such in whole or in part.'); *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (hereafter *Tolimir* Trial Judgment), para. 744 (footnotes omitted) ('The *mens rea* of the crime of genocide is characterised by the requirement of a dolus specialis; a specific intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Thus, the crime of genocide requires not only proof of the perpetrator's intent to commit the underlying act, but also proof of the specific intent to destroy the protected group, in whole or in part.'); *Popović et al.* Trial Judgment (n 8) para. 808 (footnote omitted) ('Proof of the specific genocidal intent to destroy the targeted group in whole or in part is required in addition to proof of intent to commit the underlying act.'); *Krstić* Appeal Judgment (n 8) para. 20. The *Bashir* Pre-Trial Chamber also made the following comments on the issue:

> 138. In relation to the second element, the crime of genocide is characterised by the fact that any of the five categories of genocidal acts provided for in article 6 of the Statute must be carried out with the 'intent to destroy, in whole or in part, a national, ethnic, racial or religious group.' In the view of the Majority, this introduces a subjective element that is additional to the general intent and knowledge requirement provided for in article 30 of the Statute.
> 139. As a result, the Majority considers that the crime of genocide is comprised of two subjective elements:
>
> i. a general subjective element that must cover any genocidal act provided for in article 6(a) to (e) of the Statute, and which consists of article 30 intent and knowledge requirement; and

addressed later in this book.[16] The present section focuses exclusively on the element of special genocidal intent—an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such'—which has been described variously as special intent, specific intent, *dolus specialis*, particular intent, and genocidal intent.[17]

Intent must be understood here as the ultimate aim of the perpetrator.[18] He must intend, through his action or culpable omission, to contribute to the destruction of a group or part of a group. Mere negligence or indifference to the result of one's conduct

> ii. an additional subjective element, normally referred to as 'dolus specialis' or specific intent, according to which any genocidal acts must be carried out with the 'intent to destroy in whole or in part' the targeted group.

Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest (n 1) paras 138–139 (footnotes omitted). See also ICJ *Bosnia-Serbia* 2007 Judgment (n 4) paras 186–187; ICJ *Croatia-Serbia* 2015 Judgment (n 8) para. 132 ('It is regarded as a *dolus specialis*, that is to say a specific intent, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved [...].').

[16] See, *infra*, Chapter 10.

[17] *Jelisić* Appeal Judgment (n 7) para. 45; *Akayesu* Trial Judgment (n 5) para. 498; *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 119 (footnote omitted) ('The intent required for genocide has been referred to as "special intent," "specific intent," or *dolus specialis*, terms which have been used interchangeably to describe the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.'); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgment, 11 July 2013 (hereafter *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal), para. 22; *Karadžić* Trial Judgment (n 8) para. 549.

[18] See *Trbić* Trial Judgment (n 4) para. 187 (footnote omitted) ('Genocidal intent can only be the result of a deliberate and conscious aim. The destruction, in whole or in part, must be the aim of the underlying crime(s). In addition, and consistent with Article 2 of the Genocide Convention, the term "aim" encompasses the intent to destroy the group "as such".'); *Ivanović* Appeal Judgment (n 5) para. 44 (citing *Niyitegeka* Appeal Judgment (n 1) para. 53); *Prosecutor v. Stupar et al.*, No. X-KR-05/24, First Instance Verdict, 29 July 2008 (hereafter *Stupar et al.* Trial Judgment), para. 56; *Prosecutor v. Mitrović*, No. X-KR-05/24-1, First Instance Verdict, 4 February 2009 (hereafter *Mitrović* Trial Judgment), 47; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005 (hereafter *Blagojević & Jokić* Trial Judgment), para. 656; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 60. The *ad hoc* Tribunals have generally refrained from defining the notion of 'intent' for the purpose of this offense. For instance, in *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 60 (footnote omitted), the Court stated:

> The first rule of interpretation is to give words their ordinary meaning where the text is clear. Here, the meaning of intent is made plain in the chapeau to Article 4(2) [of the ICTY Statute]. Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent. It is, however, important to understand the part of the chapeau that elaborates on and explains the required intent, that is 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'

In the *Einsatzgruppen* case, the following principles were laid out in relation to that notion. See 'United States v. Ohlendorf, Case No. 9, Opinion and Judgment' in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. 4 (William S Hein & Co. 1997) (hereafter 'United States v. Ohlendorf'), 488 ('Every man is presumed to intend the consequences of his acts. Every man is responsible for those acts unless it be shown that he did not act of his own free will.') Finally, the Statute of the ICC, Article 30(2), provides a detailed and general definition of the notion of 'intent' for the purpose of proceedings before the Court: 'For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.' Rome Statute, art. 30(2).

falls short of the requisite level of intent.[19] It is therefore not enough that the perpetrator simply knew that the underlying crime would inevitably or most likely result in the destruction of the group. He must intend such destruction.

Temporally, the special intent must be shown to have been present at the moment of the commission of the criminal act that forms the basis of the charges against him.[20] However, it is not necessary to establish exactly when the *dolus specialis* was formed in the mind of the perpetrator, as long as it is shown to be present at the time of commission of the underlying act.

8.1.3 Lowered *mens rea* standard for certain forms of participation

Proof of genocidal intent is required in order to establish the *commission* of a punishable act of genocide.[21] However, this does not mean that all those who participated or contributed in the commission such an offence must necessarily share that intent. Instead, customary international law recognizes different modes of liability based on which a participant may be charged for his role in the commission of an act of genocide each of which provide for its own requirements of *mens rea*.[22]

As a general proposition, all of the acts listed in Article III of the Genocide Convention require proof of the presence of the specific genocidal intent on the part of the perpetrator of the act.[23] Proof of genocidal intent is therefore necessary to establish

[19] See Munyaneza v. R, 2014 QCCA 906 (Can. Ct. App.), para. 178 ('Because specific intent is required, recklessness and negligence cannot be considered part of the mental element of the crime of genocide.'); *Prosecutor v. Vuković & Tomić*, No. S1 1K 006124 11 Kžk, Verdict, 22 June 2012 (hereafter *Vuković & Tomić* Appeal Judgment), para. 450; *Trbić* Trial Judgment (n 4) para. 194 (footnote omitted) ('A general intent to commit one of the enumerated acts combined with an overall awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient to establish the crime of genocide.'). See also Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009), 87 (hereafter Jessberger, 'Definition and Elements of Genocide'), 93 (citing UN GAOR, 3rd Sess., 73rd mtg., UN Doc. A/C.6/SR.73 (13 October 1948) (hereafter UN Doc. A/C.6/SR.73), 92–93, 97).

[20] See *Simba* Appeal Judgment (n 10) paras 264–266. See also *Jević et al.* Trial Judgment (n 3) para. 303 ('Given the differences in statements, the Panel could not establish beyond any reasonable doubt at what moment the plan of mass executions was devised, but it beyond a doubt existed during the implementation of the operation and, as established in the numerous judgments by the ICTY and the Court of BiH, the highest command structures of the VRS and the RS MUP were aware of it.').

[21] See, *supra*, 8.1.1.

[22] See *Zigiranyirazo* Trial Judgment (n 1) para. 398 ('[T]he *mens rea* varies according to the mode of liability.'); *Nahimana et al.* Appeal Judgment (n 1) para. 523 (footnotes omitted) ('Article 2(2) of the [ICTR] Statute defines genocidal intent as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." It is the person who physically commits one of the enumerated acts in Article 2(2) of the Statute who must have such intent. However, an accused can be held responsible not only for committing the offence, but also under other modes of liability, and, the *mens rea* will vary accordingly.'); *Prosecutor v. Kalimenzara*, Case No. ICTR-05-88-T, Judgment, 22 June 2009 (hereafter *Kalimenzara* Trial Judgment), para. 161; *Jević et al.* Trial Judgment (n 3) para. 928 ('Prosecutions of both *ad hoc* Tribunals have argued on several occasions that is not necessary to prove genocidal intent for all types of participation in genocidal criminal intent. It is sufficient, for example, that an accomplice was aware of the genocidal intent of his superior, but he himself did not have to have such an intent, he did not even have to agree with it. This position is indisputably supported by the *ad hoc* Tribunals case law to some extent. The ICTY appeals chamber accepted this position, in particular with regard to accountability for aiding and abetting and for joint criminal enterprise.').

[23] See, *infra*, Chapter 11.

not just the commission of an act of genocide, but also conspiracy, direct and public incitement, and attempt to commit genocide as well as complicity in genocide.

Furthermore, some of the modes of liability applicable to genocide under customary law require proof that an accused charged under one of these modes of liability acted with the requisite special intent. Thus, where the accused is charged with having committed, ordered, instigated, or planned an act of genocide,[24] or where his liability is alleged under the doctrine of joint criminal enterprise,[25] proof that he possessed the requisite genocidal intent must be established if customary law is applicable to the case.

In contrast, other modes of participation recognized by customary international law do not require the accused to share the genocidal intent of other perpetrators. Thus, as a matter of customary law, responsibility for aiding and abetting genocide would not require proof that the accused possessed the *dolus specialis*. It would be enough that the accomplice knew of the principal's genocidal intent.[26] He would therefore not need to share the intent of the principal perpetrator whom he is said to have assisted. Similarly, responsibility as a superior demands a showing that the accused 'knew or had reason to know' (or, as far as the International Criminal Court (ICC) is concerned for military superiors, 'should have known'[27]) of his subordinates' genocidal intent.[28] Where a superior is charged in relation to genocidal crimes of subordinates, a court could therefore hold that superior responsible for such acts without having established that he shared his subordinates' intent.[29] Liability under the third category of joint criminal enterprise responsibility would likewise be established if

[24] See, *infra*, respectively, 11.7.2.1 (committing), 11.7.2.3.1 (ordering), 11.7.2.4.1 (instigating), 11.7.2.2.1 (planning).

[25] Regarding the standards of *mens rea* applicable to the three forms of joint criminal enterprise, see, *infra*, 11.7.2.7.1.

[26] See, *infra*, 11.7.2.5.1. See also *Nyiramasuhuko et al.* Appeal Judgment (n 9) paras 2242–2257, and p. 1020 fn 6718 ('The Appeals Chamber notes that Ndayambaje was otherwise convicted of aiding and abetting genocide and that this form of responsibility does not require that the aider and abetter had genocidal intent.'); *Zigiranyirazo* Trial Judgment (n 1) para. 398; *Ntakirutimana* Appeal Judgment (n 10) paras 364, 500, 501, 508; *Krstić* Trial Judgment (n 4) para. 140; *Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Judgment, 18 December 2014 (hereafter *Ngirabatware* Appeal Judgment), para. 155 ('The Appeals Chamber recalls that the requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator. The aider and abettor need not share the mens rea of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, including his state of mind. Specific intent crimes such as genocide require that the aider and abettor must know of the principal perpetrator's specific intent.'); *Ntawukulilyayo v. Prosecutor*, Case No. ICTR-05-82-A, Judgment, 11 December 2011 (hereafter *Ntawukulilyayo* Appeal Judgment), para. 222 (footnotes omitted) ('The Appeals Chamber recalls that the *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator. Specific intent crimes such as genocide do not require that the aider and abettor share the *mens rea* of the principal perpetrator; it suffices to prove that he knew of the principal perpetrator's specific intent.'); *Seromba* Appeal Judgment (n 15) paras 65, 173, and 56 (footnotes omitted) ('The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator. In particular, as correctly outlined by the Trial Chamber, in cases of crimes requiring specific intent, such as genocide, it is not necessary to prove that the aider and abettor shared the *mens rea* of the principal, but that he must have known of the principal perpetrator's specific intent.'); *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgment, 17 November 2009 (hereafter *Bagaragaza* Sentencing Judgment), para. 23.

[27] See, *infra*, 11.7.2.6.2. [28] See ibid., and references cited therein.

[29] See, e.g., *Bagosora et al. v. Prosecutor*, Case No. ICTR-98-41-A, Judgment, 14 December 2011 (hereafter *Bagosora et al.* Appeal Judgment), para. 384; *Blagojević & Jokić* Trial Judgment (n 18) para. 686;

a crime (in this case, genocide) was reasonably foreseeable to the accused in light of the agreed upon criminality, regardless of the accused having intended to commit genocide.[30]

Outside the context of customary international law, domestic legislation and particular normative regimes—such as the one applicable before the ICC—may provide for different *mens rea* requirements than those outlined earlier. In particular, such regimes could allow for the possibility of an accused being convicted for genocide under a certain mode of liability without proof that he possessed the genocidal intent.[31] In all cases, however, proof that acts of genocide were *committed* must first be established, and proof of that fact requires a showing that the perpetrator of the underlying crime acted with the requisite special intent.

8.1.4 Premeditation not required

Although it will often exist *in practice*, premeditation does not constitute an element of the crime of genocide,[32] but may serve as proof of the presence of the requisite intent.[33] Where established, premeditation on the part of the accused may also constitute an aggravating factor for the purpose of sentencing if convicted.[34]

8.1.5 Motives

Proof of motives is not an element of the offence of genocide. Motive and intent are two distinct notions. The intent refers to the goal, which the perpetrator seeks to attain through his actions, in this case the destruction of a group in whole or in part. A motive refers to the particular reason that may have led a person to engage in criminal

Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, 1 September 2004, (hereafter *Brđanin* Trial Judgment), paras 711–721. See, also, *infra*, 11.7.2.6.2.

[30] See, *infra*, 11.7.2.7.2. See, in particular, *Milošević* Decision on Motion for Judgment of Acquittal (n 3) paras 290–293; *Prosecutor v. Karadžić*, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 (hereafter *Karadžić* Decision on Six Preliminary Motions), para. 32. See, however, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (hereafter *Ayyash et al.* Interlocutory Decision on Applicable Law), para. 249 (*obiter dicta*); and discussion, *infra*, 11.7.2.7.2.

[31] Regarding this issue before the ICC, see generally Roberta Arnold, 'The *Mens Rea* of Genocide under the Statute of the International Criminal Court' (2003) 14 Criminal Law Forum 127 (hereafter Arnold, '*Mens Rea* of Genocide').

[32] See *Jelisić* Trial Judgment (n 5) para. 100; *Brđanin* Trial Judgment (n 29) para. 710; *Trbić* Trial Judgment (n 4) para. 196; *Munyaneza* Trial Judgment (n 10) paras 97–101. In relation to the crime of conspiracy to commit genocide, see *Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-A, Judgment, 29 September 2014 (hereafter *Nzabonimana* Appeal Judgment), para. 398.

[33] For an illustration, see *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (hereinafter *Popović et al.* Appeal Judgment), paras 865, 929–930 (highlighting the premeditated nature of the crimes in Srebrenica in the context of evaluating the accused's responsibility in relation to these crimes). See also *Popović et al.* Trial Judgment (n 8) paras 1058, 1067.

[34] See *Krstić* Trial Judgment (n 4) para. 711; *Serushago* Sentencing Judgment (n 5) para. 30; *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998 (hereafter *Kambanda* Trial Judgment), para. 61; *Tolimir* Trial Judgment (n 15) para. 1221.

conduct.[35] The UN International Commission for Darfur illustrated the distinction between the two notions in relation to genocide in those terms:

> For instance, in the case of genocide a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated, for example, by the desire to appropriate the goods belonging to that group or set of persons, or by the urge to take revenge for prior attacks by members of that groups, or by the desire to please his superiors who despise that group. From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group.[36]

Where established, personal motives explaining the conduct of the perpetrator would not prevent a finding that the perpetrator acted pursuant to the specific intent to commit genocide.[37] Nor would it constitute a defence to allegations of genocide. In sum, the reason why an accused sought to destroy a group, or his motive for doing so, 'has no bearing on [his] guilt'.[38] For instance, the presence of political or personal motives will not negate the possibility that the accused acted with the intent to commit genocide if such intent is otherwise established.[39]

[35] UN International Commission, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 25 January 2005 (hereafter UN Report on Darfur), para. 493. See also *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 (hereinafter *Stakić* Appeal Judgment), para. 45.

[36] Ibid.

[37] See 8.1.5. See also *Bagosora et al.* Trial Judgment (n 1) para. 2115; *Simba* Appeal Judgment (n 10) para. 269; *Ntakirutimana* Appeal Judgment (n 10) paras 302–304; *Niyitegeka* Appeal Judgment (n 1) paras 48–54; *Krnojelac* Appeal Judgment (n 10) para. 102 (referring to *Jelisić* Appeal Judgment (n 7) para. 49); *Karemera et al.* Trial Judgment (n 1) para. 1579; *Gatete* Trial Judgment (n 1) para. 582; UN International Commission, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 25 January 2005 (UN Report on Darfur), para. 493.

[38] See *Popović et al.* Trial Judgment (n 8) para. 825. See also *Jelisić* Appeal Judgment (n 7) para. 49; *Niyitegeka* Appeal Judgment (n 1) paras 52–53; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 1 June 2001 (*Kayishema & Ruzindana* Appeal Judgment), para. 161; *Brdanin* Trial Judgment (n 29) para. 696. The Appeals Chamber of the ICTY found:

> The Prosecution is correct that the Tribunal's jurisprudence distinguishes between motive and intent; in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt. The Appeals Chamber agrees with the Appellant, however, that the Trial Chamber expressly distinguished between the 'goal' of the operation—that is, motive—and the methods that the Appellant intended to employ in order to bring that goal about. With respect to the latter, the Trial Chamber found 'insufficient evidence of an intention to [achieve the goal] by destroying in part the Muslim group.' The Trial Chamber specifically considered whether the Appellant intended to achieve his goal through particular actions, including killing and imposing of inhumane conditions of life, which amounted to genocide. The Appeals Chamber sees no error in this approach.

Stakić Appeal Judgment (n 35) para. 45 (footnote omitted); *Trbić* Trial Judgment (n 4) para. 795 ('Motive is not relevant in proving the crime of genocide, however, in an ordinary crime such as murder one often looks to motive to understand the crime itself. For a premeditated murder to be understood most of the world accepts the common motivations of greed, jealousy and hatred. These commonplace motivations are simple.'). See also *Tadić* Appeal Judgment (n 10) paras 268–269 (noting the general irrelevance of motives for the purpose of assigning liability in criminal law).

[39] UN Security Council, Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994) ('Rwanda'), UN Doc. S/1994/1405, 9 December 1994

The specific intent required for genocide must, therefore, be clearly distinguished from the reasons or motivations which may have caused the perpetrator to act.[40] Indications of the perpetrator's motives may, however, be relevant in some cases to an inference that he possessed the requisite genocidal intent,[41] and, depending on their nature, could also constitute an aggravating factor for sentencing purposes.[42]

8.2 Intent 'To Destroy'

8.2.1 Destruction as an element of *mens rea*

8.2.1.1 Destruction must be intended; it does not need to have occurred

The perpetrator of an act of genocide must intend to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. He must therefore have had 'the intent to accomplish certain specified types of destruction'; that is, while committing or participating in one of the prohibited acts, the accused sought to contribute to the destruction, in whole or in part, of a national, ethnical, racial, or religious group, as such.[43] The key factor is the perpetrator's specific *intent* to destroy the group rather than the group's *actual* physical destruction.[44] In other words, while the destruction of a protected group (in whole or in part) must be *intended*, it does not need to have occurred.[45]

(hereafter UN Commission of Experts Report on Rwanda), para. 159. See also, again, UN Report on Darfur (n 35) para. 493.

[40] ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 189; *Popović et al.* Trial Judgment (n 8) para. 825 (footnote omitted) ('The existence of a personal motive must be distinguished from intent and does not preclude a finding of genocidal intent.').

[41] See, *infra*, 9.4.4 and references cited.

[42] *Jelisić* Appeal Judgment (n 7) para. 49; *Kayishema & Ruzindana* Appeal Judgment (n 38) para. 161; *Krstić* Trial Judgment (n 4) para. 711; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000 (hereafter *Blaškić* Trial Judgment), para. 785; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 (hereafter *Blaškić* Appeal Judgment), paras 686, 694 (describing the distinction between motives and intent); *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002 (hereafter *Vasiljević* Trial Judgment), para. 278; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004 (hereafter *Vasiljević* Appeal Judgment), paras 168–173.

[43] *Jelisić* Appeal Judgment (n 7) paras 45–46. See also *Prosecutor v. Ao An*, Case No. 004/07-09-2009-ECCC-OCIJ, Closing Order, 16 August 2018 (hereafter *Ao An* 2018 Closing Order), para. 95.

[44] *Stakić* Trial Judgment (n 5) para. 522. See also *Mitrović* Trial Judgment (n 18) p 96.

[45] *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, 11 September 2006 (hereafter *Mpambara* Trial Judgment), para. 8 (footnote omitted) ('The *actus reus* of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.'); *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-T, Judgment and Sentence, 15 July 2004 (hereafter *Ndindabahizi* Trial Judgment), para. 471; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 17) para. 125 (footnote omitted) ('Since the acts in Article 4(2) of the Statute are only required to be committed with an intent to destroy the protected group, it is clear that the actual destruction of the group need not take place. However, the extent of the actual destruction, if it does take place, will more often than not be a factor from which the inference may be drawn that the underlying acts were committed with the specific intent to destroy, in whole or in part, a specific group as such.'); *Brđanin* Trial Judgment (n 29) para. 697 (footnotes omitted) ('In view of the specific intent required for genocide, it is not necessary to prove the de facto destruction of the group in whole or in part. Nevertheless, the de facto destruction of the group may constitute evidence of the specific intent and may also serve to distinguish the crime of genocide from the inchoate offences in Article 4(3) of the Statute, such as the attempt to commit genocide.'); *Mitrović* Trial Judgment (n 18) p 96

While the actual destruction of a group in whole or in part is not an element of the offence, however, the fact that it has occurred in a given case could serve as evidence relevant to establishing whether an individual involved in those events intended to bring about that result.[46]

8.2.1.2 Destruction of the group and killing of victims not the same

As discussed further at Section 8.2.2, 'destruction' in this context is to be understood as referring to the (intended) *physical* or *biological* elimination of a group (or part thereof).[47] This should not be taken to mean that acts of genocide are limited to those causing the death of a person but may entail acts falling short of death.[48] One must indeed distinguish between what is intended in relation to the group (i.e., its physical or biological destruction) and individual victims. In relation to the latter, the perpetrator might intend to kill them, but might also intend to injure, sterilize or, in the case of a child, transfer them from one group to another.[49] The perpetrator need not therefore have intended to 'destroy' the immediate victim of his actions for the act to constitute genocide. The intent to destroy need only exist in relation to the *group* itself.

8.2.1.3 Intent to destroy not limited to civilians

The intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy a group of *civilians*.[50] For the purpose of genocide, a targeted group is indifferent in principle to the *civilian versus combatant* distinction applicable under

(footnotes omitted) ('[T]he necessity of establishing genocidal intent does not in turn demand proof that the group was destroyed in fact. While destruction in fact may certainly provide evidence of genocidal intent, it is assuredly not necessary to establish that the perpetrator, alone or together with others, successfully realized his aim to destroy the group. Failed attempts at genocide do not relieve the perpetrators of responsibility for their acts of genocide.'). See also *Vuković & Tomić* Appeal Judgment (n 19) para. 443 ('The Appellate Panel stresses that the issue of whether it was a mass murder or individual instances of killing, whether or not in reality that killing affects the survival of the group, and whether these killings result in visibly severe consequences on the 'capacity of biological reproduction' of the analyzed group is of no relevance for the factual and legal analyses of the elements of the crime, its commission and for the finding that the crime was committed with that special intent.').

[46] *Rukundo* Trial Judgment (n 10) para. 556; *Krstić* Appeal Judgment (n 8) para. 35; *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 125 (footnote omitted) ('Since the acts in Article 4(2) of the Statute are only required to be committed with an intent to destroy the protected group, it is clear that the actual destruction of the group need not take place. However, the extent of the actual destruction, if it does take place, will more often than not be a factor from which the inference may be drawn that the underlying acts were committed with the specific intent to destroy, in whole or in part, a specific group as such.').

[47] See 8.2.2. See also *Stupar et al.* Trial Judgment (n 18) 56–57; *Mitrović* Trial Judgment (n 18) p 48; *Trbić* Trial Judgment (n 4) para. 188; *Prosecutor v. Vuković & Tomić*, No. X-KR-06/180-2, Verdict, 2 July 2010 (*Vuković & Tomić* Trial Judgment), para. 569.

[48] See *Muvunyi* Trial Judgment (n 5) para. 482 (footnote omitted) ('Article 2 of the [ICTR] Statute requires a showing that the perpetrator committed any of the enumerated acts with the intent to destroy a group. Trial Chambers at the Tribunal have tended to interpret the term broadly so that it not only entails acts that are undertaken with the intent to cause death but also includes acts which may fall short of causing death.'); *Kayishema & Ruzindana* Trial Judgment (n 10) para. 95.

[49] Regarding the list of relevant punishable acts and the element of *mens rea* attaching to each of them, see, *infra*, Chapter 10.

[50] The *Krstić* Appeals Chamber noted the following in that respect:

the laws of war; acts of genocide may therefore be directed at individuals who would qualify as civilians under the laws of war, but also at those who would be regarded as combatants or military personnel.[51] A genocide conviction is thus possible 'where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group' provided the perpetrator intended to destroy the group to which these individuals belonged.[52] Unlike crimes against humanity (and its focus on a 'civilian' population), the focus of the crime of genocide is not upon the *civilian* character of the targeted collectivity but upon the national, ethnical, racial, or religious characteristic of the group whose destruction is intended.

8.2.2 Intended *physical* or *biological* destruction

The sort of destruction that must be intended by the perpetrator of an act of genocide is the *physical* or *biological* destruction of a group or part of a group.[53] The intent to destroy a group's cultural, linguistic, or sociological features or symbols as opposed

> [T]he intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group. It may be that, in practice, the perpetrator's genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide. As the Appeals Chamber explained, the inquiry into whether two offences are impermissibly cumulative is a question of law. The fact that, in practical application, the same conduct will often support a finding that the perpetrator intended to commit both genocide and extermination does not make the two intents identical as a matter of law.

Krstić Appeal Judgment (n 8) para. 226 (footnote omitted).

[51] *Krstić* Appeal Judgment (n 8) para. 226 ('[T]he intent requirement of genocide is not limited to instances where the perpetrator seeks only to destroy civilians.'); *Popović et al.* Trial Judgment (n 8) para. 833.

[52] *Popović et al.* Trial Judgment (n 8) para. 833 (citing *Krstić* Appeal Judgment (n 8) para. 226).

[53] See, e.g., *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017 (hereafter *Mladić* Trial Judgment), para. 3435 (footnote omitted) ('The term "destroy" is limited to the physical or biological destruction of the group.'). For more examples, see the references cited in the next footnote. See also *Krstić* Appeal Judgment (n 8) paras 25, 33, 133; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002 (hereafter *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal), p 9; *Stakić* Trial Judgment (n 5) paras 518–519; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (hereafter *Semanza* Trial Judgment), para. 315 (citing UN Doc. A/51/10 (n 5) p 10 ('As clearly shown by the preparatory work for the [Genocide] Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other entity of a particular group.'); *Krstić* Trial Judgment (n 4) paras 571, 576; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (hereafter *Kajelijeli* Trial Judgment), para. 808; ICJ *Croatia-Serbia* 2015 Judgment (n 8) paras 134–136. See also United Nations War Crimes Commission, 'Trial of Hauptsturmführer Amon Leopold Göth: Notes on the Case: Genocide' in *Law Reports of Trials of War Criminals*, vol. 7 (HM Stationery Office 1948) (hereafter UNWCC, 'Notes on Trial of Göth'), 8 (footnotes omitted):

> It will be observed that the Prosecution at Nuremberg, when preferring against the defendants the charge of genocide, adopted this term and conception in a restricted sense only, namely, in their physical and biological connotations. This is evident not only from the definition of genocide as stated in the Indictment and from the inclusion of this charge under the general count of murder and ill-treatment, but also from the fact that all other aspect and elements of the defendants' activities aiming at the denationalization of the inhabitants of occupied

to its very physical existence would not qualify.[54] In other words, it is the physical/biological elimination of the *group* itself that must be intended, not its *identity* as a separate entity.[55] Therefore, it would not be enough to establish that the perpetrator

> territories were made the subject of a separate charge which was described as germanization of occupied countries.

See also; W Schabas, Genocide in International Law (CUP 2000), 270–73; Jessberger, Definition and Elements of Genocide (n 19) 107. See, *contra*, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004 (hereafter *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent) para. 49 ('[I]t is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the Convention on which the Statute is based, provided that that intent attached to a listed act, this being of a physical or biological nature.'), para. 50 (footnote omitted) ('Counsel for the appellant correctly recognised that the attack is directed to the existence of the group; in his words, "the principle is that genocide is not a crime against individuals; it is a crime against human groups." It is the group which is protected. A group is constituted by characteristics—often intangible—binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.') and paras 51–54.

[54] *Popović et al.* Trial Judgment (n 8) para. 822 (footnotes omitted) ('The term "destroy" in customary international law means physical or biological destruction and excludes attempts to annihilate cultural or sociological elements.'); *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, 28 April 2005 (hereafter *Muhimana* Trial Judgment), para. 497 (footnote omitted) ('The notion of "destruction of a group" means "the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group".'); *Seromba* Trial Judgment (n 1) para. 319 ('The notion "destruction of the group" means "the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group".'); *Tolimir* Trial Judgment (n 15) paras 741, 746 (footnote omitted) ('[T]he Genocide Convention as well as customary international law require that the perpetrator intends to destroy the group physically or biologically.'); *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (*Tolimir* Appeal Judgment), para. 230; *Blagojević & Jokić* Trial Judgment (n 18) para. 658 ('The Trial Chamber notes that what was originally intended to be excluded from the definition of the crime was cultural genocide, and that this does not in itself prevent that physical or biological genocide could extend beyond killings of the members of the group. The Trial Chamber acknowledges that there have been attempts, both in the Tribunal's case-law and in other sources, to interpret the concept of physical or biological destruction in this way.') (citing *Krstić* Trial Judgment (n 4) paras 577–579), 242 fn 2085 ('The destruction of a group's sociological or cultural identity in itself does not meet the definition of genocide under customary international law.'), and 242 fn 2086 (noting that cultural genocide was included in the genocide definition both in the Draft Convention on the Crime of Genocide, prepared by the Secretary-General in pursuance of the resolution of the Economic and Social Council dated 28 March 1947 (UN Doc. E/447) and in the Draft Convention drawn up by the Ad Hoc Committee on Genocide (UN Doc. E/794)); *Krstić* Appeal Judgment (n 8) para. 25; *Stakić* Appeal Judgment (n 35) paras 23–24; *Stakić* Trial Judgment (n 5) para. 518 (pointing out it 'must also be remembered that cultural genocide, as distinct from physical and biological genocide, was specifically excluded from the Convention against Genocide'); *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, Case 002/02 Judgement, 27 March 2019 (*Nuon Chea et al.* 002/02 Trial Judgment), paras 799-800; ILC, 'Commentaries on Draft Code' (n 5) 45–46, para. 12 ('[T]he destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense.'); *Krstić* Trial Judgment (n 4) para. 574. See also ICJ *Croatia-Serbia* 2015 Judgment (n 8) paras 134–136 ('The Court notes that the *travaux préparatoires* of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context [...] It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group.'). Such an understanding, which is now generally accepted, was interpreted more broadly in a number of early cases where the notion and definition of genocide was less certain. For support of this, see, e.g., UNWCC, 'Notes on Trial of Göth' (n 53) 8–9.

[55] *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 124 (footnote omitted) ('It is the material destruction of the group which must be intended and not the destruction of its identity.

intended to destroy (or erase) any of those features (e.g., language, traditions, customs) which characterize the group short of establishing that he intended the physical or biological destruction of the group itself.[56] The interest protected by the prohibition on genocide is not the ethnicity, nationality, religion, or race of the group, but the physical existence of a group which is identifiable by reason of one or several of these characteristics.[57]

8.2.2.1 *Destruction* versus *discrimination, dissolution, and displacement*

A *mere* intention to discriminate against members of a particular group would not alone meet the threshold set by the *dolus specialis*.[58] In addition to the implied element of discrimination, the perpetrator of an act of genocide must intend to contribute, through his actions, to the physical destruction of the group to which these members belong.[59] This is the fundamental distinction between the crime of persecution and

As noted by the International Law Commission in 1996, "As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group".'); *Jević et al.* Trial Judgment (n 3) para. 931 ('The perpetrator must intend to destroy the physical or biological existence of a group of people. This means that the intention of the perpetrator to destroy (eradicate) their ethnic, racial or religious characteristics does not suffice. Ethnic, racial or religious affiliation cannot be considered as a protected object, the object protected from this criminal offense can only be the physical group which is distinguished by one of these specific characteristics.'); *Vuković & Tomić* Trial Judgment (n 47) para. 569; *Trbić* Trial Judgment (n 4) para. 188. See also Report of the International Law Commission to the General Assembly on the Work of its Forty-First Session, UN Doc. A/46/10 (1991) (hereafter UN Doc. A/46/10), p 102 para. 4; William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) (hereafter Schabas, *UN International Tribunals*), 166–67. Courts in Germany have adopted a broader understanding of that notion and have expanded it to the case of 'social' destruction of a group. Support of this can be found in, BVerfG, Order of the Second Senate, 2 BvR 1290/99 (12 December 2000), para. 4(a)-(aa) (cited in *Kristić* Trial Judgment (n 10) para. 579) and in Ruth Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia' (2005) 3 Journal of International Criminal Justice 381 (hereafter Rissing-van Saan, 'The German Court and Yugoslavia Crimes'), 398; Gerhard Werle, 'German Jurisprudence on Genocidal Intent and the European Convention for the Protection of Human Rights and Fundamental Freedoms' in Kimmo Nuotio and Raimo Lahti (ed), *Festschrift in Honour of Raimo Lahti, in Honour of Raimo Lahti* (Helsinki University Press 2007) (hereafter Werle, 'German Jurisprudence on Genocidal Intent'), 43–59. See also *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent (n 53) paras 51 ('The intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological.'), and 54 (suggesting that 'the intent to destroy the 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, except in particular cases in which physical destruction is required by the Statute'); *Blagojević & Jokić* Trial Judgment (n 18) paras 657–666 (seemingly confusing the issue of intent to destroy and the nature of the underlying act that might constitute genocide). For a critique of the reasoning of the *Blagojević* Trial Chamber on that point, see Schabas, *UN International Tribunals*, 166–67.

[56] *Jević et al.* Trial Judgment (n 3) para. 931; *Vuković & Tomić* Trial Judgment (n 47) para. 569; *Trbić* Trial Judgment (n 4) para. 188.

[57] *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 124. Forced religious conversion, for instance, would therefore not qualify as genocide since the intention is not the physical annihilation of the group, but the erasing of its—in this case, religious—distinctiveness. That feature (religious, ethnic, or racial) is an identification tag to identify those groups protected by this norm.

[58] See also, *infra*, 12.3.3.2.

[59] The ICJ in the *Bosnian Genocide* case pointed to the following:
'It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very

genocide.[60] Similarly, an intent to *terrorize* a population would fall short of the requisite genocidal intent.[61] Nor would it be sufficient to show that the perpetrators intended to destroy the social structure of the community in question or to dissolve it.[62]

For the same reason, it is not enough for the perpetrator to intend to *displace* a group of people.[63] That is because the Genocide Convention protects groups from

precisely. It is often referred to as a special or specific intent or dolus specialis; in the present Judgment it will usually be referred to as the 'specific intent (dolus specialis).' It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group.

ICJ *Bosnia-Serbia* Judgment (n 4) para. 187. See also *Tolimir* Appeal Judgment (n 54) paras 231–233; *Krstić* Appeal Judgment (n 8) paras 31–33; and, *infra*, 12.3.3.

[60] See, *infra*, 12.3.3.2. See also *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ICC-02/05-01/09-3, 4 March 2009 (hereafter *Al Bashir* Decision on Warrant Application, Ušacka Dissent), para. 71.

[61] On 31 August 2001, the Supreme Court of Kosovo, sitting in a panel session of three judges, including one international judge, overruled a finding of a lower court which had found the accused, Miroslav Vučković, guilty of genocide. In the course of its Judgment, the panel made the following *obiter* finding: 'More generally, according to the Supreme Court, the exactions committed by the Milošević's regime in 1999 cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group in whole or in part, but its forceful departure from Kosovo as a result of a systematic campaign of terror including murders, rapes, arsons and severe maltreatments.' *Case of Vučković*, No. AP.156/2001, Judgment (Kosovo Sup Ct 21 August 2001) (hereafter *Vučković* Kosovo Judgment), p 8. Following that ruling, on 11 September 2001, the Supreme Court sitting this time in plenary, strongly rebuffed its chamber and disowned the above-mentioned statement in those terms: 'It is the evaluation of the Plenary Session, of which the International Judge who drafted and signed the said Decision was himself a participant, that the observation quoted above falls beyond the scope of the present action and reflects the attitude of that particular panel only, which has exceeded the limits of its discretion since, through the handling of this case, it has offered assessments of a general nature regarding the policies that the regime of Milošević implemented during the year 1999 in Kosovo.' *Case of Vučković*, No. AP.156/2001, Communiqué (Kosovo Sup Ct 11 September 2001) (on file with the author). The legal proposition that genocide was to be distinguished from acts of terror was not, however, challenged or disputed.

[62] *Popović et al.* Trial Judgment (n 8) paras 849, 854 (not challenged on appeal and effectively adopted by the *Tolimir* Appeal Judgment (n 54) para. 234) (rejecting the notion that 'the destruction of the social structure of the community and the inability of those who were forcibly transferred to reconstruct their lives [...] are the kinds of conditions intended to be prohibited by Article 4(2)(c) of the Statute'). See also *Stakić* Trial Judgment (n 5) para. 519.

[63] *Stakić* Trial Judgment (n 5) para. 519 (footnotes omitted) ('It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide. As Kreß has stated, "[t]his 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. This is because the dissolution of the group is not to be equated with physical destruction." 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 by twenty-nine votes to five, with eight abstentions.'); *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, Partially Dissenting Opinion of Judge Alphons Orie, 22 November 2017 (hereafter *Mladić* Trial Judgment, Orie Partial Dissent), para. 5220; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 56 (footnote omitted) ('The distinguishing element of the *dolus specialis* of genocide is the intent to destroy a protected group. The extent of the destructive intent, however, should be distinguished from the requisite intent for ethnic cleansing, under which a perpetrator intends to target an ethnic group, such as by expelling the group from an area, yet lacks the intent to destroy that ethnic group within the area. The nature of the destructive intent can also be distinguished from the requisite intent for forced displacement as a crime against

physical or biological *destruction*, not geographical *displacement*.[64] The line between destruction and displacement (including through 'ethnic cleansing'), is not, however, always plain.[65] Additionally, acts of forcible displacement could provide evidence of an intention on the part of those carrying them out to destroy a group of people, in whole or in part.[66] Thus, while the forced displacement of population does not *in and of itself*

humanity. Both of the aforementioned crimes lack the element of an intent to destroy.'). The Supreme Court of Kosovo found:

> The Supreme Court found that the defense counsels' appeals correctly observe that the first instance court has violated the criminal law by finding the accused guilty of criminal act of genocide pursuant to Article 141 of the CLY. Indeed, the essential characteristic of the criminal act of genocide is the intended destruction of a national, ethnical, racial or religious group. However, the appealed verdict only considered that the accused, forcefully expelling population from their houses in unbearable living conditions, was ready to accept the consequence that the part or entire group of Albanian population of these villages will be exterminated. Such motivation does not characterize the intent to destroy an ethnic group in whole or in part. More generally, according to the Supreme Court, the exactions committed by the Milosevic's regime in 1999 cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group in whole or in part, but its forcefully departure from Kosovo as a result of systematic campaign of terror including murders, rapes, arsons and severe maltreatments. Such criminal acts correspond to the definition of crimes against humanity given by international laws (widespread or systematic plan of attack against civilian population during the war) or can be qualified war crimes as per as Article 142 of the CLY.

Vučković Kosovo Judgment (n 61) 2. For more information, please see the references cited in the next footnote, *infra*.

[64] In a Memorandum of 30 March 1999, the Legal Bureau of the Canadian Department of Foreign Affairs pointed out first that, in relation to crimes directed at Kosovo Albanians during the Kosovo conflict, one element of genocide was present, namely, the 'targeting a group on the basis of ethnicity'. Then, after noting that so-called ethnic cleansing has been expressly excluded from the Genocide Convention in the 1948 negotiations, it pointed out that such notion (namely the forcible expulsion of person from their homes in order to escape the threat of subsequent ill-treatment), showed an intent different from the 'intent to destroy'. It went on note that 'Ethnic Albanians are being killed and injured *in order to drive them from their homes*, not *in order to destroy them as a group, in whole or in part*'. UN Report on Darfur (n 35) para. 504 (citing Michael Leir, 'At the Department of Foreign Affairs in 1998–99' (1999) 37 Canadian Yearbook of International Law 317 (hereafter Leir, 'Dep't of Foreign Affairs'), 328) (emphasis in the original). See, *contra*, Christian J Tams et al. (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag CH Beck 2014) (hereafter Tams *et al. Genocide Convention Commentary*), 81–83 (suggesting a broader reading whereby the social existence of a group should also be protected).

[65] See, *infra*, 12.3.6.

[66] See *Tolimir* Appeal Judgment (n 54) paras 208–209, 231, 234; *Tolimir* Trial Judgment (n 15) paras 739 and 741 (footnote omitted) ('[T]he forcible transfer of a group or part of a group does not, by itself, constitute a genocidal act, although it can be an additional means by which to ensure the physical destruction of a group.'); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, 9 May 2007 (hereafter *Blagojević & Jokić* Appeal Judgment), para. 123; *Krstić* Appeal Judgment (n 8) paras 31–33; *Blagojević & Jokić* Trial Judgment (n 18) p 238 fn 2071, paras 646, 663 (noting that a number of UN General Assembly resolutions have equated 'ethnic cleansing', which includes as a central component the forcible transfer and deportation of civilians, with genocide); *Krstić* Trial Judgment (n 4) paras 513, 518; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, 27 September 2006 (hereafter *Krajišnik* Trial Judgment), para. 862. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), (Judgment of 26 February 2007, Separate Opinion of Judge Lauterpacht), [2007] ICJ Rep 43 (ICJ *Bosnia-Serbia* 2007 Judgment, Lauterpacht Separate Opinion) ('[T]he forced migration of civilians [...] is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide.'). The UN General Assembly noted: 'Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of

constitute a genocidal act, it is a relevant consideration in the overall factual assessment regarding the existence of genocide intent and it could also be regarded in given circumstances as a means by which to ensure the physical destruction of the protected group.[67] Such acts may constitute an underlying genocidal act of causing serious bodily or mental harm, in particular where forcible transfer is conducted under inhumane conditions.[68] In addition, where the accused has partaken in the commission of such acts, evidence of that fact, when considered together with other factors, could be relevant to establishing that he possessed the requisite genocidal intent.[69]

8.3 In Whole or In Part

8.3.1 Alternative objects—a group as a whole or a part thereof

The Genocide Convention makes it clear that genocide could be committed where the perpetrator intends to destroy an entire group, but also where his intent is directed at the destruction of 'a part' of a group.[70] This view is now accepted as forming part of customary international law.[71] The requirement of genocidal intent can therefore

human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of "ethnic cleansing," which is a form of genocide.' UN General Assembly, Resolution 47/121, The Situation in Bosnia and Herzegovina, UN Doc. A/RES/47/121 (7 April 1993) (hereafter UN Doc. A/RES/47/121), 2. See also references given *infra*, 12.3.6.1.

[67] See, e.g., *Tolimir* Appeal Judgment (n 54) para. 209 (footnotes omitted):

> The Appeals Chamber recalls that while 'forcible transfer does not in and of itself constitute a genocidal act [...] it is [...] a relevant consideration as part of the overall factual assessment' and 'could be an additional means by which to ensure the physical destruction' of the protected group. Nothing in the Tribunal's jurisprudence or in the Genocide Convention provides that a forcible transfer operation may only support a finding of genocide if the displaced population is transferred to concentration camps or places of execution. [...] In past cases before the Tribunal, various trial chambers have recognised that forced displacement may—depending on the circumstances of the case—inflict serious mental harm, by causing grave and long-term disadvantage to a person's ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof.

See also *Jorgić Case (A Bosnian Serb)*, 2 BvR 1290/99, Individual Constitutional Complaint (Ger. Constitutional Ct. 12 December 2000) (hereafter *Jorgić Case*), paras 22–25.

[68] See *Tolimir* Trial Judgment (n 15) para. 739 (footnotes omitted) ('While forcible transfer does not constitute a genocidal act by itself, it can, in certain circumstances, be an underlying act causing serious bodily or mental harm—in particular if the forcible transfer operation was conducted under such circumstances as to lead to the death of all or part of the displaced population.'). See, also, *infra*, 10.3.1.2.2.

[69] See, *infra*, 9.4.7.4 (and references cited therein).

[70] Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951, 78 UNTS 277 (hereafter Genocide Convention), Article II. The view that destruction of a group 'in part' might be sufficient is apparent already from the preamble of the UN General Assembly's Resolution 96(I), which noted that many instances of genocide have occurred when racial, religious, political and other groups have been destroyed, 'entirely or in part'.

[71] See, e.g., *Tolimir* Trial Judgment (n 15) paras 186, 749; *Krstić* Appeal Judgment (n 8) paras 8, 10, 12; *Semanza* Trial Judgment (n 53) para. 316; *Kajelijeli* Trial Judgment (n 53) para. 809; *Popović et al.* Trial Judgment (n 8) para. 831; *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 127–132; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 17) para. 66; *Kayishema & Ruzindana* Trial Judgment (n 10) paras 89, 96–97; *Seromba* Appeal Judgment (n 15) para. 175. See, also, *infra*, 8.3.3.

be met by either of two alternatives: the perpetrator intended to destroy a protected group 'in whole' *or* 'in part'.[72] Each scenario will be considered in turn.

8.3.2 'In whole'

8.3.2.1 A sufficiently distinct and cohesive group

When seeking to establish an intent to destroy a group as 'a whole', it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world and wherever members of that group may be located.[73] The intent to destroy a multitude of individuals belonging to a particular group may amount to an intent to destroy the group 'in whole' even though a large number of these individuals are concentrated in a particular geographical location but members of their group can be found in other places.[74] However, the law and the jurisprudence are not entirely clear on the question of how broadly or narrowly a group can be defined before a collectivity of individuals ceases to constitute a 'whole' group for the purpose of the Genocide Convention and where it would only constitute a 'part' of a broader group. A 'group' may not simply consist of a random collective of human beings; it must in all cases be a sufficiently distinct and cohesive entity.[75] Under that understanding, European Jews or Bosniaks (i.e., Bosnian-Muslims) residing in Bosnia-Herzegovina would constitute a group 'in whole', regardless of the fact that there are Jews and Bosniaks in other parts of the world. These groups are sufficiently distinctive (both by reason of their identity and geographical location) and numerous enough to be said to constitute a sufficiently distinct, coherent, and easily identifiable collectivity. Before the International Criminal Tribunal for the former Yugoslavia

[72] See *Muhimana* Trial Judgment (n 54) para. 498; *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-T, Judgment, 17 June 2004 (hereafter *Gacumbitsi* Trial Judgment), para. 253; *Seromba* Trial Judgment (n 1) paras 316 and 319; *Semanza* Trial Judgment (n 53) para. 316; *Kayishema & Ruzindana* Trial Judgment (n 10) para. 95; *Krstić* Appeal Judgment (n 8) para. 12; *Kajelijeli* Trial Judgment (n 53) para. 809; *Popović et al.* Trial Judgment (n 8) para. 831; *Jelisić* Trial Judgment (n 5) para. 80.

[73] See *Muhimana* Trial Judgment (n 54) para. 498; *Kayishema & Ruzindana* Trial Judgment (n 10) para. 95; *Seromba* Trial Judgment (n 1) para. 319; *Jević et al.* Trial Judgment (n 3) para. 932 ('It does not have to be proved that the accused intended to "entirely destroy one group in the whole world", but only the group (or its part) which the Court established the accused intended to destroy (the geographic area where the group lives can be of a limited scope).'); *Trbić* Trial Judgment (n 4) para. 189; *Ivanović* Appeal Judgment (n 5) para. 47; *Prosecutor v. Pelemiš & Perić*, No. S 11 K 003379 09 Krl, Verdict, 31 October 2011 (hereafter *Pelemiš & Perić* Trial Judgment), para. 162 (footnotes omitted) ('In order to establish that genocide was committed, it must be established that the intent of the perpetrators was to destroy the whole group or its significant part. There is no set number, but the number must be significant enough to have an impact on the group as a whole. Although the Bosniak population of Srebrenica had only around 40,000 people, the evidence indicates that this population was a particularly prominent and significant part of the group of Bosniak people, especially in July 1995.') See also ILC, 'Commentaries on Draft Code' (n 35) p 42 para. 8.

[74] See, generally, *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 68; *Jelisić* Trial Judgment (n 5) para. 83; *Krstić* Appeal Judgment (n 8) paras 6–17.

[75] *Krstić* Trial Judgment (n 4) para. 590 ('The Trial Chamber is therefore of the opinion that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.'); *Jević et al.* Trial Judgment (n 3) para. 936; *Stakić* Trial Judgment (n 5) para. 524.

(ICTY), the group as a 'whole' that was said to be relevant to allegations of genocide was (generally[76]) described as the Bosnian-Muslims, that is, Muslims from the whole of Bosnia-Herzegovina.[77] The ICTR held that the group 'in whole' for the purpose of its proceedings was the Tutsi group in Rwanda.[78] Before the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Cham and Vietnamese residing in Cambodia at the relevant time were said to constitute two protected groups 'in whole'.[79]

8.3.2.2 Importance of identifying the group as a whole

Identifying the group as a 'whole' is relevant to a number of issues. First, the destructive intent of the accused must be directed at a protected group, in whole or in part. If alleged to have intended the destruction of a group as a whole, that whole must be clearly identified so that the accused's *mens rea* may be connected thereto. Identifying the group as a whole is also relevant where the accused is alleged to have intended to destroy a *part* of a group. That is because what may be said to constitute a 'part' of the group is established in light of the group as a whole, as it must constitute a 'substantial' part of the group as a whole.[80]

8.3.3 'In part'

8.3.3.1 Meaning

8.3.3.1.1 A 'substantial' part of a group

Where it cannot be established that the perpetrator intended to destroy the group as a whole, it may be shown, in the alternative, that he intended to destroy a group 'in part.' Thus, had Nazi leaders been prosecuted at Nuremberg for genocide, it would have been enough to show that they intended to destroy European Jews or European Jews in Germany and occupied lands, rather than Jews wherever located.

[76] See, however, *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 68 (focusing, instead, on groups located at the level of a municipality).

[77] See *Tolimir* Trial Judgment (n 15) para. 750 (footnotes omitted) ('The Prosecution has defined the targeted group that is the subject of the charges in the Indictment as the "Muslim population of Eastern Bosnia," as constituting "part" of the Bosnian Muslim people. The identification of the Bosnian Muslims as a protected group within the meaning of Article 4 of the Statute is an issue that has been settled by the Appeals Chamber and consequently, the Chamber does not deem it necessary to revisit the issue here.'); *Krstić* Appeal Judgment (n 8) paras 6–7, 15; *Krstić* Trial Judgment (n 4) paras 560 ('The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4.'), and 558, 591; *Blagojević & Jokić* Trial Judgment (n 18) para. 667; *Popović et al.* Trial Judgment (n 8) paras 839–840. See also *Prosecutor v. Jelisić*, Case No. IT-95-10-PT, Second Amended Indictment, 20 October 1998 (hereafter *Jelisić* Second Amended Indictment), para. 14; *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Sixth Amended Indictment, 9 December 2003 (hereafter *Brđanin* Sixth Amended Indictment), paras 28–29, 36 (referring to Bosnian Muslims and Bosnian Croats as a national, ethnical, racial, or religious group, as such).

[78] See, e.g., *Akayesu* Trial Judgment (n 5) para. 122; *Kayishema & Ruzindana* Trial Judgment (n 10) paras 522–526.

[79] See *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010 (hereafter *Nuon Chea et al.* 2010 Closing Order), paras 1336, 1343.

[80] Regarding the notion and definition of 'substantiality' in this context, see also, *infra*, 8.3.3.1.1.

In 1985, the *United Nations Expert Study on Genocide* defined the expression 'in part' as 'a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership'.[81] The notion was later refined and it is now accepted that to meet the requisite threshold, the perpetrator must have intended to destroy at least a *substantial* part of a protected group.[82] This does

[81] Whitaker Genocide Report (n 81), para. 29 (cited in *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 65). Regarding the *de minima* function of this requirement, see also UN General Assembly, Decisions Taken by the Preparatory Committee at its Session held from 11–21 February 1997, UN Doc. A/AC.249/1997/L.5, 12 March 1997 (hereafter UN Doc. A/AC.249/1997/L.5), 3 fn 1 ('The reference to "intent to destroy in whole or in part [...] a group as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.').

[82] See *Tolimir* Trial Judgment (n 15) paras 186, 749 (footnote omitted) ('The term "in whole or in part," relates to the requirement that the perpetrator intended to destroy at least a substantial part of a protected group.'); *Krstić* Appeal Judgment (n 8) paras 8, 10, 12; *Semanza* Trial Judgment (n 53) para. 316; *Kajelijeli* Trial Judgment (n 53) para. 809; *Popović et al.* Trial Judgment (n 8) para. 831 (footnote omitted) ('If a group is targeted "in part", the portion targeted must be a substantial part of the group because it "must be significant enough to have an impact on the group as a whole".'); *Muvunyi* Trial Judgment (n 5) para. 483 (footnotes omitted) ('In order for an accused person to be convicted of genocide, the Prosecution must prove beyond a reasonable doubt that the accused acted with the intent to destroy the group as such, in whole or in part. At the very least, it must be shown that the intent of the perpetrator was to destroy a substantial part of the group, regardless of the number of victims actually involved.'); *Milošević* Decision on Motion for Judgment of Acquittal (n 3) paras 127–132; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 17) para. 66; *Kayishema & Ruzindana* Trial Judgment (n 10) paras 89, 96–97 (suggesting that that the accused must have the intention to destroy a 'considerable' number of members of a group); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001 (hereafter *Bagilishema* Trial Judgment), para. 64; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 65; *Tolimir* Trial Judgment (n 15) paras 774–775 (describing the Bosnian Muslim population of Eastern BiH as a substantial part of the entire Bosnian Muslim population); *Brđanin* Trial Judgment (n 29) paras 701–702; *Jelisić* Trial Judgment (n 5) paras 10, 82; *Mladić* Trial Judgment (n 53) para. 3437; *Karadžić* Trial Judgment (n 8) para. 555; *Gatete* Trial Judgment (n 1) para. 582 (footnote omitted) ('Although there is no numeric threshold, the perpetrator must act with the intent to destroy at least a substantial part of the group.'); *Bagosora et al.* Trial Judgment (n 1) para. 2115 (citing *Seromba* Appeal Judgment (n 15) para. 175); *Gacumbitsi* Appeal Judgment (n 1) paras 40, 44; *Simba* Trial Judgment (n 31) para. 412; *Semanza* Trial Judgment (n 53) para. 316; *Hategekimana* Trial Judgment (n 10) para. 668; *Karemera et al.* Trial Judgment (n 1) para. 1606; *Munyakazi* Trial Judgment (n 10) para. 493; *Muvunyi* Trial Judgment (n 5) para. 479; *Ndahimana* Trial Judgment (n 1) para. 803; *Nizeyimana* Trial Judgment (n 10) para. 1491; *Nsengimana* Trial Judgment (n 1) para. 831; *Ntawukulilyayo* Trial Judgment (n 1) para. 450; *Vuković & Tomić* Trial Judgment (n 47) paras 556–566; *Jević et al.* Trial Judgment (n 3) para. 938; *Vuković & Tomić* Appeal Judgment (n 19) paras 428–443 (relating to the Bosnian population of Srebrenica); *Trbić* Trial Judgment (n 4) paras 188–189; *Ivanović* Appeal Judgment (n 5) para. 48; *Stupar et al.* Trial Judgment (n 18) 57; *Mitrović* Trial Judgment (n 18) 48; *Ao An* 2018 Closing Order (n 43) para. 96. *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) paras 144–146; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 67. See also ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 198 ('In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras 8–11 and the cases of Kayishema, Byilishema, and Semanza there referred to; and Yearbook of the International Law Commission, 1996, Vol II, Part Two, p. 45, para. 8 of the Commentary to Article 17).'); ICJ *Croatia-Serbia* 2015 Judgment (n 8) 3 para. 142. See also *Vasiliauskas v. Lithuania*, App. No. 35343/05 (ECtHR 20 October 2015) (hereafter *Vasiliauskas* Judgment), paras 167–168, 176 ('[I]n 1953 it was foreseeable that the term "in part" contained a requirement as to substantiality.'), 177 (noting that 'substantial' could now be understood as referring the numerical or qualitative aspect of the part in question) and 181 ('[T]here is no firm finding in the establishment of the facts by the domestic criminal courts to enable

not require that a specific numeric threshold be reached.[83] The number of would-be victims as well as the proportion of the targeted individuals relative to the size of the group as a whole would be factors relevant to making that evaluation.[84] However, numerical considerations alone are not the only relevant criteria to making that *substantiality* assessment. The specific nature, prominence, and composition of those targeted are also relevant to the question of whether they were a 'substantial' part of the group to which they belong.[85] Thus, *quantitative* as well as *qualitative* factors are relevant to making that assessment.[86] The number of victims as well as their prominence and importance to the community may therefore be pertinent. When taken together, all relevant considerations would have to show that the individuals concerned comprise a significant portion to have an impact on the group as a whole.[87] In other words, the

the Court to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Article II of the Genocide Convention.').

[83] *Muhimana* Trial Judgment (n 54) para. 498; *Gacumbitsi* Trial Judgment (n 72) para. 253; *Semanza* Trial Judgment (n 53) para. 316; *Tolimir* Trial Judgment (n 15) para. 749; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 17) 65 ('The Chamber notes that the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold. However, the evidence the Chamber received in relation to the municipalities, even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such.'). See also *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 67.

[84] See *Gacumbitsi* Trial Judgment (n 72) para. 253; *Kayishema & Ruzindana* Trial Judgment (n 10) para. 93; *Muhimana* Trial Judgment (n 54) para. 498; *Jević et al.* Trial Judgment (n 3) para. 941 ('[A]n analysis of the notion of "substantial" part of a group incorporates a number of elements including the numeric size, relative majority of the part relative to the total of the group as a whole, prominence within the group, if a specific part of the group is emblematic of the overall group, or is essential to its survival.'). See also ICJ *Croatia-Serbia* 2015 Judgment (n 8) 3 para. 142 ('[I]n evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group').

[85] See *Jević et al.* Trial Judgment (n 3) para. 939 ('If the quantity requirement, "vital" or "substantial", is not satisfied, the intention to destroy a group "in part" can be proved in terms of quality—if the part targeted for destruction constitutes a "vital" or "characteristic" part of the group, whose destruction would have an impact on the group as a whole. Numerous Panels have found that the destruction "in part" implies the destruction of a specific group of people, which must affect (or is likely to affect) the remaining part of the whole group.'). See also ICJ *Croatia-Serbia* 2015 Judgment (n 8) 3 para. 142 ('Account must also be taken of the prominence of the allegedly targeted part within the group as a whole.').

[86] *Krstić* Appeal Judgment (n 8) paras 177 (noting that 'substantial' could now be understood as referring the numerical or qualitative aspect of the part in question). See also Whitaker Genocide Report (n 81) para. 29 ('"In part" would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership.').

[87] *Tolimir* Trial Judgment (n 15) para. 749 (footnote omitted) ('While there is no numeric threshold of victims required, the targeted portion must comprise a "significant enough [portion] to have an impact on the group as a whole".'); *Popović et al.* Trial Judgment (n 8) para. 831 (footnote omitted) ('If a group is targeted "in part," the portion targeted must be a substantial part of the group because it "must be significant enough to have an impact on the group as a whole".'); *Krstić* Appeal Judgment (n 8) para. 8; *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 65 (footnote omitted) ('This definition means that, although the complete annihilation of the group is not required, it is necessary to establish "the intention to destroy at least a substantial part of a particular group." The Chamber believes that it is more appropriate to speak of a "reasonably substantial" rather than a "reasonably significant" number. This part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group.'); *Stakić* Trial Judgment (n 5) para. 525; *Mladić* Trial Judgment (n 53) para. 3437; *Karadžić* Trial Judgment (n 8) para. 555; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 146; *Kanyarukiga* Trial Judgment (n 10) para. 635 (footnote omitted) ('The jurisprudence also suggests that an accused must have the intent to destroy at least a

(intended) destruction in part must be of a substantial nature so that, if carried out, it would be capable of affecting the entirety of the group.[88]

What must be verified in each case is the *potential* effect of the intended destruction of that section of the group upon 'the fate of the rest of the group'.[89] The Genocide Convention is intended to protect groups as such, and only those parts whose destruction could endanger the group as a whole would fall within its ambit.[90] However, proof

reasonably substantial number of members in the protected group relative to the total population of the group.') and references cited; *Semanza* Trial Judgment (n 53) para. 316; *Bagilishema* Trial Judgment (n 82) para. 64. *Compare Kayishema & Ruzindana* Trial Judgment (n 10) para. 97 and *Gacumbitsi* Appeal Judgment (n 1) para. 44, with *Prosecutor v. Pelemiš & Perić*, No. S1 1 K 003379 12 Krž 10, Second Instance Verdict, 25 December 2012 (hereafter *Pelemiš & Perić* Second Instance Verdict), para. 84 ('When the significant part of a group is considered, there is no set number thereto, but the number must be significant enough to have an impact on the group in whole, as correctly defined by the Trial Panel.'), *Ao An* 2018 Closing Order (n 43) paras 812–819 (finding that the Cham of Kampong Cham Province constitute substantial part of the Cham of Cambodia and holding that this conclusion is based on *quantitative* factors such as the large proportion and concentration of Cham living in the area as well as *qualitative* factors related to their historical prominence), and ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 198.

[88] *Krstić* Appeal Judgment (n 8) para. 8 ('The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.'). The Appeals Chamber of the ICTY in *Krstić* noted the following:
This interpretation is supported by scholarly opinion. The early commentators on the Genocide Convention emphasized that the term 'in part' contains a substantiality requirement. Raphael Lemkin, a prominent international criminal lawyer who coined the term 'genocide' and was instrumental in the drafting of the Genocide Convention, addressed the issue during the 1950 debate in the United States Senate on the ratification of the Convention. Lemkin explained that 'the destruction in part must be of a substantial nature so as to affect the entirety.' He further suggested that the Senate clarify, in a statement of understanding to accompany the ratification, that 'the Convention applies only to actions undertaken on a mass scale.' Another noted early commentator, Nehemiah Robinson, echoed this view, explaining that a perpetrator of genocide must possess the intent to destroy a substantial number of individuals constituting the targeted group. In discussing this requirement, Robinson stressed, as did Lemkin, that 'the act must be directed toward the destruction of a group,' this formulation being the aim of the Convention. *Krstić* Appeal Judgment (n 8) para. 10 (footnotes omitted). See *Jelisić* Trial Judgment (n 5) para. 82 ('Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.'); *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 77 ('The Chamber finds persuasive the analysis in the *Jelisić* Trial Judgment that the requisite intent may be inferred from the "desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such." The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimisation within the terms of Article 4(2) (a), (b) and (c) would impact upon the survival of the group, as such.').

[89] *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 132 ('[T]he operative requirement is that of substantiality, and the intention to destroy a significant section of the group such as its leadership is not an 'independent consideration,' but an element that may establish that requirement.'); *Krstić* Appeal Judgment (n 8) paras 8, 12; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 77; *Jelisić* Trial Judgment (n 5) para. 82. See also UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) ('Yugoslavia'), UN Doc. S/1994/674, 27 May 1994 (hereafter UN Commission of Experts Report on Yugoslavia), para. 94.

[90] The United Nations General Assembly Resolution 96(I) described genocide as 'a denial of the right of existence of entire human groups.' UN General Assembly, Resolution 96(I): The Crime of Genocide, UN Doc. A/RES/96(I) (11 December 1946) (hereafter UN Doc. A/RES/96(I)). See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15 (hereafter ICJ, Reservations to the Genocide Convention), 23 ('[The Genocide Convention seeks] to safeguard the very existence of certain human groups.'); *Krstić* Trial Judgment (n 4) paras 552–553; *Krstić* Appeal Judgment (n 8) paras 12, 16, 21, 37; *Sikirica et al.* Judgment on Defense Motions to Acquit

that crimes directed at these individuals had an *actual* impact upon the group need not be established.[91] Stated otherwise, the law of genocide does not import a requirement of *group impact* regarding the *actus reus* of the offence.[92]

The 'part' of the group that is relevant to the law of genocide cannot simply be made up of the accumulation of isolated individuals.[93] The intent to destroy a group or part of a group means seeking to destroy a distinct and sufficiently identifiable entity as opposed to isolated individuals within it.[94] Thus, although perpetrators of genocide need not seek to destroy an entire group, they must view the targeted *part* of the group as a distinct entity that they intend to destroy.[95] The systematic elimination of members of a geographically limited collectivity could thus constitute a substantial part of the group if they represent a clearly distinct entity.[96]

While the subjective views and beliefs of the perpetrators regarding the substantiality of a part of a group are factors to be considered when making that assessment, a tribunal would ultimately have to establish that a substantial part of the group was *in fact* the intended object of the impugned conduct forming the basis of the charges.[97] In

(n 5) para. 89; *Akayesu* Trial Judgment (n 5) para. 521. See also Executive Session of the Senate Foreign Relations Commission, vol. 2 (81st Cong 1976 Historical Series), 370 (letter from Raphael Lemkin to Dr Kalijarvi of the Senate Foreign Relations Committee); Senate Executive Report No. 23 (94th Cong 2nd Sess 1976) 34–35 (emphasis added) (implementing legislation proposed by the Nixon and Carter administrations where it was proposed that 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part *would cause the destruction of the group as a viable entity.*) (cited in fn 113 of *Jelisić* Trial Judgment (n 5) p 26 fn 113).

[91] See, *supra*, 8.2.2.

[92] See, e.g., *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 17) para. 23. In particular, the Appeals Chamber in *Karadžić* noted:

> The Appeals Chamber notes that while the Trial Chamber assessed whether a reasonable trier of fact could infer that 'a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups *were targeted for destruction* [...] as such,' its findings on this issue pertain not to the sufficiency of the evidence of the underlying genocidal acts of killing, but to the element of genocidal intent. The Appeals Chamber accordingly discerns nothing in the Trial Chamber's ruling to suggest that it erred in law by imposing a 'group impact' requirement on the *actus reus* of killing, as the Prosecution claims. Indeed, the Appeals Chamber observes that the Trial Chamber explicitly recognised that 'the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold.'

Karadžić Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 17) para. 23 (footnotes omitted).

[93] See also *Stakić* Trial Judgment (n 5) para. 524 (footnote omitted) ('This Trial Chamber concurs with the Trial Chamber in *Krstić* which held that "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it".').

[94] *Krstić* Trial Judgment (n 4) para. 590.

[95] *Krstić* Trial Judgment (n 4) para. 590. See also *Jević et al.* Trial Judgment (n 3) para. 936 ('Even though the perpetrators of genocide need not intend to destroy the whole group protected by the Convention, they still have to perceive the part of group they want to destroy as a separate entity that has to be eliminated as such. A large number of victims viewed in the context of other evidence can lead to a conclusion that such an intent existed.'); *Stakić* Trial Judgment (n 5) para. 524.

[96] See *Krstić* Trial Judgment (n 4) para. 590.

[97] See *Trbić* Trial Judgment (n 4) para. 189 (noting that the beliefs and perceptions of the perpetrators regarding the substantiality of a part of the group are an additional factor to be considered but concluding that in the final analysis, the Panel must be satisfied that the identified part is objectively a substantial part of that group); *Ivanović* Appeal Judgment (n 5) para. 49; *Mitrović* Trial Judgment (n 18) 48

other words, the subjective perception of victims and perpetrators cannot be the sole consideration to determine that a collectivity can be regarded as a 'part' of a group for the purpose of the law of genocide.

8.3.3.1.2 Substantial part *versus* significant part

The use of the adjectives 'substantial' for one purpose and 'significant' for another risks confusion between the elements to which each of these adjectives pertain.[98] The two notions are distinct but not entirely unconnected. To constitute a 'part' of a group for the purpose of the law of genocide, those being targeted must constitute a 'substantial' part of the group as a whole, as defined earlier. The 'significance' of those being targeted within the group relates to their importance to the group as a whole.[99] For instance, if the victims are the political leaders of the group or emblematic cultural figures, this would be one of potentially many considerations relevant to establishing the general requirement of 'substantiality'.[100]

8.3.3.1.3 'In part' and actual victimization

The requirement that the accused must have intended to destroy a group 'in whole or in part' should not be confused with a requirement that the accused must be shown to be responsible for a large number of crimes or deaths. It is the accused's *mind* that must reflect intent to destroy a collectivity of individuals. At the *actus reus* level, the perpetrator need not have been personally involved in a large number of crimes or a pattern of criminal conduct to incur liability for genocide.[101] Nor does the law set a minimum number of victims that must have been affected by his conduct.[102] A single criminal act, if carried out with the requisite intent, could thus qualify as an act of genocide.[103]

('The Panel holds that the beliefs and perceptions of the perpetrators regarding the substantiality of a part of the group are an additional factor to be considered. However, in the final analysis, the Panel must be satisfied that the identified part is objectively a "substantial part of that group".').

[98] Professor Schabas thus warns against the risk of confusing the concept of destruction of a '*substantial* part' and that of a '*significant* part'. See Schabas, *Genocide in International Law* (n 53) 277–84.

[99] Whitaker Genocide Report (n 81) para. 29.

[100] See references, *supra*, in fn 85. See also *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 132 (footnote omitted) ('[T]he operative requirement is that of substantiality, and the intention to destroy a significant section of the group such as its leadership is not an "independent consideration," but an element that may establish that requirement.'). See also Jessberger, Definition and Elements of Genocide (n 19) 171 ('[T]here is no reason why the destruction of the leadership, that is, of a "significant" part, could not provide proof of intent to destroy a "substantial" part of a particular group.').

[101] See *Kayishema & Ruzindana* Appeal Judgment (n 38) para. 163 ('The Appeals Chamber notes that a "persistent pattern of conduct" is not a legal ingredient of the crime of genocide as defined in Article 2 of the [ICTR] Statute and that the Trial Chamber relied on this phrase for purely evidential purposes in examining the question whether Ruzindana possessed the requisite mental element under that provision. Accordingly, the Appeals Chamber can see no reason why the Trial Chamber would have been obliged to "legally define" it.').

[102] See *Vuković & Tomić* Trial Judgment (n 47) para. 565 (footnote omitted) ('No minimum threshold is required to establish genocidal intention.'), and 192 fn 878 (referring to the fact that in the *Ndindabahizi* Trial Judgment, the 'ICTR found that murdering one person satisfied the actus reus of genocide'); *Nyiramasuhuko et al.* Appeal Judgment (n 9) 1159 fn 7692; *Mpambara* Trial Judgment (n 45) para. 8.

[103] *Prosecutor v. Jević et al.*, No. S1 1 K003417 12 Krž 12, Second Instance Judgment, 16 August 2013 (hereafter *Jević et al.* Appeal Judgment), paras 234 ('Also, the Defense Counsel for the Accused Duško Jević contested the number of the victims of genocide in Srebrenica, thus arguing that one of the

8.3.3.2 Relevant evidential factors

8.3.3.2.1 Number of victims

When considering whether the targeted individuals constitute a substantial part of a group, the evidentiary starting point will generally be the number of individuals that were the intended target of the violence.[104] That number should be evaluated not only in *absolute* terms but also *relative* to the overall size of the group as a whole.[105] The individuals taken into account in this numerical assessment include any member of the targeted group regardless of status, including civilians and/or military personnel.[106]

important elements of the criminal offense was not satisfied. In that respect, the Appellate Panel finds that, although a simultaneous commission of several different forms of the referenced acts with a view to destroying a group is more probable, even the commission of only one of the referenced acts against one member of the group suffices for the existence of this criminal offense. Consequently, this appeal argument is also unfounded.'), and 912 (footnote omitted) ('It is important to note that "members of the group" do not necessarily imply a huge or considerable number of victims. In theory, killing a single person can still amount to the element of actus reus of Genocide.'). In fn 317 of its Judgment, the *Jević* Chamber noted that in the *Ndindabahizi* case, an ICTR Trial Chamber concluded that the killing of a single person satisfies the actus reus of Genocide. *Ndindabahizi* Trial Judgment (n 45) para. 471. See also *Vuković & Tomić* Appeal Judgment (n 19) para. 421 (footnote omitted) ('The qualification "members of the group" does not automatically imply that the number of victims must be large. In theory, murdering just one victim may satisfy the actus reus of the crime of genocide.'); *Trbić* Trial Judgment (n 4) para. 178; *Ivanović* Appeal Judgment (n 5) para. 31; *Mitrović* Trial Judgment (n 18) 45; *Stupar et al.* Trial Judgment (n 18) 54; *Ndindabahizi* Trial Judgment (n 45) para. 471 and fn 610 (regarding the murder of a single individual). See also Schabas, *UN International Tribunals* (n 55) 170 ('The intent requirement that the destruction contemplate the group "in whole or in part" should not be confused with the scale of the participation by an individual offender. The accused may only be involved in one or a few killings or other punishable acts. No single accused, as the principal perpetrator of the physical acts, could plausibly be responsible for destroying a group in whole or in part.').

[104] See, e.g., *Krstić* Appeal Judgment (n 8) para. 12 (emphasis added) ('The intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement 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.'). See also *Popović et al.* Trial Judgment (n 8) paras 831–832, 865 (pointing out that the numeric size of the targeted part of the group is the necessary and important starting point for any inquiry into whether the substantiality requirement for genocide is met and also considering other relevant factors); *Popović et al.* Appeal Judgment (n 4) paras 419–426; *Brđanin* Trial Judgment (n 29) paras 701–702, 967 (footnote omitted) ('Numerically speaking, the Bosnian Muslims and Bosnian Croats of the relevant ARK municipalities, on their own, constituted a substantial part, both intrinsically and in relation to the overall Bosnian Muslim and Bosnian Croat groups in BiH.'); *Karadžić* Trial Judgment (n 8) para. 555; *Kajelijeli* Trial Judgment (n 53) para. 810; *Kayishema & Ruzindana* Trial Judgment (n 10) para. 93. See also ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 200.

[105] *Krstić* Appeal Judgment (n 8) para. 12. See also *Popović et al.* Appeal Judgment (n 4) para. 422 (footnotes omitted) ('[I]t is the objective, contextual characteristics of the targeted part of the group, including, *inter alia*, its numeric size relative to the total size of the group, that form the basis for determining whether the targeted part of the group is substantial.'); *Popović et al.* Trial Judgment (n 8) para. 832 (footnote omitted) ('The numeric size of the part of the group targeted, evaluated in absolute terms and relative to the overall group size, "is the necessary and important starting point" in assessing whether the part targeted is substantial enough—but is "not in all cases the ending point of the inquiry".'); *Blagojević & Jokić* Trial Judgment (n 18) para. 668 (footnote omitted) ('The Appeals Chamber has held that the term "in whole or in part" must be interpreted as requiring that "the alleged perpetrator intended to destroy at least a substantial part of the protected group." The Appeals Chamber has specified that "the numeric size of the targeted part of the group," which should be evaluated not only in absolute terms but also in relation to the overall size of the entire group [...].'); *Mladić* Trial Judgment (n 53) paras 3437 (referring to the 'relative numerical size of the targeted part'), and 3528; *Karadžić* Trial Judgment (n 8) para. 555.

[106] See references, *supra*, 8.2.1.3. See also *Popović et al.* Trial Judgment (n 8) para. 833 (footnotes omitted) ('The targeted group can include military personnel: "the intent requirement of genocide is

Furthermore, in undertaking that computation, consideration should be given not just to the *immediate* victims of the crimes but also to those who indirectly, but personally, have been affected by these crimes.[107] That acts of genocide may have affected some individuals more severely or directly than others does not mean that the latter would be irrelevant to that evaluation. For instance, in *Tolimir*, the ICTY explained that whilst the forcible transfer of Bosnian-Muslims from the city of Žepa did not establish that acts carried out against *them* specifically were sufficiently serious to constitute genocide, this did not mean that they could not be victim of genocide as members of the group that was otherwise being targeted for extinction. Thus, the Yugoslav Tribunal said, all members of the part of the group relevant to the case—that is, the Bosnian-Muslim population of Eastern Bosnia and in particular, those of the enclaves of Srebrenica, Žepa, and Goražde—were to be regarded as victims of genocide by virtue of being 'within the targeted part of the protected group'.[108] In saying so, the Appeals Chamber clearly distinguished between the *actus reus* and *mens rea* elements of the offence and made it clear that an individual could be among the '*ultimate* victims of [a] genocidal enterprise' (as a member of the targeted group) without that individual being *personally* the victim of a genocidal crime. The Chamber also clarified in that context that the evaluation of whether the part of a group being targeted was substantial enough to meet the relevant standard is not limited to those against whom genocidal crimes have been committed. It includes all those who belong to the group (or part of the group) in relation to which the genocidal intent has been established.

8.3.3.2.2 Other factors

In addition to the (absolute and relative) number of targeted individuals, other non-exhaustive considerations might be relevant to establishing whether the targeted individuals were a substantial part of a group.[109] These include: the importance of the targeted individuals as members of the group, in particular their prominence within

not limited to instances where the perpetrator seeks only to destroy civilians." A genocide conviction is possible, for example, "where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group" so long as the intent and substantiality requisites are met.'); *Ao An* 2018 Closing Order (n 43) para. 97 (footnote omitted) ('The targeted group can include military personnel provided the military personnel were targeted because of their membership in protected group.'). In fact, the fact that no distinction is made by the perpetrators between civilians and military men may contribute to establishing that the targeted individuals were a group as such rather than merely men who posed a military threat. See *Popović et al.* Trial Judgment (n 8) para. 866.

[107] See generally *Popović et al.* Appeal Judgment (n 4) para. 458 (footnotes omitted) ('In its consideration of whether serious bodily or mental harm was caused to members of the group, for instance, the Trial Chamber found that "the killing operation inflicted serious bodily and mental harm on the Muslims of Eastern Bosnia". This harm was not limited to those who were directly subjected to it, but also included the suffering of the family members and loved ones of those killed.').

[108] See *Tolimir* Appeal Judgment (n 54) paras 217–218, 235–236. See also *Popović et al.* Appeal Judgment (n 33) para. 458 (to the same effect).

[109] See, e.g., *Mladić* Trial Judgment (n 53) para. 3528; *Krstić* Appeal Judgment (n 8) paras 12 ('These considerations, of course, are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.'), and 14; *Popović et al.* Trial Judgment (n 8) para. 832; *Tolimir* Trial Judgment (n 15) para. 749.

that group,[110] or their leadership role;[111] the strategic importance of the targeted individuals;[112] the reach of the perpetrators, in particular the opportunity presented to them

[110] See, *supra*, 8.3.3.1.1–8.3.3.1.2. See also *Krstić* Appeal Judgment (n 8) para. 12 (footnote omitted) ('In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute].'). In fn 22 of its Judgment, the *Krstić* Appeals Chamber noted that the Trial Chambers in *Jelisić* and *Sikirica* referred to this factor as an independent consideration which is sufficient, in and of itself, to satisfy the requirement of substantiality. 'Properly understood,' the *Krstić* Appeals Chamber added, 'this factor is only one of several which may indicate whether the substantiality requirement is satisfied.' *Krstić* Appeal Judgment (n 8) 4 fn 22 and para. 16; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 65; *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 132 (footnote omitted) ('[T]he operative requirement is that of substantiality, and the intention to destroy a significant section of the group such as its leadership is not an "independent consideration," but an element that may establish that requirement."); *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 146; *Brđanin* Trial Judgment (n 29) paras 701–702, 967; *Tolimir* Trial Judgment (n 15) para. 749 ('[O]ther relevant factors include the numerosity of the targeted portion in relation to the group as a whole, the prominence of the targeted portion, and whether the targeted portion of the group is "emblematic of the overall group, or is essential to its survival".'); *Popović et al.* Trial Judgment (n 8) para. 832 ('Other considerations that are "neither exhaustive nor dispositive" include the prominence within the group of the targeted part, whether the targeted part of the group's emblematic of the overall group, or is essential to its survival".'); *Blagojević & Jokić* Trial Judgment (n 18) para. 668; ICJ *Croatia-Serbia* 2015 Judgment (n 8) para. 142 ('Account must also be taken of the prominence of the allegedly targeted part within the group as a whole.'); *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 67 (footnote omitted) ('[I]f only a part of the group is targeted, the proportion of the targeted group in relation to the protected group as a whole, as well as the prominence of the targeted group within the protected group may be relevant to a determination of substantiality.'); *Vasiliauskas v. Lithuania*, App. No. 35343/05, Judgment, Joint Dissenting Opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque, and Kūris (ECtHR 20 October 2015) (hereafter *Vasiliauskas* Judgment, Villiger, Power-Forde, Pinto De Albuquerque, and Kūris Joint Dissent), para. 30 (characterizing the partisans as a prominent and emblematic part of the Lithuanian nation). See also *Mladić* Trial Judgment (n 53) paras 3535–3536 (providing an illustration where the targeted communities were found to have been too few and not emblematic enough to constitute a relevant 'part' of the group) and 3550–3555 (regarding the Chamber's finding that the Muslim population of Srebrenica formed a substantial part of the group to which they belonged).

[111] *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 131; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) paras 38–39, 65, 76–86, in particular, para. 78 ('In examining the evidence to determine whether leaders were targeted, one is looking for Bosnian Muslims who, whether by reason of their official duties or by reason of their personality, had this special quality of directing the actions or opinions of the group in question, that is those who had a significant influence on its actions.'); *Stakić* Trial Judgment (n 5) para. 525. See UN Commission of Experts Report on Yugoslavia (n 89) para. 94 ('The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.') (cited in *Blagojević & Jokić* Trial Judgment (n 18) para. 663); *Jelisić* Trial Judgment (n 5) para. 82 ('A targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community.'); *Krstić* Appeal Judgment (n 8) paras 12, 16, 21, 37; ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 200 (quoting *Krstić* Appeal Judgment (n 8) para. 12).

[112] See, for instance, *Krstić* Appeal Judgment (n 8) para. 15 (footnote omitted) ('Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size. As the Trial Chamber explained, Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republika Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted. The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence

to target members of the group,[113] and the perpetrators' area of activity and control;[114]

the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.'); *Popović et al.* Appeal Judgment (n 33) paras 422 (underlining Srebrenica's strategic location to the Bosnian-Serb leadership's plan for an ethnically based Serb state and thus the need to erase traces of Bosniak presence including through killings), 423–24 (regarding the relevance of Srebrenica's strategic value to the perpetrators' plan of territorial cleansing and control), and 865 (noting that the Srebrenica enclave was of immense strategic importance to the Bosnian-Serb leadership); *Trbić* Trial Judgment (n 4) para. 784 ('Strategically, the Muslim population of Srebrenica was an obstacle to the establishment of a contiguous, ethnically pure Bosnian Serb state with protected lines of communication and movement. Conversely, for the larger Muslim population, control of Srebrenica and the safety of the Muslim population there was absolutely imperative to prevent the political fragmentation of Bosnia and Herzegovina as a central state within its internationally recognized borders, which in turn was crucial for the protection of the Muslim population.').

[113] See, e.g., *Brđanin* Trial Judgment (n 29) para. 702 (pointing to the 'the possible extent of their reach'); *Tolimir* Trial Judgment (n 15) para. 749 ('[T]he area of the perpetrators' activity, control, and reach.'); *Krstić* Appeal Judgment (n 8) para. 13 (footnote omitted). In particular, the Appeal Chamber in *Krstić* noted:

> The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can—in combination with other factors—inform the analysis.

Krstić Appeal Judgment (n 8) para. 13; *Mladić* Trial Judgment (n 53) para. 3528 ('[A]nd the perpetrators' potential reach [...].' and 'The Trial Chamber in this regard recalls the Appeals Chamber jurisprudence that "The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can—in combination with other factors—inform the analysis".'); *Karadžić* Trial Judgment (n 8) para. 555; *Blagojević & Jokić* Trial Judgment (n 18) para. 668; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 67 (footnote omitted) ('The perpetrator's zone of control may also be relevant. According to the *Krstić* Appeals Chamber, for example, the destructive intent of the Nazis would be considered in the context of the extent of the Nazi regime's territorial control.').

[114] *Krstić* Appeal Judgment (n 8) paras 13 ('The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered.'), 15 ('Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people.'), and 17 ('Finally, the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control.'); *Popović et al.* Trial Judgment (n 8) para. 832 ('Other considerations that are "neither exhaustive nor dispositive" include [...] the area of the malefactors' activity and control and limitations on the possible extent of their reach.'); *Mladić* Trial Judgment (n 53) paras 3528 ('[T]he area of the perpetrators' activity and control [...].' and 'The Trial Chamber reiterates that this section concerns the specific intent of physical perpetrators and, accordingly, in determining whether the targeted part was substantial, consideration must be given, *inter alia*, to the physical perpetrators' activity, de facto control, and reach.'), 3437 (referring to the area of the perpetrators' activity and control), and 3535 ('In light of the foregoing, the Trial Chamber finds that the Bosnian Muslims in Sanski Most, Vlasenica, Foča, Kotor Varoš, and Prijedor Municipalities were targeted by the physical perpetrators of prohibited acts largely in their own respective municipalities. The Trial Chamber notes that the physical perpetrators had limited geographical control or authority to carry out activities. The Bosnian Muslims targeted in

the impact that the disappearance of the victims could have on the group's chance of survival;[115] the systematic, orderly, and methodical manner of execution of victims and lack of or limited amount of randomness in their targeting.[116] Furthermore, the part could be 'substantial' enough even if only some but not all members of the group are targeted. This could be the case, for instance, where only male (or only female) members of the group are targeted.[117]

each individual municipality formed a relatively small part of the Bosnian-Muslim population in the Bosnian-Serb claimed territory or in Bosnia-Herzegovina as a whole. The Trial Chamber received insufficient evidence indicating why the Bosnian Muslims in each of the above municipalities or the municipalities themselves had a special significance or were emblematic in relation to the protected group as a whole. The Trial Chamber is, therefore, not satisfied, beyond reasonable doubt, that the only reasonable inference that can be drawn from the surrounding facts and circumstances is that the physical perpetrators possessed the intent to destroy the Bosnian Muslims in Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica Municipalities as a substantial part of the protected group.'); *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 146; *Brdanin* Trial Judgment (n 29) para. 702. See also ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 199 ('The area of the perpetrator's activity and control are to be considered. [...] This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met.'); ICJ *Croatia-Serbia* 2015 Judgment (n 8) para. 142. In particular, the ICJ noted the following:

> The Court recalls that the destruction of the group 'in part' within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. In this regard, it held in 2007 that 'the intent must be to destroy at least a substantial part of the particular group,' and that this is a 'critical' criterion. The Court further noted that 'it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area' and that, accordingly, '[t]he area of the perpetrator's activity and control are to be considered.'

ICJ *Croatia-Serbia* 2015 Judgment (n 8) para. 142 (citing [2007] ICJ Rep paras 198, 199 and 201).

[115] See generally *Tolimir* Trial Judgment (n 15) para. 749 (pointing to the 'the impact that their disappearance would have on the survival of the group as such'); *Jelisić* Trial Judgment (n 5) para. 82. The *Jelisić* Trial Chamber referred to the Final Report of the Commission of Experts formed pursuant to Security Council Resolution 780, which found:

> If essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others—the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.

UN Commission of Experts Report on Yugoslavia (n 89) para. 94. The Commission of Experts noted further that '[s]imilarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well. Thus, the intent to destroy the fabric of a society through the extermination of its leadership, when accompanied by other acts of elimination of a segment of society, can also be deemed genocide.' Ibid., para. 94.

[116] See, e.g., *Popović et al.* Trial Judgment (n 8) paras 856–863, 866.

[117] For illustrations, see, e.g., *Popović et al.* Trial Judgment (n 8) para. 866 (footnotes omitted) ('The Trial Chamber also finds that the killing of all of the male members of a population is a sufficient basis to infer the intent to biologically destroy the entire group. The Trial Chamber notes that some young boys, elderly men and the infirm were amongst those killed and that no distinction was made between civilians and military men. Thus, the scope of the killing was wider than simply the men who posed a military threat. Further, the extent of the killings undoubtedly has had a detrimental impact on the physical survival of the Muslims of Eastern Bosnia. The Chamber finds beyond reasonable doubt that

8.3.3.2.3 Case-by-case assessment

Whilst the number of targeted individuals might suffice to meet the substantiality threshold,[118] the applicability of the factors listed earlier and the relative weight afforded to each relevant consideration must be analysed on a case-by-case basis.[119] Such an assessment would provide the tribunal with some discretion when determining whether a collectivity of individuals may be said to constitute 'a part' of a group.

the devastating impact on the community would have been evident to, and intended by, members of the Bosnian Serb Forces, including members of the VRS Main Staff and the Security Branch.'); *Krstić* Trial Judgment (n 4) paras 622, 633; *Krstić* Appeal Judgment (n 8) paras 6–23 (regarding the gender specificity of the acts of elimination of male victims in the context of the requirement of an intent to destroy a 'part' of the group); *Prosecutor v. Stupar*, No. X-KRŽ-05/24, Appellate Verdict, 9 September 2009. (hereinafter *Stupar et al.* Appeal Judgment), para. 376 ('[T]he element of substantiality does not necessarily refer to the quantitative aspect, as claimed by the defence [...]. One of the aspects pointed out in the trial Verdict is that the element of substantiality implies: a substantial part of a protected group. The trial panel found that, in the circumstances surrounding the relevant time, given the roles of men and women in the community, the destruction of the male population would have a greater impact on the ultimate destruction of the group than the killing of the female population. The Appellate Panel finds these arguments to be reasonable.'). See also *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent (n 53) para. 44 (addressing defence argument that the targeted group was 'a part' of a group) (footnote omitted) ('I respectfully agree with the Appeals Chamber that the "Defence misunderstands the Trial Chamber's analysis." The Trial Chamber found—and this has not been challenged—that the Srebrenica Muslims were "part" of the Bosnian Muslim group. Some of them were killed. The question then was whether those who were killed were killed with intent to destroy the Srebrenica "part" of the group. The Trial Chamber answered the question in the affirmative, using the killings, together with certain other matters, as evidence of that intent. Certainly, those who were killed *belonged* to the Srebrenica part of the Bosnian Muslim group, but no question really arose as to whether they constituted *"part" of any group within the meaning of the chapeau of article 4(2) of the Statute*; it was unnecessary to consider any such question. Accordingly also, no question arose as to the correct yardstick to be used to determine whether those killed constituted a "part" of any group.').

[118] See *Krstić* Appeal Judgment (n 8) para. 12; *Brdanin* Trial Judgment (n 29) para. 967 (footnote omitted) ('The requirement of substantiality is satisfied, at a minimum, by the relevant ARK municipalities, and it is therefore unnecessary to inquire further into other relevant factors such as the prominence of the targeted parts within the groups. The Trial Chamber is satisfied that, in targeting the Bosnian Muslims and Bosnian Croats of the ARK, the perpetrators intended to target at least substantial parts of the protected groups.'). See also *Kayishema & Ruzindana* Trial Judgment (n 10) para. 97, where the Chamber found that the expression 'in part' requires that the perpetrator intended to see that a 'considerable number of individuals who are part of the group' be destroyed. The magnitude of the killing might also be relevant to the accused's sentence. For an illustration, see generally *Nyiramasuhuko et al.* Appeal Judgment (n 9) para. 3358 and p. 1159 fn 7692 (citing *Ndahimana v. Prosecutor*, Case No. ICTR-01-68-A, Judgment, 16 December 2013 (hereafter *Ndahimana* Appeal Judgment), para. 231; *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Judgment, 16 January 2007 (hereafter *Ndindabahizi* Appeal Judgment), para. 135; *Nzabonimana* Appeal Judgment (n 32) para. 465; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgment and Sentence, 24 June 2011 (hereafter *Nyiramasuhuko et al.* Trial Judgment), para. 6206).

[119] *Tolimir* Trial Judgment (n 15) para. 749; *Krstić* Appeal Judgment (n 8) para. 14 ('The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.'); *Popović et al.* Trial Judgment (n 8) para. 832 (footnote omitted) ('Which factors are applicable, and their relative weight, will vary depending on the circumstances of the case.'). Regarding the process of evidential evaluation of this requirement, see also, *Tolimir* Trial Judgment (n 15) paras 774–782; *Popović et al.* Trial Judgment (n 8) paras 865 (summarizing findings of the *Krstić* Appeal Judgment (n 8) paras 15–16), and 832; *Brdanin* Trial Judgment (n 29) paras 700–703; *Karadžić* Trial Judgment (n 8) para. 555. See also ICJ *Croatia-Serbia* 2015 Judgment (n 8) para. 142 ('In 2007, the Court held that these factors would have to be assessed in any particular case. It follows that, in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group.').

However, such discretion has to be exercised in a spirit consonant with the object and purpose of the Genocide Convention.[120]

8.3.3.3 Geographically circumscribed group of individuals

The commission of an act as genocide is possible even when it occurs only in a particular geographical area.[121] The ICTY thus held that the 'part' of a group with respect to genocide charges before it were Bosnian-Muslims of Eastern Bosnia[122] or, even more narrowly, Bosnian-Muslims of the town of Srebrenica.[123] However, in such a case, the

[120] See *Krstić* Trial Judgment (n 4) para. 590.

[121] See generally *Brđanin* Trial Judgment (n 29) para. 703; *Prosecutor v. Brđanin*, Case No. IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 19 March 2004 (hereafter *Brđanin* Decision on Motion for Judgment of Acquittal), para. 53; *Jelisić* Trial Judgment (n 5) para. 83 (accepting that genocide could be committed in a 'limited geographical zone'); *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 68 (focusing on Bosnian Muslims and Bosnian Croats from the Prijedor municipality); *Krstić* Trial Judgment (n 4) paras 589 ('The intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality may be characterized as genocide.'), and 590; *Stakić* Trial Judgment (n 5) para. 523 (footnotes omitted) ('In construing the phrase "destruction of a group in part," the Trial Chamber with some hesitancy follows the jurisprudence of the Yugoslavia and Rwanda Tribunals which permits a characterisation of genocide even when the specific intent extends only to a limited geographical area, such as a municipality. The Trial Chamber is aware that this approach might distort the definition of genocide if it is not applied with caution.'); *Jević et al.* Trial Judgment (n 3) para. 935, 937 ('[K]illing all or one part of members of a group in a small geographic area, although resulting in a smaller number of victims, can be qualified as genocide if it was perpetrated with the intention to destroy one part of such group in a rather small geographic area.'); *Trbić* Trial Judgment (n 4) para. 189; *Ivanović* Appeal Judgment (n 5) para. 47; *Jorgic Case* (n 95) paras 20–27; ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 199 ('Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe." The area of the perpetrator's activity and control are to be considered.'); *Mladić* Trial Judgment (n 53) para. 3535; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 146 ('[T]he Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant.'); Schabas, *Genocide in International Law* (n 53) 286 (pointing to the 1982 resolution of the UN General Assembly 37/123 D, in which the General Assembly held that the massacre of a few hundred victims in the Palestinian refugee camp of Sabra and Shatila amounted to 'an act of genocide'). See also UN General Assembly, Resolution 37/123: The Situation in the Middle East, UN Doc. A/RES/37/123 (16 December 1982) (hereafter UN Doc. A/RES/37/123).

[122] See, e.g., *Blagojević & Jokić* Trial Judgment (n 18) paras 667, 673 ('The Trial Chamber finds that in the present case the targeted group was the Bosnian Muslims of Srebrenica—a substantial part of the Bosnian Muslim group.'); *Tolimir* Trial Judgment (n 15) paras 750, 774–775; *Tolimir* Appeal Judgment (n 54) paras 186–188; *Popović et al.* Trial Judgment (n 8) paras 839–840, 863, 865; *Popović et al.* Appeal Judgment (n 33) paras 419–426.

[123] See *Krstić* Appeal Judgment (n 8) paras 15–16. In fn 24 of its Judgment, the *Krstić* Appeals Chamber noted that the Trial Chamber had identified two sub-groups or parts (Bosnian-Muslims of Srebrenica or the Bosnian-Muslims of Eastern Bosnia) and said the following about this:

> Although the Trial Chamber did not delineate clearly the interrelationship between these two alternative definitions, an explanation can be gleaned from its Judgment. As the Trial Chamber found, 'most of the Bosnian Muslims residing in Srebrenica at the time of the [Serbian] attack were not originally from Srebrenica but from all around the central Podrinje region.' The Trial Chamber used the term 'Bosnian Muslims of Srebrenica' as a short-hand for the Muslims of both Srebrenica and the surrounding areas, most of whom had, by the time of the Serbian

group or part of a group being targeted must still be characterized by one or more of the relevant—national, racial, ethnic, or religious—features as the prohibition on genocide protects groups not on account of their constituting a territorial unit, but based on those characteristics.[124]

Furthermore, the geographical area of relevance to this assessment cannot be reduced at will. This would result in creating artificially small, 'theoretical' groups of individuals. In *Brđanin*, for instance, a case having to do with allegations of genocide in the Autonomous Region of Krajina (ARK) of Bosnia-Herzegovina, the prosecution argued that a protected group 'in whole' could be defined by reference to that relatively limited geographical area. The targeted 'part' of that group was, *in turn*, an even smaller section of that entity. However, contrary to the Prosecution's submissions, the Trial Chamber rejected this position and took the view that the Bosnian-Serb political leadership viewed the totality of the Bosnian-Muslims and Bosnian-Croats in the entire country as specific national, ethnical, racial, or religious groups. It added that 'no national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims and Bosnian Croats residing in the ARK, at the time relevant to the Indictment, from the other Bosnian Muslims and Bosnian Croats'.[125] The only distinctive criterion was their geographical location, the Chamber noted, 'not a criterion contemplated by the Genocide Convention'.[126] In addition, pointing to the subjective

attack against the city, sought refuge with the enclave. This is also the sense in which the term will be used in this Judgment.

Ibid., 5 fn 24 (quoting *Krstić* Trial Judgment (n 4) para. 559). See also *Krstić* Trial Judgment (n 4) paras 560 ('The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4.'), and 591–92 (discussing 'the Bosnian Muslim community of Srebrenica' and its surroundings); *Pelemiš & Perić* Trial Judgment (n 73) para. 157 ('[T]he Trial Panel finds that the Bosnian Muslims undoubtedly constitute a national, ethnic and religious group and that, as such, they are a protected group pursuant to Article 171 of the CC of BiH. In other words, the Panel states that the Muslims are one of the constituent "peoples" of the Socialist Republic of BiH (1974 Constitution of the SR BiH). There is ample subjective and objective evidence indicating that members of other national groups who committed crimes against the Bosniak people identified and stigmatized Muslims as a distinct national group. The Panel also concludes that the Muslims of Srebrenica constituted a "part" of the protected group of the Bosniak people pursuant to Article 171 of the CC of BiH.'). See also ICJ *Croatia-Serbia* 2015 Judgment (n 8) paras 142, 406 (cross-referencing paragraphs 295, 360, and 401 of the same judgment).

[124] See, e.g., UN Report on Darfur (n 35) para. 497 ('It is apparent that the international rules on genocide are intended to protect from obliteration groups targeted not on account of their constituting a territorial unit linked by some community bonds (such as kinship, language and lineage), but only those groups—whatever their magnitude—which show the particular hallmark of sharing a religion, or racial or ethnic features, and are targeted precisely on account of their distinctiveness.').

[125] *Brđanin* Trial Judgment (n 29) para. 734.

[126] Ibid. See also *Krstić* Trial Judgment (n 4) para. 559

> [N]o national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica, at the time of the 1995 offensive, from the other Bosnian Muslims. The only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention. In addition, it is doubtful that the Bosnian Muslims residing in the enclave at the time of the offensive considered themselves a distinct national, ethnical, racial or religious group among the Bosnian Muslims. Indeed, most of the Bosnian Muslims residing in Srebrenica at the time of the attack were not originally from Srebrenica but from all around the central Podrinje region. Evidence shows that they rather viewed themselves as members of the Bosnian Muslim group.

element of the notion of group, the Chamber added that the Prosecution had not submitted any evidence that the Bosnian-Muslims and Bosnian-Croats residing in the ARK at the time relevant to the indictment considered themselves a distinct national, ethnical, racial, or religious group among the Bosnian-Muslims and Bosnian-Croats respectively.[127] As described earlier, the group and its relevant part must constitute a sufficiently coherent and distinctive entity to form an identifiable unit relevant to the law of genocide.[128] The Chamber therefore rejected the contention that Bosnian-Muslims or Bosnian-Croats of the ARK could be regarded as a distinct group for the purpose of the law of genocide.

8.3.3.4 Targeting of multiple groups

Perpetrators will sometimes target members of several groups distinct from their own. This was the case, for instance, with the targeting of Bosnian-Croats and Bosnian-Muslims by Bosnian-Serb forces during the 1990s war in Bosnia-Herzegovina. In such cases, when evaluating whether those being targeted constitute a 'substantial' part of a group, each one of the groups concerned must be considered individually and not collectively.[129] In the example given, the tribunal would thus have to conduct this evaluation both in relation to Bosnian-Muslims and, *separately*, in relation to Bosnian-Croats.[130] Different targeted groups cannot therefore be amalgamated for the purpose of establishing that they constituted a group or a part thereof.

[127] *Brđanin* Trial Judgment (n 29) para. 734. [128] See, *supra*, 8.3.2.1.

[129] *Brđanin* Trial Judgment (n 29) paras 735–736 (footnotes omitted):

> 735. As stated earlier, where more than one group is targeted, the elements of the crime of genocide must be considered in relation to each group separately. The Trial Chamber has found that the majority of victims of acts potentially falling under Article 4(2) (a) to (c) of the Statute belong to the Bosnian Muslim group. Still, although the number of Bosnian Croats inhabiting the territory covered by the Indictment was much inferior to the number of Bosnian Muslims, the Trial Chamber finds that the evidence of crimes committed against Bosnian Croats is sufficient to allow it to conclude that the Bosnian Croat group was separately targeted, as such.
>
> 736. The Trial Chamber concludes that the protected groups, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims and Bosnian Croats, as such. The Bosnian Muslims and Bosnian Croats of the ARK would therefore constitute parts of the protected groups. The question of whether the intent to destroy these parts of the protected groups falls under the definition of genocide is discussed below.

See also *Brđanin* Trial Judgment (n 29) para. 967; *Stakić* Appeal Judgment (n 35) para. 28 (finding that the Trial Chamber did not err in concluding that the elements of genocide must be separately considered in relation to Bosnian-Muslims and Bosnian-Croats); *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 116; *Ao An* 2018 Closing Order (n 43) para. 89. But see *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 26 (footnotes omitted) ('I would define the protected group—and the target of the counter-insurgency campaign—as a single ethnic group of the "African tribes" which is in turn comprised of [sic] smaller groups, including the Fur, Masalit and Zaghawa.'). The dissenting Judge did not provide legal authority for this original approach.

[130] See, also, *infra*, 8.4.3.

8.4 A National, Ethnic, Racial, or Religious Group

8.4.1 The group as protected interest

The prohibition of genocide is based on the fundamental principle that groups of people, rather than people as individuals, should be protected and that their intended destruction is a crime under international law.[131] In other words, the object of the Genocide Convention and of its underlying prohibitions is to safeguard 'the very existence of certain human groups'.[132] The identification of one of these groups as the ultimate *victim* of the proscribed acts is thus one of the required components of the crime of genocide and a prerequisite to the establishment of this crime.[133]

[131] The United Nations General Assembly Resolution 96(I) described genocide as 'a denial of the right of existence of entire human groups'. UN Doc. A/RES/96(I) (n 90) 188. See also ICJ, Reservations to the Genocide Convention (n 90) 23 ('[The Genocide Convention seeks] to safeguard the very existence of certain human groups and [...] to confirm and endorse the most elementary principles of morality.') (cited in *Krstić* Trial Judgment (n 4) para. 552). This fact may be said to render genocide particularly serious as a criminal offense. See also *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 89 ('Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members.'). The Trial Chamber in *Akayesu* clearly stated that ultimately, 'the victim of the crime of genocide is the group itself and not only the individual' who is most directly victimized by the acts of the perpetrator. *Akayesu* Trial Judgment (n 5) para. 521. A good illustration of this notion relates to the sexual violence administered upon Tutsi women during the Rwandan conflict. See *Akayesu* Trial Judgment (n 5) paras 732–733. See also *Rutaganda* Trial Judgment (n 5) para. 60; *Krstić* Trial Judgment (n 4) para. 553 (footnote omitted) ('The Convention thus seeks to protect the right to life of human groups, as such. This characteristic makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such.'); *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000 (hereafter *Kupreškić et al.* Trial Judgment), para. 636; *Jelisić* Trial Judgment (n 5) para. 79.

[132] See ICJ *Croatia-Serbia* 2015 Judgment (n 8) para. 139 ('[A]n object of the [Genocide] Convention was the safeguarding of "the very existence of certain human groups".'). See also ICJ, Reservations to the Genocide Convention (n 90) 23; ICJ *Bosnia-Serbia* 2007 Judgment (n 4) paras 193–194; *Pelemiš & Perić* Trial Judgment (n 73) para. 157 ('The protected object of this criminal offense is not individuals, but national, ethnic, racial or religious groups.'); *Jević et al.* Trial Judgment (n 3) para. 948 ('The protected group here are not individual persons, but national, ethnic, racial or religious groups.'); *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) paras 114 ('The Majority highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group. In the view of the Majority, its purpose is to destroy in whole or in part the existence of a specific group or people, as opposed to those individuals who are members thereof. In this regards, the Majority notes the explanation by Raphael Lemkin concerning the creation of the word "genocide" from the Greek genos, meaning race or tribe, and the Latin caedere, meaning to kill.'), and 115 ('[T]he crime of genocide aims at protecting the existence of a specific group or people.'); *Tolimir* Appeal Judgment (n 54) para. 182 (footnote omitted) ('The identification of one of these protected groups as the victim of the proscribed acts is thus one of the required components of establishing the crime of genocide.'); *Tolimir* Trial Judgment (n 15) para. 735.

[133] *Tolimir* Appeal Judgment (n 54) para. 182; *Tolimir* Trial Judgment (n 15) para. 735; ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 191. The identification of the (whole or part of the) group said to have been targeted will in turn enable the court to verify that an accused charged with genocide in relation to that group (or part thereof) indeed possessed the requisite *mens rea* at the time of the events. See generally *Stakić* Appeal Judgment (n 35) para. 18 ('Because evidence of intent to destroy may be inferred from an accused's actions or utterances vis-à-vis the targeted group, it is impossible to establish with certainty whether the Appellant possessed the necessary intent to destroy if the target group itself has not been defined.').

For the purpose of the law of genocide, a group is to be understood as a section of the population 'whose members have common characteristics distinguishing them from other members of society'.[134]

Both the Genocide Convention and customary international law protect four categories of groups, which are characterized by certain features common to their members: nationality, ethnicity, race, or religion.[135] The crime of genocide thus pertains to the intended destruction in whole or in part of a group with a particular *positive* identity that is characterized by one or more of these features.[136] It does not concern itself with the destruction of people lacking such a distinctive identity.[137] This focus on the protection of groups is also reflected in the *mens rea* of the offence,

[134] UN Secretary-General, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947) (hereafter Secretary-General, Draft Commentary), 21 (reprinted in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. 1 (Martinus Nijhoff 2008) (hereafter Abtahi & Webb, *Travaux Préparatoires*), 229).

[135] See generally Schabas, *Genocide in International Law* (n 53) 117–71 (footnotes omitted) (noting that 'the drafters of the Convention quite intentionally excluded "political" groups from its scope, as they did [with] reference to "ideological," "linguistic" and "economic" groups.').

[136] Regarding the origin of this requirement, see *Stakić* Appeal Judgment (n 35) paras 20–24. See also *Karadžić* Trial Judgment (n 8) paras 541. In particular, in *Stakić*, the ICTY Appeal Chamber noted:

> 21. This reading of Article 4 finds support in the etymology of the term 'genocide,' and in the definition of the crime given by Raphaël Lemkin, the scholar who first conceptualised the term. Raphaël Lemkin explained that he created the word 'genocide' by combining 'the ancient Greek word genos (race, tribe) and the Latin cide (killing).' The combined term therefore describes 'the destruction of a nation or of an ethnic group.' Raphaël Lemkin elaborated that genocide 'is intended ... to signify a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups.' 'The objectives of such a plan,' he added, 'would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups.' Indeed, Raphaël Lemkin explained that genocide constitutes such a serious offence in part because the world loses 'future contributions' that would be 'based upon [the destroyed group's] genuine traditions, genuine culture, and ... well-developed national psychology.' Thus, genocide was originally conceived of as the destruction of a race, tribe, nation, or other group with a particular positive identity— not as the destruction of various people lacking a distinct identity.
>
> 22. The drafting history of the Genocide Convention, whose second article is repeated verbatim in Article 4(2) of the Tribunal's Statute, shows that the Genocide Convention was meant to incorporate this understanding of the term genocide—an understanding incompatible with the negative definition of target groups. General Assembly Resolution 96(I) defined genocide as the 'denial of the right of existence of entire human groups.' Members of the General Assembly's Sixth Committee, which prepared the final text of the Genocide Convention, echoed this view, making clear that leading countries viewed genocide as the destruction of 'human groups,' not just the destruction of individuals because they have, or lack, national, ethnical, racial, or religious characteristics. Perhaps even more tellingly, members of the Sixth Committee declined to include destruction of political groups within the definition of genocide, accepting the position of countries that wanted the Convention to protect only 'definite groups distinguished from other groups by certain well-established,' immutable criteria. Given that negatively defined groups lack specific characteristics, defining groups by reference to a negative would run counter to the intent of the Genocide Convention's drafters.

Stakić Appeal Judgment (n 35) paras 21–22.

[137] Certain national systems have defined the range of protected groups more broadly than provided for under the Genocide Convention and customary law. See generally O Bekou and K Miariti, *Implementing the Rome Statute of the International Criminal Court—Ratification, Implementation and Co-Operation* (Case Matrix Network), s 4.2.1. See also Elizabeth Santalla Vargas, 'An Overview of the Crime of Genocide in Latin American Jurisdictions' (2010) 10 International Criminal Law Review 441. See, also, *infra*, 8.4.3.

which demands proof that the perpetrator acted pursuant to an intent to destroy a group characterized by one (or more) of the listed features and that victims were selected accordingly.[138]

8.4.2 Existence and composition

8.4.2.1 General considerations

The determination that a group of individuals constitutes a national, ethnical, racial, or religious group under the law of genocide is an exercise fraught with difficulties. First, such a determination could hardly claim to be scientific in nature.[139] It is based on the perception of the identity of the group and of its membership supported by certain objective features that attach to the group.[140] A number of factors, some objective others subjective, will thus be relevant to that evaluation.[141]

[138] See generally *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 114 (footnotes omitted) ('The Majority highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group. In the view of the Majority, its purpose is to destroy in whole or in part the existence of a specific group or people, as opposed to those individuals who are members thereof. In this regards, the Majority notes the explanation by Raphael Lemkin concerning the creation of the word "genocide" from the Greek *genos*, meaning race or tribe, and the Latin *caedere*, meaning to kill.'); ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 193. See, also, *infra*, 8.5.2.

[139] See, *supra*, 8.4.4.1.2. See also UN Commission of Experts Report on Rwanda (n 39) para. 159 ('[T]o recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact.'). See also *Bagilishema* Trial Judgment (n 82) 29 fn 63; *Jelisić* Trial Judgment (n 5) para. 70.

[140] See, e.g., *In re* Adolfo Francisco, Case No. App 84/1998, 1998/22604 (Nat'l High Ct Spain 4 November 1998) (hereafter *Francisco* Appeal Judgment) (suggesting that the notion of genocide is 'socially understood, without the need for any standard formulation' and adding that the description of the relevant conduct 'is linked to society's conception—understood and perceived—of genocide.').

[141] *Stakić* Appeal Judgment (n 35) 10 fn 68; *Blagojević & Jokić* Trial Judgment (n 18) para. 667; *Brdanin* Trial Judgment (n 29) para. 684; *Muvunyi* Trial Judgment (n 5) para. 484; *Karadžić* Trial Judgment (n 8) para. 541; *Jelisić* Trial Judgment (n 5) para. 70 (footnotes omitted) ('Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators. This position corresponds to that adopted by the Trial Chamber in its Review of the Indictment Pursuant to Article 61 filed in the *Nikolic* case.'); *Trbić* Trial Judgment (n 4) para. 190; *Stupar et al.* Trial Judgment (n 18) 58; *Mitrović* Trial Judgment (n 18) 49. In *Bagilishema*, the Trial Chamber reached the same conclusion: 'If a victim is perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.' *Bagilishema* Trial Judgment (n 82) para. 65; *Ao An* 2018 Closing Order (n 43) para. 88; *Rutaganda* Trial Judgment (n 5) para. 56; *Munyaneza* Appeal Judgment (n 10) para. 172 ('An identifiable group may be characterized by national, ethnic, racial, or religious criteria. The identification of the protected or identifiable group must be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.') (citing *Semanza* Trial Judgment (n 53) para. 317).

