The Crime of Genocide: Then and Now

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Evolution of a Crime

Edited by

Pavel Šturma and Milan Lipovský

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Foreword

Adopted on 9 December 1948, the Convention on the Prevention and Punishment of the Crime of Genocide entered into force on 12 January 1951. In order to mark the importance of the latter event for the evolution of international law, *Pavel Šturma* and *Milan Lipovský* convened an international conference under the auspices of Prague's Charles University's flourishing Human Rights Center. In September 2020, when the conference took place, the pandemic kept a firm hold also over Prague. Together with their invitees, mainly coming from Central Europe, the two organizers and their formidable team, demonstrated that, albeit nothing can fully replace face to face scholarly exchange, a meaningful, even vibrant academic conversation is indeed possible in digital form on the basis of a well-conceived structure. Given the conference's success, its conveners must be commended for having edited most of the papers – with certain revisions and with the addition of references in footnotes – in the form of this volume. At its core, 'The Crime of Genocide Then and Now: Evolution of a Crime' collects international legal studies of a doctrinal nature, both from the perspectives of international criminal law and the law of state responsibility for internationally wrongful acts. The book covers a wide variety of events extending from the time predating the Genocide Convention's entry into force until the most recent years (look solely at the time frame covered by *Katarína Šmigová*) and it contains both close insights in the *travaux préparatoires* and detailed analysis of the most recent developments in judicial practice and in legal scholarship. While no claim is made that the definition of genocide has undergone substantial change as a result of the practice of states subsequent to the Genocide Convention's entry into force, no reader of this book can fail to appreciate to what extent the practice of states, the jurisprudence of international and domestic courts, and the work of scholars, especially since the 1990's, have led to a refined understanding of the international legal concept of genocide as well as to a sharper delineation of the multiple areas of remaining controversies. This is demonstrated in significant detail and great precision with respect to a wide range of substantial legal issues, such as genocidal intent (*Michala Chadimová*), protected groups (*Veronika Bílková, Kateřina Uhlířová*), and the interrelation between state and individual responsibility (*Pavel Šturma*) and the hitherto much less explored concept of attempted genocide (*Nikola Kurková Klímová*) as well as with a view to the boundaries of the International Criminal Court's 'territorial' jurisdiction-limb over the crime of genocide (*Kristýna Urbanová*) and to the exercise of universal jurisdiction over that crime by domestic courts (*Milan*

Lipovský). While the majority of its chapters focus their analysis on the existing law against genocide, the collection does not stop there. *Harald C. Scheu* situates the latter body of law in its broader context of international human rights law and, more particular, international law on the protection of minorities, and *Eliška Mocková* criticizes the existing concept of genocide for excluding the systematic murder of people with disabilities after recalling the painful memory of past atrocities of that kind. *Markus P. Beham* moves the analysis even beyond law and legal policy and connects the present legal debate with that conducted by scholars from other disciplines under the umbrella term of 'Genocide Studies'. Last, but not least, the volume provides further evidence for the fact that, while the international law against genocide is of a universal character at its core, regional and even national policy perspectives on that body of law may differ in emphasis. *Tamás Hoffmann* sheds light on how its experience with the communist rule in the not so distant past continues to influence the policy approach of a number of Central European countries to the law against genocide (and to international criminal law more broadly), and *Ondřej Svaček*, quite appropriately in regard to the location of the conference, presents an insight into the Czechoslovak and then Czech experience with the Genocide Convention. 'The Crime of Genocide Then and Now: Evolution of a Crime' assembles contributions of high scholarly quality with a lot of fresh thinking on the international legal and legal policy complexities of genocide seventy years after the Genocide Convention's entry into force. Last but not least, the fine collection shows how much international legal scholarship from Austria, the Czech Republic, Hungary, Poland, and Slovakia – including quite a few of its younger representatives – have to say on this intriguing subject matter. Not too far from his birthplace, even after decades *Raphael Lemkin*'s legacy resonates most creatively.

Claus Kreß

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Introduction

Pavel Šturma and Milan Lipovský

According to its title, "The Crime of Genocide Then and Now: Evolution of a Crime", the publication you are holding in hand intends to describe and analyse the 70-year long bridge between the entering into force of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide in 1951 and 2021. On the one hand, virtually nothing has changed in the text of the definition of the crime of genocide. It was taken over from the original Convention to the statutes of the ad hoc tribunals of the 1990s and also into the Rome Statute of the International Criminal Court. On the other hand, the definition was applied by international courts and tribunals in both state responsibility and individual criminal responsibility, and it has also already been applied by international and domestic case law. Consequently, a lot has developed and deserves attention.

As the practice of applying the definition of genocide started taking place predominantly since the fall of the iron curtain, the prevailing number of sources dealing with it date from the last 30 years. Unfortunately – one might add, because it shows that the crime of genocide is not a dead letter of law, but rather a very current issue.

The 70-year anniversary was an excellent opportunity to evaluate the evolution of the crime of genocide and so, Charles University Faculty of Law's Human Rights Research Center (UNCE) convened a conference of practitioners and scholars in September 2020. The participants joined from many countries of Central Europe (the Czech Republic, Austria, Germany, Hungary, Poland, and Slovakia) and all presented excellent contributions, some of which were later the basis for this publication.

Consequently, the following pages present theoretical issues of the definition as well as practical aspects of its application. At the same time, genocide is both an international crime (or serious breach of an international obligation, giving rise to state responsibility) as well as a crime under international law (individual crime); and so while some aspects of the definition are universal (e.g., the scope of protected groups dealt with in Part 3), the publication also presents separate chapters on the prosecution of individuals (e.g., forms of responsibility of individuals in Part 2), and on responsibility of states (e.g., Part 1).

Thus, the book is organized according to five axes reflected in the main parts. Part 1 addresses theoretical issues of genocide as a concept and crime

attributable both to individuals and to states. Part 2 deals with forms of criminal liability of individuals, and the entirety of Part 3 is devoted to the definition in its aspect of the protected groups. In Part 4, authors address various issues, namely the denial of genocide and finally, Part 5 reflects upon the prosecution of that crime.

Recent years have seen a rise in judicial activity in relation to the crime of genocide as Pavel Šturma shows in his chapter. The International Court of Justice decided upon the Bosnia - Herzegovina v. Serbia Genocide as well as the Croatia v. Serbia Genocide cases in the first decade of the 21st century. The ICJ is currently hearing the parties in the case raised by the Gambia against Myanmar for the alleged genocide against the Rohingya. The very same events led to the investigation by the Prosecutor of the International Criminal Court of the situation in Myanmar and Bangladesh. The Prosecutor has also charged the former President of Sudan with genocide allegedly committed in Darfur.

Though it is desirable for the purposes of international justice to hold the responsible liable for genocide, this heightened activity is not without legal problems as Kristýna Urbanová analyses in Part 4. After all, the case law, though not numerous when compared to the case law upon war crimes and crimes against humanity, has already fostered certain divisive attitudes as Michala Chadimová describes in Part 2. She also deals with the quintessential topic of the crime of genocide – the *dolus specialis*. Similarly, Nikola Kurková claims that while an attempt is counted with explicitly, it has not been applied yet and deserves proper focus.

Throughout its decades lasting history (and the criticism may actually be also found in the *travaux préparatoires* to the Convention), the definition was criticized for being overly restrictive regarding the protected groups. Currently, there are only four groups protected – national, ethnical, racial, and religious. While each and every one of these groups certainly deserves protection by the prohibition of genocide, there were also other groups considered already in 1948 and some others gained their weight. Political opinion, social status, sexual orientation, disability, or cultural relationships are the most prominent examples of those that are not included and their exclusion from the protection may be problematic for the legitimacy of the system. Part 3 is dedicated to dealing with this cross-cutting and most current issue. Veronika Bílková claims that the four encompassed groups have already been enlarged by judicial creativity, however only to the extent possible under the current text of the Convention. Harald C. Scheu particularly focuses on the concept of cultural genocide and forced assimilation/integration. Kateřina Uhlířová moves on to the most current events that lead to the claims of genocide against the Uyghurs, the Rohingya, and the Yazidis and critically analyses the methodology used for

defining the protected groups. Eliška Mocková also pleads to include another group into the list – the people with disabilities, the group that is unfortunately often forgotten but also unfortunately often targeted.

It must be kept in mind that while the Convention certainly helped to popularise the term of genocide internationally, as Markus Beham concludes his chapter, to label an event or series of events as genocide, has serious legal and social consequences. The global village of social media tends to see strong arguments, not always based on legal grounds, that could lead to watering down the seriousness of the charge of genocide. Yet fortunately it seems that the international scholarly and political debate has avoided this problematic attitude up until now. On the other hand, some states even consider the claim that genocide against certain groups occurred in the past as a threat. Consequently, even the current debates may not avoid old events like the genocide of the Armenians. Katarína Šmigová thus deals with the denial of Armenian genocide and the claim of genocide against the Rohingya and creates a bridge between these events that are separated by an entire century.

The denial of crimes is the central focus for the chapter by Tamás Hoffmann. He deals with denial of both Holocaust as well as communist crimes. The domestic experience with genocide and prosecuting it is also focus of chapters by Milan Lipovský, who introduces and describes the universal jurisdiction concepts and their application in recent cases, as well as by Ondřej Svaček who describes the Czech and Czechoslovak contribution to the definition.

The book aims to show that though 70 years have passed, the application and interpretation of the Convention and its definition of genocide is certainly not an outdated issue of international law. Rather, it deserves evaluation, clarification, enlarging the protected groups list, and more effective system of implementation free of political pressures.

The co-editors would also like to thank all the authors and other participants of the conference, namely prof. Claus Kreß, reviewer dr. Piotr Lubiński, and the participating students. Particularly, Mr. Charles Bird, J.D. LL.M. deserves gratitude for his excellent language proofreading.

PART 1

Theoretical Issues and the Concept of Genocide

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CHAPTER 1

State Responsibility and Individual Criminal Responsibility for the Crime of Genocide

Pavel Šturma

1 Introduction

There is no doubt that genocide belongs with the most heinous crimes under international law. It was successfully defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[1] That definition was then confirmed in the draft Code of Crimes against the Peace and Security of Mankind,[2] in both Statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia[3] and for Rwanda,[4] as well as in Article 6 of the 1998 Rome Statute of the International Criminal Court (ICC).[5] It is possible to conclude that the definition of the crime also became a part of customary international law.

However, the crime of genocide, which is characterized as crime under international law, has been mostly connected only with individual criminal responsibility. This is in spite of the extensive debate in academia and in the International Law Commission (ILC) in the context of the codification

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

2 Art. 17, Draft Code of Crimes against the Peace and Security of Mankind, in *Yearbook of the International Law Commission*, 1996, vol. II, Part 2.

3 Art. 5, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, approved by the Security Council resolution 827 (1993) and contained in the report of the Secretary-General pursuant to paragraph 2 of SC resolution 808 1993, doc. S/25704 and Add.1, annex (Statute of the ICTY).

4 Art. 3, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, approved by the Security Council resolution 955 (1994), annex (Statute of the ICTR).

5 Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted 17 July 1998, entered into force 1 July 2002.

of the rules on State responsibility. The concept of "international crimes" of States, as defined in draft Article 19 of the first reading of the Articles on responsibility of States for internationally wrongful acts (ARSIWA),[6] made it plain that genocide is one of the crimes that entail an aggravated form of responsibility of States. Although the deletion of the term of crimes of States from the final (second) reading of ARSIWA limited the doctrinal interest in this issue, it never disappeared.[7]

The judgment of the International Court of Justice (ICJ) in *Application of Genocide Convention* (*Bosnia and Herzegovina v. Serbia and Montenegro*)[8] thus only revived interest in the issues of State responsibility for the crime of genocide. This chapter aims at exploring the arguments contained in the judgment in light of the long-existing doctrinal debates and the earlier works of the ILC in the field of State responsibility and individual criminal responsibility. It will argue that those two forms of responsibility are different in nature and not mutually exclusive but rather supportive, as they have the same objective, which is the prevention of genocide.

2 Judgment of the ICJ in Bosnia Genocide Case

No doubts, this judgment belongs to the most cited and commented decisions of the ICJ. This is not only because of the seriousness of crime of genocide, as a matter of individual criminal responsibility, and even more, the groundbreaking decision that a State can also be internationally responsible for the crime of genocide. Some critical comments relate to the fluctuation of views of the ICJ as to the standing of the Federal Republic of Yugoslavia, later renamed Serbia and Montenegro, as a member of the United Nations and party to the Statute of the ICJ. In response to objections by the respondent State against its

6 Yearbook of the International Law Commission, 1996, vol. II, Part 2.

7 See, in particular, Bianchi, Andrea, State Responsibility and Criminal Liability of Individuals, in Cassese, Antonio (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009), pp. 16–24; Dupuy, Pierre-Marie, International Criminal Responsibility of the Individual and International Responsibility of the State, in Cassese, A., Gaeta, P., Jones, JRWD (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002), pp. 1085–1099.

8 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43.

jurisdiction, the ICJ first issued its judgment on preliminary objections in 1996,[9] where it ruled that it had jurisdiction on the basis of Article IX of the Genocide Convention. The Court then affirmed this jurisdictional basis in its judgment on the Merits (2007).[10] However, this paper will not reopen the debate on the party status and jurisdiction in the Genocide case.[11]

By contrast, the wording of the dispute settlement clause in Article IX of the Genocide Convention is extremely important not only as the sole jurisdictional basis but also for the substantive issue of State responsibility, which is the proper subject of the paper. Article IX provides:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present 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 International Court of Justice at the request of any of the parties to the dispute.[12]

This provision gives rise to conflicting interpretations. The paper presents first the reasoning of the ICJ, before embarking into individual views of some judges and writings of authors.

The fact that Article IX constitutes the only basis for the Court's jurisdiction implies that the ICJ can decide just on disputes between States parties covered by this provision. Consequently, the Court did not have jurisdiction to decide on alleged violations of obligations under international law other than genocide, in particular obligations aimed at the protection of human rights in armed conflicts. That is so "*even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed* erga omnes."[13]

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9 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996, p. 595.

10 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 147.

11 See, e.g., Wittich, Stephan, 'Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case', 18 *European Journal of International Law* (2007), no. 4, p. 591.

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

13 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 147.

This is important in view of the fact that the rule prohibiting genocide also forms a part of customary international law and is generally considered as an undisputed example of *jus cogens* norms.[14] However, the Court was, because of the jurisdictional limitation, prevented from establishing the responsibility of a State for the crime of genocide under customary international law. Therefore, it put emphasis on the interpretation of Article IX of the Genocide Convention. At the same time, the ICJ correctly pointed out that in order to determine whether the Respondent breached its obligation under the Convention, the Court will have "*recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts*."[15]

The Court noted that, in particular, a dispute existed about "*whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and other acts enumerated in Article III*."[16]

The problem is that the notion of responsibility of a State appears only in Article IX, while the general obligation in Article I of the Convention resembles other criminal law conventions. Under Article I "*the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish*." In turn, Article II includes the well-known definition of the crime of genocide.[17] Next, Article III provides that not only genocide itself but also some other acts shall be punishable.[18]

However, the ICJ found that the identification of genocide as a crime under international law, as well as the obligation of a State to prevent genocide,

14 See Gaeta, Paola, 'On What Conditions Can a State Be Held Responsible for Genocide?', 18 *European Journal of International Law* (2007), No. 4, 631, p. 642.

15 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 149.

16 *Ibid*, para. 152.

17 Art. II: "*In the present Convention, 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*."

18 Art. III: "*The following acts shall be punishable:* (*a*) *Genocide;* (*b*) *Conspiracy to commit genocide;* (*c*) *Direct and public incitement to commit genocide;* (*d*) *Attempt to commit genocide;* (*e*) *Complicity in genocide.*"

necessarily implies an obligation of a State not to commit genocide. The Court clearly stated:

> Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not expressis verbis require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation 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. It 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. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[19]

Indeed, the main focus of the Genocide Convention is on prosecuting individuals for the crime of genocide. Therefore, the ICJ stressed that a breach of the obligation to prevent and not to commit genocide is not a criminal or "punishable" act by the State, because State responsibility is "*quite different in nature from criminal responsibility*."[20] Nevertheless, the ICJ had to cope with differences between international responsibility of States and individual criminal responsibility.

First, the Court observed that "*if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as*

19 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 166.

20 *Ibid*, para. 167.

defined in the Convention has been committed."[21] It seems logical. However, the ICJ had to react to the argument raised by the Respondent that the condition *sine qua non* for establishing State responsibility is the prior establishment of the individual responsibility of a perpetrator engaging the State's responsibility. The problem includes three distinct elements: (1) whether the act of genocide was committed at all; (2) whether a prior finding of genocide by a criminal court or tribunal is necessary; and whether there is a need of conviction for the crime of genocide (or associated acts under Article III) of persons whose acts are attributable to the State.

The first question was answered in the affirmative. Second, the Court said that "*the different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts* [...] *have been committed*."[22] In other words, while recognizing the differences, the ICJ affirmed its power to decide on genocide and State responsibility for it. Third, the Court did not find a previous conviction of an individual for the crime of genocide as precondition for its capacity to adjudicate.[23]

Next, the ICJ embarked on to the elements of the crime of genocide. It noted that genocide as defined in Article II of the Convention comprises "acts" and an "intent". For the Court it is well established that the acts listed in the definition themselves include mental elements.[24] Referring to the ILC's Draft Code of Crimes against the Peace and Security of Mankind,[25] the Court concluded that the acts are by their very nature "*conscious, intentional or volitional acts*."[26]

However, in addition to those mental elements, Article II requires a further mental element, namely the establishment of the "*intent to destroy, in whole or in part,* [the protected] *group, as such*." It is often referred to as a 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.* [...] *The acts listed in Article II must be done with intent to destroy*

21 *Ibid*, para. 180.

22 *Ibid*, para. 181.

23 *Ibid*, para. 182: "*The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.*"

24 See the definition in Art. II, *supra*, fn. 17.

25 *Yearbook of the International Law Commission, 1996*, Vol. II, Part 2, p. 44, para. 5.

26 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 186.

the group as such in whole or in part."[27] The Court thus also made difference between genocide and "ethnic cleansing", the term that has frequently been employed to refer to the events in Bosnia and Herzegovina.[28]

Then, the Court referred to the definition of the protected group. There were some inconsistencies in the claims of the Applicant, referring to "non-Serb population". The ICJ concluded that the protected group is a group which "*must have particular positive characteristics – national, ethnical, racial or religious – and not the lack of them.*"[29]

Another issue addressed by the parties in dispute was the impact of geographic criteria on the identified group. The Court bears heavily on the findings of the ICTY concerning the atrocities committed in Srebrenica.[30] The Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. First, the intent must be "*to destroy at least a substantial part of the particular group*."[31] Second, the ICJ observed 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*."[32] The third suggested criterion is qualitative rather than quantitative. The ICJ accepted the view of the Appeal Chamber of the ICTY in *Krstić* case[33] that the number of individuals should be evaluated in relation to the overall size of the entire group, taking into consideration their prominence within the group.[34]

Next, when turning to the facts of the dispute, the Court had to consider first the burden of proof, the standard of proof, and the methods of proof. The ICJ affirmed that "*it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it.*" As to the second matter, the Court noted that parties also differed on the standard of proof. The ICJ did not accept the balance of probabilities suggested by the Applicant. Instead, it requires evidence that is fully conclusive. It concerns both the allegations that

27 *Ibid*, para. 187.
28 *Ibid*, para. 190.
29 *Ibid*, para. 193.
30 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33, TCh (2 August 2001), para. 546.
31 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 198.
32 *Ibid*, para. 199.
33 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33-A, ACh (19 April 2004), para. 12.
34 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 200.

the crime of genocide or other acts under Article III have been committed and the attribution for such acts.[35]

The ICJ then faced a very difficult task. On the one hand, it stressed that it must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. On the other hand, as the Court admitted, this case does have an unusual feature, because many of the allegations before it "*have already been the subject of the processes and decisions of the ICTY*."[36] As to the assessment of evidence, the Court recalled its own practice in previous cases. Against that basis, it concluded that the fact-finding process of the ICTY met such standards, as "*evidence obtained by examination of persons directly involved*", tested by cross-examination, the credibility of which has not been challenged subsequently.[37] The Court discussed the weight of numerous documents of the ICTY at some length. In fact, because of the nature of the case, the Court relied heavily on the findings by the ICTY.

Subsequently, the ICJ considered a number of cases of mass killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina which were perpetrated during the conflict. The Court thus found that it had been established by conclusive evidence that mass killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (*a*) of the Convention, were fulfilled. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the mass killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such.[38] Such intent was only proved, on the basis of findings of ICTY in the *Krstić* and *Blagojević* cases, only with respect to the killings of more than 7,000 Bosnian men in Srebrenica in July 2005.[39]

The next and final step was to establish international responsibility of the Respondent State in connection with the massacres committed in Srebrenica area. For this purpose (the test of responsibility), the Court was required to consider the following issues:

35 *Ibid*, paras. 208–209.
36 *Ibid*, para. 212.
37 *Ibid*, para. 214.
38 *Ibid*, paras. 276–277.
39 *Ibid*, para. 290.

> First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility … Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.[40]

When it comes to the issue of attribution, the ICJ found that there is nothing which could justify an affirmative response to the question whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (FRY, the Respondent) under its internal law. According to the judgment, "*it has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres*." In addition, neither the Republika Srpska (in Bosnia), nor the VRS (the Bosnian Serbs armed forces) were *de jure* organs of the FRY.[41]

Next, the ICJ addressed the argument of the Applicant that the Republika Srpska, its armed forces and some paramilitary militias must be deemed to be "*de facto* organs" of the FRY. The Court applied the test of "effective control" set in its judgment in *Military and Paramilitary Activities in and against Nicaragua* (1986).[42] The ICJ examined the question whether there were the persons or entities that committed the acts of genocide in Srebrenica had been in "complete dependence" on the Respondent (FRY, later Serbia). The Court had to answer this question in the negative. First, it concluded that at the relevant time, "*neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy*."[43]

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40 *Ibid*, para. 379.

41 *Ibid*, para. 386.

42 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14, p. 62.

43 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 394.

The Court then turned to the question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control (under Article 8 of ARSIWA).[44] Here, the ICJ based its reasoning on that article of ARSIWA (considered as customary international law) and its test adopted in the *Nicaragua* case. It rejected the "overall control" proposed by the Applicant and backed in the view of the ICTY Appeals Chamber in the *Tadić* case. Following the discussion and differentiation of the purposes of tests in *Nicaragua* and *Tadić*, the Court concluded that the overall control test is "*unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility*."[45]

Against this background and based on the examination of evidence the ICJ came to the conclusion that it had not been established that:

> [...] the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent ... It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which ... constituted the crime of genocide, were perpetrated.[46]

Therefore, the Court concluded that "*the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis*."[47]

As the next step, the ICJ examined a possible responsibility of the Respondent state for other acts under Article III of the Genocide Convention. It came to the conclusion that international responsibility of the Respondent, which was not aware of the preparation of the genocide in Srebrenica, was not engaged (through its aid or assistance) for acts of complicity in genocide mentioned in Article III paragraph e) of the Convention.[48]

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44 See Art. 8: "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*"

45 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 406.

46 *Ibid*, para. 413.

47 *Ibid*, para. 415.

48 *Ibid*, para. 424.

Finally, the Court turned to the third and last question, namely that of the responsibility for a breach of the obligations to prevent and punish genocide. Those are, in the view of the Court, two distinct yet connected obligations.

Regarding the obligation to prevent genocide, the Court recalled 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*." However, State responsibility is engaged if the State "*manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.*"[49]

Next, according to the ICJ, a State can be responsible for breaching the obligation to prevent genocide only if genocide was actually committed.[50] Here, the Court correctly referred to Article 14 (3) of the ARSIWA.[51]

When assessing the facts, the ICJ noted first that, during the period under consideration, "*the FRY was in a position of influence over the Bosnian Serbs*" who implemented the genocide in Srebrenica, unlike any of the other States parties to the Genocide Convention "*owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other*."[52] Secondly, the FRY was bound by very specific obligations by virtue of the two Orders on provisional measures delivered by the Court in 1993, requiring the FRY to ensure that any military, paramilitary or irregular units which may be directed or supported by it, or subject to its control, do not commit any acts of genocide.[53] Thirdly, the Court recalled that the Belgrade authorities "*could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.*"[54]

In the view of the ICJ, the Yugoslav federal authorities should have made the best efforts within their powers to try and prevent the tragic events. However, the Respondent did nothing to prevent the Srebrenica massacres. Therefore, the Court concluded that the Respondent had "*violated its obligation to*

49 *Ibid*, para. 430.

50 *Ibid*, para. 431.

51 Art. 14: "*3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.*"

52 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 434.

53 *Ibid*, para. 435.

54 *Ibid*, para. 436.

prevent the Srebrenica genocide in such a manner as to engage its international responsibility".[55]

As to the obligation to punish genocide, the ICJ concluded that the Respondent cannot be charged with not having tried before its own courts persons accused of having participated in the Srebrenica genocide, as it did not take place in its territory. Nevertheless, the Court sufficiently established that "*the Respondent failed in its duty to co-operate fully with the ICTY*."[56]

When it comes to the question of reparation, however, the judgment seems to disappoint those who expected that the Court would decide on the specific legal consequences of the breach of the obligation to prevent and punish genocide. Indeed, the Court could not "*regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica*." Therefore, financial compensation was not "*the appropriate form of reparation for the breach of the obligation to prevent genocide.*"[57] Instead, the ICJ concluded that the declaration of the breaches by Serbia of the obligations to prevent genocide and to comply with the provisional measures ordered by the Court in 1993 constituted appropriate satisfaction.[58]

3 Discussion

No doubt, such a complex judgment concerning the matter of genocide, in particular the State responsibility for the crime of genocide, gives rise to numerous comments that appreciate or criticize the result of the dispute or some reasoning of the ICJ. Obviously, that judgment was not adopted unanimously by the judges. Instead, they voted differently with respect of nine operative paragraphs of the judgment. In addition, most judges annexed their declarations and separate or dissenting opinions. As usual in such complex and legally and politically sensitive cases, the majority decision reflexes the compromise (or minimum common denominator) that was reached.

At the same time, the judgment also provoked an interesting doctrinal debate. It should not be surprising, as it provides a very important interpretation of many issues of international criminal law and the law of State responsibility. The present paper will focus on the problem of State responsibility (in

55 *Ibid*, para. 438.
56 *Ibid*, para. 449.
57 *Ibid*, para. 462.
58 *Ibid*, para. 471 (9).

relation to individual criminal responsibility). It includes, in particular, the issues of elements of the international wrongful act of a State and of its legal consequences. On balance, the most of procedural problems of the long case against the FRY (later Serbia) can be left aside.[59]

3.1 *Broad Case and Limited Jurisdiction of the ICJ*

It is well-known fact that the jurisdiction of the ICJ is not inherent (obligatory) but rather consent-based jurisdiction. In the absence of the declaration under Article 36 para. 2 of the Statute or of the special agreement (*compromis*), it is the dispute settlement clause in a bilateral or multilateral treaty which provides a basis for jurisdiction of the Court. Hence the clause in Article IX of the Genocide Convention plays a key role. In spite of the many atrocities committed during the conflict in Bosnia and Herzegovina, the Court had to limit itself only to the clearly evidenced case of genocide in Srebrenica. As the ICJ admitted, other documented cases of killing might constitute war crimes or crimes against humanity, but the Court did not have jurisdiction to decide on them.[60]

Even with this clear limitation, the ICJ interpreted and applied the clause in Article IX quite broadly in order to be able to decide on responsibility of a State for genocide. This is the most important, innovative, yet controversial aspect of the judgment. Obviously, it gave rise to critical comments by some judges and academics.

For example, Judge Tomka in his Separate Opinion paid attention to the careful interpretation of the Convention, in particular its Articles I and IX, including the reference to the *travaux préparatoires*.[61] It is generally recognized that the dispute settlement clause in Article IX differs from similar provisions in other international criminal law conventions establishing jurisdiction of the ICJ for disputes between the Contracting Parties by the added words "*including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III*." Other clauses usually only include disputes concerning interpretation or application of the given treaty. What is also unusual is the fact that the reference to responsibility is in the compromissory clause, "*which is usually not the source of substantive obligations*."[62]

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59 See, e.g., Wittich, *supra note* 11.

60 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 277.

61 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro)*, Separate Opinion of Judge Tomka*, ICJ Reports 2007, at 310 ff.

62 *Ibid*, para. 41.

Judge Tomka interpreted first Article I of the Convention and, referring to the drafting history of the GA resolution 96 (I) of 11 December 1946 and of the Genocide Convention, concluded that Article I of the Convention is conceived as a crime of individuals, and not of a State.[63]

He then proposed three possible ways of interpretation of the unusual provision of Article IX. The first one means that the provision can be understood as the jurisdiction of the Court to determine the responsibility of a State for the breach of one its obligations under the Convention, i.e., to prevent or punish the crime of genocide committed by individuals.[64] This seems to also be the interpretation of some writers criticizing the Court for its interpretation of Articles I and IX.[65]

Second, the clause can also be understood as empowering the ICJ to determine that a State has committed genocide. Indeed, genocide is considered to be violation of a *jus cogens* norm, constituting a "*crime against all of humankind*".[66] However, as Judge Tomka pointed out, "*that interpretation would implicate the criminal responsibility of States in international law*." This is something rejected not only by him but also (even if not in an entirely convincing way) by the majority of the Court.[67] The concept of criminal responsibility of States was also abandoned by the ILC in its second and final reading of the ARSIWA.[68]

The third and the most plausible interpretation of Article IX understands this clause as the power of the Court to determine that in a particular case "*a State has to bear the consequences of the crime of genocide, committed by an individual found to be criminally liable, because a certain relationship existed between the individual perpetrator of the genocide and the State in question*."[69] It means, in other words, that the ICJ was able to determine the responsibility of a State for genocide (or, in French version of Article IX, *en matière de génocide*), on the basis of attribution to the State of the acts perpetrated by persons.

We share this interpretation as the most convincing. Some authors criticized the judgment for establishing the responsibility of a State on the basis of Article IX. For example, Gaeta shares most of critical comments raised by Judge Tomka but (while confirming customary law based obligation of States not to commit genocide) she goes further as to exclude any State responsibility

63 *Ibid*, para. 45.
64 *Ibid*, para. 54.
65 See Gaeta, *supra note* 14, pp. 637–640.
66 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33-A, ACh (19 April 2004), para. 36.
67 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, para. 170.
68 *Separate Opinion of Judge Tomka*, para. 55.
69 *Ibid*, para. 56.

determined on the basis of Article IX. She bears on the Nuremberg legacy that "*crimes against international law 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.*"[70] Indeed, the Statute and judgment of the Nuremberg Tribunal, as well as the subsequent development of international criminal law (including the 1948 Genocide Convention) aimed at holding persons, in particular senior State officials who had committed heinous crimes, personally responsible regardless of their official capacity.

However, at that time, it was not obvious that such persons could not invoke their official status or immunity or the doctrine of Act of State in order to escape individual criminal responsibility. Therefore, it was clearly set in Article 7 of the Nuremberg Statute that "*the official position of defendants, whether Heads of State or responsible officials in Governmental Departments, shall not be considered as freeing them from responsibility or mitigating punishment.*"[71] Nowadays, the principles of individual criminal responsibility and of the non-relevance of official capacity have become the firm stones of international criminal law. They are also confirmed in Articles 25 and 27 of the Rome Statute of the International Criminal Court.[72] In other words, the past battles for individual criminal responsibility were successfully accomplished.[73]

Nevertheless, one should not disregard another aspect of crimes under international law, which was always explicitly or implicitly present, that most crimes were perpetrated by persons in official capacity whose acts are attributable to States. It is self-evident in case of the crime of aggression (or, in the Nuremberg terminology, the crime against peace). It is less evident in case of war crimes and crimes against humanity. Hence, the issue of international responsibility of a State, in parallel with individual criminal responsibility, was always present in internationalist doctrine.

The so-called dual responsibility has also been admitted by the most important documents codifying both international criminal responsibility and State responsibility, such as the Code of Crimes against the Peace and Security of

70 The Judgment of the International Military Tribunal at Nuremberg; cited by Gaeta, *supra note* 14, p. 633.

71 Art. 7, Statute of the International Military Tribunal, *ibid*, at 634.

72 Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted 17 July 1998, entered into force 1 July 2002.

73 On the permanent relevance of Nuremberg principles see, e.g., Šmigová, Katarína, *Norimberské zásady ako základ medzinárodného trestného práva* [Nuremberg Principles as a Basis of International Criminal Law], Habilitation Thesis, Bratislava: Pan European University, 2019.

Mankind,[74] the Rome Statute of the ICC,[75] and Articles on responsibility of States for internationally wrongful acts (ARSIWA).[76] Those documents do not create any misleading concept of criminal responsibility of States but they admit that two forms of responsibility under international law, yet different, are not mutually exclusive. Even the much more explicit wording of Article 19 of ARSIWA (first reading) should not be understood as the inclusion of criminal responsibility of States but rather as a clarification of the dual responsibility (see *infra*, sub 3.2).

When it comes to the crime of genocide, it is noteworthy that the responsibility of a State was also considered, as it shows the drafting history of the Convention described both in the Judgment[77] and in the Separate Opinion of Judge Tomka.[78] It may also be recalled that the Convention was drafted in the period when the historical examples of acts that would constitute genocide (in particular, the Ottoman massacres of Armenians and the Nazi extermination of Jews) clearly revealed that such acts were not committed by private persons but by State officials capable to use the machinery of States. Although the formulation that appeared in Article IX of the Convention was a result of compromise, no one should deny that acts of genocide could be attributed to a State, even if not for the purposes of punishment.

That is why the comparison with other international treaties for prevention and repression of other offences, such as counterfeiting, slavery, or traffic in women and children is not too convincing.[79] Last but not the least, those conventions do not include the provision identical with Article IX of the Genocide Convention. Any reasonable interpretation must give effect (*effet utile*) to the words "responsibility of a State for genocide".

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74 Art. 4, Draft Code of Crimes against the Peace and Security of Mankind, in *Yearbook of the International Law Commission*, 1996, vol. II, Part 2, p. 23: "*The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.*"

75 Art. 25, para. 4: "*No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.*"

76 Art. 58, ARSIWA, Yearbook of the International Law Commission, 2001, vol. II, Part 2, p. 142: "*These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.*"

77 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43 paras. 161–164.

78 *Separate Opinion of Judge Tomka*, paras. 43–50.

79 See Gaeta, *supra note* 14, pp. 634–637.

Indeed, the dispositive of the ICJ judgment only determined the responsibility of Serbia for the breach of the obligations to prevent and to punish genocide. For some commentators, it would have been sufficient if the Court limited itself to the discussion of responsibility for violation of these treaty obligations (under Article I), without an inquiry into the responsibility of a State for the commission (and complicity and other related acts) of the crime of genocide.[80] However, the findings adopted by the Court in the end, after its long and thorough examination of facts and legal arguments presented by the parties in dispute, could hardly justify the *a priori* exclusion of the hypothesis of the violation of the prohibition of genocide by a State and its possible direct responsibility. Such a narrow approach would not do justice not only to the submissions of the Applicant but also to expectations of the community of international lawyers. In other words, it was the first opportunity for the ICJ to clarify the question of the dual responsibility for genocide and the Court did not miss it. Thus, the responsibility of a State for genocide is possible in principle, yet not in the form of criminal responsibility.

3.2 *Does the Dual Responsibility Imply Violation of One or Two Rules?*

In spite of the plausibility of one (the above mentioned) interpretation of Article IX of the Genocide Convention, the judgment still incites other serious questions. One of them concerns the content of the primary rule obliging States not to commit genocide. In other words, is there only one or two different rules prohibiting genocide which when violated gives rise to the two forms of responsibility?

Some authors, in particular Gaeta, assert that "*the two forms of responsibility* are fully independent of each other *from the start*", because "*they are triggered by the* violation of non-identical primary rules."[81] With due respect, I disagree with that conclusion which seems to misinterpret the distinction between *primary* and *secondary* rules. Moreover, while the thesis about the two forms of responsibility is correct, it does not logically imply the conclusion about two different primary rules.

To sum up the main arguments that support the criticized conclusion, they are based on (a) analogy between war crimes and the crime of genocide; (b) the relevance of a mental attitude (*mens rea*) for individual criminal responsibility, which is not required for State responsibility; (c) treaty law

80 *Ibid*, pp. 647–648.

81 Gaeta, *supra note* 14, p. 641.

versus customary international law; and (d) the issue of large-scale attack or policy requirement.[82]

The analogy argument can work both ways. Indeed, it is true that, for example, State responsibility for the killing or bad treatment of prisoners of war is engaged automatically (on the basis of attribution of conduct of soldiers to the State), while the proof of *mens rea* is required to establish the individual criminal liability of the soldier for a war crime. However, does it mean, that the very prohibition of killing and other ill-treatment of prisoners of war, which is a well-established rule of international humanitarian law, is different for States and for individual soldiers? Certainly, it is not. To continue in criminal law analogy, let us take the criminal liability of legal persons (corporations) that exist in many national legal orders and is required by several international conventions on transnational crimes. The primary rules, such as prohibitions of fraud, corruption, or financing of terrorism, remain the same for both natural and legal persons, in spite of some special conditions for corporate liability.

Next, it is true that not every single case of war crimes or genocide must necessarily entail the responsibility of a State. According to the above accepted interpretation, a State has to bear the consequences of the crime, committed by an individual, because a certain relationship existed between the individual perpetrator of the crime (for ex. genocide) and the State in question. There are no doubts that conduct must be attributed to the State under the rules of attribution, which certainly belong to secondary rules of State responsibility. Likewise, the law of State responsibility may also set other conditions, such as "a large-scale or systematic practice".

From this point of view, both Article 19 of the first reading ARSIWA (1996) and Article 40 of the final ARSIWA (2001) present a clear picture. According to Article 19, which introduced the concept of international crime of States, there are two conditions for that form of an internationally wrongful act: an international obligation of essential importance for the protection of essential interests of the international community (which is a matter of primary rules) and its serious breach. The latter is a matter of the law of State responsibility (secondary rule).[83]

The same conclusion is supported by the wording of Article 40 of the 2001 ARSIWA that eliminates the term "international crime" but expressly uses the concept of obligations arising under a peremptory norm of general

82 See Gaeta, *supra note* 14, pp. 641–643.

83 See Art. 19, para. 3(c): "[…] *a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.*"

international law.[84] The ILC expressly said, in its commentary on Article 40 that "*some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale*."[85]

Since the commentary refers to the seriousness of a violation, no one can seriously argue that the requirement of "serious breach" and "gross or systematic failure" is a part of the underlying primary peremptory norms. Instead, those norms are rather general and contain prohibitions of certain conduct (for ex. genocide, slavery, apartheid, or torture). However, the responsibility of a State requires, in addition to attribution, more than one single breach by an individual perpetrator.[86]

Having said that, I can easily agree that the prohibition of genocide, including the obligation on States not to perpetrate genocide, originates in customary international law and that constitutes *jus cogens*.[87] The fact that the ICJ did not apply that rule as a customary rule and dwelled only in the Genocide Convention was due to the jurisdictional limitation in the given case. However, nothing indicates that the prohibition of genocide (as a primary obligation) would be different in the Convention and in customary international law. On the contrary, the definition of the crime of genocide is very stable and has not changed from the 1948 Convention to the Code of Crimes against

84 See Art. 40: "*1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.*

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation."

85 Yearbook of the ILC, 2001, vol. II, Part 2, p. 113, para. 8.

86 This approach seems to reflect not only the attitude of the ILC and the then Special Rapporteur Roberto Ago but also the views of several authors. Cf., e.g. Spinedi, Maria, *Les crimes internationaux de l'Etat dans les travaux de codification de la responsabilité des Etats entrepris par les Nations Unies* (EUI Working paper No. 88, 1984), pp. 24–25, 132–133; Weiler, J., Cassese, A., Spinedi, M. (eds.), *International Crimes of States – A Critical Analysis of the International Law Commission's Draft Article 19 on State Responsibility* (Berlin: W. de Gruyter, 1989); Pellet, Alain, 'Can a State Commit a Crime: Definitely, Yes!', 10 *European Journal of International Law* (1999), p. 425; Dupuy, *supra note* 7; Maison, Rafaëlle, The 'Transparency' of the State, in Crawford, J., Pellet, A., Olleson, S., *The Law of International Responsibility* (Oxford University Press, 2010), p. 717. It was also largely reflected in the Czech doctrine of international law; cf. e.g., David, Vladislav, Mezinárodní zločiny a jejich právní následky [International Crimes and Their Legal Consequences] (University Press Brno 1988), pp. 71–86; Šturma, Pavel, 'K návrhu Kodexu zločinů proti míru a bezpečnosti lidstva' [On the Draft Code of Crimes against the Peace and Security of Mankind], Právník, No. 9–10, 1989, pp. 879–882.

87 Gaeta, *supra note* 14, p. 642.

the Peace and the Security of Mankind, the two Statutes of the UN tribunals (ICTY 1993, ICTR 1994) and to the 1998 Rome Statute of the ICC. This stability is particularly striking if we compare it with other crimes, such as war crimes and crimes against humanity that went through a considerable development.

In addition, there is a doctrinal debate among specialists in international criminal law as to whether a State plan or policy context is required. On the one hand, a plan or policy of genocide, or at least a collective destructive act, is defended by Kreß[88] who also points to the ICC Elements of Crimes. Indeed, the States Parties decided to place the conduct of the individual perpetrator "*in the context of a manifest pattern of similar conduct*."[89] On the other hand, Cassese and Gaeta took an opposite view that a contextual (policy) element was not required.[90] They also rely on the judgment of the ICTY in *Jelisić* case.[91]

To conclude, it seems that it is up to the ICC to give the final answer to the question of individual criminal liability for the crime of genocide and the conditions thereof. However, it may be, this is not conclusive for the question of State responsibility that is governed by secondary rules of general international law.

3.3 *A Different Test (Standard) of Control?*

If a State can be responsible for genocide on the basis of attribution to the State of the acts perpetrated by persons, then the issue of attribution is key. In cases of attribution of the acts of persons other than State organs, the most important title for attribution is their conduct directed or controlled by a State.[92] It is well known that the ILC in its commentary to Article 8 of the ARSIWA explained that the required standard of control was an effective control.[93] This

88 See Kreß, Claus, 'The Crime of Genocide under International Law', 6 *International Criminal Law Review* (2006), p. 461; Kreß, Claus, 'The International Court of Justice and the Elements of the Crime of Genocide', 18 *European Journal of International Law* (2007), no. 4, pp. 620–623.

89 ICC-ASP/1/3, Pt. II; pursuant to Art. 9 of the Rome Statute of the ICC, the Elements of Crimes are to assist the Court in the interpretation and application of Articles 6, 7, and 8.

90 See Cassese, Antonio, *International Criminal Law* (2nd ed., Oxford University Press, 2007), pp. 140–141; Gaeta, *supra note* 14, pp. 642–643.

91 ICTY, *Prosecutor v. Jelisić* (Judgment) IT-95-10-A, ACh, (5 July 2001), para. 48: "*the existence of a plan or policy is not a legal ingredient of the crime, although it may facilitate proof of the crime.*"

92 See Art. 8 of the ARSIWA: "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*"

93 Yearbook of the ILC, 2001, vol. II, Part 2, pp. 47–48.

is in line with the standard established by the ICJ in *Nicaragua* case.[94] In turn, the ICJ confirmed that test in *Application of Genocide Convention* case.[95]

However, this was criticized by some authors who would prefer another standard, namely that of "overall control", adopted by the ICTY in the *Tadić* case and followed in other cases before that tribunal. The main criticism comes from Professor Cassese who was himself a former judge and president of the ICTY.[96]

The key issue was if the test of "overall control" in *Tadić*, originally adopted to determine whether an armed conflict is international,[97] concerns general international law of State responsibility, and if that test better corresponds to customary international law than the standard of "effective control".

The argument of Cassese, which bears on the dictum of the ICTY Appeals Chamber in the *Tadić* case,[98] is that the standard of control belongs to the body of law of State responsibility. This argument seems plausible which does not imply, however, our consent with all Cassese's conclusions. The main thesis of this eminent scholar was that, in accordance with the Appeals Chamber, both tests were applicable. The test of "effective control" should apply for acts performed by private individuals engaged by a State to perform illegal acts in the territory of another State. By contrast, another degree of control should apply to actions by organized and hierarchically structured groups, such as military and paramilitary units, where the "overall control" by the State providing support was sufficient.[99] The content of Cassese's article means not only the defence of his own Chamber decision in *Tadić* (presumably supported by State practice and case law) but also the critique of the approach of the ICJ and the ILC that allegedly neglects the State practice and case law.[100]

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94 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14, paras. 109–116.

95 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, paras. 394, 413.

96 Cassese, Antonio, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (2007), no. 4, pp. 649–668.

97 This was also the argument reiterated by the ICJ in the *Genocide* case, *ibid*, para. 406.

98 ICTY, *Prosecutor v. Tadić* (Judgment) IT-94-1-A, ACh (15 July 1999), para. 104: "*In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.*"

99 Cassese, *supra note* 96, p. 657.

100 *Ibid*, pp. 664–665.

With due respect, this view is also open to critique and can be refuted or at least questioned on several grounds. First, from a historical perspective, this famous "fragmentation" debate originated from a relatively minor (if not marginal) problem of judicial reasoning before the ICTY. That Tribunal faced to a slightly confusing drafting of its Statute with respect to its subject-matter jurisdiction. Instead of a comprehensive category of war crimes, the matter was divided into two provisions, namely Article 2 on Grave breaches of the Geneva Conventions (applicable only in international armed conflicts) and Article 3 on other violations of laws and customs of war. The qualification of armed conflicts only matters for identification of the applicable rules of international humanitarian law and, consequently, for individual criminal responsibility of perpetrators of their breaches. The distinction does not matter for other crimes, such as genocide and crimes against humanity. Moreover, it is irrelevant for the question of State responsibility.

Even though the ICTY was first able to cope with the imperfection of the Statute and overcome it by interpretation of Article 3 instead of Article 2 (in first *Tadić* judgment, 1995), the Appeals Chamber later revisited its decision and brought the standard of "overall control" in order to requalify the armed conflict as international and ensure the application of grave breaches of the Geneva Conventions. It may be left aside whether this was really necessary to fulfil the noble task of international criminal justice (in particular to avoid impunity), but it was not necessary for the Tribunal to dwell into the general rules of State responsibility. Neither was that Tribunal competent to decide on responsibility of States.

Second, it seems clear that the argument that arose form judicial activism of the ICTY in one particular case (for a rather limited purpose) may have far-reaching consequences for general secondary rules of State responsibility. The rules of attribution are general in nature, they apply to violations of any rules of international law, even in areas that are very different from humanitarian law and human rights. For example, acts of paramilitary groups can affect trade or investment of nationals of the third States. Does it imply that, on the basis of the standard of "overall control", those persons or their nation States would be entitled to claim reparation for damage suffered by the independent actions of paramilitary groups (insurgents or others) from the State providing a mere support to such groups? It does not seem that this is supported by State practice.

Third, while the distinction between private individuals and organized and hierarchically structured groups may have some rationale, it is questionable that a lower, more flexible test of control should apply to the acts of organized groups. Such groups are rather similar to insurgents or other movements

struggling against the central government. In some cases, if they control a part of the territory, they resemble a *de facto* government or a State in *statu nascendi*. There is a special rule of attribution thereby such groups will incur responsibility for their own acts if they succeed to create a new government of the State or a new State in part the territory separated from the predecessor State.[101] It does not mean, however, that the supporting State should escape from international responsibility. On the contrary, such State incurs responsibility for its own acts that may consist in aid or assistance or another contribution to the commission of a wrongful act.

Fourth, the arguments that the standard of "overall control" is based on State practice and case law, while that of "effective control" is not, are not convincing. In fact, they are mainly supported by case law of some international tribunals. However, such case law does not constitute, in and by itself, State practice necessary for creation of customary international law.[102] It can be considered only as subsidiary means for the determination of rules of law.[103] The quantitative argument also fails to convince, as the ICJ had less cases and, therefore, less opportunity to pronounce itself on the issue of standards of control. It did it consistently in such cases, namely the *Nicaragua* and *Genocide* cases.

Fifth, a number of cases of the European Court of Human Rights, which seem to be used in support of the Cassese's argument, also warrant a cautious approach. Many extraterritorial cases decided by the ECtHR, such as *Loizidou*, *Ilaşcu*, etc., bear on the confusion between jurisdiction (in the meaning of Article 1 of the ECHR) and attribution of conduct for the purposes of State responsibility.[104]

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101 See Art. 10 of the ARSIWA: "*1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.*

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."

102 See the ILC Conclusions on identification of customary international law; conclusion 4 (Requirement of practice): "*1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.*" See Report of the ILC, 2018 (doc. A/73/10), p. 130.

103 Conclusion 13 (Decisions of courts and tribunals): "*1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.*" (*Ibid*, p. 149).

104 For the more detailed analysis, see, e.g., Crawford, James, Keene, Amelia, The Structure of State Responsibility under the European Convention on Human Rights, in Van Aaken, A., Motoc, I. (eds.), *The European Convention on Human Rights and General International Law* (Oxford: OUP 2018), pp. 197–198; Besson, Samantha, Concurrent Responsibilities

Sixth and finally, we should also be aware of the risk of fragmentation of international law, the classical example of which is the conflict between the standards of "effective control" and "overall control". While the ICJ in its judgment in the *Genocide* case, by the proposed differentiation, seems to offer a conciliatory way out of the conflict,[105] the approach of the former ICTY, ardently defended by Professor Cassese, can only contribute to the deepening of the fragmentation. The call to the ICJ to revisit its case law and to adopt the test of "overall control" for the purpose of State responsibility for acts committed by persons other that organs of State, however motivated by noble intentions, is unlikely to succeed. Neither States, nor the ICJ seem to be ready to accept such a flexible test.

All in all, it seems to be wise to maintain the test of effective control for responsibility of a State for the crime of genocide, which better corresponds to current international law. Even if it may prove to be difficult, in practice, to establish the level of control necessary for the attribution of the acts of genocide to the State, that State may still be responsible for its failure to prevent and punish the crime of genocide.

4 Subsequent Developments

The judgment of the ICJ in *Application of Genocide Convention* (2007) was the first but not the last occasion for the Court to pronounce on the issue of State responsibility for that crime. The second *Genocide case* (*Croatia v. Serbia*)[106]

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under the European Convention on Human Rights, in Van Aaken, A., Motoc, I. (eds.), *The European Convention on Human Rights and General International Law* (Oxford: OUP 2018), p. 160; Milanovic, Marco, Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court, in Van Aaken, A., Motoc, I. (eds.), *The European Convention on Human Rights and General International Law* (Oxford: OUP 2018), pp. 103–111; Šturma, Pavel, 'State Responsibility and the European Convention on Human Rights', *Czech Yearbook of Public & Private International Law*, vol. 11 (2020), pp. 1–18.

105 This is also in line with the Conclusions of the work of the ILC Study Group on the Fragmentation of International Law: Difficulty Arising from the Diversification and Expansion of International Law, in particular the principle of harmonization: "4. [...] *It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.*" See the report in General Assembly, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10), para. 251.

106 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015, p. 3.

did not change the approach adopted in 2007 but brought some additional elements.

Like in its judgement in Bosnian Genocide case (2007), the ICJ confirmed that the 1948 Genocide Convention is the applicable law.[107] Consequently, the Court could not pronounce on genocide under customary international law or on international crimes other than the crime of genocide.

The Court also confirmed the separation of State responsibility and individual criminal responsibility.[108] Even if (for both regimes of responsibility) "*it must be shown that genocide as defined in the Convention, has been committed*", the Court repeatedly envisaged an alternative scenario, in which State responsibility can arise for genocide and complicity, without an individual being convicted of the crime.[109] Consequently, it was for the Court to determine whether acts of genocide had been committed. The Court nonetheless took account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY.

The Court also pronounced on the meaning and scope of "destruction" of a group, as defined in Article II of the Genocide Convention. According to Croatia, the required intent was not limited to the intent to physically destroy the group, but included also the intent to stop it from functioning as a unit. Serbia rejected this functional approach. The ICJ noted 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*."[110] Thus, it was decided to limit the scope of destruction under the Convention to the physical or biological destruction of the group.

The most innovative aspect of this judgment is that the ICJ admitted, at least in theory, that Serbia might have succeeded to the responsibility of Yugoslavia (SFRY) with respect to the acts prior to 27 April 1992. Croatia argued that, when Serbia (at that time called the FRY) had succeeded to the SFRY's obligations

107 *Ibid*, para. 124.

108 *Ibid*, para. 129: "*State responsibility and individual criminal responsibility are governed by different legal regimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon it by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person.*"

109 *Ibid*, para. 128.

110 *Ibid*, para. 136.

under the Genocide Convention, it also succeeded to responsibility already incurred by the SFRY for the alleged violations of that Convention.[111]

Since the Court did not reject the Croatian argument *a limine*, it needed to decide a number of questions.[112] The ICJ admitted that Article IX speaks generally of the responsibility of a State and contains no limitation regarding the manner in which that responsibility might be engaged. According to the Court, "*the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States* […] *The Convention itself does not specify the circumstances that give rise to the responsibility of a State, which must be determined under general international law*."[113]

However, in its consideration of the merits of Croatia's claim, the ICJ heavily relied on the case law of the ICTY and came to the conclusion that "*the acts constituting* actus reus *of genocide within the meaning of Article II* (a) *and* (b) *of the Convention were not committed with the specific intent required for them to be characterized as acts of genocide*."[114] According to the Court, since Croatia failed to substantiate its allegation that genocide was committed, there cannot be "*any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide*."[115] The Court thus confirmed its interpretation in 2007 judgment that a breach of the obligations to prevent and punish genocide (being obligations of conduct or due diligence) supposes that genocide occurred.

Finally, the ICJ did not need to consider "*whether acts alleged to have taken place before 27 April 1992 are attributable to the SFRY, or, if so, whether Serbia succeeded to the SFRY's responsibility on account of those acts*."[116]

111 *Ibid*, para. 106.

112 *Ibid*, para. 112: "[…] *the Court would need to decide: (1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention; (2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and (3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.*"

113 *Ibid*, para. 115.

114 *Ibid*, para. 440: "[…] *The Court further notes that the ICTY Prosecutor has never charged any individual on account of genocide against the Croat population in the context of the armed conflict which took place in the territory of Croatia in the period 1991-1995* […]."

115 *Ibid*, para. 441.

116 *Ibid*, para. 442.

5 Conclusions and Perspectives

The above analysis seems to prove that the prohibition of genocide is relevant for both individual criminal responsibility for the crime of genocide and State responsibility. The conditions of individual criminal responsibility are better defined thanks to the written rules in the 1948 Convention, the 1998 Rome Statute of the ICC, and the Elements of crimes, as well as the case law of the international criminal tribunals. The question of State responsibility for the crime of genocide emerged later in judicial practice. This does not mean, however, that the idea of international responsibility of a State for the crime of genocide was absent in international law. On the contrary, it has been present in the doctrine of international law and some works of the International Law Commission for a long time. Of course, such responsibility of State is international and not criminal in nature. It seems obvious that conditions and modalities of State responsibility and individual criminal responsibility differ. However, the difference of secondary rules does not imply that there are two different prohibitions and definitions of genocide, as a matter of primary rules.

The judgment of the ICJ in *Application of Genocide Convention* (2007) was the first occasion for the Court to pronounce on the issue of State responsibility for that crime. The interpretative difficulties are due to the jurisdictional limitation of the Court which had to limit itself to the Genocide Convention, despite the parallel legal basis in customary international law. There are no doubts that a State can incur its international responsibility for violation of the obligations to prevent and to punish genocide. However, the Court should be given credit for its conclusion that, because of the interpretation of Article IX of the Convention, a State may also be responsible for the crime of genocide committed by persons whose acts are attributed to the State.

This is even more important in view of the fact that it was not the last occasion to adjudicate on this question. After another case opposing the successor States of the former Yugoslavia (Croatia v. Serbia, 2015), the ICJ now has another important case with the similar name in the dispute of The Gambia v. Myanmar. The case concerns the alleged acts of genocide against the Rohingya group by the Myanmar military and other Myanmar security forces. The Court has already found that rights asserted by The Gambia under the Genocide Convention are plausible and has issued the provisional measures.[117]

117 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order, 23 January 2020, I.C.J. Reports 2020, para. 86.

Other hearings on the preliminary objections raised by Myanmar took place between 21 and 28 February 2022. Thereafter the Court begun its deliberation and its decision is awaiting.

It is noteworthy that there is a parallel criminal investigation procedure launched before the International Criminal Court. On 14 November 2019, the Pre-Trial Chamber III of the ICC authorized an investigation of the situation of alleged crimes against Rohingya in the territory of Bangladesh and Myanmar.[118] Although the decision of the Pre-Trial Chamber refers mainly to crimes against humanity, the authorized investigation should cover any alleged crimes within the Court's jurisdiction, including but not limited to crimes against humanity, such as deportation and persecution.

Of course, the ICC is still in the early stage of investigation. Therefore, it is not very likely that the ICC will adopt any judgments in cases related to the referred situation prior to the possible hearing in the inter-state dispute before the ICJ. Thus, this Court may find itself in a situation where it will not benefit from findings collected by the ICC within criminal proceedings. Depending on the speed of work of the two courts, the ICJ might have to pronounce on the existence of crimes for the purpose of State responsibility before any final conviction of individual perpetrators for such crimes. However, this unprecedented challenge for the ICJ could be facilitated if the Court would rely at least on the results of work of the Prosecutor and the Pre-Trial Chamber of the ICC.

On balance, in the present case, unlike in the Bosnian Genocide case, the alleged acts of genocide or other crimes are those of the organs of Myanmar. Therefore, the issue of attribution should be easier and not depend on the test of effective control of persons or groups other than organs of the defendant State. One can hope that the ICJ could use this occasion to better clarify other conditions of international responsibility of State for the crime of genocide.

118 ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, PTChIII, decision of 14 November 2019.

CHAPTER 2

Atrocity Labelling

Framing the Phenomenon

Markus P. Beham

1 Introduction

The term 'genocide' is a neologism devised for a legal concept, first coined during World War II, since become synonymous with the destruction of the European Jews.[1] This imagery has given the word an immense impact that goes far beyond its legal implications. States, peoples, indigenous populations, minorities, groups, politicians, NGOs, and scholars compete for recognition of past and present atrocities as the 'crime of crimes'.[2]

The reasons are manyfold: genocide is still considered "*the 'gold standard' of humanitarian emergencies*";[3] genocide alone purports the drastic nature of an event;[4] simply meeting the threshold of 'crimes against humanity' or 'war crimes' brings lesser moral opprobrium;[5] as cynical as it sounds: genocide

1 On the latter see Förster, Stig, Hirschfeld, Gerhard, Einleitung, in Förster, Stig, Hirschfeld, Gerhard (eds.), *Genozid in der modernen Geschichte* (Lit Verlag, 1999), p. 5; Zimmerer, Jürgen, Kolonialer Genozid? Vom Nutzen und Nachteil einer historischen Kategorie für eine globalgeschichte des Völkermordes, in Berg, Vivianne and others (eds.), *Enteignet – Vertrieben – Ermordet. Beiträge zur Genozidforschung* (Chronos, 2004), p. 110. Cf Moses, A. Dirk, Genocide and Settler Society in Australian History, in Moses, A Dirk (ed.), *Genocide and Settler Society. Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004), p. 23.

2 See for an early use of this description Drost, Pieter N., *The Crime of State. Penal Protection for Fundamental Freedoms of Persons and Peoples. Book II. Genocide. United Nations Legislation on International Criminal Law* (AW Sythoff, 1959), p. ii. The phrase was further popularised in international criminal law by the ICTR in ICTR, *Prosecutor v. Jean Kambanda* (Judgement and Sentence) ICTR-97-23-S, TChI (4 September 1998), para. 16.

3 Moses, A. Dirk, Raphael Lemkin, Culture, and the Concept of Genocide, in Bloxham, Donald, Moses, A. Dirk (eds.), *The Oxford Handbook of Genocide Studies* (Oxford University Press, 2010), p. 41.

4 See Lang, Berel, The Concept of Genocide, in Moses, A. Dirk (ed.), *Genocide. Critical Concepts in Historical Studies. Volume I. The Discipline of Genocide Studies* (Routledge, 2010), p. 115.

5 Cf ICTY, *Prosecutor v. Tihomir Blaskic* (Judgement) IT-95-14-T, TCh, (3 March 2000), para. 800.

sells.[6] Atrocity labelling has become an outright phenomenon that warrants further study: Which reasons stand behind the choice? On what grounds is it justified? And what are the immediate to long-term effects?

The contribution begins (2.) with a concise history of the conceptualisation of atrocities.[7] The following section (3.) deals with the emergence of 'Genocide Studies' as a cross-sectional and interdisciplinary field of research orbiting these conceptualisations. It will then (4.) discuss the phenomenon of atrocity labelling at the level of practice and scholarship. This section begins with (4.1) a look at the different motivations for choosing a certain label before turning to (4.2) the process of atrocity labelling itself. Finally, (4.3) it discusses the consequences of atrocity labelling. The contribution ends (5.) with conclusions based on discourse analysis undertaken in four case studies for an upcoming publication on atrocity labelling.[8]

2 From Crimes against Humanity to Genocide

Throughout the long 19th century, the first cornerstones of international humanitarian law were laid with codes of conduct during armed conflict.[9] The now famous 'Martens clause' in the preamble of the 1899/1907 Hague Convention on the Laws and Customs of War on Land found that

> [u]ntil a more complete code of the laws of war is issued [...], populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[10]

6 See Weiss-Wendt, Anton, Problems in Comparative Genocide Scholarship, in Stone, Dan (ed.), *The Historiography of Genocide* (Palgrave Macmillan UK, 2008), pp. 45–46.

7 This section largely builds on Beham, Markus P., '1948 – The 1948 Genocide Convention: Origins, Impact, Legacy', (2018) *Austrian Review of International and European Law* 85, 23.

8 Beham, Markus P., *Atrocity Labelling: From Crimes Against Humanity to Genocide Studies* (2022 -forthcoming).

9 For example, the 1863 Lieber Code or the outcome of the two Hague Conferences of 1899 and 1907.

10 For a comparative reproduction of the slightly different wording of both treaties see Brown Scott, James (ed.), *The Hague Conventions and Declarations of 1899 and 1907, Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations* (Oxford University Press, 1915), pp. 100–132.