8.4.2.2 Objective and subjective factors

Although the existence of certain groups and membership therein must be objectively ascertainable, there is also a subjective dimension in that evaluation. A group 'may not have precisely defined boundaries and there may be occasions when it is difficult to give a definite answer as to whether or not a victim was a member of a protected group'.[142] In other words, in a given situation, objectively ascertainable factors, such as the exercise of a particular religion, and a commonly shared *perception* of one's or another's membership in a group might be relevant to establishing the existence of a protected group. In all cases, however, a group must have some sort of *objective* reality so that purely imagined entities would not, in principle, come within the scope of protection of the Convention.[143] The existence of a group protected under the Genocide Convention cannot therefore be based *entirely* on the subjective assessment of the victims and/or perpetrators.[144] In line with this, tribunals have thus generally approached

[142] *Bagilishema* Trial Judgment (n 82) para. 65.

[143] See, generally, *Stakić* Appeal Judgment (n 35) para. 25 (footnotes omitted):

> The Prosecution raises arguments regarding support in the jurisprudence for a subjective definition of the target group. The Appeals Chamber considers these arguments to be misguided for two reasons. First, contrary to what the Prosecution argues, the Krstić and Rutaganda Trial Judgments do not suggest that target groups may only be defined subjectively, by reference to the way the perpetrator stigmatises victims. The Trial Judgment in *Krstić* found only that 'stigmatisation ... by the perpetrators' can be used as 'a criterion' when defining target groups—not that stigmatization can be used as the sole criterion. Similarly, while the Rutaganda Trial Chamber found national, ethnical, racial, and religious identity to be largely subjective concepts, suggesting that acts may constitute genocide so long as the perpetrator perceives the victim as belonging to the targeted national, ethnical, racial, or religious group, it also held that 'a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention.' Other Trial Judgments from the ICTR have also concluded that target groups cannot be only subjectively defined.

In the *Musema* Trial Judgment, the Trial Chamber stated that 'a subjective definition alone is not enough.' *Musema* Trial Judgment (n 35) para. 162. In *Semanza*, the Trial Chamber held that 'the determination of whether a group' can be defined as a target group 'ought to be assessed [...] by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators'. *Semanza* Trial Judgment (n 53) para. 317. In *Bagilishema*, the Trial Chamber was even more explicit, noting that the concept of a national, ethnical, racial, or religious group 'must be assessed in light of a particular political, social, historical, and cultural context,' and that membership in 'the targeted group must be an objective feature of the society in question.' *Bagilishema* Trial Judgment (n 82) para. 65. See also UN Commission of Experts Report on Yugoslavia (n 89) para. 96; *Nuon Chea and Khieu Samphan* 002/02 Trial Judgment (n 54) para 795 (footnotes omitted) ('The Chamber notes that, in determining what constitutes a protected group, the *ad hoc* tribunals have taken into account subjective factors including the way in which the perpetrator stigmatises the victims or the way in which the victims perceive themselves. The Trial Chamber finds that such factors are relevant and shall be taken into account. However, it considers that the subjective element alone is insufficient to establish membership of the protected group,2365 and finds that both objective and subjective criteria may be taken into account. An analysis which focuses on the objective criteria is consistent with the purpose of the Genocide Convention which was to protect relatively stable and permanent groups.').

[144] See Schabas, *Genocide in International Law* (n 53) 127–28. But see UN Report on Darfur (n 35) paras 508–511 (adopting, perhaps, a purely subjective approach to the identification of groups and group membership). The *Brdanin* Trial Chamber of the ICTY appears to have adopted a middle course between these positions, suggesting that subjective factors 'may not be sufficient' in all cases to make that determination but seemingly not excluding that this could ever be the case. See *Brdanin* Trial Judgment (n 29) para. 684 (footnotes omitted) ('The correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria. This is so because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected

the question of the existence of a protected group and of its membership using a combination of objective and subjective factors.[145]

8.4.2.3 *Subjective considerations*

The subjective perception of both victims and perpetrators is a relevant factor in the determination of the existence and composition of a protected group.[146] Evidence may

by the Genocide Convention, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) must be in fact directed against "members of the group".').

[145] See *Muvunyi* Trial Judgment (n 5) para. 484 (footnotes omitted:

> The jurisprudence of the Tribunal indicates that although the Statute does not clearly establish the criteria for determining protected groups under Article 2, the Trial Chambers have tended to decide the matter on a case-by-case basis, taking into consideration both the objective and subjective particulars, including the historical context and the perpetrator's intent. In *Karemera*, the Appeals Chamber upheld the Trial Chamber's decision taking judicial notice of 'the existence of the Twa, Tutsi and Hutu as protected groups falling under the Genocide Convention.' It is not disputed in the present case that the Tutsi are members of a protected group under the Statute.

See also *Tolimir* Trial Judgment (n 15) para. 735 (footnotes omitted) ('Article 4, which corresponds to the Genocide Convention, protects a national, ethnical, racial, or religious group. This group is referred to in each of the underlying acts and, therefore, the presence of such a group is required for each constitutive element of the crime of genocide. While the criteria for identifying the group are not specified in the Genocide Convention, the jurisprudence of the Tribunal states that the determination of the group is to be made on a case-by-case basis, using both objective and subjective criteria.'); *Brdanin* Trial Judgment (n 29) paras 682–686, in particular, paras 683–684 (finding that relevant group may be identified using the 'subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics', but that in determining the relevant protected group, it is also necessary to consult objective criteria because subjective criteria alone may not be sufficient to determine the group, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) must be directed against 'members of the group'). See also *Jelisić* Trial Judgment (n 5) para. 70; *Semanza* Trial Judgment (n 53) para. 317; *Kajelijeli* Trial Judgment (n 53) para. 811; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) 18 fn 52. In particular, the ICC noted in *Al Bashir* the following:

> The Majority notes that neither the Statute nor the rules provide for a definition of 'ethnic group.' The Majority also observes that international case law has not provided either a clear definition of what an 'ethnic group' is. In this regard, the Majority observes that the ICJ, in its recent Judgment on Genocide, did not rule on whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach to the definition of the relevant group should be adopted. However, the Majority considers that, for the purpose of the present decision, it is unnecessary to further explore this issue.

Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest (n 1) 18 fn 52 (citing ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 191). See also *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 23 (relying on the jurisprudence of the *ad hoc* Tribunals on that point). See also M Schuster, 'The Crime of Genocide Applied in Practice—Selected Aspects of the Jurisprudence of the *Ad Hoc* Tribunals' Appeals Chambers' in C Safferlin and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010), 213, 216–19 (regarding the evolution of the approach of the *ad hoc* Tribunals on that point).

[146] See, *supra*, 8.4.2.2. See also *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995 (hereafter *Nikolić* Review of Indictment), para. 27; *Krstić* Trial Judgment (n 4) para. 557; *Jelisić* Trial Judgment (n 5) para. 70; *Brdanin* Trial Judgment (n 29) para. 683; *Jević et al.* Trial Judgment (n 3) paras 955 ('A protected group can be subjectively identified "by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnic, racial or religious characteristics".'), and 958; *Trbić* Trial Judgment (n 4) para. 783.

suggest, for instance, that the victims perceived themselves as belonging to a distinct group.[147] In other cases, the perpetrator's view of the targeted group might be relevant to determine that a protected group was being targeted.[148]

8.4.2.4 No necessary legal assessment from the perpetrator

It is not necessary to establish that the accused was aware that the group in question was a protected group under the Genocide Convention. It is sufficient that he was generally aware of the facts and circumstances upon which the characterization was made and the victims targeted.[149]

[147] *Brdanin* Trial Judgment (n 29) para. 683; *Rutaganda* Trial Judgment (n 5) para. 56; *Krstić* Trial Judgment (n 4) para. 559.

[148] See, e.g., *Muhimana* Trial Judgment (n 54) para. 500 (footnote omitted) ('The Prosecution also has the burden of proving either that the victim belongs to the targeted ethnic, racial, national, or religious group or that the perpetrator of the crime believed that the victim belonged to the group.'); *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Judgment and Sentence, 12 November 2008 (hereafter *Nchamihigo* Trial Judgment), para. 338 (footnote omitted). In particular, the ICTR Chamber noted the following in *Nchamihigo*:

> In the *Media* case, the Appeals Chamber clarified that the jurisprudence of the *ad hoc* Tribunals acknowledges that the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining membership of a protected group, where the evidence demonstrates that the perpetrators of the crimes perceived Hutu political opponents as Tutsi. Where the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide. However, the fact that Hutu political opponents were killed in circumstances where such killings constitute crimes against humanity, does not prevent the killing of the Tutsi from constituting genocide. The charges of killing Hutu political opponents in the present case could result in convictions for crimes against humanity, but not for genocide.

Nchamihigo Trial Judgment (n 149) para. 338. See also *Jelisić* Trial Judgment (n 5) para. 71 (footnote omitted) ('A group may be stigmatised in this manner by way of positive or negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A 'negative approach' would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. The Trial Chamber concurs here with the opinion already expressed by the Commission of Experts and deems that it is consonant with the object and the purpose of the Convention to consider that its provisions also protect groups defined by exclusion where they have been stigmatised by the perpetrators of the act in this way.'); *Blagojević & Jokić* Trial Judgment (n 18) para. 667; *Nahimana et al.* Appeal Judgment (n 1) para. 496; *Stakić* Appeal Judgment (n 35) para. 25; *Muhimana* Trial Judgment (n 54) para. 500; *Ndindabahizi* Trial Judgment (n 45) para. 468; *Gacumbitsi* Trial Judgment (n 72) para. 255; *Kajelijeli* Trial Judgment (n 53) para. 813; *Bagilishema* Trial Judgment (n 82) para. 65; *Musema* Trial Judgment (n 35) para. 161; *Rutaganda* Trial Judgment (n 5) para. 56; *Seromba* Trial Judgment (n 1) para. 318 (footnote omitted) ('As for the notion of "members of the group" which represents belonging to a group, case-law considers this from a subjective standpoint, holding that the victim is perceived by the perpetrator of the crime as belonging to the group targeted for destruction.').

[149] See, e.g., *Trbić* Trial Judgment (n 4) para. 781:

> The identification of the Muslims (Bosniaks) from Srebrenica as a protected group for the purposes of applying the correct law in this case is a legal characterization. It is not necessary that the Accused understand or make proper legal characterizations. It is sufficient that he was aware of the facts upon which the characterization has been made, that is: that he knew that the victims held in the Zvornik Brigade area of responsibility were Muslims from Srebrenica and; that he knew that the men in the column were Muslims from Srebrenica; and that he

8.4.2.5 *Form and structure of the group*

Under the law of genocide, a 'group' need not be structured or organized in any particular way to come within the scope of the law, nor does it need to possess any particular institutional features. Thus, a 'tribe'—in the sense of group linked by language, culture, or history in a traditional society—could constitute a group for the purpose of the definition of genocide.[150]

8.4.2.6 *Targeting based on membership in protected group*

That the victims have a common nationality, ethnicity, religion, or race is not enough to conclude that they were victims of genocide. That feature must further be shown to have been the reason or one of the reasons why the victims were targeted.[151] Thus, the European Court of Human Rights concluded that Lithuanian 'partisans', who were characterized by their resistance to the Soviet presence in the country, did not come within the ordinary meaning of a 'national' or 'ethnic' group.[152] The Court noted that victims did not possess national or ethnic features which would have distinguished them from the perpetrators, and that they were being targeted not for reasons associated with their nationality or ethnicity, but by reason of their *political* resistance to the occupying power.[153] Political groups do not constitute a recognized category of

knew that the victims brought into and held in the Zvornik Brigade area of responsibility were Muslims from Srebrenica.

See also *Mitrović* Trial Judgment (n 18) 49 ('The Defense argues that the Accused had no knowledge of the legal qualifications of genocide and therefore could not have harbored the intent to commit genocide. However, it is never necessary that an accused have the ability to define the legal qualifications of his crime, only that he have notice that his actions and intentions are criminal. It is for the Panel to determine the crime then committed. The Accused need not be able to recite the legal definition of genocidal intent, as long as he possessed the intent to which the definition refers.').

[150] See, e.g., *Stakić* Appeal Judgment (n 35) para. 21 (noting that genocide was originally conceived of as 'the destruction of a race, *tribe*, nation, or other group with a particular positive identity'). See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 137; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 26 (regarding the Fur, the Masalit, and the Zaghawa); UN Report on Darfur (n 35) paras 495–497, 507–522 (finding that tribes may fall under the notion of genocide if they exhibit the characteristics of one of the four categories of group protected by international law).

[151] *Jelisić* Appeal Judgment (n 7) para. 47; *Niyitegeka* Appeal Judgment (n 1) para. 53; *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 123; *Munyaneza* Appeal Judgment (n 10) para. 177; *Muvunyi* Trial Judgment (n 5) para. 485; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, 16 May 2003 (hereafter *Niyitegeka* Trial Judgment), para. 410; *Akayesu* Trial Judgment (n 5) paras 521–522; *Kanyarukiga* Trial Judgment (n 10) para. 635; *Bagilishema* Trial Judgment (n 82) para. 61; *Seromba* Appeal Judgment (n 15) para. 176; *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, 26 May 2003 (hereafter *Rutaganda* Appeal Judgment), paras 524–525; *Karera* Trial Judgment (n 10) paras 534, 536; *Mpambara* Trial Judgment (n 45) para. 8. See, also, *supra*, 8.1.2 and *infra*, 8.5.2.

[152] *Vasiliauskas* Judgment (n 82) paras 181–185. The Court also came to the view that, by analogy, a broad interpretation of the terms of the Convention was not foreseeable to the applicant in that case. See also *Krstić* Appeal Judgment (n 8) para. 181 ('[T]here is no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Article II of the Genocide Convention.').

[153] But see, *contra*, *Vasiliauskas* Judgment, Villiger, Power-Forde, Pinto De Albuquerque, and Kūris Joint Dissent (n 110) paras 16–17 (suggesting that that the Lithuanian partisans should have been considered a substantial part of a national group). The reasoning of the minority in *Vasiliauskas* is not convincing. First, the targeted individuals were not distinguishable by reason of any national feature

protected group under the law of genocide so that 'partisans' could not be said to constitute a protected groups under the law of genocide.[154]

8.4.3 Positive definition of protected group

A national, ethnical, racial, or religious group must consist of a collection of individuals with a particular group identity.[155] The protected group must therefore be defined *positively* and possess distinguishing—national, racial, religious, or ethnic—characteristics.[156] In other words, to be relevant to this prohibition, the group in

attaching to them. They, like perpetrators, were Lithuanian nationals. They were not therefore a unit with a cohesive and distinctive national existence distinct from any other Lithuanian national. Second, there was no indication that their nationality had played any part in the decision of the perpetrators to target them or that the perpetrators targeted them because of their national identity. Such an approach would mean that the element of selectivity based on a recognized (national) feature and discrimination based on one of these features (nationality), which constitutes a necessary component of the *mens rea* of genocide, was entirely absent. The position of the minority does away with the element of discriminatory *mens rea* and effectively objectivizes the question of nationality: under the minority's reasoning, because victims had a nationality and formed part of a broader national group, they could be said to have been victims of genocide. Such an objective approach is not accepted under the law of genocide. See also *Scilingo Manzorro (Adolfo Francisco) v. Spain*, Case No. 798, Judgment (Spain Supreme Ct 1 October 2007) (hereafter *Manzorro* Appeal Judgment), para. 10 (finding that victims could not be said to constitute a distinct "national" group as they and the perpetrators shared the same nationality).

[154] See, *infra*, 8.4.4.6.3.

[155] *Mladić* Trial Judgment (n 53) para. 3436; *Stakić* Appeal Judgment (n 35) para. 20. See also *Popović et al.* Trial Judgment (n 8) para. 809 (footnotes omitted) ('Both the *actus reus* and the *mens rea* provisions of Article 4 refer to the targeting of a protected group. Genocide was "originally conceived as the destruction of a race, tribe, nation, or other group with a particular positive identity; not as the destruction of various people lacking a distinct identity." The Genocide Convention's definition of the group, reflected in Article 4, adopts the understanding that genocide is the destruction of distinct human groups with particular identities, such as "persons of a common national origin" or "any religious community united by a single spiritual ideal." A group is defined by "particular positive characteristics—national, ethnical, racial or religious—and not the lack of them".').

[156] *Mladić* Trial Judgment (n 53) para. 3436. See also *Stakić* Appeal Judgment (n 35) paras 16–28; *Akayesu* Trial Judgment (n 5) paras 510–516; *Krstić* Trial Judgment (n 4) paras 551–561; *Ao An* 2018 Closing Order (n 43) para. 89; *Nuon Chea and Khieu Samphan* 002/02 Trial Judgment (n 54) para 793. In *Al Bashir*, the ICC Chamber noted:

> In relation to the first element, the Majority is of the view that the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof. In this regard, it is important to highlight that the drafters of the 1948 Genocide Convention gave 'close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics.' It is, therefore, a matter of who the targeted people are, not who they are not. As a result, the Majority considers that negative definitions of the targeted group do not suffice for the purpose of article 6 of the Statute.

Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest (n 1) para. 135 (footnotes omitted). See also ICJ *Bosnia-Serbia* 2007 Judgment (n 4) paras 193 (footnotes omitted) ('The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics—national, ethnical, racial or religious—and not the lack of them.'), 194 ('The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups." Such an understanding of genocide requires a positive identification

question must have a particular, distinct—national, ethnic, racial, or religious—identity and be defined by its common characteristics rather than a lack thereof.[157] It is not sufficient to define a protected group exclusively by reference to *negative* factors.[158] As a result, a group could not be characterized solely by opposition to the perpetrator's group (e.g., non-Khmer Rouge; non-Nazis). This led the ICTY to determine that a protected group of individuals, which factually consisted of Bosnian-Croats and Bosnian-Muslims, could not be described negatively as 'non-Serbs' for the purpose of the prohibition on genocide as 'non-Serbs'.[159] Instead, the Tribunal made it clear that it is the positive and common—national, ethnical, racial, or religious—feature or features of each group, which would characterize a protected group (i.e., in this case, Bosnian-Muslims and Bosnian-Croats).[160]

of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.') (citing ICJ, Reservations to the Genocide Convention (n 90) 23), 195 (referring to *Stakić* Trial Judgment (n 5) paras 20–28), and 196 (holding that 'the matter on the basis that the targeted group must in law be defined positively, and thus not negatively as the "non-Serb" population.').

[157] *Tolimir* Trial Judgment (n 15) para. 735; *Stakić* Appeal Judgment (n 35) para. 21; *Popović et al.* Trial Judgment (n 8) para. 809.

[158] *Brđanin* Trial Judgment (n 29) para. 685; *Stakić* Appeal Judgment (n 35) paras 19–20, 22–28; *Tolimir* Trial Judgment (n 15) para. 735; *Popović et al.* Trial Judgment (n 10) para. 809; ICJ *Bosnia-Serbia* 2007 Judgment (n 4) paras 193–196. In particular, the ICJ noted the following:

> 193. [...] It is a group which must have particular positive characteristics—national, ethnical, racial or religious—and not the lack of them. [...] It is a matter of who those people are, not who they are not. The etymology of the word—killing a group—also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek genos, meaning race or tribe, and the termination '-cide,' from the Latin *caedere*, to kill. In 1945 the word was used in the Nuremberg indictment which stated that the defendants 'conducted deliberate and systematic genocide, viz., the extermination of racial and national groups ... in order to destroy particular races and classes of people and national, racial or religious groups.'

ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 193 (citing R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79; 'Indictment' in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (International Military Tribunal 1947) (hereafter IMT Indictment), 43–44). The issue of the positive or negative definition of the group should not be confused with the question, dealt with earlier, of the objective or subjective ascertainment of the existence and membership of a group. See *Stakić* Appeal Judgment (n 35) para. 26 ('[T]he Appeals Chamber notes that whether or not a group is subjectively defined is not relevant to whether a group is defined in a positive or a negative way, which is the issue now before the Chamber. Consequently, when a target group is defined in a negative manner (for example non-Serbs), whether the composition of the group is identified on the basis of objective criteria, or a combination of objective and subjective criteria, is immaterial as the group would not be protected under the Genocide Convention.').

[159] See, in particular, *Stakić* Appeal Judgment (n 35) paras 16–27. But see *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, Partly Dissenting Opinion of Judge Shahabuddeen, 22 March 2006 (hereafter *Stakić* Appeal Judgment, Shahabuddeen Dissent), paras 8–18 (challenging the view of the majority and positing that it is possible to define a group negatively). See, also, *Karadžić* Trial Judgment (n 8) para. 541; *Jelisić* Trial Judgment (n 5) paras 71–72; *Stakić* Trial Judgment (n 5) para. 512.

[160] See, e.g., *Karadžić* Trial Judgment (n 8) para. 541 (footnotes omitted) ('When more than one group is targeted, the elements of the crime of genocide must be considered in relation to each group separately.'); *Stakić* Trial Judgment (n 5) para. 512. In *Brđanin*, the ICTY noted:

> 685. In addition, the Trial Chamber agrees with the *Stakić* Trial Chamber that, '[i]n cases where more than one group is targeted, it is not appropriate to define the group in general

Although a group cannot be defined negatively, the fact that a group is different from the perpetrator's group and is targeted for that reason may be relevant as evidence that destructive intent existed in relation to one or more protected groups. This would be the case, for instance, if the evidence established (i) a pattern of similar criminal conduct, or (ii) a coherent approach and method on the part of the perpetrators which might provide evidence of their *dolus specialis* in relation to each or some of these groups. In such a case, however, the protected character of the targeted groups must be verified and established in relation to *each* group.[161] An illustration would consist, for instance, of the targeting of Bosnian-Muslims and Bosnian-Croats by Bosnian-Serb force, with *each* and both of these groups being targeted for destruction.[162]

8.4.4 National, ethnic, racial, or religious character of group

8.4.4.1 General considerations

8.4.4.1.1 From 'national minorities' to national, ethnical, racial, and religious groups

Article II of the Genocide Convention is applicable to four categories of groups: national, ethnical, racial, and religious groups. The same list of protected groups has since been replicated in the statutory instruments of international criminal tribunals with jurisdiction over the crime of genocide. As a whole, this set of protected groups effectively reflect a single phenomenon which had been historically—but quite misleadingly—described as 'national minorities'.[163] The Trial Chamber in the *Krstić* case thus pointed out that 'the preparatory work of the 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'.[164] The *Krstić* Chamber added that '[t]o attempt to differentiate each of the named groups on the

> terms, as for example, "non-Serbs".' It follows that the Trial Chamber disagrees with the possibility of identifying the relevant group by exclusion, *i.e.*: on the basis of 'negative criteria.'
>
> 686. Moreover, where more than one group is targeted, the elements of the crime of genocide must be considered in relation to each group separately.

Brdanin Trial Judgment (n 29) paras 685–686 (footnotes omitted).

[161] See, *supra*, 8.3.3.4. See also *Stakić* Trial Judgment (n 5) para. 512; *Brdanin* Trial Judgment (n 29) para. 685; *Karadžić* Trial Judgment (n 8) para. 541.

[162] See also, *supra*, 8.3.3.4, regarding the need to make that determination in relation to each targeted group.

[163] See generally *Krstić* Trial Judgment (n 4) para. 556; *Brdanin* Trial Judgment (n 29) para. 682. See also UNWCC, 'Notes on Trial of Göth' (n 53) 7–8 ('The word "genocide" is a new term coined by Professor Lemkin to denote a new conception, namely, the destruction of a nation or of an ethnic group. 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 the national group.'); UNWCC, 'Notes on Trial of Ulrich Greifelt' (n 8) 37 (citing Lemkin, *Axis Rule in Occupied Europe* (n 100) ('Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.')). See also Fanny Martin, 'The Notion of "Protected Group" in the Genocide Convention and its Application' in Paola Gaeta (ed), *The Genocide Convention: A Commentary* (OUP 2009) (hereafter Martin, 'Notion of Protected Group'), 121–22; Schabas, *Genocide in International Law* (n 53) 137–38.

[164] *Krstić* Trial Judgment (n 4) para. 556.

basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention'.[165] The notion of protected group has now shed both its focus on nationality (embracing other features—racial, religious, and ethnic) and any requirement of 'minority' status on the part of the protected group.

8.4.4.1.2 Overlapping character of protected groups

The four protected groups contemplated by the drafters of the Genocide Convention are not impermeable. They overlap to some extent and a targeted group may possess and be distinguishable on more than one of the listed grounds.[166] The four terms also assist in contextualizing one another, operating in effect as 'four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection'.[167]

This overlap, combined with the rather uncertain nature of some of these notions, might help explain why a number of jurisdictions have determined that victims were part of a protected group without specifying which type of group.[168] In the *Krstić* case, for instance, the Trial Chamber took such a course; it concluded that the Bosnian-Muslims of Srebrenica constituted a protected group pursuant to Article 4 of the ICTY Statute, but refrained from saying which sort of group it was or what characteristics made it a discrete 'group' for the purpose of this provision.[169] It is questionable whether such a generic sort of finding satisfies the Chamber's obligation to give a reasoned opinion and whether such an approach is in fact supported in law.[170] It is the

[165] Ibid. For additional information on the overlapping nature of the categories of protected groups, refer to the sources cited in the next section.

[166] See, e.g., *Stakić* Trial Judgment (n 5) para. 512; *Jević et al* Trial Judgment (n 3) para. 949 ('These four categories can partially overlap, but each of them has a clear core.'). See also Doudou Thiam, Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/CN.4/398 (11 March 1986) (hereafter Thiam Fourth Report on the Draft Code of Offences), para. 56.

[167] Schabas, *Genocide in International Law* (n 53) 129. Professor Schabas also notes that this was the perception of the drafters: 'For example, they agreed to add the term "ethnical" so as to ensure that the term "national" would not be confused with "political". On the other hand, they deleted the reference to "linguistic" groups, "since it is not believed that genocide would be practiced upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics". The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.' Ibid, 129–30 (footnotes omitted).

[168] See, e.g., *Blagojević & Jokić* Trial Judgment (n 18) para. 667 (finding that the Bosnian Muslim people constituted a protected group under Article 4 of the ICTY Statute without specifying the particular feature—national, racial, religious, or, ethnical—upon which that determination was based). See also UN Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64 (24 August 2018) (hereafter UNHRC, Report on Myanmar), para. 84 ('Genocide occurs when a person commits a prohibited act with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. The Rohingya are a protected group under this definition.').

[169] *Krstić* Trial Judgment (n 4) paras 559–560. See also *Stakić* Trial Judgment (n 5) para. 512. The Trial Chamber's approach seems to have been inspired by the *Interim Report of the Commission of Experts*. In its report, the Commission considered the situation where perpetrators of group A intended to destroy not only groups B and C, but any *non*-A group. See UN Commission of Experts Report on Yugoslavia (n 89) para. 96 ('If there are several or more than one victim groups, and each group as such is protected, it may be within the spirit and purpose of the [Genocide] Convention to consider all the victim groups as a larger entity. [...] in one-against-everyone-else cases the question of a significant number or a significant section of the group must be answered with reference to all the target groups as a larger whole.').

[170] See, e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003 (hereafter *Milutinović et al.* Decision Refusing Milutinović Leave to Appeal), para. 23:

> A Chamber is required to give reasons for its finding on the facts which led to its conclusion but this does not mean that it has a duty to give a detailed analysis of each such factor.

case, however, that a tribunal would be permitted to find that a group of individuals protected under the law of genocide comes within the terms of more than one of the protected groups.

Furthermore, the notions of nationality, ethnicity, race, and religion are not fixed notions capable of scientific proof.[171] For present purposes, these are 'legal' concepts that are subject to interpretative nuances and differing subjective perceptions.[172] At the ICTR for instance, Hutus and Tutsis have been found to constitute two different 'ethnic' groups within the meaning of the Genocide Convention.[173] The *Akayesu* Trial

> In most applications for provisional release, it would be sufficient for a Chamber to state that the matters put forward by the applicant have not satisfied it that he will appear for trial, or that, if released, he will not pose a danger to any victim, witness or other person (as the case may be). In the particular case, one or more of the particular matters put forward by the applicant will be of such a nature that, in the discharge of its duty to give reasons, the Chamber will be obliged to explain why it has not accepted one or more of the various matters as being sufficient to establish the relevant fact. It is not possible to state in advance any specific test as when such an obligation will arise. Each case will depend upon its own circumstances.

See also Schabas, *Genocide in International Law* (n 53) 131 ('There is a danger that a search for autonomous meanings for each of the four terms will weaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed. [...] Deconstructing the enumeration risks distorting the sense that belongs to the four terms, taken as a whole.').

[171] See, *supra*, 8.4.2.1 and 8.4.4.1.1. See also *Jelisić* Trial Judgment (n 5) para. 70 (footnotes omitted) ('Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.'); *Bagilishema* Trial Judgment (n 82) 29 fn 63 ('[T]he Chamber agrees with the comment of the Commission of Experts on Rwanda that "to recognise that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact": Morris and Scharf, *The International Criminal Tribunal for Rwanda*, vol. 1, p. 176.'); UN Commission of Experts Report on Rwanda (n 39) para. 159.

[172] See *Rutaganda* Trial Judgment (n 5) para. 56 ('The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context.'); *Musema* Trial Judgment (n 35) para. 161; *Bagilishema* Trial Judgment (n 82) para. 65; *Kajelijeli* Trial Judgment (n 53) para. 811; *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment, 22 January 2004 (hereafter *Kamuhanda* Trial Judgment), para. 630. See also, *supra*, 8.4.2.1.

[173] See, e.g., *Akayesu* Trial Judgment (n 5) para. 122; *Kayishema & Ruzindana* Trial Judgment (n 10) paras 522–526; *Kajelijeli* Trial Judgment (n 53) para. 817. In *Akayesu*, the Trial Chamber said the following: 'The term ethnic group is, in general, used to refer to a group whose members speak the same language and/or have the same culture. Therefore, one can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture. However, in the context of the period in question, they were, in consonance with a distinction made by the colonizers, considered both by the authorities and themselves as belonging to two distinct ethnic groups; as such, their identity cards mentioned each holder's ethnic group.' *Akayesu* Trial Judgment (n 5) 62 fn 56. See also UN Security Council, Preliminary Report of the Independent Commission of Experts Established in accordance with Security Council Resolution 935 (1994) ("Rwanda"), UN Doc. S/1994/1125, 4 October 1994 (hereafter UN Commission of Experts Preliminary Report on Rwanda), para. 124 (demonstrating that the Commission considers Hutus and Tutsis to be different 'ethnic' groups); *Munyaneza* Trial Judgment (n 10) para. 106 (characterizing the Rwandan Tutsis as an ethnic group).

Chamber noted in that respect that while the Tutsis did not have their own language or a distinct culture when compared to Hutus—two factors generally central to the definition of an 'ethnic' group[174]—a number of objective and subjective indicators pointed to a 'distinct [ethnic] identity'.[175] In particular, the Trial Chamber pointed to the fact that Rwandan identity cards of the time included an indication of each individual's 'ethnicity,' the ethnic group being Hutu, Tutsi, or Twa,[176] and that the Rwandan Constitution and Civil Code in force at the time also identified Rwandans by reference to their ethnic group.[177] Moreover, the Chamber noted that both victims and perpetrators understood and regarded each other as distinct ethnic groups.[178] As for the ICTY, it characterized Bosnian-Muslims, Bosnian-Serbs, and Bosnian-Croats as different 'national' groups—although at times it also described these groups in 'ethnic' or 'religious' terms.[179] Several factors informed the Tribunal's conclusion that Bosnian-Muslims were a distinct 'national' group; the most dispositive being the recognition by the 1963 Yugoslav Constitution of Bosnian-Muslims as a 'nation' and the fact that Bosnian-Muslims were regarded and treated by the Serbian leadership as a distinct nation.[180]

8.4.4.1.3 Context-specific determination of character of the group

A group's characteristics 'must be identified within the socio-historic context which it inhabits' and 'by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.'[181] Thus, factors which could be relevant in one context to establish the existence and membership in a group may not necessarily be relevant or carry the same weight in another.

[174] See *infra* 8.4.4.3. [175] *Akayesu* Trial Judgment (n 5) para. 170.
[176] Ibid. [177] Ibid.
[178] Ibid., para. 171 ('Moreover, customary rules existed in Rwanda governing the determination of ethnic group, [*sic*] which followed patrilineal lines of heredity. The identification of persons as belonging to the group of Hutu or Tutsi (or Twa) had thus become embedded in Rwandan culture. The Rwandan witnesses who testified before the Chamber identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbours belonged. Moreover, the Tutsi were conceived of as an ethnic group by those who targeted them for killing.'). See also ibid., para. 702.
[179] In *Krstić*, for instance, the Trial Chamber did not attempt to state what sort of protected group the Bosnian-Muslims fell into. See *Krstić* Trial Judgment (n 4) paras 559–560. In *Stakić*, the Trial Chamber identified the Bosnian-Muslims group as the targeted group. *Stakić* Trial Judgment (n 5) para. 545. The Trial Chamber did not specify, however, the protected category into which that group of individuals fell. The ICTY has had occasion, however, in relation to other offences—mainly torture and persecution—to say that Bosnian-Muslims and Bosnian-Serbs could be distinguished and discriminated against on, *inter alia*, a religious or ethnic basis. See, e.g., *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (hereafter *Krnojelac* Trial Judgment), para. 438 (holding that acts of persecution committed by Serb authorities against Muslim and other non-Serb male civilians could be said to be discriminating on 'religious or political grounds').
[180] See, e.g., *Krstić* Trial Judgment (n 4) para. 559 ('Originally viewed as a religious group, the Bosnian Muslims were recognised as a "nation" by the Yugoslav Constitution of 1963. The evidence tendered at trial also shows very clearly that the highest Bosnian Serb political authorities and the Bosnian Serb forces operating in Srebrenica in July 1995 viewed the Bosnian Muslims as a specific national group.').
[181] Ibid., para. 557.

8.4.4.1.4 'Auto-genocide'

Genocide does not require the perpetrator and his victims to belong to different groups.[182] The killing of members of one's own group could form part of a genocide if the act was committed in full knowledge of the status of the victim and with the requisite *dolus specialis*.[183] The possibility is, however, more theoretical than real as the perpetrator would, in effect, have to intend to destroy the group to which he belongs. It is, therefore, more likely that this sort of criminality would be prosecuted as crimes against humanity.[184]

[182] See also United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 15 (HM Stationary Office 1949) (hereafter UNWCC, *LRTWC* vol. 15), 122 (citing United Nations War Crimes Commission, 'Trial of Josef Altöstter and Others' in *Law Reports of Trials of War Criminals*, vol. 6 (HM Stationery Office 1948), 1–110 (hereafter UNWCC, 'Justice Case'), 32, 75, and 99) (entertaining the possibility of acts of genocide being committed by enemy nationals against enemy nationals).

[183] See, generally, Schabas, *Genocide in International Law* (n 53) 138, 170–71 (regarding the notion of 'auto-genocide' and noting that such a scenario would generally come under the rubric of 'national' groups but might also fall within the rubric of other categories of protected groups); Jessberger, Definition and Elements of Genocide (n 19) 94 (noting that the perpetrator could be a member of the protected groups); O Ben-Nafiali and Y Tuval, 'Punishing International Crimes Committed by the Persecuted', (2006) 4 Journal of International Criminal Justice 128, p 153 (pointing out, however, that 'no Jew was ever charged with Crimes against the Jewish People [*the domestic 'equivalent' concept to genocide—author's note*]—a datum attributed, in an obiter in the Enigster case, to the fact that the offence requires "the intent to destroy the collectivity against which the crimes are committed' 97—an intent which the persecution refrained from assigning to Enigster, and indeed to any Jew".'); C Kreß, 'The Crime of Genocide under International Law', 6 International Criminal Law Review (2006) 461, at 473 (supporting the possibility of a member of the targeted group committing the crime); Whitaker Genocide Report (n 81) p 16 para. 31 ('It is noteworthy that the definition does not exclude cases where the victims are part of the violator's own group. The United Nations Rapporteur on the mass-killings in Kampuchea designated this slaughter as "auto-genocide", a term implying an internal mass destruction of a significant part of the members of one's own group.') (citing UN Commission on Human Rights, 35th Sess, 1510th mtg, UN Doc. E/CN.4/SR.1510 (9 March 1979) (hereafter UN Doc. E/CN.4/SR.1510)). For an illustration of the notion of 'auto-genocide,' see Order of the Criminal Chamber of the National Court Confirming the Jurisdiction of Spain to Hear the Crimes of Genocide and Terrorism Committed during the Chilean Dictatorship, Case No. 173/98 (Spain Penal Chamber 5 November 1998) (hereafter Spain Confirmation of Genocide Jurisdiction) (discussing the commission of acts of genocide by Chilean perpetrators against Chilean nationals during the *Pinochet* era). Professor Schabas has strongly criticized the reasoning of Spain's Penal Chamber. Schabas, *Genocide in International Law* (n 53) 170–71. See also Tara H Gutman, 'Cambodia, 1979: Trying Khmer Rouge Leaders for Genocide' in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (CUP 2016) (hereafter Gutman, 'Trying Khmer Rouge for Genocide'), 167, in particular, 175 and 178 (pointing out that Pol Pot and Ieng Sary were prosecuted and convicted in 1979 for acts committed, not just against particular ethnic groups, but against the 'Kampuchean people as a whole' thereby committing acts of 'auto-genocide'). The scope of that notion went, however, far beyond the terms of the Convention and encompassed criminal acts directed at a broad range of members of Cambodian society, who were not necessarily identifiable by reason of membership in one of the protected groups. This precedent must therefore be approached with caution. See also William A Schabas, 'Cambodia: Was It Really Genocide?' (2001) 23 Human Rights Quarterly 470 (hereafter Schabas, 'Was It Really Genocide?').

[184] DC (TA), *Attorney-General of the State of Israel v. Ternek* (1951) (regarding crimes against humanity committed by Jewish Kapos against Jewish camp inmates during the Second World War). In October 1978, the US Congress adopted legislation prohibiting exports and imports of goods and technology to and from Uganda. In providing reasons for its decision, Congress suggested (perhaps a bit hyperbolically) that '[t]he Government of Uganda ... has committed genocide against Ugandans' and that the 'United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide'. Uganda Embargo Act, Public Law 95-435 of 10 October 1978, United States Statutes at Large 1978, vol 92, part 1 (Washington, DC, United States Government Printing Office, 1980), 1051–53, in particular, ss 5(a) and (b).

8.4.4.2 National

A 'national' group has been defined as 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[185] This definition must be applied with caution as citizenship and legal bonds do not appear to have been a core consideration behind the adoption of that term in the Convention.[186] Furthermore, the strict application of such requirements might disqualify the very groups that the Convention seeks to protect. The notion of 'nationality' in this context must not, therefore, be construed too narrowly and cannot be reduced to a question of citizenship or legal status.[187] The ICTY has thus held that

[185] *Akayesu* Trial Judgment (n 5) para. 512. See also *Krstić* Trial Judgment (n 4) paras 558–559; *Jević et al.* Trial Judgment (n 3) para. 950 ('A "national group" is a collection of people who are perceived to share a legal bond based on common citizenship, coupled with the reciprocity of rights and duties.'); *Ivanović* Appeal Judgment (n 5) para. 51. See also UN Report on Darfur (n 35) para. 494 ('[B]y "national groups," one should mean those sets of individuals which have a distinctive identity in terms of nationality or of national origin.'). According to Arendt, '[a] people becomes a nation when "it takes conscience of itself according to its history".' Hannah Arendt, *Essays in Understanding, 1930–1945: Formation, Exile, and Totalitarianism* (Harcourt Brace & Company 1994) (hereafter Arendt, *Essays in Understanding*) 208. It is interesting in that context to consider the way in which the Appeals Chamber has defined the concept of nationality for the purpose of the Geneva Convention's grave breaches regime. For an individual to be protected under that regime, he or she must be 'in the hands of a Party to the conflict or Occupying Power of which he or she is *not a national*.' That requirement of a different nationality between the perpetrator and the victim has been interpreted quite liberally by the Appeals Chamber which held that nationality was not solely determined by the passport held by each one, but by their respective allegiance to a party to an armed conflict. See *Tadić* Appeal Judgment (n 10) para. 166 ('Th[e] legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. [...] The [Geneva] Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.'). Thus, the Appeals Chamber concluded, Bosnian-Muslims and Bosnian-Serbs, although they are all strictly speaking Bosnians, could be said to be of different nationalities for the purpose of the grave breaches regime, to the extent that they owed allegiance to different—national—fighting parties. *Tadić* Appeal Judgment (n 10) paras 167–169. Whether the same reasoning could apply in relation to genocide is unclear, but there is no *a priori* reason why it could or should not. For a much broader definition of the notion, see *Francisco* Appeal Judgment (n 140) (suggesting that the expression 'national groups' should not mean a group formed by persons belonging to one and the same nation, but simply 'a national group of human beings, a differentiated group of human beings, characterized by something, forming part of a wider community'), however this suggestion is unsupported and unsourced. See also *In re* Augusto Pinochet, Case No. App 173/1998, 1998/22605 (Nat'l High Ct Spain 3 November 1998) (hereafter *Pinochet* Appeal Judgment) (to the same effect).

[186] See also Martin, 'Notion of Protected Group' (n 163) 118–19 (criticizing this definition for erroneously referring to an affiliation with a state rather than a nation).

[187] See Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol. 2 (9th edn, Longman 1996) (hereafter Jennings & Watts, vol 2 of *Oppenheim's International Law*), 857 ('"Nationality" in the sense of citizenship of a certain state, must not be confused with "nationality" as meaning membership in a certain nation in the sense of race.'). See also Schabas, *Genocide in International Law* (n 53) 134–39, and 138 ('[T]he term "national group" dictates a large scope corresponding to the concept of "minority" or "national minority," one that in reality is broad enough to encompass racial, ethnic and religious groups as well.'). During the negotiations of the Convention, there were diverging views regarding the true meaning of that term. See generally Martin, 'Notion of Protected Group' (n 163) 115 (pointing out that the notion of 'national' group was alternatively described as 'a group enjoying civic rights in a given State' or as a 'national minority'). The notion of 'nationality' is not, however, without concrete limitations and could not, for instance, be read as including the political opposition

Bosnian-Muslims were a national group distinct from other fellow Bosnians (Bosnian-Serbs and Bosnian-Croats) who shared a common (Bosnian) citizenship.[188] Similarly, the ECCC applied this notion broadly and found that Cambodians of Vietnamese ethnicity were a distinct national group within Cambodia.[189]

8.4.4.3 Ethnic(al)

The category of 'ethnical' groups was introduced in the Convention pursuant to a proposal from Sweden.[190] The introduction of this category was intended to avoid any confusion between a 'national' and 'political' group and to account for the fact that a minority might be distinguished by its language.[191] If a linguistic group did not coincide with the state, it was thought that it would be protected as an 'ethnical' rather than a 'national' group.[192]

An 'ethnic(al)' group has been defined as 'a group whose members share a common language or culture'.[193] Such a definition has limitations. First, it is extremely vague

to the nation's leadership or partisan groups. For an illustration of these limitations, see *Vasiliauskas* Judgment (n 82) para. 183:

> The Court also notes that, in accordance with Article 31 § 1 of the Vienna Convention on the Law of Treaties, the ordinary meaning is to be given to the terms of the treaty. In this regard, it is not immediately obvious that the ordinary meaning of the terms 'national' or 'ethnic' in the Genocide Convention can be extended to cover partisans. Thus, the Court considers that the domestic courts' conclusion that victims came within the definition of genocide as part of a protected group was an interpretation by analogy, to the applicant's detriment, which rendered his conviction unforeseeable.

[188] See, e.g., *Krstić* Appeal Judgment (n 8) para. 15; *Popović et al.* Trial Judgment (n 8) paras 839, 840 (footnotes omitted) ('The Trial Chamber notes that Bosnian Muslims were recognized as a "nation" by the Yugoslav Constitution of 1963, and that other Chambers have considered that Bosnian Muslims are a protected group within the meaning of Article 4 of the Statute. The Trial Chamber agrees with this analysis and accepts the conclusion.'). See also *Jević et al.* Trial Judgment (n 3) para. 957; *Ivanović* Appeal Judgment (n 5) para. 56 (finding that that Bosnian Muslims, or Bosniaks, represent a national, ethnic, and religious group and, as such, they belong to a protected group).

[189] See *Nuon Chea et al.* 2010 Closing Order (n 79) para. 1343 (characterizing the Vietnamese group as both an ethnic and national group, and noting that perpetrators may also have considered them a racial group).

[190] The ILC Commentary to the 1996 Draft Code of Crimes against the Peace and Security of Mankind says the following about this notion, which appeared in the Genocide Convention under the expression 'ethnical': 'The word "ethnical" used in the Convention has been replaced by the word "ethnic" in article 17 to reflect modern English usage without in any way affecting the substance of the provision. Furthermore, the Commission was of the view that the article covered the prohibited acts when committed with the necessary intent against members of a tribal group.' UN Doc. A/51/10 (n 5) 45. The Statutes of international criminal tribunals with jurisdiction over the crime of genocide all use the term 'ethnical' in relation to this crime, consistent with the terminology of the Convention.

[191] See also Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1949) (hereafter N Robinson, *Genocide Convention*), 59 (noting that the Sixth Committee added 'ethnical' groups to 'national' and 'racial', in order to avoid possible interpretation of 'national' as related to 'political').

[192] For a discussion of this aspect of the negotiations, see Schabas, *Genocide in International Law* (n 53) 143–44 (and references cited therein). See also Martin, 'Notion of Protected Group' (n 163) 115–16 (noting that the belated inclusion of this category aimed at extending the protection of the Convention to 'human collectivities if the state whose territory they lived on had ceased to exist or if it was in the process of formation' and was regarded as a sort of residual category whose members were bound by culture and traditions).

[193] *Akayesu* Trial Judgment (n 5) para. 513; *Jelisić* Trial Judgment (n 5) 22 fn 95; *Jević et al.* Trial Judgment (n 3) para. 951 (footnote omitted) ('An "ethnic group" is a "group whose members share a common language or culture".'); *Ivanović* Appeal Judgment (n 5) para. 52. According to the *Kayishema*

and provides little guidance about the sort of groups relevant to this notion.[194] Furthermore, this definition could fail to capture the very sort of 'ethnic' groups that the Convention had in mind. The fact that individuals share a common language (such as, for instance, the English language for many Nigerians and Australians), or a common culture (as with Bosnian-Serbs and Bosnian-Muslims, in most relevant respects) seems barely sufficient to suggest that, on that basis alone, they may be said to constitute a single 'ethnic' group for the purpose of the Genocide Convention. Instead, as outlined at 8.4.4.1.2 *infra*, groups with a common language and culture (e.g., Rwanda's Tutsis and Hutus, and Cham and Vietnamese Cambodians) have been said to constitute *distinct* 'ethnic' groups. It therefore appears that 'ethnicity' in its contemporary understanding would reflect a mixture of objective linguistic, religious, and cultural peculiarities which result in the subjective perception of 'ethnic' differences between different groups. Such a nuanced approach would help explain how Tutsis have been said to constitute a distinct 'ethnic' group in the Rwandan context, despite the fact that they objectively shared a great deal of cultural, linguistic, and religious characteristics.[195] Relying upon a similar approach, the ECCC has determined that the Cham and Vietnamese minorities in Cambodia could both be regarded as

& Ruzindana Trial Chamber, an 'ethnic' group is 'one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).' *Kayishema & Ruzindana* Trial Judgment (n 10) para. 98. See also Thiam Fourth Report on the Draft Code of Offences (n 166) para. 58 ('It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common *physical* traits.'); UN Report on Darfur (n 35) para. 494 ('"Ethnical groups" may be taken to refer to sets of individuals sharing a common language, as well as common traditions or cultural heritage.'). See also *Munyaneza* Trial Judgment (n 10) para. 105 (defining an ethnic group 'according to political, cultural, social or historical characteristics', and according to the perpetrators' perceptions of them).

[194] An ICC Pre-Trial Chamber has thus noted the following:

> The Majority notes that neither the Statute nor the rules provide for a definition of 'ethnic group.' The Majority also observes that international case law has not provided either a clear definition of what an 'ethnic group' is. In this regard, the Majority observes that the ICJ, in its recent Judgment on Genocide, did not rule on whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach to the definition of the relevant group should be adopted. However, the Majority considers that, for the purpose of the present decision, it is unnecessary to further explore this issue.

Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest (n 1) 48 fn 152 (citing ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 191).

[195] *Akayesu* Trial Judgment (n 5) para. 702; *Kayishema & Ruzindana* Trial Judgment (n 10) para. 523; *Hategekimana* Trial Judgment (n 10) para. 670; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (hereafter *Karemera et al.* Decision on Prosecutor's Interlocutory Appeal of Judicial Notice), para. 25 (regarding the Trial Chamber taking judicial notice of the fact that the Tutsis, Hutus, and Twas constituted 'stable and permanent' groups protected under the Genocide Convention without expressly specifying to which of the protected group(s) they would belong); *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005 (hereafter *Semanza* Appeal Judgment), para. 192; *Karemera et al.* Trial Judgment (n 1) para. 1581. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice, 9 November 2005 (hereafter *Karemera et al.* Decision on Motion for Judicial Notice). See also *Munyaneza* Appeal Judgment (n 10) para. 173 ('The international jurisprudence has found on numerous occasions that the Tutsi population constitutes an identifiable ethnic group within the meaning of the definition of genocide. Similarly, in *Mugesera* at paras 11 *et seq.*, the

'ethnic' groups.[196] In relation to the Darfur situation, a Pre-Trial Chamber of the ICC determined that three targeted tribes (the Fur, the Masalit, and the Zaghawa) could be regarded as distinct ethnic groups having first established that there were no reasonable grounds to believe that these groups were distinct by reason of nationality, race, and/or religion.[197] Bosnian-Serbs and Bosnian-Muslims have also been said to constitute distinct 'ethnic' groups for the purpose of the prohibition on genocide despite the great cultural and linguistic overlap between the two groups.[198]

8.4.4.4 Racial

A 'racial' group is one that 'is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors'.[199] As with other categories of protected groups, the *perception* of victims and perpetrators of their own, and the other's, race may be relevant in establishing that a grouping of individuals indeed constitutes a 'racial' group for the purpose of the Genocide Convention.

Regarding the practice of international(ized) criminal tribunals, it has not been suggested that either Tutsis and Hutus on the one hand or Serbs, Croats, or Bosniaks on the other constituted different races. In contrast, the ECCC has hinted at the view that Vietnamese victims of the Khmer Rouge could be characterized as a specific 'race' for the purpose of genocide.[200] As reiterated throughout this chapter, the inquiry is intensely context-sensitive and the determinations are legal in character, not scientific.

8.4.4.5 Religious

A 'religious' group is 'one whose members share the same religion, denomination or mode of worship'.[201] The UN Economic and Social Council also defined groups quite

Supreme Court used the contextual approach to recognize the ethnic character of the Tutsi population.') (citing *Akayesu* Trial Judgment (n 5) para. 702; *Niyitegeka* Trial Judgment (n 152) para. 419).

[196] *Nuon Chea et al.* 2010 Closing Order (n 79) paras 1336, 1343. See also *Ao An* 2018 Closing Order (n 43) paras 590 ('The Cham people are distinct ethnic and religious group within Cambodia.'); and 812–819.

[197] See *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) paras 136–137. See also UN Report on Darfur (n 35) paras 508–512 (suggesting that while, objectively, these groups might not be protected groups under the terms of the Convention, they may be considered subjectively as making up such a protective group).

[198] See, e.g., *Jević et al.* Trial Judgment (n 3) para. 957; *Ivanović* Appeal Judgment (n 5) para. 56 (finding that they represent a distinct national, ethnic, and religious group).

[199] *Akayesu* Trial Judgment (n 5) para. 514; *Jević et al.* Trial Judgment (n 3) para. 952 ('A "racial group" is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.'); *Ivanović* Appeal Judgment (n 5) para. 53; UN Report on Darfur (n 35) para. 494 ('"[R]acial groups" comprise those sets of individuals sharing some hereditary physical traits or characteristics.'). In *Krstić*, the Trial Chamber pointed out that the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.' *Krstić* Trial Judgment (n 4) para. 555. See also *Kayishema & Ruzindana* Trial Judgment (n 10) para. 98; Schabas, *Genocide in International Law* (n 53) 143 (criticizing this definition as overly narrow and suggesting that the meaning of 'racial groups' was 'unquestionably much broader at the time the Convention was drafted, when it was to a large extent synonymous with national, ethnic and religious groups').

[200] See *Nuon Chea et al.* 2010 Closing Order (n 79) para. 1343 (characterizing Vietnamese as an ethnic and national group, who may also have been considered as a racial group by the CPK).

[201] *Akayesu* Trial Judgment (n 5) paras 514–515; *Kayishema & Ruzindana* Trial Judgment (n 10) para. 98; *Jević et al.* Trial Judgment (n 3) para. 953 ('A "religious group" is a "group whose members share the

broadly as 'any religious community united by a single spiritual ideal'.[202] This definition of 'religion' is generic and circular, as the attribute of the group (as a 'religious' group) is defined by the exercise of those features which makes the group a distinct religious group (for instance, its mode of worship). In most cases differences in religion between two or more groups of individuals will be self-evident, as for instance between Bosnian-Muslims and Bosnian- (Christian Orthodox) Serbs.[203] Sometimes, it may be less so, as in the case of a sect or the extremist expression of a given religion. The Human Rights Committee has suggested that 'religion' should not be limited to 'traditional religions or to religions and beliefs with institutional characteristics analogous to those of traditional religions'.[204] It is also clear that the notion of religion has been interpreted quite broadly in the present context and could include spiritual beliefs that might not possess all the typical features of traditional religions.[205]

In the practice of international(ized) criminal tribunals, the ECCC has suggested that the Cham (Muslim) minority could be said to constitute a religious group for the purpose of the Convention.[206] Interestingly, the ICTY did not describe Bosnian-Muslims as a 'religious' group under the Convention, although the Prosecution had argued in a number of cases that Bosnian-Muslims (and Bosnian-Croats) should be regarded as, *inter alia*, a 'religious' group under the Convention.[207] In contrast, the

same religion, denomination or mode of worship".'); *Ivanović* Appeal Judgment (n 5) para. 54. See also UN Report on Darfur (n 35) para. 494 ('The expression "religious groups" may be taken to encompass sets of individuals having the same religion, as opposed to other groups adhering to a different religion.').

[202] Nicodème Ruhashyankiko, Study of the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/416 (4 July 1978) (hereafter Ruhashyankiko Study of Genocide), 20 para. 78 (citing with apparent approval Antonio Planzer, *Le crime de genocide* (Thesis, F Schwald AG 1956), 98 (arguing that religious groups include 'any religious community united by a single spiritual ideal')). See also *Stakić* Appeal Judgment (n 35) para. 24.

[203] See, e.g., *Jević et al.* Trial Judgment (n 3) para. 957; *Ivanović* Appeal Judgment (n 5) para. 56.

[204] UN Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) (hereafter UNHRC Comment No. 22), para. 2 (cited in Schabas, *Genocide in International Law* (n 53) 148).

[205] See generally Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later' (1994) 8 Temple International and Comparative Law Journal 1 (hereafter Lippman, 'Convention on Genocide Forty-Five Years Later'), 29; Schabas, *Genocide in International Law* (n 53) 149 (seemingly agreeing with Lippman). For an illustration, see also Margarita Lacabe, 'The Criminal Procedures Against Chilean and Argentinian Repressors in Spain' [1998] *Derechos Human Rights* <http://www.derechos.net/marga/papers/spain.html> (hereafter Lacabe, 'Criminal Procedures in Spain'). Lacabe discusses Judge Garzon's application alleging genocide in Argentina in the following terms:

> To destroy a group because of its atheism or its common non-acceptance of the Christian religious ideology is ... the destruction of a religious group, inasmuch as, in addition, the group to be destroyed also technically behaves as the object of identification of the motivation or subjective element of the genocidal conduct. It seems, in effect, that the genocidal conduct can be define both in a positive manner, vis a vis the identity of the group to be destroyed (Muslims, for example), as in a negative manner, and, indeed, of greater genocidal pretensions (all non-Christians, or all atheists, for example). This idea concludes, thus, that the total or partial, systematic and organized destruction of a group due to its atheist or non-Christian ideology, that is to say, so as to impose a Christian religious ideology, constitutes genocide.

Lacabe, 'Criminal Procedures in Spain' (n 206).

[206] See *Nuon Chea et al.* 2010 Closing Order (n 79) para. 1336.

[207] See, e.g., *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 (hereafter *Karadžić* Third Amended Indictment), paras 36, 41; *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Fourth Amended Indictment, 16 December 2011 (hereafter *Mladić* Fourth Amended Indictment), paras 35, 40.

State Court of Bosnia-Herzegovina has sometimes described the Bosnian-Muslim group in religious terms.[208]

8.4.4.6 Exhaustiveness of the list of protected groups?

8.4.4.6.1 The Convention and customary law

The Convention exhaustively provides for only four, distinct, categories of protected groups. The *Travaux Préparatoires* suggest that, besides these four, no other group was to be protected under the Convention.[209] The statutory instruments of international(ized) criminal tribunals with jurisdiction over the crime of genocide list the same four groups.[210] Similarly, it is generally accepted that customary international law protects only these four groups.[211]

8.4.4.6.2 'Stable and permanent' groups

In two successive judgments,[212] Trial Chamber I of the ICTR (composed of the same judges) suggested that the notion of genocide could extend beyond these four protected groups and may include all 'stable and permanent' groups.[213] Whilst the

[208] See, e.g., *Jević et al.* Trial Judgment (n 3) para. 957; *Ivanović* Appeal Judgment (n 5) para. 56.

[209] See generally Schabas, *Genocide in International Law* (n 53) 124–34; Martin, 'The Notion of Protected Group' (n 163) 114–17; N Robinson, *Genocide Convention* (n 192); WA Schabas, *Commentary on the Rome Statute* (OUP 2010) 128 (pointing to the fact that efforts to enlarge the list of protected groups at the time of the drafting of the Convention and of the ICC Statute were rejected); Tams *et al.*, *Genocide Convention Commentary* (n 64) 114–15.

[210] See also *Jelisić* Trial Judgment (n 5) para. 69 (footnotes omitted) ('Article 4 of the Statute protects victims belonging to a national, ethnical, racial or religious group and excludes members of political groups. The preparatory work of the Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting "stable" groups objectively defined and to which individuals belong regardless of their own desires.').

[211] See references *infra* 8.4.4.6. See also *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 21 (noting that Article 6 of the ICC Statute, which is consistent with the Genocide Convention in this regard, extends protection *only* to national, ethnical, racial, or religious groups). See *Akayesu* Trial Judgment (n 5) paras 510–511 (discussing '*the* four types of groups' protected by the Genocide Convention and how these four were chosen because they are stable) (emphasis added); *Stakić* Appeal Judgment (n 35) paras 20–28 (clarifying that a protected group cannot be negatively defined because the protected group is one which shares particular national, ethnical, racial, or religious characteristics); *Krstić* Trial Judgment (No. 4), para. 554; *Tolimir* Trial Judgment (n 15) para. 735; *Ao An* 2018 Closing Order (n 43) para. 87. See also Marko Milanović, 'State Responsibility for Genocide' (2006) 17 European Journal of International Law 553 (hereafter Milanović, 'State Responsibility for Genocide'), 557.

[212] *Akayesu* Trial Judgment (n 5) paras 511, 516; *Rutaganda* Trial Judgment (n 5) paras 56–58. The Trial Chamber in *Akayesu* merely noted that a common feature of these groups is that membership thereto is generally of a permanent or, at least, of a stable sort in the sense that 'membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.' *Akayesu* Trial Judgment (n 5) para. 511.

[213] See *Akayesu* Trial Judgment (n 5) para. 516 (suggesting that the list of protected groups is not necessarily exhaustive). The Trial Chamber in *Akayesu* noted:

> [T]he Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the [ICTR] Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.

Chamber thus seemingly sought to expand the reach of the crime of genocide, its holding is supported by little evidence of state practice and hardly any indication of *opinio juris*.[214] As such, it is difficult to support the proposition that groups outside the list of protected groups in the Genocide Convention are recognized by the customary international law of genocide.[215]

8.4.4.6.3 Groups not covered

Cultural,[216] political,[217] economic,[218] and social groups,[219] groups characterized by their opinion,[220] professional groups,[221] sexual or gender-based groups, linguistic

Akayesu Trial Judgment (n 5) para. 516. In the *Rutaganda* Judgment, the Trial Chamber suggested that other sufficiently stable groups could come under the protection of that norm but that determination would have to be made on a case-by-case basis. *Rutaganda* Trial Judgment (n 5) paras 57–58. For a discussion of this 'stable and permanent' jurisprudence, see also Schabas, *UN International Tribunals* (n 55) 168; Schabas, *Genocide in International Law* (n 53) 151–53 (rejecting the idea that the Convention's definition could be extended to protect any 'stable and permanent' group). See also Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 230 (characterizing the *Akayesu* Chamber's decision to extend the definition of genocide as judge-made law).

[214] For a criticism of this approach, see also: M Schuster, 'The Crime of Genocide Applied in Practice—Selected Aspects of the Jurisprudence of the *Ad Hoc* Tribunals' Appeals Chambers', in C Safferlin and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010), 213, 217; Schabas, *Genocide in International Law* (n 53), 132–33.

[215] As noted earlier, a number of states have adopted legislation that would provide for the protection of additional categories of groups and the case law of at least one country suggests that the protection of the Genocide Convention could apply to 'social' groups. See generally Martin, 'Notion of Protected Group' (n 163) 113–14. See also the approach of German courts in relation to 'social' groups, referred to in fn 55, *supra*; Judgment of the Supreme Court of the Republic of Latvia Concerning Genocide, Case PAK-269 (Sup Ct Latvia 4 November 1996). (Latvia Supreme Court *Judgment Concerning Genocide*) (finding that during the period between 15 June 1940 and 7 March 1953 Alfons Noviks, Minister of Public Security, committed genocide 'against certain groups of Latvia's population that were regarded by the totalitarian regime to be socially dangerous and detrimental to the existing regime'). For an illustration of a tribunal engaging in this analysis, see for example *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 1) paras 136–137.

[216] The *Stakić* Appeals Chamber noted the following:

> Debates within the Sixth Committee about whether 'cultural genocide' should be proscribed also show that Committee members did not envision the negative definition of target groups. Supporters of the 'cultural genocide' concept 'argued that a group could be suppressed by extinguishing [its] specific traits, as well as by physical destruction.' Opponents of the concept, who found it too vague, succeeded in keeping the Convention focused on the physical destruction of groups. The mere fact that it was considered, however, shows that the Convention's drafters viewed target groups as groups with specific distinguishing characteristics. As previously explained, unlike positively defined groups, negatively defined groups have no unique distinguishing characteristics that could be destroyed.

Stakić Appeal Judgment (n 35) para. 23 (footnotes omitted). See also Schabas, *Commentary on the Rome Statute* (n 210) 130 (regarding the intentional omission of cultural groups from the Genocide Convention); UN GAOR, 3rd Sess, 83d mtg, UN Doc. A/C.6/SR.83 (25 October 1948) (hereafter UN Doc. A/C.6/SR.83); ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 344 (pointing out that during its consideration of the draft text of the Genocide Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts); *Beanal v. Freeport-McMoran Incorporated and Freeport McMoran Copper and Gold Incorporated*, 197 F 3d 161 (5th Cir 1999) (hereafter *Beanal* Appeal Judgment) (noting that complainant was unable to demonstrate that cultural genocide had achieved universal acceptance as a discrete violation of international law); *Kruger et al. v. Australia* (The Stolen Generations Case), Final Judgment on Reserved Questions of Law, [1997] HCA 27 (hereafter *Stolen Generations Case* Reserved Questions of Law Judgment), in particular, Dawson J para. 105.

[217] See generally *Stakić* Appeal Judgment (n 35) para. 22 (taking note of the fact that members of the Sixth Committee declined to include destruction of political groups within the definition of genocide and accepting the position of countries that wanted the Convention to protect only 'definite

groups, or groups defined simply as 'a minority' would fall outside the protected categories and are outside the scope of protection of the law of genocide.[222] Thus, Hutus

groups distinguished from other groups by certain well-established', immutable criteria); *Rutaganda* Trial Judgment (n 5) para. 57 ('It appears, from a reading of the *travaux préparatoires* of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups [...] .'). The European Court of Human Rights has also determined the following in relation to that issue:

> The Court begins by noting that the crime of genocide prohibited by Article II of the 1948 Convention lists four protected groups of persons: national, ethnical, racial or religious. That provision does not refer to social or political groups. Furthermore, the *travaux préparatoires* disclose an intention by the drafters not to include political groups in the list of those protected by the 1948 Convention. The ICJ, when examining the drafting history of Article II of the 1948 Convention in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, observed that the drafters of the Convention 'gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude.' The Court finds no convincing arguments for departing from the treaty definition of genocide as established in 1948, including the list of the four protected groups referred to therein. [...] In the Court's view, the fact that certain States decided later to criminalise genocide of a political group in their domestic laws does not, as such, alter the reality that the text of the 1948 Convention did not do so.

Vasiliauskas Judgment (n 82) para. 170 (cross-referencing paras 36, 38, and 105 of that same decision). See also ibid., para. 175 ('[T]he Court finds that there is no sufficiently strong basis for finding that customary international law as it stood in 1953 included "political groups" among those falling within the definition of genocide.'), and paras 178, 181; *Vasiliauskas* Judgment, Villiger, Power-Forde, Pinto De Albuquerque, and Kūris Joint Dissent (n 110) para. 9. Regarding the exclusion of 'political' groups from the scope of the Genocide Convention, see also Martin, 'Notion of Protected Group' (n 163) 116–17; Schabas, *Genocide in International Law* (n 53) 153–65; UN Doc. A/51/10 (n 5) 45 ('Political groups were included in the definition of persecution contained in the Nuremberg Charter, but not in the definition of genocide contained in the Convention because this type of group was not considered to be sufficiently stable for purposes of the latter crime. None the less persecution directed against members of a political group still constitute a crime against humanity.'). For an argument that protection from genocide should be expanded to include political groups, see also Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 Yale Law Journal 2259 (hereafter B van Schaack, 'Crime of Political Genocide'); Lawrence J LeBlanc, 'The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?' (1988) 13 Yale Journal of International Law 268 (hereafter LeBlanc, 'Genocide Convention and Political Groups'). But see *Francisco* Appeal Judgment (n 140) (suggesting that the non-inclusion of the 'political' groups or 'other' groups in Article II of the Convention is not tantamount to positive exclusion, however this suggestion by the court is un-supported). For a discussion of the possible inclusion of 'political' groups into the Convention, see also UN Ad Hoc Committee on Genocide, Summary Record of the Fifth Meeting, UN Doc. E/AC.25/SR.5, 16 April 1948 (hereafter UN Doc. E/AC.25/SR.5).

[218] *Rutaganda* Trial Judgment (n 5) para. 57.

[219] See, e.g., *Vasiliauskas* Judgment (n 82) paras 170–178. As noted earlier, this has not prevented certain national jurisdictions from defining the range of protected groups more broadly than provided under the Genocide Convention and customary law, so that certain domestic jurisdictions have extended this notion to 'social' groups. For an illustration, see *Prosecutor v. Rwabukombe*, 71 JZ (2016) 103, Judgment (Germany 21 May 2015) (hereafter *Rwabukombe* Judgment) 105 (discussed in Kai Ambos, 'The German *Rwabukombe* Case: National Prosecution of International Crimes' (2016) 14 *Journal of International Criminal Justice* 1221 (hereafter Ambos, 'German *Rwabukombe* Case') 1230. See also Ambos & Wirth, 'Genocide and War Crimes in Yugoslavia' (n 15) 791–93 (discussing other genocide cases tried before German courts in which this issue arose).

[220] See UN Doc. E/AC.25/SR.5 (n 218) (regarding the unsuccessful suggestion by France to consider adding groups identified by their 'opinion' among the groups protected under the Genocide Convention).

[221] *Estate of Valmore Lacarno Rodriquez et al. v. Drummond Company Incorporated*, Decision on Motion to Dismiss, 256 F Supp 2d 1250 (ND Ala 2003) (hereafter *Rodriguez et al.* Motion to Dismiss Decision), in particular, paras 29–32 (members of trade unions falling beyond the scope of protection of the notion of genocide).

[222] Interestingly, the UN General Assembly Resolution 96(I) described genocide as occurring when 'racial, religious, *political* and *other groups* have been destroyed, entirely or in part'. UN Doc. A/RES/96(I)

killed by Hutu extremists because of their political opposition were considered unprotected by the prohibition on genocide because they effectively qualified as a political group.[223] For the same reason, the killing by members of one linguistic group (say, Swiss Germans) of members of another linguistic group (say, French-speaking Swiss) who otherwise share common national, ethnic, racial, and, for the most part, religious features would not come within the scope of the Convention absent a distinctive and relevant—national, racial, ethnic, or religious—element characterizing the targeted group.[224]

That a genocidal mindset may be related to, and may in fact merge with, a particular political agenda would not necessarily negate a finding that the accused possessed the required genocidal intent, and may even reinforce it.[225] For the same reason, while cultural and political groups are not protected by the prohibition of genocide, attacks on the cultural and political symbols of a national, racial, ethnic, or religious group could be evidence relevant to establishing a genocidal attack upon such groups and to establishing the genocidal intent of the perpetrators.[226]

8.4.4.6.4 Domestic regimes

The fact that the Convention and customary law only provide for the protection of four groups does not create an obligatory international *numerus clausus* that would forbid a state from recognizing other groups as protected under its own definition of the notion of genocide.[227]

(n 90) (emphasis added). These expressions were not captured in the subsequently adopted Genocide Convention. It could be argued, however, that the Convention defined the range of groups protected under the Convention more narrowly than existing international law would have permitted at the time. Absent evidence of general practice and *opinio juris* on that point, it would hard to suggest, however, that 'political' groups have somehow remained part of the customary law of genocide and that they are a recognized type of group under that body of law.

[223] For example, the ICTR Trial Chamber noted the following:

> It has been judicially determined that acts committed against 'Hutu political opponents,' the Hutus who are politically opposed to the MRND regime in April 1994, may be crimes against humanity but they cannot be perceived as acts of genocide, because the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group under Article 2 of the Statute and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide. The group 'Hutu political opponents' does not constitute a 'national, ethnic, racial or religious group' under these provisions.

Nchamihigo Trial Judgment (n 149) para. 337 (footnotes omitted) (citing *Stakić* Appeal Judgment (n 35) para. 22 (recalling that the drafters of the Genocide Convention declined to include destruction of political groups within the definition of genocide). See also *Nahimana et al.* Appeal Judgment (n 1) paras 495–497.

[224] See *Vasiliauskas* Judgment (n 82).

[225] See, e.g., *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003 (hereafter *Nahimana et al.* Trial Judgment), para. 969 ('The Chamber considers that the association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal *animus* that motivated the Accused. To the contrary, the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity underscores the fact that their membership in the ethnic group, as such, was the sole basis on which they were targeted.'). See also, *supra*, 8.1.5.

[226] See, e.g., *Tolimir* Appeal Judgment (n 54) para. 230; *Krstić* Trial Judgment (n 4) para. 580; *Karadžić* Trial Judgment (n 8) para. 553. See also references given *infra* 9.4.7.3.

[227] See *Vasiliauskas* Judgment (n 82) para. 181 ('The Court accepts that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in 1948 Genocide

8.5 'As Such'

8.5.1 A protected group beyond the immediate victim

The expression 'as such' in the definition of the crime of genocide reflects and further underlines that ultimately it is the group to which the victim belongs that is the intended target of the offence.[228] As pointed out by the International Court of Justice (ICJ), the intent of the perpetrator must relate to the group 'as such' in the sense that the crime requires intent to destroy a collection of people with a particular group

Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively.'); John B Quigley, *The Genocide Convention: An International Law Analysis* (Routledge 2016) (hereafter Quigley, *Analysis of the Genocide Convention*), 17–19. For illustrations, see also *Special Prosecutor v. Hailemariam (Mengistu) et al.*, Case No. 1/87, Preliminary Objections (Ethiopia Fed High Ct 9 October 1995) (hereafter *Hailemariam et al.* Preliminary Objections) (finding that the inclusion, under domestic law, of political groups under the domestic definition of genocide did not violate international law); *Prosecutor v. Paulov (Karl-Leonhard)*, Case No. 3-1-1-31-00, Cassation Judgment (Estonia Supreme Ct 21 March 2000) (hereafter *Paulov* Cassation Judgment), (providing for the protection under the national prohibition of genocide of 'groups resisting an occupying regime'). See also Lauri Mälksoo, 'Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law' (2001) 14 Leiden Journal of International Law 757 (hereafter Mälksoo, 'Soviet Genocide?').

[228] *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) para. 89 ('The ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.') (cited with approval in *Brđanin* Trial Judgment (n 29) paras 698, and 699 (footnotes omitted) ('This is consonant with the United Nations General Assembly Resolution 96(I), which defined genocide as "a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings." The intent to destroy makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such.'); *Stakić* Trial Judgment (n 5) para. 521 (footnotes omitted) ('The group must be targeted because of characteristics peculiar to it, and the specific intent must be to destroy the group as a separate and distinct entity.'); *Stakić* Appeal Judgment (n 35) paras 20 ('The term "as such" has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet when a person targets individuals because they lack a particular national, ethnical, racial, or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics.'), and 21–28; *Ao An* 2018 Closing Order (n 43) para. 98; *Nuon Chea and Khieu Samphan* 002/02 Trial Judgment (n 54) para 798. See also *Hipperson* Queen's Bench Judgment (n 10). In its English (and amended) version, the Law of the ECCC uses the expression 'such as' instead of 'as such.' It would appear from the other linguistic (French and Khmer) versions of this text, as well as the *travaux* and the earlier version of the law that this would merely be a translation error, not a substantive departure from the terms of the Genocide Convention. See Mélanie Vianney-Liaud, 'Legal Constraints in the Interpretation of Genocide' in *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Springer 2016) 261–63.

[229] ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 193. See also *Karadžić* Trial Judgment (n 8) para. 551 (footnote omitted) ('The term "as such" has great significance as it shows that the crime of genocide requires intent to destroy a collection of people because of their particular group identity based on nationality, race, ethnicity, or religion.'); *Stakić* Appeal Judgment (n 35) para. 20; *Niyitegeka* Appeal Judgment (n 1) para. 53.

[230] For an illustration, see *Stakić* Trial Judgment (n 5) para. 545, in particular as regards the evidential relevance of the number of crimes committed against members of a particular group to infer that the group itself is being targeted:

> The Trial Chamber will first identify the relevant targeted group or groups for the purposes of the definition of genocide. The Trial Chamber finds that the majority of victims of acts

identity.[229] It will thus have to be demonstrated that it was the group itself that was targeted rather than only individual victims in their personal capacity.[230]

The specific intent to destroy a group 'as such' illustrates the exceptional gravity of genocide resulting from the attack on a collectivity and that the perpetrator's purpose is the destruction of that group.[231] This expression also emphasizes that genocide is about more than *mere* discrimination and assists in distinguishing genocide from other serious crimes, including the crime against humanity of persecution.[232]

8.5.2 Individual victims targeted because of membership in a protected group

8.5.2.1 Membership as reason for targeting

Reflecting the other side of the same coin, the expression 'as such' makes it clear that individual victims are selected by the perpetrators by reason of their membership in

> potentially falling under Article 4(2) (a) to (c) of the Statute belong to the Bosnian Muslim group. Some evidence has also been presented of similar crimes committed against Bosnian Croats. However, the number of Croats in the Municipality of Prijedor was limited and the Trial Chamber finds that the evidence of crimes committed against Croats has been insufficient to allow it to conclude that the Bosnian Croat group was separately targeted.

Stakić Trial Judgment (n 5) para. 545. See also *Tolimir* Trial Judgment (n 15) para. 747 (footnote omitted) ('The term "as such" reemphasises the crime's prohibition of the destruction of the protected group itself, as opposed to the destruction of a collection of the group's individual members.'); *Stakić* Appeal Judgment (n 35) para. 20; *Popović et al.* Trial Judgment (n 8) para. 821 (footnotes omitted) ('The words "as such" underscore that something more than discriminatory intent is required for genocide; there must be intent to destroy, in whole or in part, the protected group "as a separate and distinct entity." The ultimate victim of the crime of genocide is the group.'); *Sikirica et al.* Judgment on Defense Motions to Acquit (n 5) paras 89 ('Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against members, that is, individuals belonging to that group.'), and 87; *Jelisić* Appeal Judgment (n 7) para. 67; *Akayesu* Trial Judgment (n 5) para. 521; *Kayishema & Ruzindana* Trial Judgment (n 10) para. 99; *Niyitegeka* Appeal Judgment (n 1) para. 53 (footnotes omitted) ('The words "as such," however, constitute an important element of genocide, the "crime of crimes." It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term "as such" has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term 'as such' clarifies the specific intent requirement.'); *Niyitegeka* Trial Judgment (n 152) para. 410; *Nahimana et al.* Trial Judgment (n 226) para. 948); *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 70 (footnote omitted) ('The inclusion of the term as such re-emphasises the focus of the prohibition of genocide: the destruction of the protected group itself, rather than the destruction of its individual members.'). For an illustration of the evidential verification of that requirement, see *Tolimir* Trial Judgment (n 15) paras 769–773.

[231] *Karadžić* Trial Judgment (n 8) para. 551.

[232] ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 187 ('It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.'). See also *Karadžić* Trial Judgment (n 8) para. 551; *Popović et al.* Trial Judgment (n 8) para. 821 (footnotes omitted) ('The words "as such" underscore that something more than discriminatory intent is required for genocide; there must be intent to destroy, in whole or in part, the protected group "as a separate and distinct entity." The ultimate victim of the crime of genocide is the group.'); *Brdanin* Trial Judgment (n 29) para. 699; *Krstić* Trial Judgment (n 4) para. 553; *Kupreškić* Trial Judgment (n 131) para. 636.

the protected group so that their elimination or mistreatment is seen as capable of achieving the intended purpose of the perpetrator to destroy their group.[233]

Although necessary,[234] mere knowledge that the victim is a member of a targeted group is insufficient to establish an intent to destroy the group *as such*.[235] Genocide requires that the proscribed conduct is intentionally directed against members of the

[233] See *Muvunyi* Trial Judgment (n 5) para. 485 (footnote omitted) ('The term "as such" has been interpreted to mean that the prohibited act must be committed against a person based on that person's membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself.'); *Niyitegeka* Trial Judgment (n 152) para. 410; *Kanyarukiga* Trial Judgment (n 10) para. 635 (footnote omitted) ('The victims must be targeted because of their membership in the protected group.'); *Niyitegeka* Appeal Judgment (n 1) para. 53 (finding that the Trial Chamber was correct in interpreting 'as such' to mean that the proscribed acts were committed against the victims 'because of their membership in the protected group, but not solely because of such membership'); *Bagilishema* Trial Judgment (n 82) para. 61 ('[T]he victim of the crime of genocide is singled out by the offender not by reason of his or her individual identity, but on account of his or her being a member of a national, ethnical, racial or religious group. This means that the victim of the crime of genocide is not only the individual but also the group to which he or she belongs.'); *Milošević* Decision on Motion for Judgment of Acquittal (n 3) para. 123 (footnotes omitted) ('Genocide is a discriminatory crime in that, for the crime to be established, the underlying acts must target individuals because of their membership of a group. The perpetrator of genocide selects and targets his victims because they are part of a group that he seeks to destroy. This means that the destruction of the group must have been sought as a separate and distinct entity. According to the International Law Commission, "the action taken against individual members of the group is the means used to achieve the ultimate objective with respect to the group".'); *Seromba* Appeal Judgment (n 15) para. 176; *Rutaganda* Appeal Judgment (n 152) paras 524–525; *Jelisić* Appeal Judgment (n 7) para. 47; *Karera* Trial Judgment (n 10) paras 534 and 536; *Mpambara* Trial Judgment (n 45) para. 8; *Akayesu* Trial Judgment (n 5) para. 521 ('Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group.'); *Bagilishema* Trial Judgment (n 82) para. 65; *Semanza* Trial Judgment (n 53) para. 312 (clarifying that membership in group determined by subjective intentions of perpetrator, not objective criteria); *Jelisić* Trial Judgment (n 5) para. 70 (same); *Rutaganda* Trial Judgment (n 5) para. 55 (same); *Rukundo* Trial Judgment (n 10) para. 556; *Gacumbitsi* Appeal Judgment (n 1) para. 39; *Simba* Trial Judgment (n 31) para. 412; *Munyaneza* Appeal Judgment (n 10) para. 177 (footnotes omitted) ('It follows that the proscribed act must have been committed against a person precisely because that person was part of the identifiable group, thus conflating the individual with that group.'); *Blagojević & Jokić* Trial Judgment (n 18) para. 669 (footnote omitted) ('The victims of the crime must be targeted because of their membership in the protected group, although not necessarily solely because of such membership.'); *Tolimir* Trial Judgment (n 15) para. 747; *Jević et al.* Trial Judgment (n 3) paras 912 and 927; *Vuković & Tomić* Trial Judgment (n 47) para. 568; *Trbić* Trial Judgment (n 4) paras 179 and 187; *Pelemiš & Perić* Trial Judgment (n 73) para. 156 (footnote omitted) ('[C]onsistent with Article 2 of the Genocide Convention, the term "goal" encompasses the intent to destroy the group "as such." That is, the evidence must establish that "the proscribed acts were committed against the victims because of their membership in the protected group," although they need not have been committed "solely because of such membership".'); *Vuković & Tomić* Appeal Judgment (n 19) paras 421 (finding that victims must be members of the national, ethnic, racial, or religious group that the perpetrator sought to exterminate in full or in part), and 425; *Ivanović* Appeal Judgment (n 5) paras 31–32; *Mitrović* Trial Judgment (n 18) p 45; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 60) para. 70; *Ao An* 2018 Closing Order (n 43) para. 98. The Report of the International Law Commission noted the following:

> [T]he intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct.

UN Doc. A/51/10 (n 5) 88.

[234] *Pelemiš & Perić* Trial Judgment (n 73) para. 159.

[235] *Krstić* Trial Judgment (n 4) para. 561.

targeted 'group',[236] and that by targeting members of a protected group, that intention is ultimately directed at the group itself 'as a separate and distinct entity'.[237]

8.5.2.2 *Randomness in targeting*

A degree of randomness in the selection of victims by a perpetrator does not necessarily exclude an intention on his part to destroy a group as such.[238] In many instances, the commission of such crimes involve an element of incoherence, be it in the form of unexpected mercy or by reason of pure opportunism.[239] Thus, the ICTY Appeals Chamber said that the Trial Chamber should not have acquitted Goran Jelisić of genocide on the basis that his actions did not show an intent to destroy the group 'as such', simply because he spared a number of Muslim prisoners. The Trial Chamber should have 'discounted the few incidents where he showed mercy as aberrations in an otherwise relentless campaign against [Bosnian-Muslims]'.[240] However, in particular circumstances, a failure on the part of the accused to kill or mistreat more members of a group than he might otherwise have been able to could provide evidence contradicting the suggestion that he possessed the requisite genocidal *mens rea*.[241] In such a case, one would have to inquire into the reasons for such selectivity with a view to ascertaining whether the evidence reflects certain reasons or a pattern

[236] ICJ *Bosnia-Serbia* 2007 Judgment (n 4) para. 193. See also UN Report on Darfur (n 35) para. 490 ('Genocide can be charged when the prohibited conduct referred to above is taken against one of these groups or members of such group.').

[237] See, e.g., *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 53) para. 30; *Stakić* Trial Judgment (n 5) para. 521.

[238] See, e.g., *Jelisić* Appeal Judgment (n 7) para. 71:

> The Trial Chamber also placed heavy reliance on the randomness of the respondent's killings. It cited examples of where he let some prisoners go, played Russian roulette for the life of another, and picked his victims not just off lists allegedly given to him by others, but according to his own whim. Entitled though it may have been to consider such evidence, the Trial Chamber, in the view of the Appeals Chamber, was not entitled to conclude that these displays of 'randomness' negated the plethora of other evidence recounted above as to the respondent's announced intent to kill the majority of Muslims in Brčko and his quotas and arrangements for so doing. A reasonable trier of fact could have discounted the few incidents where he showed mercy as aberrations in an otherwise relentless campaign against the protected group.

[239] *Kayishema & Ruzindana* Appeal Judgment (n 38) paras 147–149, where the defense argued, unsuccessfully, that the fact that the Hutu accused Kayishema and Ruzindana may have saved 72 Tutsi children excluded the fact that he may have had a genocidal *mens rea* vis-à-vis this ethnic group.

[240] *Jelisić* Appeal Judgment (n 7) para. 71. The Trial Chamber's reasoning in that respect can be found in paragraphs 106–108 of the Trial Chamber's Judgment. *Jelisić* Trial Judgment (n 5) paras 106–108.

[241] The *Stakić* Appeal Chamber noted the following:

> Contrary to what the Prosecution argues, paragraph 553 does not suggest that the Trial Chamber thought genocide requires intent to kill all members of the target group. In that very paragraph, the Trial Chamber specifically found that the Prosecution had not proven that the Appellant sought to 'destroy in part the Muslim group.' To be sure, the Trial Chamber also found that '[h]ad the aim been to kill all Muslims, the structures were in place for this to be accomplished.' Yet the Trial Chamber cited this fact because it constitutes evidence that the Appellant did not seek to destroy the Bosnian Muslim group in whole or in part—the fact that more Bosnian Muslims could have been killed, but were not, indicates that the Appellant lacked *dolus specialis*. While the Trial Chamber might have expressed itself more clearly, it did not commit any error.

Stakić Appeal Judgment (n 35) para. 42 (footnotes omitted).

of conduct that would be compatible or incompatible with an otherwise held genocidal intent.[242]

8.5.2.3 Crimes committed against non-members

Can a crime committed against an individual who is not a member of the protected group—for example, an individual mistakenly believed to be a member of the targeted group or someone who protected members of the targeted group—constitute an act of genocide? The raison d'être of the prohibition of genocide—the protection of certain groups—would tend to suggest that this could be the case where the killing of a third party is intended to contribute to the destruction of a protected group. However, the underlying acts provided in Article II of the Convention make it clear that, to come within the scope of that prohibition, the act must have been committed against members 'of the group'. This suggests that actual and potential victims of acts of genocide are limited to members of a targeted group.[243] In *Nahimana*, for instance, the Appeals Chamber of the Rwanda Tribunal was seised of findings that suggested that the killing of Hutus who had protected Tutsis from harm or who politically opposed the perpetrators could constitute acts of genocide. The Appeals Chamber disapproved of these findings and held that 'acts committed against Hutu political opponents cannot be perceived as acts of genocide, because the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group'.[244] The Appeals Chamber added that even if the perpetrators of the Rwandan genocide believed that eliminating Hutu political opponents was necessary or useful to the for successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide since they were not members of the protected Tutsi group.[245] The same reasoning would perforce mean that a crime committed against an individual who is not a member of the targeted group in the mistaken belief that he was would not constitute an act of genocide. But whilst crimes committed against third parties cannot constitute acts of genocide, they may provide evidence of the perpetrators' genocidal intent to the extent that they reflect an intention to harm and destroy a protected group.

[242] See *infra* 9.4.7.9.

[243] Message relatif à la modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale international, 08.034, 23 April 2008, p 3514 (Switzerland) (noting that the killing of individuals who opposed the destruction of a group but who were not members of that group does not constitute genocide). See also N Robinson, *Genocide Convention* (n 192) 58 ('The main characteristic of Genocide is its object: the act must be directed toward the destruction of a group. Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not per se but only as members of the group to which they belong.').

[244] *Nahimana et al.* Appeal Judgment (n 1), paras 495–496. [245] Ibid.

9

Establishing Genocidal Intent

9.1 Evidential Challenges

Lon Fuller pointed out that 'if intention is a fact, it is a private fact inferred from outward manifestations'.[1] External manifestations of intent might be particularly rare and hard to detect in a criminal context where those concerned have an interest in keeping their acts and their intentions shielded from view.[2] 'This is the reason why', the *Akayesu* Trial Chamber found, 'in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact'.[3]

The evidential challenge generally involved in establishing an accused's intent is accentuated in the case of genocide by a number of factors specific to that offence. First, the requisite genocidal intent is eminently specific and evidentially demanding. It requires proof of three discrete sub-elements: an intent, to destroy, a group as such. In effect, these three elements imply not *one* level of special intent, but *two*—one in regards to the ultimate target of his action, the group, and one in regards to the intended fate of the group, that is, its physical or biological destruction.[4] This double level of special intent itself comes in addition to the necessary 'general intent' that the accused must have possessed to commit the underlying act which forms the basis of the charges.[5]

Second, an intent to destroy a group of human beings is rarely publicized and is often dissimulated by the perpetrators. In such cases, the culpable intent will have to be inferred from what might have trickled from the words and actions of the accused

[1] Lon L Fuller, *The Morality of Law (Storr's Lectures on Jurisprudence)* (rev edn, Yale University Press 1977) (hereafter Fuller, *Morality of Law*), 72.

[2] *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 1 June 2001 (*Kayishema & Ruzindana* Appeal Judgment), para. 159 ('[E]xplicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials.').

[3] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (hereafter *Akayesu* Trial Judgment), para. 523.

[4] See, e.g., *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004 (hereafter *Milošević* Decision on Motion for Judgment of Acquittal), para. 119 (footnote omitted) ('[F]or the enumerated acts proscribed in Article 4(2) of the Statute to constitute genocide, it has to be proved that, in addition to the criminal intent accompanying the underlying offence (e.g., killing), the perpetrator also intended to destroy, in whole or in part, a protected group.').

[5] For each of the underlying acts charged against an accused—for example, killing or causing serious bodily or mental harm—the prosecution will have to prove the *mens rea* attached to each of the particular underlying crimes charged. See, generally, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001 (hereafter *Bagilishema* Trial Judgment), para. 58; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999 (*Kayishema & Ruzindana* Trial Judgment), paras 103–104; ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 186 (noting that acts of 'killing' must be intentional, as must 'causing serious bodily or mental harm' and that such acts are, in the words of the ILC, 'by their very nature conscious, intentional or volitional acts'). See, also, *supra*, 8.1.

and others involved in the commission of the crime.[6] The available evidential indicators will often offer a variety of possible narratives, some of which might be criminal but not necessarily genocidal. These narratives will have to be reduced to a single one that dispels any ambiguity regarding the state of mind of the accused and leaves no reasonable doubt about his intentions.[7] This challenging exercise has been well summarized by a Judge of the Yugoslav Tribunal:

> Proving intent, in particular intent to destroy a part of a protected group, is difficult. Evidence of utterances of the physical perpetrators suggesting such intent is rare. There is an inherent and complex evidentiary issue with regard to establishing the intent vis-à-vis the fate of the group as such, where the physical perpetrators act in a limited geographic area and at a relatively low level of hierarchy and responsibility. As is often the case when analysing *mens rea*, the mental state of the physical perpetrators must be determined based on inferences from their acts and omissions. In this respect, it is insufficient to rely on the fact that the physical perpetrators committed murder, extermination, or persecution. The acts as established by the Trial Chamber were horrendous, widespread, and systematic. However, the only question here is whether the only reasonable inference to be drawn from their acts and omissions is that the physical perpetrators intended to physically or biologically destroy a part of the protected group as such.[8]

9.2 Standard of Proof and Drawing of Inferences

In the absence of direct evidence of genocidal intent, the special intent of the accused may be circumstantially inferred from his actions and words.[9] However, because of

[6] See, for instance, *Milošević* Decision on Motion for Judgment of Acquittal (n 4) paras 120–122; *Prosecutor v. Karadžić* Rule 98*bis* Oral Decision, Transcript, 28 June 2012, 28751 (hereafter *Karadžić* Rule 98*bis* Oral Decision):

> In relation to the accused's challenge as to the lack of genocidal intent of the physical perpetrators of the killings in Srebrenica, the Chamber recalls that the specific intent of such perpetrators by its nature is not usually susceptible to direct proof but can be inferred from various factors, including the general context of the case, the numerical size of the atrocities committed, the repetition of destructive and discriminatory attacks, or the existence of a plan or policy to commit the underlying offence.

See also *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgment, 11 July 2013 (hereafter *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal), paras 80–81.

[7] For an illustration of the challenge, see generally *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 (hereinafter *Stakić* Appeal Judgment), para. 56.

[8] *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, Partially Dissenting Opinion of Judge Alphons Orie, 22 November 2017 (hereafter *Mladić* Trial Judgment, Orie Partial Dissent), para. 5219 (footnote omitted).

[9] See, e.g., *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 159 ('[E]xplicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials. In order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances.'); *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, 26 May 2003 (hereafter *Rutaganda* Appeal Judgment), paras 525–530; *Prosecutor v. Karadžić & Mladić*, Case No. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 (hereafter *Karadžić & Mladić* Rule 61 Review), paras 94–95; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001 (hereafter *Sikirica et al.* Judgment on Defense Motions to Acquit), paras 61 and 46; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of

the presumption of innocence, an inference based on circumstantial evidence must be the only reasonable inference that can be drawn from the evidence.[10]

Acquittal, 31 October 2002 (hereafter *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal), para. 17; *Milošević* Decision on Motion for Judgment of Acquittal (n 4) para. 120 ('While it is not impossible to have express evidence of the required intent, most usually the intent will have to be inferred from the evidence.'); *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017 (hereafter *Mladić* Trial Judgment), para. 3440; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 88–99 (in relation to the application of these factors in the concrete case); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment), para. 823 (and references cited therein); *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (hereinafter *Popović et al.* Appeal Judgment), para. 468; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment), para. 47; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 (hereafter *Krstić* Appeal Judgment), para. 34; *Hategekimana v. Prosecutor*, Case No. ICTR-00-55B-A, Judgment, 8 May 2012 (hereafter *Hategekimana* Appeal Judgment), para. 133; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (hereafter *Tolimir* Trial Judgment), para. 745; *Stakić* Appeal Judgment (n 7) para. 55; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004 (hereafter *Vasiljević* Appeal Judgment), paras 120 and 128; *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008 (hereafter *Strugar* Appeal Judgment), para. 333; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (hereafter *Krnojelac* Trial Judgment), para. 83; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999 (hereafter *Rutaganda* Trial Judgment), paras 63 and 399–400; *Kayishema & Ruzindana* Trial Judgment (n 5) paras 93 and 527; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (hereafter *Semanza* Trial Judgment), para. 313; *Akayesu* Trial Judgment (n 3) paras 478 and 523; *Bagilishema* Trial Judgment (n 5) para. 63; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (hereafter *Kajelijeli* Trial Judgment), paras 804–807 and 819–828; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003 (hereafter *Nahimana et al.* Trial Judgment), paras 957–969; *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-T, Judgment and Sentence, 15 July 2004 (hereafter *Ndindabahizi* Trial Judgment), para. 454; *Prosecutor v. Gatete*, Case No. ICTR-00-61-T, Judgment and Sentence, 31 March 2011 (hereafter *Gatete* Trial Judgment), para. 583; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008 (hereafter *Bagosora et al.* Trial Judgment), para. 2116; *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Judgment, 12 March 2008 (hereafter *Seromba* Appeal Judgment), para. 176; *Prosecutor v. Seromba*, Case No. ICTR-01-66-T, Judgment, 13 December 2006 (hereafter *Seromba* Trial Judgment), para. 320; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007 (hereafter *Nahimana et al.* Appeal Judgment), paras 524–525; *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Judgment, 27 November 2007 (hereafter *Simba* Appeal Judgment), para. 264; *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, 7 July 2006 (hereafter *Gacumbitsi* Appeal Judgment), paras 40–41; *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005 (hereafter *Semanza* Appeal Judgment), paras 262 and 264; *Kayishema & Ruzindana* Appeal Judgment (n 2) paras 147–148 and 159; *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T, Judgment, 27 February 2009 (hereafter *Rukundo* Trial Judgment), para. 557; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, 28 April 2005 (hereafter *Muhimana* Trial Judgment), para. 496; *Stakić* Appeal Judgment (n 7) paras 53–57; *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, Judgment, 28 September 2011 (hereafter *Munyakazi* Appeal Judgment), para. 142; *Prosecutor v. Al Bashir*, (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) [2009] ICC-02/05-01/09-3 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), paras 153–161 (and references cited therein). See also, UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) ('Yugoslavia'), UN Doc. S/1994/674, 27 May 1994 (hereafter Final Report on the former Yugoslavia), para. 97.

[10] *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (hereafter *Tolimir* Appeal Judgment), para. 601; *Tolimir* Trial Judgment (n 9) paras 745 and 1161; *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32-1-A, Judgment, 4 December 2012 (hereafter *Lukić & Lukić* Appeal Judgment), para. 149; *Jelisić* Appeal Judgment (n 9) paras 47–48; *Munyakazi* Appeal Judgment (n 9) para. 142; *Gacumbitsi* Appeal Judgment (n 9) paras 40–41 ('the inferential approach does not relieve the Prosecution of its burden to prove each element of its case, including genocidal intent, beyond reasonable doubt. Rather, it is simply a different means of satisfying that burden.'); *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 159; *Krstić* Appeal Judgment (n 9) para. 37. For an illustration of that evaluation, see, e.g.,

9.3 Holistic Approach to Assessment of Evidence

9.3.1 Evidence to be considered as a whole and in context

To evaluate whether the accused possessed the requisite *mens rea*, the court must consider the overall factual picture within the context in which the accused's acts occurred, rather than each individual incident or alleged genocidal act.[11] Said differently, when assessing the evidence of genocidal intent, one should consider whether 'all of the evidence, taken together, demonstrates a genocidal mental state', instead of considering whether the accused intended to destroy a protected group through each of the separate relevant acts that form the basis of the charge.[12] This assessment will require the court to consider the acts and words of the accused, not in isolation, but

Popović et al. Appeal Judgment (n 4) paras 525–528. See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 158–159 ('[T]he Majority considers that, if the existence of a [Government of Sudan's] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.') and 205. The standard of 'beyond reasonable doubt' was later considered inapposite by the Appeals Chamber in relation to the issuance of an arrest warrant. See, generally, *Prosecutor v. Al Bashir* (Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir') [2010] ICC-02/05-01/09-73 (hereafter *Al Bashir* Warrant Application Appeal Judgment), paras 33–39.

[11] See, e.g., *Stakić* Appeal Judgment (n 7) para. 55 ('The Appeals Chamber agrees with the Prosecution that the Trial Chamber's compartmentalised mode of analysis obscured the proper inquiry. Rather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state. Nonetheless, it does not appear that the Trial Chamber's piecemeal approach had any effect on its conclusion. The reasons it gave with respect to Article 4(1)(b) and (c) simply cross-referenced its analysis of mental state with respect to Article 4(1)(a), in which it concluded that there simply was no evidence in the record (including, for example, the Appellant's statements) that proved that the Appellant sought to destroy the Muslim population. In reaching this conclusion, it must be assumed, the Trial Chamber was obviously aware of its own factual findings, but found them insufficient to establish intent beyond a reasonable doubt.'); *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 56–60, in particular, para. 56 (footnote omitted) ('The Appeals Chamber recalls that, in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state. Thus, in the context of Rule 98 *bis* of the Rules, a trial chamber must both consider the evidence at its highest and assess all of the evidence as a whole.'). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 148 ('[T]o state that, "for a pattern of conduct to be accepted as evidence of [...] existence [of genocidal intent], it [must] be such that it could only point to the existence of such intent" amounts to saying that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.').

[12] *Stakić* Appeal Judgment (n 7) para. 55; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016 (hereinafter *Karadžić* Trial Judgment), para. 550. See also *Tolimir* Appeal Judgment (n 10) paras 246–247 (footnotes omitted):

> 247. The Appeals Chamber notes that the Trial Chamber made findings concerning the existence of genocidal intent in this case after assessing 'all of this evidence, taken together', an approach that, according to the Trial Chamber, 'is in line with the fluid concept of intent'. The Trial Chamber thus considered a variety of factors as a whole—including, but not limited to, the circumstances under which the actions constituting the *actus reus* of genocide were carried out—and concluded that the acts of Article 4(2)(a)-(c) of the Statute were perpetrated

within the context of the overall criminal picture to which they belong or with which they are associated.[13]

9.3.2 Nature and quality of the evidence

What evidence may be relevant to establishing the accused's genocidal intent will vary from case to case. The law of genocide does not limit the kind of evidence that could be relevant to that determination, although practice has now identified certain categories of evidence that are *a priori* relevant to establishing such intent.[14] In particular, a finding that the accused possessed the requisite genocidal intent may, in principle, be established by evidence of what occurred either before, during, or after the commission of the crime relevant to the charges.[15] It might be based on evidence of various degrees of reliability, but the totality of the evidence must in all cases meet the

> with the *dolus specialis* required for genocide. This holistic approach is consistent with the Tribunal's jurisprudence. As the Appeals Chamber has recently stated:
>
> in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state.
>
> Tolimir himself acknowledges that 'it is a good approach to consider whether "all of the evidence, taken together, demonstrated a genocidal mental state".' Since Tolimir fails to show any reason why the Trial Chamber's holistic analysis of the relevant evidence was erroneous or why the Appeals Chamber should depart from its settled case law in that regard, his arguments as to the approach adopted by the Trial Chamber are rejected.

See also *Mladić* Trial Judgment (n 9) para. 3435; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 56 (footnotes omitted) ('The Appeals Chamber recalls that, in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state.') and 59 (referring to the need for a 'holistic analysis' rather than an incident or infraction-by-infraction analysis of the matter); *Stakić* Appeal Judgment (n 7) para. 55; *Popović et al.* Appeal Judgment (n 4) para. 492; *Popović et al.* Trial Judgment (n 10) para. 820 (footnote omitted) ('Whether there was genocidal intent is assessed based on "all of the evidence, taken together".'), and fn 2939 ('The inquiry concerning genocidal intent should not be compartmentalized into separately considering whether there was specific intent to destroy through each of the genocidal acts specified at Article 4(1)(a), (b), and (c).'). See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 419 (stating that the ICJ would examine 'the context in which the acts constituting the *actus reus* of genocide within the meaning of subparagraphs (a) and (b) of [Article II of] the Convention were committed, in order to determine the aim pursued by the authors of those acts').

[13] For an illustration, see, e.g., *Prosecutor v. Jević*, No. X-KR-09/823-1, Verdict, 22 August 2012 (hereafter *Jević et al.* Trial Judgment), para. 946 (footnote omitted) ('The Panel concludes that all the killed men, nearly 7000 of them, including all the prisoners killed in the Kravica Farming warehouse (at least 1000 of them) whose killing is the subject of this criminal proceedings, were killed in the same murder operation following the take-over of Srebrenica. Their killing by itself, but also in combination with the transfer of the remaining Srebrenica Muslim population, had a significant impact on that group of Bosnian Muslims as a whole.').

[14] See, *infra*, 9.4.

[15] See, e.g., *Nahimana et al.* Appeal Judgment (n 9) paras 560–561, 575; *Tolimir* Appeal Judgment (n 10) paras 564–577, in particular, para. 565 ('Tolimir's related actions in the months preceding the Indictment period are clearly relevant and probative to the inquiry into his genocidal intent. In this context, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion by relying on Tolimir's actions prior to the Indictment period to establish his *mens rea* for the crimes committed during that period.'). See also *Tolimir* Appeal Judgment (n 10) para. 569, finding that:

requisite standard of proof. That the accused did not possess the same level of information about a genocidal venture than his fellow participants would thus not exclude a finding that he possessed the requisite *mens rea* if this can otherwise be established from the totality of the evidence.[16]

9.3.3 Genocidal intent and reasoned opinion

When fulfilling its obligation to render a reasoned opinion in relation to charges involving allegations of genocide, a court must be mindful of the critical nature of its finding regarding the requirement of genocidal intent. Thus, the court is expected to ensure that it makes clear and detailed findings in relation to that 'touchstone issue'.[17]

9.4 Basis for Inference and Relevant Evidential Factors

9.4.1 General considerations

Where the accused is allegedly responsible for genocide, the prosecution must show that the accused possessed the requisite genocidal intent when he committed the underlying conduct relevant to the charges.[18] A number of factors have been identified that are *a priori* relevant to—albeit not necessarily *conclusive* of—the question of whether an accused possessed the necessary genocidal intent.[19] These factors include the following:

> Insofar as Tolimir suggests that *ex post facto* evidence cannot support an inference of genocidal intent, the Appeals Chamber reiterates that, as a general principle, it is not an error of law to rely on material originating from outside the time period of the Indictment, so long as it has probative value.

[16] See, e.g., *Prosecutor v. Kos et al.*, No. S1 1 K 003372 10 Krl, Verdict, 15 June 2012 (hereafter *Kos et al.* Trial Judgment), para. 618 ('It is important to note that there is no rule which, in terms of quality, prescribes the required level of knowledge on the part of the Accused during the incriminated time period. In other words, the Defense's argument that the Accused should be exculpated of the perpetrated crime only because they did not have the same level of knowledge about the general plan or policy as their superiors is unacceptable.').

[17] See, generally, *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) para. 85 ('[T]he Appeals Chamber considers that, particularly when addressing the touchstone issue of genocidal intent, clearer and more detailed reasoning in the Judgment of Acquittal would have been preferable.').

[18] See, *supra*, Chapter 8. For an illustration in the context of a joint criminal charge, see, e.g., *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) para. 82 (footnotes omitted) ('The Appeals Chamber notes that the Trial Chamber's analysis makes one explicit reference to evidence of the genocidal intent of the "physical perpetrators of the crimes". However, the Trial Chamber also expressly considered evidence concerning Karadžić himself and. other alleged JCE members. Moreover, in reaching its conclusions as to genocidal intent, the Trial Chamber did not state that its holdings concerned the genocidal intent of the physical perpetrators alone but instead described the absence of evidence of genocidal intent more broadly. In these circumstances, the Appeals Chamber is not persuaded that the Trial Chamber's conclusions on genocidal intent were restricted to the physical perpetrators of the underlying genocidal acts or that it failed to assess Karadžić's genocidal intent and that of other alleged JCE members.').

[19] For discussions of these factors in general terms, see, e.g., *Popović et al.* Trial Judgment (n 10) paras 856–863, for an application *in concreto*, in particular, para. 856; *Mladić* Trial Judgment (n 9) paras 3440 and 3457 ('[W]here direct evidence of specific intent is absent, the specific intent may be inferred from the surrounding facts and circumstances which may include: the general context; the perpetration of other culpable acts systematically directed against the same group; the scale of the atrocities committed;

the systematic targeting of victims on account of their membership in a particular group; proof of the mental state with respect to the commission of the underlying acts; the repetition of destructive and discriminatory acts; or the existence of a plan or policy.'), and 3456–3536, in particular, paras 3503–3526 (regarding the Chamber's findings in relation to the prosecution's allegation that the specific intent of the perpetrators was revealed both by the concerted attack on the very foundation and fabric of the protected group to prevent it from continued existence in the Count 1 municipalities through the prohibited acts and other culpable acts, as well as by direct evidence of intent found in the statements of Mladić, Karadžić, and other alleged members of the alleged JCE); *Jelisić* Appeal Judgment (n 9) paras 47–48; *Stakić* Appeal Judgment (n 7) para. 55; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 99; *Karadžić* Rule 98*bis* Oral Decision (n 6) 28768 ('As mentioned earlier, the Chamber notes that in the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence.'); *Popović et al.* Appeal Judgment (n 4) paras 430, 440, and 468; *Tolimir* Appeal Judgment (n 10) paras 246, 248, and 253; *Karadžić* Trial Judgment (n 12) para. 550; *Hategekimana* Appeal Judgment (n 9) paras 133–134; *Krstić* Appeal Judgment (n 9) para. 34; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgment, 18 December 2008 (hereafter *Zigiranyirazo* Trial Judgment), para. 398; *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 159; *Rutaganda* Appeal Judgment (n 9) paras 525 and 528; *Ndindabahizi* Trial Judgment (n 9) para. 454; *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Judgment and Sentence, 6 December 2010, para. 669; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment, 11 February 2010 (hereafter *Muvunyi* Trial Judgment II), para. 29; *Gatete* Trial Judgment (n 9) para. 583; *Bagosora et al.* Trial Judgment (n 9) para. 2116; *Seromba* Appeal Judgment (n 9) para. 176; *Seromba* Trial Judgment (n 9) para. 320; *Nahimana et al.* Appeal Judgment (n 9) paras 524–525; *Simba* Appeal Judgment (n 9) para. 264; *Gacumbitsi* Appeal Judgment (n 9) paras 40–41; *Semanza* Appeal Judgment (n 9) paras 261–262 (citing *Jelisić* Appeal Judgment (n 9) para. 47); *Kayishema & Ruzindana* Appeal Judgment (n 2) paras 147–148; *Rukundo* Trial Judgment (n 9) para. 557; *Muhimana* Trial Judgment (n 9) par 496; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment and Sentence, 12 September 2006 (*Muvunyi* Trial Judgment), para. 480; *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-T, Judgment and Sentence, 30 December 2011, para. 804; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgment and Sentence, 13 December 2005 (hereafter *Simba* Trial Judgment), paras 413 and 415; *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, 7 December 2007 (hereafter *Karera* Trial Judgment), para. 534; *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, 11 September 2006, para. 8. However, the inference must be the only available reasonable inference which can be made from the evidence. *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, Judgment and Sentence, 5 July 2010 (hereafter *Munyakazi* Trial Judgment), para. 494; *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Judgment and Sentence, 12 November 2008 (hereafter *Nchamihigo* Trial Judgment), paras 331, 333–335; *Prosecutor v. Bizimungu*, Case No. ICTR00-56B-A, Judgment, 30 June 2014 (hereafter *Bizimungu* Appeal Judgment), fn 571; *Popović et al.* Appeal Judgment (n 4) paras 503–505; *Tolimir* Trial Judgment (n 9) para. 745 (and references cited therein); *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004 (hereafter *Brdanin* Trial Judgment), paras 969–971 (taking into consideration four primary factors: the extent of actual destruction and number of victims; evidence of the existence of a genocidal plan or policy; the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct; the utterances of the Accused—with the Trial Chamber concluding, on the basis of the evidence presented in this case, that it could not beyond reasonable doubt that genocide was committed in the relevant ARK municipalities, in April to December 1992). See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 153–161, in particular, para. 164 (listing the nine evidential factors advanced by the prosecution as being relevant to inferring the requisite genocidal intent) (footnote omitted) ('In the Majority's view, they can be classified into the following categories: i. the alleged existence of a [Government of Sudan—GoS] strategy to deny and conceal the crimes allegedly committed in the Darfur region against the members of the Fur, Masalit and Zaghawa groups; ii. some official statements and public documents, which, according to the Prosecution, provide reasonable grounds to believe in the (pre) existence of a GoS genocidal policy; iii. the nature and extent of the acts of violence committed by GoS forces against the Fur, Masalit, and Zaghawa civilian population.'). See also Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64, 24 August 2018 (hereafter UN Myanmar Report), paras 85 ('Factors pointing at such intent include the broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level

- deeds and utterances of the person to whom genocidal intent is attributed;[20]
- the general context in which the acts were carried out;[21]
- the accused/perpetrator's personal circumstances, education, and position;[22]
- the accused's physical presence at relevant locations, in particular the crime scene;
- evidence of acquiescence with criminal acts;
- statements or acts inciting or encouraging the commission of crimes;[23]
- evidence of national, racial, religious, or ethnic bias or prejudice;
- evidence of personal involvement in relation to certain actions central to the commission of the crimes;[24]

of organization indicating a plan for destruction; and the extreme scale and brutality of the violence.'), and 86 (regarding a statement to the effect that the attack on the Rohingya was intended to carry out the 'unfinished job' of 'solv(ing) the long-standing Bengali problem').

[20] See, e.g., *Muhimana* Trial Judgment (n 9) para. 496. See also references, *infra*, 9.4.2. See also *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Ušacka [2009] ICC-02/05-01/09-3 (hereafter *Al Bashir* Decision on Warrant Application, Ušacka Dissent), para. 37 (and references cited therein).

[21] See, e.g., *Prosecutor v. Mitrović*, No. X-KR-05/24-1, First Instance Verdict, 4 February 2009 (hereafter *Mitrović* Trial Judgment) 49–50 (referring as factors relevant to such inference to: (i) the general context of events in which the perpetrator acted; (ii) the perpetrator's knowledge of that context; and (iii) the specific nature of the perpetrator's acts); *Prosecutor v. Trbić*, No. X-KR-07/368, First Instance Verdict, 29 April 2010 (hereafter *Trbić* Trial Judgment), paras 197 ('Evidence of the context of the alleged culpable acts may help to determine the intention of the accused, especially where the intention is not clear from what that person says or does. It is to be noted that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the accused.'), 198, and 202 (for *in concreto* assessment). See also, *infra*, 9.4.7.

[22] See, e.g., *Tolimir* Trial Judgment (n 9) paras 1161, 1172 (finding that the accused possessed the requisite genocidal *mens rea* in consideration of 'the Accused's education, his experience as an officer, his general capabilities especially with respect to his duties and responsibilities stemming from his specific professional position' together with 'the facts that in his position as Chief of the Sector for Intelligence and Security Affairs the Accused had knowledge of the large-scale criminal operations on the ground, that he knew of the genocidal intentions of the JCE members, that he actively contributed to the JCEs to Forcibly Remove and to Murder, that the Accused freely used derogatory and dehumanising language, and that the Accused proposed to destroy groups of fleeing refugees [...].'); *Tolimir* Appeal Judgment (n 10) paras 560–562; *Popović et al.* Appeal Judgment (n 4) para. 515; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 39 (suggesting that 'the Accused's position of power or authority can be relevant to support an inference that an accused not only knew of a genocidal plan, but also that he or she shared the genocidal intent of the members of the plan').

[23] See, e.g., *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010 (hereafter *Nuon Chea et al.* 2010 Closing Order), paras 1345–1346 (noting that killings of Vietnamese were committed in the context of statements commenting on the objective to physically destroy the group in its entirety).

[24] See also, for an illustration in relation to the ICTY accused Beara, *Popović et al.* Trial Judgment (n 10) paras 1310–1318; *Popović et al.* Appeal Judgment (n 9) paras 480 (pointing to Beara's position as well as 'his walk through Bratunac on the night of 13 July, his personal visits to the various execution [sites] and the extensive logistical challenges he faced throughout to support the finding that he had detailed knowledge of the killing operation'), and 490 (referring to the following 'decisive' factors: (i) the scale and scope of the killing operation carried out with Beara's knowledge, pursuant to his instructions and under his supervision; (ii) his extensive and forceful participation in all components of the killing operation; (iii) his demonstrated determination to kill as many Bosnian-Muslims as possible; and (iv) his vital contribution in overcoming hurdles and challenges to effective implementation and also pointing to Beara's 'destructive and discriminatory acts and his words' as evidence of his genocidal intent).

- the perpetration of other culpable acts systematically directed against the same group;[25]
- the scale and nature of the atrocities, including their general occurrence in a region or a country;[26]
- proof of the accused's state of mind with respect to the commission of the underlying acts;[27]
- knowledge of other people's genocidal intent;[28]
- the repetition of violent and discriminatory acts directed at the relevant community of individuals;[29]
- attacks on religious and cultural objects and symbols;[30]
- acts of deportation and forcible transfer of members of the targeted community;[31]
- subjection of members of the group to inhumane living conditions;[32]

[25] *Mladić* Trial Judgment (n 9) para. 3457; *Karadžić* Rule 98*bis* Oral Decision (n 6) 28768; *Tolimir* Appeal Judgment (n 10) paras 246 and 253–254; *Tolimir* Trial Judgment (n 9) para. 748; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 48.

[26] See, e.g., *Popović et al.* Appeal Judgment (n 4) para. 503 (footnote omitted) ('It is clear that the Trial Chamber was aware of the massive scale of crimes being committed, and had recalled that this would be a relevant consideration in determining genocidal intent.'). See also *Trbić* Trial Judgment (n 21) para. 198 ('Intent may be inferred from [...] the repetition of destructive and discriminatory acts.'); *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 51–52 (and references cited therein). Regarding the relevance of the number of victims, see also *Nuon Chea et al.* 2010 Closing Order (n 23) paras 1342 ('Although there is no numeric threshold of victims necessary to establish genocide, the evidence from the Case File shows that the portion of the Cham population killed during the acts of destruction targeting the Cham group is strong evidence of the intent to destroy the group, in whole or in part: following the Demographic Expert Report, 36% of the Cham people in Cambodia died during the regime, which is compared to the average rate of Khmer deaths being an estimated 18.7%.'), and 1349.

[27] See, e.g., *Nchamihigo* Trial Judgment (n 19) paras 331, 333–335; *Karera* Trial Judgment (n 19) para. 539.

[28] See, *infra*, 9.4.3.

[29] See, e.g., *Nuon Chea et al.* 2010 Closing Order (n 23) paras 1341 and 1348 (regarding a campaign of discriminatory/persecutory acts); *Trbić* Trial Judgment (n 21) para. 198; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 46 (footnotes omitted) ('Additionally, indicia such as (i) the existence of execution lists targeting the protected group; (ii) the dissemination of extremist ideology; and (iii) the screening and selection of victims on the basis of their membership in the protected group may also be relevant to show the formation of intent. Moreover, the existence of a plan or project to create an ethnically homogenous state, along with evidence of an intent to exclude non-members by violence and evidence that the targeted group could not lay claim to any specific territory, has been held to support an inference that the plan contemplates the destruction of the non-member ethnic groups.'), para. 73 (footnotes omitted) ('Various types of evidence support an inference that an intent to destroy the group as such existed. Direct evidence could include statements by the perpetrator implying an intent to destroy, while circumstantial evidence might include, inter alia: (i) evidence of widespread systematic violence against the targeted group; (ii) evidence of a general campaign of persecution against the targeted group; and (iii) evidence of members of the targeted group being separated or classified according to their membership in the targeted group prior to the commission of the crime.'), and paras 74–76.

[30] See, e.g., *Nuon Chea et al.* 2010 Closing Order (n 23) para. 1341 ('The CPK Centre directed a country-wide suppression of Cham culture, traditions and language, and forcibly moved Cham communities in an effort to break them up.'); Application of The Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), para. 344. See also, *infra*, 9.4.7.3.

[31] See, *infra*, 9.4.7.4. See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 162 and 434; ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 190; Prosecutor v. Karadžić, Case No. MICT-13-55-A, Judgement, 20 March 2019. (*Karadžić* Appeal Judgment), paras 717ff.

[32] *Tolimir* Appeal Judgment (n 10) para. 251 (regarding the inference to be drawn from the denial of a humanitarian corridor). See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of

- opportunistic killings;[33]
- the prominence of the targeted individuals within their community;[34]
- a 'pattern of purposeful action';[35]

Arrest (n 9) pars 178–189 (concerning the issue of hindrance of medical and humanitarian assistance and finding the evidence on that point inconclusive); ICJ *Bosnia-Serbia* 2007 Judgment (n 30) paras 324–328. See also, for an illustration concerning inhuman conditions of detention, *Stakić* Appeal Judgment (n 7) para. 48 (footnotes omitted) ('Moreover, the Trial Chamber's reference to deportation in this paragraph does not suggest that it thought that the only relevant "conditions of life" were the acts of deportation themselves. Indeed, as the Prosecution itself observes, the Trial Chamber's own factual findings elsewhere in the Judgment illustrate that it was well aware of the evidence demonstrating the terrible conditions in the camps and on deportation buses. It can be assumed that the Trial Chamber took this evidence into account when it considered the *mens rea* question, even if it made no specific reference to it. The Prosecution's related argument that this evidence, in combination with the other evidence adduced at trial, required an inference of genocidal intent will be considered in Section F below.').

[33] *Tolimir* Appeal Judgment (n 10) para. 249 (footnotes omitted) ('The Appeals Chamber also dismisses Tolimir's argument regarding the Trial Chamber's reliance on opportunistic killings as an indicator of genocidal intent. As Tolimir acknowledges, opportunistic killings may be used to infer such intent on a limited basis—by placing the mass killings in their proper context. This is exactly what the Trial Chamber did, relying on the opportunistic killing of one Bosnian Muslim man on 13 July 1995 as a part of its consideration of the circumstances under which the separation of the men at Potočari occurred on 12 and 13 July 1995 and the capture of thousands of Bosnian Muslim men from the column on the same day, i.e. 13 July 1995, which it found to be "telling of the intent of the Bosnian Serb Forces". The Appeals Chamber finds no error in this analysis.'); *Tolimir* Trial Judgment (n 9) 329 fn 3131 ('Similarly, the Appeals Chamber has determined that, analysed solely in connection with forcible transfer, "opportunistic killings" by their very nature constitute a very limited basis for inferring genocidal intent.') (citing *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, 9 May 2007 (hereafter *Blagojević & Jokić* Appeal Judgment), para. 123).

[34] See, e.g. *Tolimir* Appeal Judgment (n 10) paras 261 (footnote omitted) ('[T]he Trial Chamber correctly stated that the prominence of the targeted portion of the protected group is a relevant factor in determining whether the perpetrator intended to destroy at least a substantial part of the protected group. Indeed, as the Trial Chamber held, "genocidal intent may [...] consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such".'), 262–63 ('[S]elective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent [...].' and 'The Appeals Chamber is not persuaded that the commission of genocide through the targeted killings of only the leaders of a group suggests that the leaders of the group are subject to special, stronger protection than the other members of the group, as Tolimir suggests. Recognising that genocide may be committed through the killings of only certain prominent members of the group "selected for the impact that their disappearance would have on the survival of the group as such" aims at ensuring that the protective scope of the crime of genocide encompasses the entire group, not just its leaders.'), and 264 (footnotes omitted) ('For a finding of genocide it suffices that the leaders were "selected for the impact that their disappearance would have on the survival of the group as such". Genocide may be committed even if not all leaders of a group are killed—even though targeting "the totality [of the leadership] per se may be a strong indication of genocide regardless of the actual numbers killed".'); *Tolimir* Trial Judgment (n 9) paras 749 and 777; *Jelisić* Trial Judgment (n 8) paras 82–83; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 9) paras 77 and 84–85; *Krstić* Appeal Judgment (n 9) para. 12 ('If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute].'). See also, Final Report on the former Yugoslavia (n 9) para. 94 (cited with approval in *Jelisić* Trial Judgment (n 8) para. 82; *Tolimir* Appeal Judgment (n 10) paras 262–263); *Brđanin* Trial Judgment (n 19) para. 703 (footnotes omitted) ('The Trial Chamber further notes that according to the jurisprudence of the Tribunal, the intent to destroy a group may, in principle, be established if the destruction is related to a significant section of the group, such as its leadership. The Appeals Chamber has stated that "[p]roperly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied".'). And see, for an illustration, *Tolimir* Appeal Judgment (n 10) paras 265–269.

[35] *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (hereafter *Stakić* Trial Judgment), para. 526; *Kayishema & Ruzindana* Trial Judgment (n 5) para. 93. See also, ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 413 (noting that 'of the 17 factors suggested by Croatia to establish the existence of a pattern

- the systematic targeting of victims on account of their membership of a particular group and *modus operandi*;[36]
- the fact that members of other groups were spared;[37]
- the existence and repetition of discriminatory acts and practices;
- the number of people killed in absolute terms and relative to the overall size of the group;[38]
- an awareness of incidents of mass killings;[39]
- the means and methods used to carry out the crimes, in particular, the systematic and organized manner in which it was carried out;[40]
- the methodical planning that went into the crimes and their implementation;[41]
- the type and number of weapons employed to commit the crimes;[42]

of conduct revealing a genocidal intent, the most important are those that concern the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population') and 414–418 (for consideration of these factors).

[36] See, e.g., *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 48 (footnotes omitted) ('The general context of the perpetration may also support an inference that the perpetrator had formulated intent. For example, where it is demonstrated that acts of a consistent character have been systematically directed against a protected group, such acts may support an inference that intent has been formulated. Such evidence may include, in particular, evidence of killings perpetrated in a systematic manner, evidence tending to show that types of weapons and methods employed by the attackers were consistent across attacks, and evidence of a consistent *modus operandi* across attacks.'), and 49 (finding that evidence submitted by the Prosecution in relation to the contextual elements of crimes against humanity, as well as in relation to the crime of extermination, is relevant as evidence of killings perpetrated in a systematic manner as underlying acts of genocide).

[37] *Muvunyi* Trial Judgment II (n 19) para. 29; *Akayesu* Trial Judgment (n 3) para. 523; *Karadžić & Mladić* Rule 61 Review (n 9) para. 92.

[38] See, e.g., *Mitrović* Trial Judgment (n 21) 108 (footnotes omitted):

> Likewise, the number of victims, though relevant, is not dispositive. The Appeals Chamber in *Seromba* convicted the Accused of committing genocide with respect to the murder of 1,500 Tutsis; whereas the Trial Chamber of the ICTR in *Ndinibahizi* concluded the existence of genocidal intent in the killing of a single individual at a roadblock. In concluding that the principal perpetrators of that killing committed the killing with genocidal intent, the Trial Chamber specifically noted, 'The fact that only a single person was killed on this occasion does not negate the perpetrators' clear intent, which was to destroy the Tutsi population of Kibuye and of Rwanda, in whole or in part.' The Trial Chamber instead looked at all the facts, including the broader context of events, and concluded that the perpetrators of that single killing committed the killing with genocidal intent.

See also, for an illustration, ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 437.

[39] See *Jević et al.* Trial Judgment (n 5) para. 988 (referring to the *Krstić* Trial Judgment (n 10)); *Prosecutor v. Vuković & Tomić*, No. X-KR-06/180-2, Verdict, 2 July 2010 (hereafter *Vuković & Tomić* Trial Judgment), para. 574; *Prosecutor v. Vuković & Tomić*, No. S1 1K 006124 11 Kžk, Verdict, 22 June 2012 (hereafter *Vuković & Tomić* Appeal Judgment), paras 462–488.

[40] The fact that a perpetrator did not choose the most efficient method to destroy the targeted group is not necessarily dispositive of a lack of genocidal intent. See *Tolimir* Trial Judgment (n 9) para. 748; *Krstić* Appeal Judgment (n 9) para. 32. See also *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 78.

[41] *Muhimana* Trial Judgment (n 9) para. 496.

[42] *Jević et al.* Trial Judgment (n 5) para. 960; *Trbić* Trial Judgment (n 21) paras 193–198; *Prosecutor v. Stupar et al.*, No. X-KR-05/24, First Instance Verdict, 29 July 2008 (hereafter *Stupar et al.* Trial Judgment), pp 58ff; *Prosecutor v. Pelemiš & Perić*, No. S 11 K 003379 09 Krl, Verdict, 31 October 2011 (hereafter *Pelemiš & Perić* Trial Judgment), paras 449–452; *Mitrović* Trial Judgment (n 21) 108–09;

- the extent of bodily injuries caused;[43]
- the use of derogatory language towards members of the group;[44]
- the targeting of property belonging to members of the group;[45]
- the area in which the perpetrator was active;[46]
- the fact that the perpetrator may have targeted the same group during the commission of other criminal acts;[47]
- the perpetrator's demonstrated intent to kill his victims;[48]
- the gravity of the act;[49]
- the general political doctrine which gave rise to the acts;[50]
- the fact that the crimes in question otherwise 'violate the very foundation of the group';[51]
- statements or utterances by the accused/perpetrator relating to the fate of the group or the victims have used to help establish his criminal state of mind;[52]
- efforts to dissimulate the crimes;[53]

Akayesu Trial Judgment (n 3) paras 523–524; *Kayishema & Ruzindana* Trial Judgment (n 5) paras 93–94 and 527; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, 27 January 2000 (hereafter *Musema* Trial Judgment), para. 166; *Jelisić* Appeal Judgment (n 9) para. 47; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 48.

[43] Ibid. [44] Ibid. See also references, *infra*, in fn 96.

[45] *Tolimir* Trial Judgment (n 9) para. 746. See also, ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 344; ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 386–390. See also, *infra*, 9.4.7.3.

[46] *Krstić* Appeal Judgment (n 9) paras 13 and 17; *Popović et al.* Trial Judgment (n 9) para. 832; *Karadžić* Appeal Judgment (n 31) para 727 (footnote omitted) ('The Appeals Chamber recalls that the intent to destroy a group as such is circumscribed by the "area of the perpetrators' activity and control" and the "extent of [the perpetrators'] reach".'); *Mladić* Trial Judgment (n 9) paras 3528 and 3535; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) para. 146; *Brdanin* Trial Judgment (n 19) para. 702; *Krstić* Trial Judgment (n 10) para. 590; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 9) para. 75.

[47] See, e.g., *Nchamihigo* Trial Judgment (n 19) para. 331.

[48] See, *inter alia*, *Jelisić* Appeal Judgment (n 9) para. 47; *Akayesu* Trial Judgment (n 3) para. 523; *Jelisić* Trial Judgment (n 8) paras 73–77; *Karadžić & Mladić* Rule 61 Review (n 9) paras 94–95; *Krstić* Appeal Judgment (n 9) paras 12–14 and 21; *Milošević* Decision on Motion for Judgment of Acquittal (n 4) paras 246 and 288; *Kayishema & Ruzindana* Trial Judgment (n 5) para. 93; *Kajelijeli* Trial Judgment (n 9) para. 806 (and cases cited therein).

[49] *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 34.

[50] *Karadžić & Mladić* Rule 61 Review (n 9) para. 94; *Muvunyi* Trial Judgment II (n 19) para. 29 ('[T]he political doctrine which gave rise to the acts referred to [...].'); *Trbić* Trial Judgment (n 21) para. 198 ('Intent may be inferred from the totality of the circumstances, including the general political doctrine which gave rise to the genocidal acts.').

[51] *Trbić* Trial Judgment (n 21) para. 198. For an illustration as to how this intent is inferred in practice, see, e.g., *Musema* Trial Judgment (n 42) paras 931–934.

[52] See, e.g., *Jelisić* Trial Judgment (n 8) para. 73.

[53] *Tolimir* Appeal Judgment (n 10) paras 567–569 ('All of Tolimir's actions to conceal the crimes that were part of the common plan of the JCE to Murder, therefore even if the 22 February 1997 letter was ex post facto in time, constructively it was contemporaneous with the murder operation. The Appeals Chamber therefore finds that the Trial Chamber did not abuse its discretion by relying on the 22 February 1997 letter as additional evidence in support of its finding that Tolimir possessed genocidal intent.'). See, *contra*, *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) para. 165 ('In relation to the alleged existence of a GoS strategy to deny and conceal the alleged commission of crimes in Darfur, the Majority considers that, even if the existence of such strategy was to be proven, there can

- steps taken to erase the existence of members of the group;[54]
- the systematic detention of members of a group and associated death rate;[55]
- the commission by physical perpetrators of other culpable acts;[56]
- connections between physical perpetrators in terms of time, location, and composition of their group;[57]
- proof of the existence of a plan or policy to commit the crimes;[58]
- the display of genocidal intent through public speeches[59] or at meetings.[60]

Acts which might not qualify as acts of genocide per se because they fail to meet the elements of one of the recognized categories of genocidal crimes could still be relevant as evidence of the specific intent of a perpetrator if these acts provide indications of the perpetrator's state of mind.[61] This could be the case, for instance, of acts of forcible expulsion[62] or attacks on cultural objects.[63]

Other considerations could also be relevant insofar as they might, depending on the circumstances, provide evidence militating *against* a finding of genocidal intent. This category of evidence could include, for instance, the following: evidence of good

be a variety of other plausible reasons for its adoption, such as the intention to conceal the commission of war crimes and crimes against humanity.').

[54] See, for an illustration, *Tolimir* Appeal Judgment (n 10) para. 248 (referring to the following as a basis for its finding of genocidal intent of the perpetrators: the destruction by Bosnian-Serb Forces of the identification documents of the Bosnian-Muslim men from Srebrenica who were detained for the purpose of being executed, the inhumane conditions of detention of those men, the large number of Bosnian-Muslim men killed, and the burial and reburial of the victims killed).

[55] See *Trbić* Trial Judgment (n 21) para. 198 ('Intent may be inferred from [...] the placing members of the group in concentration camps where death rate is very high.').

[56] *Mladić* Trial Judgment (n 9) para. 3440. [57] Ibid.

[58] Ibid., *Karadžić* Trial Judgment (n 12) para. 555; *Tolimir* Appeal Judgment (n 10) para. 246; *Popović et al.* Appeal Judgment (n 4) paras 430, 440, 468; *Hategekimana* Appeal Judgment (n 9) para. 133; *Jelisić* Appeal Judgment (n 9) paras 47–48; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 99; *Tolimir* Trial Judgment (n 9) para. 745. See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 143–148, in particular, paras 143 and 145 (pointing to the evidential importance of a state's policy, if none is established); *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 42–47 (noting that whilst the existence of a genocidal plan or policy has not been considered a legal element of the crime of genocide, proof of such a plan or policy has been deemed relevant to the formation of intent), and 44 (finding that evidence tending to show that preparations for genocide, such as the mobilization of civil defence forces or militia groups and the distribution of weapons to civilians, would also support an inference that a genocidal plan existed); *Nuon Chea et al.* 2010 Closing Order (n 23) paras 1339–1340 (regarding the killing of members of the Cham group) and para. 1347 (in relation to Vietnamese). See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 145.

[59] *Gacumbitsi* Appeal Judgment (n 9) para. 43; *Karadžić* Trial Judgment (n 12) para. 555; *Kajelijeli* Trial Judgment (n 9) para. 531; *Tolimir* Trial Judgment (n 9) para. 745.

[60] *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, Judgment, 19 September 2005, paras 81–82. See also, *Tolimir* Trial Judgment (n 9) para. 745; *Karadžić* Trial Judgment (n 12) para. 555; *Karera* Trial Judgment (n 19) para. 542.

[61] See, e.g., *Krstić* Trial Judgment (n 10) para. 580; *Tolimir* Appeal Judgment (n 10) paras 230 and 254; *Blagojević & Jokić* Appeal Judgment (n 33) para. 123; *Krstić* Appeal Judgment (n 9) paras 33, 133; *Mladić* Trial Judgment (n 9) para. 3435. See also, for an illustration, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015 (hereafter *Nyiramasuhuko et al.* Appeal Judgment), paras 541–549 and related trial findings (finding that the distribution of condoms to perpetrators of rapes with a view to contribute to the commission of such crimes did not constitute evidence of direct and public incitement to crime but could constitute evidence of the accused's genocidal *mens rea*).

[62] See, *supra*, 8.2.3 and, *infra*, 9.4.7.4. [63] See *infra*, 9.4.7.3.

deeds towards members of the targeted group;[64] selectivity in the killing, which might suggest that considerations other than a genocidal intent determined the scope of victimhood;[65] the crimes committed were neither widespread nor systematic; the crimes charged were not backed by an organization or a system;[66] evidence of a disturbed personality which might explain the conduct of the perpetrator;[67] randomness and contradictory nature of the acts of violence attributable to the accused;[68] indications that the perpetrators had a different intention than the destruction of a group (e.g., the elimination of rebels or political opposition);[69] the fact that the perpetrator(s) made no effort to eradicate surviving members of the group, thereby suggesting an absence of destructive mindset towards the group as such;[70] conditions of life and treatment of victims incompatible with an intent to destroy;[71] humanitarian efforts carried out to assist the concerned population;[72] evidence that the acts were motivated only by goals other than the destruction of a group;[73] absence of sufficient connections or affiliations between the disparate physical perpetrators of different crimes;[74] surrounding facts and circumstances (including the relatively small number of victims from each prohibited act); insufficient evidence to determine the scale of the other culpable acts committed by the same perpetrators;[75] speeches and statements reasonably understood to be propaganda or directed at a military enemy, rather than an expression of a genocidal intent,[76] including speeches and statements reasonably consistent with a desire to separate communities rather than destroy one of them;[77] evidence of an intent which falls short of an intent to destroy (such as an intent to displace or create

[64] See *infra*, 9.4.7.9. See also *Karadžić* Appeal Judgment (n 31) para. 727 (noting that the fact that more members of a targeted group could have been killed but were not may indicate a lack of the *dolus specialis* required to prove such intent).

[65] See, e.g., UN International Commission, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 25 January 2005 (hereafter UN Report on Darfur), para. 513 ('[T]here are other more indicative elements that show the lack of genocidal intent. The fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element.') and para. 516. See, also, *infra*, 9.4.7.9; and *Jelisić* Trial Judgment (n 8), para. 106.

[66] *Jelisić* Trial Judgment (n 8) paras 100–101. [67] Ibid, para. 105. See also, *infra*, 8.1.6.

[68] *Jelisić* Trial Judgment (n 8), para. 106. See, however, *supra*, 8.5.2.2.

[69] UN Report on Darfur (n 65) para. 514.

[70] See, e.g., UN Report on Darfur (n 65) para. 515 ('Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Sudanese Government may be held to be in breach of international legal standards on human rights and international criminal law rules, it is not indicative of any intent to annihilate the group.').

[71] Ibid (regarding living conditions in IDP camps in which Darfuris were relocated).

[72] Ibid.

[73] Ibid., para. 517 (in this case, the desire to appropriate cattle belonging to the inhabitants of the village).

[74] *Mladić* Trial Judgment (n 9) paras 3504–3505. [75] Ibid., paras 3506–3507.

[76] Ibid., para. 4235. See also ICJ *Croatia*-Serbia 2015 Judgment (n 11) paras 504–507 (regarding the ICJ's discussion of the meaning and purport of the *Brioni* transcript).

[77] *Mladić* Trial Judgment (n 9) para. 4235. See also, *Karadžić* Trial Judgment (n 12) paras 2596–2597.

ethnically homogeneous locations);[78] isolated nature of the acts;[79] and indications that the perpetrators intended to punish rather than destroy members of a group.[80]

The factors listed above are by no means exhaustive. Which factors are ultimately relevant in a particular case will depend on the specifics of that case.[81] The assessment of all relevant circumstances would determine whether the only reasonable inference is that of genocidal intent, or not.[82] A number of particularly important factors are considered in more detail in the following.

9.4.2 Evidence of conduct and statements of the accused

The accused's participation in, and contributions to, acts of killing and other forms of abuse or mistreatment of members of a targeted group[83] would provide critical

[78] *Mladić* Trial Judgment, Orie Partial Dissent (n 8) para. 5220. See also *Karadžić* Trial Judgment (n 12) paras 2596, 2603 and 2605.

[79] See, e.g., ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 139:

> Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part.

[80] See, e.g., ibid., para. 430; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment, 27 September 2007 (hereafter *Mrkšić et al.* Trial Judgment), para. 535.

[81] Before the ICJ, Croatia had come up with a list of seventeen factors, which it claimed was relevant to the drawing of an inference of genocidal intent. See ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 408. See also, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015, Separate Opinion of Judge Keith) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment, Keith Separate Opinion). See also, *Jević et al.* Trial Judgment (n 5) para. 960; *Trbić* Trial Judgment (n 21) paras 193–198 (listing various factors relevant to such an inference), and 202 (listing the following as factors relevant to establishing the accused's intent: (i) the general context of events in which the perpetrator acted including any plan to commit the crime; (ii) the perpetrator's knowledge of that plan; and (iii) the specific nature of the perpetrator's acts including the following: (a) no acts to the contrary for genocidal intent; (b) single-mindedness of purpose; (c) efforts to overcome resistance of victims; (d) efforts to overcome the resistance of other perpetrators; (e) efforts to bar escape of victims; (f) persecutory cruelty to victims; (g) ongoing participation within the act itself; (h) repetition of destructive acts, i.e. more than one act or site; (i) the acts themselves (The Kravica test): (*i*) the number of victims; (*ii*) the use of derogatory language toward members of the targeted group; (*iii*) the systematic and methodical manner of killing; (*iv*) the weapons employed and the extent of bodily injury; (*v*) the methodical way of planning; (*vi*) the targeting of victims regardless of age; (*vii*) the targeting of survivors; and (*viii*) the manner and character of the perpetrator's participation); *Stupar et al.* Trial Judgment (n 42) 58ff; *Pelemiš & Perić* Trial Judgment (n 42) paras 449–452 (relying on the same ten factors to evaluate the state of *mens rea* of the accused and finding that the perpetrated acts, given the totality of circumstances surrounding the case, were not of such intensity and significance to indicate beyond a doubt that the accused intended to kill the prisoners at Pilica, let alone destroy the Muslim population of Srebrenica); *Kos et al.* Trial Judgment (n 16) paras 609–611, 623–646 (and references cited therein).

[82] Regarding the necessarily 'holistic' approach to the evaluation of the evidence, see, *supra*, 9.3.

[83] Regarding the accused's order to commit rape and her aiding and abetting such crimes as a basis for the inference that the relevant Chambers drew in relation to her genocidal *mens rea* see *Nyiramasuhuko et al.* Appeal Judgment (n 61) paras 508, 738–745, 986, 1012–1014, and 1031 ('Turning to Nyiramasuhuko's submission that her order to rape Tutsi women could also be reasonably explained by a willingness to take revenge on these women rather than by the specific intent to destroy, in whole or in part, the Tutsi group, the Appeals Chamber finds that Nyiramasuhuko fails to demonstrate that the Trial Chamber erred. Indeed, the Appeals Chamber finds that a reasonable trier of fact could have concluded on the basis of the totality of the circumstantial evidence that the only reasonable inference was that Nyiramasuhuko possessed genocidal intent, especially in light of the fact that, during the distribution of condoms, she

indicia regarding the possible presence of the requisite intent.[84] The accused's role in planning, organizing, or implementing a murder operation or other types of violence against such individuals would be particularly relevant in that context.[85] The number of incidents in which the accused was involved,[86] as well as the continuous nature of his involvement in the commission of crimes against members of a group would also be relevant to such an inference.[87]

also uttered that, "after having raped [the Tutsi women,] they should kill all of them" and stated "Let no Tutsi woman survive". Her submission regarding another possible inference is therefore also dismissed.'). See also *Nyiramasuhuko et al.* Appeal Judgment (n 61) para. 546; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgment and Sentence, 24 June 2011 (hereafter *Nyiramasuhuko et al.* Trial Judgment), paras 5870, 5871, 5940, and 6018, where the Trial Chamber relied on its finding that the accused distributed condoms to those encouraged to rape Tutsi women as circumstantial evidence of the accused's genocidal intent.

[84] See, generally, *Popović et al.* Trial Judgment (n 9) paras 1400–1413; *Popović et al.* Appeal Judgment (n 9) paras 504–506; *Tolimir* Appeal Judgment (n 10) paras 571–572 (concerning a document authored by the accused); *Jević et al.* Trial Judgment (n 5) paras 962 (footnote omitted) ('The problems in establishing the genocidal intent occur because "intent is a mental factor which is difficult, if not impossible, to determine, but, on a case-to case basis, it can be inferred from the documentary evidence submitted to the Panel". In practice, the determination that the accused had a genocidal intent often seems only as a conclusion inferred from the hard evidence on the participation in the commission of the criminal offense, coupled with the knowledge that members of the group were massively killed or ill-treated. Therefore, the accused willingly decided to participate in the criminal campaign, aware of what was going on (an enemy group being destroyed or was designated as a group to be destroyed), so it can be concluded that the accused who participated in that campaign undoubtedly had the intention to destroy the group.') and 995–996; *Vuković & Tomić* Trial Judgment (n 39) para. 574. For an illustration, see, e.g., *Seromba* Appeal Judgment (n 9) paras 177–182.

[85] See, e.g., *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Judgment, 1 November 2010, para. 653 (footnote omitted) ('The Chamber recalls that genocidal intent may be inferred from the facts. In this case the Accused attended a meeting at which the demolition of the Nyange Church was discussed, that he suggested to others that the church should be destroyed and that he was present during the attacks on the Tutsi on the morning of 15 April 1994, including when Ndahimana instructed the assailants to start working, which was understood to mean "kill the Tutsi". The Accused was also seen repeatedly on 15 and 16 April 1994 in the presence of individuals such as Ndahimana, Kayishema and Ndungutse, who were overseeing and directing the attacks. Having considered the totality of the evidence, the Chamber finds it established beyond reasonable doubt that Kanyarukiga acted with the special intent to destroy the Tutsi ethnic group, either in whole or in part.'). See, also, *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, Judgment, 21 May 2007 (hereafter *Muhimana* Appeal Judgment), para. 31 (and references to factors and evidence relevant to the Trial Chamber's finding on that point); *Muhimana* Trial Judgment (n 9) paras 515–518; *Munyakazi* Appeal Judgment (n 9) para. 142 (footnotes omitted) ('The Trial Chamber established Munyakazi's intent to participate in the crimes based on his personal participation and leadership role in attacks, which resulted in the death of thousands of mostly Tutsi civilians. The Appeals Chamber can identify no error in this approach. The Appeals Chamber has held that an accused's intent to participate in a crime may be inferred from circumstantial evidence, including his active participation in an attack. Indeed, contrary to Munyakazi's suggestion, "[t]he inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent." The lack of evidence concerning Munyakazi's personal views about Tutsis does not undermine the reasonableness of the Trial Chamber's findings. Furthermore, the evidence of his active participation in the killing of thousands of Tutsi civilians at two parishes reasonably demonstrates that he possessed both genocidal intent and the requisite intent for extermination as a crime against humanity, that is, the intent to kill on a large scale with awareness that the crimes formed part of a widespread and systematic attack against Tutsi civilians.'); *Munyakazi* Trial Judgment (n 19) paras 496–500; *Karera* Trial Judgment (n 19) paras 541–543.

[86] See, e.g., *Mitrović* Trial Judgment (n 21) 108 ('It is not necessary that the perpetrator participated in multiple events or incidents in order to establish that the perpetrator had genocidal intent.').

[87] *Trbić* Trial Judgment (n 21) para. 790 (regarding the mass killing of detained persons) ('While this suffices for intent as to the underlying offense of both killing and serious bodily or mental harm, the Panel also reaches the same conclusion as to the standard for genocidal intent as found below. Any doubt

However, the mere fact of an accused's involvement in an operation in which acts of genocide were committed would not necessarily be sufficient, on its own, to draw the necessary inference that he possessed the genocidal intent.[88] The scope and nature of his participation, as well as the information that would have been available to him as a result of his role, would be directly relevant to drawing an inference on that point.[89] His position and function in such an operation would also be an important factor.[90]

Proof that the accused had the requisite intent to commit the underlying offence with which he is charged (killing, for example), may also serve as evidence from which to draw 'the further inference that the accused possessed the specific intent to destroy [one of the protected groups]'.[91] In other words, the commission of the *actus reus* of a crime of genocide could be relevant, though not necessarily conclusive, evidence of his having acted with the requisite *dolus*.[92] The two elements of *mens rea*—that attaching

as to his intentions is clearly eliminated when one realizes he participated in the continuous nature of the act for hours and hours until all the prisoners were believed to be dead.').

[88] See, e.g., *Kos et al.* Trial Judgment (n 16) paras 621 (regarding the events of Srebrenica of July 1995) ('Therefore, based on the presented evidence the Panel failed to establish beyond a reasonable doubt that the Accused acted with genocidal intent when executing detainees in the Branjevo farm, that is, one of the essential elements of the criminal offence of Genocide set forth in Article 171 of the CC of BiH has not been proven.'), 622 ('The Accused could not have been found guilty of aiding and abetting genocide, because the Prosecution failed to prove that at the time of the execution of men in Branjevo they knew of the mass executions of Bosniak men from Srebrenica in other locations in the area of responsibility of the Bratunac and Zvornik Brigade, that is, that at the time of perpetration they knew of the genocidal intent of principal perpetrators from the VRS military and civilian leadership, who have not been named under the Indictment.'), and 623–646 (finding that the accused did not know of the perpetrator's genocidal intent). See also *Prosecutor v. Kuvelja*, No. S1 1 K 004050 13 Kri, First Instance Verdict, 26 April 2013 (hereafter *Kuvelja* Trial Judgment), paras 484–504 (for an illustration of a case where it was found that the accused, whilst involved in acts of killing and forcible transfer, was not aware of a plan or intent on the part of others involved in the operation to destroy a group in whole or in part as such); *Prosecutor v. Kuvelja*, No. S1 1 K 004050 13 Krž 15, Second Instance Verdict, 19 November 2013 (hereafter *Kuvelja* Appeal Judgment), paras 111–117 (pointing, in particular, to the Accused's young age, the lack of military training and experience, the selected information that he received before he went to the Srebrenica territory, and after his arrival in Srebrenica).

[89] See, for an illustration, *Popović et al.* Appeal Judgment (n 9) para. 517 (regarding the accused Nikolić).

[90] For an illustration, see, e.g., *Popović et al.* Appeal Judgment (n 4) paras 509–510 and 515 (regarding the accused Nikolić). See also, *Jević et al.* Trial Judgment (n 5) para. 987 and 990; *Vuković & Tomić* Trial Judgment (n 39) para. 572; *Trbić* Trial Judgment (n 21) para. 200; *Kos et al.* Trial Judgment (n 16) para. 614 (suggesting that the level of knowledge about the details of the plan or policy for the perpetration of genocide depends on the position of the perpetrator in the civilian hierarchy or military chain of command).

[91] *Krstić* Appeal Judgment (n 9) para. 20. See, for an illustration, *Mitrović* Trial Judgment (n 21) 108–09 (footnote omitted) ('The underlying criminal act of killing co-perpetrated by the Accused constitutes probative evidence from which the Accused's genocidal intent can be inferred beyond doubt when viewed in light of his exposure to the broader context of the events of Srebrenica, and his basic knowledge of the genocidal plan. In considering the inferences that can be drawn from the act of killing, the following factors, inter alia, have been identified by other Tribunals as relevant to this analysis: the number of victims; the use of derogatory language toward members of the targeted group; the systematic and methodical manner of killing; the weapons employed and the extent of bodily injury; the methodical way of planning; the targeting of victims regardless of age; the targeting of survivors; and the manner and character of the perpetrator's participation.'). The *Mitrović* Trial Judgment was overturned on appeal based on the view that no reasonable trier of fact could conclude that the accused Petar Mitrović indeed had a genocidal intent to destroy a protected group, in whole or in part. *Prosecutor v. Mitrović*, No. S 1 K 014264 13 Krž, Second Instance Verdict, 22 January 2014 (hereafter *Mitrović* Appeal Judgment), paras 209, 216 and 221.

[92] For an illustration, see *Nyiramasuhuko et al.* Appeal Judgment (n 61) paras 1029–1031. See also, *Tolimir* Appeal Judgment (n 10) para. 253 (footnotes omitted):

> The Appeals Chamber further rejects Tolimir's argument that the Trial Chamber erred by basing its mens rea analysis on the very acts constituting the *actus reus* of genocide, thereby

to the underlying crime and the genocidal intent—are legally distinct, however, and both must be established in each case in relation to the accused.

Statements and utterances of the accused (in whatever form) might also be relevant.[93] Orders to commit crimes or inciting and encouraging words intended to lead to the commission of crimes would provide relevant evidence of the accused's state of mind.[94] Implied calls to kill members of the targeted group could also constitute evidence of genocidal intent.[95] The accused's use of derogatory language to describe the targeted group or its member might also be relevant evidence of genocidal intent.[96]

> double-counting those acts as indicators of genocidal intent. Tolimir misunderstands the Trial Chamber's analysis. The Trial Chamber did not consider the underlying genocidal acts themselves (i.e., the mass killings, the acts causing serious mental harm or leading to conditions of life designed to bring about the Bosnian Muslims' destruction as a group) as proof of the *dolus specialis*. It only relied on the circumstances under which such acts were committed, as well as the mental state of the perpetrators. The Appeals Chamber recalls that genocidal intent may be inferred from 'the general context' of the commission of the underlying genocidal acts, 'the perpetration of other culpable acts systematically directed against the same group', or 'proof of the mental state with respect to the commission of the underlying act' of genocide. This was the approach followed by the Trial Chamber in this case. The Appeals Chamber finds no error in the Trial Chamber's analysis.

[93] See, e.g., *Nahimana et al.* Appeal Judgment (n 9) para. 567 ('The Trial Chamber found on the basis of Witness LAG's testimony that the Appellant stated at Bucyana's funeral that "if Habyarimana were also to die, we would not be able to spare the Tutsi". Appellant Ngeze does not explain how these remarks were taken out of context and could not be relied upon in determining his genocidal intent.'); *Nizeyimana v. Prosecutor*, Case No. ICTR-00-55C-A, Judgment, 29 September 2014, paras 120–122; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 84 (referring to the Trial Chamber's finding at Transcript, 28 June 2012, 28769), and 88, 95 and 97–98; *Karadžić* Appeal Judgment (n 31) paras 588ff, 712ff and 738ff; *Stakić* Appeal Judgment (n 7) paras 49–52; *Stakić* Trial Judgment (n 35) para. 554. Proof of genocidal intent does not, however, require specific statements or admissions by the perpetrator describing his intent. *Stupar et al.* Trial Judgment (n 42) p 58; *Mitrović* Trial Judgment (n 21) 49. See, also, references *supra* in fn 19.

[94] See, for an illustration, *Nchamihigo* Trial Judgment (n 19) paras 331 and 333–335 (regarding the accused's own words and deeds). See also *Karera* Trial Judgment (n 19) para. 539 ('Karera's orders to kill Tutsis demonstrate his genocidal intent. He was aware of the dangerously unstable environment, having evacuated his family from Nyamirarnbo for safety reasons (IL7), and knew that his order would lead to killings. His order to destroy houses of Tutsis as well as the destruction of the houses of Kahabaye and Felix Dix (11.4.5) also illustrate his intent. The Chamber sees no need to take into account Karera's anti-Tutsi statement concerning school-children in Zaire in December 1994 (11.8.2).').

[95] See, generally, for an illustration, *Nahimana et al.* Appeal Judgment (n 9) paras 568–569.

[96] See, generally, *Popović et al.* Appeal Judgment (n 4) paras 470, 506 (footnote omitted) ('The Appeals Chamber notes that the Trial Chamber did explicitly discuss Nikolić's use of derogatory language as a relevant factor in inferring genocidal intent but concluded that "there is nothing to suggest this was [something] other than a reflection of an unacceptable but common practice". The Prosecution has failed to present any cogent argument why this conclusion was one that no reasonable trier of fact could have made.'); *Tolimir* Appeal Judgment (n 10) paras 573–576; *Tolimir* Trial Judgment (n 9) paras 1161, 1168–1169 and 1172; *Popović et al.* Trial Judgment (n 10) para. 1177; *Stakić* Trial Judgment (n 35) para. 554 ('Even though Dr. Stakić helped to wage an intense propaganda campaign against Muslims, there is no evidence of the use of hateful terminology by Dr. Stakić himself from which the *dolus specialis* could be inferred. Statements made by Dr. Stakić do not publicly advocate killings and while they reveal an intention to adjust the ethnic composition of Prijedor, the Trial Chamber is unable to infer an intention to destroy the Muslim group.'); *Stakić* Appeal Judgment (n 7) para. 52 (footnote omitted) (relating to the Trial Chamber's conclusion that Stakić's derogatory statements were not evidence of a genocidal *mens rea*, but only revealed his ethnic bias and bigotry):

> The Trial Chamber thus clearly considered the Appellant's derogatory statements and propaganda, and the Appeals Chamber concludes that its assessment of them was reasonable. Evidence demonstrating ethnic bias, however reprehensible, does not necessarily prove genocidal intent. It is true, as the Prosecution suggests, that utterances might constitute evidence

Similarly, the presence of the accused at relevant sites, particularly when combined with words or other forms of encouragement, could provide evidence from which the requisite intent could be inferred.[97] However, mere presence at the scene of a crime would not in and of itself necessarily allow for the drawing of such an inference.[98]

Evidence of acts and decisions attributable to the accused could also be relevant insofar as it would contradict the suggestion that he possessed the requisite intent. For instance, evidence of his refusal to carry out criminal orders or to take part in acts of killing could militate against an inference of genocidal intent.[99]

9.4.3 Genocidal intent of third parties

An inference that the accused possessed the requisite genocidal intent will often be based on what he is shown to have known about other people's state of mind.[100]

> of genocidal intent even if they fall short of express calls for a group's physical destruction; a perpetrator's statements must be understood in their proper context. In the context of events such as those occurring at Prijedor, ethnic slurs and calls for ethnic cleansing might reasonably be understood as an implied call for the group's destruction. But it is for the Trial Chamber in the first instance to draw factual inferences from indirect evidence. On the facts of this case, the Prosecution has not demonstrated that no reasonable Trial Chamber could fail to conclude that the Appellant's utterances demonstrated his genocidal intent beyond a reasonable doubt. The Appeals Chamber will consider the implications of the utterances in combination with the remainder of the evidence in the following section.

[97] See, e.g., *Nyiramasuhuko et al.* Appeal Judgment (n 61) paras 984–987. See also *Gatete* Trial Judgment (n 9) paras 589–590 (in regard to a case of involvement in a joint criminal enterprise); *Kos et al.* Trial Judgment (n 16) paras 611 and 613; *Jevic et al.* Trial Judgment (n 5) paras 961 (footnote omitted) ('[T]he statements and/or testimony of the accused, showing his attitude towards the fate of the group or victims, can be taken into account to possibly examine his state of mind at the moment of perpetration of the criminal offense.') and 965; *Trbić* Trial Judgment (n 21) paras 193 and 197.

[98] *Kos et al.* Trial Judgment (n 16) para. 640, finding that the mere presence of the accused Kos at the Kravica warehouse where executions took place did not prove that at any point he became aware of the genocidal intentions and plans of the leaders of the Main Staff of the army after the fall of Srebrenica.

[99] See, e.g., *Trbić* Trial Judgment (n 21) paras 803–807; *Stupar et al.* Appeal Judgment (n 4) paras 553–556 and 572; *Kos et al.* Trial Judgment (n 16) para. 620 ('The assignment given to a few members of the 10th Sabotage Detachment on the 16 July included unlawful acts directed at the killings of a large number of people selected only on their ethnic, national and religious background, so the Accused cannot fully avoid their responsibility for those actions. However, at the same time it is undisputed that after their assignment in Branjevo they refused to participate in the execution of men in the Pilica Dom, which also shows that they did not have the intent to destroy, in whole or in part, the Muslim population as a group, because if they had had such a motive, they would have certainly continued with the execution of those men.').

[100] See, generally, *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 40–41. See also, *Jević et al.* Trial Judgment (n 13) paras 963 (footnote omitted) ('The Panel holds that the knowledge of the Accused about the genocidal intent of others is relevant since it shows his certain genocidal *mens rea*. However, the existence of genocidal intent within the meaning of Article 171 of the CC of BiH must be the only reasonable conclusion from the evidence and must be established beyond a reasonable doubt.'), 968–969 (highlighting that such knowledge is not necessarily sufficient to infer the presence of genocidal intent, even when the accused participated in the commission of crimes with those possessing that intent), and 983–1061 (for related legal and factual findings); *Vuković & Tomić* Appeal Judgment (n 39) paras 462–488; *Mitrović* Trial Judgment (n 21) 96 ('Of course, the consequences of the principal perpetrator's actions are a relevant evidentiary consideration with respect to genocidal intent, but proof that the principal perpetrators, by their acts alone, did not or could not achieve the destruction in whole or in part of the protected group is legally irrelevant.'); *Kos et al.* Trial Judgment (n 16) para. 612.

Particularly important in that context is proof that the accused had knowledge that the perpetrators of underlying acts, for which he is allegedly responsible, possessed the requisite genocidal intent.[101] This could be the case, for instance, in relation to subordinates of the accused, individuals above him in the hierarchy,[102] or third parties operating 'horizontally' alongside him.[103] In the context of a single hierarchical structure, such as a military hierarchy, the involvement of individuals who serve at different levels of the hierarchy in killing operations could also provide circumstantial evidence of genocidal intent of those involved.[104]

The accused's knowledge of other people's genocidal intent might not be enough in all cases for the court to draw an inference that the accused possessed the requisite intent, although he might have acted alongside perpetrators who possessed that intent.[105]

[101] See, for instance, *Bizimungu* Appeal Judgment (n 19) paras 199 (footnotes omitted) ('The Trial Chamber also made no finding with respect to the *mens rea* for genocide. However, Witness DBJ, whose evidence the Trial Chamber accepted as credible, testified that the soldiers selected Tutsis to be taken away after checking their identity cards. The only reasonable inference available from this evidence, taken in conjunction with the widespread killing of Tutsis in Rwanda at the time, was that the soldiers who participated in these killings acted with genocidal intent. Furthermore, in light of the Trial Chamber's finding that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the killings of Tutsi civilians at the Josephite Brothers compound, the only reasonable inference is that he also knew of their genocidal intent.'), 275 (footnotes omitted) ('The Trial Chamber also made no finding with respect to the *mens rea* for genocide. However, the Trial Chamber considered the testimony of Witness EZ, whose evidence it accepted as credible, that Jean-Paul Akayesu, the bourgmestre of Taba Commune, and Sixbert Ndayambaje, the former bourgmestre of Runda Commune, visited the ESI bearing lists of names and that Akayesu removed some refugees whose names featured on those lists. This evidence, when taken together with the regular and repeated nature of the crimes and the finding that Tutsis were victims, indicates that the killings and rapes were targeted against Tutsis. The Appeals Chamber finds that the only reasonable inference available from this evidence, taken in conjunction with the widespread killing of Tutsis in Rwanda at the time, was that the soldiers who participated in these killings and rapes acted with genocidal intent. Furthermore, in light of the Trial Chamber's finding that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the killings and rapes of Tutsi civilians at the ESI, the Appeals Chamber finds that the only reasonable inference is that he also knew of their genocidal intent.'), 312 and 346. See also *Tolimir* Trial Judgment (n 9) paras 769–773; *Tolimir* Appeal Judgment (n 10) para. 246 (footnotes omitted) ('The Appeals Chamber recalls that "[a]s a specific intent offense, the crime of genocide requires proof of intent to commit the underlying act and proof of intent to destroy the targeted group, in whole or in part". However, "by its nature, genocidal intent is not usually susceptible to direct proof". As correctly stated by the Trial Chamber, "in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy".'); *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 83 (and authorities referenced therein); *Ngirabatware* Appeal Judgment (n 50) para. 158.

[102] See, e.g., *Stakić* Trial Judgment (n 35) para. 547 ('Having heard all the evidence, the Trial Chamber finds that it has not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakić to enable it to draw the inference that those perpetrators had the specific genocidal intent. As a consequence, the Trial Chamber is unable to draw any inference from the vertical structure that Dr. Stakić shared the intent.').

[103] See, e.g., *Stakić* Trial Judgment (n 35) para. 555 (footnotes omitted) ('The Trial Chamber has considered whether anyone else on a horizontal level in the Municipality of Prijedor had the *dolus specialis* for genocide by killing members of the Muslim group but concludes that there is no compelling evidence to this effect. Simo Drljača, head of the Prijedor SJB, clearly played an important role in establishing and running the camps, and was portrayed by the evidence as being a difficult or even brutal person, but the Trial Chamber is not satisfied that Drljača pulled the Crisis Staff into a genocidal campaign.').

[104] *Tolimir* Appeal Judgment (n 10) paras 246 and 252.

[105] See, e.g., *Mitrović* Appeal Judgment (n 91) para. 225 ('The Accused's knowledge of the genocidal plan and someone else's genocidal intent, however, is insufficient to find the Accused guilty of the criminal offense of Genocide. Rendering a convicting verdict for this gravest crime against the whole

What inference may ultimately be drawn from the accused's knowledge of the acts and state of mind of others will ultimately depend on the nature, extent, and detail of what he knew and what he personally did.[106] In every case, however, the special intent must be established in relation to the accused or perpetrator of the crime.[107]

9.4.4 Motives and inference of special intent

Proof that the accused acted pursuant to certain motives may, in some circumstances, be relevant to drawing inferences regarding his intentions.[108] Thus, for instance, proof of racist motivations or his support for an extremist political agenda may support a finding

humanity requires a proof that he was not only aware that others had such an intent, but rather that the Accused himself shared the same genocidal intent too.'). See also, references *supra* in fn 100.

[106] See, e.g., *Blagojević & Jokić* Trial Judgment (n 10) paras 786–787 and 797; *Blagojević & Jokić* Appeal Judgment (n 33) paras 121 (noting that the Trial Chamber based its finding that Blagojević knew of the genocidal intent of the principal perpetrators on the following facts: (i) his knowledge that the purpose of the Krivaja 95' operation was to create conditions for the elimination of the Srebrenica enclave; (ii) his knowledge that the Bosnian-Muslim population was driven out of Srebrenica town in its entirety to Potočari; (iii) his knowledge that Bosnian-Muslim men were separated from the rest of the population; (iv) his knowledge that Bosnian-Muslim women, children, and the elderly were forcibly transferred to non-Serb held territory; (v) his knowledge that Bosnian-Muslim men were detained in inhumane conditions in temporary detention centres pending further transport; (vi) his knowledge that the Bratunac Brigade contributed to the murder of Bosnian-Muslim men detained in Bratunac town; and (vii) his knowledge of and participation in an operation to search the terrain with the purpose of capturing and detaining Bosnian-Muslim men from the column so as to prevent them from reaching territory under Bosnian-Muslim control), and 123. See also, *Stakić* Appeal Judgment (n 7) para. 40 ('In context, however, it is clear that the Trial Chamber did not suggest that genocidal intent on the part of others was a prerequisite to convicting the Appellant for genocide. Rather, it simply considered whether the apparent intentions of others—such as other members of the Crisis Staff—could provide indirect evidence of the Appellant's own intentions when he agreed with those others to undertake criminal plans. The Trial Chamber also considered the direct evidence of the Appellant's mental state, including his statements, and found it insufficient to establish genocidal intent. The Appeals Chamber sees no error in this approach.'); *Krstić* Appeal Judgment (n 9) paras 99 and 100; *Mladić* Trial Judgment (n 9) para. 3457 (explaining its approach to evaluating whether perpetrators possessed the requisite *mens rea* and what inference could be drawn therefrom in relation to the accused).

[107] The approach taken by the Pre-Trial Chamber in the *Bashir* case, whereby it adopted a *collective* approach to the question of genocidal intent is particularly troubling and unprecedented. Such an approach, which attributes the requisite intent to a collectivity of individuals without legal existence, finds no support in the Convention or under customary international law. See *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 147ff, in particular, paras 150–151 and 159 (referring to 'the [Government of Sudan's] genocidal intent' as opposed to President Bashir's genocidal intent). Such a collective approach to the establishment of genocidal intent is unsupported as a matter of law or practice. It has the effect of collectivizing responsibility by attributing an element of the offence, not to the accused or suspect, but to an abstract entity (made of unspecified members of the Government of Sudan or those sharing control over the 'apparatus' of the State). In so doing, the Chamber *assumes* that members of this entity must have a uniform state of mind and *presumes* that what could be established in relation to this collective entity would necessarily be true of any of its members (including the accused/suspect himself). The law does not provide for such an approach nor for the presumption underlying it. See also H-P Kaul, 'The International Criminal Court and the Crime of Genocide' in C Safferling and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010), 195, in particular, 205ff.

[108] The line between intent and motive is sometimes rather thin from the perspective of the tribunals, who must draw evidential inferences. For example, the Trial Chamber of the ICTY addressed this narrow distinction in the following manner:

> In relation to 'killing members of the group' the Trial Chamber is not satisfied that Dr. Stakić possessed the requisite *dolus specialis* for genocide, but leaves open the question whether he possessed the *dolus eventualis* for killings which may be sufficient to satisfy the subjective elements of other crimes charged in the Indictment. While the Trial Chamber is satisfied that the common goal of the members of the SDS in the Municipality of Prijedor, including Dr. Stakić as President

that the accused possessed the requisite genocidal intent if it can be shown that these motivations are consistent with or indicative of the accused's genocidal intent.[109] In contrast, motives or, rather, an explanation for why the accused may have acted in a particular way, could rebut the suggestion that he possessed the requisite *dolus specialis*.[110] In all cases, however, the fact that the accused may have had certain reasons to commit a crime is not in itself conclusive of his having had the required *mens rea*.[111] Conversely, the fact that the accused may have had particular motives unrelated to a genocidal enterprise, such as a desire to avenge some old family feud or to eliminate political or military resistance,[112] does not necessarily negate the presence of such intent.[113]

> of the Municipal Assembly, was to establish a Serbian municipality, there is insufficient evidence of an intention to do so by destroying in part the Muslim group. The Trial Chamber believes that the goal was rather to eliminate any perceived threat, especially by Muslims, to the overall plan and to force non-Serbs to leave the Municipality of Prijedor. Security for the Serbs and protection of their rights seems to have been the paramount interest. As one member of the ECMM delegation which visited Prijedor Municipality in late August 1992 pointed out, 'the conclusion to be drawn from what we have seen is that the Muslim population is not wanted and is being systematically kicked out by whatever method is available.' Had the aim been to kill all Muslims, the structures were in place for this to be accomplished. The Trial Chamber notes that while approximately 23,000 people were registered as having passed through the Trnopolje camp at various times when it was operational and through other suburban settlements, the total number of killings in Prijedor municipality probably did not exceed 3,000.

Stakić Trial Judgment (n 35) para. 553 (footnotes omitted). See also, *supra*, 8.1.5.

[109] *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 160. The presence of odious or sadistic instincts does not preclude the conclusion that the required *mens rea* has been met. For instance, the fact that an individual took pleasure in committing crimes does not preclude the finding that he intended to commit a genocidal crime. *Jelisić* Appeal Judgment (n 9) para. 71.

[110] The Appeals Chamber of the ICTY noted the following:

> With regard to the Prosecution's argument that the Trial Chamber erred in law by considering that Nikolić's possible motive for participating in the genocidal plan undermined his genocidal intent, the Appeals Chamber does not construe the Trial Chamber's assertion that '[a]nother reasonable inference is that Nikolić's blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation, despite its murderous nature and the genocidal aim of his superiors' to mean that the Trial Chamber confused intent and motive or that it concluded that the existence of a motive would be incompatible with genocidal intent. The Appeals Chamber considers that the Trial Chamber held that the Prosecution had not established genocidal intent beyond reasonable doubt.

Popović et al. Appeal Judgment (n 9) para. 516 (footnotes omitted).

[111] See, *supra*, 8.1.5.

[112] For an illustration, see *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 22 (noting that attacks on the Fur, Masalit, and Zaghawa population appeared to be the result of a perception of an affiliation between the Fur, Masalit, and Zaghawa and the rebel groups, rather than driven by a genocidal intent), 64 ('The focus of the destructive intent required for genocide must also be distinguished from the intent to destroy rebels and sources of support for rebels to the extent that they are considered combatants. Within the framework established by customary international law, however, the suppression and targeting of rebel groups and their supporters is legal only to the extent that the targeted persons are combatants. Civilians, by contrast, do not lose their protected status and become legitimate targets until they participate in hostilities to the extent that they become combatants. For example, it would not be permissible to make a blanket assumption that members of a protected group are, by definition, rebels or rebel supporters and to target or seek to destroy them accordingly.'), and 65–66 (suggesting that even if some evidence indicates that some members of the 'African tribes' were assisting rebels, this would not per se legitimize the suggestion that the entire group of 'African tribes' was a 'lawful target').

[113] *Jelisić* Appeal Judgment (n 9) para. 49. See also *Krstić* Trial Judgment (n 10) para. 597 (concerning the impact of strategic or military ends to a finding that the accused possesses the genocidal *mens rea*). See also, *supra*, 8.1.5.

9.4.5 Method used

The method by which the crime is carried out is not, in principle, determinative of the question of whether genocide has been committed or whether the perpetrator acted with genocidal intent.[114] The fact, for instance, that a perpetrator did not choose the most efficient of means to carry out his deeds is not dispositive of the question of whether he acted with genocidal intent.[115] Even where the method selected proves incapable of implementing the perpetrator's goal of group destruction, a court may still find that he acted with that intention.[116] It is the case, however, that certain methods—such as mass killings—might provide strong evidence of the possible presence of such an intent.[117] It should be reiterated that there are a number of ways to seek to physically destroy a group or a part thereof, and even though the killing of members of the group is the most direct way towards achieving that goal, there are other methods which, individually or in combination, could contribute to that result and which may reflect a genocidal intent.[118] This is already reflected in the variety of punishable acts recognized under Article II of the Genocide Convention, which includes not just acts of killing but also other forms of non-lethal violence towards members of the group.[119]

9.4.6 Initial steps in a genocidal process

An intent to destroy a group might not be immediately apparent from the initial steps taken by the perpetrators towards that goal. The adoption of discriminatory laws or discriminatory practices such as the compulsory wearing of identifiable signs might not, at the time, have been clear indications of an intent to destroy a group.[120] When considered in context, however, such acts could provide evidence of just such an intention. Similarly, the creation of inhumane living conditions or the systematic denial

[114] In his appeal, Clément Ruzindana claimed that the Trial Chamber had omitted to conduct an analysis of the circumstances and means whereby he was alleged to have carried out his acts of genocide. See *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 167. The Appeals Chamber held that there was no necessary relationship between the manner in which genocide is carried out and the personal circumstances of an accused; nor does genocide require proof that the accused possessed certain means to prepare or commit genocide. Ibid., para. 169. See also *Krstić* Appeal Judgment (n 9) para. 32 ('While this [genocidal] intent must be supported by the factual matrix, the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.').

[115] *Tolimir* Trial Judgment (n 9) para. 748; *Krstić* Appeal Judgment (n 9) para. 32.

[116] *Krstić* Appeal Judgment (n 9) para. 32.

[117] See, e.g., *Mitrović* Trial Judgment (n 21) 108; ICJ *Croatia-Serbia* 2015 Judgment (n 11) 3 para. 437. See also, *infra*, 9.4.7.

[118] See *Ivanović* Appeal Judgment (n 35) para. 46; *Stupar et al.* Trial Judgment (n 42) 57.

[119] See, *infra*, Chapter 10. Acts that do not themselves constitute genocidal acts could provide evidence of the perpetrator's genocidal intent. See, e.g., *Karadžić* Appeal Judgment, para. 728 (footnotes omitted) ('The Trial Chamber recalled that conduct not constituting acts of genocide may be considered when assessing. genocidal intent. Furthermore, when assessing the mens rea for genocide, the Trial Chamber extensively detailed criminal conduct committed against Bosnian Muslims and Bosnian Croats that resulted in both immediate physical destruction as well as the remaining conduct which the Prosecution argues would have impacted the long-term survival of the targeted groups.').

[120] See *Krstić* Trial Judgment (n 10) para. 547.

of rights on discriminatory grounds to members of a particular group could be indications of the presence of genocidal intent towards this group.[121] To determine the evidential relevance of certain actions for the purpose of inferring the presence of genocidal intent, one must therefore look beyond the immediacy which may exist between a particular conduct and the consequences of that conduct upon the targeted group or its members.[122] This state of affairs is now formally acknowledged by the *Elements of Crimes*, which provide that the term 'in the context of' would include 'the initial acts in an emerging pattern'.[123]

Also relevant in this context is the inchoate crime of conspiracy to commit genocide.[124] One of the principal reason for the inclusion of this notion in the Genocide Convention was to provide an important normative tool capable of criminalizing the early stages of a genocidal process.[125]

9.4.7 Other contextual factors

A great many contextual factors could be relevant to establishing the presence of genocidal intent and many have been mentioned earlier. This section will address only a few of these factors.

9.4.7.1 Scale and number of crimes committed

An important contextual factor is the scale, scope, nature, and intensity of the criminality directed at members of a particular group.[126] Proof of widespread criminality

[121] See *Judgment of the Supreme Court of the Republic of Latvia Concerning Genocide*, Case PAK-269 (Sup Ct Latvia 4 November 1996) (hereafter Latvia Supreme Court *Judgment Concerning Genocide*) (suggesting that acts of genocide against members of a targeted group were carried out by killing them, inflicting serious physical injuries, 'as well as deliberately creating such living conditions that led to their physical destruction or decrepitude, in whole or in part, or by depriving people of their economic, political and social rights or restricting these').

[122] See Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) (hereafter Lemkin, *Axis Rule in Occupied Europe*), 79, 87–89.

[123] Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess, part II.B, UN Doc. ICC-ASP/1/3, 3–10 September 2002 (hereafter ICC *Elements of Crimes*), art. 6(a).

[124] See *infra*, 11.3.

[125] See *infra*, 11.3.2. See also See also, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgment, 22 June 2009 (hereafter *Kalimanzira* Trial Judgment), para. 510.

[126] See references *supra*, 9.4.1. See also, for illustrations, *Nyiramasuhuko et al.* Appeal Judgment (n 61) para. 3308 (footnote omitted) ('The Appeals Chamber notes that the Trial Chamber found that the individuals responsible for the killing of the abducted Tutsi women and girls had genocidal intent based on "the widespread killing of Tutsis throughout Rwanda as well as the fact that the assailants who abducted Nambaje came to a house claiming to look for Tutsis".'); *Muhimana* Trial Judgment (n 9) paras 515–518, in particular 516 ('Factors such as the sheer scale of the massacres, during which a great number of Tutsi civilians died or were seriously injured, and the number of assailants who were involved in the attacks against Tutsi civilians, lead the Chamber to the irresistible conclusion that the massacres, in which the Accused participated, were intended to destroy the Tutsi group in whole or in part.'); *Mladić* Trial Judgment (n 9) paras 3511, 3513, 3515, 3519, 3524 and 3526; *Rukundo* Trial Judgment (n 9) paras 568 ('Considering the general context of mass ethnic killing in Gitarama préfecture and in Kabgayi, and, specifically, the systematic targeting of Tutsi at St. Joseph's College and the Accused's reference to the Rudahunga family as Inyenzi, the Chamber is satisfied that Madame Rudahunga, her two children and the two other Tutsi civilians were targeted because they were Tutsi. Under these circumstances,

aimed at members of a particular group would be relevant to at least two aspects of an accused's *mens rea*.[127] First, large-scale violence directed at members of a given group would weaken an accused's claim that he had no knowledge of the commission of these crimes. Second, this sort of criminal occurrence would almost necessarily reflect a commonality of goals by different actors, which would at least be consistent with the purpose of destroying the group, though not necessarily conclusive. The fact, however, that crimes are committed on a wide scale and that the accused participated in their planning or commission does not necessarily result in the necessary conclusion that the crimes were driven by an intent to destroy a group or that the accused possessed that intent.[128]

Conversely, the small number of members of a particular group who were targeted relative to the size of the group might militate against a finding of genocidal intent.[129] The fact that incidents are few or isolated may also weigh against the suggestion that genocide was intended.[130] One should, however, guard against a suggestion that the limited number of crimes is always and necessarily an indication of the absence of genocidal intent as destruction only needs to be *intended* and genocide can be, and often is, an evolving process where crimes targeting members of a group might increase over time.[131]

the Chamber finds beyond reasonable doubt that Rukundo, when committing these crimes, possessed the intent to destroy, in whole or in part, the Tutsi ethnic group.'), and 572 and 575; *Semanza* Appeal Judgment (n 9) para. 262 (regarding the genocidal intent of the principal perpetrators); *Simba* Trial Judgment (n 19) paras 415–419.

[127] See, generally, *Krstić* Trial Judgment (n 10) para. 590 ('Although the perpetrators of genocide need not seek to destroy the entire group protected by the [Genocide] Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such resulting in a lesser number of victims, would qualify as genocide if carried out with intent to destroy the part of the group as such located in this small geographical area. [...] In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.'). See also *Sikirica et al.* Judgment on Defense Motions to Acquit (n 9) para. 75.

[128] For an illustration of that state of affair, see the findings of the *Mladić* Trial Chamber in relation to 'other municipalities' (i.e., other than Srebrenica). *Mladić* Trial Judgment (n 9) paras 3504–3505. See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 193–201 (listing factors militating against a finding of genocidal intent), in particular, para. 201 ('As a result, the Majority considers that the existence of reasonable grounds to believe that the [Government of Sudan—GoS] acted with genocidal intent is not the only reasonable conclusion of the alleged commission by GoS forces, in a widespread and systematic manner, of the particularly serious war crimes and crimes against humanity mentioned above. Whether a different conclusion is merited when assessed in light of the other materials provided by the Prosecution in support of the Prosecution Application shall be analysed by the Majority in the following section.').

[129] See, e.g., *Stakić* Appeal Judgment (n 7) paras 34–35. See also *Sikirica et al.* Judgment on Defense Motions to Acquit (n 9) para. 75.

[130] ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 139 ('Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part.').

[131] See, e.g., *Nuon Chea et al.* 2010 Closing Order (n 23) para. 1341 ('[T]he intention of the senior leaders of the CPK is inferred from the fact that the genocide of the Cham occurred in the general context of an escalating persecutory attack against the Cham directed by the CPK Centre.') and para. 1348.

9.4.7.2 *Unrealistic goals*

That the destructive aim of the perpetrators might have been unrealistic does not necessarily negate the fact that the conduct in question might have been genocidal in character. Rather, that fact would be relevant to establishing whether it was truly carried out with the requisite intent.[132]

9.4.7.3 *Attacks on cultural and religious objects*

The Genocide Convention prohibits the intended physical and biological destruction of a group, not attacks on cultural or religious objects or symbols of the group.[133] However, while such actions cannot constitute the underlying acts of genocide, they may, in the circumstances of a given case, be considered evidence of an intent to physically destroy the group.[134] The destruction, for instance, of religious buildings can

[132] See, e.g., *Mitrović* Trial Judgment (n 21) 96–97:

> One act, if the perpetrator performed it with the aim to destroy the protected group, is theoretically sufficient, even if the aim was an unrealistic one. On the other hand, whether or not the aim could be realistically achieved is relevant in determining whether the act was committed with such an aim. The killing of several hundred Bosniak men in isolation could in fact be committed with the aim to destroy the protected group of Srebrenica Bosniaks, depending on the other evidence adduced. However, if the killing was committed in the context of a larger plan to destroy the group by transferring the women, children, and the elderly and killing all of the men, and the perpetrators were aware of that context, the killings would constitute a realistic contribution to the goal of the plan and render the goal more achievable. It would also be a relevant, although not decisive, factor in considering the intent of the perpetrators.

See also *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, 11 September 2006, fn 7 ('The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected.').

[133] See, *supra*, 8.4.1. See also *Krstić* Appeal Judgment (n 9) para. 25; *Karadžić* Trial Judgment (n 12) para. 553.

[134] *Tolimir* Appeal Judgment (n 10) para. 230 (finding that the Trial Chamber erred in concluding that the destruction of mosques was an additional act of genocide under Article 4(2)(c) of the Statute); *Krstić* Trial Judgment (n 10) para. 580; *Karadžić* Trial Judgment (n 12) pars 553; *Popović et al.* Trial Judgment (n 9) para. 822; *Tolimir* Trial Judgment (n 9) para. 746 (footnote omitted) ('Although an attack on cultural or religious property or symbols of the group would not constitute a genocidal act, such an attack may nevertheless be considered evidence of an intent to physically destroy the group.'); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004 (hereafter *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent), paras 53–54; Latvia Supreme Court *Judgment Concerning Genocide* (n 121); ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 344 ('[T]he destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group" [...].'); ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 386–390 (affirming that the destruction of cultural property cannot qualify as an act of genocide under any of the categories of Article II of the Genocide Convention, even if such acts may be taken into account to establish genocidal intent) (cited with approval in *Tolimir* Appeal Judgment (n 10) fn 664). See also United Nations War Crimes Commission, 'Trial of Hauptsturmführer Amon Leopold Göth: Notes on the Case: Genocide' in *Law Reports of Trials of War Criminals*, vol. 7 (HM Stationery Office 1948), 8–9 (footnote omitted) ('According to Lemkin genocide does not necessarily mean the immediate destruction or a nation or of a national group, except when accomplished by mass killings of all its members. It is intended to signify also a co-ordinated plan of different actions

help demonstrate genocidal intent on the part of those carrying out such acts insofar as this may illustrate the perpetrators' efforts at erasing all traces of its existence.[135] Ultimately, however, it is the intent to destroy the group physically or biologically which must be established so that a mere intent to erase a group's culture or symbols would be insufficient to meet this requirement.

9.4.7.4 *Acts of forcible displacement*

Acts of forcible displacement alone are not sufficient to demonstrate an intent to destroy a group but, depending on the circumstances, might provide evidence relevant to establishing such intent.[136]

aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.'); United Nations War Crimes Commission, 'Notes on the Trial of Ulrich Greifelt and Others,' in *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) 37 ('The detailed objectives of such an action are directed towards the "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups".').

[135] See, e.g., *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent (n 134) paras 53–54 (holding that the deliberate destruction of the principal mosque belonging to members of the targeted group could be considered as evidence of intent to destroy the group).

[136] See references, *supra*, 8.2.3, and 12.3.6. See also, *Krstić* Appeal Judgment (n 9) paras 33 and 133 (holding that Krstić harboured no genocidal intent as '[H]is own particular intent was directed to a forcible displacement. Some other members of the VRS Main Staff harboured the same intent to carry out forcible displacement, but viewed this displacement as a step in the accomplishment of their genocidal objective. It would be erroneous, however, to link Krstić's specific intent to carry out forcible displacement with the same intent possessed by other members of the Main Staff, to whom the forcible displacement was a means of advancing the genocidal plan (footnotes omitted).'); *Karadžić* Trial Judgment (n 12) para. 553; ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 190 ('Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is to "destroy, in whole or in part," a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group [...].') (referring to *Stakić* Trial Judgment (n 35) para. 519); *Tolimir* Appeal Judgment (n 10) para. 254 (footnotes omitted) ('The Appeals Chamber rejects, for similar reasons, Tolimir's argument that the Trial Chamber erred in law by holding that evidence of the intent to forcibly remove may also constitute evidence of genocidal intent when considered in connection with other culpable acts systematically directed against the group. The fact that the forcible transfer operation does not constitute, in and of itself, a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of those individuals involved. The Appeals Chamber therefore finds no legal error in the Trial Chamber's holding. For the same reasons, the Appeals Chamber finds no merit in Tolimir's related argument that forcible transfer can only be considered as evidence of genocidal intent if the affected members of the group are transferred to a place where they are subjected to conditions leading to their death or destruction. As noted, a trial chamber may rely on the act of forcible transfer as evidence of genocidal intent, regardless of the destination of the transfer. Tolimir's argument is thus dismissed.'); *Blagojević & Jokić* Appeal Judgment (n 33) para. 123; *Popović et al.* Trial Judgment (n 9) para. 824 (footnotes omitted) ('Forcible transfer alone is an insufficient basis from which to infer the intent to destroy. The intent to displace a group from a given area is distinct from the intent to destroy, and forcible transfer may evince intent to displace rather than destroy. However, forcible transfer is nonetheless a relevant consideration when assessing genocidal intent.'); *Tolimir* Trial Judgment (n 9) para. 748 ('While evidence of intent to forcibly remove is not necessarily indicative of an intent to destroy a group, it may nevertheless constitute evidence of the latter when considered in connection with "other culpable acts systematically directed against the same group".'); and, *infra*, 12.3.6.

9.4.7.5 Discriminatory acts

Evidence of discriminatory acts, which would not themselves be sufficient to constitute the *actus reus* of genocide, may constitute evidence relevant to establishing the presence of genocidal intent.[137] However, discrimination against members of one group, even when implemented through the commission of serious criminal offences, does not necessarily imply that such acts were carried out with genocidal intent.[138] They might, for instance, reflect the existence of an intent to deny rights otherwise guaranteed to others or to enforce discriminatory policies towards members of a particular community.[139] Such acts could amount to persecution.[140] Evidence of discrimination or discriminatory policies is thus not enough on its own to infer an intent to destroy, but it would be relevant, in principle, to establishing the presence of such an intent.

9.4.7.6 Plan or policy to commit crimes

Proof of the existence of a plan or policy underlying the acts is not a necessary legal ingredient of the crime of genocide.[141] Nor will knowledge of such a plan or policy necessarily be sufficient to infer the presence of genocidal intent.[142] Such an awareness will, however, be highly relevant to such an inference.[143]

[137] See references, *supra*, 8.2.3. Genocide is in the category of discriminatory crimes but the element of discrimination against members of a particular group is combined with an intent to destroy that group as such. See *Milošević* Decision on Motion for Judgment of Acquittal (n 4) para. 123 (footnote omitted) ('Genocide is a discriminatory crime in that, for the crime to be established, the underlying acts must target individuals because of their membership of a group. The perpetrator of genocide selects and targets his victims because they are part of a group that he seeks to destroy.').

[138] See, e.g., *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) para. 167 (footnote omitted) ('In the Majority's view, the first three documents (the 1992 NIF Secret Bulletin, the 1994 Decree and 1995 Local Reform) do not provide, by themselves, any indicia of a GoS's genocidal intent. In this regard, the Majority considers that they provide, at best, indicia of the GoS's intent to discriminate against the members of the Fur, Masalit and Zaghawa groups by excluding them from federal government and implementing political arrangements aimed at limiting their power in their homeland (Darfur).'). See also, *supra*, 8.2.3, and *infra*, 12.3.3.

[139] In some cases, such acts could constitute the crime against humanity of persecution rather than genocide. See, generally, Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005), 182ff.

[140] Regarding the overlap and differences between persecution and genocide, see, *infra*, 12.3.3.

[141] See, *supra*, 3.3.2.4 and 7.1.2.

[142] See, e.g., *Mitrović* Trial Judgment (n 21) 103 ('Knowledge of the genocidal plan cannot alone support the inference that the accused possessed genocidal intent.').

[143] See, e.g., *Kayishema & Ruzindana* Trial Judgment (n 5) paras 91, 94, 276, and 528–545; *Krstić* Trial Judgment (n 10) para. 572; *Kambanda* Trial Judgment (n 10) para. 16; *Pelemiš & Perić* Trial Judgment (n 42) para. 446 (footnotes omitted) ('[T]he accused's knowledge of the genocidal plan and of the genocidal intent of others, as well as their participation in their implementation is not on its own sufficient to infer that the accused possessed the genocidal intent themselves [...].' and '[N]ot all persons who contributed to the furtherance of the genocidal plan acted with the identical state of mind or the same level of intention.'); *Stupar et al.* Trial Judgment (n 42) 133; *Stupar et al.* Appeal Judgment (n 4) para. 548 and p. 97; *Vuković & Tomić* Trial Judgment (n 39) para. 574 ('[I]t does not automatically logically follow that [their] participation in the plan—on the orders of their superiors—means that they had the requisite genocidal intention themselves').

9.4.7.7 *Commission of genocidal acts*

Whilst one must take care not to fall for the temptation of hindsight, the fact that 'a genocide' has taken place in a particular area would be relevant to the inference that the court may be able to draw in relation to the acts of a particular defendant.[144]

9.4.7.8 *Mental disorder*

That an accused suffered at the time of the events from a mental disorder will not, in principle, negate the possibility that he might have possessed the requisite intent.[145] Thus, in relation to the accused Goran Jelisić, a lowly Bosnian-Serb camp guard whose mental fitness to stand trial had been questioned, the International Criminal Tribunal for the former Yugoslavia (ICTY) took the view that:

> [There is] no *per se* inconsistency between a diagnosis of immature, narcissistic, disturbed personality on which the Trial Chamber relied and the ability to form an intent to destroy a particular protected group. Indeed, as the prosecution point[ed] out, it is the borderline unbalanced personality who is more likely to be drawn to extreme racial and ethnical hatred than the more balanced modulated individual without personality defects.[146]

Jelisić was, nevertheless, acquitted of the charge of genocide because there was insufficient evidence to establish that he possessed the requisite intent.

9.4.7.9 *'Good deeds'*

The fact that the accused saved or treated certain members of the targeted group humanely will not necessarily negate a finding that he possessed the genocidal *mens rea*, particularly where other reasons might explain his conduct.[147] Similarly, statements of

[144] See, e.g., *Nahimana et al.* Appeal Judgment (n 9) paras 707–709, in particular, para. 709 (footnote omitted):

> The Appeals Chamber is not persuaded that the mere fact that genocide occurred demonstrates that the journalists and individuals in control of the media intended to incite the commission of genocide. It is, of course, possible that these individuals had the intent to incite others to commit genocide and that their encouragement contributed significantly to the occurrence of genocide (as found by the Trial Chamber), but it would be wrong to hold that, since genocide took place, these individuals necessarily had the intent to incite genocide, as the genocide could have been the result of other factors. However, the Appeals Chamber notes that paragraph 1029 of the Judgment concludes that the fact that 'the media intended to [cause genocide] is evidenced *in part* by the fact that it did have this effect'. The Appeals Chamber cannot conclude that this reasoning was erroneous: in some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide and that this was indeed the intent of the author of the speech. The Appeals Chamber, notes, however, that this cannot be the only evidence adduced to conclude that the purpose of the speech (and of its author) was to incite the commission of genocide.

[145] One would have to reserve situations in which the accused's condition might provide him with a defence of 'insanity'.

[146] *Jelisić* Trial Judgment (n 8) para. 70.

[147] See, e.g., *Nahimana et al.* Appeal Judgment (n 31) para. 571 (footnotes omitted) ('The Trial Chamber then concluded that the Appellant's "role in saving Tutsi individuals whom he knew does not, in the

the accused that not *all* members of the targeted group are bad would not necessarily negate a finding that the accused possessed the genocidal intent.[148]

Genocide might be committed by different individuals with varying degrees of commitment to the overall purpose of destroying another group. It is not necessary to establish that the accused was among the 'hardline' supporters of such a genocidal enterprise.[149] It is sufficient to show that he adhered to the purpose of destroying a particular group and that he contributed thereto.

Finally, the fact that a number of members of the targeted group were spared and exchanged rather than killed does not necessarily negate a finding that acts of genocide were committed against members of their group.[150] Instead, as is apparent, for instance, from both genocidal activities during the Second World War and during the Bosnian conflict, the physical removal of people from a particular geographical area could contribute to the perpetrators' overall intent to destroy the group or the part of a group from that particular geographical area, and thus constitute evidence of the perpetrator's overarching goal of destruction.[151]

Chamber's view, negate his intent to destroy the ethnic group as such". The Appellant has failed to demonstrate that these findings were unreasonable. In the opinion of the Appeals Chamber, it was reasonable for the Trial Chamber to find that the Appellant had a genocidal intent while also recognizing that he had saved Tutsi.'). See also *Muhimana* Appeal Judgment (n 85) paras 30–32; *Rutaganda* Appeal Judgment (n 9) para. 537 ('[T]he Appeals Chamber holds the view that a reasonable trier of fact could very well not take account of some of the illustrations [of assisting Tutsi] provided by the Appellant, which appear immaterial within the context of the numerous atrocities systematically and deliberately perpetrated against members of the Tutsi group, owing to their being members of thereof.'); *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005, paras 232, 233 (referring to persecution as a crime against humanity, which is also a specific intent crime); *Nahimana et al.* Trial Judgment (n 9) para. 968; *Karadžić* Appeal Judgment (n 31) para 629 (footnotes omitted) ('The Appeals Chamber notes that Karadzic's first submission challenges the Trial Chamber's conclusion that his agreement to allow the local staff of UNPROFOR, which included Bosnian - Muslim males, to leave the UN compound did not raise any doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed. The Trial Chamber noted in this respect that the reason proffered by the Bosnian Serb forces for separating and taking custody of, Bosnian Muslim males in Potocari, namely that they were to be screened for involvement in war crimes, would not have applied to the local staff of UNPROFOR. Karadzic maintains that his decision allowing such local staff to leave demonstrates that he did not intend that every able-bodied Bosnian Muslim male from Srebrenica be killed. In this respect, 'the Appeals Chamber reiterates that evidence of limited and selective assistance to a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide. Moreover, the. Appeals Chamber considers reasonable the Trial Chamber's view that the pretext of screening for war crimes would not have applied to UNPROFOR staff. Consequently, the Appeals Chamber finds that Karadzic fails to show that the Trial Chamber erred in finding that allowing the local UNPROFOR staff to leave the UN compound did not raise doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.'). See also references, *supra*, 19.4.1 (with regard to the possible 'randomness' of the accused's conduct); and *Jelisić* Trial Judgment (n 8), para. 106.

[148] See *Nahimana et al.* Appeal Judgment (n 9) para. 572 ('Lastly, the Appellant cites no evidence in support of his claim that he went on record many times to say that not all Tutsi were bad. In any event, the Appeals Chamber is of the opinion that, even if this were true, it would not be sufficient to raise a reasonable doubt in regard to the Appellant's genocidal intent as established by the Prosecution evidence. This ground of appeal cannot succeed.').

[149] See, e.g., *Simba* Trial Judgment (n 19) para. 417 ('There is no clear evidence that Simba was among the adherents of a hard line anti-Tutsi philosophy. It cannot be excluded that he participated in the joint criminal enterprise, as a former career military officer and public servant, out of a misguided sense of patriotism or to ensure the protection of himself and those in his are.'); *Simba* Appeal Judgment (n 9) para. 267.

[150] See, e.g., *Popović et al.* Appeal Judgment (n 9) para. 460; *Popović et al.* Trial Judgment (n 9) paras 590–596 and 838.

[151] See references *supra*, in particular, 8.2.3, 9.4.7.4, and 12.3.6.2 (and references cited therein).

10

Punishable Acts

10.1 General Observations

10.1.1 Five categories of punishable acts

Pursuant to Article II of the Genocide Convention, genocide consists of 'any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such':

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group; and

(v) Forcibly transferring children of the group to another group.

Any of these are proscribed inasmuch as they are directed against members of a protected group and are committed with the intent to destroy that group in whole or in part.[1] The list was directly inspired by the sort of criminality witnessed during the Second World War.[2] The same enumeration was later replicated in the statutory instruments of international(ized) criminal tribunals with jurisdiction over acts of genocide.[3]

[1] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 149.

[2] See United Nations War Crimes Commission, 'Notes on the Trial of Ulrich Greifelt and Others' in *Law Reports of Trials of War Criminals* (HM Stationery Office 1949 vol. 13) (hereafter UNWCC, 'Notes on Trial of Ulrich Greifelt'), 39–40 ('As can be seen the offences enumerated in Article 2 of this Convention cover practically the entire field tried in this case. The most conspicuous instances are abortions, punishments for sexual intercourse, preventing marriages and hampering reproduction, and the measures undertaken for forced Germanization, including the kidnapping or taking away of children and infants, the deportation and resettlement of populations, and the persecutions of Jews.').

[3] UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 (hereafter ICTY Statute), art. 4; UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, 8 November 1994 (hereafter ICTR Statute), art. 2; Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 1 July 2002 (hereafter ICC Statute or Rome Statute), art. 6; Law on the Establishment of Extraordinary Chambers in the Courts Of Cambodia for the Prosecution Of Crimes Committed during the Period of Democratic Kampuchea, Doc. NS/RKM/1004/006, 27 October 2004 (hereafter ECCC Statute), art. 4; UN Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (hereafter East Timor Tribunal Statute), art. 4. See, *contra*, Article 28B(f) of

It is understood to be exhaustive in character.[4]

10.1.2 Gravity and potential effect on the group

The five categories of punishable acts share two core features: a high threshold of seriousness *and* the potential to contribute to the destruction of a group (or part of the group). All five punishable acts are grave and infringe upon fundamental protected values, including the protection of human life and the mental integrity of the victims. In turn, serious interferences with these fundamental rights and guarantees represent a potential threat to the existence of a group to which the victims belong.[5] The second characteristic of these offences is their objective. The acts in question must be directed at the destruction of a group and individual members of such a group are targeted because they belong to such group.[6] It is relevant here that the enumeration is not limited to killing or of serious physical or mental harm, but to killing *members of the group*, or causing serious bodily or mental harm *to members of the group*. The conduct of the accused must therefore be directed at members of that group with a view of destroying the group to which they belong and the underlying acts must be capable of contributing to such a goal.[7]

10.1.3 Element of intentionality

To constitute genocide, the underlying act would have to be committed intentionally,[8] that is, deliberately rather than negligently,[9] and 'with intent to

the *Malabo* Protocol, which provides for a more expansive list of prohibited acts. African Union, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 2014 (hereafter *Malabo* Protocol).

[4] See, *infra*, 10.7.

[5] UN GAOR, 3rd Sess, 81st mtg, UN Doc. A/C.6/SR.81 (22 October 1948) (hereafter UN Doc. A/C.6/SR.81), 175 (where UK representative, Mr. Fitzmaurice, noted in relation to the offence of 'causing serious harm' that one should refrain from including in the list of offences acts that were 'not likely to lead to the physical destruction of a group').

[6] Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) (hereafter Robinson, *Commentary on the Genocide Convention*), 58 ('The main characteristic of Genocide is its object: the act must be directed toward the destruction of a group. Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not per se but only as members of the group to which they belong.').

[7] See, e.g., ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 157. See also *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, 27 September 2006 (hereafter *Krajišnik* Trial Judgment), para. 862; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (hereafter *Tolimir* Trial Judgment), para. 738. See also, *supra*, 8.5.2.3 (regarding crimes committed against non-members of the group).

[8] See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), (Judgment of 26 February 2007), [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), para. 186. As discussed below, indirect intent might be sufficient in relation to some of the underlying offence. See, e.g., *infra*, 10.2.2.

[9] See, e.g., *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001 (hereafter *Bagilishema* Trial Judgment), para. 58 (relating to the offence of killing). See also, UN International Law Commission, Draft Code of Crimes against Peace and Security of Mankind with commentaries, 1996 (hereafter ILC, Draft Code 1996), p. 44 and para. 5 ('The prohibited acts enumerated in subparagraphs (a) to (e) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the

destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[10]

10.2 Killing Members of the Group

10.2.1 *Actus reus*

10.2.1.1 Definition

At the *actus reus* level, the notion of 'killing' as an act of genocide is equivalent in substance to the offence of murder,[11] and therefore requires proof that the accused caused the death of the victim.[12] This is also reflected in the International Criminal Court's *Elements of Crimes*.[13] The manner in which the perpetrator killed his victim(s),[14] or

type of acts that would normally occur by accident or even as a result of mere negligence.'); Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Jessberger, 'Definition and Elements of Genocide'), 90.

[10] See, *supra*, Chapter 8.

[11] See generally *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016 (hereafter *Karadžić* Trial Judgment), para. 542 (citing *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004 (hereafter *Brđanin* Trial Judgment), para. 688); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (hereafter *Stakić* Trial Judgment), para. 514; *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017 (hereafter *Mladić* Trial Judgment), para. 3434; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgment, 11 July 2013 (hereafter *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal), paras 18–26; *Prosecutor v. Jević et al.*, No. X-KR-09/823-1, Verdict, 22 August 2012 (hereafter *Jević et al.* Trial Judgment), paras 910–911 and 913 (pointing out that the elements of the offence are identical to those of the war crime and crime against humanity of murder); *Prosecutor v. Vuković & Tomić*, No. S1 1K 006124 11 Kžk, Verdict, 22 June 2012 (hereafter *Vuković & Tomić* Appeal Judgment), paras 419–423; *Prosecutor v. Trbić*, No. X-KR-07/368, First Instance Verdict, 29 April 2010 (hereafter *Trbić* Trial Judgment), paras 176–181; *Prosecutor v. Ivanović*, No. S1 1 K 003442 14, Second Instance Verdict, 1 July 2014 (hereafter *Ivanović* Appeal Judgment), paras 29–30; *Prosecutor v. Pelemiš & Perić*, No. S 11 K 003379 09 Krl, Verdict, 31 October 2011 (hereafter *Pelemiš & Perić* Trial Judgment), paras 148–149; *Munyaneza v. R*, 2014 QCCA 906 (Can. Ct. App.) (hereafter *Munyaneza* Appeal Judgment), para. 167 ('The *actus reus* and the *mens rea* of murder as an underlying offence of genocide do not differ from these elements as described earlier regarding crimes against humanity. It should be added that the number of murders is not a determinative factor.'). During the drafting of the Convention, different views had been expressed about the definition and scope of the notion of 'killing'. See generally William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) (hereafter Schabas, *Genocide in International Law*), 287–88.

[12] See generally *Karadžić* Trial Judgment (n 11) paras 446–448, 481, 542; *Prosecutor v. Ao An*, Case No. 004/07-09-2009-ECCC-OCIJ, Closing Order, 16 August 2018 (hereafter *Ao An* 2018 Closing Order), para. 91 (and references cited). See also Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess, part II.B, UN Doc. ICC-ASP/1/3, 3–10 September 2002 (hereafter ICC *Elements of Crimes*), fn 2 (specifying that 'killed' in this context is 'interchangeable with the phrase "caused death" '). The manner or method of killing is not relevant to the commission of the crime. See, e.g., *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 (hereafter *Krstić* Appeal Judgment), para. 32. See also ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 156.

[13] The *Elements* provide that the perpetrator must have killed one or more person. It is made clear that the expression 'killed' in this context is to be understood as 'causing death'. ICC *Elements of Crimes* (n 12) fn 2.

[14] See, e.g., *Tolimir* Trial Judgment (n 7) para. 737; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment), para. 811; *Brđanin* Trial Judgment (n 11) para. 688; *Stakić* Trial Judgment (n 11) para. 514; *Karadžić* Trial Judgment (n 11) para. 542; *Mladić* Trial Judgment (n 11) para. 3434; *Trbić* Trial Judgment (n 11) para. 779 (finding that the primary means of destruction utilized was killings either execution style or arbitrary and targeted individual killings).

the number of people killed are not material elements of the offence,[15] although it may be relevant to the inferences which can be drawn from the accused's actions (in particular, regarding his *mens rea*) and, if convicted, to his sentence.

It has further been suggested by a Chamber of the State Court of Bosnia-Herzegovina that acts of concealment could also be said to form part of the *actus reus* of that crime where they are intrinsically linked to acts of killing.[16] Such a proposition is hard to justify in light of the definition of the offence. Such acts are better characterized as acts of complicity or aiding and abetting rather than as an illustration of the *actus reus* of killing.[17]

10.2.1.2 Overlap with other genocidal crimes

Factually, acts of killing can overlap with or involve other kinds of genocidal acts; in particular, inflicting conditions calculated to bring about the physical destruction of the group in whole or in part or causing serious bodily or mental harm to members of the group.[18] In such cases, if the act resulted in the death of the victims, the same conduct could constitute two or more underlying genocidal offences. In each case,

[15] A single act of killing could be sufficient. See, e.g., *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (hereafter *Semanza* Trial Judgment), para. 319 (referring to the intentional killing of 'one or more members of the group'); *Karadžić* Trial Judgment (n 11) para. 542 (footnote omitted) ('A numeric assessment of the number of people killed is not required for the *actus reus* of genocide to be established.'); *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, Case 002/02 Judgement, 27 March 2019, para 796. In particular, the ICTY noted:

> The Appeals Chamber notes that while the Trial Chamber assessed whether a reasonable trier of fact could infer that 'a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups *were targeted for destruction* [...] *as such*', its findings on this issue pertain not to the sufficiency of the evidence of the underlying genocidal acts of killing, but to the element of genocidal intent. The Appeals Chamber accordingly discerns nothing in the Trial Chamber's ruling to suggest that it erred in law by imposing a 'group impact' requirement on the *actus reus* of killing, as the Prosecution claims. Indeed, the Appeals Chamber observes that the Trial Chamber explicitly recognised that 'the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold'.

Karadžić Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 11) para. 23 (footnote omitted). This is now expressly reflected in the *Elements of Crimes* applicable before the ICC, which provide that 'The perpetrator [must have] killed *one or more persons*'. ICC *Elements of Crimes* (n 12) art. 6(a)(1) (emphasis added) (footnote omitted). See also, Jessberger, 'Definition and Elements of Genocide' (n 9) 97.

[16] *Trbić* Trial Judgment (n 11) paras 180–181. In particular, the court of Bosnia & Herzegovina noted:

> 180. In this instance, the crime of killing also encompasses the concealment of the crime. Concealment of a crime can also be a separate offence. However, when these acts constitute one operation the act of concealing the crime can be considered part of the underlying offense. The ICTY has regarded the burial of the victims of mass executions, right after they were killed, as comprised within the killing operation. The Panel endorses this approach and regards the further reburials as part of the killing operation as well. Indeed, in the present case, the only difference between the burials of July 1995 and the reburials of September 1995 is one of time; for the remaining part, the acts and the intent are the same.

Ibid., para. 180 (footnote omitted) (citing *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005 (hereafter *Blagojević & Jokić* Trial Judgment), para. 567(l)).

[17] See, in particular, *infra*, 11.7.2.5.

[18] See, *infra*, 10.4 and 10.3.

however, the court would have to satisfy itself that the act, measure, or conduct in question was carried out with the requisite intent and satisfied the elements of each offense. In *Pelemiš & Perić*, for instance, the Chamber found that the treatment of the victims prior to their killing (including acts of starvation, deprivation of fundamental medical services, or acts of physical exhaustion) did not constitute measures designed to bring about the destruction of their group. The conclusion was reached on the basis that the perpetrators 'obviously did not have either the intention or the need to impose measures with that aim' because they knew that they would soon execute the detainees, which was the perpetrator's ultimate goal.[19] Similarly, while the mass killing of men of reproductive age might prevent births within a group, such a killing will not normally constitute a 'measure' designed to bring about the destruction of a group. Additionally, the intent to destroy is most clearly explicated in such a case by the taking of the victims' lives rather than indirectly, through the prevention of births within the group.[20]

10.2.2 *Mens rea*

The notion of 'killing' in this context is equivalent to that of '*meurtre*' (i.e., murder) in the French text (rather than '*assassinat*').[21] The perpetrator must therefore have acted and killed the victim *intentionally*.[22] In the alternative, it is enough to establish that

[19] *Pelemiš & Perić* Trial Judgment (n 11) para. 144.

[20] For illustration of this nuance, see *Pelemiš & Perić* Trial Judgment (n 11) para. 145. See also, *supra*, 9.4.5.

[21] See, e.g., *Tolimir* Trial Judgment (n 7) para. 736; *Krajišnik* Trial Judgment (n 7) para. 859(i) (citing *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 1 June 2001 (hereafter *Kayishema & Ruzindana* Appeal Judgment), para. 151); *Blagojević & Jokić* Trial Judgment (n 16) para. 642; *Popović et al.* Trial Judgment (n 14) paras 810 and 841; *Brdanin* Trial Judgment (n 11) para. 689; *Stakić* Trial Judgment (n 11) para. 515; ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 156 (citing as authority ICJ *Bosnia-Serbia* 2007 Judgment (n 8) para. 186; *Blagojević & Jokić* Trial Judgment (n 16) para. 642). See also UN Doc. A/C.6/SR.81 (n 5) 177.

[22] ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 156. See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (hereafter *Akayesu* Trial Judgment), paras 500–501; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008 (hereafter *Bagosora et al.* Trial Judgment), para. 2117; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgment and Sentence, 13 December 2005 (hereafter *Simba* Trial Judgment), para. 414; *Kayishema & Ruzindana* Appeal Judgment (n 21) para. 151; *Prosecutor v. Gatete*, Case No. ICTR-00-61-T, Judgment and Sentence, 31 March 2011 (hereafter *Gatete* Trial Judgment), para. 584 (footnote omitted) ('Killing members of the group requires a showing that the principal perpetrator intentionally killed one or more members of the group.'); *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Judgment and Sentence, 6 December 2010 (hereafter *Hategekimana* Trial Judgment), para. 670; *Prosecutor v. Kalimenzara*, Case No. ICTR-05-88-T, Judgment, 22 June 2009 (hereafter *Kalimenzara* Trial Judgment); *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Judgment, 1 November 2010 (hereafter *Kanyarukiga* Trial Judgment), para. 637; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Judgment and Sentence, 2 February 2012 (hereafter *Karemera et al.* Trial Judgment), para. 1608; *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Judgment and Sentence, 17 May 2011 (hereafter *Ndindiliyimana et al.* Trial Judgment), para. 2074; *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Judgment and Sentence, 20 December 2012 (hereafter *Ngirabatware* Trial Judgment), para. 1326; *Prosecutor v. Seromba*, Case No. ICTR-01-66-T, Judgment, 13 December 2006 (hereafter *Seromba* Trial Judgment), paras 317 and 332–335; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, 27 January 2000 (hereafter *Musema* Trial Judgment), para. 155; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999 (hereafter *Rutaganda* Trial Judgment), para. 50; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999 (hereafter *Kayishema & Ruzindana* Trial Judgment), paras 101–104; *Bagilishema* Trial Judgment (n 9) para. 57; *Semanza* Trial Judgment (n 15) para. 319;

he caused serious injury or grievous bodily harm which one should reasonably have known may result in death.[23] Thus, the *mens rea* of the crime of killing, like murder, includes both direct intent (*dolus directus*), where the perpetrator desired the death of the individual to be the result of his act or omission, and indirect intent (*dolus eventualis*), where the perpetrator knew that the death of a victim was a probable consequence of his act or omission.[24] Involuntary or negligent homicide therefore does not qualify as 'killing' for the purpose of this offence.[25] Proof of premeditation is not required.[26]

Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (hereafter *Kajelijeli* Trial Judgment), para. 813; *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment, 22 January 2004 (hereafter *Kamuhanda* Trial Judgment), para. 632; *Stakić* Trial Judgment (n 11) para. 515. For an illustration of relevant factual evaluation, see, e.g., *Brdanin* Trial Judgment (n 11) paras 738–740.

[23] *Karadžić* Trial Judgment (n 11) paras 447 (relating to the war crime of murder, applicable by *renvoi*) and 542, fn 1722; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005 (hereafter *Kvočka et al.* Appeal Judgment), para. 261; *Prosecutor v. Milošević*, Case No. IT-98-29/1-A, Judgment, 12 November 2009 (hereafter *Milošević* Appeal Judgment), para. 108; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgment, 26 February 2009 (hereafter *Milutinović et al.* Trial Judgment), para. 138; *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgment, 30 June 2006 (hereafter *Orić* Trial Judgment), para. 348. See also William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) (hereafter Schabas, *UN International Tribunals*), 173.

[24] *Karadžić* Trial Judgment (n 11) para. 448; *Prosecutor v. Delić*, Case No. IT-04-83-T, Judgment, 15 September 2008 (hereafter *Delić* Trial Judgment), para. 48; *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, 12 June 2007 (hereafter *Martić* Trial Judgment), para. 60; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, 31 January 2005 (hereafter *Strugar* Trial Judgment) paras 235–236; *Stakić* Trial Judgment (n 11) para. 587. See also *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 (hereafter *Stakić* Appeal Judgment), paras 236, 239, 242 (discussing the application of *dolus eventualis* as the requisite *mens rea* for murder).

[25] See, e.g., *Bagilishema* Trial Judgment (n 9) para. 58. See also Professor Schabas discussing footnote 2 in the *Elements of Crimes* pertaining to the mental element of that offence under the ICC regime:

> The Elements of Crimes of the International Criminal Court appear to adopt a broader view of 'killing' that would enable it to cover even negligent homicide. A footnote to the Elements of 'killing' states: 'The term "killed" is interchangeable with the term "caused death".' One of the problems with interpreting the act of genocide of 'killing' is that the corresponding acts in the Rome Statute under the headings of war crimes and crimes against humanity refer respectively to 'wilful killing' and 'murder'. It does not seem coherent that, in the case of war crimes and crimes against humanity, homicide could be defined in such a fundamentally different manner. The explanation for the different terminology is historical. The term 'wilful killing', which is used in the modern definitions of war crimes, is derived from the grave breach provisions of the Geneva Conventions of 1949, while the term 'murder' is used in both the war crimes and crimes against humanity definitions of the Charter of the International Military Tribunal. The Elements of Crimes attempt to reconcile these differences in terminology by describing 'murder' and 'wilful killing' as 'killing', and adding the same footnote as with the Elements of genocide, namely, that this means 'causing death'. The Elements reduce all forms of homicide to the lowest level, in terms of mental element, but of course also require that death be caused by a perpetrator with the very much more demanding mental element related to the context of the international crime in question.

Schabas, *Genocide in International Law* (n 11) 289–90 (footnotes omitted). It should be noted that the footnote in question, footnote 2, is attached, not to the *mens rea* element of the offence, but to its *actus reus*, i.e., the act of killing or causing death.

[26] *Bagilishema* Trial Judgment (n 9) paras 55 and 57–58; *Musema* Trial Judgment (n 22) para. 155; *Rutaganda* Trial Judgment (n 22) paras 49, 50, and 60; *Kayishema & Ruzindana* Trial Judgment (n 22) paras 99 and 103; *Akayesu* Trial Judgment (n 22) paras 499–501; *Semanza* Trial Judgment (n 15) para. 319. See also, *Kayishema & Ruzindana* Appeal Judgment (n 21) para. 151; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment and Sentence, 12 September 2006 (hereafter *Muvunyi* Trial Judgment), para. 486; *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, Judgment, 17 November 2009 (hereafter *Nsengimana* Trial Judgment), para. 833. See also, *supra*, 10.1.4.

10.3 Causing Serious Bodily or Mental Harm to Members of the Group

10.3.1 *Actus reus*

10.3.1.1 Definition

The underlying offence of 'causing serious bodily or mental harm to members of the group' has been described more than it has been defined.[27] The *actus reus* of that offence consists of the infliction of serious bodily harm, 'which involves some type of physical injury';[28] or mental harm, 'which involves some type of impairment of mental faculties'.[29]

10.3.1.2 Serious harm

10.3.1.2.1 'Physical or mental'

Acts falling within the scope of this offence require proof that serious mental or physical harm was inflicted upon a victim.[30] *Bodily* or *physical* harm refers to harm that

[27] See, generally, *Kalimenzara* Trial Judgment (n 22) para. 159; *Bagosora et al.* Trial Judgment (n 22) para. 2117; *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005 (hereafter *Semanza* Appeal Judgment), para. 192; *Kayishema & Ruzindana* Appeal Judgment (n 21) paras 110, 151; *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Judgment, 12 March 2008 (hereafter *Seromba* Appeal Judgment), paras 46–49, and in particular 46 (footnote omitted) ('The Appeals Chamber recalls that "serious bodily or mental harm" is not defined in the Statute, and that the Appeals Chamber has not squarely addressed the definition of such harm.'); *Gatete* Trial Judgment (n 22) para. 584; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgment and Sentence, 25 February 2004 (hereafter *Ntagerura et al.* Trial Judgment), para. 664; *Kajelijeli* Trial Judgment (n 22) para. 815; *Semanza* Trial Judgment (n 15) paras 321–322; *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-T, Judgment, 17 June 2004 (hereafter *Gacumbitsi* Trial Judgment), para. 292; *Akayesu* Trial Judgment (n 22) paras 706–707; *Kanyarukiga* Trial Judgment (n 22) para. 637; *Karemera et al.* Trial Judgment (n 22) para. 1608; *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Judgment and Sentence, 31 May 2012 (hereafter *Nzabonimana* Trial Judgment), para. 1703; *Muvunyi* Trial Judgment (n 26) para. 487; *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-T, Judgment and Sentence, 30 December 2011 (hereafter *Ndahimana* Trial Judgment), para. 805; *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Judgment and Sentence, 19 June 2012 (hereafter *Nizeyimana* Trial Judgment), para. 1493; *Seromba* Trial Judgment (n 22) paras 317 and 323–331; *Prosecutor v. Setako*, Case No. ICTR-04-81-T, Judgment and Sentence, 25 February 2010 (hereafter *Setako* Trial Judgment), para. 468; *Tolimir* Trial Judgment (n 7) para. 737; *Popović et al.* Trial Judgment (n 14) para. 811; *Brdanin* Trial Judgment (n 11) para. 690; *Stakić* Trial Judgment (n 11) para. 516; *Blagojević & Jokić* Trial Judgment (n 16) paras 645–646; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (hereafter *Tolimir* Appeal Judgment), para. 201 (noting that 'serious bodily or mental harm' is not defined in the Statute); *Munyaneza* Appeal Judgment (n 11) paras 168–170.

[28] *Kajelijeli* Trial Judgment (n 22) para. 814. See also *Kamuhanda* Trial Judgment (n 22) para. 634; *Ntagerura et al.* Trial Judgment (n 27) para. 664.

[29] *Kajelijeli* Trial Judgment (n 22) para. 814; *Ao An* 2018 Closing Order (n 12) para. 92; *Trbić* Trial Judgment (n 11) para. 180. For a brief historical account of the origin of this prohibition, see also Christian J Tams *et al.* (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag CH Beck 2014) (hereafter Tams *et al.*, *Genocide Convention Commentary*) 89–90. See also UN Doc. A/C.6/SR.81 (n 5) 175–79.

[30] See, e.g., *Tolimir* Appeal Judgment (n 27) para. 216; *Brdanin* Trial Judgment (n 11) para. 688; *Stakić* Trial Judgment (n 11) para. 514; *Tolimir* Trial Judgment (n 7) para. 737 (footnote omitted) ('Like Article 4(2)(a), it is necessary pursuant to Article 4(2)(b) to prove a result.'); *Popović et al.* Trial Judgment (n 14) paras 811, 844 (finding that that the killing operation inflicted serious bodily and mental harm on the Muslims of Eastern Bosnia), and 845 (finding that serious bodily and mental harm was caused to those who survived the killing operation); *Karadžić* Trial Judgment (n 11) para. 543; *Prosecutor v. Karadžić*,

seriously injures a person's health, causes disfigurement, or causes any serious injury to the external or internal organs or senses of the victim.[31] *Mental* harm refers to more than minor or temporary impairment of mental faculties.[32] It would include instances of psychological trauma resulting from witnessing acts of violence inflicted on others.[33]

10.3.1.2.2 'Serious'

The requirement that the harm be 'serious' entails more than 'minor impairment on mental or physical faculties'.[34] Such harm must go 'beyond temporary unhappiness, embarrassment or humiliation' and must result 'in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life'.[35] It does not mean, however, that the consequences of the act must be irremediable, irreparable, or

Case No. IT-95-5/18-T, Transcript of Rule 98 *bis* Judgment, 28 June 2012 (hereafter *Karadžić* Rule 98*bis* Oral Decision), 28765–766:

> The Chamber recalls that serious bodily harm must go beyond temporary unhappiness, embarrassment or humiliation, and result in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life, but it need not be permanent and irremediable. [...] [I]n order to support a conviction for genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part. In that regard, the Chamber has not heard evidence, even taken at its highest, which could support a conclusion by a reasonable trier of fact that the harm caused reached a level where it contributed to or tended to contribute to the destruction of the Bosnian Muslims and/or Bosnian Croats in whole or in part or that it was committed with the intent to destroy those groups.

[31] See, e.g., *Jević et al.* Trial Judgment (n 11) para. 920; *Trbić* Trial Judgment (n 11) para. 183; *Ivanović* Appeal Judgment (n 11) para. 36.

[32] See, e.g., *Jević et al.* Trial Judgment (n 11) para. 920; *Trbić* Trial Judgment (n 11) para. 183; *Ivanović* Appeal Judgment (n 11) para. 36. See also Stephen Gorove, 'The Problem of "Mental Harm" in the Genocide Convention' [1951] Washington University Law Quarterly 174 (footnotes omitted) ('In the language of the Restatement "serious mental harm" would then be a mental harm, the consequence of which is so grave or serious that it is regarded as differing in kind, and not merely in degree, from other mental harm. A mental harm which creates a substantial risk of fatal consequences would be a "serious mental harm." Such an act, however, could only become a crime under the Genocide Convention if coupled with the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.').

[33] See, *infra*, 10.3.1.3 and references cites.

[34] *Bagilishema* Trial Judgment (n 9) para. 59; *Semanza* Trial Judgment (n 15) paras 320–322; *Seromba* Appeal Judgment (n 27) paras 46–49, and in particular 46 (footnote omitted) ('[S]erious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat". Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings.'); *Tolimir* Trial Judgment (n 7) para. 738 (footnote omitted) ('The harm [...] must go "beyond temporary unhappiness, embarrassment or humiliation" and inflict "grave and long-term disadvantage to a person's ability to lead a normal and constructive life".'); *Popović et al.* Trial Judgment (n 14) paras 811 (to the same effect), and 842–847 (regarding the evaluation of the impact *in concreto*); *Tolimir* Appeal Judgment (n 27) para. 215 (footnote omitted) ('While the circumstances of the forcible transfer must have been frightening for Žepa's population, serious mental harm must be "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".'); *Seromba* Appeal Judgment (n 27) para. 46.

[35] *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001 (hereafter *Krstić* Trial Judgment), para. 513. See also *Karadžić* Trial Judgment (n 11) para. 543; *Gatete* Trial Judgment (n 22) para. 584 ('Serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".'); *Seromba* Appeal Judgment (n 27) para. 46; *Kajelijeli* Trial Judgment (n 22) para. 815; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 110; *Semanza* Trial Judgment (n 15) para. 321.

permanent,[36] but '[i]t must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life'.[37] Acts of sexual violence or other forms of physical violence could thus constitute the underlying conduct relevant to such a charge.[38]

Therefore, not every type of intentional harm constitutes an act of genocide.[39] To verify that an act was of sufficient gravity for a genocide conviction, tribunals have looked at whether the harm inflicted on members of a group was of such a serious nature as to threaten the group's destruction in whole or in part, or, as sometimes put, of such a serious nature as to contribute or tend to contribute to the destruction of the group.[40] The International Court of Justice (ICJ) has adopted a similar

[36] *Musema* Trial Judgment (n 22) para. 156; *Akayesu* Trial Judgment (n 22) paras 501–504; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002 (hereafter *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal), para. 24; *Kayishema & Ruzindana* Trial Judgment (n 22) paras 108–110; *Semanza* Trial Judgment (n 15) paras 320 and 322; *Kajelijeli* Trial Judgment (n 22) para. 815; *Karemera et al.* Trial Judgment (n 22) para. 1608 (footnote omitted) ('The serious bodily or mental harm need not be an injury that is permanent or irremediable.'); *Ndindiliyimana et al.* Trial Judgment (n 22) para. 2075; *Karadžić* Trial Judgment (n 11) para. 543; *Tolimir* Trial Judgment (n 7) para. 738 (noting that harm need not be permanent or irreversible); *Tolimir* Appeal Judgment (n 27) paras 203 (footnotes omitted) ('Contrary to Tolimir's argument, serious mental harm must be lasting but need not be permanent and irremediable. Tolimir fails to show that these articulations of serious mental harm are "too general and imprecise".'), 204 (rejecting the United States' apparent understanding of this notion requiring 'permanent impairment' as *inconsistent* with customary law); *Jević et al.* Trial Judgment (n 11) para. 919; *Trbić* Trial Judgment (n 11) para. 182; *Ivanović* Appeal Judgment (n 11) paras 35–36; *Pelemiš & Perić* Trial Judgment (n 11) para. 153.

[37] See, generally, *Blagojević & Jokić* Trial Judgment (n 16) para. 645 (footnotes omitted) ('The Tribunals' case-law has specified that the harm need not be permanent or irremediable, but "[i]t must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life".'); *Krstić* Trial Judgment (n 35) para. 513; *Tolimir* Trial Judgment (n 7) para. 738 (upheld in *Tolimir* Appeal Judgment (n 27) paras 201–202) (citing *Krajišnik* Trial Judgment (n 7) para. 862); *Seromba* Appeal Judgment (n 27) para. 46; *Gatete* Trial Judgment (n 22) para. 584, *Brdanin* Trial Judgment (n 11) para. 690; *Stakić* Trial Judgment (n 11) para. 516; *Akayesu* Trial Judgment (n 22) paras 502–504; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 108; *Bagosora et al.* Trial Judgment (n 22) para. 2117. The International Law Commission has observed that 'the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part'. See Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10 (1996) (hereafter UN Doc. A/51/10), 91.

[38] See, *infra*, 10.3.1.3.

[39] See, e.g., *Seromba* Appeal Judgment (n 27) para. 48 ('The Trial Chamber failed to define the underlying crime to which Athanase Seromba's actions supposedly contributed. It also had a duty to marshal evidence regarding the existence of the underlying crime that caused serious bodily or mental harm, and its parsimonious statements fail to do so. In the absence of such evidence, the Appeals Chamber cannot equate nebulous invocations of "weakening" and "anxiety" with the heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture.').