The term 'war crimes' was, supposedly, first applied in a legal sense in a publication of 1872.[11] 'Crimes against humanity' has been traced even further back, well into the 18th century.[12] In a Joint Declaration of 15 May 1915, the Entente powers, France, Great Britain, and Russia referred to the atrocities committed against the Armenian population of the Ottoman Empire as 'new crimes of Turkey against humanity and civilization' and 'massacres'.[13] The contemporary voice on the Armenian genocide, British historian Arnold Toynbee, famously spoke of the 'murder of a nation'.[14]

Part VIII of the Treaty of Versailles sought penalties for the former German Emperor Wilhelm II of Hohenzollern and "*persons accused of having committed acts in violation of the laws and customs of war*" as well as those "*guilty of criminal acts against the nationals of one of the Allied and Associated Powers.*"[15] It resulted in a number of trials before the German Reichsgericht in Leipzig in 1921, the so-called Leipzig trials.[16] Similarly, the Treaty of Sèvres would have included such provisions on criminal responsibility for persons "*responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.*"[17] The provision was dropped from the subsequent Treaty of Lausanne of 1923.[18]

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11 See Gessler, Myriam, Segesser, Daniel Marc, Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948), in Moses, A. Dirk (ed.), *Genocide. Critical Concepts in Historical Studies. Volume I. The Discipline of Genocide Studies* (Routledge, 2010), p. 27; Segesser, Daniel Marc, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872–1945* (Ferdinand Schöningh, 2010), p. 50.

12 See Schabas, William, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012), p. 53.

13 See Joint Declaration of France, Great Britain and Russia <http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html>.

14 Toynbee, Arnold J., *Armenian Atrocities. The Murder of a Nation* (Hodder & Stoughton, 1915). See on this also Quigley, John, *The Genocide Convention. An International Law Analysis* (Ashgate, 2006), p. 3.

15 See Articles 227–229 of the Treaty of Versailles, 28 June 1919.

16 See Hankel, Gerd, *The Leipzig Trials: German War Crimes and Their Legal Consequences after World War I* (Republic of Letters, 2014).

17 See Article 230 of the Treaty of Peace with Turkey, Sèvres, 10 August 1920, 11 United Kingdom Treaty Series 1 (1920).

18 See Balint, Jennifer, The Ottoman State Special Military Tribunal for the Genocide of the Armenians: "Doing Government Business", in Heller, Kevin Jon, Simpson, Gerry (eds.), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013), p. 84; Bassiouni, M. Cherif, Revisiting the Architecture of Crimes Against Humanity. Almost a Century in the Making, with Gaps and Ambiguities Remaining – the Need for a Specialized Convention, in Sadat, Leila Nadya (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011), p. 49.

Much of the intellectual groundwork for the idea of international criminal law was laid during the interwar period: The creation of an international criminal court was debated in the context of the League of Nations, a set of atrocity crimes was proposed by the International Law Association, and a number of further proposals were made within the framework of the Association Internationale de Droit Pénal.[19]

It was not until a Polish lawyer and 'norm entrepreneur'[20] by the name of Raphaël Lemkin,[21] under the impression of the horrors of World War II, came to create a word that rings louder than any other neologism:[22] genocide.

In 1944, Lemkin published a study on the laws and decrees of the territories occupied by Nazi Germany: *Axis Rule in Occupied Europe*, published through the Carnegie Endowment of International Peace. Apparently, inspired by Churchill's famous 1941 radio address on the 'crime without a name'[23] and the

19 See on this Cooper, John, *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave Macmillan, 2015), pp. 18 and 24; Gessler and Segesser, *supra note* 11, p. 30; Irvin-Erickson, Douglas, *Raphaël Lemkin and the Concept of Genocide* (University of Pennsylvania Press, 2017), pp. 40–42; Kraft, Claudia, Nationalisierende Transnationalisierung. (Inter) nationale Strafrechtswissenschaft in der Zwischenkriegszeit, in Müller, Dietmar, Skordos, Adamantios (eds.), *Leipziger Zugänge zur rechtlichen, politischen und kulturellen Verflechtungsgeschichte Ostmitteleuropas* (Leipziger Universitätsverlag, 2015), pp. 23–24; Müller, Dietmar, Zu den Anfängen des Völkerstrafrechts. Vespasian Pella und Raphael Lemkin, in Müller, Dietmar, Skordos, Adamantios (eds.), *Leipziger Zugänge zur rechtlichen, politischen und kulturellen Verflechtungsgeschichte Ostmitteleuropas* (Leipziger Universitätsverlag, 2015), pp. 33–34; Segesser, *supra note* 11, pp. 232–302 and the following chapter; Ternon, Yves, *L'État Criminel. Les Génocides Au XXe Siècle* (Seuil, 1995), pp. 24–27.

20 Jones, Adam, *Genocide. A Comprehensive Introduction* (2nd ed., Routledge, 2011), pp. 8 and 13.

21 Lemkin has recently been the centre of attention in a number of publications, including biographies, a theatrical play, and a work of popular non-fiction, see Sands, Philippe, *East West Street. On the Origins of Genocide and Crimes Against Humanity* (Weidenfeld & Nicolson, 2017); van der Wilt, Harmen, and others (eds), *The Genocide Convention: The Legacy of 60 Years* (Nijhoff, 2012). For an overview of publications until 2012 see Vervliet, Jeroen, 'Raphael Lemkin (1900–1959) and the Genocide Convention of 1948. Brief Biographical and Bibliographical Notes' in van der Wilt, Harmen, and others (eds.), *The Genocide Convention: The Legacy of 60 Years* (M Nijhoff Pub, 2012), p. xi.

22 See also Schabas, William A., *Genocide in International Law: The Crime of Crimes* (2nd ed., Cambridge University Press, 2009), p. 14.

23 Taken from a speech by Winston Churchill from 24 August 1941, the expression a 'crime without a name' has entered the discourse on the genesis of the origin of the term. See, exemplary, Barth, Boris, *Genozid. Völkermord Im 20. Jahrhundert. Geschichte, Theorien, Kontroversen* (Beck, 2006), p. 7; Fussell, James T., '"A crime without a name". Winston Churchill, Raphael Lemkin and the World War II Origins of the Word "Genocide"', <http://www.preventgenocide.org/genocide/crimewithoutaname.htm>; Jones, *supra note* 21, p. 8; Quigley, *supra note* 14, p. 4. However, in the speech, while emphasising the extent and

artificial name 'Kodak' for the new camera[24] – Lemkin came up with a neologism that was both 'concise and memorable':[25] genocide.

An entire chapter of Lemkin's book was devoted to this new category of international crime. As opposed to 'mass-murder' or 'mass-extermination', the term 'genocide' was to "*convey the racial and national motivation of the crime.*"[26]

Lemkin immediately went on to promote his concept, trying to secure favourable book reviews for his publication.[27] Reactions were not all praise[28] but the book became a talking point.[29] The epistemic context of the Holocaust was still fresh and, thus, the term easily received to add a label to the atrocities committed by Nazi Germany. Lemkin sought to draw further attention through a number of articles[30] published in *Free World*,[31] the *American Scholar*,[32] and the *American Journal of International Law*.[33]

In 1946, Lemkin travelled to Nuremberg to lobby the use of his neologism by the prosecution,[34] even becoming part of the US team there,[35] although he

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brutality of the 'aggressor', Churchill was referring to aggression and war crimes of an extensive scale committed against combatants rather than the deportation and systematic killing of civilians. See Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt, 24 August 1941, <http://www.ibiblio.org/pha/policy/1941/410824a.html>.

24 See Jones, *supra note* 20, p. 9; Power, Samantha, *A Problem from Hell. America and the Age of Genocide* (Basic Books, 2013), pp. 41–42.

25 Jones, *supra note* 20, p. 9.

26 Memorandum from Raphaël Lemkin to R. Kempner, 5 June 1946, United States Holocaust Memorial Museum, R. Kempner Papers (RS 71.001), quoted from Moses, Raphael Lemkin, Culture, and the Concept of Genocide, *supra note* 3, p. 28. In this context it is not clear why Cathie Carmichael writes that Lemkin "*was creating a neologism rather than simply forging a juridical concept*", see Carmichael, Cathie, *Genocide before the Holocaust* (Yale University Press, 2009), p. 9.

27 See Cooper, *supra note* 19, pp. 62–64 and 67.

28 See Sands, *supra note* 21, p. 183. On the initial reception by the journalist Robert W. Cooper see Irvin-Erickson, *supra note* 19, p. 150.

29 See Cooper, *supra note* 19, p. 70; Irvin-Erickson, *supra note* 19, p. 140.

30 See Segesser, *supra note* 11, p. 387; Vervliet, *supra note* 21, p. xiii–xiv.

31 Lemkin, Raphaël, 'Genocide – A Modern Crime', (1945) *Free World* 39, p. 9.

32 Lemkin, Raphaël, 'Genocide', (1946) XV/2 *American Scholar* 227.

33 Lemkin, Raphaël, 'Genocide as a Crime under International Law', (1947) 41/1 *American Journal of International Law* 145.

34 See Barrett, John Q., Raphael Lemkin and "Genocide" at Nuremberg, 1945–1946, in Conze, Eckart, Safferling, Christoph (eds.), *The Genocide Convention Sixty Years After its Adoption* (TMC Asser Press, 2010), pp. 47–49; Irvin-Erickson, *supra note* 19, p. 143; Power, *supra note* 24, p. 48.

35 See Barrett, *supra note* 34, pp. 41–51; Gessler and Segesser, *supra note* 11, p. 38; Irvin-Erickson, *supra note* 19, p. 140.

seems rather to have been 'a marginal figure'.[36] Though he was unsuccessful in getting genocide included among the list of crimes in the Charter of the International Military Tribunal, he achieved a small victory with the inclusion of the term for the first time in an official legal document at the International Military Tribunal (IMT) under 'Count Three' of the indictment of the major Nazi war criminals,[37] probably "*the first formal recognition of the crime of genocide*."[38] Although there was no consecutive reference by the IMT in its judgments,[39] the concept took on a subliminal role, being used in the background and picked up in subsequent trials.[40]

What had been included in the Charter of the International Military Tribunal, upon suggestions of Hersch Lauterpacht,[41] were crimes against humanity:

> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[42]

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36 Cooper, *supra note* 19, p. vii. See also Irvin-Erickson, *supra note* 19, p. 150 (cf, however, *ibid*, p. 143).

37 'International Military Tribunal, Indictment, The United States of America et al. against Herman Wilhelm Göring et al.' reprinted in Watkins, John C., Weber, John Paul (eds.), *War Crimes and War Crime Trials: From Leipzip to the ICC and Beyond. Cases, Materials and Comments* (Carolina Academic Press, 2006), pp. 127–143 [Göring misspelt 'Göering'] and also available at The Avalon Project, Documents in Law, History and Diplomacy <http://avalon.law.yale.edu/imt/count.asp>.

38 Kuper, Leo, *Genocide. Its Political Use in the Twentieth Century* (Yale University Press, 1982), p. 22.

39 See *ibid*.

40 See Barrett, *supra note* 34, pp.38–49; Cooper, *supra note* 19, pp. vii and 75; Irvin-Erickson, *supra note* 19, pp. 143–144; Ternon, *supra note* 19, p. 39.

41 See Cooper, *supra note* 19, p. 66. On the influences of other lawyers such as Bohuslav Ečer, Egon Schwelb, and Antonin Trainin on this process see von Lingen, Kerstin, Fulfilling the Martens Clause. Debating "Crimes Against Humanity", 1899–1945, in Klose, Fabian, Thulin, Mirjam (eds.), *Humanity. A History of European Concepts in Practice From the Sixteenth Century to the Present* (Vandenhoeck & Ruprecht, 2016), pp. 198–205.

42 Charter of the International Military Tribunal, Annex to the 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, art. 6(c).

The subordinate clause "*in execution of or in connection with any crime within the jurisdiction of the Tribunal*" – *i.e.* 'crimes against peace' and 'war crimes'[43] – was interpreted by the judges at Nuremberg as requiring a nexus between crimes against humanity and war.[44] The reason for this applicational *caveat* was supposedly the concern of states, such as the United States of America, that they might themselves be confronted with claims by minorities within their own territories.[45]

Lemkin, consternated by the restriction of crimes committed during wartime,[46] was rejected for "*trying to push international law into a field where it did not belong*."[47] The apocryphal story is that he heard on a Paris hospital radio of the newly established United Nations General Assembly setting up its agenda.[48] Lemkin, in "*a literally one-man obsession to have the League of Nations and, latterly, the United Nations take up the issue*,"[49] supposedly came up with the first draft of what would later become General Assembly Resolution 96(I), the first formal recognition of the concept by the United Nations, on the plane to New York.[50]

It did not take long for the newly established United Nations to put the issue of atrocity prevention on its agenda, the international community was still under "*the shadow of Auschwitz*."[51] The passing of a resolution reaffirming the 'Nuremberg Principles',[52] was followed by the unanimous adoption

43 See Charter of the International Military Tribunal, 8 August 1945, art. 6 <http://avalon.law.yale.edu/imt/imtconst.asp>.

44 See Schabas, William A., Crimes Against Humanity, in Shelton, Dinah L (ed.), *Encyclopedia of Genocide and Crimes Against Humanity. Vol. 1* [*A-H*] (Thomson Gale, 2005), pp. 211–212.

45 See *ibid*, 212. On the discussions of the London Conference see Schabas, *Genocide in International Law*, *supra note* 22, pp. 38–42; Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, *supra note* 12, p. 108.

46 See Cooper, *supra note* 19, pp. 77–78; Irvin-Erickson, *supra note* 19, p. 148; Schabas, William, Genocide in International Law and International Relations Prior to 1948, in Conze, Eckart, Safferling, Christoph (eds.), *The Genocide Convention Sixty Years After its Adoption* (TMC Asser Press, 2010), p. 19; Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, *supra note* 12, p. 109.

47 Power, *supra note* 24, p. 50. See also Cooper, *supra note* 19, p. 73.

48 See Cooper, *supra note* 19, pp. 74–75 and 78; Power, *supra note* 24, p. 50.

49 Levene, Mark, *Genocide in the Age of the Nation-State. Volume I: The Meaning of Genocide* (IB Tauris, 2005), p. 43.

50 See Power, *supra note* 24, p. 50. Cf, however, the narrative of Cooper, *supra note* 19, p. 79; Irvin-Erickson, *supra note* 19, p. 152.

51 Gellately, Robert, Kiernan, Ben, The Study of Mass Murder and Genocide, in Gellately, Robert, Kiernan, Ben (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective* (Cambridge University Press, 2003), p. 6.

52 UNGA Res. 95 (I), 'Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal', 11 December 1946, UN Doc A/64/Add 1.

of Resolution 96(I) on 'The Crime of Genocide'.[53] It instructed the Economic and Social Council of the United Nations to draw up "*a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly*."[54]

Resolution 96(I) is also where some of the confusion regarding the scope of 'genocide' has its roots. In its preambular paragraphs it defines the concept 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*" and goes on to find that "[m]*any instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part*."[55] In contrast to the later Genocide Convention – which makes reference to Resolution 96(I) in its preamble[56] – it includes political groups.[57]

On 9 December 1948, four years after Lemkin's original treatise had been published, the General Assembly of the United Nations approved the text of the Genocide Convention in Paris.[58] As of 2020, the Convention counts a total of 152 parties of which 41 are original signatories.[59] Its definition has stood the test of time with its *verbatim* inclusion into the 1998 Rome Statute of the International Criminal Court (ICC).[60]

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53 The draft resolution was put to the 6th Committee of the United Nations General Assembly by Cuba, India, and Panama. On the process at the United Nations see Drost, *supra note* 2. With a focus on Lemkin's involvement see also Cooper, *supra note* 19, pp. 79–80; Irvin-Erickson, *supra note* 19, p. 153.

54 UNGA Res. 96 (I), 'The Crime of Genocide', 11 December 1946, UN Doc A/64/Add 1.

55 See *ibid*.

56 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted on 9 December 1948, entered into force on 12 January 1951, Preamble.

57 See already Drost, *supra note* 2, pp. 29–30 and 60–63.

58 See United Nations Treaty Collection, Chapter IV. Human Rights. 1. Convention on the Prevention and Punishment of the Crime of Genocide <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en>.

59 At time of writing, 42 – primarily African, American, and Asian – states had not yet acceded: Angola, Bhutan, Botswana, Brunei Darussalam, Cameroon, Central African Republic, Chad, Congo, Djibouti, Dominican Republic, Equatorial Guinea, Eritrea, Grenada, Guyana, Indonesia, Japan, Kenya, Kiribati, Madagascar, Marshall Islands, Mauritania, Micronesia, Nauru, Niger, Oman, Palau, Qatar, Saint Lucia, Saint Kitts and Nevis, Samoa, Sao Tome and Principe, Sierra Leone, Solomon Islands, Somalia, South Sudan, Suriname, Swaziland, Thailand, Timor-Leste, Tuvalu, Vanuatu, and Zambia. Of these, the Dominican Republic is an original signatory. All European states have ratified. Palestine acceded in 2014.

60 See Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted on 17 July 1998, entered into force on 1 July 2002, art. 6.

When the concept of *ius cogens* first formally appeared in an international treaty, the drafters were also thinking of genocide.[61] When the International Court of Justice (ICJ) drew up a catalogue of norms of *erga omnes* character, it was naturally included.[62] As a peremptory norm,[63] any violation of the prohibition, be it under the Convention or under customary international law, must lead to cooperation 'to bring to an end through lawful means' the breach.[64]

The two *ad hoc* tribunals created by the United Nations Security Council, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have prosecuted and convicted individuals for the commission of genocide and, thereby, shaped the concept through practical application.[65] Their work finds a continuation in the International Residual Mechanism for Criminal Tribunals. Further examples of the prosecution of individuals by 'hybrid tribunals'[66] include the Extraordinary Chambers in the Courts of Cambodia or the Special Criminal Court in the Central African Republic.

As for crimes against humanity, it has since shed the nexus requirement imposed by the Nuremberg Tribunal in the practice of the ICTY[67] and the ICTR.[68] However, the Statue of the ICTR added a subordinate clause, which is also referred to as the 'contextual elements',[69] requiring that the crime must take place 'as part of a widespread or systematic attack'. This approach was also adopted by the Rome Statute of the ICC in 1998.[70]

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61 See Yearbook of the International Law Commission, 1966, Vol. II, 248, para. 3.

62 See ICJ, *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belgium v. Spain), Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3, para. 34.

63 See ICJ, *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006, p. 6, para. 64.

64 See Article 41(1) of the Articles on State Responsibility.

65 For a concise overview of the creation of these tribunals together with some of their landmark cases regarding genocide see Asuncion, Amabelle C., 'Pulling the Stops on Genocide: The State or the Individual?', (2009) 20 *European Journal of International Law* 1195, pp. 1197–1202.

66 The label is somewhat misleading in that the act of creation of such tribunals is either international or domestic. The 'hybrid' nature stems rather from the usual reference to both international and domestic crimes as well as the appointment of international and domestic judges.

67 See ICTY, *Prosecutor v. Tadić* (Appeal on Jurisdiction) IT-94-1-AR72, para. 141.

68 Statute of the International Criminal Tribunal for Rwanda as of 31 January 2010, art. 3, <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf>.

69 See Schabas, 'Crimes Against Humanity', *supra note* 44, p. 212.

70 Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted on 17 July 1998, entered into force on 1 July 2002, art. 7.

Some authors have held that crimes against humanity constitute customary international law, a reflection of practice and recognition of the prohibition as a universal standard by states.[71] Even if it is argued that "*the obligations upon States found in the Genocide Convention now apply* mutatis mutandis*, on a customary basis, in the case of crimes against humanity*,"[72] the Genocide Convention allows for the jurisdiction of the ICJ.[73] There is no such provision with regard to crimes against humanity.[74]

3 From State Responsibility and Prosecution to 'Genocide Studies'

At the level of international law, a violation of the prohibition of genocide will result in either state responsibility or prosecution of the perpetrators before international or domestic courts and tribunals. But the concept has not remained in a legal vacuum. The humanities, the social sciences, and many more have picked up the question, trying to understand:

> What is genocide? Is it limited to mass killing or does group culture also play a central role for group survival? How and why has it occurred in the past? Are certain kinds of societies particularly susceptible? Are particular periods of world history structurally vulnerable to mass violence? Why do people – elites and non-elites – plan or participate in it? How can it be prevented? How are post-genocidal societies reconstructed, let alone 'reconciled'?[75]

The term 'Genocide Studies' has developed as a loose interdisciplinary *chapeau* for scholars dealing with the phenomenon of genocide, in particular, at the comparative level. Indeed, there appears to be an obvious necessity of engaging with the phenomenon of killing individuals based on their membership within a particular group across disciplines.[76]

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71 Cf, critically, Vervliet, *supra note* 21, pp. 111–113.

72 Schabas, *Genocide in International Law*, *supra note* 22, p. 14.

73 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted on 9 December 1948, entered into force on 12 January 1951, art. IX.

74 Schabas, 'Crimes Against Humanity', *supra note* 44, p. 216.

75 Moses, A. Dirk, Introduction: The Field of Genocide Studies, in Moses, A. Dirk (ed.), *Genocide. Critical Concepts in Historical Studies. Volume I. The Discipline of Genocide Studies* (Routledge, 2010), p. 13.

76 See Ternon, *supra note* 19, pp. 11–12.

Depending on one's approach, the related 'Holocaust Studies' serve as a subcategory thereof, or as an entirely separate playing field.[77] Donald Bloxham and A. Dirk Moses call Genocide Studies "*part offspring of, part uneasy junior partner to, the longer standing discipline Holocaust studies*."[78] For certain, scholarly preoccupation with the Holocaust as a specific instance of respective 'the' genocide can already look back upon a much larger tradition and degree of in-depth specialisation than Genocide Studies.[79]

A. Dirk Moses tracks the popularisation of terms, pointing out that 'Holocaust memory' had its 'breakthrough' in 1970s USA and that it even 'gradually supplanted genocide as the main signifier of evil'.[80] Due to the often synonymous use and association of the terms 'genocide' and 'Holocaust', the collective memory of the destruction of the European Jews became an essential test for the applicability of the concept to other situations.

In this sense, genocide has been described as the 'most heinous'[81] crime or the 'crime of crimes'.[82] It carries the full weight of the Holocaust with it, considered synonymous with 'genocide'[83] and termed the 'genocide of genocides'.[84] It is not possible to use the term without the destruction of the European Jews in all of its horror springing to mind. It has also been suggested that much of the shaping of Genocide Studies may in fact range back to the biographies of its earliest proponents, for many of whom the Holocaust was part of their family history or who had experienced it themselves.[85]

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77 See Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 3.

78 Bloxham, Donald, Moses, A. Dirk, Editor's Introduction: Changing Themes in the Study of Genocide, in Bloxham, Donald, Moses, A. Dirk (eds.), *The Oxford Handbook of Genocide Studies* (Oxford University Press, 2010), p. 3. See also Weitz, Eric, *A Century of Genocide. Utopias of Race and Nation* (Princeton University Press, 2003), p. x.

79 See, by way of example, the United States Holocaust Memorial Museum, Bibliographies <https://www.ushmm.org/research/research-in-collections/search-the-collections/bibliography>. See also Sémelin, Jacques, *Säubern und Vernichten. Die Politik der Massaker und Völkermorde* (Hamburger Edition, 2007), p. 13; Shaw, Martin, *What Is Genocide?* (2nd ed., Polity Press, 2015), pp. 53–54.

80 Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 3. See on this also Ascherson, Neal, *The King Incorporated. Leopold the Second and the Congo* (Granta Books, 1999), p. 8; Bloxham and Moses, *supra note* 78, p. 3; Clavero, Bartholomé, *Genocide or Ethnocide 1933–2007. How to Make, Unmake, and Remake Law With Words* (Gieuffrè, 2008), pp. 105–106; Shaw, *supra note* 79, p. 59.

81 See the CNN documentary and report by Christiane Amanpour, 'Scream Bloody Murder. The World's Most Heinous Crime', 12 January 2009 <http://edition.cnn.com/2008/WORLD/europe/11/20/sbm.overview/index.html#cnnSTCText>.

82 See *supra note* 2.

83 See *supra note* 1.

84 Levene, *supra note* 49, p. 1.

85 See Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 2.

The comparative study of genocides gained momentum in the 1970s through a number of seminal articles and books on the subject.[86] Many more, in particular sociologists,[87] followed these early examples.[88] The bookshelf presence of Genocide Studies has now reached a high point at the outset of the 21st century.[89] Moses, in his anthology of Genocide Studies, attests to the view that it has "*now attained a level of intellectual sobriety, academic credibility and official recognition that was inconceivable forty years ago*."[90] Other scholars have passed judgment less kindly: "*Today, genocide studies is a field torn between historians,*[91] *legal scholars and social scientists, between two generations, between interventionists and advocates of analytical scholarship, and between 'liberal' and "post-liberals."*"[92] There currently exist an 'International Association of Genocide Scholars'[93] with its journal 'Genocide Studies and Prevention' now

86 See, in particular, Dadrian, Vahakn N., 'A Typology of Genocide', (1975) 5 *International Review of Modern Sociology* 201, 201–212; Kuper, *supra note* 38. See on this also Chalk, Frank, Jonassohn, Kurt, Conceptualizations of Genocide and Ethnocide, in Krawchenko, Bohdan, Serbyn, Roman (eds.), *Famine in Ukraine 1932–1933* (University of Toronto Press, 1986), pp. 184–186; Jones, *supra note* 20, pp. 12 and 15; Schaller, Dominik, Genozidforschung: Begriffe Und Debatten. Einleitung, in Berg, Vivianne, and others (eds.), *Enteignet – Vertrieben – Ermordet. Beiträge zur Genozidforschung* (Chronos, 2004), p. 9. Cf, however, Weitz, *supra note* 78, p. x, who sets the emergence much later, in the 1990s, with the International Association of Genocide Scholars and the publication of Power, *supra note* 24.

87 See Moses, Introduction: The Field of Genocide Studies, *supra note* 75, pp. 1 and 5–6.

88 For a short overview see Jones, *supra note* 20, p. 15; Gellately, Robert, Kiernan, Ben, Investigating Genocide, in Gellately, Robert, Kiernan, Ben (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective* (Cambridge University Press, 2003), p. 375; Shaw, *supra note* 79, p. 4; Ternon, *supra note* 19, pp. 62–64. See also Kader, David, Progress and Limitations in Basic Genocide Law, in Charny, Israel W. (ed.), *Genocide. A Critical Bibliographical Review. Volume Two* (Facts on File Publications, 1991), pp. 142–143 with regard to legal literature on genocide.

89 See Tanner, Jakob, Der Historiker und der Richter. Der Genozid an den Armeniern und die Genozidforschung aus rechtlicher und geschichtswissenschaftlicher Sicht, in Kieser, Hans-Lukas, Plozza, Elmar (eds.), *Der Völkermord an den Armeniern, die Türkei und Europa / The Armenian Genocide, Turkey and Europe* (Chronos, 2006), p. 177.

90 Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 1. For a detailed account of the development of Genocide Studies – and, thereby, bibliography – see *ibid,* pp. 3–13, although it must be taken into account that the account itself is largely written as a critique of the International Association of Genocide Scholars.

91 Cf on the more limited role of historians in the field, however, Bloxham and Moses, *supra note* 78, p. 6.

92 Gerlach Gerlach, Extremely Violent Societies. An Alternative to the Concept of Genocide, in Moses, A. Dirk (ed.), *Genocide. Critical Concepts in Historical Studies. Volume I. The Discipline of Genocide Studies* (Routledge, 2010), p. 455.

93 See International Association of Genocide Scholars <http://www.genocidescholars.org/>.

renamed 'Genocide Studies International'[94] and an 'International Network of Genocide Scholars'[95] with another 'Journal of Genocide Research'.[96] Oxford University Press also has its own journal on 'Holocaust and Genocide Studies'.[97] Yale University even tends to its own 'Genocide Studies Program'[98] and the International Institute for Genocide and Human Rights Studies of the Zoryan Institute in Toronto organises an annual two-week summer university,[99] while the University of Amsterdam even offers an M.A. in History in 'Holocaust and Genocide Studies'[100] and the University of Uppsala has its own "*Master Programme in Holocaust and Genocide Studies*",[101] alongside the sheer number of centres and institutes devoted to Holocaust and Genocide Studies worldwide. This list is, of course, exemplary rather than comprehensive.[102]

One particular aspect of this interdisciplinary patchwork is that scholars engaged in Genocide Studies usually follow a particular goal with their efforts: atrocity prevention.[103] The 'moral impulse' for many is to "*universalise*

94 See UTP Journals Online, Genocide Studies International <http://www.utpjournals.com/Genocide-Studies-and-Prevention.html>.

95 See International Network of Genocide Scholars <http://www.inogs.com/>.

96 See International Network of Genocide Scholars, Journal of Genocide Research <http://inogs.com/journal-of-genocide-research/>.

97 See Oxford Journals Humanities Holocaust and Genocide Studies <http://hgs.oxfordjournals.org/>.

98 See Yale University, Genocide Studies Program <http://www.yale.edu/gsp/>.

99 See International Institute for Genocide & Human Rights Studies <http://www.genocidestudies.org>.

100 See University of Amsterdam, Graduate School of Humanities, Holocaust and Genocide Studies (History) <http://gsh.uva.nl/content/masters/holocaust-and-genocide-studies-history/holocaust-and-genocide-studies.html>.

101 See Syllabus for Master Programme in Holocaust and Genocide Studies <http://www.uu.se/en/education/master/selma/utbplan/?pKod=HFF2M&lasar=13/14>.

102 See also Bloxham and Moses, *supra note* 78, p. 2; Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 1. For a concise introduction to the field in all its facets see Jones, *supra note* 20.

103 See, by way of example, already Charny, Israel W., Editor's Preface, in Charny, Israel W. (ed.), *Toward the Understanding and Prevention of Genocide. Proceedings of the International Conference on the Holocaust and Genocide* (Westview Press, 1984), p. xvii. Moses sees the trend towards activism arising, in particular, in the 1990s against the background of inaction in the Balkans and Rwanda. See Moses, Introduction: The Field of Genocide Studies, *supra note* 75, pp. 4–5. See on this idea, generally, also Sémelin, *supra note* 79, pp. 397–412. For an earlier appraisal of such preventive measures see Charny, Israel, Intervention and Prevention of Genocide, in Charny, Israel (ed.), *Genocide. A Critical Bibliographical Review* (Facts on File Publications, 1988), pp. 20–30. See also the concluding chapters in Bloxham, Donald, Moses, A. Dirk (eds.), *The Oxford Handbook of Genocide Studies* (Oxford University Press, 2010). Yehuda Bauer even sees the issue of defining genocide as a 'necessary step to taking preventive measures'. See Bauer, Yehuda, Comparison of Genocides, in

the lessons of the Holocaust in light of postwar history."[104] Thus, a predominantly sociological endeavour,[105] the search for the causes of genocide stands at the centre of the discipline.[106] This activism is oftentimes evident in the setting of research agendas and an openly expressed understanding of the term 'genocide' as a tool for activism. It has already been suggested to divide Genocide Studies into two different branches: scholars and activists.[107]

Within this division, unsurprisingly, there has also been fragmentation in the use of the term 'genocide'. Some authors rely on the accepted definition under international law, some come up with their own conceptual framework, while again others simply work with a layman's understanding of the word.[108]

4 Atrocity Labelling

The difficulties arising in the application of legal terminology so broadly and in such varied disciplines have not gone unnoticed. Scholars have questioned the analytical value of the concept of genocide.[109] It has been suggested, by what has been called 'the inclusivist camp',[110] to simply use the term 'genocide' as a *pars pro toto* for all related mass crimes.[111] Yet, as Chalk and Jonassohn have pointed out, whereas "*history is full of horrible events that also should be studied*", "*no light will be shed on them by lumping together what should be kept apart.*"[112]

Chorbajian, Levon, Shirinian, George (eds.), *Studies in Comparative Genocide* (St Martin's Press, 1995), p. 31.

104 Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 2.

105 See, e.g., Jabri, Vivienne, *Discourses on Violence. Conflict Analysis Reconsidered* (Manchester University Press, 1996), pp. 3–4.

106 See Förster and Hirschfeld, *supra note* 1, pp. 6–7; Gellately and Kiernan, *supra note* 51, p. 8.

107 See Moses, Introduction: The Field of Genocide Studies, *supra note* 75, pp. 9–11.

108 See below under 4.2.

109 See the references below under C.

110 Levene, *supra note* 49, p. 38.

111 See Genocide Prevention Task Force, *Preventing Genocide. A Blueprint for U.S. Policymakers* (United States Holocaust Memorial Museum, The American Academy of Diplomacy, and the Endowment of the United States Institute of Peace 2008), p. xxii: "*The colloquial description of large-scale and deliberate attacks on civilians is buttressed by a framework in international law that has been accepted by the United States and other governments and that defines serious crimes meriting special international concern. We use the term genocide in this report as a shorthand expression for this wider category of crimes.*" See also Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, *supra note* 12, p. 116.

112 Chalk, Jonassohn, Conceptualizations of Genocide and Ethnocide, *supra note* 86, p. 182.

Emphasis of group value – as in genocide – over the individual – as in crimes against humanity – has been brought to attention, both in scholarship[113] and popular non-fiction,[114] contrasting the contributions of Hersch Lauterpacht and Raphaël Lemkin to international law.

There now appears an increasing interest in developing a framework to discuss such events more holistically, as opposed to moving forward from a particular definition. 'Atrocity' has recently been popularised as a generic term in international criminal law and human rights law – most prominently by one of the most eminent scholars in the field, William Schabas[115] – to cover the three crimes of 'genocide', 'crimes against humanity', and 'war crimes'.[116] The American Society of International Law lists 'atrocity prevention' as a signature topic[117] and the UN High Commissioner for Human Rights delivered a statement on the 'Global Action Against Mass Atrocity Crimes Platform for Prevention High Level Dialogue on Atrocity Prevention' on 16 November 2020.[118] But little do these initiatives look at the process of applying words to certain present and past events.

The study of atrocity labelling offers a conceptual framework by looking at (1.1) the reasons, (1.2) the methodology applied, and (1.3) the short to long-term effects.

4.1 *Motivations*

There may be multiple reasons for labelling an event as genocide that go beyond mere legal analysis and range from pragmatic to cynical: from support for the plight of a people to commercial considerations of authors and publishers.

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113 See Vrdoljak, Ana Filipa, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law', (2009) 20 *European Journal of International Law* 1163, 1163.

114 See Sands, *supra note* 21.

115 See already the title of the publication by Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, *supra note* 12.

116 See, *e.g.*, United Nations, 'Framework of Analysis for Atrocity Crimes. A Tool for Prevention', 2004, pp. 1–2. During the debate following the presentation of the present contribution, the term was criticised for excluding the crime of aggression within its scope.

117 See American Society of International Law, Signature Topics – Atrocity Prevention <https://www.asil.org/related-terms-vocabulary/signature-topics-atrocity-prevention>.

118 See United Nations Human Rights Office of the High Commissioner, Global Action Against Mass Atrocity Crimes Platform for Prevention, High Level Dialogue on Atrocity Prevention, Statement by Michelle Bachelet, UN High Commissioner for Human Rights, 16 November 2020 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26507&LangID=E>.

Already for Lemkin, the idea was not just to work out a legal concept but to create a word that would serve as a suitable vehicle for the conveyance of moral vilification. According to Samantha Power, in "*one of his surviving notebooks, Lemkin scribbled and circled 'THE WORD' and drew a line connecting the circle to the phrase, penned firmly, 'MORAL JUDGMENT'.*"[119]

As a consequence, if not already by the nature of the underlying act itself, "[t]*he charge of genocide places great opprobrium on the perpetrators or alleged perpetrators and* […] *endows the greatest moral and political capital on the victims*,"[120] whereas "[t]*he accusation of genocide can be a large rhetorical and moral club to be used against one's political opponents*."[121] Kevin O'Neill sums it up:

> The stakes are high in this area, as various individuals, groups, governments, and institutions vie to map out a narrative of the past that legitimates their agendas or desire for justice, to assert or reject the right to legal redress for and moral outrage about 'the crime of all crimes', and to acknowledge or disavow memoires, experiences, suffering, and losses linked to mass murder.[122]

The act of labelling, thereby, appropriates collective memory, inevitably connecting a specific event to the Holocaust.[123] The "*hegemony of Holocaust* as *genocide* […] *repeatedly acts as a magnet to advocates of other human catastrophes, clamouring to the point that the 'g-word' applies to theirs, too*."[124] Thereby,

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119 Power, *supra note* 24, p. 42.

120 Beachler, Donald, *The Genocide Debate. Politicians, Academics, and Victims* (Palgrave Macmillan, 2011), p. 5. See also Kirsch, Stefan, The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct, in Conze, Eckart, Safferling, Christoph (eds.), *The Genocide Convention Sixty Years After its Adoption* (TMC Asser Press, 2010), p. 142; Schabas, *Genocide in International Law*, *supra note* 22, p. 10; Sémelin, *supra note* 79, p. 340.

121 Beachler, *supra note* 120, p. 10. See also Barth, *supra note* 23, pp. 44–45, who also gives a list of practical examples; Sémelin, *supra note* 79, p. 340. See in this regard also, generally, Osiel, Mark, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers, 1997), p. 13.

122 O'Neill, Kevin Lewis, 'Anthropology and Genocide', in Bloxham, Donald, Moses, A. Dirk (eds.), *The Oxford Handbook of Genocide Studies* (Oxford University Press, 2010), p. 195. See also, with regard to the Holocaust, Horowitz, Irving Louis, *Taking Lives. Genocide and State Power* (5th ed., Transaction Publishers, 2002), pp. 35 and 320.

123 See Zimmerer, *supra note* 1, p. 110.

124 Levene, *supra note* 49, pp. 2–3. See also Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 14; Snyder, Timothy, *Bloodlands. Europe Between Hitler and Stalin* (The Bodley Head, 2010) p. 413.

labelling can be used to give impact to reports of atrocities, which would otherwise draw little attention.[125] Schabas has observed the effect of this associative quality in distinguishing the use of the term 'genocide' from qualification as any other internationally recognised mass crime such as 'crimes against humanity':

> Important political prerogatives and much symbolism remain associated with the label genocide. Many victims are deeply disappointed when their own suffering is acknowledged as 'mere' crimes against humanity. They do not fully appreciate the validity of the legal distinctions, which are the result of a complex historical debate. […] The distinction between genocide and crimes against humanity is still of great symbolic significance […].[126]

Beyond that, it "*is often applied rhetorically to gain attention for different causes*."[127]

Irrespective of such broad proclamations, as within the '2005 World Summit Outcome Document' on the 'responsibility to protect',[128] genocide alone remains "*the 'gold standard' of humanitarian emergencies*."[129] Gareth Evans holds that the term "*remains the best linguistic vehicle for energizing mass support and high-level governmental support for effective action in response to newly emerging atrocity situations*."[130]

For scholars, preoccupation with genocide may also bring a sense of vocation and relevance: "*Why, indeed, study genocide? First and foremost, if you are concerned about peace, human rights, and justice, here is a sense that with genocide you are confronting the 'Big One', what Joseph Conrad called the 'heart of darkness.'*"[131] Within the comparative study of genocide, one cannot help but

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125 See with regard to the cases of Argentina, Côte d'Ivoire, the Democratic Republic of the Congo, Israel, and Sudan Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, *supra note* 12, pp. 99–103 and 122.

126 *Ibid,* pp. 121 and 124. Cf, however, Schabas, Genocide in International Law and International Relations Prior to 1948, *supra note* 46, p. 34.

127 Fein, Helen, Introduction, in Fein, Helen (ed.), *Genocide Watch* (Yale University Press, 1992), p. 2.

128 See UNGA Res. 60/1, '2005 World Summit Outcome', 24 October 2005, UN Doc A/RES/60/1, paras. 138–139.

129 See *supra note* 3.

130 Evans, Gareth, Crimes Against Humanity and the Responsibility to Protect, in Sadat, Leila Nadya (ed.) *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011), p. 3.

131 Jones, *supra note* 20, xxiv.

see what appears to be collector's passion or explorative curiosity. Many publications start with a historical appraisal, trying to go as far back in history as possible to find the earliest instance of the crime,[132] an effort that Raphaël Lemkin had already pursued in attempting to compile a complete history of genocide that remains unpublished.[133] Norman Naimark appointed him 'the founding father of genocide studies' for that very reason.[134]

4.2 *Labels*

What does it take then for past or present atrocities to be considered 'genocide', 'crimes against humanity', or 'war crimes'? Is it the benchmark the legal definition of each of these internationally recognised crimes, the Holocaust, or simply a whim?

Some authors rely on the accepted definition under international law, some come up with their own conceptual framework, while again others simply work with the connotations of the word as a layman would. It appears that the majority of scholarship does not apply legal analysis in labelling an event as genocide: "*A lot of current literature on genocide, however true, would not stand up before the law*."[135] Even so, were Articles II and III of the Genocide Convention applied,[136] "*like most legal definitions its language is subject to various interpretations*."[137]

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132 See, by way of example, Chalk, Frank, Jonassohn, Kurt, The History and Sociology of Genocidal Killings, in Charny, Israel W. (ed.) *Genocide. A Critical Bibliographical Review* (Facts on File Publications, 1988), pp. 41–44; Chalk, Frank, Jonassohn, Kurt, *The History and Sociology of Genocide. Analyses and Case Studies* (Yale University Press, 1990), pp. 32–40; Jones, *supra note* 20, p. 3 et seq; Kuper, *supra note* 38, pp. 11–14; Rubinstein, William, *Genocide: A History* (Pearson Longman, 2004) passim; Ternon, *supra note* 19, pp. 267–357. See on this phenomenon also Sémelin, *supra note* 79, p. 336.

133 See Cooper, *supra note* 19, p. 57; Naimark, Norman, How the Holodomor can be Integrated into our Understanding of Genocide, in Makuch, Andrij, Sysyb, Frank E. (eds.), *Contextualising the Holodomor. The Impact of Thirty Years of Ukrainian Famine Studies* (Canadian Institute of Ukrainian Studies Press, 2015), p. 113; Horowitz, *supra note* 122, pp. 54–55. Cf Lemkin, Raphaël, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, 1944), p. 80.

134 Naimark, *supra note* 133, p. 113. See also Cooper, *supra note* 19, p. 242; Schaller, *supra note* 86, p. 13.

135 Clavero, *supra note* 80, p. 93.

136 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted on 9 December 1948, entered into force on 12 January 1951, articles II and III.

137 Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, *supra note* 12, p. 104.

Of course, a legal term must not necessarily offer any analytical value to start with. 'Genocide' is a term created to capture a certain legal concept, not to handle the results of historical research.[138] The definition is not designed to produce any explanatory outcome or predictive result[139] – lawyers, historians, and social scientists all pursue different agendas.[140] As former judge at the International Court of Justice, Rosalyn Higgins, writes: "*History is concerned with the study of past events, even if lessons are to be drawn from them. Law is concerned with past events (*"*rules,*" "*accumulated past decision*"*), but is concerned with their application in a formalised and normative manner today*."[141]

The definition of the Genocide Convention is primarily descriptive.[142] Accordingly, it has been found by scholars of other disciplines limited "[a]*s a guide to historical and moral interpretation*,"[143] "*flawed and unsatisfactory*",[144] "*too open-ended and vague*",[145] and "*a badly drafted definition that included a specific intent that would be hard to prove*",[146] whereas "*others have deferred to it simply because in international law it* is *canonical*."[147] Some go as far as to argue that "[a]*lthough it marked a milestone in international law, the UN definition is of little use to scholars*."[148]

There are multiple reasons given for this supposed deficiency: "*Nearly everyone who considers the definition finds it insufficient for one reason or another*."[149] Some find that "[t]*he lack of rigor in the UN definition of genocide is responsible for much of the confusion that plagues scholarly work in the field*"[150] and that

138 See Tanner, *supra note* 89, p. 184.
139 See Sémelin, *supra note* 79, p. 344.
140 See *ibid,* pp. 351–352.
141 Higgins, Rosalyn, 'The Identity of International Law', in Cheng, Bin (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), p. 43.
142 See Gerlach, *supra note* 92, p. 443.
143 Snyder, *supra note* 124, p. 413.
144 Levene, *supra note* 49, p. 35.
145 Bartov, Omer, Seeking the Roots of Modern Genocide. On the Macro- and Microhistory of Mass Murder, in Gellately, Robert, Kiernan, Ben (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective* (Cambridge University Press, 2003), p. 77.
146 Clark, Richard S., History of Efforts to Codify Crimes Against Humanity. From the Charter of Nuremberg to the Statute of Rome, in Sadat, Leila Nadya (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011), p. 14.
147 Levene, *supra note* 49, p. 35.
148 Chalk, Jonassohn, *The History and Sociology of Genocide. Analyses and Case Studies*, *supra note* 132, pp. 10–11.
149 Weitz, *supra note* 78, p. 9.
150 Chalk, Jonassohn, *The History and Sociology of Genocide. Analyses and Case Studies*, *supra note* 132, pp. 10–11.

it is "*both too broad and too narrow for scholarly comparative purposes*,"[151] "*at one and the same time, extremely broad and extremely narrow*."[152] Others find it overladen with baggage: "*Could such a polemically-loaded term be operationalised for serious academic investigation?*"[153]

Particularly, in the social sciences, the value of the legal definition of genocide as a heuristic term has been questioned: "*Social scientists and historians are well advised to address legal discussions* […] *but* […] *should not be unduly deferential to them*."[154] It has been suggested that the term genocide "*in the coming years and decades, will prove more significant as an intellectual and scholarly framework* […] *and as a tool of advocacy and mobilization' so that its 'most significant deployment* […] *may not be as a legal-prosecutorial device, but as an intellectual concept and* […] *an advocacy tool to arouse public concern, shame perpetrators, and press for intervention*."[155] In turn, "[t]*his may also free the term from its unnecessarily restrictive framing in the UN Genocide Convention, with its limited target groups and high evidentiary requirement of genocidal intent*."[156]

This has led to a fragmentation in the understanding of what amounts to genocide. 'Classicide', 'democide', 'ecocide', 'ethnocide', 'humanicide',[157] 'linguicide'[158] etc. have all been suggested[159] – and again rejected[160] – in the literature. It has been pointed out that additional neologisms are of little help for

151 Melson, Robert, Problems in the Comparison of the Armenian Genocide and the Holocaust: Definitions, Typologies, Theories, and Fallacies, in Förster, Stig, Hirschfeld, Gerhard (eds.), *Genozid in der modernen Geschichte* (Lit Verlag, 1999), p. 27. *Verbatim* Weitz, *supra note* 78, p. 9.

152 Parsons, William, Totten, Samuel, Introduction, in Parsons, William, Totten, Samuel (eds.), *Century of Genocide. Critical Essays and Eyewitness Accounts* (3rd ed., Routledge, 2009), p. 4.

153 Moses, Introduction: The Field of Genocide Studies, *supra note* 75, p. 1.

154 Shaw, *supra note* 79, p. 5.

155 Jones, *supra note* 20, pp. 25 and 540–541.

156 *Ibid.*

157 See the subtitle of Drost, *supra note* 2.

158 See on this concept Rudnyckyj, Jaroslav B., Linguicide: Concept and Definition, in Charny, Israel W. (ed.), *Toward the Understanding and Prevention of Genocide. Proceedings of the International Conference on the Holocaust and Genocide* (Westview Press, 1984), pp. 217–219.

159 See, generally, on these terms and concepts Barth, *supra note* 23, p. 28; Clavero, *supra note* 80, pp. 8 and 111–122; Jones, *supra note* 20, pp. 26–29; Sémelin, *supra note* 79, pp. 348–349; Shaw, *supra note* 79, pp. 84–100; Ternon, *supra note* 19, pp. 41–42.

160 Cf Clavero, *supra note* 80, pp. 203–204; Gellately and Kiernan, *supra note* 88, p. 377; Horowitz, Irving L., Science, Modernity and Authorized Terror: Reconsidering the Genocidal State, in Chorbajian, Levon, Shirinian, George (eds.), *Studies in Comparative Genocide* (St Martin's Press, 1995), p. 15.

the purpose of comparative analysis.[161] It has been held that "[n]*o generally accepted definition of genocide is available in the literature*"[162] and that "*it is hard to find two genocide scholars who adhere to the same definition*":[163]

> Genocide scholars have constructed their individual definitions of genocide like the Procrustean bed of Greek mythology. They analyzed social events according to the definition they chose, stretching some points, shortening others, and in general "cutting and pasting" the narrative to match their 'bed.'[164]

4.3 *Consequences*

How has the use of legal terminology influenced the narrative of past and present atrocities? Will this in turn influence the application of the law?

It appears that "[i]*n the late 1990s, the word 'genocide' began to be used as a type of moral category, taking on a symbolic quality as the crime of crimes, the darkest of humanity's inhumanity*,"[165] leaving the legal domain to become a political slogan.[166] As for genocide, the term is "*at once universally known and widely invoked*"[167] and "*has come to be used when all other terms of opprobrium fail, when the speaker or writer means to indict a set of actions as extraordinary in their malevolence and heinousness*."[168] Its use "*effectively is to make an accusation against whatever it is that one thinks is the very worst thing imaginable*."[169] Mahmood Mamdani pointedly expresses this in more drastic language: "*It seems that genocide has become a label to be stuck on your worst enemy,*

161 See Förster and Hirschfeld, *supra note* 1, p. 8. Cf, however, Chalk and Jonassohn, *The History and Sociology of Genocide. Analyses and Case Studies*, *supra note* 132, p. 23 with regard to 'ethnocide'.

162 Chalk and Jonassohn, *The History and Sociology of Genocide. Analyses and Case Studies*, *supra note* 132, p. xvii. See also Parsons and Totten, *supra note* 152, p. 4.

163 Gerlach, *supra note* 92, p. 454. See also Charny, Israel W., Introduction, in Charny, Israel W. (ed.), *Genocide. A Critical Bibliographical Review* (Facts on File Publications, 1988), xii; Rubinstein, *supra note* 132, pp. 1–6.

164 Akçam, Taner, *The Young Turks' Crime Against Humanity. The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire* (Princeton University Press, 2012), p. xxix.

165 Irvin-Erickson, *supra note* 19, p. 2.

166 Zimmerer, *supra note* 1, p. 109.

167 Bloxham and Moses, *supra note* 78, p. 1.

168 Lang, *supra note* 4, p. 115.

169 Levene, *supra note* 49, p. 37.

a perverse version of the Nobel Prize, part of a rhetorical arsenal that helps you vilify your adversaries while ensuring impunity for your allies."[170]

So it has been determined that "[t]*he term* genocide *is fraught with ambiguities, possibly because it became a catchphrase for the dispossessed*."[171] The term becomes 'trivialized'[172] and "*some cynics deprecate labelling events as genocide, viewing it just a rhetorical weapon because the concept of genocide has been so diminished, vulgarized and banalized in public rhetoric*".[173] This kind of use has a long tradition ranging as far back as its creation and far into the Cold War.[174] William Schabas has referred to this overall phenomenon as the 'genocide mystique'.[175]

This ambiguity reflects on the use of the term. It becomes either too fuzzy or too contentious for any proper analytical scope.[176] Whereas "*the media as well as historians tend to use the term simply to describe the occurrence of mass killings or ethnic cleansing based on discriminatory motives*,"[177] this has made it "*a much contested and overused term*" that is "[s]*ometimes* […] *uttered with thoughtless abandon*."[178] Mark Levene goes so far to say that "*the term now is so broadly used and abused that it has become much less a tool for understanding and more a millstone around our necks*:"[179] "*One can only conclude that 'genocide' has become, on the one hand, so ubiquitous a term, yet on the other, so unmalleable to interrogation, that is* [*sic*] *has completely lost any descriptive value*."[180]

When it comes to genocide as a threshold for action, States have become uncomfortable using the term to assess humanitarian crises. In the international political theatre, the implications of applying the term – either legally

170 Mamdani, Mahmood, The Politics of Naming. Genocide, Civil War, Insurgency, in Moses, A. Dirk (ed.), *Genocide. Critical Concepts in Historical Studies. Volume I. The Discipline of Genocide Studies* (Routledge, 2010), p. 360.

171 Harff, Barbara, Recognizing Genocides and Politicides, in Fein, Helen (ed.), *Genocide Watch* (Yale University Press, 1992), p. 28.

172 Chalk, Jonassohn, Conceptualizations of Genocide and Ethnocide, *supra note* 86, p. 182.

173 Fein, Helen, Definition and Discontent: Labelling, Detecting, and Explaining Genocide in the Twentieth Century, in Förster, Stig, Hirschfeld, Gerhard (eds.), *Genozid in der modernen Geschichte* (Lit Verlag, 1999), p. 12.

174 See Moses, Introduction: The Field of Genocide Studies, *supra note* 81, p. 1 with further references.

175 See Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, *supra note* 12, pp. 99–124.

176 See Zimmerer, *supra note* 1, p. 109.

177 Kirsch, *supra note* 120, p. 141.

178 Weitz, *supra note* 78, p. 8.

179 Levene, *supra note* 49, p. 37.

180 *Ibid*, pp. 37–38.

or politically – have, at times, lead to skirting around the term 'genocide' by government administrations.

> U.S. officials spin themselves (as well as the American public) about the nature of the violence in question and the likely impact of an American intervention. They render the bloodshed two-sided and inevitable, not genocidal. […] They avoid use of the word 'genocide.' Thus, they can in good conscience favor stopping genocide in the abstract, while simultaneously opposing American involvement in the moment.[181]

This becomes a humanitarian Groundhog Day, in that "[w]*henever new challenges arise the same confused debate occurs over whether attacks on civilians constitute 'genocide', 'ethnic cleansing' or just the excess of a dirty 'civil war'*."[182] Here, atrocity labelling demarcates the path towards different decisions whenever humanitarian action might be seen as required.[183] It is here, that atrocity labelling bears its most practical relevance.[184]

Finally, the emphasis on genocide has detracted from the moral gravity and sense of urgency in other mass crimes, proving itself a jealous concept. Many authors, most prominently William Schabas, adhere to the view that genocide is still superior in terms of wrongdoing.[185] In international criminal law, tribunals took the distinction between the three atrocity crimes of genocide, crimes against humanity, and war crimes to signify a moral scale. The ICTY laid this out in its assessment of the jurisprudence of its sister-tribunal, the ICTR:

> A hierarchy of crimes seems to emerge from the case-law of the ICTR [*International Criminal Tribunal for Rwanda*]. *The Trial Chamber seised* [*sic*] of the Kambanda case established a complete scale of seriousness of the crimes which was taken up in the subsequent Judgements of the ICTR. The following hierarchy of crimes falling under the jurisdiction of the Tribunal may therefore be compiled:
> 1) 'The crime of crimes': genocide

181 Power, *supra note* 24, p. XVIII. See in this regard also Akçam, *supra note* 164, p. XXVIII; Gerlach, *supra note* 92, pp. 452–453; Sémelin, *supra note* 79, pp. 338–340.

182 Shaw, *supra note* 79, p. 1.

183 See on this idea specifically with regard to genocide Harff, *supra note* 171, pp. 146–147.

184 Jäger suggests this should be the top criterion for selecting the object of critical discourse analysis. See Jäger, Siegfried, *Kritische Diskursanalyse. Eine Einführung* (6th ed., UNRAST-Verlag, 2012), p. 91.

185 See Schabas, *Genocide in International Law*, *supra note* 22, p. 15.

2) Crimes of an extreme seriousness: crimes against humanity
3) Crimes of a lesser seriousness: war crimes

The ICTR has thus supposedly established a genuine hierarchy of crimes and this has been used in determining sentences as witnessed by the fact that the crime of genocide was punished by life imprisonment.[186]

The 2005 report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General is symptomatic by having to emphasise that it should "*not be taken in any way as detracting from the gravity of the crimes perpetrated in that region*' that only constituted 'crimes against humanity' or 'war crimes'.[187] The same William Schabas finds that"[i]*f labelling genocide the "crime of crimes" has contributed to the difficulty in explaining the terrible seriousness of crimes against humanity* [...]*, then there are solid grounds to abandon the expression*."[188]

As already pointed out with regard to the generic category of 'atrocity crime', the approach is seemingly shifting towards considering the three core crimes, genocide, crimes against humanity, and war crimes to be 'of equal gravity',[189] also evident in the inclusion of genocide alongside crimes against humanity and war crimes triggering the 'responsibility to protect'.[190] Others see "*a subtle but noticeable shift in international tribunals away from genocide and toward crimes against humanity as the preferred legal framework*."[191]

5 Conclusions

The Genocide Convention introduced to international law and helped popularise a concept which is understood across the world today. It might not appear overly bold to argue that it has probably had more popular and interdisciplinary impact than any other idea put forward in international law to date.

186 ICTY, *Prosecutor v. Tihomir Blaskic* (Judgement) IT-95-14-T, TCh, (3 March 2000), para. 800.
187 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, Geneva, 25 January 2005, S/2005/60, 4 and 132, para. 522.
188 Schabas, *Genocide in International Law*, *supra note* 22, p. 653.
189 *Ibid*, pp. 652–653.
190 See UNGA Res. 60/1, '2005 World Summit Outcome', 24 October 2005, UN Doc A/RES/60/1, paras. 138–139.
191 Jones, *supra note* 20, p. 540.

In an upcoming monograph on the question of atrocity labelling,[192] the conceptual framework laid out in the present contribution is subjected to empirical scrutiny by applying it to four case studies: two within a colonial setting, the 'Rubber Terror' in the Congo Free State and the atrocities committed in the German campaign against the indigenous population in German South-West Africa; two within the context of an (imperial) state apparatus in the process of (national) transformation, the atrocities committed against the Armenian population within the declining Ottoman Empire during World War I and the Ukrainian 'Holodomor' of the early 1930s.

By way of induction, a number of common denominators appear to take precedence over the legal elements of the crime as defined by Article II of the Genocide Convention:

(1) Scale implies genocide. The discussions surrounding the labelling process – whether an event is genocide or not – ultimately revolve around scale. Authors who speak of 'genocidal proportions' usually refer to the number of victims, not to the killing of individuals for their membership within a group. The higher the number of victims, the greater authority for an attribution or at least the more justified appears a comparison. Extent, although irrelevant from the perspective of the definition of the Genocide Convention, plays a central role in atrocity labelling. This also resonates with the 6 million dead in the collective memory of the Holocaust.

(2) The contextual elements of crimes against humanity imply genocide. The fact that an act 'is committed in the context of a widespread or systematic attack against the civilian population and with knowledge of the attack […] pursuant to or in furtherance of a State or organizational policy to commit such attack', as required by the *lege artis* definition of crimes against humanity, is used as a legitimising and differentiating criterion for assessing events as genocide. Even more so than a 'widespread or systematic attack', a 'master plan' of governmental policy implies genocide. Against the background of dissatisfaction with the legal definition of genocide, it demonstrates the thirst for legal arguments as authoritative gloss. However, the genocide label is only legally justified if any of the acts listed in Article II of the Genocide Convention were committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.

192 See *supra note* 8.

(3) Continuity implies genocide. Suggesting an event is a precursor of the Holocaust or serves as a kind of 'blueprint' reaches into the future to claim a label. While certain historical continuities may be identified and prove useful for analysis, most often comparisons can only be understood as (rhetorical) instruments in the labelling process. This is also accompanied by the attempt to establish a 'canon' of recognised genocides which circulate around the Holocaust and to which individual cases can be attributed: Armenia, Ukraine, Cambodia, Rwanda etc.

(4) Representations of the Holocaust imply genocide. Connotations awakening the collective memory of the destruction of the European Jews have become an essential element in applying the term genocide to other situations. Sometimes, the imagination of the Holocaust does not appear sufficient and the portrayal of an event elevates it to even greater horror by scale, scope, or scenario. Thereby, Holocaust comparisons serve as labelling catalysts, not as an instrument of comparative methodology.

(5) Only 'genocide, the noun' implies genocide. Use of the word 'genocidal' appears prominently where an event cannot clearly be labelled as genocide. In the case of the Congo, this is so done in order to illustrate the extent and moral gravity of the atrocities committed. In the case of the Armenians, 'genocidal' is used to contrast the atrocities repeatedly committed throughout the late 19th and early 20th century with the exceptional character of later events during World War I. This equally dilutes the understanding of genocide suggesting that other labels such as crimes against humanity or war crimes express insufficient moral opprobrium.

(6) Genocide Studies imply genocide. They include the study of events that are not accepted as genocide under any possible definition but are added to a chain of knowledge of atrocities committed throughout the 20th century, throughout the 19th century, throughout the entire history. Accordingly, the attribution seems to be due less to a qualitative assessment or analytical investigation than explorative curiosity: the more events that can be added to the collection, ranging from the biblical annihilation of the Amalekites and Canaanites to Carthage or Genghis Khan, the better. But in light of the disinterest in discussing the application of other terms by other disciplines, Genocide Studies is perhaps the only haven for the discussion of mass atrocities there currently is.

PART 2

Forms of Responsibility for the Crime of Genocide

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CHAPTER 3

Time Yet Again for Judicial Creativity

Does a Purpose-Based Approach Hinder Successful Prosecutions of Genocide Cases?

Michala Chadimová

1 Introduction

The crime of genocide[1] has two separate mental elements, namely, a general element that could be called 'general intent' and an additional special intent element embodied in the wording "*the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*."[2] General intent normally relates to all objective elements of the crime (*actus reus*). In the case of genocide, general intent relates to the opening paragraph (the perpetrator must, for example, know that their actions target one of the protected groups) as well as to the acts listed as specific genocidal acts.[3] The 'intent to destroy' constitutes an additional subjective requirement that complements the general intent.

Special intent is a well-established criminal law concept which is required as a constitutive element of certain international crimes. The terms 'special intent', 'specific intent', and '*dolus specialis*' are used interchangeably in the jurisprudence of international courts and tribunals.[4] The special intent element for genocide was first introduced in Article II of the Genocide Convention. The Convention itself does not address this element as 'special intent' but embodies this element in its wording 'genocide means any of the following acts committed with intent to destroy'. Similarly, the statutes of the *ad hoc* tribunals, the Rome Statute, and the Elements of Crimes don't use the expression of 'special intent' but use wording from the Genocide Convention. When assessing special intent, two different elements of special intent can be distinguished.

1 This chapter builds upon its author's Ph.D. dissertation thesis: Chadimová, Michala, Superior Responsibility and its Application to the Crime of Genocide, Palacký University Olomouc, Law Faculty, defended in 2022.

2 Triffterer, Otto, 'Genocide, its particular intent to destroy in whole or in part the group as such', (2001) 14 *Leiden Journal of International Law*, p. 400.

3 Ambos, Kai, 'What does 'intent to destroy' in genocide mean?', (2009) 91 (876) *International Review of the Red Cross*, p. 837.

4 Schabas William A., *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), p. 260.

Firstly, it must be shown that the perpetrator wanted to destroy the group as such. Secondly, it must be proven that the perpetrator sought the destruction of the group because of its national, racial, ethnic, or religious characteristics.

Several modes of liability have emerged as judicial interpretation of the founding Statutes of the ICTY and the ICC. Joint criminal enterprise was brought by the judges at the *Tadić* Appeal judgment at the ICTY. Similarly, (indirect) co-perpetration emerged by interpreting provisions of the Rome Statute by the Pre-Trial Chamber (PTCH) in the *Lubanga* case and the *Katanga and Chui* case. The Rome Statute itself has also brought a newly formed 'common purpose' liability under Article 25(3)(d). It has also brought a new *mens rea* requirements to superior responsibility under Article 28.[5] The core question is whether the newly formed modes of liability or new elements to modes of liability are compatible with the traditional view of special intent requirements for the crime of genocide. To hold an accused responsible under several modes of liability, it suffices if the perpetrator foresees consequences other than those desired as a certainty. This chapter aims to analyze how special intent interacts with the *mens rea* requirement for international criminal responsibility.