[40] *Seromba* Appeal Judgment (n 27) paras 46–49, in particular, para. 46; *Gatete* Trial Judgment (n 22) para. 584 (footnote omitted) ('To support a conviction for genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.'); *Tolimir* Trial Judgment (n 7) para. 738 (footnote omitted) ('The harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group.'); *Krajišnik* Trial Judgment (n 7) paras 862–863 ('[F]ailure to provide adequate accommodation, shelter, food, water, medical care, or hygienic sanitation facilities will not amount to the actus reus of genocide if the deprivation is not so severe as to contribute to the destruction of the group, or tend to do so. Living conditions, which may be inadequate by any number of standards, may nevertheless be adequate for the survival of the group.'); ICC *Elements of Crimes* (n 12) art. 6(b) fn 3 (specifying that an act of serious bodily or mental harm 'may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment'.); *Kajelijeli* Trial Judgment (n 22) para. 184; *Tolimir* Appeal Judgment (n 27) paras 203 and 217 (noting the absence of evidence on the record establishing that the mental harm

approach.[41] However, the *Karadžić* Trial Chamber has made it clear that one must distinguish between the *potential* threat that the act poses for the protected group and the demonstration of *actual* harm to that group. Only the former, not the latter, is relevant to establishing the commission of an act of genocide.[42] Therefore, it need not be shown

suffered by the group tended to contribute to the destruction of the Muslims of Eastern BiH as such and pointing to the absence of a link between the circumstances of the transfer operation in Žepa and the physical destruction of the protected group as a whole). In the *Tolimir* case, the ICTY noted:

> Contrary to Tolimir's contention, the Trial Chamber did make findings satisfying the requirement that the harm suffered be of such a nature that it tends to contribute to the destruction of the protected group as such. The Appeals Chamber notes in this regard the Trial Chamber's findings that the lives of the displaced population 'drastically changed', while some women have been 'so profoundly traumatized that they prefer to die'. As noted earlier, serious mental harm need not result from acts causing permanent or irremediable mental impairment. It suffices that the harmful conduct caused grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life so as to threaten the physical destruction of the group in whole or in part. The Appeals Chamber is satisfied that the Trial Chamber provided sufficient reasoning for its conclusion that the suffering of the women, children, and elderly forcibly transferred from Srebrenica amounted to serious mental harm under Article 4 of the Statute [...].

Tolimir Appeal Judgment (n 27) para. 212 (footnotes omitted). See also *Karadžić* Rule 98*bis* Oral Decision (n 30) p 28766; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 11) paras 27–38, in particular, para. 37 ('While the commission of individual paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, including evidence of sexual violence and of beatings causing serious physical injuries, III could have concluded that it was insufficient to establish the *actus reus* of genocide in the context of Rule 98 *bis* of the Rules. Accordingly, the Trial Chamber failed to take the evidence at its highest.'); *Karadžić* Trial Judgment (n 11) paras 543–545; *Mladić* Trial Judgment (n 11) paras 3434 (footnote omitted) ('In relation to (b), the bodily or mental harm caused must be of such a serious nature as to contribute or tend to contribute to the destruction of the group.') and 3544 ('Based on the foregoing, the Trial Chamber observes that thousands of Bosnian Muslims of Srebrenica were subjected to serious bodily or mental harm which included: threats of death or treatment which brought them to the point of death or suicide; knowledge, in many cases, of impending death due to the terrible manner in which they were treated prior to being killed; and long-lasting physical and mental damage. The harm inflicted upon the victims by the perpetrators preceded the suffering which was inherently part of the acts of killing. The Trial Chamber, therefore, finds that the serious bodily or mental harm suffered by thousands of Bosnian Muslims of Srebrenica contributed to the destruction of the targeted group as a result of actions of the physical perpetrators.'); UN Doc. A/51/10 (n 37) p 46 ('The bodily harm or the mental harm inflicted on the members of a group must be of such a serious nature as to threaten its destruction in whole or in part.'). In the course of discussing the definition of 'causing serious bodily or mental harm to members of a protected group', Drost noted that the purpose and raison d'être of the Genocide Convention was to protect the group, rather than its members: 'It must be remembered that the object of the Convention is the protection of the life of a human group as such. The crime to be prevented and punished must be directed against the continued existence of the protected group. The injury inflicted upon the individual members must be such as to endanger the continuation of normal life and the integrity or healthy existence of the group in whole or in part.' Pieter Drost, *The Crime of State* (Sythoff 1959 vol. 2), 86.

[41] ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 157.

[42] See e.g., *Karadžić* Trial Judgment (n 11) para. 544 (footnotes omitted):

> The Chamber notes that according to the *Seromba* Appeals Chamber '[t]o support a conviction for genocide, the bodily or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.' However, in its assessment of the facts, the *Seromba* Appeals Chamber did not examine whether the evidence demonstrated that the inflicted harm was so serious as to threaten the group's destruction. Similarly, Trial Chambers of the Tribunal and the ICTR which recite the language in question have only examined the seriousness of acts without referring to any showing that the harm was such as to threaten the group's destruction. Moreover, the majority of trial Judgments rendered prior to and after the *Seromba* Appeal Judgment consistently reiterate the language of Article 4(2)(b) of the Statute without requiring a showing that the harm was such as to threaten the group's destruction. Furthermore, in

that the harm *actually* impacted the group.[43] The degree of the threat to the group's destruction may, however, be considered as a measure of the seriousness of the bodily or mental harm.[44]

Finally, the determination of what constitutes serious harm must be made in light of the particular circumstances of each case.[45] The requirement must be applied strictly and, in case of doubt as to whether the act is sufficiently serious to qualify, the accused should receive the benefit of the doubt in the application of the presumption of innocence.[46]

10.3.1.3 Categories of qualifiable acts

There is no exhaustive list of acts which could amount to serious mental or physical harm. However, the jurisprudence has identified certain categories of conduct which have been said to meet those requirements, including: acts of inhumane or degrading treatment; torture; rape; sexual violence;[47] mutilation; beatings; acts of persecution; forcible displacement;[48] non-fatal physical violence that causes disfigurement or

> the instant case, the Appeals Chamber in the Rule 98 *bis* Appeal Judgment simply recalled Article 4(2)(b) without indicating the existence of an additional requirement. In light of the foregoing, the Chamber is therefore of the view that there is no additional requirement that the serious bodily or mental harm to members of the group be of such serious nature as to threaten the destruction of the group in whole or in part. The degree of threat to the group's destruction may, however, be considered as a measure of the seriousness of the bodily or mental harm.

[43] See *Karadžić* Trial Judgment (n 11) para. 544. See, also, *Karemera et al.* Trial Judgment (n 22) paras 1609 and 1666 ('[T]he sexual assaults, mutilations and rapes that Tutsi women were forced to endure from April to June 1994 certainly constituted acts of serious bodily and mental harm.'); *Tolimir* Trial Judgment (n 7) paras 738 and 753–759; *Popović et al.* Trial Judgment (n 14) paras 811 and 844–847 (finding that through the killing operation, serious bodily and mental harm was inflicted upon the Bosnian-Muslim males); *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgment and Sentence, 24 June 2011 (hereafter *Nyiramasuhuko et al.* Trial Judgment), paras 5731 and 5868 (wherein the Trial Chamber made no factual findings due to its holding that the Indictment in that case was defective in failing to plead rape as genocide); *Gatete* Trial Judgment (n 22) paras 584–608; *Kanyarukiga* Trial Judgment (n 22) paras 637–641.

[44] *Karadžić* Trial Judgment (n 11) para. 544.

[45] *Popović et al.* Trial Judgment (n 14) para. 811; *Blagojević & Jokić* Trial Judgment (n 16) para. 646; *Krstić* Trial Judgment (n 35) para. 513; *Karadžić* Trial Judgment (n 11) para. 545; *Tolimir* Trial Judgment (n 7) para. 738 (footnote omitted) ('The determination of the seriousness of the bodily or mental harm inflicted on members of a group must be made on a case-by-case basis, with appropriate consideration given to the particular circumstances of each case.'); *Tolimir* Appeal Judgment (n 27) paras 201–202; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 110.

[46] This principle was applied by the Trial Chamber in *Krnojelac* in order, *inter alia*, to distinguish between acts sufficiently serious to amount to torture and those which, gravity-wise, would *only* amount to cruel treatment. *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (hereafter *Krnojelac* Trial Judgment), para. 219 ('[I]n case of doubt as to whether or not the act is serious enough to amount to torture, the Accused should have the benefit of that doubt, and the acts for which he is charged should be considered under the heading of the less serious offence, namely cruel treatment under Article 3 or inhumane acts under Article 5(i).').

[47] ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 158 (pointing out that rape and other acts of sexual violence are capable of constituting the *actus reus* of genocide within the meaning of Article II (b) of the Convention).

[48] *Ao An* 2018 Closing Order (n 12) para. 92; *Prosecutor v. Stupar et al.*, No. X-KR-05/24, First Instance Verdict, 29 July 2008 (hereafter *Stupar et al.* Trial Judgment), 56–57; Prosecutor v. Mitrović, No. X-KR-05/24-1, First Instance Verdict, 4 February 2009 (hereafter *Mitrović* Trial Judgment), p 48; *Trbić* Trial Judgment (n 11), p 188; *Prosecutor v. Vuković & Tomić*, No. X-KR-06/180-2, Verdict, 2 July 2010 (hereafter *Vuković & Tomić* Trial Judgment), para. 569.

serious injury to the external or internal organs;[49] acts of enforced disappearance;[50] mistreatment and inhumane conditions associated with detention.[51]

[49] *Prosecutor v. Karadžić & Mladić*, Case No. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 (hereafter *Karadžić & Mladić* Rule 61 Review), para. 93; *Akayesu* Trial Judgment (n 22) paras 503–504, 720–722, and 731; *Rutaganda* Trial Judgment (n 22) para. 51; *Kayishema & Ruzindana* Trial Judgment (n 22) paras 105–113; *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 36) para. 24; *Seromba* Appeal Judgment (n 27) paras 46–49; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 11) para. 33 ('[Q]uintessential examples of serious bodily harm as an underlying act of genocide include torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.'); *Mladić* Trial Judgment (n 11) para. 3434 (footnote omitted) ('The acts causing such harm may include torture; rape; and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.'); *Karadžić* Trial Judgment (n 11) para. 545; *Blagojević & Jokić* Trial Judgment (n 16) para. 645; *Brdanin* Trial Judgment (n 11) para. 690; *Krstić* Trial Judgment (n 35) para. 513 ('[I]nhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.'); *Gatete* Trial Judgment (n 22) para. 584 (footnotes omitted) ('Examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs. Serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".'); *Semanza* Trial Judgment (n 15) paras 320–321; *Ntagerura et al.* Trial Judgment (n 27) para. 664; *Kajelijeli* Trial Judgment (n 22) para. 815; *Popović et al.* Trial Judgment (n 14) para. 812 (footnote omitted) ('Examples of acts causing serious bodily or mental harm include "torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group".'); *Karemera et al.* Trial Judgment (n 22) paras 1609 (noting that the term 'causing serious bodily harm' refers to acts of 'sexual violence' and 'serious physical violence' which fall short of killing but do seriously damage the health, disfigure, or cause any serious injury to the external or internal organs or senses), and 1668; *Bagilishema* Trial Judgment (n 9) para. 59; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Judgment, 29 September 2014 (hereafter *Karemera et al.* Appeal Judgment), paras 599–612, in particular 608 (footnotes omitted) ('The Appeals Chamber is not convinced that Ngirumpatse has demonstrated that the Trial Chamber erred in concluding that the perpetrators of rape and sexual assaults possessed genocidal intent. In this respect, the Trial Chamber concluded that "Tutsi women and girls were raped and sexually assaulted systematically and on a large scale by the same individuals who were attacking Tutsis as a group". In addition, the Trial Chamber found that many of the Tutsi women were killed after being raped and sexually assaulted. The Trial Chamber determined that the rape and sexual assault of these women prior to their killing was intended to increase their suffering and to cause further harm to the Tutsi women's families and communities. Bearing in mind that these rapes and sexual assaults were intricately linked to the killing of members of the Tutsi group and intended to inflict further suffering, the Appeals Chamber finds that the Trial Chamber adequately explained and reasonably concluded that the perpetrators possessed genocidal intent. Ngirumpatse's mere contention, without any reference to the record, that rapes were perpetrated against all ethnic groups by men from both sides of the conflict is insufficient to call into question the Trial Chamber's finding that Tutsi women were targeted.'), 611 ('[T]he Trial Chamber's findings on sexual assaults can reasonably underpin a conviction of genocide.'), and fn 1685 ('[T]he Trial Chamber reasonably considered that rapes and sexual assaults amounted to genocide in the form of serious bodily and mental harm.'); *Ao An* 2018 Closing Order (n 12) para. 92. See also ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 158 ('The Court recalls that rape and other acts of sexual violence are capable of constituting the *actus reus* of genocide within the meaning of Article II (b) of the Convention (I.C.J. Reports 2007 (I), p. 167, par 300 (citing in particular the Judgment of the ICTY Trial Chamber, rendered on 31 July 2003 in the Stakić case, IT-97-24-T, and p. 175, par 319).'); ICJ *Bosnia-Serbia* 2007 Judgment (n 8) para. 319. See also ICC *Elements of Crimes* (n 12) art. 6 fn 3 providing that '[t]his conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.'

[50] See, e.g., ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 160 ('In the Court's view, the persistent refusal of the competent authorities to provide relatives of individuals who disappeared in the context of an alleged genocide with information in their possession, which would enable the relatives to establish with certainty whether those individuals are dead, and if so, how they died, is capable of causing psychological suffering. The Court concludes, however, that, to fall within Article II (b) of the Convention, the harm resulting from that suffering must be such as to contribute to the physical or biological destruction of the group, in whole or in part.').

[51] See, e.g., *Brdanin* Trial Judgment (n 11) paras 741–903. See also, *Popović et al.* Trial Judgment (n 14) para. 812; *Pelemiš & Perić* Trial Judgment (n 11) para. 155 (footnote omitted) ('It has been proved beyond

While forcible transfer does not constitute a genocidal act *by itself*, it could, in certain circumstances, constitute an underlying act causing serious bodily or mental harm to those affected by such transfer—in particular, if the forcible transfer operation was conducted under circumstances meant to lead to the death of all or part of the displaced population.[52] As discussed in the following, such acts could also come under the umbrella of the genocidal crime of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[53]

The harm and injuries caused to survivors of atrocities could also, under certain circumstances, come within the scope of this particular offence.[54] In *Krstić*, for instance, the Trial Chamber held that 'the ordeal inflicted on the men who survived the massacres [in Srebrenica] may appropriately be characterized as a genocidal act

a reasonable doubt that the detainees in Pilica suffered serious bodily or mental harm, both by the very detention conditions in the buses, the School and the Cultural Center, as well as the acts undertaken against them during the brief but terrible period of detention in which the climate of terror and fear was maintained by individual killings of the detainees.').

[52] See, e.g., *Tolimir* Trial Judgment (n 7) para. 739 (and references cited therein); *Popović et al.* Trial Judgment (n 14) paras 813 (and references cited therein), and 843; *Mladić* Trial Judgment (n 11) fn 13317; *Tolimir* Appeal Judgment (n 27) paras 208–209 (footnotes omitted) ('This holding is consistent with the Tribunal's precedent. The Appeals Chamber recalls that while "forcible transfer does not in and of itself constitute a genocidal act [...] it is [...] a relevant consideration as part of the overall factual assessment" and "could be an additional means by which to ensure the physical destruction" of the protected group. Nothing in the Tribunal's jurisprudence or in the Genocide Convention provides that a forcible transfer operation may only support a finding of genocide if the displaced population is transferred to concentration camps or places of execution. [...] In past cases before the Tribunal, various trial chambers have recognised that forced displacement may—depending on the circumstances of the case—inflict serious mental harm, by causing grave and long-term disadvantage to a person's ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof.') and 212; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, 9 May 2007 (hereafter *Blagojević & Jokić* Appeal Judgment), para. 123; *Krstić* Appeal Judgment (n 12) paras 31–33; *Blagojević & Jokić* Trial Judgment (n 16) paras 646, 654, and fn 2071; *Krstić* Trial Judgment (n 35) paras 513 and 518; *Krajišnik* Trial Judgment (n 7) para. 862; *Stakić* Trial Judgment (n 11) para. 519; *Karadžić* Rule 98*bis* Oral Decision (n 30) p 28766 ('The Tribunal's jurisprudence establishes that forcible transfer does not constitute in and of itself a genocidal act, but where attended by such circumstances as to lead to the death of the whole or part of the displaced population, it may be considered an underlying offence that causes serious bodily or mental harm.'); *Jević et al.* Trial Judgment (n 11) para. 921; *Trbić* Trial Judgment (n 11) para. 184. See also ICJ *Bosnia-Serbia* 2007 Judgment (n 8) para. 190 ('Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is to "destroy, in whole or in part," a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group [...].') (referring to *Stakić* Trial Judgment (n 11) para. 519; *Tolimir* Trial Judgment (n 7) para. 739; *Popović et al.* Trial Judgment (n 14) para. 813); *Vuković & Tomić* Appeal Judgment (n 11) para. 452; *Pelemiš & Perić* Trial Judgment (n 11) para. 165; *Mitrović* Trial Judgment (n 48) 105 ('These events conformed with the platoon's understanding of part of the eradication plan: Bosniak women, children and elderly would be forcibly transferred out of the area under the control of the RS.'); *Jević et al.* Trial Judgment (n 11) paras 397 ('The Panel does not find that in taking an active part in the forcible removal, the Accused acted with a genocidal intent or that they were members of that or any other JCE. However, the Accused were indeed aware of the genocidal intent of the main perpetrators, and by giving orders to members of the 1st Company to participate in the forcible removal of civilians and by controlling them they aided and abetted the commission of the criminal offense of Genocide.'), 924 and 933. Forcible transfer is also expressly provided as a possible underlying act of genocide in Article 141 of the criminal code of the Socialist Federal Republic of Yugoslavia. See also *Trbić* Trial Judgment (n 11) paras 168–169. See also, *supra*, 8.2.3 and 9.4.7.4 and, *infra*, 12.3.6.

[53] See, *infra*, 10.4.

[54] *Ao An* 2018 Closing Order (n 12) para. 92.

causing serious bodily and mental harm to members of the group".'[55] Similar findings were made in the *Blagojević & Jokić*,[56] *Jević*, *Trbić*, and *Ivanović* cases.[57] In *Popović* and *Tolimir*, two other cases pertaining to the killing operation in Srebrenica in July 1995, the Trial Chamber found that the inhumane and terrorizing treatment of men who were subsequently executed was such as to qualify as a form of serious harm.[58] It was

[55] *Krstić* Trial Judgment (n 35) para. 635.

[56] *Blagojević & Jokić* Trial Judgment (n 16) para. 647 (footnote omitted) (finding that the trauma and wounds suffered by those who managed to survive the mass executions in Srebrenica would constitute serious bodily and mental harm):

> The Trial Chamber finds that there is sufficient evidence to establish beyond reasonable doubt that the trauma and wounds suffered by those individuals who managed to survive the mass executions does constitute serious bodily and mental harm. The fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends' safety as well as for their own safety, is a traumatic experience from which one will not quickly—if ever—recover. Furthermore, the Trial Chamber finds that the men suffered mental harm having their identification documents taken away from them, seeing that they would not be exchanged as previously told, and when they understood what their ultimate fate was. Upon arrival at an execution site, they saw the killing fields covered of bodies of the Bosnian Muslim men brought to the execution site before them and murdered. After having witnessed the executions of relatives and friends, and in some cases suffering from injuries themselves, they suffered the further mental anguish of lying still, in fear, under the bodies—sometimes of relative or friends—for long hours, listening to the sounds of the executions, of the moans of those suffering in pain, and then of the machines as mass graves were dug.

[57] *Jević et al.* Trial Judgment (n 11) paras 921 and 922 ('[T]he suffering of a few male Srebrenica survivors resulting from the separation of their families, treatment during the capture, imprisonment and attempts of summarily executions, all amount to serious bodily and/or mental harm.'); *Trbić* Trial Judgment (n 11) paras 185 and 787 (footnote omitted) ('The survivors' stories exemplify the hours and days spent in fear, in abusive conditions and in the knowledge of what was coming. The testimony from the survivors of the reality of the executions and the escape from these execution sites are graphic. The Panel heard from the survivors about their pain and suffering, but also about the sufferings of the victims who did not die instantly. None of this evidence was challenged by the Defense. It is also the mental harm to the other class of survivors, the surviving relatives, which is equally egregious here. The killing of an entire part of the group rendered enormous psychological damage to the remaining survivors which threatens their continued survival as a community even today. One has only to realize that today the rate of return of Bosniaks to their former homes is minimal. The ethnic makeup of these communities is changed. Their former way of life has been destroyed, families have disintegrated and the land abandoned. Additionally, the mass graves which were designed to conceal the crime have to this day still succeeded in separating survivors from their loved ones.'); *Ivanović* Appeal Judgment (n 11) para. 37.

[58] See, in particular, *Popović et al.* Trial Judgment (n 14) para. 844 (footnotes omitted):

> The Trial Chamber finds that the killing operation inflicted serious bodily and mental harm on the Muslims of Eastern Bosnia. The males in Potočari first had to endure a painful separation process and the anxiety that followed from not knowing what would happen to their families. Once detained, the men had their personal property—including identification cards and passports—removed and uncertainty as to their ultimate fate turned to fear and terror. They were detained in intolerable conditions of overcrowded facilities with no food, little if any water and abhorrent sanitary conditions. In many instances they were subjected to taunting and physical abuse. Similar rudimentary and cruel conditions awaited the men who were captured from the column. For all of them, any hope of survival was extinguished in the terrifying moments when they were brought to execution sites, in many instances already filled with bodies, and realized their fate. The Trial Chamber finds that through the operation to detain and kill, serious bodily and mental harm was inflicted on the males who were the subject of this murderous enterprise.

See also, ibid., para. 845 (regarding the survivors of the killing operations). See also, *Tolimir* Trial Judgment (n 7) paras 753–759, in particular, para. 754 (footnotes omitted) ('The group of men that elected not to join the column of Bosnian Muslims who headed to A BiH-held territory after the fall of Srebrenica on 11 July 1995 and instead joined their families to seek shelter at the UN compound in

said that the forced and violent separation and transfer of family members could also constitute such an offence.[59]

The *Tolimir* case offers an interesting illustration of how a court evaluates the seriousness of the harm done to victims. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) evaluated this requirement in relation to two categories of victims: (i) Bosnian-Muslims detained by the Bosnian-Serb forces prior to their execution, and (ii) those affected by the Bosnian-Serb operations in Srebrenica and Žepa but who survived.[60] In relation to the former, the Appeals Chamber rejected Tolimir's argument that the mental harm suffered by those Bosnian-Muslim men who were subsequently killed cannot be considered a separate act of genocide. The Appeals Chamber noted in particular, that 'threats of death' and knowledge of impending death could constitute or involve serious mental harm.[61] The Appeals Chamber further observed that there was nothing in the Statute of the ICTY or the Genocide Convention that prevented a chamber from considering the harm

Potočari, must have soon realised there was no hope of being protected. The night before the transportations of the women, children and elderly began, the Bosnian Muslim population in Potočari huddled together in horrid conditions at the UN compound with insufficient food, water or proper sanitation, enduring a night of terror inflicted by Bosnian Serb Forces on the night thereafter. The men were abruptly and systematically separated from their female family members. They were forced to leave their belongings and IDs behind before being detained in the White House, mistreated, and finally shipped off in buses towards Bratunac. At least 800 Bosnian Muslim men, comprised of [sic] some of the men from Potočari as well as men captured from the column, were murdered in the Bratunac area while others continued to be detained in various temporary facilities. These men were kept in abominable conditions for a further period of time before being transported to remote locations in the Zvornik area. The Chamber finds that the group of men separated in Potočari and taken to the White House, as well as the group of men who surrendered or were captured from the column throughout 13 July, would have become aware at one stage or another of the real possibility that they would ultimately meet their death at the hands of Bosnian Serb Forces who were detaining them. It finds that the suffering of these men, in the days and hours before they were killed, amounted to serious bodily or mental harm.'), 755 ('There is no doubt in the mind of the Chamber that the suffering inflicted on the Bosnian Muslim men in the days and hours before their deaths was of the most serious nature, and that these horrific confrontations with death have had a long-lasting impact on those that survived. As such, the Chamber finds that the harm inflicted upon them rises to the level of serious bodily and mental harm, a phrase which, the Chamber recalls, is understood to mean, inter alia, inhumane or degrading treatment, causing serious injury to members of the group. The Chamber is satisfied, moreover, that this harm was of such a nature as to contribute or tend to contribute to the destruction of all or part of the group in that their suffering prevented these members of the group from leading a normal and constructive life.'), and 756–757.

[59] *Jević et al.* Trial Judgment (n 11) para. 924 ('The Panel is satisfied that the forcible separation of men from women, mothers from their minor children and forcible transfer of civilians from Potočari, also amounts to mental harm inflicted on the victims, since the women who survived lost their male family members (husbands, brothers, children) and, having suffered such a tragedy, they were definitely incapable of living a normal and constructive life.').

[60] *Tolimir* Appeal Judgment (n 27) paras 205–221 (adopting and following the analysis of the Trial Chamber, which also separately assessed the harm inflicted on each of those categories of Bosnian-Muslim civilians).

[61] *Tolimir* Appeal Judgment (n 27) para. 206. See also *Popović et al.* Trial Judgment (n 14) paras 812 and 844; *Blagojević & Jokić* Trial Judgment (n 16) para. 649; *Brđanin* Trial Judgment (n 11) para. 690; *Krstić* Trial Judgment (n 35) para. 543. See also ICJ *Bosnia-Serbia* 2007 Judgment (n 8) paras 290–291 (accepting that the experience of those Bosnian-Muslim men from Srebrenica who were about to be executed amounted to serious mental harm and was 'fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or mental harm within the terms of Article II (b) thereof occurred during the Srebrenica massacre').

suffered by a victim prior to his death as a separate act of genocide.[62] Regarding survivors, the Appeals Chamber also rejected Tolimir's argument that the survivors did not suffer serious mental harm because the harm they experienced was individualized. The Appeals Chamber pointed to the Trial Chamber's findings that these survivors had 'horrific confrontations with death [that] have had a long-lasting impact' on their ability to lead 'a normal and constructive life'.[63] The Appeals Chamber concluded from these findings that the harm the survivors suffered was the direct consequence of intentional acts perpetrated upon them not as individuals but as Muslims of Eastern Bosnia-Herzegovina who were targeted for destruction as members of a protected group.[64] The Appeals Chamber also pointed to ICTY and other international jurisprudence according to which survivors of killing operations may suffer serious mental harm amounting to an act of genocide.[65]

Regarding the second category of victims—the Bosnian-Muslim women, children, and elderly who were forcibly transferred from Srebrenica—the *Tolimir* Appeals Chamber accepted the Trial Chamber's view that the seriousness of the harm suffered by the victims should be assessed by considering the painful separation process from their male relatives, the fear and uncertainty as to their own fate and that of their detained male relatives, and the appalling conditions of the journey to Muslim-held territory by bus and on foot. The Trial Chamber considered these in light of the continuation of the victims' profound trauma and the financial and emotional difficulties they faced in their 'drastically changed' lives following the forced transfer.[66] The Appeals Chamber thus upheld the 'holistic' approach adopted by the Trial Chamber that consisted of considering all relevant acts perpetrated against the Bosnian Muslim women, children, and elderly arising from the forcible transfer operation and the separation from and killings of their male relatives in determining whether their suffering amounted to serious mental harm.[67] The Appeals Chamber also rejected Tolimir's suggestion that the Trial Chamber was not entitled to take into account the inability and fears of the group to return to their former homes, or the post-transfer quality of their life in making such an assessment; the Appeals Chamber characterized those factors as 'particularly relevant to considering whether the harm caused grave and long-term disadvantage to the ability of members of the protected group to lead a normal and constructive life'.[68]

Finally, concerning the seriousness of the harm caused to the Bosnian-Muslim population forcibly transferred from Žepa, the ICTY reiterated that serious mental harm can result from acts that caused the members of the protected group to be unable to lead a normal and constructive life and threatened the physical destruction of the group as such.[69] On the evidence, a majority of the Appeals Chamber determined that,

[62] *Tolimir* Appeal Judgment (n 27) para. 206. Regarding the relationship between the offence of killing and that of serious harm, see also *Ao An* 2018 Closing Order (n 12) para. 92(a)(iv).

[63] *Tolimir* Appeal Judgment (n 27) para. 207. [64] Ibid., para. 207.

[65] Ibid., (referring to: *Popović et al.* Trial Judgment (n 14) para. 845; *Blagojević & Jokić* Trial Judgment (n 16) para. 647; *Krstić* Trial Judgment (n 35) para. 514; ICJ *Bosnia-Serbia* 2007 Judgment (n 8) paras 290–291).

[66] *Tolimir* Appeal Judgment (n 27) paras 210–211 (referring to *Tolimir* Trial Judgment (n 7) paras 756–757).

[67] Ibid. [68] Ibid., para. 211.

[69] Ibid., para. 215. See also *Seromba* Appeal Judgment (n 27) para. 46.

unlike the Bosnian-Muslims who were forcibly transferred from Srebrenica, there was no evidence of any long-term psychological trauma among Žepa's Bosnian-Muslims, even though their emotional pain and distress was irrefutably grave.[70] The Chamber also drew relevant distinctions between what happened during the Srebrenica and Žepa 'evacuations' to conclude that the harm done to the Žepa evacuees was much less severe than that inflicted in Srebrenica.[71] The Chamber thus concluded that, unlike the Srebrenica expellees, no reasonable trial chamber could have found that the Bosnian-Muslims forcibly transferred from Žepa suffered serious mental harm within the meaning of that offence.[72]

10.3.2 *Mens rea*

Harm must have been inflicted intentionally.[73] Furthermore, like other genocidal offences, it must be committed with genocidal intent, that is, with the intent to destroy a group in whole or in part. The mere intention of causing harm will therefore not suffice if unaccompanied by the requisite special intent.

10.4 Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part

10.4.1 *Actus reus*

10.4.1.1 Definition

This offence has been described as 'the denial to members of a certain group of the elementary means of existence enjoyed by other sections of the population'.[74] Acts punishable under this prohibition are understood to refer to certain methods of destruction by which the perpetrator does not immediately kill the members of the group, but which ultimately seek their physical destruction.[75] In other words, it covers

[70] *Tolimir* Appeal Judgment (n 27) para. 215. [71] Ibid., paras 216–217.

[72] Ibid., para. 217. See also *Popović et al.* Trial Judgment (n 14) para. 811 (noting that harm must be inflicted intentionally to meet the *mens rea* required for that offence).

[73] See, e.g., *Popović et al.* Trial Judgment (n 14) para. 811; *Blagojević & Jokić* Trial Judgment (n 16) para. 645; *Brdanin* Trial Judgment (n 11) para. 690; *Muvunyi* Trial Judgment (n 22) para. 487; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 112; *Mladić* Trial Judgment (n 11) para. 3434; *Jević et al.* Trial Judgment (n 11) para. 920; *Trbić* Trial Judgment (n 11) para. 183; *Ivanović* Appeal Judgment (n 11) paras 38 and 40 (finding that neither the factual description of the Indictment described, nor the Prosecution presented any evidence to prove the Accused's intent to cause such serious bodily or mental harm through the acts undertaken against these men); *Pelemiš & Perić* Trial Judgment (n 11) para. 155.

[74] *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 36) para. 25.

[75] *Akayesu* Trial Judgment (n 22) paras 505–506; *Musema* Trial Judgment (n 22) para. 157; *Rutaganda* Trial Judgment (n 22) para. 52. See also *Stakić* Trial Judgment (n 11) paras 517–518 ('The words "calculated to bring about its physical destruction" replaced the phrase "aimed at causing death" proposed by Belgium in the UN General Assembly's Sixth (Legal) Committee. The Trial Chamber in *Akayesu* held that the expression "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". The element of physical destruction is inherent in the word genocide itself, which is derived from the Greek "genos" meaning race or tribe and the Latin "*caedere*" meaning to kill.'); *Karadžić* Trial Judgment

methods of physical destruction other than killing.[76] It is enough that such conditions are imposed 'upon one or more persons'.[77]

10.4.1.2 No requirement of result

Contrary to the previous offences (killings and causing serious harm), this particular offence does not require proof that a specific result was attained.[78] As such, it does not require proof that the conditions of life in question *actually* led to the death or serious bodily or mental harm of members of the protected group.[79] When such a result is achieved, the practice has normally been to bring charges and enter a conviction in relation to the result-based offences.[80] It could also serve as circumstantial evidence relevant to establishing that the measures in question sought to achieve the intended goal of destroying a group.[81]

(n 11) para. 546; *Mladić* Trial Judgment (n 11) para. 3453 (footnote omitted) ('The Trial Chamber recalls that Article 4(2)(c) relates to those prohibited acts which do not immediately kill the members of a protected group, but which ultimately seek their physical destruction.'); *Tolimir* Appeal Judgment (n 27) paras 225–228; *Tolimir* Trial Judgment (n 7) paras 740–741(cited with approval in *Tolimir* Appeal Judgment (n 27) paras 225–226); *Brđanin* Trial Judgment (n 11) para. 691; *Kayishema & Ruzindana* Trial Judgment (n 22) paras 115–116; *Popović et al.* Trial Judgment (n 14) paras 814 and 848–855 (for the application of the relevant elements to the case); *Ao An* 2018 Closing Order (n 12) para. 93; ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 161 ('Deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, within the meaning of Article II (c) of the Convention, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group (see, *inter alia*, *Stakić*, IT-97-24-T, Trial Chamber, Judgment of 31 July 2003, paras 517 and 518).'). The ICJ identified those possible methods of physical destruction: deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion. ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 161.

[76] See *Tolimir* Appeal Judgment (n 27) paras 225–237, in particular, para. 229.

[77] See, generally, ICC *Elements of Crimes* (n 12) art. 6(c), para. 1.

[78] See, generally, *Tolimir* Trial Judgment (n 7) para. 741 (footnote omitted) ('Unlike Articles 4(2)(a) and (b), Article 4(2)(c) does not require proof of a result such as the ultimate physical destruction of the group in whole or in part.'); *Stakić* Trial Judgment (n 11) para. 517 ('Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" under sub-paragraph (c) does not require proof of a result.').

[79] *Karadžić* Trial Judgment (n 11) para. 546; *Popović et al.* Trial Judgment (n 14) para. 814; *Brđanin* Trial Judgment (n 11) para. 691; *Stakić* Trial Judgment (n 11) para. 517.

[80] *Tolimir* Appeal Judgment (n 27) paras 227–228; *Brđanin* Trial Judgment (n 11) para. 905 and fn 2255; *Karadžić* Trial Judgment (n 11) para. 546; *Mladić* Trial Judgment (n 11) para. 3453 ('The Trial Chamber recalls that when the same prohibited acts are charged under both Article 4(2)(b) and Article 4(2)(c), a chamber will consider whether these alleged acts amount to conditions calculated to bring about physical destruction only when it does not find them to amount to "causing serious bodily or mental harm". The Trial Chamber, therefore has only considered prohibited acts under Article 4(2)(c) which are not found to have met the test under Article 4(2)(b) above. The Trial Chamber recalls that Article 4(2)(c) relates to those prohibited acts which do not immediately kill the members of a protected group, but which ultimately seek their physical destruction. Such acts include the imposition of inhumane living conditions, forced labour, and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities.'). See also *The Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 ILR 5 (D Ct Jerusalem 1961) (hereafter *Eichmann* District Court Judgment), para. 196 (limiting the charge of imposing living conditions upon Jews calculated to bring about their physical extermination to persecution of Jews who had survived the Holocaust and ruling that Jews who were not saved should not be included 'as if, in their case, there were two separate actions: first, subjection to living conditions calculated to bring about their physical destruction, and later the physical destruction itself'). See also *Popović et al.* Trial Judgment (n 14) para. 814 and fn 2930.

[81] See, generally, *supra*, 11.4.7.

10.4.1.3 'Calculated' *to bring about physical destruction*

Those measures must have been 'calculated' to bring about physical destruction.[82] To qualify, they need not have *resulted* in the death of the intended victims.[83] But the prohibition applies *only* to acts deliberately calculated to cause a group's physical or biological destruction and, as such, these acts must be clearly distinguished from those acts designed to bring about the mere dissolution of the group, its cultural disappearance, or displacement.[84] To evaluate whether this is the case, the court will consider all relevant circumstance *in concreto*.[85] In the absence of direct evidence, a chamber can be guided by 'the objective probability of these conditions leading to the physical destruction of the group in part',[86] and factors like the nature of the conditions imposed, the length of time during which members of the group were subjected to them, and specific characteristics of the targeted group, such as its vulnerability.[87]

10.4.1.4 *Categories of qualifiable acts*

The following have been said to provide illustrations of categories of acts that could fall within the scope of this prohibition: systematic expulsion from homes; denial of medical care; the creation of circumstances that would lead to a slow death, such as deprivation of food, water, clothing, and hygiene, and the imposition of excessive work

[82] See Tams *et al.*, *Genocide Convention* Commentary (n 29) 124 (pointing out that during the drafting, a proposal by Uruguay and the United Kingdom to use the phrase 'likely to cause' failed to win approval at the Sixth Committee and was 'attenuated' to the phrase 'calculated to bring about').

[83] See *Eichmann* District Court Judgment (n 80) para. 196.

[84] *Tolimir* Trial Judgment (n 7) para. 741. See also *Stakić* Trial Judgment (n 11) para. 518; UN Doc. A/51/10 (n 37) 90–91 ('As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense.').

[85] But see *Karadžić* Rule 98*bis* Oral Decision (n 30) 28767–768; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 11) paras 39–51, in particular, paras 47–50. See also *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka (*Al Bashir* Decision on Warrant Application, Ušacka Dissent), paras 97–102.

[86] *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 11) para. 40 (footnotes omitted) ('The Trial Chamber recalled that in determining whether conditions of life imposed on a targeted group were calculated to bring about the group's physical destruction, it was required to focus on the "objective probability of these conditions leading to the physical destruction of the group in part". The Trial Chamber further explained that it was required to assess factors including "the nature of the conditions imposed, the length of time that members of the group were subjected to that, and characteristics of the targeted· group such as vulnerability".'); *Ao An* 2018 Closing Order (n 12) para. 93 (footnotes omitted) ('Absent direct evidence that the conditions were calculated to physically destroy the group focus turns to the "objective probability of such conditions leading to the group's physical destruction with relevant factors including the nature of the conditions the length of time persons were subjected to them and characteristics of the members of the targeted group for example their vulnerability. Conditions that are inadequate by any number of standards but are still adequate for the survival of the group and therefore do not contribute to the destruction of the group will not satisfy the *actus reus* requirement.'); *Karadžić* Rule 98*bis* Oral Decision (n 30) 28767.

[87] *Tolimir* Trial Judgment (n 7) para. 742. See also *Popović et al.* Trial Judgment (n 14) para. 816; *Brdanin* Trial Judgment (n 11) para. 906; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 548; *Krajišnik* Trial Judgment (n 7) para. 863; *Prosecutor v. Karadžić*, Case No. MICT-13-55-A, Judgement, 20 March 2019, paras 694ff.

or physical exertion; the imposition of inhumane living conditions; forced labour; the failure to provide adequate accommodation, shelter, food, or hygienic sanitation facilities; subjecting the group to a subsistence diet; systematically expelling members of the group from their homes; reducing essential medical services below minimum requirements.[88] Subjecting detainees to sub-human conditions of life would provide a clear illustration of the sort of conduct encompassed by this offence.[89] Acts of sexual

[88] See, generally, *Mladić* Trial Judgment (n 11) paras 3434 (footnote omitted) ('In relation to (c), the acts may include: systematic expulsion from homes; denial of medical services; and the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing, and hygiene or excessive work or physical exertion.'), and 3453 (footnotes omitted) (referring to the imposition of inhumane living conditions, forced labour, and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities); *Karadžić* Trial Judgment (n 11) para. 547 (footnote omitted) ('Examples of such acts include, but are not limited to, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.'); *Brdanin* Trial Judgment (n 11) para. 691; *Musema* Trial Judgment (n 22) para. 157; *Kayishema & Ruzindana* Trial Judgment (n 22) paras 115–116; *Akayesu* Trial Judgment (n 22) para. 506; *Tolimir* Trial Judgment (n 7) para. 740 (footnote omitted) ('Examples of such acts punishable under Article 4(2)(c) include, *inter alia*, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.'); *Stakić* Trial Judgment (n 11) para. 517 (footnotes omitted) ('The acts envisaged by this sub-paragraph include, but are not limited to, methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services. Also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.'); *Tolimir* Appeal Judgment (n 27) para. 226 (referring to ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 161) ('Such methods of destruction include notably deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion.'); *Popović et al.* Trial Judgment (n 14) para. 815; *Ao An* 2018 Closing Order (n 12) para. 93; UN Ad Hoc Committee on Refugees and Stateless Persons, Summary Record of Third Meeting Held at Lake Success, UN Doc. E/AC.25/SR.414 (17 January 1950) (hereafter UN Doc. E/AC.25/SR.414) (Mr Ordonneau, France) (illustrating the offence by reference to the treatment the inhabitants of Jewish ghettos during the Second World War). See also UN Secretary-General, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947) (hereafter Secretary-General, Draft Convention with Commentary) re-printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008) (hereafter Abtahi & Webb, *Travaux Préparatoires*), 233 (noting that this offence may be termed 'slow death' and that an intent to commit genocide may be inferred from the death rate resulting from the treatment of members of the group; and adding: 'There may be borderline cases where a relatively high death rate might be ascribed to lack of attention, negligence or inhumanity, which, though highly reprehensible, would not constitute evidence of intention to commit genocide.').

[89] See *Eichmann* District Court Judgment (n 80) paras 199 and 204. Thus, in the context of a review procedure pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence, Trial Chamber I held that this crime had been put into effect by the accused Radovan Karadžić and Ratko Mladić in the various Serb detention camps of Bosnia and through the siege and shelling of cities and protected areas. The then operative Indictment against Radovan Karadžić contained the following factual description in relation to that charge (*Prosecutor v. Karadžić & Mladić*, Case No. IT-95-5-I, Initial Indictment, 24 July 1995; this indictment has since been amended and this part of the charges withdrawn):

> **Conditions Calculated to Bring About Physical Destruction**
>
> 30. Conditions in the camps and detention facilities included inadequate food, often amounting to starvation rations, foul water, insufficient or non-existent medical care, inadequate hygiene conditions and lack of space.
> 31. Between 1 July 1991 and 30 November 1995, Radovan KARADŽIĆ knew or had reason to know that Bosnian Serb forces under his direction and control were committing the acts described in

violence, such as rape, could also qualify.[90] The large-scale destruction of fields or harvests, leaving members of the group without food could also qualify.[91] Consistent with the aforementioned case law, footnote 4 of the ICC *Elements of Crimes* provides that the term 'conditions of life' may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.[92]

The mere geographical displacement or forcible transfer of a group or part of a group would not *in and of itself* fall within the terms of that offence.[93] However, where accompanied by other forms of mistreatment or the denial of means of survival, such acts of displacement could fall within the scope of this prohibition.[94]

Paragraphs 17 through 30 above, or had done so. Radovan KARADŽIĆ failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof.

32. In addition, between 1 December 1995 and 19 July 1996, Radovan KARADŽIĆ knew or had reason to know that Bosnian Serb forces under his direction and control had committed the acts described in Paragraphs 17 through 30 above. Radovan KARADŽIĆ failed to take the necessary and reasonable measures to punish the perpetrators thereof.

See, however, Schabas, *Genocide in International Law* (n 11) 292–93 (pointing out that acquittals were entered in relation to charges pertaining to the conditions in camps as they fell short of the required *dolus specialis* in the circumstances of the relevant cases). See also ICJ *Bosnia-Serbia* 2007 Judgment (n 8) para. 354 ('[T]he Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (*dolus specialis*) to destroy the protected group, in whole or in part. In this regard, the court observes that in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (*dolus specialis*).').

[90] See, e.g., *Kayishema & Ruzindana* Trial Judgment (n 22) para. 116 ('[T]he conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.'). See also *Malabo* Protocol (n 3) art. 28(B)(f) (which includes 'acts of rape or any other form of sexual violence' among the categories of crimes which could constitute genocide).

[91] See Commission of Historical Clarification, *Guatemala: Memory of Silence* (United Nations 1999) (hereafter Comm. of History, *Memory of Silence*) para. 116 (cited by Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461 (hereafter Kreß, 'Crime of Genocide under International Law'), 482).

[92] Regarding the use of the word 'certain' in paragraph 1 of the *Elements of Crimes*, see also Valerie Oosterveld and Charles Garraway, 'The Elements of Genocide' in Roy Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) (hereafter Oosterveld & Garraway, 'Elements of Genocide') 52 ('Discussion then centered on the use of the phrase 'certain conditions of life'. The word "certain" was seen by some delegations as an unnecessary qualifier. They were reassured that this was purely grammatical and was designed to link the first and fourth elements.')

[93] *Stakić* Trial Judgment (n 11) para. 519; *Krstić* Appeal Judgment (n 12) para. 33; ICJ *Bosnia-Serbia* 2007 Judgment (n 8) para. 190; *Tolimir* Trial Judgment (n 7) para. 741; *Tolimir* Appeal Judgment (n 27) paras 227–237, in particular, paras 231 and 234. Certain national systems have gone beyond the terms of the Convention and regards acts of displacement as acts of genocide. For instance, Article 141 of the SFRY Criminal Code characterizes the forcible dislocation of the population as a prohibited act of genocide.

[94] *Karadžić* Trial Judgment (n 11) para. 547; *Tolimir* Trial Judgment (n 7) para. 741 (footnote omitted) ('[T]he forcible transfer of a group or part of a group does not, by itself, constitute a genocidal act, although it can be an additional means by which to ensure the physical destruction of a group.'); *Krstić* Appeal Judgment (n 12) paras 31 and 33; *Stakić* Trial Judgment (n 11) para. 519; ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 162 (quoting ICJ *Bosnia-Serbia* 2007 Judgment (n 8) paras 190 (internal quotation marks omitted) ('[D]eportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. [...] [T]his is not to say that acts described as 'ethnic cleansing' may never constitute genocide, [...] provided such action[s] [are] carried out [...] with a view to the destruction of the group, as distinct from its removal from the region. [...] in other words, whether a particular operation

In all cases, the acts must be shown to have been deliberately calculated to cause a group's physical destruction and, as such, these acts must be clearly distinguished from those acts which are solely designed to bring about the dissolution of the group.[95] The forcible displacement of members of a particular group may

described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such.'), and paras 163, 477 ('The forced displacement of a population, even if proved, would not in itself constitute the *actus reus* of genocide.'), 478 (noting that the forced displacement of a population may contribute to the proof of genocidal intent), and 480 ('In any event, even if it were proved that it was the intention of the Croatian authorities to bring about the forced displacement of the Serb population of the Krajina, such displacement would only be capable of constituting the *actus reus* of genocide if it was calculated to bring about the physical destruction, in whole or in part, of the targeted group, thus bringing it within the scope of subparagraph (c) of Article II of the Convention. The Court finds that the evidence before it does not support such a conclusion. Even if there was a deliberate policy to expel the Serbs from the Krajina, it has in any event not been shown that such a policy was aimed at causing the physical destruction of the population in question.'). The Appeals Chamber for the ICTY has noted the following:

> After carefully examining the relevant evidence, the Appeals Chamber is not convinced that the forcible transfer operations in Srebrenica and Žepa, viewed separately from the killings of Srebrenica's male population, were conducted under circumstances calculated to result in the total or partial physical destruction of the protected group, i.e., the Muslims of Eastern BiH. There is no doubt that the Bosnian Muslims who were forced to abandon their houses and belongings in Srebrenica and Žepa and then endured a painful process of separation from their ancestral land and transferred to other parts of BiH were traumatised as a result of the transfer and have since faced harsh realities in their new lives, both financially and psychologically. The record, however, is devoid of any evidence that the forcible transfers, if they are analysed—as they must—separately from the killing operation and the destruction of mosques in Srebrenica and Žepa, were 'carried out [...] with a view to the destruction of the group, as distinct from its removal from the region' at issue (i.e., the enclaves of Srebrenica and Žepa. Although the Appeals Chamber is satisfied that there was a deliberate plan to expel the Bosnian Muslim women, children, and elderly from Srebrenica and the entire Muslim population from Žepa, it has not been established beyond reasonable doubt that such a policy of removal, implemented through the JCE to Forcibly Remove, was aimed at causing the physical destruction, i.e., the slow death, of these populations. It bears noting, in this regard, that the Trial Chamber found that despite the distress caused by the transfer process, these populations were ultimately transferred to ABiH-held territory where they were safe and no longer ran any risk of physical extinction. The *actus reus* of Article 4(2)(c) of the Statute 'covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group'. There is no evidence on the record that the forcible transfer operations were carried out in such a way so as to lead to the ultimate death of the displaced Bosnian Muslims.

Tolimir Appeal Judgment (n 27) para. 233 (footnotes omitted) and para. 235; *Tolimir* Trial Judgment (n 7) paras 760–767 (regarding the forcible transfer of the women and children from Srebrenica and Žepa, the separation of men in Potočari, and the execution of men from Srebrenica); *Popović et al.* Trial Judgment (n 14) paras 849 and 854 (not challenged on appeal and effectively adopted by the *Tolimir* Appeal Judgment (n 27) para. 234) (rejecting the idea that 'the destruction of the social structure of the community and the inability of those who were forcibly transferred to reconstruct their lives [...] are the kinds of conditions intended to be prohibited by Article 4(2)(c) of the Statute'). See also Secretary-General, Draft Convention with Commentary reprinted in Abtahi & Webb, *Travaux Préparatoires* (n 88) 232 ('*Mass displacements of populations* from one region to another also does not constitute genocide. It would, however, become genocide if the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population. (if, for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemics).'). See, also, *infra*, 12.3.6.

[95] *Brđanin* Trial Judgment (n 11) paras 692 and 694; *Stakić* Trial Judgment (n 11) para. 519; *Karadžić* Trial Judgment (n 11) para. 547. ICJ *Croatia-Serbia* 2015 Judgment (n 1) paras 161–163, and in particular 163 (holding that in order to determine whether the forced displacements constitute genocide in the sense of Article II of the Convention (subparagraph (c), in particular), 'it will seek to ascertain whether, in the present case, those forced displacements took place in such circumstances that they were calculated to

also be relevant to establishing that the accused intended to destroy a particular group.[96]

The differing approaches of the Trial and Appeal Chambers in the *Tolimir* case illustrate the contrasting approaches taken to evaluating this matter in relation to the forcible displacement of Bosnian-Muslim civilians from the towns of Srebrenica and Žepa. The Trial Chamber found that the 'combined effect' of the 'forcible transfer operations of the women and children of the protected group' and the killing of at least 5,749 Bosnian-Muslim men from this same group 'had a devastating effect on the physical survival of the Bosnian Muslim population of Eastern BiH' and that 'these operations were aimed at destroying this Bosnian Muslim community and preventing reconstitution of the group in this area'. In reaching this conclusion, the Trial Chamber considered the destruction of the mosques in Srebrenica and Žepa following the fall of those enclaves. Based on this, the Trial Chamber concluded that the only reasonable inference to draw was that the conditions of life resulting from the combined effect of the killing and forcible transfer operations were 'deliberately inflicted, and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern BiH'.[97] The Appeals Chamber disapproved of this approach. First, it noted that the crime of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' does not encompass acts of actual killing, which falls under the scope of other genocidal offences. On that basis, the Appeals Chamber held it was wrong for the Trial Chamber to consider the combined effect of the killing and the forcible transfer operations. Such combined consideration, the Appeal Chamber held, was contrary to the legal principles governing the application of this provision, which limit the scope of the provision to 'methods of physical destruction, other than killing'.[98] The *Tolimir* Appeals Chamber also found fault with the Trial Chamber's reliance on the destruction of mosques as a factor relevant to establishing the commission of this crime. The Appeals Chamber noted that acts amounting to 'cultural genocide' are excluded from the scope of the Genocide Convention.[99] In agreement with the ICJ on this point, the Appeals Chamber noted that the destruction of historical, cultural, and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. The Appeals Chamber therefore concluded that the Trial Chamber committed a legal error when considering the destruction of mosques in Srebrenica and Žepa under that heading. Accordingly, the Appeals Chamber took the view that the record was devoid of any evidence that the forcible transfers, if they are analysed—as they must be—separately from the killing operation and the destruction of mosques in Srebrenica and Žepa were 'carried out [...] with a view to the destruction of the group, as distinct from its removal from the region' at issue

bring about the physical destruction of the group. The circumstances in which the forced displacements were carried out are critical in this regard'). See also ICJ *Bosnia-Serbia* 2007 Judgment (n 8) para. 190.

[96] *Krstić* Appeal Judgment (n 12) paras 30–33. See, *supra*, Chapter 9.

[97] *Tolimir* Trial Judgment (n 7) para. 766.

[98] See *Tolimir* Appeal Judgment (n 27) paras 225–237, in particular, para. 229.

[99] Ibid., para. 230 (referring to *Tolimir* Trial Judgment (n 7) para. 741 and authorities cited therein).

(i.e., the enclaves of Srebrenica and Žepa).[100] This reasoning is not entirely satisfactory. Cultural groups are not per se protected by the Genocide Convention.[101] Nonetheless it cannot be assumed from this that the destruction of cultural symbols is irrelevant to establishing the commission of an act of genocide.[102] Mosques were no less a symbol of culture than religious and ethnic identity of the Bosnian-Muslim victims. In those circumstances, it would seem that the Appeals Chamber was wrong when suggesting such destructions could not provide evidence of the commission of a genocidal offence. The Appeals Chamber's failure to take into account the killings as relevant contextual evidence regarding the intention of the perpetrator in relation to the group itself also seems inapposite. In this instance, the conclusion of the Appeals Chamber also appears to be illogical (at least in relation to Srebrenica) as it suggests that the perpetrators possessed the genocidal *mens rea* in relation to some members of the targeted group (i.e., those killed) but not in relation to others (i.e., those removed and displaced), although they all belonged to the same group which, it said, was the intended target of their acts.

10.4.1.5 Conditions of life and other genocidal offences

This offence covers 'methods of destruction *that do not immediately kill* the members of the group, but ultimately seek their physical destruction'.[103] Under this label, actual killings cannot therefore be considered as acts resulting in the deliberate infliction of conditions of life calculated to bring about the protected group's physical destruction.[104] The greater level of remoteness that exists between the acts and the consequence of those acts upon the targeted group is what distinguishes this offence from the crime of killing.[105] Whereas the act of killing has the immediate potential to contribute to the destruction of the group, such measures may have a more remote potential to contribute to the ultimate destruction of the group. But whilst killings could not constitute the *actus reus* of this crime, evidence of such killings could help establish the existence of an environment in which victims are rendered more vulnerable, fear for their lives, and feel a general sense of helplessness which may exacerbate the

[100] Ibid., para. 233. [101] See, *supra*, 8.4.4.6.3. [102] See, *supra*, 9.4.7.3.

[103] *Tolimir* Trial Judgment (n 7) para. 740; *Tolimir* Appeal Judgment (n 27) para. 227.

[104] *Tolimir* Appeal Judgment (n 27) paras 227 and 228 (footnotes omitted) ('The Appeals Chamber recalls that the different categories of genocidal acts proscribed in Article 4(2) of the Statute correspond to and aim to capture different methods of physical destruction of a protected group: subparagraphs (a) and (b) of Article 4(2) of the Statute proscribe acts causing a specific result, which must be established by the evidence, i.e., killings and serious bodily or mental harm respectively; on the other hand, subparagraph (c) of the same Article purports to capture those methods of destruction that do not immediately kill the members of the group, but which, ultimately, seek their physical destruction. The chambers of the Tribunal and the ICJ have listed several acts as examples of such methods of destruction that could potentially meet the threshold of Article 4(2)(c) of the Statute and Article II(c) of the Genocide Convention, including deprivation of food, medical care, shelter or clothing, lack of hygiene, systematic expulsion from homes, or subjecting members of the group to excessive work or physical exertion. Notably, killings, which are explicitly mentioned as a separate genocidal act under Article 4(2)(a) of the Statute, may not be considered as a method of inflicting upon the protected group conditions of life calculated to bring about its destruction under Article 4(2)(c) of the Statute.'). See also *Tolimir* Trial Judgment (n 7) para. 741; *Brđanin* Trial Judgment (n 11) paras 691 and 905; *Stakić* Trial Judgment (n 11) para. 517.

[105] See, *supra*, 10.2.

trauma and suffering that would otherwise result if other forms of mistreatment were inflicted on them. Relevant factual circumstances may therefore largely overlap with the offence of causing serious bodily or mental harm to members of the group as both offences typically involve the infliction of serious pain or injury to individuals.[106]

This offence also bears a certain resemblance to the crime against humanity of extermination.[107] Whilst both may indeed serve to cover overlapping factual situations, their elements are different.[108] In particular, the crime of extermination requires no proof of an intent to destroy the group to which the victim belongs. Further, where the crime of extermination requires proof of killings on a mass scale, the crime of 'conditions of life' requires no proof of actual deaths.[109]

10.4.2 *Mens rea*

To qualify, the act must have been carried out 'deliberately'.[110] This would distinguish such crimes from the causing of accidental or *collateral* deaths.[111] According to Robinson, the inclusion of this requirement was intended to highlight the implied element of 'premeditation' underlying this particular offence.[112]

The conditions of life must also have been 'calculated' to bring about the physical destruction of the group, in whole or in part.[113] As pointed out by Professor Schabas, this requirement 'adds an important concept to the offence, implying not only intent and even premeditation but also indicating that the imposition of conditions must be the principal mechanism used to destroy the group, rather than some form of ill-treatment that accompanies or is incidental to the crime'.[114] One would only take issue with the suggestion that such conditions must be the 'principal' or primary

[106] See, e.g., *Tolimir* Trial Judgment (n 7) (relating to the forcible transfer and mistreatment of expelled civilians from Srebrenica).

[107] Schabas, *UN International Tribunals* (n 23) 176–177. [108] See, *infra*, 12.3.4.

[109] Ibid.

[110] See, e.g., *Mladić* Trial Judgment (n 11) para. 3434; *Popović et al.* Trial Judgment (n 14) para. 817 (footnote omitted) ('The *mens rea* standard for the underlying offence of "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" is explicitly specified by the adjective "deliberately".'); *Stakić* Trial Judgment (n 11) para. 517.

[111] See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996) [1996] ICJ Rep 226, 240 para. 26; Case Concerning Legality of Use of Force (*Yugoslavia v. United Kingdom*) (Request for the Indication of Provisional Measures, Order of 2 June 1999) [1999] ICJ Rep 826, para. 35.

[112] See Robinson, *Commentary on the Genocide Convention* (n 6) 60 ('However, "premeditation" was retained in sub-paragraph (c) dealing with the infliction of conditions of life calculated to bring about the physical destruction of a group in whole or in part. The word "deliberately" was included there to denote a precise intention of the destruction, i.e., the premeditation related to the creation of certain conditions of life.') (citing UN GAOR, 3rd Sess, 82nd mtg, UN Doc. A/C.6/SR.82 (23 October 1948) (hereafter UN Doc. A/C.6/SR.82) 3).

[113] See, *supra*, 10.4.1.3.

[114] W. Schabas, *Genocide in International Law* (n 11) 291. But see Kreß, 'Crime of Genocide under International Law' (n 91) 481 (footnote omitted) ('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, 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.').

mechanism used to destroy the group, an element not required by the definition of this crime.[115] Instead, as is apparent from the approach taken in the precedent cases cited earlier, the requirement that such conditions of life are 'calculated' to bring about the physical destruction of that group has been treated as requiring the prosecution to establish that measures were taken, not to inflict pain or discomfort but as a way to contribute to the over-arching purpose of destroying the group, in whole or in part. It is therefore unnecessary that the conditions of life be the principal mechanism by which the perpetrators achieve this destruction.

In the absence of *direct* evidence that the conditions of life were deliberately calculated to bring about the group's physical destruction, a tribunal can evaluate the objective probability that these conditions could lead to the physical destruction of the group in part.[116] Relevant factors in conducting this evaluation include: the actual nature of the conditions of life, the length of time that members of the group were subjected to them, and the characteristics of the group, such as its vulnerability.[117] In *Krstić*, the ICTY Appeals Chamber made it clear that, for the purpose of conducting such an evaluation, the court could also consider the long-term impact of the criminal acts on the likely survival of the group.[118]

Finally, like other categories of punishable acts, this crime must have been committed with the requisite genocidal intent. As this offence entails a somewhat more indirect relationship between the underlying conduct and its intended genocidal result, the evidence put forth to establish the perpetrator's genocidal *mens rea* must be particularly unambiguous to allow for such a finding. In the *Kayishema & Ruzindana* case, for instance, the Trial Chamber refused to consider the momentary deprivation of food, water, and adequate sanitary and medical facilities as amounting to such conditions of life intended to bring about the destruction of the group. The Trial Chamber gave essentially two reasons for its finding: first, the deprivation was relatively short-lived; and second, those people were in any case to be exterminated shortly thereafter so that it could not conclude beyond reasonable doubt that the conditions of life were intended to cause the group's destruction.[119] That such measures have affected a protected group is insufficient unless it is shown to have been the perpetrator's intention.

[115] Neither the *travaux* nor relevant precedents appear to support a requirement that such measures should be the 'primary' means by which destruction is sought or achieved. See, e.g., *Tolimir* Appeal Judgment (n 27) paras 225–227 and 233 (and references cited therein) (highlighting, instead, that proof must be made that death is sought by those adopting such measures whilst excluding acts of killing from the scope of that offence). See also Tams *et al.*, *Genocide Convention* Commentary (n 29) 123–24 (criticizing Professor Schabas' view as unduly narrow and putting interpreting the requirement as meaning 'capable of' bringing about the destruction of the group).

[116] *Karadžić* Trial Judgment (n 11) para. 548. See also *Tolimir* Trial Judgment (n 7) para. 742; *Popović et al.* Trial Judgment (n 14) para. 816; *Brdanin* Trial Judgment (n 11) para. 906. See, also, *supra*, 10.4.1.3.

[117] *Tolimir* Trial Judgment (n 7) para. 742; *Popović et al.* Trial Judgment (n 14) para. 816; *Brdanin* Trial Judgment (n 11) para. 906; *Karadžić* Trial Judgment (n 11) para. 548; *Krajišnik* Trial Judgment (n 7) para. 863; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 548.

[118] *Krstić* Appeal Judgment (n 12) para. 28.

[119] *Kayishema & Ruzindana* Trial Judgment (n 22) para. 548.

10.5 Imposing Measures Intended to Prevent Births within the Group

10.5.1 *Actus reus*

10.5.1.1 Definition

The Genocide Convention prohibits the act of imposing 'measures' intended to prevent births within the group although the meaning of the expression 'measures' is not entirely clear.[120] The Secretariat Draft referred to three categories of conduct relevant to this offence: sterilization and/or compulsory abortion; segregation of the sexes (through, for example, compulsory residence in remote places, or systematic allocation of work to men and women in different locations); and obstacles to marriage.[121] It is generally accepted that such measures could be physical or mental in nature,[122] and that the law does not impose any particular requirement of form or modalities regarding those.[123] It would thus cover not only cases where force has been used but also instances where the victim was denied the chance of giving free and informed consent.[124]

Regarding the victim of such a crime, it could be either male or female,[125] and the victim of such measures need not be numerous. It is sufficient that the perpetrator has imposed such measures on one or a limited number of victims.[126]

Consistent with a literal reading of the definition of this offence, the measures must only be *intended* to prevent births.[127] It is therefore not necessary to establish that the perpetrator was successful in preventing birth within the group.[128] However, as

[120] See, e.g., *Pelemiš & Perić* Trial Judgment (n 11) para. 145 (suggesting, without explanation, that murders do not constitute a 'measure' for the purpose of this offence).

[121] Secretary-General, Draft Convention with Commentary, reprinted in Abtahi & Webb, *Travaux Préparatoires* (n 88) 215, 228 and 234. See also Tams *et al.*, *Genocide Convention* Commentary (n 29) 91.

[122] *Rutaganda* Trial Judgment (n 22) para. 53; *Akayesu* Trial Judgment (n 22) para. 508; *Tolimir* Trial Judgment (n 7) para. 743; *Popović et al.* Trial Judgment (n 14) para. 818.

[123] But see ILC, Draft Code 1996 (n 9) 'Commentary on Article 17', para. 16 (propounding an element of 'force' not dissimilar to the one applicable to the offence of '[f]orcibly transferring children of the group to another group').

[124] See, e.g., United Nations War Crimes Commission, 'Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess' in *Law Reports of Trials of War Criminals*, vol. 7 (HM Stationery Office 1948) (hereafter UNWCC, 'Poland v. Hoess'), 25 ('Experiments were always carried out under compulsion and in many cases physical violence was used.').

[125] See, e.g., ibid., 25 (pertaining to acts of sterilization and castration performed on men and women).

[126] See also ICC *Elements of Crimes* (n 12) para. 1 ('The perpetrator imposed certain measures upon one or more persons.').

[127] See also ibid., art. 6(d) para. 4.

[128] See also Schabas, *Genocide in International Law* (n 11) 197–201; Antonio Cassese, *International Criminal Law* (3rd edn, OUP 2013), 115–19. But see Kreß, 'Crime of Genocide under International Law' (n 91) 483 (suggesting an *objectivized* approach). According to Kreß, '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.' Ibid. Kreß's view has little support in, and is in fact contradicted by, the statutory text of the offence. Nor does it seem to be supported by existing practice (besides perhaps the German legislation cited by Kreß). See generally, Soh Sie Eng Jessie, 'Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide' (2006) 4 New Zealand Journal of Public and International Law 311 (illustrating how rape and sexual

with any underlying act of genocide,[129] the conduct in question must at least have the demonstrated potential to contribute to its destructive goal.[130] The fact that it would have that effect, albeit unintentionally, would not fulfil the requirement of the offence. Thus, whilst the killing of men might negatively impact the reproductive capacity of the members of a group, this would not qualify under that particular heading absent a showing that the killing was intended to have that effect.[131]

10.5.1.2 Type of relevant underlying conduct

The following is a non-exhaustive list of measures that have been said to come within the terms of that offense: sexual mutilation; enforced sterilization; forced birth control; forced separation of males and females; and prohibition of marriages.[132] Rape could also qualify if it is carried out with a view to prevent the possibility of birth thereafter.[133]

violence can effectively prevent birth within a society, even if not medically so, because of the social consequences levied onto women who were raped); Todd A Salzman, 'Rape Camps as Means of Ethnic Cleansing: Religious, Cultural, and Ethical Response to Rape Victims in former Yugoslavia' (1998) 20 Human Rights Quarterly 348 (same).

[129] See, *supra*, 10.1.2.

[130] See also ICJ *Croatia-Serbia* 2015 Judgment (n 1) paras 166 (emphasis added) ('The Court considers that rape and other acts of sexual violence, which may also fall within subparagraphs (b) and (c) of Article II, are capable of constituting the *actus reus* of genocide within the meaning of Article II (d) of the Convention, provided that they are of a kind which prevent births within the group. In order for that to be the case, it is necessary that the circumstances of the commission of those acts, and their consequences, are such that *the capacity of members of the group to procreate is affected*. Likewise, the systematic nature of such acts has to be considered in determining whether they are capable of constituting the *actus reus* of genocide within the meaning of Article II (d) of the Convention.') and 397.

[131] See, e.g., *Pelemiš & Perić* Trial Judgment (n 11) para. 145 ('With respect to the measures intended to prevent births within the group, the Panel finds that it is indisputable that with mass murders of the men of all ages biological reproduction of the group was rendered impossible. However, the murders do not constitute a "measure" and this fact of preventing biological regeneration of the group has been evaluated in the context of the specific intention to commit the criminal offense of genocide, but not in its own right as a criminal act referred to in Sub-Paragraph (d) of Article 171 of the CC of BiH.').

[132] *Rutaganda* Trial Judgment (n 22) para. 53; *Akayesu* Trial Judgment (n 22) paras 507–508; *Musema* Trial Judgment (n 22) para. 158; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 117; *Tolimir* Trial Judgment (n 7) para. 743; *Popović et al.* Trial Judgment (n 14) para. 818. For domestic application of this prohibition, see also UNWCC, 'Poland v. Hoess' (n 124) 25 (regarding experiments of wholesale castration and sterilization); UNWCC, 'Notes on Trial of Ulrich Greifelt' (n 2) 17; *Eichmann* District Court Judgment (n 80) para. 244 (finding Eichmann guilty of devising measures, the purpose of which was to prevent child-bearing among Jews 'by his instruction forbidding births and for the interruption of pregnancy of Jewish women in the Theresin Ghetto with intent to exterminate the Jewish people'); ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 166 ('The Court considers that rape and other acts of sexual violence, which may also fall within subparagraphs (b) and (c) of Article II, are capable of constituting the *actus reus* of genocide within the meaning of Article II (d) of the Convention, provided that they are of a kind which prevent births within the group. In order for that to be the case, it is necessary that the circumstances of the commission of those acts, and their consequences, are such that the capacity of members of the group to procreate is affected. Likewise, the systematic nature of such acts has to be considered in determining whether they are capable of constituting the *actus reus* of genocide within the meaning of Article II (d) of the Convention.').

[133] See, generally, *Akayesu* Trial Judgment (n 22) para. 508 ('[T]he Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.'). See also

The payment of fines for having children, if dissuasive enough, has also been considered factually relevant to the commission of such a crime.[134]

10.5.1.3 *Evaluating the measures*

The determination as to whether a given measure may be said to have been intended to prevent births within the group must be assessed in light of the context in which it was adopted and implemented. Where relevant, the particular cultural and social environment in which the measure was deployed should be considered. The *Akayesu* Trial Chamber held, for instance, that in patriarchal societies such as the Rwandan society, where membership of a group is determined by the identity of the father, a measure intended to prevent births within a group would include 'the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group'.[135]

10.5.1.4 *Measures intended to prevent birth and other genocidal acts*

Acts which could qualify as 'measures intended to prevent births' may also qualify as acts 'causing serious bodily or mental harm'. In contrast to the former, the genocidal offence of causing harm only requires that harm be inflicted with the requisite *mens rea*. It does not require the additional element of intention to prevent births in the group.[136] These two offences also differ at the *actus reus* level insofar as the present offence does not require proof that the measure taken to prevent birth should result in any form of serious physical or mental harm for the victim. It only requires proof that the measure was intended to deprive the victim of the ability to conceive.

The crime of imposing measures intended to prevent births within the group could also partly overlap with the offence of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. For the former to be established, however, it would have to be shown that the conditions of life imposed on members of the group were intended to destroy the group through the prevention of births within the group.[137]

10.5.2 *Mens rea*

A prosecution based upon this underlying offence requires proof that, through his conduct (say, rape, sexual mutilation, or sterilization of the victim), the perpetrator not only

Kayishema & Ruzindana Trial Judgment (n 22) paras 116–117 (adopting the views of the *Akayesu* Trial Chamber on that point). See also Cherif M Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1996), 588; *Malabo* Protocol (n 3) art. 28(B)(f) (listing 'acts of rape or any other form of sexual violence' among the underlying categories of possible genocidal acts).

[134] UNWCC, 'Notes on Trial of Ulrich Greifelt' (n 2) 18–19.

[135] See *Akayesu* Trial Judgment (n 22) para. 507.

[136] See, *infra*, 10.3.2.

[137] See, *supra*, 10.4.2.

intended to abuse his victim but also intended to prevent births within the group of his victim so as to contribute to the ultimate destruction of that group.[138] As with the other genocidal underlying crimes, the perpetrator must have acted with the requisite *dolus specialis* that attaches to all genocidal offences.[139]

10.6 Forcibly Transferring Children of the Group to Another Group

10.6.1 *Actus reus*

10.6.1.1 Underlying act

The forcible transfer of children from one group to another could constitute an underlying act of genocide where those responsible for transferring the children intend to destroy the group physically, in whole or in part.[140] In such a case, the act can have

[138] *Popović et al.* Trial Judgment (n 14) para. 819 (footnotes omitted) ('To amount to a genocidal act, the evidence must establish that the acts were carried out with intent to prevent births within the group and ultimately to destroy the group as such, in whole or in part.'). See also ICJ *Bosnia-Serbia* 2007 Judgment (n 8) paras 355–356, 361 (finding, in response to the Applicant's claims that 'forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practiced when various municipalities were occupied by the Serb forces... in all probability entailed a decline in birth rate of the group, given the lack of physical contact over many months' and 'rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility', that no evidence was provided as to 'enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II (d) of the Convention') (summarized in *Popović et al.* Trial Judgment (n 14) fn 2937).

[139] But see Schabas, *Genocide in International Law* (n 11) 174 (footnote omitted) ('In contrast with paragraph (c), paragraph (d) does not require that the measures to restrict births be "calculated" to bring about the destruction of the group in whole or in part, only that they be intended to prevent births within the group. Such measures can be merely ancillary to a genocidal plan or programme, as it was, for example, in the case of the Nazis. Adolph Eichmann was tried on a charge of "devising measures intended to prevent child-bearing among the Jews." The Court said that it did not regard the prevention of child-bearing as an explicit part of the "final solution," concluding Eichmann's involvement in "imposing measures" had not been proven. Nevertheless, he was convicted for devising "measures the purpose of which was to prevent childbearing among Jews by his instruction forbidding births and for the interruption of pregnancy of Jewish women in the Theresin ghetto with intent to exterminate the Jewish people".'). Professor Schabas's view on that point is not entirely convincing. To constitute genocide, every category of genocidal act listed in Article II of the Genocide Convention must be committed with the requisite genocidal intent. The crime of 'preventing births' is no different in that regard. The fact that the measure must be only be 'intended' to prevent birth with no further mention that it must also be calculated to bring about the destruction of the group in whole or in part does not negate the general, *chapeau*, requirement that the perpetrator must also have intended to prevent births in order to contribution to the destruction of a group, in whole or in part. The absence of mention in letter (d) of the element of 'calculation' (in contrast to letter (c)) can be explained in that preventing births in a group would *per se* be capable of contributing to the destruction of a group whereas 'conditions of life' under letter (c) would not necessarily be. It would therefore have been considered necessary from the normative point of view to specify that only those measures that are calculated to have that effect would qualify under letter (c).

[140] Lemkin understood the notion of genocide to include 'deliberate separation of families for depopulation purposes [...] [which is] subordinated to the criminal intent to destroy or to cripple permanently a human group'. Raphaël Lemkin, 'Genocide as a Crime under International Law' (1947) 41 American Journal of International Law 145 (hereafter Lemkin, 'Genocide as a Crime') 147. Genocide, he said, typically comprises two phases: the destruction of the cultural and social life of the 'oppressed group' and the imposition of the national pattern of the 'oppressor'. Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for

consequences for the group's capacity to regenerate itself and hence, upon its long-term survival.[141] The transferred children must come from the group which the perpetrators intend to destroy. However, the children need not be transferred to the perpetrator's group. It is enough that the children are transferred from the targeted group to another.[142]

Footnote 5 of the ICC's *Elements of Crimes* suggests that the term 'forcibly' is not restricted to the use of physical force, but may include threats of force or coercion, such as that caused by the fear of violence, duress, detention, psychological oppression, or abuse of power, against such person, persons, or another person, or by taking advantage of a coercive environment. One could also imagine the possible situation where the transfer is carried out without the informed consent of the transferee as is the case, for instance, if the child concerned is too young to provide informed consent.[143]

10.6.1.2 Nature of the act—cultural genocide in disguise?

A number of commentators have described this offence as a sort of cultural genocide.[144] Whilst not entirely devoid of factual merit, the proposition is not legally convincing. First, cultural genocide is not a form of conduct prohibited by the law of genocide.[145]

International Peace 1944) 79. In an *obiter dictum*, the *Akayesu* Trial Chamber held that the objective of this prohibition is 'not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another'. See *Akayesu* Trial Judgment (n 22) para. 509. The holding was later adopted and reiterated by other Chambers of the ICTR. See, in particular, *Musema* Trial Judgment (n 22) para. 159; *Rutaganda* Trial Judgment (n 22) para. 54; *Kayishema & Ruzindana* Trial Judgment (n 22) para. 118. Regarding the negotiating history of this prohibition, see also Tams *et al.*, *Genocide Convention* Commentary (n 29) 91–93 (for a brief discussion of the *travaux* in respect of that offence).

[141] See, generally, ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 136. It has sometimes been suggested that the crime of transfer of children from one group to another is better regarded as a form of 'cultural' genocide than a biological one. See, e.g., Hirad Abtahi and Philippa Webb, 'Secrets and Surprises in the *Travaux Préparatoires* of the Genocide Convention' in Margaret M DeGuzman and Diane M Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018) 310–11; Robinson, *Commentary on the Genocide Convention* (n 6) 64–65.

[142] See also the ICC *Elements of Crimes* (n 12) art. 6(e)(4) (providing that the transfer was 'from that group [which the perpetrator intended to destroy in whole or in part] to another group').

[143] See, generally, *Akayesu* Trial Judgment (n 22) para. 509 ('With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.'); *Rutaganda* Trial Judgment (n 22) para. 54; *Musema* Trial Judgment (n 22) para. 159. See also Oosterveld & Garraway, 'Elements of Genocide' (n 92) 55 (explaining that the *Elements*' footnote was a normative echoing of the holding of the Trial Chamber in *Akayesu*).

[144] See, e.g., Kreß, 'Crime of Genocide under International Law' (n 91) 484 (footnotes omitted) ('This prohibited act is situated at the border line with so-called cultural genocide. It may, however, also be seen as a more subtle form of biological genocide by eliminating the group's reproductive capacity.'). See also, Robinson, *Commentary on the Genocide Convention* (n 6) 64–65; Secretary-General, Draft Convention with Commentary reprinted in Abtahi & Webb, *Travaux Préparatoires* (n 88) 235 ('The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.').

[145] See, *supra*, 8.4.4.6.3.

Second, this suggestion creates a degree of confusion between the purpose that the perpetrator must pursue (i.e., the physical or biological destruction of the group) and the impact that the transfer could have on the victim (i.e., a change of culture). The latter is not an element nor, in general, is it relevant to establishing the commission of this crime. Instead, the removal of children from one community to another, like the selective killing of males in Srebrenica, would impact the group's ability to perpetuate itself physically and biologically.[146] It is therefore more accurate to characterize this offence, like other genocidal offences, as being relevant to the intended *physical* or *biological* destruction of a group.[147]

10.6.1.3 Age of the victim—who are 'children'?

The Genocide Convention does not specify the age limit relevant to establishing the status of an individual as a 'child' under this prohibition. At the time of the adoption of the Convention, it was thought that the relevant age might depend on the law of the country concerned.[148] During the negotiations of the ICC's *Elements of Crimes*, states initially disagreed about this matter,[149] but eventually agreed to a limit of eighteen years, consistent with the UN Convention on the Rights of the Child (Article 1).[150] Considering the absence of clear and uniform practice on this

[146] During the drafting of the Convention, the representative of Venezuela noted the following in relation to the practice of transferring children from one group to another:

> [T]he forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization [...] to a highly civilized group [...] yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.

UN GAOR, 3rd Sess, 83d mtg, UN Doc. A/C.6/SR.83 (25 October 1948) (hereafter UN Doc. A/C.6/SR.83), 195.

[147] The suggestion that the transfer of children from one group to another constitutes 'cultural' genocide could also jeopardize the reliability of findings that such conduct constitutes genocide. See generally, Commonwealth of Australia, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) (hereafter Australia, *Separation of Aboriginal Children*) (finding that the transfer of aboriginal and Torres Strait islander children to communities of other (white) culture amounted to 'cultural' genocide). See also UN Committee on the Elimination of Racial Discrimination, Reports Submitted by State Parties under Article 9 of the Convention: Twelfth Periodic Reports of State Parties due in 1998, UN Doc. CERD/C/335/Add.2, 14 December 1999 (hereafter UNCERD Australia 1998 Report), paras 115–118; and *Kruger et al. v. Australia* (The Stolen Generations Case), Final Judgment on Reserved Questions of Law, [1997] HCA 27.

[148] See Robinson, *Commentary on the Genocide Convention* (n 6) 65 ('The Convention does not define the term "children." It must be accepted in the general sense of a "child" as distinguished from an "adult." Who is a "child" and who an "adult" depends on the law of the country, establishing the age when a person may legally dispose of himself.').

[149] Oosterveld & Garraway, 'Elements of Genocide' (n 92) 54–55 (noting the disagreement among states regarding the relevant age-limit). See also William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) (hereafter Schabas, *Commentary on the Rome Statute*) 133 (and references in fn 107).

[150] See, ICC *Elements of Crimes* (n 12) art. 6(e) para. 5 ('The person or persons were under the age of 18 years.').

point, it is unclear whether the eighteen-year threshold could be said to form part of customary law.

10.6.2 *Mens rea*

Like other genocidal offences, this crime must be carried out intentionally, that is, knowingly and deliberately, and with the requisite genocidal intent. Knowledge and deliberateness would have to pertain, in particular, to the fact that those subject to the acts are children and that they are being transferred to a group which is not their own.

In line with the necessary element of age injected into the *actus reus* of the offence, the *Elements of Crimes* also provide that the perpetrator must have been aware that the victim was under eighteen years old. The *Elements* do so, however, by providing for a form of *mens rea* that envisages the possibility that mere negligence on the part of the accused in relation to the age of the transferee could be enough to meet the requisite threshold: 'The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.' The compatibility of this standard of *mens rea* with Article 30 has been questioned and is not yet resolved.[151]

10.7 Exhaustive Character of the List?

It is generally accepted that the list of five prohibited acts enumerated in Article II of the Genocide Convention is exhaustive or, as one author put it, 'limitative'[152] At the time of the drafting of the Convention, there were, suggestions to broaden that list. Lemkin, for instance, thought that acts of confiscation could in some cases constitute underlying acts of genocide.[153] However, from the Genocide

[151] See, e.g., William A Schabas, 'Article 6: Genocide' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Nomos 2016) (hereafter Schabas, 'Article 6: Genocide') 140; Schabas, *Commentary on the Rome Statute* (n 149) 133 (pointing out, however, that the issue is unlikely to be of great factual significance).

[152] Robinson, *Commentary on the Genocide Convention* (n 6) 57 and 64 ('[O]nly the five acts specifically enumerated in Article II were to be considered as Genocide, provided they were committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.'). See also Mélanie Vianney-Liaud, 'Legal Constraints in the Interpretation of Genocide' in Simon M Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Springer 2016), 262–63; Jessberger, 'Definition and Elements of Genocide' (n 9) 94; Schabas, *UN International Criminal Tribunals* (n 23) 172. See also *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, paras 1311 (footnotes omitted) ('It should be noted that some versions of the definition of this crime in the relevant ECCC instruments could be interpreted as creating an open-ended list of constitutive acts of genocide. In order to avoid a breach of the *nullum crimen sine lege* principle, the Co-Investigating Judges will take into consideration Article 9 of the ECCC Agreement and Article 4 of the ECCC Law which provide that "the Extraordinary Chambers have jurisdiction to prosecute the suspects who have committed crimes of genocide, as defined in the 1948 Convention" and apply the international definition of genocide.') and 1312 (limiting the list of underlying acts to those provided for in Article II of the Genocide Convention).

[153] UNWCC, 'Notes on Trial of Ulrich Greifelt' (n 2) 37 (footnotes omitted):

> The term of genocide was coined and its substance defined by Professor R. Lemkin of the United States. The word itself is the amalgamation of the ancient Greek term *genos* (race,

Convention onwards, international instruments—in particular, the statutory instruments of international(ized) criminal tribunals—have dutifully stuck to that limited list of five recognized categories of underlying offences.[154] The acts punishable as genocide under customary international law are therefore arguably limited to those five categories, but whilst the list is exhaustive as a matter of customary law, international law does not prohibit a national or international(ized) jurisdiction from expanding upon that list.[155] A number of jurisdictions have thus prohibited other types of crimes as genocide and thus reached beyond the Convention.[156]

> tribe) and the Latin *cide* (killing), and falls into the group of words such as homicide, infanticide and the like, 'Generally speaking,' said Professor Lemkin, 'Genocide does not necessarily mean the immediate destruction of a nation.... It is intended rather to signify a co-ordinated plan of different nations aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.... Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.' The detailed objectives of such an action are directed towards 'the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.'

As an illustration of a given action falling within the scope of Genocide, the author referred to confiscations of property, such as precisely those tried in this case:

> 'The confiscation of property of nationals of an occupied area on the ground that they have left the country may be considered simply as a deprivation of their individual property rights. However, if the confiscations are ordered against individuals, solely because they are Poles, Jews, or Czechs, then the same confiscations tend in effect to weaken the national entities of which these persons are members.'

[154] ICTY Statute (n 3) art. 4; ICTR Statute (n 3) art. 2; ICC Statute (n 3) art. 6; ECCC Statute (n 3) art. 4; East Timor Tribunal Statute (n 3) art. 4. The statutory instruments of these tribunals are directly inspired from the terms of the Genocide Convention. See, generally, *Karadžić* Trial Judgment (n 11) para. 539 ('The crime of genocide punishable under Article 4 of the Statute adopts the definition and list of punishable acts enumerated in Article II of the Genocide Convention.').

[155] Thus, for instance, Article 28(B), letter (f), of the *Malabo* Protocol includes 'acts of rape or any other form of sexual violence' among the underlying categories of crimes that could constitute genocide. *Malabo* Protocol (n 3) art. 28B(f). In so doing, the Protocol does not create a new sort of genocidal criminality. It has long been accepted that rape and other forms of sexual violence could constitute underlying acts of genocide. See, *supra*, including ICJ *Croatia-Serbia* 2015 Judgment (n 1) para. 158; ICJ *Croatia-Serbia* 2015 Judgment (n 1) paras 166; *Popović et al.* Trial Judgment (n 14) para. 812; *Karemera et al.* Trial Judgment (n 22) para. 1609; ICC *Elements of Crimes* (n 12) art. 6 and fn 3. In that sense, the Protocol merely explicit an existing penal reality. In addition, it makes it clear that, under that Protocol, a rape or other forms of sexual violence would not need to fulfil the elements of another category of recognized genocidal offence to come within the terms of that prohibition.

[156] See, generally, references in Olympia Bekou and Katerina K Miariti, *Implementing the Rome Statute of the International Criminal Court: Ratification, Implementation and Co-operation* (Center for International Law Research and Policy 2017) (hereafter Bekou & Miariti, *Implementing the Rome Statute*), s 4.2.2, pp. 29–33. See also, *Malabo* Protocol (n 3) art. 28B(f) (providing for the following as underlying genocidal offence: 'Acts of rape or any other form of sexual violence').

Finally, an act which is not explicitly listed as one of the prohibited acts (e.g., 'ethnic cleansing'[157]) could still constitute an act of genocide if it satisfies the *actus reus* and *mens rea* elements of one of the listed offences.[158] Acts of rape or sexual violence,[159] torture, enforced disappearance, or forced displacement have thus already been shown to be capable of amounting to genocide.

[157] Regarding a proposal by Syria to include in the Genocide Convention a prohibition on ethnic cleansing, see UN Doc. A/C.6/SR.82 (n 112) 184–86.

[158] In the *Akayesu* case, for instance, the accused had been charged with genocide, *inter alia*, in relation to various sexual violence incidents, including rape. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-I, Amended Indictment, 17 June 1997 (hereafter *Akayesu* Indictment), paras 12A and 12B. Although he was convicted for these acts, Akayesu was not convicted for rape *qua* genocide proper, but for rape as 'causing serious bodily and mental harm' per Article 2(2)(b) of the ICTR Statute. *Akayesu* Trial Judgment (n 22) paras 706–707 and 731. For an illustration regarding acts of looting see, ICJ Croatia-Serbia 2015 Judgment (n 1) paras 498 ('The Court recalls that, in order to come within the scope of Article II (c) of the Genocide Convention, the acts alleged by Serbia must have been such as to have inflicted on the protected group conditions of life calculated to bring about its physical destruction in whole or in part. The Court finds that the evidence before it does not enable it to reach such a conclusion in the present case. Even if Serb property was looted and destroyed, it has in any event not been established that this was aimed at bringing about the physical destruction of the Serb population of the Krajina.'), and 510 (regarding acts of 'ethnic cleansing'). See also *Krstić* Trial Judgment (n 35) para. 580; *Tolimir* Appeal Judgment (n 27) paras 230 and 254; *Blagojević & Jokić* Appeal Judgment (n 52) para. 123; *Krstić* Appeal Judgment (n 12) paras 33 and 133; *Mladić* Trial Judgment (n 11) para. 3435.

[159] See, e.g., *The Queen v. Munyaneza* (Désiré), 2009 QCCS 2201 (Can. Superior Ct.) (hereafter *Munyaneza* Trial Judgment), paras 94–96.

11

Genocide, Other Genocidal Acts, and Modes of Participation

11.1 General Considerations

11.1.1 Range of prohibited conduct

Article III of the Genocide Convention provides that the following acts shall be punishable: (i) genocide; (ii) conspiracy to commit genocide; (iii) direct and public incitement to commit genocide; (iv) attempt to commit genocide; and (v) complicity in genocide.[1] These punishable acts are now part of customary international law.[2] Taken as a whole, they indicate 'how far the crime needs to have advanced before it becomes punishable' and reflect 'what kind of involvement in actual genocide may result in penal

[1] The statutory instruments of international tribunals with jurisdiction over the crime of genocide have faithfully replicated that list. UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 (hereafter ICTY Statute), art. 4; UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, 8 November 1994 (hereafter ICTR Statute), art. 2; UN Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (hereafter East Timor Serious Crimes Panels Statute), section 4; Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 3 (hereafter ICC Statute or Rome Statute), art. 6; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Doc. NS/RKM/1004/006, 27 October 2004 (hereafter ECCC Statute), art. 4. See, however, regarding the peculiarities of the ICC Statute, *infra*, in particular, 11.3.6, 11.4.4, 11.5.2.2, and 11.7.2.8.

[2] See, generally, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment), para. 807 (footnotes omitted) ('The crime of genocide is punishable under Article 4 of the Statute, which adopts the definition of genocide and list of punishable acts in Articles II and III of the Genocide Convention. These articles of the Genocide Convention are widely accepted as customary international law. Genocide was therefore a punishable offence under customary international law at the time of the acts alleged in the Indictment.'); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005 (hereafter *Blagojević & Jokić* Trial Judgment), para. 639 (footnote omitted) ('It is widely recognised that the law set out in the Convention reflect customary international law and that the norm prohibiting genocide constitutes jus cogens.'); *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004 (hereafter *Brdanin* Trial Judgment), para. 680; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (hereafter *Stakić* Trial Judgment), para. 500; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (hereafter *Tolimir* Trial Judgment), para. 733; *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999 (hereafter *Jelisić* Trial Judgment), para. 60; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001 (hereafter *Krstić* Trial Judgment), para. 541; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999 (hereafter *Kayishema & Ruzindana* Trial Judgment), para. 88. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), paras 142 and 161; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion of 28 May 1951) [1951] ICJ Reports 23 (hereafter ICJ, Reservations to the Genocide Convention).

responsibility'.[3] These were intended to ensure the effectiveness of the Convention, encapsulating many categories of conduct which could contribute to the commission of such a crime, including at the earliest stages of the genocidal process.[4] However, whilst the Convention provides for these five inchoate offences and modes of liability, a culpable contribution to an act of genocide is not limited to these. Liability could be incurred as a matter of customary law for contributing to an act of genocide in a variety of other ways, including by instigating, ordering, or aiding and abetting such a crime or pursuant to the doctrine of superior responsibility.[5] Domestic regimes could recognize still more categories of punishable acts or modes of liability applicable to acts of genocide.

11.1.2 Categories of potential perpetrators

The Genocide Convention provides no express limitation as regards the categories of potential perpetrators of such crimes.[6] Instead, Article IV of the Convention expressly

[3] UN Security Council, Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, UN Doc. S/1994/674, 27 May 1994 (hereafter Final Report on the former Yugoslavia), para. 99 ('Article III of the Convention lists the punishable acts as being: 'genocide, conspiracy to commit genocide, direct or public incitement to commit genocide, attempt to commit genocide and complicity in genocide'. This enumeration indicates how far the crime needs to have advanced before it becomes punishable. For example, an attempt will suffice. Second, it describes what kind of involvement in actual genocide may result in penal responsibility under the Convention. Thus, criminal responsibility extends to those involved in incitement, conspiracy and attempt, as well as individuals actually executing the specific acts prohibited by the Convention. Political masterminds or propaganda people are no less responsible than the individuals who perform the actual carnage. There are, therefore, several legal bases for criminal responsibility of individuals who engage in or are part of the various aspects of genocide.').

[4] See, generally, Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960) (hereafter Robinson, *Commentary on the Genocide Convention*), 66:

> It is obvious that the purpose of punishing and preventing Genocide would not be achieved by declaring punishable only those acts which constitute Genocide in accordance with the provisions of Article II. Persons are accessories to group destruction by cooperating with those directly guilty of Genocide or by performing certain acts preparatory to Genocide. The involvement could mean participation in a common design of annihilation by planning, scheming, giving orders or otherwise preparing for, or assisting in, the commission of the acts of Genocide. There may also be persons inciting to Genocide or making attempts to commit such acts. All such culprits must also be included in the group of persons subject to punishment. Article III, therefore, lists as punishable acts not only those of Genocide, but also of conspiracy to commit it, complicity therein, as well as direct and public incitement and attempts to commit Genocide.

[5] See, generally, *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Judgment, 16 January 2007 (hereafter *Ndindabahizi* Appeal Judgment), fn 259 (noting that the modes of liability as regulated under Article 6(1) of the ICTR Statute are also applicable to the crime of genocide pursuant to Article 2 of that Statute); *Prosecutor v. Ntakirutimana et al.*, Case Nos ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004 (hereafter *Ntakirutimana* Appeal Judgment), para. 500; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 (hereafter *Krstić* Appeal Judgment), para. 138; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007 (hereafter *Nahimana et al.* Appeal Judgment, para. 492 (footnote omitted) ('[E]ven if an accused has not committed genocide himself, his responsibility may be established under one of the modes of responsibility provided for in Article 6(1) and (3) of the Statute. Where a person is accused of having planned, instigated, ordered or aided and abetted the commission of genocide by one or more other persons pursuant to Article 6(1) of the Statute, the Prosecutor must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide.'). See also, *infra*, 11.7.

[6] See, *supra*, 3.3.3 and discussion therein. See, however, regarding the situation of monarchs, Matthew Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later'

provides that any person committing such an act shall be punished 'whether they are constitutionally responsible rulers, public officials or private individuals'.[7] Any individual, regardless of position or title, may therefore in principle commit one of the punishable acts and be held responsible for it:

> Genocide is not a crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike.[8]

In particular, whilst such a scenario might seem factually incongruous, the law does not exclude the possibility that a member of the targeted group could commit an act of genocide against members of the group to which he belongs.[9]

(1998) 15 Arizona Journal of International & Comparative Law 415 (hereafter Lippman, 'Convention on Genocide Fifty Years Later'), 458–59; UN GAOR, 3rd Sess, 93rd mtg, UN Doc. A/C.6/SR.93 (6 November 1948) (hereafter UN Doc. A/C.6/SR.93), 317 (Mr Petren, Sweden); UN GAOR, 3rd Sess, 94th mtg, UN Doc. A/C.6/SR.94 (8 November 1948) (hereafter UN Doc. A/C.6/SR.94), 342 (Mr Fitzmaurice, United Kingdom); and, *supra*, 3.3.3.1.2.

[7] See, *supra*, 3.3.3. See also Final Report on the former Yugoslavia (n 3) para. 100:

> It is explicitly stated in the Convention that people who have committed genocide shall be punished whether they are 'constitutionally responsible rulers, public officials or private individuals' (art. IV). Public officials include both civilian and military personnel and everyone who holds (or held) a public office—be it legislative, administrative or judicial. To meet the aims of the Convention, people in the said categories must be treated equally irrespective of their de jure or de facto positions as decision-makers. As individuals, they are subject to prosecution like any other individual violator. They cannot hide behind any shield of immunity. The legal and moral responsibilities are the same and the need to prevent genocide no less clear because of the position of the violator.

[8] *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 1 June 2001 (hereafter *Kayishema & Ruzindana* Appeal Judgment), para. 170.

[9] See, generally, Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Jessberger, 'Definition and Elements of Genocide'), 94 (noting that the perpetrator could be a member of the protected groups); Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461 (hereafter Kreß, 'Crime of Genocide under International Law'), 473 (supporting the possibility of a member of the targeted group committing the crime); Orna Ben-Naftali and Yogev Tuval, 'Punishing International Crimes Committed by the Persecuted' (2006) 4 Journal of International Criminal Justice 128 (hereafter Ben-Naftali and Tuval, 'Punishing International Crimes'), 153 (pointing out, however, that 'no Jew was ever charged with Crimes against the Jewish People—a datum attributed, in an obiter in the Enigster case, to the fact that the offence requires "the intent to destroy the collectivity against which the crimes are committed"—an intent which the persecution refrained from assigning to Enigster, and indeed to any Jew.'). The 'Crimes against the Jewish People' that Ben-Nafatli and Tuval mention are the domestic 'equivalent' concept to genocide. In October 1978, the US Congress adopted legislation prohibiting exports and imports of goods and technology to and from Uganda. In providing reasons for its decision, Congress suggested (perhaps a bit hyperbolically) that '[t]he Government of Uganda [...] has committed genocide against Ugandans' and that the 'United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide'. Uganda Embargo Act, Public Law 95-435, 92 Stat. 1051 (1978), 1051–53, in particular, ss 5(a) and (b). Whilst more than purely legal considerations might have played a part in the words chosen by the US Congress, it illustrates, at the very least, the possibility of the concept of genocide being made to apply in a situation of racial, religious, ethnic, and national homogeneity between victims and perpetrators. See also, *supra*, 8.4.4.1.4. In that regard, genocide does not differ from crimes against humanity which may also, in principle, be committed by any person including a member of the targeted population. See *infra*, 12.3.1.

11.1.3 Manner, form, and method of commission and culpable contribution

The Genocide Convention provides for five categories of punishable acts.[10] These do not, however, constitute a *numerus clausus* of the possible culpable contributions that can be made to the commission of a genocidal offence. International law does not prohibit national and international jurisdictions from expanding upon that list. Nor does international law prescribe the manner in which such punishable acts could be committed or the form that they could take. It is now accepted, for instance, that a genocidal act could be committed by act or omission.[11] It may consist of a single act,[12] or as more often the case, a pattern or series of actions.[13] A culpable contribution to the commission of such a crime may in turn take many forms and can, in principle, be made at any point in time during the commission of the crime and at any level of a structure or chain of command involved in the commission of such crimes.[14] Liability for the commission of an act of genocide may therefore extend not only to those who physically committed or aided and abetted killings or other genocidal acts 'but also to those who intentionally participated in a common plan that yielded such acts'.[15]

[10] Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951, 78 UNTS 277 (hereafter Genocide Convention), art. 3. See, *supra*, 11.1.1.

[11] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998 (hereafter *Kambanda* Trial Judgment), para. 39(ix); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgment, 3 July 2002 (hereafter *Bagilishema* Appeal Judgment), para. 35. See also *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgment, 17 November 2009 (hereafter *Bagaragaza* Sentencing Judgment), para. 22; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (hereafter *Akayesu* Trial Judgment), paras 485, 546–548 (regarding complicity, by act or omission); *Prosecutor v. Kalimenzara*, Case No. ICTR-05-88-T, Judgment, 22 June 2009 (hereafter *Kalimenzara* Trial Judgment), para. 161; *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Judgment, 1 November 2010 (hereafter *Kanyarukiga* Trial Judgment), para. 635 (regarding the possibility of planning, instigating, ordering, and aiding and abetting by omission); *Nahimana et al.* Appeal Judgment (n 5) paras 478 (providing for the possibility of liability for commission by omission), 595 (regarding instigation by omission), and 672 (aiding and abetting by omission); *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007 (hereafter *Brđanin* Appeal Judgment), paras 273–277; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgment Issued on 24 March 2016, 24 March 2016 (hereafter *Karadžić* Trial Judgment), para. 575; *Prosecutor v. Mrkšić & Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009 (hereafter *Mrkšić & Šljivančanin* Appeal Judgment), paras 49 and 134; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR72.1, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III—Special Intent Crimes, Superior Responsibility), 25 June 2009 (regarding JCE liability). Liability under the doctrine of superior responsibility is also engaged as a result of a culpable failure to act. See, generally, Guénaël Mettraux, *The Law of Command Responsibility* (OUP 2009) (hereafter Mettraux, *Command Responsibility*), 37ff. See also *Brđanin* Trial Judgment (n 2) paras 717–721; and *infra*, 11.7.2.6.

[12] Note, however, the use of the plural in the Convention and relevant statutory documents (e.g., 'killing members of the group', 'causing serious bodily or mental harm to members of the group').

[13] *Kayishema & Ruzindana* Appeal Judgment (n 8) para. 163.

[14] See, generally, *Prosecutor v. Kaing Guek Eav (Duch)*, Case No. 001/18-07-2007-ECCC/SC, Judgment, 3 February 2012 (hereafter *Duch* Appeal Judgment), para. 292 ('Crimes such as genocide or crimes against humanity describe multiple categories of conduct, capable of encompassing several criminal transactions, often spanning long periods of time.'). One may have to reserve the case of the 'lone perpetrator' acting outside a context and situation in which his intent could even theoretically be fulfilled. See, e.g., *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, 11 September 2006 (hereafter *Mpambara* Trial Judgment), fn 7 ('The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected.').

[15] *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004

Ultimately, it is the law applicable in the jurisdiction in question that will determine the extent and scope of potential liability attaching to acts of genocide.

11.2 Genocide

11.2.1 Genocide as 'the crime of crimes'

Genocide has been variously described as 'the crime of crimes'[16] and as 'a crime against all of humankind',[17] symbolizing the 'pinnacle of evil'.[18] For many victims of mass atrocities, it represents a suitable and desirable legal acknowledgment of their suffering. In contrast, for perpetrators and those associated with them, the 'genocide' label is a historical marker to be evaded at all costs. In addition, because this prohibition seeks to protect not just individuals but groups as such, it is generally acknowledged to constitute a particularly serious criminal offence. The gravity of genocide is in turn reflected in the stringent requirements of that offence.[19] These requirements—the demanding proof of specific intent and the showing that the group was targeted for destruction—guard against any danger that convictions for this significant crime will be imposed lightly or without full consideration of its significance.[20] However, where its requirements are satisfied, 'the law must not shy away from referring to the crime committed by its proper name'.[21] These particular features of the crime of genocide have been reflected in the generally cautious approach taken to the task of defining this crime and setting strict limits to its application.[22] The intrinsic gravity of the crime of genocide

(hereafter *Rwamakuba* Decision on JCE), para. 19; *Prosecutor v. Nuon Chea & Khieu Samphân*, Case No. 002/19-09-09-2007/ECCC/TC, Case 002/01 Judgment, 7 August 2014 (hereafter *Nuon Chea et al.* Appeal Judgment), para. 787.

[16] *Kambanda* Trial Judgment (n 11) para. 16. See also *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999 (hereafter *Serushago* Sentencing Judgment), para. 15; *Stakić* Trial Judgment (n 2) para. 502.

[17] *Krstić* Appeal Judgment (n 5) para. 36. See also *In re* Adolfo Francisco, Case No. App 84/1998, 1998/22604 (Nat'l High Ct Spain 4 November 1998) (hereafter *Francisco* Appeal Judgment) (describing genocide as 'a crime of world-wide import which has a direct effect on the international community and the whole of humanity'); *In re* Augusto Pinochet, Case No. App 173/1998, 1998/22605 (Nat'l High Ct Spain 3 November 1998) (hereafter *Pinochet* Appeal Judgment). See also Global Policy Forum, 'Excerpt of High Level Panel's Report: Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect' (2 December 2004) <https://www.globalpolicy.org/component/content/article/154/26051.html> (hereafter Excerpt of High Level Panel Report), para. 200 (pointing out that 'genocide anywhere is a threat to the security of all and should never be tolerated').

[18] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) (hereafter Mettraux, *Ad Hoc Tribunals*), 193ff.

[19] *Krstić* Appeal Judgment (n 5) para. 37. See also, *supra*, 3.5. [20] Ibid. [21] Ibid.

[22] See, e.g., *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, 5 July 2001 (hereafter *Jelisić* Appeal Judgment, Wald Dissent), para. 2 (footnote omitted) (citing William A Schabas, *Genocide in International Law: The Crime of Crimes* (CUP 2000) (hereafter Schabas, *Genocide in International Law* 2000), 9) ('Some learned commentators on genocide stress that the currency of this "crime of all crimes" should not be diminished by use in other than large scale state-sponsored campaigns to destroy minority groups, even if the detailed definition of genocide in our Statute would allow broader coverage.'). See also *Stakić* Trial Judgment (n 2) para. 502 ('Like in its Decision on Rule 98 bis Motion for Judgment of Acquittal, the Trial Chamber will, whilst interpreting Article 4 restrictively and with caution, always be guided by the unique nature of the crime of genocide.'); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002 (hereafter

is also generally reflected in particularly harsh sentences handed to those convicted of that crime.[23]

11.2.2 Elements of genocide

The crime of genocide consists of two elements:[24]

i. a prohibited conduct falling within one of the relevant categories of underlying conducts, *combined with*

Stakić Decision on Rule 98*bis* Motion for Judgment of Acquittal), para. 22 (pointing out that Article 4 of the ICTY Statute, which prohibits genocide, needs to be interpreted 'restrictively and with caution' and stresses the 'exclusivity' of the crime of genocide). The *Stakić* Trial Chamber expressed its general support for the view expressed by Judge Wald in the cited holding, but qualified it by pointing out that Judge Wald's use of the word 'minority' was incorrect. The *Stakić* Trial Chamber is right that the protection against genocide is not limited to minorities but could also in theory apply to a group that represents the majority of the population. *Stakić* Trial Judgment (n 2) fn 1069. See also Steven Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd edn, OUP 2001) (hereafter Ratner & Abrams, *Accountability for Human Rights Atrocities*, 2nd edn), 42–43 (emphasizing the need to 'rescue' genocide from the risk of linguistic dilution). See also, *supra*, 3.7.1.

[23] See, for an illustration, *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgment, 1 April 2011 (hereafter *Muvunyi* Appeal Judgment), para. 66:

> In assessing the gravity of the offence at issue, the Trial Chamber briefly recalled the factual and legal basis of Muvunyi's crime. The Trial Chamber expressly considered that genocide "shocks the conscience of humanity" and that direct and public incitement to commit genocide was "of similar gravity" to genocide. Therefore, the Trial Chamber was aware of all the factual and legal circumstances surrounding the offences referred to by the Prosecution. Accordingly, the Appeals Chamber is not convinced that the Prosecution has demonstrated that the Trial Chamber erred in its assessment of the gravity of Muvunyi's offence.

Muvunyi was convicted for the inchoate offence of direct and public incitement to commit genocide and sentenced to fifteen years of imprisonment. See also, *supra*, 3.5.

[24] See, generally, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017 (hereafter *Mladić* Trial Judgment), para. 3433 ('Genocide is defined under Article 4(2) of the [ICTY] Statute to encompass any of certain prohibited acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such.'); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgment, 11 July 2013 (hereafter *Karadžić* Rule 98*bis* Appeal Judgment), para. 22 (footnotes omitted) ('The Appeals Chamber further observes that Article 4(2) of the [ICTY] Statute defines genocide to encompass any of certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" and lists a number of prohibited acts, including "killing members of the group". Thus, for the crime of genocide, one or more of the prohibited acts enumerated in Article 4(2) of the Statute must be established. In addition, it must be established that the prohibited act was committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, which is often referred to as either genocidal intent, *dolus specialis*, or specific intent. The requirement of an underlying, prohibited act, or *actus reus*, of genocide is thus analytically distinct from the requirement of genocidal intent.'); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001 (hereafter *Bagilishema* Trial Judgment), para. 55 (noting that genocide 'is proven if it is established beyond reasonable doubt, firstly, that one of the acts listed under Article 2(2) of the ICTR Statute was committed and, second, that this act was committed against a specifically targeted national, ethnical, racial or religious group, with the specific intent to destroy, in whole or in part, that group'); *Krstić* Trial Judgment (n 2) para. 542. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 130 ('According to that Article [i.e., Article II of the Genocide convention], genocide contains two constituent elements: the physical element, namely the act perpetrated or *actus reus*, and the mental element, or *mens rea*. Although analytically distinct, the two elements are linked. The determination of *actus reus* can require an inquiry into intent. In addition, the characterization of the acts and their mutual relationship can contribute to an inference of intent.').

ii. the intent on the part of the perpetrator to destroy, in whole or part, a national, ethnical, racial, or religious group, as such (*dolus specialis*).[25]

The underlying prohibited act of genocide could take the form of any of the punishable acts discussed earlier, any of which could constitute its *actus reus*.[26] Acts which do not fall within the definition of any of these could constitute evidence of the specific intent of a perpetrator to physically destroy the group.[27] The *mens rea* of genocide consists of the specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.[28] No proof of an agreement to commit such crimes, or of a policy or plan is required.[29] Nor is it necessary to show that the commission of the underlying acts has in fact impacted the group.[30]

The broad nature of the definition of genocide means that not only does it encompass a variety of factual scenarios, but that *a* particular genocide may be factually quite different from another. Where, for instance, the protected group is relatively small, the crime of genocide might not involve a large number of victims.[31] In contrast, some cases may involve state organs and the state apparatus and a large number of participants (perpetrators and victims); the degree of sophistication involved in the planning and execution of such a crime may also vary substantially from one case

[25] This could consist of one of these and/or a combination thereof: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; and (v) forcibly transferring children of the group to another group. See also *Mladić* Trial Judgment (n 24) par 3435; and, *supra*, 10.2–10.6.

[26] See, *supra*, 10.1–10.7. See also *Mladić* Trial Judgment (n 24) para. 3434. See also Final Report on the former Yugoslavia (n 3) para. 98 ('Each of these categories of acts can constitute the crime of genocide, as could any combination of these acts.').

[27] *Mladić* Trial Judgment (n 24) para. 3435 (footnote omitted) ('Acts which do not fall under the definition of prohibited acts may be considered as evidence of the specific intent of a perpetrator to physically destroy the group.'); *Krstić* Trial Judgment (n 2) para. 580; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (hereafter *Tolimir* Appeal Judgment), paras 230 and 254. See also *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, 9 May 2007 (hereafter *Blagojević & Jokić* Appeal Judgment), para. 123; *Krstić* Appeal Judgment (n 5) paras 33 and 133. See also, *supra*, 9.4.7.3–9.4.7.4.

[28] *Mladić* Trial Judgment (n 24) para. 3435. See also, *supra*, 8.1–8.5.

[29] *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Judgment, 27 November 2007 (hereafter *Simba* Appeal Judgment), para. 260; *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005 (hereafter *Semanza* Appeal Judgment), para. 260; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment), para. 48. See also references *supra*, 7.1.2 and 3.3.2.4.

[30] See, generally, *Karadžić* Rule 98*bis* Appeal Judgment (n 24) para. 23 (footnote omitted) ('The Appeals Chamber accordingly discerns nothing in the Trial Chamber's ruling to suggest that it erred in law by imposing a "group impact" requirement on the *actus reus* of killing, as the Prosecution claims. Indeed, the Appeals Chamber observes that the Trial Chamber explicitly recognised that "the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold".'). See also, *supra*, 8.2, making it clear that the destruction requirement exclusively forms part of the *mens rea* of the offence, not its *actus reus*.

[31] *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015 (hereafter *Nyiramasuhuko et al.* Appeal Judgment), para. 3492 (footnote omitted) ('The Appeals Chamber recalls that there is no minimum number of victims required for a conviction of genocide and that a particularly large number of victims can be an aggravating circumstance in relation to the sentence for extermination as a crime against humanity where the extent of the killings exceeds that required for extermination.'). See also *Ndahimana v. Prosecutor*, Case No. ICTR-01-68-A, Judgment, 16 December 2013 (hereafter *Ndahimana* Appeal Judgment), para. 231; *Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-A, Judgment, 29 September 2014 (hereafter *Nzabonimana* Appeal Judgment), para. 465. The number of victims could, however, be relevant to the sentence imposed on the accused if responsible

to another. Therefore, whilst historical precedents of genocide may provide a general sense of the *sort* of criminality that might be relevance to this offence, they are only *examples* and by no means represent the exhaustive list of factual scenarios which could come within the scope of this prohibition.[32]

11.3 Conspiracy to Commit Genocide

11.3.1 General considerations

The concept of 'conspiracy' as an inchoate offence is one more familiar to common law lawyers than lawyers from the civil law tradition.[33] In Nuremberg, the introduction of the notion of conspiracy in the Charter of the International Military Tribunal was thus viewed with a great deal of suspicion by lawyers from the continental system.[34] The idea of criminalizing what in effect was a plot to commit a crime without even the commencement of such crime was theoretically uncomfortable to some.[35] This contributed, in turn, to the adoption of a narrow definition of the notion of conspiracy by the Nuremberg Tribunal and one which only applied to the crime of aggression.[36]

for a large number of victims. See, generally, *Ndindabahizi* Appeal Judgment (n 5) para. 135 (footnotes omitted):

> Also, the Trial Chamber did not err in considering the large number of victims at Gitwa Hill as an aggravating circumstance relevant to the sentence. As to the conviction for genocide, there need not be a large number of victims to enter a genocide conviction. As for extermination, the actus reus requires 'killing on a large scale'. While this does not 'suggest a numerical minimum', a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination. In the present case, there is no indication that, in considering aggravating circumstances, the Trial Chamber looked at only those killings required for extermination when it specifically cited the fact that 'thousands' of people were killed.

[32] During the *Krstić* appeal, the Defence suggested that the ICTY Appeals Chamber should consider the gravity of the acts attributed to the accused in light of other genocidal events of past: 'while in no way justifying the events at Srebrenica, it cannot be ignored that its scale pales in comparison with the three *bona fide* genocides recognised in modern history: the Armenia [*sic*] genocide, the Holocaust, and the Rwanda genocide.' *Prosecutor v. Krstić*, Case No. IT-98-33-A, Defence Response to Prosecution Appeal Brief, 21 December 2001 (hereafter *Krstić* Defence Response Brief), para. 58. The Appeals Chamber did not accept that submission and, instead, evaluated the gravity of the accused's conduct in light of his actions and the consequences thereof. See, generally, *Krstić* Appeal Judgment (n 5) paras 237–243.

[33] Regarding the common law origin of the notion of conspiracy, see, e.g., *Tolimir* Trial Judgment (n 2) para. 784 (footnotes omitted) ('According to the jurisprudence of the ICTY and the ICTR, the concept of conspiracy to commit genocide in the Genocide Convention was adopted from the common law and Article 4(3) of the Statute was taken directly from the Genocide Convention. The Chamber concurs with the *Popović et al.* Trial Chamber's findings that there are reasonable grounds to follow the common law approach in interpreting conspiracy to commit genocide.'); *Popović et al.* Trial Judgment (n 2) para. 873; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000 (hereafter *Musema* Trial Judgment), paras 185 and 187.

[34] See, e.g., Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10* (William S Hein & Co. 1997) (hereafter Taylor, *Final Report to the Secretary*), 227.

[35] See, generally, H Donnedieu de Vabres, 'Le procès de Nuremberg devant les principes modernes du Droit Pénal International' (1947) 70 *Recueil des Cours de l'Académie de droit international de La Haye* 477, (translated and reprinted in Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (OUP 2008) (hereafter Mettraux, *Perspectives on Nuremberg*)).

[36] See, again, Taylor, *Final Report to the Secretary* (n 34) 146 ('The court [i.e. the IMT] adopted a rather narrow view of the concept of conspiracy, not so evident in its general language as in its decision as to the guilt and innocence of particular defendants.').

The Tribunal held that 'conspiracy must be clearly outlined in its criminal purpose' and 'must not be too far removed from the time of decision and of action'.[37] The *United Nations War Crimes Commission* summarized the offence of conspiracy by describing it as 'one under which it is a criminal offence to conspire or to take part in an allegiance to achieve an unlawful object, or to achieve a lawful object by unlawful means'.[38] Thus understood, a 'conspiracy' may be said to consist of an 'agreement between two or more persons to commit an unlawful act'.[39]

The Genocide Convention expressly provides for the crime of conspiracy to commit genocide.[40] Similar to the Nuremberg Tribunal, it was intended to reflect the common law understanding of this concept, that is, an inchoate crime, not a mode of accomplice liability.[41] This is also how this notion was understood and interpreted by the *ad hoc* Tribunals, which determined that the crime of conspiracy to commit genocide now forms part of the *corpus* of customary international law.[42] It has been suggested that, at this point in the development of general international law, the inchoate offence of conspiracy exists in relation to only two international 'core' crimes: aggression and genocide.[43]

11.3.2 *Raison d'être*

The rationale behind the criminalization of a *mere* agreement to commit genocide was essentially twofold.[44] First, the very gravity of the crime being planned (genocide)

[37] 'Judgment' in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1 (International Military Tribunal 1947) (hereafter IMT Judgment), 225. The IMT also pointed out that there may have been several, partly overlapping, conspiracies. Ibid. In Tokyo, when discussing the charge of conspiracy to wage aggressive war, the International Military Tribunal for the Far East defined the concept of conspiracy in the following terms: 'A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plans and prepare for its fulfillment they become conspirators'. 146 Records of the Proceedings 48, 448.

[38] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) (hereafter UNWCC, *History of the UNWCC*), 196. In his Closing Speech before the IMT, Justice Robert Jackson stated that '[t]he forms of this grand type of conspiracy are amorphous, the means are opportunistic, and neither can divert the law from getting the substance of things'. Justice R Jackson, 'Speeches at the Close of the Case against the Individual Defendants' (1946) 3 The Trial of German Major War Criminals 3 (hereafter Jackson, 'Closing Speech'), 22.

[39] *Musema* Trial Judgment (n 33) para. 187 (quoting from the Sixth Committee Report). See also ibid., 63 fn 77; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003 (hereafter *Nahimana et al.* Trial Judgment), para. 1045.

[40] Genocide Convention (n 10) art. III(b).

[41] See, generally, William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) (hereafter Schabas, *Genocide in International Law*), 310; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) (hereafter Schabas, *Commentary on the Rome Statute*), 134 (citing UN GAOR, 3rd Sess, 84th mtg, UN Doc. A/C.6/SR.84 (26 October 1948) (hereafter UN Doc. A/C.6/SR.84)). See also UN Ad Hoc Committee on Genocide, Summary Record of the Seventh Meeting, UN Doc. E/AC.25/SR.7, 20 April 1948 (hereafter UN Doc. E/AC.25/SR.7) (referring to the Anglo-Saxon notion of 'conspiracy' as 'an offence consisting in the agreement of two or more persons to effect any unlawful purpose').

[42] See *infra*, 11.3.

[43] See, generally, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F Supp 2d 633 (S D N Y 2006) (hereafter *Presbyterian Church of Sudan* Trial Judgment) 669; *Hamdan v. Rumsfeld*, 126 S Ct 2749 (2006) (hereafter *Hamdan* SCOTUS Judgment), 2784.

[44] Jens D Ohlin, 'Incitement and Conspiracy to Commit Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Ohlin, 'Incitement and Conspiracy'),

demanded tools capable of preventing the commission of such a crime or, where this failed, for the possibility of criminalizing its earliest expression.[45] This provided an important element of dissuasion and prevention of the commission of an act of genocide from being fully realized.[46] Second, the criminalization of conspiracy to commit genocide was intended to sanction the fact that a group of individuals had agreed to collaborate and to join forces to commit genocide.[47] The particular danger implicit in this sort of association justified the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide was committed.[48]

11.3.3 An inchoate and continuing offence

11.3.3.1 An inchoate offence

As a matter of customary international law, conspiracy is understood to constitute an inchoate offence.[49] As such, its *actus reus* is complete as soon as an agreement is concluded between two or more individuals to commit the crime, regardless of whether it

218ff. Regarding the history of the adoption of this notion in the Genocide Convention, see also Christian J Tams *et al.*, *Convention on the Prevention and Punishment of the Crime of Genocide: Commentary* (Beck, Hart, Nomos 2014) (hereafter Tams *et al.*, *Genocide Convention Commentary*), 159–60.

[45] See, generally, *Gatete v. Prosecutor*, Case No. ICTR-00-61-A, Judgment, 9 October 2012 (hereafter *Gatete* Appeal Judgment), para. 262; *Musema* Trial Judgment (n 33) para. 185 ('The Chamber notes that the crime of conspiracy to commit genocide covered in the Statute is taken from the Genocide Convention. The "*Travaux Préparatoires*" of the Genocide Convention suggest that the rationale for including such an offence was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide should be punishable even if no preparatory act has taken place.'). See also UN Economic and Social Council, Ad Hoc Committee on Genocide: Relations Between the Convention on Genocide on the one hand and the Formulation of the Nürnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other: Note by the Secretariat, UN Doc. E/AC.25/3, 2 April 1948 (hereafter UN Doc. E/AC.25/3), 8.

[46] *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgment, 22 June 2009 (hereafter *Kalimanzira* Trial Judgment), para. 510. See also Robinson, *Commentary on the Genocide Convention* (n 4) 68.

[47] See, again, *Gatete* Appeal Judgment (n 45) para. 262 (and references in fn 638) (noting that the *travaux preparatoires* of the Genocide Convention show that the Committee considered that conspiracy to commit genocide should be punished both in view of the gravity of the crime of genocide and in view of the fact that, in practice, genocide is a collective crime which requires the involvement of a group of individuals). See Karim Azkoul, Report of the Committee and Draft Convention Drawn up by the Committee, UN Doc. E/794 (24 May 1948) (hereafter UN Doc. E/794), 20.

[48] *Gatete* Appeal Judgment (n 45) para. 262.

[49] For example, the Appeals Chamber for the ICTY noted:

> Finally, the Appeals Chamber finds no merit in Tolimir's related argument that conspiracy to commit genocide under Article 4(3)(b) of the Statute is essentially a mode of liability identical to JCE, rendering convictions under both modes of liability impermissibly cumulative. The Appeals Chamber recalls that under the Statute of the Tribunal, conspiracy to commit genocide is not a mode of liability but an inchoate crime, constituted as soon as there is an agreement among the conspirators 'to act for the purpose of committing genocide'. By contrast, JCE is a form of 'committing' under Article 7(1) of the Statute—a form of liability that requires the actual commission of the crime.

Tolimir Appeal Judgment (n 27) para. 590 (footnotes omitted). See also *Nahimana et al.* Appeal Judgment (n 5) para. 896. See also references *supra*, 11.3.1.

is actually committed.[50] Proof of the commission of a crime resulting from that agreement is therefore not necessary, as the agreement itself is the essence of the crime,[51] and the absence of consequences would provide no evidence of the necessary absence of an agreement.[52] However, evidence that genocide was in fact committed could be evidentially relevant to establishing that a conspiracy to commit it might have existed.[53]

The inchoate character of the notion of conspiracy distinguishes it from the notion of 'joint criminal enterprise' or 'common purpose' liability, which is a mode of liability that requires that, in addition to an agreement to commit an offence, a crime must actually have been committed in execution of that agreement.[54] In other words, to prove a charge of conspiracy, it is enough to show that the participants had agreed to carry out a crime, whilst in the case of a joint criminal enterprise, the prosecution must not only show that there was such an agreement, but also that crimes were committed 'in furtherance of [it]'.[55] However, it is unlikely that conspiracy will be charged

[50] See, e.g., *Musema* Trial Judgment (n 33) para. 193; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (hereafter *Kajelijeli* Trial Judgment), para. 788; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 473 (footnote omitted) ('The crime of conspiracy to commit genocide is an inchoate offence, the actus reus of which is "a concerted agreement to act for the purpose of committing genocide", and does not require evidence of the time range and end of the conspiracy. Of significance is when the agreement was formed, not when it ended. Therefore, the Appeals Chamber finds that the Trial Chamber erred in determining that the Indictment was defective because it failed to specify "when the conspiracy ended".'); *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Judgment and Sentence, 2 February 2012 (hereafter *Karemera et al.* Trial Judgment), para. 1577; *Nahimana et al.* Appeal Judgment (n 5) para. 720; *Popović et al.* Trial Judgment (n 2) para. 868; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, 16 May 2003 (hereafter *Niyitegeka* Trial Judgment), para. 423.

[51] *Tolimir* Trial Judgment (n 2) para. 786. See also *Popović et al.* Trial Judgment (n 2) para. 868; *Niyitegeka* Trial Judgment (n 51) para. 423; *Musema* Trial Judgment (n 33) para. 193; *Nahimana et al.* Appeal Judgment (n 5) para. 720.

[52] See, e.g., *Nzabonimana* Appeal Judgment (n 31) para. 417 ('Finally, recalling that conspiracy to commit genocide is an inchoate offence, the Appeals Chamber does not see how, in itself, the lack of criminal consequences following events at Murambi and Musambira supports another reasonable inference.').

[53] See, generally, *Tolimir* Appeal Judgment (n 27) para. 583 (footnotes omitted):

> Regarding Tolimir's argument that the Trial Chamber erred by relying on its findings on genocide to establish his responsibility for the crime of conspiracy to commit genocide, the Appeals Chamber notes that the Trial Chamber relied on its findings on genocide as well as on findings related to his liability pursuant to the JCE to Murder. The Appeals Chamber can identify no error in the Trial Chamber's approach. The Appeals Chamber recalls that to establish the *actus reus* of conspiracy to commit genocide where direct evidence of an agreement to commit genocide is lacking, an agreement to commit genocide may be inferred from the conduct of the conspirators or the concerted or coordinated action of a group of individuals, so long as it is the only reasonable inference to be drawn from the totality of the evidence. The Trial Chamber was therefore entitled to consider all the relevant facts and circumstances, including any factual findings made in the context of determining whether genocide had been committed.

See also *Akayesu* Trial Judgment (n 11) para. 479; *Musema* Trial Judgment (n 33) paras 184–198; *Prosecutor v. Milutonivić et al.*, Case No. IT-99-37-AR72, Decision on Dragolub's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003 (hereafter *Ojdanić* Joint Criminal Enterprise Decision), para. 23.

[54] See *Ojdanić* Joint Criminal Enterprise Decision (n 54) para. 23. The terminology of the *ad hoc* Tribunals has varied on the point. It appears that, more recently, the phrase 'joint criminal enterprise' is favoured. Ibid., para. 36. Regarding the elements of that particular mode of liability, see also, *infra*, 11.7.2.7.

[55] *Ojdanić* Joint Criminal Enterprise Decision (n 54) para. 23. See also United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 15 (HM Stationery Office 1949) (hereafter

independently if the conspiracy did not in fact lead to the commission of some other genocidal crimes and it has systematically been charged at the *ad hoc* Tribunals in conjunction with a charge of genocide 'proper'.[56]

11.3.3.2 A continuing offence

Conspiracy to commit genocide has been said to be a continuing crime in the sense that a participant could join a conspiracy as long as it remains active and operational.[57] An individual could therefore join a conspiracy even after the initial agreement has been reached, and may be held liable for his participation therein as though he was an original conspirator.[58]

UNWCC, *LRTWC* vol. 15), 95 and 97–98 ('In conclusion, it may be repeated that the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it.').

[56] See, e.g., *Kambanda* Trial Judgment (n 11) paras 3 and 40(2). See also Schabas, *Genocide in International Law* (n 41) 365; *Prosecutor v. Nsengiyumva*, Case No. ICTR-96-12-I, Amended Indictment, 12 August 1999 (hereafter *Nsengiyumva* Amended Indictment), 36–37; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-I, Amended Indictment, 24 August 2005 (hereafter *Karemera et al.* Amended Indictment), 1.

[57] *Popović et al.* Trial Judgment (n 2) paras 870–876, in particular, paras 872–876 (footnotes omitted):

> 872. Nikolić argues that this holding of the ICTR Appeals Chamber supports a conclusion that, as an inchoate offence like direct and public incitement to commit genocide, conspiracy is not a continuing crime. The Trial Chamber notes, however, that this appears to be contrary to the common law position. In the United States, conspiracy is considered a continuing crime. Individuals are capable of joining a conspiracy even after the initial agreement, and may be held liable for such conspiracy as though they were an original conspirator. The addition of new conspirators does not alter the status of the original conspirators, nor create a new conspiracy. In the United Kingdom and Canada, the position is the same.
>
> 873. The Trial Chamber notes that the concept of criminal conspiracy incorporated into the Genocide Convention derived from the common law approach and that Article 4(3) of the Statute was adopted directly from the Genocide Convention. Consequently, there is good reason to follow the common law interpretation of the crime of conspiracy.
>
> 874. The Trial Chamber finds the common law position to be persuasive. Inchoate crimes developed with the principal object of frustrating the commission of a contemplated crime by arresting and punishing the offenders before they commit the crime. This justifies punishing a conspirator for his agreement before the commission of the crime; it does not follow that the crime of conspiracy comes to an end at that point.
>
> [...]
>
> 876. The Trial Chamber therefore concludes that conspiracy is a continuing crime and that, as such, an individual can join a conspiracy after the initial agreement is concluded.

[58] Ibid. In *Popović et al.*, the accused Nikolić argued that conspiracy to commit genocide was not a continuing crime. The thrust of his argument was that once an agreement is concluded, participation in any ensuing acts of genocide can incur criminal responsibility for involvement in genocide, but not for conspiring to commit genocide. Under that theory, if a conspiracy to commit genocide in Srebrenica was shown to have been concluded on the evening of 11 July or morning of 12 July, as charged in the Indictment, Nikolić could not subsequently have joined in that agreement. The Trial Chamber rejected Nikolić's view and instead concluded that conspiracy to commit genocide is a continuing crime in the sense that a participant could join in that conspiracy at any stage of the planning or execution of that conspiracy. Ibid., para. 876. See also *Nuon Chea et al.* Appeal Judgment (n 15) para. 220 ('As to the charge of conspiracy to commit genocide, the ICTR Appeals Chamber declined to discuss whether this was a continuing crime, given that it found that, in any event, the charge had not been established beyond reasonable doubt. The ICTR Appeals Chamber

11.3.4 Definition of the offence

11.3.4.1 Elements

The offence of conspiracy criminalizes the act of conspiring or taking part in an agreement 'to achieve an unlawful object, or to achieve a lawful object by unlawful means'.[59] The existence of such an agreement (or 'concerted agreement to act for the purpose of committing genocide'[60]) constitutes the material element (*actus reus*) of the offence. To fulfil the elements of the offence, the perpetrator must have acted with the intent to destroy in whole or in part a national, ethnical, racial or religious group as such (*mens rea*).[61]

did not discuss a constellation comparable to the one in the present case, namely where accused are held responsible based on their contributions—stretching over a long period of time—to the implementation of a common purpose, without, however, themselves fulfilling the actus rei of the crimes charged.'); *Nahimana et al.* Appeal Judgment (n 5) paras 318 and 912.

[59] UNWCC, *History of the UNWCC* (n 38) 196. In his Closing Speech before the International Military Tribunal at Nuremberg, Justice Robert Jackson stated that '[t]he forms of this grand type of conspiracy are amorphous, the means are opportunistic, and neither can divert the law from getting the substance of things' (Justice R Jackson, in *Speeches of the Chief Prosecutors*, Trial of German Major War Criminals by the International Military Tribunal sitting at Nuremberg, Germany, vol. 22, (1947)). See also *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgment, 7 July 2006 (hereafter *Ntagerura et al.* Appeal Judgment), para. 92; *Nahimana et al.* Appeal Judgment (n 5) para. 894; *Kajelijeli* Trial Judgment (n 51) para. 787; *Niyitegeka* Trial Judgment (n 51) para. 423; *Prosecutor v. Ntakirutimana et al.*, Case Nos ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, 21 February 2003 (hereafter *Ntakirutimana et al.* Trial Judgment), para. 798; *Musema* Trial Judgment (n 33) paras 187 and 191; *Nahimana et al.* Trial Judgment (n 39), para. 1045; *Prosecutor v. Gatete*, Case No. ICTR-00-61-T, Judgment and Sentence, 31 March 2011 (hereafter *Gatete* Trial Judgment), para. 611 (footnotes omitted) ('Conspiracy to commit genocide is "an agreement between two or more persons to commit the crime of genocide". The *actus reus* of the crime is the existence of an agreement between individuals to commit genocide. The persons involved in the agreement must possess the *mens rea* for genocide, that is the intent to destroy in whole or in part a national, ethnic, racial or religious group as such.'); *Prosecutor v. Seromba*, Case No. ICTR-01-66-T, Judgment, 13 December 2006 (hereafter *Seromba* Trial Judgment), para. 345; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgment, 18 December 2008 (hereafter *Zigiranyirazo* Trial Judgment), para. 389; *Karemera et al.* Trial Judgment (n 51) para. 1577 ('Conspiracy to commit genocide is "an agreement between two or more persons to commit the crime of genocide". The factual element of the crime is the entering into an agreement to commit genocide and the mental element the same as for genocide, namely that the individuals involved in the conspiracy must possess the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'); *Tolimir* Trial Judgment (n 2) paras 784–787; *Popović et al.* Trial Judgment (n 2) paras 867–86, in particular, para. 868; *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Judgment, 12 March 2008 (hereafter *Seromba* Appeal Judgment), paras 207–225; *Nahimana et al.* Appeal Judgment (n 5) paras 893–912; *Ntagerura et al.* Appeal Judgment (n 60) para. 92; *Prosecutor v. Bagosora & Nsengiyumva*, Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008 (hereafter *Bagosora & Nsengiyumva* Trial Judgment), paras 2084–2113; *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, 2 December 2008 (hereafter *Bikindi* Trial Judgment), paras 404–407; *Kajelijeli* Trial Judgment (n 51) paras 785–98; *Niyitegeka* Trial Judgment (n 51) paras 422–429; *Ntakirutimana et al.* Trial Judgment (n 60) paras 797–801, 838–41; *Musema* Trial Judgment (n 33) paras 184–198, 937–41l; *Kambanda* Trial Judgment (n 11) para. 40.

[60] *Nahimana et al.* Appeal Judgment (n 5) para. 894. The jurisprudence refers to an 'agreement' and to a 'concerted agreement to act', in which a number of individuals join. *Ntagerura et al.* Appeal Judgment (n 60) para. 92; *Kajelijeli* Trial Judgment (n 51) paras 787–88; *Niyitegeka* Trial Judgment (n 51) para. 423; *Musema* Trial Judgment (n 33) paras 187 and 191.

[61] *Nahimana et al.* Appeal Judgment (n 5) para. 894; *Niyitegeka* Trial Judgment (n 51) para. 423; *Musema* Trial Judgment (n 33) para. 19.

11.3.4.2 Actus reus

11.3.4.2.1 Agreement to commit genocide

The *actus reus* of the crime of conspiracy to commit genocide consists of an agreement between two or more individuals to commit genocide, that is, with all participants in the agreement sharing an intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such.[62] Such an agreement among the participants has been said to be the 'essence of the charge of conspiracy'.[63] The mere showing of negotiations or discussions which fall short of an agreement to commit genocide will not in principle suffice; it must be established that the commission of the crime was agreed upon by the conspirators.[64] The members of that conspiracy must have consciously interacted with each other and participants must have possessed the required genocidal intent.[65] The evidence must establish a concerted agreement to act, and not merely a coincidence of similar conduct,[66] or a negotiation in progress.[67] The form by which the agreement is reached is not material.[68] It may remain relatively informal so long

[62] *Ntakirutimana et al.* Trial Judgment (n 60) paras 798–799; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 469 (regarding the adequate pleading of these elements); *Ntagerura et al.* Appeal Judgment (n 60) paras 90 and 92 (footnote omitted) ('[T]he Appeals Chamber considers that, at a minimum, conspiracy to commit genocide consists of an agreement between two or more persons to commit the crime of genocide.'); *Nzabonimana* Appeal Judgment (n 31) paras 255 and 391; *Seromba* Appeal Judgment (n 60) paras 218 and 221; *Nahimana et al.* Appeal Judgment (n 5) paras 894–898; *Gatete* Appeal Judgment (n 45) para. 260; *Tolimir* Trial Judgment (n 2) para. 785 (footnotes omitted) ('The crime of conspiracy to commit genocide is defined as "an agreement between two or more persons to commit the crime of genocide". The *actus reus* for the crime of conspiracy to commit genocide is the agreement to commit genocide.'); *Kajelijeli* Trial Judgment (n 51) para. 787; *Niyitegeka* Trial Judgment (n 51) para. 423; *Musema* Trial Judgment (n 33) para. 191; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Judgment, 29 September 2014 (hereafter *Karemera et al.* Appeal Judgment), para. 643 (footnote omitted) ('[T]he *actus reus* of the crime of conspiracy to commit genocide is a concerted agreement to act for the purpose of committing genocide.'); *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Judgment and Sentence, 31 May 2012 (hereafter *Nzabonimana* Trial Judgment), para. 1739. The agreement must per force involve the accused. See, generally, *Karemera et al.* Trial Judgment (n 51) para. 1582 ('At the outset, the Chamber emphasises that the question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda. Rather, it is whether the Prosecution has proven beyond a reasonable doubt, based on the evidence in this case, that Karemera and Ngirumpatse committed the crime of conspiracy to commit genocide.'). See also, ibid., paras 1583 ('Another general matter relates to the participants in the alleged conspiracy. The Prosecution argues that the Accused conspired amongst themselves and with other named civilian and military authorities. There is no requirement that the Chamber conclude that the Accused conspired with all alleged co-conspirators named in the Indictment. It suffices if the Prosecution can establish that Karemera and Ngirumpatse conspired with at least each other, or one other person with whom they are alleged to have planned to commit genocide. The Chamber observes that there is limited evidence with respect to many of the other alleged co-conspirators in the record, in particular with respect to their role in planning the alleged conspiracy.') and para. 1591 (finding that that Karemera and Ngirumpatse conspired among themselves and with others to commit genocide by at least 25 May 1994).

[63] *Nahimana et al.* Trial Judgment (n 39) para. 1045.

[64] *Kajelijeli* Trial Judgment (n 51) para. 787.

[65] *Nahimana et al.* Trial Judgment (n 39) paras 1042 and 1047–1055; *Musema* Trial Judgment (n 33) para. 192. The accidental 'meeting of minds' whereby a number of individuals would be acting in parallel but without agreement to achieve a common goal could not be said to be (co-)conspirators for the purpose of this provision. *Nahimana et al.* Trial Judgment (n 39) pars 1048–1055.

[66] *Nahimana et al.* Appeal Judgment (n 5) para. 898; *Popović et al.* Trial Judgment (n 2) para. 869.

[67] *Kajelijeli* Trial Judgment (n 51) para. 787; *Popović et al.* Trial Judgment (n 2) para. 869.

[68] See, e.g., *Nzabonimana* Appeal Judgment (n 31) para. 406 (footnotes omitted):

> The Appeals Chamber is equally not convinced by Nzabonimana's argument that, since the meeting was 'impromptu', the conduct of ministers was more consistent with 'conscious

as those operating within its framework are 'aware of its existence, their participation in it, and its role in furtherance of their common purpose [to commit genocide]'.[69] Premeditation on their part or the existence of a pre-existing agreement is not an element of the crime of conspiracy to commit genocide.[70]

The names and identity of the specific individuals with whom an accused is alleged to have reached such an agreement do not necessarily have to be established for the conspiracy to be proven. Establishing the general category of individuals is sufficient in principle to provide adequate notice of the allegations.[71] Furthermore, the agreed contribution of each participant in the conspiracy need not be identical and each one of them will be equally responsible for the acts of the other conspirators.[72]

> parallelism' rather than 'concerted' actions. Irrespective of the impromptu or planned nature of the meeting, the Trial Chamber found that the agreement materialised on 18 April 1994. As already discussed, the Appeals Chamber recalls the Trial Chamber's considerations that: (i) the Interim Government held a meeting for the bourgmestres; and (ii) ministers, including Nzabonimana, 'imposed themselves' on the bourgmestres, supported the killings, took turns making various threats, and 'used' the meeting to threaten the bourgmestres to stop protecting the Tutsis. This determination, along with the assembling of bourgmestres, formed the basis of the Trial Chamber's finding of a conspiracy. The Appeals Chamber finds no error in the Trial Chamber's finding that the only reasonable inference that could be drawn from the concerted and coordinated actions of Nzabonimana and other members of the Interim Government was that an agreement to commit genocide materialised at the meeting on 18 April 1994.

[69] *Nahimana et al.* Trial Judgment (n 39) para. 1047. See also *Nahimana et al.* Appeal Judgment (n 5) para. 898 (footnotes omitted) ('Turning to Appellant Barayagwiza's argument, the Appeals Chamber considers that the agreement need not be a formal one. It stresses in this respect that the United States Supreme Court has also recognized that the agreement required for conspiracy "need not be shown to have been explicit". The Appellant is thus mistaken in his submission that a tacit agreement is not sufficient as evidence of conspiracy to commit genocide. The Appeals Chamber recalls, however, that the evidence must establish beyond reasonable doubt a concerted agreement to act, and not mere similar conduct.') (citing *Iannelli v. United States*, 420 US 770 (1975) (hereafter *Iannelli* SCOTUS Judgment) (reaffirming *Direct Sales Co. v. United States*, 319 US 703 (1943) (hereafter *Direct Sales Co.* SCOTUS Judgment))); *Nzabonimana* Appeal Judgment (n 31) para. 391 ('[T]he agreement need not be formal and a tacit agreement may be sufficient as evidence of conspiracy to commit genocide.').

[70] *Nzabonimana* Appeal Judgment (n 31) paras 398 (footnote omitted) ('The Appeals Chamber is not persuaded that premeditation or the existence of a pre-existing agreement is an element of the crime of conspiracy to commit genocide and Nzabonimana fails to provide any supporting reference to the Tribunal's jurisprudence.') and 405 ('[T]he question of a pre-conceived plan is irrelevant to the finding of conspiracy.').

[71] *Nyiramasuhuko et al.* Appeal Judgment (n 31) paras 474 and 477; *Karemera et al.* Appeal Judgment (n 63) para. 370; *Nzabonimana* Appeal Judgment (n 31) para. 400 ('Recalling that a conspiracy requires an agreement between "two or more persons", the Appeals Chamber considers that finding that Nzabonimana agreed with "other members of the Interim Government" is a sufficient basis for the finding of conspiracy to commit genocide. Thus, any possible error with respect to the identification by name of the members of the Interim Government would not result in a miscarriage of justice nor impact the Trial Chamber's finding of a conspiracy.'). In its Judgment, the *Nyiramasuhuko et al.* Appeals Chamber also noted the following in regard to the issue of pleadings:

> The Appeals Chamber further finds that the fact that other members of the Interim Government were not convicted for conspiracy before the Tribunal is irrelevant to the question of whether Nyiramasuhuko was put on notice of the charges against her and is not inconsistent with the fact that Nyiramasuhuko was charged with having conspired with other members of the Interim Government.

Nyiramasuhuko et al. Appeal Judgment (n 31) fn 1112 (citing *Bagosora & Nsengiyumva v. Prosecutor*, Case No. ICTR-98-41-A, Judgment, 11 December 2011 (hereafter *Bagosora & Nsengiyumva* Appeal Judgment), para. 121).

[72] See UN Secretary-General, Memorandum: The Charter and Judgment of the Nürnberg Tribunal—History and Analysis, UN Doc. A/CN.4/5, 3 March 1949 (hereafter UN Doc. A/CN.4/5), 53 ('[The conspirators] contribution to the common plan need not be the same nor equally important. [...] one single man can even completely dominate the initiation and development of the plans without their ceasing to be

11.3.4.2.2 Joining in the conspiracy

The process of joining in a conspiracy to commit genocide need not take any particular form. This could occur at any point before the completion of the underlying crime.[73] Thus, an accused cannot escape liability by joining the conspiracy after the original formation of the agreement.[74] A subsequent co-conspirator may be considered as culpable as the initial parties to the agreement.[75] Withdrawal from the conspiracy will only exonerate a conspirator where there is affirmative and contemporaneous evidence of his withdrawal.[76]

11.3.4.2.3 Proving the agreement

An agreement to commit genocide will rarely be formalized. Where there is no direct proof of its existence, it may be inferred from the circumstances of the case.[77] The *ad hoc*

common planning. The collaborators can have different sphere of activity.'). In *Tolimir*, the ICTY Appeals Chamber refrained from discussing in any detail how each relevant mode of liability would interact with the crime of conspiracy to commit genocide. See *Tolimir* Appeal Judgment (n 27) para. 588 (footnote omitted) ('As to Tolimir's contention that the Trial Chamber failed to state the mode of liability under which he was convicted for conspiracy to commit genocide, the Appeals Chamber considers that while the Trial Chamber did not explicitly discuss the mode of liability for conspiracy to commit genocide, it is sufficiently clear from the Trial Judgment that the Trial Chamber convicted Tolimir for committing the crime of conspiracy to commit genocide by having "acceded to an agreement to commit genocide.').

[73] See *supra*, 11.3.3.2. See also *Popović et al.* Trial Judgment (n 2) para. 872 (and references cited therein). See also *Tolimir* Trial Judgment (n 2) para. 785.

[74] See *Popović et al.* Trial Judgment (n 2) para. 872 (and references cited therein); *Tolimir* Trial Judgment (n 2) para. 785.

[75] *Tolimir* Trial Judgment (n 2) para. 785 (and references cited therein).

[76] Ibid. See also *United States v. Caicedo*, 103 F 3d 410 (5th Cir 1997) (hereafter *Caicedo* Appeal Judgment); *United States v. Phillips*, 955 F Supp 622 (W D Va 1997) (hereafter *Phillips* Trial Judgment) (affirmed by *United States v. Phillips*, 129 F 3d 118 (4th Cir 1997) (hereafter *Phillips* Appeal Judgment)); *State v. Lucas*, 372 N W 2d 731 (Minn 1985) (hereafter *Lucas* Judgment); *State v. Peterson*, 881 P 2d 965 (Utah Ct App 1994) (hereafter *Peterson* Appeal Judgment).

[77] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) paras 896–897, 901 ('In the absence of direct evidence of the Appellants' agreement to commit genocide, the Trial Chamber inferred the existence of the conspiracy on the basis of circumstantial evidence. The Appeals Chamber will now consider whether this was the only possible reasonable inference.'), and 905–906 (regarding the relevant factual findings); *Nahimana et al.* Trial Judgment (n 39) para. 1047; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 650; *Karemera et al.* Trial Judgment (n 51) paras 1578, 1583–1591; *Seromba* Trial Judgment (n 60) para. 346; *Nzabonimana* Trial Judgment (n 63) para. 1739; *Karemera et al.* Appeal Judgment (n 63) paras 643 (footnote omitted) ('[A] conviction for conspiracy to commit genocide may be based on circumstantial evidence provided that the inference of guilt drawn is the only reasonable inference available from the evidence.'), and 740; *Nzabonimana* Appeal Judgment (n 31) para. 255, 391–392, 448; *Seromba* Appeal Judgment (n 60) para. 221; *Tolimir* Trial Judgment (n 2) paras 786 and 790–791; *Tolimir* Appeal Judgment (n 27) paras 584 (upholding the Trial Chamber's approach and conclusion), and 587; *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (hereafter *Popović et al.* Appeal Judgment), para. 544; *Popović et al.* Trial Judgment (n 2) para. 869. In the application of the beyond reasonable doubt standard, the inference of the existence of such an agreement would have to be the only reasonable inference available on the record of the evidence. See, generally, *Mugenzi & Mugiraneza v. Prosecutor*, Case No. ICTR-99-50-A, Judgment, 4 February 2013 (hereafter *Mugenzi & Mugiraneza* Appeal Judgment), para. 88 ('The Appeals Chamber recalls that a conviction for conspiracy to commit genocide may be based on circumstantial evidence but that, where an inference of guilt is drawn from circumstantial evidence, it must be the only reasonable inference available from the evidence.'); *Nahimana et al.* Appeal Judgment (n 5) para. 896 (footnote omitted) ('The Appeals Chamber recalls that the actus reus of the crime of conspiracy to commit genocide is a concerted agreement to act for the purpose of committing genocide. While such *actus reus* can be proved by evidence of meetings to plan genocide, it can also be inferred from other evidence. In particular, a concerted agreement to commit genocide may be inferred from the conduct of the conspirators. However, as in any case where the Prosecutor seeks, on the basis of circumstantial evidence, to prove a particular fact upon which the guilt of the accused depends, the

Tribunals have thus endorsed the view that the existence of a formal, written, or express agreement is not needed to prove the charge of conspiracy.[78] A coalition, even an informal one, can constitute such an 'agreement' as long as those acting within it are aware of its existence, their participation in it, and its role in furtherance of their common purpose.[79]

The following can constitute evidence of the existence of such an agreement:[80] the concerted or coordinated action of a group of individuals;[81] the interactions with

existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.'); *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 650 (footnotes omitted) ('The Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence only if it is the only reasonable conclusion that could be drawn from the evidence presented. This also holds true for a conviction for conspiracy to commit genocide based on circumstantial evidence.'); *Bagosora & Nsengiyumva* Trial Judgment (n 60) para. 2088 (citing *Seromba* Appeal Judgment (n 60) para. 221); *Nahimana et al.* Appeal Judgment (n 5) para. 896; *Gatete* Trial Judgment (n 60) para. 612. Relevant evidence may include extra temporis evidence, i.e., evidence pertaining to facts preceding the inception of the jurisdiction *ratione temporis* of the tribunal. See, e.g., *Nahimana et al.* Trial Judgment (n 39) para. 1044; *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Corrigendum to the Decision on Defence Motions Pursuant to Rule 98*bis*, 18 June 2007 (hereafter *Ndindiliyimana et al.* Rule 98*bis* Decision), para. 15; *Prosecutor v. Bikindi*, Case No. ICTR-2001-72-T, Décision relative á la demande d'acquittement de la défense (Article 98 *bis* du Réglement de procédure et de preuve), 26 June 2007 (hereafter *Bikindi* Rule 98*bis* Decision), paras 16–17; *Prosecutor v. Bikindi*, Case No. ICTR-2001-72-I, Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File and Amended Indictment, 22 September 2003 (hereafter *Bikindi* Decision on Motion Challenging Jurisdiction), para. 34.

[78] *Nahimana et al.* Trial Judgment (n 39) para. 1045 (with further references).

[79] *Nahimana et al.* Trial Judgment (n 39) para. 1047.

[80] For concrete illustrations of the applications of these criteria, see e.g., *Nzabonimana* Appeal Judgment (n 31) para. 399 (footnotes omitted):

> The Appeals Chamber is also not convinced that the Trial Chamber convicted Nzabonimana of conspiracy to commit genocide without factual basis. The Trial Chamber determined that an agreement materialised at the Murambi meeting on 18 April 1994. The Appeals Chamber notes the Trial Chamber's determination that Interim Government Ministers, including Nzabonimana, used the Murambi meeting to threaten to remove bourgmestres from their posts if they did not stop supporting the Tutsi population. According to the Trial Chamber, the purpose of the agreement was to encourage the killing of Tutsis. The Appeals Chamber observes that these conclusions were based on the Trial Chamber's factual determinations from section 3.5.7.3.2 of the Trial Judgment. In this regard, the Trial Chamber considered and found that: (i) Kambanda and other members of the Interim Government, including Nzabonimana, 'held a meeting for the bourgmestres of Gitarama préfecture'; (ii) Nzabonimana and other Interim Government officials took turns making various threats at the assembled bourgmestres as a means to ensure their participation in the genocide; and (iii) the bourgmestres were intimidated.

Ibid., paras 449–453 (regarding the Trial Chamber's inference of an agreement to commit genocide inferred from Nzabonimana's and Ukirikyeyezu's agreement to establish the Crisis Committee and from their distribution of weapons and considered unreasonable in the circumstances by the Appeals Chamber); *Nahimana et al.* Trial Judgment (n 39) para. 1048. See also *Popović et al.* Trial Judgment (n 2) paras 881–886 (pointing to the significant coordination with which the plan was carried out, the vast process was put into place, 'a great deal of synchronization' among participants and stages of the operation, and noting that 'certain aspects of the operation were often carried out in a strikingly similar manner across various locations, by different individuals'), in particular, 886 (describing the efforts to conceal the crimes and concluding that 'the organised and systematic manner in which the executions were carried out, over a number of days, and the targeting of victims, presupposes the existence of a concerted agreement to destroy the Muslims of Eastern Bosnia').

[81] See, generally, *Nahimana et al.* Appeal Judgment (n 5) para. 897:

> The Appeals Chamber takes the view that the concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers 'concerted or coordinated'

relevant actors, coordination among them in relation to activities associated with the commission of crimes;[82] the interaction of the accused with relevant institutions

> are important: as the Trial Chamber recognized, these words are 'the central element that distinguishes conspiracy from "conscious parallelism", the concept put forward by the Defence to explain the evidence in this case'. The Appeals Chamber thus considers that the Appellants were not found guilty by association or by reason of the similarity of their conduct: rather, the Trial Chamber found that there had been a concerted or coordinated action and, on the basis inter alia of this factual finding, it inferred the existence of a conspiracy. The Appeals Chamber will consider below whether such findings and inference were the only reasonable ones that could be drawn from the evidence.

Gatete Trial Judgment (n 60) para. 612 (footnote omitted) ('The concerted or coordinated action of a group of individuals can constitute evidence of an agreement. Given the requirements of "concerted or coordinated", it is insufficient to simply show similarity of conduct.'); *Bagosora & Nsengiyumva* Trial Judgment (n 60) para. 2088 (citing *Nahimana et al.* Appeal Judgment (n 5) paras 896–897); *Karemera et al.* Trial Judgment (n 51) para. 1578; *Niyitegeka* Trial Judgment (n 51) paras 417–418; *Nzabonimana* Appeal Judgment (n 31) paras 255, and 259 (footnote omitted) ('With respect to Nzabonimana's argument on the circumstances of the conspiracy, the Appeals Chamber recalls that the agreement to commit genocide can be inferred from a concerted or coordinated action. The Appeals Chamber recalls that the Trial Chamber considered the concerted and coordinated actions of Nzabonimana and the Ministers of the Interim Government to infer that an agreement with the specific intent to destroy Rwanda's Tutsi population in whole or in part materialised on 18 April 1994. The Appeals Chamber will examine whether paragraph 59 of the Indictment, read in conjunction with paragraph 26 of the Indictment, clearly allege concerted or coordinated action as a basis for inferring conspiracy between Nzabonimana and his co-conspirators.'); *Tolimir* Trial Judgment (n 2) paras 786 and 790–791 (pointing to 'the level of coordination amongst various layers of the VRS leadership from the very beginning of the implementation of the plan to murder [...] indicating that those involved in the [murder] operation were acting in accordance with an agreed course of action'); *Tolimir* Appeal Judgment (n 27) paras 584 (upholding the Trial Chamber's approach and conclusion) and 587; *Popović et al.* Appeal Judgment (n 78) paras 544 (footnotes omitted) ('The Appeals Chamber recalls that "a concerted agreement to commit genocide may be inferred from the conduct of the conspirators" and can be based on circumstantial evidence. Further, the concerted or co-ordinated action of a group of individuals can constitute evidence of an agreement. In inferring that an agreement to commit genocide existed, the Trial Chamber observed that: (1) "the men were not simply killed upon capture; rather a vast process was put into place"; (2) the "evidence reveals a great deal of synchronization"; (3) the separations, transportation, detentions, and killings were of such a large-scale that they were carried out by many people, and required significant resources; (4) certain aspects of the operation were often carried out in a strikingly similar manner across various locations; and (5) the murder operation was being co-ordinated at a high level.'), 544–46, 549 (for illustrations), 553 ('While [the] actus reus [of conspiracy to commit genocide] can be proved by evidence of meetings to plan genocide, it can also be inferred from other evidence. In particular, a concerted agreement to commit genocide may be inferred from the conduct of the conspirators.'), and 554 (noting that the Trial Chamber's finding that the accused Beara had entered into an agreement to commit genocide was based on the following factors, from which it drew the reasonable conclusion of its having entered in such an agreement: (i) he had heated exchanges with Witness Deronjić on where the remaining mass executions should be carried out demonstrating the cold and calculated nature of the plan; (ii) key figures of the Security Branch, including Beara, met to discuss the murder operation during the 14 July Meeting; (iii) Beara was at the centre of operations with Popović, and together they were responsible for overall planning and implementation—logistics, locations, personnel; (iv) '[t]he meetings, acts, movements and whereabouts of Popović, Beara and Nikolić from the morning of 14 July onward evince the close cooperation and communication between the officers of the Security Branch as the plan unfolded'; and (v) Beara made multiple contributions to the common plan, guiding and directing implementation at all phases); *Nahimana et al.* Trial Judgment (n 39) para. 1047 (pointing to the coordinated actions by individuals who have a common purpose and are acting within a unified framework).

[82] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) paras 905–906 (not established in this case). See also *Karemera et al.* Trial Judgment (n 51) paras 1583–1591. In *Karemera et al.*, Trial Chamber III of the ICTR found that Karemera and Ngirumpatse conspired among themselves and with others to commit genocide by at least 25 May 1994. Ibid., para. 1591. The Trial Chamber gave weight, in particular, to the following factors: their link, role, and involvement in the decision-making process of the (interim) Government; links with and support for policies of the Government, understood to be genocidal in character; implementation through instructions of policies thought to underlie the genocidal endeavour of the Government with a view to promote and advance those; evidence of the concerted and coordinated

involved in the commission of the crimes;[83] the existence of, presence at, and participation in meetings at which the planning of crimes is thought to have been discussed;[84] the conduct of individual conspirators;[85] statements attributed to the accused pointing to the existence of such an agreement.[86] Further, a tacit understanding of the criminal

actions of party leaders and the Interim Government that gave rise to a policy of genocide; Ngirumpatse's involvement as President of the MRND, which was the party of the two ministries coordinating the civil defence.

[83] *Nahimana et al.* Appeal Judgment (n 5) paras 907 ('The Appeals Chamber is of the opinion that in certain cases the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions. As explained above the existence of the conspiracy would, however, have to be the only reasonable inference to be drawn from the evidence.') and 908–912 (regarding the relevant factual findings), in particular, 910:

> At this stage, the question for the Appeals Chamber is to determine whether, assuming that such institutional coordination has been proved, a reasonable trier of fact could find that the only possible reasonable inference was that the coordination was the result of a conspiracy to commit genocide. There is no doubt, in the Appeals Chamber's view, that the aforementioned factual findings are compatible with the existence of 'a joint agenda' aiming at committing genocide. However, it is not the only reasonable inference. A reasonable trier of fact could also find that these institutions had interacted to promote the ideology of 'Hutu power' in the context of a political struggle between Hutu and Tutsi, or to disseminate ethnic hatred against the Tutsi without going as far as the destruction, in whole or in part, of that group.

[84] For example, in *Nyiramasuhuko et al.*, the Appeals Chamber noted:

> As regards the Trial Chamber's reliance on Nyiramasuhuko's participation in Cabinet meetings as evidence of an agreement between her and members of the Interim Government to commit genocide, the Appeals Chamber notes that the Trial Chamber specifically pointed to Nyiramasuhuko's presence at meetings when the ministers were briefed on the massacres of the Tutsi population, and the fact that the Interim Government, including her, did nothing to stop the massacres but, rather, adopted directives and issued instructions which were designed to encourage the killing of Tutsis. Nyiramasuhuko does not challenge that she did attend a number of these meetings and acknowledged to having been involved in the elaboration of directives and instructions. Under these circumstances, the Appeals Chamber finds that a reasonable trier of fact could have relied, among other things, on Nyiramasuhuko's participation in Cabinet meetings to find that she conspired to commit genocide. Although the Trial Chamber at times used imprecise language, the Appeals Chamber is nonetheless satisfied from a holistic review of the Trial Chamber's relevant findings that it did not impose strict liability on Nyiramasuhuko but reached its finding of guilt on the basis of Nyiramasuhuko's own acts and omissions and did not substitute the intent of the Interim Government for her intent.

Nyiramasuhuko et al. Appeal Judgment (n 31) para. 644 (footnotes omitted). See also *Gatete* Trial Judgment (n 60) para. 612 (footnote omitted) ('With respect to the *actus reus*, the agreement can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on circumstantial evidence.'); *Bagosora & Nsengiyumva* Trial Judgment (n 60) para. 2088 (citing *Seromba* Appeal Judgment (n 60) para. 221); *Nahimana et al.* Appeal Judgment (n 5) para. 896; *Nzabonimana* Appeal Judgment (n 31) para. 391; *Niyitegeka* Trial Judgment (n 51) paras 417–418.

[85] See, e.g., *Nzabonimana* Trial Judgment (n 63) para. 1739; *Nzabonimana* Appeal Judgment (n 31) para. 391; *Niyitegeka* Trial Judgment (n 51) paras 417–418.

[86] See, e.g., *Nzabonimana* Appeal Judgment (n 31) para. 401 (footnotes omitted):

> The Appeals Chamber is equally not convinced that the Trial Chamber was required to determine the exact utterances of the ministers present. In the Appeals Chamber's view, the ministers' specific words were not material to the Trial Chamber's finding of a conspiracy. In this regard, the Trial Chamber considered consistent evidence, from Witnesses CNAA and CNAC, that the ministers present at the second meeting took turns threatening bourgmestres to ensure their participation in the genocide, and all 'reiterated the common theme' that bourgmestres who supported Tutsis would be removed from their posts.

purpose underlying the agreement has been said to be sufficient.[87] In contrast, a position of authority would not in itself be sufficient to infer the existence of such an agreement with others.[88]

11.3.4.3 Mens rea

To prove the *mens rea* relevant to the crime of conspiracy to commit genocide, the prosecution will have to establish that the individuals involved in the agreement possessed the intent to destroy in whole or in part a national, ethnical, racial, or religious group, as such.[89] The *mens rea* for the conspiracy is therefore identical to the crime of genocide and may be inferred from the totality of evidence.[90]

11.3.5 Conspiracy to commit genocide and genocide

The crimes of genocide and conspiracy to commit genocide share the same *mens rea*.[91] They differ, however, as regards their respective *actus reus*.[92] The crime of genocide

[87] *Nahimana et al.* Trial Judgment (n 39) para. 1045 (citing *State v. Cavanaugh*, 23 Conn App 667 (Conn App Ct 1991) (hereafter *Cavanaugh* Appeals Judgment), 671; *State v. Grullon*, 212 Conn 195 (Conn 1989) (hereafter *Grullon* Supreme Ct Judgment), 199). See also *Nzabonimana* Appeal Judgment (n 31) para. 391.

[88] See, e.g., *Karemera et al.* Appeal Judgment (n 63) para. 651:

> Even assuming that Ngirumpatse wielded authority over ministers from his political party, his mere position of authority cannot suffice to infer, as the only reasonable conclusion, that he influenced the decisions taken by them and in fact agreed or intended to agree to their ultimate decisions. Therefore, the Appeals Chamber is not persuaded that the only reasonable inference to be drawn from the evidence on the record is that Ngirumpatse conspired with Karemera or with others to commit genocide. Consequently, the Appeals Chamber is not convinced that a reasonable trier of fact could have reached the conclusion that Ngirumpatse, because of his link with the Interim Government and his position as Chairman of the MRND, conspired with Karemera or with others to commit genocide.

[89] *Ntagerura et al.* Appeal Judgment (n 60) para. 92; *Nzabonimana* Trial Judgment (n 63) para. 1740; *Nahimana et al.* Appeal Judgment (n 5) para. 894 (footnote omitted) ('[T]he individuals involved in the agreement must have the intent to destroy in whole or in part a national, ethnical, racial or religious group as such (mens rea).'); *Niyitegeka* Trial Judgment (n 51) para. 423; *Musema* Trial Judgment (n 33) para. 19; *Seromba* Trial Judgment (n 60) para. 347; *Karemera et al.* Trial Judgment (n 51) para. 1579; *Tolimir* Trial Judgment (n 2) para. 787 (footnotes omitted) ('Because genocide is a specific intent crime, the accused must possess the intent required for the crime of genocide. Thus, the mens rea required for conspiracy to commit genocide is the intent to destroy in whole or in part a national, ethnical, racial or religious group.').

[90] See *Tolimir* Appeal Judgment (n 27) paras 582 and 586; *Tolimir* Trial Judgment (n 2) paras 745 and 1161; *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 (hereafter *Stakić* Appeal Judgment), para. 55; *Gatete* Trial Judgment (n 60) para. 611 (footnotes omitted) ('The persons involved in the agreement must possess the mens rea for genocide, that is the intent to destroy in whole or in part a national, ethnic, racial or religious group as such.').

[91] See, *supra*, 11.3.4.3. See also *Tolimir* Appeal Judgment (n 27) para. 582.

[92] See *Gatete* Appeal Judgment (n 45) para. 260, and fns 632–33; *Gatete* Trial Judgment (n 60) para. 654; *Tolimir* Appeal Judgment (n 27) para. 582 (footnotes omitted) ('The Appeals Chamber recalls that genocide and conspiracy to commit genocide are distinct crimes under Article 4 of the [ICTY] Statute. While the *mens rea* for the two crimes is identical—i.e., "the intent to destroy in whole or in part a national, ethnical, racial or religious group as such"—the *actus reus* is different.'); *Popović et al.* Appeal Judgment (n 78) para. 537 (footnote omitted) ('[C]onspiracy to commit genocide and genocide involve different underlying acts or omissions and a materially distinct *actus reus*.'); *Popović et al.* Trial Judgment (n 2) para. 2118, and fns 6115–16; *Karemera et al.* Appeal Judgment (n 63) para. 710.

requires the commission of one of the punishable acts enumerated earlier,[93] whilst conspiracy to commit genocide requires the act of entering into an agreement to commit genocide.[94] As an inchoate offence, conspiracy to commit genocide does not require proof of commission of the underlying crime of genocide, as the agreement itself is the essence of the crime.[95] The two crimes are therefore distinct and the conduct underlying them is not identical in all relevant respects.[96]

The question of the definitional relationship and overlap between the two offences was raised in relation to the question of the possibility of cumulative conviction for genocide and conspiracy to commit genocide in relation to the same underlying conduct. This gave rise to contradictory practice before the *ad hoc* Tribunals.[97] In *Kambanda*, for instance, the Trial Chamber accepted a guilty plea by the accused in relation to both counts and went on to convict him for conspiracy to commit genocide *and* for genocide proper in relation to the same underlying conduct.[98] In *Niyitegeka* and in *Nahimana*, Trial Chambers followed the same approach and held that an accused could be convicted for both offences in relation to the same set of acts.[99] In contrast, in *Musema*, the Trial Chamber held that an accused cannot be convicted of both genocide and conspiracy to commit genocide as to do so would be contrary to the intention of the Genocide Convention, its *travaux préparatoires*, and further, because there would be no purpose in entering a conviction in relation to conspiracy when a genocide conviction has been entered.[100] In view of the fact that the two crimes contain a least one element which the other does not possess, namely, an agreement for conspiracy and the actual carrying out of one of the listed underlying offences for genocide, the view of the *Kambanda*, *Niyitegeka*, and *Nahimana* Chambers seems to be the correct position under the test applicable before the *ad hoc* Tribunals.[101] That view has now been adopted by the Appeals Chamber of the *ad hoc* Tribunals.[102] Such

[93] See, *supra*, Chapter 10 and 11.1.1. See also *Nahimana et al.* Appeal Judgment (n 5) para. 492; *Gatete* Appeal Judgment (n 45) para. 260; *Karemera et al.* Appeal Judgment (n 63) para. 710.

[94] See, *supra*, 11.3.4.2. See also *Seromba* Appeal Judgment (n 60) para. 218; *Nahimana et al.* Appeal Judgment (n 5) para. 894; *Ntagerura et al.* Appeal Judgment (n 60) para. 92; *Gatete* Appeal Judgment (n 45) para. 260; *Karemera et al.* Appeal Judgment (n 63) para. 710.

[95] *Tolimir* Appeal Judgment (n 27) para. 582. See also *Karemera et al.* Appeal Judgment (n 63) para. 711; *Popović et al.* Trial Judgment (n 2) para. 68; *Niyitegeka* Trial Judgment (n 51) para. 423; *Musema* Trial Judgment (n 33) para. 193; *Nahimana et al.* Appeal Judgment (n 5) para. 720.

[96] *Gatete* Appeal Judgment (n 45) para. 260.

[97] See also Schabas, *Commentary on the Rome Statute* (n 41) 317–18; Ohlin, 'Incitement and Conspiracy' (n 44) 219–20.

[98] *Kambanda* Trial Judgment (n 11) paras 40(1) and (2) (with reference to paragraphs 3.13–3.15, and 3.19 of the indictment).

[99] *Niyitegeka* Trial Judgment (n 51) paras 429, 480 and 502; *Nahimana et al.* Trial Judgment (n 39) para. 1043.

[100] *Musema* Trial Judgment (n 33) para. 198.

[101] Under the applicable test, convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. See generally *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001 (hereafter *Čelebići* Appeal Judgment), para. 412. See also *Gatete* Appeal Judgment (n 45) para. 259; *Bagosora & Nsengiyumva* Appeal Judgment (n 72) paras 260 and 413; *Karemera et al.* Appeal Judgment (n 63) para. 710.

[102] See, e.g., *Tolimir* Appeal Judgment (n 27) paras 621–622 (concluding that as genocide and conspiracy to commit genocide are distinct crimes not based on the same underlying conduct, convictions

an approach is consistent with the fact that the two offences seek to criminalize and prevent different types of criminal conduct[103] and with a chamber's duty to enter convictions for all distinct crimes which have been proven in order to reflect in full the criminality of the convicted person.[104] In view of this last obligation, the inchoate nature of the crime of conspiracy does not obviate the need to enter a conviction for this crime when genocide has also been committed by the accused, since the crime of genocide does not otherwise punish the agreement that led to the commission of genocide.[105]

11.3.6 Conspiracy to commit genocide and the ICC Statute

The Rome Statute does not provide for the inchoate offence of conspiracy to commit genocide and language used during the drafting process that resembled the notion

for both crimes was permissible in order to hold Tolimir responsible for the totality of his criminal conduct). See also *Popović et al.* Appeal Judgment (n 78) paras 532–557.

[103] See, generally, *Gatete* Appeal Judgment (n 45) paras 260–261. The Appeals Chamber for the ICTY noted:

> As regards Tolimir's argument that the Trial Chamber mistakenly equated responsibility for genocide with conspiracy to commit genocide, the Appeals Chamber considers that Tolimir misinterprets the statement in the Trial Judgment that '[t]he rationale for criminalising conspiracy to commit genocide involves not only preventing the commission of the substantive offence, but also punishing the collaborative aspect of the crime'. Contrary to Tolimir's contention, the Trial Chamber did not suggest that conspiracy to commit genocide is one element of the crime of genocide but explained why the two crimes are materially distinct and thus why convictions may be entered for both crimes. The Appeals Chamber finds no error in the Trial Chamber's reasoning and rejects Tolimir's argument. The Trial Chamber made distinct findings about each crime, articulating separate reasoning for each conviction on both the actus reus and the mens rea.

Tolimir Appeal Judgment (n 27) para. 589 (footnotes omitted). *Karemera et al.* Appeal Judgment (n 63) paras 710–711.

[104] *Karemera et al.* Appeal Judgment (n 63) para. 711 (citing *Gatete* Appeal Judgment (n 45) para. 261; *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008 (hereafter *Strugar* Appeal Judgment), para. 324); *Stakić* Appeal Judgment (n 91) para. 358.

[105] *Karemera et al.* Appeal Judgment (n 63) para. 711. See also, again, *Gatete* Appeal Judgment (n 45) para. 262. For the opposing view in the context of state responsibility, the ICJ has noted:

> Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b) to (e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, par (a)), conspiracy to commit genocide (Art. III, par (b)), and direct and public incitement to commit genocide (Art. III, par (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of 'genocide' (Art. III, par (a)), 'attempt to commit genocide' (Art. III, par (d)), and 'complicity in genocide' (Art. III, par (e)), in relation to the same actions, must be rejected as untenable both logically and legally.

ICJ *Bosnia-Serbia* 2007 Judgment (n 2) para. 380. See also Schabas, *Genocide in International Law* (n 41) 310 (commenting on that holding of the ICJ and suggesting that '[t]he same considerations apply when individual criminal responsibility is at issue. In effect, the "other acts" play second fiddle to the crime of genocide as defined in article II').

of conspiracy was ultimately set aside.[106] Instead, Article 25(3)(d) provides for a type of accomplice liability for acts carried out in a collective manner, which has been interpreted by the International Criminal Court (ICC) as a form of accessoryship.[107] In other words, unlike the inchoate offence of conspiracy, this provision requires that the underlying crime (genocide) be completed and requires of the accused an act or omission of support to the crime carried out in the knowledge of the intention of the group to commit the crime.[108] To prosecute such acts successfully, the Prosecutor of the ICC will have to establish that: (i) a crime within the jurisdiction of the Court was committed; (ii) the persons who committed the crime belonged to a group acting with a common purpose; (iii) the accused made a significant contribution to the commission of the crime; (iv) the contribution was intentional; and (v) the accused's contribution was made in the knowledge of the intention of the group to commit the crime.[109]

[106] Schabas, *Commentary on the Rome Statute* (n 41) 436–38. See also Per Saland, 'International Criminal Law Principles' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) (hereafter Saland, 'International Criminal Law Principles'), 199 (referring to the notion of conspiracy as 'a very divisive issue' during negotiations).

[107] See, generally, *Prosecutor v. Katanga et al.*, Judgment Pursuant to Article 74 of the Statute, [2014] ICC-01/04-01/07-3436-tENG (hereafter *Katanga et al.* Trial Judgment), paras 1616–1621 (and references cited). See also *Prosecutor v. Ongwen*, Decision on the Confirmation of Charges Against Dominic Ongwen, [2016] ICC-02/04-01/15-422-Red (hereafter *Ongwen* Decision on Confirmation of Charges), para. 44; *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, [2014] ICC-01/04-02/06-309 (hereafter *Ntaganda* Decision on Confirmation of Charges), para. 158. See further, *Prosecutor v. Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, [2014] ICC-02/11-01/11-656-Red (hereafter *Gbagbo* Decision on Confirmation of Charges), paras 252–59; *Prosecutor v. Blé Goudé*, Decision on the Confirmation of Charges against Charles Blé Goudé, [2014] ICC-02/11-02/11-186 (hereafter *Blé Goudé* Decision on Confirmation of Charges), para. 172; *Prosecutor v. Al-Mahdi*, Decision on the Confirmation Charges against Ahmad Al Faqi Al Mahdi, [2016] ICC-01/12-01/15-84-Red (hereafter *Al-Mahdi* Decision on Confirmation of Charges), para. 27; *Prosecutor v. Kenyatta et al.*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, [2011] ICC-01/09-02/11-1 (hereafter *Kenyatta et al.* Decision on Application for Summonses to Appear), para. 47; *Prosecutor v. Kenyatta et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [2012] ICC-01/09-02/11-382-Red (hereafter *Kenyatta et al.* Decision on Confirmation of Charges), para. 421; *Prosecutor v. Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, [2010] ICC-01/04-01/10-1 (hereafter *Mbarushimana* Arrest Warrant Application Decision), para. 38; *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, [2011] ICC-01/04-01/10-465-Red (hereafter *Mbarushimana* Decision on the Confirmation of Charges), paras 271–289. See generally William A Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)' (1998) 6 European Journal of Crime, Criminal Law and Criminal Justice 400 (hereafter Schabas, 'General Principles of Criminal Law').

[108] Ohlin, 'Incitement and Conspiracy' (n 44) 221; Schabas, *Commentary on the Rome Statute* (n 41) 134. In similar fashion, the 1996 International Law Commission (ILC) Draft Code had envisaged the notion of conspiracy along the 'civil law' understanding of it as a sort of accomplice liability. See, generally, UN General Assembly, Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, 6 May–26 July 1996 (hereafter UN Doc. A/51/10), 25 (Article 2(3)(e) and associated commentary). Professor Schabas notes that the wording of Article 25(3)(d) appears to have come from Article 2(3) of the International Convention for the Suppression of Terrorist Bombing. See Schabas, *Genocide in International Law* (n 41) 315 (citing UN General Assembly, Resolution 52/164: International Convention for the Suppression of Terrorist Bombing, UN Doc. A/RES/52/164, 9 January 1998 (hereafter UN Doc. A/RES/52/164)). Regarding modes of liability applicable before the ICC, see also *infra*, 11.7.2.8.

[109] *Katanga et al.* Trial Judgment (n 108) para. 1620. See also *Prosecutor v. Katanga et al.*, Decision Transmitting Additional Legal and Factual Material (Regulation 55(2) and 55(3) of the Regulations of the Court), [2013] ICC-01/04-01/07-3371-tENG (hereafter *Katanga et al.* Decision on Legal and Factual Material), para. 16.

The omission of the offence of conspiracy to commit genocide from the ICC Statute has been explained on various grounds: exhausted drafters; a drafting error; or a compromise between competing legal traditions.[110] Professor Cassese rightly described it as an 'inconsistency' between customary law and the ICC Statute, as indeed it is.[111] The failure to include the offence of conspiracy to commit genocide in the ICC Statute is unquestionably a *malus* of this document. It deprives the prosecution of a potentially important tool to investigate and prosecute culpable involvement in what might have been the earliest planning stage of genocide.

11.4 Direct and Public Incitement to Commit Genocide

11.4.1 Nature of the offence

11.4.1.1 An inchoate offence

Under the Genocide Convention and customary law, 'direct and public incitement to commit genocide' constitutes an inchoate offence.[112] Thus understood, the crime of direct and public incitement does not require a showing that anyone actually acted upon the statement or actions that form the basis of a charge of incitement, nor that it

[110] *Contra*, Elies van Sliedregt, 'Complicity to Commit Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Van Sliedregt, 'Complicity to Commit Genocide'), 175 (calling it a drafting error); Albin Eser, 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (OUP 2002) (hereafter Eser, 'Individual Criminal Responsibility'), 802; Schabas, *Genocide in International Law* (n 41) 315 (blaming the 'oversight' on 'exhausted drafters'); Schabas, *Commentary on the Rome Statute* (n 41) 438 (suggesting that the exclusion of the notion of conspiracy to commit genocide 'was almost certainly an oversight rather than an intentional omission'); Ohlin, 'Incitement and Conspiracy' (n 44) 221–22 (suggesting that conspiracy as an inchoate offence is excluded from the Statute because its drafters 'could not agree to its inclusion').

[111] Antonio Cassese, 'Genocide' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (OUP 2002) (hereafter Cassese, 'Genocide'), 347.

[112] See, e.g., *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 2677 ('[T]he crime of direct and public incitement to commit genocide is an inchoate crime, punishable even if no act of genocide has resulted therefrom.'); *Nzabonimana* Appeal Judgment (n 31) para. 234; *Nahimana et al.* Appeal Judgment (n 5) paras 678, 720; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment, 11 February 2010 (hereafter *Muvunyi* Trial Judgment II), para. 24; *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Judgment and Sentence, 20 December 2012 (hereafter *Ngirabatware* Trial Judgment), para. 1354; *Akayesu* Trial Judgment (n 11) paras 549–62; *Kalimanzira* Trial Judgment (n 46) para. 510 (footnote omitted) ('In specifying a distinct act of "Direct and Public Incitement to Commit Genocide", the drafters of the Genocide Convention sought to create an inchoate crime, in that it is not necessary to prove that the incitement was successful in achieving a genocidal result. It is sufficient to establish that an accused directly and publicly incited the commission of genocide (*actus reus*), and that he or she had the intent to directly and publicly incite others to commit genocide (*mens rea*); such intent in itself presupposes a genocidal intent. The inchoate nature of the crime allows intervention at an earlier stage, with the goal of preventing the occurrence of genocidal acts.'); *Bikindi* Trial Judgment (n 60) para. 419; *Karemera et al.* Trial Judgment (n 51) para. 1593 ('It is not a requirement that the incitement lead to the actual perpetration of any genocidal crimes, only that the audience for the incitement understood it as a call to commit genocide.'); *Nahimana et al.* Trial Judgment (n 39) para. 1029. See also *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100 (hereafter *Mugesera* Judgment), paras 84 (by reference to ICTR case law), and 85 ('In the case of the allegation of incitement to genocide, the Minister does not need to establish a direct causal link between the speech and any acts of murder or violence. Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone irrespective of the result. It remains a crime regardless of whether it has the effect it is intended to have [...].').

produced any other result.[113] It is also generally accepted that the notion of direct and public incitement to genocide provided in Article 25(3)(e) of the ICC Statute constitutes an inchoate offence, although it comes with jurisdictional peculiarities that affects its nature.[114]

As an inchoate crime, direct and public incitement to commit genocide is therefore completed as soon as the impugned statement is uttered or published, even though the

[113] *Akayesu* Trial Judgment (n 11) paras 561–562; *Musema* Trial Judgment (n 33) paras 193–194; *Kajelijeli* Trial Judgment (n 51) paras 855, and 562 ('The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.') The concept of 'incitement' is known both in common law and civil law under different forms and definitions. See *Akayesu* Trial Judgment (n 11) para. 555. The Prosecution need not, therefore, establish any causal relationship between the act of 'incitement' and the acts, if any, which it is said to have triggered; the Prosecution only needs to establish that, in view of all the circumstances, the conduct that constitutes 'incitement' for the purpose of the charges, had the 'potential' to cause genocide. *Nahimana et al.* Trial Judgment (n 39) paras 1007–1017; *Kajelijeli* Trial Judgment (n 51) para. 855; *Niyitegeka* Trial Judgment (n 51) para. 431; *Musema* Trial Judgment (n 33) para. 120; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999 (hereafter *Rutaganda* Trial Judgment), para. 38; *Akayesu* Trial Judgment (n 11) para. 562; *Nahimana et al.* Appeal Judgment (n 5) para. 678 (footnotes omitted) ('By contrast, direct and public incitement to commit genocide under Article 2(3)(c) is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide. In other words, the crime of direct and public incitement to commit genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the *travaux preparatoires* of the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement to commit genocide, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts.'). In a footnote, the *Nahimana et al.* Appeals Chamber noted the following about the *travaux* on that point:

> The United States proposed amendment to remove incitement from the list of punishable acts [...] was rejected by 27 votes to 16, with 5 abstentions [...] . Many delegations which voted to reject this amendment explained that it was important to make direct and public incitement to commit genocide punishable even when it was not followed by acts, so that the Convention should be an effective instrument for the prevention of genocide: see UN ORGA, Sixth Committee, Third Session, 84th and 85th meetings, UN Doc. A/C.6/3/SR.84 and UN Doc. A/C.6/3/SR.85, 27 and 27 October 1948, p. 208 (Venezuela), 215 and 226 (Poland), 216 (Yugoslavia), 219 (Cuba), 219, 227 and 230 (USSR), 222 (Uruguay), 223 (Egypt). The Appeals Chamber notes that the Draft Code of Crimes against the Peace and Security of Mankind by the International Law Commission in 1996 provides that direct and public incitement to commit genocide is punishable only if the act in fact occurs: see Articles 2(f) and 17 of the Draft Code of Crimes against the Peace and Security of Mankind and the comments relating thereto, 1996, Report of the International Law Commission on the deliberations of its 48h meeting, 51 UN ORGA Supp. (No. 10), reproduced in the Yearbook of the International Law Commission, 1996, vol. II (Part Two) [...]. However, the Appeals Chamber considers that this position does not reflect customary international law on the matter. Indeed, the International Law Commission itself specified that this limitation 'does not in any way affect the application of the general principles independently of the Code or of similar provisions contained in other instruments, notably article III of the Convention on the Prevention and punishment of the Crime of Genocide': Draft Code of Crimes against the Peace and Security of Mankind, footnote 45 (para. 6, p. 20).

Nahimana et al. Appeal Judgment (n 5) fn 1614 (citing UN ORGA, 3rd Sess, 84th mtg, UN Doc. A/C.6/3/SR.84 (26 October 1948); UN ORGA, 3rd Sess, 85th mtg, UN Doc. A/C.6/3/SR.85 (27 October 1948)).

[114] See, generally, Ohlin, 'Incitement and Conspiracy' (n 44) 207; William A Schabas, 'Article 6: Genocide' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Nomos 2016) (hereafter Schabas, 'Article 6: Genocide'), 141 and footnote 30; Schabas, *Genocide in International Law* (n 41) 325 (noting that the Rome Statute provides for the 'inchoate crime' of direct and public incitement to commit genocide, 'faithfully reflecting the [Genocide] Convention on this point'); Schabas, *Commentary on the Rome Statute* (n 41) 438–39. See also, *infra*, 11.4.4.

effects of incitement may extend in time.[115] It is punishable even if no act of genocide has resulted from it.[116] Further, it is not necessary to show that the actions of the accused were likely to cause the commission of the crime of genocide.[117] Nor is it relevant that genocide might or would have occurred regardless of the inciting act of the accused.[118]

In light of the inchoate nature of the crime, it is also unnecessary to establish that the impugned conduct took place at a time when acts of genocide were actually being committed. Instead, the impugned conduct might have occurred prior to the commission of any act of genocide.[119] However, where the act took place in a location or at a time when genocide was actually being committed, this could be evidentially relevant to establishing both the inciting and direct nature of the act.

Whilst the inchoate character of the offence means that no consequence need to have arisen from the impugned conduct, evidence that the inciting conduct caused a third party to act may be relevant, however, to establish the 'direct' character of that alleged incitement.[120] Crimes which can be shown beyond reasonable doubt to have resulted directly from the inciting act could also impact the accused's sentence.[121]

11.4.1.2 No continuing offence

The question arose as to whether the crime of direct and public incitement, like the crime of conspiracy, is a continuing crime. The *Nahimana* Trial Judgment held that

[115] *Nahimana et al.* Appeal Judgment (n 5) para. 723.

[116] *Nzabonimana* Appeal Judgment (n 31) para. 234; *Nahimana et al.* Appeal Judgment (n 5) para. 678. During the negotiation of the Genocide Convention, Mr Fitzmaurice, for the United Kingdom, highlighted that the proposed addition of the phrase 'whether such incitement be successful or not' would have no effect because incitement would be punished in any case, whether it resulted in the commission of crimes or not. UN GAOR, 3rd Sess, 85th mtg, UN Doc. A/C.6/SR.85 (27 October 1948) (hereafter UN Doc. A/C.6/SR.85), 231.

[117] *Nzabonimana* Appeal Judgment (n 31) para. 234 (footnotes omitted):

> As for Nzabonimana's contention regarding the likelihood of his actions causing the crime of genocide, the Appeals Chamber recalls that direct and public incitement is an inchoate crime and that it is punishable even if no act of genocide has resulted therefrom. In light of this, the actus reus of direct and public incitement is satisfied when a person directly and publicly incites the commission of genocide, irrespective of whether his or her acts were likely to cause the crime of genocide. Accordingly, the Appeals Chamber rejects Nzabonimana's contention that, to establish direct and public incitement to commit genocide, it must be proven that the accused's actions were likely to cause the commission of the crime of genocide.

[118] *Nahimana et al.* Appeal Judgment (n 5) para. 766 ('The Appeals Chamber summarily dismisses Appellant Ngeze's argument that the genocide would have occurred even if the Kangura articles had never existed, because it is not necessary to show that direct and public incitement to commit genocide was followed by actual consequence.').

[119] See, generally, *Nahimana et al.* Appeal Judgment (n 5) para. 766 ('Regarding the argument that Kangura was not being published at the time of the genocide, this is not relevant in deciding whether the Kangura publications constituted direct and public incitement to commit genocide.'). See also, ibid., paras 564–565 (finding that the Trial Chamber committed no error in accepting evidence prior to 1 January 1994 in order to establish the Appellant's genocidal intent).

[120] See, *infra*, 11.4.2.3.2. See also *Nahimana et al.* Appeal Judgment (n 5) fn 1674 ('In this respect, while it is not necessary to prove that the pronouncements in question had actual effects, the fact that they did have such effects can be an indication that the receivers of the message understood them as direct incitement to commit genocide.').

[121] See, e.g., *Nyiramasuhuko et al.* Appeal Judgment (n 31) paras 3460–3463 (where this could not be established).

incitement is an inchoate offence that continues in time until the completion of the acts contemplated.[122] The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) overturned this finding,[123] noting that the 'inchoate' and 'continuing' characters of an offence are independent and distinct attributes and that the Trial Chamber erred in finding that incitement continues in time until the completion of the acts contemplated.[124] Instead, it held that the crime is 'completed as soon as the impugned discourse or statement is uttered or published, even though the effects of incitement may extend in time'.[125]

11.4.1.3 Gravity of the offence

The gravity of the crime of direct and public incitement to commit genocide derives from the notion of genocide, a crime of the most serious gravity. Publicly calling for and inciting the commission of such a crime is therefore regarded as a serious offence as reflected in the sentences generally handed down for such offence.[126]

[122] *Nahimana et al.* Trial Judgment (n 39) paras 1016–1039 (finding that the crime of direct and public incitement to commit genocide 'is an inchoate offence that continues in time until the completion of the acts contemplated' and that 'the entirety of RTLM broadcasting, from July 1993 through July 1994, [...] falls within the temporal jurisdiction of the Tribunal to the extent that the broadcasts are deemed to constitute direct and public incitement to genocide').

[123] *Nahimana et al.* Appeal Judgment (n 5) paras 318, 723 (citing *Nahimana et al.* Trial Judgment (n 39) para. 1017). See also *Popović et al.* Trial Judgment (n 2) para. 871.

[124] *Nahimana et al.* Appeal Judgment (n 5) paras 716–727, in particular, 723 (footnote omitted) ('The Appeals Chamber is of the opinion that the Trial Chamber erred in considering that incitement to commit genocide continues in time "until the completion of the acts contemplated". The Appeals Chamber considers that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time. The Appeals Chamber accordingly holds that the Trial Chamber could not have jurisdiction over acts of incitement having occurred before 1994 on the grounds that such incitement continued in time until the commission of the genocide in 1994.') and 724–725 (regarding the relevance of jurisdictionally *extra temporis* evidence). The Appeals Chamber explained that 'an inchoate crime penalizes the commission of certain acts capable of constituting a step in the commission of another crime, even if that crime is not in fact committed.' A continuing crime 'implies an ongoing criminal activity.' Ibid., para. 720. The Appeals Chamber referred to Black's Law Dictionary which states that a continuing crime is '1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] 2. A crime ... that continues over an extended period.' Ibid., para. 720 and fn 1701 (citing Brian A Garner (ed), *Black's Law Dictionary* (8th edn, Thompson West Publishing Company 2004) (hereafter Garner, *Black's Law*), 399).

[125] *Nahimana et al.* Appeal Judgment (n 5) para. 723. See also *Popović et al.* Trial Judgment (n 2) para. 871.

[126] *Bikindi v. Prosecutor*, Case No. ICTR-01-72-A, Judgment, 18 March 2010 (hereafter *Bikindi* Appeal Judgment), para. 208; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3449 (footnotes omitted) ('The Appeals Chamber observes that the gravity of the crime of direct and public incitement to commit genocide derives from that of the crime of genocide, a crime of the most serious gravity. The Trial Chamber found that Nteziryayo committed direct and public incitement to commit genocide on three separate occasions. Accordingly, the Appeals Chamber considers that, regardless of whether or not deaths resulted from his statements, the imposition of a sentence of 30 years of imprisonment was not beyond the Trial Chamber's sentencing discretion.'). The accused Bikindi was convicted by the ICTR exclusively for direct and public incitement to genocide. He received a fifteen-year sentence that was confirmed on appeal.

11.4.2 Elements

11.4.2.1 General definition

A person may be found guilty of direct and public incitement to commit genocide if he directly and publicly incited the commission of genocide (*actus reus*) with the intent to incite others directly and publicly to commit genocide (*mens rea*).[127] This requires that the accused possessed the requisite, genocidal, intent.[128] It also requires that his inciting conduct or statement were both 'public' and 'direct', as defined below.

11.4.2.2 Incitement

11.4.2.2.1 Context-specific assessment

Direct and public incitement to commit genocide consists of 'directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication'.[129] The nature of what may be considered to be *inciting* for the purpose of that prohibition may depend on the context—in particular, the political and cultural context—and circumstances in which the impugned conduct occurs.[130] Consideration must be given in particular to the relevant linguistic, social, and cultural context in which the statement or acts of the accused have taken place[131] as the meaning of a message can be intrinsically linked to that

[127] *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3338; *Karemera et al.* Trial Judgment (n 51) para. 1593 (footnote omitted) ('A person may be found guilty of direct and public incitement to commit genocide if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).'); *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Judgment, 20 October 2010 (hereafter *Kalimanzira* Appeal Judgment), para. 155; *Bikindi* Appeal Judgment (n 127) para. 135; *Muvunyi* Trial Judgment II (n 113) paras 23–24; *Nzabonimana* Appeal Judgment (n 31) paras 121, 231, and 381 (footnote omitted) ('[A] person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2(3)(c) of the Statute, if he or she directly and publicly incited the commission of genocide (actus reus) and had the intent to directly and publicly incite others to commit genocide (mens rea).'); *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment and Sentence, 12 September 2006 (hereafter *Muvunyi* Trial Judgment), paras 500–501; *Nahimana et al.* Appeal Judgment (n 5) para. 677.

[128] See, generally, *Nahimana et al.* Appeal Judgment (n 5) para. 677.

[129] *Akayesu* Trial Judgment (n 11) para. 559.

[130] *Akayesu* Trial Judgment (n 11) paras 557–558.

[131] *Nahimana et al.* Appeal Judgment (n 5) paras 698–703, in particular, 698 (pointing to the necessity to take account of Rwanda's culture and language in determining whether a speech constitute direct incitement to commit genocide), 700 (footnote omitted) ('The Appeals Chamber agrees that the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.'), and 701 ('The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide.'). See also ibid., paras 739 (footnotes omitted) ('The Appeals Chamber would begin by pointing out that the broadcasts must be considered as a whole and placed in their particular context. Thus, even though the terms *Inyenzi* and *Inkotanyi* may have various meanings in various contexts (as with many words in every language),

incitement is an inchoate offence that continues in time until the completion of the acts contemplated.[122] The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) overturned this finding,[123] noting that the 'inchoate' and 'continuing' characters of an offence are independent and distinct attributes and that the Trial Chamber erred in finding that incitement continues in time until the completion of the acts contemplated.[124] Instead, it held that the crime is 'completed as soon as the impugned discourse or statement is uttered or published, even though the effects of incitement may extend in time'.[125]

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[125] *Nahimana et al.* Appeal Judgment (n 5) para. 723. See also *Popović et al.* Trial Judgment (n 2) para. 871.

[126] *Bikindi v. Prosecutor*, Case No. ICTR-01-72-A, Judgment, 18 March 2010 (hereafter *Bikindi* Appeal Judgment), para. 208; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3449 (footnotes omitted) ('The Appeals Chamber observes that the gravity of the crime of direct and public incitement to commit genocide derives from that of the crime of genocide, a crime of the most serious gravity. The Trial Chamber found that Nteziryayo committed direct and public incitement to commit genocide on three separate occasions. Accordingly, the Appeals Chamber considers that, regardless of whether or not deaths resulted from his statements, the imposition of a sentence of 30 years of imprisonment was not beyond the Trial Chamber's sentencing discretion.'). The accused Bikindi was convicted by the ICTR exclusively for direct and public incitement to genocide. He received a fifteen-year sentence that was confirmed on appeal.

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11.4.2.2 Incitement

11.4.2.2.1 Context-specific assessment

Direct and public incitement to commit genocide consists of 'directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication'.[129] The nature of what may be considered to be *inciting* for the purpose of that prohibition may depend on the context—in particular, the political and cultural context—and circumstances in which the impugned conduct occurs.[130] Consideration must be given in particular to the relevant linguistic, social, and cultural context in which the statement or acts of the accused have taken place[131] as the meaning of a message can be intrinsically linked to that

[127] *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3338; *Karemera et al.* Trial Judgment (n 51) para. 1593 (footnote omitted) ('A person may be found guilty of direct and public incitement to commit genocide if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).'); *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Judgment, 20 October 2010 (hereafter *Kalimanzira* Appeal Judgment), para. 155; *Bikindi* Appeal Judgment (n 127) para. 135; *Muvunyi* Trial Judgment II (n 113) paras 23–24; *Nzabonimana* Appeal Judgment (n 31) paras 121, 231, and 381 (footnote omitted) ('[A] person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2(3)(c) of the Statute, if he or she directly and publicly incited the commission of genocide (actus reus) and had the intent to directly and publicly incite others to commit genocide (mens rea).'); *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment and Sentence, 12 September 2006 (hereafter *Muvunyi* Trial Judgment), paras 500–501; *Nahimana et al.* Appeal Judgment (n 5) para. 677.

[128] See, generally, *Nahimana et al.* Appeal Judgment (n 5) para. 677.

[129] *Akayesu* Trial Judgment (n 11) para. 559.

[130] *Akayesu* Trial Judgment (n 11) paras 557–558.

[131] *Nahimana et al.* Appeal Judgment (n 5) paras 698–703, in particular, 698 (pointing to the necessity to take account of Rwanda's culture and language in determining whether a speech constitute direct incitement to commit genocide), 700 (footnote omitted) ('The Appeals Chamber agrees that the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.'), and 701 ('The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide.'). See also ibid., paras 739 (footnotes omitted) ('The Appeals Chamber would begin by pointing out that the broadcasts must be considered as a whole and placed in their particular context. Thus, even though the terms *Inyenzi* and *Inkotanyi* may have various meanings in various contexts (as with many words in every language),

context.[132] A statement that might be inciting in one set of circumstances need not necessarily be so in another. A Chamber must thus consider the potential impact of the statement made *in context*—notably, how the message would have been understood by its intended audience[133]—before determining whether it constituted direct and public incitement to commit genocide.[134] The purpose of the speech is indisputably a factor in that determination.[135] Recent or ongoing violence surrounding the impugned statement could also be relevant.[136]

11.4.2.2.2 Incitement *versus* hate speech and propaganda

During both the Yugoslav and the Rwandan conflicts, the media played a crucial role in spreading rumours of crimes allegedly committed by the enemy side, messages of ethnic hatred, and calls to violence.[137] In Rwanda in particular, media outlets played a very direct part in the creation and the perpetuation of a criminal mindset and had a clear encouraging and legitimizing role in the carrying out of mass killings.[138] An ICTR Trial Chamber noted that '[t]he power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media

the Appeals Chamber is of the opinion that it was reasonable for the Trial Chamber to conclude that these expressions could in certain cases be taken to refer to the Tutsi population as a whole. The Appeals Chamber further considers that it was reasonable to conclude that certain RTLM broadcasts had directly equated the Tutsi with the enemy.'), and 746. See also, *Nahimana et al.* Trial Judgment (n 39) para. 1011; *Akayesu* Trial Judgment (n 11) paras 557–558; *Muvunyi* Trial Judgment (n 128) para. 502; *Kajelijeli* Trial Judgment (n 51) para. 853; *Niyitegeka* Trial Judgment (n 51) para. 431; *Mugesera* Judgment (n 113) paras 86–87 and 94.

[132] *Nahimana et al.* Appeal Judgment (n 5) paras 710–711, and in particular 711.

[133] See, e.g., *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 2678 (footnotes omitted):

> Notwithstanding this finding, the Trial Chamber concluded that 'the fact that after both megaphone announcements searches were conducted and more Tutsis were killed' constituted further evidence that the public understood that the 'enemy' and 'Inkotanyi' referred to in Kanyabashi's speeches were Tutsis and that they were to be killed. The Appeals Chamber recalls that in determining whether a speech constitutes a direct and public incitement to commit genocide, it may be helpful to examine how the speech was understood by its intended audience in order to determine its true message. The Trial Chamber's analysis reveals that this was the assessment the Trial Chamber undertook.

[134] Ibid. In this respect, the ICTR Appeals Chamber noted that the crime of direct and public incitement to commit genocide is punishable as such 'precisely because of the potential dangers inherent in discourse directly and publicly inciting the commission of genocide'. *Nahimana et al.* Appeal Judgment (n 5) fn 1684.

[135] See *Nahimana et al.* Appeal Judgment (n 5) paras 704–715, and in particular 706:

> The Appeals Chamber is of the opinion that the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide, and it can see no error in this respect on the part of the Trial Chamber. It is plain that the Trial Chamber did not find that a speech constitutes direct and public incitement to commit genocide simply because its author had criminal intent.

[136] *Karemera et al.* Trial Judgment (n 51) paras 1598 and 1602.

[137] See on this matter, Jean-Pierre Chrétien (ed), *Rwanda: Les Médias du Génocide* (Karthala 1995) (hereafter Chrétien, *Rwanda*).

[138] See *Kambanda* Trial Judgment (n 11) para. 39(ix). See also, *inter alia*, Steven Majstorović, 'Ancient Hatreds or Elite Manipulation? Memory and Politics in the Former Yugoslavia' (1997) 159 World Affairs 170 (hereafter Majstorović, 'Ancient Hatreds'); Jamie F Metzl, 'Rwandan Genocide and the International Law of Radio Jamming' (1997) 91 American Journal of International Law 628 (hereafter Metzl, 'Rwandan Genocide').

are accountable for its consequences.'[139] The Chamber added that the fact that killings or other forms of mistreatment might have been effected by 'an immediately proximate cause in addition to the [media] communication itself' does not diminish the blame that might be attributed to the media, nor does it negate the criminal liability of those responsible for propagating inciteful messages by using those media.[140] In that regard, 'freedom of expression and freedom from discrimination are not incompatible principles of law' and 'hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination'.[141]

The line between 'legitimate' political propaganda and criminal incitement can be acutely difficult to draw, particularly in times of conflict or serious tensions where the parties involved use the media to create a climate of violence and to shore up popular support for their cause, often by demonizing enemies. With regard to incitement to genocide, the prosecution would have to establish that the perpetrator intended to prompt or provoke another to commit genocide by creating in that person a particular state of mind necessary to commit genocide.[142] The direct appeal to others to commit genocide distinguishes this crime from hate speech.[143] In contrast, mere

[139] *Nahimana et al.* Trial Judgment (n 39) para. 945. [140] Ibid., paras 952 and 1060.
[141] Ibid., paras 1074 and 1076. [142] *Akayesu* Trial Judgment (n 11) para. 560.
[143] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) paras 692–693 (footnotes omitted):

> 692. The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the travaux preparatoires to the Genocide Convention.
>
> 693. The Appeals Chamber therefore concludes that when a defendant is indicted pursuant to Article 2(3)(c) of Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide. However, it is not entirely clear if the Trial Chamber relied on this jurisprudence in defining direct incitement to commit genocide.

See also, ibid., para. 741 ('This broadcast is referred to in paragraphs 369 and 370 of the Judgment. The Trial Chamber found that this RTLM broadcast "heated up heads". The Appeals Chamber agrees with the Trial Chamber: the broadcast of 1 January 1994 encouraged ethnic hatred. The Appeals Chamber notes that the broadcast also wanted the Hutu majority against an impending "threat". The implicit message was perhaps that the Hutu had to take action to counter that "threat". However, in the absence of other evidence to show that the message was actually a call to commit acts of genocide against the Tutsi, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast was a direct and public incitement to commit genocide.'); *Kajelijeli* Trial Judgment (n 51) para. 852; *Akayesu* Trial Judgment (n 11) para. 557; *Mugesera* Judgment (n 113) para. 87. See also UN International Law Commission, Draft Code of Crimes against Peace and Security of Mankind with commentaries, 1996 (hereafter ILC, Draft Code 1996), 22 ('The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.') As noted by the ICTR Appeals Chamber in *Nahimana et al.*, the view that stirring hatred fell short of that offence is supported by the *travaux* of the Genocide Convention:

> In particular, the travaux préparatoires demonstrate that Article 3(c) (Article 2(3)(c) of the Statute of the Tribunal) is intended to criminalize only direct appeals to commit acts of genocide and not all forms of incitement to hatred. Indeed, the first draft of the Convention,

propaganda, even if crude or violent, would not qualify as incitement unless a call to genocide forms a direct part of it.[144] Similarly, inflammatory or hurtful speeches,[145] or the act of inciting violence generally,[146] or creating fear within a group,[147] will normally fall short of that prohibition unless they involve a direct call to destroy a protected group.

> which was prepared by a group of experts on behalf of the United Nations Secretary General (UN Doc. E/447), contained provisions criminalizing not only direct and public incitement to commit genocide (Article II(II)(2.)), but also all forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as necessary, legitimate or excusable (Article III). The second draft of the Convention (prepared by the *Ad Hoc* Committee of the Economic and Social Council, UN Doc. E/794), contained only one provision criminalizing direct and public incitement to commit genocide, regardless of whether it was made in public or in private, and of whether it was successful or not (Article IV(c)). The Soviet delegate had suggested the inclusion of a provision criminalizing hate propaganda and propaganda tending to incite acts of genocide, but the suggestion was rejected by the majority of the *Ad Hoc* Committee (UN Doc. E/794, 23). Later, the Soviet delegate again suggested to the 6th Committee of the General Assembly an amendment of Article III (UN Doc. A/C.6/215/Rev.1) criminalizing 'all forms of public propaganda (press, radio, cinema etc.) that tend to incite racial, national or religious hatred' and 'all forms of propaganda that are aimed at provoking the commission of acts of genocide'. The amendment was rejected (UN ORGA, 6th Committee, 3rd Session, 87th meeting, 253). The reasons for rejecting the two parts of the amendment seem to have been the same as those for rejecting the Soviet amendment presented to the *Ad Hoc* Committee: the first part of the amendment fell outside the framework of the Genocide Convention (see addresses of the delegates of Greece, France, Cuba, Iran, Uruguay, and India) while the second part was a duplication of the provision prohibiting incitement [*sic*] of direct and public incitement to commit genocide (see addresses of the delegates of Greece, Cuba, Iran, Uruguay, Egypt, the United States of America).

Nahimana et al. Appeal Judgment (n 5) fn 1658 (citing UN GAOR, 3rd Sess, 86th mtg, UN Doc. A/C.6/3/CR.86 (28 October 1948), 244–48; UN ORGA, 3rd Sess, 87th mtg, UN Doc. A/C.6/3/CR.87 (29 October 1948), 248–54).

[144] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) paras 726–727, in particular, 726 (footnote omitted) ('The Appeals Chamber agrees with Appellant Nahimana that an accused cannot be convicted simply on the basis of "programming". As noted *supra*, it appears from the travaux preparatoires of the Genocide Convention that only specific acts of direct and public incitement to commit genocide were sought to be criminalized and not hate propaganda or propaganda tending to provoke genocide. Thus the Appeals Chamber is of the opinion that the acts constituting direct and public incitement to commit genocide must be clearly identified.') and 727 ('The Trial Chamber should have identified more clearly all of the broadcasts which, in its opinion, constituted direct and public incitement to commit genocide.').

[145] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) para. 742 ('This broadcast is referred to in paragraphs 351 to 356, 471 and 472 of the Judgment. The Trial Chamber found that the broadcast was an "example of inflammatory speech", that the journalist's obvious intention as to mobilize anger against the Tutsis and to make fun of them. However, the broadcast contains no direct and public incitement to commit genocide against the Tutsi.').

[146] *Nahimana et al.* Appeal Judgment (n 5) para. 745 (footnote omitted) ('This broadcast is discussed in paragraphs 375, 376 and 474 of the Judgment. The Trial Chamber found that this broadcast named Tutsi civilians not because they were RPF members or because there were reasons to believe so, but simply on the basis of their ethnicity. The Appeals Chamber notes the following statements from the broadcast: "How does he manage when we catch his colleague Nkotanyi Tutsi? Let him express his grief". Those statements were perhaps intended as an incitement to violence against the Tutsi. However, in the absence of more precise evidence to show that that was the case, the Appeals Chamber cannot conclude beyond reasonable doubt that this was a direct and public incitement to commit genocide.').

[147] *Nahimana et al.* Appeal Judgment (n 5) para. 751 ('This broadcast is discussed in paragraphs 388 and 389 of the Judgment. Even if this broadcast was calculated to cause fear among the population by predicting an imminent attack by the RPF, the Appeals Chamber cannot conclude beyond reasonable doubt that it was a direct and public incitement to commit genocide.').

11.4.2.2.3 Forms of incitement

The law does not expressly provide for particular ways in which an accused could commit this crime.[148] It could in fact take many forms and be oral or written.[149] Existing case law suggests that public statements, media broadcastings, and actions that clearly signify that person's intention could qualify.[150] An omission or a failure to act when under a duty to do so could also serve as evidence of the fact that the conduct of the accused had an inciting effect on the conduct of the perpetrators.[151] In contrast, merely embracing someone else's view, if not accompanied by the clear expression of one's own position, might not necessarily suffice to bring such conduct within the scope of direct and public incitement unless that embrace is itself clearly shown to be inciting.[152]

[148] See also Wibke K Timmermann, 'Incitement in International Criminal Law' (2006) 88 International Review of the Red Cross 823 (hereafter Timmermann, 'Incitement in ICL').

[149] For an illustration, see *Bikindi* Trial Judgment (n 60) paras 247–255 and 421 (considering the possibility of direct and public incitement to genocide having taken the forms of songs, but acquitting the accused in relation to that aspect of the charges on the basis that, having considered the meanings of the said songs, none was found to constitute direct and public incitement to commit genocide per se). See also Summary and Grounds for Punishment, Decision No LJN:BZ5728, 1 March 2013 (Rechtbank 's-Gravenhage) (hereafter NL Summary and Grounds for Punishment), Chapter 12 (characterizing the fact that the accused led a song calling for the killing of all Tutsis as direct and public incitement to genocide).

[150] See, e.g., *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgment and Sentence, 24 June 2011 (hereafter *Nyiramasuhuko et al.* Trial Judgment), paras 5946, 6022–6025, 6036 and 6186; *Nyiramasuhuko et al.* Appeal Judgment (n 31) paras 2335–2336; *Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Judgment, 18 December 2014 (hereafter *Ngirabatware* Appeal Judgment), para. 55 (footnotes omitted) ('Lastly, Ngirabatware misrepresents the trial record in suggesting that there is no evidence of direct incitement to commit genocide. The Appeals Chamber notes that Witness ANAN explicitly stated that Ngirabatware called upon the group of about 150 to 250 youths to "take vengeance" by killing Tutsis. Witness ANAT also testified that Ngirabatware told them to "track down all the Tutsi of the Gisa *secteur* for the purpose of killing each and every one of them".').

[151] See e.g., *Karemera et al.* Trial Judgment (n 51) paras 1596 (regarding Karemera's speech paying tribute to the Interahamwe, calling on them to flush out, stop, and combat the enemy) and 1597 ('By not condemning, or even addressing, the recent massacre of more than 2,000 Tutsi civilians, which had taken place in the vicinity of the meeting venue, the speakers condoned the killings and instigated and incited the population to continue killing Tutsis.'); *Karemera et al.* Appeal Judgment (n 63) para. 484 ('The Trial Chamber's analysis reflects that its assessment of "what was not said" at the meeting merely served to assist in the interpretation of the speeches, including that of Karemera, and in assessing them in the given context.').

[152] See, e.g., *Nyiramasuhuko et al.* Appeal Judgment (n 31) paras 3339–3340 (footnotes omitted):

> 3339. The Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches were inflammatory and constituted a call to the public to kill Tutsis and their accomplices. It also found that Kanyabashi addressed the audience after Kambanda and Sindikubwabo, that his own speech was not inflammatory but that it supported their speeches, and that his address contained a commitment to execute the directives and instructions announced by them. The Trial Chamber found that this conduct did not rise to the level of directly inciting genocide.
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> 3340. The Appeals Chamber is not convinced by the Prosecution's contention that, by embracing as his own Kambanda's and Sindikubwabo's Speeches, Kanyabashi's Speech amounted to a call to kill Tutsis. The Appeals Chamber finds that a reasonable trier of fact could have found that Kanyabashi's support and own commitment to Kambanda's and Sindikubwabo's Speeches did not rise to the level of directly appealing to the people in Butare Prefecture to carry out Kambanda's and Sindikubwabo's genocidal instructions. Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that Kanyabashi's Speech did not rise to the level of direct incitement to commit genocide and dismisses this part of the Prosecution's appeal without further consideration.

Furthermore, not every sort of incitement has been criminalized under the Genocide Convention: to come within the scope of the prohibition, incitement must be *both* 'public' and 'direct'. Only this sort of incitement could constitute the *actus reus* of this crime.[153]

11.4.2.3 'Direct'

11.4.2.3.1 Definition

Incitement is 'direct' when it 'specifically provoke[s] another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute [it]'.[154] The 'direct' element of the crime therefore implies more than vague or indirect suggestion, such that his words or actions could be reasonably understood as calls to commit genocide.[155] However, direct does not necessarily mean *explicit* as long as it is

[153] *Ngirabatware* Appeal Judgment (n 151) para. 52 (footnotes omitted) ('The Appeals Chamber recalls that the *actus reus* of direct and public incitement to commit genocide requires that the accused directly and publicly incited the commission of genocide. The crime is completed as soon as the discourse in question is uttered.'); *Nzabonimana* Appeal Judgment (n 31) para. 121; *Kalimanzira* Appeal Judgment (n 128) para. 155; *Bikindi* Appeal Judgment (n 127) para. 135; *Nahimana et al.* Appeal Judgment (n 5) paras 677 and 723; *Ngirabatware* Trial Judgment (n 113) para. 1352 ('The *actus reus* of direct and public incitement to commit genocide is that the accused must have directly and publicly incited the commission of genocide.'); *Nzabonimana* Trial Judgment (n 63) para. 1751 ('The *actus reus* of direct and public incitement to commit genocide is that the accused must have directly and publicly incited the commission of genocide.').

[154] *Akayesu* Trial Judgment (n 11) para. 557. See also, *Kajelijeli* Trial Judgment (n 51) para. 852; *Nahimana et al.* Appeal Judgment (n 5) para. 692; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3338. In *The Genocide Convention: A Commentary*, Nehemiah Robinson noted that the expression 'direct' in Article III(c) meant 'incitement which *calls* for the commission of acts of Genocide, not such which *may result* in such commission'. Robinson, *Commentary on the Genocide Convention* (n 4) 67. See also UN Doc. A/51/10 (n 109) 26 (noting that the element of direct incitement requires 'specifically urging another individual to take immediate action rather than merely making a vague or indirect suggestion').

[155] *Kalimanzira* Trial Judgment (n 46) para. 514. For illustrations, see *Nzabonimana* Appeal Judgment (n 31) para. 233 (footnotes omitted) ('Turning to Nzabonimana's argument that the Trial Chamber erred in finding the incitement to be direct, the Appeals Chamber recalls that direct and public incitement implies that the speech is a direct appeal to commit any act referred to in Article 2(2) of the Statute and requires more than a vague or indirect suggestion. The Appeals Chamber notes the Trial Chamber's finding that Nzabonimana's speech "included explicit instructions to kill Tutsis" and thus constituted "an incontestably direct call on those assembled to commit genocide". In coming to this conclusion, the Trial Chamber noted that Witnesses CNAZ and CNBH provided different versions of Nzabonimana's words. It considered the differences to be minor and attributed them to the passage of time. The Appeals Chamber finds this assessment reasonable. The Appeals Chamber is also not persuaded that these minor inconsistencies impact the Trial Chamber's finding that, according to both witnesses, Nzabonimana made inflammatory statements about the Tutsis and asked whether there were any Tutsis in the crowd. Accordingly, the Appeals Chamber is not persuaded that the Trial Chamber erred in finding the incitement to be direct.'); *Nahimana et al.* Appeal Judgment (n 5) paras 771–774; *Muvunyi* Trial Judgment (n 128) paras 506–510. For two contrasting scenarios, see *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgment of Acquittal, 2 February 2005 (hereafter *Bagosora et al.* Decisions on Acquittal Motions), para. 23 (footnote omitted):

> Nsengiyumva is charged with incitement on three distinct occasions. As to the first occasion, on the night of 6–7 April 1994 (par 6.14 of the Indictment), Witness ZF testified that he heard Nsengiyumva tell a certain Lieutenant Bizumuremyi under his command that 'work had to begin to finish off the *Inyenzi*' and later that the Tutsi were evil. Shortly after speaking with Nsengiyumva, Bizumuremyi ordered soldiers to kill Tutsi civilians, including babies. In light of the possible range of interpretations of the words spoken in the context, the Chamber cannot say that there is insufficient evidence upon which any reasonable trier of fact could find

established that those for whom the message was intended 'immediately grasped the implication thereof'.[156] An act or statement may thus be 'direct' although implicit if and where its inciting character results from or is magnified by the context in which it takes place.[157] For instance, exhorting a crowd to unite against the 'sole enemy', or to 'get to work', or calling on 'the majority' to 'rise up and look everywhere possible' and not to 'spare anybody', in the context of the Rwandan genocide, has been found in the particular circumstances of those cases to amount to calls to genocide against the Tutsi people.[158] For the same reason, a speech containing no explicit appeal to commit genocide or which appeared ambiguous could still constitute direct incitement to

> the Accused guilty of incitement for this event. Several witnesses testified to the second alleged act of incitement (par 6.16 of the Indictment), at which Nsengiyumva allegedly called for the killing of Tutsi, urged roadblocks to be reinforced, and distributed weapons to *Interahamwe*. As to the third incident (par 6.30 of the Indictment), a witness testified that Nsengiyumva told a municipal leader during an assembly at Umuganda stadium in Gisenyi that he should reinforce roadblocks and 'to warn his Muslim friends not to continue hiding Tutsi in their houses'. This evidence, if believed, is not insufficient to possibly lead to a finding of guilt beyond a reasonable doubt.

[156] *Akayesu* Trial Judgment (n 11) paras 557–558. See also *Mugesera* Judgment (n 113), 95–98. See also Ohlin, 'Incitement and Conspiracy' (n 44) 216.

[157] See, e.g., *Muvunyi* Trial Judgment II (n 113) para. 25 (footnote omitted) ('[I]mplicit language may be "direct" because incitement does not have to involve an explicit appeal to commit genocide. In order to determine whether a speech is direct, it should be viewed in light of its cultural and linguistic context, its audience, and the political and community affiliations of the inciter. The Chamber will therefore consider whether, in light of Rwandan culture, including the nuances of the Kinyarwanda language, certain acts of incitement can be viewed as direct, the principal consideration being the meaning of the words used in the specific context. An important factor for determining the true message of a speech is how it was understood by its intended audience.'); *Kajelijeli* Trial Judgment (n 51) para. 853; *Kalimanzira* Trial Judgment (n 46) para. 514 ('[I]mplicit language may nonetheless be "direct" and should be viewed in light of its cultural and linguistic content, its audience, and the political and community affiliations of the inciter.'); *Karemera et al.* Trial Judgment (n 51) para. 1594 (footnote omitted) ('The speech has to be more than a mere vague or indirect suggestion. A hate speech that does not directly appeal to commit genocide cannot constitute a sufficient basis for a conviction under Article 2(3)(c) of the Statute. However, when a speech that does not contain an explicit appeal to commit genocide is analysed in a particular context, it may still constitute direct incitement to commit genocide as long as it is not considered ambiguous within that context; it does not matter whether the message may appear ambiguous in another context. For this reason, it might be helpful to examine how a speech was understood by its intended audience. In the context of Rwanda, the culture and the nuances of the Kinyarwanda language should be considered in determining whether a speech constitutes direct and public incitement to commit genocide.'); *Nahimana et al.* Appeal Judgment (n 5) paras 692–693, 700–701; *Muvunyi* Trial Judgment (n 128) para. 502; *Ngirabatware* Trial Judgment (n 113) para. 1353; *Niyitegeka* Trial Judgment (n 51) para. 431. Whilst a degree of ambiguity might not disqualify a statement from being inciting where the context would have made it sufficiently clear what was intended, ambiguous statements might in other cases be such as to allow for reasonable (non-inciting) interpretations of such statements the benefit of which should accrue the defendant. See, e.g., *Nahimana et al.* Appeal Judgment (n 5) paras 744 ('This broadcast is discussed in paragraphs 377 to 379 and 477 of the Judgment. The broadcast named a person said to be an RPF member and his family members. The broadcast did not directly call on anyone to kill the children, although it was perhaps an implicit call to do so. However, in the absence of other evidence to that effect, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast directly and publicly incited the commission of genocide.'), 746 and 750.

[158] *Akayesu* Trial Judgment (n 11) paras 334–65; *Niyitegeka* Trial Judgment (n 51) paras 433–435; *Bikindi* Trial Judgment (n 60) para. 423; *Kalimanzira* Trial Judgment (n 46) para. 514. See also *Nzabonimana* Trial Judgment (n 63) para. 1753 (footnote omitted) ('In determining whether a speech constitutes "direct" incitement to commit genocide, the principal consideration is the meaning of the words used in the specific context. The culture, including the nuances of the Kinyarwanda language, should be considered. A Chamber may consider how a speech was understood by its intended audience in order to determine its true message.').

commit genocide if the context would have made it clear to the audience what the intended result of the statement was.[159]

11.4.2.3.2 Relevant factors and considerations

A court seised of such an allegation will have to consider on a case-by-case basis whether, in light of the particular circumstances of the case, acts of incitement can be viewed as 'direct' by examining how a speech was or could reasonably have been understood by its intended audience.[160] The use of expressions such as 'cockroaches' in the context of the Rwandan conflict, for instance, to describe one particular ethnic group (the Tutsis) as targets for elimination could therefore be sufficient where the underlying meaning of that expression would be clear to its recipients. What matters, ultimately, is whether the person to whom the message was intended could unambiguously understand its meaning and implication.[161] It should be clear that the requirement that the incitement must have been 'direct' does not restrict the scope of responsibility to those who spoke or who were the mouthpiece of a particular message, but could also include those who made the transmission or communication of that message possible, including editors of media outlets and their owners.[162]

The fact that a speech leads to the commission of acts of genocide may be an indication that in that particular context the speech was understood to be an incitement to

[159] *Karemera et al.* Appeal Judgment (n 63) para. 483 ('The Appeals Chamber further recalls that a particular message may appear ambiguous on its face or to a given audience, or not contain an explicit appeal to commit genocide, and still, when viewed in its proper context, amount to direct incitement.'). See, e.g., *Nahimana et al.* Appeal Judgment (n 5) paras 702–703 (footnotes omitted):

> 702. The Appeals Chamber is not persuaded that the Streicher and Fritzsche cases demonstrate that only discourse explicitly calling for extermination, or discourse that is entirely unambiguous for all types of audiences, can justify a conviction for direct and public incitement to commit genocide. First, it should be recalled that Streicher and Fritzsche were not charged with direct and public incitement to commit genocide, as there was no such crime under international law at the time. Second, it should be noted that the reason Fritzsche was acquitted is not because his pronouncements were not explicit enough, but rather because they did not implicitly or explicitly, '[intend] to incite the German people to commit atrocities on conquered peoples'.
>
> 703. The Appeals Chamber therefore concludes that it was open to the Trial Chamber to hold that a speech containing no explicit appeal to commit genocide, or which appeared ambiguous, still constituted direct incitement to commit genocide in a particular context. The Appeals Chamber will examine below if it was reasonable to conclude that the speeches in the present case constituted direct and public incitement to commit genocide of the Tutsi.

[160] *Kalimanzira* Trial Judgment (n 46) para. 514 (footnotes omitted) ('The Chamber will therefore consider on a case-by-case basis whether, in light of Rwandan culture and the particular context of each allegation, acts of incitement can be viewed as direct or not by examining how a speech was understood by its intended audience. In some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide and that this was indeed the intent of the author of the speech. However, this cannot be the only evidence adduced to conclude that the purpose of the speech (and of its author) was to incite the commission of genocide.'); *Karemera et al.* Trial Judgment (n 51) para. 1594.

[161] *Akayesu* Trial Judgment (n 11) para. 558; *Nahimana et al.* Trial Judgment (n 39) paras 1004–1006 and 1008. See also *Kajelijeli* Trial Judgment (n 51) para. 853 (where the Trial Chamber indicates that the alleged incitement should be viewed 'in light of its cultural and linguistic content').

[162] See, e.g., *Nahimana et al.* Trial Judgment (n 39) paras 979, 1001–1003 (concerning the responsibility of editors or those responsible for the programming and owners of media outlets).

commit genocide, and that this was indeed the intent of the speaker.[163] However, the subsequent commission of genocide is insufficient, in and of itself, to conclude that the speech was directly inciting and that this was its intended purpose.[164] Nor, as noted earlier, is the commission of a crime a condition or element of the crime of direct and public incitement.

11.4.2.4 'Public'

11.4.2.4.1 Definition

11.4.2.4.1.1 'Public' as an element of the actus reus *and* mens rea

To be criminal, incitement must be public in character. The exclusion of mere private incitement from the scope of this prohibition was based mainly on the belief that such conduct is insufficiently serious to warrant criminalization as an inchoate offence.[165] Establishing the public element of the offence requires not only that the accused publicly incited (*actus reus*), but also that the accused had the intent to incite publicly (*mens rea*).[166]

As regards the *actus reus* aspect of this requirement, the 'public' character of the incitement relates essentially to two elements: the place where the alleged incitement

[163] *Nzabonimana* Trial Judgment (n 63) para. 1752; *Muvunyi* Trial Judgment II (n 113) para. 26 (footnote omitted) ('In some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide, and that this was indeed the intent of the author of the speech. This cannot, however, be the only evidence adduced to conclude that the purpose of the speech, and of its author, was to incite the commission of genocide.').

[164] *Nahimana et al.* Appeal Judgment (n 5) para. 709; *Nzabonimana* Trial Judgment (n 63) para. 1752.

[165] See, generally, Robinson, *Commentary on the Genocide Convention* (n 4) 67 ('The present wording of Article III excludes incitement "in private" because it was felt that such incitement was not serious enough to be included in the Convention.'). See also UN Doc. A/C.6/SR.84 (n 41) 214 (Iran).