2 Mental Element of Genocide

Concerning the special intent of the crime of genocide, two approaches can be distinguished. The first approach is a purpose-based approach, which is focused on the genocidal intent as such and requires a demonstration that the outcome of the genocidal scheme was anticipated and willed by the perpetrator.[6] The second approach is a knowledge-based approach. There are different interpretations of the knowledge-based approach but the core element is the same – existence of a plan or policy and the perpetrator's knowledge of the context in which the crime of genocide occurs.[7]

Knowledge can be defined theoretically as:

– *dolus directus* of the second degree – the perpetrator foresees consequences other than those desired as a certainty but the perpetrator did not desire those secondary consequences, or

5 On the interaction between superior responsibility and genocide see Chadimova, Michala, Genocide and superior responsibility – conviction for a special intent crime without proving special intent!, in Odello, Marco, Lubinski, Piotr (eds), *The Concept of Genocide in International Criminal Law* (Routledge, 2020), pp. 165–190.

6 Fisher, Kirsten J., 'Purpose-based or knowledge-based intention for collective wrongdoing in international criminal law?', (2014) 10 (2) *International Journal of Law in Context*, pp. 167–168.

7 *Ibid.*

– *dolus eventualis* – the perpetrator foresees consequences other than those desired as a possibility.[8]

Conversely, the notion of negligence – both conscious (consequences not foreseen and not desired but *aware of the risk*) and unconscious (consequences not foreseen and not desired and *not aware of the risk*) does not satisfy the knowledge requirement (emphasis added by the author).

A historic and literal interpretation of the term 'intent' in the context of the Genocide Convention does not indicate any clear preference for a purpose-based or knowledge-based approach.[9] However, Ambos points out that a literal interpretation of Article 6 of the ICC Statute in the French and Spanish versions express purpose-based conduct.[10] He also proposes a twofold solution distinguishing between low-level and mid/high-level perpetrators. He argues that for perpetration – or principal-like participation – special intent is required. However, for low-level perpetrators, knowledge of the genocidal context should suffice.[11] Cassese argues in favor of the knowledge-based approach when he describes the *dolus specialis* for genocide as an "*aggravated intent that signifies the pursuance of a specific goal going beyond the result of the offender's conduct*."[12] The knowledge-based approach is also preferred by Greenawalt who suggests that such an approach would be better in a scenario when genocide is committed due to a superior's orders. He argues that it would rightfully extend responsibility for genocide to those who may personally lack genocidal purpose, but who commit genocidal acts while having full knowledge of the consequences of their actions.[13] Selection of the preferred approach determines the practical applicability of several modes of liability. It does not mean that the purpose-based approach would be applicable only towards the direct perpetrators who personally committed genocide. Nevertheless, it is much easier to prove that a perpetrator who personally committed genocide sought and anticipated that their conduct will result in the commission of genocide. This might be evidentiary problematic in other cases – when genocide

8 The structure taken from the Lubanga case – ICC, *Prosecutor v. Lubanga* (Decision on the confirmation of charges) ICC-01/04-01/06-803, PTCh I (7 February 2007), paras. 351–352. See also Van der Vyver, J. D., 'The International Criminal Court and the Concept of Mens Rea', (2004) *International and Comparative Law Review,* pp. 62–63.

9 Triffterer, *supra note* 2, p. 404; Greenawalt, K., Alexander K, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', (1999) 99 *Columbia Law Review*, pp. 2265 - 2266.

10 Ambos, Kai, 'What does 'intent to destroy' in genocide mean?', *supra note* 3, pp. 847–848.

11 Ambos, p. 855.

12 Cassese, Antonio, *International Criminal Law* (2nd ed., Oxford: Oxford University Press, 2008), p. 65.

13 Greenawalt, K., Alexander K, *supra note* 9, pp. 2259–2294.

is committed as part of a policy and high-level perpetrators who might not have been personally involved in the genocidal acts are being held responsible. This includes, among others, responsibility based on participation in the JCE, common purpose liability, and (indirect) co-perpetration.

Looking at the *mens rea* for the crime of genocide, there is no specific detailed provision in the Rome Statute. However, the Rome Statute is the first international document including a general provision on the mental element required for individual criminal responsibility for international crimes. Article 30 of the Rome Statute of the International Criminal Court provides a general definition for the mental element required to trigger the criminal responsibility for international crimes:

> Article 30
> Mental element
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

In terms of Article 30(1) of the ICC Statute, the requirement of 'intent and knowledge' applies "[u]nless otherwise provided." This introductory phrase makes allowance for deviations from the general requirement of intent and knowledge. In January 2007, the PTCH in the *Lubanga* case ruled that Article 30 of the Rome Statute encompasses the three degrees of *dolus*, namely, *dolus directus* of the first and second degrees and *dolus eventualis*.[14]

14 ICC, *Prosecutor v. Lubanga* (Decision on the confirmation of charges) ICC-01/04-01/06-803, PTCh I (7 February 2007), paras. 351–352.

However, the International Law Commission explicitly affirmed that *dolus eventualis* does not suffice for the crime of genocide by stating "[..] *a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act for the immediate victim or victims is not sufficient for the crime of genocide*."[15] However, some scholars are challenging this traditional view. On the one hand, Claus Kreß argues that a low-level perpetrator must act with knowledge of the collective genocidal attack and with *dolus eventualis* to at least the partial destruction of a protected group.[16] Otto Triffterer also opts for the application of *dolus eventualis*, a position which is motivated mainly by the difficulty to prove a special intent and hence to obtain convictions for genocide.[17] In the 2019 Appeal Judgment in the *Karadžić* case, Judge de Prada in his dissent calls for an adoption of a broader mental element of genocide, including *dolus eventualis*. He argues that "*the certainty of knowledge on the part of the accused that his acts or omissions were contributing to the collective destruction of a group*" should be taken into account for proving a special genocidal intent.[18]

On the other, Van der Vyver argues that the 'intent to destroy' formulation only leaves scope for *dolus directus*.[19] Special intent is an essential element of genocide and special intent is certainly a manifestation of *dolus directus*. Piragoff argues that "*intent* [...] *connotes some element, although only minimal, of desire or willingness to do the action, in light of an awareness of the relevant circumstances*."[20] However, intent does not necessarily include a desire to bring about the consequences of the act. Greenawalt argues for the inclusion of *dolus directus of second degree* by employing the knowledge-based interpretation of *dolus specialis* – suggesting that genocide comprises of underlying acts that one knows will lead to the destruction of the group or whose foreseeable or probable consequence is the destruction of the group.[21]

Nevertheless, the formulation of Article 30 of the Rome Statute 'unless otherwise provided' clearly states that other mental elements standards may

15 ILC, Report of the ILC on the Work of Its Forty-Eighth Session, A/CN.4/ SER.A/1996/Add. 1 (Part 2), Art. 17(5).

16 Kreß, Claus, 'The Darfur Report and genocidal intent', (2005) 3(3) *Journal of International Criminal Justice*, p. 572.

17 Triffterer, *supra note* 2, pp. 405–406 ('much more difficult to be proven ...').

18 ICTY/MICT, *Prosecutor v. Karadžić* (Partially Dissenting Opinion of Judge de Prada) IT-95-5/18-A, ACh (20 March 2019), para. 843.

19 Van der Vyver, J. D., *supra note* 8, p. 71.

20 Piragoff K., Donald K., Mental Element, in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 1999), pp. 527–533.

21 Greenawalt, K., Alexander K, *supra note* 9, pp. 2259–2288.

come in play and, as such, prevail over the general provisions in Article 30 of the Rome Statute. Proving a genocide intent constitutes the most difficult problem relating to the crime of genocide. Direct evidence proving the existence of genocidal intent is not available in most cases and thus the intent has to be deduced from numerous pieces. In practice, the courts do not require a finding of specific intent based solely on direct evidence of a mental state as this finding may instead be deduced from the complete set of facts and circumstances. Due to the existence of multiple approaches to special intent, the applied theory influences whether a conviction will be entered.

The *ad hoc* tribunals' case law tends to apply the purpose-based approach. However, while acknowledging evidentiary difficulties, the argumentation often comes to stretching the purpose-based knowledge into a very wide horizon. The following chapter will analyze the case law on the interaction between genocide - and its special intent – to direct perpetration and responsibility based on the joint criminal enterprise (JCE).

3 Interaction between Special Intent and Modes of Liability in the Case Law

3.1 *Application to 'Direct' Perpetration*

3.1.1 The Akayesu Case

Akayesu was the first person to be convicted for genocide in the ICTR. His responsibility was established under Article 6(1) of the ICTR Statute that provides responsibility for a perpetrator who 'ordered, committed, aided and abetted' the crimes.[22] Although, the direct mode of liability was employed, the Trial Chamber (TCH) experienced significant difficulties while finding the required special intent for genocide. The TCH in the *Akayesu* case found that special intent of a crime is the specific intention which demands that the perpetrator "*clearly seeks to produce the act charged*."[23] Nevertheless, the TCH went on and cited a significant amount of evidence which one could deduce special intent from. It also acknowledged the difficulties to prove, adding that, in the absence of a confession from the accused, the intent "*can be inferred from a certain number of presumptions of fact*."[24] The TCH provided examples of facts from which it is possible to deduce genocidal intent, including "*scale of atrocities committed, their general nature, in a region or a country, or furthermore, the*

22 ICTR, *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T, TCh (2 September 1998), para. 715.
23 *Ibid*, para. 498.
24 *Ibid*, para. 523.

fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups."[25] It seems that the TCH argued for a purpose-based approach but with a looser evidentiary standard that resembles a knowledge-based approach. The TCH in the *Akayesu* case advanced that special intent can be presumed largely by virtue of the fact that a perpetrator knew about an overall genocidal campaign, using somehow an even looser approach than a knowledge-based.

3.1.2 The Jelisić Case

The case law at the ICTY presents some clashes in special intent's interpretation between the trial and appeals chambers. The first collision may be seen in the *Jelisić* case. The prosecution argued that Goran Jelisić, who introduced himself as the "Serb Adolf", is responsible for committing or aiding and abetting the genocide of the Bosnian Muslim in Brčko.

The TCH, while acknowledging difficulties to prove genocidal intent if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system, held that Jelisić did not have the requisite intent. The TCH reached this conclusion despite the findings that he 'wanted to cleanse the Muslims', told the Muslim detainees in Luka camp that 70% of them were to be killed and he claimed to have gone Luka camp to kill Muslims.[26] The TCH in *Jelisić* found that despite that he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group and his acts were not the physical expression of an affirmed resolve to destroy in whole or in part a group as such.[27]

However, the Appeals Chamber (ACH) disagreed and found that the evidence presented could have provided a basis for establishing Jelisić's intent to destroy the Muslim group.[28] Kirsten argues that it shows that while TCH clearly voted for the purpose-based approach, the ACH favored a knowledge-based interpretation.[29] The ACH put more emphasis on the existence of a policy to kill Muslims and Jelisić's attitude. The ACH made several remarks, while analyzing Jelisić's intent, to the existence of policy and campaign.[30] While it is correct to

25 *Ibid.*

26 ICTY, *Prosecutor v. Jelisić* (Judgment) IT-95-10-T, TCh (14 December 1999), para. 102.

27 *Ibid*, paras. 106–107.

28 ICTY, *Prosecutor v. Jelisić* (Judgment) IT-95-10-A, ACh (5 July 2001), paras. 57–72.

29 Fisher J. Kirsten, *supra note* 6, p. 168.

30 "[R]*elentless campaign against the protected group*", ICTY, *Prosecutor v. Jelisić* (Judgment) IT-95-10-A, ACh (5 July 2001), para. 71. "[t]*he respondent believed himself to be following a plan sent down by superiors to eradicate the Muslims in Brcko* […]", *Ibid*, para. 66.

see ACH's argumentation leaning towards a knowledge-based approach, the key point in the different findings of the TCH and the ACH is arguably in the perception of randomness. Contrary to the ACH, the TCH favored the reliance on the randomness of the killing, citing 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 whim.[31] The TCH regarded this 'randomness' as a key factor in the analysis of special intent. To the contrary, the ACH held that the acts showing 'randomness' in these actions should be seen as aberrations. Thus, the special intent cannot be automatically negated if the perpetrator's showing some signs of the randomness in the genocidal act. Randomness might be a factor indicating a lack of special intent, but it must be seen in the entirety of all evidence. Even though the clash between purpose-based and knowledge-based approach is not the key in the case, it is evident that both chambers favored different approaches.

3.2 *Application to JCE*

The concept of a JCE has been widely applied by different tribunals since its adoption in the *Tadić* case.[32] The JCE has been divided into three categories, commonly known as the basic (JCE I), systematic (JCE II), and the extended (JCE III).[33] Despite its wide use in the tribunals' practice, the JCE concept has attracted serious criticism, especially the extended form (JCE III). The extended form holds an individual who intentionally participates in a JCE responsible for crimes committed outside of the common plan if those crimes were reasonably foreseeable, yet he willingly took the risk that they would be committed.

When a JCE I includes the commission of genocide, it is required that the participants to the JCE share the requisite *dolus specialis*.[34] However, a disagreement arose in regards to the extended form of the JCE. The TCH in the *Stakić* case argued that "*the application of a mode of liability cannot replace a core element of a crime*" and that "*conflating the third variant of a joint criminal enterprise and the crime of genocide would result in the* dolus specialis *being so watered down that it is extinguished.*"[35] The TCH required proof of special intent to commit genocide and was not satisfied with genocide as a 'natural and foreseeable consequence' of the JCE actions.[36] The ACH in the *Stakić* case

31 ICTY, *Prosecutor v. Jelisić* (Judgment) IT-95-10-T, TCh (14 December 1999), para. 106.
32 ICTY, *Prosecutor v. Tadić* (Judgment) IT-94-1-A, ACh (15 July 1999), paras. 185–229.
33 *Ibid*, paras. 220, 228.
34 ICTY, *Prosecutor v. Popović* (Judgment) IT-05-88, TCh (10 June 2010), paras. 1175–1181.
35 ICTY, *Prosecutor v. Stakić* (Judgment) IT-97-24-T, TCh (31 July 2003), para. 530.
36 *Ibid*.

held that a perpetrator can be held responsible for the special intent crime (in this case extermination) under the extended form of the JCE. The ACH was satisfied that Stakić acted at least with *dolus eventualis* to commit the special intent crime.[37]

In the *Brđanin* case, the ACH also discussed the applicability of JCE III to the crime of genocide. The ACH argued that participants other than the direct perpetrator of the criminal act may also incur liability for a crime, and in many cases, different *mens rea* standards may apply to direct perpetrators and other persons.[38] In relation to genocide, it must be established that it was reasonably foreseeable to the accused that underlying acts of the genocidal act would be committed and that it would be committed with genocidal intent.[39] The ACH argued for a distinction between the *mens rea* requirement for the genocide and the *mens rea* requirement attached to the mode of liability – the extended form of the JCE concept. The only connection to the *mens rea* requirement for the genocide would be the foreseeability of the commission of the crime, including its special intent, which would be bore by a different perpetrator. Thus, a member of a JCE III may be convicted for genocide if it was reasonably foreseeable for him that one of the objective acts of the genocide offence would be committed and that it would be committed with genocidal intent.

3.2.1 The Krstić Case

Despite the agreement that a member of a JCE, in its basic form, must have *dolus specialis* in relation to the crime of genocide, disagreement between the approaches to special intent can be found in the ICTY case law. The TCH in the *Krstić* case claimed that knowledge of the consequence of actions and the lasting impact of those actions upon a group was sufficient to demonstrate Krstić's genocidal intent. The TCH explicitly held that Krstić 'must have known' that the military activities against Srebrenica were calculated to trigger a humanitarian crisis, eventually leading to the destruction of persons displaced to Srebrenica.[40] The TCH found that Krstić participated in the criminal plans to ethnically cleanse Srebrenica of all Muslim civilians and to kill the military-aged men of Srebrenica. The TCH held that he had not devised the killing plan, or participated in the initial decision to escalate the objective of the criminal enterprise from forcible transfer to the destruction of Srebrenica's Bosnian

37 ICTY, *Prosecutor v. Stakić* (Judgment) IT-97-24-A, ACh (22 March 2006), paras. 97–98.

38 ICTY, *Prosecutor* v. Brđanin (Decision on Interlocutory Appeal) IT-99-36-A, ACh (19 March 2004), para. 6.

39 *Ibid*, para. 5.

40 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33-T, TCh (2 August 2001), para. 335.

Muslim military-aged male community, but since he "*learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men*."[41] He was ultimately found guilty of genocide by the TCH based on the concept of co-perpetrator in a JCE I.

The ACH, however, argued that mere knowledge of the consequences of actions is insufficient to demonstrate genocidal intent, explicitly stating that knowledge on Krstić part alone cannot support an inference of genocidal intent.[42] The ACH denied that a knowledge-based interpretation of intent is justified for a conviction for genocide. According to this judgment, the perpetrators must themselves have the intent to contribute to the genocide and desire the destruction of the targeted group. The ACH set aside the conviction for genocide based on membership in the JCE and found Krstić guilty of aiding and abetting genocide.[43] This case presents the substance of the debate between the knowledge-based and purpose-based approach. The TCH voted for the knowledge-based approach arguing that it suffices to prove the perpetrator's knowledge of collective genocidal intent – collective goal to commit genocide. Conversely, the ACH voted for the purpose-based approach according which the perpetrator's intent has to mirror the collective goal in the form of a personal desire, aim, goal or purpose.

3.2.2 The Karadžić Case

In 2016, the TCH held Karadžić responsible for genocide, finding that he had the specific genocidal intent regarding the Srebrenica killings.[44] The TCH found that Karadžić was a participant in a JCE whose common purpose eventually evolved to encompass the agreement to kill all Bosnian adult males and to forcibly transfer women and children.[45] The TCH noted that Karadžić knew about the killings at Srebrenica due to a conversation he had with another official, Miroslav Deronjić.[46] The conversation does not explicitly mention the killing of detainees during the conversation, they spoke in code, referring to the detainees as 'goods' which had to be placed 'inside the warehouses before twelve tomorrow'. The Chamber further recalled that immediately after this

41 *Ibid,* para. 633.

42 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33-A, ACh (19 April 2004), para. 134.

43 *Ibid*, para. 144.

44 The special intent of physical perpetrators in regards to Srebrenica killings was based on the systematic and highly organized nature of the killings of every Bosnian Muslim able-bodied male. ICTY, *Prosecutor v. Karadžić* (Judgment) IT-95-5/18-T, TCh (24 March 2016), para. 5669.

45 ICTY, *Prosecutor v. Karadžić* (Judgment) IT-95-5/18-T, TCh (24 March 2016), paras. 5741–98.

46 *Ibid*, para. 5805.

conversation, Deronjić with another official discussed where the detainees were to be killed. The Chamber emphasized the fact that no discussion was made on whether the detainees were to be killed presuming that this has been already agreed upon. Finally, the Chamber drew Karadžić's special intent from "*his active involvement in overseeing the implementation of the plan to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys*."[47] When the TCH explained how actively involved he was, the Chamber presented its findings on his dissemination of "*false information about what happened in Srebrenica' and the fact he praised and rewarded the perpetrators of the killings*."[48] Also, the TCH argued that his special intent could be seen in Karadžić's failure to prosecute the direct perpetrators after he knew about the killings.[49]

As argued by Sterio, the TCH's approach to the genocidal intent under the definition provided in the Genocide Convention and the present customary law definition, to say the least, an innovation.[50] The TCH based its findings regarding Karadžić's special intent on his knowledge about killings and his reluctance to do anything after he acquired knowledge about the killings. Also, the TCH's conclusion about his knowledge regarding the killings was based solely on indirect evidence. Indeed, the TCH's findings on Karadžić special intent are controversial. The most troubling part is the finding that he had actual knowledge about the killings as this is based on indirect evidence. It would be far more suitable and persuasive to argue that he had constructive knowledge, i.e., he had reason to know about the killings which would be a basis for his superior responsibility as opposed to the TCH's preferred JCE.

However, the findings of the Chamber regarding Srebrenica seem strangely inconsistent looking at the findings of the TCH in regard to the incidents in the other parts of Bosnia and Herzegovina (municipalities). The prosecution claimed his responsibility based on fact that he was informed of the killings which was accepted by the TCH.[51] The TCH presented analyses of several of Karadžić's speeches, some of them describing a 'highway of hell' for Bosnian Muslims, and their "annihilation", "vanish[ing]", "elimination", and "extinction".[52] Nevertheless, the Chamber argued that it is not the only reasonable

47 *Ibid*, para. 5811.
48 *Ibid*, para. 5813.
49 *Ibid*, para. 5812.
50 Sterio, Milena, 'The Karadžić genocide conviction: inferences, intent, and the necessity to redefine genocide', (2017) 37 *Emory International Law Review*, p. 272.
51 ICTY, *Prosecutor v. Karadžić* (Judgment) IT-95-5/18-T, TCh (24 March 2016), paras. 3331–3363.
52 *Ibid*, para. 2600.

inference that speeches, statements, and actions demonstrate Karadžić's intent to physically destroy a part of the Bosnian Muslim group in the provinces.[53] However, the same argument can be raised for the killings in Srebrenica – it could be argued that Karadžić was only aware of the removal of the Bosniaks, but not to their killing.[54]

The decision was confirmed on appeal in 2019 with Judge de Prada dissenting who pointed out that the purely purpose-based approach is almost unreachable and inapplicable for a non-principal perpetrator.[55] The *Karadžić* case shows the troubles of demonstrating genocidal intent under the current legal standard. In relation to Srebrenica killings, a conviction was achieved based on presumed knowledge, streaming from indirect evidence, and abstraction of special intent from his knowledge. While this line of reasoning still satisfies the strict approach of a purpose-based interpretation of special intent, it is a significantly looser standard. Surprisingly, regarding the killings in the provinces, he was acquitted of genocidal charges despite *Karadžić*'s knowledge, supported by direct evidence about the killings and existence of evidence supporting his special intent. The judicial battle in this case perfectly demonstrates the difficult battle under the current legal standard of genocide intent.

3.3 *Application to the 'Newly Emerged' Modes of Liability*

The modes of liability applicable at the ICC are set out in Articles 25 and 28 of the Statute. Compared to the Statutes of the ad hoc tribunals, the Rome Statute has brought a 'common purpose' liability under Article 25(3)(d) while an (indirect) co-perpetration liability emerged from Article 25(3)(a) of the Rome Statute. This has added even more uncertainty into modes of liability under international criminal law, their elements and their applicability to special intent crimes – such as genocide.

3.3.1 Co-perpetration Based on Joint Control over the Crimes

Joint co-perpetration emerged by interpreting Article 25(3)(a) of the Rome Statute 'commits jointly with another' by the PTCH in *Lubanga* case. The basic elements require that the accused makes an essential contribution to the commission of the crime, is part of the group acting with a common plan and all co-perpetrators must be mutually aware and must mutually accept that executing their plan will result in genocide. The mental element requires that a

53 *Ibid*, paras. 2605 – 2625.

54 Sterio, Milena, *supra note* 50, p. 292.

55 ICTY, *Prosecutor v. Karadžić* (Partially Dissenting Opinion of Judge de Prada) IT-95-5/18-A, ACh (20 March 2019), paras. 837–840.

perpetrator carries out their actions either with the purposeful intent to commit the crime (*dolus directus* in the first degree) or with the awareness that the crime would be committed in the ordinary course of events (*dolus directus* in the second degree). *Dolus eventualis*, contrary to the extended form of the JCE, is excluded from the notion of joint co-perpetration.[56] The ICC does not apply the JCE concept and the PTCH in the *Lubanga* case raised the difference between the JCE concept and joint co-perpetration under the Rome Statute. The PTCH in the *Lubanga* case specifically rejected the idea that a defendant charged jointly with another could be convicted of a special intent crime like genocide without the proof of special intent on the part of the co-perpetrator.[57] This finding was then repeated in the *Katanga and Chui case,*[58] *Bemba,*[59] and the *Ntaganda* case.[60]

The only case available for the analysis of the ICC's approach towards genocidal intent has been the *Al-Bashir* case. In the second arrest warrant, reasonable grounds to believe Al-Bashir is responsible for genocide in Darfur under the concept of the indirect perpetrator or indirect co-perpetration[61] have been established. Indirect (co)-perpetration emerged as a variant of co-perpetration based on Article 25(3)(a) of the Rome Statute. On a basis of textual interpretation – 'jointly with another, *or* through another person' (emphasis added by the author) – the PTCH in the *Katanga and Chui* case held that indirect co-perpetration forms part of Article 25(3)(a) of the Rome Statute. It provides for the responsibility of those who control an organized apparatus and for the crimes committed within that apparatus.[62] The PTCH in the *Katanga and Chui* case presented the indirect co-perpetration concept, as a situation when a perpetrator (who has no control over a person used as an instrument)

56 Ambos, Kai, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22(4) *Leiden Journal of International Law*, p. 718.

57 ICC, *Prosecutor v. Lubanga* (Decision on the confirmation of charges) ICC-01/04-01/06-803, PTCh I (7 February 2007), para. 346.

58 ICC, *Prosecutor v. Katanga and Chui* (Decision on the confirmation of charges) ICC-01/04-01/07-717, PTCh I (14 October 2008), para. 527.

59 ICC, *Prosecutor v. Bemba* (Decision on the confirmation of charges) ICC-01/05-01/08, PTCh II (15 June 2009), para. 351.

60 ICC, *Prosecutor v. Ntaganda* (Decision on the confirmation of charges) ICC-01/04-02/06-309, PTCh II (14 June 2014), para. 121.

61 ICC, *Prosecutor v. Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95, PTCh I (12 July 2010), p. 4.

62 ICC, *Prosecutor v. Katanga and Chui* (Decision on the confirmation of charges) ICC-01/04-01/07-717, PTCh I (14 October 2008), para. 491.

acts jointly with another individual (one who controls the person used as an instrument).[63]

As the Rome Statute does not specify any approach towards the interpretation of genocidal intent, it comes with no surprise that the PTCH in the *Al-Bashir* case conforms to the purpose-based approach. Nevertheless, it did not happen without any controversy. Firstly, the prosecution tried to introduce the knowledge-based approach by arguing that "[t]*he conduct took place in the context of a manifest pattern of similar conduct directed against the group and was conduct that could itself affect such destruction*."[64] The prosecution explained that while the existence of a plan or policy is not a legal requirement for establishing genocide, it is an important factor in proving the specific intent.[65] As the direct evidence of special intent of Al-Bashir to commit genocide was missing, the prosecution listed several facts that presented the existence of Al-Bashir's special intent to commit genocide.[66]

In assessing the prosecution's application, the PTCH correctly deconstructed the requisite *mens rea* of genocide into two elements: (i) a general subjective element that must cover any genocidal act provided for in Article 6(a) to 6(e) of the Statute, and which consists of Article 30's intent and knowledge requirement; and (ii) an additional subjective element, normally referred to as *dolus specialis* or specific intent, according to which any genocidal act must be carried out with the "intent to destroy in whole or in part" the targeted group.[67] However, the PTCH held that the adduced evidence fell short of demonstrating the existence of genocidal intent, which was "*only one of several reasonable conclusions available on the Prosecution material*."[68] The ACH reversed the PTCH's decision not to issue a warrant of arrest on genocidal charges given an erroneous standard invoked by the PTCH that is higher than the standard of 'reasonable grounds to believe' embodied in Article 58(1)(a) of the Statute.[69] The PTCH subsequently decided that there were reasonable grounds to believe

63 *Ibid*, para. 493.

64 ICC, *Situation in Darfur – Sudan* (Public Redacted Version of the Prosecutor's Application under Article 58) ICC-02/05 Office of the Prosecutor (14 July 2008), para. 209.

65 *Ibid*, para. 378.

66 *Ibid*, paras. 364–400.

67 ICC, *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, PTCh I (4 March 2009), para. 139.

68 *Ibid*, para. 159.

69 ICC, *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") ICC-02/05-01/09-73, ACh (3 February 2010), para. 39.

that Al-Bashir is criminally responsible for the crime of genocide and issued the arrest warrant.[70] The PTCH considered that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under Article 25(3)(a) of the Statute for the genocide. Until this case goes further, no conclusion on the ICC approach towards the applicability of knowledge-based approach can be determined. It might be argued that the ACH did indirectly support the knowledge-based approach while hiding behind the standard of proof.

While Al-Bashir special genocidal intent may be seen in his several statements[71] his knowledge of the crimes committed and commission of genocide as a foreseeable consequence of Al-Bashir's and his forces and agents under his command as a certainty is supported by overwhelming evidence – including the existence of a genocidal plan or policy, strategy to deny and conceal the genocide as evidence of intention, rapes, and sexual violence as part of a destruction process and forcible transfers accompanying the genocidal acts. It is clear that to comply with a strict purpose-based approach in regards to indirect (co)-perpetration of genocide might be a nearly impossible task.

3.3.2 A Common Purpose Liability

The Rome Statute itself has also brought a newly formed 'common purpose' liability under Article 25(3)(d). The common purpose liability under Article 25(3)(d) of the Statute requires that all perpetrators are mutually aware and must mutually accept that executing their plan will result in sexual slavery. Under common purpose liability (Article 25(3)(d) of the Rome Statute), it is not required that the perpetrator is part of the group who bears the common purpose to commit genocide, as long as he or she provides a significant contribution to the commission of genocide. Similarly, the perpetrator does not have to share the intent of the group, it suffices that he or she acts intending to further the group's criminal purpose or with knowledge of the group's criminal intentions.[72] The positive knowledge is required, so it does not suffice that a perpetrator was merely aware and accepted a foreseeable risk that a crime would be committed – *dolus eventualis* is thus excluded from the notion of

70 ICC, *Prosecutor v. Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95, PTCh I (12 July 2010).

71 ICC, *Situation in Darfur – Sudan* (Public Redacted Version of the Prosecutor's Application under Article 58) ICC-02/05 Office of the Prosecutor (14 July 2008), paras. 384–385.

72 ICC, *Prosecutor v. Blé Goudé* (Decision on the confirmation of charges) ICC-02/11-02/11-186, PTCh I (12 December 2014), para. 173. ICC, *Prosecutor v. Ntaganda* (Decision on the confirmation of charges) ICC-01/04-02/06-309, PTCh II (14 June 2014), para. 158.

common purpose liability. Common purpose liability is wider than joint co-perpetration as it can apply to outside contributors – perpetrators who do not belong to the group.[73]

Following a hierarchical reading of Article 25(3) of the Rome Statute by the ACH in the *Lubanga* case, the common purpose liability has been presented as a residual – or subsidiary – mode of participation.[74] This was subsequently refused by the majority of the TCH in the Katanga case and common purpose liability has moved to assess the responsibility of high-level perpetrators.[75] As the common purpose liability does not require the perpetrator to share the intent of the group, the conviction for genocide under common purpose liability could also be based on the *dolus directus* of the second degree.

4 Conclusion

Reflecting on the case law, proving special intent is always a challenging task. The case law is predominantly focused on proving the perpetrator's special intent, his personal desire to cause consequences. However, this is often done by using indirect evidence and interference from presumed knowledge. Adopting enhanced knowledge-based approach, requiring the proof of the existence of 'genocidal context' and perpetrator's knowledge that the genocide would certainly be committed within this context would better reflect current modes of liability and addressed evidentiary roadblocks in most of the cases. Similarly, the judiciary gymnastic seen in *ad hoc* tribunals' case law, could have been avoided.

The modes of liability applicable at the ICC are set out in Articles 25 and 28 of the Statute. Compared to the Statutes of the ad hoc tribunals, the Rome Statute has brought a new and complex 'common purpose' liability under Article 25(3)(d) while an 'indirect co-perpetration' liability emerged from Article 25(3)(a) of the Rome Statute. Both of the responsibilities do not enhance inclusion of *dolus eventualis* and thus it does not suffice that the perpetrator foresees consequences other than those desired as a possibility. This differs from the notion of a JCE – and its extended form – which requires that the accused participated in the commission of the core crime and then it was foreseeable that genocide might be perpetrated, with the required genocidal intent, and the accused took

73 ICC, *Prosecutor v. Katanga* (Judgment) ICC-01/04-01/07, TCh (7 March 2014), para. 1384.

74 ICC, *Prosecutor v. Lubanga* (Judgment) ICC-01/04-01/06-3121-Red, ACh (1 December 2014), para. 462.

75 ICC, *Prosecutor v. Katanga* (Judgment) ICC-01/04-01/07, TCh (7 March 2014), para. 1378.

willingly risk. While a JCE is not used at the ICC, it is still a valid concept which is employed at the ad hoc and hybrid tribunals. The amount of different modes of liability only adds more uncertainty into their individual elements and its applicability to special intent crimes.

The distinction between the *mens rea* requirement for the crime and the *mens rea* requirement attached to the mode of liability must be made. However, requiring a strict purpose-based approach to genocidal intent – supporting only *dolus directus* of the first degree – is incompatible with several modes of liability. Several modes of liability enable conviction under *dolus directus of the second degree* but also *dolus eventualis.* To interpret special intent for genocide in the form of *dolus directus* of first degree would significantly limit the ability to fully enjoy and exhaust possibilities given by modes of liability available. As seen from the case law, *dolus directus of the second degree* lead to a conviction for genocide in several cases. Looking at the newly emerged modes of liability, common purpose liability under Article 25(3)(d) and (indirect) (co)-perpetration' liability under Article 25(3)(a) of the Rome Statute enables conviction under the *dolus directus* of the second degree -when the perpetrator foresees consequences other than those desired as a certainty (but the perpetrator did not desire those secondary consequences). Opening interpretation of genocidal intent to *dolus directus* of the second degree would enable full applicability of newly emerged modes of liability.

CHAPTER 4

Attempted Genocide in International Criminal Law

Nikola Kurková Klímová

1 Introduction

Without large controversies, the drafters of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) decided to criminalise the attempt to commit genocide as one of the other punishable acts under Article III(d). Although, the provision was transposed into the statutes of the International Criminal Tribunal for Rwanda (ICTR)[1] and the International Criminal Tribunal for the Former Yugoslavia (ICTY)[2] *verbatim*, attempted genocide has remained rather unnoticed so far.

The theoretical anxiety surrounding the attempt to commit genocide is related to the fact that there is no consensus on the interpretation of its elements. In national jurisdictions, an attempt is understood as an inchoate act which is penalised although the criminal conduct never reaches the stage of a completed offense as intended by the perpetrator.[3] Criminal legislation is, however, mostly silent on the legal implications of this definition, even more so with respect to the crime of genocide specifically. It is thus open to debate at what stage criminal actions reach the threshold of attempt and whether the requirement of incompleteness refers to the crime of genocide itself or to its underlying acts.[4] Given the absence of any prosecutions, the controversies regarding attempted genocide will arguably not be clarified in full any time soon. In this regard, the recent application of The Gambia against Myanmar before the International Court of Justice (ICJ)[5] based on the Genocide

1 ICTR Statute, Article 2(3)(d).

2 ICTY Statute, Article 4(3)(d).

3 Fletcher, George G., *Rethinking Criminal Law* (1st ed., Oxford: Oxford University Press, 2000), p. 131–2; Robinson, Paul H., *Criminal Law* (New York: Aspen Publishers, 1997), p. 611.

4 Compare Ohlin, Jens D., Attempt to Commit Genocide, in Gaeta, Paola (ed), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009), p. 175; Mettraux, Guénaël, *International Crimes and the Ad Hoc Tribunals* (1st ed., Oxford: Oxford University Press, 2005), p. 257.

5 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Application Instituting Proceedings and Request for Provisional Measures, [2019], para. 112.

Convention provides a rare opportunity to resolve at least some of these doctrinal dilemmas.

2 Definition of Attempt under Public International Law

2.1 *Attempted Genocide in the Travaux Préparatoires of the Genocide Convention*

The criminalisation of the attempt to commit genocide has been debated since the early drafts of the Genocide Convention. Resembling, to a large extent, the wording of Article III(d), the original proposals presented the concept in a slightly different context, making an explicit distinction between genocide as a completed crime and other acts directing to it.[6] It is noticeable that over the entire drafting process, negotiators made very little effort to clarify the terms of attempted genocide, leaving its scope open for future interpretation. Their discussions underlying the criminalisation of other acts directing to genocide may, however, shed some light on their understanding of the concept.

First, the drafters intended to draw a firm line between attempt to commit genocide and preparatory acts penalised by the Genocide Convention.[7] While the concept of attempt remained unqualified, the Secretariat Draft characterised the preparation of genocide with an exhaustive list of acts, covering:

(a) studies and research for the purpose of developing the technique of genocide;
(b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide;
(c) issuing instructions or orders and distributing tasks with a view to committing genocide.[8]

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6 UN Doc. E/447, Article II(1)(1) (Secretariat Draft); UN Doc. 4/794, Article IV(c) (*Ad Hoc* Committee Draft); UN Doc. A/C.6/211 (French Draft); UN Doc. E/AC.25/9 (Chinese Draft); UN Doc. E/AC.25/7 (Soviet Principles). *See* also Ohlin, *supra note* 4, pp. 175–6.

7 The reasons for adopting a different approach towards both concepts were rather pragmatic. Members of the *Ad Hoc* Committee feared an overly extensive interpretation of preparatory acts which could cover situations far too remote from the actual crime of genocide. However, they were also aware of the fact that a detailed listing of preparatory acts could conflict with national criminal legislation and increase the risk of some acts remaining unpunished. *See* UN Doc. E/AC.25/SR.6 and UN Doc. E/AC.25/SR.15. The proposal of criminalising the preparation of genocide was eventually overruled with the explanation that such acts were adequately punishable as conspiracy or complicity. *See* UN Doc. E/AC.25/SR.17 (*Ad Hoc* Committee) and UN Doc. A/C.6/SR.86 (Sixth Committee).

8 UN Doc. E/447, Article II(1)(2).

As the comments by the Polish representative in the *Ad Hoc* Committee indicate, the proposals building upon the Secretariat Draft sought to limit preparatory acts mainly to the securing of means for committing genocide while requiring a closer proximity for acts falling within the category of criminal attempts.[9]

At the same time, the discussion among state representatives regarding the relationship between attempted genocide and incitement to commit genocide suggests that the drafters did not follow a restrictive notion of attempt as the commencement of actual execution of a crime, opting instead for a more open-ended definition.[10] The rationale for this approach may be arguably linked to the preventive aim of the Genocide Convention. The negotiators repeatedly cited the punishment of attempts as an important deterrent to the crime of genocide.[11]

2.2 *Attempt in the Draft Code of Crimes against the Peace and Security of Mankind*

Article III of the Genocide Convention provided inspiration for the work of the International Law Commission (ILC) on the Draft Code of Crimes against the Peace and Security of Mankind.[12] Members of the ILC tabled two alternative proposals on the method of criminalising attempt, qualifying it either as a self-standing crime or as a form of participation in the commission of the principal crimes.[13] Following an examination of the relevant national

9 UN Doc. E/AC.25/SR.6.

10 The United States representatives were the driving force behind the motion to delete the draft provision criminalising public incitement to commit genocide, arguing that such acts were punishable as attempts or conspiracy and that their express inclusion would conflict with the freedom of speech and press. These justifications were largely rebutted by other delegations, especially with reference to the gravity of the acts and the potential weakening of the preventive function of the Genocide Convention. For a detailed discussion, *see* Schabas, William A., *Genocide in International Law* (2nd ed., Cambridge: Cambridge University Press, 2009), pp. 319–24; Timmermann, Wibke K., 'Incitement in International Criminal Law', (2006) 88 *International Review of the Red Cross* 823, p. 835.

11 UN Doc. A/PV.123 and UN Doc. A/C.6/SR.65. *See* also Ohlin, *supra note* 4, pp. 181–2; Eser, Albin, Individual Criminal Responsibility, in Cassese, Antonio (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), pp. 808–9; Mettraux, Guénaël, *International Crimes: Law and Practice. Volume I: Genocide* (1st ed., Oxford: Oxford University Press, 2019), p. 333.

12 Draft Code of Offences against the Peace and Security of Mankind with commentaries (1954), YbILC (1954), vol. II, article 2(12)(III), p. 136–7; Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996), YbILC (1996) vol. II (Part Two), article 2(3)(g), p. 22, para. 17.

13 The ILC members could not reach a consensus on the question whether attempt could pertain to all crimes or whether it was possible only with respect to war crimes or crimes

legislation,[14] the ILC favoured the latter approach, making an exception for the crime of aggression due to the theoretical confusion as to its form as an inchoate act.[15]

Unlike its first version of 1954, the text of the 1996 Draft Code went beyond the mere enumeration of an attempt among punishable acts. Given the fears of diverging interpretations by national courts,[16] the ILC agreed to define attempt to commit a crime against peace and security of mankind as:

> taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.[17]

In the ILC's view, criminal attempt must involve three elements, namely, the intent to commit a specific crime, an action directing to its execution, and non-completion of the crime due to events independent of the offender's will. While the requirement of commencing the execution of a crime could suggest that the drafters intended to limit attempts solely to acts forming part of *actus reus* of that crime, the Special Rapporteur in fact underscored the notorious difficulty in distinguishing between attempts and preparatory acts in practice.[18] This ambiguity was also reflected in the commentary to the 1996 Draft Code which linked the beginning of an attempt with '*a significant step towards the completion of the crime*.'[19] In light of the variety of approaches to this question in national jurisdictions, the ILC left the precise delimitation of attempts for resolution by competent courts.

2.3 *Attempted Genocide under the ICTY and ICTR Statutes*

Although Article III of the Genocide Convention was incorporated in Article 4(3) of the ICTY Statute and Article 2(3) of the ICTR Statute *verbatim*, neither tribunal disentangled the conceptual ambiguities of attempt to commit genocide.

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against humanity. *See* YbILC (1986), Vol. II, Part 2, p. 49, para. 128; YbILC (1990), Vol. II, Part 2, p. 16, paras. 68–76; YbILC (1991), Vol. I, p. 188, para. 24; YbILC (1991), Vol. II, Part 2, p. 99, para. 5; YbILC (1994), Vol. I, p. 145, para. 10; YbILC (1994), Vol. II, Part 2, p. 85, para. 196.

14 YbILC (1986), Vol. II, Part 1, p. 68, paras. 133–41.

15 YbILC (1990), Vol. II, Part 1, p. 34, paras. 66–67.

16 YbILC (1990), Vol. I, p. 28, para. 4.

17 Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996), YbILC (1996) vol. II, Part Two, Article 2(3)(g).

18 YbILC (1986), Vol. II, Part 1, p. 68, paras. 137–8.

19 Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996), YbILC (1996) vol. II, Part Two, Article 2(3)(g), p. 22, para. 17.

For the period of the tribunals' existence, no defendant was ever prosecuted for this act which thus received only minor attention, mostly in the context of debates on modes of liability. For instance, in *Akayesu*, the ICTR Trial Chamber placed attempted genocide set out in Article 2(3) of the ICTR Statute in a sharp contrast with the forms of criminal participation listed in Article 6(1) of the ICTR Statute, ranging from planning, instigating, and ordering to commission.[20] With reference to the Draft Code of Crimes Against the Peace and Security of Mankind, the Trial Chamber explained that the individual criminal responsibility under Article 6(1) of the ICTR Statute presupposed the actual occurrence of a crime while the same condition did not apply to attempt as an inchoate offense.[21] The provision on attempted genocide was thus described as an exception, imposing criminal responsibility for acts which did not necessarily need to produce harmful effects.

Apart from the sporadic references to attempted genocide, the ICTY and the ICTR never addressed attempt as a mode of liability for other international crimes in its adjudicatory practice. In *Vasiljević*, the ICTY Trial Chamber was seized with the case of murder of seven Bosnian Muslim men by the eastern bank of the Drina River in 1992.[22] While five victims were directly executed, two civilians managed to survive the shooting by falling into the water and pretending to be dead.[23] Instead of bringing charges for attempted murder as a crime against humanity under Article 5(a) of the ICTY Statute, the Prosecutor decided to indict Mitar Vasiljević and his two co-accused Milan Lukić and Sredoje Lukić of other inhumane acts under Article 5(i) of the ICTY Statute and violence to life and person under Article 3(1)(a) of the Geneva Conventions.[24]

This choice was arguably strategic for two reasons. First, neither the ICTY nor the ICTR Statute explicitly criminalised attempt as a general form of individual criminal responsibility which would pertain to all international crimes.[25] However, some authors argue that by the 1990s, 'attempt' had already

20 ICTR, *Prosecutor v. Jean-Paul Akayesu* (Judgment) ICTR-96-4-T, TCh (2 September 1998), para. 473.

21 *Ibid*, para. 475.

22 ICTY, *Prosecutor v. Mitar Vasiljević* (Judgment) IT-98-32-T, TCh (29 November 2002), paras. 97–8.

23 *Ibid.*

24 *Ibid*, para. 96.

25 The conceptual incongruity between genocide-specific modes of liability in Article 4(3) of the ICTY Statute and general heads of individual criminal responsibility in Article 7(1) of the ICTY Statute was criticised by the ICTY Trial Chamber in ICTY, *Prosecutor v. Radislav Krstić* (Judgment) IT-98-33-T, TCh (2 August 2001), para. 640. *See* also Ohlin, *supra note* 4, pp. 182–3. According to Schabas, there was no need to incorporate a general

crystallized into customary international law and could be thus invoked in the proceedings.[26] Even if this view was accepted, it is still debatable whether attempted crimes against humanity or war crimes would satisfy the seriousness threshold in Article 1 of the Statutes.[27] Interestingly, the Trial Chamber did not seem to take issue with this matter, describing the attempted murder of two Bosnian Muslim civilians as a serious attack on their human dignity inflicting grave physical and mental suffering, and found Vasiljević guilty of inhumane acts as a crime against humanity.[28]

2.4 *Attempt under the Rome Statute*

The most elaborate codification of attempt[29] as a mode of liability was incorporated in Article 25(3)(f) of the Rome Statute which imposes individual criminal responsibility if a 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.

The drafters of the Rome Statute did not follow the model in the ICTY and ICTR Statutes and decided to sanction an attempt with respect to all crimes within the jurisdiction of the ICC,[30] placing it among the general principles of

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attempt provision because both the ICTY and the ICTR were established after the crimes had already occurred, *see* Schabas, *supra note* 10, p. 281.

26 Cryer, Robert, Robinson, Darryl, Vasiliev, Sergey, *An Introduction to International Criminal Law and Procedure* (4th ed., Cambridge: Cambridge University Press, 2019), p. 364; Cassese, Antonio, 'Black Letter Lawyering vs Constructive Interpretation: The Vasiljević Case', (2004) 2 *Journal of International Criminal Justice* 265, pp. 266–71; Werle, Gerhard, Jessberger, Florian, *Principles of International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2014), p. 264.

27 Ohlin, *supra note* 4, p. 183; Mettraux, *supra note* 4, p. 293.

28 ICTY, *Prosecutor v. Mitar Vasiljević* (Judgment) IT-98-32-T, TCh (29 November 2002), para. 230.

29 ICTY, *Prosecutor v. Beqa Beqaj* (Judgment on Contempt Allegations) IT-03-66-T-R77, TCh (27 May 2005), para. 25.

30 Ohlin, *supra note* 4, p. 180; Triffterer, Otto, Ambos, Kai, *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., Munich: C.H.Beck, Hart, Nomos, 2016), p. 1019; Eser, *supra note* 11, p. 808.

criminal law in Part 3 of the Rome Statute. Indeed, this seems to be the correct approach since it eliminates problematic duplications[31] and brings the concept of attempt more into line with its legal sources, tracing back to the French *Code pénal* and American Model Penal Codes.[32]

Article 25(3)(f) of the Rome Statute is composed of two sentences. The definition of attempt in the first sentence somewhat departs from its predecessor in the 1996 Draft Code, adding a new qualifying element of a substantial step. Despite this clarification, the provision still causes difficulties in answering the question of when an attempt actually occurs. On one hand, the Pre-Trial Chamber I in *Banda and Jerbo Jamus* made clear that Article 25(3)(f) of the Rome Statute went above mere preparation.[33] This finding fully corresponds with the ILC's view during the drafting process on the 1996 Draft Code.[34]

On the other, more controversies arise as to whether attempt requires the commencement of *actus reus* of a crime or whether actions merely directing to it could also fulfil the threshold. Until now, the ICC has merely dealt with charges of attempted murders which occurred during ongoing attacks.[35] For instance, in *Ongwen*, the Pre-Trial Chamber II agreed with the Prosecutor on the qualification of indiscriminate shooting and burning down of houses with civilians caught inside by fighters of the Lord's Resistance Army in the context of a series of attacks at internally displaced persons' camps as attempted murders, noting that some victims managed to survive despite the perpetrators' actions.[36] Similarly, in *Banda and Jerbo Jamus*, the Pre-Trial Chamber I confirmed charges of attempted murder for shooting at eight peacekeeping

31 Triffterer and Ambos, *supra note* 30, p. 1019.

32 *Ibid*, pp. 1019-20; Schabas, *supra note* 10, p. 338; Cryer, Robinson, Vasiliev, *supra note* 26, p. 364; Werle, Jessberger, *supra note* 26, p. 264 *et seq.*; Heller, Kevin J., The Rome Statute of the International Criminal Court, in Heller, Kevin J., Dubber, Markus D. (eds.), *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press, 2011), p. 609.

33 ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Corrigendum of the 'Decision on the Confirmation of Charges') ICC-02/05-03/09, PTCh I (7 March 2011), paras. 96-97.

34 YbILC (1986), Vol. II, Part 2, p. 49, para. 129.

35 ICC, *Prosecutor v. Bosco Ntaganda* (Decision on the Confirmation of Charges) ICC-01/04-02/06-309, PTCh II (9 June 2014), para. 36 *et seq.*; ICC, *Prosecutor v. Laurent Gbagbo* (Decision on the Confirmation of Charges) ICC-02/11-01/11-656-Red, PTCh I (12 June 2014), para. 197 *et seq.*; ICC, *Prosecutor v. Charles Blé Goudé* (Decision on the Confirmation of Charges) ICC-02/11-02/11-186, PTCh I (11 December 2014), para. 121; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717, PTCh I (30 September 2008), paras. 458–64.

36 ICC, *Prosecutor v. Dominic Ongwen* (Decision on the Confirmation of Charges) ICC-02/04-01/15-422-Red, PTCh II (23 March 2016), paras. 27, 34, 41, 47, 54, 60.

personnel of the African Union Mission in Sudan who had survived their serious injuries thanks to medical assistance provided immediately after the attack.[37]

Yet, these findings do not automatically imply that the ICC would not also be ready to accept closely proximate acts immediately preceding such attacks, for example a siege of a civilian residential area by armed forces which would be frustrated by a third party, as attempted crimes. The legal qualification of individual attempted acts would heavily depend on evidence related to the purpose, means, and method of the thwarted attack. This approach has been, to some extent, already suggested by the Pre-Trial Chamber I in *Katanga* where the judges refused to confirm simultaneous charges of attempted murder under Article 7(1)(a) and other inhumane acts under Article 7(1)(k) of the Rome Statute, concluding that given the indiscriminate nature of attacks against victims and types of weapons used during these attacks, they saw no reason to downgrade the perpetrators' special intent to murder the civilian population of Bogoro to "mere" intent to cause severe injuries.[38] In the view of the Pre-Trial Chamber I, the absence of harmful effects, forming part of *actus reus* of murder, was an inherent feature of criminal attempt.[39] The legal qualification of the act, however, has to fully capture the scope of the perpetrator's criminal intent as inferred in the proceedings.[40]

The more expansive interpretation of the first sentence of Article 25(3)(f) of the Rome Statute is finally corroborated by the doctrinal understanding of its terms. The provision conceptually combines classic formulations of attempt found in the French *Code pénal* ('*commencement d´éxecution*')[41] and the American Model Penal Code ('*a substantial step in a course of conduct planned to culminate in his commission of the crime*').[42] While their wording is seemingly contradictory, the French scholarly literature has always construed criminal attempt as a mode of liability covering "*tout acte qui tend directement au délit*."[43] As a consequence, narrowing Article 25(3)(f) of the Rome Statute

37 ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Corrigendum of the 'Decision on the Confirmation of Charges') ICC-02/05-03/09, PTCh I (7 March 2011), paras. 94–100.

38 ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717, PTCh I (30 September 2008), paras. 462, 464.

39 *Ibid*, para. 463.

40 *Ibid*, paras. 460, 464.

41 France, *Code pénal* (1992), Articles 121–5.

42 American Law Institute, *Model Penal Code and Commentaries* (1985), Article 5(1).

43 Triffterer, Ambos, *supra note* 30, p. 1020; Eser, *supra note* 11, pp. 812–3; Elliott, Catherine, 'France', in Heller, Dubber, *supra note* 32, pp. 220–1.

only to the criminalisation of acts that constitute at least partial execution of a crime would be in conflict with its legal roots.[44]

Thanks to a last-minute proposal tabled by Japan with the support of Germany, Argentina, and other like-minded states,[45] Article 25(3)(f) of the Rome Statute furthermore accounts for the possibility of voluntary abandonment of attempt. Confusingly, the provision does so in two forms. In the last part of the first sentence, reverting to the negative definition under the French law,[46] it conceptualises attempt as an inchoate act which did not occur due to circumstances independent of the perpetrator's intentions. Conversely, this means that attempt is not subject to criminal sanctions if the incompleteness of a crime was the result of the perpetrator's wilful actions. The same principle is in essence reiterated in the second sentence of Article 25(3)(f) of the Rome Statute[47] that adopts a positive and explicit approach instead.

Putting this duplication aside, the second sentence of Article 25(3)(f) of the Rome Statute is not, however, entirely redundant as it clarifies, at least generally, conditions for abandonment.[48] First, in cases of so-called unfinished attempts, perpetrators can abandon the commission of a crime simply by discontinuing their prohibited actions. Since they have not yet taken all steps necessary for bringing about the harmful results, it is sufficient to refrain from furthering their criminal conduct, such as to stop shooting at a victim, without the need to make any other active efforts to forestall the crime. The conditions are different for so-called finished attempts where the offender's prior actions would in a normal course of events inevitably result in the completion of a crime. Here, more than a mere withdrawal is required because perpetrators must also endeavour to prevent the effects of their criminal conduct, for instance by providing medical assistance to an injured victim.

Despite these helpful clarifications, Article 25(3)(f) of the Rome Statute still leaves out several problematic points, such as which conditions must be fulfilled for the abandonment to be perceived as voluntary, whether perpetrators may receive assistance from a third person to prevent the occurrence of

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44 Triffterer, Ambos, *supra note* 30, p. 1020; Heller, *supra note* 32, p. 609; Mettraux, *supra note* 11, pp. 334–5.

45 Triffterer, Ambos, *supra note* 30, p. 1021; Eser, *supra note* 11, p. 814; Schabas, *supra note* 10, p. 338.

46 Article 121–5 of the French *Code pénal* (1992) reads: '*La tentative est constituée dès lors que, manifestée par un commencement d'exécution, elle n'a été suspendue ou n'a manqué son effet qu'en raison de circonstances indépendantes de la volonté de son auteur.*'

47 Triffterer, Ambos, *supra note* 30, p. 1021; Ohlin, *supra note* 4, p. 181, fn. 49.

48 For a discussion of conditions of abandonment under the Rome Statute, *see* Eser, *supra note* 11, pp. 814–7.

a crime, to what extent they would be criminally responsible for other crimes which were completed before the abandonment, or whether they could avoid criminal sanctions should the crime be completed by other participants. National jurisdictions provide different answers to these questions[49] and the positions of negotiators on these points during the Rome Conference were far from being uniform.[50] As a result, the drafters decided to let the Court fill these gaps.

3 Elements of Attempt from a Doctrinal Perspective

3.1 *Mens Rea*

The mental element of attempt corresponds to the mental element required for a completed crime.[51] The *mens rea* thus must anticipate the fulfilment of all elements of a crime and encompass the perpetrators' decision to execute a crime otherwise they would be prosecuted for mere criminal thoughts. For instance, if a person deliberately shoots at a spot close to a victim to scare them, it is doubtful whether such a conduct should attract criminal responsibility for attempted murder or grievous bodily harm rather than, as some national jurisdictions would provide, for mere dangerous threatening.

The same reasoning should undoubtedly apply to the element of *dolus specialis* required for the crime of genocide, i.e., the special intent to destroy a protected group in whole or in part. In its absence, the stabbing of several members of an ethnic group who would survive the attack could qualify as attempted murder, but not attempted genocide simply because the perpetrator did not aim to target the protected group as such.

By definition, criminal responsibility for attempt is excluded in the case of crimes which do not require a purposeful action and may thus be committed with negligence. Perpetrators of negligent crimes lack the intention to bring about a harmful result. In fact, the only reason why these crimes are penalised is the absence of the perpetrators' foresight that their actions would cause the

49 For a discussion, *see* Heller, Dubber, *supra note* 32; Dubber, Markus D., Hörnle, Tatjana, *Criminal Law: A Comparative Approach* (1st ed., Oxford: Oxford University Press, 2014), pp. 342–58; Fletcher, *supra note* 3, pp. 184–97; Fletcher, George G., *Basic Concepts* (1st ed., Oxford: Oxford University Press, 1998), pp. 181–4.

50 Triffterer, Ambos, *supra note* 30, p. 1021.

51 *See* Robinson, *supra note* 3, pp. 632–3; Fletcher, *supra note* 3, p. 180; Fletcher, *supra note* 49, p. 175; Satzger, Helmut, *International and European Criminal Law* (2nd ed., Munich: C.H. Beck, Hart, Nomos, 2012), pp. 245–53.

prohibited consequences. In this regard, sanctioning an attempted negligent act would practically mean sanctioning mere innocent conduct.[52] At the same time, some jurisdictions do not necessarily link attempt only with *dolus directus*, but also impose penalties on perpetrators acting with *dolus eventualis*, thus criminalising recklessness towards the harmful effects of their criminal conduct.[53]

3.2 *Substantial or Significant Step*

Unlike in the case of a completed crime, the criminal responsibility for attempt arises although *actus reus* is not fulfilled. While there is a general understanding that attempt requires an action going beyond mere preparation of a crime,[54] national legal systems use various terms for testing the proximity between attempt and a completed offense.[55] Their differences are, nevertheless, more elusive than real. In fact, the doctrinal research shows that attempt does not need to fulfil any elements of *actus reus* as long as the perpetrator takes a substantial step to execute a crime.[56] Whether a particular act satisfies this standard will be necessarily subject to a case-by-case judicial analysis. Except for the US Model Penal Code, which lists a series of illustrations, such as lying in wait, following a contemplated victim, unlawful entry into the place of the crime, or possessing materials necessary for the commission of the crime,[57] national legislation typically does not provide any detailed guidance in this regard.

In scholarly debates, theorists disagree whether a substantial step can also be accomplished in the case of so-called impossible attempts which cannot,

52 Ohlin, *supra note* 4, p. 177; Robinson, *supra note* 3, pp. 631–2.

53 *See* for instance Eser, *supra note* 11, p. 811 (discussing *mens rea* for attempt under German law); Ferrante, Marcelo, 'Argentina', in Heller, Dubber, *supra note* 32, p. 26 (discussing *mens rea* for attempt under Argentinian law).

54 Ohlin, *supra note* 4, p. 178; Fletcher, *supra note* 49, pp. 175–6; Fletcher, *supra note* 3, pp. 135–6; Bronitt, Simon, 'Australia', in Heller, Dubber, *supra note* 32, p. 60; Kugler, Itzhak, 'Israel', in Heller, Dubber, *supra note* 32, p. 368; Ashworth, Andrew J., 'United Kingdom', in Heller, Dubber, *supra note* 32, p. 538.

55 *See* for instance American Law Institute, *Model Penal Code and Commentaries* (1985), Section 5.01(1) (defining attempt as an act or omission "*constituting a substantial step in a course of conduct*"); France, *Code pénal* (1992), Articles 121–5 (referring to the "*commencement d'exécution*"); Germany, *Strafgesetzbuch* (1998), Section 22 (sanctioning persons who "*nach seiner Vorstellung von der Tat zur Verwirklichung des Tatbestandes unmittelbar ansetzt*"); United Kingdom, *Criminal Law Act* (1981), Section 1(1) (defining attempt as an act "*more than merely preparatory to the commission of the offence*").

56 Ohlin, *supra note* 4, p. 178; Elliott, *supra note* 43, p. 220; Weigend, Thomas, 'Germany', in Heller, Dubber, *supra note* 32, pp. 263–4.

57 American Law Institute, *Model Penal Code and Commentaries* (1985), Section 5.01(2).

under any event, result in a completed crime.[58] This concept is closely related to the perpetrators' mistaken belief about the factual circumstances of a crime, such as, when they shoot at a dead body or when they stab a person whom they wrongly hold for a member of an ethnic minority. The criminalisation of impossible attempts differs between proponents of a subjective and objective approach. Objectively, these attempts can never reach the stage of a completed crime and should thus not warrant criminal sanctions. Contrarily, the subjective theory accentuates the perpetrators' guilty mind and their belief that they are in fact executing a crime. At first glance, both theories represent extreme positions. As a middle ground, adjudicators should arguably consider the nature of the concrete act as well as its danger to the society before deciding whether the perpetrator's conduct should remain unpunished. These considerations are of special importance for attempted genocide.

3.3 *Incompleteness of the Crime*

An inherent element of attempt is the incompleteness of a crime. In other words, attempt is a stage immediately preceding the full execution and becomes unpunishable once it merges with a completed offense.[59] Otherwise, perpetrators would incur criminal responsibility for the same act twice.

In the case of genocide, the interpretation of the element of incompleteness is controversial. First, the incompleteness may be related to the underlying acts of the crime of genocide,[60] such as attempted killing of members of a protected group or attempted forcible transfer of children of one group to another, and prosecutions before national courts have followed this approach so far.[61] Second, even if a perpetrator murders one victim with genocidal intent, the genocidal plan may be, nevertheless, frustrated and the crime of genocide

58 For a discussion *see* Eser, *supra note* 11, p. 813; Fletcher, *supra note* 3, pp. 146–57; Ohlin, *supra note* 4, pp. 178–9.

59 Fletcher, *supra note* 3, p. 132.

60 Ohlin, *supra note* 4, p. 179.

61 *See* The Netherlands, District Court of The Hague, *Prosecutor v. Yvonne Basebya* (Judgment) Case No. 09/748004-09 (1 March 2013) (regarding prosecution for attempted genocide in the form of killings of Tutsis which resulted in an acquittal due to lack of evidence); Germany, Federal Constitutional Court, *Prosecutor v. Nikola Jorgić* (Judgment) 2 BvR 1290/99, 4th Chamber of the Second Senate (12 December 2000) (regarding the prosecution for attempted murder of Bosnian Muslims which resulted in a sentence of life imprisonment). A similar approach was adopted also in trials before national courts for charges of war crimes, *see* The Netherlands, District Court of The Hague, *Prosecutor v. Joseph Mpambara* (Judgment) Case Nos. 09/750009-06 and 09/750007-07 (23 September 2009) (regarding prosecution for war crimes including attempted rape of Tutsis which resulted in partial acquittal).

would thus never occur.[62] A final option is the combination of both preceding scenarios.[63]

At first glance, all above described situations would fit the characteristics of criminal attempt. However, the two former options could be equally perceived as the completed crime of genocide. For instance, in some national jurisdictions, perpetrators who injured members of a protected group and voluntarily refrained from further shooting would escape responsibility for attempted killing but could still be punished for the crime of genocide as they might have already completed the act of causing serious bodily or mental harm.[64] Similarly, if perpetrators stabbed to death (with genocidal intent) several victims in an isolated incident, the killing could strictly speaking amount to a completed crime of genocide[65] which requires merely the intent to destroy, in whole or in part, a protected group rather than its actual destruction.[66]

The latter line of reasoning was to some extent adopted by the ICTY in *Krstić*, who had been charged with the genocide of Bosnian Muslims in Srebrenica.[67] Although the crime was committed in a small geographical area, the Trial Chamber put emphasis on the perpetrators' subjective perception of the protected group[68] and concluded that it was sufficient if they understood the targeted victims at least as a distinct part of it.[69] The judgment was heavily criticised for setting too low of a standard for genocide which is generally perceived as a large-scale crime.[70]

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62 *Ibid.*

63 *Ibid.*

64 Thaman, Stephen C., 'Russia', in Heller, Dubber, *supra note* 32, p. 422.

65 For a discussion on the link between the crime of genocide and the existence of a widespread and systematic practice, *see* Cassesse, Antonio, *International Criminal Law* (1st ed., Oxford: Oxford University Press, 2003), p. 100.

66 *See* ICTY Statute, Article 4(2); ICTR Statute, Article 2(2); Rome Statute, Article 6. For these reasons, some others argue that genocide in itself constitutes an inchoate crime, *see* Ohlin, *supra note* 4, p. 174; Teitel, Ruti, 'The International Criminal Court: Contemporary Perspectives and Prospects for Ratification', (2000) 16 *New York Law School Journal of Human Rights* 505, p. 526.

67 ICTY, *Prosecutor v. Radislav Krstić* (Judgment) IT-98-33-T, TCh (2 August 2001), para. 539.

68 The Trial Chamber found that the Bosnian Muslims of Srebrenica and Eastern Bosnia constituted a part of a protected group within the meaning of Article 4(2) of the ICTY Statute. *Ibid*, paras. 559–60.

69 *Ibid,* para. 590. These findings were upheld also by the Appeals Chamber, *see* ICTY, *Prosecutor v. Radislav Krstić* (Judgment) IT-98-33-A, ACh (19 April 2004), paras. 12–23.

70 Schabas, William, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia', (2002) 25 *Fordham International Law Journal* 23, pp. 45–7; Southwick, Katherine, 'Srebrenica as Genocide? The Krstić Decision and the Language of the Unspeakable', (2005) 8 *Yale Human Rights and Development Law Journal* 188, pp. 206–11.

Reflecting this criticism, the attempt to commit genocide could arguably be a more fitting charge if perpetrators mistakenly believe that they destroyed an important part of a protected group, but such a part was not in fact substantial from a legal point of view. This mistake should be understood as a circumstance independent of the perpetrators' intentions and thus qualify as attempt.[71] The gravity of the perpetrators' criminal purpose should not be degraded to another international crime simply because the genocide was not objectively feasible. Indeed, as noted above, if these impossible attempts automatically escaped penalisation, international criminal law would fail to fully appreciate the perpetrators' original intent and to punish highly dangerous acts to the society. A more nuanced approach to imposing criminal sanctions should be preferred in this respect.

Finally, an identical finding regarding the existence of attempted genocide must be made all the more so in scenarios when perpetrators kill a number of members of a protected group, acknowledging that they do not form its substantial part, but additional planned attacks are frustrated by the enforcement authorities. Again, the crime of genocide would remain incomplete, yet the perpetrators should be prosecuted for such an attempt since they already commenced the *actus reus* of the crime and their intention also covered further criminal acts with the aim to destroy the protected group.

3.4 *Abandonment of Attempt*

According to all modern legal systems, perpetrators can escape criminal responsibility for an attempted crime if they voluntarily discontinue their prohibited conduct.[72] The rationale for this defence is twofold; first, to motivate perpetrators to refrain from completing a crime, and second, to limit criminal sanctions solely to offenses which are dangerous to a society.[73]

In most national jurisdictions, the abandonment of an attempt implies not only a withdrawal from prohibited conduct but also surrender of the criminal purpose. Depending on the stage of completion, the perpetrator is required to suspend their actions or even take active steps to prevent the occurrence of harm. On this point, a question arises whether perpetrators must try to erase

71 The same conclusion should be arguably reached in a scenario when a perpetrator mistakenly believes that a victim belongs to a protected group. *See* Quigley, John, *The Genocide Convention: An International Law Analysis* (1st ed., Hampshire: Ashgate Publishing, 2006), pp. 160–1.

72 Ohlin, *supra note* 4, p. 180; Triffterer, Ambos, *supra note* 30, p. 1021; Fletcher, *supra note* 3, p. 181.

73 Ohlin, *supra note* 4, p. 180; Fletcher, *supra note* 3, pp. 186–8.

the harmful consequences of their actions alone. For instance, the French *Code pénal* exempts persons from criminal responsibility who prevent the completion of specific offenses by alerting competent legal or administrative authorities.[74] Similarly, German law grants impunity to persons that try to prevent a crime, but its prohibited effects have been in fact averted by others.[75] On one hand, there seem to be no plausible reason why the same principle should not be transposed into international criminal law. On the other hand, the crime of genocide is associated with a contextual element which accounts for the possible involvement of state authorities as creators of the criminal policies. Expanding the scope of this defence in the direction suggested by some national jurisdictions should thus be considered with the utmost caution.

In addition to the physical frustration of a crime, abandonment must equally encompass the complete and voluntary renunciation of the criminal purpose. This requirement is explicitly stressed, for instance, in the US Model Penal Code.[76] As it clarifies, abandonment of attempt is ineffective when perpetrators merely postpone the commission of a crime or when their renunciation of criminal purpose is motivated by circumstances which make the completion of a crime more difficult or which increase the prospects of apprehension.[77] In practice, defining purely voluntary abandonment has posed substantial difficulties. For these reasons, national jurisdictions typically leave these questions subject to the courts' interpretation on a case-by-case basis.

4 State Responsibility for Attempted Genocide

Although the Genocide Convention remains unclear on this matter, the prohibition of genocide and other punishable acts under its Article III incurs not only individual criminal responsibility but also the responsibility of states. Understandably, state responsibility for genocide and other punishable acts, including attempt, is qualitatively different.[78] However, it arguably struggles with similar theoretical ambiguities.

74 *See* for instance France, *Code pénal* (1992), Articles 132–78, 221-5-3, 222-6-2, 222-43-1.

75 Weigend, *supra note* 56, p. 264.

76 American Law Institute, *Model Penal Code and Commentaries* (1985), Section 5.01(4).

77 *Ibid.*

78 *See* ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment [2007] I.C.J. Rep 2007, p. 43, para. 170. A discussion on the relationship between individual criminal responsibility and state responsibility also took place during the process of

The contours of state responsibility for genocide were briefly outlined in the decisions of the ICJ in the *Bosnian Genocide* case. The ICJ did not have the opportunity to directly address Bosnia's allegations against Serbia regarding its responsibility for attempted genocide under the Genocide Convention[79] because these counts had been withdrawn before the final submission.[80] It did, nevertheless, discuss the possibility of holding states responsible under public international law for committing genocide and other acts enumerated in Article III of the Genocide Convention. The ICJ presented three arguments for its proposition. First, the prohibition of genocide as an international crime was found to be intricately linked to the obligation of states to prevent the commission of genocide.[81] Exempting states from this prohibition would effectively mean that they would have to stop persons unrelated to the state apparatus from committing the crime but would be free to pursue genocidal policies themselves through organs or persons whose acts are attributable to them.[82] This extensive interpretation found further support in Article IX of the Genocide Convention[83] which grants jurisdiction to the ICJ over disputes between Contracting Parties regarding both interpretation, application, and fulfilment of the Convention and "*the responsibility of a State for genocide or for any of the other acts enumerated in* [A]*rticle III*." The Court finally corroborated their finding with reference to the *travaux préparatoires* of the Genocide Convention[84] which revealed that its drafters repeatedly rejected proposals incorporating criminal responsibility of states for the crime of genocide but at the same time agreed to grant jurisdiction to the ICJ over the responsibility of states for genocide and other punishable acts in Article III as internationally wrongful acts under public international law.[85]

Given the scarce references to attempted genocide, it is far from clear how the ICJ intended to construe the elements of attempt in connection with state responsibility. The conundrum can be probably best illustrated with respect to

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the drafting of the Articles on Responsibility of States for Internationally Wrongful Acts, *see* Schabas, *supra note* 10, pp. 513–5.

79 ICJ, *Bosnian Genocide*, *supra note* 78, para. 65.

80 *Ibid*, para. 416.

81 *Ibid,* para. 166.

82 *Ibid.*

83 *Ibid,* paras. 168–9.

84 *See* UN Doc. A/C.6/236; UN Doc. A/C.6/SR.92; UN Doc. A/C.6/SR.95; UN Doc. A/C.6/SR.96; UN Doc. A/C.6/SR.97; UN Doc. A/C.6/SR.99; UN Doc. A/C.6/SR.100; UN Doc. A/C.6/SR.103; UN Doc. A/C.6/SR.104; UN Doc. A/C.6/SR.105.

85 ICJ, *Bosnian Genocide*, *supra note* 78, paras. 175–8. For a detailed discussion, *see* Schabas, *supra note* 10, pp. 492–9.

the Court's brief comments on Bosnia's submission under Article II(c) of the Genocide Convention where it stated:

> Article II(c) of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. … Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.[86]

At first sight, it seems that the ICJ understood attempted genocide as involving incomplete underlying acts, such as the attempted deportation of the protected group.[87] Yet, the next sentence suggests that the Court was also willing to interpret attempted genocide as an incomplete crime due to a failed policy of cultural genocide.[88] Leaving these ambiguities aside, the ICJ eventually appears to have favoured, at least implicitly, the latter approach. In the discussion of the relationship between genocide proper and other punishable acts, the Court held that it would be '*logically and legally*'[89] untenable to find a state simultaneously responsible for the crime of genocide as well as for its attempt and complicity in genocide. The judges thus relied on the doctrine of merger of a completed crime with its preceding stages,[90] possibly implying that the attempted genocide related to the overall crime and not merely to predicate acts.

Considering the features of the crime of genocide and the scope of attributable acts that give rise to state responsibility, the comment of the ICJ seems reasonable. It is indeed difficult to imagine scenarios when a state would commit attempted genocide for instance in the form of attempted killing since the crime as such can be executed by other perpetrators acting on behalf of the state. As a result, states would most probably be held responsible for the attempt to commit genocide if their genocidal policies were frustrated. There

86 ICJ, *Bosnian Genocide*, *supra note* 78, para. 320.

87 Ohlin, Jens D., State Responsibility for Conspiracy, Incitement, and Attempt to Commit Genocide, in Gaeta, Paola (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009), p. 379.

88 *Ibid.*

89 ICJ, *Bosnian Genocide*, *supra note* 78, para. 380.

90 Ohlin, *supra note* 87, p. 380.

are many unresolved points though that have yet to be clarified, such as at what stage the genocidal policy would reach the threshold of an attempt or whether states should be allowed to avoid international responsibility if they abandoned the attempt to commit genocide. On the one hand, the defence of abandonment is not listed among the circumstances precluding wrongfulness and does not thus fall expressly within the scope of Article 26 ARSIWA which prohibits a state from invoking these defences to justify violations of peremptory norms. On the other hand, even if the state does not fully execute its genocidal policy but instead backtracks, its actions could already qualify as a completed attempt in violation of the peremptory norm under Article III(d) of the Genocide Convention and it is plausible to argue that the logic of Article 26 of the ARSIWA should equally extend to the defence of abandonment.

5 Concluding Remarks

The doctrinal debates regarding attempt as a mode of liability in international criminal law are undoubtedly far from nearing their end. Although provisions criminalising either attempted genocide as an inchoate act or attempt as a general form of participation common to all crimes appear in most international criminal statutes, their effect has been rather marginal in practice. This omission may be explained in two points. International criminal law has been developed to punish the most horrific crimes threatening world peace and security. As a result, qualifying some of these acts as 'mere attempts', even if it were legally more accurate, could possibly be perceived as downplaying their seriousness for the international community. Furthermore, it is a well-known fact that international criminal courts and tribunals have struggled with limited capacities and problematic cooperation of state authorities. Under these circumstances, it is understandable that prosecutors have concentrated their efforts on completed international crimes which are necessarily easier to be proven than attempts. The heavy burden of clarifying the theoretical confusion regarding attempted genocide or other international crimes will thus arguably rest mostly on national courts, however, only limited opportunities have appeared in this regard so far.

PART 3

Specially Protected Groups

CHAPTER 5

A House with Four Rooms Only?

The Protected Groups under the Definition of Genocide

Veronika Bílková

1 Introduction

The crime of genocide, as defined in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention or GC), is notorious for its narrow scope. It only encompasses violent acts directed against members of four protected groups enlisted in Article II – national, ethnical, racial and religious groups. Violent acts directed against members of other groups, even if they otherwise meet all the characteristics of genocide (violent acts, targeting members of a certain group, special intent to destroy such a group in whole or in part), do not fall under the GC. These acts may be prosecuted as crimes against humanity or war crimes or, at least, they may amount to serious offences under national law. None of these alternative qualifications, however, carries the same symbolic value as does the finding that genocide has been committed. None moreover brings about the same public condemnation of perpetrators and the same compassion for victims. Genocide stands apart as the *"the crime of crimes"*[1] – and it is so exactly due to the fact that unlike crimes against humanity, war crimes or common offences, it is directed not only, and not so much, against individual human beings but also, and primarily, against entire human groups.

The narrow scope of Article II of the GC has, over the years, given rise to criticism, both among states and among scholars.[2] It has been argued, again both by states and by scholars, that the list of the protected groups should be extended to encompass some or, even, all other human groups as well. Three main mechanisms through which such an extension could take place and, in some views, has already taken place, have been proposed. One consists in the

1 Schabas, William A., *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2000), title.

2 See Nersessian, David L., *Genocide and Political Groups* (Oxford University Press, 2010); van Schaack, Beth, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', *Yale Law Journal,* vol. 106(7), 1997, pp. 2259–2292.

(re)interpretation of Article II of the GC. The second consists in the development of a new rule of customary international law that would exist in parallel to the treaty regulation and would be broader in scope. The third mechanism presupposes a formal revision of the GC or, alternatively, the adoption of a new international instrument on genocide or some forms thereof. This paper scrutinizes the three mechanisms. It discusses whether, and to what extent, they could result in the inclusion under the definition of genocide, of violent acts directed against other than the four protected groups. It also considers whether, and to what extent, such an inclusion has already occurred.

The paper argues that the understanding of the protected groups has indeed not remained static. Yet, rather than leading to the extension of the list of the protected groups, the changes – carried out through the (re)interpretation of Article II of the GC in the case law of international courts and in the implementing acts at the national level – have made the definitions of the four protected groups enshrined in Article II more flexible. At the same time, the paper argues that there is nothing in the concept of genocide or in international law that would make the future extension of the list of the protected groups – through the development of a new customary rule or through a revision of the GC or the adoption of a new treaty – impossible. While such legal developments have not taken place yet, nor are they likely to occur in the near future, the reasons for that are pragmatic rather than legal or conceptual. The definition of genocide, as enshrined in Article II of the GC is the product of its time – and it reflects the experiences and legal, political, and other conceptions of those times. Since times have changed and the experiences and conceptions have changed with them, there is no reason why this should remain without an impact on the understanding of genocide.

The paper consists of four sections. The first three sections map the legal developments related to the protected groups. The first section traces the origins of the crime of genocide in the work of Raphael Lemkin and in the negotiations leading to the adoption of the GC in 1948. It shows that the inclusion of only four groups into the definition of genocide was heavily informed by the atrocities committed by the Nazi Germany and by pre-war minorities treaties. The second section focuses on the case law of the *ad hoc* international criminal tribunals and on other important legal developments that have occurred at the international level since 1948. It shows that the understanding of the protected groups has not remained static but has been subject to various (re)interpretations. The third section pertains to the developments at the national level. It gives an overview of the lists of the protected groups contained in national criminal codes and discusses the relevant national case law. Building on the material collected, and analysed, in the first three sections, the fourth section

scrutinizes the viability of the extension of the protected groups through the three available mechanisms and it provides evidence in support of the argument introduced above.

2 From Lemkin to the Genocide Convention

The Genocide Convention, adopted in 1948, enshrines a narrow definition of the crime of genocide that is limited to acts directed against members of only four protected groups. This regulation is the outcome of lengthy negotiations that took place in several bodies established at the UN in 1946–1948. The course of these negotiations is outlined in the second subsection. The first subsection recalls the work of Raphael Lemkin, who is generally considered as the spiritual father of the crime of genocide, because he proposed both the concept of this crime and the term to denote it.

2.1 *The Invention of the Crime of Genocide: Raphael Lemkin (1944)*

The term genocide was coined by the Polish scholar of the Jewish origin, Raphael Lemkin, in the 1940s.[3] It combines the ancient Greek word *genos* which denotes race or tribe and the Latin word *cide* which means killing. It is modelled on similar words such as homicide or tyrannicide. In his 1944 book *Axis Rule in Occupied Europe*,[4] Lemkin defined genocide as "*the destruction of a nation or of an ethnic group*".[5] He stressed that the thrust of the crime consisted in "*a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating groups themselves*".[6] Genocide, thus, "*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*".[7] Lemkin saw genocide as a comprehensive process that involved a range of techniques used in eight main fields (political, social, cultural, economic, biological, physical, religious, and

3 Already in 1933, Lemkin proposed the adoption of a multilateral convention that would make the extermination of human groups an international crime, one of the offences against the law of nations. He then labelled the crime as acts of barbarity. Ten years later, he introduced the term genocide (also ethnocide). Lemkin, Raphael, *Les actes constituant un danger général* (*interétatique*) *considérés comme délits de droit des gens* (Paris: Pedone, 1933).

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

5 *Ibid,* p. 79.

6 *Ibid.*

7 *Ibid.*

moral) within an elaborated system "*designed to destroy nations according to a previously prepared plan*".[8] He cited the prosecution of Jews as well as the regimes imposed on nations living in the territories occupied by Nazi Germany as examples of genocidal behaviour.

The new concept of genocide was thus to reflect two specific and, in Lemkin's view, unprecedented elements of crimes committed by Nazi Germany – their highly coordinated and carefully designed nature, and their orientation not on individuals but on groups. For Lemkin, groups, more specifically national and religious groups, were the third entity recognized under international law, alongside states and individuals. This recognition had taken place through the minority treaties concluded after 1918. Lemkin saw these legal developments as

> quite natural, when we conceive that nations are essential elements of the world community. The world represents only so much culture and intellectual vigour as are created by its component national groups. […] The destruction of a nation, therefore, results in the loss of its future contributions to the world.[9]

The quotation shows that for Lemkin, groups to be protected against genocide were national and religious minorities that found themselves, due to territorial rearrangements or military occupation, under the dominance of majority groups. He had no doubts that such minorities objectively existed and that it was possible to tell them apart, though sometimes, the specific criteria of appurtenance to the minority might have been produced by the dominant group (as was the case for the Jews, with *"the definition of a Jew* […] *based mainly upon the Nuremberg laws*")[10].

The inter-war treaties offered some protection to minorities. Yet, for Lemkin, this protection was insufficient, because domestically, the relevant provisions had remained at the constitutional level and had not been included in criminal codes. Moreover, the then existing treaties seeking to protect victims of war, such as the 1899 and 1907 Hague Conventions, were also insufficient, because they did not reflect the comprehensive nature of genocide, dealing just with some of its manifestations. What was needed, and what Lemkin proposed, was a new international treaty that would define genocide as a separate crime falling among *delicta juris gentium* and that would, furthermore, establish an efficient system of prevention and repression of genocide. Under this system,

8 *Ibid,* p. 81.
9 *Ibid,* p. 91.
10 *Ibid,* p. 75.

states would have to criminalize genocide, committed both in times of war and in times of peace, taking into account the complex nature of the crime and the many ways in which it can be carried out. The prosecution, through national courts, would be subject to the principle of universal repression, i.e., *"the culprit should be liable to trial not only in the country in which he committed the crime, but also, in the event of his escape therefrom, in any other country in which he might have taken refuge*".[11]

2.2 *The Regulation of the Crime of Genocide: The Genocide Convention (1948)*

Lemkin's ideas were received as timely and inspiring.[12] In fact, they provided an answer to the question on how to deal with mass murder campaigns directed against national groups, that had been intriguing certain states and scholars at least since the World War I. In the course of this war, what is sometimes labelled as *"the first modern genocide"*[13] took place, consisting in the extermination of over a million of Armenians living in the Ottoman Empire in less than a year.[14] Although Lemkin considered the atrocities committed by the Nazi Germany during the World War II unprecedented, the anti-Armenian campaign in the Ottoman Empire had already revealed all the features of genocide he identified – it had been carefully planned, implemented in a coordinated way and aimed at the destruction of a whole nation. These features did not go unnoticed and they earned the events the designation of *"the murder of a nation"*.[15] They also led to the debate about the prosecution at the national or even international level, of those responsible for *"attacks on humanity that might be perpetrated in a country under the influence of race hatred"*.[16]

The debates did not produce any results at the time but they sensitised the world to a new type of large-scale atrocities that (re)appeared in Europe in the

11 *Ibid,* p. 94.

12 Lemkin, Raphael, 'Genocide as a Crime under International Law', *American Journal of International Law*, vol. 41, 1947, pp. 145–151.

13 Armas-Cardona, Gabriel, 'The First Modern Genocide and the Duty to Remember and Recognize', *Global Health&Human Rights,* 17 April 2015.

14 Kevorkian, Raymond, *The Armenian Genocide: A Complete History* (London and New York: I. B. Tauris, 2011); Akçam, Taner, *The Young Turks' Crime Against Humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire* (Princeton University Press, 2012).

15 Toynbee, Arnold J., *Armenian Atrocities: The Murder of a Nation* (London and New York: Hodder and Stoughton, 1915).

16 Donnedieu de Vabre, Henri, 'La Cour Permanente de Justice Internationale et sa vocation en matière criminelle', *Revue internationale de droit pénal,* vol. 19, 1924-1925, p. 186.

first half of the 20th century. When then, in the 1930s-1940s, the Nazi Germany engaged in the same atrocities, albeit on an even larger scale, the international community was already prepared to go beyond the verbal condemnation. *"A crime without a name"*,[17] as the UK prime minister Winston Churchill labelled the atrocities committed by the Nazis in the occupied territories, was to get a name – that coined by Lemkin. Together with it, the international community also embraced Lemkin's proposal for a new legal instrument. Such an instrument was needed to ensure that in future, the crime of genocide could be prosecuted as an autonomous crime bringing together all the different acts that were, at that moment (for instance at the International Military Tribunals in Nuremberg and Tokyo), subsumed under war crimes or crimes against humanity.[18]

On 11 December 1946, the UN General Assembly, at the initiative of Cuba, India, and Panama, adopted Resolution 96(I) entitled *The Crime of Genocide*.[19] The Resolution took over most of the ideas expressed by Lemkin. It 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"*.[20] It noted that genocide *"results in great losses to humanity in the form of cultural and other contributions represented by these human groups"*.[21] It qualified genocide as a crime under international law, whose punishment is a matter of international concern. It called upon the UN Economic and Social Council (ECOSOC) to start working on a draft convention on the crime of genocide, and upon states to enact the necessary legislation for the prevention and repression of the crime. All these provisions echoed Lemkin's ideas. The Resolution went beyond his ideas by providing a list of groups against which *"many instance of such crime* [...] *have occurred"*.[22] The list consisted of *"racial, religious, political and other groups"*.[23] Lemkin himself mostly used the term national groups, though in one place of his book, when he pondered the definition of genocide, he used a broader notion of *"national, religious, or racial group"*.[24] Neither Lemkin nor

17 Cit. in Fournet, Caroline, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (London and New York: Routledge, 2016), p. 3.

18 Barrett, John Q., Raphael Lemkin and 'Genocide' At Nuremberg, 1945–1946, in Safferling, Christoph, Conze, Eckart (eds.), *The Genocide Convention Sixty Years After Its Adoption* (TMC Asser Press, 2010), pp. 35–54.

19 UN Doc. A/RES/96(I), *The Crime of Genocide*, 11 December 1946. The resolution was adopted unanimously by 53 states.

20 *Ibid,* para. 1 of the Preamble.

21 *Ibid.*

22 *Ibid,* para. 2 of the Preamble.

23 *Ibid.*

24 Lemkin, Raphael, *Axis Rule in Occupied Europe, supra note* 4, p. 93.

the Resolution provided a definition of the groups. The texts nonetheless suggest that whereas Lemkin saw his three groups as more or less identical to those protected by inter-war minority treaties, the Resolution was much more open-ended in this respect.

This open-endedness gave rise to unease which was articulated during the drafting of the new instrument that started shortly after the adoption of the Resolution. The drafting proceeded in three steps.[25] First, the UN Secretariat, assisted by an expert group composed of renowned international lawyers, including Lemkin, prepared the draft of the convention. This draft was, secondly, discussed and revised by an *ad hoc* committee composed of representatives of seven states (China, France, Lebanon, Poland, the USSR, the US, and Venezuela). The text produced by this committee was, thirdly, submitted to the UN General Assembly which, after further revisions of the text in its Sixth Committee, adopted the Genocide Convention on 9 December 1948.[26] The GC largely builds on Lemkin's ideas and on Resolution 96(I), though it departs from both in some respects and it is also, unsurprisingly, more detailed and specific in some areas. It conceives of the crime of genocide as a planned, deliberate atrocity crime directed against members of certain groups with the intention to destroy these groups as such, in whole or in part. The text diverges from Lemkin in that it only focuses on physical and biological genocide. It also adopts a different approach to jurisdictional grounds, abandoning the idea of universal repression and replacing it with that of an international penal tribunal. Article II of the GC limits the scope of the instrument to four protected groups (national, ethnical, racial, or religious). That makes it less ambitious than Resolution 96(I).

The narrowing of the scope was the result of lengthy discussions that took place in all the three stages of the drafting process. The draft submitted by the UN Secretariat contained a closed list consisting of *"racial, national, linguistic, religious or political groups".*[27] The commentary first confirms that genocide is *"aimed at a group through the individual members which compose it",* specifying that *"a human group is made up of a certain part of the population whose members have common characteristics distinguishing them from other members of society".*[28] It then notes that there are many such groups but that only the five

25 Schabas, William A., *Convention on the Prevention and Punishment of the Crime of Genocide. Introductory Note* (United Nations Audiovisual Library of International Law, 2008).

26 UN Doc. A/RES/260(III)A, *Adoption of the Convention on the Prevention and Punishment of the crime of genocide, and text of the Convention,* 9 December 1948. The resolution was adopted unanimously by 56 states.

27 UN Doc. E/447, *Draft Convention on the Crime of Genocide,* 26 June 1947, Draft Article I(1).

28 *Ibid,* p. 21.

enumerated ones should be included in the definition of genocide. Two reasons are provided, albeit in a very vague manner – the need to be practical and to follow the text of Resolution 96(I); and the experiences of the World War II. As the records indicate, there was no agreement among experts consulted by the Secretariat with respect to the protected groups. Lemkin, on the one hand, questioned the inclusion of political groups, arguing that these groups lacked *"the permanency and the specific characteristics of the other groups referred to"*.[29] He also asserted that the inclusion of these groups might jeopardize the perspective of the GC and that in practice, human groups most likely to suffer from genocide were racial, national, and religious groups. The French jurist Donnedieu de Vabres, on the other hand, opined that *"genocide was an odious crime, regardless of the group which fell victim to it"*,[30] expressing fear that the exclusion of political groups might be read as condoning violent acts against them.

The exchange of views between the two experts was replicated in the *ad hoc* committee, this time among the representatives of states. The focus again lied on political groups. The most actively opposed to the inclusion of these groups were the USSR and Poland. The USSR argued that the inclusion would *"give the words an extension of meaning contrary to the fundamental notion of genocide as recognized by science"*.[31] Poland noted that whereas the other groups had *"a fully established historical background,* [...] *political groups had no such stable form"*.[32] The two countries, occasionally supported by other states (Venezuela, Lebanon), also stressed the risks that a broad definition of genocide might constitute for the ratification of the GC. Poland, moreover, referred to the historical context suggesting that *"the aim of the convention* [is] *to prevent a repetition of the atrocities perpetrated during the last war"*.[33] These arguments were questioned by other states (France, the US, and China). France noted that *"persecution of persons belonging to a political group* [...] *was quite as reprehensible as that of the other groups"*.[34] It also recalled that in the Nazi Germany, being a social democrat or a communist was as dangerous as being a Jew.[35] In the vote, the position of the latter group prevailed and political groups were maintained

29 *Ibid,* p. 22.
30 *Ibid.*
31 UN Doc. E/794, *Report of the Committee and Draft Convention Drawn up by the Committee,* 24 May 1948, p. 16.
32 Abtahi, Hirad, Webb, Philippa, *The Genocide Convention: The Travaux Préparatoires*, Volume One (Martinus Nijhoff Publishers, 2008), p. 717.
33 *Ibid.*
34 *Ibid,* p. 718.
35 *Ibid,* p. 719.

in the text by four votes to three.[36] When the draft left the *ad hoc* committee, it thus referred to *"national, racial, religious or political groups",*[37] with linguistic groups being dropped as redundant without any substantive discussion.

The Sixth Committee discussed the protected groups at length. States were again divided over the inclusion of political groups. The arguments in favour or against were largely the same as those raised in the previous two stages of the drafting process. The outcome however was different. When the proposal to exclude political groups was put to vote, only six states opposed it, whereas 22 voted in favour (12 states abstained and 18 did not vote). Some of the original supporters of the inclusion, such as the US, changed their position due to a reference in the text to an international penal tribunal.[38] In addition to political groups, several other groups were considered. That was the case of economic and ethnical groups. The proposal to add the former groups was submitted but later withdrawn by the US. In the latter case, the initiative came from Sweden, which wanted to be sure that minorities not qualifying as nations and having no bonds to any kin-states would not fall outside the scope of the instrument.[39] Despite criticism raised by certain countries, such as Belgium, ethnical groups were kept in the text. Thus, when adopted on 9 December 1948, the GC applied to acts of physical and biological genocide committed against members of *"a national, ethnical, racial and religious group"* (Article II), with the aim to destroy such a group.

3 From the Genocide Convention to the Events in Rwanda or Darfur

Adopted in 1948, the GC remained, more due to the lack of political will than for want of serious crimes, virtually unapplied for several decades. The situation started to change in the 1990s, when the first prosecutions for the crime of genocide took place. These prosecutions ran into several obstacles and the narrow definition of the protected groups was one of them. Since the mid-1990s, international criminal tribunals and other international expert bodies have looked for ways to overcome this obstacle. The first subsection focuses on

36 *Ibid,* p. 14.

37 *Ibid,* p. 54.

38 See Leblanc, Lawrence J., 'The United Nations Genocide Convention and Political Groups: Should the United States Propose and Amendment?', *Yale Journal of International Law,* vol. 13, 1988, pp. 268–295.

39 Robinson, Nehemiah, *The Genocide Convention, A Commentary* (New York: Institute of Jewish Affairs, World Jewish Congress, 1960), p. 59.

the case law of the two *ad hoc* International Criminal Tribunals. The second subsection discusses the contribution made by other bodies (the International Criminal Court, the Darfur Commission, etc.).

3.1 *Confusion over the Crime of Genocide: Ad Hoc International Criminal Tribunals*

The first judicial body to be confronted with the narrow definition of genocide was the International Criminal Tribunal for Rwanda (ICTR).[40] The ICTR, similarly as its older twin, the International Criminal Tribunal for the Former Yugoslavia (ICTY), had jurisdiction over the crime of genocide. The definition of this crime in the ICTY /ICTR Statutes was taken over from the GC. When, in *Akayesu* (1998), the ICTR was to decide whether the mass killing of the Tutsis committed by the Hutus in 1994 could qualify as genocide, none of the four protected groups included in this definition seemed appropriate. The Tutsis, as the ICTR noted, did not *"have its own language or a distinct culture from the rest of the Rwandan population"*.[41] The ICTR was nonetheless inclined to see the Tutsis a separate group, an ethnical group more exactly, due to the differentiated treatment accorded to them, as opposed to the Hutus and Kwa, since the colonial times. Yet, to be on the safe site, it suggested that the groups protected by the GC did not need to be limited to the four groups enlisted in Article II. Relying, allegedly, on the *travaux préparatoires* of the GC, the ICTR stated that *"the intention of the drafters* [...] *was patently to ensure the protection of any stable and permanent group"*.[42] It is not altogether clear whether this statement was an *obiter dictum* or whether the ICTR saw the Tutsis as an example of a stable and permanent group that is different from the four groups in Article II. In the same section of the judgment, the ICTR put forward definitions of the four protected groups. The definitions relied on objective features that the groups were supposed to reveal.[43]

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40 See Prunier, Gérard, *The Rwanda Crisis, History of a Genocide* (London: Hurst & Company Ltd., 1998).

41 ICTR, *Prosecutor v. Jean-Paul Akayesu* (Judgement) ICTR-96-4-T, TChI (2 September 1998), para. 170.

42 *Ibid,* para. 516.

43 A national group is *"a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties"*; an ethnic group is *"a group whose members share a common language or culture"*; a racial group is a group *"based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors"*; a religious group is *"one whose members share the same religion, denomination or mode of worship". Ibid,* paras. 512–515.

The definitions and the concept of stable and permanent groups gave rise to criticism among scholars.[44] It apparently stirred some unease within the ICTR itself. One year after *Akayesu*, another ICTR trial chamber, deciding in *Kayishema* (1999), did not feel the need to invoke the concept of stable and permanent groups, noting that it *"finds beyond a reasonable doubt that the Tutsi victims of the massacres were an ethnical group* […]*, and were targeted as such"*.[45] Interestingly, the chamber suggested that the same conclusion had been reached in *Akayesu*, confirming the hypothesis of *obiter dictum.* Yet, while (allegedly) concurring with the other chamber in the qualification of the Tutsis as an ethnical group, it differed from it in the definition of this group. In *Akayesu*, the chamber relied on objective criteria (common language and culture). In *Kayishema*, it added subjective elements. An ethnical group is *"one whose members share a common language and culture; or, a group which distinguishes itself, as such* […]*, or, a group identified as such by others, including perpetrators of the crimes* […] *"*.[46] It remains unclear whether the subjective elements are meant to complement the objective ones or are alternative to them. It is moreover interesting to note that the definitions of racial and religious groups also provided in the judgment do not contain subjective elements.[47]

The ICTR revisited these issues in *Rutaganda* (1999).[48] Here, it invokes the concept of stable and permanent groups again.[49] It however seems to do so – relying once more, this time more correctly, on the *travaux préparatoires* – not to extend the list of the protected groups but, rather, to set the limits to the interpretation of Article II. This move is closely linked to the rejection by the ICTR of its own previous attempt to provide objective definitions of the four groups. The ICTR now opines that *"the concepts* […] *have been researched extensively and* […] *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"*.[50] It, moreover, endorses

44 See Lingaas, Carola, 'Defining the Protected Groups of Genocide Through the Case Law of International Courts', *ICD Brief 18,* December 2015; Schabas, William A., 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda', *ILSA Journal of International & Comparative Law,* vol. 6, 2000, pp. 375–387.

45 ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Judgement) ICTR-95-1-T, TChII (21 May 1999), para. 526.

46 *Ibid,* para. 98.

47 *Ibid.*

48 ICTR, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Judgement) ICTR-96-3-T, TChI (6 December 1999).

49 *Ibid,* para. 57.

50 *Ibid,* para. 56. See also para. 811.

the idea that membership in the group can be based on self-identification or identification by others, noting however that *"a subjective definition alone is not enough to determine victim groups"*.[51] The subjective elements need to be matched by the objective reality or, in other words, the relevant group has to be (self)-identified as one of the four groups enlisted in the GC and, most probably, has to have some objective features thereof. The crime of genocide can thus only be committed against members of *"relatively stable and permanent groups"*[52] as opposed to *"mobile groups"*,[53] such as political or economic groups. The rejection of any general definitions together with the case-by-case assessment of each particular group, leave the door open for a creative interpretation of Article II.

The conclusions reached by the ICTR in *Rutaganda* were confirmed in the subsequent case law of this Court.[54] They were also largely taken over by the ICTY. The ICTY also sought to contribute to the debate on its own, for the first time in *Jelisić* (1999). It did so in two main ways. First, it elaborated on the definition of the protected groups by making a distinction between religious groups, for which, allegedly, *"the objective determination* [...] *still remains possible"*,[55] and the other three groups, where *"to attempt to define* [them] *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"*.[56] The basis for this distinction and whether the identification of the latter groups should rely solely on subjective elements, i.e., the stigmatization by others,[57] is unclear, though the Court seems to answer the latter question in the affirmative. Furthermore, and that is the second innovation, the ICTY suggests that the stigmatization may be based both on positive and on negative criteria. The positive approach builds on the common features revealed by, or projected into, members of a group. The negative approach, conversely, builds on the absence of such features, the groups are thus *"defined by exclusion"*[58] (non-Serbs, non-Muslims, etc.).

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51 *Ibid,* para. 57.

52 *Ibid.*

53 *Ibid.*

54 ICTR, *Prosecutor v. Ignace Bagilishema* (Judgement) ICTR-95-1A-T, TChI (7 June 2001); ICTR, *Prosecutor v. Juvénal Kajelijeli* (Judgement) ICTR-98-44A-T, TChII (1 December 2003).

55 ICTY, *Prosecutor v. Goran Jelisić* (Judgement) IT-95-10-T, TCh (14 December 1999), para. 70.

56 *Ibid.*

57 *Ibid.*

58 *Ibid,* para. 71.

The innovations proposed in *Jelisić* were revisited by the ICTY in subsequent cases. In *Krstić* (2001),[59] the ICTY rejected, albeit implicitly, the line drawn between religious and the other groups. It did so noting that the list of the protected groups in Article II

> was designed more to describe a single phenomenon, roughly corresponding to what was recognised [...] as "national minorities", rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.[60]

The statement is in line with the ICTR position in *Rutaganda*, as is the call by the ICTY to assess each particular group in light of *"the socio-historic context which it inhabits"*.[61] The identification of the groups was further discussed, this time by the Appeals Chamber, in *Stakić* (2006).[62] Here, the ICTY rejected both the purely subjective approach and the approach based on the exclusion. With respect to the former, it sided with the combined subjective-objective test proposed in *Rutaganda,* though it also failed to provide any details on the practical application of this test.[63] With respect to the latter, it stated that *"when a person targets individuals because they lack a particular* [...] *characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals"*.[64] Thus, *"defining groups by reference to a negative would run counter to the intent of the Genocide Convention's drafters"*.[65]

3.2 *Further Debates about the Crime of Genocide: The ICC and Other Bodies*

The post-1990 international legal developments cannot be reduced to the case law of the ICTY /ICTR. Prior to debates at the tribunals, the definition of the crime of genocide was already considered by the drafters of the Rome Statute of the International Criminal Court (ICC). At the meetings of the Preparatory Committee for the Establishment of the ICC in 1996, some states suggested

59 ICTY, *Prosecutor v. Radoslav Krstić* (Judgement) IT-98-23-T, TCh (2 August 2001).
60 *Ibid,* para. 556.
61 *Ibid,* para. 557.
62 ICTY, *Prosecutor v. Stakić* (Judgment) IT-97-24-A, ACh (22 March 2006).
63 *Ibid,* para. 25.
64 *Ibid,* para. 20.
65 *Ibid,* para. 22.

that *"consideration should be given to extending the definition to include social and political groups"*.[66] These proposals were however rejected and in fact, it seems that they were not even seriously discussed. The predominant position was that the four protected groups of the GC should be maintained and that the protection of other groups could be ensured through the provision on crimes against humanity.[67] Schabas reports that the issue came back at the Rome Conference held in July 1998.[68] During the meeting of the Committee of the Whole, Cuba argued in favour of altering the definition and including social and political groups. The argument did not get across, with Ireland voicing what was probably the general view when it noted that if there was no intention to draft a new genocide convention, it was better to stick to the four protected groups. This solution was maintained and the Rome Statute contains the same list as the GC (Article 6).

Since its establishment in 1998, the ICC has not had many opportunities to comment on the definition of genocide, as charges under Article 6 have been rare. One such opportunity has arisen in the case of the Sudanese president, Omar Al-Bashir. In 2008, the Prosecution requested the issuance of arrest warrant against Al-Bashir for *inter alia* the crime of genocide, allegedly committed against members of three groups living in the Darfur region – the Fur, Masalit, and Zaghawa groups. When considering this request in 2009, the Pre-Trial Chamber had to decide whether the three groups fell under Article 6 of the Rome Statute. It answered this question in the affirmative, noting that *"there are reasonable grounds to believe that each of the groups* […] *has its own language, its own tribal customs and its own traditional links to its lands"*.[69] The ICC thus relied on objective criteria, leaving the question of (self)identification aside. At the same time, it rejected the definition by exclusion, proposed in *Jelisić,* stressing that *"the targeted group must have particular positive characteristics* […]*, and not a lack thereof"*.[70] More generally, the ICC confirmed that more than six decades after its codification, genocide remains a crime the

66 UN Doc. A/51/22, *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* Volume I (March-April and August 1996), p. 17.

67 *Ibid*, p. 18.

68 Schabas, William A., *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2006), p. 136.

69 ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, PTChI (4 March 2009), para. 137. In her Separate and Partly Dissenting Opinion, Judge Ušacka disagreed with the conclusion, as she saw the three groups as subgroups within a single ethnic group of the *"African Tribes",* para. 26.

70 *Ibid,* para. 135.

purpose of which is *"to destroy* [...] *the existence of a specific group or people, as opposed to those individuals who are members thereof".*[71]

The events in Darfur have given rise to other positions as well. In 2004, the UN Security Council established *the International Commission of Enquiry on Darfur* (*Darfur Commission*). The Commission, composed of five experts, submitted its report in January 2005.[72] The report, equally as the ICC Decision, considered whether crimes committed in Darfur could be qualified as genocide, which implies the question whether they were directed against one of the protected groups. The Commission, again alike the ICC, answered the question in the affirmative. In a passage that deserves to be quoted at length, the Commission noted that

> international rules on genocide use a broad and loose terminology when indicating the various groups against which one can engage in acts of genocide, including references to notions that may overlap [...]. [T]he principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness [...]) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects.[73]

Building on this statement, the Commission proposed definitions of the four protected groups,[74] which, somewhat surprisingly, rely on objective criteria. Yet, the Commission rushed to add, in another noteworthy passage, that

> the approach taken to determine whether a group is a (fully) protected one has evolved from an objective to a subjective standard to take into account that "collective identities [...] are by their very nature social constructs, "imagined" identities entirely dependent on variable and

71 *Ibid,* para. 114.

72 UN Doc. S/2005/60, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* 25 January 2005.

73 *Ibid,* para. 494.

74 "[B]*y "national groups", one should mean those sets of individuals which have a distinctive identity in terms of nationality or of national origin.* [...] *"racial groups" comprise those sets of individuals sharing some hereditary physical traits or characteristics. "Ethnical groups" may be taken to refer to sets of individuals sharing a common language, as well as common traditions or cultural heritage. 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". Ibid.*

> contingent perceptions, and not social facts, which are verifiable in the same manner as natural phenomena or physical facts.[75]

Using this intersubjective approach, the Commission came to the conclusion that the tribes in the Darfur region, although they would not meet the objective test, constituted a protected group in the sense of Article 2 of the GC.[76] It made two further remarks that merit attention. First, it qualified the move to the intersubjective approach as an instance of *"the interpretative expansion of one of the elements of the notion of genocide"*,[77] based on the teleological method of interpretation. Secondly, it noted that this interpretation was in line with the customary rules on genocide, since, in its view, *"it may* […] *be safely held that that interpretation and expansion has become part and parcel of international customary law"*.[78]

In the second half of the 2010s, the definition of genocide was extensively discussed by the European Court of Human Rights (ECtHR). The discussion was linked to the prosecution of members of the Soviet security forces for acts of genocide committed against anti-Soviet partisans in the territory of Lithuania in the 1950s. The prosecution took place under the Lithuanian Criminal Court, which defined genocide as acts committed not only against the four groups but also against social or political groups. In 2015, in the *Vasiliauskas* Case,[79] the ECtHR (its Grand Chamber) considered whether applying this extended definition to crimes committed against partisans – defined as a political group – in 1953 would meet the requirements of the principle of legality (*nullum crimen sine lege*) enshrined in Article 7 of the European Convention on Human Rights. It answered this question in the negative, noting that *"in 1953 international treaty law did not include a "political group" in the definition of genocide, nor can it be established with sufficient clarity that customary international law provided for a broader definition of genocide"*.[80] In 2019, in the *Drėlingas* Case,[81]

75 *Ibid,* para. 499. It relies on Verdirame, Guglielmo, 'The Genocide Definition in the jurisprudence of the *ad hoc* tribunals', *International and Comparative Law Quarterly,* vol. 49, 2000, pp. 578–592.

76 UN Doc. S/2005/60, *supra note* 72., para. 512.

77 *Ibid,* para. 501.

78 *Ibid*.

79 ECtHR, *Vasiliauskas v. Lithuania,* application no. 35343/05, Judgment (Grand Chamber), 20 October 2015.

80 *Ibid,* para. 178.

81 ECtHR, *Drėlingas v. Lithuania,* application no. 28859/16, Judgment, 12 March 2019.

the ECtHR confirmed this conclusion but accepted the requalification of anti-Soviet partisans as a significant part of a national or ethnical group.[82]

Over the years, the definition of genocide has been discussed in other bodies and other contexts as well. Some of these discussions have related to genocide in general, others have focused on concrete events. None of them has gone beyond the legal developments described above. Thus, when the UN International Law Commission (ILC) was drafting the *Draft Code of Crimes against the Peace and Security of Mankind,* finally adopted in 1996, it simply took the list of the protected groups over from the GC.[83] Similarly, when the *Independent International Commission of Inquiry on the Syrian Arab Republic*, established by the UN Human Rights Council in 2011, assessed the violent acts committed by ISIS against the Yazidis, it applied the definition enshrined in the GC, as interpreted by the ICTR/ICTY, to determine, *"on the basis of objective and subjective definitions,* [...] *that the Yazidis are a protected religious group within the meaning of Article II".*[84] Even the International Court of Justice (ICJ), in its 2007 judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*,[85] limited the analysis of the protected groups to the endorsement of the ICTY view that the groups had to be defined by its positive characteristics. Other sources, e.g., the application filed by Gambia against Myanmar with respect to the crime of genocide, allegedly committed by Myanmar against the Rohingya group, fail to discuss the concept altogether.[86]

4 From the International to the National Level

In parallel to the legal developments at the international level, the crime of genocide has been subject to the (re)interpretation and application at the national level. This has happened through national legislation, which is

82 *Ibid,* paras. 108–111.

83 Article 17 of the *Draft Code of Crimes against the Peace and Security of Mankind,* in UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2), *Yearbook of the International Law Commission, 1996,* p. 44.

84 UN Doc. A/HRC/32/CRP.2, *"They came to destroy": ISIS Crimes Against the Yazidis,* Report by the Independent International Commission of Inquiry on the Syrian Arab Republic, 15 June 2016, para. 105.

85 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43, paras. 191–201.

86 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Application, 11 November 2019.

discussed in the first subsection, and through domestic case law and studies produced by expert organs, which are the focus of the second subsection. Due to the extent of national regulations and their changes over time, the section cannot do justice to all of them and it offers just an overview of the main trends that can be discerned in these regulations.

4.1 *Pluralization of Approaches to the Crime of Genocide: National Legislation*

In a comprehensive analysis of national legislation related to the crime of genocide produced in 2010,[87] Wouters and Verhoeven demonstrate that states adopt different approaches to the definition of genocide. Some apply, mostly through a reference in their domestic law, the definition of genocide enshrined in the GC and/or the Rome Statute;[88] others have incorporated this definition in their national law;[89] and yet others have adopted their own, national definition of genocide. The two authors note that *"the major differences concern the groups protected by the prohibition of genocide"*.[90] Some states opt for a narrower definition, excluding some of the protected groups enshrined in Article II of the GC (mostly racial groups).[91] Other opt for a broader definition, adding new groups – usually political groups[92] and social or class groups,[93] though other groups are occasionally included as well.[94] Certain states, albeit a minority, leave the definition of the protected groups completely open. This is the case of France, which defines genocide as violent acts directed against members of, and aiming at the destruction of, *"a national, ethnical, racial or religious group, or of a group determined on the basis of any other arbitrary criterion"*.[95]

87 Wouters, Jan, Verhoeven, Sten, 'The Domestic Prosecution of Genocide, Leuven Centre for Global Governance Studies', *Working Paper No. 55,* 1 December 2010.

88 This model is applied in six countries, for instance Argentina, Canada, or the UK. *Ibid,* p. 6 (ft 18).

89 This model is applied in 43 countries, for instance Australia, Belgium, Brazil, Bulgaria, Burundi, Cambodia, Denmark, Germany, Iraq, Israel, Italy, Mali, Mexico, or the Russian Federation. *Ibid*, p. 6 (ft 17).

90 *Ibid*, p. 6.

91 Racial groups are omitted in Bolivia, Côte d'Ivoire, Guatemala, Honduras, Nicaragua, Paraguay, and Peru; ethnical groups in Costa Rica; national groups in Canada, Nicaragua, and Uzbekistan. *Ibid,* p. 7 (ft 19).

92 Political groups are added in Colombia, Costa Rica, Côte d'Ivoire, Ethiopia, Panama, and Slovenia. *Ibid.*

93 Social or class groups are added in Estonia, Latvia, Paraguay, Peru, and Slovenia. *Ibid.*

94 Canada, for instance, adds groups determined by colour and sexual orientation; Estonia adds groups resisting occupation; Romania adds communities, etc. *Ibid.*

95 Article 211–1 of the Criminal Code (France).

Several other states have adopted a similar definition,[96] though the inclusion of other groups is sometimes conditioned on their permanent and stable character[97] or on them being similar to the classical four groups.[98]

These conclusions have been confirmed, and further specified, by the extensive research carried out by Hoffmann in 2020.[99] Hoffmann shows that, indeed, it is not uncommon for States to include a narrower or, more frequently, a broader list of protected groups into their national legal acts. The narrower lists either omit one of the four classical groups (usually racial groups)[100] or opt for a more limited understanding of one of these groups (a group identifiable by a defined religion rather than religious groups in Latvia). The expanded lists mostly include political groups (13 countries)[101] and social groups (6 countries),[102] though certain other groups feature in national legal act as well (class groups, groups resisting occupation, ideological groups, etc.). Following on the example set by France, several States have adopted an open definition of protected groups. They have done so through the use of general terms such as *"groups determined by any arbitrary criterion"* (Czech Republic) or *"any other identifiable group"* (Lesotho). Hoffmann also shows that sometimes, the narrowing down or broadening of the list is merely rhetorical, i.e., although some groups are omitted or added, the scope of the list remains more or less unaltered.

The majority of national criminal codes simply enumerate the protected groups without seeking to provide any definitions thereof. Some however do otherwise. That is the case of the *Proxmire Act* which introduced genocide into the US law in 1988.[103] The definitions rely on objective criteria. This may

96 This is so in Belarus, Finland or Senegal. See Wouters, Jan, Verhoeven, Sten, *supra note* 87, p. 7 (ft 19).

97 This is the case of the Philippines. *Ibid.*

98 This is the case of the Czech Republic, see Article 400 of the Criminal Code (Law No. 40/2009 Coll.).

99 Hoffmann, Tamás, The Crime of Genocide in Its (Nearly) Infinite Domestic Variety, in Odello, Marco, Łubiński, Piotr (eds.), *The Concept of Genocide in International Criminal Law – Developments after Lemkin* (Routledge, 2020), pp. 67–97.

100 Racial groups are omitted in Bolivia, Ecuador, Guatemala, Paraguay and Perú; national groups in Nicaragua; ethnic groups in Costa Rica, El Salvador and Oman. *Ibid,* p. 70. The lists of countries are not completely identical to those indicated in 2010 which might have to do with the changes in the legislation in 2010–2020.

101 These are Bangladesh, Colombia, Costa Rica, Côte d'Ivoire, Ecuador, Ethiopia, Lithuania, Nicaragua, Panama, Poland, Switzerland, Togo and Uruguay. *Ibid,* p. 83.

102 These are Estonia, Paraguay, Peru, Sao Tome, Switzerland, and the Philippines. *Ibid.*

103 Public Law 100–606, Genocide Convention Implementation Act of 1987 (the Proxmire Act), § 1093(2),(5–7): Ethnic groups are *"a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage"*; national group *"a set of individuals*

probably be explained by the period of the adoption of the legal act, preceding the establishment of the ICTY/ICTR. These definitions are also somewhat different from those present at the international level. For instance, the definition of national groups is broader than in *Akayesu,* as it is not limited to a group of people with the same citizenship; yet, it also differs from Lemkin's conception, as it presupposes the existence of a formal link between members of this group. It is interesting to note that only six years after the adoption of the *Proxmire Act,* the US Congress enacted the *Cambodian Genocide Justice Act,*[104] which opts for a broader definition of genocide. Referring several times to *"the genocide committed in Cambodia",*[105] it seems to suggest that crimes committed by the Khmer Rouge in Cambodia, which were mostly directed against political or social groups, could qualify as genocide.

4.2 *Further Confusion over the Crime of Genocide: National Case-Law and Expert Studies*

Provisions dealing with genocide have only rarely been applied by national courts or other domestic bodies (truth and reconciliation commissions, national human rights institutions, expert reports).[106] Consequently, the concept of the protected groups has not been extensively discussed at the national level. There are nonetheless some exceptions to this rule.[107] Particularly important among those are the cases in which national bodies have engaged in the interpretation of the provision on the protected groups or have commented upon the difference between the lists of such groups in the GC and the Rome Statute on the one hand and those contained in the national legal acts on the other.

In the former case, national bodies have usually been asked to decide whether a certain group could be subsumed under one of the four classical protected groups. Some have opted for a rather traditional approach. Thus, the *Commission for Historical Clarification*, established in Guatemala in 1994, concluded that Guatemala, within its "counterinsurgency operations" carried

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whose identity as such is distinctive in terms of nationality or national origins"; racial group *"a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent"*; religious group *"a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals"*.

104 Pub. L. No. 103–236, § 572(a), 108 Stat. 486, 486–87 (1994).

105 *Ibid,* Sections 572(b) and 573(b).

106 See also Schabas, William A., *Genocide in International Law, supra note* 1, pp. 400–490.

107 For more details, see Wierczynska, Karolina, 'The Evolution of the Notion of Genocide in the Context of the Jurisdiction of the National Courts', *Polish Yearbook of International Law,* vol. 28, 2009, pp. 83–93.

out in the 1980s committed acts of genocide against groups of Mayan people, which were *"groups identified by their common ethnicity"*.[108] This conclusion, and the qualification of the Mayan people as an ethnical group,[109] were later confirmed by the Guatemalan Court of High Risk in the prosecution against the former dictator Ríos Montt (2013)[110] and the former director of the Military Intelligence José Mauricio Rodríguez Sánchez (2018).[111]

Other national bodies have adopted a more innovative approach. For instance, in 1998, the Spanish National Court held that crimes committed by the Argentinean military junta against political opponents and other co-citizens could qualify as genocide.[112] It noted that the junta sought to eradicate *"a certain sector of the population, an extremely heterogeneous but differentiated group* [...] *The group was made up of citizens opposed to the regime, but also citizens indifferent to the regime"*.[113] Such a group, in the Court's view, could be subsumed under a national group which should be defined, in very broad terms, as *"a national human group, differentiated human group, characterized by something, integrated into a larger collectivity"*.[114] This *"social conception of genocide"*, derived from the opprobrium that the *"hateful scourge"*[115] of this crime produces, entails that virtually any groups within the national society can count as a protected group (the Court cites AIDS-patients, elderly, and foreigners as examples). A similar conclusion was reached by the Spanish National Court in the case against the former president of Chile, Augusto Pinchet, with respect to crimes committed during his dictatorship in the 1970s-1980s.[116]

Some of the most recent prosecutions for the crime of genocide have taken place before the Extraordinary Chambers in the Court of Cambodia (ECCC).

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108 *Memory of Silence,* Report of the Commission for Historical Clarification: Conclusions and Recommendations, February 1999, para. 122.

109 See also Blake, Jillian, 'Should Domestic Courts Prosecute Genocide: Examining the Trial of Efrain Rios Montt', *Brooklyn Journal of International Law,* vol. 39(2), 2014, pp. 563–612.

110 Burt, Jo-Marie, 'Rios Montt Convicted of Genocide and Crimes Against Humanity: The Sentence and Its Aftermath', *International Justice Monitor,* 13 May 2013.

111 Burt, Jo-Marie, Estrada, Paulo, 'Court Finds Guatemalan Army Committed Genocide, but Acquits Military Intelligence Chief', *International Justice Monitor*, 28 September 2018.

112 Spain, *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de loscrímenes de genocidio y terrorismo cometidos durante ladictadura Argentina*, Madrid, 4 de noviembre de 1998.

113 *Ibid,* Sección Quinta.

114 *Ibid.*

115 *Ibid.*

116 Spain, *Auto de la Audiencia Nacional por el que se considera competente la Justicia española para perseguir delitos de genocidio, tortura y terrorismo cometidos en Chile*, 5 de noviembre de 1998.

By its nature, the ECCC are within the national judicial system of Cambodia, though they were established back in 2003 as part of an agreement between Cambodia and the UN and they reveal several features of internationalized or hybrid tribunals (mixed composition of the bench, etc.).[117] Article 4 of the *Law on the Establishment of the Extraordinary Chambers* gives the ECCC the competence *"to bring to trial all Suspects who committed the crimes of genocide as defined in the* [GC]*, and which were committed during the period from 17 April 1975 to 6 January 1979".* In their judicial practice, the ECCC have drawn a clear line between violent acts directed against political opponents or members of various social groups, which have been qualified as crimes against humanity or crimes under the domestic law, and violent acts directed against members of the national minorities living in Cambodia (Cham and Vietnamese minorities), which on the contrary have been qualified as genocide.[118] This approach differs from that adopted by the *People's Revolutionary Tribunal,* established in Cambodia after the overthrow of the Khmer Rouge regime in 1979,[119] which qualified the violent acts committed by this regime, regardless of their targets, as genocide.[120]

In addition to the status of concrete groups, the question whether the definition should be based on subjective or objective criteria has also been raised at the national level – and addressed in quite diverse ways. For example, the Supreme Court of Estonia, when considering the killing of persons who had resisted the Soviet occupation of Estonia, ruled that genocide was a crime committed against groups, the membership of which was based on objective criteria and could not be changed by members themselves.[121] The District Court of The Hague, when discussing the possibility of qualifying the Kurds in Iraq as an ethnical group, opted – citing the ICTR decision in *Kayishema* – for a

117 See Williams, Sarah, *Hybrid and Internationalised Criminal Tribunals Selected Jurisdictional Issues* (Hart, 2012).

118 ECCC, *Case 002/02 Judgment,* Case File/Dossier No. 002/19-09-2007/ECCC/TC (16 November 2018).

119 See Hannum, Hurst, 'International Law and Cambodian Genocide: The Sounds of Silence', *Human Rights Quarterly,* vol. 11, 1989, pp. 82–138.

120 People's Revolutionary Tribunal, *The Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique,* Judgment, August 1979. The PRT however relied on an autonomous definition of genocide contained in Decree Law No. 1, enacted in 1979, which defines genocide as *"planned mass killing of innocent people, forced evacuation of the population from cities and villages, concentration of the population and forcing them to work in physically and morally exhausting conditions, abolition of religion, destruction of economic and cultural structures and of family and social relations"* (art. 1).

121 Estonia, Supreme Court, *Prosecutor v. Paulov*, Cassation judgment, No 3-1-1-31-00, 21 March 2000, as presented in Wouters, Jan, Verhoeven, Sten, *supra note* 87, p. 8.

combined approach, stressing both objective (common language and culture) and subjective (self-identification) criteria.[122]

The second category of the relevant national practice includes cases, in which national bodies have commented upon the difference between the international and the national lists of the protected groups. The best-known case of this category concerns the former president of Ethiopia Mengistu Haile Mariam and other members of his Derg movement.[123] In 1994, the Ethiopian Federal High Court charged these persons *inter alia* with genocide, for the killing of thousands of people, mainly during the period of the Red Terror at the end of the 1970s. In 2006, Mengistu and some of the other accused were found guilty and imposed lengthy sentences. This happened by virtue of Article 281 of the Ethiopian Criminal Code which defined genocide (or, rather, genocide and crimes against humanity), as violent acts directed not only against the four classical protected groups but also against political groups. The Court considered this definition in its 1995 decision.[124] It ruled that

> Article 281 [...], which was enacted to give wider human rights protection, should not be viewed as if it is in contradiction with the Genocide Convention. As long as Ethiopia does not enact a law that minimizes the protection of rights afforded by the Convention, the mere fact that Ethiopia is a party to the Convention does not prohibit the government from enacting a law, which provides a wider range of protection than the Convention. Usually international instruments provide only minimum standards and it is the duty of the Ethiopian Government to enact laws that assist their implementation.[125]

The judgment rendered in 2006 confirmed this view,[126] though one of the judges dissented arguing that violent acts against political groups did not

122 The Netherlands, District Court, The Hague, *Public Prosecutor v. Van Anraat*, 23 December 2005.

123 Tiba, Firew Kebede, 'The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice',* vol. 5, 2007, pp. 513–528.

124 Ethiopia, Federal High Court, *Special Prosecutor v Col Mengistu Hailemariam et al.,* File No. 1/87, 9 October 1995.

125 Cit. in Hailegebriel, Debebe, Prosecution of Genocide at International and National Courts. A Comparative Analysis of Approaches by ICTY/ICTR And Ethiopia/Rwanda, *Dissertation,* Makerere University, 2003, p. 16.

126 Ethiopia, Federal High Court, *Special Prosecutor v. Col. Mengistu Haialemariam et al.*, File No. 1/87, Judgment, 12 December 2006.

qualify as genocide under international law and the defendants thus should not be found guilty of this crime.[127]

5 From Four to More Protected Groups?

Article II of the GC, reproduced literally in other international instruments, including the Rome Statute of the ICC, limits genocide to violent acts directed against members of, and with the intention to destroy, four protected groups. The exclusion of all the other groups has, over the years, given rise to criticism both among states and among scholars. It has been argued, again both by states and scholars, that the list of the protected groups has to be extended to include some or, even, all other human groups as well. Three mechanisms through which such an extension could take place and, in some views, already have taken place, have been proposed – the (re)interpretation of Article II, the development of a new rule of customary international law, and, finally, the revision of the GC or the adoption of a new treaty. This section discusses whether, and to what extent, these mechanisms could result in the extension of the list of the protected persons and whether, and to what extent, such an extension has already occurred. The section builds on the analysis of the legal developments presented in the previous sections.