[166] *Nzabonimana* Appeal Judgment (n 31) para. 121 (footnote omitted ('[A] person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2(3)(c) of the Statute, if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).') and para. 129 (footnotes omitted):

> The Appeals Chamber now turns to Nzabonimana's argument that the Trial Chamber relied on his intention to establish that he was not heard by an exclusive and limited group. In assessing the public element, the Trial Chamber stated: '[t]he fact that Witness CNAI was summoned over, and that Evariste Munyagatare, a Tutsi, was also present, establishes beyond reasonable doubt that the words were intended to be heard by anyone in the area, rather than an exclusive and limited group'. Recalling the definition of direct and public incitement to commit genocide, the Appeals Chamber notes that establishing the public element requires not only that the accused publicly incited (*actus reus*), but also that the accused had the intent to incite publicly (*mens rea*). The Trial Chamber concluded that Nzabonimana's conduct satisfied the public element of the crime but failed to explicitly state whether it was making a finding on the actus reus or mens rea or both. However, the Appeals Chamber observes that in this specific instance, the facts used by the Trial Chamber to establish the public element—the public location, a crowd of approximately 30 people, and audience that was not selected or limited—showed that the incitement was public and that Nzabonimana intended it to be so. In this context, the Appeals Chamber considers that the Trial Chamber made an assessment of both the actus reus and mens rea of the public element based on the same facts. While the Trial Chamber could have been clearer, the Appeals Chamber does not consider that the Trial Chamber used the mens rea to prove the *actus reus*, or that the Trial Chamber indicated that the public character was not established.

occurred (a public square or on television, for instance) and whether or not the attendance where the incitement allegedly took place had been pre-selected or not.[167] The act or speech that constitutes the underlying conduct relevant to the charges must therefore be such as to be capable of reaching a public audience.[168]

11.4.2.4.1.2 Private incitement excluded

Purely private acts of incitement would not qualify under that prohibition.[169] Therefore, personal conversations, private meetings, or messages would in principle fall beyond

[167] *Ngirabatware* Appeal Judgment (n 151) para. 52 (footnote omitted) ('When assessing the "public" element of the incitement, factors such as the place where the incitement occurred and whether the audience was selected or limited can be taken into account.'); *Nzabonimana* Appeal Judgment (n 31) paras 122–132, 231–232 and 384; *Kajelijeli* Trial Judgment (n 51) para. 851; *Muvunyi* Trial Judgment II (n 113) para. 27; *Nzabonimana* Trial Judgment (n 63) paras 1754–1755; *Kalimanzira* Trial Judgment (n 46) para. 515 ('The jurisprudence of this Tribunal has also established that the "public" element of incitement should be appreciated in light of the place where the incitement occurred and whether or not attendance was selective or limited.'); *Akayesu* Trial Judgment (n 11) para. 556 (footnotes omitted) ('The public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not assistance was selective or limited. A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition. According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.'). The International Law Commission pointed out that such incitement was characterized by a 'call for criminal action to a number of individuals in a public place or to members of the general public at large'. See ILC, Draft Code 1996 (n 144) art. 2(3)(f) ('The [...] element of public incitement requires communicating the call for criminal action to a number of individuals in person in a public place or by technical means of mass communication, such as by radio or television.'); UN Doc. A/51/10 (n 109) 26 (cited by *Akayesu* Trial Judgment (n 11) fn 126).

[168] See, e.g., *Kalimanzira* Trial Judgment (n 46) para. 515 (footnote omitted) ('Incitement is "public" when conducted through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.'); *Nzabonimana* Appeal Judgment (n 31) paras 122–133, in particular, 126 (noting that the International Law Commission confirmed that the indispensable element of public incitement requires communicating 'the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technical means of mass communication, such as by radio or television'); *Karemera et al.* Trial Judgment (n 51) para. 1595 (footnotes omitted) ('[T]he Appeals Chamber recently noted that all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to "large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area".'); *Kalimanzira* Appeal Judgment (n 128) paras 156–158 (noting that with the exception of the *Kalimanzira* Trial Judgment, all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area and suggesting that the *travaux préparatoires* of the Genocide Convention confirms that public incitement to genocide pertains to mass communications); *Nyiramasuhuko et al.* Trial Judgment (n 151) para. 5987. See also ILC, Draft Code 1996 (n 144) 22 (commentary on Article 2(3)(f)). The International Law Commission specified that the 'public appeal for criminal action increases the likelihood that at least on individual will respond to the appeal and, moreover, encourages the kind of "mob violence" in which a number of individuals engage in criminal conduct'. Ibid.

[169] See, e.g., *Kalimanzira* Trial Judgment (n 46) para. 515 (footnote omitted) ('Because of the crime's inchoate nature, even the possibility of private incitement to commit genocide is ruled out; only unequivocally public forms of incitement may be punished under Article 2 (3)(c) of the Statute.'). See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001 (hereafter *Akayesu* Appeal Judgment), paras 480 ('[T]he Statute makes clear that the act must be direct and public, which plainly excludes any other form of incitement to commit genocide, including private incitement to commit

the scope of that offence.[170] However, such acts could under certain circumstances constitute evidence of a conspiracy to commit genocide, aiding and abetting, or instigation. The exclusion of 'private' acts of incitement from this particular offence does not, therefore, result in the necessary non-criminalization of incitement occurring in private or among a small group of persons.[171]

11.4.2.4.2 Relevant factors and considerations

There is no minimum size of audience which the message of the accused must have reached for it to qualify as public. Nor does it need to have been communicated through mass media,[172] given that the number of individuals in the audience is *not* an element of the offence.[173] Thus, whilst most relevant cases involve speeches or broadcasts made

genocide.'), and 556 (footnote omitted) ('It should be noted in this respect that at the time Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement.'). Regarding the discussion during the negotiation of the Convention of the possibility of incriminating private incitement and their ultimate exclusion from the scope of the Convention, see *Kalimanzira* Appeal Judgment (n 128) para. 158 (footnotes omitted) ('The *travaux préparatoires* indicate that the Sixth Committee chose to specifically revise the definition of genocide in order to remove private incitement, understood as more subtle forms of communication such as conversations, private meetings, or messages, from its ambit. Instead, the crime was limited to "direct and public incitement to commit genocide," understood as incitement "in public speeches or in the press, through the radio, the cinema or other ways of reaching the public".') and fn 414 ('The Appeals Chamber notes that the definition adopted by the Sixth Committee resembled that originally proposed by the Secretariat of the United Nations (which was altered for some time to include private incitement to genocide, until this alteration was struck by the Sixth Committee). The proposal of the Secretariat differentiated acts such as instructions from officials to subordinates or heads of organizations to members from "direct public incitement." These acts were considered as "preparatory acts" and covered by other sections of the convention.'); *Nzabonimana* Appeal Judgment (n 31) paras 122 and 126; Hirad Abtahi and Philippa Webb (eds), *The Genocide Convention: The Travaux Préparatoires*, vol. 1 (Martinus Nijhoff 2008) (hereafter Abtahi & Webb, *Travaux Préparatoires* vol. 1), 986; Hirad Abtahi and Philippa Webb (eds), *The Genocide Convention: The Travaux Préparatoires*, vol. 2 (Martinus Nijhoff 2008) (hereafter Abtahi & Webb, *Travaux Préparatoires* vol. 2), 1549 and 1552; UN Doc. A/C.6/SR.84 (n 41).

[170] See, e.g., *Karemera et al.* Trial Judgment (n 51) para. 1595 (footnotes omitted):

> [T]he Appeals Chamber recently noted that all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to 'large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area'. Furthermore, the *travaux préparatoires* of the Genocide Convention, confirm that 'public' incitement to commit genocide pertains to mass communications, whereas the notion of 'private' incitement, understood as more subtle forms of communications such as conversations, private meetings, or messages, was removed from the Convention.

[171] *Nzabonimana* Appeal Judgment (n 31) fn 373. [172] In particular, see ibid., para. 126.

[173] Ibid., paras 126, 128 ('[T]he number of persons present is not an essential factor in this assessment.'), 132 (footnotes omitted) ('The Appeals Chamber recalls that the Trial Chamber relied on the public location, a crowd of approximately 30 people, and an audience that was not exclusive or limited to find that the incitement was public. [...] The Appeals Chamber recalls that the words were spoken in a public space, were heard by several persons, including Tutsis, and contained a message directed to anyone in the area rather than selected persons. The Appeals Chamber is not convinced that Witness CNAI's testimony described facts corresponding to private conversations. Accordingly, the Appeals Chamber finds that Nzabonimana has failed to demonstrate that the Trial Chamber erred in characterising the incitement as public.'), 231, and 232 (footnote omitted):

> The Appeals Chamber observes the Trial Chamber's consideration that: (i) the audience consisted of approximately 20 members of the general population, including Tutsis, who happened to be present in the area at the time; and (ii) the incitement occurred in an undeniably

to large audiences, it does not foreclose the possibility of convictions based on communications to a smaller audience when the incriminating message is given in a public space to an unselected audience.[174] The number of persons and the medium through which the message is conveyed may be relevant, however, in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public or a select (private) group of individuals.[175] The ICTR Appeals Chambers did not consider that an inciting speech, which discussed public matters, delivered to a gathering of public officials, addressed in their official was necessarily public.[176] In the same vein, the ICTR has held that supervising a specific group of individuals manning a roadblock does not necessarily constitute *public* incitement to commit genocide 'since only the individuals manning the roadblocks would have been the recipients of the message and not the general public'.[177] This will

> public location. Therefore, the Appeals Chamber is satisfied that the Trial Chamber, in assessing the public character of the incitement, properly considered the public location of the utterances and whether the audience was selected or limited. The Appeals Chamber rejects Nzabonimana's argument that the Trial Chamber erred in failing to specify the size of the audience. While not determining the exact number of the persons present in the crowd, the Trial Chamber nevertheless determined the approximate number. In this regard, the Appeals Chamber considers that it is not required for a trial chamber to determine the exact number of people present. Given the foregoing, the Appeals Chamber finds that Nzabonimana has failed to demonstrate an error in the Trial Chamber's finding of the public element of the incitement and therefore dismisses his argument that the incriminating message was tantamount to a private conversation.

See also *Akayesu* Trial Judgment (n 11) para. 556; *Muvunyi* Trial Judgment (n 128) para. 503; *Ngirabatware* Trial Judgment (n 113) para. 1355.

[174] *Nzabonimana* Appeal Judgment (n 31) paras 126 (noting that the *travaux préparatoires* of the Genocide Convention do not contradict but rather support this position by stating that public incitement was understood as 'public speeches or in the press, through the radio, the cinema or other ways of reaching the public', though it expressly excluded 'private' incitement), and 127 (noting that though most convictions for direct and public incitement involve mass communication, a smaller audience is also consistent with international law). See also Abtahi & Webb, *Travaux Préparatoires* vol. 1 (n 170) 986. In *Nzabonimana*, the ICTR Appeals Chamber notes that 'this exclusion [of private incitement] does not result in the non-criminalisation of incitement on a smaller scale per se'. *Nzabonimana* Appeal Judgment (n 31) fn 373.

[175] *Nzabonimana* Appeal Judgment (n 31) paras 231–232 ('The Appeals Chamber recalls that when assessing the "public" element of the incitement, factors such as the place where the incitement occurred and whether the attendance was selected or limited can be taken into account. It also recalls that the number of persons present is not an essential factor in this assessment. The Appeals Chamber considers that, though not required, the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.') and 384; *Ngirabatware* Appeal Judgment (n 151) para. 52.

[176] *Nzabonimana* Appeal Judgment (n 31) para. 386.

[177] *Kalimanzira* Appeal Judgment (n 128) para. 155. Ibid., paras 156, 159 and 161; *Nahimana et al.* Appeal Judgment (n 5) para. 862:

> The Appeals Chamber notes that, in convicting the Appellant of direct and public incitement to commit genocide under Article 6(1) of the Statute, the Trial Chamber also relied on the fact that CDR promoted the killing of Tutsi, that the Appellant 'was at the organizational helm of CDR' and that 'he was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for the killing of Tutsi'. However, the Judgment does not explain how these facts constituted personal acts of the Appellant which could form a basis for his conviction for direct and public incitement to commit genocide under any of the modes of responsibility set out in Article 6(1) of the Statute. In particular, the supervision of roadblocks cannot form the basis for the Appellant's conviction for direct and public incitement to commit genocide; while

depend, however, on the facts of the case and, in particular, the composition of the audience.

The *official* character of the encounter or meeting does not per se render it 'public' for the purpose of this prohibition.[178] This will depend, however, on the facts of the case and, in particular, the composition of the audience and the public nature of the occasion, rather than its *official* or *unofficial* nature. Furthermore, the means used to incite and to spread a genocidal message, be it via television, print media, loudspeakers, or otherwise, is generally not determinative although the method used may support a finding that the incitement was indeed 'public' in character.[179]

11.4.2.5 Mens rea

Concerning the *mens rea* applicable to the offence, the prosecution must establish that the perpetrator intended to incite others directly and publicly to commit genocide (i.e., 'to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging, that is to say that the person who is inciting to commit genocide')[180] and that he himself possessed the specific genocidal intent.[181] Inference of intent in this context could be based, in particular, on the action

> such supervision could be regarded as instigation to commit genocide, it cannot constitute public incitement, since only the individuals manning the roadblocks would have been the recipients of the message and not the general public. Therefore, the Appeals Chamber sets aside the Appellant's conviction under Article 6(1) of the Statute for direct and public incitement to commit genocide.

[178] For an illustration, see *Nzabonimana* Appeal Judgment (n 31) paras 382–388.

[179] *Akayesu* Trial Judgment (n 11) para. 556.

[180] *Kajelijeli* Trial Judgment (n 51) para. 854; *Akayesu* Trial Judgment (n 11) para. 560.

[181] *Ngirabatware* Appeal Judgment (n 151) paras 58 (footnotes omitted) ('The Appeals Chamber recalls that the *mens rea* of direct and public incitement to commit genocide requires that the accused had the intent to directly and publicly incite others to commit genocide. Such intent presupposes in itself a genocidal intent. The Appeals Chamber is satisfied that the Trial Chamber correctly articulated the law in this respect.') and 59–60 (regarding the basis for an inference of intent); *Nzabonimana* Appeal Judgment (n 31) para. 121; *Kalimanzira* Appeal Judgment (n 128) para. 155; *Bikindi* Appeal Judgment (n 127) para. 135; *Nahimana et al.* Appeal Judgment (n 5) para. 677 (footnote omitted) (emphasis added) ('A person may be found guilty of the crime specified in Article 2(3)(c) of the Statute if he or she directly and publicly incited the commission of genocide (the material element or *actus reus*) and had the intent directly and publicly to incite others to commit genocide (the intentional element or *mens rea*). *Such intent in itself presupposes a genocidal intent.*'); *Akayesu* Trial Judgment (n 11) para. 560; *Ngirabatware* Trial Judgment (n 113) para. 1352 (footnote omitted) ('The *mens rea* is that the accused had the intent to directly and publicly incite others to commit genocide. The *mens rea* required for the crime presupposes a genocidal intent.'); *Karemera et al.* Trial Judgment (n 51) para. 1593 (footnote omitted) ('Such intent presupposes genocidal intent.'); *Muvunyi* Trial Judgment II (n 113) para. 28; *Muvunyi* Trial Judgment (n 128) para. 504; *Nzabonimana* Trial Judgment (n 63) para. 1751 (footnote omitted) ('The *mens rea* is that the accused had the intent to directly and publicly incite others to commit genocide. The *mens rea* required for the crime presupposes a genocidal intent.'); *Mugesera* Judgment (n 113) paras 88–89 (noting that the person who incites must also have the specific intent to commit genocide). See also *Mugenzi & Mugiraneza* Appeal Judgment (n 78) para. 135 (footnotes omitted):

> The Appeals Chamber further recalls that the *mens rea* for the crime of direct and public incitement to commit genocide is the intent to directly and publicly incite others to commit genocide. Such intent in itself presupposes that the perpetrator possesses the specific intent for genocide. The Trial Chamber found that Sindikubwabo possessed both genocidal intent and the intent to directly and publicly incite genocide. While the Trial Chamber did not expressly conclude that Mugenzi and Mugiraneza had the requisite intent to directly and publicly incite

and words of others.[182] Motives that may explain or underlie the commission of such crime are irrelevant in principle. The fact, for instance, that the accused acted as he did out of a genuinely held fear of those against whom he incited genocide would be no defence to such charge.[183]

11.4.3 Direct and public incitement, genocide, instigating genocide, and persecution

11.4.3.1 Incitement and genocide

The crimes of genocide and direct and public incitement to commit genocide and genocide share a core element of intent in that both require proof that the accused intended to destroy in whole or in part a protect group as such. They diverge in other important respects. In particular, as noted earlier, direct and public incitement is an inchoate offence. Therefore, unlike genocide, it does not require any sort of punishable act being committed: the act of incitement is enough. Furthermore, it requires a specific element of intent not required for other kinds of genocidal acts, namely, the intent that the perpetrator's acts or words should be direct in their inciting effect and should go out to the public (*supra*, 11.4.2.5).

11.4.3.2 Incitement and instigation

Direct and public incitement is closely linked to the notion of instigation. Instigation has been said to form part of customary international law as a mode of individual responsibility, which can apply, *inter alia*, to the crime of genocide.[184] Unlike direct and public incitement, it is a mode of liability rather than an inchoate offence and responsibility is incurred under that mode of liability only if the instigation has in fact contributed to the commission of a crime.[185] In contrast, and as noted earlier, direct and public incitement to commit genocide is itself a crime, which does not require a demonstration that the act of incitement contributed to the commission of a crime.[186] Thus, whilst the commission of an act of genocide is a necessary precondition

> others to commit genocide, it found that they possessed the 'same genocidal intent held by Sindikubwabo'. The Appeals Chamber is satisfied that, when read in context, this finding shows that the Trial Chamber considered that Mugenzi and Mugiraneza possessed both genocidal intent and the intent to incite. The Trial Chamber's findings in this respect as well as its reference to the definition of the crime of direct and public incitement indicate that it was aware of the legal requirement set out above.

Ibid., paras 136–141 (regarding the Chamber's findings on the evidence), and in particular 139 (finding that no reasonable trier of fact could have excluded the reasonable possibility that Mugenzi and Mugiraneza attended the installation ceremony for reasons other than because they shared a common criminal purpose of killing Tutsis in Butare Prefecture). Notably, Mugenzi and Mugiraneza submitted that they attended the ceremony as a result of obligations arising from their positions as ministers. Ibid., para. 139.

[182] For an illustration, see *Nahimana et al.* Appeal Judgment (n 5) paras 564–565.

[183] See, generally, *Nahimana et al.* Appeal Judgment (n 5) para. 757. See also, *supra*, 8.1.5 and 9.4.4.

[184] See *infra*, 11.7.2.4. [185] *Nahimana et al.* Appeal Judgment (n 5) para. 678.

[186] Ibid., *Kajelijeli* Trial Judgment (n 51) para. 855; *Nlyitegeka* Trial Judgment (n 51) para. 431; *Musema* Trial Judgment (n 33) para. 120; *Rutaganda* Trial Judgment (n 114) para. 38; *Akayesu* Trial Judgment (n 11) para. 562. See also, *supra*, 11.4.1.1.

to liability being incurred for *instigating* it, this is not a required element of direct and public *incitement*.[187] Whilst requiring proof of an element of causation, instigation could prove particularly relevant to two sorts of factual scenarios not covered by direct and public incitement: acts of 'incitement' done in private; and acts of 'incitement' that do not meet the requirement of *directness* relevant to that crime.[188]

11.4.3.3 Incitement and persecution

Direct and public incitement can also be distinguished from the crime against humanity of persecution. The former requires direct and public incitement to commit genocide as a material element and the intent to incite others to commit genocide (itself implying a genocidal intent) as a mental element, which is not required for the crime of persecution.[189] In contrast, persecution requires the underlying act to have been committed as part of a widespread and systematic attack on a civilian population and with discriminatory intent so that acts of incitement to violence committed in such a context and with discriminatory intent could constitute acts of persecution.[190]

[187] See also *Kalimanzira* Trial Judgment (n 46) paras 511–513 (footnotes omitted):

> 511. The distinction between committing direct and public incitement and committing genocide by means of instigation often seems blurred. The term 'incitement' is synonymous with 'instigation', 'provocation', and 'encouragement', all of which are used interchangeably when describing the conduct underlying certain modes by which genocide may be committed. However, the differences are important and must be respected.
>
> 512. Instigation under Article 6 (1) is a mode of liability; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement is itself a crime, requiring no demonstration that it in fact contributed in any way to the commission of acts of genocide.
>
> 513. The most important difference lies in the requirement that the crime of incitement be 'direct' and 'public', which serves to limit the scope of its inchoate nature. In other words, incitement which is not followed by the commission by others of genocidal acts must be direct and public for it to be criminal. By contrast, committing genocide by means of instigation need not be direct or public for it to be criminal.

[188] *Nahimana et al.* Appeal Judgment (n 5) para. 679. The Trial Chamber in *Akayesu* found that the 'direct' and 'public' requirements were also applicable to instigation under Article 6 (1) of the Statute. *Akayesu* Trial Judgment (n 11) para. 481. The Appeals Chamber in *Akayesu* found such interpretation to be erroneous and established that instigation under Article 6 (1) of the Statute need not be 'direct' or 'public'. *Akayesu* Appeal Judgment (n 170) paras 474–483. See also, *supra*, 11.4.2.3.

[189] *Nahimana et al.* Appeal Judgment (n 5) para. 1034. See also, ibid., para. 1035 ('[W]hile the intent to discriminate required by persecution can in practice be considered to be subsumed within genocide, the reverse is not true. The fact remains that the crime of direct and public incitement to commit genocide, like the crime of genocide, requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which is not required for persecution as a crime against humanity.'). See also, *infra*, 12.3.3.2.

[190] *Nahimana et al.* Trial Judgment (n 39) paras 1072–1084 (upheld on appeal), see also *Nahimana et al.* Appeal Judgment (n 5) paras 986–988; *Bikindi* Trial Judgment (n 60) paras 390–397; *Prosecutor v. Šešelj*, MICT-16-99-A, Judgment, 11 April 2018 (hereafter *Šešelj* Appeal Judgment), paras 125–126, 156–166, in particular, 159 and 163–164; *Mugesera* Judgment (n 113) paras 137–150, and in particular 146–147; IMT Judgment (n 37) 304 ('Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes Crimes against Humanity.'). In the *Ministries* case, Otto Dietrich was found guilty for participating in persecution of the Jews by approving of press directives calling for their annihilation. See 'The *Ministries* Case: Judgment' in *Trials of War Criminals before the Nürnberg Military Tribunals*,

11.4.4 ICC regime

Article 25(3)(e) of the ICC Statute provides for individual criminal responsibility '[i]n respect of the crime of genocide' for an individual who 'directly and publicly incites others to commit genocide'. This wording tracks and replicates the terms of the Convention and similar wording from the Statutes of the *ad hoc* Tribunals. Professor Schabas has described it in terms similar to the Convention as an 'inchoate offence'.[191] The structure of the Rome Statute's framework may require some qualification. First, the Court's jurisdiction *ratione materiae* in relation to genocidal offences is limited by Articles 5(1)(a) and 6 of the Statute to genocide *proper*. In other words, unlike the *ad hoc* Tribunals, jurisdiction before the ICC is not provided, *ratione materiae*, for an inchoate offence of 'direct and public incitement to commit genocide'. Nor does the *Elements of Crimes* provide for such a notion. Second, Article 25, which provides for that notion, is a provision dealing with 'individual criminal responsibility', that is, modes of liability that must pertain to one of the statutory crimes. These indications would tend to suggest that genocide must be committed for the Court to have jurisdiction, *ratione materiae*, over genocidal offences so that liability pursuant to Article 25(3)(e) would require proof that genocide has been committed *in the first place*.

The next question concerns the necessary, statutory, relationship between the act of genocide listed in Article 6 of the Statute and the notion of 'direct and public incitement' in Article 25(3)(e). Two readings of the Statute appear possible: first that liability under that provision requires some sort of material relationship between the two, which would bring the notion of 'direct and public incitement' closer to the notion of 'instigation' discussed in section 11.7.2.4.1; the second would interpret the requirement that genocide must have been committed as merely *jurisdictional* in nature. Under that latter interpretation, 'direct and public incitement' would still constitute an inchoate offence materially unconnected to the primary offence of genocide. However, the commission of genocide would, as a matter of jurisdiction, nevertheless need to be proven though there would be no need to prove a causal relationship between that crime and the act of incitement.

11.5 Attempt to Commit Genocide

11.5.1 Attempt under international criminal law

In criminal law, an 'attempt' is traditionally understood as an act carried out with intent to commit a certain crime which is more than merely preparatory to the commission of that crime but which has not been fully successful.[192] Historical precedents

vol. 14 (US Government Printing Office 1951) (hereafter *Ministeries* Judgment), 575–76 (referred to in *Prosecutor v. Kaing Guek Eav (Duch)*, Case No. 001/18-07-2007-ECC/SC, Judgment, 3 February 2012 (hereafter *Duch* Appeal Judgment), para. 252). See also, *infra*, 12.3.3.

[191] Schabas, *Genocide in International Law* (n 41) 325.

[192] Article 25(3)(f) of the ICC Statute provides that the 'attempt' to commit a crime means the commencement of its execution 'by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions'. ICC Statute (n 1) art. 25(3)(f). For a brief

dealing specifically with international crimes have not been consistent on the question of whether the notion of attempt is applicable as customary international law in relation to all international core crimes.[193] It should be noted, however, that most and

comparative study of the notion of attempt, see also Jens D Ohlin, 'Attempt to Commit Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Ohlin, 'Attempt to Commit Genocide'), 197ff.

[193] See *Akayesu* Trial Judgment (n 11) para. 473 ('[T]he principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.'); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (hereafter *Krnojelac* Trial Judgment), p 181 fn 1292 ('The existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may in some circumstances amount to the inchoate offence of attempted persecution, but no such crime falls within the jurisdiction of this Tribunal.'). For historical illustrations, see also OGH, No. StS 5/48, Judgment of 22 June 1948, 1 Strafsachen 11 (hereafter OGH, Judgment of 22 June 1948) ('Nor does the attempt to commit a crime against humanity come into question because, as stated in detail in [decision] StS 3/48, an attempted crime of this nature is inconceivable.'); OGH, P. Case, No. StS 3/48, Judgment of 20 May 1948 (hereafter *P Case*, Judgment of 20 May 1948) ('[T]he ingredients of the act cannot be realized by what the victim did not actually suffer but could easily have suffered. This clarification makes it possible to state that, in the German legal sense, in respect of a crime against humanity, attempt is conceptually impossible. Nonetheless, the attempt to commit harm may fulfil the definition of a crime against humanity even if the worst possible results did not occur.'). During the discussions on the scope and meaning of war crimes at the London International Assembly in 1942, for instance, the rapporteur, M de Baer, had submitted that an 'attempt to commit a crime' should not be made a war crime, 'whatever may have been the reasons which caused the attempt to miscarry'. London International Assembly, *Commission for the Trial of War Criminals: Scope and Meaning of the Conception of War Crimes* (on file with the author) (hereafter London International Assembly, *Scope of War Crimes*), 6. Article II of Control Council Law No. 10 did not provide for attempt as a form of criminal liability in relation to any of the crimes, but it appears, however, that the list of forms of criminal participation found in this provision were not meant to be exhaustive and that, conviction could have been entered on the basis of 'analogy from almost all systems of domestic law'. See Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10* (William S Hein & Co. 1997) (hereafter Taylor, *Final Report to the Secretary*), 229. See also United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 15 (HM Stationery Office 1949) (hereafter UNWCC, *LRTWC* vol. 15), 89. Also indicative of the position under international law is the 1968 Convention on Statutory Limitations which does not apply to attempted war crimes or attempted crimes against humanity but only to offences that have been fully realized. In its *Commentary* to Additional Protocol I, the ICRC has expressed serious doubts as to whether the attempt to commit a grave breach or a similar crime should be regarded as criminal under international law. See Jean S Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, vol. 1 (ICRC 1952) (hereafter ICRC *1952 Commentary to Geneva Convention I*), paras 3414–3416. There are only very few indications in international law that attempts to commit war crimes or crimes against humanity could be said to be criminalized. See, e.g., UN International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind: Responsibility and Punishment (1995) (hereafter ILC, Draft Code 1995), art. 3(3) (which provided for the criminalization of attempt in relation to what was known then as 'crimes against the peace of security of mankind'. UN General Assembly, Report of the International Law Commission on the work of its Forty-Seventh Session, 2 May–21 July 1995, UN Doc. A/50/10, Supp No. 10 (1995) (hereafter UN Doc. A/50/10), 29 ('An individual who commits an act constituting an attempt to commit a crime against the peace of security of mankind [...] is responsible therefore and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.'). See also ILC, Draft Code 1996 (n 144) para. 2(3) (which also provided for the criminalization of the mere attempt at committing such crimes). See, however, ICC Statute (n 1) art. 25(3), and in particular 25(3)(d) (which could contribute to the crystallization of attempt as a generalized category of prohibited conduct in relation to all core international crimes). See, however, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: Rules (CUP 2005) (hereafter ICRC,

perhaps all domestic legal systems now provide for such a type of responsibility,[194] as does the Statute of the ICC.[195] One could therefore reasonably argue that the notion of attempt is recognized as a general principle of international criminal law and may even be in the process of crystallizing into a norm of customary international law in relation to all core international crimes.[196]

As far as genocide is concerned, the notion of 'attempt' is provided for in the Genocide Convention (Article III(d)) and has been replicated since then in the statutes of all international(ized) criminal tribunals with jurisdiction over genocide.[197] As such, like other aspects of Article III of the Convention, it may be said to form part of customary international law.[198]

Customary IHL: Rules), 554 (footnote omitted) ('Individuals are not only criminally responsible for committing a war crime, but also for attempting to commit a war crime, as well as for assisting in, facilitating, aiding and abetting the commission of a war crime. They are also responsible for planning or instigating the commission of a war crime.') See also Mettraux, *Ad Hoc Tribunals* (n 18) 257.

[194] Similarly, the 1996 ILC Draft Code of Crimes contained a general provision on attempt, applicable to all listed crimes. UN Doc. A/51/10 (n 109) 18 para. 17 ('An individual shall be responsible for a crime set out in article 17 [i.e., genocide] [...] if that individual [...] (g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.'). See also Doudou Thiam, Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/CN.4/430 and Add.1 (1990) (hereafter Thiam Eighth Report on the Draft Code), paras 63–67.

[195] See ICC Statute (n 1) art. 25(3). See also ILC, Draft Code 1995 (n 194) art. 3(3) (which provided for the criminalization of attempt in relation to what was known then as 'crimes against the peace of security of mankind'); UN Doc. A/50/10 (n 194) 29 ('An individual who commits an act constituting an attempt to commit a crime against the peace of security of mankind [...] is responsible therefore and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.'). See also ILC, Draft Code 1996 (n 144) para. 2(3) (which also provided for the criminalization of a mere attempt at committing such crimes).

[196] See, however, *contra*, OGH, Judgment of 22 June 1948 (n 194) ('Nor does the attempt to commit a crime against humanity come into question because, as stated in detail in [decision] StS 3/48, an attempted crime of this nature is inconceivable.'); *P Case*, Judgment of 20 May 1948 (n 194) ('[T]he ingredients of the act cannot be realized by what the victim did not actually suffer but could easily have suffered. This clarification makes it possible to state that, in the German legal sense, in respect of a crime against humanity, attempt is conceptually impossible. Nonetheless, the attempt to commit harm may fulfil the definition of a crime against humanity even if the worst possible results did not occur.'). During the discussions on the scope and meaning of war crimes at the London International Assembly in 1942, the rapporteur, M de Baer, had submitted that an 'attempt to commit a crime' should not be made a war crime, 'whatever may have been the reasons which caused the attempt to miscarry'. London International Assembly, *Scope of War Crimes* (n 194) 6. Also relevant here is the 1968 Convention on Statutory Limitations which does not apply to attempted war crimes or attempted crimes against humanity. In its *Commentary* to Additional Protocol I, the ICRC similarly expressed doubts as to whether the attempt to commit a grave breach or a similar crime should be regarded as criminal under international law. See ICRC *1952 Commentary to Geneva Convention I* (n 194) 980 paras 3414–3416.

[197] ICTY Statute (n 1), art. 4(3)(d); ICTR Statute (n 1), art. 2(3)(d); ECCC Statute (n 1), art. 4. Unlike other such instruments, the Statute of the ICC does not list 'attempt to commit genocide' as one of the recognized category of genocidal offences. Instead, it lists 'attempt' as a particular category of prohibited conduct under Article 25(3)(d), which applies to all statutory crimes (i.e., including genocide). See also UN International Law Commission, Draft Code of Offences against the Peace and Security of Mankind (1954) (hereafter ILC, Draft Code 1954), art. 2(13)(iv); ILC, Draft Code 1996 (n 144) art. 17(3)(g); and, *infra*, 11.5.2.

[198] See, *supra*, 3.6.1.

11.5.2 Attempt to commit genocide—elements and definition

11.5.2.1 The Convention and customary international law

Article III(d) of the Genocide Convention prohibits as a punishable act 'attempt to commit genocide'.[199] It is understood to constitute an inchoate offence.[200] The main justification for the criminalization of this offence under the Convention appears to have been the danger and threats associated with the possible commission of an act of genocide.[201]

This inchoate offence does not appear to have been relied upon for prosecution purposes although a number of elements are clear. First, it is apparent that of all the prohibited underlying crimes only *genocide* itself is criminalized if attempted. In other words, the Convention, and arguably customary international law, does not criminalize an attempt to commit one of the other listed offences (e.g., direct and public incitement to commit genocide or conspiracy to commit genocide). Nor, arguably, does customary international law.[202] Second, the attempt must be in relation to the underlying offence (i.e. killing, causing serious bodily or mental harm, etc.), which forms the basis of a charge of genocide. In contrast, the genocidal *mens rea* must necessarily be established for liability to be incurred for an attempt to commit genocide.[203] Third, an attempt would require, as a matter of general principal of criminal law, the commencement of the offence, whilst mere preparatory acts would not be sufficient.[204] However, customary law is not entirely clear as regards how far the accused must have gone for his acts to qualify as an attempt. Nor is the law specific as regards the circumstances that must have prevented the actual commission of an offence.[205]

[199] The Statutes of the *ad hoc* Tribunals and the Law of the ECCC similarly provide for the inchoate crime of 'attempts to commit acts of genocide'. ICTY Statute (n 1), art. 4(3)(d); ICTR Statute (n 1), art. 2(3)(d); ECCC Statute (n 1), art. 4.

[200] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) para. 720. See also *Akayesu* Trial Judgment (n 11) para. 473.

[201] See UN Doc. A/51/10 (n 109) 22 (where the ILC expressed the view that an individual who has taken substantial steps to commit genocide presents 'a high degree of culpability' and his action 'entails a threat to international peace and security because of the very serious nature of these crimes'); Ohlin, 'Attempt to Commit Genocide' (n 193) 202–03.

[202] Regarding the situation at the ICC, see *supra*, 11.4.4 and, *infra*, 11.5.2.2.

[203] *Katanga et al.* Trial Judgment (n 108) paras 459–460 (pointing out that the *mens rea* must be complete).

[204] See, generally, Schabas, *Genocide in International Law* (n 41) 336 (noting that the *travaux* make clear the exclusion of preparatory acts from the scope of the Convention); UN Economic and Social Council, Ad Hoc Committee on Genocide: Summary Record of the Sixth Meeting, UN Doc. E/AC.25/SR.6, 18 April 1948 (hereafter UN Doc. E/AC.25/SR.6), 4 (where the representative of Poland, Mr Rudzinski, pointed out that there is a juridical distinction between a 'preparatory act' and an 'attempt', with the latter implying the commencement of execution while 'preparatory act' merely indicated securing the means of executing a plan which would be revealed only after the 'attempt' had been made).

[205] UN Doc. A/51/10 (n 109) para. 17; Doudou Thiam, Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/CN.4/398 (11 March 1986) (hereafter Thiam Fourth Report on the Draft Code of Offences), paras 132–141. The International Law Commission expressed the view that the commencement of an attempt consists of 'taking action commencing the execution of a crime' i.e., 'a significant step towards the completion of [the] crime'. ILC, Draft Code 1996 (n 144) art. 2, para. (17). Professor Schabas has noted that domestic legal regimes vary considerably in this area, although most (and perhaps all) require some beginning of execution of the act going beyond mere preparations. Professor Schabas further identifies what he says are four different (national) approaches to this matter, which he summarizes thus: 'the material act must be unequivocal; the material act must have a causal link with the offence to which it leads directly; the material act must be the first

As with other offences and modes of liability listed in Article III of the Convention, proof of liability for an attempt to commit genocide would require proof of the presence of the special genocidal intent.[206]

11.5.2.2 ICC law

The ICC Statute provides for a general provision on attempt applicable to all statutory crimes, *including* genocide.[207] Article 25(3)(f) provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person—

> Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

This provision reflects what has been characterized as 'a recent international codification of the concept of attempt'.[208] It combines the definitions of 'attempt' found in civil law and common law systems and for the first time articulates clearly the standard

step after preparation; the material act must be the final step before the commission of the crime itself'. Schabas, *Genocide in International Law* (n 41) 337–38. See also Ohlin, 'Attempt to Commit Genocide' (n 193) 197–201 (questioning the ILC's limitation, in its 1996 Draft Code, to the possibility of attempt being interrupted by 'circumstances independent of [the accused's] intentions'); Rosemary Rayfuse, 'The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission' (1997) 8 Criminal Law Forum 43 (hereafter Rayfuse, 'Eating Disorders at the ILC'), 63 (suggesting that the ILC Draft Code thus imposes a higher threshold than that set by the Genocide Convention).

[206] *Prosecutor v. Katanga et al.*, Decision on the Confirmation of Charges, [2008] ICC-01/04-01/07 (hereafter *Katanga et al.* Decision on Confirmation of Charges), para. 460 (footnotes omitted) ('The majority of the Chamber endorses the doctrine that establishes that the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete. Therefore, the *dolus* that embodies the attempt is the same than the one that embodies the consummated act. As a consequence, in order for an attempt to commit a crime to be punished, it is necessary to infer the intent to further an action that would cause the result intended by the perpetrator, and the commencement of the execution of the act.'); UN Doc. A/51/10 (n 109) 18, para. 17 (requiring the perpetrator form the intent to commit a crime). See also Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (3rd edn, Beck 2016) (hereafter Triffterer & Ambos, *Commentary on ICC Statute* 2016), 1020 fn 42; Tams *et al. Genocide Convention Commentary* (n 44) 151, 174 (Article III); Helmut Satzger, *International and European Criminal Law* (2nd rev'd edn, Beck, Hart, Nomos 2012) (hereafter Satzger, *International and European Criminal Law*), 245–53. Schabas, *Genocide in International Law* (n 41) 334–39 (discussing attempt to commit genocide which does not occur 'because of circumstances independent of his intentions'). For an illustration (albeit not related to genocide), see also *Katanga et al.* Decision on Confirmation of Charges (n 207) para. 460 (pointing out that the element of *mens rea* required for liability for attempt to commit a crime is the same as required for the completed offence).

[207] Triffterer & Ambos, *Commentary on ICC Statute* 2016 (n 207) 1019ff and fns 40ff.

[208] *Prosecutor v. Beqaj*, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations, 27 May 2005 (hereafter *Beqaj* Trial Judgment), para. 25.

by which acts of attempts may be criminalized.[209] In sum, what is required for the attempt to be punishable before the ICC is: (i) conduct consisting of a significant commencement of the criminal action, (ii) the intention to commit a crime, (iii) the failure of that intention to take effect owing to external circumstances.[210] Preparatory acts are therefore not sufficient. The accused must have gone some way towards the commission of the crime and in fact commenced its execution (i.e., 'commence[d] its execution by means of a substantial step'). The requirement of 'substantial' step would require that the accused has taken a step towards completion of the underlying offence, without there being the need to establish that any of the elements of *actus reus* have actually been met.[211] It is sufficient that the act in question should clearly tend towards the commission of the intended crime.[212] In *Ongwen*, for instance, in regard to charges of attempted murders, the Prosecution took the view that the 'substantial step' consisted of 'attacking the victims'.[213]

The Rome Statute also regulates the principle of 'abandonment' by which the accused would avoid liability if he abandons his efforts to commit the crime or otherwise prevents the completion of the crime if he can be shown to have 'completely and voluntarily [given] up the criminal purpose'.[214] It requires voluntariness in the sense

[209] Ibid. See also Schabas, *Genocide in International Law* (n 41) 338; Schabas, *Commentary on the Rome Statute* (n 41) 439 (describing Article 25(3)(f) as 'a hybrid and somewhat ambiguous formulation drawn from French and American law that sets a relatively low threshold').

[210] *Beqaj* Trial Judgmen (n 209), para. 25. The jurisprudence of the ICC has phrased the elements slightly differently:

a. The person fulfils the subjective elements of the offence;
b. The person's conduct reaches a more definite and concrete stage going beyond mere preparatory acts; and
c. The person's conduct will have resulted in the crime being completed, had circumstances outside the person's control not intervened.

See also, generally, *Prosecutor v. Banda & Jerbo Jamus*, Corrigendum of the 'Decision on the Confirmation of Charges', [2011] ICC-02/05-03/09-121-Corr-Red (hereafter *Banda & Jerbo Jamus*, Corrigendum to the Decision on Confirmation of Charges), paras 95–97 (citing *Katanga et al.* Decision on Confirmation of Charges (n 207) para. 460). See also *Ntaganda* Decision on Confirmation of Charges (n 108) paras 35–73, and 175; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 121; *Katanga et al.* Trial Judgment (n 108) para. 1621 (declining to entertain contributions to any attempted commission of crimes).

[211] The French text of the Statute speaks of 'un commencement d'exécution'. See also, UN Doc. A/51/10 (n 109) para. 17 (suggesting that the phrase 'by taking action commencing the execution of a crime' used in the Draft Code is intended to indicate that the individual has performed an act which constitutes a significant step towards the completion of the crime).

[212] See also Triffterer & Ambos, *Commentary on ICC Statute* 2016 (n 207) 1020 and fn 41.

[213] See *Ongwen* Decision on Confirmation of Charges (n 108) paras 34, 47 and 60. See also *Katanga et al.* Decision on Confirmation of Charges (n 207) para. 458 (footnotes omitted):

> Based on the evidence tendered by the Prosecution, the majority of the Chamber, Judge Anita Usacka dissenting, finds, however, that the combatants, in attacking civilians during and in the aftermath of the 24 February 2003 attack on Bogoro, and by indiscriminately using machetes, firearms and heavy weapons against civilians in such attacks, had the specific intent to kill such civilians, rather than the intent to cause severe injuries. They commenced the execution of the conduct of killing civilians by means of a substantial step toward the killing of one or more persons, but did not achieve the act because of circumstances independent of the perpetrator's intent.

See also *Prosecutor v. Kony & Otti*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, [2005] ICC-02/04-02/05-53 (hereafter *Kony* Arrest Warrant); *Prosecutor v. Kony & Otti*, Warrant of Arrest for Vincent Otti, [2005] ICC-02/04-02/05-54 (hereafter *Otti* Arrest Warrant) (where charges pertaining to attempted crimes also feature).

[214] See Schabas, *Commentary on the Rome Statute* (n 41) 439–40.

of the decision not to commit the offence having come from the accused himself, and 'completeness' which would suggest that he terminated any sort of involvement with the commission of the crime.[215] To be effective, abandonment would have to occur prior to the *actus reus* of the offence having been fulfilled.

At the *mens rea* level, the subjective element of the underlying offence—including any element of intent required by the offence—must be established.[216] In the case of genocide, this would mean that an attempt would require proof that the accused possessed the special genocidal intent.

It has been pointed out that under the ICC regime, unlike the Convention and the regime of the *ad hoc* Tribunals, liability attaches for all participants to the offence of genocide in accordance with Articles 5(1)(a) and 6 of the Statute. This means that those found responsible pursuant to the notion of direct and public incitement (Article 25(3)(e)), attempt (Article 25(3)(f)), and the quasi-conspiracy notion of accessoryship (Article 25(3)(d)) are convicted, not for an inchoate offence, but as accessories to the offence of genocide.[217] Under these circumstances, attempt under the ICC Statute would be inchoate by name only.[218]

11.6 Complicity in Genocide

11.6.1 General considerations

Complicity[219] is one of the forms of criminal responsibility recognized by general principles of criminal law.[220] The Genocide Convention explicitly provides for it in

[215] This contrasts with the approach taken by the ILC in its 1996 Draft Code of Crimes against Peace and the Security of Mankind (which made no mention of voluntariness or abandonment) and in its 1991 version (referring to a 'failed' or 'halted' execution of the crime without again making menton of the possibility of abandonment). The 1954 Draft Code contained a general provision (Art. 2(13)(iv)) on attempt applying to all crimes provided for in the Code. It did not foresee the possibility of abandonment. See ILC, Draft Code 1996 (n 144); UN International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/L.459 [Corr. 1], 5 July 1991 (hereafter ILC, Draft Code 1991); ILC, Draft Code 1954 (n 198).

[216] See *Katanga et al.* Decision on Confirmation of Charges (n 207) para. 460.

[217] Schabas, *Genocide in International Law* (n 41) 308–10.

[218] This position appears to have been accepted by the ICC, which has characterized attempt as a form of 'principal liability'. See *Katanga et al.* Trial Judgment (n 108) para. 1385 (footnote omitted) ('In the aforegoing forms of participation in the commission of a crime, accessorial liability is always contingent on the existence of a principal. An accessory can be held criminally liable as such, only where a person commits or attempts to commit a crime within the jurisdiction of the Court. Principal liability, however, imports in essence autonomy as it does not hinge on the liability of a third person.'); *Katanga et al.* Decision on Confirmation of Charges (n 207) 460 (footnotes omitted):

> The majority of the Chamber endorses the doctrine that establishes that the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete. Therefore, the *dolus* that embodies the attempt is the same than the one that embodies the consummated act. As a consequence, in order for an attempt to commit a crime to be punished, it is necessary to infer the intent to further an action that would cause the result intended by the perpetrator, and the commencement of the execution of the act.

[219] Regarding the terminological use of that word, see *Brđanin* Trial Judgment (n 2) para. 723 (footnote omitted) ('"Complicity" and "accomplice liability" have the same meaning and are used interchangeably.')

[220] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998 (hereafter *Čelebići* Trial Judgment), para. 321 ('This recognition that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with

Article III[221] and it is recognized as forming part of customary international law.[222] By incorporating this form of liability in the Convention and the statutory instruments of some of the international(ized) criminal tribunals, the drafters ensured that a broad range of culpable contributions and accessoryship to the commission of an act of genocide would be criminalized.[223] In particular, this would encompass acts

general principles of criminal law.'). See also *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 (hereafter *Tadić* Appeal Judgment), para. 338; *Akayesu* Trial Judgment (n 11) para. 527; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006 (hereafter *Karemera et al.* Decision on Motion Challenging JCE in Complicity), para. 8 ('Whereas the genocide is the crime, joint criminal enterprise and complicity in genocide are two modes of liability, two methods by which the crime of genocide can be committed and individuals held responsible for this crime. It is therefore impossible to plead that complicity in genocide has been committed by means of a joint criminal enterprise. Complicity can only be pleaded as a form of liability for the crime of genocide.'). The Nuremberg Principles suggested, somewhat misleadingly, that complicity (in the commission of a crime against peace, a war crime or a crime against humanity) is 'a crime under international law'. UN International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries Formulated by the International Law Commission, (1950) 2 Yearbook of the International Law Commission 374 (hereafter Principles of Nuremberg Charter and Judgment), 377; UN General Assembly, Report of the International Law Commission on the work of its Second Session, 5 June–29 July 1950, UN Doc. A/1316 (1950) (hereafter UN Doc. A/1316), 12 (Article VII).

[221] *Brdanin* Trial Judgment (n 2) para. 724.

[222] *Brdanin* Trial Judgment (n 2) para. 724. See also *Prosecutor v. Tadić*, Case No IT-94-I-T, Opinion and Judgment, 7 May 1997 (hereafter *Tadić* Trial Judgment), paras 666 ('The concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act also has a basis in customary international law.') and 669 ('The foregoing establishes the basis in customary international law for both individual responsibility and of participation in the various ways provided by Article 7 of the Statute. The International Tribunal accordingly has the competence to exercise the authority granted to it by the Security Council to make findings in this case regarding the guilt of the accused, whether as a principal or an accessory or otherwise as a participant.'). See also Charter of the International Military Tribunal annexed to Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280 (hereafter Nuremberg Charter), art. 6; 'Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945' (1946) 3 Official Gazette Control Council for Germany 12 (hereafter Control Council Law No. 10), art. II(2); Principles of Nuremberg Charter and Judgment (n 221) 377 ('Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.'); UN General Assembly, Formulation of the Nürnberg Principles—Report by J Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/22, 12 April 1950 (hereafter Spiropoulos, Formulation of Nuremberg Principles), para. 43 (pointing out that the Principles declare liable to punishment not only the perpetrators of international crimes but also the accomplices in the commission of those acts). The General Assembly Resolution 96(I) of 11 December 1946 that eventually led to the adoption of the Genocide Convention already made it clear that genocide was a crime under international law 'for the commission of which principals and accomplices' were punishable. See UN General Assembly, Resolution 96(I): The Crime of Genocide, UN Doc. A/RES/96(I), 11 December 1946 (hereafter UN Doc. A/RES/96(I)), 189.

[223] For illustrations, see *Krstić* Trial Judgment (n 2) para. 640; *Brdanin* Trial Judgment (n 2) para. 726; *Krstić* Appeal Judgment (n 5) paras 138–139. In a footnote, the *Brdanin* Trial Chamber added the following in response to the Prosecution's submissions regarding that prohibition's overlap with the Statutes' provisions pertaining to certain modes of liability:

> The Trial Chamber disagrees with the Prosecution's submission that 'this apparent "overlap" in language between Article 7(1) [of the ICTY Statute] and Article 4(3) of the Statute is an

of assistance and support provided before, during, or after the commission of the crime.[224]

Like the Convention,[225] the Statutes of the *ad hoc* Tribunals provided for the criminalizing of complicity in relation to the crime of genocide but not in relation to the other punishable acts listed in Article II of the Convention (nor in relation to other statutory crimes).[226] This would suggest that, under the Convention and customary law, complicity to direct and public incitement or complicity to conspiracy to commit genocide is not provided for.[227] The Law of the Extraordinary Chambers in the Courts of Cambodia (ECCC) for its part does not expressly provide for the notion of 'complicity in genocide' but instead mentions 'participation in acts of genocide', which *could* be read as including accomplice participation.[228] The ICC regime approaches the issue

> incidental result of the *verbatim* incorporation of Articles 4(2) and 4(3) from the Genocide Convention, and thus does not reflect a deliberate construction of particular language by the drafters of the Statute' [...]. The Appeals Chamber has held that: '[b]ecause the Statute must be interpreted with the utmost respect to the language used by the legislator, the Appeals Chamber may not conclude that the consequent overlap between Article 7(1) and Article 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is possible' [...].

Brdanin Trial Judgment (n 2) fn 1766 (citing *Krstić* Appeal Judgment (n 5) para. 139). See also Schabas, *Genocide in International Law* (n 41) 340–41 ('[A] provision authorizing prosecution for complicity seems important in order to reach those who organize, direct or otherwise encourage genocide but who never actualy wield machine guns or machetes.'); Van Sliedregt, 'Complicity to Commit Genocide' (n 111) 165 (noting that the Convention's drafters felt the need to extend the circle of those held responsible for what, effect was a collective criminal endeavour).

[224] See UN Doc. A/C.6/SR.84 (n 41) 209 (Mr Pérez Perozo, Venezuela) (suggesting during the negotiation of the Genocide Convention that it should 'specify clearly that the complicity envisaged in sub-paragraph (e) should apply equally to acts carried out before the crime was committed and to those performed subsequently, that is, to acts assisting the culprits to escape the punishment they deserved'); UN Doc. E/794 (n 46) (recording the fact that, during the negotiations of the Convention, the US representative understood the notion of 'complicity' as referring to accessoryship before and after the fact and to aiding and abetting in the commission of a crime).

[225] Robinson, *Commentary on the Genocide Convention* (n 4) 69 ('Deviating from the Ad Hoc Committee's draft, however, the present wording, as indicated above, restricts complicity to acts of Genocide only. Thus complicity in attempt and incitement are excluded from punishment. The reason was that attempt and incitement were only preparatory acts to Genocide and neither conspiracy nor complicity therein represented sufficiently defined criminal acts.'). See also UN GAOR, 3rd Sess, 86th mtg, UN Doc. A/C.6/SR.86 (28 October 1948) (hereafter UN Doc. A/C.6/SR.86); UN GAOR, 3rd Sess, 87th mtg, UN Doc. A/C.6/SR.87 (29 October 1948) (hereafter UN Doc. A/C.6/SR.87). Earlier phrasing ('complicity in any of the acts enumerated in this article'; 'complicity in crimes of genocide'; 'complicity in any act of genocide') had left the issue ambiguous and had been subject to debate. See, e.g., UN Ad Hoc Committee on Genocide, Summary Record of the Sixteenth Meeting, UN Doc. E/AC.25/SR.16, 29 April 1948 (hereafter UN Doc. E/AC.25/SR.16); UN Ad Hoc Committee on Genocide, Summary Record of the Seventeenth Meeting, UN Doc. E/AC.25/SR.17, 30 April 1948 (hereafter UN Doc. E/AC.25/SR.17).

[226] Both the *Akayesu* and *Musema* Trial Judgments noted that the *travaux préparatoires* of the Genocide Convention confirm this interpretation as they show that 'only complicity in the completed offence of genocide was intended for punishment and not complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the eyes of some states, too vague to be punishable under the Convention'. See *Akayesu* Trial Judgment (n 11) fn 105; *Musema* Trial Judgment (n 33) para. 172; *Blagojević & Jokić* Trial Judgment (n 2) fn 2052. See also Van Sliedregt, 'Complicity to Commit Genocide' (n 111) 164–65 (to the same effect).

[227] This would not prohibit a domestic legal order to go beyond the terms of the Convention and provide for the possibility of complicity to other prohibited acts of genocide and not just genocide itself.

[228] It is not entirely clear whether the reference, in article 4 of the ECCC Law, to 'participation in acts of genocide' would include the notion of complicity to genocide nor, if it does, why it would not have been expressly stated.

differently and does not provide explicitly for the notion of 'complicity in genocide'. Instead, the Rome Statute provides for a number of modes of liability that would come under the umbrella of complicity or complicity-like types of liability (e.g., soliciting, inducing, aiding, abetting, and assisting).[229] These modes of liability are, in turn, applicable to all statutory crimes, including genocide.

11.6.2 Elements

11.6.2.1 Definition and reach

Complicity in genocide refers to liability incurred by those who associate themselves in the commission of the crime. It does not encompass association in an attempt or any other preparatory act which does not result in the actual commission of the crime: complicity in genocide requires that genocide be committed.[230] It is, therefore, a secondary or *auxiliary* sort of liability.[231]

As a form of criminal participation, the meaning of complicity in genocide is governed by the general principles of criminal law.[232] According to the jurisprudence of the *ad hoc* Tribunals, complicity in genocide can consist of aiding and abetting genocide,[233] although this does not exclude other acts which are not strictly aiding and abetting but which could amount to a prohibited form of complicity.[234] The Appeals

[229] See, in particular, ICC Statute (n 1) arts 25(3)(b) and (c). See also, *infra*, 11.7.2.8.

[230] *Blagojević & Jokić* Trial Judgment (n 2) para. 638. See also *Stakić* Trial Judgment (n 2) para. 561; *Akayesu* Trial Judgment (n 11) paras 527 and 530; *Musema* Trial Judgment (n 33) paras 171-172.

[231] See *Krstić* Trial Judgment (n 2) paras 643 ('It seems clear that "accomplice liability" denotes a secondary form of participation which stands in contrast to the responsibility of the direct or principal perpetrators. The Trial Chamber is of the view that this distinction coincides with that between "genocide" and "complicity in genocide" in Article 4(3).') and 641–45. The line between principal and secondary sort of liability is not always an easy one to draw and there exists a grey area between the two. For an illustration, see and compare *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, Separate Opinion of Judge Shahabuddeen, 7 July 2006 (hereafter *Gacumbitsi* Appeal Judgment, Shahabuddeen Separate Opinion); *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006 (hereafter *Gacumbitsi* Appeal Judgment, Schomburg Separate Opinion); *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, Partially Dissenting Opinion of Judge Güney and Partially Dissenting Opinion of Judge Meron, 7 July 2006 (hereafter *Gacumbitsi* Appeal Judgment, Meron Partial Dissent).

[232] *Brđanin* Trial Judgment (n 2) para. 729; *Krstić* Trial Judgment (n 2) para. 590; *Stakić* Trial Judgment (n 2) para. 524.

[233] *Krstić* Appeal Judgment (n 5) para. 12; *Jelisić* Trial Judgment (n 2) para. 10; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001. (*Sikirica et al.* Judgment on Defense Motions to Acquit), para. 65; *Brđanin* Trial Judgment (n 2) para. 729.

[234] *Brđanin* Trial Judgment (n 2) para. 729 (citing *Krstić* Appeal Judgment (n 5) paras 8, and 137–144. See also *Krstić* Trial Judgment (n 2) para. 590; *Jelisić* Trial Judgment (n 2) para. 82; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 234), para. 77. See also *Ngirabatware* Trial Judgment (n 113) para. 1347 (footnote omitted) ('The jurisprudence of this Tribunal has treated complicity in genocide as the aiding and abetting, instigating, or procuring of genocide. Complicity in genocide by aiding and abetting requires knowledge of the specific genocidal intent of the principal perpetrators, while the other forms of complicity may require proof that the accomplice shared that specific intent. The accomplice's criminal participation may occur before or after the act of the principal perpetrator, and the accomplice need not be present during the commission of the crime.'); *Bagaragaza* Sentencing Judgment (n 11) paras 22–23 (footnotes omitted) ('The jurisprudence of this Tribunal has defined complicity as aiding and abetting, instigating, and procuring. Complicity by aiding and abetting implies a positive action, excluding, in principle, a complicit participation by failure to act or by omission. The accomplice's criminal participation may occur at the planning, preparation or execution stage of the crime, occurring before or after

Chamber of the ICTY has thus held that 'the terms "complicity" and "accomplice" may encompass conduct broader than aiding and abetting'.[235]

It has been suggested by ICTY Trial Chambers that a charge of complicity in genocide might be limited to individuals who, from an hierarchical point of view, are lesser participants in the grand criminal scheme, whereas genocide would be reserved for high officials or military commanders, thereby creating a vertical divide between the 'planners' who would generally be principals to genocide, while 'executioners' would generally be mere accomplices to such crimes.[236] Such a proposition does not appear to be good law. It finds no support in the text of the ICTY Statute, state practice, or the Genocide Convention. State practice does not support a suggestion that different forms of liability have been assigned (or should be assigned) depending on the hierarchical level of criminal participation. Furthermore, it is contradicted by the fact that, in a number of cases, the two modes of liability were charged as alternatives in relation to the same defendant.[237] What matters for any form of liability is the nature of one's *conduct*, the prosecution's ability to establish that conduct, and the extent to which such conduct partakes into the commission of the offence of the principal, not the perpetrator's *rank or position*.

11.6.2.2 An act of genocide as a prerequisite

Complicity in genocide necessarily implies that genocide has been or is being committed.[238] Once it has been proven that the crime of genocide has been committed

the act of the principal offender. It is not necessary that the person aiding and abetting the principal offender be present during the commission of the crime.'); *Ntakirutimana* Appeal Judgment (n 5) para. 500; *Kajelijeli* Trial Judgment (n 51) para. 766; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003 (hereafter *Krnojelac* Appeal Judgment), para. 52; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (hereafter *Semanza* Trial Judgment), paras 386 and 393; *Bagilishema* Trial Judgment (n 24) para. 69; *Musema* Trial Judgment (n 33) paras 125 and 177–183; *Tadić* Appeal Judgment (n 221) para. 229; *Blagojević & Jokić* Appeal Judgment (n 27) paras 119–124; *Nyiramasuhuko et al.* Trial Judgment (n 151) para. 5980 ('The jurisprudence of this Tribunal has treated complicity in genocide as the aiding and abetting, instigating, or procuring of genocide. Complicity in genocide by aiding and abetting requires knowledge of the specific genocidal intent of the principal perpetrators, while the other forms of complicity may require proof that the accomplice shared that specific intent.').

[235] See *Krstić* Appeal Judgment (n 5) paras 12–14. See also *Brđanin* Trial Judgment (n 2) para. 729. Regarding the possibility of aiding and abetting genocide, see *infra*, 11.7.2.5.

[236] It has been said that the principal is '[the one] who devises the genocidal plan at the highest level and takes the major steps to put it into effect', 'the one who fulfills "a key co-ordinating role" and whose "participation is of an extremely significant nature and at the leadership level" '. *Stakić* Decision on Rule 98*bis* Motion for Judgment of Acquittal (n 22) para. 50. See also *Krstić* Trial Judgment (n 2) paras 642–644.

[237] Complicity in genocide has often been charged as an alternative to the primary and more serious charge of genocide. See, e.g., *Nyiramasuhuko et al.* Trial Judgment (n 151) para. 5981 ('The Chamber has found Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi and Ndayambaje guilty of genocide in relation to various allegations. Because the Prosecution pleads complicity in genocide as an alternative to genocide, the Chamber dismisses this count in respect to these allegations.'); *Stakić* Trial Judgment (n 2) para. 534.

[238] *Brđanin* Trial Judgment (n 2) para. 728; *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 237) para. 52; *Akayesu* Trial Judgment (n 11) paras 527–530; *Stakić* Trial Judgment (n 2) paras 533 (footnotes omitted) ('Complicity therefore necessarily implies the existence of a principal offence. Stated otherwise, complicity in genocide is possible only where genocide actually has been or is being committed. However, the Trial Chamber is aware that an individual can be prosecuted for complicity even where the perpetrator has not been tried or even identified and that the perpetrator and

liability for complicity may attach to any participant complicit in the commission of this crime.[239] However, an individual can be prosecuted for complicity in genocide even when the principal perpetrator of genocide has not been tried or identified.[240] Furthermore, acts committed *prior* to the commission of genocide could constitute complicity if and when genocide is later committed.[241]

11.6.2.3 Actus reus

Under a charge of complicity to commit genocide, the prosecution is required to demonstrate that the accused carried out an act of substantial assistance, encouragement, or moral support to the principal offender, culminating in the latter's actual commission of the crime.[242] This element is essentially similar to the *actus reus* required for aiding and abetting.[243] It can, therefore, consist of an act or culpable omission.[244]

While the assistance need not be *indispensable* to the crime, it must have a *substantial* effect on the commission of the crime.[245] The assistance provided can take many

accomplice need not know each other.'), 534 ('An accused can thus be held liable only in respect of the alternative charge of complicity in genocide if the Trial Chamber is satisfied beyond reasonable doubt that genocide as such took place.'), and 561; *Musema* Trial Judgment (n 33) paras 171–174; *Blagojević & Jokić* Trial Judgment (n 2) para. 638.

[239] *Akayesu* Trial Judgment (n 11) para. 530. This requirement does not imply that the identity of the main perpetrator be determined. Ibid., para. 531.

[240] *Brdanin* Trial Judgment (n 2) para. 728; *Stakić* Trial Judgment (n 2) para. 533; *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 237) para. 52; *Akayesu* Trial Judgment (n 11) para. 531. See also *Krstić* Appeal Judgment (n 5) paras 35, 134, 137, and 143; *Krstić* Trial Judgment (n 2) paras 591–599. The failure of the prosecution to identify the principal might have evidential consequences, in particular as regard the possibility of drawing certain inferences based on the conduct and state of mind of the principal.

[241] See, *infra*, 11.6.2.3.

[242] See, e.g., *Bagaragaza* Sentencing Judgment (n 11) para. 23. The *Akayesu* Trial Chamber suggested that complicity (unlike aiding and abetting) might require a position act (of commission), whilst exclude a mere omission to act. See *Akayesu* Trial Judgment (n 11) paras 485, 546–548 ('[C]omplicity requires a positive act, i.e., an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action.'). The correctness of this holding is questionable. First, it was made obiter, without arguments having been invited on that point. Second, the holding offers no support that would give it credit, let alone evidence of state practice or *opinio juris* that would sanction such a position under customary international law. See also *Semanza* Trial Judgment (n 235) para. 394 (rejecting the proposed distinction) ('[T]here is no material distinction between complicity in Article 2(3)(e) [complicity in genocide] of the Statute and the broad definition accorded to aiding and abetting in Article 6(1).').

[243] See, e.g., *Prosecutor v. Mpambara*, Case ICTR-2001-65-I, Decision on the Prosecutor's Request to File an Amended Indictment, 4 March 2005 (hereafter *Mpambara* Decision on Amended Indictment), para. 19; *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98 *bis*, 22 November 2005 (hereafter *Bizimungu et al.* Rule 98 *bis* Decision), para. 51.

[244] See, *supra*, 11.1.3 (and references cited therein). See, e.g., *Bagaragaza* Sentencing Judgment (n 11) para. 22; *Akayesu* Trial Judgment (n 11) paras 485, 546–548 (complicity by act or omission); *Kalimenzara* Trial Judgment (n 11) para. 161; *Kanyarukiga* Trial Judgment (n 11) para. 635 (regarding the possibility of planning, instigating, ordering, and aiding and abetting by omission); *Brdanin* Appeal Judgment (n 11) para. 274; *Orić* Appeal Judgment (n 326) para. 43. See, *contra*, ICJ *Bosnia-Serbia* 2007 Judgment (n 2) para. 432 (limiting the scope of that notion for the purpose of assigning state responsibility to positive acts of commission).

[245] *Bagaragaza* Sentencing Judgment (n 11) para. 23; *Kayishema & Ruzindana* Appeal Judgment (n 8) para. 186; *Kajelijeli* Trial Judgment (n 51) paras 763 and 766; *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment, 22 January 2004 (hereafter *Kamuhanda* Trial Judgment), para. 597; *Akayesu*

forms as long as it has such an effect on the perpetration of the crime.[246] Encouragement or practical assistance may be given, for instance, by transporting executioners to the killing site,[247] identifying the members of the enemy group and pointing them out,[248] and providing forces and ammunition for the killing.[249]

The assistance provided can be given in principle at any point before the commission of the crime, during its commission, or in its aftermath, and does not necessitate the physical presence of the accomplice.[250] It must be given towards the commission of a crime of genocide. This means that, in addition to the possibility of providing assistance to the principal perpetrator, complicity in genocide might also encompass an act of assistance to the perpetrators of a joint criminal enterprise to commit genocide. Joint criminal enterprise has been identified by the *ad hoc* Tribunals as a mode of *commission* of the offence.[251]

Trial Judgment (n 11) paras 473–475, 537–538 and 540; *Rutaganda* Trial Judgment (n 114) para. 43; *Bagilishema* Trial Judgment (n 24) paras 33 and 71; *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, Judgment, 19 September 2005 (hereafter *Kamuhanda* Appeal Judgment), para. 70; *Musema* Trial Judgment (n 33) paras 180-82; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 (hereafter *Blaškić* Appeal Judgment), para. 49. See also *Prosecutor v. Todorović & Radić*, No. X-KRŽ-07/382, Appeal Judgment, 17 February 2009 (hereafter *Todorović & Radić* Appeal Judgment), paras 147 and 152 (footnote omitted):

> 147. The Appellate Panel considers that the key issue raised by the Defense is whether the Trial Panel properly concluded that the Appellants' contributions were decisive to the commission of the crimes and that the Appellants acted with knowledge and intent.
>
> [...]
>
> 152. A 'decisive' contribution has been defined as a contribution 'without which the offense would not be accomplished (at all or in a way as it is planned to be accomplished).'

[246] See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998 (hereafter *Furundžija* Trial Judgment), para. 249; *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal (n 22) para. 62. See also *Musema* Trial Judgment (n 33) para. 917; *Rutaganda* Trial Judgment (n 114) para. 391.

[247] *Ntakirutimana et al.* Trial Judgment (n 60) paras 789 and 829.

[248] Ibid.

[249] Ibid., para. 791; *Rutaganda* Trial Judgment (n 114) para. 86.

[250] See, e.g., *Nyiramasuhuko et al.* Trial Judgment (n 151) para. 5980 (footnote omitted) ('The accomplice's criminal participation may occur before or after the act of the principal perpetrator, and the accomplice need not be present during the commission of the crime.'); *Bagaragaza* Sentencing Judgment (n 11) paras 22–23 (citing *Ntakirutimana et al.* Appeal Judgment (n 5) para. 500; *Kajelijeli* Trial Judgment (n 51) para. 766; *Krnojelac* Appeal Judgment (n 235) para. 52; *Semanza* Trial Judgment (n 235) paras 386 and 393; *Bagilishema* Trial Judgment (n 24) para. 69; *Musema* Trial Judgment (n 33) paras 125 and 177–183; *Blagojević & Jokić* Appeal Judgment (n 27) paras 119–124; *Krstić* Appeal Judgment (n 5) paras 137–144. Regarding acts of complicity committed prior to the commission of an act of genocide, see UN Doc. E/794 (n 46); UN Doc. A/C.6/SR.84 (n 41) 209 (representative of Venezuela recording his view that the notion of complicity 'should apply equally to acts carried out before the crime was committed and to those performed subsequently, that is, to acts assisting the culprits to escape the punishment they deserved'); Tams *et al. Genocide Convention Commentary* (n 44) 151 and 162 (Article III); Robinson, *Commentary on the Genocide Convention* (n 4) 69.

[251] For an illustration of that approach, see for instance, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004 (hereafter *Milošević* Rule 98*bis* Decision), para. 298 ('On the basis of the evidence set out above in relation to the First Question, a Trial Chamber could be satisfied beyond reasonable doubt that the Accused aided and abetted or was complicit in the commission of the crime of genocide in that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its aim and intention was the destruction of a part of the Bosnian Muslims as a group.'). See also, *infra*, 11.7.2.7.

11.6.2.4 Mens rea

To be found guilty, an accomplice must have acted deliberately and in the knowledge of the assistance thus provided by him to the commission of a crime.[252] The question of whether complicity to commit genocide requires proof of genocidal intent is a more complex matter.

Article II of the Genocide Convention mentions the need to establish genocidal intent in relation to all acts listed in that provision. Article III proceeds to list prohibited acts coming within the scope of the general prohibition on genocide. The Convention contains no suggestion that any of these prohibited acts would not require the establishment of the *dolus specialis*. In fact, the *travaux* of the Convention would appear to support the view that this *dolus* was required in relation to complicity in genocide.[253] The jurisprudence of the *ad hoc* Tribunals on that point reveals initial hesitations and contradictions.[254] However, appellate jurisprudence leans towards a requirement of *dolus specialis* for complicity in genocide. In *Krstić*, for instance, the accused was charged in the alternative for genocide (count 1) and complicity in genocide (count 2). At trial, General Krstić was convicted for genocide and the Trial Chamber held that he had acted with the requisite *dolus specialis*, which was subsequently challenged on

[252] See, e.g., *Akayesu* Trial Judgment (n 11) paras 538–539 and 544; *Semanza* Trial Judgment (n 235) para. 395. Regarding the element of deliberateness of the act, see also UN Doc. A/C.6/SR.87 (n 226).

[253] See, e.g., UN Doc. A/C.6/SR.84 (n 41) (Mr Pérez Perozo, Venezuela) (noting that in the case of genocide, 'it was important to bear the element of intent in mind when establishing complicity'). See also Schabas, *Genocide in International Law* 2000 (n 22) 289 (quoting UN General Assembly, Genocide: Draft Convention and Report of the Economic and Social Council—United Kingdom: Further Amendments to the Draft Convention (E/794), Corrigendum, UN Doc. A/C.6/236/Corr.1, 16 October 1948 (hereafter UN Doc. A/C.6/236/Corr.1); UN Doc. A/C.6/SR.87 (n 226)) (cited in *Krstić* Appeal Judgment (n 5) para. 142). See also *Krstić* Appeal Judgment (n 5) para. 142. See, *contra*, Tams *et al. Genocide Convention Commentary* (n 44) 176 and fn 43.

[254] The Trial Chamber in *Akayesu* appeared at first to suggest that an accomplice must possess the special *mens rea*, although it later concluded that knowledge thereof was sufficient. *Akayesu* Trial Judgment (n 11) paras 485, 540 and 547. In contrast, in *Jelisić*, the Trial Chamber held that an accomplice needed to possess the *dolus specialis* of genocide. *Jelisić* Trial Judgment (n 2) para. 86. In other ICTR cases, knowledge of the principal's genocidal intent was considered to be sufficient for an accomplice to be held liable as an accomplice to genocide. See, e.g., *Musema* Trial Judgment (n 33) para. 181; *Bagilishema* Trial Judgment (n 24) paras 36 (regarding aiding and abetting), and 71 (seemingly suggesting, *obiter*, that knowledge of the principal's genocidal intent is enough for complicity to genocide); *Semanza* Trial Judgment (n 235) para. 394 (footnotes omitted) ('In the view of the Chamber, there is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1). The Chamber further notes that the *mens rea* requirement for complicity to commit genocide in Article 2(3)(e) mirrors that for aiding and abetting and the other forms of accomplice liability in Article 6(1).'); *Ntakirutimana et al.* Trial Judgment (n 60) paras 510–511; *Bikindi* Rule 98*bis* Decision (n 78) para. 28. These Chambers' interpretation of the concept of 'complicity' leaned heavily on 'the Rwanda Penal Code', so that their value as international law precedent is doubtful. In *Stakić*, the Trial Chamber noted that certain Trial Chambers had been satisfied that knowledge, rather than intent, was sufficient for an accomplice to be held responsible for a genocidal offence. *Stakić* Decision on Rule 98*bis* Motion for Judgment of Acquittal (n 22) para. 66. It said, however, that this could constitute 'a departure from the strict pre-requisite of *dolus specialis* related to all forms of committing and participation in genocide'. Ibid., paras 48 and 67. This Chamber eventually refrained from expressly stating its own view on this matter. The Trial Chamber in *Milošević* appeared to consider that knowledge of the principal's genocidal intent is sufficient in principle for complicity as well as aiding and abetting genocide. *Milošević* Rule 98*bis* Decision (n 252) paras 297–298 and 309. See also *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, Dissenting Opinion of Judge O-Gon Kwon, 16 June 2004 (hereafter *Milošević* Rule 98*bis* Decision, Kwon Dissent), para. 3.

appeal. Instead of directly addressing that challenge (which would have required the Appeals Chamber to verify the Trial Chamber's factual finding that Krstić indeed possessed the requisite intent), the Appeals Chamber opted to re-qualify the charges on appeal under the heading of 'aiding and abetting'.[255] The Chamber did so *proprio motu* and without Krstić having been charged under that particular mode of liability. The first point to note here is that unless there was a substantive difference between the notion of complicity and aiding and abetting in regard to genocide, there would have been no reason for the Appeals Chamber to undertake that re-characterization. Second, by convicting Krstić under the theory of aiding and abetting, the Appeals Chamber only needed to satisfy itself that he had *known* of the principals' genocidal intent, not that he possessed it himself (see, *infra*, 11.7.2.5.2). This re-characterization on appeal of the mode of participation relevant to General Krstić's responsibility followed the reversal of his conviction under the theory of joint criminal responsibility after the Appeal Chamber had found the evidence on record insufficient to conclude that he possessed or shared the intent to commit genocide.[256] This again provides some support for the view that the Trial Chamber's finding on that point might have been unreasonable and thus insufficient to support a conviction for complicity in genocide. Third, when addressing the related legal issue, the Appeals Chamber noted that although there is authority to suggest that liability for complicity in genocide requires proof that the accomplice possessed the specific intent to destroy a protected group, no such requirement existed if the accomplice was charged with 'aiding and abetting' the principals.[257] This enabled the Appeals Chamber to convict Krstić for aiding and abetting genocide without verifying that he possessed and shared the genocidal intent. Commenting later on the findings of the *Krstić* Appeals Chamber, the ICTR Appeals Chamber in *Ntakirutimana* noted that in reaching its conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would encompass the notion of aiding and abetting under the same conditions as are applicable to other international crimes (i.e., knowledge of the crime committed by the principal, including any element of intent, and knowledge that the acts performed by the aider and abettor assist the commission of a specific crime),[258] while other forms of complicity (not amounting to aiding and abetting) would require proof of specific intent.[259] This line of jurisprudence suggests, as foreseen in the *travaux*

[255] See *Krstić* Appeal Judgment (n 5) para. 139.

[256] See *Krstić* Appeal Judgment (n 5) para. 134.

[257] Ibid., paras 142–143, in particular, 142 ('[T]here is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group.')

[258] See, *infra*, 11.7.2.5.

[259] *Ntakirutimana* Appeal Judgment (n 5) para. 500 (footnotes omitted):

> The ICTY Appeals Chamber has explained, on several occasions, that an individual who aids and abets other individuals committing a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime. More recently, as the Prosecution argued at the Appeal hearing, in the *Krstić* case the ICTY Appeals Chamber considered that the same principle applies to the Statute's prohibition of genocide

préparatoires, that complicity to commit genocide requires proof that the accomplice possessed the requisite genocidal intent whilst aiding and abetting that crime would not.[260] This view has also been adopted by other jurisdictions.[261] The lower standard of

> and that '[t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal.' In reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same mens rea, while other forms of complicity may require proof of specific intent.

See also *Semanza* Appeal Judgment (n 29) paras 316 and 369. The fact that aiding and abetting genocide does not require proof of genocidal intent does not prevent a Chamber from making a finding that the accused possessed that intent. See, e.g., *Kalimanzira* Appeal Judgment (n 128) para. 220 ('The Appeals Chamber recalls that it is not unusual for a trial chamber to find that an individual convicted only of aiding and abetting possesses genocidal intent.'); *Ntakirutimana et al.* Trial Judgment (n 60) paras 827–831; *Semanza* Trial Judgment (n 235) paras 431–433. See also *R. c. Jacques Mungwarere*, [2013] ONCS 4594 (hereafter *Mungwarere* Ontario Superior Ct Judgment), paras 55–56.

[260] See, generally, *Brdanin* Trial Judgment (n 2) para. 730 (footnotes omitted) ('As stated, the meaning of complicity in genocide is governed by the general principles of criminal law. Complicity in genocide, where it consists of aiding and abetting genocide, does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group. In that case the Prosecution must prove beyond reasonable doubt "that an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender's state of mind; it need not show that an accused shared the specific intent of the principal offender".'); *Bagaragaza* Sentencing Judgment (n 11) para. 23 (footnote omitted) ('[C]omplicity in genocide by aiding and abetting requires knowledge of the *mens rea* of the specific genocidal intent of the principal perpetrators, while the other forms of complicity may require proof that the accomplice shared the specific intent.'); *Ntakirutimana* Appeal Judgment (n 5) paras 499–500; *Krstić* Appeal Judgment (n 5) para. 142; *Semanza* Appeal Judgment (n 29) paras 316, 369 ('[T]he *mens rea* for complicity in genocide, for those forms of complicity amounting to aiding and abetting, is knowledge of the specific intent of the perpetrator(s).'); *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, 27 September 2006 (hereafter *Krajišnik* Trial Judgment), para. 865 ('The term "complicity" comes from the Genocide Convention, not from Article 7(1) of the Tribunal's Statute, and as it has been suggested that there is a difference between complicity, on the one hand, and the cognate "aiding and abetting" found in Article 7(1), on the other, the Chamber will pause briefly to consider this difference. The Appeals Chamber has said that complicity, as it occurs in the Genocide Convention, may encompass conduct "broader" than aiding and abetting. For complicity that is "broader", the Prosecution must prove that the accomplice not only knew of the principal's specific intent to destroy the protected group in whole or in part, but also shared that intent himself or herself.'); *Milošević* Rule 98*bis* Decision (n 252) para. 297 (footnotes omitted):

> In the absence of anything to indicate that complicity is broader than aiding and abetting in the circumstances of this case, the Trial Chamber considers that there is merit in the Prosecution's submission that the two are essentially the same. The Prosecution also submitted that, in light of the similarities between the charges, the Trial Chamber should confine itself to a determination on aiding and abetting under Article 7(1) of the Statute. It appears to the Trial Chamber that because complicity in genocide under Article 4(3)(e) of the Statute is, following the Trial Chamber's Judgment in *Prosecutor v. Stakic*, the lex specialis in relation to liability under Article 7(1) of the Statute, the proper characterisation of the Accused's liability in this case may be complicity in genocide. However, the matter need not be determined at this stage. The final determination, if necessary, will be made at the Judgment phase.

[261] See, e.g., *Prosecutor v. Vuković & Tomić*, No. S1 1K 006124 11 Kžk, Verdict, 22 June 2012 (hereafter *Vuković & Tomić* Appeal Judgment), para. 449 (requiring proof of genocidal intent for liability under this mode of participation).

mens rea applicable to aiding and abetting genocide (when compared to complicity in genocide) would also explain the Prosecution's application, in the *Blagojević et al.* case which followed the *Krstić* Appeal Judgment, to amend the charges against the accused and to replace the charge of complicity with a charge of aiding and abetting genocide.[262] This would have been the result of the lower threshold of *mens rea* required for the latter sort of responsibility.

11.6.3 Complicity in genocide and genocide

Whilst genocide and, arguably, complicity in genocide both require proof of the *dolus specialis*, liability for the latter is dependent on the establishment that the crime of genocide has been committed or is being committed (*supra*, 11.6.2.2). Genocide thus encompasses principal offenders, including but not limited to the physical perpetrators and those liable under the theory of joint criminal enterprise (JCE).[263] By contrast, an accomplice to genocide is someone who associates himself in the crime of genocide committed by another.[264] His responsibility is secondary or auxiliary to the primary responsibility of the perpetrator. This means that, under the standard of cumulative convictions applicable before the *ad hoc* Tribunals, if the requirements of both genocide and complicity in (or aiding and abetting) genocide were to be met in relation to a single incident of criminal conduct, the former would absorb the latter and conviction for genocide would exclude a conviction for complicity.[265]

[262] See *Blagojević & Jokić* Trial Judgment (n 2) para. 637 (and references cited therein). See also *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Leave to File Fourth Amended Joinder Indictment, 10 June 2004 (hereafter *Blagojević & Jokić* Decision on Prosecution's Motion for Fourth Amended Indictment).

[263] *Brdanin* Trial Judgment (n 2) para. 727. For instance, the Appeals Chamber in the *Krstić* case found that Krstić was 'not guilty of genocide as a principal perpetrator' and that his criminal liability was 'more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator': *Krstić* Appeal Judgment (n 5) paras 134 and 138. It characterized his responsibility as aiding and abetting genocide under Article 7(1) of the Statute, but not pursuant to the provision of complicity in genocide under Article 4(3)(e), even though the latter was also alleged in the Indictment. See also *Krstić* Trial Judgment (n 2) para. 643 ('It seems clear that "accomplice liability" denotes a secondary form of participation which stands in contrast to the responsibility of the direct or principal perpetrators. The Trial Chamber is of the view that this distinction coincides with that between "genocide" and "complicity in genocide" in Article 4(3).'). See also *Stakić* Trial Judgment (n 2) para. 532 ('This Trial Chamber regards genocide as under Article 4(3)(a) as usually limited to "perpetrators" or "co-perpetrators" [...] .'); *Stakić* Decision on Rule 98*bis* Motion for Judgment of Acquittal (n 22) para. 51. A participant in a joint criminal enterprise has been understood to be liable as a (co-)perpetrator, i.e., as the person committing the crime. *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004 (hereafter *Vasiljević* Appeal Judgment), paras 95 and 102.

[264] See, e.g., *Stakić* Trial Judgment (n 2) para. 533; *Akayesu* Trial Judgment (n 11) para. 527; *Brdanin* Trial Judgment (n 2) para. 727.

[265] *Musema* Trial Judgment (n 33) para. 175; *Bagilishema* Trial Judgment (n 24) para. 67; *Akayesu* Trial Judgment (n 11) para. 532 ('[A]n individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. [...] [T]he same individual cannot be convicted of both crimes for the same act.'); *Ntakirutimana* Trial Judgment (n 60) paras 796 and 837; *Nahimana et al.* Trial Judgment (n 39) para. 1056 ('[T]he crime of complicity in genocide and the crime of genocide are mutually exclusive, as one cannot be guilty as a principal perpetrator and as an accomplice with respect to the same offence.'); *Stakić* Trial Judgment (n 2) para. 534.

11.7 Other Forms of Criminal Participation?

11.7.1 General considerations

Article III of the Genocide Convention says that 'the following acts shall be punishable', and then goes on to list the acts mentioned above (genocide, conspiracy to commit genocide, etc.). This sentence has been interpreted by the *ad hoc* Tribunals as being *illustrative* rather than *exhaustive*.[266] This has enabled tribunals to utilize and rely upon other modes of participation in connection to acts of genocide.[267] Accused persons in both Tribunals have thus been charged with and convicted of genocide under various heads of liability which are not expressly provided for in the Genocide Convention, in particular, aiding and abetting, ordering, and instigating genocide as well as the doctrines of superior responsibility and 'joint criminal enterprise'.[268]

[266] See, e.g., *Akayesu* Trial Judgment (n 11) para. 546; *Krstić* Appeal Judgment (n 5) paras 138–139. See also *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004 (hereafter *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent), paras 59–68 (regarding the inclusion of the notion of aiding and abetting genocide).

[267] See, e.g., *Kalimanzira* Trial Judgment (n 46) para. 161 (footnote omitted):

> 'Committing' implies, primarily, physically perpetrating a crime. 'Planning' implies designing the preparation and execution of a crime. 'Instigating' implies prompting or provoking another to commit a crime. With respect to ordering, a person in a position of authority may incur responsibility for ordering another person to commit an offence, if the person who received the order actually proceeds to commit the offence subsequently. 'Aiding and abetting' implies assisting, furthering or lending moral support to the perpetration of a crime. Thus, even if Kalimanzira has not 'committed' genocide himself, his responsibility may be established under any one of the modes of liability provided for in Article 6 (1). The *mens rea* varies accordingly. Where an accused is charged with having planned, instigated, ordered or aided and abetted the commission of genocide pursuant to Article 6 (1), the Prosecution must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide. In addition, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator's specific genocidal intent, whereas for planning, instigating and ordering, he must share that intent.

Nahimana et al. Appeal Judgment (n 5) paras 478–483 and 492; *Seromba* Appeal Judgment (n 60) para. 65; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004 (hereafter *Kordić & Čerkez* Appeal Judgment), para. 26; *Krstić* Appeal Judgment (n 5) para. 140; *Kanyarukiga* Trial Judgment (n 11) para. 635 (footnote omitted) (citing *Nahimana et al.* Appeal Judgment (n 5) para. 492) ('Where a person is accused of planning, instigating, ordering or aiding and abetting the commission of genocide by one or more other persons, the Prosecutor must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide.'); *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, 28 April 2005 (hereafter *Muhimana* Trial Judgment), para. 503–507.

[268] The structure of the Tribunals' Statutes indeed suggests that the Security Council intended the forms of individual criminal responsibility provided for in Article 7 of the Statute to apply to all crimes provided for in Articles 2–5, including genocide. See also UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993 (hereafter UN Secretary-General Report on ICTY), para. 54 ('The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law [...] contribute to the commission of the violation and are, therefore, individually responsible.'). Interestingly, the Law of the ECCC only provides for three categories of participatory acts in relation to the crime of genocide: attempts to commit acts of genocide; conspiracy to commit acts of genocide; and 'participation in acts of genocide'. It is not entirely clear what this last notion was intended to provide for and whether its scope is broader or narrower than what is provided under the Genocide Convention. See, generally, Mélanie Vianney-Liaud, 'Legal Constraints in the Interpretation of Genocide' in Simon M Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Springer 2016) (hereafter Vianney-Liaud, 'Legal Constraints in Interpretation of Genocide'), 264–65.

Similarly, the ICC has made use of the doctrine of 'co-perpetration' in relation to the crime of genocide.[269] In practice, this has had the effect of expanding the range and categories of prohibited conduct that could entail individual criminal responsibility in relation to the commission of an act of genocide.[270]

Finally, one should note that international law does not dictate that jurisdictions prosecuting acts of genocide should necessarily apply modes of liability recognized as forming part of international law. They may, instead, choose to rely on modes of liability recognized under their own domestic laws.[271] This also means that, when applying a particular mode of liability (say, complicity) that exists both under international and domestic law, a domestic jurisdiction could opt to apply its own, domestic, definition of that particular type of responsibility. Therefore, the modes of liability considered in the next section are relevant to the extent only that the jurisdiction in question applies customary international law or ICC law to the definition or interpretation of the applicable modes of liability.

11.7.2 Other forms of culpable involvement in genocide

11.7.2.1 Committing

The notion of 'commission' implies, primarily, the physically perpetration of a crime,[272] but it is not limited to that scenario alone.[273] The determining factor to identify an act of culpable commission, and the issue that will decide the *principal* or *secondary* nature of the contribution, turns on whether the conduct in question was as much an

[269] *Prosecutor v. Al Bashir*, (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) [2009] ICC-02/05-01/09-3 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), 210–23.

[270] *Krstić* Appeal Judgment (n 5) paras 138–139.

[271] See, e.g., *Public Prosecutor v. Van Anraat*, Case No. 09/751003-04, Judgment, 16 December 2010 (The Hague, District Court) (hereafter *Van Anraat* District Ct Judgment); *Public Prosecutor v. Van Anraat*, Case No. 07/10742, Judgment, 30 June 2009 (NL Supreme Court) (hereafter *Van Anraat* Supreme Ct Judgment); Van Sliedregt, 'Complicity to Commit Genocide' (n 111) 181–86. See also *Zazai v. Canada (Minister of Citizenship and Immigration)*, [2005] FCA 303 (hereafter *Zazai* Fed Ct Appeal Judgment). See also Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 International Criminal Law Review 229 (hereafter Van der Wilt, 'Equal Standards?'), 241–47; Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8 Journal of International Criminal Justice 803 (hereafter Huisman & Van Sliedregt, 'Rogue Traders'). See also *Prosecutor v. Rwabukombe*, Case No. 5-3 StE 4/10-4-3/10, Judgment, 18 February 2014 (hereafter *Rwabukombe* Trial Judgment); *Prosecutor v. Rwabukombe*, Case No. 71 JZ (2016) 103, Judgment, 21 May 2015 (hereafter *Rwabukombe* Appeal Judgment).

[272] *Kalimanzira* Trial Judgment (n 46) para. 161; *Kalimanzira* Appeal Judgment (n 128) paras 218–220; *Nahimana et al.* Appeal Judgment (n 5) para. 478 ('The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.').

[273] See, e.g., *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, 7 July 2006 (hereafter *Gacumbitsi* Appeal Judgment), para. 60 ('In the context of genocide, however, "direct and physical perpetration" need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime.'); *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T, Judgment, 27 February 2009 (hereafter *Rukundo* Trial Judgment), para. 562; *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Judgment, 28 September 2011 (hereafter *Munyakazi* Appeal Judgment), para. 135; *Kalimanzira* Appeal Judgment (n 128) paras 218–20; *Seromba* Appeal Judgment (n 60) paras 155 and 161; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3322.

integral part of the genocide as were the killings which it enabled.[274] The personal commission of crimes by the accused is not therefore the only or even the most important relevant factor.[275] In a number of cases where it was concluded that an accused's role was that of a principal perpetrator, it was noted that he was present at the crime scene and conducted, supervised, directed, played a leading role; in other situations, he had fully exercised influence over the physical perpetrators of the crimes.[276] In *Mitrović*, for instance, the State Court of Bosnia-Herzegovina found the accused to be 'one of the principal perpetrators of one of the genocidal acts' although he was 'not the architect of the plan, nor was he a tactician or commander who had responsibility for its overall accomplishment'. Rather, the Chamber held, he was an instrument by which the plan was carried out.[277] The jurisprudence also includes a number of cases where the commission of the crime was characterized by more remote, organization-wide, contribution to a joint criminal enterprise.[278] A similarly broad understanding of the

[274] *Kalimanzira* Appeal Judgment (n 128) para. 219 (footnote omitted) ('The question is whether an accused's conduct "was as much an integral part of the genocide as were the killings which it enabled".'); *Gacumbitsi* Appeal Judgment (n 274) para. 60. See also *Seromba* Appeal Judgment (n 60) para. 161 (footnote omitted) ('The jurisprudence makes clear that "committing" is not limited to direct and physical perpetration and that other acts can constitute direct participation in the actus reus of the crime.'); *Karemera et al.* Trial Judgment (n 51) para. 1607 (footnote omitted) ('Physical perpetration need not only mean physical killing; other acts can constitute direct participation in the crime. The question is whether an accused's conduct "was as much an integral part of the genocide as were the killings which it enabled".'); *Ndindabahizi* Appeal Judgment (n 5) para. 123.

[275] *Seromba* Appeal Judgment (n 60) para. 161.

[276] *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3322; *Munyakazi* Appeal Judgment (n 274) paras 135–136; *Seromba* Appeal Judgment (n 60) paras 171–172; *Gacumbitsi* Appeal Judgment (n 274) paras 60–61. See also *Nzabonimana* Appeal Judgment (n 31) para. 477; *Kalimanzira* Appeal Judgment (n 128) paras 219–220. For instance, in *Prosecutor v. Gacumbitsi*, the accused Gacumbitsi was held to have committed genocide when he separated Tutsi from Hutu as part of a criminal act in which the concerned Tutsi were killed. In construing the criminal responsibility of Gacumbitsi in that case, the Appeals Chamber held that his actions were 'as much an integral part of the genocide as were the killings which [they] enabled'. *Gacumbitsi* Appeal Judgment (n 274) para. 60. See also *Rukundo* Trial Judgment (n 274) para. 562.

[277] *Prosecutor v. Mitrović*, No. X-KR-05/24-1, First Instance Verdict, 4 February 2009 (hereafter *Mitrović* Trial Judgment), 107–08 (footnote omitted):

> The Accused Petar Mitrović is one of the principal perpetrators of one of the genocidal acts committed against the Srebrenica Bosniaks during the period between 10 and 19 July 1995. That act was consistent with a larger genocidal plan, and committed within the genocidal context of the Srebrenica area during 12 and 13 July 1995. The Accused was not the architect of the plan, nor was he a tactician or commander who had responsibility for its overall accomplishment. Rather, he was an instrument by which the plan was carried out. Without people willing to carry out the genocidal plan by commission of the kinds of acts prohibited in Article 171 [of the Bosnian Criminal Code], genocide could not be committed. He shall be criminally liable for commission of the criminal offense of genocide if he committed the referenced acts with the specific intent to destroy the protected group. Tribunals have in a number of cases determined beyond doubt that principal perpetrators possess the required genocidal intent by examining both the context in which they committed the underlying acts, including the existence of a genocidal plan and their knowledge of it, and by examining the acts themselves. The crime of genocide is indisputably not limited in application to those who organize, plan, or order the perpetration of genocide. In particular, the Panel notes the ICTR Trial Chamber's conclusion in Cyangugu that soldiers who perpetrated the massacre of Tutsi civilians committed those killings with genocidal intent, as well as the Trial Chamber's conclusion in *Ndinibahizi* that the participants in the attack against Tutsi civilians on Gitwa Hill committed genocide.

[278] See references *infra*, 11.7.2.7. 'Joint criminal enterprise' has been characterized as a mode of *commission* by the *ad hoc* Tribunals. See, e.g., *Vasiljević* Appeal Judgment (n 264) para. 95; *Ojdanić* Joint

notion of 'commission' has now been adopted before the ICC.[279] The line separating commission from other forms of participation is not always an easy one to draw.[280]

Criminal Enterprise Decision (n 54) para. 20; *Tadić* Appeal Judgment (n 221) paras 188 and 226; *Krnojelac* Appeal Judgment (n 235) para. 29.

[279] See, generally, *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 270) para. 27 (footnote omitted):

> As the Chamber has already held, the term 'committed' in article 58(1) or (7) of the Statute includes:
> (i)The commission *stricto sensu* of a crime by a person 'as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible';
> (ii) Any other forms of accessory, as opposed to principal, liability provided for in article 25 (3) (b) to (d) of the Statute;
> (iii) An attempt to commit any of the crimes provided for in articles 6 to 8 of the Statute;
> (iv) Direct and public incitement to commit genocide (the only preparatory act punishable under the Statute); and
> (v) The responsibility of commanders and other superiors under article 28 of the Statute.

[280] See, e.g., *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3323:

> Even if the Appeals Chamber were to overturn the Trial Chamber's findings that Kanyabashi's Speech was not inflammatory and did not substantially contribute to the subsequent killings, it is not convinced that Kanyabashi's approval of Kambanda's and Sindikubwabo's Speeches, his position of authority, and the contents of his speech are sufficient to qualify Kanyabashi's overall conduct as that of 'committing' genocide. The Appeals Chamber considers that, where it is not established that the accused was present at the scene of the crimes, conducted, supervised, directed, played a leading role, or otherwise fully exercised influence over the physical perpetrators, making a speech days, if not weeks, before the physical perpetration of killings cannot be deemed to constitute 'direct participation in the *actus reus*' of the killings. Nor can such circumstances compel the conclusion that the conduct of the individual who gave the speech was as much an integral part of the genocide as were the killings which it allegedly enabled. In the view of the Appeals Chamber, the notion of commission by playing an integral part in the crime is not as expansive as the Prosecution argues in the present case. Consequently, the Appeals Chamber finds it unnecessary to discuss the Prosecution's submissions concerning Kanyabashi's genocidal intent.

Rukundo Trial Judgment (n 274) para. 563 ('On the basis of the totality of the evidence presented, the Chamber finds that the *Gacumbitsi* threshold has been met in the present case. Rukundo participated from the outset until the completion of the crime: from the time when the soldiers, acknowledging his authority, showed him documents taken from St. Joseph's College, before abducting Madame Rudahunga, and following the blue pick-up which carried Madame Rudahunga away from the College, until he boasted about killing Madame Rudahunga and her two children, therefore claiming ownership of the acts. Rukundo's acts were as much an integral part of the criminal act as were the killing and the causing of serious bodily harm which they enabled. His acts amount to "committing" under Article 6(1) of the Statute.'). See also *Kalimanzira* Appeal Judgment (n 128) paras 219–220 (footnotes omitted):

> 219. [...] Bearing this in mind, the Appeals Chamber is not convinced that the Trial Chamber's conclusion that Kalimanzira's conduct was best characterized as aiding and abetting was unreasonable. The Trial Chamber did not find that he supervised or directed the attack at Kabuye hill. Instead, it concluded that he lured Tutsis to Kabuye hill and brought armed reinforcements.
>
> 220. In other cases, trial chambers have qualified bringing assailants to a killing site as aiding and abetting. In the circumstances of this case, the Appeals Chamber is not convinced that Kalimanzira's tacit approval of Sub-Prefect Ntawukulilyayo's call for Tutsis to go to Kabuye hill, and his leading assailants to Kabuye hill, are sufficient to require that the legal qualification of his overall conduct be elevated to 'committing'. Furthermore, the fact that the Trial Chamber found that Kalimanzira possessed genocidal intent, rather than simply knowledge of the principal perpetrators' *mens rea*, does not in itself compel the conclusion that the Trial Chamber erred in finding that aiding and abetting most accurately described Kalimanzira's conduct.

See also *Seromba* Appeal Judgment (n 60) paras 161 (indicating that, in considering whether the accused could be said to have committed the crime, it would consider whether through is actions he became a

At the *mens rea* level, liability for committing an act of genocide requires proof on the part of the perpetrator that he possessed the requisite genocidal intent.[281]

11.7.2.2 Planning

11.7.2.2.1 General elements

As a matter of customary law, liability may be incurred for planning a crime.[282] To be found criminally responsible for planning, an accused—either acting alone or with another—must have designed criminal conduct that is later carried out.[283] The planning must have been a factor substantially contributing to the commission of the crime,[284] but the prosecution need not establish that the crime would not have been committed but for the accused's plan.[285]

As far as *mens rea* is concerned, the planner must have intended the crime to be committed, or intended that his plan be executed in the awareness of the substantial likelihood that it would lead to the commission of the planned crime.[286]

11.7.2.2.2 Planning genocide

Absent clear jurisprudential guidance on that point, it is not entirely clear whether liability for planning genocide would require the planner to himself possess the *dolus specialis*. In light of the nature of this mode of liability, a strong case could be made

principal perpetrator of the crime itself 'by approving and embracing as his own the decision to commit the crime and thus should be convicted for committing genocide') and 164–182 (regarding the application of this criteria).

[281] See, e.g., *Prosecutor v. Pelemiš & Perić*, No. S 11 K 003379 09 Krl, Verdict, 31 October 2011 (hereafter *Pelemiš & Perić* Trial Judgment), para. 446 (footnote omitted) ('[T]he Court may find the person whose actions contributed to the perpetration of genocide guilty as a principal or direct perpetrator of genocide only if the Court is satisfied that the person had the intent to bring about the destruction of a group in whole or in part.'). See also *Prosecutor v. Stupar et al.*, No. X-KRŽ-05/24, Appellate Verdict, 9 September 2009 (hereafter *Stupar et al.* Appeal Judgment), para. 569; *Prosecutor v. Vuković & Tomić*, No. X-KR-06/180-2, Verdict, 2 July 2010 (hereafter *Vuković & Tomić* Trial Judgment), para. 580.

[282] *Mladić* Trial Judgment (n 24) para. 3564. See also *Kordić & Čerkez* Appeal Judgment (n 268) para. 26; *Nahimana et al.* Appeal Judgment (n 5) para. 479; *Prosecutor v. Milošević*, Case No. IT-98-29/1-A, Judgment, 12 November 2009 (*D. Milošević* Appeal Judgment), para. 268.

[283] See, e.g., *D. Milošević* Appeal Judgment (n 283) para. 268; *Kordić & Čerkez* Appeal Judgment (n 268) para. 26; *Karadžić* Trial Judgment (n 11) para. 571.

[284] *D. Milošević* Appeal Judgment (n 283) para. 268; *Kordić & Čerkez* Appeal Judgment (n 268) para. 26. See also *D. Milošević* Appeal Judgment (n 283) para. 270 and fn 793 (citing *Brđanin* Trial Judgment (n 2) paras 357–358 (emphasis added) ('Responsibility for [planning] a crime could [...] only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance. [...] Although the Accused espoused the Strategic Plan, it has not been established that he personally devised it. [...] the Trial Chamber finds the evidence before it insufficient to conclude that the Accused was involved in the immediate preparation of the concrete crimes. This requirement of specificity distinguishes 'planning' from other modes of liability. [...]')).

[285] See *Karadžić* Trial Judgment (n 11) para. 571; *Popović et al.* Trial Judgment (n 2) para. 1006; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgment, 26 February 2009 (hereafter *Milutinović et al.* Trial Judgment), para. 82.

[286] *Kordić & Čerkez* Appeal Judgment (n 268) paras 29 and 31; *Nahimana et al.* Appeal Judgment (n 5) para. 479; *D. Milošević* Appeal Judgment (n 283) para. 268; *Mladić* Trial Judgment (n 24) para. 3564; *Karadžić* Trial Judgment (n 11) para. 571. This is true regardless of whether the *mens rea* of the crime

that liability depends on the presence of the special intent. A similar approach has been adopted for 'ordering' and 'instigating' genocide.[287]

Planning genocide is to be distinguished from a conspiracy to commit genocide. First, planning is a mode of liability whereas conspiracy to commit genocide is an inchoate offence. This means that whereas the former requires the actual commission of an act of genocide, the latter does not. Second, to be criminalized, an act of planning must have substantially contributed to the commission of the crime. In contrast, conspiracy to commit genocide only requires proof of an agreement having been reached to commit that crime, without the need of any connection—causal or otherwise—to the commission of an act of genocide (see, *supra*, 11.3.4).

11.7.2.3 Ordering

11.7.2.3.1 General elements

'Ordering' has been recognized as a mode of liability that forms part of customary international law. It is also one that is expressly provided for in the statutory instruments of all international(ized) criminal tribunals with jurisdiction over genocide.[288] To be held criminally responsible for ordering the commission of a crime, an accused must have instructed another person to engage in a criminal act or an omission,[289] and such instruction must have resulted in the commission of a crime.[290] In such a case, the accused must have held a position of authority over the other person, but it need not have amounted to formal subordination and their relationship may even be temporary in nature.[291] However, there must be 'proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order'.[292]

is general or specific. See *Kordić & Čerkez* Appeal Judgment (n 268) para. 112 (citing *Blaškić* Appeal Judgment (n 246) para. 166); *Karadžić* Trial Judgment (n 11) fn 1822.

[287] See *infra*, respectively, 11.7.2.3 and 11.7.2.4.

[288] See ICTY Statute (n 1) art. 7(1); ICTR Statute (n 1) art. 6(1); ICC Statute (n 1) art. 25(3)(b). Regarding ICC jurisprudence pertaining to this mode of liability, see references, *infra*, in footnote 299.

[289] *Kordić & Čerkez* Appeal Judgment (n 268) para. 28; *Blaškić* Appeal Judgment (n 246) para. 42. Such instruction necessarily requires a positive action on the part of the instructor. *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, 30 November 2006 (hereafter *Galić* Appeal Judgment), para. 176; *Karadžić* Trial Judgment (n 11) para. 573; and (ICC) references, *infra*, in footnote 299.

[290] *Nahimana et al.* Appeal Judgment (n 5) para. 481; *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-T, Judgment, 27 March 2013 (hereafter *Stanišić & Župljanin* Trial Judgment), para. 98; Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, 12 June 2007 (hereafter *Martić* Trial Judgment), para. 441 (citing *Brdanin* Trial Judgment (n 2) para. 267); *Karadžić* Trial Judgment (n 11) para. 573. Under the ICC Statute, it seems enough that the order resulted in an attempt to commit a crime. See, again, (ICC) references, *infra*, in footntote 299.

[291] *Kordić & Čerkez* Appeal Judgment (n 268) para. 28; *Semanza* Appeal Judgment (n 29) para. 363; *Karadžić* Trial Judgment (n 11) para. 573.

[292] *Karadžić* Trial Judgment (n 11) para. 573; *Semanza* Appeal Judgment (n 29) para. 361 (citing *Kordić & Čerkez* Appeal Judgment (n 268) para. 28); *Galić* Appeal Judgment (n 290) para. 176; *Brdanin* Trial Judgment (n 2) para. 270 (finding that sufficient authority may be reasonably implied from the circumstances); *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment, 27 September 2007 (hereafter *Mrkšić et al.* Trial Judgment), para. 550; and (ICC) references, *infra*, in footnote 299.

Regarding the form in which the impugned order is given, it need not be in written or any particular form,[293] nor does it need to be transmitted directly to the physical perpetrator.[294] As with planning and instigating, it need not be shown that the crime would not have been perpetrated but for the accused's order.[295] It is sufficient to establish that the order must have had 'a direct and substantial effect on the commission of the illegal act'.[296]

As regards the required *mens rea*, the accused must have intended to order a crime, or must be aware of the substantial likelihood that a crime would be committed in the execution of the act or omission ordered.[297] The ICC has adopted a standard that is essential similar in nature: the accused must at least be aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order.[298]

11.7.2.3.2 Ordering genocide

The above principles are directly applicable to a case where an accused is charged with ordering the commission of genocide.[299] One outstanding issue, however, pertains to the degree of *mens rea* required to engage one's responsibility for ordering genocide, in particular, whether special genocidal intent is required or not. As noted earlier, and applying the general principles pertaining to this doctrine, less than actual

[293] *Kamuhanda* Appeal Judgment (n 246) para. 76 (citing *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001 (hereafter *Kordić & Čerkez* Trial Judgment), para. 388); *Stanišić & Župljanin* Trial Judgment (n 291) para. 98. The order's existence may also be proven by circumstantial evidence. *Mrkšić et al.* Trial Judgment (n 293) para. 550 (citing, *inter alia*, *Galić* Appeal Judgment (n 290) paras 170–71); *Karadžić* Trial Judgment (n 11) para. 573.

[294] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000 (hereafter *Blaškić* Trial Judgment), para. 282. See also *Tolimir* Trial Judgment (n 2) para. 905; *Popović et al.* Trial Judgment (n 2) para. 1012; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, 31 January 2005 (hereafter *Strugar* Trial Judgment), para. 331; *Brdanin* Trial Judgment (n 2) para. 270; *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003 (hereafter *Naletilić & Martinović* Trial Judgment), para. 61; *Kordić & Čerkez* Trial Judgment (n 294) para. 388; *Karadžić* Trial Judgment (n 11) para. 573.

[295] *Karadžić* Trial Judgment (n 11) para. 573; *Strugar* Trial Judgment (n 295) para. 332.

[296] *Kamuhanda* Appeal Judgment (n 246) para. 75. See also *Stanišić & Župljanin* Trial Judgment (n 291) para. 98; *Tolimir* Trial Judgment (n 2) para. 905; *Strugar* Trial Judgment (n 295) para. 332; *Karadžić* Trial Judgment (n 11) para. 573.

[297] *Kordić & Čerkez* Appeal Judgment (n 268) paras 29–30; *Blaškić* Appeal Judgment (n 246) paras 41–42; *Karadžić* Trial Judgment (n 11) para. 573.

[298] *Prosecutor v. Mudacumura*, (Decision on the Prosecutor's Application under Article 58) [2012] ICC-01/04-01/12-1-Red (hereafter *Mudacumura* Article 58 Decision), para. 63. See also more recently, *Ongwen* Decision on Confirmation of Charges (n 108) para. 42 and disposition; *Prosecutor v. Bemba*, (Judgment Pursuant to Article 74 of the Statute) [2016] ICC-01/05-01/13-1989-Red (hereafter *Bemba* Trial Judgment), para. 77; *Ntaganda* Decision on Confirmation of Charges (n 108) para. 145. See further, *Gbagbo* Decision on Confirmation of Charges (n 108) para. 244; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 159; *Al-Mahdi* Decision on Confirmation of Charges (n 108) para. 25.

[299] For an illustration, see *Kalimanzira* Appeal Judgment (n 128) para. 213 (footnotes omitted) ('The Appeals Chamber recalls that ordering requires that a person in a position of authority instruct another person to commit an offence. It is clear that the Trial Chamber found that Kalimanzira was in a position of authority. The Trial Chamber, however, made no findings that he instructed anyone at Kabuye hill to commit a crime. Instead, it follows from the Trial Judgment that Kalimanzira's role during his time at Kabuye hill involved "providing armed reinforcements." While it is possible that an order to attack could have been inferred from the surrounding circumstances, the Appeals Chamber is not satisfied that the Prosecution has demonstrated that this is the only reasonable inference from the evidence.'). See also *Semanza* Appeal Judgment (n 29) paras 355–364, in particular, 361 and 363; *Semanza* Trial Judgment

intent on the part of the accused would seem to be sufficient to fulfil its requirements. *A contrario*, one could argue that because of the very nature of the act in question (i.e., ordering or making someone else perform an act you intend to be carried out), a finding that the accused alleged to have ordered others to commit genocide should himself possessed the requisite *dolus specialis*.[300] This would appear to be a logical consequence of the nature of the act of ordering. That view appears to be supported in the case law. In her appeal, Pauline Nyiramasuhuko submitted that, in finding her guilty of genocide for ordering (genocidal) killings, the Trial Chamber had erred in its assessment of her *mens rea*.[301] In convicting her, the Trial Chamber determined that Nyiramasuhuko had acted with the intent to destroy the Tutsi group in whole or in part.[302] In addressing her appeal on that point, the Appeals Chamber noted that 'the relevant indictment pleads Nyiramasuhuko's genocidal intent [...] and that, in such circumstances, the facts by which such intent is to be established are matters of evidence that need not be pleaded', thereby suggesting that the *dolus specialis* was in fact the correct *mens rea* for that particular mode of participation in genocide.[303] The Appeals Chamber further found and concluded that the appellant failed to demonstrate that the Trial Chamber erred in its assessment of her *mens rea* with respect to her responsibility for ordering the crime of genocide.[304] This, again, suggests that the *dolus specialis* is a required element of liability for ordering genocide.

11.7.2.4 Instigating

11.7.2.4.1 General elements

Instigation is another mode of liability recognized by the *ad hoc* Tribunals as forming part of customary international law and which is expressly provided for under their

(n 235) paras 178, 196, 206, 382 and 426; *Nyiramasuhuko et al.* Appeal Judgment (n 31) paras 1891–1906; *Nyiramasuhuko et al.* Trial Judgment (n 151) para. 5867; *Ntawukulilyayo v. Prosecutor*, Case No. ICTR-05-82-A, Judgment, 11 December 2011 (hereafter *Ntawukulilyayo* Appeal Judgment), paras 179–207.

[300] See e.g. *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgment and Sentence, 3 August 2010 (hereafter *Ntawukulilyayo* Trial Judgment), paras 400–409, 416, 456–457 (finding that Ntawukulilyayo shared that genocidal intent). The accused's conviction for ordering genocide was quashed on appeal on the basis of inadequate notice of the charge. *Ntawukulilyayo* Appeal Judgment (n 300) paras 206–207.

[301] *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 973.

[302] The relevant findings of the Trial Chamber were as follows:

> Moving to the *mens rea* of genocide, it was clear that those staying at the [Butare Prefecture Office] were Tutsis and this fact was widely known throughout the *préfecture*. [...] Furthermore, there was a pattern of killing at the [prefectoral office] itself. There were pits dug which contained those killed at the [prefectoral office]. [...] In evaluating Nyiramasuhuko's *mens rea* at the [Butare Prefecture Office], the Chamber also considers Nyiramasuhuko's conduct at Nsabimana's swearing-in ceremony on 19 April 1994 [...], where she tacitly approved of the inflammatory speeches of President Sindikubwabo and Prime Minister Kambanda, and also her distribution of condoms in June 1994 [...], where she urged Hutus to rape Tutsi women. These actions can only be understood as intending to eliminate this group of persons. By attacking this group of wounded and sick Tutsi refugees, and in light of the evidence as a whole, the only reasonable conclusion is that [...] Nyiramasuhuko [...] possessed the intent to destroy, in whole or in substantial part, the Tutsi group.

Nyiramasuhuko et al. Trial Judgment (n 151) paras 5870–5871.

[303] *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 986.

[304] Ibid., para. 987.

statutory instruments.[305] In contrast, the Rome Statute of the ICC does not explicitly provide for this mode of liability although the notions of 'solicitation' and 'inducement' in Article 25(3) of the Statute may cover some of the same grounds.[306]

As a matter of customary law, criminal liability for instigation would be incurred when an accused prompts another person to commit an offence,[307] which is actually committed.[308] The prompting may be either express or implied;[309] it need not be direct or public,[310] and it may consist of either an act or an omission.[311] The accused's prompting must have been a factor 'substantially contributing to the conduct of another person committing the crime', but the Prosecution need not prove that the crime would not have been committed but for such prompting,[312] or that the accused had effective control or any other sort of authority over the perpetrator.[313]

There is no need to prove that the accused was present when the instigated crime was committed.[314] It is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[315]

[305] See ICTY Statute (n 1) art. 7(1); ICTR Statute (n 1) art. 6(1). See also ECCC Statute (n 1) art. 29; Statute of the Special Court for Sierra Leone, 16 January 2002 (hereafter SCSL Statute), art. 6(1).