5.1 *(Re)Interpretation of Article II of the Genocide Convention*

The first mechanism that could lead to the extension of the list of the protected groups, consists in the (re)interpretation of Article II of the GC or of the identically worded provisions contained in other international instruments (the Rome Statute) or in national criminal acts. As we have seen in the previous sections, both international and national courts and other bodies have been repeatedly called upon to apply and consequently also interpret these provisions since the 1990s. We have also seen that some of the courts have not shied away from engaging in acts of creative interpretation, introducing concepts that were clearly not present in the minds of drafters of the GC (subjective definition, definition by exclusion etc.). Virtually all these concepts have given rise to controversies not only among scholars but also, not unfrequently, among international and national bodies themselves. These controversies have resulted in the rejection of some of the concepts, a large acceptance of others and a still ongoing discussion about the remaining ones.

127 *Ibid,* dissenting opinion by Judge Nuru Seid.

What is interesting to note is that although many courts, other bodies, and scholars have engaged in the interpretation of Article II, relatively few have paid attention to the rules that this interpretation should be guided by. It may be argued that since Article II of the GC is a treaty provision, the usual rules of interpretation, enshrined in Articles 31–33 of the *Vienna Convention on the Law of Treaties* (VCLT), apply. The VCLT is, indeed, the natural starting point for the interpretation of these provisions and it could most probably even be used with respect to those international instruments that are not treaties, i.e., the Statutes of the ICTR/ICTY.[128] Yet, the VCLT does not deal with all aspects of interpretation in an exhaustive way. While it identifies the methods of interpretation and makes a useful distinction between the general rule and the supplementary means, it remains silent on, or deals only implicitly, with such issues as the recourse to evolutive interpretation or the choice between restrictive, literal, and extensive interpretation. It is largely accepted that these issues are not subject to strict general rules that would apply across all fields of international law but, rather, that the rules applicable across these various fields differ somewhat from each other.[129]

The Darfur Commission suggested that the interpretation of the definition of genocide should be guided by the principle of effectiveness. This speaks in favour of an extensive and flexible interpretation that the Commission also embraced in its report. An even more open-ended approach was adopted by the Spanish National Court which derived the need to interpret the concept of the protected groups in a broad and dynamic manner from the horrible nature of genocide.[130] Such an approach, relying usually on the teleological method of interpretation, is well-known in human rights law.[131] Yet, the GC, although

128 The ICTY held in *Tadić* that "[a]*lthough the Statute* […] *is* a sui generis *legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant".* ICTY, *Prosecutor v. Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) IT-94-1-T, ACh (10 August 1995), para. 18. It can be argued that this reasoning applies *a fortiori* in cases when the provision of the Statute subject to the interpretation mirrors word by word a treaty provision, as is the case with the definition of genocide in the Statutes of the ICTY/ICTR.

129 Bílková, Veronika, 'Worlds Apart? Interpretation of International Criminal Law and International Human Rights Law Treaties and the VCLT', *Austrian Review of International and European Law,* vol. 24, 2019, pp. 1–21.

130 Spain, National Court, *Auto de la Sala de lo Penal, supra note* 112*.,* Sección Quinta.

131 See Fitzmaurice, Malgosia, Interpretation of Human Rights Treaties, in Shelton, Dinah (ed.)*, The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), pp. 739–772.

it seeks to improve the protection of individuals, is not a human rights instrument only. It aims at ensuring the prevention of the crime of genocide and its repression through criminal means as well. (International) criminal law does not build on the principle of effectiveness favouring extensive and flexible interpretation. It builds on the principle of legality favouring restrictive and rigid interpretation. This is expressly confirmed in Article 22 of the Rome Statute of the ICC, which stipulates that the *"definition of a crime shall be strictly construed* […]. *In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted"* (par. 2). Although the principle of legality does not preclude the recourse to evolutive interpretation, it sets limits to this recourse and prevents courts from interpreting criminal law provisions in a too liberal and progressivist way.

What "too liberal and progressivist" means needs to be determined on a case-by case basis. It is nonetheless clear that avoiding this extreme does not require adhering to the other extreme, i.e., to stick strictly and forever to the "originalist" interpretation. Legal rules are produced in a certain social, technological, and ideological context. The changes in this context can hardly remain without an impact on the interpretation of these rules, though the nature and extent of this impact again has to be determined on a case-by-case basis. The GC, as we saw in Section 1, was drafted against the background set by the atrocities committed by the Nazi Germany and by the pre-war minority treaties. These treaties reflected the then dominant understanding of national minorities as relatively clearly delineated, separated groups of people sharing common features and constituting a smaller part of the population in their state. The existence of such groups was seen as an objective fact. The application of the GC outside Europe, together with the social, technological, and normative changes that have taken place since the 1940s, has made this understanding difficult to sustain in an unaltered way.

The structure of non-European societies and, in fact, of European societies today, is not identical to that known to the drafters of the GC. If the GC is to have any meaningful application in this new context, the concept of the protected groups has to be interpreted, as the ICTR held in *Rutaganda, "on a case-by-case basis, taking into account* […] *the political and cultural context".*[132] Furthermore, as noted by Lingaas, *"the understanding of race, ethnicity, nationality and religion has changed parallel with technological, scientific and sociological developments".*[133] The objective existence of such groups is no longer taken for granted.

132 ICTR, *Rutaganda, supra note* 48, para. 58.

133 Lingaas, *supra note* 44, p. 4.

The constructive approach that defines groups as an intersubjective phenomenon, *"the product of constant social interactions and negotiations"*[134] has gradually prevailed. This approach, again, encourages a context-specific assessment of each instance of purported genocide and a context-specific interpretation of Article II. The final rejection by the ICTR/ICTY of both the purely objective and the purely subjective definition of the protected groups and the insistence that the identification has to be made by reference to *"the* objective *particulars of a given social or historical context, and by the* subjective *perceptions"*,[135] constitute the judicial reflection of this shift. Finally, the interpretation of Article II has to take account of normative shifts, such as the rejection of the concept of race as an objective category.

Due to all these developments, the understanding of the protected groups could not, and has not, remained static. Article II has been subject to a (re) interpretation, in the result of which its borders, which seemed relatively strict and fixed in 1948, have become much more blurred and flexible. The intersubjective approach makes it possible to subsume under Article II groups that would be left out of its scope under the objective approach. At the same time, Article II still refers to national, ethnical, racial, and religious groups only and a particular group that could not be identified, albeit intersubjectively, as one of these groups, would be left out of the scope of Article II. Attempts to make the provision borderless and inclusive of virtually all human groups – i.e., through the definition by exclusion – have so far always met with resistance and rejection. These attempts are also at odds with the principle of legality, which conversely is not necessarily jeopardized by the evolutive interpretation within the borders set by Article II. It is nonetheless clear that such interpretation could not, and has not resulted, in the inclusion in Article II of human groups that do not fit within the contours, albeit blurred and flexible ones, of the provision.[136]

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134 Forster, Thomas Karl, *The Khmer Rouge and the Crime of Genocide:Issues of Genocidal Intent With Regard to the Khmer Rouge Mass Atrocities* (DIKE Publishers, 2012), p. 69.

135 ICTR, *Prosecutor v. Laurent Semanza* (Judgment) ICTR-97-20-T, TChIII (15 May 2003), para. 317 (a different script in the original).

136 As Nersessian held, *"it is proper to adopt a liberal understanding of the groups protected under the Convention* […]. *In the final analysis, however, these efforts must be understood and applied within the textual parameters set forth by the Convention's drafters".* Nersessian, David L., 'The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention', *Cornell International Law Journal*, vol. 36(2), 2003, p. 327.

5.2 *Development of a New Rule of Customary International Law*

The second mechanism that could bring about the extension of the list of the protected groups consists in the development of a new rule of customary international law. This rule would exist in parallel to Article II of the GC, though the extent to which it could have an impact on the application and interpretation of the provision remains uncertain.[137] Some authors have argued that a customary definition could trump the treaty definition, depriving the latter of any legal weight.[138] Yet, the argument is based on the (alleged) appurtenance of the broader definition (list) to *jus cogens* rather than on its customary nature and it is disputable in either form. On the contrary, what is relatively unquestionable is that a broader customary regulation could serve as an argument in favour of extending the list of the protected groups in national criminal codes and in new international treaties that might be concluded in future (for instance a treaty establishing a new *ad hoc* tribunal). It could also, more controversially, justify the use of such an extended list by national courts in situations when they are competent to apply rules of customary international law directly or when their national criminal codes define genocide by reference to customary international law.[139]

The argument that the customary definition of genocide is broader than that enshrined in Article II, encompassing a larger number of the protected groups, has been the most actively promoted by Van Schaack.[140] More specifically, she has made the case in favour of the inclusion of political groups which, in her opinion, are protected by *"the customary* jus cogens *prohibition of genocide"*[141] alongside the four groups enshrined in the GC. Support for the argument should come from *"positive law sources, the application of analogous international legal norms, the dictates of public sentiment, and the lack of a legally justifiable principle to justify the exclusion of political groups".*[142] It might be useful to recall that *"to determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general*

137 In *Jelisić*, the ICTY referred to international custom to interpret the definition of genocide as encompassing situations, when *"the exterminatory intent only extends to a limited geographic zone".* ICTY, *Prosecutor v. Jelisić*, *supra note* 55, para. 83.

138 See van Schaack, *supra note* 2, p. 2262.

139 See Kreicker, Helmut, 'National Prosecution of Genocide from a Comparative Perspective', *International Criminal Law Review,* vol. 5(3), 2005, pp. 319–322.

140 van Schaack *supra note* 2.

141 *Ibid,* p. 2280 (a different script in the original).

142 *Ibid.*

practice that is accepted as law (opinio juris)".[143] Whereas evidence for each element may come in many forms, most of the sources identified by Van Schaack would have difficulties to fit under any of them. The relevant sources quoted by her include Resolution 96(I), statements made by states during the drafting of the GC and national criminal codes with a broader definition of genocide. Assessing this (alleged) evidence, Forster notes that *"the legal basis* [for a broader customary rule] *seems very thin, with clear evidence of both* opinio juris *and state practice lacking"*.[144]

The overview of the legal developments in the previous sections gives him the truth, both with respect to political and to other groups. There is some practice at the national level confirming that certain states do not limit genocide to violent acts against the four classical groups only. This practice takes various forms, including legislative acts, decisions of national courts, and statements that states have made during the elaboration of relevant instruments (the GC, the Rome Statute) or when commenting upon, and condemning, crimes committed in other countries (e.g., condemnations of "genocide" in Cambodia). This practice is, however, sporadic and, pertaining to various human groups, also inconsistent. In addition, it is contradicted by numerous instances of contrary practice (again in the form of national criminal codes, national case law, or statements), which mostly goes in support of the list of the protected groups enshrined in Article II of the GC. In this situation, it is impossible to conclude that the material element of a new customary rule would already be present, as the relevant practice is neither widespread, not representative, nor consistent.[145]

The subjective element (*opinio juris*) is clearly lacking as well. During the drafting of new international instruments that were to rely on the rules of customary international law, such as the Rome Statute, a vast majority of states have expressed their support for the definition of genocide contained in Article II. Dissident voices have been rare and as the Irish reaction to the Cuba's proposal to include social and political groups to the Rome Statute demonstrates, these voices have typically been interpreted as relating to *lex*

143 ILC, *Draft conclusions on identification of customary international law, with commentaries,* in UN Doc. A/73/10, *Report of the International Law Commission, Seventieth session,* 2018, Conclusion 2 (a different script in the original).

144 Forster, *supra note* 134, p. 61 (a different script in the original). Similarly, Nersessian concludes that *"there simply is insufficient state practice and opinio juris to legitimately recognize the crime under international customary law".* Nersessian, David L., *Genocide and Political Groups, supra note* 2, p. 219.

145 ILC, *Draft conclusions, supra note* 143, Conclusion 8.

ferenda (proposing changes to the existing list) rather than to *lex lata* (reflecting the existing list). Moreover, states that have incorporated a broader list of the protected groups in their national legal acts, do not seem to have done so in reflection of customary international law. For instance, when the Ethiopian Federal High Court found the inclusion of political groups into the Ethiopian criminal code compatible with the GC, it did not invoke the existence of a broader customary rule but, rather, relied on the space left by the GC to individual states to go beyond what the Court saw as a minimal standard enshrined in an international instrument.

Van Schaack's claim that there is a rule of customary international law, let alone of *jus cogens,* making political groups part of the definition of genocide and imposing on states the obligation to prosecute violent acts directed against these groups as genocide, thus stands on shaky grounds.[146] Nersessian rightly held that *"however strong the underlying justifications, the formalities of law-making on the international plane cannot be dispensed with"*.[147] These formalities have clearly not been met in this case, as both the relevant state practice and the necessary *opinio juris* are absent. This conclusion holds, *a fortiori,* for other than political groups, where evidence in favour of their inclusion is even more sporadic and incoherent. At the same time, it is important to add that there are no inherent limits built in customary rules that would make the extension of the list of the protected groups through the second mechanism *a priori* impossible. Unlike the (re)interpretation of Article II of the GC, which has to remain within the borders set by the text of the provision, customary regulation does not encounter any such borders and may go – to the extent the resort to customary rules is not excluded in some areas of international law[148] – beyond what is contained in the treaty regulation. It may, but, as we have seen, it has not taken this course so far, as there is no rule of customary international law extending the list of the protected groups.

146 A similar claim has been made by the Darfur Commission (UN Doc. S/2005/60, *supra note* 72, para. 501), without however any evidence in support.

147 Nersessian, David L., *Genocide and Political Groups, supra note* 2., p. 217.

148 Fletcher and Ohlin argue that *"customary international law has no role in international criminal law* […]. *To use custom to enhance the prospects of conviction is to violate the fundamental assumptions of modern criminal law."* Fletcher, George P., Ohlin, Jens David, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case'*, Journal of International Criminal Justice,* vol. 3, 2005, p. 559.

5.3 *Revision of the Genocide Convention or Adoption of a New Instrument*

The third mechanism that could result in the inclusion of new protected groups under the definition of genocide consists in the revision of the GC or, alternatively, the adoption of a new instrument on genocide or some forms thereof. It is obvious that this mechanism, in either of its forms, has not been put in place yet. In fact, it seems that since the adoption of the GC, this option has never even been seriously contemplated by states. Initiatives, such as the 1986 resolution by the US Senate calling upon the president to take steps, after the ratification of the GC by the US, to notify the UN of the desire of the US to amend the GC to include acts of political genocide within the definition of genocide,[149] have remained isolated and, actually, have not had any effects. Scholars have paid more attention to the third mechanism, though even among them, scepticism seems to have largely prevailed.[150] The question arises whether this scepticism, and the general lack of interest in a revision of the GC or the adoption of a new treaty, arises from the legal unavailability or unfeasibility of this option or whether it reflects other considerations.

Prima facie, the mechanism, in both its forms, seems available. The GC clearly admits revisions, as it regulates the procedure through which such revisions should be carried out in Article XVI. This regulation is in line with the general rule contained in Article 39 of the VCLT, by virtue of which *"a treaty may be amended by agreement between parties".* One limit that may apply concerns the possibility of a revision carried out between some state parties only (Article 41 of the VCLT). Unlike many other treaties, the GC does not aim at coordinating relations between states solely. Rather, it aims at establishing a special international regime.[151] Revisions of the GC among some parties only, even if they sought to enhance or extend the standard of protection, could threaten the coherence of this regime. The GC would thus need to be revised among all state parties, following the procedure set in its Article XVI and in Article 40 of the VCLT. At the same time, there is nothing in the GC or the VCLT that would render it unlawful for states to conclude a new convention on

149 US Senate, Resolution 347, 19 February 1986, cit. in Leich, Maria Nash, 'Contemporary Practice of the United States Relating to International Law', *American Journal of International Law,* vol. 80(3), 1986, p. 622.

150 See Leblanc, Lawrence J., *supra note* 38*;* Schabas, William A., 'Groups Protected', *supra note* 44*;* Hirsch, Asher, 'Should the Genocide Convention be expanded?', *AsherHirschBlog,* 25 September 2013.

151 Bílková, Veronika, *Global Prohibition Regimes and International Law* (Passau-Berlin-Prague: rw&w Science&New Media, 2017), pp. 110–123.

genocide or on some forms thereof, though in the two cases, it would be necessary to determine the relationship between the new instrument and the GC.[152]

The main arguments raised against the third mechanism do not, in fact, relate to its availability and lawfulness – these seem widely accepted. Rather, these arguments concern the absence of political will to make use of the mechanism; and the suitability of resorting to it with respect to the list of the protected groups. The first argument echoes the worries articulated during the drafting of the GC that the inclusion of other than the four groups would threaten the prospects of the ratification of the instrument. Nowadays, it mostly draws attention to the low interest among states in changing the legal framework on genocide. It is indeed true that the political will to reopen this framework is lacking, partly certainly due to worries that a revised GC or a new instrument would not secure such high support among states as the original GC.[153] Yet, political will is a variable. It can be absent one moment but present the next, as the adoption of the GC or of the Rome Statute show very well. One of the factors that may bring it about is the evidence in support of the suitability and utility of the relevant legal change.

The suitability and utility of the extension of the list of the protected groups has, however, been repeatedly questioned. It has been argued that this extension would be not only inappropriate but even dangerous. Inappropriateness is usually linked to the special features of the four protected groups that allegedly tell them apart from other groups. Dangerousness relates to that *"diluting the definition* […] *risks trivializing the horror of the real crime when it is committed"*.[154] Neither of these arguments is convincing. The special features of the four groups should consist either in their stable and permanent nature (Lemkin, ICTR) or in their higher propensity to become victims of violent campaigns (Poland 1948). Concerning the latter, this higher propensity has been repeatedly proven wrong by history. Many other groups – defined by their political views, social class, sexual orientation, gender, or state of physical or mental health – have become victims of violent campaigns over the past decades. There is probably not a single human group that would be safe in this respect, as human capacity to "discover" or, fabricate, new enemy groups

152 Article 30 of the VCLT (Application of successive treaties relating to the same subject matter) could be of some relevance here, though it is highly unlikely that if states decided to adopt a new genocide convention, they would do so without determining its relationship to the GC explicitly.

153 As of May 2022, the GC has been ratified by 153 states.

154 Schabas, William A., 'Groups Protected', *supra note* 44, p. 387.

whose members do not purportedly deserve to be treated as fully humans, appears endless.

The nature of the four protected groups deserves more attention. The claim that these groups are stable and permanent, whereas all the other groups lack these qualities, has been made many times by many actors since the 1940s.[155] Yet, as Nersessian shows, the four groups are not really coherent in that respect, as they include both *"groups based principally upon what they* are *and upon what they* believe*"*.[156] The latter groups can hardly be seen as truly stable and permanent in the sense that the membership in them would be acquired on birth and would be unalterable. At the same time, some groups that reveal such features – e.g., those based on sexual orientation or gender – have been left out of Article II. With the objective approach making way to the inter-subjective one and, also with the technological progress (making it possible to change sex or physical features), the distinction between stable and permanent, and flexible and non-permanent groups has lost much of its currency. Nersessian, moreover, is right to ask why the groups with an innate membership should enjoy higher protection than those with voluntary membership.[157] This question is already closely linked to the argument that extending the list of the protected groups would be dangerous.

The dangerousness shall consist in that the inclusion of new groups might *"trivializ/e/ the horror of the real crime when it is committed"*.[158] This argument seems to be predicated on the idea that crimes committed against the four groups are somehow more serious than those committed against other groups. Whereas the former are "real crimes" that should qualify as genocide, the latter may not aspire to such a qualification, though they may meet the definition of some other crimes (war crimes, crimes against humanity, crimes under national law). None of these alternative qualifications carry however the same symbolic value as does the finding that genocide has been committed. Moreover, nothing brings about the same public condemnation of perpetrators and the same

155 The etymological argument could also be made, limiting genocide to violent acts against a race or tribe (*genos*). Yet, the current list, including religious groups, already goes beyond what would correspond to the literal wording of the text. Moreover, that international crimes do not need to be prisoners of their 'labels' has been shown by war crimes, which originally encompassed only crimes committed in international armed conflicts (called as wars) but have been extended to crimes committed in non-international armed conflicts as well.

156 Nersessian, David L., *Genocide and Political Groups, supra note 2,* p. 71 (a different script in the original).

157 *Ibid,* pp. 71–72.

158 Schabas, William A., 'Groups Protected', *supra note 44,* p. 387.

compassion for victims. The idea of special seriousness of crimes committed against the four groups can probably be traced back to Lemkin's conception of genocide as a crime that deprives the world community of the future contribution made by nations as *"essential elements of the world community"*.[159] This conception is not without merits. Yet, it suffers from two weaknesses.

First, Nersessian's question why some groups should matter more than others may be translated here into the query why the contributions made by some groups should be considered more valuable than those by other groups. None of the scholars advancing the trivialization argument addresses this question and, in fact, none of them alleges that other than the four groups would have nothing to contribute to the world community. Rather, these scholars either stress the quantitative aspect – genocide should *"occur only rarely"*[160] to be taken seriously; or relate to the historical origins of the crime – the narrow list *"accurately protects those it was intended to – national minorities"*.[161] The first claim seems to suggest that to make horrors suffered by some groups more visible, horrors suffered by other groups must be treated as less relevant. The second claim suggests that the line between the groups that matter more and those that matter less, shall be that drawn back in 1948. Yet, as noted above, this line largely reflected the special context of the 1940s, since, as Poland declared in 1948, the primary aim of the GC was *"to prevent a repetition of the atrocities perpetrated during the last war"*.[162] One needs to ask whether the GC and the concept of genocide as such have to remain the prisoner of "the last war", which is now more than 75 years over, forever.

Secondly, the concept of genocide relies on the collectivist vision of human society. As Lemkin held back in 1944, genocide *"is directed against the* [...] *group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group"*.[163] At that time, there was nothing unusual about this approach, as the pre-war minorities treaties had also put national minorities as such, rather than individual members thereof, to the centre of attention. Furthermore, members of national minorities were the only persons then whose protection was granted internationally, with the other individuals and groups being largely left at the goodwill of states. After 1945, international law made an individualist turn. Individuals, all individuals this time, have been granted protection by international law, primarily through

159 Lemkin, Raphael, *Axis Rule in Occupied Europe, supra note* 4, p. 91.
160 Hirsch, Asher, *supra note* 150.
161 *Ibid.*
162 Abtahi, Hirad, Webb, Philippa, *supra note* 32, p. 717.
163 Lemkin, Raphael, *Axis Rule in Occupied Europe, supra note* 4, p. 91.

human rights law. They enjoy this protection *qua* human beings rather than *qua* members of specific groups. Contemporary international law relies on the principles of equal dignity and equal value of all individuals, and it prohibits discrimination based on personal characteristics. The question may be asked whether the enhanced protection that the GC provides to those who have certain physical features (race) or believe in certain Deity (religion) but denies to those who have other physical features (disability) or believe in some ideology (political orientation), is fully compatible with these principles.[164]

6 Conclusions

According to an old Indian proverb, every individual is a house with four rooms. The same traditionally holds true for the definition of genocide, which only includes violent acts directed against four – national, ethnical, racial, and religious – groups. This paper has discussed whether this narrow scope is inherent in the concept of genocide or whether the concept could be expanded to include violent acts against other groups as well. Three possible mechanisms of this extension – the (re)interpretation of Article II of the GC, the development of a new rule of customary international law, and the revision of the GC or the adoption of a new treaty – have been considered. The paper has come to two main conclusions.

First, the understanding of the protected groups has not remained static. Over the past decades, international and national courts and other bodies have engaged in a (re)interpretation of Article II of the GC (and the provisions containing the same definition of genocide, such as Article 6 of the Rome Statute). Rather than leading to the extension of the list of the protected groups, however, this (re)interpretation has made the definitions of the four classical groups more flexible. The strict borders that the definitions seemed to have in 1948, have turned out to be much more blurred. This is the result of the application of the GC and the other instruments outside the original (European) context and of the social, technological, and normative changes having taken place since the 1940s. In reflection of these changes, the objective

164 Traditionally, the prohibition of discrimination applies to unreasonable distinctions among groups of the same type (e.g., various religious groups). One may wonder whether it could not be extended to unreasonable distinctions among different groups (e.g., religious and political groups), as long as these groups are in a comparable position. See Vierdag, Bert E. W., *The Concept of Discrimination in International Law* (Martinus Nijhoff, 1973).

definition of the groups (based on objective features) has been abandoned and, after a short judicial flirting with a subjective definition (based on self-identification or identification by perpetrators), the intersubjective approach has prevailed. This approach, which sees groups as social constructs, calls for a context-specific assessment of each instance of purported genocide and for a context-specific interpretation of Article II.

Secondly, while the (re)interpretation of the treaty provisions has made the definitions of the four protected groups more flexible, it has not led to the extension of the list of these groups. It is, moreover, not able to do so, as the first mechanism runs here into the limits set by the texts of the provisions referring only to four groups. At the same time, there are no similar limits imposed on the other two mechanisms, i.e., the development of a new customary rule, and a revision of the GC or the adoption of a new treaty. The narrow scope of the definition of genocide enshrined in Article II is the product of the times when the GC was adopted, reflecting the experiences and legal, political, and other conceptions of those times. Since times have changed and the experiences and conceptions have changed with them, there is no reason why the understanding of genocide could not change as well. The inclusion of new groups – by the customary or conventional way – would not question a difference between the four groups on the one hand and all the other groups on the other; such a difference does not exist in the first place. Nor would it trivialize horrors experienced by members of the four groups; rather, it would recognize that there is no reason to trivialise horrors experienced by members of other groups and to treat these groups as less essential elements of the world community. It would also reflect the universalist turn in international law that has made group affiliation less crucial for the determination of the status and the level of protection of individuals. The house of genocide thus could accommodate more than the four classical rooms and doing so would not deprive it of its status of *"the crime of crimes".*[165]

165 Schabas, William A., *Genocide in International Law, supra note* 1*,* title.

CHAPTER 6

The Prevention of Cultural Genocide and the International Protection of National Minorities

Harald Christian Scheu

1 Introduction

The Genocide Convention of 1948[1] is a complex international treaty addressing important issues of international criminal law and international human rights law. Moreover, from a historical perspective, there is no dispute that the prevention of genocide is also a crucial instrument of international minority protection.

In the period following World War II, the international community had relatively little interest in dealing with the protection of national minorities. Neither the 1945 UN Charter nor the 1948 Universal Declaration of Human Rights made any explicit reference to minority rights because, after the decline of the Leagues of Nations' system, the majority of states were convinced that the legal problems of national minorities should instead be tackled by new instruments aiming at the general protection of human rights than by codifications of specific minority rights.[2]

In this respect, the 1948 Genocide Convention can be seen as an important exception from the quite restrictive approach towards minority protection. Although the Genocide Convention did not explicitly use the term "minority", there is no serious doubt that the term "national, ethnical, racial or religious group" in Article 2 of the Genocide Convention intends to cover traditional minorities.[3]

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1 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted on 8 December 1948, entered into force on 12 January 1951.

2 Korkeakivi, Antti, Beyond Adhocism – Advancing Minority Rights through the United Nations, in Hofmann, Rainer, Malloy, Tove H., Rein, Detlev (eds.), *The Framework Convention for the Protection of National Minorities* (Leiden/Boston: Brill Nijhoff, 2018), pp. 22–48; and Hafner, Gerhard, Die Entwicklung des Rechts des Minderheitenschutzes, in Hofmann, Rainer et al (eds.), *Das Rahmenübereinkommen zum Schutz nationaler Minderheiten. Kommentar* (Zürich/St. Gallen: Dike Verlag, 2015), pp. 27–46.

3 Brückner, Wenke. *Minderheitenschutz im Völkerstrafrecht* (Baden-Baden: Nomos, 2018), pp. 204–207.

We may say that, for almost two decades, the Genocide Convention was the only universal legal norm of international minority protection. It was only in 1966, when Article 27 of the International Covenant on Civil and Political Rights (ICCPR) clarified that besides the prohibition of the physical extinction of minorities, international law of minority protection includes a set of cultural rights. At the European level, the 1995 Framework Convention for the Protection of National Minorities is the most prominent treaty in the field of minority rights. Cultural minority rights, in a broad sense, relate to the protection of a minority's language, religion, historical conscience, traditions, etc.

From an international legal perspective, we may therefore identify two major elements of minority protection. Firstly, the physical existence of a minority and its members is guaranteed by the Genocide Convention and by a number of human rights treaties stipulating the right to life. Secondly, specific cultural rights of national minorities are provided for by Article 27 ICCPR and by various provisions of the Framework Convention.

This dichotomy is inspired by the idea that, whereas there shall be a common universal standard preventing the physical extinction of minorities, cultural minority rights are somehow relative, as their implementation largely depends on factors such as the absolute and the relative number of minority members, available financial resources, historical circumstances, etc. The structure of standard textbooks on international minority protection further suggests that the protection from genocide is a necessary precondition for minority rights.[4] Therefore, quite a lot of textbooks refer to the Genocide Convention only in passing, without dealing with the Convention in details.[5]

However, the dividing line between genocide prevention on one hand and the protection of minority culture on the other cannot be drawn with absolute precision. Between both areas, there is a grey zone that relates to the concept of "cultural genocide". This concept, which was originally intended to be included to the Genocide Convention, suggests that the physical existence of a minority cannot always be separated from aspects concerning the cultural identity of minority.

In this contribution, we start from the assumption that the Genocide Convention is an important instrument of international minority protection.

4 Pentassuglia, Gaetano, *Minorities in International Law: An Introductory Study* (Strasbourg: Council of Europe Publ., 2002), pp. 42 and 79–83.

5 Henrard, Kristin, Dunbar, Robert, *Synergies in Minority Protection* (Cambridge: Cambridge UP, 2009); Arp, Björn, Arp, Bjorn, *International Norms and Standards for the Protection of National Minorities* (Leiden: Brill, 2008); Pan, Franz, *Der Minderheitenschutz im neuen Europa und seine historische Entwicklung* (Wien: Braumüller, 1999).

In the first part of this paper, we deal with the concept of cultural genocide from the perspective of the Genocide Convention and its drafting process. In the second part, we will analyse the relationship between cultural genocide and forced assimilation in light of the Framework Convention for the Protection of National Minorities. In our conclusions, we will show the potential impact which the Genocide Convention could have on the protection of cultural minority rights.

2 The Genocide Convention and the Prevention of Cultural Genocide

2.1 *Drafting History*

In his famous publication of 1944, which has become a major point of reference in academic literature, Raphael Lemkin identified several forms of genocide which go beyond the physical destruction of a group. Among eight dimensions of genocide he mentioned also the cultural and religious dimension.[6] Especially, with a view to crimes committed by the German Nazi regime, Lemkin listed concrete examples of cultural genocide such as the prohibition of the use of a group's language, the prohibition of minority associations, cultural institutions and media, and the destruction of church property.[7]

The first draft of the Genocide Convention, presented in June 1947, contained a number of examples of cultural genocide, such as the forced and systematic exile of individuals representing the culture of a group, the prohibition of the use of the national language, even in private intercourse, the systematic destruction of books printed in the national language or of religious works or the prohibition of new publications, and the systematic destruction of historical or religious monuments or their diversion to alien uses.[8] Of all the examples enumerated in the draft, only "the forcible transfer of children to another group" remained part of the genocide definition laid down in Article 2 of the Convention.[9]

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

7 Irvin-Erickson, Douglas, Raphaël Lemkin: Culture and Cultural Genocide, in Bachman, Jeffrey S., *Cultural Genocide* (London: Taylor and Francis, 2019), pp. 21–44.

8 UN Secretariat, *Secretariat Draft. First Draft of the Genocide Convention*, May 1947, UN Doc. E/447.

9 See Article 2 (e) of the Genocide Convention: "*forcibly transferring children of the group to another group*". It needs to be added that the forcible transfer of children does not imply the physical killing of children but the extinction of their culture. In this sense, this example goes beyond the narrow concept of physical destruction of a group.

In the second draft version of April 1948, cultural genocide was defined as "*any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial, or religious group on grounds of the national or racial origin or the religious belief of its members*." The draft provision gave two specific examples of cultural genocide: first, prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group and, second, destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[10]

We see how closely these elements of cultural genocide are related to the core of minority protection. During the 83rd session of the Sixth Committee in October 1948,[11] the Swedish delegation quite correctly pointed out that draft Article III on cultural genocide had many similarities with minority protection clauses in the minority treaties concluded after World War I. Indeed, both examples listed in draft Article III, i.e., the prohibition of the use of minority languages and the destruction of cultural sites and cultural heritage, very negatively affect the identity of a national minority and represent a clear violation of minority rights as provided by current international treaties.

At its session of October 1948, the Sixth Committee intensely discussed the definition of cultural genocide contained in Article III. A number of issues were highlighted which are very relevant from the perspective of minority protection. As for the above-mentioned dichotomy of physical genocide and cultural minority rights, the delegation of Pakistan openly questioned the assumption that physical genocide is under all circumstances a more serious crime than cultural genocide. According to Pakistan, the purpose of cultural genocide is to destroy the very soul of a national, racial, or religious group. Therefore, Pakistan suggested that the protection of sacred books and shrines, for many millions of people in Eastern countries, was more important than life itself. Some other delegations, like e.g., the Chinese delegation, joined the view that cultural genocide might be even more harmful than physical or biological genocide.

However, one of the major problems related to the inclusion of cultural genocide in draft Article III was the vagueness of the concept. E.g., the Danish delegation argued that the unclear notion of cultural genocide would not be practicable in proceedings before national and international courts. Egypt

10 Ad Hoc Committee Draft, Second Draft of the Genocide Convention Prepared by the Ad Hoc Committee of the Economic and Social Council (ECOSOC), UN Doc. E/AC.25/SR.1 to 28 (meeting between 5 April 1948 and 10 May 1948).

11 United Nations General Assembly, UN Doc. A/C.6/SR.83 (25 October 1948).

expressed the fear that cultural genocide could be hardly distinguished from forced assimilation. The Iranian delegation even wondered whether assimilation resulting from the civilizing action of a state should constitute genocide.

It is well known that the drafted provision on cultural genocide as such was voted out of the Genocide Convention. In December 1948, the Sixth Committee informed that the draft article on cultural genocide (draft Article III) "*gave rise to a discussion on the question whether this form of genocide should be covered by the Convention*." The Sixth Committee, by 25 votes to 16, with 4 abstentions, decided not to include provisions relating to cultural genocide in the Genocide Convention. Several members of the Sixth Committee declared that cultural genocide "*might more appropriately be taken within the sphere of human rights*."[12]

2.2 *Interpretation by International Bodies*

When the International Law Commission (ILC) in 1996 presented its commentary to the Draft Code of Crimes against Peace and Security,[13] it provided detailed guidance on the interpretation of Article 17 of the Draft Code dealing with the crime of genocide.[14] Relying on the preparatory work for the Genocide Convention, the ILC confirmed that the term destruction relates to the material destruction of a group and shall not cover "*the destruction of the national, linguistic, religious, cultural or other identity of a particular group*." According to the ILC, the term genocide comprises "physical genocide" as defined in Article II subparagraph (a) to (c) of the Genocide Convention and "biological genocide" as defined in subparagraphs (d) and (e).[15] So, the forcible transfer of children, originally conceived as an element of cultural genocide has been requalified by the ILC as an element of biological genocide.

After having excluded elements of cultural genocide within the material scope of the crime of genocide, the ILC conceded that acts of cultural genocide might for example constitute a crime against humanity (Article 18 of the Draft Code) or war crime (Article 20 of the Draft Code).[16] This question, however, goes beyond the scope of our contribution.

12 UN Doc. A/760 (3 December 1948), para. 11.

13 UN Doc A/CN.4/SER.A/1996/Add.l (Part 2), pp. 17–56.

14 Article 17 of the Draft Code, in principle, reproduces the definition of genocide contained in Article II of the Genocide Convention.

15 Commentary to Article 17 of the Draft Code, para. 17.

16 Novic, Elisa, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford UP, 2016), pp. 142–168.

As for the interpretation of the term genocide by international judicial bodies, we may point at the prominent case of *Prosecutor v. Radislav Krstić*. In 2001, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in line with interpretation provided by the ILC, insisted on the argument that "*the notion of cultural genocide was considered too vague and too removed from the physical or biological destruction that motivated the Convention*."[17] With regard to the principle of *nullum crimen sine lege*, the Trial Chamber refused to re-interpret the concept of genocide in the light of new developments. According to the Trial Chamber, "*customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group*" and that "*an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements* [...] *would not fall under the definition of genocide*."[18] In 2004, this interpretation was confirmed by the ICTY Appeals Chamber.[19]

A rather restrictive approach towards the concept of cultural genocide has also been applied by the International Court of Justice (ICJ). In the case of *Bosnia and Herzegovina v. Serbia and Montenegro*[20] the Court reiterated 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 ICJ found that "*such destruction, though highly significant, does not fall within the categories of acts of genocide set out in Article II of the Convention*."[21] The ICJ upheld this interpretation in its more recent judgment in the case of *Croatia v Serbia*.[22] With a view to the circumstances of these cases, we may conclude that if even a systematic and ruthless practice of forced displacements does not qualify as genocide within the meaning of Article II of the Genocide Convention, other forms of cultural genocide will not do so either.

In academic literature, the judgment of the ICTY Trial Chamber in the case of *Prosecutor v. Blagojevic* is being presented as the only significant deviation

17 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33-T, TCh (2 August 2001), para. 576.

18 *Ibid*, para. 580.

19 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33-A, ACh (19 April 2004), para. 25.

20 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43.

21 *Ibid*, para. 344.

22 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015, p. 3, paras. 162–163.

from consolidated international jurisprudence.[23] In 2005, the ICTY Trial Chamber found that "*physical or biological genocide could extend beyond killings of the members of the group*." With regard to the interpretation of the term "destruction of a group" the Trial Chamber concluded that it can encompass the forcible transfer of a population.[24] According to the ICTY Trial Chamber "*the physical or biological destruction of a group is not necessarily the death of the group members*" and not only the killing of large numbers of a group, but also other acts or series of acts can lead to the destruction of the group.[25]

Such broader concept of genocide, however, has not been confirmed by more recent case law. We may conclude that there is very little space for the inclusion of elements of cultural genocide within the narrow concept of genocide as laid down in the Genocide Convention. Different aspects of minority culture, therefore, shall not be addressed within the frame of the Genocide Convention. They have to be tackled by legal instruments of minority protection.

3 The Prevention of Cultural Genocide and the Protection of National Minorities

Neither the Framework Convention for the Protection of National Minorities, nor the *Advisory* Committee on the Framework Convention for the Protection of National Minorities (ACFC), as the competent monitoring body, use the term cultural genocide. A general provision on the protection of national minority culture has been included in Article 5 of the Framework Convention. The first paragraph of the provision contains a positive obligation, i.e., the duty to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity. The second paragraph adds a negative obligation according to which States Parties shall refrain from policies or practices aimed at assimilation of minority members against their will. States Parties shall protect minority members against any action aimed at such assimilation.

While the Explanatory Report to the Framework Convention does not provide a definition of the term assimilation, it clarifies that the purpose of the above-quoted provision is to protect persons belonging to national minorities from assimilation against their will and that it does not prohibit voluntary

23 Novic, *supra note* 16, pp. 86–87.

24 ICTY, *Blagojević/Jokić* (Judgment) IT-02-60-T, TCh (17 January 2005), paras. 658 and 665.

25 *Ibid*, para. 666.

assimilation (para. 245). The Explanatory Report further confirms that States Parties are not precluded from taking measures in pursuance of their general integration policy (para. 246).

It seems, however, that this explanation raises more questions than it provides answers. First, it is unclear how to distinguish between forced and voluntary assimilation. Shall minority members submit an informed consent? Indeed, in the context of indigenous rights, the instrument of free, prior, and informed consent has been considered by several international human rights bodies.[26] A clear reference to this instrument may be found in the United Nations Declaration on the Rights of Indigenous Peoples of 2017.[27] Second, it is unclear according to which criteria we shall recognize that minority members are being assimilated or have already been assimilated? How many essential elements of a minority identity need to be cancelled or fundamentally changed so that we can call such process assimilation? The issue gets even more complicated if we try to link the undefined concept of assimilation to the vague notion of integration. Which kind of integration measures aimed at facilitating elements of majority culture to minority members shall be considered as being in compliance with the obligations under the Framework Convention?

We have to admit that, in its monitoring practice, the ACFC has not provided definite answers to these questions, so far, but it has elaborated on some important aspects of minority culture. Whereas in its first and second thematic commentaries on education issued in 2006[28] and on participation issued in 2008,[29] the ACFC did not deal with issues of assimilation, in its third thematic commentary on language rights of 2012[30] it made an interesting point on voluntary assimilation. According to the ACFC, assimilation as a voluntary individual process is often preceded by a period of cultural, social, or political inequality between the majority and minority population and that such inequality may lead minority members to consent to assimilate.[31]

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26 Barelli, Mauro, Free, Prior, and Informed Consent in the UNDRIP, in Hohmann. J., Weller, M. (eds.), *The UN Declaration on the Rights of Indigenous Peoples. A Commentary* (Oxford: Oxford UP, 2018), pp. 247–271.

27 UNGA, A/RES/61/295 (13 September 2007). The term "free, prior, and informed consent" is contained in Articles 10, 19, 29(2), and 32(2) of the Declaration.

28 ACFC, *Thematic Commentary No 1 on Education under the Framework Convention for the Protection of National Minorities* (ACFC/25DOC(2006)002).

29 ACFC, *Thematic Commentary No 2 on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs* (ACFC/31DOC(2008)001).

30 ACFC, *Thematic Commentary No 3 on the language rights of persons belonging to national minorities under the Framework Convention* (ACFC/44DOC(2012)001rev).

31 ACFC, *Thematic commentary No 3,* para. 24.

In the same thematic commentary, the ACFC presented integration, as opposed to assimilation, as a legitimate process of social cohesion which respectfully accommodates diversity. The ACFC adopted the picture of integration as a two-way process based upon recognition and respect on the side of the majority population as well as on the side of the minority.[32] During such a process, both the majority and minority cultures undergo changes.[33]

The fourth thematic commentary of the ACFC issued 2016[34] deals more explicitly with the concept of diversity. The Framework Convention is presented as a key tool in managing diversity through minority rights. In order to draw a clear line between forced assimilation and legitimate integration, the ACFC explains that whereas assimilation forces minority members to relinquish their specific characteristics to blend into a society that is dominated by the majority, integration requires both the majority and the minorities to mutually adapt and change through an ongoing negotiation and accommodation process.[35] The thematic commentary, however, does not clarify what is the effect of such process of change and accommodation on the essential elements of minority identity within the meaning of Article 5 of the Framework Convention.

It rather seems that, for the sake of "managing diversity", the elements of minority culture are considered as replaceable and interchangeable. From such a perspective, the commitment laid down in Article 5 of the Framework Convention no longer plays a crucial role. Therefore, in its fourth thematic commentary, the ACFC contended that protection from assimilation had been important in the light of state-formation and national-building processes in the 1990s. However, at present, there shall be a new understanding of minority rights which reflects global and regional mobility of populations. According to the ACFC, attention has shifted to the challenge of forming integrated and inclusive societies where diversity is acknowledged and welcomed.[36]

These considerations are certainly legitimate. The goal of building diverse societies is supported not only by the ACFC, but also by the documents of the OSCE High Commissioner on National Minorities and the European Commission against Racism and Intolerance (ECRI). Without a doubt, the

32 Scheu, Harald Christian, 'Migrant Integration as a new EU Agenda', *Czech Yearbook of Public and Private International Law*, vol. 8, 2017, pp. 173–181.

33 ACFC, *Thematic commentary No 3,* para. 25.

34 ACFC, *Thematic Commentary No 4 on the scope of application of the Framework Convention for the Protection of National Minorities* (ACFC/56DOC(2016)001).

35 ACFC, *Thematic commentary No 4*, para. 44.

36 ACFC, *Thematic commentary No 4*, para. 84.

concept of a society based upon a mutual agreement between the majority and the minorities and the peaceful transformation of majority and minority cultures is very likeable. However, we are not sure whether diverse societies shaped in accordance with current human rights documents are the place where the identity of traditional national minorities may be maintained and developed, and the essential elements of their culture may be preserved.

4 Conclusions

From this brief analysis of some key documents related to the concepts of minority identity, assimilation, and cultural genocide we may draw the following conclusions.

The Genocide Convention is the major legal instrument for the protection of the physical survival of traditional minorities. As the concept of cultural genocide has been excluded from the final version of the Genocide Convention, there is very little space, in this context, for referring to the cultural dimension of minority protection. Nevertheless, the concept of cultural genocide has the potential to inspire international scholars and international judicial bodies. Very often, acts aimed at the physical destruction of a minority group are accompanied by measures against its cultural identity. In some cases, the destruction of a minority's culture may be the first step to its physical extinction.

The Framework Convention, as the major regional instrument of minority protection, does not include the term cultural genocide but contains the prohibition of forced assimilation. The monitoring practice of the ACFC has shown that the vague concept of assimilation needs further clarification, especially in relation to the concept of integration. So far, in ACFC practice we do not find clear guidelines for the interpretation of the term "essential elements of minority identity". However, it is evident that the disappearance of these essential elements, no matter whether they are based upon language, religion, customs, or traditions, will, necessarily lead to the disappearance of the minority as such.

Recent attempts to conceive minority identity as part of diverse and inclusive societies question the need for the conservation of essential cultural elements. It seems that the procedure of mutual exchange and mutual adaptation is considered more important than the result of such process. We do not question that, in principle, minority integration is rather a complex process than a state of things. However, we find it dangerous to promote the vision of a diverse society without defining clear cultural essentials that need

to be protected or even conserved. A new interpretation of Article 5 of the Framework Convention should not be abused to discredit more traditional understandings of minority culture as backward and outdated and to replace them by the concept of diverse societies as a product of elite culture.

From this perspective, it is to be regretted that the concept of cultural genocide has been excluded from the Genocide Convention. The interpretation of the Framework Convention and its crucial terms in the light of the "living instrument" doctrine, which is so typical and important for human rights treaties, may, at times, lead to ambiguity and ideological conflict. In contrast, the terms of the Genocide Convention, which is an instrument of international criminal law, need to be interpreted in a more narrow and unequivocal manner that is in line with the standard of *nullum crimen sine lege*. If cultural genocide had been included into the Genocide Convention, the jurisprudence of international and national criminal courts would probably have contributed to a more consolidated understanding, not only of the very concept of cultural genocide, but also, of crucial terms of minority protection such as e.g., minority identity, essential elements, forced assimilation and minority integration.

The drafting process of the Genocide Convention reminds us that the basic elements of a minority culture are not easily interchangeable and relative by their nature. It might be necessary to consider whether, in specific situations, the defense and preservation of essential elements of minority culture are as important as the physical survival of a minority group.

CHAPTER 7

"The Victim Is the Group Itself"

The Objective and Subjective Criteria in Determining the Groups Protected against Genocide

Kateřina Uhlířová

1 Introduction

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which came into force 70 years ago, considers national, ethnic, racial, and religious groups as the *sole* categories of groups that must be protected against the crime of genocide.[1] The genocidal acts must be committed against individuals because of their membership in one of these groups and "*as an incremental step in the overall objective*" of destroying the targeted group.[2] Yet, the "*broad and loose*"[3] terminology of the Genocide Convention does not specify any criteria for identifying the four protected groups,[4] and as

1 Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, entry into force on 12 January 1951), UN GA Res. 260 (III) A (1948). Compare with Article I(I) of the Draft Convention on the Crime of Genocide (prepared by the UN Secretariat on 26 June 1947) UN Doc. E/447 (1947). Some observers expressed criticism relating to the creation of a special crime of genocide, since the definition arguably "*reifies national, ethnic, racial, and religious groups, and thus requires exactly the kind of group-based thinking that causes genocide*". Luban, David, 'Arendt on the Crime of Crimes' (2005) 28 (3) *Ratio Juris* pp. 307–325.

2 Report of the International Law Commission on the work of its forty-eighth session (6 May - 26 July 1996), Official Records of the General Assembly, Fifty-first session, Supplement No.10, *The Yearbook of the International Law Commission* (1996), vol. II(2), A/51/10, p. 45, para. 6. Compare with ICTR, *Prosecutor v. Rutaganda* (Trial Judgment) ICTR-96-3-A, TCh I (6 December 1999), para. 59. See also the findings of the Independent International Commission of Inquiry on the Syrian Arab Republic: "*ISIS commits the crime of genocide against individual Yazidis, as an incremental step in their overall objective of destroying this religious community*", in Human Rights Council, 'They came to destroy: ISIS Crimes Against the Yazidis', A/HRC/32/CRP.2 (15 June 2016), p. 4 and p. 36.

3 Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc S/2005/60 (1 February 2005), para. 494.

4 ICTY, *Prosecutor v. Krstić* (Trial Judgement) IT-98-33-T, TCh (2 August 2001), para. 555.

such, there is no generally and internationally accepted definition of each of these categories.[5] At the same time, the special status of groups needs to be identified and explained, "*over and above the value of the individuals*"[6] composing the group, since "*the victim is the group itself, not merely the individual*",[7] as the International Criminal Tribunal for Rwanda in the *Niyitegeka* case emphasized.[8] This exceptionally difficult task poses many theoretical and practical challenges, including "*the very possibility of using legal tools to address genocide*".[9] The question of who is protected within the ambit of the four groups is "*one of the most complicated ones*".[10] Accordingly, the surrounding discourse still remains discordant and an ongoing debate about conceptual issues relating (not only) to the group membership is as alive today[11] – and with the allegations of genocidal acts committed against the Yazidis, Rohingya, or Uyghurs as urgent – as it was more than 70 years ago, when Raphael Lemkin first coined the word "genocide".[12]

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5 See for example ICTR, *Prosecutor v. Rutaganda, supra note* 2, para. 56 ("[T]*here are no generally and internationally accepted precise definitions* [of] *national, ethnical, racial and religious groups*", thus each group should "*be assessed in the light of a particular political, social and cultural context*"). Similarly, ICTR, *Prosecutor v. Kajelijeli* (Trial Judgement) ICTR-98-44A-T, TCh II (1 December 2003), para. 811.

6 Luban, David, 'Arendt on the Crime of Crimes' (2015) 28 (3) *Ratio Juris*, pp. 307–325.

7 ICTR, *Prosecutor v. Muhimana* (Trial Judgment) ICTR-95-1B-T, TCh III (28 April 2005), para. 500; ICTR, *Prosecutor v. Kajelijeli*, *supra note* 5, para. 813.

8 Compare with the Report of the International Law Commission, *supra* note 2, p. 45, paras. 6–7.

9 Luban, David, *supra note* 6.

10 Lingaas, Carola, 'Defining the Protected Groups of Genocide Through the Case Law of International Courts', *International Criminal Database Brief* 18 (2015), p. 2. With regard to the crimes committed by the Khmer Rouge in Cambodia, see for example Luban arguing: "*Some international lawyers have found legal arguments of questionable soundness to justify describing the Cambodian slaughter as genocide-but the very fact that lawyers need to torture the language of the Genocide Convention to call the Cambodian events "genocide" shows clearly how far the law deviates from common moral classification.*" Luban, David, *supra note* 6, p. 317. Compare with Schabas, William A., *Genocide in International Law*. 2nd ed. (Cambridge: Cambridge University Press, 2009), p. 118.

11 Van Schaack, Beth, 'Darfur and the Rhetoric of Genocide', (2004) 26 *Whittier Law Review* 1101. See, for example, Claus Kreß arguing against "*the current trend of the international case law to expand the boundaries of the definition at the risk of the crime's trivialization*" in Kreß, Claus, 'The Crime of Genocide under International Law', (2006) 6(4) *International Criminal Law Review*, pp. 461–502.

12 See Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, Division of International Law, 1944), p.79. See also Lemkin, Raphael, 'Genocide as a Crime under International Law', (1947), 41 *American Journal of International Law*, pp. 145–47.

This paper focuses on the legal challenges in defining protected groups through international case law, which significantly transformed the understanding of the protected groups. The importance of this examination lies in the fact that the methodological criteria applied for the purposes of defining whether a protected group exists will to a large extent determine whether a charge of genocide will succeed or not.[13] The jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) has been instrumental in deconstructing the definition of genocide, including the definition of the protected groups, and is thus referred throughout this analysis. Next, the approaches for identifying the protected groups taken by the International Criminal Court (ICC) in the *Al-Bashir* case and the International Court of Justice (ICJ) in *The Gambia v. Myanmar* case are discussed. In addition to the existing case law, the paper further considers to what extent are the findings of the International Commission of Inquiry on Darfur and, more recently, the Independent International Fact-Finding Mission on Myanmar and the Independent International Commission of Inquiry on the Syrian Arab Republic, helpful in elucidating the contours of the groups protected by the Genocide Convention.

The primary goal of this paper is a critical analysis of the methodology used for defining the protected groups. Based on the current trajectory of genocide jurisprudence and other relevant findings, the paper argues that there was a gradual shift from an objective to a subjective approach in defining protected groups.[14] While being aware of the inherent limitations of each of these approaches, especially if applied in isolation, this paper concludes by opting for a combined subjective–objective approach that (i) requires a minimal measure of "*baseline objective evidence*"[15] or the "*objective starting point*",[16] that would link the perpetrator's perception to the pre-genocidal existence of the protected group and simultaneously (ii) considers "*collective perceptions*"[17] and thereby encompasses the subjective views of the perpetrator.[18] A combination of these factors – that is, the perpetrator-based subjective approach,

13 Nersessian, David L., 'The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention', (2003) 36 (2) *Cornell International Law Journal.*

14 See e.g., Verdirame, Guglielmo, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', (2000) 49 *International and Comparative Law Quaterly*, p. 589.

15 Nersessian, David L., *supra note* 13.

16 See Kreß, Claus, The ICC's First Encounter with the Crime of Genocide. The Case against Al Bashir, in Stahn, *Law and Practice* (Oxford: Oxford University Press, 2015), pp. 684–685.

17 *Ibid*, p. 685.

18 Nersessian, David L., *supra note* 13, p. 296.

accompanied by some external ("objective") indicia of group status[19] – represents a preferred method in the context of the group identities,[20] since it contributes to balancing the over-reliance on perpetrator's perception, which might otherwise challenge the exclusivity of the four protected groups[21] and thus conflict with the very object and purpose of the Genocide Convention.[22]

2 Lack of Clarity in Defining the Protected Groups

Article II of the Genocide Convention reads: "*In the present Convention, 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* […]." There must be an intent to destroy a group and not merely individuals who are coincidentally members of the particular group.[23] The decisive criterion in determining the victims of the genocide is precisely "*the membership of the individual in a particular group rather than the identity of the individual*", as the International Law Commission (ILC) emphasized in its Draft Code of Crimes against the Peace and Security of Mankind of 1996.[24] While a presence of the protected group is required for each constitutive element of the crime of genocide,[25] a UN Study on Genocide stated that *"*[*t*]*he lack of clarity about which groups are, and are not, protected has made the Convention less effective and popularly understood than should be the case*".[26] Yet, it is important to note that the definition of the four protected groups has remained inevitably unclear for several reasons.[27]

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19 See e.g., ICTR, *Prosecutor v. Akayesu* (Trial Judgement) ICTR-96-4-T, TCh I (2 September 1998), para. 702; Nersessian, *supra note* 13.

20 See e.g., ICTR, *Prosecutor v. Semanza* (Trial Judgement) ICTR-97-20-T, TCh III (15 May 2003), para. 317; ICTR, *Prosecutor v. Kajelijeli*, *supra note* 5, para. 811.

21 Lingaas, Carola, *supra note* 10, p. 2.

22 See Kreß, Claus, *supra note* 11; Nersessian, *supra note* 13.

23 See the Report of the International Law Commission, *supra note* 2, p. 45, para. 6. The importance of group identity was explained by the ICTY in the *Stakić* case in the following terms: "[…] *the offence requires intent to destroy a collection of people who have a particular group identity*." ICTY, *Prosecutor v. Stakić* (Appeals Judgement) IT-97-24-A, ACh (22 March 2006), para. 20.

24 See the Report of the International Law Commission, *supra note* 2, p. 45, para. 6.

25 ICTY, *Prosecutor v. Tolimir* (Trial Judgement) IT-05-88/2-T, TCh II (12 December 2012), para. 735.

26 Whitaker, Benjamin, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, para. 30.

27 This paper does not add to the existing debate over whether the Genocide Convention should include additional protected groups beyond the national, religious, ethnic, and racial categories. This ground has been well-covered already. See e.g., Van Schaak, Beth,

First, the Genocide Convention was not applied (at the international level) until fifty years after its creation,[28] it was thus long believed to be a dead letter.[29] Some authors even suggest that it was operating arguably more as a "*retrospective condemnation of the Nazi enterprise than a criminal code for prospective enforcement or prevention*".[30] Second, the notions of ethnicity, race, nationality, and religion are not susceptible to easy definition. Many disciplines, including anthropology, political science, sociology, psychology, or social geography "*lay claim*"[31] to these terms, and in some sense, they are "*still on the move*".[32] Their understanding has changed together with technological, scientific, and sociological developments.[33] Third, the interpretation of the protected groups was purposefully left to the states parties who are obliged to implement the Genocide Convention.[34]

The Genocide Convention's definition of the crime of genocide was reproduced verbatim in the Statute of the ICTY (Article 2), Statute of the ICTR (Article 4) and Rome Statute of the ICC (Article 6). The same definitional challenges in identifying the members of the protected group were therefore transposed into all subsequent international instruments.[35] Subsequently, the jurisprudence of the international criminal tribunals significantly transformed

'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997), 106 *Yale Law Journal* 2259 and sources cited therein.

28 The ICTR was the first international tribunal, which in 1998 convicted a person for the crime of genocide. ICTR, *Prosecutor v. Akayesu*, *supra note* 19.

29 Lingaas, Carola, *supra note* 10.

30 Van Schaack, Beth, *supra note* 11, p. 1112.

31 Van Schaack, Beth, *supra note* 11, p. 1124. See also Verdirame, Guglielmo, *supra note* 14, p. 592 (arguing that "*collective identities, and in particular ethnicity, are by their very nature social constructs, "imagined" identities entirely dependent on variable and contingent perceptions, and not social facts, which are verifiable in the same manner as natural phenomena or physical facts*").

32 Compare with Glazer, Nathan, Moynihan, Daniel P., Schelling, Corinne S., *Ethnicity: Theory and Experience* (Harvard: Harvard University Press, 1975).

33 Lingaas, Carola, *supra note* 10. See Report of the International Commission of Inquiry on Darfur to the Secretary-General (Darfur Report), *supra note* 3, para. 494: "*This terminology is criticised for referring to notions such as 'race', which are now universally regarded as outmoded or even fallacious. Nevertheless, the 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*".

34 Lingaas, Carola, *supra note* 10.

35 See Lingaas, Carola, 'The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law', (2015) 3 *International Criminal Law Review*.

the understanding of the protected groups, as illustrated in the following chapters. Yet, before we engage in this analysis, and consider how as a matter of law the "group" is to be defined, it is instructive to introduce the existing approaches, and challenges, to the definition of the protected group.

3 In Search of the Criteria for Defining the Protected Groups: Evaluating the Objective and Subjective Approaches

As already noted in the introduction, a search for tangible indicia of group membership is exceptionally difficult and may even challenge "*the very possibility of using legal tools*"[36] to determine whether particular victims qualify for membership in protected groups under the Genocide Convention. Which methodological criteria should (not only) the international criminal tribunals apply?[37] There are two possible approaches: an objective or subjective determination of group status, with an emphasis on a perpetrator's or victim's perception. For a purely objective determination, the focus is on objective, scientifically verifiable parameters, which can also be supported by expert testimony from anthropologists, historians, religious scholars, or others with an adequate expertise.[38] Views of either the victim or the perpetrator are only one of several factors – they can be taken into account as an evidence, but they are not dispositive as to the defining contours of the group.[39] For a subjective determination, the criteria used by the perpetrator to define the group become decisive – the primary focus is thus on the perpetrator's or victim's mental state.

When viewed in isolation, it becomes clear that "*neither approach is entirely satisfactory*".[40] In the context of objective formulation, it has been rightfully noted that *"*[*u*]*nless the genocidists specifically consulted anthropologists or historians to develop criteria, the "scientific" determination of what constitutes a particular group may bear no resemblance whatsoever to the group actually*

36 Compare with Luban, David, *supra note* 6.

37 Compare with the Darfur Report, supra *note* 3, para. 500: "[…] *the criteria initially used by courts to interpret and apply those treaty provisions and customary rules have proved either too loose or too rigid; in short, they were unable to take account of situations where manifestly there existed a stark opposition and conflict between two distinct sets of persons, one of which carried out the actus reus typical of genocide with the intent to destroy the other in whole or in part*."

38 See Nersessian, *supra note* 13, p. 307.

39 Nersessian, *supra note* 13.

40 *Ibid*, p. 310.

targeted", moreover, there are often competing expert testimonies or scholarly opinions making the historic or scientific evidence to some extent also subjective.[41] When turning to the victim-based subjective approach, the personal understanding of group membership by victims can also be problematic. As Luban rightly points out, there has always been a flaw in a theoretical approach focusing on the importance of ethnic groups to their members:

> The flaw is that the theory applies only when the ethnic group's members actually partake in shared communal relationships. But some ethnic groups are assimilated or dispersed within the general population; some members have disaffiliated with their own ethnic group, or even reject their ethnic heritage [...]. Some ethnic groups are "imagined communities," either in their own imaginations or in those of their enemies.[42]

Several questions may arise in this context, such as whether ethnicity is being formed through actual communal relationships or whether a subjective definition should prevail over objective anthropological facts.[43] Moreover, if a subjective approach is to prevail, should the group's own members or the perpetrators define ethnic belonging?[44] An example will illustrate the problem. In Nazi Germany, for instance, the decisive factor for being Jewish was the categorization by the Nazi government, not the fact that the victim participated in the Jewish community, spoke Hebrew and/or attended synagogue.[45] This clearly shows that the perpetrator's mental state toward the group is the critical element, after all, it is the *dolus specialis* which differentiates genocide from war crimes or crimes against humanity. Therefore, the victim's perception of belonging to a particular group is to a large extent irrelevant to whether or not that person is "*ultimately targeted for genocide as part of a perpetrator's efforts to destroy the group*".[46]

This brings us to the perpetrator-based subjective approach, where the perpetrator's perception of the group becomes the defining factor.[47] It has been

41 *Ibid*, pp. 310–311. See e.g., the U.S. Genocide Statute, which uses an objective definition of an ethnic group: *"The term 'ethnic group' means a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage*", 18 U.S.C. 1093(2).

42 Luban, David, *supra note* 6.

43 *Ibid*.

44 *Ibid*.

45 Nersessian, *supra note* 13.

46 Nersessian, *supra note* 13, p. 311.

47 For arguments against predominantly subjective approach, see e.g., Akhavan, Payam, *Reducing Genocide to Law* (Cambridge: Cambridge University Press 2012), p. 150.

noted that this approach "*considerably challenges international criminal jurisprudence*", since the principle of legality – including the elements of specificity and foreseeability of criminal norms – requires a clear and specific identification of the protected group.[48] Due to the fact that each perpetrator might perceive their victims differently, an objective and uniform determination of the victim group would be inevitably hindered by relying exclusively on the perpetrator's mental state.[49] This outcome, however, can be (partially) rectified by taking into account the following. First, since the Genocide Convention does not protect all types of human groups,[50] the perception of the perpetrator cannot go beyond the four categories enumerated in the Genocide Convention. Put differently, the definitional requirements of the crime of genocide thus eliminate creation of purely subjective "imaginary groups". Second, the perpetrator-based subjective approach in fact corresponds with a pre-genocidal process of "othering", during which the perpetrator "*identifies, names and stigmatizes the members of this out-group*".[51] Some scholars even argue that by adopting the perpetrator-based approach, "*the pre-genocidal process of othering has been translated into law*".[52] Finally, the subjective approach can be, and indeed should be, modified by also taking into consideration certain objective criteria, where available and appropriate. The following chapters will demonstrate how various international case law endorsed these – at times conflicting – approaches and how the preferences shifted in time. Given the limited scope of this paper, the most representative cases are chosen. We shall start our analysis with the introduction of the first genocide trial in the context of international criminal justice, where the ICTR attempted to define the racial, ethnical, national, and religious group.[53]

48 Lingaas, Carola, *supra note* 10. For further details on the operation of principle of legality in international criminal law, see e.g., Uhlířová, Kateřina, War Crimes Chamber of the Court of Bosnia and Herzegovina: Seeding "International Standards of Justice"? in Nollkaemper, André, Kristjánsdóttir, Edda, Ryngaert, Cedric (eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (Cambridge-Antwerp-Portland: Intersentia, 2012).

49 Lingaas, Carola, *supra note* 10.

50 See e.g., *Prosecutor v. Krstić*, *supra note* 4, para. 554.

51 Belman, Jonathan, "'A Cockroach Cannot Give Birth to a Butterfly" and Other Messages of Hate Propaganda', May 2004, <http://gseweb.harvard.edu/~t656_web/peace/Articles_Spring_2004/Belman_Jonathan_hate_propaganda.htm>, Lingaas, Carola, *supra note* 10, p. 10.

52 Lingaas, Carola, *supra note* 10.

53 *Ibid*, p. 2.

4 Primarily Objective Determination of the Protected Groups in the First Genocide Trial: The Akayesu Case

In 1998, the ICTR delivered a judgment in the first genocide trial in a history of international criminal justice, the *Akayesu* case,[54] which is still considered a yardstick for the definition of genocide.[55] Genocide in Rwanda vividly illustrated "*the limitations of current international rules on genocide*" and obliged the judges at the ICTR to engage in an innovative interpretation on those rules, because at first glance, the Tutsi and the Hutu did not constitute distinct ethnic, racial, religious, or national groups.[56] As regards the concrete definition of the four protected groups, the ICTR resorted to a primarily objective determination that was later heavily criticized.[57] The ICTR relied on the *travaux preparatoires* of the Genocide Convention and, on that basis, reasoned that the crime of genocide is allegedly connected only with "*stable*" groups, constituted in a permanent fashion and membership in such groups is to be determined by birth.[58] The ICTR stated that the four protected groups share a "*common criterion*," namely, "*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*".[59] It then provided simple definitions of each of the four categories, citing however no authorities for the definitions, except the *Nottebohm* case before the ICJ in support of its definition of national group.[60]

4.1 *The National Group*

The ICTR took an inspiration in the *Nottebohm* case, where the ICJ held that nationality is to be understood as

> a legal bond having its basis [in] a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the

54 ICTR, *Prosecutor v. Akayesu*, *supra note* 19.

55 Almost every judgment of the ICTR refers to the *Akayesu* judgment, see e.g., ICTR, *Prosecutor v. Kajelijeli*, *supra note* 5, para. 804, ICTR, *Prosecutor v. Rutaganda*, *supra note* 2, para. 47.

56 The Darfur Report, *supra note* 3, para. 498.

57 Kreß, Claus, *supra note* 11; Lingaas, Carola, *supra note* 10; Nersessian, David L., *supra note* 13.

58 ICTR, *Prosecutor v. Akayesu*, *supra note* 19, para. 511.

59 *Ibid*, para. 511.

60 See ICJ, *Nottebohm Case* (Liechtenstein v. Guatemala) Judgment of 6 April 1955, I.C.J. Rep. 1955, p. 22.

> existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected to the population of the State conferring nationality than with that of any other State.[61]

By importing the *Nottebohm* criteria, the ICTR defined a national group as a "*collection of people who are perceived to share a legal bond based on common citizenship coupled with reciprocity of rights and duties*".[62]

4.2 *The Ethnic Group*

The ethnic group was described as people sharing "*a common language and culture*".[63] Ambiguities surrounding the characterization of the Tutsi as one of the protected groups are well known. The ICTR found that the Tutsis were the ethnical group separate from the Hutus, although they shared a common language and culture with the Hutus. Some authors suggest that such determination was possible only due to "*creation of a stable and permanent threshold, which was made in an attempt to assign the group some objectivity*".[64] This "*newly created*" generic category was criticized by several commentators for expanding the definition of genocide.[65] In addition, it has been argued in

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61 *Ibid*, para. 23.

62 ICTR, *Prosecutor v. Akayesu*, *supra note* 19, para. 512. Compare with Lemkin's wider notion of nationality: "*the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology*", Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, Division of International Law, 1944), p. 91.

63 ICTR, *Prosecutor v. Akayesu*, *supra note* 19, para. 513. Compare with: "*The importance of "cultural values" was highlighted also by a Special Rapporteur of the ILC, who articulated the distinction between ethnic and racial groups as follows: "The difference between the terms 'ethnic' and 'racial' is perhaps harder to grasp. 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*." In: Thiam, Doudou, Special Rapporteur, *Fourth Report on the Draft Code of Offenses Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4./398 and Corr. 1–3, para. 58 (1986).

64 Lingaas, Carola, *supra note* 10, p. 6.

65 See Werle, Gerhard, Jessberger, Florian, *International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2014); Schabas, William A., The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in Fischer, Horst, Kreß, Claus, Lüder, Sascha Rolf (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin: Berliner Verlag, 2001), pp. 451–452.

the scholarship that ethnicity depends mainly on the self-identification of its members, and importantly, represents a permeable and fluid form of identity, often enabling outsiders to assimilate into the ethnic group by adopting the cultural and linguistic characteristics of this group.[66] In any case, the effect of the *Akayesu* ethnic group definition was limited; only a few later judgments strictly followed this approach[67] and the concept of the ethnic group has continuously developed since then.[68]

4.3 *The Definition of a Racial Group*

The ICTR has specified that a racial group is based on "*hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors*".[69] Again, this objective understanding of race ("*hereditary physical traits*") has been subject to criticism, since "*it has long been recognized that there is no gene for race*."[70] Long before the genocide took place in Rwanda, the UNESCO Statement on Race emphasized that: "*For all practical social purposes, "race" is not so much a biological phenomenon as a social myth*".[71] The meaning of a racial group has changed dramatically since the time of drafting the Genocide Convention.[72] As will become apparent, the larger social and historical context of a group currently dominates the legal determination of the victim group membership.[73]

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66 Weitz, Eric, *Genocide: Utopias of Race and Nation* (Princeton and Oxford: Princeton University Press, 2003), p. 21; Lingaas, Carola, *supra note* 10, pp. 6–7; Nersessian, David L., *supra note* 13, p. 306.

67 Zahar, Alexander, Sluiter, Göran, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008), p. 161; Schabas, William A., Genocide, in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed., München: Verlag C.H. Beck, 2008), p. 149.

68 Lingaas, Carola, *supra note* 10, p. 7.

69 ICTR, *Prosecutor v. Akayesu*, *supra note* 19, paras. 514 and 516.

70 See e.g., Yudell, Michael, *Race Unmasked: Biology and Race in the Twentieth Century* (New York: Columbia University Press, 2014), p. 204; Cooper, Richard S. et al, 'Race and Genomics', (2003) *The New England Journal of Medicine*, pp. 1166–1170. Compare with Nersessian, David L., *supra note* 13, p. 300. See also Proxmire Act, 18 U.S.C. § 1093(6).

71 UNESCO, *Four Statements on the Race Question* (1969), p. 33.

72 See also Schabas, William A., 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda', (2000) 6 *ILSA Journal of International & Comparative Law.*

73 Lingaas, Carola, *supra note* 10, p. 8, citing Wilson, Richard Ashby, Crimes against Humanity and the Conundrum of Race and Ethnicity at the International Criminal Tribunal for Rwanda, in Feldman, Ilana, Ticktin, Miriam (eds.), *In the Name of Humanity: The Government of Threat and Care* (Durham/ London: Duke University Press, 2010), pp. 33 and 37.

4.4 *The Definition of a Religious Group*

Lastly, the ICTR defined a religious group as "*one whose members share the same religion, denomination or mode of worship*".[74] This has been understood as a functional definition grounded in the objective practices of members of the religious group, in contrast to an emphasis on the more subjective belief system of group members.[75] Indeed, a year later, the ICTR in *Kayishema and Ruzindana* added a subjective element, by acknowledging that a religious group includes "*denomination or mode of worship or a group sharing common beliefs*."[76]

In sum, the ICTR decision in *Akayesu* was largely grounded in a search for an objective judicial determination of group status, despite the fact that the Commission of Experts, which recommended the establishment of the ICTR, was of the view that it was "*not necessary to presume or posit the existence of a race or ethnicity itself as a scientifically objective fact*".[77]

5 The Objective and Subjective Approaches Taken by the Two *Ad Hoc* Tribunals: "Courts Try Cases, But Cases Also Try Courts"[78]

5.1 *The International Criminal Tribunal for Rwanda: "After Akayesu"*

After the primarily objective approach taken by the ICTR in the *Akayesu case*, the ICTR gradually embraced the understanding of group membership as a subjective rather than an objective concept, or rather as a combination of both. In the *Rutaganda* case, it held that the concepts of national, ethnical, racial, and religious groups "*must be assessed in the light of a particular political, social and cultural context*",[79] but as regards the issue of identification, it went on to note that "[*t*]*he victim is perceived by the perpetrator of genocide as belonging*

74 ICTR, *Prosecutor v. Akayesu*, *supra note* 19, para. 515.

75 For a further discussion, including whether a nonreligious or an atheistic group qualifies for protection under the Genocide Convention, see e.g., Nersessian, David L., *supra note* 13, pp. 300–301.

76 ICTR, *Prosecutor v. Kayishema and Ruzindana* (Trial Judgement) ICTR-95-1-T (21 May 1999), para. 98.

77 Final Report on the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), U.N. Doc. S/1994/1405, para. 159 (1994).

78 Although this has been observed by Justice Jackson in a different context, it well captures our topic. Jackson, Robert H., Rule of Law Among Nations, available online at URL <https://www.roberthjackson.org/wp-content/uploads/2015/01/Rule_of_Law_Among_Nations.pdf>.

79 ICTR, *Prosecutor v. Rutaganda*, *supra note* 2, para. 55.

to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group."[80] The subjective definition alone was found insufficient to determine victim groups, since – according to the ICTR – the Genocide Convention "*presumably*" intended to include relatively stable and permanent groups.[81] Similarly, in the *Musema* case,[82] the predominantly subjective approach was accompanied by a "*perceived limitation*" in the Genocide Convention restricting it once again to stable and permanent groups into which individuals belonged regardless of their own choices and desires.[83]

In the cases of *Kayishema and Ruzindana,*[84] the ICTR offered three methods of identifying the ethnic group: an objective approach ("*an ethnic group is one whose members share a common language and culture*"), a perpetrator-based subjective approach ("*a group identified as such by others, including perpetrators of the crimes* (*identification of others*)"), or a victim-based subjective approach ("*a group which distinguishes itself, as such* (*self identification*)").[85] The *Bagilishema* case approached membership of the targeted group as "*an objective feature of the society in question*", while also emphasizing "*a subjective dimension*", because the targeted group may not have precisely defined boundaries and a definitive answer as to whether or not a victim was a member of a protected group may therefore be difficult to prove:

> Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be

80 *Ibid.*

81 ICTR, *Prosecutor v. Rutaganda*, *supra note* 2, para. 57.

82 ICTR, *Prosecutor v. Musema* (Trial Judgment) ICTR-96-13-A, TCh I (27 January 2000), para. 161.

83 *Ibid*, para. 162. Similarly, ICTR, *Prosecutor v. Rutaganda*, *supra note* 2, para. 56. Nersessian, David L., *supra note* 13.

84 ICTR, *Prosecutor v. Kayishema and Ruzindana*, *supra note* 76, para. 98 and paras. 522–526. See Schabas labelling the approach taken by the ICTR in *Kayishema* as purely subjective, in Schabas, William A., *supra note* 72. See differently Nersessian arguing that the ICTR applied an objectified approach, in Nersessian, David L., *supra note* 13.

85 ICTR, *Prosecutor v. Kayishema and Ruzindana*, *supra note* 76, para. 98. For criticism of this subjective definition see e.g., Kreß, Claus, 'The Crime of Genocide Under International Law', (2006) 6 *International Criminal Law Review*, p. 474.

> considered by the Chamber as a member of the protected group, for the purposes of genocide.[86]

The *Bagilishema* case thus applied a combined approach, utilizing subjective as well as objective criteria.[87]

In *Semanza*, the ICTR again consulted both objective and subjective criteria:

> The Statute of the Tribunal does not provide any insight into whether the group [...] is to be determined by objective or subjective criteria or by some hybrid formulation [...T]he determination [...] ought to 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.[88]

Similar wording, and reliance predominantly on the perpetrator-based subjective approach and the victim-based subjective approach, appeared in the *Gacumbitsi* case and the *Muhimana* case.[89]

5.2 *International Criminal Tribunal for the Former Yugoslavia*

When moving to the ICTY,[90] the *Jelisić* case represents another important example of a gradual shift towards a subjective concept.[91] On the one hand, the

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86 ICTR, *Prosecutor v. Bagilishema* (Trial Judgment) ICTR-95-1A-T, TCh I (7 June 2001), para. 65.

87 See also ICTR, *Prosecutor v. Kajelijeli*, *supra note* 5, para. 811; ICTR, *Prosecutor v. Kamuhanda* (Trial Judgment) ICTR-95-54A-T, TCh II (22 January 2004), para. 630.

88 ICTR, *Prosecutor v. Semanza* (Trial Judgment) ICTR-97-20-T, TCh III (15 May 2003), para. 317.

89 ICTR, *Prosecutor v. Muhimana*, ICTR-95-1B-T, TCh III (28 April 2005), para. 500.

90 For an overview of challenges and inconsistencies related to the Milošević trial, especially with regard to the relevant target groups, see Boas, Gideon, *The Milošević Trial, Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007), pp. 123–126.

91 The subjective approach recognizes that perpetrators can stigmatize the target group either positively or negatively: "*A group may be stigmatised* [...] *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*." ICTY, *Prosecutor v. Jelisić* (Trial Judgement) IT-95-10-T (14 December 1999), para. 71. Compare, however, with the *Stakić* case, where the ICTY Appeals Chamber rejected the negative construction: "*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*

ICTY mentioned that an objective determination still remains possible. On the other hand, it made clear that instead of using objective and scientifically irreproachable criteria, "*it is more appropriate to evaluate the status of a* [...] *group from the point of view of those persons who wish to single that group out from the rest of the community*".[92] As regards the definition of protected groups, the ICTY concluded that they are defined principally by their enemies: "*it is the stigmatization 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*".[93] In the *Brdanin* case, the ICTY again confirmed, in essence, that membership of a group is a subjective rather than an objective concept,[94] by finding that the 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*," although it noted that it is also necessary to consult objective criteria.[95]

The *Tolimir* case[96] referred to both *Brdanin* and *Jelisić* and further confirmed that the determination of the protected group is to be made on a case-by-case basis, using both objective and subjective criteria.[97] The ICTY judgment in the case against *Krstić* acknowledged that any attempts to differentiate the enumerated groups on the basis of scientifically objective criteria would be inconsistent with the object and purpose of the Genocide Convention.[98]

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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 [...]*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.*" ICTY, *Prosecutor v. Stakić* (Judgement), *supra note* 3, paras. 20–21. Compare with Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* ("ICC, *Prosecutor v. Al Bashir*") ICC-02/05-01/09-3, PTCh I (4 March 2009), para. 135 ("*negative definitions of the targeted group do not suffice for the purpose of article 6 of the Statute*").

92 ICTY, *Prosecutor v. Jelisić*, *supra note* 91, para. 70.

93 ICTY, *Prosecutor v. Jelisić*, *supra note* 91, para. 70.

94 ICTY, Prosecutor v. Brdanin (Trial Judgment) IT-99-36-T, TCh II (1 September 2004), para. 683.

95 *Ibid*, paras. 683–684. See also ICTY, *Prosecutor v. Jelisić*, *supra note* 91, para. 70; ICTR, *Prosecutor v. Semanza*, *supra note* 88, para. 317; ICTR, *Prosecutor v. Muvunyi* (Trial Judgement) ICTR-00-55A-T, TCh III (11 February 2010), para. 484.

96 ICTY, *Prosecutor v. Tolimir* (Trial Judgement) IT-05-88/2-T, TCh II (12 December 2012), para. 735.

97 *Ibid*.

98 ICTY, *Prosecutor v. Krstić*, *supra note* 4, para. 556.

Accordingly, an objective criteria – identification of the targeted group's cultural, religious, ethnical, or national characteristics "*within the socio-historic context which it inhabits*" – was joined by a subjective aspect when using as a criterion the stigmatisation of the group, notably by the perpetrators, "*on the basis of its perceived national, ethnical, racial or religious characteristics*".[99]

What may be drawn from the presented case law of the ICTR and the ICTY is that in order to constitute a protected group, "*the victims must be at least perceived as belonging to the targeted group; which must at least be perceived as forming a distinct national, ethnic, racial, or religious group; and that there must be some objective support for the group to be treated as such.*"[100] In sum, when ascertaining the existence of a protected group before the two *ad hoc* tribunals, the combined subjective-objective approach with an emphasis on the perpetrator's perception became prevalent.

6 International Commission of Inquiry on Darfur: Tribal Groups as Protected Groups?

The International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law[101] (Darfur Commission), in some respects, drew on the jurisprudence of the two *ad hoc* international tribunals, for instance in its expansive treatment of the term "ethnic group".[102] Defining the targeted group within the genocide paradigm proved rather problematic in Darfur,[103] where genocidal acts against groups did not "*perfectly match the definitions*" of the four protected groups.[104] The main challenge for the Darfur Commission was the fact that crimes were committed between tribal groups, which manifested multiple identities along ethnic, social, racial, political, linguistic, and economic dimensions.[105] The Darfur Commission observed that tribes may benefit from the protection "*only if*" they also exhibit the characteristics of one of the four categories of groups protected by international

99 *Ibid*, para. 557.

100 Boas, Gideon, Bischoff, James L., Reid, Natalie R. (eds.), *International Criminal Law Practitioner Library. Volume 2: Elements of Crimes under International Law* (Cambridge: Cambridge University Press, 2009), p. 175. See ICTR, *Prosecutor v. Muhimana*, *supra note* 89, para. 500.

101 UNSC Res. 1564 (18 September 2004).

102 Van Schack, *supra note* 11.

103 *Ibid*.

104 The Darfur Report, *supra note* 3, para. 498.

105 *Ibid*, para. 510. Van Schack, *supra note* 11.

law.[106] The rebel tribal groups were, simplistically put, perceived as "*Africans*" and their enemies as "*Arabs*",[107] yet both groups shared Muslim religion, spoke Arabic, and frequent inter-marriages blurred the distinction between them. Thus, it was found that members of the tribe's victims of attacks did not objectively constitute a protected group.[108]

Could they nonetheless subjectively make up distinct groups? After examining several other elements, the Darfur Commission stated that members of African tribes and members of Arab tribes indeed perceived each other and themselves as constituting distinct groups.[109] The tribes who were victims of attacks and killings were therefore found to subjectively make up a protected group.[110] Although this subjective approach was coupled by references to "objective" criteria, such as "*outward physical appearance*" of the tribes[111] or "*similar racial features*",[112] the Darfur Commission noted that from the perspective of international criminal law, it is increasingly irrelevant whether or not there is an objective difference between perpetrator and victim groups.[113] The Darfur Commission even suggested that the interpretative expansion of the concept of protected group (by adopting a predominantly subjective approach) by the ICTY and ICTR may be "*safely*" considered as becoming "*part and parcel of international customary law*", however, citing no authority for such conclusion.[114]

Importantly, the Darfur Commission also emphasized one crucial factor, that is the process of formation of a perception and self-perception of another (ethnic, national, religious, or racial) group as distinct:

> While on historical and social grounds this may begin as a subjective view, as a way of regarding the others as making up a different and opposed group, it gradually hardens and crystallizes into a real and factual opposition. It thus leads to an objective contrast. The conflict, thus, from

106 The Darfur Report, *supra note* 3, para. 497.
107 Compare with Van Schack, *supra note* 11, p. 1116.
108 The Darfur Report, *supra note* 3, para. 508.
109 The Darfur Report, *supra note* 3, paras. 500 and 509.
110 *Ibid*, para. 512.
111 *Ibid*, para. 508.
112 *Ibid*, paras. 41, 52–53 and 60.
113 Van Schack, *supra note* 11, p. 1117. Compare with Luban, David, 'Calling Genocide by its Rightful Name: Lemkin's Word, Darfur and the UN Report', (2006) (7:1) *Chicago Journal of International* Law, pp. 303 and 318.
114 The Darfur Report, *supra note* 3, para. 501.

> subjective becomes objective. It ultimately brings about the formation of two conflicting groups, one of them intent on destroying the other.[115]

The Darfur Commission thus incorporated an objective view into the subjective approach, and this "*complex contextual analysis*" was found to be "*in line with certain nominalist conceptions*", as suggested by May.[116] Despite all these (quite innovative) findings, the Darfur Commission concluded that the Government of Sudan has not pursued a policy of genocide since the central government authorities lacked one crucial element: genocidal intent.[117] Let us now examine, and compare, the Darfur situation from a different angle, through the case law of the ICC in the *Al Bashir* case.

7 The First Ever Genocide Charge before the ICC: The *Al Bashir* Case

In 2005, the UN Security Council referred the situation in Darfur to the Office of the Prosecutor at the ICC,[118] which charged the then Head of State of Sudan Omar Al Bashir with war crimes, crimes against humanity, and (three counts of) genocide. When examining the specific elements of the crime of genocide, the ICC's Pre-Trial Chamber I (Pre-Trial Chamber) was of the view that the targeted group must have particular positive characteristics, as also emphasized in various judgments of the two *ad hoc* tribunals, for instance in *Akayesu*, *Stakić*, and *Krstić*.[119] Given the emphasis of the drafters of the Genocide Convention on "*the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics*",[120] the Pre-Trial Chamber rightfully[121] rejected the possibility of negative identification of groups.[122]

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115 *Ibid*, para. 501.

116 May, Larry, Hoskins, Zachary (eds.), *International Criminal Law and Philosophy* (Cambridge: Cambridge University Press, 2009), p. 94.

117 The Darfur Report, *supra note* 3, para. 518.

118 UNSC Res. 1593 (31 March 2005).

119 ICTR, *Prosecutor v Akayesu*, *supra note* 19, paras. 510–516; ICTY, *Prosecutor v Krstić*, *supra note* 4, paras. 551–561; ICTY, *Prosecutor v. Stakić*, *supra note* 23, paras. 20–28.

120 ICC, *Prosecutor v. Al Bashir*, *supra note* 91, para. 135. Citing ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Rep. 1951, p. 23, paras. 191–194.

121 Compare with ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment) I.C.J. Rep. 2007, para. 194 ("*The drafting history of the Convention confirms that a positive definition must be used*").

122 Compare with ICTY, *Prosecutor v. Jelisić*, *supra note* 91.

As regards the three targeted groups, namely the Fur, the Masalit, and the Zaghawa, the Pre-Trial Chamber found, with a reference to the findings of the Darfur Commission, that nationality, race, and/or religion are not a distinctive feature of any of these groups, because these groups "*appear to have Sudanese nationality, similar racial features, and a shared Muslim religion*".[123]

It then moved on to consider whether any of these groups constitute a distinct ethnic group. By utilizing objective criteria, such as its "*own language*", as well as its "*own tribal customs*" and "*own traditional links to its lands*", it found that each of these groups indeed constitutes a distinct ethnic group.[124] When compared to the above-discussed findings of the ICTR in *Kayishema and Ruzindana*, and the ICTY in *Jelisić* or *Krstić,*[125] it can be argued that the ICC predominantly "*encapsulates an essentially objective starting point*" to the definition of the ethnic group.[126] At the same time, however, the Pre-Trial Chamber observed that neither the Rome Statute nor international case law provide a clear definition of the ethnic group. Building on the ICJ judgment in *Bosnia and Herzegovina v Serbia and Montenegro*, the Pre-Trial Chamber stated that it is not entirely clear "*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*".[127] In this context, the Pre-Trial Chamber concluded that it is unnecessary to further explore this issue. However understandable "*for the purpose of the present decision*",[128] it is regrettable, especially in light of the fact that (apart from the domestic courts), the ICC currently remains the only permanent international court with jurisdiction to prosecute individuals for the crime of genocide. In any case, this important debate is not closed, as evident also from Judge Ušacka's Separate and Partly Dissenting Opinion.[129]

In procedural terms, the Pre-Trial Chamber first rejected the Prosecution's Application in respect of the charge of genocide, since the existence of a Government of Sudan's genocidal intent was "*only one of several reasonable*

123 ICC, *Prosecutor v. Al Bashir*, *supra note* 91, para. 136.

124 ICC, *Prosecutor v. Al Bashir*, *supra note* 91, para. 137.

125 ICTR, *Kayishema and Ruzindana*, supra *note* 76, para. 98; ICTY, *Prosecutor v. Jelisić*, *supra note* 91, para. 70; ICTY, *Prosecutor v. Krstić*, *supra note* 4, para. 557.

126 Kreß, *supra note* 16, p. 684.

127 ICC, *Prosecutor v. Al Bashir*, *supra note* 91, para. 137, fn. 152 (citing ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra note* 121, para. 191).

128 *Ibid*.

129 ICC, *Prosecutor v. Al Bashir*, *supra note* 91, Decision on the Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras. 25–6.

conclusions", thereby not meeting the evidentiary standard provided for in the Rome Statute.[130] This decision was appealed and the Pre-Trial Chamber had to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide.[131] It concluded that there actually are reasonable grounds to believe that Al-Bashir acted with specific intent to destroy in part the Fur, Masalit, and Zaghawa ethnic groups, and delivered a second arrest warrant.[132] Any future development of the group definition before the ICC is therefore open and awaiting further exploration and, indeed, consolidation.[133] The result in this particular case obviously depends on whether Al Bashir will be (ever) surrendered to The Hague.

8 Contemporary (Allegations of) Genocides?

The persistent and urgent need to protect minority groups is evident in the current context of the crimes being committed against the Yazidis[134] in Iraq, Rohingya in Myanmar,[135] and Uyghurs in China.[136] However heinous these

130 ICC, *Prosecutor v. Al Bashir*, *supra note* 91, para. 159.

131 ICC, *Prosecutor v. Al Bashir*, ICC-02/05-01/09-73 OA, ACh (3 February 2010), para. 41.

132 ICC, *Prosecutor v. Al Bashir*, ICC-02/05-01/09-94, PTC I (12 July 2010).

133 Compare with Kreß, *supra note* 16, p. 683.

134 Chertoff, Emily, 'Prosecuting Gender-Based Persecution: The Islamic State at the ICC', (2017) *The Yale Law Journal,* p. 126. For a more general overview of sexual and gender-based crimes, see e.g., Uhlířová, Kateřina, Contribution of the International Criminal Court to the Prosecution of Sexual and Gender-Based Crimes: between Promise and Practice, in Šturma, Pavel, *The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives* (Leiden/Boston: Brill Nijhoff, 2019). Many Yazidi women and girls were subject, among other crimes, to slavery and/or trafficking in human beings, see e.g., Hosseini, S. Behnaz, *Trauma and the Rehabilitation of Trafficked Women: The Experiences of Yazidi Survivors* (Oxfordshire: Routledge, 2020); more generally see also Uhlířová, Kateřina, Fragmentation of International Law Examined in the Context of Criminalisation of Trafficking in Persons: Centripetal Tendencies or Expansion Beyond Necessary?, in Petrlík, David, Bobek, Michal, Passer, Jan M., Masson, Antoine, *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiří Malenovský* (Bruxelles: Larcier/Bruylant, 2020), pp. 729–752.

135 See UNSC Res 13552 (24 October 2018) ("*Myanmar categorically rejects the inference that the legitimate counter-terrorist actions by the security forces in Rakhine state were carried out with 'genocidal intent*'"). See also Van Schaack, Beth, 'Commission of Genocide in Myanmar', (2019) 17 *Journal of International Criminal Justice*, pp. 285–323.

136 Detailed examination would go beyond the scope (and focus) of this paper. For more details, see e.g., Yazidis (Daesh): UNSC Res 2379 (21 September 2017), Rohingya: UNGA, Third Committee, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/C.3/75/L.34 (30 October 2020). See also Karazsia, Zachary A., 'An Unfulfilled

atrocities are, it is also important to note from the outset that, in general, "*not every campaign of so-called "ethnical cleansing" is to be considered as the infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part*", as Claus Kreß aptly observes.[137] Thus far, there is no judgment authoritatively confirming whether these crimes indeed constitute genocide.[138] There are several jurisdictional limitations (not to mention the political obstacles) relating to these three situations,[139] but some of these situations could be sought through the ICC, the ICJ, or domestic courts exercising universal jurisdiction.[140] In fact, all three approaches have been activated in relation to the Rohingya situation. Some UN officials[141] and governments[142] have characterized the conduct of the Myanmar authorities as acts of genocide. The UN Human Rights Council established the Independent International Fact-Finding Mission on Myanmar, which issued a report in 2018, founding that there was a reasonable inference of genocidal intent: "*senior generals of the Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes*".[143] In 2019, the ICC approved a request to conduct a full investigation into crimes against humanity (but not genocide) alleged to have been committed against

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Promise: The Genocide Convention and the Obligation of Prevention', (2018) 11:4 *Journal of Strategic Security*, p. 25.

137 Kreß, *supra note* 85, pp. 461–502.

138 As of 1 May 2021.

139 Their detailed examination would, however, go beyond the scope and focus of this paper.

140 See e.g., Human Rights Council, A/HRC/42/CRP.6 (16 September 2019), 'Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar, to the Government of Myanmar, armed organizations, the UN Security Council, Member States, UN agencies, the business community and others'.

141 "*I am becoming more convinced that the crimes committed following 9 October 2016 and 25 August 2017 bear the hallmarks of genocide and call in the strongest terms for accountability*". Statement by Yanghee Lee, Special Rapporteur on the Situation of Human Rights in Myanmar at the 37th session of the Human Rights Council (12 March 2018), available online at URL <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E>.

142 "*Je souhaite que nous condamnions — et la France en prendra l'initiative avec plusieurs partenaires du Conseil de sécurité — ce génocide qui est en cours, cette purification ethnique, et qu'on puisse agir de manière concrète*", in: Emmanuel Macron qualifie la situation en Birmanie de "génocide". Statement by Emmanuel Macron in *Le Monde* (20 September 2017), available online at URL <https://www.lemonde.fr/asie-pacifique/article/2017/09/20/emmanuel-macron-qualifie-la-situation-en-birmanie-de-genocide_5188784_3216.html>. See also Carbert, Michelle, 'House of Commons Declares Myanmar's Treatment of Rohingya a Genocide', *The Globe and Mail* (20 September 2018).

143 Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2 (17 September 2018), p. 1.

the Rohingya by the government of Myanmar.[144] Rohingya and Latin American human rights organisations commenced proceedings in Argentinian courts under universal jurisdiction against leaders of the Myanmar Government and military.[145] Finally, The Gambia lodged an application against Myanmar at the ICJ under the Genocide Convention, arguing that Myanmar is trying to "*destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence*."[146] As of January 2020, the ICJ has ordered Myanmar to "*take all measures within its power*" to prevent the commission of genocide,[147] as well as to ensure the preservation of any evidence related to allegations of genocide.[148] The ICJ's orders on provisional measures have binding effect[149] and create international legal obligations for any party to whom these measures are addressed.[150]

As regards the crimes committed by the Islamic State of Iraq and Syria (ISIS) against the Yazidis, there have been – so far unsuccessful – calls for the UN Security Council to refer the situations in Syria and/or Iraq to the ICC,[151] or to establish an *ad hoc* tribunal with relevant geographic and temporal jurisdiction.[152] While noting States' obligations under the Genocide Convention, the Independent International Commission of Inquiry on the Syrian Arab

144 The Pre-Trial Chamber I has authorized the Office of the Prosecutor to open a preliminary examination into the situation on the basis of Bangladesh's ratification of the Rome Statute. *Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, ICC-RoC46(3)-01/18, PCh I (6 September 2018).

145 Burmese Rohingya Organisation UK, 'Argentinean Courts Urged To Prosecute Senior Myanmar Military And Government Officials For The Rohingya Genocide' (13 November 2019), available online at URL https://www.brouk.org.uk/argentinean-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide/.

146 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) Order of 23 January 2020, para. 14: "*The Gambia seeks protection for 'all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention'*". See also paras. 79–81.

147 *Ibid*, para. 79.

148 *Ibid*, para. 81.

149 See also ICJ, *La Grand* (Germany v. United States of America) Judgment, I.C.J. Rep 2001, p. 506, para. 109.

150 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra note* 146, para. 84.

151 UN Human Rights Council Report, A/HRC/32/CRP.2 (15 June 2016), 'They came to destroy: ISIS Crimes Against the Yazidis', p. 36.

152 *Ibid,* p. 4.

Republic stressed that "*ISIS has committed the crime of genocide as well as multiple crimes against humanity and war crimes against the Yazidis*".[153]

Last but not least, there have been serious concerns about the on-going detention and treatment of Uyghurs expressed by UN officials[154] or governmental officials, for example during the UN Security Council meetings.[155] Some states directly characterized the Chinese Communist Party campaign of persecution against the Uyghur people in Xinjiang as constituting "*genocide under international law*".[156] Nonetheless, the path to accountability for crimes against the Uyghurs within international (let alone Chinese) criminal justice mechanisms remains blocked.

8.1 *The Group Membership: Atrocities against the Yazidis, Rohingya and Uyghurs*

For the purposes of our examination, it is suggested that each of these communities can be identified as either national, ethnic, racial, or religious group. The Yazidis[157] can be considered as a longstanding ethnic and religious group,[158] both objectively, and from their own as well as the perpetrator's

153 *Ibid*, pp. 1–2 and 34–36. See also then-Secretary of State, John Kerry, declaring that the Islamic State was committing genocide: "[…] *in my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims. Daesh is genocidal by self-proclamation, by ideology, and by actions*", in Kerry, John, 'Remarks on Daesh and Genocide', 17 March 2016, available online at URL <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>.

154 See e.g., Comments by the Special Rapporteurs on the Effect and Application of the Counter-Terrorism Law of the People's Republic of China: "*The application of the Counter-Terrorism Law and related practices raises serious concerns* […], *particularly for designated minorities, notably Uyghurs and Tibetans*", available online at URL <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24845>.

155 UN Security Council 8716th Meeting, SC/14102 (7 February 2020).

156 Secretary Antony J. Blinken at a Press Availability (27 January 2021); compare with the then-US presidential candidate Joe Biden: "*Regarding the* [Uyghurs], *I'm going to work with our allies, at the U.N. and elsewhere to stand against the detention and repression and call it for what it is, it is: genocide*", available online at URL <https://www.state.gov/secretary-antony-j-blinken-at-a-press-availability/>.

157 See Simon-Skjodt Center for the Prevention of Genocide, 'Our Generation is Gone' The Islamic State's Targeting of Iraqi minorities in Ninewa (2015), available online at URL <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf>.

158 See, e.g., UN High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers, April 2009, available online at URL <https://www.refworld.org/docid/49f569cf2.htm>. See also Human Rights Council Report, *supra note* 151, paras. 101–103.

(i.e., the ISIS) subjective perspective.[159] Their status has also been confirmed by the Independent International Commission of Inquiry on the Syrian Arab Republic, which has determined "*on the basis of objective and subjective definitions*" that the Yazidis are a protected religious group within the meaning of Article II of the Genocide Convention.[160]

The Uyghur Muslim minority would also qualify as one of the four protected groups since they are "*ethnically, racially, and religiously distinct from the majority Han Chinese population*".[161] The Chinese government in fact recognizes the Uyghur as a distinct ethnic minority within its census data,[162] as opposed to the situation of the Rohingya in Myanmar, where successive governments rejected to include the Rohingya in the list of the country's 135 official ethnic groups.[163]

The Rohingya constitute a religious group, while they could be conceptualized also as an ethnic group, given their distinctive cultural traditions and dialect, and arguably, even "*as a racial group, given subjective perceptions among Myanmar society that the Rohingya constitute a different 'race' than the majority population*".[164] According to a 2016 Report of the UN High Commissioner for Human Rights, Rohingya "*self-identify as a distinct ethnic group with their own language and culture*".[165] Similarly, the ICJ in *The Gambia v. Myanmar* noted that the Rohingya should be understood as the group that self-identifies as such and claims a longstanding connection to Rakhine State,[166] thus combing both subjective and objective factors.

It becomes evident that all of the above-mentioned organs and other actors – mainly, the Independent International Commission of Inquiry on the Syrian Arab Republic, Independent International Fact-Finding Mission on Myanmar, UN Human Rights Council, UN High Commissioner for Human Rights, and the ICJ – currently utilize mostly the combined approach, with an emphasis on the subjective elements.

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159 Indeed, the ISIS expressly articulated an intent to destroy the Yazidis as a group. Human Rights Council Report, *supra note* 151.

160 *Ibid*, p. 21, para. 105.

161 Van Schaack, Beth, 'Genocide against the Uyghurs: Legal Grounds for the United States' Bipartisan Genocide Determination', *Just Security* (27 January 2021), available online at URL <https://www.justsecurity.org/74388/genocide-against-the-uyghurs-legal-grounds-for-the-united-states-bipartisan-genocide-determination/>.

162 Chinese Ethnic Groups: Overview Statistics, available online at URL <https://guides.lib.unc.edu/china_ethnic/statistics>.

163 UN Human Rights Council, A/HRC/32/18 (29 June 2016), Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar, para. 3.

164 B. Van Schaack, Commission of Genocide in Myanmar, p. 292 (emphasis added).

165 UN Human Rights Council, A/HRC/32/18, *supra note* 163, para. 3.

166 ICJ, *The Gambia v. Myanmar*, *supra note* 146, para. 15.

9 Conclusion

This paper has demonstrated how international case law variously endorsed conflicting approaches to the definition of protected groups under the Genocide Convention. Initially, international criminal tribunals tended to define the victim groups in a primarily objective manner. However, over the years, the protected groups were increasingly determined subjectively, "*by relying on the perception of the group's differentness*".[167] Yet, as evident from the above analysis, the international case law has never *fully* departed from an objective approach.[168] Other relevant findings, including Reports of the Commissions of Inquiry (Darfur and the Syrian Arab Republic) and the Fact-Finding Mission (Myanmar), have confirmed a move towards the combined subjective–objective approach.

In the first genocide judgment in *Akayesu*, the ICTR attempted to define the national, racial, ethnical, and religious groups by means of objective parameters, including a rather questionable criterion of a "*stable and permanent group*".[169] In light of the subsequent criticism, the ICTR and ICTY either replaced or supplemented the objective identification of the protected groups by a subjective standard of perception and self-perception as a member of a group. This important shift – and stronger reliance on the subjective or combined approach – has been equally followed by the Darfur Commission, which noted that from the perspective of international criminal law, it is increasingly irrelevant whether or not there is an "objective" difference between perpetrator and victim groups,[170] and that the approach has evolved to the currently prevailing partially subjective standard.[171] A similar approach was adopted by the Commission of Inquiry on the Syrian Arab Republic and the ICJ in *The Gambia v. Myanmar*. As for the ICC, the Pre-Trial Chamber in the *Al Bashir* case utilized certain objective criteria in identifying a distinct ethnic group. At the same time, however, it observed that neither the Rome Statute nor international case law provide for a clear definition of the ethnic group and it is "*not entirely clear*" which approach to the definition of the protected groups should

167 Lingaas, Carola, *supra note* 10.

168 Kreß, *supra note* 16, p. 684, referring to Young, Robert, 'How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purposes of Genocide', (2010) 10:1 *International Criminal Law Review*, p. 10.

169 See Kreß, *supra note* 16, p. 683 (arguing that the Pre-Trial Chamber I in the Al Bashir case was correct to reject "*the idea of recognizing* other *protected groups than those explicitly listed, provided such groups are comparably* stable").

170 Van Schaack, *supra note* 11, p. 1117.

171 The Darfur Report, *supra note* 3, para. 499.

be adopted.[172] As such, the protected group definition before the ICC remains open to further exploration, and indeed, consolidation.

Based on the evaluation of both the objective and subjective approaches, it may be concluded that the focus on the perpetrator's subjective stigmatization of the group is well justified, because it is indeed the *génocidaire* who defines the target group.[173] The uniqueness of the crime of genocide is based upon the special intent (*dolus specialis*) with which the underlying acts are accomplished, and as such, the perpetrator's "special" mental state toward the group is the critical element that distinguishes genocide from other crimes under international law.[174] Accordingly, it has been argued that without a subjective determination, the aims of the Genocide Convention could be frustrated, since the conduct and intentions of the perpetrator may have no connection to an "objective" measure of the targeted group.[175] Indeed, the ICTY in *Krstić* acknowledged that any attempts to differentiate the enumerated groups on the basis of scientifically objective criteria would be inconsistent with the object and purpose of the Genocide Convention.[176]

Yet, this issue has two sides. The perpetrator's determination of the group should not be treated in isolation, otherwise there is a risk of disconnecting "*a fundamental link*" between the perpetrator's determination of the group and the contours of the group existing in society before the genocide took place.[177] As Schabas aptly puts it: "*Law cannot permit the crime to be defined by the offender alone.*"[178] Many difficult choices were made during the drafting process of the Genocide Convention in order to reach consensus upon a four protected groups only, and in that context, a purely subjective approach should be rejected as also possibly conflicting with the very object and purpose of the Genocide Convention.[179] Therefore, for the purposes of avoiding the protection of completely imaginary groups, a subjective approach should not serve as the basis for broadening of the protected categories, given the fact that the Genocide Convention protects an exhaustive number of groups.

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172 ICC, *Prosecutor v. Al Bashir*, *supra note* 91, para. 137, fn. 152.

173 Nersessian, *supra note* 13.

174 *Ibid*.

175 *Ibid*.

176 ICTY, *Prosecutor v. Krstić*, *supra note* 4, para. 556.

177 Nersessian, *supra note* 13. See also Chapter 3.

178 Schabas, William A., *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), p. 110.

179 See Kreß, *supra note* 85, pp. 461–502. Nersessian, *supra note* 13.

Indeed, inclusion of *any* group created by the perpetrator's imagination has consistently been rejected.[180]

In sum, when determining group membership, we propose to methodologically follow a combined approach to the definition of the relevant group. We suggest, first, that there should be at least some plausible evidence that the targeted group has certain recognized ethnic, national, racial, or religious existence "outside of the mind" of the perpetrator – this could include any external ("objective") indicia of group status as drawn upon by the ICTR judgments in *Akayesu* and *Kayishema,* the ICC in *Al-Bashir* or the ICJ in *The Gambia v. Myanmar.* The key, however, is in how that evidence is used – in contrast to the objective approach, where it is used to determine the contours of the group itself, under the combined approach, the evidence serves merely as a safeguard to "*ensure some logical connection*" between the perpetrator's determination of the group and this group's existence in society before the genocide took place.[181] Second, after establishing this "*minimum baseline*",[182] or the "*objective starting point*",[183] the rest of the inquiry should consider "*collective perceptions*"[184] and thereby focus on the group as identified by the perpetrator. Following these steps offers certain guarantee that the combined approach does not depart from the text of the Genocide Convention, since it remains limited to four protected groups, which are no longer defined (only) by their objective connotations, but encompass the subjective perceptions.[185] Importantly, as noted for instance by the ICJ judgment in *Bosnia and Herzegovina v. Serbia and Montenegro* and by the Darfur Commission, this interpretation has not been challenged by States.[186] Finally, any drawbacks associated with the combined method are outweighed by the practical impossibility of defining the protected group in any other way.[187]

180 Lingaas, Carola, *supra note* 10. See also Kreß, *supra note* 16, p. 685, with a reference to UNGA Res 96(I).

181 Nersessian, *supra note* 13.

182 *Ibid.*

183 Kreß, *supra note* 16, pp. 684–685.

184 *Ibid*, p. 685.

185 The Darfur Report, *supra note* 3, para. 501.

186 The Darfur Report, *supra note* 3, para. 501. See also, ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra note* 121, para. 191 ("*The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach*").

187 Nersessian, *supra note* 13.

CHAPTER 8

Invisible Genocide

The Relevance of the 1948 Genocide Convention to the People with Disabilities

Eliška Mocková

1 Introduction: The Incomplete Definition?

Long before World War II (WWII) started, a distinct group of people in Nazi Germany was singled out. The Nazi regime believed that their genetic heredity determined their social conduct, which was deemed undesirable. Hence, the regime decided that these people needed to be eliminated; the national gene pool should have been "purged".[1] This group was therefore "excluded, incarcerated, sterilized, and neglected" and eventually deprived of their right to life.[2] The reason was their disability.

During the Nazis rise to power, people with disabilities[3] were already in a vulnerable position. The calls for "eugenic" killing of institutionalized patients were present in the public sphere. A notorious illustration is the 1920 brochure "Permitting the Destruction of Unworthy Life" written by the psychiatrist Alfred Hoche and the attorney Karl Binding.[4] They advocated killing of people with intellectual disabilities or "destruction of life unworthy of life" (*Lebensunwertes Leben*) who lived in institutions.[5] These authors argued that

1 Friedlander, H., *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (University of North Carolina Press, 1997), p. 90.

2 *Ibid*, p. 21.

3 Human rights lawyers attempt to replace the word "persons" (in Czech osoby which is close to the meaning of the word persons) with "people" (lidé) in the Czech Republic. It is to emphasize that people with disabilities are people in the first place. The word persons (osoby) often has a pejorative meaning in the Czech language, depending on the context and intonation, while people (lidé) and the adjective (lidské) is used in a positive manner. For this reason, I choose to continue with this choice of vocabulary in English, even though it may seem odd to native speakers of English. Even less acceptable would be to use the term "disabled". This essentially reduces human beings to their disability. As written by the United Kingdom's Disability Office, "disabled" is a description, not a group of people. Such use should be avoided.

4 *Ibid*, p. 92.

5 Binding, K., 'Permitting the Destruction of Unworthy Life: Its Extent and Form', vol. 8, issue 2 *Issues in law & medicine Legal Center for the Medically Dependent & Disabled*, 1992.

whether a life was worth living was to be determined by the society.[6] They also believed that the cost of care for people who, according to them, had "no purpose" could not be justified. Instead of promoting alternatives to the costly and inefficient institutional care, they promoted an "alternative" to the lives of those patients – death.[7]

The ideas presented by Hoche and Binding, including the administrative procedure which they designed, were readily embraced by the Nazis and put into practice. People with intellectual and other disabilities thus became the first victims of the Nazi regime. The selection procedure, use of gas, pillaging and burning of their dead bodies – that is all what Nazis learned during their first organized mass murder, murder of people with disabilities.[8] Since 1933, between 200,000 and 300,000 people with disability were slaughtered by the meticulously murderous, fanatic regime.[9] In addition, while the official part, the so-called Aktion T4, was officially stopped in 1941, it continued unofficially and was even supposed to resume after the end of war in an official manner.[10]

Arguably, these crimes were the same in their nature as the crimes committed later against the Jews, Roma, Sinti, and other groups, their occurrence preceded the genocide of the Jews, and were committed on a massive scale.[11] Still, people with disabilities were not protected by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the first international instrument to react to the Nazi crimes.[12] This convention only protects national, ethnical, racial, or religious groups. The crimes against people with disabilities were to some extent punished after the war. However, a shadow of historical injustice lingers over the crimes and their subsequent

6 Friedlander, *The Origins of Nazi Genocide, supra note* 1, p. 15.

7 *Ibid,* p. 16.

8 *Ibid,* p. 22.

9 United States Holocaust Memorial Museum, "People with Disabilities." Bibliographies, available online at URL <https://www.ushmm.org/collections/bibliography/people-with-disabilities> [last visited 30 September 2020].

10 Weindling, P., The Need to Name: The Victims of Nazi "Euthanasia" of the Mentally and Physically Disabled and Ill 1939–1945, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 61.

11 I am aware that this argument has been articulated by scholars for people from other minority groups that were deemed "unfit" and persecuted by the Nazi regime. Due to the scale and their "primacy" as victims, as well as relative silence in literature, I only focus in this article on people with disabilities.

12 Ratner, S., Ramcharan, B., Akhavan, P., Ridgway, D., 'The Genocide Convention after Fifty Years', Proceedings of the Annual Meeting, *American Society of International Law - CPU*, 92, 1998, p. 1.

handling by international criminal law.[13] In addition, the topic has been omitted from historical research for some time and due to this many uncertainties surround the facts, including the number and identities of the victims.[14]

The article tries to address the invisibility of people with disabilities in the Genocide Convention and the situation in international criminal law as such. In the first part, it describes the Nazi regime's crimes through the language of the Genocide Convention. The purpose is to demonstrate that people with disabilities were omitted from its protective scope for no intuitive reason. The second part maps the subsequent (lack of satisfactory) international legal response and its reasons. The last part discusses further context and implications.

2 Nazi Crimes against People with Disabilities

2.1 *Imposing Measures Intended to Prevent Births within the Group*

In January 1933, less than six months after the Nazi's grasp on power was complete, the "Law for the Prevention of Offspring with Hereditary Diseases" or the Sterilization Law was enacted by the government.[15] Such a speed was possible because the law was prepared before 1933. According to this law, any person suffering from a hereditary disease could be sterilized if his or her offspring could suffer from severe hereditary disability. The law included anyone with intellectual disability, schizophrenia, bipolar disorder, epilepsy, Sydenham's disease (Huntington disease), blindness, deafness, severe physical disability, or severe alcoholism.[16] However, in its previous version, it included one crucial aspect – consent. Instead, the Nazi version created a system of coercion.[17] An

13 Müller, M., Editorial: Medical ethics in the 70 years after the Nuremberg Code, 1947 to the present, in Czech, H., Druml, Ch., Weindling, P., Medical Ethics in the 70 Years after the Nuremberg Code, 1947 to the Present (Wiener klinische wochenschrift - The Central European Journal of Medicine, 130, 2018), p. 161.

14 Disability Rights Advocates, "Forgotten Crimes: The Holocaust and People with Disabilities", report, 2001, available online at URL <https://www.canonsociaalwerk.eu/1943_apeldoorn/forgotten_crimes.pdf>, p. 2.

15 The Enabling Act of 1933 amended the Weimar Constitution to allow Hitler's government to enact laws without going through the Reichstag, even when the laws violated the Constitution, English translation available online at URL <http://germanhistorydocs.ghi-dc.org/pdf/eng/English5.pdf>.

16 Germany, Law for the Prevention of Offspring with Hereditary Diseases (14 July 1933), German government, para. 1.

17 Friedlander, *The Origins of Nazi Genocide, supra note* 1, p. 26.

application for sterilization could be submitted by the people themselves, but also by the doctors and heads of institutions, as well as legal guardians.[18]

This law enabled massive, forced sterilization to "thrive". 388.400 requests or denunciations were submitted between 1934 and 1936, with almost 75 % from the medical professionals.[19] About 259.000 of them reached courts and almost 200.000 sterilizations were imposed by the courts, with over 160.000 surgeries taking place between 1934 and 1936.[20] Over 200 so-called Hereditary Health Courts were established in Germany and in the annexed territories, each having two doctors and one judge. Eighteen courts of appeal were established, yet a few decisions were ever reversed. Sterilization was done mostly by ligation of ovarian tubes or vasectomy. Irradiation was used occasionally. Hundreds of people died due to the operations.[21] Until 1939, between 350,000 and 375,000 people with disabilities were forcibly sterilized.[22]

The sterilization law was complemented by one of the Nuremberg laws – the 'Marriage Health Law' of 1935. This law enabled screening of the whole population to prevent marriages from which any children could be afflicted with a hereditary condition or disease, particularly those covered by the Sterilization Law.[23] These laws were followed by by-laws enlarging the scope of the targeted persons to include for example criminally prosecuted people, linking tightly disability and antisocial behavior.[24]

2.2 *Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part*

In 1935, Hitler told the Reich's chief medical officer that he intends to use the pretext of war to eliminate people with disabilities. In peacetime, he feared public opinion in Germany and abroad.[25] At the end of the 1930s (the exact year is not known), the so-called Knauer baby case occurred: A father asked for killing of his disabled child and was granted consent and assistance by Hitler's personal doctor. Shortly after, the Reich Committee for the Scientific

18 Law for the Prevention of Offspring with Hereditary Diseases, paras. 2 and 3.

19 Friedlander, *The Origins of Nazi Genocide, supra note* 1, p. 27.

20 *Ibid,* p. 28.

21 *Ibid,* p. 28.

22 Karowicz-Bienias, S. K., 'Nazi Crimes on People with Disabilities in the Light of International Law – a Brief Review', in *Białostockie Studia Prawnicze,* 2018, p. 188; Friedlander, H., 'Registering the Handicapped in Nazi Germany: A Case Study', Fall, 1997, vol. 11, no. 2 (Fall, 1997) *Springer*, p. 90.

23 Friedlander, *The Origins of Nazi Genocide, supra note* 1, p. 44.

24 *Ibid,* p. 23.

25 Ternon, Y., 'L'Aktion T4', *Revue d'Histoire de la Shoah*, 2013, p. 41.

Registering of Serious Hereditary and Congenital Illnesses was established under the control of the Chancellery of the Führer. In collaboration with the civil authorities the Committee started selecting future victims among children with disabilities in the pediatric wards.[26]

According to a non-public decree issued by the Reich Ministry of the Interior in August 1939, all physicians and midwives were obligated to report newborns and children under the age of three with severe disabilities. The decree included a financial compensation for the midwives.[27] The reporting obligation was created because many children with disabilities were not institutionalized and remained with their families, therefore out of reach of the authorities.[28] The authorities also encouraged parents of children with disabilities to place them into special clinics in Germany and Austria. Here, medical staff oversaw that the children died. Some of them were killed through overdoses of medication, others died as a result of starvation and other conditions imposed on them.[29] At first, only infants and toddlers were targeted, later children up to 17 years of age were included.[30] Some scholars report that about 5,200 German children became victims of the child "euthanasia" program,[31] others mention higher numbers, such as 9.731.[32] Many adults with disabilities, too, died due to inhumane conditions imposed on them in the institutions and outside, for example when they were forced to labor to death.[33]

2.3 *Killing Members of the Group*

In October 1939, Hitler sanctioned the official "euthanasia" program. He dated it back to 1 September, to create an impression of a link with the war. The Aktion T4[34] took place in Germany and later in the countries under German

26 Weindling, The Need to Name, *supra note* 10, p. 56.

27 Heberer, P., *Children during the Holocaust* (Altamira Press, 2011), p. 212.

28 *Ibid*, p. 211.

29 The underlying acts covered by Article 4(2)(c) are "*methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction*": ICTY, *Prosecutor v. Zdravko Tolimir* (Judgment) ICTY-IT-05-88/2-A, ACh (8 April 2015), para. 225.

30 Heberer, P., The Nazi "euthanasia" program, in Friedman, Jonathan C. (ed.) *The Routledge History of the Holocaust* (London/New York: Routledge, 2011), p. 141.

31 Burleigh, M., Wippermann, W., *The Racial State: Germany 1933–1945* (Cambridge: Cambridge University Press, 1991), p. 144.

32 Weindling, The Need to Name, *supra note* 10, p. 63.

33 Disability Rights Advocates, "Forgotten Crimes: The Holocaust and People with Disabilities", *supra note* 33, p. 31.

34 According to the address of the "euthanasia" headquarter at Tiergarten Street 4.

occupation.[35] In the beginning, Hitler entrusted the Chancellery to serve as the engine for the T4. Chancellery director Phillip Bouhler and physician Karl Brandt led the extermination operations. They established six extermination sites for adult patients in Germany and Austria: Brandenburg, Grafeneck, Bernburg, Sonnenstein, Hartheim, and Hadamar. Later, an official structure was designed in the way that it did not lead directly to the Chancellery and Hitler himself.[36]

Patients were registered in the office of the Chancellery via a form. The form contained their "race", heredity as inferred from the patients' diagnosis, prospects (particularly incurability inferred from length of institutional treatment, work capability and asocial or criminal behavior) and work capacity. Each form was given a six-digit number, photocopied and submitted to three out of 42 medical experts.[37] The so-called assessors decided about lives and deaths based on forms, filled by the care-providers, without even seeing the people.[38] When some institutions refused to fill out the form, the T4 medical commissions visited the places to select. The selection was followed by mass transportations to the extermination centers.[39] Later, transit places were added to the murderous equation, where people waited for some weeks to be exterminated later. People had their transport numbers, marked on tape on their backs. The doctors verified their identity and created a false death certificate.[40] Then the people were taken to gas chambers designed as shower rooms. There they were asphyxiated by carbon monoxide. Crematorium staff (burners) afterwards cleansed the places; pre-marked bodies had their golden teeth pulled out.[41]

The families were notified and delivered the false death certificates.[42] However, the families of 5.000 Jewish victims with disabilities did not even receive the letter of condolences.[43] From the literature, it is unclear how much was publicly known. Some claim that the sudden death of tens of thousands of

35 Rotzol, M., Richter, P., Fuchs, P., Hinz-Wessels, A., Topp, S., Hohendorf, G., 'The First National Socialist Extermination Crime: The T4 Program and Its Victims', *International Journal of Mental Health*, 2006, pp. 18–19.

36 Burleigh, Wippermann, *supra note* 31, p. 148.

37 Rotzol and others, *supra note* 35, p. 20.

38 Burleigh, Wippermann, *supra note* 31, p. 146.

39 Rotzol and others, *supra note* 35, p. 21.

40 *Ibid*, p. 22.

41 *Ibid*, p. 21.

42 United States Holocaust Memorial Museum, "A page of the Hadamar Institute's death register in which the causes of death were faked to conceal the euthanasia killings that took place there", 5 April 1945, photograph n. 76282, available online from URL <https://collections.ushmm.org/search/catalog/pa6789> [last visited 1 October 2020].

43 Ternon, *supra note* 25, p. 46.

institutionalized people and similar death certificates made it an open secret.[44] The official program lasted from 1939 to the summer of 1941 and claimed 70,273 lives according to the internal statistics.[45] In 1941, the public protests escalated, especially from the church which had initially turned a blind eye to the crimes, but also from judiciary and from within the party.[46] It was halted but the killing continued in a decentralized way and the pace even increased.[47] The official children killing program continued.[48]

In this stage, decisions as to who would be killed became the decision of the individual physicians rather than of an official review committee. People were killed by medication, but also systematic starvation, and neglect in many of the institutions under instruction by the willing institution's director. In summer 1942, Karl Brandt became the Commissioner of the Health System. He was responsible for distributing of personnel and medical equipment between the civilian and military hospitals.[49] He also helped to deliver the necessary drugs for killing (morphine and scopolamine), though without the official permission.[50] In addition, people continued to be exterminated in Bernburg and Sonnenstein until 1943 and in Hartheim until the end of 1944 as if nothing happened in 1941.[51]

The killing thus continued throughout WWII and gradually included diverse groups of victims with disabilities such as geriatric patients, victims of bombing, and foreign forced laborers with mental health issues.[52] People with disabilities were also transported into "regular" concentration camps. There, their

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44 United States Holocaust Memorial Museum, "Nazi Persecution of the Disabled: Murder of the unfit" <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/nazi-persecution-of-the-disabled> [last visited 15 October 2020]; Disability Rights Advocates, "Forgotten Crimes: The Holocaust and People with Disabilities", *supra note* 33, p. 11.

45 Rotzol and others, *supra note* 35, p. 23. However, the numbers differ in literature - some estimate over 90.000 victims: Katz, S.T., Foreword, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 30.

46 Rotzol and others, *supra note* 35, p. 21.

47 Disability Rights Advocates, "Forgotten Crimes: The Holocaust and People with Disabilities", *supra note* 33, p. 17.

48 *Ibid*, p. 17.

49 Nuremberg Military Tribunal, *United States of America v. Karl Brandt, et al.* a, case n. 1 (The Medical Case), judgment, Green Series, Vol. 2 at 298 (no. 11947-08-19), p. 190.

50 Katz, *supra note* 45, p. 30.

51 Ternon, *supra note* 25, p. 47.

52 United States Holocaust Memorial Museum, "Euthanasia Program", available online at URL <https://encyclopedia.ushmm.org/content/en/article/euthanasia-program> [last visited 15 September 2020].

killing was given the code name "14 f 13" - prisoners with disabilities unable to work were also exterminated. The cruelties experienced by people with disabilities there and elsewhere need not to be retold here.[53] But they testify to the complete dehumanization of this part of population, one of the most chilling, yet typical signs of genocide as described by social scientists.[54] This dehumanization is confirmed also by the fact that people with disabilities were being killed even after the end of WWII. On 29 May 1945, Richard Jenne became the last child with disability murdered in a child's ward at Kaufbenren hospital, with unaware American troops a half mile away. A German physician returning from the front discovered that psychiatrists kept killing the patients in a local institution three months after the end of war.[55]

All of this reflects the eugenic/genocidal thinking about people with disabilities, which the Nazi regime adopted. People with disabilities were supposed to be eliminated to clean the body of the people (Volkskörper). There was also an effort to save the cost of their care and achieve "rationalization" of medical care - to spare places for those returning from war.[56] Murders of people with disabilities took place in the occupied countries too, particularly in Poland and the Soviet Union but also in Yugoslavia, today's Belarus, Ukraine, or Baltic states. In occupied Poland, patients in institutions were murdered by the Schutzstaffel (SS) and by the armed forces. The killing even preceded the T4 in Germany, Austria and Czechoslovakia.[57] In the Soviet Union, the SS and Sicherheitsdienst (security service) murdered institutionalized patients in mass executions – mass shooting, gas vans, by explosives, and in other ways.[58]

Overall, it is not precisely known, and perhaps never will be, how many people with disabilities were killed in Germany and the occupied territories because of their disability, especially during the period of wild "euthanasia".[59] Conservative estimates range between 200.000 to 300.000 victims (about

53 For example: Disability Rights Advocates, "Forgotten Crimes: The Holocaust and People with Disabilities", *supra note* 33, pp. 14 and 15.