[306] See also ICC Statute (n 1) arts 25(3)(c) ('or otherwise assists in its commission') and 25(3)(e) (providing that in respect of the crime of genocide, directly and publicly inciting others to commit genocide would come within the terms of the Statute). However, Article 25(3)(e) would seem to reflect the prohibition discussed above ('incitement to commit genocide') rather than instigating genocide. Schabas, *Commentary on the Rome Statute* (n 41) 430ff; Triffterer & Ambos, *Commentary on ICC Statute* 2016 (n 207) 1001ff.

[307] See, e.g., *Kordić & Čerkez* Appeal Judgment (n 268) para. 27; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001 (hereafter *Kvočka et al.* Trial Judgment), para. 252.

[308] See *Brdanin* Trial Judgment (n 2) para. 267 and para. 269 (citing, *inter alia*, *Blaškić* Trial Judgment (n 295) para. 280; *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, 5 December 2003 (hereafter *Galić* Trial Judgment), para. 168); *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgment, 30 June 2006 (hereafter *Orić* Trial Judgment), para. 269; *Karadžić* Trial Judgment (n 11) para. 572.

[309] *Tolimir* Trial Judgment (n 2) para. 902; *Brdanin* Trial Judgment (n 2) para. 269; *Blaškić* Trial Judgment (n 295) paras 280–81; *Karadžić* Trial Judgment (n 11) para. 572.

[310] *Akayesu* Appeal Judgment (n 170) paras 477–478 and 483; *Stanišić & Župljanin* Trial Judgment (n 291) para. 96; *Popović et al.* Trial Judgment (n 2) para. 1008.

[311] *Orić* Trial Judgment (n 309) para. 273 (citing *Blaškić* Trial Judgment (n 295) paras 270 and 280; *Kordić & Čerkez* Trial Judgment (n 294) para. 387; *Naletilić & Martinović* Trial Judgment (n 295) para. 60; *Brdanin* Trial Judgment (n 2) para. 269; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, 30 November 2005 (hereafter *Limaj et al.* Trial Judgment), para. 514; *Kamuhanda* Trial Judgment (n 246) para. 593); *Karadžić* Trial Judgment (n 11) para. 572.

[312] *Kordić & Čerkez* Appeal Judgment (n 268) para. 27; *Karadžić* Trial Judgment (n 11) para. 572.

[313] *Karadžić* Trial Judgment (n 11) para. 572; *Semanza* Appeal Judgment (n 29) para. 257; *Tolimir* Trial Judgment (n 2) para. 902; *Orić* Trial Judgment (n 309) para. 272 (holding that instigating does not presuppose any kind of superiority). See also *Brdanin* Trial Judgment (n 2) para. 359 (finding it immaterial whether the physical perpetrators were even subordinate to the instigator so long as a causal link between the instigation and the commission of a crime exists). Where a conviction is entered based on this mode of liablity, the circumstances relevant to establishing the instigating character of the acts of the accused cannot be *double-counted* as aggravating factors in sentencing. See, e.g, *Ndindabahizi* Appeal Judgment (n 5) paras 137–138.

[314] *Nahimana et al.* Appeal Judgment (n 5) para. 660; *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3327. See also *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-A, Judgment, 19 May 2010 (hereafter *Boškoski & Tarčulovski* Appeal Judgment), para. 125 and fn 347.

[315] *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3327. Regarding factors relevant to establishing the accused's substantial contribution to a crime of genocide, see *Nzabonimana* Appeal Judgment (n 31) paras 136–149, in particular, 144 (noting that that the Trial Chamber did not solely rely on Nzabonimana's influence to establish his substantial contribution to the attacks; but rather,

There is also no requirement of proof that the crime would not have been perpetrated without the involvement of the accused.[316] The instigating act of the accused instigation need only contribute, albeit substantially, to the crime of another person.[317] The individuals who were instigated need not necessarily be the same as those who committed the crimes for as long as it can be shown that the perpetrators ultimately acted as a result of the accused's instigation.[318] If, for instance, a superior instigates his immediate subordinates to commit a crime who, in turn, instigate their own subordinates to implement it, the initial instigator could be held responsible for this crime, all other conditions being met.

Regarding the applicable *mens rea*, the accused must have intended to instigate another person to commit a crime, or at a minimum, he must have been aware of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[319]

his influence was one of several factors that the Trial Chamber took into account), and 145 (footnote omitted):

> The Appeals Chamber will now examine alleged errors in relation to the other factors which the Trial Chamber relied upon to infer that Nzabonimana substantially contributed to the killings at the Nyabikenke commune office. Regarding the Trial Chamber's reference to the prior unsuccessful attack, the Appeals Chamber observes that the Trial Chamber was considering the temporal proximity between the unsuccessful attack on 13 April 1994, Nzabonimana's speech at the Cyayi centre on 14 April 1994, and the subsequent successful attack the night right after his speech. The Appeals Chamber finds it reasonable for the Trial Chamber to consider this sequence of events, among other factors, to infer Nzabonimana's substantial contribution to the attacks. Nzabonimana fails to demonstrate how the Trial Chamber erred in this regard.

[316] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) paras 657–665, and in particular 660 (footnote omitted) ('The Appeals Chamber recalls that, for a defendant to be convicted of instigation to commit a crime under Article 6(1) of the Statute, it must be established that the acts charged contributed substantially to the commission of the crime, but they need not be a *sine qua non* condition for its commission. The Appeals Chamber further recalls that, contrary to what the Appellant appears to contend, the accused does not need to be actually present when the instigated crime is committed.').

[317] See, e.g., *Nzabonimana* Appeal Judgment (n 31) para. 146 (footnotes omitted):

> The Appeals Chamber now turns to Nzabonimana's arguments on the population's behavioural change after his speech. The Appeals Chamber recalls the Trial Chamber's determination that prior to Nzabonimana's exhortations at the Cyayi centre, commune policemen and members of the population assisted in repelling attacks on the commune office. It then found that, following Nzabonimana's address at the Cyayi centre, commune police and members of the population successfully attacked the commune office with the only resistance coming from the refugees themselves. The Appeals Chamber detects no error in this regard. The Appeals Chamber is not persuaded how Nzabonimana's submission, that the population had been attacking Tutsis since 8 April 1994, undermines the Trial Chamber's findings on behavioural change before and after Nzabonimana's address. The Appeals Chamber is also not convinced that the Trial Chamber was specifically required to determine that assailants of the Night and Day Attacks heard what he said at the Cyayi centre. The Appeals Chamber recalls that the actus reus of 'instigating' is to prompt another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.

[318] Ibid.

[319] *Nahimana et al.* Appeal Judgment (n 5) para. 480; *Kordić & Čerkez* Appeal Judgment (n 268) paras 29 and 32; *Karadžić* Trial Judgment (n 11) para. 572; *Nchamihigo v. Prosecutor*, Case No. ICTR-2001-63-A, Judgment, 18 March 2010 (hereafter *Nchamihigo* Appeal Judgment), para. 61.

11.7.2.4.2 Instigating genocide

The principles stated above have been said to apply as a matter of customary international law to cases where the underlying crime said to have been instigated is genocide.[320] In such cases, the accused's prompting must therefore have been a factor substantially contributing to the conduct of another person committing genocide. This could take many forms. For instance, statements calling for the killings of members of a particular group or the distribution of weapons have been considered to come within the scope of this mode of liability.[321] Media broadcasts could also qualify as instigation if they can be shown to have substantially contributed to the commission of

[320] See, generally, *Nzabonimana* Appeal Judgment (n 31) paras 134–157; *Nchamihigo* Appeal Judgment (n 320) para. 61 (footnotes omitted) ('The Appeals Chamber recalls that the mens rea for instigating is established where the perpetrator acts with either direct intent to prompt another to commit a crime, or with awareness of the substantial likelihood that a crime will be committed in execution of that instigation. Furthermore, where the crime alleged is genocide, it must also be proven that the perpetrator acted with the specific intent to destroy a protected group as such in whole or in part.').

[321] See, e.g., *Ngirabatware* Appeal Judgment (n 151) para. 162 (footnotes omitted):

> The evidence considered by the Trial Chamber showed that during Ngirabatware's second visit to the Bruxelles roadblock, Ngirabatware addressed the Interahamwe manning the roadblock by telling them that they only pretended to work and accused Nyambwega of communicating with 'Inyenzi'. The evidence also showed that Ngirabatware told the Interahamwe that he delivered the weapons because he did not want to see any Tutsis in Busheke cellule. The Appeals Chamber recalls that the *actus reus* of 'instigating' implies prompting another person to commit an offence. The Trial Chamber noted that, immediately after Ngirabatware gave weapons to the Interahamwe at the Bruxelles roadblock, these Interahamwe attacked Nyambwega with a machete, and inflicted serious bodily injury by cutting his ear and leg. The Trial Chamber also referred to Witness ANAO's evidence that those manning the roadblocks were 'desirous of carrying out instructions' and people were killed at the roadblocks. In view of the scale of the crimes, the Trial Chamber was not required to identify each member of the Interahamwe who was prompted by Ngirabatware's inflammatory statements to commit killings or each individual victim of such crimes. The Appeals Chamber is satisfied that a reasonable trier of fact could have concluded that the only reasonable inference from the evidence was that Ngirabatware prompted the Interahamwe at the Bruxelles roadblock to attack and kill Tutsis.

See also *Karera v. Prosecutor*, Case No. ICTR-01-74-A, Judgment, 2 February 2009 (hereafter *Karera* Appeal Judgment), para. 317 (citing *Nahimana et al.* Appeal Judgment (n 5) para. 480; *Ndindabahizi* Appeal Judgment (n 5) para. 117; *Kordić & Čerkez* Appeal Judgment (n 268) para. 27). But see, *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3328 (footnotes omitted):

> The Trial Chamber found that Kanyabashi's Speech was not inflammatory and did not substantially contribute to the genocide in Butare Prefecture that followed the ceremony. The Trial Chamber did not further discuss Kanyabashi's alleged responsibility for instigating genocide in relation to his speech. The Appeals Chamber is not persuaded by the Prosecution's contention that Kanyabashi's conduct as found by the Trial Chamber satisfies the *actus reus* of instigating. As noted above, the Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches were inflammatory and constituted a call to the public to identify and kill Tutsis and their accomplices, and that Kanyabashi gave a speech following those of Kambanda and Sindikubwabo, in which he supported their message and committed to execute their directives and instructions. The Appeals Chamber considers that Kanyabashi's commitment to execute the directives and instructions announced by Kambanda and Sindikubwabo to identify and kill Tutsis does not necessarily amount to prompting the attendees or the people in Butare Prefecture to kill Tutsis. In the absence of any evidence discussed by the Trial Chamber or pointed out by the Prosecution that Kanyabashi's Speech was understood as instigating the killing of Tutsis or had any impact on the conduct of those who subsequently committed killings, the Appeals Chamber finds that a reasonable trier of fact could have concluded that Kanyabashi did not instigate genocide through his speech.

acts of genocide.[322] In such a case, it would thus have to be established that the accused played an active role in broadcasts instigating the killing of members of the targeted group, or used the media in question for such purpose.[323] The sole fact that an accused would express satisfaction over broadcasts having allegedly instigated the killing of Tutsi would in principle not be sufficient to support a finding that he instigated such crime; it must also be established that through acts of omission he personally and substantially contributed to such crimes.[324]

[322] See, e.g., *Ndindabahizi* Appeal Judgment (n 5) para. 502 (footnote omitted) ('The Appeals Chamber recalls that it suffices for Kangura publications, RTLM broadcasts and CDR activities to have substantially contributed to the commission of acts of genocide in order to find that those publications, broadcasts and activities instigated the commission of acts ofgenocide; they need not have been a pre-condition for those acts.'). See also *Nahimana et al.* Appeal Judgment (n 5) para. 505 (footnote omitted):

> The Appeals Chamber also notes the last sentence of paragraph 949 of the Judgment, which appears to conclude that the causal link between the acts of genocide and RTLM broadcasts had been established only for the killings of certain Tutsi announced on the airwaves, or whose movements had been manipulated. Nevertheless, the paragraphs which follow paragraph 949 conclude more generally that RTLM broadcasts contributed to the massacre of Tutsi civilians. In this regard, it should be noted that the Trial Chamber finds at paragraph 953 of the Judgment that 'the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM ... before and after 6 April 1994' and subsequently finds Appellants Nahimana and Barayagwiza responsible for the 'killing of Tutsi civilians'. Thus it appears that the conclusion contained in the paragraphs following paragraph 949 is not entirely consistent with that provided in the last sentence of that paragaph. In these circumstances, the Appeals Chamber believes that it should be presumed that the requisite causal link between RTLM broadcasts and the acts of genocide was established only for the cases described in the last sentence of paragraph 949 of the Judgment. Thus, contrary to what Appellant Nahimana avers, the Appeals Chamber believes that the Trial chamber did indeed identified the RTLM broadcasts, and the acts of genocide to which those broadcasts contributed.

Ibid., paras 506–521 (regarding the relevant factual findings), and 513:

> In the opinion of the Appeals Chamber, evidence of a link between the broadcasts aired on RTLM before 6 April 1994 and the acts of genocide committed against the individuals so named seems, at the very least, tenuous, especially when the date of the broadcast in question is not provided or when the period between the broadcast denouncing a person and the killing of that person is relatively long. This applies notably to the killing of Charles Shamukigar and Daniel Kabaka. Thus the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it. Moreover, even though RTLM was widely listened to in Rwanda, there is no evidence that the unidentified persons responsible for killing Charles Shamukiga and Daniel Kabaka heard the RTLM broadcasts denouncing them. The Appeals Chamber is therefore of the opinion that it has not been sufficiently demonstrated that RTLM broadcasts before 6 April 1994 substantially contributed to the killing of these individuals. Therefore, the Trial Chamber committed an error which partially invalidates the verdict in finding in paragraph 949 of the Judgment that RTLM broadcasts prior to 6 April 1994 substantially contributed to the commission of acts of genocide.

Ibid., para. 515 ('The Appeals Chamber notes that the Trial Chamber found that in several instances after 6 April 1994 the naming of persons of Tutsi origin on the airwaves contributed to the commission of acts of genocide.'). For illustration, see also, ibid., paras 516–519, 589.

[323] See, e.g., ibid., paras 596–599.

[324] Ibid., para. 593 ('The Appeals Chamber agrees, however, that the sole fact that the Appellant expressed his satisfaction over broadcasts having allegedly instigated the killing of Tutsi could not support the finding that he was responsible under Article 6(1) of the Statute. This fact cannot in-itself represent an act or omission capable of constituting the *actus reus* of one of the modes of liability provided under Article 6(1) of the Statute.') and para. 595 ('[F]or the Appellant to be convicted under Article 6(1) of the Statute, it must have been established that specific acts or omissions of the Appellant themseives constituted an instigation to the commission of genocide. An alternative would be that specific acts or omissions of the Appellant may have substantially contributed to instigation by others.').

Passive forms of encouragement if they constitute a clear and substantial contribution to the commission of genocide and are intended to instigate such crimes could also meet this requirement. For instance, the presence of a superior or person of authority during the commission of a crime could be sufficient if it is shown to have encouraged or instigated others to commit such crimes.[325] Similarly, the supervision of a roadblock where killings occurs might be sufficient to conclude that there was a substantial connection between the acts of the accused and the crimes.[326] In such a case, the position of authority of the accused and his attitude in the face of crimes would constitute critical factors in that assessment.

The *mens rea* for instigating is established where the perpetrator acts with either direct intent to prompt another to commit a crime, or with awareness of the substantial likelihood that a crime will be committed in execution of that instigation.[327] Where the crime alleged is genocide, it must also be proven that the instigator acted with the specific intent to destroy a protected group as such in whole or in part.[328]

[325] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999 (hereafter *Aleksovski* Trial Judgment), para. 65; *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgment, 3 July 2008 (hereafter *Orić* Appeal Judgment), para. 42; *Brdanin* Appeal Judgment (n 11) para. 273; *Blaškić* Trial Judgment (n 295), para. 284; *Kayishema & Ruzindana* Appeal Judgment (n 8), paras 201–202; *Kayishema & Ruzindana* Trial Judgment (n 2) paras 200–202; *Prosecutor v. Bagilishema* Trial Judgment (n 24) paras 34 and 386; *Akayesu* Trial Judgment (n 11) para. 693 and, ibid., Separate and Dissenting Opinion of Judge Mehmet Güney, 7 June 2001 (hereafter *Bagilishema* Trial Judgment, Güney Dissent), paras 17–25 and authorities cited therein; *Strugar* Appeal Judgment (n 105) para. 301; United Nations War Crimes Commission, 'The Abbaye Ardenne Case. Trial of S.S. Brigadefuhrer Kurt Meyer: Outline of the Proceedings' in *Law Reports of Trials of War Criminals*, vol. 4 (HM Stationery Office 1947) (hereafter UNWCC, 'Abbaye Ardenne Case'). Where an accused is charged for providing assistance by reason of his presence in or near the scene of the crime, he must be shown to have known that his presence would indeed encourage or give moral support to the principal(s). See, e.g., *Kayishema & Ruzindana* Trial Judgment (n 2) para. 201; *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment, 22 January 2004 (hereafter *Kamuhada* Trial Judgment), para. 600.

[326] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) para. 663 (footnotes omitted):

> The Appeals Chamber notes that the Trial Chamber did not expressly find that the *Impuzamugambi* at the roadblocks supervised by Appellant Barayagwiza in Kigali actually killed large numbers of Tutsi. However, it is of the opinion that such a finding was implicit and it could reasonably be based on the testimony of Witness ABC. This witness specifically described a number of murders of Tutsi by the *Impuzamugambi* at roadblocks supervised by the Appellant, and it has not been shown that his testimony lacked probative value. Consequently, the Appeals Chamber is of the view that the Trial Chamber could reasonably find that, because of his involvement in the supervision of roadblocks erected during the genocide, and of the instructions given to the *Impuzamugambi* manning those roadblocks to stop and kill the Tutsi who came there – instructions that were in fact followed – the Appellant instigated the commission of genocide. The Appeals Chamber adds *obiter* that it would in all probability have been open to the Trial Chamber to rely also on other modes of responsibility, such as planning, ordering or aiding and abetting. This ground of appeal is dismissed.

[327] See, *supra*, 11.7.2.4.1. See also *Nchamihigo* Appeal Judgment (n 320) para. 61; *Kordić & Čerkez* Appeal Judgment (n 268) paras 29 and 32.

[328] *Nchamihigo* Appeal Judgment (n 320) para. 61; *Seromba* Appeal Judgment (n 60) para. 175; *Nzabonimana* Appeal Judgment (n 31) paras 150–156, and in particular 153 (footnote omitted) ('[T]he *mens rea* for instigating is established where the perpetrator acts with either direct intent to prompt another to commit a crime, or with awareness of the substantial likelihood that a crime will be committed in execution of that instigation.') and 154; *Nzabonimana* Trial Judgment (n 63) paras 1717 and 1759–1761; *Nchamihigo* Appeal Judgment (n 320) para. 61; *Nahimana et al.* Appeal Judgment (n 5) para. 480; *Kordić & Čerkez* Appeal Judgment (n 268) paras 29 and 32; *Ngirabatware* Appeal Judgment (n 151) paras 166 (footnotes omitted) ('The Appeals Chamber recalls that the *mens rea* for instigating is established where the perpetrator acts with either direct intent to prompt another to commit a crime, or with awareness of the substantial likelihood that a crime will be committed in execution of that instigation. Furthermore, where the crime alleged is genocide, it must also be proven that the perpetrator acted with the specific

Understood as a form of encouragement, by words or deeds, instigation may overlap in some cases with liability for aiding and abetting.[329] However, unlike instigation, aiding and abetting does not require proof of genocidal intent on the part of the accused,[330] and the overlap of *actus reus* is not entirely complete as aiding and abetting can cover many categories of assistance, including many that carry no instigatory element. As discussed earlier, instigating genocide may also have much in common, factually, with the (inchoate) crime of direct and public incitement to commit genocide.[331]

11.7.2.5 Aiding and abetting

11.7.2.5.1 General elements

11.7.2.5.1.1 Customary law status

Aiding and abetting is a form of accomplice liability recognized under customary international law.[332] It is expressly provided for in the Statutes of international criminal tribunals and has figured prominently in their jurisprudence.[333]

11.7.2.5.1.2 Actus reus

Aiding and abetting is a form of liability in which the accused contributes to the perpetration of a crime that is committed by another person.[334] That contribution may take various forms and liability may be incurred for assisting, encouraging, or lending moral support to the commission of a crime where this support has a substantial effect on the perpetration of the crime.[335] Aiding and abetting by omission could also be

intent to destroy a protected group as such in whole or in part.') and 168 (regarding the factual findings of the Appeals Chamber on that point).

[329] See, e.g., *Ngirabatware* Trial Judgment (n 113) paras 1335–1341 (regarding the making of inciting statements and distribution of weapons used to kill).

[330] See *infra*, 11.7.5.2.

[331] See *supra*, 11.4.3.2. See also *Stakić* Trial Judgment (n 2) para. 503 (expressing the view that where both have been charged in relation to the same underlying conduct, the direct and public incitement to commit genocide punishable under Article 4(3)(c) of the ICTY Statute would take priority as *lex specialis*).

[332] See, generally, Mettraux, *Ad Hoc Tribunals* (n 18) 284ff.

[333] ICTY Statute (n 1) art. 7(1); ICTR Statute (n 1) art. 6(1); ECCC Statute (n 1) art. 29; ICC Statute (n 1) art. 25(3)(c); East Timor Serious Crimes Panels Statute (n 1) s 14.3(c); SCSL Statute (n 306) art. 6(1); Assembly of Republic of Kosovo, Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 (hereafter KSC Statute), art. 16(1)(a); African Union, Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 2014 (hereafter *Malabo* Protocol), art. 28N(ii).

[334] *Karadžić* Trial Judgment (n 11) para. 874; *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgment, 28 November 2006 (hereafter *Simić* Appeal Judgment), para. 85. This other person may be either the person who carries out the *actus reus* of the crime with which the accused is charged or a participant in a JCE. See *Vasiljević* Appeal Judgment (n 264) para. 102(i). See also *Popović et al.* Trial Judgment (n 2) para. 1015.

[335] *Mladić* Trial Judgment (n 24) para. 3567. See also *Tadić* Appeal Judgment (n 221) para. 229; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001 (hereafter *Čelebići* Appeal Judgment), para. 352; *Vasiljević* Appeal Judgment (n 264) para. 102; *Blaškić* Appeal Judgment (n 246) paras 45–46 and 48; *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005 (hereafter *Kvocka et al.* Appeal Judgment), para. 89; *Simić* Appeal Judgment (n 335) para. 85; *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Nahimana et al.* Appeal Judgment (n 5) para. 482; *Orić* Appeal Judgment (n 326), para. 43; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) paras 81, 146 and 159; *Kalimanzira* Appeal Judgment (n 128) paras 74 and 86; *Karadžić* Trial Judgment (n 11) para. 575.

established and would require that the accused had the means to fulfil his or her duty to act and failed to do so.[336] The act of assistance could occur before, during, or after the commission of the principal crime.[337] The location at which the *actus reus* takes place may be removed from the location of the principal crime.[338] In all cases, the prosecution must establish that the crime for which it seeks to make the accused responsible in fact occurred.[339] That is because aiding and abetting is a secondary or auxiliary sort of responsibility.

Whichever form the support or assistance takes, the actions of the accused must be shown to have a substantial effect upon the perpetration of the crime.[340] Whether an act or omission had a substantial effect on the commission of a crime is a fact-based inquiry.[341] This could be the case even when the accused provides the said assistance in a location remote from the scene of the crime.[342] This also means that it is unnecessary to establish that the crime would not have been committed without the contribution of the aider and abettor.[343] Nor does the prosecution have to prove the existence of a plan or agreement between the aider and abettor and the perpetrator; the latter may not even know of the aider and abettor's contribution.[344] After some hesitation and contradiction in the jurisprudence, it has been accepted that 'specific direction'

[336] *Brđanin* Appeal Judgment (n 11) para. 274; *Orić* Appeal Judgment (n 326) para. 43; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) paras 49, 82 and 154; *Mladić* Trial Judgment (n 24) para. 3567.

[337] *Mladić* Trial Judgment (n 24) para. 3567 (footnote omitted) ('Aiding and abetting may occur before, during, or after the commission of the principal crime.'); *Blaškić* Appeal Judgment (n 246) para. 48 ('[T]he *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated.'); *Simić* Appeal Judgment (n 335) para. 85; *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Nahimana et al.* Appeal Judgment (n 5) para. 482; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) para. 81.

[338] *Blaškić* Appeal Judgment (n 246) para. 48.

[339] *Karadžić* Trial Judgment (n 11) para. 574; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000 (hereafter *Aleksovski* Appeal Judgment), para. 165.

[340] *Karadžić* Trial Judgment (n 11) para. 575; *Aleksovski* Appeal Judgment (n 340) paras 162, 164 (confirming the *Aleksovski* Trial Chamber's reliance on the *Furundžija* Trial Judgment (n 247) paras 233–235). See also *Krstić* Trial Judgment (n 2) para. 601 (citing *Aleksovski* Appeal Judgment (n 340) paras 162–164) ('"[A]iding and abetting" means rendering a substantial contribution to the commission of a crime.'); *Prosecutor v. Perišić*, Case No. IT-04-81-T, Judgment, 6 September 2011 (hereafter *Perišić* Trial Judgment), para. 126; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Public Judgment with Confidential Annex, 23 February 2011 (hereafter *Đorđević* Trial Judgment), paras 1873–1874; *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-T, Judgment, 20 July 2009 (hereafter *Lukić & Lukić* Trial Judgment), para. 901; *Milutinović et al.* Trial Judgment (n 286) para. 89; *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, 10 July 2008 (hereafter *Boškoski & Tarčulovski* Trial Judgment), paras 401–402; *Mrkšić et al.* Trial Judgment (n 293) paras 551–552; *Limaj et al.* Trial Judgment (n 312) paras 516–517; *Blagojević & Jokić* Trial Judgment (n 2) para. 726; *Galić* Trial Judgment (n 309) paras 168–169; *Naletilić & Martinović* Trial Judgment (n 295) para. 63; *Kvočka et al.* Trial Judgment (n 308) paras 243 and 253; *Mladić* Trial Judgment (n 24) para. 3567.

[341] *Mladić* Trial Judgment (n 24) para. 3567; *Blagojević & Jokić* Appeal Judgment (n 27) para. 134; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) para. 200; *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32-1-A, Judgment, 4 December 2012 (hereafter *Lukić & Lukić* Appeal Judgment), para. 438; *Popović et al.* Appeal Judgment (n 78) para. 1741; *Karadžić* Trial Judgment (n 11) para. 576.

[342] *Mrkšić & Šljivančanin* Appeal Judgment (n 11) para. 81; *Blaškić* Appeal Judgment (n 246) para. 48; *Karadžić* Trial Judgment (n 11) para. 576.

[343] *Karadžić* Trial Judgment (n 11) para. 576; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) para. 81 (citing *Blaškić* Appeal Judgment (n 246) para. 48); *Brđanin* Appeal Judgment (n 11) para. 348; *Simić* Appeal Judgment (n 335) para. 85.

[344] *Brđanin* Appeal Judgment (n 11) para. 263 (citing, *inter alia*, *Tadić* Appeal Judgment (n 221) para. 229(ii)); *Krnojelac* Appeal Judgment (n 235) para. 33; *Karadžić* Trial Judgment (n 11) para. 576.

on the part of the accused to commit a particular crime is not an element of aiding and abetting responsibility under customary international law.[345] It would, therefore, appear that there is no requirement of a showing that the acts of the accused were specifically directed to assist, encourage, or lend moral support to the commission of the crimes.[346] Nor is it necessary to prove that the accused had any form of authority over the person whom he assisted.[347]

11.7.2.5.1.3 Specific direction?

There has been some controversy in the jurisprudence of the United Nations war crimes tribunals as regards the question of whether liability for aiding and abetting requires proof of 'specific direction' on the part of the accused or not. In its earliest iteration, the *Tadić* Appeals Chamber had hinted (though not entirely clearly) that this might be the case.[348] Subsequent cases offered different views of the matter, with some of them seemingly reiterating the requirement and others ignoring it.[349] The requirement appeared again in the Judgment of the Appeals Chamber in *Perišić*. In that case, a majority of the Chamber—with strong dissenting opinions on that point—suggested that assistance had to be 'specifically', rather than 'in some way', directed towards the

[345] See, *infra*, references in fn 351ff. See also *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgment, 23 January 2014 (hereafter *Šainović et al.* Appeal Judgment), paras 1649 and 1651; *Karadžić* Trial Judgment (n 11) para. 576.

[346] *Mladić* Trial Judgment (n 24) para. 3567 (footnote omitted) ('When making this assessment, the Trial Chamber does not have to find that the acts carried out by the aider and abettor are specifically directed to assist, encourage, or lend moral support to the perpetration of that crime.'); *Karadžić* Trial Judgment (n 11) para. 576 ('Nor must the Prosecution prove the existence of a plan or agreement between the aider and abettor and the perpetrator; the latter may not even know of the aider and abettor's contribution. Finally, specific direction is not an element of aiding and abetting responsibility under customary international law. This means that there is no requirement of a showing that the acts of the Accused were specifically directed to assist, encourage, or lend moral support to the commission of the crimes.'). See also *Šainović et al.* Appeal Judgment (n 346) paras 1649–1650; *Popović et al.* Appeal Judgment (n 78) para. 1758; *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-A, Judgment, 9 December 2015 (hereafter *Stanišić & Simatović* Appeal Judgment), paras 104–106.

[347] See, e.g., *Nahimana et al.* Appeal Judgment (n 5) para. 672 (footnote omitted) ('[I]n order to convict a defendant of aiding and abetting another in the commission of a crime, it is unnecessary to prove that he had authority over that other person; it is sufficient to prove that the defendant's acts or omissions substantially contributed to the commission of the crime by the principal perpetrator.').

[348] *Tadić* Appeal Judgment (n 221) para. 229 (emphasis added) ('The aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.').

[349] See, generally, Mettraux, *Ad Hoc Tribunals* (n 18) 284ff (and references cited therein). See also *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005 (hereafter *Kvočka et al.* Appeal Judgment), para. 89; *Blaškić* Appeal Judgment (n 246) para. 45; *Vasiljević* Appeal Judgment (n 264) para. 102; *Krnojelac* Appeal Judgment (n 235) para. 33; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgment, 23 October 2001) (hereafter *Kupreškić et al.* Appeal Judgment), para. 254; *Aleksovski* Appeal Judgment (n 340) para. 163; *Kalimanzira* Appeal Judgment (n 31) para. 74; *Muvunyi* Appeal Judgment (n 23) para. 79; *Seromba* Appeal Judgment (n 60) para. 139; *Nahimana et al.* Appeal Judgment (n 5) para. 482; *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, Judgment, 21 May 2007 (hereafter *Muhimana* Appeal Judgment), para. 189; *Ntagerura et al.* Appeal Judgment (n 60) para. 370; *Ntakirutimana et al.* Appeal Judgment (n 5) para. 530. Other decisions made no reference to such an elements or seemingly excluded it. See *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, 28 February 2013 (hereafter *Perišić* Appeal Judgment), paras 29–31 (and references cited therein).

commission of relevant crimes.[350] On the facts of the case, which pertained mainly to the provision of weapons and logistics to the perpetrators of crimes, the Appeals Chamber found that this had not been established in relation to General *Perišić* and it acquitted him for that reason.[351] The matter was subsequently revisited. First, the *Taylor* Appeals Chamber of the SCSL reviewed relevant authorities, including the *Perišić* Appeal Judgment, and declined to adopt a definition of aiding and abetting that required proof of 'specific direction'.[352] The issue came up again before the Appeals Chamber of the ICTY, albeit in a different composition, in the *Šainović* appeal. In that case, the ICTY Appeals Chamber changed its view or, as the case may be, reverted to an earlier position, and held that 'specific direction' is not an element of aiding and abetting liability under customary international law.[353] That view was upheld in subsequent appeal judgments of that tribunal.[354] The exact state of the law on that particular point is therefore somewhat uncertain.

11.7.2.5.1.4 Mens rea

The requisite mental element for aiding and abetting is 'knowledge that the acts performed by the aider and abettor assist the commission of a specific crime'.[355] The aider and abettor must be aware of the essential (but not specific or detailed) elements of the crime ultimately committed,[356] including the perpetrators' state of mind and any relevant specific intent.[357] If an accused is aware that one or more crimes would probably

[350] *Perišić* Appeal Judgment (n 350) paras 17–72, in particular, 36. [351] Ibid., paras 41–44.

[352] *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013 (hereafter *Taylor* Appeal Judgment), paras 466–481.

[353] *Šainović et al.* Appeal Judgment (n 346) paras 1626–1650, and in particular 1649.

[354] See, e.g., *Popović et al.* Appeal Judgment (n 78) paras 1758 (finding that 'specific direction' is not an element of aiding and abetting liability under customary international law), and 1764. Pursuant to that understanding, there would be no need to show that the acts of the accused were *specifically directed* to assist, encourage, or lend moral support to the commission of the crimes. *Mladić* Trial Judgment (n 24) para. 3567 (footnote omitted) ('When making this assessment, the Trial Chamber does not have to find that the acts carried out by the aider and abettor are specifically directed to assist, encourage, or lend moral support to the perpetration of that crime.'); *Karadžić* Trial Judgment (n 11) para. 576; *Šainović et al.* Appeal Judgment (n 346) paras 1649–1650; *Popović et al.* Appeal Judgment (n 78) 1758. Nor would it be necessary to prove that the accused had any form of authority over the person whom he assisted. See, e.g., *Nahimana et al.* Appeal Judgment (n 5) para. 672 (footnote omitted):

> [I]n order to convict a defendant of aiding and abetting another in the commission of a crime, it is unnecessary to prove that he had authority over that other person; it is sufficient to prove that the defendant's acts or omissions substantially contributed to the commission of the crime by the principal perpetrator.

[355] *Karadžić* Trial Judgment (n 11) para. 577; *Tadić* Appeal Judgment (n 221) para. 229(iv). See also *Lukić & Lukić* Appeal Judgment (n 342) para. 428; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) paras 49 and 159; *Orić* Appeal Judgment (n 326) para. 43; *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Brdanin* Appeal Judgment (n 11) para. 484; *Simić* Appeal Judgment (n 335) para. 86; *Blaškić* Appeal Judgment (n 246) paras 45 and 49; *Vasiljević* Appeal Judgment (n 264) para. 102; *Šainović et al.* Appeal Judgment (n 346) para. 1649. This knowledge need not have been explicitly expressed, but may be inferred from all relevant circumstances. *Tolimir* Trial Judgment (n 2) para. 911; *Đorđević* Trial Judgment (n 341) para. 1876; *Milutinović et al.* Trial Judgment (n 286) para. 94; *Strugar* Trial Judgment (n 295) para. 350; *Mladić* Trial Judgment (n 24) para. 3567.

[356] *Mrkšić & Šljivančanin* Appeal Judgment (n 11) paras 49 and 159; *Orić* Appeal Judgment (n 326) para. 43; *Brdanin* Appeal Judgment (n 11) paras 484 and 487; *Karadžić* Trial Judgment (n 11) para. 577.

[357] *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Krstić* Appeal Judgment (n 5) para. 140; *Vasiljević* Appeal Judgment (n 264) para. 142; *Krnojelac* Appeal Judgment (n 235) para. 52; *Karadžić* Trial Judgment (n 11) para. 577; *Mladić* Trial Judgment (n 24) para. 3567 (footnote omitted) ('The aider and

be committed, and one of these crimes is in fact committed, he is deemed to have intended the facilitation of the commission of that crime and is guilty as an aider and abettor.[358] He need *not* share that specific intent where such intent is an element of the offence committed.[359] An accused may, therefore, be convicted for aiding and abetting a crime, including one which requires specific intent, even where the specific individuals who committed the crime have not been tried or identified.[360]

11.7.2.5.1.5 ICC's Article 25(3)(c)

The ICC Statute appears to have tracked existing customary law for the most part. Article 25(3)(c) recognizes as one of the applicable modes of liability acts done '[f]or the purpose of facilitating the commission of such a crime, [which] aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.[361] This would appear to cover much of the same factual grounds as is understood to come within the customary law notion of aiding and abetting.[362] The use of the phrase 'for the purpose of' suggests, however, that mere knowledge of the fact that the conduct provides assistance to the commission might not be enough if not accompanied by proof that the assistance was provided *for that purpose*. Under that definition, the notion of 'facilitation' under Article 25(3)(c) of the Statute would in fact come quite close to the 'specific direction' standard discussed earlier.[363]

11.7.2.5.2 Aiding and abetting genocide

11.7.2.5.2.1 General conditions

The Genocide Convention does not specifically provide for the notion of aiding and abetting genocide. It was understood, however, that this notion would be subsumed in the broader notion of complicity.[364] The principles and requirements laid out above

abettor does not, however, need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed.').

[358] *Karadžić* Trial Judgment (n 11) para. 577; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) para. 159 (citing *Simić* Appeal Judgment (n 335) para. 86; *Blaškić* Appeal Judgment (n 246) para. 50); *Mladić* Trial Judgment (n 24) para. 3567 (footnotes omitted) ('The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind. This includes the specific intent of the principal perpetrator, if the crime requires such intent.').

[359] *Simić* Appeal Judgment (n 335) para. 86 (citing *Krnojelac* Appeal Judgment (n 235) para. 52; *Aleksovski* Appeal Judgment (n 340) para. 162); *Karadžić* Trial Judgment (n 11) para. 577; *Mladić* Trial Judgment (n 24) para. 3567.

[360] *Karadžić* Trial Judgment (n 11) para. 577. See also *Brdanin* Appeal Judgment (n 11) para. 355 (approving the Trial Chamber's identification of the perpetrators as 'members of the "Bosnian Serb forces"'); *Krstić* Appeal Judgment (n 5) para. 143.

[361] Triffterer & Ambos, *Commentary on ICC Statute* 2016 (n 207), 1001.

[362] *Bemba* Trial Judgment (n 299) paras 84–98. See also, *Ongwen* Decision on Confirmation of Charges (n 108) para. 43; *Al-Mahdi* Decision on Confirmation of Charges (n 108) para. 26; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 167.

[363] See Triffterer & Ambos, *Commentary on ICC Statute* 2016 (n 207) 1009–1010 and fn 27 (noting that this phrase introduces 'a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of Article 30 [of the ICC Statute]' and pointing out that this element only refers to the act of assistance not to the underlying crime).

[364] *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent (n 267) paras 59–75. See also Robinson, *Commentary on the Genocide Convention* (n 4) 69 (pointing out that the term 'complicity' was taken

apply to cases where the accused, through acts or omission, aided and abetted the commission of an act of genocide.[365] Aiding and abetting genocide thus refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide by the principal offender.[366]

As an auxiliary sort of responsibility, the possibility of liability for aiding and abetting genocide requires, in the first place, the commission of an act genocide.[367] This does not mean, however, that aiding and abetting could not occur prior to the commission of the act of genocide, as indeed it could.[368] It simply implies that customary law does not criminalize conduct as aiding and abetting genocide unless an act of genocide is in fact committed that may be connected to the act of assistance forming the basis of the charges.

11.7.2.5.2.2 Form of contribution

Aiding and abetting genocide may take various forms. The provision of physical, military, or logistical assistance could thus qualify. Threats or encouragement to commit such crimes or acts of denunciation of victims could all constitute aiding and abetting genocide. In *Hategekimana*, it was determined that the accused's assistance to the commission of genocide consisted of providing assistance to the assailants, in the form of armed military reinforcements, coupled with his presence and orders given which

over from the Ad Hoc Committee's draft, 'in which it was understood to refer to accessorship before and after the act, and to aiding and abetting in the commission of any of the crimes enumerated in the Convention'); UN Doc. E/794 (n 46) 21.

[365] See, e.g., *Nyiramasuhuko et al.* Appeal Judgment (n 31) para. 3332 (footnotes omitted):

> The Appeals Chamber recalls that the actus reus of aiding and abetting 'consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.' It is also well-established 'that proof of a causal relationship, in the sense of a *conditio sine qua non*, between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition to the commission of the crime, is not required' as long as 'the support of the aider and abettor has a substantial effect upon the perpetration of the crime.' Whether a particular contribution qualifies as 'substantial' is a fact-based inquiry. Moreover, the actus reus may occur before, during, or after the principal crime has been perpetrated and the location at which the *actus reus* takes place may be removed from the location of the principal crime. The Appeals Chamber further recalls that it is not necessary for the principal perpetrator to be aware of the aider and abettor's contribution.

Seromba Appeal Judgment (n 60) para. 44; *Nahimana et al.* Appeal Judgment (n 5) para. 482; *Ntagerura et al.* Appeal Judgment (n 60) para. 370; *Ntakirutimana* Appeal Judgment (n 5) para. 530; *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Vasiljević* Appeal Judgment (n 264) para. 102; *Blaškić* Appeal Judgment (n 246) para. 45; *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent (n 267) paras 59–75. See, however, *contra*, *Milošević* Rule 98*bis* Decision (n 252) paras 294–299 (suggesting that there might be no difference between the elements of aiding and abetting genocide and complicity to genocide).

[366] *Krstić* Appeal Judgment (n 5) para. 14.

[367] See, e.g., *Pelemiš & Perić* Trial Judgment (n 282) para. 77 (footnote omitted) ('[T]his Verdict finds the Accused guilty of aiding and abetting in genocide and that "criminal liability for aiding [and abetting] cannot exist if the criminal offence with which the accused is charged as an aider [or abettor] has not been committed".') (citing *Aleksovski* Appeal Judgment (n 340) para. 165 (noting that where a charge of aiding and abetting has been brought, the Prosecution must establish the acts of the principal or principals for which it seeks to make the aider and abettor responsible).

[368] See references, *supra*, 11.7.2.5.1. See also Robinson, *Commentary on the Genocide Convention* (n 4) p 69.

substantially influenced the killings that followed.[369] Presence and words, in particular when coming from someone with authority or prestige, could thus. constitute culpable acts of encouragement to the perpetrators of acts of genocide.[370] Encouraging members of the targeted group to 'seek refuge' in a particular location with a view to facilitating their killing would also qualify.[371] Physically and logistically assisting acts of killing could also amount to aiding and abetting although, depending on the nature and proximity of the contribution of the accused to the commission of the crime, such actions could also constitute the actual commission of the offence.[372] The denunciation or turning over of vulnerable members of the targeted group could also meet the requirements of this mode of liability.[373] Presence and the distribution of weapons

[369] See, generally, *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Judgment and Sentence, 6 December 2010 (hereafter *Hategekimana* Trial Judgment), para. 686 (and associated findings).

[370] See, e.g., *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, 7 December 2007 (hereafter *Karera* Trial Judgment), para. 543 (footnote omitted) ('Given Karera's position of authority and influence, the Chamber finds that by travelling with *Interahamwe* and soldiers to Ntarama and verbally urging them to attack Tutsis, he encouraged them to attack the Tutsi refugees at Ntarama Church. By his words and, acts, Karera substantially contributed to the attack, thus instigating genocide. By being present during the attack and participating through shooting, he is also guilty of committing genocide.'). See also *Gacumbitsi* Appeal Judgment (n 274) paras 59–61 (where the Appeals Chamber held that presence, supervision and separation of the ethnic groups during an attack constituted committing genocide). For more general information about aiding and abetting through presence and encouragement, see *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002 (hereafter *Vasiljević* Trial Judgment), para. 70; *Furundžija* Trial Judgment (n 247) para. 232; *Tadić* Trial Judgment (n 222) para. 689; *Aleksovski* Trial Judgment (n 326), para. 64; *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-7 & IT-96-23/1-T, Judgment, 22 February 2001 (hereafter *Kunarac et al.* Trial Judgment), para. 393; *Krnojelac* Trial Judgment (n 194) para. 88; *Kajelijeli* Trial Judgment (n 51) para. 769.

[371] *Ntawukulilyayo* Appeal Judgment (n 300) paras 208–229, in particular, 216 ('The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that Ntawukulilyayo substantially contributed to the Kabuye hill killings by encouraging Tutsis to seek refuge there and then providing reinforcements to those attempting to kill them. These acts alone suffice to constitute the *actus reus* of aiding and abetting. The Appeals Chamber is of the opinion that it is therefore unnecessary to assess whether the Trial Chamber erred in concluding that Kabuye hill was an isolated area and that the transfer of refugees thereby provided a "tactical advantage", or in concluding that his status and position lent moral support to the perpetrators. Ntawukulilyayo's prior good conduct is equally inconsequential to the Trial Chamber's finding that the *actus reus* of aiding and abetting had been fulfilled.').

[372] For an illustration of the line between the two, see *Seromba* Appeal Judgment (n 60) paras 163–185 and, ibid., para. 55 ('The Appeals Chamber therefore finds that it was not unreasonable for the Trial Chamber to base its finding on Athanase Seromba's substantial contribution to the destruction of the church on his statement regarding the weak side of the church building, without assessing his specific knowledge of the structure of the building.'); *Prosecutor v. Jević et al.*, No. X-KR-09/823-1, Verdict, 22 August 2012 (hereafter *Jević et al.* Trial Judgment), para. 518 ('Having issued orders to the unit members to separate the men, who were subsequently pillaged, abused, and held in inhumane conditions in various detention sites, the Accused significantly contributed to the implementation of a genocidal plan. This is so because the separation of men marked the beginning of implementation of the plan to kill all able bodied Bosniak men from Srebrenica.'); *Prosecutor v. Kos et al.*, No. S1 1 K 003372 10 Krl, Verdict, 15 June 2012 (hereafter *Kos et al.* Trial Judgment), para. 627. In *Kos et al.*, the trial panel concluded on the facts of the case that members of the 10th Sabotage Detachment—to which the accused belonged—participated in the attack against Srebrenica, upon the order of officers of the Main Staff of Bosnian-Serb Army. But the court found that the 10th Sabotage Detachment did not participate in (i) the transport of Muslim civilians to Potočari, (ii) the separation of Bosnian-Muslim men from the rest of the population in Potočari, (iii) the holding under guard the captured men in the 'White house', (iv) the search of the terrain and capture of Muslim men who moved in the column along the Bratunac-Konjević Polje Road, and (v) the holding of Bosnian-Muslim men in temporary detention centres. Ibid.

[373] See, e.g., *Seromba* Appeal Judgment (n 60) paras 183–185:

> 183. The Trial Chamber found that Athanase Seromba turned Tutsi employees and Tutsi refugees out of Nyange parish and thereby assisted in the killing of several Tutsi refugees,

in the context of ongoing genocidal violence could also qualify where the provision of weapons is shown to have encouraged acts of killing or otherwise made a substantial contribution thereto,[374] as could the issuance of threats, if shown to have had a substantial contribution to the commission of an underlying act of genocide.[375]

> including Patrice and Meriam. It found that in light of the security situation that prevailed in Nyange parish, he could not have been unaware that he thereby substantially contributed to their being killed by the attackers. The Trial Chamber found that based on this conduct, Athanase Seromba aided and abetted the killing of refugees in Nyange church, and found him guilty of aiding and abetting genocide.
>
> 184. The Appeals Chamber is not convinced that, based on these factual findings, it was unreasonable for the Trial Chamber to find that Athanase Seromba aided and abetted in the killing of the refugees, including Meriam and Patrice, instead of finding him guilty of 'committing'. The Appeals Chamber observes that the circumstances of this case are similar to those in the *Gacumbitsi* case, where the Appeals Chamber found that Sylvestre Gacumbitsi, by expelling his tenants who were subsequently killed, and 'knowing that by so doing he was exposing them to the risk of being targeted by Hutu attackers on grounds of their ethnic origin' aided and abetted murder. The Appeals Chamber therefore affirms the Trial Chamber's finding that Athanase Seromba aided and abetted genocide in relation to the killings of Patrice and Meriam, which are separate acts from the killings resulting from the destruction of the church.

See also *Gacumbitsi* Appeal Judgment (n 274) para. 124.

[374] See, e.g., *Simba* Appeal Judgment (n 29) para. 262; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgment and Sentence, 13 December 2005 (hereafter *Simba* Trial Judgment), para. 418 ('Simba was physically present at two massacre sites. He provided traditional weapons, guns, and grenades to attackers poised to kill thousands of Tutsi. Simba was aware of the targeting of Tutsi throughout his country, and as a former military commander, he knew what would follow when he urged armed assailants to "get rid of the filth". The only reasonable conclusion, even accepting his submissions as true, is that at that moment, he acted with genocidal intent.'). See also *Ngirabatware* Appeal Judgment (n 151) paras 147–152 (and references cited therein), and in particular 150 (footnotes omitted):

> The Appeals Chamber further recalls that 'encouragement' is a form of conduct which may lead to criminal responsibility for aiding and abetting a crime. The ICTY Appeals Chamber has held that 'the encouragement or support need not be explicit; under certain circumstances, even the act of being present on the crime scene (or in its vicinity) as a "silent spectator" can be construed as the tacit approval or encouragement of the crime.' Ngirabatware points to the fact that he was not found to have been present when the attacks and killings of Tutsis were taking place. The Appeals Chamber finds Ngirabatware's argument to be misguided. It follows from the Trial Chamber's relevant finding that it did not consider Ngirabatware to be a 'silent spectator' who tacitly approved and encouraged the crime by his mere presence and authority. Rather, the Trial Chamber found that the encouragement provided by Ngirabatware was explicit in that, as an influential figure in Nyamyumba Commune, he distributed weapons to the *Interahamwe* while exhorting them to kill Tutsis. In such circumstances, whether Ngirabatware was present at the crime scene is inconsequential for his responsibility for aiding and abetting to arise. In view of the evidence considered and relied upon by the Trial Chamber, Ngirabatware's claim that the *Interahamwe* who were manning the roadblock and committed the killings were unaware of the encouragement he provided is similarly without merit.

[375] In *Nyiramasuhuko et al.*, the Appeals Chamber considered that this had not been established in the particular circumstances of the case. See, generally, *Nyiramasuhuko et al.* Appeal Judgment (n 31) paras 1511–1513 (footnotes omitted):

> 1511. Indeed, the Trial Chamber made no findings about the circumstances of the killing of the Rwamukwaya family, its principal perpetrators, including whether they acted pursuant to Ntahobali's threat to kill the Rwamukwaya family, or the circumstances in which Ntahobali came into possession of Rwamukwaya's vehicle. Nor did the Trial Chamber refer to any evidence in these respects. Likewise, while the Trial Chamber concluded that unidentified principal perpetrators committed the killing with the requisite genocidal intent and that Ntahobali was aware of this intent, it did not refer to any of its factual findings or evidence on the record to substantiate this conclusion.

The giving of speeches or expressions of support for calls to genocide could also qualify.[376] A culpable omission or mere presence (whether under the command responsibility theory or another form of liability) could also provide a sufficient basis to enter a conviction for genocide if the other requirements (in particular of *mens rea*) are met.[377]

11.7.2.5.2.3 Mens rea

The *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of a crime by the principal perpetrator.[378] Specific intent crimes such as genocide do not require the aider and abettor to share the *mens rea* of the principal perpetrator; it suffices to prove that he knew of the principal perpetrator's specific intent.[379] The accused's knowledge of the relevant

> 1512. The Appeals Chamber finds that, in the absence of any evidence that Ntahobali's threat contributed to the killing of the Rwamukwaya family, following which he acquired their vehicle, the 'narrow time frames involved between Ntahobali's threat pronounced against the Rwamukwaya family, the sighting of their bodies, and the first sightings of Ntahobali in Rwamukwaya's vehicle' could not lead a reasonable trier of fact to find that the only reasonable inference was that Ntahobali substantially contributed to the crime and was aware of the principal perpetrators' genocidal intent.
>
> 1513. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in finding that Ntahobali aided and abetted the killing of the Rwamukwaya family on or about 29 or 30 April 1994.

[376] For an illustration of the overlap between aiding and abetting genocide and direct and public incitement to genocide, see *Nyiramasuhuko et al.* Appeal Judgment (n 31) paras 3333 and 3345–3346.

[377] See, e.g., *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-T, Judgment and Sentence, 30 December 2011 (hereafter *Ndahimana* Trial Judgment), paras 810–823. Liability for 'aiding and abetting by omission proper' should be distinguished from aiding and abetting by tacit approval and encouragement, *Brdanin* Appeal Judgment (n 11) paras 273–277, which may only attach where an accused had both a legal duty to act and the means to fulfil this duty. See also *Karadžić* Trial Judgment (n 11) para. 575; *Mrkšić & Šljivančanin* Appeal Judgment (n 11) paras 49, 134 (citing *Blaškić* Appeal Judgment (n 246) para. 47) (stating that the Appeals Chamber has 'consistently found that, in the circumstances of a given case', the *actus reus* of aiding and abetting may be perpetrated through an omission), and 154 (citing *Orić* Appeal Judgment (n 326) para. 43); *Brdanin* Appeal Judgment (n 11) para. 274 (holding that 'omission proper' may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act); *Galić* Appeal Judgment (n 290) para. 175; *Blaškić* Appeal Judgment (n 246) para. 663.

[378] See, e.g., *Kaliminzira* Appeal Judgment (n 128) para. 86; *Rukundo v. Prosecutor*, Case No. ICTR-2001-70-A, Judgment, 20 October 2010 (hereafter *Rukundo* Appeal Judgment), para. 53; *Nahimana et al.* Appeal Judgment (n 5) para. 482; *Ntawukulilyayo* Appeal Judgment (n 300) para. 222.

[379] See *Kalimanzira* Appeal Judgment (n 128) para. 86; *Rukundo* Appeal Judgment (n 379) para. 53; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, Judgment, 19 July 2010 (hereafter *Haradinaj et al.* Appeal Judgment), para. 58; *Blagojević & Jokić* Appeal Judgment (n 27) para. 127; *Ntawukulilyayo* Appeal Judgment (n 300) para. 222; *Zigiranyirazo* Trial Judgment (n 60) para. 368; *Ntakirutimana* Appeal Judgment (n 5) paras 364, 501 and 508; *Stupar et al.* Appeal Judgment (n 282) paras 570–571 and 573 ('If a person is only aware of the genocidal intent of the perpetrator, but the person did not share the intent, the person is an accessory to genocide. In the present case, considering that all of the essential elements of the criminal offence of Genocide have been satisfied, except for the genocidal intent (as stated above), the Appellate Panel finds that the actions of the Accused constituted the acts of aiding/accessory in the perpetration of the referenced criminal offence.'). Regarding the distinction between the *mens rea* relevant to the commission of a crime contrasted to aiding and abetting, see also *Seromba* Appeal Judgment (n 60) para. 173 (footnotes omitted) ('The Appeals Chamber recalls that an accused evinces the requisite *mens rea* for committing a crime when he acts with an intent to commit that crime. This stands in contrast to the mens rea for aiding and abetting, which "is indicated by the requirement

circumstances, in particular that of the perpetrators' genocidal intent, must be established at the time when the culpable assistance is provided.[380] This may be inferred from the circumstances.[381] As with other types of crimes, a conviction for aiding and abetting genocide does not require that the principal perpetrators have been tried or identified.[382]

that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act".'); *Jević et al.* Trial Judgment (n 373) paras 969–982, and in particular 978, 981 (basing the accused's convictions on mere knowledge of the perpetrators' special intent without requiring proof of that intent in relation to the accused themselves), and 991–993; *Vuković & Tomić* Trial Judgment (n 282) paras 576 (finding that the accused were aware that their actions amounted to aiding and abetting genocide but was not satisfied that the Prosecution had proven beyond reasonable doubt that they had the requisite genocidal intention to find them guilty of committing genocide; they were convicted for aiding and abetting genocide) and 577–581 (for associated legal and factual findings); *Prosecutor v. Vuković & Tomić*, No. X-KRŽ-06/180-2, Decision Revoking Trial Verdict of the Court of Bosnia and Herzegovina No. X-KR-06/180-2 of 22 April 2010, 11 May 2011 (hereafter *Vuković & Tomić* Decision Revoking Trial Verdict), paras 24–27 (referring to ICTY caselaw on that point and noting that the *mens rea* of an accessory consists of the knowledge of a specific (genocidal) intent on the part of the perpetrator and of the awareness that by his own acts (the accessory) assisted in the commission of the crime); *Vuković & Tomić* Appeal Judgment (n 262) paras 486–487; *Prosecutor v. Trbić*, No. X-KR-07/368, First Instance Verdict, 29 April 2010 (hereafter *Trbić* Trial Judgment), para. 792 ('If the evidence shows that the perpetrator does not personally aim at the destruction of the group, he may be criminally responsible for genocide, but as an aider and abettor and not a principle perpetrator.'); *Prosecutor v. Ivanović*, No. S1 1 K 003442 14, Second Instance Verdict, 1 July 2014 (hereafter *Ivanović* Appeal Judgment), paras 21 and 25 ('The difference between the crime of genocide, in terms of its commission, and aiding and abetting in genocide, with which the accused Ivanović was charged and of which he was found guilty, however, lies exactly in the genocidal intent. More specifically, proving the criminal offense of genocide requires proving the genocidal intent on the part of the perpetrator. In relation to aiding and abetting in (the commission of) genocide, however, the perpetrator neither has nor shall have the genocidal intent (or otherwise he would be a perpetrator of genocide), but he must be aware of the genocidal intent of others.'); *Prosecutor v. Kuvelja*, No. S1 1 K 004050 13 Krž 15, Second Instance Verdict, 19 November 2013 (hereafter *Kuvelja* Appeal Judgment), paras 108 and 110; *Pelemiš & Perić* Trial Judgment (n 282) paras 173 and 453–461.

[380] See, e.g., *Seromba* Appeal Judgment (n 60) para. 57 (footnote omitted) ('[T]he Appeals Chamber does not consider that the Prosecution was required to establish that Athanase Seromba had the requisite *mens rea* to aid and abet genocide prior to the arrival of the Tutsi refugees at the church. Rather, only at the time that he provided support to the principal perpetrators through his acts found to have formed the *actus reus* in question, must he have known the specific intent of the perpetrators.').

[381] For an illustration, see *Seromba* Appeal Judgment (n 60) para. 65 (footnotes omitted):

> With regard to Athanase Seromba's challenge to the Trial Chamber's finding relating to his awareness of the attackers' intent, based on his lack of legal ties with these attackers, the Appeals Chamber finds this argument to be without merit. As outlined above, the relevant *mens rea* for aiding and abetting genocide is knowledge of the principal perpetrator's specific genocidal intent. No specific ties between the aider and abettor and the principal perpetrators are required by law. Moreover, the Appeals Chamber considers that Athanase Seromba has failed to substantiate any error by the Trial Chamber when it found that 'Athanase Seromba could not have been unaware of the intention of the attackers and other *Interahamwe* militiamen to commit acts of genocide against Tutsi refugees in Nyange parish'. It was not unreasonable for the Trial Chamber to conclude that due to the situation which prevailed throughout Rwanda and specifically based on the attacks he personally witnessed, as established by the evidence before the Trial Chamber, Athanase Seromba knew of the genocidal intent of the attackers and other *Interahamwe* militia.

[382] See, e.g., *Ngirabatware* Appeal Judgment (n 151) para. 149.

11.7.2.6 Command responsibility

11.7.2.6.1 General elements

Command responsibility is a doctrine of liability that now forms part of customary international law,[383] and which is now clearly defined in that context.[384] The elements of the doctrine are as follows:[385]

(i) there was a superior–subordinate relationship between the accused and the perpetrator of the underlying crime;

(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Each element of this definition has in turn been further refined by the jurisprudence.[386] Concerning the first element (*a superior–subordinate relationship*), a superior may be held liable only if he or she has the material ability to prevent and punish crimes perpetrated by the subordinate ('effective control').[387] The relationship

[383] See, e.g., *Čelebići* Appeal Judgment (n 102) para. 195; *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (hereafter *Hadžihasanović et al.* Decision on Challenge to Command Responsibility), paras 11, 27, 29 ('The Appeals Chamber affirms the view of the Trial Chamber that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, as the Trial Chamber considered, Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it.'), 31 and 33; *Čelebići* Trial Judgment (n 221) paras 333 and 343; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgment, 16 November 2005 (hereafter *Halilović* Trial Judgment), para. 55; *Orić* Trial Judgment (n 309) para. 291; *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 (hereafter *Hadžihasanović* Decision on Jurisdiction), para. 179. See also *Prosecutor v. Cardoso Ferreira*, Case No. 04/2001, Judgment, 5 April 2003 (hereafter *Ferreira* Judgment), para. 507 ('The concept of command responsibility as stated in the mention[ed] UNTAET regulation is not new and follows the examples set in the ICTY and ICTR Statutes, that develop a concept already well-established in customary international law and eventually also in conventional international law.'). The Appeals Chamber of the ICTY has suggested that the doctrine of superior responsibility was part of customary international law even before the adoption of Additional Protocol I and that this Protocol was merely declaratory of the existing position under international law. See *Hadžihasanović et al.* Decision on Challenge to Command Responsibility (n 384) para. 29. The exact date at which the doctrine became part of customary international law has not been clearly identified but is generally considered to go as far back as the adoption of Additional Protocol I to the Geneva Convention

[384] See, *inter alia*, references cited in footnote 386, *supra*. See also, Mettraux, *Command Responsibility* (n 11) Chapter 3.

[385] See, e.g., *Karadžić* Trial Judgment (n 11) para. 579 (and references cited therein). See also, for instance, *Perišić* Appeal Judgment (n 350) para. 86; *Prosecutor v. Gotovina & Markač*, Case No. IT-06-90-A, Judgment, 16 November 2012 (hereafter *Gotovina & Markač* Appeal Judgment), para. 128; *Orić* Appeal Judgment (n 326) para. 18; *Prosecutor v. Halilović*, Case No. IT-01-48-A, Judgment, 16 October 2007 (hereafter *Halilović* Appeal Judgment), para. 59; *Blaškić* Appeal Judgment (n 246) para. 484; *Aleksovski* Appeal Judgment (n 340) para. 72; *Mladić* Trial Judgment (n 24) paras 3568–3571. See, generally, Mettraux, *Ad Hoc Tribunals* (n 18) 129ff.

[386] See, generally, Mettraux, *Command Responsibility* (n 11) and references cited therein.

[387] *Aleksovski* Appeal Judgment (n 340) para. 76; *Čelebići* Appeal Judgment (n 102) paras 191–192, 196–198, 256, 266 and 303; *Kayishema & Ruzindana* Appeal Judgment (n 8) para. 294; *Bagilishema* Appeal Judgment (n 11) paras 50, 52, 55 and 61; *Blaškić* Appeal Judgment (n 246) paras 375 and 484; *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, 23 May 2005 (hereafter *Kajelijeli* Appeal Judgment), paras 86–87; *Halilović* Appeal Judgment (n 386) paras 59, 85 and 210; *Nahimana et al.* Appeal Judgment

of subordination can be direct or indirect,[388] within a hierarchy that is formal or informal, [389] *de jure* or *de facto*,[390] and civilian or military in nature.[391] The accused need not know the exact identity of a subordinate-perpetrator to be held responsible under this doctrine.[392]

Regarding the second element (*the superior's knowledge of his subordinates' actions*), a superior may be held liable under customary law only if he knew or had reason to know of his subordinates' actions. To prove that the accused had reason to know of crimes committed, it is necessary to show that he had information available to him which would have put him on notice of unlawful acts committed or about to be committed by his subordinates.[393] A superior may therefore be held liable only if general or specific information was available to him or her that was sufficiently alarming to put him or her on notice of offences committed or about to be committed by his or her subordinates and justify further inquiry by the superior.[394] A deliberate failure to conduct or conclude such an inquiry, despite having the means to do so, satisfies this standard.[395] The information available to the superior does not need to contain

(n 5) paras 484, 605 and 625; *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-A, Judgment, 22 April 2008 (hereafter *Hadžihasanović & Kubura* Appeal Judgment), paras 20–21; *Orić* Appeal Judgment (n 326) paras 20 and 91–92; *Mladić* Trial Judgment (n 24) para. 3569; *Karadžić* Trial Judgment (n 11) para. 580. The *Karadžić* Trial Chamber noted that the following would be among the relevant factors to determine whether a superior exercised effective control include: (i) his capacity to issue orders and whether those orders were in fact followed, (ii) the authority to issue disciplinary measures, and (iii) the power to promote personnel and terminate positions held. Ibid., para. 581. The Chamber also noted that the superior's de jure authority 'constitutes prima facie a reasonable basis for assuming that he has effective control over his subordinates' but still requires the Prosecution to prove that he exercised effective control. Ibid.

[388] *Čelebići* Appeal Judgment (n 102) paras 252 and 303; *Halilović* Appeal Judgment (n 386) para. 59; *Orić* Appeal Judgment (n 326) para. 20; *Mladić* Trial Judgment (n 24) para. 3569.

[389] *Čelebići* Appeal Judgment (n 102) para. 197; *Kayishema & Ruzindana* Appeal Judgment (n 8) para. 294; *Halilović* Appeal Judgment (n 386) paras 59 and 210; *Mladić* Trial Judgment (n 24) para. 3569.

[390] *Mladić* Trial Judgment (n 24) para. 3569. See also *Čelebići* Appeal Judgment (n 102) paras 192–193 and 195; *Kayishema & Ruzindana* Appeal Judgment (n 8) para. 294; *Bagilishema* Appeal Judgment (n 11) paras 50, 56 and 61; *Kajelijeli* Appeal Judgment (n 388) para. 85; *Gacumbitsi* Appeal Judgment (n 274) para. 143; *Nahimana et al.*,= Appeal Judgment (n 5) paras 484 and 605; *Hadžihasanović & Kubura* Appeal Judgment (n 388) para. 20; *Karadžić* Trial Judgment (n 11) para. 580.

[391] *Aleksovski* Appeal Judgment (n 340) para. 76; *Čelebići* Appeal Judgment (n 102) paras 195–196; *Bagilishema* Appeal Judgment (n 11) paras 50–51; *Kajelijeli* Appeal Judgment (n 388) paras 85–86; *Nahimana et al.* Appeal Judgment (n 5) para. 605; *Mladić* Trial Judgment (n 24) para. 3569; *Karadžić* Trial Judgment (n 11) para. 580 (footnote omitted) ('In assessing whether there is a superior-subordinate relationship it does not matter whether the accused was a civilian or military superior.').

[392] *Blagojević & Jokić* Appeal Judgment (n 27) para. 287. See also *Karadžić* Trial Judgment (n 11) para. 583.

[393] *Čelebići* Appeal Judgment (n 102) paras 238, 241. See also *Blaškić* Appeal Judgment (n 246) para. 62; *Karadžić* Trial Judgment (n 11) para. 586.

[394] *Mladić* Trial Judgment (n 24) para. 3570. See also, *inter alia*, *Čelebići* Appeal Judgment (n 102) paras 238–239, 241; *Bagilishema* Appeal Judgment (n 11) paras 28, 42; *Krnojelac* Appeal Judgment (n 235) paras 59, 155; *Blaškić* Appeal Judgment (n 246) paras 62, 64; *Nahimana et al.* Appeal Judgment (n 5) para. 791; *Hadžihasanović & Kubura* Appeal Judgment (n 388) paras 27–31, and in particular 28 (footnotes omitted) ('[I]t must be established whether, in the circumstances of the case, he possessed information sufficiently alarming to justify further inquiry.'); *Strugar* Appeal Judgment (n 105) paras 297–301, 304; *Bagosora & Nsengiyumva* Appeal Judgment (n 72) para. 384; *Karadžić* Trial Judgment (n 11) para. 584. Knowledge may be inferred from circumstantial evidence but requires an assessment of the specific circumstances of each case and the 'specific situation of the superior concerned at the time in question'. See generally, *Karadžić* Trial Judgment (n 11) para. 585 (and references cited therein).

[395] *Čelebići* Appeal Judgment (n 102) paras 226 and 232; *Blaškić* Appeal Judgment (n 246) para. 406; *Hadžihasanović & Kubura* Appeal Judgment (n 388) para. 28; *Strugar* Appeal Judgment (n 105) para. 298; *Mladić* Trial Judgment (n 24) para. 3570.

extensive or specific details about the unlawful acts committed or about to be committed.[396] The subordinate may himself have participated in the commission of a crime in any relevant form that is criminal in nature.[397] The superior need not know the identity of the subordinate(s) who has perpetrated the crimes. [398] As discussed below, ICC law is slightly different in regard to that element of *mens rea*.

Finally, regarding the third element (*the superior's culpable failure to take the necessary and reasonable measures to prevent or punish his subordinates*), once on sufficient notice of the actions of his subordinates, the superior must adopt necessary and reasonable measures to prevent or punish them. The duty to prevent and the duty to punish are distinct legal obligations, and a superior may be held liable for violating either duty.[399] The duty to prevent attaches to a superior from the moment he or she knows or has reason to know that a crime is about to be committed, while the duty to punish only arises after the commission of a crime.[400] The duty to punish includes, at a minimum, the obligation to investigate possible crimes or have the matter investigated, and if the superior has no power to sanction, to report them to the competent authorities.[401] 'Necessary' measures are those that are appropriate for the superior to fulfil his or her obligation genuinely to try to prevent or punish, whilst 'reasonable' measures are those which reasonably fall within the material powers of the superior.[402]

The law of command responsibility applicable before the ICC (Article 28 of the Rome Statute) differs in some significant respects from existing customary international law:[403]

(i) It provides a disjunctive regime, which distinguish between military (or military-like) superiors (Article 28, let (a)) and civilian superiors (Article 28, let (b)). Such a duality of standards does not exist under customary international law.

(ii) It provides for a stricter system of liability for military (or military-like) superiors than for civilian superiors, which again is not foreseen by customary international law. In particular,

[396] *Karadžić* Trial Judgment (n 11) para. 586. See also *Hadžihasanović & Kubura* Appeal Judgment (n 388) para. 28; *Galić* Appeal Judgment (n 290) para. 184; *Krnojelac* Appeal Judgment (n 235) para. 155; *Čelebići* Appeal Judgment (n 102) para. 238.

[397] *Blagojević & Jokić* Appeal Judgment (n 27) paras 280–282; *Nahimana et al.* Appeal Judgment (n 5) paras 485–486; *Orić* Appeal Judgment (n 326) para. 21; *Mladić* Trial Judgment (n 24) para. 3570.

[398] See, e.g., *Mladić* Trial Judgment (n 24) para. 3570; *Blagojević & Jokić* Appeal Judgment (n 27) para. 287.

[399] *Hadžihasanović & Kubura* Appeal Judgment (n 388) para. 259. See also *Mladić* Trial Judgment (n 24) para. 3571.

[400] *Blaškić* Appeal Judgment (n 246) para. 83; *Hadžihasanović & Kubura* Appeal Judgment (n 388) paras 259–260; *Mladić* Trial Judgment (n 24) para. 3571.

[401] *Halilović* Appeal Judgment (n 386) para. 182; *Hadžihasanović & Kubura* Appeal Judgment (n 388) para. 154; *Boškoski & Tarčulovski* Appeal Judgment (n 315) paras 230–234; *Bagosora & Nsengiyumva* Appeal Judgment (n 105) para. 510; *Mladić* Trial Judgment (n 24) para. 3571

[402] *Halilović* Appeal Judgment (n 386) para. 63; *Orić* Appeal Judgment (n 326) para. 177; *Mladić* Trial Judgment (n 24) para. 3571.

[403] *Bemba* Trial Judgment (n 299) para. 170; *Prosecutor v. Bemba*, (Decision pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) [2009] ICC-01/05-01/08-424 (hereafter *Bemba* Article 61 Decision), para. 407. See also *Ntaganda* Decision on Confirmation of Charges (n 108) para. 164. See further, *Gbagbo* Decision on Confirmation

(a) It limits the responsibility of civilian superiors to crimes concerned with activities that were 'within the effective responsibility and control of the superior'; no such limitation exists for military (or military-like) superiors (see art. 28(b)(ii)).
(b) Article 28(a)(i) provides that a military(-like) superior can be held responsible where he 'should have known' of crimes committed by subordinates. That standard, which was rejected as not forming part of customary international law, is inapplicable to civilians.

(iii) The ICC Statute also conditions liability under that mode of liability to crimes committed 'as a result of' the superior's failure to exercise control properly over subordinates. The exact meaning of that phrase is subject to jurisprudential debate before the ICC and the exact meaning of the requirement remains uncertain.[404] No such element forms part of the doctrine of superior responsibility under customary international law.[405]

11.7.2.6.2 Command responsibility and genocide

The *ad hoc* Tribunals have made it clear that, as a mode of liability recognized under customary international law, command or superior responsibility may be applicable where the underlying crime committed by a superior's subordinates is genocide.[406] The fact that the Genocide Convention does not provide for this mode of responsibility is irrelevant. Command responsibility has developed into a generally applicable mode of liability outside and independently of the Convention and may apply in principle to any international crime.[407] Therefore, where a superior, with the requisite knowledge

of Charges (n 108) para. 262. For a full discussion of the matter, see Mettraux, *Command Responsibility* (n 11) Chapter 3.2.

[404] But see, *contra*, *Prosecutor v. Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', [2018] ICC-01/05-01/08-3636-Red (hereafter *Bemba* Appeal Judgment), para. 136; *Prosecutor v. Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, [2018] ICC-01/05-01/08-3636-Anx2 (hereafter *Bemba* Appeal Judgment, Van den Wyngaert and Morrison Separate Opinion), paras 51–56; *Prosecutor v. Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', Concurring Separate Opinion of Judge Eboe-Osuji) [2018] ICC-01/05-01/08-3636-Anx3 (hereafter *Bemba* Appeal Judgment, Eboe-Osuji Concurring Opinion), paras 151–186; *Bemba* Trial Judgment (n 299) para. 211; *Bemba* Article 61 Decision (n 404) para. 425; *Prosecutor v. Bemba*, Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Sylvia Steiner, [2016] ICC-01/05-01/13-3343-AnxI (hereafter *Bemba* Trial Judgment, Steiner Separate Opinion), paras 14, 18; *Prosecutor v. Bemba*, Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Kuniko Ozaki, [2016] ICC-01/05-01/13-3343-AnxII (hereafter *Bemba* Trial Judgment, Ozaki Separate Opinion), paras 17–23.

[405] Mettraux, *Command Responsibility* (n 11) 263ff (and references cited therein).

[406] See, e.g., *Milošević* Rule 98*bis* Decision (n 252) para. 300 (rejecting the suggestion that the doctrine of command responsibility is incompatible with the special intent requirement for genocide). For an illustration, see *Prosecutor v. Stupar et al.*, No. X-KR-05/24, First Instance Verdict, 29 July 2008 (hereafter *Stupar et al.* Trial Judgment), 161ff.

[407] See, generally, *Blagojević & Jokić* Trial Judgment (n 2) para. 682 (footnotes omitted) ('No reference is made, under Article 4(3) of the Statute, to a command or superior criminal responsibility as a form of liability for genocide. However, Article 7(3), which provides for superior criminal responsibility as a form of liability, applies to all crimes within the jurisdiction of the Tribunal, including genocide. In addition, the jurisprudence of both Tribunals has been consistent in accepting convictions for genocide on the basis of Article 7(3). However, such convictions have so far been entered under Article 4(3)(a), while in the

and effective control culpably fails to prevent or punish acts of genocide committed by subordinates, he could be held responsible for such crimes pursuant to that doctrine. Liability for genocide pursuant to the doctrine of command responsibility does not

present case the Prosecution charges this form of liability under Article 4(3)(e).'). See also *Brdanin* Trial Judgment (n 2) paras 711–721, in particular, paras 711–712 and 715–716 (footnotes omitted):

> 711. Pursuant to Article 7(3) of the Statute, an accused in a hierarchically responsible position may be held liable for genocide as a result of his failure to carry out his duty as a superior to exercise control over his or her subordinates.
>
> 712. Superior criminal responsibility as a form of liability for genocide is not contemplated in Article III of the Genocide Convention, which Article 4(3) of the Statute reproduces verbatim. Contrary to the submissions of the Defence, the absence in the Genocide Convention of explicit reference to superior criminal responsibility is not fatal to the determination that, under customary international law, superior criminal responsibility extended to the crime of genocide at the time the acts charged in the Indictment are alleged to have been committed. Amongst other reasons, this is so because there may have been 'a play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument'.
>
> [...]
>
> 715. The Trial Chamber is satisfied that it reasonably falls within the application of the doctrine of superior criminal responsibility for superiors to be held liable if they knew or had reason to know that their subordinates were about to commit genocide or had done so and failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrators thereof.
>
> 716. This understanding is confirmed by the Statute, which in Article 7(3) explicitly refers to all the crimes within the jurisdiction of the Tribunal, including genocide, and which, according to the Appeals Chamber, 'must be interpreted with the utmost respect to the language used by the legislator'. In addition, with one exception which is shown below, the application of superior criminal responsibility to the crime of genocide has not been contested in the jurisprudence of the Tribunal. Furthermore, it has been upheld in cases before the ICTR.

For instances of application of that doctrine in the context of genocide proceedings before the ICTR, see the following cases: Bizimungu, Kambanda, Serushago, Kayishema, Musema, Kajelijeli, Barayagwiza and Imanishimwe, Ntagerura and Muvunyi. For instances of application of that doctrine in the context of genocide proceedings before the ICTY, *Milošević* Rule 98*bis* Decision (n 252) paras 300–309; *Karadžić* Trial Judgment (n 11) paras 578–591; *Mladić* Trial Judgment (n 24) paras 3568–3572; *Blagojević & Jokić* Trial Judgment (n 2) paras 681–686; *Brdanin* Trial Judgment (n 2) paras 711–721. In *Brdanin*, the ICTY Trial Chamber II noted:

> In the *Cyangugu* case, the majority of the ICTR Trial Chamber found that for one factual incident Samuel Imanishimwe was criminally responsible for genocide solely on the basis of Article 6(3) of the ICTR Statute because he failed to prevent the killing of members of the Tutsi ethnic group by soldiers under his authority and effective control: '[t]he Chamber has found that, on 12 April 1994, soldiers participated in the attack on the refugees at the Gashirabwoba football field. The Chamber lacks sufficient reliable evidence to find that Imanishimwe ordered his soldiers to participate in the attack within the meaning of Article 6(1). The Chamber however finds that Imanishimwe knew or should have known about the participation of his soldiers in the attack at the Gashirabwoba football field ... The Chamber notes that there is no evidence that Imanishimwe took any steps to prevent the attack or to punish any soldier at Karambo camp for participating in the massacre. Thus, the Chamber finds that Imanishimwe can be held criminally responsible under Article 6(3) for the actions of his subordinates at the Gashirabwoba football field' [...]. 'The Chamber also finds that the soldiers at the Gashirabwoba football field possessed the requisite genocidal intent during the killings on 12 April 1994, that is, to destroy, in whole or in part, members of the Tutsi ethnic group' [...]. In contrast, it is difficult to draw any conclusions from the remaining ICTR verdicts since no other accused before it has been convicted for genocide pursuant to Article 6(3) of the ICTR Statute in the absence of a finding that he was also responsible *for the same acts* under Article 6(1) and thus that he had the specific intent for genocide. Thus, Kambanda, Serushago, Kayishema, Musema, Kajelijeli and Barayagwiza were all convicted also for genocide pursuant to Article 6(1). Article 6(1) of the ICTR Statute is the provision analogous to Article 7(1).

Brdanin Trial Judgment (n 2) fn 1752 (citing *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgment and Sentence, 25 February 2004 (hereafter *Ntagerura et al.* Trial Judgment), paras 653–654, 690, 694–695 and 821).

require proof that the superior shared his subordinates' genocidal intent.[408] It is sufficient in such a case that he knew or had reason to know that his subordinates (i) were about to commit or had committed genocide and (ii) that the subordinates possessed the requisite specific intent.[409]

The situation would be different before the ICC where the accused is regarded as a military or military-like superior pursuant to Article 28(a) of the Statute.[410] In relation to this category of superiors, the Statute of the ICC provides for a lower(ed) standard of *mens rea*, whereby a military superior could be held criminally responsibility where he did not know of a crime but 'should have known' about it. Such a standard of *mens rea* has been found not to form part of customary international law.[411] Where the underlying crime is genocide, such a standard of *mens rea* could mean that a superior who has failed to keep himself sufficiently informed of the actions of his subordinates could be held responsible for genocide with no knowledge of that crime or even without consideration of such a possibility. The oddity of such a state of affair has been noted elsewhere.[412]

Finally, regarding the third element of command responsibility ('necessary and reasonable measures'), the intrinsic gravity of the crime of genocide might have a bearing on what measures would be regarded as 'necessary and reasonable' in the circumstances when a superior learns of the commission of such crimes by subordinates or of the risk thereof. The measures expected to be taken are limited in all cases to what is reasonably feasible in the circumstances and within the power of the superior in question.[413] Considering the seriousness of the underlying offences which may constitute acts of genocide, a superior who knows or is put on sufficient notice that such crimes have or are about to be committed would be expected to take urgent and very effective measures to try to punish or prevent them.[414]

[408] See, e.g., *Bagosora & Nsengiyumva* Appeal Judgment (n 105) para. 384 (footnote omitted) ('The Appeals Chamber recalls that, for a conviction as a superior pursuant to Article 6(3) of the Statute, it is not necessary for an accused to have had the same intent as the perpetrator of the criminal act; it suffices to prove that the accused knew or had reason to know that the subordinate was about to commit such act or had done so. The Trial Chamber was therefore not required to establish that Nsengiyumva shared his subordinates' intent to find that he could be held responsible as a superior. It follows that the Trial Chamber did not err in finding that Nsengiyumva was liable as a superior without considering evidence suggesting that he might not have had such intent.'). See also *Blagojević & Jokić* Trial Judgment (n 2) para. 686 (footnote omitted) ('[T]he *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent.'); *Musema* Trial Judgment (n 33) paras 894–895; *Kayishema & Ruzindana* Trial Judgment (n 2) paras 228, 555 and 559; *Brdanin* Trial Judgment (n 2) paras 720–721. See, *contra*, *Stakić* Decision on Rule 98*bis* Motion for Judgment of Acquittal (n 22) para. 92 (suggesting, based on the particular nature of the offence of genocide and without providing any authority, that proof of genocidal intent applies in the context of the doctrine of command responsibility).

[409] See, generally, *Brdanin* Trial Judgment (n 2) paras 717–721.

[410] See, generally, *Bemba* Trial Judgment (n 299) paras 170-213.

[411] See, e.g., *Čelebići* Appeal Judgment (n 102) paras 226 and 241; *Blaškić* Appeal Judgment (n 246) paras 62 and 106; *Halilović* Trial Judgment (n 384) para. 69; *Hadžihasanović* Decision on Jurisdiction (n 384) para. 128.

[412] See, generally, Mettraux, *Command Responsibility* (n 11) 194.

[413] *Krnojelac* Trial Judgment (n 194) para. 95 ('The measures required of the superior are limited to those which are feasible in all the circumstances and are "within his power". A superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations.'). See also *Čelebići* Appeal Judgment (n 102) para. 226.

[414] See, e.g., *Orić* Trial Judgment (n 309) para. 329 ('[T]he more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react.').

11.7.2.7 Joint criminal enterprise and co-perpetration

11.7.2.7.1 General elements

The notion of 'joint criminal enterprise' (or common purpose doctrine or 'JCE') is essentially a construct of the *ad hoc* Tribunals, which seeks to reflect in legal terms the reality of the criminal division of labour often accompanying the commission of international crimes, including genocide. The doctrine received its first detailed treatment in the *Tadić* case.[415] The *Tadić* Appeals Chamber determined that a person who in execution of a common criminal purpose contributes to the commission of crimes by a group of persons may be held criminally liable subject to certain conditions.[416] The Appeals Chamber's analysis of customary international law resulted in the identification and definition of three forms of JCE liability.[417] In the first JCE (JCE I) form:

> [A]ll co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they [...] all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have effected the killing are as follows:
>
> (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and
> (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.[418]

The *second* form of JCE (JCE II), which derives from the first, was found to have served cases where the offences charged were alleged to have been committed by members of military or administrative units, such as those running concentration camps and comparable detention 'systems'. It is essentially a facts-specific derivation of the first category of JCE.

The *third* form of JCE (JCE III) is characterized by a common criminal design to pursue a course of conduct where one or more of the co-perpetrators commit an act which, while outside the common design, is a natural and foreseeable consequence of the implementation of that design.[419] While the first from of JCE requires proof of intent, this form

[415] *Tadić* Appeal Judgment (n 221) paras 172–185. [416] Ibid., para. 190.

[417] For a detailed accounting of the jurisprudence regarding this mode of liability and its elements, see *Karadžić* Trial Judgment (n 11) paras 560–570.

[418] Ibid., para. 196. See also *Mladić* Trial Judgment (n 24) para. 3558. Regarding the *mens rea* applicable to this 'basic' form of JCE, see also *Karadžić* Trial Judgment (n 11) para. 569 (footnotes omitted) ('With regard to the basic category of JCE, the accused must both share the intent to effect the common purpose of the JCE as well as intend the commission of the crime with which he is charged. Where an accused is charged with a crime requiring specific intent which allegedly formed part of the JCE's common purpose, he and the other JCE members must share the requisite specific intent for that crime.'). The *Mladić* Trial Chamber noted that the first form of the JCE requires intent in the sense of *dolus directus* and that recklessness or *dolus eventualis* does not suffice. *Mladić* Trial Judgment (n 24) fn 13437.

[419] *Tadić* Appeal Judgment (n 221) para. 204; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009 (hereafter *Karadžić* Decision on JCE III Appeal), para. 18; *Mladić* Trial Judgment (n 24) para. 3560.

contains both an objective and a subjective element. The objective element is the requirement that the resulting crime was a 'natural and foreseeable' consequence of the intended JCE's execution. In other words, the crime must have been sufficiently linked to the implementation of the agreement that it logically flows from its execution. This objective element is to be distinguished from the subjective state of mind of the participant, namely the requirement that the accused must have been aware that the resulting crime falling outside of the intended JCE was a possible consequence of the execution of that JCE, and participated with that awareness.[420] In that sense, liability under the third form of JCE depends on whether it was *natural and foreseeable* that the execution of the JCE in its first form would lead to the commission of one or more other crimes. In addition to the intent of the first form, the third form thus requires proof that the accused took the risk that another crime, not forming part of the common criminal objective, but nevertheless being a natural and foreseeable consequence of the JCE, would be committed.[421] This standard of liability is applicable also in relation to special intent crimes, including genocide.[422]

11.7.2.7.2 Joint criminal enterprise and genocide

When genocide is the intended purpose of the enterprise (i.e., JCE I), all members must share the requisite genocidal intent.[423] Stated differently, when genocide is charged

[420] See, e.g., *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (hereafter *Brđanin & Talić* Decision on Form of Further Amended Indictment), paras 28–30; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment, 3 April 2008 (hereafter *Haradinaj et al.* Trial Judgment), para. 137; *Blaškić* Appeal Judgment (n 246) para. 33; *Mladić* Trial Judgment (n 24) para. 3560.

[421] See, *inter alia*, *Tadić* Appeal Judgment (n 221) paras 227–228; *Blaškić* Appeal Judgment (n 246) para. 33; *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgment, 8 October 2008 (hereafter *Martić* Appeal Judgment), para. 83; *Brđanin & Talić* Decision on Form of Further Amended Indictment (n 421) para. 31; *Krstić* Trial Judgment (n 2) para. 613; *Haradinaj et al.* Trial Judgment (n 421) para. 138; *Mladić* Trial Judgment (n 24) para. 3561; *Karadžić* Trial Judgment (n 11) para. 570 (footnote omitted) ('For a crime that falls outside the common purpose of the JCE ("extended crime"), an accused may nevertheless incur responsibility pursuant to the third category of JCE liability even when he does not share the intent to commit the extended crime if (i) he intended to participate in and contribute to the furtherance of the common criminal purpose, (ii) it was foreseeable to him that the extended crime might be perpetrated in carrying out the common purpose, and (iii) the accused willingly took the risk that the extended crime might occur by participating in the common purpose.').

[422] See, again, *Karadžić* Trial Judgment (n 11) para. 570; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004 (hereafter *Brđanin* Decision on Interlocutory Appeal), paras 5–7 and 9. See also *Brđanin* Appeal Judgment (n 11), fn 841; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 (hereafter, *Rwamakuba* Appeal Decision), paras 14–31, in particular, para. 24.

[423] See, e.g. *Karadžić* Rule 98*bis* Appeal Judgment (n 24) para. 79. For an illustration, see also *Milošević* Rule 98*bis* Decision (n 252) paras 139–144, and 246 ('On the basis of the inference that may be drawn from this evidence, a Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population, and that genocide was in fact committed in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Klju c and Bosanski Novi. The genocidal intent of the Bosnian Serb leadership can be inferred from all the evidence, including the evidence set out in paragraphs 238–245. The scale and pattern of the attacks, their intensity, the substantial number of Muslims killed in the seven municipalities, the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to genocide.') See also *Brđanin* Trial Judgment (n 2) paras 708 (footnote omitted) ('As stated earlier, the participant in a JCE of the first category must share with the person who physically carried out the crime the state of mind required for that crime. In the case of the crime of genocide, the two

through the framework of JCE I (i.e., as the common intended goal of the enterprise), the accused needs to share genocidal intent with other members of the JCE.[424] Where the members of the JCE have used others to commit acts of genocide, it is not necessary that those who physically committed such acts shared the *dolus specialis*.[425]

Whilst the crime of genocide and JCE III have been found not to be incompatible,[426] the issue of what standard of *mens rea* should apply where special intent crimes are

must share the specific intent.'), and 969; *Zigiranyirazo* Trial Judgment (n 60) paras 406–410. In *Brđanin*, the Trial Chamber sought to distinguish, legally and factually, a situation where genocide is un-intended but foreseeable (falling within the notion of JCE III) from a situation where an intention to commit such crime builds over time (which would be relevant to JCE I). See *Brđanin* Trial Judgment (n 2) para. 710 (footnotes omitted) ('In this connection, the Trial Chamber finds it necessary to distinguish the notion of "escalation" to genocide from the notion of genocide as a "natural and foreseeable consequence" of a JCE not aimed specifically at genocide. "Escalation" to genocide merely designates a factual allegation that the specific intent for genocide was formed at a stage later than the onslaught of an initial operation not amounting to genocide. According to the *Krstić* Trial Chamber, "Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period. It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation". The factual scenario described does not rule out that genocide may have been within the common purpose of the JCE.'). See also *Jević et al.* Trial Judgment (n 373); *Vuković & Tomić* Trial Judgment (n 282) paras 588–596.

[424] *Karadžić* Trial Judgment (n 11) para. 549; *Karadžić* Rule 98*bis* Appeal Judgment (n 24) para. 79 ('[I]n accordance with the allegations underlying Count 1 of the Indictment, it is the genocidal intent of Karadžić and other alleged JCE members, not the physical perpetrators of the underlying alleged genocidal acts, that is determinative for purposes of JCE I.'). The Appeals Chamber stated that it was not persuaded that the Chamber's conclusions on genocidal intent were restricted to the physical perpetrators of the acts or that it failed to assess Karadžić's genocidal intent and that of other alleged JCE members. It went on to conclude that the Chamber's focus on physical perpetrators in relation to the allegations of genocide in Srebrenica under Count 2 did not demonstrate that the Chamber 'necessarily considered that liability under JCE I requires a showing of the physical perpetrators' genocidal intent or that, in assessing the evidence of Count 1 of the Indictment, [it] failed to consider the genocidal intent of Karadžić and the other alleged JCE members'. See *Karadžić* Rule 98*bis* Appeal Judgment (n 24) para. 83.

[425] *Karadžić* Rule 98*bis* Appeal Judgment (n 24) paras 79 (footnotes omitted) ('The Indictment alleges that JCE members, including Karadzic, used others to carry out the crimes forming part of the JCE's common purpose, including members of the Bosnian Serb forces. The Appeals Chamber recalls that members of a JCE can incur liability for crimes committed by principal perpetrators who were non-JCE members, provided that it has been established that the crimes can be imputed to at least one member of the JCE and that this member—when using the principal perpetrators—acted in accordance with the common objective. Such a link is established by a showing that the JCE member used the non-JCE member to commit a crime pursuant to the common criminal purpose of the JCE. The Appeals Chamber further recalls that the relevant question in the context of JCE I liability is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose; it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that the non-JCE member knew of the existence of the JCE. Therefore, in accordance with the allegations underlying Count 1 of the Indictment, it is the genocidal intent of Karadzic and other alleged JCE members, not the physical perpetrators of the underlying alleged genocidal acts, that is determinative for purposes of JCE I.'), and 82, 83 ('[I]s not persuaded that the Trial Chamber's focus on physical perpetrators in relation to Count 2 of the Indictment demonstrates either that the Trial Chamber necessarily considered that liability under JCE I requires a showing of the physical perpetrators' genocidal intent or that, in assessing the evidence of Count 1 of the Indictment, the Trial Chamber failed to consider the genocidal intent of Karadzic and the other alleged JCE members.'); *Šainović et al.* Appeal Judgment (n 346) para. 1256; *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, Case 002/02 Judgement, 27 March 2019, para 804.

[426] *Stakić* Appeal Judgment (n 91) para. 38; *Brđanin* Decision on Interlocutory Appeal (n 423) paras 9–10; *Milošević* Rule 98*bis* Decision (n 252) para. 291 (footnotes omitted) ('The Appeals Chamber in *Prosecutor v. Brđanin* held that there is no incompatibility between the requirement of genocide and the *mens rea* requirement for a conviction pursuant to the third category of joint criminal enterprise; it is

at stake has remained a contentious issue. A majority of cases suggest that in such a case, it is enough to show that it was reasonably foreseeable to the accused that, as a consequence of the commission of those crimes that were intended by him, genocide would be committed by other participants in the joint criminal enterprise.[427] In other

therefore not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability. That submission of the Amici Curiae is, therefore, without merit.').

[427] *Milošević* Rule 98*bis* Decision (n 252) paras 291 (noting that it is therefore not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability), and 292 (finding that a Trial Chamber could be satisfied beyond reasonable doubt in the present case that the Accused was a participant in a joint criminal enterprise to commit other crimes than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide of a part of the Bosnian Muslims as a group would be committed by other participants in the joint criminal enterprise, and it was committed). See also *Brdanin* Appeal Judgment (n 11) para. 408; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 (hereafter *Karadžić* Decision on Six Preliminary Motions), para. 32 ('[E]ven if the arguments brought by the Accused in that Motion were considered as proper challenges to jurisdiction, the Chamber would dismiss them, as there is clear Appeals Chamber authority to the effect that convictions for genocide, which is a specific intent crime, can be entered on the basis of the third form of joint criminal enterprise liability.'). See also *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Strike JCE III Allegations as to Specific Intent Crimes, 8 April 2011 (hereafter *Karadžić* Decision on Motion to Strike JCE III), para. 5 (characterizing a Karadzic's challenge on that point and relying upon ECCC and STL caselaw to be premature). For completeness of the record, see also *Karadžić* Decision on JCE III Appeal (n 420). See also *Brdanin* Decision on Interlocutory Appeal (n 423) paras 5–9; including *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, Separate Opinion of Judge Shahabuddeen, 19 March 2004 (hereafter *Brdanin* Decision on Interlocutory Appeal, Shahabuddeen Separate Opinion), paras 1–6; *Rwamakuba* Decision on JCE (n 15) para. 31 ('The Appeals Chamber holds that customary international law recognized the application of the mode of liability of joint criminal enterprise to the crime of genocide before 1992, and that in consequence the statement to that effect in Tadic Appeal Judgment was legally correct. Consequently, the [ICTR] has jurisdiction to try the Appellant on a charge of genocide through the mode of liability of joint criminal enterprise.'); *Karadžić* Trial Judgment (n 11) para. 570 (footnotes omitted) (emphasis added):

> For a crime that falls outside the common purpose of the JCE ('extended crime'), an accused may nevertheless incur responsibility pursuant to the third category of JCE liability even when he does not share the intent to commit the extended crime if (i) he intended to participate in and contribute to the furtherance of the common criminal purpose, (ii) it was foreseeable to him that the extended crime might be perpetrated in carrying out the common purpose, and (iii) the accused willingly took the risk that the extended crime might occur by participating in the common purpose. *This is true even where the extended crime is a specific intent crime such as genocide or persecution*. Where that crime is genocide, the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent. Moreover, the possibility of the crime being committed must be sufficiently substantial as to be reasonably foreseeable, based on the information available to the accused at the time, but an accused need not understand that the extended crime 'would probably be committed'. In other words, the accused must have sufficient knowledge that the extended crime was a natural and foreseeable consequence of the common criminal purpose.

Prosecutor v. Stanišić & Župljanin, Case No. IT-08-91-A, Judgment, 30 June 2016 (hereafter *Stanišić & Župljanin* Appeal Judgment) paras 595–599; *Prosecutor v. Đordević*, Case No. IT-05-87/1-A, Judgment, 27 January 2014 (hereafter *Đordević* Appeal Judgment) paras 73–84 (rejecting Đordević's suggestion that proof of special intent is required under the JCE III doctrine), and 83 (footnotes omitted) (rejecting the position of the STL to the contrary) ('Finally, with respect to Đordević's reliance on the STL Decision of 16 February 2011, the Appeals Chamber notes that this jurisprudence is not binding on the Tribunal. The Appeals Chamber of the STL found it preferable not to allow convictions under the third category of joint criminal enterprise for specific intent crimes, such as terrorism. While Đordević asserts that

words, the prosecution will be required to establish that it was reasonably foreseeable to the accused that a punishable act would be committed and that it would be committed with genocidal intent.[428] Under that view, an accused could therefore be found criminally liable under the third category of JCE for genocide, provided that the crime was reasonably foreseeable without the accused having himself shared the genocidal intent.[429] However, such a view has not been unanimously accepted.[430] In particular, following arguments on that point before the Special Tribunal for Lebanon,[431] Judge

the STL Appeals Chamber held that "customary international law does not allow for convictions as a principal perpetrator for specific intent crimes on the basis of a mens rea standard of foreseeability and risk-taking", the STL Appeals Chamber does not refer to customary international law when discussing the issue. The jurisprudence of this Tribunal not only allows for convictions under the third category of joint criminal enterprise for specific intent crimes as a matter of principle, but several accused have actually been convicted of specific intent crimes pursuant to the third category of joint criminal enterprise liability. These are precedents not to be lightly dismissed by the Appeals Chamber simply because another tribunal has decided the matter differently. Similarly, while the Tribunal may take into consideration scholarly writings and decisions of other courts and tribunals in ascertaining the law, the Appeals Chamber observes that Đordević fails to provide an explanation as to why the STL Decision of 16 February 2011 or independent writing of Judge Cassese justifies a departure from past practice.').

[428] See, e.g., *Brđanin* Decision on Interlocutory Appeal (n 423) para. 6; *Karadžić* Trial Judgment (n 11) para. 570; *Milošević* Rule 98*bis* Decision (n 252) para. 291.

[429] *Prosecutor v. Brđanin*, Case No. IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 19 March 2004 (hereafter *Brđanin* Decision on Motion for Judgment of Acquittal), para. 6 (where the Trial Chamber found that an accused can be held liable for the crime of genocide under the third category of joint criminal enterprise). See also *Stakić* Appeal Judgment (n 91) para. 38; *Krstić* Appeal Judgment (n 5) paras 149–151; *Stanišić & Župljanin* Appeal Judgment (n 428) paras 595–599; *Brđanin* Trial Judgment (n 2) para. 709 (footnote omitted) ('Where the crime charged is the crime of genocide, the Appeals Chamber has held that "the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent".'); *Brđanin* Decision on Motion for Judgment of Acquittal (n 430) para. 6.

[430] See, in particular *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (hereafter *Ayyash et al.* Interlocutory Decision on Applicable Law), para. 249; *Prosecutor v. Ieng Sary et al.*, Case No 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010 (hereafter *Ieng Sary et al.* Decision on JCE), para. 83; *Prosecutor v. Im Chaem*, Case 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017 (hereafter *Im Chaem* Closing Order), para. 98 (footnote omitted) ('Where the crime involves persecution or genocide the JCE members must share the special intent required for those crimes.') (citing *Kvočka et al.* Appeal Judgment (n 350) para. 110; *Krnojelac* Appeal Judgment (n 235) paras 111–112); *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Judgment, 18 May 2012 (hereafter *Taylor* Trial Judgment), para. 468; *Stakić* Trial Judgment (n 2) paras 530 ('According to this Trial Chamber, the application of a mode of liability can not replace a core element of a crime. The Prosecution confuses modes of liability and the crimes themselves. Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to "commit" genocide, the elements of that crime, including the dolus specialis must be met. The notions of "escalation" to genocide, or genocide as a "natural and foreseeable consequence" of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a).') and 558; *Stakić* Decision on Rule 98*bis* Motion for Judgment of Acquittal (n 22) para. 48; *Brđanin* Decision on Motion for Judgment of Acquittal (n 430) paras 56–57.

[431] See *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Hearing on Preliminary Questions, Transcript, 7 February 2011 (hereafter *Ayyash et al.* Preliminary Questions Hearing), 93–94:

> [MR METTRAUX, on behalf of the STL's Defence Office] The last point that we would like to underline is also the issue of the possibility, as Judge Cassese just mentioned, the possibility under existing law of JCE of a conviction under JCE III of a foreseeable crime for a special-intent crime. I fully agree with the submission of my colleague [of the Prosecution] Mr. Withopf that this is possible under the law of the *ad hoc* tribunal. The first thing we will

Antonio Cassese, who has been credited with inventing the doctrine of JCE, changed his position on that point and took the view that JCE III liability required proof of special intent for the accused JCE member where that intent was part of the underlying crime, even though the crime itself did not form part of the common design.[432] The law on that point remains in a state of flux and uncertainty.

11.7.2.8 The ICC regime of liability for acts of genocide

11.7.2.8.1 No genocide-specific regime of liability

Unlike other statutory instruments, the ICC Statute does not include a provision replicating Article III of the Genocide Convention. Instead, it provides for a generic regime of modes of liability, in Articles 25 and 28, which are applicable (*in all but one respect*) to all statutory crimes.[433] Pursuant to Articles 5(a) and 6 of the Statute, this means that the jurisdiction *ratione materiae* of the Court is limited to genocide *proper*.[434] This means that the Court's jurisdiction over genocidal acts requires proof of the commission of genocide.[435] Where this has been established, liability may be incurred under any of the modes of liability provided for in the Statute, including attempted genocide (Article 25(3)(f)), providing assistance in such an attempt (Article 25(3)(b)-(d)), or directly and publicly inciting the commission of such a crime (Article 25(3)(e) of the Statute).

On the positive side, this statutory arrangement has the clear benefit of providing for a single and uniform system of liability applicable (with the above-mentioned exception) to all statutory crimes. This should enable the Court to develop a coherent body of jurisprudence regarding modes of liability. It will also avoid the pitfalls

> say is it is not possible under Lebanese law to be convicted of a special-intent crime without the intent to commit that offence. We will also say that this is, in our view, a very bad position as a general matter of law [...]
>
> JUDGE RIACHY: [Interpretation] When you talk about that type of crime, you're saying in a JCE there's no intention, be it *dolus eventualis* or other—
>
> MR. METTRAUX: [T]hat's entirely correct, Your Honour, yes, in particular [in] terms of JCE III, the natural and foreseeable consequences of the crime. [...] I would like also to say that yes, as [counsel for the Prosecution] mentioned a moment ago, under the ICTY and ICTR jurisprudence you could have a conviction under JCE III for a special-intent crime, and I was about to cite the word of Judge Cassese in his academic incarnation, where he takes aim at this possibility, saying this:
>
> 'Resorting to such class would be intrinsically ill-founded when the crime committed by the primary offender requires a special specific intent.'
>
> This is a position that we whole-heartedly adopt and which we say is consistent [...].

[432] *Ayyash et al.* Interlocutory Decision on Applicable Law (n 431) para. 249 ('Thus, while the case law of the ICTY allows for convictions under JCE III for genocide and persecution as a crime against humanity even though those crimes require special intent, and contrary to what the Prosecution pleads, the better approach under international criminal law is not to allow convictions under JCE III for special intent crimes like terrorism. In other words, it would be insufficient for a finding of guilt for an accused charged as a participant in a JCE (directed, for instance, to the commission of robbery or murder) to have foreseen the possibility that the crimes within the common purpose would eventually give rise to a terrorist act by another participant in the criminal enterprise.').

[433] The one exception is Article 25(3)(e), which only applies to the crime of genocide and brings into the jurisdiction of the Court the inchoate offence of direct and public incitement to commit genocide.

[434] See Article 5(1)(a) and Article 6.

[435] See also Schabas, *Genocide in International Law* (n 41) 308–309.

encountered by the *ad hoc* Tribunals in having two distinct, partly overlapping, provisions dealing with issues of liability.[436] The statutory regime applicable before the ICC also significantly expands upon the narrow confines of the Genocide Convention and, in so doing, tracks to a large extent the developments of earlier international(ized) criminal tribunals. The liability regime applicable before the ICC is indeed capable of widely extending into the responsibilities of those associated with acts of genocide and would cover most of the most significant contributions that can be made to the commission of such an act.

Less laudable is the absence of the notions of conspiracy and instigation. Whilst the latter could be read into the notions of 'solicitation' or 'inducement',[437] the absence of the inchoate offence of conspiracy might leave a significant normative gap in the ICC regime in that the Court might be unable to capture the very initial planning stages of a genocidal process.[438] Furthermore, the fact that the Statute does not provide for a number of modes of liability known to customary international law (e.g., JCE or 'instigating') will have the negative effect of rendering existing caselaw pertaining to the former inapplicable before the ICC whilst requiring the Court to develop jurisprudentially new and untested notions such as that of indirect co-perpetration, 'soliciting', or 'inducing'. Furthermore, as outlined earlier (11.4.4), the provision in Article 25(3)(e) of the notion of direct and public incitement to genocide actually operates as a hybrid between a mode of liability and a genuine inchoate offence as it will only come within the Court's jurisdiction where it has been established that genocide has actually been committed, thereby limiting the independent jurisdictional value of that notion.

In addition, the Rome Statute provides for a provision (Article 30), which deals with the issue of the 'mental element' and operates as a standard of *mens rea* for individual criminal responsibility where a specific standard of *mens rea* is not otherwise provided for in the text.[439] However, as specific *mens rea* are already provided for in many parts of the Statute, in the *Elements*, and in other potentially applicable secondary sources under Article 21(1)(b)-(c), and because it introduces complicated and overlapping notions, Article 30 can end up complicating the process of figuring out the applicable element of *mens rea*.[440]

[436] ICTY Statute (n 1) arts 4 and 7; ICTR Statute (n 1) arts 2 and 6.

[437] *Prosecutor v. Bemba et al.*, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu, and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', [2018] ICC-01/05-01/13-2275-Red (hereafter *Bemba et al.* Appeal Judgment), paras 847–851.

[438] See, *infra*, 11.7.2.8.2 and, *supra*, 11.3.6.

[439] See, generally, Gerhard Werle and Florian Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 Journal of International Criminal Justice 35 (hereafter Werle & Jessberger, 'Article 30 of the ICC Statute'), 38 (pointing out that the intent requirement relates to conduct and consequences only, while the knowledge requirement relates to circumstances and consequences only).

[440] When underlying crimes and modes of liability are considered together in relation to a particular charge, this statutory arrangement can result, in some cases, in a dozen or more elements having to be proven beyond reasonable doubt, not all of them entirely clear or free of dispute. A charge of indirect co-perpetration of a crime of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Article 6(c)) provides an illustration of the mental puzzle resulting from the overlapping provisions of the Statute.

11.7.2.8.2 Deviations from customary international law

Whilst the statutory regime of the ICC tracks in significant parts existing (customary) international law, it also contains some important deviations from it. In some respects, the ICC regime of liability goes *beyond* existing customary law. This is arguably the case with Article 25(3)(f), which extends the application of the notion of 'attempt' to all core international crimes, not just genocide. It also introduces certain notions (e.g., 'soliciting', co-perpetration, and 'inducing'), which are unknown to customary international law and thus deviates from it. In some other regards, the Statute *retracts* from customary international law, for instance in relation to the notion of 'instigation' or JCE, which the Statute fails to incorporate. In relation to at least one mode of liability (command responsibility), the Rome Statute has tweaked existing customary international law and lowered the requisite *mens rea* in relation to one category of potential defendants (military and military-like superiors) below what would otherwise be required under customary law.

Finally, the combined effect of Articles 6, 25, 28, and 30 of the Rome Statute can result in creating a heightened standard of *mens rea* for particular modes of liability when compared to their customary law equivalent.[441] Thus, under customary international law, aiding and abetting requires proof that the accused acted deliberately and in the knowledge of the assistance thus provided by him to the commission of a crime.[442] Where the underlying offence is genocide, there is no need for proof that the aider and abettor himself intended to destroy a group as such. In contrast, under the ICC regime, a defendant charged with aiding and abetting the commission of a crime must have had the intent with regard to the principal offence pursuant to Article 30 of the Statute.[443] Where that offence is genocide, this would require proof that he himself possessed the *dolus specialis* of genocide. In that sense, aiding and abetting under the ICC regime provides for a standard of *mens rea* comparable to the customary law understanding of 'complicity in genocide'.[444] These differences between ICC law and customary international law will have a number of consequences. First, the ICC will not be able to rely upon customary law (and its jurisprudential expressions) where its statutory regime differs from it. This jurisprudential deficit will in turn require of the Court to create and perhaps invent new legal standards that have no or little normative standing outside the Court's Statute. Second, some of these concepts are judicially untested so that their very interpretation will continue for some time to be subject to challenges and uncertainties, thereby conflicting with the demands for legal security and certainty. Third, the ICC jurisprudence regarding these *para*-customary notions will effectively create a parallel stream of jurisprudence running

[441] It has been suggested in the literature that, to limit the risk of such conflict, customary international law could be read into Article 30 of the Statute by reference to the 'unless otherwise provided' phrase in combination with Article 21. See, generally, Werle & Jessberger, 'Article 30 of the ICC Statute' (n 440) 42 and 45–46.

[442] See, *surpa*, 11.7.2.5.

[443] *Bemba* Trial Judgment (n 299) paras 84–98. See also, *Ongwen* Decision on Confirmation of Charges (n 108) para. 43; *Al-Mahdi* Decision on Confirmation of Charges (n 108) para. 26; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 167. See also Eser, Individual Criminal Responsibility (n 111), 801.

[444] See, *surpa*, 11.6.2.4.

alongside standards set by other jurisdictions. This will give rise to conflicts of law at the international level, which will test the Court's ability to contribute to the development of general international law, and might create confusion as to which of two conflicting international standards is controlling in a given case where international law is applicable.

11.7.2.8.3 The various statutory modes of liability

The Statute of the ICC recognizes a number of particular modes of liability, which could apply in relation to the crime of genocide. As noted above, several of these effectively track customary international law, although they may end up deviating slightly from customary law as a result of the Court's peculiar statutory terms. This is the case, for the following: ordering;[445] aiding and abetting or otherwise assisting;[446] (direct) perpetration;[447] attempt and incitement.[448] The Statute also provides for other modes of participation not thus far said to form part of customary international law: co-perpetration;[449]

[445] *Mudacumura* Article 58 Decision (n 299) para. 63; *Ongwen* Decision on Confirmation of Charges (n 108) paras 42 and disposition; *Bemba* Trial Judgment (n 299) para. 77; *Ntaganda* Decision on Confirmation of Charges (n 108) para. 145; *Gbagbo* Decision on Confirmation of Charges (n 108) para. 244; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 159; *Al-Mahdi* Decision on Confirmation of Charges (n 108) para. 25.

[446] See, generally, *Bemba* Trial Judgment (n 299) paras 84–98. See also, *Ongwen* Decision on Confirmation of Charges (n 108) para. 43; *Al-Mahdi* Decision on Confirmation of Charges (n 108) para. 26; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 167. As discussed earlier, aiding and abetting under ICC law diverges from the customary law rendition of that mode of liability in that it requires a higher threshold of *mens rea*. The *Bemba et al. Contempt* Appeals Chamber of 8 March 2018 has also held that the three notions of 'aiding', 'abetting', and 'otherwise assisting' in fact constitute a single mode of liability. *Bemba et al.* Appeal Judgment (n 438) paras 1324–1325. See also, *Prosecutor v. Bemba et al*, Judgment pursuant to Article 74 of the Statute, [2016] ICC-01/05-01/13-1989-Red (hereafter *Bemba et al.* Trial Judgment), paras 87–89.

[447] This is, in effect, the ICC equivalent to the notion of 'commission' as adopted and defined by other international criminal tribunals. See, generally, *Ntaganda* Decision on Confirmation of Charges (n 108) para. 136 (following the Pre-Trial Chamber's *obiter* statement in *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, [2007] ICC-01/04-01/06-803-tEN (hereafter *Lubanga* Decision on the Confirmation of Charges), para. 318. See also *Bemba* Trial Judgment (n 299) para. 58 (Article 25(3)(a) is applicable in Article 70 cases); *Ongwen* Decision on Confirmation of Charges (n 108) para. 117; *Prosecutor v. Al-Mahdi*, Judgment and Sentence, [2016] ICC-01/12-01/15-171 (hereafter *Al-Mahdi* Judgment), paras 59–61 (where all the elements of different variations under Article 25(3)(a) of the Statute are proven, the Chamber must elect which mode of responsibility best reflects the full scope of the Accused's individual criminal responsibility); *Katanga et al.* Decision on Confirmation of Charges (n 207) para. 488.

[448] For a discussion of these, see *supra*, 11.5.1 and 11.4.4.2, respectively. The extent to which these may end up deviating from existing customary international law is uncertain at this point.

[449] This mode of liability (arising out of Article 25(3)(a) of the Statute) has been said to consist of the following elements:

a. The person makes an essential contribution with the resulting power to frustrate the commission of the crime.
b. The person's contribution is made within the framework of an agreement with others, which led to the commission of the crime.
c. The person satisfies the subjective elements of the crime.