54 Stanton, G.H., 'The Eight Stages of Genocide', *Genocide Watch*, info sheet, 1998, available online at URL <https://www.keene.edu/academics/ah/cchgs/resources/educational-handouts/the-eight-stages-of-genocide/download/> [last visited 18 September 2020].

55 Friedlander, *The Origins of Nazi Genocide, supra note* 1, p. 162.

56 Rotzol and others, *supra note* 35, p. 19.

57 Weindling, The Need to Name, *supra note* 10, p. 57.

58 Bättig, B., Opening Remarks, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 16.

59 Nevertheless, the efforts to establish the identities of the victims have not ceased, for example there is an ongoing Czech-German project: <http://www.schloss-hartheim.at/projekt-sudetenland-protektorat/en/index.htm>.

200.000 in Germany and Austria and 100.000 in the occupied countries).[60] The numbers remain problematic as they are only estimates.[61] Interestingly, the surviving files from T4 were never fully analyzed, which speaks to the limited general interest in this area.[62]

3 Legal Response

After the World War II, international law responded to the then recent past in two ways – by the groundbreaking and controversial international criminal prosecutions in Nuremberg and Tokyo[63] and through an equally important and innovatory international legal instrument – the Genocide Convention. This part nevertheless illustrates that both largely failed people with disabilities.

3.1 *The International Military Tribunal at Nuremberg* (*IMTN*)

On the crimes against people with disabilities, the IMTN's judgment stated that

> [r]eference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane, and incurable people, 'useless eaters', were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign labourers, who were no longer able to work, and were therefore useless to the German war machine.[64]

The judgment noted that this "putting to death" was under the responsibility of the Ministry of the Interior. It quoted a report by the Czechoslovak War Crimes

60 Karowicz-Bienias, *supra note* 22, p. 190.

61 Weindling, The Need to Name, *supra note* 10, p. 52.

62 *Ibid*, p. 54.

63 Meltzer, B. D., 'A Note on the Nuremberg Debate', *University of Chicago Law Review*, 1947, p. 455. While people with disabilities were also targeted in Japan, for example by a 1940 National Eugenic Law - a compulsory sterilization law, the crimes did not reach this massive scale and are therefore omitted from this article (e.g., Matsubara, Y., 'The Enactment of Japan's Sterilization Laws in the 1940s: A Prelude to Postwar Eugenic Policy', *Historia Scientiarum: The International Journal of the History of Science Society of Japan*, 1998, p. 8).

64 International Military Tribunal at Nuremberg, judgment, 1946 (1947), 41 AJIL 172, p. 75; also: Germany, Reich Minister of the Interior, Order Extending Euthanasia to Insane Eastern Workers, 1944, retrieved on 10 September 2020, available online at URL <https://www.vaholocaust.org/order-extending-euthanasia-to-insane-eastern-workers/>.

Commission which estimated that 275,000 people with disabilities were killed as a result of this policy.[65]

Wilhelm Frick, the Reich Minister of the Interior from 1933 to 1943 and the Supreme Reich Authority in Bohemia and Moravia, was found guilty of crimes against humanity. The judgment stated that as the then Minister of the Interior he had knowledge of the murders in nursing homes, hospitals, and asylums and did nothing to stop them.[66] This is all to be found in the judgment. The brief and incomplete account of the events needs to be understood in the context. Firstly, the IMTN focused predominantly on the crimes against peace as "the ultimate international crime".[67] Also, to have the jurisdiction over the other crimes – war crimes and crimes against humanity - the war nexus (link to the war efforts) needed to be established.[68] Hence, there was a clear emphasis on the victims outside Germany.[69] This is also the reason why the efforts to codify peacetime international crimes started almost immediately, in 1946.[70]

Without attempting a linguistic analysis, the language used in the judgment is also notable. When describing the crimes against people with disabilities, the judgment uses the term euthanasia (good death) without quotation marks[71] - the very word which the Nazi used to legitimize their mass extermination of people with disabilities. In addition, it mentions "putting to death", a term which even has legal connotations and suggests a lawful killing in a form of the capital punishment.[72] It does not speak of massacres, slaughter, terror or other terms that are used elsewhere throughout the judgment to describe other Nazi crimes, such as the massacre of political opponents, civilians in the occupied territories, Jews, the enemy's armed forces, etc.[73] The word murder is mentioned once in this context.[74]

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65 International Military Tribunal at Nuremberg, judgment, pp. 75, 119–120.

66 International Military Tribunal at Nuremberg, judgment, pp. 75 and 119.

67 King, H.T. Jr., 'Nuremberg and Crimes against Peace', *Case Western Reserve Journal of International Law*, 2009, p. 277.

68 Van Schaack, B., 'The Definition of Crimes Against Humanity: Resolving the Incoherence', *Santa Clara University School of Law, Faculty Scholarship,* 1998, p. 791.

69 *Ibid*, p. 799.

70 UNGA Res. 96 (1), 'The Crime of Genocide', 11 December 1946, UN Doc A/64/Add 1.

71 Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172, pp.119 and 120.

72 Merriam Webster Dictionary Entry "be put to death" available online at URL <https://www.merriam-webster.com/dictionary/be%20put%20to%20death#:~:text=%3A%20to%20be%20killed%20at%20a,was%20later%20put%20to%20death> [last visited 29 September 2020]; Oxford Learner's Dictionary, Oxford University Press Dictionary Entry "put somebody to death", available online at URL <https://www.oxfordlearnersdictionaries.com/definition/english/death#death_idmg_6> [last visited 29 September 2020].

73 International Military Tribunal at Nuremberg, judgment, pp. 20, 60, 64, 77, 99, etc.

74 International Military Tribunal at Nuremberg, judgment, p 119.

Clearly, those crimes were not prosecuted as genocide in Nuremberg, particularly the crimes against people with disabilities. The concept of genocide was innovatory then. It became known through Raphael Lemkin's book *Axis Rule in Occupied Europe*, published in 1944 (though he introduced it to the academic audience in 1933).[75] His purpose was to conceptualize the effort to annihilate a group of people because of a shared characteristic(s) of its members. An attack not against an individual but against the very existence of a group of people, regardless of their other features. The actions could be diverse, including political, social, economic, cultural, physical, and biological aspects.[76] This definition was too broad, vague, and abstract to comply with the principle of legality and hence of no use for criminal prosecution. And it was also too narrow in that it focused exclusively on religious, ethnic, or national groups.[77]

Nevertheless, Lemkin's book was read by the lawyers participating in the Nuremberg trial. He also exchanged correspondence with the representatives of the U.S. and British prosecution authorities. His communications had an impact. The term genocide was used by the prosecution authorities. The indictment stated that the Reich committed "*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*."[78] The definition was not exhaustive regarding the protected groups. In particular, the wording "classes of people" and "others" left the door open for people with disabilities.

At last, the word "genocide" did not appear in the 1946 judgment. However, the systemic nature of crimes against people with disabilities would not be punished even as an act of persecution. The Charter made it clear that this crime was reserved for racial, religious, or political groups.[79] The crimes before the tribunal in Nuremberg were equal to any other murder of a civilian - in case they fulfilled the war nexus requirement. The fact that this was

75 Lemkin, R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (The Lawbook Exchange, Ltd., 2008).

76 *Ibid*, p. 82ff.

77 *Ibid*, p. xiii.

78 Indictment presented to the International Military Tribunal sitting at Berlin on 18 October 1945. London: Her Majesty's Stationery Office, November 1945. 50 p. (Cmd. 6696). p. 12.

79 Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 82 UNTS 251, adopted on 8 August 1945, entered into force on 8 August 1945, art. 6 c).

a state-sanctioned policy against people with disabilities, that a whole killing structure was created and that brutal, collective violence of majority against a marginalized minority took place, was completely neglected. In addition, the war nexus excluded a large number of victims with disabilities. Furthermore, there was complete silence on the hundreds of thousands of forcibly sterilized people. Clearly, justice delivered in Nuremberg could not suffice.[80]

3.2 *Subsequent Nuremberg Trials and the Other Trials*

The incomplete justice in Nuremberg was one of the reasons why the twelve subsequent trials that followed were before the American Nuremberg Military Tribunals (NMT) from 1946 to 1949. Here, the prosecution worked with the term genocide more often.[81] The term made its way into a verdict, though not in the context of disability. Even before the NMT started, there was an attempt to punish the staff of the Hadamar extermination center. However, the prosecution established that it had no jurisdiction over the crimes of Germans against Germans. Only the killing of Polish and Russian workers with tuberculosis in 1944, was prosecuted, resulting in the capital punishment for Hadamar's chief administrator and two male nurses. The chief physician received a life sentence and the two administrative workers received sentences of 35 and 30 years. A female chief nurse was sentenced to 25 years.[82]

The crimes against people with disabilities were the subject of the first of the NMT's twelve trials. Czech prosecutor Arnost Horlick-Hochwald prepared a successful case against Karl Brandt, Viktor Brack, Kurt Blome, Waldemar Hoven, and other "most responsible", in what would be later known as Euthanasia or Medical Trial.[83] However, the charges mostly detailed the inhuman experiments in Dachau, Ravensbruck, Buchenwald, and other concentration camps, such as exposing people to diseases, poison, and other substances, extreme conditions and medical procedures (sterilizations) which resulted in their suffering, deaths, and disabilities. In the indictment, the crimes against protected foreigners were conceived as war crimes and against Germans as

80 This concerns not only people with disabilities but also other groups of victims such as the crimes committed against Roma and Sinti people who are not mentioned in the judgment.

81 E.g., Nuremberg Military Tribunal, indictment in the case no. 8, the *United States of America v. Ulrich Greifelt*, et al, p. 5; Nuremberg Military Tribunal, indictment in the case no. 11, *USA v. Ernst von Weizsäcker*, et al., p. 37.

82 United States Holocaust Memorial Museum, "The Hadamar Trial" Holocaust Encyclopedia, available online at URL <https://encyclopedia.ushmm.org/content/en/article/the-hadamar-trial> [last visited 8 November 2020].

83 NMT, *USA v. Karl Brandt* [1947], judgment.

crimes against humanity. Crimes against humanity involved the program of the "*systematic and secret execution of the aged, insane, incurably ill, of deformed children and other persons, by gas, lethal injections, and diverse other means in nursing homes, hospitals, and asylums.*"[84]

The crimes against people with disabilities was also the concern of the NMT's third Judges trial. The charges mention a special responsibility of three defendants in the program which saw "[i]*nsane, aged, and sick nationals of occupied territories and Jews, the so-called "useless eaters",* [who] *were systematically murdered*"[85] as war crimes. In addition, the indictment specifies the responsibility of the Special Health Courts in the "perverted eugenic and sterilization laws or policies" regarding German civilians and inhabitants of other countries which resulted in the "systematic murder and ill-treatment of thousands of persons". Oswald Pohl and other members of the SS were charged with i.a., carrying out the "euthanasia" program as a war crime and a crime against humanity in the fourth NMT.[86] In the eighth NMT, the charges included the special responsibility of one of the defendants for euthanasia.[87] In the twelfth case, two instances of mass killing of people with psychosocial disabilities were included among the charges.[88]

While the prosecution was fairly ambitious, the judgments were underwhelming, and the justice delivered was very partial, again. In the Medical trial, the medical experiments were considered by the Tribunal in cases of both, Germans (as crimes against humanity) and non-Germans (as war crimes) victims.[89] However, the Tribunal made it clear that the extent to which the "euthanasia" program would be considered is limited to non-Germans.[90] And indeed, Karl Brand was found responsible for the administration of "euthanasia" program only against non-German victims. The comment made by Tribunal on the German victims is quite shocking: *"Whether or not euthanasia is justified in certain cases of the class referred to is no concern of this Tribunal. Whether or not a state may validly enact legislation which* imposes euthanasia upon certain

84 NMT, *USA v. Karl Brandt* [1946], indictment, p. 11.
85 Nuremberg Military Tribunal, *USA v. Altstötter* et al., case n. 3, [1947], indictment, p. 13.
86 Nuremberg Military Tribunal, *USA v. Pohl* et al., case n. 4, [1947], indictment, pp. 5, 9.
87 Nuremberg Military Tribunal, *USA v. Ulrich Greifelt*, et al., case n. 8, [1947], indictment, p. 12.
88 Nuremberg Military Tribunal, *USA v. Wilhelm von Leeb*, et al., case n. 12, [1947], indictment, pp. 36–37.
89 NMT, *USA v. Karl Brandt* [1947], judgment, p. 174.
90 NMT, *USA v. Karl Brandt* [1947], judgment, p. 178.

classes of its citizens *is likewise a question which does not enter into the issues."*[91] Hoven was also found guilty for his role in the "euthanasia" program for the non-German victims of 14 f 13.[92] Brack was found guilty for non-German victims of "euthanasia" program which "gradually merged into the Action 14 f 13" according to the judgment. Blome was acquitted. The concept of genocide did not appear here.

The concept of genocide appeared in the Judges trial's judgment several times. It was conceptualized by the judges in a sufficiently broad way and could include people with disabilities among the protected groups.[93] However, the judgment did not respond to the charges regarding crimes against people with disabilities from the indictment at all. The "euthanasia" program or the participation in sterilization and the Special/Hereditary Health Courts were not mentioned. As stated above, the NMT's judges were not willing to prosecute crimes against German victims.[94] The sterilization was discussed only in the context of Jewish victims in the concentration camps.[95] In the eighth NMT's trial, the defendant Hildebrandt was not punished for his role in the euthanasia program and the attempt of the prosecution was met with a chilling comment from the judges. "*It is our view that euthanasia, when carried out under state legislation against citizens of the state only, does not constitute a crime against humanity*."[96] It does not mention the question of consent. This judgment used the term genocide extensively, as it focused on the "racial hygiene" program and on the destruction of certain (national and ethnic) groups. In the case no. 12, the judges found Von Kuechler guilty i.a,. for a mass extermination of people in a Soviet asylum where some 230 "insane and diseased women" lived.[97]

Other occupation zones also saw some disability-centered trials. For example, in 1947, the Soviets conducted a trial for "euthanasia" at Sonnenstein-Pirna.

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91 NMT, *USA v. Karl Brandt* [1947], judgment, pp. 198, 279. The judgment also elaborates on the role of Philipp Bouhler who committed suicide in May 1945.

92 NMT, *USA v. Karl Brandt* [1947], judgment, p. 289.

93 Nuremberg Military Tribunal, the Justice Case, case n. 3, *United States v. Altstoetter* et al., Opinion and Judgment and Sentence, Green Series, vol. 3 at 954 (Mil. Trib. No. 31947-12-04), pp. 963, 983, 1128.

94 Nuremberg Military Tribunal, *USA v. Pohl* et al., [1947], judgment, Green Series, vol. 5 at 958 (Mil. Trib. No. 21947-11-03), pp. 971, 1014–1116.

95 NMT, *USA v. Pohl*, [1947], judgment, p. 1017.

96 Nuremberg Military Tribunal, *USA v. Ulrich Greifelt* et al., Judgment, case n. 73, Law Reports of Trials of War Criminals, vol. 13 at 1 [1948], pp. 28, 33–34.

97 Nuremberg Military Tribunal, *USA v. Wilhelm von Leeb* et al., [1948], Judgment, Green Series, vol. 11 at 462 (No. 51948-10-28) p. 577.

The trial took place in Dresden and resulted in among others, four death sentences, including Paul Nitsche, the former chief psychiatrist. The crimes were prosecuted as an extermination (killing on a large scale) as a crime against humanity.[98] In 1948, Erwin Jekelius, who was highly involved in child "euthanasia" and T4 in Austria, was condemned to 25 years of hard labor for the deaths at the Spiegelgrund/Steinhof.[99]

U.S.-run trials also took place in Austria, most notably the *USA vs. Altfuldisch* et al., which established the link between T4 and the concentration camps.[100] However, only one low-profile person was sentenced in its course. Other cases followed at the domestic level in Austria. Mostly, the prosecution tried to hold the perpetrators responsible for the "clear-cut" murders of the patients by the doctors and nurses.[101] Sometimes, not even murder but "hired assassination" was the classification, revealing a further disconnect from the systematic nature of the crimes and them being state-sanctioned.[102] Furthermore, there was a clear pattern of short harsh sentencing periods after the end of war, followed by a wave of leniency – acquittals, health and age-based releases, pardons, and amnesties. Some of the doctors, such as Heinrich Gross, pursued distinguished careers afterwards.[103]

The same pattern prevailed in Germany, where a few cases were successfully prosecuted early after the war. For example, between 1946 and 1948, 44 doctors and nurses from the Hadamar, Eichberg, and Kalmenhof, involved in the killing of patients, were prosecuted.[104] In 1949, the Grafeneck trial began, in which eight defendants were charged with the murder of over 10,000 patients at the Grafeneck Euthanasia Centre. When the Germanies took over responsibility for prosecution, the leniency prevailed and a number of acquittals and amnesties followed for political reasons.[105] As an illustration, it took 19 years for Dr. Horst Schumann to appear before the judge for his involvement in mass

98 Mehring S., *First Do No Harm: Medical Ethics in International Humanitarian Law* (Martinus Nijhoff Publishers, 2014), p. 154.

99 Czech, H., Post-war trials against perpetrators of Nazi medical crimes – the Austrian case, in Czech, H., Druml, Ch., Weindling, P., *Medical Ethics in the 70 Years after the Nuremberg Code, 1947 to the Present* (Wiener klinische wochenschrift - The Central European Journal of Medicine, 130, 2018), p. 166.

100 *Ibid*, pp. 165–6.

101 *Ibid*, p. 167.

102 *Ibid*, p. 168.

103 *Ibid*, p. 168. As Czech explains, the freshness of memory and pressure from Allies motivated the prosecutions for half of a decade before both faded away.

104 Czech, Post-war trials against perpetrators of Nazi medical crimes, *supra note* 99, p. 167.

105 Loewenau, A., The failure of the West German judicial system in serving justice: the case of Dr. Horst Schumann, in Czech, H., Druml, Ch., Weindling, P., *Medical Ethics in the 70*

sterilizations and killings. He was found unable to stand the trial because of (self-inflicted) health conditions and after six years in detention he was released to live for 13 more years as a free man.[106]

Next to political reasons, practical reasons (shortage of doctors) and collective desire not to proceed with the cases loomed large. The prosecutions were also objectively complicated by the fact that many of the perpetrators were already dead. Without those often-valuable witnesses it was particularly difficult for the prosecutions to successfully frame the so-called "experts". Abetment of murder was difficult to establish due to the shared responsibility (three expert opinions were gathered, and only the 'chief experts' took the final decision on life or death). Hence, they were mainly indicted for the direct activities rather than their expert opinions on the registration forms. The same goes for the administrative apparatus and even those involved in the transports.[107]

In Poland, the crimes against people with disabilities were particularly serious, estimates suggest between 20,000 to 30,000 victims.[108] Special commissions were established to investigate Nazi crimes. They opened a case in 1946 regarding the murder of patients in the psychiatric hospital in Kobierzyn. The investigations lasted for over 30 years and failed to bring those guilty to justice.[109] In Czechoslovakia, the crimes against people with disabilities mainly took place in the Protectorate's Kosmonosy and Sudetenland's Dobřany, Opava, and Šternberk na Moravě.[110] Little remains known apart from the research conducted by Šimůnek and Novák.[111] They highlighted a case of Opava's director Karl Girschek. He refused to select patients for the transports to extermination centers. When appointed director in Dobřany in 1944, he also refused to continue the "euthanasia" of children and demanded that the children be

Years after the Nuremberg Code, 1947 to the Present (Wiener klinische wochenschrift - The Central European Journal of Medicine, 130, 2018), p. 171.

106 *Ibid*, p. 169.

107 Raim, E., West and East German euthanasia trials since 1945, in Czech, H., Druml, Ch., Weindling, P., *Medical Ethics in the 70 Years after the Nuremberg Code, 1947 to the Present* (Wiener klinische wochenschrift - The Central European Journal of Medicine, 130, 2018), p. 193.

108 Nasierowski. T., Marcinowski, F., The Extermination of People with Disabilities in Occupied Poland. The Beginning of Genocide, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 144.

109 Karowicz-Bienias, *supra note* 22, p. 194.

110 Zeman, P., 'Kancelář vůdce NSDAP a akce „T4"', *Paměť a dějiny*, 2015, p. 61.

111 Šimůnek, M. V., Novák, M., The "Aktion T4" in Bohemia and Moravia and its Context, 1939–1941, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 127 ff.

taken out of this institution (to be killed elsewhere). He was sentenced to life imprisonment in Czechoslovakia in 1946 but profited from a 1955 amnesty. Perhaps, unsurprisingly, the prosecutions focused on the Czech victims but also included charges of forced sterilization for which he was eventually convicted.[112] However, the overall attempts to investigate and prosecute the crimes by the Czechoslovak government were disastrous. In fact, in the 1970s the Czech government told the German authorities in official correspondence that "*euthanasia measures have never been implemented in the Czech territory*."[113]

Interestingly, during their commission, the head of German administration in Belarus tried to "alleviate the fates of Jews" deported there from Reich but he had no reservation to the extermination of about 5,000 people with mental and psychosocial disabilities[114] even by explosives and in gas vans.[115] Subsequent investigations and prosecutions of these crimes in Belarus were largely incidental – when they were connected to other investigations or used for propaganda. Some trials with perpetrators connected to Nazi crimes against people with disabilities in Belarus and Ukraine took place in the 1960s in Stuttgart.[116] Public scrutiny during the Soviet regime remained limited in those countries.[117] About 3,500 of "mentally ill" were killed in the northern Russian territories between the Estonian border and Leningrad and 5,500 were killed in the former Baltic republics alone largely with no punishment ensuing.[118]

The prosecutions gradually ceased in the affected territories. Especially, from the 1950s to the early 80s "euthanasia" was a marginal issue. Moreover, it was considered as disconnected from the Holocaust.[119] In 1983, journalist Ernst Klee renewed public outrage by writing about the topic with "eloquent irony". The scientist Götz Aly then discovered that brain specimens from the

112 Šimůnek, M. V., 'Deus iudicat, cum nemo accusat. Reflexe, dokumentace a (ne)vyšetřování nacistické „eutanazie" v Československu v letech 1945–1990', *Studie, securitas imperii*, p. 150.

113 Šimůnek, Deus iudicat, cum nemo accusat, *supra note* 112, p. 166.

114 Björn, M. F., Starvation, Mass Murder, and Experimentation: Nazi "euthanasia" in the Baltics 1941–1944, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 175.

115 Friedman, A., Murders of the Ill in the Minsk Region in 1941 and their Historic Reappraisal in the Soviet Union and the Federal Republic of Germany, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 154.

116 Friedman, Murders of the Ill in the Minsk Region, *supra note* 115, pp. 160–1. E.g., trial with Widmann in Stuttgart (1967).

117 *Ibid*, p. 162.

118 Björn, *supra note* 114, p. 175.

119 Weindling, The Need to Name, *supra note* 10, p. 68.

murdered children were still held at Max Planck Institute for Brain Research.[120] Important impetus came from the victim organization Bund der "Euthanasie"-Geschädigten und Zwangssterilisierten (League for Persons Damaged by Euthanasia and Compulsory Sterilization), founded in 1987. The organization demanded recognition "of the racial character" of both sterilization and "euthanasia" killings.[121] Certain achievements followed. Austria subsequently recognized sterilization victims by providing eligibility for compensation from 1995 and inclusion in the Victims' Welfare Act. In 2007, the 1933 sterilization law was finally subject to proscription.[122]

3.3 *Genocide Convention and Disability*

The Genocide Convention[123] was part of the answer from international law to the Nazi crimes. The conclusion that the wrongful acts (actus reus) listed in the Convention are close-fitting to the crimes described in the first part is therefore not surprising. But this is clearly not the whole story. According to the Convention's Article II, genocide means any of these wrongful acts "*committed with intent to destroy, in whole or in part a national, ethnical, racial or religious group*". The Convention does not include people with disabilities as a protected group. That is, it does not protect people with disabilities unless they were simultaneously targeted for being members of those other groups. It is striking because the crimes, as argued in the first part, would be most precisely described as genocide - if the Convention's definition included this protective ground.

The *travaux préparatoires* for this Convention contain fascinating stories on many issues pertinent to the Convention, even today, including that of a protected group which was considered as perhaps the most important.[124] However, there is an absolute silence on the crimes against people with disabilities and their possible reflection in the Convention. The initial U.N. resolution of 1946 speaks about destruction of racial, religious, national, political, or

120 Seidelman, W. E., The tainted eponym: transgression and memory in medical science, in Czech, H., Druml, Ch., Weindling, P., *Medical Ethics in the 70 Years after the Nuremberg Code, 1947 to the Present* (Wiener klinische wochenschrift - The Central European Journal of Medicine, 2018), p. 186.

121 Weindling, The Need to Name, *supra note* 10, p. 70.

122 *Ibid*, p. 73.

123 Adopted by the United Nations General Assembly on 9 December 1948 as UNGA Res. 260 (III)A, entered into force in 1951.

124 Abtahi, H., Webb, P., *The Genocide Convention: The Travaux Préparatoires* (Brill Nijhoff; 2008), p. 224.

"other groups".[125] Nevertheless, it appears from other documents that the crime of genocide was perceived by the state representatives from the outset almost exclusively as reserved to ethnic, national, religious, or racial groups.[126] Occasionally, some other distinguishable ground was mentioned (such as language or a "social group").[127] Reference to Jewish victims and nations of the occupied countries appeared in the speeches.[128]

The United Nations approached the then arising definition in a broader manner than states, following the resolution of 1946. It considered as genocidal all actions leading to an annihilation of group "*whether the crime is committed on religious, racial, political or any other grounds*."[129] However, the first draft of the Convention, prepared by the Secretariat, already restricted the definition to "*groupes humains d'ordre racial, national, linguistique, religieux ou politique*".[130] It states that the group must be distinguishable by a certain element which its members share and which distinguishes them from the rest of the society. It referred to WWII and stated that clearly professional or sport groups do not need protection.[131] They add that by exhaustively listing racial, national, linguistic, religious, and political groups they opted for the "*widest possible formula*".[132] It attests to a complete ignorance - not only of the states but also of the very organization that was there to protect human rights, towards people with disabilities.

The question of antidiscrimination law and equality appeared throughout the *travaux*. Venezuela and Peru considered the topic of genocide connected with anti-discrimination law.[133] Mexico mentioned equality as the relevant principle for the Convention,[134] as well as France.[135] The Soviet Union stated that the states "need to prevent the crime of genocide by fighting against discrimination". Also, the Women's International Democratic Federation made the connection and appealed to the drafters to consider the egregious inequality and discrimination towards women when drafting the Convention.[136]

125 UNGA Res. 96 (I), 'The Crime of Genocide', 11 December 1946, UN Doc A/64/Add 1.
126 Abtahi, Webb, *supra note* 124, p. 3 (Cuba, India, Panama), p. 7 (Saudi Arabia), p. 11 (Soviet Union), etc.
127 *Ibid*, p. 13 (Columbia), p. 137 (France).
128 *Ibid*, p. 9 (UK), p. 19 (Czechoslovakia), p. 30 (Yugoslavia), p. 165 (France).
129 *Ibid*, p. 36.
130 *Ibid*, pp. 67, 303, and 333.
131 *Ibid,* p. 83.
132 *Ibid,* p. 230.
133 *Ibid,* pp. 39, 370.
134 *Ibid,* p. 453.
135 *Ibid,* p. 532.
136 *Ibid,* p. 473.

Resistance appeared – Poland stated that "*the extermination of groups of people, and the protection of minorities*" are unrelated, the other not being legal but "political" and of no concern to the Convention.[137]

During the negotiations, a dispute arose regarding political groups which eventually disappeared from the Convention for not being stable enough, as insisted by the Soviet Union.[138] Already, Lemkin discouraged their inclusion.[139] The Consultative Council of Jewish Organizations submitted a request that the political ground be omitted from the convention to unblock the negotiations.[140] And so, it happened. The linguistic groups were considered as superfluous and excluded for that.[141] The Convention, while groundbreaking in many aspects, did not even "touch the ground" of disability. It was illustrated in the previous part that during the different trials, prosecutors and judges did not frame disability as the *raison d'être* of the crimes committed by Nazis. The same invisibility of disability accompanied drafting of the Genocide Convention. The Convention does not guarantee the right to existence to people with disabilities, because it seems that, in the eyes of some of the drafters, they might not be entitled to such protection. The following part further supports this argument.

3.4 *World's Guilt*

Eugenic thoughts of "improving [the] human race by the bearing of healthy offspring" have been part of the Western civilization for hundreds of years. With the boom of Social Darwinism, a worldwide movement bloomed in the first half of the 20th century, including in Argentina, Austria, Brazil, Cuba, Denmark, Finland, France, Germany, Great Britain, Mexico, Norway, Russia, Sweden, Switzerland, Singapore,[142] but also Lithuania, Estonia, and Latvia where the Nazi practices later found resonance.[143] In Switzerland, eugenic circles, interlinked with Nazis, called for sterilization of persons with disabilities

137 *Ibid,* p. 608.
138 *Ibid*, p. 1114.
139 *Ibid*, p. 230.
140 *Ibid*, pp. 469–470.
141 *Ibid,* p. 537.
142 Garver, K. L., Garver, B., 'Eugenics, Euthanasia and Genocide', *The Linacre Quarterly,* 1992, p. 25.
143 Felder, B. M., Starvation Mass Murder, and Experimentation Nazi "euthanasia" in the Baltics 1941–1944, in Bailer, B., Wetzel, J., *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 192.

and prevention of their marriages.[144] Eventually, they reached their goals and cantons of Vaud and Berne approved laws permitting forced sterilization of "promiscuous idiots." Hitler asked for copies.[145] Most of the sterilizations in 1930s/1940s took place "for economic reasons", proving that eugenics is no enemy of capitalism.[146]

In the USA (and elsewhere), immigration was restricted on eugenic grounds in 1924. Preference was given to the countries such as England and Germany. Excluded were the so-called inferior southern races from Southern Europe, Africa, South America, and Asia, as well as Jews.[147] Eugenics had large support from social and economic elites there. In 1907, the state of Indiana passed the world's first compulsory sterilization law targeting mentally "inferior". By the 1920s, thirty American states took the same action.[148] In 1927, Justice Holmes wrote that "three generations of imbeciles are enough" in Buck v. Bell, in which the Supreme Court ruled that compulsory sterilization of the "unfit" was constitutional (it has never been expressly overturned). The so-called "ugly laws" in many states in the 1860s, prohibited people who were "unsightly or unseemly" to appear in public (the last of them was repelled in 1975!).[149] People with disabilities were oppressed before and during the war elsewhere. For example, during the war, the Vichy France saw tens of thousands of people with disabilities starved to death,[150] similarly the Netherlands, in a rate excessive to the rest of the population (about 9% as compared to 1–2,5%).[151] Hence, it is difficult to imagine that the states would be overly concerned with the crimes against people with disabilities.

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144 Argast, R., Swiss Eugenics and its Impact on Nazi Racial Hygiene, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 41.

145 Disability Rights Advocates, "Forgotten Crimes: The Holocaust and People with Disabilities", *supra note* 33, p. 22.

146 Bauer, Y., Foreword, in Bailer, B., Wetzel, J. (eds.) *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 20.

147 Katz, *supra note* 45, p. 27.

148 *Ibid*, p. 28.

149 Schweik, S. M., Wilson, R. A., Ugly Laws, 2015, available online at URL <http://eugenicTarchive.ca/diTcover/encZclopedia/54d39e27f8a0ea4706000009>, p. 4.

150 Bueltzingsloewen, I., Starvation in French Asylums During the German Occupation Reality and Misinterpretations, in Bailer, B., Wetzel, J. (eds.), *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 85.

151 aan de Stegge, Cecile, Excess Mortality and Causes of Death in Dutch Psychiatric Institutions 1940–1945, in Bailer, B., Wetzel, J., *Mass Murder of People with Disabilities and the Holocaust* (International Holocaust Remembrance Alliance, 2019), p. 99.

4 International Criminal Law and Disability Nowadays

In the current international landscape, calls to change this situation, i.e. to amend the Genocide Convention, would be likely futile. The only way in which crimes against people with disabilities may legally constitute genocide, is domestic legislation. The Genocide Convention's Article 5 requires national implementation but leaves the door open as to the exact definition. According to Tamás Hoffmann's research, 34 states opted for a greater protective scope and included other grounds in their domestic laws.[152] Of them, 16 countries adopted an open definition which potentially covers any identifiable group. In addition, some of them also protect social groups which might theoretically suffice. Two countries in the world, Spain and Uruguay, explicitly protect people with disabilities against genocide.[153]

Genocide and disability continued to be intertwined throughout the 20th century. People with disabilities were slaughtered on the "killing fields" in Cambodia as well as in the villages and cities of Rwanda.[154] But this topic remains under researched. People with disabilities also suffered in Yugoslavia and elsewhere as they are necessarily those especially affected by armed conflicts.[155] Still, they remain largely invisible for international criminal law. They are not to be found explicitly in any international criminal instrument. Disability is not mentioned in any of the *ad hoc* tribunals' statutes, nor in the Statute of the Special Court for Sierra Leone where their best hope would be "other inhuman acts".[156] People with disabilities are not explicitly covered even in the Rome Statute which otherwise lists "*political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or* other grounds" as a ground for persecution.[157] As emphasized by Pons, while the international criminal

152 Hoffmann, T., The Crime of Genocide in Its (Nearly) Infinite Domestic Variety, in Odello, Marco, Łubiński, Piotr (eds.), *The Concept of Genocide in International Criminal Law - Developments after Lemkin* (draft) (Routledge, 2020), p. 16.

153 *Ibid*, pp. 16–18.

154 Blaser, A., 'From the Field -- People with Disabilities (PWDs) and Genocide: The Case of Rwanda', *Disability Studies Quarterly*, 2002, p. 53.

155 Pons, W., An Argument for the Prosecution of Crimes Against Persons with Disabilities, blog post, intercross, 2017, available online at URL <https://intercrossblog.icrc.org/blog/an-argument-for-the-prosecution-of-crimes-against-persons-with-disabilities> [last visited 22 November 2020].

156 Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Res. 827 (1993) UN Doc. S/RES/827 (1993); the Statute of the International Criminal Tribunal for Rwanda, UNSC Res. 955 (1994) UN Doc. S/RES/955 (1994).

157 Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted 17 July 1998, entered into force 1 July 2002.

tribunals worked extensively with aggravating factors such as victims' age or gender, they remained oblivious to the victims with disabilities.[158]

Again, the context needs to be considered. The oppression of people with disabilities did not stop after the Nazi horrors. In fact, even harsher sterilization laws were passed in Finland in 1950 than before the war.[159] Between 1907 and 1963 more than 64,000 forced sterilizations of both men and women were performed in the US, particularly targeted were women of color and Native American women.[160] And, there is no one to "cast the stone". In Sweden, over 20,000 persons had been forcibly sterilized by 1975. Similar, though less radical programs existed in Norway and Denmark.[161] Tens of thousands of women were sterilized in central Europe, including Czechia, Slovakia, Hungary for disability overlapping with Roma ethnicity, and gender.[162] As always, the past casts long shadows, nowadays we see people disproportionately dying due to the pandemic of SARS-CoV-2. In certain countries they are pressured to sign "do-not-resuscitate" orders.[163] Without addressing, these "charges" may continue and are far from exclusive to the Western countries.[164]

5 Labeling

As showed in the previous parts, the lax approach towards the Nazi crimes against people with disabilities and their subsequent omission from the protective scope of the Genocide Convention represent yet another layer of marginalization. The assumption underlying this argument is that it is desirable to be protected by the Genocide Convention and that people with disabilities should be protected as well. This brings us to the elephant in the room, the so-called issue of labelling. Simplistically, there is a tendency by some to overuse

158 Pons, *supra note* 155.

159 Seeman, M. V., 'Sterilization of the Mentally III During the Years of World War II in Finland', *International Journal of Mental Health,* 2007, p. 58.

160 Katz, *supra note* 45, p. 28.

161 Bauer, *supra note* 146, p. 24.

162 Organizace pro bezpečnost a spolupráci v Evropě (OBSE), Úřad pro demokratické instituce a lidská práva, Kontaktní místo pro záležitosti Romů a Sintů "Souhrnná zpráva z konference Nedobrovolná a nucená sterilizace romských žen: Spravedlnost a odškodnění obětem v České republice", Praha 2016, p. 4.

163 COVID-19 Disability Rights Monitor "Disability rights during the pandemic: A global report on findings of the COVID-19 Disability Rights Monitor" 2020, available online at URL <https://covid-drm.org/assets/documents/Disability-Rights-During-the-Pandemic-report-web.pdf> [last visited 25 November 2020], pp. 23, 33, and 42.

164 *Ibid.*

the term of genocide and to expand its content often for political purposes. And there is a countertendency by criminal law "purists", who refuse to allow for "degradation" of the strict version of the definition, which has been constant for decades.[165]

It is not within the scope of this article to engage in depth with the ongoing discussion. However, some arguments can be offered in order to "label" the Nazi crimes as genocide. First of all, it is historically unjust. The crimes against people with disabilities were the model genocide and should be recognized as such. This is also connected to their long-lasting marginalization – unnamed victims of unnamed crime (there is still insufficient identification of the victims, places of commemoration are scarce). The symbolism is clearly important. Some Jewish scholars specifically refuse to accept that the crimes against people with disabilities could be called or connected to genocide.[166] Steven T. Katz even wrote that no one attempting serious and reliable research in those areas could suggest that these crimes were qualitatively the same.[167] On the other hand, Friedlander put his life effort into broadening the scope of Holocaust victims to include also people with disabilities and in a sense to stop the marginalization of the other Nazi victims.[168]

More important than labelling is conceptualizing for the future purposes. In criminal law, it is crucial to subsume actions under the most fitting offences as the principle of legality dictates. Elimination of a well-identifiable and permanent group of people with disabilities took place in the past and therefore should be conceptualized in international criminal law for any possible future offences, even if so dreaded.[169] In addition, efforts should be made to combat fragmentation of different branches of international law. Similarly, as national criminal law systems protect the most important values secured by the legal system of a given society, international criminal law should do the same. Therefore, the definition needs to adjust to the developments in other branches, for example the existence of the UN Convention on the Rights of Persons with Disabilities. Indeed, persecution as a crime against humanity exists. However, it is genocide that was created by international community as

165 Kelly, M. J., 'Genocide - The Power of a Label', *Case Western Reserve Journal of International Law*, 40(1/2), 2008, p. 149.

166 Bauer, *supra note* 146, p. 24; Katz, *supra note* 45, p. 27.

167 Katz, *supra note* 45, p. 30.

168 Weindling, The Need to Name, *supra note* 10, p. 70.

169 Practical reasons are connected to this as well. As some states opt for differing concepts of genocide, tensions may arise with regard to universal jurisdiction.

the ultimate protection of "the right to exist". It is essential that such a socially vulnerable group is given no less than the ultimate form of protection.

Thirdly, history has also showed us that the justice delivered was partial and lenient towards the perpetrators. The special stigma and gravity attached, especially today, to the crime of genocide would make it difficult to take such an approach again and perhaps better process the role of those who have participated in the crime in other ways than through a direct killing.[170] In addition, it would be a moral signaling. As a physician involved in the children "euthanasia" stated after WWII: "*According to the thinking of that time, in the case of children, killing seemed somehow justifiable* […]."[171] Currently, in Belgium 89.1% doctors agree that in the event of a serious (non-lethal) neonatal condition, administering drugs with the explicit intention to end neonatal life is acceptable.[172] It is important to communicate right and wrong in the clearest possible manner and that, too, is the role of international criminal law.

6 Conclusion

Exclusion of people with disabilities from the Genocide Convention has been highlighted by the fact that they were not seen as worthy or in need of protection throughout the negotiations, not once. Even though they were the original victims of what would be called genocide if they had had a "right to exist" in the post WWI world. The partial justice delivered in Nuremberg reflected this fact in sometimes very explicit judgments. Not only that the NMT's judges refused to grant people with disabilities legal protection against a state-sanctioned killing policy "euthanasia" and forced sterilization. They even avoided a moral judgment. The overall justice delivered was partial, the acts were, at best, punished as individual murders, not as a complex policy embedded in a specific social context. International criminal law thus ignored and mostly continues to ignore systemic crimes against people with disabilities. In international criminal law instruments, they appear under the label "other" - among crimes against humanity (persecution for other reasons or simply other inhuman

170 Kelly, *supra note* 165, p. 149.

171 Facing History and Ourselves "Unworthy to Live" Holocaust and Human Behavior, available online at URL <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-8/unworthy-live> [last visited 28 November 2020].

172 Roets, E, Dierickx, S, Deliens, L, Chambaere, K, Dombrecht, L, Roelens K, Beernaert, K., 'Healthcare professionals' attitudes towards termination of pregnancy at viable stage', *Acta Obstet Gynecol Scand*. 2020.

acts). It is almost an irony, given how much scholars in genocide studies write about the process of "othering".[173]

As Friedlander brilliantly described, the Nazis' crimes against people with disabilities were the result of old beliefs and recent policies.[174] As much as these oppressive policies did not disappear after WWII, the "old beliefs" are present in societies even today, the eugenicist notions are deeply ingrained.[175] What Hoche and Binding claimed in 1920s, "practical ethicists" such as Peter Singer echo about people with disabilities today. In 2015, Singer, talking with a radio host, stated, "*I don't want my health insurance premiums to be higher so that infants who can experience zero quality of life can have expensive treatments*."[176] Echoing (whose?) resources and passing judgments on other people's quality of life is clearly not reserved to the Nazi past. For this, the discussion on what protection should people with disabilities receive is not a theoretical exercise. It has been argued in this article that they should be protected by the Genocide Convention as the ultimate form of guarantee of the "right to exist" as a group.

173 E.g., Holslag, A., 'The Process of Othering from the "Social Imaginaire" to Physical Acts: An Anthropological Approach', *Genocide Studies and Prevention: An International Journal*, 2015.

174 Friedlander, *The Origins of Nazi Genocide, supra note* 1, p. 21.

175 Renwand, G., The Experience of the Deaf During the Holocaust, 2012, available at URL <https://www.nmu.edu/english/sites/DrupalEnglish/files/UserFiles/Files/Renwand.pdf> [last visited 29 November 2020].

176 Smart, J., *Disability Across the Developmental Lifespan, Second Edition: An Introduction for the Helping Professions* (Springer Publishing Company, 2019), p. 469.

PART 4

Denial of Crimes and Current Situations

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CHAPTER 9

The Stigma of Genocide and the Denial of Communist Crimes

Tamás Hoffmann

1 Introduction – The Stigma of Genocide

Even though the word "genocide" was only created in 1944 by the Polish lawyer Raphael Lemkin,[1] it quickly captured the public imagination. After the adoption of the Genocide Convention by the United Nations General Assembly on 9 December 1948,[2] the crime of genocide became universally regarded as the "crime of crimes"[3] in international criminal law. While formally there is no legal hierarchy between international crimes,[4] international courts tend to award significantly longer sentences for genocide than for war crimes or crimes against humanity.[5] Owing to the extraordinary significance attached to the concept and a persistent public belief in the existence of an international duty to prevent genocide even by armed force, if necessary, an internal US State Department memorandum even banned its public use concerning

1 Lemkin, Raphael, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944).

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

3 ICTR, *Prosecutor v. Jean Kambanda* (Judgement and Sentence) ICTR-97-23-S, TChI (4 September 1998), para. 16.

4 The ICTR Appeal Chamber emphasized that "*there is no hierarchy of crimes under the Statute, and … all of the crimes specified therein are serious violations of international humanitarian law, capable of attracting the same sentence.*" ICTR, *Prosecutor v. Kayishema and Ruzindama* (Judgment) ICTR-95-1-A, ACh (1 June 2001), para. 367.

5 Doherty and Steinberg submit based on the results of an empirical study conducted on the sentencing practice of international criminal courts and tribunals that "*despite the general trend toward rejecting a hierarchy of crimes … in practice, the sentences international courts impose reflect a hierarchy of crimes. Courts tend to award the longer sentences for genocide, awarding a median of thirty-four years; followed by crimes against humanity, with a median of twenty years; and then grave breaches of the Geneva Conventions, with a median of eighteen years.*" Doherty, Joseph W., Steinberg, Richard H., 'Punishment and Policy in International Criminal Sentencing: An Empirical Study', 110 (2016) *American Journal of International Law* 49–81, p. 72.

the events of the Bosnian civil war in the early 1990s for Department officials[6] and similarly attempted to avoid using the "G-word" in relation to the 1994 Rwandan ethnic conflict.[7]

This special stigma of genocide that is recognized both in legal practice and by the general public, however, has the unintended consequence that genocide overshadows all other international crimes and communities surviving mass atrocities might even feel that their tragedies are not acknowledged if they are not categorized as genocide but "only" as crimes against humanity or war crimes. Since the arguably narrow legal definition of the crime remained unchanged on the international plane ever since it was defined in Article II of the Genocide Convention,[8] in common parlance the concept of genocide became so inflated that even political issues such as birth control are often characterized as genocide.

This chapter maps the main approaches in scholarship and legal practice that aim to resolve the unintended ramifications of the special status of genocide. It first addresses the attempts in social science scholarship to either redefine the narrow legal concept of genocide or create new, overarching categories that could unify international crimes. Next, it examines how the concept of genocide is reinterpreted both on the international and domestic level. Finally, it focusses on a specific consequence of the genocide stigma, i.e., on the growing dissatisfaction of post-communist countries concerning what they perceive as a "double standard" between the recognition of Nazi crimes and the indifference demonstrated towards communist crimes. After giving a general overview of regional approaches, the section will concentrate on the Hungarian practice and will demonstrate that stigma of genocide may lead to an inflation of some communist crimes in order to emphasize their significance.

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6 Wald, Patricia M., 'Genocide and Crimes against Humanity', 6 (2007) *Washington University Global Studies Law Review* 621–633, p. 629.

7 At a press conference on 10 June 1994, US State Department spokesperson Christine Shelly even tried to explain to the press why the killings in Rwanda constituted "acts of genocide" but not "genocide". Mennecke, Martin, 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word", (2007) 2 *Genocide Studies and Prevention: An International Journal* 57–71, p. 67, fn. 10.

8 All international and internationalized criminal fora retained the original definition. See art. 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia. UN Doc. S/RES/827 (1993); art. 2 of the Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994); art. 6 of the Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90; art. 11 of Law No. (10) 2005 of the Iraqi Higher Criminal Court, 18 October 2005; art. 9 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea of 2003.

2 Attempts to Remedy the Narrow Scope of Legal Definition of Genocide in Academic Scholarship

2.1 *Expanding the Definition of Genocide in Genocide Studies*

Given the universally accepted legal definition of the crime of genocide, legal scholars generally refrained from reinterpreting it save from a few attempts at expanding its scope of application by invoking supposed changes in customary international law.[9] Most social science scholars researching genocide, however, have not felt the need to be bound by the legal definition and going back to Lemkin's original intentions many have come up with significantly broader definitions bridging crimes against humanity and genocide.

Before the Second World War, Raphael Lemkin proposed the introduction of two new crimes against the law of nations – the crime of barbarity (exterminations by means of massacres, pogroms, or economic discrimination), and the crime of vandalism (the destruction of cultural and artistic works).[10] Even though he unified these two categories with the creation of the concept of genocide, it was meant to encompass 'the disintegration of 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'.[11]

Starting from the 1970s, social scientists from different academic disciplines started to develop a new approach to the research of genocide that was not necessarily beholden to the legal definition of genocide but reflected Lemkin's original approach.[12] In the new academic discipline of genocide studies

9 See e.g., van Schaack, Beth, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 (1997) *The Yale Law Journal* 2259–2291; Novic, Elisa, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016).

10 Lemkin, Raphael, 'Les actes constituant un danger general (interétatique) consideres comme delites des droit des gens', Report Presented at the 5th International Conference for the Unification of Criminal Law (Madrid, 1933), available online at URL <http://www.preventgenocide.org/fr/lemkin/madrid1933.htm> [last visited 22 October 2020].

11 Lemkin, *Axis Rule in Occupied Europe*, *supra note* 1, p. 79. In 1946, the UN General Assembly affirmed this notion by declaring that "*genocide is a denial of the right of existence of entire human groups* [...] *such denial* [...] *results in great losses to humanity in the form of cultural and other contributions represented by these human groups* [...] *Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.*" UNGA Res. 96(I) (1946).

12 See e.g., Horowitz, Irving Louis, *Genocide: State Power and Mass Murder* (New Jersey: Transaction Publishers, 1976); Fein, Helen, *Accounting for Genocide: National Responses and Jewish Victimization during the Holocaust* (New York: Free Press, 1979);

scholars were free to advance novel definitions that were more suitable to describe the whole spectrum of the genocide process.[13] Most of these definitions aimed to radically expand the scope of genocide, sometimes extending it to every social group,[14] dispensing with the intention to destroy the group,[15] or classifying any form of subjugation as genocide,[16] some scholars even going as far as classifying any form of destruction of groups that is incompatible with international humanitarian law.[17] Overall, these approaches are closer in spirit to the original Lemkinian idea, however, since genocide scholars could not agree on a single definition of genocide, these could hardly serve as a substitute for the universally accepted legal definition.[18]

2.2 *Creating Unifying Concepts for International Crimes in Academic Scholarship*

An alternative approach to counter the narrow scope of the legal definition of genocide is to create unifying concepts that express the inherent gravity of

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Kuper, Leo, *Genocide: Its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1982).

13 Rosenberg, Sheri P., 'Genocide Is a Process, Not an Event', (2012) 7 *Genocide Studies and Prevention* 16; Straus, Scott, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide', (2001) 3 *Journal of Genocide Research* 349.

14 Chalk and Jonassohn included in the victim groups all human groups as targeted by the perpetrators. Chalk, Frank, Jonassohn, Kurt, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven, CT: Yale University Press, 1990), p. 23.

15 Bauer distinguished the Holocaust, which connoted the intention of total destruction, from genocide, that did not imply complete destruction. Bauer, Yehuda, Comparison of Genocides, in Chorbajian, Levon, Shirinian, George (eds.), *Studies in Comparative Genocide* (Basingstoke: Palgrave MacMillan, 1999), pp. 31–43.

16 According to Porter genocide can involve "political, economic and biological subjugation". Nusan Porter, Jack, 'What is Genocide? Notes Toward a Definition (1981)', 5 *Humanity & Society*, p. 57.

17 Thompson and Quets for instance defined genocide as "*the extent of destruction of a social collectivity by whatever agents, with whatever intentions, by purposive actions which fall outside the recognized conventions of legitimate warfare*." Thompson, John L., Quets, Gail A., Genocide and Social Conflict: A Partial Theory and Comparison, in Kriesberg, Louis (ed.) *Research in Social Movements, Conflict and Change* (Greenwood, CT: JAI Press, 1990), p. 248. Similarly, Charney held that "*Genocide in a generic sense is the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defencelessness and helplessness of the victims*." Charney, Israel W., Toward a Generic Definition of Genocide, in Andreopoulos, George (ed.), *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994), p. 75.

18 For an overview of the different genocide definitions see Jones, Adam, *Genocide: A Comprehensive Introduction* (Routledge, 2017), pp. 64–88.

all international crimes by grouping them together under one label. The most successful such attempt is the characterization of war crimes, crimes against humanity and genocide as atrocity crimes by the US legal scholar David Scheffer. He hoped that a single term would be suitable to describe the magnitude and character of international crimes and thus end the obsession of the general public with genocide.[19] Even though the term has initially been criticised for neither expressing the "truly heinous nature of orchestrated efforts to destroy a people" captured by the notion of genocide, nor "underscoring that the interests of all of humanity are at stake and also the unacceptability of denying the humanity of victims" that is aptly encapsulated in the concept of crimes against humanity,[20] it became remarkably successful. It has gained wide currency in academic circles[21] and the United Nations has also endorsed it.[22] However, there is little evidence that the concept of atrocity crimes has gained broader recognition beyond the academic circles and new unifying concepts have been suggested in academic discourse.[23]

19 Scheffer, David, 'Genocide and Atrocity Crimes', (2006) *Genocide Studies and Prevention*, 1(3), 229–250.

20 Minow, Martha, 'Naming Horror: Legal and Political Words for Mass Atrocities', (2007) 2 *Genocide Studies and Prevention: An International Journal* 37–42, p. 40.

21 This is clearly demonstrated by the fact that a forthcoming Oxford Handbook is dedicated to the term. Holá, Barbora, Nyseth Brehm, Hollie, Weerdesteijn, Maartje (eds.), *Oxford Handbook on Atrocity Crimes* (Oxford: Oxford University Press, 2021). Its academic popularity is further underscored by the fact that Judge Theodor Meron, former president of the International Criminal Tribunal for the Former Yugoslavia and the International Residual Mechanism for Criminal Tribunals also uses it to describe core international crimes. See Meron, Theodor, *Standing Up for Justice: The Challenges of Trying Atrocity Crimes* (Oxford: Oxford University Press, 2021).

22 The Special Advisers to the United Nations Secretary-General on the Prevention of Genocide and on the Responsibility to Protect adopted the concept of atrocity crimes encompassing the three legally defined international crimes, i.e., genocide, crimes against humanity and war crimes. United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes – A Tool for Prevention* (New York: United Nations, 2014).

23 For instance, in a recent book Dirk Moses argues that the implicit hierarchy of international criminal law, blinds us to other types of humanly caused civilian death, like bombing cities, and the 'collateral damage' of missile and drone strikes. He posits that the true cause of all international crimes is the desire for "permanent security", i.e., an excessive, often paranoid policy response that necessarily leads to civilian casualties by striving for the unobtainable goal of absolute safety. Moses, Dirk, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge: Cambridge University Press, 2021).

3 Legal Approaches

3.1 *Expansive Recodification of Genocide in Domestic Legislation*

The narrowness of the international legal definition of the crime of genocide resulted in expansive recodification in a significant number of states. Altogether, 100 countries and the Special Administrative Region of Macao changed at least some aspects of the international definition in their domestic legislation while only 41 State Parties to the Genocide Convention retained the international definition. Most countries chose to broaden the ambit of genocide in their domestic jurisdiction, while only a few opted to further restrict it.[24]

Conversely, 34 countries have decided to expand the scope of their domestic genocide legislation beyond the enumerated groups by incorporating specific groups beyond the closed enumeration of the Genocide Convention, 13 countries included political groups into the *ratione persone* of genocide,[25] 6 countries added social groups,[26] while some states have opted to introduce other specific protected groups. Thus the Czech Republic criminalizes underlying offences against people belonging to a class;[27] Estonia prosecutes crimes committed against "a group resisting occupation";[28] Honduras protects "ideological

24 See Hoffmann, Tamás, The Crime of Genocide in Its (Nearly) Infinite Domestic Variety, in Odello, Marco, Łubiński, Piotr (eds.), *The Concept of Genocide in International Criminal Law - Developments after Lemkin* (Routledge, 2020), pp. 70–74.

25 Colombia (art. 101 of the Criminal Code of the Republic of Colombia of 2000); Bangladesh (art. 3(2)(c) of International Crimes (Tribunals) Act 1973); Costa Rica (art. 382 of the Criminal Code of Costa Rica of 1998); Côte d'Ivoire (art. 137 of the Criminal Code of Côte d'Ivoire of 1981); Ecuador (art. 79 of the Criminal Code of the Republic of Ecuador of 2014); Ethiopia (art. 269 of the Criminal Code of the Federal Democratic Republic of Ethiopia of 2004); Lithuania (art. 99 of the Criminal Code of the Republic of Lithuania); Nicaragua (art. 484 of the Criminal Code of the Republic of Nicaragua of 2007); Panama (art. 440 of the Criminal Code of the Republic of Panama of 2007); Poland (art. 118 of the Criminal Code of the Republic of Poland of 1997); Switzerland (art. 264 of the Criminal Code of the Swiss Confederation of 1937); Togo (art. 143 of the Criminal Code of the Togolese Republic of 2015); Uruguay (art. 16 of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006).

26 Estonia (art. 90 of the Criminal Code of the Republic of Estonia of 2001); Paraguay (art. 319 of the Criminal Code of the Republic of Paraguay of 1997); Peru (art. 319 of the Criminal Code of the Republic of Peru of 1991); Philippines (art. 5 of the Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity of 2009); Sao Tome (art. 210 of the Criminal Code of 2012 of the Democratic Republic of Sao Tome and Principe); Switzerland (art. 264 of the Criminal Code of the Swiss Confederation of 1937.).

27 Art. 400 of the Criminal Code of the Czech Republic of 2009.

28 Art. 90 of the Criminal Code of the Republic of Estonia of 2001.

groups";[29] Poland prohibits genocidal acts against groups with "a different perspective on life";[30] while Spain regards as genocide the commission of acts committed against "a specific group determined by the disability of its members."[31] The most diverse definition, however, can be found in the Criminal Code of Uruguay, which defends "political, syndical, and any other group identified by reasons of gender, sexual orientation, cultural or social background, age, disability or health."[32] Finally, 16 countries have adopted an all-encompassing approach that potentially extends to any identifiable group.[33]

Several states have substantially expanded the scope of the crime of genocide by altering the wording of underlying offences,[34] however, 10 countries have introduced completely new forms of genocide in their domestic legislation, creating the crime of "preventing a group's way of life",[35] punishing by "forcing members of the protected group to wear distinctive signs or emblems",[36] condemning the "general confiscation or seizure of goods owned by the members

29 Art. 143 of the Criminal Code of the Republic of Honduras of 2019.

30 Art. 118 of the Criminal Code of the Republic of Poland of 1997.

31 Art. 607 of the Criminal Code of the Kingdom of Spain of 1995.

32 Art. 16 of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006.

33 Andorra (art. 456 of the Criminal Code of the Principality of Andorra of 2005); Belarus (art. 127 of the Criminal Code of the Republic of Belarus of 1999); Burkina Faso (art. 421–1 of the Criminal Code of Burkina Faso of 2019); Cabo Verde (art. 268 of the Criminal Code of the Republic of Cabo Verde of 2003); Canada (Section 4(3) of the Crimes against Humanity and War Crimes Act of 2000); Chad (art. 296 of the Penal Code of the Republic of Chad of 2017); Comoros (art. 17 of Decree N° 12-022/PR, promulgating law No. 11-022 of 2011 on the Implementation of the Rome Statute); Czech Republic (art. 400(1)(c) of the Criminal Code of the Czech Republic of 2009); France (art. 211(1) of the Criminal Code of the Republic of France of 1992); Georgia (art. 407 of the Criminal Code of Georgia of 1999); Lesotho (art. 93 of the Criminal Code of the Kingdom of Lesotho of 2012); Niger (art. 208(1) of the Criminal Code of the Republic of Niger of 2003); Philippines (art. 5 of the Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity of 2009); Senegal (art. 431 (1) of the Criminal Code of 1965).

34 See in detail Hoffmann, Tamás, The Crime of Genocide in Its (Nearly) Infinite Domestic Variety, *supra note* 24, pp. 87–89.

35 Panama (art. 440(8) of the Criminal Code of the Republic of Panama of 2007); Spain (art. 607(1)(4) of the Criminal Code of the Kingdom of Spain of 1995); Uruguay (art. 16(C) of the Law on Cooperation with the International Criminal Court in the fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006).

36 Italy (art. 6 of Law No. 962 on the Prevention and Punishment of the Crime of Genocide of 9 October 1967 of the Republic of Italy); San Marino (art. 2(f) of Law No. 138 on the Prevention and Punishment of the Crime of Genocide of 5 September 2014 of the Republic of San Marino).

of the group" and "the prohibition of certain commercial, industrial or professional activities to the members of the group,"[37] "committing bloody massacres in the country",[38] or "making it impossible for [members of protected groups] to worship or practice their customs".[39] The most idiosyncratic definition can probably be found in the Criminal Code of Vietnam that criminalizes "destroying sources of living, cultural or spiritual life of a nation or sovereign territory, upsetting the foundation of a society in order to sabotage it".[40]

These domestic definitions clearly manifest a dissatisfaction with certain aspects of the international legal definition of genocide. However, arguably the countries that diverged from the universally accepted genocide definition intended to restrict this departure to their respective domestic jurisdiction and continued to advocate the international definition on the international plane.

3.2 *Creating Symbolic Equivalence between International Crimes with the Responsibility to Protect Doctrine*

In 2001, the International Commission on Intervention and State Sovereignty (ICISS), an independent panel of experts established by the Canadian Government to analyse the ramifications of the NATO military intervention in Yugoslavia in 1999, discerned a new emerging norm of collective responsibility to protect civilian populations "*when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator*."[41] Avoiding a concrete definition of harm, the Report identified two broad sets of circumstances justifying military intervention: "large scale loss of life" and "large scale "ethnic cleansing"".[42]

The concept gained universal recognition when it was incorporated into the 2005 United Nations World Summit Outcome document adopted by the United Nations General Assembly.[43] The document reaffirmed both the individual states' and the international community's responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The change from a vague sets of circumstances to legally defined

37 Guinea-Bissau (art. 101(1)(e)-(f) of the Criminal Code of the Republic of Guinea-Bissau of 1993); Timor-Leste (art. 123(1)(g)-(h) of the Criminal Code of the Republic of Timor-Leste of 2009).

38 Bolivia (art. 138 of the Criminal Code of the Plurinational State of Bolivia of 1972).

39 Paraguay (art. 319(4) of the Criminal Code of the Republic of Paraguay of 1997).

40 Art. 422(1) of the Criminal Code of the Socialist Republic of Viet Nam of 2015.

41 Report of the International Commission on Intervention and State Sovereignty (2001), p. 16, available online at URL <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

42 *Ibid*, p. 32.

43 World Summit Outcome, UN Doc. A/60/1 (20 September 2005), paras. 138–139.

international crimes[44] introduced consistency into the concept but, at the same time, arguably clashed with the underlying moral imperative of responsibility to protect that "*exists regardless of the question of whether the threat to the lives emanates from internationally defined crimes or other events*."[45]

Since 2006,[46] the UN Security Council has repeatedly invoked the concept of Responsibility to Protect (R2P) and reaffirmed that all states have an obligation to protect their populations from all international crimes equally.[47] Nevertheless, even though R2P enjoys broad appeal in academic circles, it has failed to make inroads into popular conscience, hence it cannot effectively mitigate the impact of the stigma of genocide.

4 Denial of Communist Crimes – Symbolic Equality between International Crimes?

4.1 *The Criminalization of Communist Crimes in Central and Eastern Europe*

Many post-communist countries in Central and Eastern Europe share the sentiment that there is a dualism in European collective memory. While Nazi crimes are rightfully remembered as the most heinous atrocities in European history, the evils of the communist era have largely remained unrecognized outside the Eastern part of the continent.[48] Essentially, the spectre of the Holocaust and the fact that the Soviet Union had a decisive role in the defeat

44 The category of ethnic cleansing, however, is arguably redundant as it is not a *sui generis* international crime but depending on the circumstances, can qualify as either war crimes, crimes against humanity or genocide.