See, generally, *Al-Mahdi* Judgment (n 448) para. 19 (citing to *Prosecutor v. Lubanga*, (Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction) [2014] ICC-01/04-01/06-3121-Red (hereafter *Lubanga* Appeal Judgment)). See also *Bemba* Trial Judgment (n 299) paras 62–71; *Bemba* Article 61 Decision (n 404) paras 33 and 350; *Prosecutor v. Abu Garda*, Decision on Confirmation of Charges, [2010] ICC-02/05-02/09-243-Red (hereafter *Abu Garda* Decision on the Confirmation of Charges), paras 160–61; *Al-Mahdi* Decision on Confirmation of Charges (n 108) para. 24; *Banda & Jerbo Jamus*,

indirect perpetration and co-perpetration;[450] soliciting;[451] inducement;[452] or contributing in any other way pursuant to Article 25(3)(d).[453]

11.7.2.8.4 The issue of the *mens rea*

11.7.2.8.4.1 Special intent

The question of applicable *mens rea* in relation to the crime of genocide is particularly complex before the ICC as it could depend on four separate, interacting, normative elements: the genocidal intent (expressed in Article 6, introductory paragraph); the element of 'general intent' applicable to the underlying crimes listed in Articles 6(a)-(e), as might be read into the Statute as a result of Article 21(b) or (c); the element of *mens rea* applicable to the relevant modes of liability (Articles 25 and 28); and Article 30 of the Statute which deals generically and residually ('unless otherwise provided') with the question of the mental element where not otherwise regulated. This normative challenge 'à quatre bandes' appears to mean the following in relation to the crime of genocide. First, as noted earlier, the ICC Statute provides for the Court's jurisdiction *ratione materiae* over genocide only.[454] This means that, regardless of the mode of liability (or inchoate offence) pursuant to which a particular accused is charged, the prosecution will have to establish that genocide has indeed been committed if the charge is genocidal in nature.

Corrigendum to the Decision on Confirmation of Charges (n 211) paras 128 and 150; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 134; *Mbarushimana* Arrest Warrant Application Decision (n 108) para. 30; *Lubanga* Decision on the Confirmation of Charges (n 448) paras 343–67; *Katanga et al.* Decision on Confirmation of Charges (n 207) paras 522–539. For a discussion of domestic use of the notion of co-perpetration in relation to the crime of genocide, see also Kai Ambos, 'The German *Rwabukombe* Case: National Prosecution of International Crimes' (2016) 14 Journal of International Criminal Justice 1221.

[450] See, generally, *Katanga et al.* Trial Judgment (n 108) para. 1416; *Katanga et al.* Decision on Confirmation of Charges (n 207) paras 500–510. See also *Prosecutor v. Gaddafi et al.*, Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', [2011] ICC-01/11-01/11-1 (hereafter *Gaddafi et al.* Article 58 Decision), para. 69 (citing to *Katanga et al.* Decision on Confirmation of Charges (n 207) paras 500–537; *Lubanga* Decision on the Confirmation of Charges (n 448) paras 349–65); *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 270) paras 211 and 213; *Ongwen* Decision on Confirmation of Charges (n 108) paras 38–41 (citing to *Lubanga* Appeal Judgment (n 450) paras 445, 458, 465, and 473). See also *Blé Goudé* Decision on Confirmation of Charges (n 108) paras 136 and 141; *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [2012] ICC-01/09-01/11-373 (hereafter *Ruto et al.* Confirmation Decision), paras 291–292; *Mudacumura* Article 58 Decision (n 299) para. 60; *Ntaganda* Decision on Confirmation of Charges (n 108) paras 104, 121; *Gbagbo* Decision on Confirmation of Charges (n 108) para. 230; *Kenyatta et al.* Decision on Application for Summonses to Appear (n 108) para. 36; *Kenyatta et al.* Decision on Confirmation of Charges (n 108) para. 297.

[451] *Bemba* Trial Judgment (n 299) paras 73–82; *Bemba* Article 61 Decision (n 404) para. 34.

[452] *Bemba* Trial Judgment (n 299) paras 73–82; *Bemba* Article 61 Decision (n 404) para. 34. See also, *Ntaganda* Decision on Confirmation of Charges (n 108) para. 153.

[453] See *Katanga et al.* Trial Judgment (n 108) para. 1620. See also *Ongwen* Decision on Confirmation of Charges (n 108) para. 44; *Ntaganda* Decision on Confirmation of Charges (n 108) para. 158; *Gbagbo* Decision on Confirmation of Charges (n 108) para. 253; *Blé Goudé* Decision on Confirmation of Charges (n 108) para. 172; *Al-Mahdi* Decision on Confirmation of Charges (n 108) para. 27; *Kenyatta et al.* Decision on Application for Summonses to Appear (n 108) para. 47; *Kenyatta et al.* Decision on Confirmation of Charges (n 108) para. 421; *Mbarushimana* Arrest Warrant Application Decision (n 108) para. 38; *Mbarushimana* Decision on the Confirmation of Charges (n 108) paras 271–289.

[454] See, ICC Statute (n 1) arts 5(1)(a) and 6.

Second, if the accused is charged with *committing* (Article 25(2)-(3)(a) of the Statute) one of the acts listed in Article 6, the *dolus specialis* as well as any particular element of intent attached to the particular underlying crime with which he is charged (e.g., the element of intention attached to Article 6(d) of the Statute) will have to be established in relation to *him*. The same is true where the accused has been charged with a mode of liability which, under the terms of the Statute, requires proof that he possessed or shared the requisite intent of the offence. This will be the case, for instance, where the accused is charged pursuant to one of these modes of liability or inchoate offence; that is, aiding and abetting;[455] (direct and indirect) perpetration;[456] indirect perpetration through an organization;[457] co-perpetration;[458] and attempt.[459] In contrast, where the charge concerns any of the following modes of liability, lower standards of *mens rea* which do not demand proof of intent would apply: command responsibility;[460] 'contributing in any other way' (Article 25(3)(d)).[461] This would also arguably be the case in relation the following: ordering,[462] soliciting,[463] and inducing.[464]

Furthermore, as discussed earlier, it remains an open question whether the contextual element of the crime of genocide imported into the definition of that offence by the *Elements of Crimes* has had the effect of adding an element of *mens rea* to the definition of that crime.[465]

11.7.2.8.4.2 'General intent'

Each and all of the underlying offences listed in Article II of the Convention and Article 6 of the ICC Statute requires proof of a 'general intent' in addition to the element of genocidal intent that is applicable to all of them. For a number of these offences, customary law requires particular elements of intent or deliberateness. Thus, the offence of 'deliberately inflicting on the group conditions of life calculated to

[455] See references cited *supra*, in fn 447.

[456] See references, *supra*, in fns 448 and 450. [457] See references, *supra*, in fn 451.

[458] See references, *supra*, in fn 450. [459] See references earlier in fn 449.

[460] Where an accused has been charged with command responsibility for acts of genocide committed by subordinates, it will be enough to establish that he knew, had reason to know or 'should have known' of the acts of his subordinates (including their genocidal intent). It will not be necessary for the prosecution to establish that he himself possessed that *dolus specialis*. See *supra*, 11.7.2.6.

[461] In relation to this particular mode of liability, it is necessary to establish at *mens rea* level that (i) contribution of the accused was intentional; and (ii) his contribution was made in the knowledge of the intention of the group to commit the crime. For references, see, *supra*, in fn 454.

[462] Pursuant to this mode of liability, it is sufficient to establish that the accused is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order. For references, see, *supra*, in fn 446.

[463] Under that particular mode of liability, proof must be made that the accused meant to solicit the commission of the offence, or must have been at least aware that the offence(s) would be committed 'in the ordinary course of events' as a consequence of the realization of his or her act or omission. For references, see, *supra*, in fn 452.

[464] In relation to this particular mode of liability, the applicable *mens rea* has been identified as follows: the accused meant to induce the commission of the offence, or must have been at least aware that the offence(s) would be committed 'in the ordinary course of events' as a consequence of the realization of his or her act or omission. For references, see, *supra*, in fn 453.

[465] See *supra*, 7.2.2–7.2.3.

bring about its physical destruction in whole or in part' (Article II(c) Convention; Article 6(c) ICC Statute) requires proof of 'deliberateness' on the part of the perpetrator. 'Imposing measures intended to prevent births within the group' (Article II(d) Convention; Article 6(d) ICC Statute) requires proof on the part of the perpetrator of an '*intention* to prevent birth' within the relevant group.[466] It is not entirely clear from the articulation of the Rome Statute whether these particular elements of 'general intent' as exist under customary international law will be read into the Statute through Article 30 of the Statute. If they are not, the law of genocide applicable before the ICC would diverge from customary international law in regards to the elements of these offences. Should Article 30 on its own be thought incapable of bringing these elements into the definition of these offence, Article 21(b) or (c) could provide the avenue by which the Court could interpret the terms of Article 6 in light of existing customary law as reflected in the jurisprudence of other international criminal tribunals and thus build these particular elements of intent and deliberateness into the definition of these offences for the purposes of the Court.

For all remaining underlying offences listed in Article 6 of the Statute, which do not entail additional element of intent or deliberateness, the 'general intent' attaching to them will be determined in relation to the accused by reference to the mode of liability charged against him with Article 30 playing a residual role where the element of *mens rea* is not otherwise provided.[467]

Kress has pointed to a particular quirk that attaches to one of the underlying offences of genocide, namely, the forcible transfer children of the group to another group: the *Elements of Crimes* introduce in relation to that offence a negligence standard with regard to the age of the transferred person: 'The perpetrator knew, or *should have known*, that the person or persons were under the age of 18 years'.[468] Such a standard is not provided for in the Statute and is, arguably, contrary to Article 30(1) of the Statute. One interpretation of this apparent inconsistency is to read the words 'unless provided otherwise' in Article 30(1) as referring, *inter alia*, to the *Elements*, which would render the negligence standard compatible with the terms of the Statute.[469] The alternative approach, propounded by Kreβ, is to regard the *Elements* as *ultra vires* on this point.[470] Kreβ's approach appears preferable. The Statute does not provide for the possibility of a negligence standard of *mens rea* so that the *Elements* could not possibility help interpret an element that is not provided for in the first place. It is the *Elements* that must help interpret the Statute, not the other way around. Second, Article 9(3) makes it clear

[466] See, *supra*, 10.4.2 and 10.5.2, respectively.

[467] For an illustration of the complex process of 'decortication' of the elements of a genocidal offence as a result of the structure of the Statute, see Roger S Clark, 'The Mental Element in the International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Criminal Law Forum 291 (hereafter Clark, 'Mental Element in ICL'), 324 (in relation to the offence of 'killing' pursuant to Article 6(a) of the Statute and Elements).

[468] Emphasis added.

[469] See, generally, Schabas, *Commentary on the Rome Statute* (n 41) 475 (and finding support for his view in *Bemba* Article 61 Decision (n 404) paras 353 and 136), and 478. See also, generally, Werle & Jessberger, 'Article 30 of the ICC Statute' (n 440) 35–55.

[470] Kreß, 'Crime of Genocide under International Law' (n 9) 484–85.

that the *Elements* 'shall be consistent' with the Statute. Reading into them a standard of *mens rea* not statutorily foreseen would arguably violate this requirement. As the Court has not yet addressed this issue, it remains unclear whether it will find that negligence is sufficient or that actual knowledge is required in relation to the element concerning the age of the transferred person.[471]

[471] It should be noted, however, that in relation to the war crimes of conscripting or enlisting child soldiers (Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute), which provide for a similar 'should have known' standard in the *Elements*, Chambers do not appear to be treating this 'should have known' element as being ultra vires although they do not appear to have expressly addressed it. See, e.g., *Ntaganda* Decision on Confirmation of Charges (n 108) para. 133.

12

Genocide and Other International Crimes

12.1 Genocide in a Nutshell

Genocide is characterized by a number of important definitional features which set it apart from other international core crimes. First, unlike war crimes and crimes against humanity, the primary focus of its protection is *groups*, rather than individuals. Genocide's concern for the fate of individuals is only incidental to the protection of these groups.[1]

Second, the *dolus specialis* of genocide (i.e., an intent to destroy in whole or in part a protected group as such) is specific to that offence. Whilst this special intent involves an element of discrimination similar to the crime against humanity of persecution, genocidal intent goes beyond mere discrimination and involves the *further* purpose of physically or biologically destroying the group to which victims belong. This element is unique to the crime of genocide and constitutes its core definitional feature.[2]

Third, whilst some, and perhaps most, acts of genocide may also amount to a war crime or a crime against humanity if committed in the relevant context—that is, an armed conflict or a widespread or systematic attack against a civilian population, respectively—these acts constitute a particularly narrow subset of acts capable of contributing to the destruction of a group. Unlike genocide, war crimes and crimes against humanity are not as restricted and are generally broader in scope because their protected interests are significantly more diverse, and unlike war crimes and crimes against humanity, genocide does not require proof of a particular contextual or *chapeau* element.[3]

Fourth, the law of genocide is specifically designed to encompass the early stages of criminal activity in order to prevent or deter the actual commission of acts of genocide. For that purpose, the law of genocide criminalizes the mere conspiracy to commit genocide and acts of direct and public incitement to genocide. Such inchoate offences are not a part of the law of war crimes or crimes against humanity.[4]

Despite their different origins and reach, the international core crimes significantly overlap. What constitutes genocide also often satisfies the requirements of

[1] See, *supra*, 8.4.1. [2] See, *supra*, 8.2.3. [3] See, *supra*, 7.1.

[4] A common plan or conspiracy to commit the crime of aggression was provided for and criminalized in the Charters of the Nuremberg and Tokyo Tribunals. See, respectively, Charter of the International Military Tribunal annexed to Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 280 (hereafter Nuremberg Charter), art. 6(a); Charter of the International Military Tribunal for the Far East, 19 January 1946 (as amended 26 April 1946), 1589 Treaties and Other International Agreements Series 20 (hereafter Tokyo Charter), art. 5(a). See also, *supra*, 11.3.1.

other international crimes and evidence relevant to establishing an act of genocide may also be relevant to establishing other core crimes.[5] As a group, these crimes offer an impressive tool box of penal prohibitions that cover a wide range of criminality.

12.2 Genocide and War Crimes

12.2.1 Common and overlapping elements

Genocide and war crimes constitute grave violations of international law. Both categories criminalize serious attacks on vulnerable communities, their members, or important values of those communities. In principle, both can be committed by and against civilians and combatants. As a result of this partial normative overlap, a criminal act could constitute both an act of genocide and a war crime.[6] Furthermore, the laws of war could help determine whether certain acts constitute acts of genocide when committed in the context of an armed conflict.[7]

[5] See *Prosecutor v. Kaing Guek Eav (Duch)*, Case No. 001/18-07-2007-ECCC/SC, Judgment, 3 February 2012 (hereafter *Duch* Appeal Judgment), para. 286 (citing Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) (hereafter Mettraux, *Ad Hoc Tribunals*), 315). See also *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000 (hereafter *Kupreškić et al.* Trial Judgment), paras 697 ('Unlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallized in the relevant case-law or found in statutory enactments, each Article of the [ICTY] Statute does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain general legal ingredients. It follows that, for instance, a crime against humanity may consist of such diverse acts as the systematic extermination of civilians with poison gas or the widespread persecution of a group on racial grounds. Similarly, a war crime may for instance consist in the summary execution of a prisoner of war or the carpet bombing of a town.') and 698 ('In addition, under the [ICTY Statute], some provisions have such a broad scope that they may overlap. [...]'). This partial overlap explains why the same underlying conduct has sometimes been prosecuted as and/or resulted in conviction of genocide and crimes against humanity and/or war crimes. For illustrations, see *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgment Issued on 24 March 2016, 24 March 2016 (hereafter *Karadžić* Trial Judgment).

[6] This was thought to be the case, for instance, with the crime of 'de-nationalization' in Second World War prosecutions. See, generally, United Nations War Crimes Commission, 'Trial of Ulrich Greifelt and Others: Notes on the Case' in *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) (hereafter UNWCC, 'Notes on RuSHA Case'), 42. See also, for an illustration, *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Fourth Amended Indictment, 16 December 2011 (hereafter *Mladić* Fourth Amended Indictment), where factual allegations relevant to genocide charges are also material to allegations of war crimes and crimes against humanity. In some instances, jurisdictional limitations have resulted in acts of genocide being characterized and prosecuted as war crimes. Thus, in the *Niyonteze* case before Swiss courts, the accused was charged and convicted for war crimes (violations of the Geneva Conventions) in relation to crimes committed during the Rwandan genocide. Genocide charges were excluded as a result of the fact that the notion of genocide did not form part of the Swiss legal framework at the relevant time. See, generally, Jugement en la cause Fulgence Niyonteze, Tribunal de Division 2, 3 September 1999; Jugement en la cause Fulgence Niyonteze, Tribunal Militaire d'Appel 1A, 26 May 2000, in particular, 31–32.

[7] See, *supra*, 3.2. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 153.

12.2.2 Differences

12.2.2.1 Different origins and scope of application

The law of genocide and the laws of war have different origins. Genocide stems from the events of Second World War and is intended to encapsulate the particular sort of criminality witnessed during that conflict: the targeting of groups with the intent to destroy them.[8] In contrast, the laws or customs of war are centuries old and were initially conceived of as a code of military conduct between warring parties.[9] Over time, the laws of war evolved to provide increasingly extensive protection to certain categories of individuals and objects that were not or not anymore involved in the operations of war.[10] In parallel, elements of the laws of war came to be regarded as binding not just on states but also on individuals, and the violation of some of these prohibitions were said to constitute criminal offences—'war crimes'—for which an individual could be found individually responsible as a direct result of international law.[11]

Genocide and war crimes also have different scopes of application. The laws of war and the notion of war crimes only apply where an armed conflict (or a state of occupation) exists.[12] Within that general context, the laws of war provide for different legal regimes depending on the nature of the conflict in question.[13] In contrast, the law of genocide applies indistinctly in times of peace and war.[14] The same general prohibitions on genocidal acts will, therefore, apply whether an armed conflict exists or not and whatever the nature of the conflict.[15]

[8] See, *supra*, 2.1–2.2.

[9] See, generally, Leslie C Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) (hereafter Green, *Contemporary Law of Armed Conflict*).

[10] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) (UNWCC, *History of the UNWCC*), 24.

[11] Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (OUP 2014), 232ff. See also George Brand, 'The War Crimes Trials and the Laws of War' (1949) 26 British Yearbook of International Law 414; Philipp Ambach, 'From State to Individual: Evolution and Future Challenges of the Transposition of International Humanitarian Law into International Criminal Trials Against Individuals' in Morten Bergsmo et al. (eds), *Historical Origins of International Criminal Law*, vol. 3 (Torkel Opsahl Academic EPublisher 2014).

[12] See, generally, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereafter *Tadić* Jurisdiction Decision on Interlocutory Appeal), para. 67; *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 (hereafter *Kunarac et al.* Appeal Judgment), para. 402; *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003 (hereafter *Naletilić & Martinović* Trial Judgment), paras 176, 225, and references cited therein.

[13] See, generally, Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 International Review of the Red Cross 69, 70–71, 90; Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2010); Eve La Haye, *War Crimes in Internal Armed Conflict* (CUP 2008). But see *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001 (hereafter *Čelebići* Appeal Judgment), para. 172)pointing to the increased overlap between those regimes).

[14] See, *supra*, 3.2.

[15] Ibid. See also ICJ *Croatia-Serbia* 2015 Judgment (n 7) para. 153 (noting that when an armed conflict is taking place at the time relevant to the charges, the determination of whether a particular conduct was legally permissible under the applicable laws of war might constitute evidence relevant to establishing the commission of an act of genocide).

12.2.2.2 Different aims and protected interests

The two regimes pursue different aims. The prohibition of genocide seeks to protect human groups by criminalizing acts aimed at their physical or biological destruction. In contrast, the laws of war regulate the conduct of hostilities and criminalize serious deviations from those standards.[16] The two regimes thus protect distinct, but partly overlapping, interests.[17] As a result, although most genocidal acts would generally constitute war crimes when committed in an armed conflict, the reverse is not necessarily true.

12.2.2.3 Different material elements

The material elements of war crimes and genocide are significantly different. This reflects their different purposes and reach.

12.2.2.3.1 Armed conflict and nexus therewith

The first and perhaps most obvious definitional difference between genocide and war crimes is that whilst the latter can only be committed in times of war, genocide may be committed during war or peace.[18] The commission of a war crime therefore requires proof of the existence of an armed conflict (or state of occupation) at the time and place relevant to the charges *and* proof of a sufficient material connection (or nexus) between the acts in question and the conflict.[19] These requirements are not part of the definition of genocide.

[16] See, generally, ICJ *Croatia-Serbia* 2015 Judgment (n 7) para. 153:

> The Court notes that the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Convention seeks to prevent and punish genocide as a crime under international law (Preamble), 'whether committed in time of peace or in time of war' (Art. I), whereas international humanitarian law governs the conduct of hostilities in an armed conflict and pursues the aim of protecting diverse categories of persons and objects.

[17] In particular, the laws of war protect (private and public) properties, which are not protected *per se* under the law of genocide although attacks on national, cultural or religious objects and symbols could constitute evidence relevant to establishing the commission of an act of genocide. See, *supra*, 3.2 and 9.4.7.3.

[18] See, *supra*, 3.2. See, *inter alia*, UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993 (hereafter UN Secretary-General Report on ICTY), para. 45 (noting that 'genocide, whether committed in time of peace or in time of war, is a crime under international law' and reflecting upon Article I of the Genocide Convention). See also *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 12) para. 70; *Kunarac et al.* Appeal Judgment (n 12) para. 57. Whilst not a legal ingredient of the definition of genocide, the existence of an armed conflict at the relevant time and place often accompanies the commission of such an act. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (hereafter *Akayesu* Trial Judgment), paras 127–128:

> [T]he genocide did indeed take place against the Tutsi group, alongside the conflict. The execution of this genocide was probably facilitated by the conflict, in the sense that the fighting against the RPF forces was used as a pretext for the propaganda inciting genocide against the Tutsi [...]. [...] [A]lthough the genocide against the Tutsi occurred concomitantly with the above-mentioned conflict, it was, evidently, fundamentally different from the conflict.

[19] See, generally, *Karadžić* Trial Judgment (n 5) para. 441 and references cited therein; *Prosecutor v. Bemba*, Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016 (hereafter *Bemba* Trial Judgment), paras 126–130, 142–144. See also William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006), 229ff.

12.2.2.3.2 Genocidal intent

In contrast to genocide, war crimes do not require proof of a special intent to destroy in whole or in part a protected group as such.[20] The perpetrator of a war crime must simply intend to commit the underlying offence (say, murder) with the general awareness that his acts are part of an armed conflict.[21] This difference in *mens rea* reflects the crimes' different aims and protected interests.[22] Therefore, the mere infliction of severe casualties on civilians during an armed conflict, even if extensive and intentional, would not per se constitute an act of genocide. For this act to become an act of genocide, it would further have to be established that the perpetrators intended to destroy a protected group and that such casualties constitute evidence of that intent.[23]

12.2.2.3.3 Potential victims

Both civilians and combatants can be victims of genocide and of war crimes.[24] Furthermore, there is no requirement that the victims and perpetrators of either of these crimes should be from different groups or nations. A war crime could thus be committed against fellow nationals and even against members of one's own forces.[25]

[20] See, *supra*, 8.1.

[21] *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004 (hereafter *Kordić & Čerkez* Appeal Judgment) para. 311; *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-A, Judgment, 3 May 2006 (hereafter *Naletilić & Martinović* Appeal Judgment), paras 114–116; *Prosecutor v. Kaing Guek Eav (Duch)*, Case No. 001/18-07/2007/ECCC/TC, Judgment, 26 July 2010 (hereafter *Duch* Trial Judgment), paras 420–422; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Judgment, 29 May 2013 (hereafter *Prlić et al.* Trial Judgment), para. 202. See also Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess, part II.B, UN Doc. ICC-ASP/1/3, 3–10 September 2002 (hereafter ICC *Elements of Crimes*), art. 8; *Prosecutor v. Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 5 April 2012 (hereafter *Lubanga* Trial Judgment), para. 984; *Bemba* Trial Judgment (n 19) paras 146–147.

[22] See, *supra*, 12.2.2.2. See also UN Economic and Social Council, Ad Hoc Committee on Genocide: Relations Between the Convention on Genocide on the one hand and the Formulation of the Nürnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the other: Note by the Secretariat, UN Doc. E/AC.25/3, 2 April 1948 (hereafter UN Doc. E/AC.25/3), 6 ('The destruction of the human group is the actual aim in view. In the case of foreign or civil war, one side may inflict extremely heavy losses on the other but its purpose is to impose its will on the other side and not to destroy it.').

[23] See, generally, UN Economic and Social Council, Draft Convention on the Crime of Genocide, UN Doc. E/447, 26 June 1947 (hereafter Secretary-General, Draft Convention with Commentary), 23:

> 2. The infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide.
>
> [...]
>
> 3. War may, however, be accompanied by the crime of genocide. This happens when one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives. Examples of this are the execution of prisoners of war, the massacre of the populations of occupied territory and their gradual extermination. These are clearly cases of genocide.

[24] See, *supra*, 8.2.1.3. Certain war crimes can only be committed against certain categories of individuals, such as civilians (e.g., indiscriminate attacks against civilians or civilian objects) or against combatants (e.g., killing of combatants who are *hors de combat* or giving no quarter to surrendering enemy soldiers).

[25] See, e.g., *Prosecutor v. Ntaganda*, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-1707, 4 January 2017 (hereafter *Ntaganda* Second Decision on Jurisdiction Challenge), in particular, para. 54:

> [T]he Chamber finds that members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)

Similarly, acts of genocide could in principle be committed against fellow members of the targeted group.[26]

However, whilst genocide must be committed against members of a protected ethnic, religious, racial, or national group,[27] war crimes can be committed in principle against anyone, regardless of membership in a given group.[28]

Genocide can in principle be committed against civilians and combatants.[29] Whilst the majority of recognized categories of war crimes relate to acts of violence committed against individuals who take no active part in hostilities,[30] some categories of war crimes would also criminalize acts directed against individuals who may still be involved in hostilities.[31]

Furthermore, the laws of war are not limited to protecting *individuals*, that is, human beings. Some war crimes prohibit attacks on objects, properties, or locations—such as undefended towns.[32] In contrast, the prohibition against genocide only protects

(vi); whether as a result of the way these crimes have been incorporated in the Statue or on the basis of the framework of international humanitarian law, or international law more generally.

This was subsequently upheld on appeal, see *Prosecutor v. Ntaganda*, Judgment on the Appeal of Mr Ntaganda Against the 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9', ICC-01/04-02/06-1962, 15 June 2017 (hereafter *Ntaganda* Appeal Judgment on the Second Decision on Jurisdiction Challenge), paras 59–60.

[26] See, *supra*, 8.4.4.4.1.4. See also United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 15 (HM Stationary Office 1949) (hereafter UNWCC, *LRTWC* vol. 15), 122 (citing United Nations War Crimes Commission, 'Trial of Josef Altöstter and Others' in *Law Reports of Trials of War Criminals*, vol. 6 (HM Stationery Office 1948) (hereafter UNWCC, '*Justice* Case'), 32, 75, 99, providing for the possibility of acts of genocide being committed by enemy nationals against enemy nationals).

[27] See, *supra*, 8.4.4.

[28] In the *Ntaganda* case, for instance, the Appeals Chamber of the ICC made it clear that common Article 3 provides for 'unqualified protection against inhumane treatment irrespective of a person's affiliation, requiring only that the persons were taking no active part in hostilities at the material time'. *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', 15 June 2017, par 60 (footnote omitted). An element of affiliation remains relevant, however, in respect of 'grave breaches' of the Geneva Conventions. This type of war crime can only be committed against individuals who find themselves at the time 'in the hands of a party to the conflict of which she is not a national'. This has been interpreted as requiring that victims and perpetrators should owe their respective allegiance to different states. See, e.g., *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 (hereafter *Tadić* Appeal Judgment), paras 166ff; *Aleksovski* Appeal Judgment (n 36) para. 152; *Kordić & Čerkez* Appeal Judgment (n 21) para. 329; *Čelebići* Appeal Judgment (n 13) para. 82 (noting that that 'formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds'); *Prlić et al.* Trial Judgment (n 21) para. 100; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Judgment, 29 November 2017, paras. 354-355; *Duch* Trial Judgment (n 21) para. 419; *Prosecutor v Andjelko Kolasinac*, District Court of Prizren, 14 June 2001, P. Nr. 44/2000, pp. 12–13.

[29] See, *supra*, 8.2.1.3.

[30] See, e.g., *Karadžić* Trial Judgment (n 5) para. 444; *Čelebići* Appeal Judgment (n 13) paras 420 and 423–424; *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-A, Judgment, 19 May 2010, para. 66; *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008, para. 172; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Judgment, 15 April 2011, para. 1678; *Prlić et al.* Trial Judgment (n 21), Vol 3, paras 143 and 511; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgment, 16 November 2005, paras 32–33.

[31] See, e.g., ICC Statute, article 8(2)(b)(XI) (killing or wounding treacherously individuals belonging to the hostile nation or army), article 8(2)(b)(xii) and (e)(x) (declaring that no quarter will be given), and war crimes pertaining to the impermissible use of prohibited weapons.

[32] The following acts, for instance, do constitute recognized categories of war crimes: wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic

groups and, by extension, members of groups.[33] The law of genocide does not directly concern itself with objects, symbols, and properties, although attacks upon those might constitute evidence relevant to inferring the presence of genocidal intent.[34]

12.2.2.4 Gravity

In terms of their respective gravity, war crimes cover a much broader spectrum than genocide. War crimes range from relatively *minor* offences such as plunder of property, to very serious offences—say, murder or employment of poisonous weapons. As genocide protects the most fundamental human values, that is, the existence of human groups and indirectly, the life and physical or mental integrity of its members, every genocidal action will per se be extremely serious.[35] In terms of gravity, the range of genocidal offences is therefore much narrower than is the case with war crimes. The necessary presence of genocidal intent on the part of the perpetrator of such an act also operates as a sort of aggravating factor that sets genocide apart from other international crimes.[36] Sentences for genocide are, therefore, generally harsher than might be the case for war crimes, all things being equal, although an adequate sentence will depend on all relevant circumstances and not merely on the legal label that attaches to the defendant's conviction.[37]

12.2.2.5 Other normative differences

12.2.2.5.1 Duty to punish

The law of genocide and the laws of war provide obligations that are binding on individuals as well as states. In particular, the law of genocide obligates states with the dual duty to prevent and punish acts of genocide.[38] The laws of war similarly provide for an obligation on the part of states to investigate and, as the case may be, prosecute war crimes committed by their nationals or armed forces or when committed on their territory or over which they have jurisdiction.[39] The scope of this obligation is at once broader—expanding the range of crimes in relation to which an obligation to investigate and prosecute exists—and narrower—not providing for an obligation in relation to those over which a state has power of influence—than is the case under the law of genocide.[40] The legal regime applicable to 'grave breaches' of the Geneva Conventions,

monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives; attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings.

[33] As discussed earlier, attacks on objects and properties (e.g., cultural or religious objects and monuments) may, however, serve as evidence of an intent to destroy one of the protected groups in its physical and biological existence. See, *supra*, 9.4.7.3.

[34] See, *supra*, 8.4.4.6.3 and 9.4.7.3. [35] See, *supra*, 3.5. [36] See references in, *infra*, fn 90.

[37] See, *supra*, 3.5 and references. [38] See, *supra*, Chapter 5.

[39] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, vol. 1: Rules* (CUP 2005) (hereafter *ICRC Customary IHL: Rules*), Rule 158 ('States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.').

[40] See, *supra*, 5.1 and 5.3.

which applies exclusively in international armed conflicts[41] and only in relation to 'protected persons' and 'protected properties',[42] goes one step further and establishes a twofold system. On the one hand, it provides for an enumeration of violations of the laws of war that are regarded as so serious as to constitute 'grave breaches';[43] along with this enumeration, a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting states to search for and prosecute or extradite persons allegedly responsible for 'grave breaches'.[44] Under that regime, High Contracting Parties to the 1949 Geneva Conventions have a *duty* to investigate and prosecute those responsible for such breaches.[45] This mechanism effectively establishes 'universal mandatory criminal jurisdiction among contracting States' in relation to such crimes.[46] This mechanism is now understood to form part of customary international law.[47] In relation to all other categories of war crimes, states have the *right*—but no obligation—to vest universal jurisdiction in their national courts over such crimes.[48] As noted earlier, the law of genocide does not provide for a principle of universal jurisdiction over such crimes although it does not interfere with the *right* of

[41] *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 12) paras 80–84; *Naletilić & Martinović* Appeal Judgment (n 21) paras 110–112, 116; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000 (hereafter *Aleksovski* Appeal Judgment), para. 119; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 (hereafter *Blaškić* Appeal Judgment), para. 170. See also Sonja Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?' (2000) 5 Journal of Conflict and Security Law 63.

[42] *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 12) paras 81–82. Regarding the definition of these notions, see, generally, Mettraux, *Ad Hoc Tribunals* (n 5) 64–71 and references cited therein.

[43] *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 12) para. 80. [44] Ibid.

[45] See, generally, *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 12) para. 79. That duty subsumes an obligation on the part of High Contracting Parties to give effect to the principle of universal jursidiction in their legal order. See, generally, *ICRC Customary IHL: Rules* (n 35) Rules 157, 158. State parties to the Geneva Conventions must also provide for criminal sanctions for individuals committing or ordering the commission of grave breaches, enact legislation necessary to provide for effective punishment of persons committing or ordering the commission of a grave breach, and search for persons alleged to have committed or ordered the commission of grave breaches and bring them (regardless of their nationality) before their courts. See, generally, Gerald Irving A Dare Draper, *The Red Cross Conventions* (Praeger 1958), 20ff.

[46] *Tadić* Jurisdiction Decision on Interlocutory Appeal (n 12) para. 79. The purpose of the Geneva Conventions in providing for universal jurisdiction in relation to its grave breaches only was 'to avoid interference by domestic courts of other States in situations which concern only the relationship between a State and its own nationals'. See *Čelebići* Appeal Judgment (n 13) para. 79; *Naletilić & Martinović* Appeal Judgment (n 21) para. 111. See also Oscar Uhler and Henri Coursier, *Commentary on the Geneva Conventions of 12 August 1949, vol. 4* (ICRC 1958) (hereafter *ICRC Commentary on Geneva Convention IV*), 46. A number of other treaties oblige states to provide universal jurisdiction over certain categories of crimes, including when committed in an armed conflict. See, in particular, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 UNTS 85 (hereafter Torture Convention), art. 5; Convention on the Safety of United Nations and Associated Personnel, 15 January 1999, 2051 UNTS 363 (hereafter Convention on the Safety of UN Personnel), art. 10; Inter-American Convention on Forced Disappearance of Persons, 28 March 1996 (hereafter Inter-American Convention on Forced Disappearance), art. 4; Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 9 March 2004, 2253 UNTS 172 (hereafter Second Protocol to the Hague Convention for the Protection of Cultural Property), art. 16(1).

[47] Antonio Cassese, *International Criminal Law* (OUP 2003), 302 (referring, in particular, to Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996) [1996] ICJ Rep 226 (hereafter ICJ, Nuclear Weapons Advisory Opinion), para. 79).

[48] *ICRC Customary IHL: Rules* (n 35) Rule 157 and references cited. Regarding the application of the notion of universal jurisdiction in relation to genocide, see, *supra*, 4.2.

any one state to enforce this broad a jurisdictional competence where its laws allow for it.[49]

Unlike the Genocide Convention, the Geneva Conventions do not explicitly foresee a jurisdictional path to the International Court of Justice in relation to disputes pertaining to the application and interpretation of these Conventions.[50]

12.2.2.5.2 Duty to prevent

The laws of war do not explicitly incorporate the duty of states to prevent war crimes similar to the duty foreseen by the law of genocide.[51] However, the Geneva Conventions provide that the High Contracting Parties must respect and ensure respect for the Convention in all circumstances.[52] This principle, which now forms part of customary international law, is understood to mean that each party to an armed conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting on its instructions or under its direction or control.[53] This requirement can be read as implying a general obligation on all parties to a conflict to take necessary and reasonable measures to ensure that those under their authority do not commit serious violations of the laws and customs of war.[54]

12.2.2.5.3 Amnesties

Acts of genocide cannot validly be subject to an amnesty.[55] Nor can grave breaches.[56] In contrast, amnesties pertaining to other categories of war crimes—barring torture

[49] See, *supra*, 4.2. [50] See, *supra*, 4.1.4. [51] See, *supra*, 5.2.

[52] Article 1 common to the four 1949 Geneva Conventions. See also Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 7 December 1978, 1125 UNTS 3 (hereafter Additional Protocol I), art. 1(1).

[53] *ICRC Customary IHL: Rules* (n 35) Rules 139, 149; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, vol. 2: Practice* (CUP 2005) (hereafter *ICRC Customary IHL: Practice*), Chapter 40, Section A and Chapter 42, Section A.

[54] See, *ICRC Customary IHL: Rules* (n 35), Rule 139. For an illustration, see UN Security Council, Security Council Resolution 904 (1994), UN Doc. S/RES/904(1994), 18 March 1994 (hereafter Security Council Resolution 904), regarding the obligation of Israel to take steps to prevent Israeli settlers from committing crimes against Palestinian civilians. Rule 144, as defined by the ICRC, suggests that the obligation to ensure respect for humanitarian law is, like the duty to prevent and punish genocide, *erga omnes* in character (*ICRC Customary IHL: Rules* (n 35) Rule 144; see also, *supra*, 5.1.1.4). According to that Rule, '[s]tates may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law'. *ICRC Customary IHL: Rules* (n 35) Rule 144.

[55] See, *supra*, 6.2.2.

[56] *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011 (hereafter *Nuon Chea et al.* Decision on Ieng Sary Objections), para. 39; Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, vol. 1 (ICRC 1952) (hereafter *ICRC 1952 Commentary to Geneva Convention I*), commentary to art. 51 ('This provision does not, of course, affect the obligation to prosecute and punish the authors of infractions, since that obligation is absolute under Article 49. If any doubt still existed, however, the present Article would remove it.'); ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, CUP 2016) (hereafter *ICRC 2016 Commentary on Geneva Convention I*), paras 3020 ('The obligations under Article 49 being absolute, Article 51 means that any agreements negotiated by States Parties cannot affect the fulfilment of the obligations under Article 49.'), 2880 (footnote omitted):

> Extradition is an option given to States Parties on whose territory the accused are or into whose hands they have fallen. It relieves States Parties of the obligation to submit the case to

and cases of blanket, self-granted, amnesties[57]—are not *per se* impermissible under international law and have in fact been repeatedly granted.[58]

12.3 Genocide and Crimes against Humanity

12.3.1 Common features

It is sometimes suggested that genocide is a particular type of crime against humanity.[59] The association between the two offences dates back to the Second World

> their appropriate authorities for prosecution. In the absence of a request for extradition, the obligation to investigate and, if warranted, to prosecute alleged perpetrators of grave breaches is absolute.

Ibid., para. 2890, in particular, fn 66:

> In international armed conflict, the granting of amnesties or any other measures, precluding in effect any genuine investigation and prosecution, cannot extend to those suspected of having committed grave breaches, as this would violate the absolute obligations contained in Article 49 to investigate and, if appropriate, prosecute or extradite alleged offenders.

'Report drawn up by the Joint Committee and Presented to the Plenary Assembly' in *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II-B, 133 ('This provision was the only means of ensuring that the compulsory character of the prosecution, as proclaimed in the preceding Article, should continue in force.'). See also Louise Mallinder, 'Amnesties' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) (hereafter Mallinder, 'Amnesties'), 421 (suggesting that state parties to the Geneva Conventions can under no circumstances grant perpetrators of grave breaches amnesties or immunities); Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell International Law Journal 507 (hereafter Scharf, 'Amnesty Exception to ICC Jurisdiction'), 516 (suggesting that the obligation to prosecute grave breaches is absolute so that States Parties 'can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches of the Conventions'); Virginia Morris and Michael P Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: Documentary History and Analysis* (Brill/Nijhoff 1995) (hereafter Morris & Scharf, *Insider's Guide to ICTY*), 114 (quoting *ICRC 1952 Commentary to Geneva Convention I* (n 49) 373 (commentary to art. 51)); Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) (hereafter Meron, *Human Rights and Humanitarian Norms as Customary Law*), 215.

[57] See, *supra*, 6.2.1.1.

[58] See Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013), in particular, 41–42; Mallinder, 'Amnesties' (n 50) 422; Scharf, 'Amnesty Exception to ICC Jurisdiction' (n 50) 520–21.

[59] See, generally, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 (hereafter *Tadić* 1997 Judgment), paras 622, 655 (referring to genocide as an 'egregious manifestation' of crimes against humanity); *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999 (hereafter *Jelisić* Trial Judgment), para. 68; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999 (hereafter *Kayishema & Ruzindana* Trial Judgment), para. 89 ('The crime of genocide is a type of crime against humanity. Genocide, however, is different from other crimes against humanity.') and paras 577–578; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002 (hereafter *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal), para. 26 (characterizing genocide is 'a species of crimes against humanity'); 'Trial of Eichmann, Israel, District Court of Jerusalem, Judgment of 12 December 1961' in Elihu Lauterpacht (ed), *International Law Reports*, vol. 36 (CUP 1968) (hereafter *Eichmann* Jerusalem District Court Judgment). See also Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, 11 November 1970, 754 UNTS 73, art. I(b); European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 27 June 2003, 2245 UNTS 307, art. 1(1); UN General Assembly, Second Report on the Draft Code of Offences Against the Peace and Security of Mankind by Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/377, 1 February 1984 (hereafter UN Doc. A/CN.4/377), para. 29; UN General Assembly, Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, 6 May–26 July 1996 (hereafter UN Doc. A/51/10), 86; UN General Assembly, Report of the Committee on the

War when both notions were first conceptualized.[60] In its original iteration, genocide could be described as an emanation of the broader concept of crimes against humanity.[61] At Nuremberg, for instance, the Prosecution used the expression 'genocide' to describe crimes which, under the Charter, were crimes against humanity or war crimes.[62] Similarly, in the *Justice* trial, the Tribunal spoke of 'genocide' when referring to a type of crime against humanity which could be committed either by enemy nationals against enemy nationals or by enemy nationals against Allied nationals.[63]

As a result of this common origin, the two categories of international crimes continue to share a number of features. First, both crimes entail an element of *collectiveness*. Genocide is aimed at a *group* of individuals, whilst crimes against humanity must form part of a widespread or systematic attack against a civilian *population*. Second, both crimes criminalize a subset of extremely serious interferences with the most fundamental human rights and interests of human beings, either on an individual or collective basis. As such, they are particularly serious criminal offences that affect the interests of the international community as a whole. Third, both can be committed in an armed conflict or in peacetime and both could apply to many of the same cases and situations.[64] Their normative overlap also means that the same

Elimination of Racial Discrimination, UN Doc. A/52/18, 26 September 1997 (hereafter UN Doc. A/52/18), para. 159 (noting that genocide has 'rightly been condemned as a crime against humanity'); UN Economic and Social Council, Official Records of the 219th Meeting, UN Doc. E/SR.219, 26 August 1948 (hereafter UN Doc. E/SR.219), 1 (representative of the USSR, Mr Pavlov, referring to genocide as 'a grave crime against humanity'); *Prosecutor v. Paulov*, Case No. 3-1-1-31-00, Cassation Judgment, 21 March 2000 (hereafter *Paulov* Cassation Judgment) (describing genocide as a sub-category of crimes against humanity); *Special Prosecutor v. Hailemariam et al.*, Criminal File No. 1/87, Preliminary Objections, 9 October 1995.

[60] Robert H Jackson and Harlan B Phillips, *The Reminiscences of Robert H. Jackson* (Columbia University Oral History Research Office 1955) (hereafter Jackson & Phillips, *Reminiscences of Jackson*), 1641 (referring to Justice Roberg H Jackson speaking of 'crimes against humanity, such as genocide' prosecuted at Nuremberg).

[61] See UN Doc. E/AC.25/3 (n 22) 4 ('[T]he crime of genocide, considered from the point of view of the actual facts which constitute it, is certainly included in the list contained in article 6, paragraph (c) of the [Nuremberg Charter] [i.e., crimes against humanity]'), and 6 ('The General Assembly considered that it could make genocide indictable separately from other crimes against humanity because it had itself noted certain specific characteristics of that crime which made it possible to differentiate it from other crimes against humanity.'). See also William A Schabas, 'Genocide in International Law and International Relations Prior to 1948' in Christoph Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010), 24ff.

[62] See, *supra*, 2.2.

[63] UNWCC, *LRTWC* vol. 15 (n 26) 122 (referring to UNWCC, '*Justice* Case' (n 26) 32, 48, 75, 99).

[64] See, *supra*, 3.2. Immediately after the Second World War, the newly minted notion of crimes against humanity required a connection with an armed conflict. This particular feature, which has now disappeared, was a factor that would have distinguished crimes against humanity from genocide. See generally UNWCC, 'Notes on RuSHA Case' (n 6) 40 (footnote omitted):

> As it is conceived in the above quoted Convention, genocide is a crime as much in time of peace as in time of war. This is one of its distinctive features in comparison with crimes against humanity. The latter were recognized as crimes arising out of or in connection with a war of aggression. This feature derives from Art. 6 (c) of the [Nuremberg Charter], which defines crimes against humanity as offences committed 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'.

See also Mettraux, *Ad Hoc Tribunals* (n 5) 148–52 and references cited therein.

underlying conduct could qualify as both genocide and crimes against humanity,[65] whilst evidence relevant to establishing the commission of one of them could also be relevant to establishing the commission of the other.

12.3.2 Differences

Whilst they started life as closely linked notions, crimes against humanity and genocide have grown apart and now constitute two separate categories of international core crimes. From the point of view of their definitions, it is not therefore particularly helpful to present genocide as a species of crime against humanity as this does little to identify their contrasting elements.[66]

12.3.2.1 Different mens rea *and relevance of groups*

One of the core definitional distinctions between crimes against humanity and genocide pertains to their respective *mens rea*.[67] The perpetrator of genocide must intend

[65] This is apparent, for instance, from the fact that international criminal tribunals have often charged the same conduct as both genocide and crimes against humanity. See, e.g., *Prosecutor v. Jelisić & Češić*, Case No. IT-95-10-I, Initial Indictment, 21 July 1995 (hereafter *Jelisić & Češić* Initial Indictment); *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Third Amended Indictment, 16 July 2001 (hereafter *Brđanin & Talić* Third Indictment); *Prosecutor v. Krstić et al.*, Case No. IT-98-33-I, Indictment, 30 October 1998 (hereafter *Krstić et al.* Indictment); *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Third Amended Indictment, 4 November 2009 (hereafter *Tolimir* Third Amended Indictment); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Revised Second Consolidated Amended Indictment, 4 August 2006 (hereafter *Popović et al.* Rev'd Second Indictment); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Marked-Up Indictment, 19 October 2009 (hereafter *Karadžić* Indictment); *Mladić* Fourth Amended Indictment (n 6); *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52, Amended Indictment, 13 April 2000 (hereafter *Nahimana et al.* Amended Indictment); *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Third Amended Indictment, 12 October 1999 (hereafter *Semanza* Third Amended Indictment); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Amended Indictment, 29 April 1999 (hereafter *Musema* Amended Indictment); *Prosecutor v. Gatete*, Case No. ICTR-2000-61-I, Amended Indictment, 10 May 2005 (hereafter *Gatete* Amended Indictment); *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-I, Amended Indictment, 29 November 2002 (hereafter *Munyakazi* Amended Indictment); *Prosecutor v. Al Bashir*, Second Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-02/05-01/09-94, 12 July 2010 (hereafter *Al Bashir* Second Decision on Warrant Application) read in conjunction with *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest). See also *Munyaneza v. R* [2014] QCCA 906 (hereafter *Munyaneza* Appeal Judgment), para. 180 (citation omitted) ('Several underlying offences can be identified as either crimes against humanity or as genocide. Professor Cassese goes so far as to say that the two categories of crime overlap.').

[66] See, generally, Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 Harvard Journal of International Law 237 (hereafter Mettraux, 'Crimes Against Humanity in ICTY and ICTR'), 302–06.

[67] See, e.g., *Munyaneza* Appeal Judgment (n 65) para. 183:

> [T]he mental elements are not the same. In the case of crimes against humanity, in addition to the elements of the underlying offence, knowledge of the existence of a widespread or systematic attack and the link between the underlying offence and the attack must be proved. In the case of genocide, apart from the elements of the underlying offence, it is also necessary to prove the intent to destroy, in whole or in part, an identifiable group of people.

to destroy all or part of a protected group.[68] His intent is therefore ultimately directed at the group, rather than individuals, and it focuses on the physical or biological destruction of that group.[69] In contrast, perpetrators of crimes against humanity need to be aware that their actions belong to or partake in a widespread or systematic attack against a civilian population.[70] Crimes against humanity do not require proof of ill-intent towards a group.[71] As a consequence, membership in a given group is of relevance to the crime of genocide but not—with the exception of persecution[72]—for crimes against humanity.[73]

12.3.2.2 Range of underlying crimes

The range of underlying offences which may qualify as genocide is more limited than for crimes against humanity.[74] That is because the acts underlying genocide must have the potential, even remotely, to contribute to the complete or partial destruction of the victim's group.[75] Crimes against humanity are not so limited because that offence

[68] *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment), paras 45–46 (holding that genocidal intent should be understood as 'the intent to accomplish certain specified types of destruction'; in other words, by committing one of the acts enumerated in Article 4 of the ICTY Statute, the perpetrator seeks to achieve the destruction, 'in whole or in part, of a national, ethnical, racial or religious group, as such').

[69] See, *supra*, 8.1.

[70] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-T, Judgment, 22 February 2001 (hereafter *Kunarac et al.* Trial Judgment), para. 418. See also *Ndindiliyimana et al. v. Prosecutor*, Case No. ICTR-00-56-A, Judgment, 11 February 2014. (*Ndindiliyimana et al. Appeal Judgment*), para. 260; *Bagosora & Nsengiyumva v. Prosecutor*, Case No. ICTR-98-41-A, Judgment, 11 December 2011 (hereafter *Bagosora & Nsengiyumva* Appeal Judgment), para. 389.

[71] See, e.g., UN General Assembly, Draft Code of Offences Against the Peace and Security of Mankind—Report by J. Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/25, 26 April 1950 (hereafter UN Doc. A/CN.4/25), para. 65 (pointing out that the distinction between genocide and crimes against humanity was 'not easy to draw'). Mr Spiropoulos also cited the commentary in the case reports of post-war trials, which states that:

> While the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connexion with war need be shown and, on the other hand, genocide is aimed against groups whereas crimes against humanity do not necessarily involve offences against or persecutions of groups.

See also UN General Assembly, Draft Code of Offences Against the Peace and Security of Mankind—Second Report by J Spiropoulos, Rapporteur, UN Doc. A/CN.4/44, 12 April 1951 (hereafter UN Doc. A/CN.4/44), 33:

> [C]rimes against humanity and the crime of genocide were two quite different things. Doubtless, the crime of genocide might constitute a crime against humanity, but only if it was perpetrated against a group of human beings either in wartime or in connexion with crimes against peace or war crimes.

[72] See, *infra*, 12.3.3.1. [73] *Paulov* Cassation Judgment (n 59) para. 5.

[74] See, e.g., *Munyaneza* Appeal Judgment (n 65) para. 182 ('[B]oth types of crime may be based on the same proscribed act, but crimes against humanity are broader in scope. For example, crimes against humanity include torture or arbitrary imprisonment, but that is not necessarily the case with genocide.').

[75] This is evident already from the type of acts listed in the Genocide Convention. The imposition of 'measures intended to prevent births within the group', for instance, constitute a genocidal act to the extent only that those measures are directed at the destruction of the group. In *Akayesu*, the Trial Chamber thus held that:

> 507. [...] In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case

does not require any element of destructiveness, intended or actual. This explains why crimes which could not contribute to the destruction of a group (e.g., imprisonment unaccompanied by other forms of violence) and crimes against property could constitute crimes against humanity but not genocide. Whilst genocide focuses exclusively on the physical and biological preservation of groups, crimes against humanity are concerned with the protection of a variety of objects and interests, including the sexual integrity of individual victims (e.g., rape; sexual enslavement; enforced prostitution; forced pregnancy; enforced sterilization; sexual violence) and the fundamental rights of targeted individuals (e.g., enslavement; torture; enforced disappearance; imprisonment), comprising their right not to be discriminated against (persecution) and right to live in their home and community (e.g., deportation and forcible transfer of population).

12.3.2.3 Widespread or systematic attack

Crimes against humanity must occur in the context of a 'widespread or systematic attack against a civilian population'.[76] No such requirement applies to the crime of genocide.[77] Whilst legally distinct on that point, genocide often occurs in circumstances which in all but name resemble the sort of attack that is required for crimes against humanity.[78]

A Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has suggested that the requirement pursuant to which crimes against humanity must be 'part of a widespread or systematic attack on a civilian population' is essentially similar to the requirement of the law of genocide that a perpetrator must have acted with the intent 'to destroy in whole or in part a specific protected

> where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.
>
> 508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Akayesu Trial Judgment (n 18) paras 507–508. Hence, the list of underlying offences which could form the basis of a genocide charge as opposed to a charge of crime against humanity is more limited both in kind and in gravity. See also M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1996) (hereafter Bassiouni & Manikas, *Law of the ICTY*). Professor Schabas points out, however, that the Prosecution need not demonstrate a cause and effect relationship between the acts of violence and the destruction of the group. See William A Schabas, 'Article 6: Genocide' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck, Hart, Nomos 2016) (hereafter Schabas, 'Article 6: Genocide'), 132.

[76] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 (hereafter *Krstić* Appeal Judgment), para. 223.

[77] See, *supra*, 7.1.1. See also *Jelisić* Trial Judgment (n 59) paras 98, 100; *Jelisić* Appeal Judgment (n 68) paras 47–48. Unlike crime against humanity, the perpetrator of a genocidal offence need not, therefore, know of any relationship between his acts and an attack against a civilian population. See *Krstić* Appeal Judgment (n 76) para. 223.

[78] *Jelisić* Trial Judgment (n 59) para. 100; *Jelisić* Appeal Judgment (n 68) para. 66.

group as such'.[79] This proposition is incorrect because the two notions are in fact distinct:[80]

(i) A protected 'group' under the genocide regime differs from a 'population' for the purpose of crimes against humanity.[81] A population may encompass members of several protected groups, and an attack upon it, if indiscriminate, may not demonstrate any particular *animus* towards a given group or an intent to destroy it.

(ii) With respect to crimes against humanity, it is the attack itself, *not the acts of the accused*, which must be shown to be directed against the civilian population. The acts of the accused must only *form part* of that attack. In the case of genocide, in contrast, *the acts of the perpetrators* must be shown to have been directed (albeit at *mens rea* level) at the destruction, in whole or in part, of one of the protected groups as such.[82]

(iii) Crimes against humanity do not require that the perpetrator intended to destroy a group or population. It is enough that he acted *with the knowledge that* his acts formed part of a widespread or systematic attack against a civilian population. In contrast, a *génocidaire* must have *intended* the complete or partial destruction of a protected group.

(iv) For crimes against humanity, the attack is relevant to both the *actus reus* and *mens rea* of the offence.[83] In contrast, the destruction requirement of genocide only forms part of the offence's *mens rea*. It need not have materialized.[84]

Accordingly, the concept of 'widespread or systematic attack against a civilian population' and the genocidal *mens rea* must be regarded as two distinct legal requirements and cannot be regarded as mirror images of one another.

[79] *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001 (hereafter *Krstić* Trial Judgment) para. 682 (which was subsequently overturned on appeal). See *Krstić* Appeal Judgment (n 76) paras 224–225, in particular (footnotes omitted):

> The Appeals Chamber has explained, however, that 'the existence of a plan or policy is not a legal ingredient of the crime' of genocide. While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence.

See also *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgment, 16 November 2001 (hereafter *Musema* Appeal Judgment), para. 366 adopting, without reference to the *Krstić* Trial Judgment, the opposite position. The notion of genocidal plan was also rejected as an element of the offence of genocide in *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (hereafter *Popović et al.* Appeal Judgment), paras 430, 440; *Nchamihigo v. Prosecutor*, Case No. ICTR-2001-63-A, Judgment, 18 March 2010 (hereafter *Nchamihigo* Appeal Judgment), para. 363.

[80] See also Mettraux, 'Crimes Against Humanity in ICTY and ICTR' (n 66) 305–06.

[81] *Krstić* Trial Judgment (n 79) para. 682. [82] See, *supra*, Chapter 8.

[83] See, e.g., *Kunarac et al.* Trial Judgment (n 70) paras 418, 434; *Kunarac et al.* Appeal Judgment (n 12) para. 102; *Ndindiliyimana et al.* Appeal Judgment (n 70) para. 260; *Bagosora & Nsengiyumva* Appeal Judgment (n 70) para. 389; *Popović et al.* Appeal Judgment (n 79) paras 570, 677. See also Mettraux, *Ad Hoc Tribunals* (n 5) 161–163, 173–174, 332.

[84] See, *supra*, 8.2.1.

12.3.2.4 Protected individuals

Crimes against humanity can, in principle, be committed against any member of a civilian population regardless of nationality, ethnicity, race, or religion. In contrast, genocide can only be committed against individuals who belong to a protected group.[85] The nationality, ethnicity, race, or religion constitutes a central element of the perpetrator's reason for selecting and targeting his victim.[86] Membership of the victim in a particular group is therefore of relevance to the crime of genocide but not—with the exception of persecution[87]—to crimes against humanity.[88]

In one respect, however, the two sorts of crimes overlap when it comes to potential victims: it is generally accepted that both genocide and crimes against humanity can be committed against civilians and combatants.[89] Nevertheless, for crimes against humanity, the attack to which these acts form part must have been directed against a predominantly *civilian* population.[90] No such requirement exists in relation to acts of genocide.[91]

12.3.2.5 Specific inchoate offences for genocide

The law of genocide provides for specific inchoate offences, which account for the particular danger represented by this crime and which do not exist in relation to crimes against humanity (or war crimes). The notions of 'conspiracy to commit genocide' and

[85] See, *supra*, 8.5.2.3. When considering the relationship between crimes against humanity and genocide, the United Nations War Crimes Commission noted that with respect to crimes against humanity 'it is not necessary that the wronged person belong to an organised or well-defined group'. See UNWCC, *LRTWC* vol. 15 (n 26) 138.

[86] See, *supra*, 8.4.

[87] See, e.g., *Popović et al.* Trial Judgment (n 5) para. 968; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005 (hereafter *Blagojević & Jokić* Trial Judgment), para. 583; *Prosecutor v. Chea et al.*, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgment, 23 November 2016 (*Nuon Chea et al.* Appeal Judgment), paras 667–668 (referring to *Duch* Appeal Judgment (n 5) para. 274). See also Rome Statute of International Criminal Court, 1 July 2002, 2187 UNTS 3 (hereafter ICC Statute), art. 7(1)(h); ICC *Elements of Crimes*, art. 7(1)(h), element 2 (emphasis added) (referring to '*identifiable* group or collectivity').

[88] *Paulov* Cassation Judgment (n 59) para. 5.

[89] Regarding genocide, see, *supra*, 8.2.1. Regarding crimes against humanity, see, e.g., *Prosecutor v. Milošević*, Case No. IT-98-29/1-A, Judgment, 12 November 2009 (hereafter *Milošević* Appeal Judgment), paras 58, 96; *Ministère Public c. Habré*, Judgment, 30 May 2016 (hereafter *Habré* Trial Judgment), paras 1368–1369; *Popović et al.* Appeal Judgment (n 79) para. 569; *Prosecutor v. Đorđević*, Case No. IT-05-87/1, Judgment, 23 February 2011 (hereafter *Đorđević* Trial Judgment), para. 1593; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (hereafter *Tolimir* Trial Judgment), paras 695, 697; *Prosecutor v. Bundalo et al.*, Case No. X-KRŽ-07/419, Second Instance Verdict, 28 January 2011, para. 313; *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgment, 8 October 2008 (hereafter *Martić* Appeal Judgment), paras 303–314; *Popović et al.* Trial Judgment (n 5) para. 755; *Blagojević & Jokić* Trial Judgment (n 87) para. 544; *Prosecutor v. Mrkšić & Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009 (hereafter *Mrkšić & Šljivančanin* Appeal Judgment), in particular, para. 29; *Karadžić* Trial Judgment (n 5) para. 476; *Duch* Trial Judgment (n 21) para. 311; *Prosecutor v. Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgment, 7 August 2014 (hereafter *Nuon Chea et al.* Trial Judgment), para. 187.

[90] *Milošević* Appeal Judgment (n 89) para. 58; *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Judgment, 18 May 2012 (hereafter *Taylor* Trial Judgment), para. 507; *Prosecutor v. Im Chaem*, Case 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017 (hereafter *Im Chaem* Closing Order), para. 62; *Popović et al.* Trial Judgment (n 5) para. 761.

[91] See, *supra*, 8.2.1.3.

'direct and public incitement to commit genocide' are thus both intended to provide important preventive and prosecutorial tools intended to capture and criminalize the earliest stages of a genocidal process.[92]

12.3.2.6 Policy element

As a matter of customary law, neither genocide nor crimes against humanity require proof that these crimes were committed as a result of or in relation to the implementation of the *policy* of a state or organization.[93] In contrast, the International Criminal Court (ICC) Statute explicitly introduces a requirement of policy in relation to crimes against humanity.[94] In so doing, the Statute defines crimes against humanity more narrowly than what would have been recognized under customary law. The ICC's *Elements of Crimes* similarly seeks to introduce an element of policy in relation to the definition of genocide.[95] Whilst the validity of that addition is questionable,[96] its application would have the practical effect of bringing genocide closer to the ICC notion of crimes against humanity with both categories being defined as policy-based offences for the purpose of proceedings before the Court.

12.3.2.7 Gravity

Whilst they might cover some of the same criminal acts, genocide is, all other conditions being the same, a more serious offence than crimes against humanity because

[92] See, *supra*, respectively 11.3 and 11.4. Regarding the notion of 'attempt', see, *supra*, 11.5.

[93] See, *supra*, 3.3.2.4 and 7.1.2 regarding genocide. Regarding crimes against humanity, see generally: *Kunarac et al.* Appeal Judgment (n 12) paras 98 and 104; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002 (hereafter *Vasiljević* Trial Judgment), para. 36; *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003, para. 234; *Blaškić* Appeal Judgment (n 41) paras 100, 120, and 126; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (hereafter *Krnojelac* Trial Judgment), para. 58; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, 27 September 2006 (hereafter *Krajišnik* Trial Judgment), para. 706; *Krstić* Appeal Judgment (n 76) para. 225; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004 (hereafter *Brdanin* Trial Judgment), para. 137; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (*Semanza* Trial Judgment), para. 329; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (hereafter *Kajelijeli* Trial Judgment), para. 872; *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005 (hereafter *Semanza* Appeal Judgment), para. 269; *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, 7 July 2006, para. 84; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, 28 November 2007 (hereafter *Nahimana et al.* Appeal Judgment), para. 922; *Taylor* Trial Judgment (n 90) para. 511; *Prosecutor v. Brima et al*, Case SCSL-04-16-T, Judgment, 20 June 2007, para. 215; *Prosecutor v. Sesay et al.*, Case SCSL-04-15-T, Judgment, 2 March 2009, para. 79; *Prosecutor v. Rasević and Todović*, Case No. X-KR/06/275, Verdict of 28 February 2008, p. 39; *Habré* Trial Judgment (n 89) paras 1358, 1386; *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40, pars 157-158; *Nuon Chea et al.* Trial Judgment (n 89), para. 181; *Nuon Chea et al.* Appeal Judgment (n 87), paras 707ff, in particular, para. 732; *Duch* Trial Judgment (n 21) para. 301; *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para. 86. For an extensive discussion of the issue, see also G Mettraux, 'The Definition of Crimes Against Humanity and the Question of a "Policy" Element' in L Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011).

[94] ICC Statute (n 87) art. 7(2)(a) ('[P]ursuant to or in furtherance of a State or organizational policy to commit such attack').

[95] ICC *Elements of Crimes* (n 21) art. 6.

[96] See, *supra*, 7.2.2.

it requires proof of the *aggravating* element of special intent.[97] The particular gravity and danger of genocide is reflected, *inter alia*, in the fact that the Convention and customary international law criminalize certain inchoate offences and preliminary acts (in particular, conspiracy to commit genocide) which have no equivalent in the law of crimes against humanity.[98] However, the sentence to be imposed to a person convicted of genocide will be determined primarily by the gravity of his conduct rather than by the label attaching to his crimes.[99]

12.3.2.8 Other normative differences

Other normative features distinguish genocide from crimes against humanity. First, no convention provides for duties to punish and prevent crimes against humanity equivalent to those foreseen in the Genocide Convention.[100] However, a general duty binding on states to protect their population from crimes against humanity and qualified duties to prevent and punish crimes against humanity may be said to exist under customary international law under certain circumstances.[101] But whilst the International Court of Justice (ICJ) is competent under Article IX of the Genocide Convention to hear disputes between contracting parties pertaining to their responsibilities under the Convention, including in relation to those duties, there is no equivalent instrument and jurisdictional path to the ICJ in relation to crimes against humanity.[102].

Finally, amnesties cannot create an exception to the obligation of states to punish acts of genocide and amnesties pertaining to this crime are invalid as a matter of

[97] See, generally, *Jelisić* Appeal Judgment (n 68) para. 13 ('Indisputably, genocide is at the apex of this hierarchy'); *Krstić* Trial Judgment (n 79) para. 700:

> It can also be argued, however, that genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of war, the convicted person is, because of his specific intent, deemed to be more blameworthy. However, this does not rule out the Trial Chamber's duty to decide on the appropriate punishment according to the facts of each case.

See also *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 981; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999, para. 451; *Kayishema & Ruzindana* Trial Judgment (n 59) para. 9; *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998, paras 14, 16; *Krstić* Appeal Judgment (n 76) para. 36:

> Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.

And, ibid., para. 275.

[98] See, in particular, *supra*, 11.3.1 (conspiracy to commit genocide) and 11.4 (Direct and public incitement to commit genocide).

[99] See, references, *supra*, in fn 36.

[100] Genocide Convention, Article I.

[101] G Mettraux, *International Crimes—The Law and the Practice: Vol 2, Crimes Against Humanity* (OUP 2019).

[102] See, *supra*, 4.1.4.

international law.[103] In contrast, amnesties are not entirely excluded for crimes against humanity, with the exception of those pertaining to torture and self-granted, blanket, amnesties which are similarly invalid as a matter of international law.[104]

12.3.3 Genocide and persecution

12.3.3.1 Same genus

Persecution constitutes a particular sort of crime against humanity. It has been described as '[t]he gross or blatant denial, on discriminatory grounds, of a fundamental right, laid out in international customary or treaty law, reaching the same level of gravity as the [other categories of crimes against humanity]'.[105] In addition to the general contextual elements of crimes against humanity, the crime of persecution requires proof of three additional elements:

(i) a discriminatory act or omission;

(ii) a discriminatory basis for that act or omission on one of the listed grounds; and

(iii) the intent to cause, and the resulting infringement of, an individual's enjoyment of a basic or fundamental right.[106]

Both persecution and genocide imply that the individual victim of the crime has been selected *at least in part* because of his or her membership in a group.[107] In both cases, the crime reflects the perpetrator's prejudice toward members of that group and his intent to discriminate against them.[108] Persecution, it may thus be said, is an offence of the same *genus* as genocide,[109] whilst genocide can be described as an

[103] See, *supra*, 6.2.2.

[104] *Nuon Chea et al.* Decision on Ieng Sary Objections (n 56) paras 49, 55. See also John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, vol. 1* (OUP 2002), 698–99. Regarding the process of evaluation of the validity of amnesties pertaining to crimes against humanity, see also G Mettraux, *International Crimes—The Law and the Practice: Vol 2, Crimes Against Humanity* (OUP 2019).

[105] *Kupreškić et al.* Trial Judgment (n 5) para. 621. See also *Tadić* 1997 Judgment (n 59) paras 694, 697; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001 (hereafter *Kvočka et al.* Trial Judgment), paras 184–205. On the law of persecution, see, generally, Ken Roberts, 'The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia' (2002) 15 Leiden Journal of International Law 623 (hereafter Roberts, Persecution); Jérôme de Hemptinne, 'Controverses Relatives à la Définition du Crime Contre l'Humanité de Persécution' (2003) 53 Revue Trimestrielle des Droits de l'Homme 15; Mettraux, 'Crimes Against Humanity in ICTY and ICTR' (n 66) 294–98.

[106] See, generally, *Tadić* 1997 Judgment (n 59) para. 715. See also *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001 (hereafter *Kordić & Čerkez* Trial Judgment), paras 195–196; *Krstić* Trial Judgment (n 79) paras 533–538.

[107] See, e.g., *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000 (hereafter *Blaškić* Trial Judgment), para. 235 ('[T]he perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.').

[108] See Roberts, *Persecution* (n 105) 628–29.

[109] *Kupreškić et al.* Trial Judgment (n 5) para. 636. See also *Duch* Appeal Judgment (n 5) para. 268 (footnote omitted) ('[Genocide] belongs to the same genus as persecution in the sense that perpetrators of genocide target their victims on the basis of group membership.'); *Jelisić* Trial Judgment (n 59) para. 68 ('[G]enocide is closely related to the crime of persecution' because the perpetrator 'also chooses his victims because they belong to a specific human group'.). Regarding the proximity between the two notions

extreme form of persecution.[110]

12.3.3.2 *Different* mens rea

The *mens rea* required for persecution stops short of genocidal intent. The *dolus specialis* of genocide effectively amounts to discrimination for the purpose of destroying a group, whilst persecution is discrimination for its own sake.[111] It does not require proof of any intention to destroy the group to which the victim belongs.

and the initial confusion about their respective definitional borders, see also UNWCC, 'Notes on RuSHA Case' (n 6) 41 (footnote omitted):

> On account of the fact, however, that crimes against humanity include 'persecutions on political, racial or religious grounds,' crimes against humanity of this nature fall within the concept of genocide when committed in time of war. In these particular circumstances the specific acts constituting genocide are at the same time crimes against humanity. In the opinion of one member—the French representative—of the United Nations Ad Hoc Committee which drew up the Draft Convention, genocide is even the most typical of the crimes against humanity.

[110] UN Doc. E/AC.25/3 (n 22) 5:

> If the crime of genocide is understood in the widest sense to include the destruction by brutal means of the specific characteristics of a human group, it is still covered by the terms of Article 6, paragraph (c) of the [Nuremberg] Charter of the International Military Tribunal which is concerned with 'persecutions on political or racial or religious grounds.

[111] See, generally, *Tolimir* Trial Judgment (n 89) para. 746 (footnote omitted):

> A perpetrator's specific intent to destroy can be distinguished from the intent required for persecutions as a crime against humanity on the basis that a perpetrator who possesses genocidal intent has formed more than an intent to harm a group by virtue of his discriminatory acts; he actually intends to *destroy* the group itself.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment) para. 187:

> In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the 'intent to destroy, in whole or in part ... [the protected] group, as such'. It is not enough to establish, for instance in terms of paragraph (*a*), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the 'specific intent (*dolus specialis*).' It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group.

Ibid., para. 188. See also ICJ *Croatia-Serbia* 2015 Judgment (n 7) para. 139; *Kupreškić et al.* Trial Judgment (n 5) para. 636; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004 (hereafter *Milošević* Decision on Motion for Judgment of Acquittal), para. 123 (footnote omitted):

> Genocide is a discriminatory crime in that, for the crime to be established, the underlying acts must target individuals because of their membership of a group. The perpetrator of genocide selects and targets his victims because they are part of a group that he seeks to destroy. This means that the destruction of the group must have been sought as a separate and distinct entity.

Nahimana et al. Appeal Judgment (n 93) para. 1032:

> [T]he crime of genocide *inter alia* requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Persecution, like the other acts enumerated in Article 3 of the Statute, must have been committed as part of a widespread and systematic attack on a civilian population.

The *Kupreškić* Trial Chamber summarized the difference between the two in the following manner:

> Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.[112]

Therefore, it is the relation of the crimes to the targeted group which distinguishes genocide from persecution.[113] Whereas genocidal acts target a group as such with the intention of destroying it, persecution does not: it stops with individual victims who are being discriminated against by reason of their membership in a group.[114] The fact that a persecutor intended to discriminate against members of a particular group does not allow for the *necessary* inference that he intended to destroy that group.[115]

[112] *Kupreškić et al.* Trial Judgment (n 5) para. 636. See also *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001 (hereafter *Sikirica et al.* Judgment on Defense Motions to Acquit), para. 58; *Jelisić* Trial Judgment (n 59) para. 68.

[113] *Sikirica et al.* Judgment on Defense Motions to Acquit (n 112) para. 89:

> [I]t is the mental element of the crime of genocide that distinguishes it from other crimes that encompass acts similar to those that constitute genocide. The evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase 'as such' in the chapeau. Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group. This is what differentiates genocide from the crime against humanity of persecution.

Krstić Trial Judgment (n 79) para. 684:

> The offences of genocide and persecutions both require proof of a special intent, respectively an intent to destroy a particular type of group (or part of that group) as such and an intent to discriminate against persons on political, racial or religious grounds. Clearly, genocide has a distinct, mutual element in the form of its requirement of an intent to destroy a group, altogether, in whole or in part, over and above any lesser persecutory objective.

[114] The criminalization of persecution does not protect the group as such, but its members in their (political, racial, or religious) differences. See *Krstić* Trial Judgment (n 79) para. 553. See also *Jelisić* Trial Judgment (n 59) para. 79.

[115] See, e.g., ICJ *Bosnia-Serbia* 2007 Judgment (n 111) paras 187–188, 370–373 (finding that the existence of a pattern manifested by discriminatory practices is not sufficient in itself to establish the requisite *dolus specialis* for genocide); *Krstić* Trial Judgment (n 79) para. 568 ('[A] purposeful decision was taken by the Bosnian Serb forces to target the Bosnian Muslim population in Srebrenica, by reason of their membership in the Bosnian Muslim group. It remains to determine whether this discriminatory attack sought to destroy the group, in whole or in part, within the meaning of Article 4 of the Statute.'); *Kupreškić et al.* Trial Judgment (n 5) para. 636; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 112) para. 94; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 65) paras 140–141, 167.

Understanding the nuance between the two notions is particularly relevant to situations of 'ethnic cleansing' where the perpetrators might engage in the forced displacement or mistreatment of particular individuals targeted due to their identity without an intention to physically destroy them.[116] Such acts could qualify as crimes against humanity, but would fall short of genocide absent an intent to destroy the group.[117]

The respective *mens rea* of both offences differs for yet another reason. The discriminatory grounds relevant to both offences only overlap in part. Whereas, as a matter of customary international law, a *persecutor* may discriminate on 'political, racial or religious' grounds, the genocidal act must be committed on 'national, ethnical, racial or religious' grounds.[118] Thus, under customary law, *political* discrimination is only relevant to persecution and *national* and *ethnic* discrimination to genocide.[119]

[116] See, e.g., *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 65) para. 143 (footnote omitted):

> In the view of the Majority, the distinction between genocidal intent and persecutory intent is pivotal in cases of ethnic cleansing, a practice consisting of 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area'. This distinction is particularly relevant in cases such as the one at hand, in which allegations of forcible transfer and/or deportation of the members of the targeted group are a key component.

[117] For illustrations, see, e.g., *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Judgment, 15 April 2011, paras 1812–1813; *Kupreškić et al.* Trial Judgment (n 5) para. 629; *Blaškić* Appeal Judgment (n 41) paras 150–153; *Karadžić* Trial Judgment (n 5) paras 496, 515–516, 2519–2521; *Brdanin* Trial Judgment (n 93) paras 570, 1025; *Kvočka et al.* Trial Judgment (n 99) para. 186; *Krnojelac* Trial Judgment (n 93) paras 472–485; *Prosecutor v. Šešelj*, Case No. MICT-16-99-A, Judgment, 11 April 2018, paras 114, 142–155; *Tadić* 1997 Judgment (n 59) para. 717; *Naletilić & Martinović* Trial Judgment (n 12) paras 669–672; *Blagojević & Jokić* Trial Judgment (n 87) paras 595–622, in particular, paras 602, 616–618, 621; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003, para. 218 (in the context of the crime against humanity of persecution through forcible displacement); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (hereafter *Stakić* Trial Judgment), para. 769; *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, 12 June 2007, paras 427, 430, 432; *Krstić* Trial Judgment (n 79) para. 537; *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, Judgment, 30 May 2013, para. 1243; *Popović et al.* Trial Judgment (n 5) para. 989; *Krajišnik* Trial Judgment (n 86) paras 748–749, 807–809; *Duch* Appeal Judgment (n 5) para. 691; *Prosecutor v. Ruto et al.* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 4 February 2012, in particular, paras 269–281; *Prosecutor v. Kenyatta et al.* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 29 January 2012, paras 281–286; *Prosecutor v. Ruto et al.* Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, ICC-01/09-01/11-1, 8 March 2011. See also 'The *Ministries* Case: Judgment' in *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. 14 (US Government Printing Office 1951) (hereafter *Ministries* Judgment), 471 (noting that '[Jews] were forced to emigrate and to buy leave to do so; they were deported to the East, where they worked to exhaustion and death; they became slave laborers'); *Attorney General v. Eichmann*, 36 ILR 277 (Israel Supreme Ct. 29 May 1962) (hereafter *Eichmann* Supreme Court Judgment, Count 5; United Nations War Crimes Commission, 'Trial of Gauleiter Artur Greiser: Outline of the Proceedings' in *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) (hereafter UNWCC, 'Greiser Case'), 105; United Nations War Crimes Commission, 'Trial of Willy Zuehlke: Outline of the Proceedings' in *Law Reports of Trials of War Criminals*, vol. 14 (HM Stationery Office 1949) 141.

[118] See, e.g., *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ICC-02/05-01/09-3, 4 March 2009 (hereafter *Al Bashir* Decision on Warrant Application, Ušacka Dissent), para. 71.

[119] The suggestion made in the *Akayesu* Trial Judgment that the Genocide Convention was intended to protect 'any stable and permanent group' is unsupported. *Akayesu* Trial Judgment (n 18) para. 516. The scope of the crime of genocide was clearly circumscribed and the protected group strictly limited to national, ethnical, racial, or religious groups. See Schabas, 'Article 6: Genocide' (n 75) 135–36; *supra*, 8.4.4.6.3.

The situation is different before the ICC where the Statute has greatly expanded the grounds relevant to the crime of persecution, adding four, possibly five, new grounds of discrimination (as *emphasized*): political, racial, *national, ethnic, cultural*, religious, *gender*, and 'other grounds that are universally recognized as impermissible'.[120] Before the ICC, the crime of persecution thus covers the same four grounds as are relevant to the crime of genocide and encompasses three or four more grounds not applicable to the crime of genocide. The ICC regime therefore has the potential to close a normative (and punitive) gap by enabling the prosecution of serious discriminatory acts that are based on grounds of discrimination unforeseen by the law of genocide.

12.3.3.3 *Different* actus reus

Genocide and persecution also differ at the *actus reus* level. Whereas the protection afforded by the prohibition on genocide is limited to certain groups in their physical or biological existence, persecution protects all 'elementary and inalienable rights of man'.[121] The *actus reus* of persecution is thus defined as an act or omission which discriminates *in fact* and which denies or infringes upon a fundamental right laid down in international customary law or treaty law.[122] In practice, it may consist of a variety of acts that cause physical or mental harm, as well as the adoption of discriminatory laws, ethnic cleansing, serious infringement upon an individual's fundamental rights and freedoms,[123] and the seizure or destruction of his property.[124] The range of actions that could constitute the *actus reus* of an act of persecution is therefore much broader in scope and nature than is the case for genocide.[125]

12.3.3.4 *Relative gravity of underlying acts*

Compared to genocide, persecution encompasses acts of a much greater variety in terms of severity.[126] Not every denial of a human right may constitute persecution,[127] and acts of persecution must generally be of equal gravity or seriousness to other categories of crimes against humanity.[128] However, the *bottom-line gravity* of those offences varies greatly: from acts of killing at one end of the spectrum to imprisonment or the adoption of discriminatory policies at the other. In contrast, all acts of genocide must reach a level of seriousness which is not necessarily (and often is not) met by acts of persecution, even in cases where the denial of a fundamental right is 'gross or

[120] ICC Statute (n 87) art. 7(1)(h). [121] *Blaškić* Trial Judgment (n 107) para. 220.

[122] See, e.g., *Karadžić* Trial Judgment (n 5) paras 497–498 and references cited therein; *Kordić & Čerkez* Appeal Judgment (n 21) para. 106; *Blaškić* Appeal Judgment (n 41) para. 143.

[123] *Karadžić* Trial Judgment (n 5) paras 521, 536; *Blaškić* Trial Judgment (n 107) para. 233 (as clarified by *Blaškić* Appeal Judgment (n 41) paras 137–139; *Kupreškić et al.* Trial Judgment (n 5) para. 615.

[124] *Karadžić* Trial Judgment (n 5) paras 527–529, 531; *Blaškić* Trial Judgment (n 107) paras 227–232; *Kordić & Čerkez* Trial Judgment (n 106) para. 198.

[125] See, *supra*, Chapter 10.

[126] *Tadić* 1997 Judgment (n 59) para. 704. Nevertheless, due to its discriminatory nature, persecution is generally considered to be a particularly serious crime against humanity. See, e.g., *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, para. 32; *Blaškić* Trial Judgment (n 107) para. 785.

[127] *Kupreškić et al.* Trial Judgment (n 5) para. 618. [128] Ibid., para. 619.

blatant' or, as the ICC Statute describes it, 'severe'.[129] Each and all of the acts of genocide must indeed be capable of contributing to the destruction of the group to which the victim belongs.[130] They are therefore strictly limited to five categories of punishable acts, which are all located at the gravest end of the mentioned spectrum and all focus on actions resulting in grave consequences for the mental and physical integrity of the victims.[131]

Ultimately, however, the gravity of the conduct in question, and the sentence associated therewith, will depend on the circumstances of the case; in some cases, acts of persecution might be as grave as acts of genocide.

12.3.3.5 Factual overlap

Although they are *legally* different, genocide and persecution are often intertwined factually and evidentially. A *genocide* is oftentimes an evolving process, which may have started with acts of persecution and ultimately results in acts of mass killing.[132] Evidence going to prove one of these crimes may therefore also be relevant to establishing the other and both crimes are sometimes charged cumulatively or alternatively in relation to the same facts.[133] From a prosecutorial point of view, persecution can serve as a possible charge that highlights the discriminatory nature of the act

[129] Ibid., para. 621. The seriousness of persecutory acts should not, however, be considered individually or in isolation, but they should be assessed for their cumulative effect. An act which, in itself, may not appear to be particularly serious, may, because of the context in which it is committed be particularly grave. *Kupreškić et al.* Trial Judgment (n 5) para. 622; *Krnojelac* Trial Judgment (n 93) para. 434. Acts of 'denunciation' are obvious examples. See, e.g., 'Decision of the Supreme Court for the British Zone dated 22 June 1948, S. StS 5/48' in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. 1 (1949) 19–25; 'OGHBZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949), S. StS 19/49' in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. 1 (1949) 321–43.

[130] In relation to those, see, *supra*, 10.1.2. [131] See, *supra*, Chapter 10.

[132] In his opening speech before the IMT, Justice Robert Jackson had thus carefully described the incremental nature of the attack on the European Jewry, with its genocidal peak:

> The persecution policy against the Jews commenced with non-violent measures, such as disfranchisement and discriminations against their religion, and the placing of impediments in the way of success in economic life. It moved rapidly to organised mass violence against them, physical isolation in ghettos, deportation, forced labour, mass starvation, and extermination. [...]
>
> The conspiracy or common plan to exterminate the Jew was so methodically thoroughly pursued, that despite the German defeat and Nazi prostration this Nazi aim largely succeeded. Only remnants of the European Jewish population remain in Germany, in the countries which Germany occupied, and in those which were her satellites or collaborators.

'Summary Review of the Indictment and the Charter and Their Legal Foundations: Session 2, 21 November 1945', Parts 1–8 in *The Trial of German Major War Criminals*, vol. 1 (HM Stationery Office 1946) (hereafter 'Summary Review of Nuremberg Indictment'), 62.

[133] See, e.g., *Karadžić* Indictment (n 59); *Nahimana et al.* Amended Indictment (n 65); *Nahimana et al.* Appeal Judgment (n 93) para. 1032:

> [T]he Appeals Chamber would recall that the crime of genocide *inter alia* requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Persecution, like the other acts enumerated in Article 3 of the Statute, must have been committed as part of a widespread and systematic attack on a civilian population. It was therefore open to the Trial Chamber to enter cumulative convictions under Articles 2(3)(a) and 3(h) of the Statute on the basis of the same acts.

when evidence of an intent to destroy a group cannot be established, thus excluding charges of genocide.

12.3.4 Genocide and extermination

12.3.4.1 Common features

Murder and extermination are two recognized categories of crimes against humanity.[134] Similar to the crime of genocide they concern themselves with the unlawful taking of life. Extermination has thus sometimes been described as a precursor to genocide.[135] In addition, factually, extermination and murder have served as prosecutorial proxies to what in practice were acts of genocide before the term entered the normative jargon,[136] or where evidence of genocidal intent was not readily available,[137] but all three crimes are materially distinct.[138] They vary in scale, ultimate purpose, and required legal elements.

12.3.4.2 Differences

Whilst extermination and genocide share a common concern for the protection of human life, they are legally distinct. First, contrary to genocide, the perpetrator of an

[134] See, e.g., ICC Statute (n 87) art. 7(1)(a) and (b).

[135] See *Nuon Chea et al.* Appeal Judgment (n 87) para. 517 (footnote omitted):

> The Supreme Court Chamber recalls that, in the IMT jurisprudence, the crime against humanity of extermination encompassed what would later be qualified as genocide, especially in the context of the Final Solution, as evidenced by the passage of the IMT Judgment to which NUON Chea refers. In this sense, the crime of extermination was a precursor to genocide.

Thus, in early prosecutions, the two notions were sometimes mixed up and confused. See, e.g., UNWCC, 'Notes on RuSHA Case' (n 6) 37–38 (footnote omitted):

> The concept of Genocide was used at the trial of the Nazi Major War Criminals before the International Military Tribunal at Nuremberg. The prosecution charged the defendants with having 'conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups'.

[136] For an illustration, see, generally, 'The Einsatzgruppen Case: Opinion and Judgment' in *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. 4 (US Government Printing Office 1950) (hereafter *Einsatzgruppen* Judgment).

[137] *Vasiljević* Trial Judgment (n 93), para. 227.

[138] *Nuon Chea et al.* Appeal Judgment (n 87) para. 519 (footnote omitted):

> The Supreme Court Chamber further takes into consideration the discussion of the International Law Commission on the 1996 Draft Code of Offences against the Peace and Security of Mankind (with regard to its Article 18) on the differences between murder, extermination and genocide:
>
> [Murder and extermination] consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed.

act of extermination may, but need not, have intended to destroy a group to which the victims belonged.[139] The prosecution must only prove that he intended to kill a large number of individuals, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[140] This constitutes a significant difference from the *mens rea* for genocide.[141] Second, unlike persecution and genocide, extermination does *not* require proof of any sort of discriminatory *mens rea*.[142]

Genocide and extermination also differ in relation to the context in which they are relevant and in relation to the categories of victims to which they respectively apply. In relation to context, acts of extermination must have been part of a widespread or systematic attack against a civilian population, like all other crimes against humanity.[143]

[139] *Vasiljević* Trial Judgment (n 93) para. 227. See also *Krstić* Appeal Judgment (n 76) para. 222; *Musema* Appeal Judgment (n 79) para. 366.

[140] See also *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Judgment, 28 September 2011, para. 141 (footnotes omitted):

> The Appeals Chamber notes that the Trial Chamber correctly set forth the requisite elements of the *mens rea* for genocide and extermination as a crime against humanity. In particular, the Trial Chamber observed that for genocide an accused must act 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such'. With respect to extermination as a crime against humanity, the Trial Chamber recalled that an accused must 'intend to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their death in a widespread or systematic manner.' The Trial Chamber further observed that the perpetrator must have acted with knowledge that his acts formed part of a widespread or systematic attack against the civilian population on national, political, ethnic, racial, or religious grounds.

Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (hereafter *Tolimir* Appeal Judgment), para. 610 (footnote omitted):

> Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group which is not required by extermination as a crime against humanity. Extermination requires proof that the crime was committed as part of a widespread or systematic attack against a civilian population, an element not required by genocide. The Appeals Chamber finds no merit in Tolimir's submission that the civilian component in each renders cumulative convictions impermissible.

Vasiljević Trial Judgment (n 93) para. 228; *Tolimir* Trial Judgment (n 89) paras 1204–1205; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015, fn 4930:

> The Appeals Chamber is mindful that there is no genocidal intent requirement for the crime of extermination as a crime against humanity. However, the Appeals Chamber finds that the Trial Chamber's findings with respect to the perpetrators' and Ntahobali's genocidal intent are relevant in this case to establish that the killings were directed against Tutsis as a collective group rather than victims in their individual capacities.

[141] As a prosecutorial tool, extermination can thus serve as a 'Plan B' to genocide charges where the underlying conduct pertains to mass killings but where evidence of an intent to destroy is weak or uncertain. See, e.g., *Vasiljević* Trial Judgment (n 93) para. 227.

[142] *Vasiljević* Trial Judgment (n 93) para. 228:

> As opposed to persecution pursuant to Article 5(h) of the Statute, it need not be established that [an offender of extermination] acted on any discriminatory grounds. Also, the ultimate reason or motives—political or ideological—for which the offender carried out the acts are not part of the required *mens rea* and are, therefore, legally irrelevant. [fn 589: In Nuremberg, the International Military Tribunal made reference to 'extermination', *inter alia*, in relation to mass murders committed for ideological reasons (Jews), political reasons (political opponents, communists and intelligentsia in occupied territories), economic reasons (creation of a *lebensraum*), military reasons (resistance members).]

[143] *Musema* Appeal Judgment (n 79) para. 366; *Kajelijeli* Trial Judgment (n 93) para. 751.

Furthermore, its perpetrator must have known of the vast scheme of collective murder and must have been willing to take part therein.[144] These contextual requirements do not apply to genocide.[145] In addition, and perhaps counterintuitively, extermination is a crime of larger scale than genocide, *legally speaking*. While a conviction for genocide may occur even without the accused having killed or taken part in the killing or mistreatment of more than one individual,[146] extermination requires that the acts of the accused be inscribed in or associated with a vast killing operation (although his own actions might have pertained to only one killing).[147] It follows that an individual could be convicted for genocide even when his victims (actual or potential) are few, whilst the exterminator must have partaken in incidents of killings that involved a large number of individuals.[148] Because of their distinct material elements, genocide

[144] See, e.g., 'Judgment of the International Military Tribunal for the Trial of German Major War Criminals' in *The Trial of German Major War Criminals*, vol. 1 (HM Stationery Office 1946) (hereafter IMT Judgment), 114–16 (regarding Sauckel), 126–28 (regarding Fritzsche).

[145] See *Krstić* Appeal Judgment (n 76) para. 226.

[146] As already pointed out, if charged with 'killing members of the group' the killing of one, or possibly two, members of such group would be sufficient to qualify as genocide.

[147] *Vasiljević* Trial Judgment (n 93) para. 227. See more recently, *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-A, Judgment, 30 June 2016, para. 1021. See also Mettraux, 'Crimes Against Humanity in ICTY and ICTR' (n 66) 284–86; Mettraux, *Ad Hoc Tribunals* (n 5) 338. Regarding the element of killing on a large scale, the Trial Chamber in *Vasiljević* noted that the 733 civilians in *Einsatzgruppen* case appears to be the smallest number of victims in an extermination case by 1992 but clarified that it neither suggests this number to be a threshold nor that a lower number would necessarily disqualify the act as 'extermination'. *Vasiljević* Trial Judgment (n 93) fn 587 (citing *Einsatzgruppen* Judgment (n 136) 421). Nonetheless, this element cannot be satisfied by a collective consideration of total victims in distinct events committed in different locations, in different circumstances, by different perpetrators, and over an extended period of time. See, generally, *Tolimir* Appeal Judgment (n 140) para. 147 relying on, *inter alia*, *Bagosora & Nsengiyumva* Appeal Judgment (n 70) para. 396. Meanwhile, the ICC definition of 'extermination' does not require a large number of deaths. ICC *Elements of Crimes* (n 21) art. 7(1)(b); *Vasiljević* Trial Judgment (n 93) fn 586. It was deemed over-burdensome for the Prosecution and therefore excluded from the ICC *Elements of Crimes*. *Vasiljević* Trial Judgment (n 93) fn 586, citing Darryl Robinson *et al.*, 'Elements for Crimes Against Humanity' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001) (hereafter Robinson, *et al.*, 'Elements for CAH'), 83. However, as the *Vasiljević* Trial Chamber made clear, this new development is not for the *ad hoc* Tribunals' consideration; nor does it allow for a deviation from 'the law as the Tribunal finds it'. *Vasiljević* Trial Judgment (n 93) fn 586. The 'more lenient definition' of extermination adopted in the ICC *Elements of Crimes* is thought to be 'directly inspired by' the *Kayishema & Ruzindana* Trial Judgment, which found that a limited number of killings or even one single killing could qualify as extermination if it forms part of a mass killing event. *Kayishema & Ruzindana* Trial Judgment (n 59) para. 147; *Vasiljević* Trial Judgment (n 93) fn 586. However, the *Vasiljević* Trial Chamber argued that the *Kayishema & Ruzindana* Trial Chamber's failure to provide *any* state practice supporting this ruling greatly weakens its value as a precedent. *Vasiljević* Trial Judgment (n 93) fn 586. The appeal of *Kayishema & Ruzindana* sheds no light on this matter since the definition of 'extermination' adopted by the Trial Chamber was neither subject to appeal nor addressed by the Appeals Chamber in any way. See *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons), 1 June 2001 (hereafter *Kayishema & Ruzindana* Appeal Judgment); *Vasiljević* Trial Judgment (n 93) fn 586.

[148] As pointed out by the *Vasiljević* Trial Chamber, historically, extermination charges seem to have been limited to those individuals who could decide upon the fate of many:

> Those who were charged with that criminal offence did in fact exercise authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals. Those, such as executioners, who were not in such position but who had participated in the killing of one or a number of individuals were generally charged with murder or related offences whilst the charge of 'extermination' seems to have been limited to individuals who, by reason of either their position or authority, could decide upon the fate or had control over a large number of individuals.

and extermination can result in cumulative conviction in relation to the same underlying conduct under the test applicable before of the *ad hoc* Tribunals.[149]

12.3.5 Genocide and enforced sterilization

Some acts of genocide could overlap with acts of 'enforced sterilization', which are recognized as both a category of crime against humanity and a war crime.[150] Like enforced sterilization, certain punishable genocidal acts (in particular, 'causing serious bodily or mental harm to members of the group' and 'imposing measures intended to prevent births within the group') seek to protect the victim's sexual integrity and, in particular, punish measures interfering with an individual's reproductive capacities. Depending on the circumstances of the case, the same underlying conduct could therefore qualify as a crime against humanity or the war crime of enforced sterilization and as genocide.

However, in addition to this common protected interest, genocide also seeks to protect the group to which the victim belongs. This is reflected in the element of special intent not required for the crime against humanity or war crime of enforced

Vasiljević Trial Judgment (n 93) para. 222. See also IMT Judgment (n 144) 85–86 (regarding Göring), 89–90 (regarding Ribbentrop), 93–94 (regarding Kaltenbrunner), 96–98 (regarding Frank), 101–02 (regarding Streicher).

[149] *Nahimana et al.* Appeal Judgment (n 93) para. 1029 (footnote omitted):

> It is established case-law that cumulative convictions for genocide and crime against humanity are permissible on the basis of the same acts, as each has a materially distinct element from the other, namely, on the one hand, 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group', and, on the other, 'a widespread or systematic attack against a civilian population'.

See also *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgment, 7 July 2006 (hereafter *Ntagerura et al.* Appeal Judgment), para. 426; *Semanza* Appeal Judgment (n 93), paras 318, 368. With specific reference to cumulative convictions for genocide and extermination, see *Prosecutor v. Ntakirutimana et al.*, Case Nos ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004 (hereafter *Ntakirutimana* Appeal Judgment), para. 542; *Musema* Appeal Judgment (n 79) paras 364–367, 370. For the same reason, cumulative conviction would be possible under that test for genocide and murder (as a crime against humanity or as a war crime). See, e.g., *Tolimir* Appeal Judgment (n 140) para. 616 (footnotes omitted):

> The Appeals Chamber notes that there is no appellate jurisprudence which addresses the specific cumulative convictions for genocide and murder as a violation of the laws or customs of war. However, the ICTR Appeals Chamber has upheld cumulative convictions for war crimes, as a broad category, and genocide based on the materially distinct elements of genocide and war crimes. Relevantly, genocide requires proof of specific intent while war crimes require proof of the existence of a nexus between the alleged crimes and the armed conflict.

See also *Semanza* Appeal Judgment (n 93) para. 368; *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, 26 May 2003, paras 582–583.

[150] Under the ICC regime, enforced sterilization is listed as a crime against humanity and as a war crime. ICC Statute (n 87) art. 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi). A similar regime is provided in the law regulating the East Timor Serious Crimes Panels. UN Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (hereafter East Timor Tribunal Statute), arts 5.1(g), 6.1(b)(xxii), 6.1(e)(vi). Interestingly, the law of the Kosovo Specialist Chambers only criminalizes 'enforced sterilization' as a war crime, but not as a crime against humanity. Assembly of Republic of Kosovo, Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 (hereafter Law on Specialist Chambers for Kosovo), arts 14(1)(b)(xxii), 14(1)(d)(vi). Under such a normative system, acts of enforced sterilization could qualify under other provided offences (e.g., other inhumane acts; persecution; sexual violence). See also Kelly Askin, 'The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Nijhoff 2005).

sterilization. Where an act of interference with the sexual integrity of the victim is charged as a genocidal offence, it must therefore be shown that the group as such was the ultimate target of the perpetrator who must have acted with the intent to destroy the group in whole or in part.[151]

Furthermore, the two sets of crimes might cover a slightly different range of sterilization methods. Where one is alleged to have committed genocide by imposing measures intended to prevent births within the group, the key element to be proved is the *intention* to prevent births.[152] The act need not have succeeded in preventing births within the group nor does it need to have resulted in destroying the victim's reproductive abilities.[153] In contrast, the war crime and crime against humanity of enforced sterilization requires the destruction or severe diminishment of the victim's biological reproductive capacity.[154]

12.3.6 Genocide, forcible transfer/deportation, and 'ethnic cleansing'

12.3.6.1 The notion of 'ethnic cleansing'

'Ethnic cleansing' is not a legally recognized category of international crime, although such practice would typically involve the commission of acts that constitute international crimes.[155] During the negotiations of the Genocide Convention, a Syrian proposal to add a sixth category of punishable act of 'imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was rejected.[156] This suggests there was no consensus among nations at the time to create a separate category of punishable act, referred to today as 'ethnic cleansing'.[157] This does not mean, however, that such practice is not relevant to the law of genocide.

The notion of 'ethnic cleansing' reflects and encapsulates the practice of rendering ethnically homogeneous a particular geographical area by means of force or coercion.[158] Depending on the circumstances, this may involve the commission of a variety of

[151] See, *supra*, Chapter 8. [152] See discussion, *supra*, 10.5.2. [153] See, *supra*, 10.5.1.

[154] See ICC *Elements of Crimes* (n 21) arts 7(1)(g)-5(1), 8(2)(b)(xxii)-5(1), 8(2)(e)(vi)-5(1). See also Christopher K Hall, Joseph Powderly, and Niamh Hayes, 'Article 7: Crimes Against Humanity—g) "Rape ... or any other form of sexual violence of comparable gravity"' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck, Hart, Nomos 2016), 216; Michael Cottier and Sabine Mzee, 'Article 8: War Crimes—Paragraph 2(b)(xxii): Rape and Other Forms of Sexual Violence' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck, Hart, Nomos 2016), 500.

[155] See, however, S.C. Res. 1674, para. 4, UN Doc. S/RES/1674 (28 April 2006) (referring to the 2005 World Summit Outcome Document and providing for the responsibility of states to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity).

[156] UN General Assembly, Genocide—Draft Convention (E/794) and Report of the Economic and Social Council: Amendment to Article II by Syria, UN Doc. A/C.6/234, 15 October 1948 (hereafter UN Doc. A/C.6/234); ICJ *Bosnia-Serbia* 2007 Judgment (n 111) para. 190.

[157] See Schabas, 'Article 6: Genocide' (n 75) 136.

[158] UN Security Council, Letter dated 9 February 1993 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/25274, 10 February 1993 (hereafter Preliminary Report on the Former Yugoslavia), para. 55:

> The expression 'ethnic cleansing' is relatively new. Considered in the context of the conflicts in the former Yugoslavia, 'ethnic cleansing' means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area. 'Ethnic cleansing' is contrary to international law.

crimes—including unlawful killings, persecutions, destruction of properties, arbitrary detention, and acts of deportation or forcible transfer.[159] The fact that 'ethnic cleansing' does not constitute a separate category of punishable acts does not mean that acts of genocide will never be committed in the context of or as part of incidents of ethnic cleansing, as indeed could happen.[160] Thus, acts committed in the context of an operation of ethnic cleansing could constitute genocide where the underlying acts come within the scope of one or more of the punishable acts and are committed with the requisite special intent.[161] Such acts could also be indicative of the perpetrator's genocidal intent.[162]

See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 65) para. 143 (defining 'ethnic cleansing' as 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area') (citing ICJ *Bosnia-Serbia* 2007 Judgment (n 111) para. 190).

[159] See, e.g., UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) ('Yugoslavia'), UN Doc. S/1994/674, 27 May 1994 (hereafter UN Commission of Experts Report on Yugoslavia), paras 129–150. See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 65) para. 145.

[160] *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 65) para. 145:

> [T]his does not mean that the practice of ethnic cleansing—which usually amounts to the crime against humanity of persecution—can never result in the commission of the crime of genocide. In this regard, the Majority considers that such a practice may result in genocide if it brings about the commission of the objective elements of genocide provided for in article 6 of the Statute and the Elements of Crimes with the *dolus specialis*/specific intent to destroy in whole or in part the targeted group.

See, e.g., UN General Assembly, Resolution 47/121: The Situation in Bosnia and Herzegovina, UN Doc. A/RES/47/121, 7 April 1993, (adopted 18 December 1992) (hereafter UN Doc. A/RES/47/121) (cited in *Blagojević & Jokić* Trial Judgment (n 87) para. 663, fn 2103):

> Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of 'ethnic cleansing', which is a form of genocide.

[161] *Krstić* Trial Judgment (n 79) paras 577–580; *Krstić* Appeal Judgment (n 76) para. 25; ICJ *Bosnia-Serbia* 2007 Judgment (n 111) para. 190:

> [Ethnic cleansing] can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II, paragraph (*c*), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while 'there are obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"' (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.' (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519). In other words, whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such.

[162] ICJ *Bosnia-Serbia* 2007 Judgment (n 111) para. 190. For illustrations, see also *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence,

12.3.6.2 *Intent to forcibly displace not the same as intent to destroy*

The forcible displacement or coerced evacuation of civilians from a particular location does not per se constitute genocide.[163] That is because genocide protects a group not against *displacement* but against physical or biological *destruction*.[164] An intent to forcibly displace certain individuals from their community cannot therefore be equated to an intention to destroy that group, as is required for acts of genocide.[165] Subject to the following section, genocide must therefore be distinguished from acts of forcible displacement.

12.3.6.3 *Evidential overlap*

From an evidential point of view, acts of forcible displacement and the means and methods used to effect it may rise to the level of genocidal actions if it can be shown that the perpetrator, not content to simply expel and displace individuals from a certain group, sought thereby to physically destroy the group as such—including by way of forcible expulsion.[166] Acts of forcible displacement may thus form part of or

20 October 1995 (hereafter *Nikolić* Review of Indictment), para. 34; *In re Jorgić*, Bundesverfassungsgericht, 12 December 2000 (2001) Neue Juristische Wochenschrift 1848, 1850. See also, *supra*, 9.4.7.4.

[163] See, *supra*, 8.2.3 and 9.4.7.4. See also *Stakić* Trial Judgment (n 117) paras 518–519 (footnotes omitted) ('It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide. [...] 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 by twenty-nine votes to five, with eight abstentions.') and para. 554 ('The intention to displace a population is not equivalent to the intention to destroy it.'); *Kupreškić et al.* Trial Judgment (n 5) para. 606:

> It should be added that if persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a *lacuna* would exist in the Statute of the Tribunal. There would be no means of conceptualizing those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent 'to destroy, in whole or in part, a national, ethnical, racial, or religious group'. An example of such a crime against humanity would be the so-called 'ethnic cleansing', a notion which, although it is not a term of art, is particularly germane to the work of this Tribunal.

Krstić Trial Judgment (n 79) para. 562, noting 'obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"'.

[164] See, *supra*, 8.2.3.

[165] See, generally, *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 118) para. 56 (footnote omitted):

> The distinguishing element of the *dolus specialis* of genocide is the intent to *destroy* a protected group. The extent of the destructive intent, however, should be distinguished from the requisite intent for ethnic cleansing, under which a perpetrator intends to target an ethnic group, such as by expelling the group from an area, yet lacks the intent to *destroy* that ethnic group within the area. The nature of the destructive intent can also be distinguished from the requisite intent for forced displacement as a crime against humanity. Both of the aforementioned crimes lack the element of an intent to destroy.

[166] *Nikolić* Review of Indictment (n 162) para. 34 ('In this instance, this policy of "ethnic cleansing" took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character. [...] More specifically, the constitutive intent of the crime of genocide may be inferred from the very gravity of those discriminatory acts.'); *Stakić* Trial Judgment (n 117) para. 557 ('[D]eporting a group or part of a group is insufficient [to establish the required *dolus specialis* for genocide] if it is not accompanied by methods seeking the physical destruction of the group.'); *Prosecutor v. Karadžić & Mladić*,

constitute the underlying conduct by which genocide is committed.[167] For this to be the case, it will have to be established that the perpetrator's acts in the process of 'ethnic cleansing' come within the terms of one of the prohibited genocidal acts listed in Article II of the Convention and reveal the presence of the requisite genocidal intent.[168]

Depending on the circumstances, acts of forcible displacement may also provide evidence relevant to an inference of genocidal intent on the part of those involved in acts of unlawful displacement.[169]

12.4 Genocide and Aggression

Genocide and the crime of aggression have little in common. The first is intended to protect the physical and biological existence of certain groups. The second seeks to criminalize recourse to wars of aggression in violation of peace and state sovereignty. Therefore, genocide and aggression reflect different protected interests and have a different set of potential victims. Furthermore, whilst aggression has been defined narrowly so as effectively to constitute a *leadership* crime, genocide can in principle apply at any and all levels of a hierarchy or structure involved in the commission of such a crime.[170] Their definitions are distinct in all material respects.[171]

Case No. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 (hereafter *Karadžić & Mladić* Rule 61 Review), paras 94–95; Preliminary Report on the Former Yugoslavia (n 158) para. 56 ('[Ethnic cleansing] could also fall within the meaning of the Genocide Convention.'). See also *Krstić* Appeal Judgment (n 76) paras 31–35 (concerning the Defence argument that the fact that the Bosnian Serb army decided to forcibly transfer, rather than kill, the women and children of Srebrenica undermines the Trial Chamber's finding of a genocidal intent on Krstić's part).

[167] See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) (Order of 13 September 1993, Separate Opinion of Judge Lauterpacht) [1993] ICJ Rep 407 (hereafter ICJ *Bosnia-Serbia* 1993 Order, Lauterpacht Separate Opinion), paras 68–70 (suggesting the Serb campaign of 'ethnic cleansing' of Bosnian Muslims as acts of genocide), and in particular para. 69:

> [I]t is difficult to regard the Serbian acts as other than acts of genocide in that they clearly fall within categories (*a*), (*b*) and (*c*) of the definition of genocide quoted above, they are clearly directed against an ethnical or religious group as such, and they are intended to destroy that group, if not in whole certainly in part, to the extent necessary to ensure that that group no longer occupies the parts of Bosnia-Herzegovina coveted by the Serbs.

[168] See, generally, ICJ *Bosnia-Serbia* 2007 Judgment (n 111) para. 190 ('In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.').

[169] *Karadžić & Mladić* Rule 61 Review (n 166) para. 94. See also *Nikolić* Review of Indictment (n 162) para. 34; *Krstić* Appeal Judgment (n 76) paras 30–33.

[170] See also Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461 (hereafter Kreß, 'Crime of Genocide under International Law'), 473 (noting that unlike aggression, genocide is not a leadership crime).

[171] Regarding the notion of aggression, see generally, Quincy Wright, 'The Concept of Aggression in International Law' (1935) 29 American Journal of International Law 373; Roger S Clark, 'Negotiating

One point of conjunction between the two offences, however, is that aggression can sometimes be used as a way to achieve control of a given geographical area in which genocidal acts are then committed. The risk exists, however, that this point of convergence could mask the true reality of a genocidal crime. For example, the narrative the Nuremberg Tribunal produced of the mass elimination of Jews and other vulnerable communities by Nazi Germany was less than ideal. The Tribunal set the Holocaust within the general framework of Germany's aggressive wars, that is, as merely one element of a broader policy of territorial expansion. In so doing, the Nuremberg Tribunal failed to recognize the specific criminal character of the 'Final Solution' and the targeting of particular communities with a view to their destruction.[172] In describing attacks on these communities as just one aspect of Germany's aggressive wars—rather than as a criminal enterprise of mass killing intended to eliminate groups of individuals—the Tribunal misunderstood the true nature of these crimes and distorted their historical significance.[173]

12.5 Genocide and Terrorism

Acts of genocide and acts of terrorism might sometimes overlap. Both involve the use of violence towards generally identifiable targets and both protect fundamental values

Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction over it' (2009) 20 European Journal of International Law 1103; Christian Wenaweser and Stefan Bariga, 'Forks in the Road: Personal Reflections on Negotiating the Kampala Amendment on the Crime of Aggression' in Suzannah Linton et al. (eds), *For the Sake of Present and Future Generations: Essays in International Law, Crime and Justice in Honour of Roger S. Clark* (Brill, Nijhoff 2015); Roger S Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court' (2002) 15 Leiden Journal of International Law 859; Silvia A Fernández de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court' (2001) 25 Fordham International Law Journal 589.

[172] In his closing speech, UK Prosecutor, Sir Hartley Shawcross, had laid down the view of the prosecution in relation to the place of crimes committed against the Jews:

> So the crime against the Jews, in so far as it is a Crime Against Humanity and not a War Crime, is one which we indict because of its association with the Crime Against the Peace. That is, of course, a very important qualification, and is not always appreciated by those who have questioned the exercise of this jurisdiction. But subject to that qualification, we have thought it right to deal with matters which the Criminal Law of all countries would normally stigmatise as crimes.

'Concluding Speeches by Prosecution: Session 187, 26 July 1946', Parts 6–12 in *The Trial of German Major War Criminals*, vol. 19 (HM Stationery Office 1946), 431. Such an interpretation of these events was correctly excluded by US Military Tribunal II in the *Einsatzgruppen* case, where it held that '[t]he annihilation of the Jews had nothing to do with the defense of Germany, the genocide program was in no way connected with the protection of the Vaterland, it was entirely foreign to the military issue'. *Einsatzgruppen* Judgment (n 136) 469–70.

[173] See, generally, Mettraux, *Ad Hoc Tribunals* (n 5) 197–98; Mettraux, 'Crimes Against Humanity in ICTY and ICTR' (n 66) 245, fn 35; William A Schabas, 'Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"' in Mauro Politi and Giuseppe Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Routledge 2004). See also William J Bosch, *Judgment on Nuremberg: American Attitudes Towards the Major German War-Crime Trials* (University of North Carolina Press 1970), 119. In the *Akayesu* case, the Trial Chamber was careful to distinguish between the armed conflict and the genocidal crimes which occurred in its midst. *Akayesu* Trial Judgment (n 18) paras 127–128.

of humanity, including human dignity and life. Methods used to commit one crime might also sometimes be used to commit the other, and the international community has an interest in preventing and punishing both crimes—as is clearly evidenced by the existence of a significant corpus of international norms pertaining to both crimes. Thus, atrocities committed against a particular vulnerable group by members of a terrorist organization could at once constitute terrorist acts and genocide.[174]

The two crimes are, however, legally distinct and their respective elements have little, if anything, in common. In particular, the special intent to destroy a group in whole or in part is a characteristic of the crime of genocide that does not apply to the crime of terror or terrorism. And whilst genocide constitutes a core feature of the international legal order, there remains some doubts as to the existence (and possible definition) of the crime of terrorism under general international law.[175]

[174] See, e.g., UN Human Rights Council, 'They Came to Destroy': ISIS Crimes Against the Yazidis, UN Doc. A/HRC/32/CRP.2, 15 June 2016 (hereafter UNHRC, 'They Came to Destroy'). See also Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015, in which the ICC Prosecutor stated she stood ready to investigate ISIS, as a group continually spreading terror on a massive scale in the territories it occupies, for, *inter alia*, its alleged commission of genocide.

[175] See, generally, Guénaël Mettraux, 'The United Nations Special Tribunal for Lebanon: Prosecuting Terrorism' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014), 651. See also *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 85, 147. See also *Almog v. Arab Bank, Public Ltd Comp*, 471 F Supp 2d 257 (EDNY 2007), Discussion–III.A.2.

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