45 Kleffner, Jann K., The Scope of the Crimes Triggering the Responsibility to Protect, in Hoffmann, Julia, Nollkaemper, André (eds.), *Responsibility to Protect from Principle to Practice* (Amsterdam: Pallas Publications, 2012), p. 86.

46 The Responsibility to Protect principle was first invoked on 27 January 2006 concerning the armed conflict between the Democratic Republic of Congo and Burundi and emphasized that "*the governments in the region have a primary responsibility to protect their populations*". UN Doc. S/RES/1653 (27 January 2006).

47 As of 12 March 2021, the Security Council issued 92 resolutions referring to the concept. See URL <https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/>.

48 As Gliszczyńska-Grabias aptly put it "*the post-Second World War mood of unwillingness to treat Stalin's and Communist crimes as equivalent to those committed by Hitler has a troublingly persistent quality*." Gliszczyńska-Grabias, Aleksandra, The Jurisprudence of the European Court of Human Rights in the Area of Europe's Totalitarian Past – Selected Examples, in Grzebyk, Patrycja (ed.), *Responsibility for Negation of International Crimes* (Warsaw, Publishing House: The Justice Institute, 2020), p. 86.

of Nazi Germany overshadows communist crimes and the assertions regarding the comparability and equivalence of crimes committed by the two totalitarian regimes are summarily rejected in the West.[49] Even the European Court of Human Rights emphasized "*the special stigma which attaches to activities inspired by National Socialist ideas*"[50] and consistently held that the denial or trivialization of the Holocaust falls outside the scope of the freedom of expression under Article 10 of the European Convention on Human Rights,[51] but found that the denial of other atrocities remains within the realm of the freedom of expression.[52] This perceived "double standard" spurred post-communist countries like the Czech Republic,[53] Hungary,[54] Lithuania,[55]

49 In 2010, the European Commission rejected an initiative by six post-communist countries – Lithuania, Latvia, Bulgaria, Hungary, Romania, and the Czech Republic – to criminalize the denial of communist crimes in the same manner as Holocaust denial, citing a lack of consensus among EU Member States. See Phillips, Leigh, "EU Rejects Eastern States' Call to Outlaw Denial of Crimes by Communist Regimes" (21 December 2010) *The Guardian*.

50 ECtHR, *Andreas Wabl v. Austria*, app. no. 24773/94, Judgment, 21 March 2000, para. 41.

51 See e.g., ECtHR, *Lehideux and Isorni v. France*, app. no. 24662/94, Judgment (Grand Chamber) 23 September 1998; ECtHR, *Garaudy v. France*, app. no. 65831/01, Court Decision, 24 June 2003. For a thorough overview see Lobba, Paolo, 'Holocaust Denial before the European Court of Human Rights', (2015) 26 *European Journal of International Law*, pp. 237–241.

52 See ECtHR, *Perinçek v. Switzerland*, app. no. 27510/08, Judgment (Grand Chamber) 15 October 2015, para. 279.

53 Act 40 of 2009 on the Criminal Code of the Czech Republic. Art. 405: "*Anyone who publicly denies, disputes, approves or attempts to justify a Nazi, Communist or other genocide or Nazi, Communist or other crimes against humanity or war crimes or crimes against peace will be punished by imprisonment for six months to three years*."

54 See in detail at Section 4.2. below.

55 Act VIII-1968 of 2000 on the Criminal Code of the Republic of Lithuania. Art. 170(1): "*1. A person who publicly condones the crimes of genocide or other crimes against humanity or war crimes recognised under legal acts of the Republic of Lithuania or the European Union or effective judgements passed by courts of the Republic of Lithuania or international courts, denies or grossly trivialises them, where this is accomplished in a manner which is threatening, abusive or insulting or which disturbs the public order, also a person who publicly condones the aggression perpetrated by the USSR or Nazi Germany against the Republic of Lithuania, the crimes of genocide or other crimes against humanity or war crimes committed by the USSR or Nazi Germany in the territory of the Republic of Lithuania or against the inhabitants of the Republic of Lithuania or other grave or serious crimes committed during 1990–1991 against the Republic of Lithuania by the persons perpetrating or participating in perpetration of the aggression against the Republic of Lithuania or grave crimes against the inhabitants of the Republic of Lithuania, denies or grossly trivialises them, where this is accomplished in a manner which is threatening, abusive or insulting or which disturbs the public order, shall be punished by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to two years.*"

Poland,[56] and Slovakia[57] to adopt legislation that condemn communist crimes and even criminalize their denial or trivialization alongside Holocaust denial.

In sum, these countries attempted to emphasize the fundamental similarities between Nazi and communist crimes by adopting memory laws that do not differentiate between these crimes and thus create a symbolic counterbalance to the stigma of genocide. However, as the Hungarian practice suggests, this might lead to the inflation of the gravity of some communist crimes to match the horrors of the Holocaust.

4.2 *The Hungarian Regulation and Jurisprudence Concerning Communist Crimes*

Shortly after the sweeping election victory of the Fidesz party in Hungary, the new right-wing majority parliament amended the Criminal Code to criminalize not only the public denial of the crimes of the national socialist regimes but also communist crimes "*to apply an equal measure to the crimes and victims of totalitarian regimes*."[58] Article 269. quater. of the Hungarian Criminal Code became "The public denial of the crimes of national socialist and communist regimes". The new law provided that:

> Any person who before the public at large denies, trivializes, or seeks to justify the crime of genocide and other acts committed against humanity by national socialist and communist regimes commits a felony punishable by imprisonment not exceeding three years.[59]

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56 Act 155 of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. Art. 1(1)(a): "*This Act shall govern* [...] *a*) *crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity, nationalities in the period between 1 September 1939 and 31 December 1989: ω Nazi crimes, ω communist crimes, ω other crimes constituting crimes against peace, crimes against humanity or war crimes.*"

Art. 55: "*He who publicly and contrary to facts contradicts the crimes mentioned in Article 1, clause 1 shall be subject to a fine or a penalty of deprivation of liberty of up to three years. The judgment shall be made publicly known.*"

57 Act 300 of 2005 of the Criminal Code of Slovakia. Art. 422(d): "*who publicly denies, denies, approves or tries to justify the Holocaust, crimes of regimes based on fascist ideology, crimes of regimes based on communist ideology or crimes of other similar movements that use violence, the threat of violence or the threat of other serious harm with the aim of suppressing the fundamental rights and freedoms of persons shall be punished by imprisonment of six months to three years.*"

58 Official Explanatory Note of the Minister of Justice to Act LVI. of 2010.

59 Art. 7 of Act LVI. of 2010 on the Amendment of Act IV. on the Criminal Code of Hungary. The crime was retained almost verbatim in the newly adopted Criminal Code as well. Act C of 2012 on the Criminal Code of Hungary. Art. 333: "*Any person who before the large*

The Hungarian Government repeatedly reaffirmed its commitment to highlight the impact of communist crimes also through other legislative acts. In 2011, the preamble of the newly adopted Fundamental Law of Hungary, the so-called "National Avowal", renounced any legal continuity with the previous regime and declared that: "*We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship*." Moreover, Article U claimed that "*The Hungarian Socialist Workers' Party and its legal predecessors and the other political organisations established to serve them in the spirit of communist ideology were criminal organisations, and their leaders shall have responsibility without statute of limitations*."[60]

Finally, in the same year, the Hungarian Parliament adopted Act CCX of 2011 that introduced the concept of 'communist crimes', i.e., voluntary manslaughter, aggravated bodily assault, torture, illegal confinement, and treason committed for, in the interest, or in agreement with the party state, which were not prosecuted during the communist dictatorship due to political reasons. The act treated communist crimes as the core crimes of genocide, crimes against humanity, and war crimes, and prescribed their application with retroactive effect, abolishing the applicable statute of limitations.[61]

These legislative acts unequivocally demonstrated that Hungary intends to treat communist crimes as international crimes. However, the imprecise formulation of these norms, especially the allusion to "acts committed against humanity" in the crime of "The public denial of the crimes of national socialist and communist regimes," raised doubts whether this term fulfils the constitutional requirement of legal clarity.[62]

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public denies, doubts, trivializes or seeks to justify the crime of genocide and other acts committed against humanity by national socialist and communist regimes commits a felony punishable by imprisonment not exceeding three years." For an analysis of the provision see Hoffmann, Tamás, The Punishment of Negationism in Hungarian Criminal Law – Theory and Practice, in Grzebyk, Patrycja (ed.), *Responsibility for Negation of International Crimes* (Warsaw: Publishing House: The Justice Institute, 2020), pp. 207–217.

60 The Fundamental Law came into effect from 1 January 2012. It is unnumbered to emphasize its significance within the Hungarian legal order.

61 Act CCX of 2011 on the Criminalization of Crimes against Humanity and Exclusion of Statute of Limitations, along with the Prosecution of Certain Crimes Committed During the Communist Dictatorship, art. 3.

62 Many Hungarian authors simply assumed that it was a drafting error and the text referred to crimes against humanity. See e.g., Mezőlaki, Erik, A köznyugalom elleni bűncselekmények, in Karsai, Krisztina (ed.), *Kommentár a Büntető Törvénykönyvhöz* (Budapest: Complex, 2013), p. 695.

The Hungarian Constitutional Court's decision on the constitutionality of the provision gave a rare insight into the distorting effects of the stigma of genocide on the national psyche. Relying on a textual interpretation, without any recourse to international law scholarship, the Court concluded that:

> the object of the crime of the public denial of the crimes of national socialist and communist regimes are not solely acts that constitute under international and domestic law genocide and crimes against humanity but also … any horrific act of a similar gravity to genocide and crimes against humanity that are generally accepted as historic facts and were committed during national socialist and communist dictatorships.[63]

Moreover, the Constitutional Court even submitted that the Hungarian legislation deliberately tried to remedy a politically motivated oversight in international law-making. According to the Court:

> [D]uring the tense world political situation of the Cold War, the Western powers – understandably – were much more "cautious" to judge and "criminally define" events taking place during communist regimes than concerning national socialist crimes in the Post-Second World War era. Therefore, some of the crimes committed during communist rule are "difficult" or even impossible to interpret – in a legal sense – using the terminology of international law or domestic criminal law. Consequently, the legislator defined the material scope of application as other acts committed against humanity in order to "cover" every situation of communist crimes alongside the category of genocide as a crime under international and domestic criminal law … "other acts committed against humanity" are crimes that are – based on their gravity – similar to genocide and therefore require similar evaluation.[64]

Even though the Court rejected the assumption that any immoral acts committed during the communist rule could constitute "other acts committed against humanity", it held that the courts themselves have to determine whether in the individual case the act in question meets the threshold of a "historic crime that is – according to the civilised world – based on its gravity similar to genocide".[65]

63 Hungarian Constitutional Court Decision No. 16/2013 of 20 June 2013, para. 20.
64 *Ibid*, para. 21.
65 *Ibid*, para. 22.

Throughout the decision, the Constitutional Court repeatedly muddled the boundaries between international crimes and even common crimes. While on the one hand it suggested that communist crimes were left undefined in international law for political reasons, it also claimed that such acts are similar in nature and gravity to genocide and crimes against humanity, but simultaneously refusing to define their specific characteristics, which would set them apart from established international crimes. The ramifications of this approach became evident in the only criminal proceeding where the concept of communist crimes was actually applied, the case of former communist politician Béla Biszku.

Biszku was a Minister of Interior between 1957 and 1961, and in his capacity he oversaw state retaliations against the participants of the 1956 Hungarian Revolution that resulted in the execution and imprisonment of thousands of people. In 2010, the former minister was interviewed by a TV station, where he claimed that the events of 1956 were not a revolution but a counterrevolution against the legal order, and the criminal proceedings against the revolutionaries were justified since "they had committed something", while "fighting for the regime was just", concluding that the revolution was a "national tragedy". Biszku was duly prosecuted among other charges with "The public denial of the crimes of national socialist and communist regimes".[66]

The first instance judgment of the Budapest Metropolitan Court adopted the view of the Hungarian Constitutional Court and concluded that Biszku's statements were:

> closely related to the communist ideology and period and reach such a "threshold" that in its scale and gravity they can be assimilated to genocide … It is public knowledge … that several thousand people were condemned innocently, thus crippling them and their families, and several hundred people were condemned to death and executed. Moreover, also during this period, due to the events of 1956, several thousand people left their homeland to find refuge abroad and rebuild their lives.[67]

The judgment clearly demonstrates the far-reaching consequences of completely dismantling distinctions between different categories of international

66 For a detailed analysis of Biszku's background and the case see Hoffmann, Tamás, The Difficulties of Prosecuting Communist Crimes – The Biszku Trial in Hungary, in Grzebyk, Patrycja (ed.), *The Prosecution of Communist Crimes* (Warsaw: Publishing House: The Justice Institute, 2021) (forthcoming).

67 Budapest Metropolitan Court, 25.B.766/2015/117, Judgment of 17 December 2015, 167.

crimes to remedy perceived historical injustices. The attempt to create on the one hand a *sui generis* category of communist crimes, which at the same time attempted to justify its existence by recourse to genocide, invoking its stigma to change the prevailing public opinion concerning the communist era culminated in a judgment that claimed that acts of retaliation following a failed revolution are tantamount to genocide. Paradoxically, such attempts to inflate the magnitude of historic tragedies might actually lead to further denials of the gravity of communist crimes.

5 Conclusion

The stigma of genocide has deeply engrained itself to the collective psyche of humanity. Even though arguably other international crimes, such as crimes against humanity, are often similarly heinous,[68] and indeed, "*were originally conceptualized as acts of so odious a nature that their commission was not just an assault on the victims involved … but an offense against all humanity*",[69] it is undeniable that qualifying atrocities as genocide set them apart in perceived seriousness from any other crime.

Schabas suggests that the narrow legal definition of genocide is actually one of the primary reasons of the creation of its stigma,[70] and even if for victims of other international crimes the privileged role of genocide might seem appalling, it is justified "*since the beginnings of criminal law society has made such distinctions, establishing degrees of crime and imposing a scale of sentences and other sanctions in proportion to the social denunciation of the offence*."[71]

68 The International Commission of Inquiry on Darfur thus argued that "[I]*t 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 an equally grave stigma*." Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para. 506.

69 Wald, *supra note* 6, p. 624. Schabas also points out that "*The Nazis were prosecuted for crimes against humanity rather than genocide, a fact that suggests there is nothing trivializing about using the former term rather than the latter*." Schabas, William A., Crimes Against Humanity as a Paradigm for International Atrocity Crimes', (2011) 20 *Middle East Critique* 253–269, p. 256.

70 "*Why is genocide so stigmatized? In my view, this is precisely due to the rigours of the definition and its clear focus on crimes aimed at the eradication of ethnic minorities or, to use the Convention terminology, 'national, racial, ethnical and religious groups'*[…]". Schabas, William A., *Genocide in International Law* (Cambridge: Cambridge University Press, 2009), p. 10.

71 *Ibid*.

However, as this paper clearly indicates, there is a widespread dissatisfaction with the legal definition of genocide and there have been manifold attempts to widen its scope or dissolve it in other concepts. Moreover, it seems unlikely that preserving the legal definition that is largely unknown outside the circle of international lawyers is indispensable for sustaining the opprobrium associated with the concept of genocide. Be that as it may, even if terms like atrocity crimes enjoy popularity in academic circles or certain domestic definitions of genocide have an expansive scope, the international legal definition prevails.

Ultimately, there is an undeniable concern that the idea of genocide as the ultimate evil can consign other crimes to oblivion in the consciousness of the world. However, this issue could unlikely be resolved by redrafting the concept or erasing the boundaries between different international crimes. It seems that the only solution is to raise awareness of the existence of heinous acts without focusing on their legal classification thus ensuring that the suffering of the victims of such crimes are properly recognised. Still, as Minnow aptly put, even though a "*general term would be useful to identify the range of these offenses … but perhaps the very awkwardness of locution should remain — as a partial acknowledgment of the incommensurability of human language and responses to the horrors at hand.*"[72]

72 Minow, *supra note* 20, p. 40.

CHAPTER 10

The Denial of the Armenian Genocide and the Claim of the Rohingya Genocide

Katarína Šmigová

1 Introduction

It is generally well known that the definition of the crime of genocide has not been changed since its adoption in 1948 in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[1] According to the statutes of *ad hoc* Tribunals[2] and the Rome Statute of the International Criminal Court (Rome Statute),[3] genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent birth within the group, forcibly transferring children of the group to another group.[4] Moreover, it is not only genocide as such but also conspiracy to commit genocide, direct and public incitement to commit genocide and attempt to commit genocide and complicity in committing genocide that are punishable as well.[5]

Nevertheless, despite the same wording, several interpretative methods have been used and the results of their application have influenced the case law and judiciary of international criminal bodies. From interpretation of protected groups[6] through interpretation of individual

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

2 UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as last amended on 17 May 2002), 25 May 1993, UN Doc. S/RES/808 (1993); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, UN Doc. S/RES/955 (1994).

3 Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted on 17 July 1998, entered into force on 1 July 2002.

4 *See* art. II of the Genocide Convention.

5 *Ibid*, art. III.

6 See e.g., Schabas, William, A., *Genocide in International Law. The Crime of Crimes* (2nd ed., Cambridge: Cambridge University Press, 2009), p. 117 *et seq*.

acts[7] to different approaches,[8] there has been a development in relation to the prosecution of this crime of crimes. Moreover, implementation of the international commitment of states to prevent and punish genocide has created various ways of coping with this duty, one of which reflects the issue of denial of genocide. The first part of this article therefore analyses the interpretation of several aspects of the crime of genocide in relation to the use of legal and political language and consequences of this usage, looking into the Armenian and Rohingya situation as well. The second part aims at the denial of genocide that is punishable in some countries, e.g., in Slovakia.

2 Some Aspects of the Armenian and Rohingya Genocide Claims

It is politically quite common, not only around 24 April which is marked as the beginning of the genocide of the Armenians, to give statements regarding the Armenian genocide either by Turks and their allies or by their opponents.[9] On one hand, Turkey admits the killing of hundreds of thousands of Armenians, on the other hand, it points out that the intent to destroy the Armenians as a group was missing.[10] Although it has been recognised that throughout all periods of history, genocide has inflicted great losses on humanity,[11] it was only in 1948 that the crime of genocide was introduced to the international law. Nevertheless, it could have become a part of international law already in 1933 when prof. Raphael Lemkin presented his proposal of a new crime at the International Congress of Penal Law.[12] He is the father of the term genocide by uniting the old Greek word *genos* (race, nation, tribe) and the Latin word *caedere* (to kill). Moreover, it was he who proposed a definition of the crime of

7 *Ibid*, p. 307 *et seq*.

8 Kreß, Claus, The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir, in Stahn, Carsten (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), p. 695 *et seq*.

9 E.g., the US Senate passed a resolution recognising the Armenian Genocide in 2019, information available online at Senate Passes Resolution Recognizing Armenian Genocide, in Defiance of Trump, URL https://www.nytimes.com/2019/12/12/us/politics/senate-armenian-genocide.html [last visit 14 December 2020].

10 Questions and Answers: Armenian Genocide Dispute, information available online at Q&A: Armenian genocide dispute - BBC News, URL https://www.bbc.com/news/world-europe-16352745 [last visit 14 December 2020].

11 *See* Preamble of the Genocide Convention.

12 Schabas, William, A., *Genocide in International Law. The Crime of Crimes, supra note* 6, p. 26.

genocide in 1944.[13] Keeping in mind the criminal principle of *nullum crimen sine lege*, it is therefore more political to claim the mass killing of Armenians to be genocide when no such crime had been defined at that time. Nevertheless, one must insist that those crimes committed against Armenians were of no less gravity since crimes against humanity are crimes under international law as well. The distinction between genocide and crimes against humanity is obviously less significant today since the definition of crimes against humanity has evolved and it refers to acts committed both in peacetime and wartime.[14] Furthermore, there is no hierarchy between crimes under international law, all of them shock the conscience of humankind.[15]

When discussing the crime of genocide as one of the most heinous crimes – crimes under international law, it is *sine qua non* to consider generally accepted interpretation rules.[16] According to Art. 31 of the Vienna Convention on the Law of Treaties, interpretation shall be provided in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is especially the ordinary meaning of the relevant terms that is under closer examination in the following subchapter.

2.1 *Dolus Specialis*

In relation to the Armenian genocide, it is usually submitted that during the First World War under the Young Turk government, a campaign of deportation and mass killing took place against Armenians.[17] As for the Rohingya, the media has provided information that under the government of the Burmese military from 2016 until 2018, but especially in 2017, there was a military crackdown with a systematic campaign of violence against this group.[18] An ordinary meaning of a campaign is a planned group of especially political, business,

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

14 Schabas, William A., *An Introduction to the International Criminal Court* (4th ed., Cambridge: Cambridge University Press, 2012), p. 100.

15 See e.g., Ratner, Steven R., 'Can We Compare Evils - The Enduring Debate of Genocide and Crimes against Humanity', (2007) 6 *Washington University Global Studies Law Review*, pp. 583 – 589. See also ICTR, *Prosecutor v. Kayishema and Ruzindama* (Judgment) ICTR-95-1-A, ACh (1 June 2001), para. 367.

16 ICTY, *Prosecutor v. Krtić* (Judgment) IT-98-33-T, TCh (2 August 2001), para. 541.

17 Suny, Ronald Grigor, Armenian Genocide, *Encyclopaedia Britannica*, 19 May 2020.

18 See e.g., 'Systemic failure' of U.N. ahead of Myanmar military crackdown: review | Reuters, URL https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKCN1TI2LM [last visit 14 December 2020].

or military activities that are intended to achieve a particular aim.[19] In both cases, there is an element of organising and an element of a specific goal. This is very important when one prosecutes the crime of genocide since the *dolus specialis* has to be proved.[20] It is this intent to destroy that is the specific defining element that is not just a complement to the *actus reus*, but a separate intent, as if an intent in addition.[21] This particular characteristic,[22] which in some cases distinguishes genocide from crimes against humanity,[23] is usually the most problematic element when proving the act of genocide, sometimes even impossible.[24] This is also the reason why if there is no confession of the accused, it is necessary to determine the *dolus specialis* on other factors, including e.g., general context of the prosecuted acts, their scope or nature.[25]

2.2 *Protected Groups*

Another issue to be analysed is the status of protected groups. Could Armenians and Rohingya be considered to be protected within the definition of genocide? This definition raises the question of whether protection concerns individuals or groups. Prof. Lemkin has already expressed his opinion on this when he pointed out that in this case the perpetrator chooses his victims based on the fact that they are members of a particular group.[26] The definition of genocide includes an exclusive list of protected groups. That is why probably the most controversial issue in any situation concerning genocide is whether the group which is or was the object of genocidal acts falls within the defined list of protected groups.[27] Within this list there is no group protected on the basis of political membership, sexual orientation or social status. Although it is a wider

19 Cambridge Dictionary available online at CAMPAIGN | meaning in the Cambridge English Dictionary, URL https://dictionary.cambridge.org/dictionary/english/campaign [last visit 14 December 2020].

20 *See* art. II of the Genocide Convention.

21 ICTY, *Prosecutor v. Stakić* (Judgment) IT-97-24-A, ACh (22 March 2006), para. 520.

22 ICTY, *Prosecutor v. Brđanin* (Judgment) IT-99-36-T, TCh (1 September 2004), para. 699.

23 Compare ICTY, *Prosecutor v. Kupreškić et al.* (Judgment) IT-95-16-T, TCh (14 January 2000), para. 636. See also International Court of Justice, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Hercegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43, paras. 186 – 189, 198, 199.

24 ICTR, *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T, TCh (2 September l998), para. 523.

25 *Ibid*.

26 Lemkin, Raphael, 'Genocide as a Crime under International Law', (1947) 41 *American Journal of International Law*, p. 147.

27 Lisson, David, 'Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste', (2008) 60 *Stanford Law Review*, p. 1460.

range of groups than originally proposed by prof. Lemkin, the original plan to include a political group into the definition was rejected by the Soviet Union.[28] The final list thus includes only national, ethnical, racial, or religious groups.[29]

Since there is no definition of protected groups in the Genocide Convention, it is legitimate to interpret the terms used within it. The first case in which the Genocide Convention was applied at the international level was the case of *Akayesu* decided by the International Criminal Tribunal for Rwanda.[30] The defining element of protected groups was thus interpreted internationally in this case for the first time as well.

Due to the exhaustive list of protected groups, the ICTR had to determine whether the groups of Hutu and Tutsi fall within the scope of the groups protected by the Genocide Convention. ICTR considered the *travaux préparatoires* of the Genocide Convention and presented the idea of a stable and permanent group. According to the ICTR, the crime of genocide in its definition focuses only on permanent and stable groups whose membership is determined by birth.[31] The ICTR subsequently defined all four groups listed in the Genocide Convention[32] and finally stated that it was particularly important to respect the intent of draftsmen of the Genocide Convention.[33] Nevertheless, a critical analysis of this part of the *Akayesu* judgment points out several problematic aspects of that procedure. In terms of interpretation, preparatory works can only be used as supplementary means of interpretation to confirm the meaning, or to determine the meaning when the interpretation leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[34] However, the wording of the Genocide Convention is understandable and clear; the ICTR did not have to use preparatory works. Moreover, this interpretation concerned a definition of a criminal offense. In addition to the principle of *nullum crimen sine lege* there is another criminal principle to be applied, namely the principle *in dubio pro reo*, the essence of which is that in

28 Yale Law Journal Company, Inc., 'Genocide: A Commentary on the Convention', (1949) 58 *Yale Law Journal* 1145.

29 Compare art. II of the Genocide Convention.

30 Van Schaack, Beth, 'Darfur and the Rhetoric of Genocide', (2005) 26 *Whittier Law Review*, p. 1117.

31 ICTR, *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T, TCh (2 September l998), paras. 511, 701.

32 *Ibid*, paras. 512 – 515.

33 *Ibid*, para. 516.

34 See art. 32 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331, adopted on 23 May 1969, entered into force 27 January 1980.

case of doubt, a decision is taken in favour of the accused.[35] If the ICTR wanted to use the concept of a permanent and stable group, it should have found support for such an approach in the current wording of the legal norm, i.e., in Article 2 of the Genocide Convention.[36]

The use of preparatory materials led the ICTR to define each group, since the groups mentioned in the definition were neither defined in the Genocide Convention nor in the ICTR Statute.[37] It is interesting that the ICTR has presented a stable and permanent concept of protected groups also in relation to a religious or national group, whereas membership in these groups is variable during one's life. Nevertheless, according to this approach the ICTR had difficulties in classifying Hutu and Tutsi as protected groups based on different ethnicity since they shared the same language and culture.[38] However, in relation to the differentiation examined, it is relevant to point out that another ICTR Senate held in its decision that the Tutsis were of a different ethnic group not because they met some objectively defined definition, but because they were thus defined by Rwandan law.[39] Even so, the ICTR did not apply the concept of a permanent and stable group in other cases and worked out the concept of protected groups in different ways in various decisions.[40] From

35 Jones, John R. W. D., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (2nd ed., Ardsley: Transnational Publisher Inc., 2000), p. 476.

36 Schabas, William A., 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda', (2002) 6 *ILSA Journal of International and Comparative Law*, p. 380.

37 Tiefenbrun, Susan W., 'The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, The World Court, and the International Criminal Court', (2000) 25 *North Carolina Journal of International Law and Commercial Regulation*, p. 587.

38 It is interesting that although the ICTR had problems to consider ethnicity in relation to the crime of genocide, it considered ethnicity in relation to the crimes against humanity where it decided that these acts were a part of a widespread or systematic attack against a civilian population on national, political, ethnic, or racial grounds. ICTR, *Prosecutor v. Akayesu* (Judgment) 96-4-T, TCh (2 September 1998), para. 173.

39 ICTR, *Prosecutor v. Kayishema and Ruzindana* (Judgment) ICTR-95-1-T, TCh (21 May 1999).

40 In each case it had to deal with a question whether the protection applies to groups as such. According to the International Court of Justice, it means that it is necessary to analyse the intent to destroy a group with a particular group identity, i.e., who those people are, not who they are not. See International Court of Justice, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Hercegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 193. This approach was presented for the first time by ICTY, *Prosecutor v. Stakić* (Judgment) IT-97-24-A, ACh (22 March 2006), para. 20 *et seq*. As for positive characteristics, not lack of them, as a definition prerequisite, *see* also ICC, *Prosecutor v. Al Bashir*

objective approach in the case of *Akayesu* through a subjective approach in the case of *Jelisić* (in the eyes of … perpetrators)[41] or in the case of *Kayishema and Ruzindana* (self-determination of victims)[42] to a case-by-case context in the case of *Rutaganda*.[43] A concise approach can be seen in later cases which stated that there are no generally or internationally accepted definitions of a national, ethnic, racial or religious group and therefore each of these concepts has to be assessed in terms of a specific political, social, historical and cultural context.[44] This approach respects that although membership is an objective element of the protected group, it is necessary to examine its subjective element as well, including the perception of victims and their membership of the group by the perpetrators.[45] As a result, a contextual approach has been considered, according to which a group identification has to be decided on a case-by-case basis, taking into account the objective elements of the social and historical context, as well as the subjective perception of the perpetrators.[46] Such an approach has been confirmed by the jurisprudence of the ICC that stressed positive identification of protected groups, not their negative determination.[47] As for Armenians and Rohingya, one could aim both at their ethnicity and/or religious distinction from the majority group.

2.3 *Context of Actus Reus*

Moreover, another important contextual circumstance must be analysed, namely the context of *actus reus*, especially in relation to the jurisprudence of the ICC. The wording of art. 6 of the Rome Statute, which defines the crime of genocide, in contrast to the widespread or systematic attack, which is required by a definition of crimes against humanity within the meaning of art. 7 of the Rome Statute, corresponds to a situation where an individual may also aim to destroy a group as such.[48] However, in the context of the regulation contained

(Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, PTCh I (4 March 2009), para. 135.

41 ICTY, *Prosecutor v. Jelisić* (Judgment) IT-95-10-T, TCh (14 December 1999), para. 70.

42 ICTR, *Prosecutor v. Kayishema and Ruzindana* (Judgment) ICTR-95-1-T, TCh (21 May 1999), para. 98.

43 ICTR, *Prosecutor v. Rutaganda* (Judgment) ICTR-96-3-T, TCh (6 December 1999), para. 56.

44 ICTR, *Prosecutor v. Bagilishema* (Judgment) ICTR-95-1A-T, TCh (7 June 2001), para. 65.

45 *Ibid*.

46 ICTR, *Prosecutor v. Semanza* (Judgment and Sentence) ICTR-97-20-T, TCh III (15 May 2003), para. 317.

47 ICC, *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, PTCh I (4 March 2009), para. 135.

48 ICTY, *Prosecutor v. Jelisić* (Judgment) IT-95-10-T, TCh (14 December 1999), para. 100.

in the Rome Statute, it is also necessary to consider Elements of Crimes which in relation to genocide provide for the general element that genocide for the purposes of the Rome Statute requires that the genocidal 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.[49] This requirement is within the scope of the introduction to the elements of the crime of genocide supplemented by the explanation that the term "in the context of" would include the initial acts in an emerging pattern, the term "manifest" is an objective qualification and that the element *mens rea* in relation to this requirement will have to be decided by the ICC on a case-by-case basis.[50]

The Pre-Trial Chamber tried to disperse the initial surprise as if the defining element of a crime of genocide was supplemented contrary to the principle of *nullum crimen sine lege* by pointing out the implicitness of the contextual requirements, as the crime of genocide can only be considered if the conduct under investigation constitutes the existence of a specific threat to a target group or part thereof.[51] If we look at the Elements of Crimes as such, in terms of how they were adopted, they can be considered an international community consensus, and therefore the statements of the *opinio iuris* of an international customary norm.[52] But e.g., the Appeals Chamber of the ICTY expressed doubts about the proceedings in this regard by the Trial Chamber, which referred to the Elements of Crimes, on the ground that the contextual requirement is neither treaty nor customary part of the definition of genocide.[53] However, a different issue within the case law has to be pointed out in this context, namely determination of *dolus specialis*, when a contextual requirement of a real threat was examined precisely in relation to its determination. Although it is theoretically possible for one person to achieve this threat by their acts,[54] the case law has, in principle, examined the existence and certain organization of the plan to destroy a group or part thereof precisely because of

49 ICC, Elements of Crimes, p. 2.

50 *Ibid*.

51 ICC, *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, PTChI (4 March 2009), para. 124. As for need of a threat, not of a proof of the destruction of a group itself, *see* also *ad hoc* tribunals, e.g., ICTY, *Prosecutor v. Brđanin* (Judgment) IT-99-36-T, TCh (1 September 2004), para. 691.

52 Malliaris, Stylianos, 'Assessing the ICTY Jurisprudence in Defining the Elements of the Crime of Genocide: The Need for a "Plan"', (2009) 5 *Review of International Law and Politics*, p. 116.

53 ICTY, *Prosecutor v. Krstić* (Judgment) IT-98-33-A, ACh (19 April 2004), para. 223 *et seq*.

54 In case of a status of a decisive executive body, e.g., commander of armed forces.

the *dolus specialis* determination factor.[55] Elements of Crimes could therefore be interpreted in a way that they require nothing more than what the international criminal tribunals have already done in previous judicial practice, but this is now required not in relation to *dolus specialis*, but as an element of *actus reus*. Although it may be a trifle for court practice, in terms of the definition itself, this is an obvious shift. This is because such nuances can lead to different application results, as is the case, for example, already in the field of interpretation of *dolus specialis* as such, even without a contextual link with the material element of the crime of genocide. Moreover, in this case, the interpretive nuance is not such a nuance, since originally crystallized opinion, which was already formulated in the case of *Akayesu*[56] and which was intended to examine the intent of the conduct, i.e., to destroy a protected group (a purpose-based intent)[57] was later re-examined by the academic community from the point of knowledge-based intent of the perpetrator of the attack and its objectives.[58] This other understanding was pointed at by the ICC in the *Al-Bashir* case, albeit it held in the conclusion that this approach had an influence "only" on whether to decide upon criminal responsibility of the prosecuted individual as about the principal or secondary perpetrator.[59]

All these context issues are very important especially for the situation of the Rohingya since the ICC has authorised the Prosecutor to open investigations not only on crimes against humanity as requested by the Prosecutor but on any crimes committed at least in part on the territory of Bangladesh (since Myanmar is not a Party to the Rome Statute).[60] It means that the crime of genocide might be investigated as well if it is sufficiently linked to the situation. Moreover, another case is under consideration regarding the Rohingya, namely by the International Court of Justice (ICJ) that is to decide a claim submitted

55 Compare Schabas, William, A., *Genocide in International Law. The Crime of Crimes, supra note* 6, p. 246 *et seq*.

56 ICTR, *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T, TCh (2 September l998), para. 498.

57 This purpose was analysed also by the International Commission of Inquiry on Darfur, see its Report to the United Nations Secretary-General, 25 January 2005, para. 491.

58 Greenwalt, Alexander, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', (1999) 99 *Columbia Law Review*, pp. 2259 et seq. ICC, *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, PTChI (4 March 2009), para. 139, ft. 154.

59 ICC, *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, PTChI (4 March 2009), para. 139.

60 ICC, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar, ICC-01/19-27, PTChIII (14 November 2019).

by the Gambia in late 2019 against Myanmar, claiming that Myanmar did not meet its commitments under the Genocide Convention. ICJ has adopted an order indicating legally binding provisional measures to bind Myanmar to prevent genocidal acts against the Rohingya and to prevent the destruction and ensure the preservation of evidence related to allegation of genocidal acts.[61]

Despite all the legal challenges that both these international judicial bodies face, the initiated proceedings have a significant political force also in relation to international legal obligations of states. The Gambia is not a state that has been directly involved in the alleged genocide of the Rohingya, nevertheless, it has filed a legal claim against Myanmar. Politically, the protected group of Rohingya is not of such an interest, unfortunately, as to urge the World Powers to become involved. On the other hand, although there existed no definition of crime of genocide during the First World War, there are states that have politically recognised the mass killing of the Armenians as genocide. The most well-known states are France, Canada, Germany, and the USA. As for Slovakia, the resolution of its parliament, issued when the EU started the accession negotiations with Turkey, is legally somewhat schizophrenic, since it held that the National Council of the Slovak Republic recognizes the genocide of the Armenians in 1915, in which hundreds of thousands of Armenians living in the Ottoman Empire perished and considers this act a crime against humanity.[62]

3 Denial of Genocide

Genocide is a sadly known word, the essence of which is an intentional destruction of specified groups mostly by the killing of its members.[63] According to some, these are the most serious violations of human rights possible[64] or the most intolerable crime against humanity[65] or simply, an unnameable horror.[66] Although someone may claim that it is more important to analyse this

61 ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) (Order of 23 January 2020), para. 86.

62 National Council of the Slovak Republic (Resolution 1341) (30 November 2004).

63 Shaw, Malcolm, *War & Genocide* (Cambridge: Polity Press, 2003), p. 34.

64 Weigall, David, *International Relations* (London: Arnold, 2002), p. 100.

65 Shah, Sonali B., 'The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide', (2002) 16 *Emory International Law Review*, p. 353.

66 Kuper, Leo, *Genocide, its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1981), p. 20.

phenomenon and to understand it than to define it,[67] there is no doubt that words are still important, especially in the area of criminal law. Genocide is not something that just happens.[68] As described in the Genocide Study Program, genocide has ten basic phases.[69] Classification (that is common for the whole process) is followed by symbolization (giving a meaning to classification), discrimination (application of law and power to deny rights of a particular group), dehumanization (that is supposed to justify killing), organization (which does not have to be detailed), polarization (by eliminating neutral centres, the whole subsequent process will be accelerated), preparation (of personnel and material equipment), persecution (the actual destruction of a group, including, but not limited to physical removal of its members), extermination (as a final solution) and denial.[70]

According to the president of the Genocide Watch, the final phase of genocide as a process is the denial of genocide itself.[71] Although it is true that it usually covers those who were involved in genocidal killing and who afterwards deny that they committed genocide, one can include into this group of deniers also those who deny that genocide has been committed without having been included.[72] Within the Convention's punishable acts and the definition of genocide itself, there is not anything expressly devoted to a denial. Nevertheless, there might be some interpretation space for a claim that the incitement to commit genocide includes denial of genocide.[73] However, most scholars address the denial of genocide from the point of view of hate

67 Shaw, Malcolm, *What is genocide?* (Cambridge: Polity Press, 2006), p. 11.

68 Reichel, Philip (ed.), *Handbook of Transnational Crime and Justice* (London: Sage, 2004), p. 220.

69 Stanton, Gregory H., *Ten Stages of Genocide. The Genocide Education Project*. 1998, revised in 2013. Project is available online at https://genocideeducation.org/wpcontent/uploads/2016/03/ten_stages_of_genocide.pdf [last visit 14 December 2020].

70 *Ibid*.

71 *Ibid*.

72 *Compare* e.g., Huttenbach Henry. R., The Psychology and Politics of Genocide Denial: a Comparison of Four Case Studies, in Chorbajian Levon, Shirinian George (eds.), *Studies in Comparative Genocide* (London: Palgrave Macmillan, 1999), pp. 216 - 229.

73 Prof. Schabas points out that Benjamin Whitaker described negationism as a form of incitement to genocide. Schabas, William, A., *Genocide in International Law. The Crime of Crimes, supra note* 6, p. 334. Nevertheless, a reporter to the Human Rights Commission, Mr. Whitaker, only described an approach of the German legislator that planned *"to prosecute the people who seek to deny the truth about the Nazi crimes"* and the fact that there is also another approach, namely no constraint upon freedom of expression. Whitaker, Benjamin, *Revised and Undated Report on the Question of the Prevention and Punishment of the Crime of Genocide*. UN Doc. E/CN.4/Sub.2/1985/6, paras. 23 and 49.

propaganda, therefore from the human rights perspective.[74] It therefore means that although genocide is a crime under international law and its prohibition is a *ius cogens* norm, denial of genocide is rather a concept analysed in the human rights legal framework. The international commitment to prevent genocide is thus generally not considered to include the commitment to prosecute its denial. Quite opposite, for states with a free speech culture such a speech might be considered protected by a human rights framework both on national and international level. However, even within this framework, there are different approaches that might follow different backgrounds and historical experience of members of the particular international bodies. Some of them are rather strict, others are more open for a broader interpretation of the relevant legally binding treaties.

As for the first group that is rather strict, it has already been decided that the denial of clearly established historical facts is not protected by the right to freedom of expression.[75] It is interesting though that this so often cited decision of the European Court of Human Rights was adopted in a case where the European Court of Human Rights held that the conviction of applicants for the support of Philippe Pétain was not necessary in a democratic society and therefore violated their freedom of expression. The reasoning pointed out that the case did not belong to the category of clearly established historical facts whose negation or revision would not be protected by article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) covering freedom of expression.[76] On the contrary, free speech would be restricted by art. 17 of the ECHR prohibiting abuse of rights.[77] The European Court of Human Rights has expressly provided an example of a clearly established historical fact, namely the Holocaust.[78]

Regarding the second group, who are less strict in limiting free speech, one has to point out the legal framework of the USA where free speech is

74 *See* e.g., Harris, D. J. et al., *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009), p. 450 *et seq*.

75 ECtHR, *Lehideux and Isorni v. France*, app. no. 55/1997/839/1045, Judgment, 23 September 1998, para. 47.

76 *Ibid*.

77 Art. 17 of the ECHR: "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*"

78 ECtHR, *Lehideux and Isorni v. France*, app. no. 55/1997/839/1045, Judgment, 23 September 1998, para. 47.

constitutionally protected because of its First Amendment. However, already in 1981 it was judicially noted that the Holocaust is a legally incontestable fact.[79]

The language concerning the situation of the Rohingya is not so strict, nevertheless, Turkey as the state considered to be responsible for the mass killing of Armenians because of the identity of the group even passed an act in 2004 which makes it a criminal offense to claim the Armenian genocide.[80] On the other hand, there are countries that have passed acts to make it a criminal offense to deny a genocide under various conditions. Slovakia is one of the countries where a denial of genocide is a separate criminal offence. According to § 422d (2) of the Slovak Criminal Code:

> anyone who publicly denies, approves, questions, grossly offenses or seeks to justify genocide … in a manner which may incite violence or hatred against a group of persons, or a member thereof shall be punished if the perpetrator or participant in this act was convicted by a valid judgment of an international court established on the basis of public international law, the jurisdiction of which was recognized by the Slovak Republic, or by a valid judgment of a court of the Slovak Republic.[81]

Nevertheless, already the first reading points out clearly that prosecution on the basis of this article might be rather rare. As for the Armenian genocide, the National Council of the Slovak Republic, i.e., the Slovak parliament, declared already in 2004 that the genocide against Armenians was a crime against humanity.[82] However, it was a political statement without consequences in the criminal law area. And although the cited definition of the crime of denial of genocide was adopted within a special amendment of the Criminal Code already in 2009, there has been no judgment on the national nor international level so far that is a prerequisite for a punishment based on this paragraph. Moreover, it is currently legally impossible to expect a valid judgment of an international court in relation to the situation during the First World War since the only one that is functional has jurisdiction over crimes that took place after 1 July 2002. On the other hand, in Slovakia, the Office of Special Prosecutor that focuses on the prosecution of e.g., extremism and related criminal offences has

79 USA, Superior Court of Los Angeles County, *Mel Mermelstein v. Institute for Historical Review* (1981).

80 Cohan, Sara, 'A Brief History of the Armenian Genocide', (2005) 69 (6) *Social Education*, p. 337.

81 Slovak Republic, Law. No. 300/2005 Collection of Laws, Criminal Code, § 422d (2).

82 National Council of the Slovak Republic (Resolution 1341) (30 November 2004).

been established. Since an extremist political party was elected in the parliamentary elections in Slovakia in 2016 and 2020, the judgment against the political leader of this party for support and promotion of the movement for the suppression of fundamental rights and freedoms on 12 October 2020 was welcome as a victory of democracy, and so was the final decision of the Supreme Court of the Slovak Republic adopted on 5 April 2022 punishing this political leader for sympathy for such a movement. It is a partial victory though since the leader has already founded the second political party with a more cautious approach in his statements; the first political party was dissolved for its rather open racist statements and approval of deportation of Jews from Slovakia.[83]

4 Conclusion

The crime of genocide is one of the crimes under international law. Although there is no hierarchy between these crimes, the crime of genocide has a very specific *renomé* that might have been influenced by one, very difficult to prove, element, namely *dolus specialis*, since it exponentiates the difficulties to understand motives and prosecute individuals that have an intent to destroy a group of human beings as such.

The situation of Armenians and Rohingya is very challenging when discussing the crime of genocide. Both these minority groups could be protected under the Genocide Convention because of their religious and/or ethnic specificity that is covered by the definition of the crime of genocide under Art. 2 of this Convention even though both Turkey and Myanmar deny *dolus specialis*, i.e., the intent to destroy these specific groups as such. However, legally speaking, there existed no such crime as genocide on international nor national level during the First World War when massive killing of Armenians took place. The UN Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948. Nevertheless, politically speaking, there are several countries that have recognised that the massive killing of Armenians was genocide committed by Turkey, although states at that time, namely France, the United Kingdom and Russia, condemned the Turkish Government for massacre on the Armenian population and called it a crime against civilization and humanity

83 Decision of the Supreme Court of the Slovak Republic to dissolve a political party was adopted on 1 March 2006. As for the political representation, see media summary available online at Nový župan ešte ako líder Pospolitosti chválil vyhnanie Židov z krajiny – SME, URL https://domov.sme.sk/c/7017134/novy-zupan-este-ako-lider-pospolitosti-chvalil-vyhnanie-zidov-z-krajiny.html [last visit 14 December 2020].

for which all members of the Turkish government and other responsible are to be criminally liable. It was for the first time that a specific act was recognised as a crime against humanity.[84]

And again, legally speaking, it is worth mentioning that the situation of the Rohingya has been opened for investigation by both the ICC that may prosecute individuals also for the crime of genocide and by the ICJ that has been asked by the Gambia to declare that Myanmar has failed to comply with its international obligations under the Convention on the Prevention and Punishment of the Crime of Genocide and that has already adopted an order to bind Myanmar to prevent any genocidal act against the Rohingya. Nevertheless, politically speaking, the Rohingya community is not of such an interest for the World Powers to adopt any serious political statements, therefore it is usually the civil society and international organisations that emphasize the need of not allowing the perpetrators of the most heinous atrocities to go unpunished.

Finally, especially in the states with sensitive historical memory, it is very important to find the balance in relation to freedom of speech. Some states have even made it a criminal offence to deny a genocide which is supposed to help society not to forget its historical mistakes and to make sure that vulnerable minorities are effectively protected.[85]

84 Bassiouni, Mahmoud Cherif, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011), p. 88.

85 See not always legally certain Rwandan denial legal framework: Jansen, Yakaré-Oulé (Nani), 'Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Law', (2014) 12(2) *Northwestern Journal of International Human Rights*, p. 191.

CHAPTER 11

The Situation in Myanmar and the Territorial Jurisdiction of the ICC

Kristýna Pelikánová Urbanová

1 Introduction

The 2016 wave of violence in Myanmar did not escape the attention of the international community and triggered a debate whether the conditions of the Rohingya people amounted to the crime of genocide. In Response, the Independent International Fact-Finding Mission on Myanmar was established by the United Nations Human Rights Council in April 2017 and it published its report on the situation in 2018.[1] According to the Fact-Finding mission, the activities in Myanmar constituted crimes against humanity, war crimes, and genocide.[2] One of the recommendations made by the Fact-Finding Mission was pursuance of individual criminal responsibility before International Criminal Court (ICC or the Court).[3] It seemed to be a logical step since all the mentioned crimes are within the material jurisdiction of the Court[4] and the Court was established to put an end to impunity of the perpetrators of these crimes.[5] However, the issue whether the ICC can exercise its jurisdiction over the alleged crimes was not unambiguous.

2 The Possible Ways of Establishing Jurisdiction over the Crimes Committed in Myanmar

According to Article 19(1) of the Statute, the Court shall satisfy itself that it has jurisdiction in any case brought before it. This rule reflects the established

1 Human Rights Council, Report of the Detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2 (17 September 2018).

2 *Ibid*, para. 1557.

3 *Ibid*, para. 1651.

4 Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted on 17 July 1998, entered into force on 1 July 2002, art. 5.

5 *Ibid*, Preamble, recital 5.

principle of "la compétence de la compétence",[6] meaning that any judicial body has the power to decide over the existence or absence of its own jurisdiction. But this also reflects the obligation of the Court to make sure it exercises its jurisdiction only when it is endowed with it.[7] According to Article 12(2) of the Statute '*Preconditions to the exercise of jurisdiction*' and Article 13 of the Statute '*Exercise of jurisdiction*' the conditions for the exercise of jurisdiction differ depending on which subject refers the situation to the ICC.

Since Myanmar is a non-member state to the Rome Statute, hypothetically, the Security Council could have, acting under Chapter VII of the Charter of the United Nations (UN), referred the situation to the ICC. However, that route to ICC jurisdiction did not seem viable considering the political standing of some permanent members of the Security Council. In March 2017, some diplomatic sources confirmed that the United Kingdom requested a Council's meeting over the Rohingya situation.[8] The request followed a massive escape of Rohingya people to Bangladesh after military operation in October 2016. The president of the Security Council for March 2017, the British Ambassador Matthew Rycroft, confirmed for Reuters that the United Kingdom proposed a press statement of the Council regarding the situation in Myanmar, however such statement was blocked by China with Russia's backing.[9] Therefore, the Security Council's referral of the situation to the ICC seems to be highly unlikely.

In the absence of the UN Security Council referral, the Court may exercise its jurisdiction under the conditions set out in Article 12(2) of the Rome Statute:

> [I]f one or more of the following States are Parties to this Statute (or have accepted the jurisdiction of the Court in accordance with paragraph 12(3)): (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

The available facts did not point to participation of foreigners from the ICC member states in the situation. Therefore, the extraterritorial source of jurisdiction based on a personal element (Article 12(2)(b) of the Statute) was not

6 ICC, *Prosecutor v. Ruto, Kosgey, Sang* (Decision) ICC-01/09-01/11-01, PTC II, para. 8.

7 O'Keefe, Roger, *International Criminal Law* (New York: Oxford University Press, 2015), p. 538.

8 Reuters Staff, 'China, Russia block U.N. council concern about Myanmar violence' 17 March 2017, *Reuters*.

9 *Ibid.*

of much help here, and the only possibility left was territorial jurisdiction. However, Myanmar was not a party to the Rome Statute, neither did it accept the jurisdiction of the ICC on an ad hoc basis pursuant to Article 12(3) of the Rome Statute. On the other hand, the Rohingya people massively fled to Bangladesh which is a member of the Rome Statute.[10] Therefore, the crucial question was whether this cross-border element would satisfy the definition of 'the territory of which the conduct in question occurred' under Article 12(2)(a) of the Statute.

3 The Pre-trial Chamber I Approach to Territorial Jurisdiction under the Rome Statute

Given the above-described legal difficulties, on 9 April 2018, the Office of the Prosecutor (OTP) filed a formal request for a ruling on jurisdiction under Article 19(3) of the Rome Statute. The OTP stated that:

> [C]oercive acts relevant to the deportations occurred on the territory of a State which is not a party to the Rome Statute (Myanmar). However, the Prosecution considers that the Court may nonetheless exercise jurisdiction under article 12(2)(a) of the Statute because an essential legal element of the crime—crossing an international border—occurred on the territory of a State which is a party to the Rome Statute (Bangladesh).[11]

In this context the OTP sought a ruling on the Court's jurisdiction "*to verify that the Court has territorial jurisdiction when persons are deported from the territory of a State which is not a party to the Statute directly into the territory of a State which is a party to the Statute*."[12]

It is noteworthy that the OTP focused its request on the crime of deportation under Article 7(1)(d) of the Statute. The OTP argued that deportation, as a crime against humanity, requires that the victim is forced to cross an international border. Hence, some legal element of the crime takes place in the territory of first state, but the crime is completed in the second state.

10 Ratification of the Rome Statute of the International Criminal Court by Bangladesh, 23 March 2010, reference C.N.185.2010.TREATIES-2.

11 ICC, *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,* ICC-RoC46(3)-01/18-1, OTP (9 April 2018), para. 2.

12 *Ibid*, para. 4.

With regard to interpretation of Article 12(2) of the Statute, the OTP took the position that the requirement of a 'State's territory on which the conduct in question occurred' was met when at least one legal element of the crime occurred on the territory of a state party to the Court.[13] This interpretation explains the OTP's focus on the crime of deportation as a crime which includes crossing of the borders and thus the occurrence of legal elements on territories of different states. The OTP compared that situation to a cross-border shooting, when a perpetrator fires from the territory of one state while the victim is injured on the territory of a second state.[14]

But, establishing the ICC's jurisdiction only with respect to the crime of deportation under Article 7(1)(d) of the Statute would also provide for significant limits of the OTP's investigation and contours of a case before the ICC. Other crimes against the Rohingya, such as genocide or war crimes and crimes against humanity of murder rape, etc., would have been excluded from the ICC's scrutiny.[15]

The Pre-Trial Chamber I decided over the OTP's request in its decision on 6 September 2018, concluding that the Court had jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.[16]

The Pre-Trial Chamber I supported its conclusion by a contextual interpretation of Article 12(2)(a) of the Statute. First, it referred to public international law, namely to the *Lotus case*.[17] The Pre-Trial Chamber I relied on the finding of the Permanent Court of International Justice that '*the territoriality of criminal law* [...] *is not an absolute principle of international law and by no means coincides with territorial sovereignty.*'[18] Further, the Chamber pointed to the research revealing that a number of states have adopted legislation to the effect that criminal jurisdiction may be asserted if part of a crime takes place on the territory of such state, and that aforementioned approach has also been taken by various international instruments.[19] Based on these findings, the Pre-Trial Chamber I found that Article 12(2)(a) of the Statute requires, as a

13 ICC, *Prosecution's Request*, *supra note* 11, para. 28.

14 ICC, *Prosecution's Request*, *supra note* 11, para. 13.

15 Heller, Kevin John, 'Three Cautionary Thoughts on the OTP's Rohingya Request', *OpinioJuris blog* (9 April 2018).

16 ICC, *Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,* ICC-RoC46(3)-01/18, PTC I (6 September 2018), para. 73.

17 PCIJ, *The Case of the S.S. Lotus* (France v. Turkey), Series A. No. 70, Judgment of 7 September 1927, p. 20.

18 ICC, *Decision on the Prosecution's Request*, *supra note* 16, para. 66.

19 ICC, *Decision on the Prosecution's Request*, *supra note* 16, para. 66.

minimum, that at least one legal element of a crime is committed on the territory of a state party,[20] even though the Statute does not explicitly provide so.

While it is possible to read Article 12(2)(a) of the Statute and reach the same conclusion as the Pre-Trial Chamber I did, its analysis is not entirely persuasive.

First, the Pre-Trial Chamber I's reliance on finding in Lotus case that '*the territoriality of criminal law* […] *is not an absolute principle of international law*' does not seem to provide too much help with interpretation of the scope of territorial jurisdiction set out in Article 12(2)(a) of the Statute. In the relevant part of the Lotus judgment the Permanent Court of International Justice (PCIJ) was analysing and answering a different question than the Pre-Trial Chamber I was supposed to analyse and answer.

It follows from part of the Lotus judgment that the PCIJ rejected the view that the Turkish courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law. To the contrary, the PCIJ adopted the Turkish government's view, that the question was whether Turkey's exercise of its jurisdiction contravened the principles of international law, and if so, what principles.[21] As the PCIJ put it "*therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings*."[22]

The PCIJ then continued to explain that international law, in general, limits states to the effect that in the absence of a permissive rule to the contrary a state may not exercise its power in any form in the territory of another state. The PCIJ then concluded that in this sense jurisdiction is territorial, it cannot be exercised by a state outside of its territory unless by virtue of a permissive rule derived from international law.[23] However, the PCIJ observed that international law does not prohibit a state from exercising jurisdiction in its own territory, in respect to acts which have taken place abroad, since international law did not contain a general prohibition to states "*to extend the application of their laws and jurisdiction of their courts to persons, property and acts outside their territory*."[24] The PCIJ then concluded that with certain exceptions, international law leaves states with a wide measure of discretion which is only limited by certain prohibitory rules. Within these limits its title to exercise jurisdiction

20 ICC, *Decision on the Prosecution's Request*, *supra note* 16, para. 64.

21 PCIJ, *The case of the S.S. "Lotus"* (France v. Turkey) Judgment of 7 September 1927, Series A.-No. 70, p. 18.

22 *Ibid*.

23 *Ibid*, pp. 18–19.

24 *Ibid*, p. 19.

rests in its sovereignty and states have the liberty to adopt the principles which they regard as best and most suitable.[25]

It follows that the Pre-Trial Chamber I relied on part of the *Lotus* judgment where the PCIJ analysed what limits international law imposes on states' rules on jurisdiction or its application. But the Pre-Trial Chamber I was facing an entirely different question. It should have analysed whether the ICC had a valid legal basis for the exercise of its jurisdiction, i.e., whether Article 12(2)(a) provided a sufficient legal basis for the jurisdiction of the ICC over the situation of the Rohingya people.

Such a question could not have been answered through reference to the part of *Lotus* judgment dealing with what limits international law imposes on states. Because, even if Article 12(2)(a) of the Statute or the proposed interpretation of that article was perfectly within the limits of international law, it did not mean that the ICC was given such a scope of territorial jurisdiction. In other words, answering a question of compliance between the proposed reading of Article 12(2)(a) of the Statute and public international law does not in itself answer the question whether the proposed reading of Article 12(2)(a) of the Statute corresponds with the scope of territorial jurisdiction the drafters of the Rome Statute embodied into Article 12(2)(a) of the Statute.

Similar doubts also arise from the second part of the Pre-Trial Chamber I's analysis concerning the national legislation and international instruments. The Pre-Trial Chamber I referred and quoted a number of national legislative examples showing that (i) in numerous states the exercise of criminal jurisdiction requires the commission of one legal element of the crime on its territory, and (ii) criminal jurisdiction may be asserted if part of a crime takes place on the territory of a state.

For example, the Pre-Trial Chamber I cited the following national legislation:

- the Criminal Code of Afghanistan: '*Provisions of this Law are also applicable to the following persons: 1. Any person who commite* [*sic*] *an act outside Afghanistan as a result of which he is considered the performer of or accomplice in a crime which has* taken place in whole or in part in Afghanistan';
- the Criminal Code of Australia: '*If this section applies to a particular offence, a person does not commit the offence unless:* (*a*) *the conduct constituting the alleged offence occurs:* (*i*) wholly or partly *in Australia*';
- the Criminal Code of the Czech Republic: '*A criminal offence shall be considered as committed in the territory of the Czech Republic* (*a*) *if an offender committed* the act here, either entirely or in part*, even though the violation*

25 *Ibid.*

or endangering of an interest protected by the criminal law occurred or was supposed to occur, either entirely or in part abroad';

– the Criminal Code of Timor-Leste: '*An act is considered to have been committed in the place where, by any means, the action or omission occurred,* wholly or in part*, as well in wherever the typical result has or should have been caused*'.[26]

The cited examples of national legislation indeed showed that at least some states construed their territorial jurisdiction in a way that it required only some part of the conduct in question to occur in their territory. However, and again, it did not show that this was the construction adopted by the Rome Statute drafters.

Moreover, the referred pieces of national legislation always provided that the conduct occurs on the territory '*wholly* or partly' or '*wholly or* in part' etc. Therefore, the states in their Criminal Codes explicitly stressed that the occurrence of a mere part of criminal conduct in their territory triggers their territorial jurisdiction.

A similar pattern can be spotted in the international instruments referred to by the Pre-Trial Chamber I. For example, the Chamber cited:

– the European Convention on Extradition which provides that: '*The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed* in whole or in part *in its territory or in a place treated as its territory*';
– the Criminal Law Convention on Corruption stating that '*Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with Articles 2 to 14 of this Convention where: the offence is committed in whole* or in part in its territory';
– the African Union Convention on Preventing and Combating Corruption providing that '*Each State Party has jurisdiction over acts of corruption and related offences when:* (*a*) *the breach is committed* wholly or partially inside its territory.'[27]

Therefore, both the examples of national legislation and international instruments, contained explicit provisions covering 'partial' conduct within the territory. In contrast, the Rome Statute is silent on such cases when only 'part' of the conduct occurs on the territory of a member state.

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26 ICC, *Decision on the Prosecution's Request*, *supra note* 16, footnote 109, p. 38, [the emphasis was added].

27 ICC, *Decision on the Prosecution's Request*, *supra note* 16, footnote 110, pp. 38 – 39 [the emphasis was added].

Article 12(2)(a) of the Statute merely provides '*The State on the territory of which the conduct in question occurred*'. Therefore, using a comparative method of interpretation, it is also conceivable to reach the exactly opposite conclusion than the Pre-Trial Chamber I did, i.e., that the drafters of the Rome Statute did not construe the territorial jurisdiction the same way as the states did in their national legislation or as the drafters of the quoted international instruments did since the explicit wording about 'partial' conduct present in the cited examples is missing in the Rome Statute.

In summary, from the decision of the Pre-Trial Chamber I, it follows that the adopted interpretation of Article 12(2)(a) does not contravene, or that such interpretation complies with approaches taken by national legislation or international instruments (which both use quite different wording). But it does not follow how and if the Chamber analysed how the drafters of the Rome Statute themselves wanted to construe the territorial jurisdiction of the ICC.

This answer was also not provided by the other part of the decision. In this context, the Chamber further supported its conclusion by referencing several international treaties that Myanmar was a party to. It cited a number of treaties which required Myanmar to establish its jurisdiction '*over certain offences, inter alia, in cases where the alleged offender is present in its territory, irrespective of the location of the commission of the alleged offence or the nationality of the alleged offender*'[28]

However, it is rather unclear, what the fact that a state in several international treaties explicitly construed a jurisdiction in the above-mentioned way says about what the drafters incorporated into the Rome Statute (in particular when the drafters of the Statute chose a different wording for construction of territorial jurisdiction).

That applies even more in the case of Myanmar, which is not a party to the Rome Statute. This example merely shows that Myanmar has been willing to enter into several other international treaties which explicitly adopted this concept of territorial jurisdiction. But, it says nothing about the scope of the territorial jurisdiction in the Rome Statute, neither can it imply that Myanmar should somehow be forced to subscribe to the ICC or delegate its territorial jurisdiction to the ICC within the same scope.

Even more noteworthy is the fact that the Pre-Trial Chamber I broadened the scope of jurisdiction beyond the crime of deportation.[29] According to the Chamber if it were established that at least one element of another crime

28 ICC, *Decision on the Prosecution's Request*, *supra note* 16, para. 67.

29 Gomez, p. 193.

within the jurisdiction of the Court is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to Article 12(2)(a) of the Statute.[30]

The Chamber then provided two examples. First, it pointed to the crime of persecution under Article 7(1)(h) of the Statute, because persecution must be committed in connection with any other crime within the jurisdiction of the Court. Therefore, if the deportation of the Rohingya people to Bangladesh (to a territory of a State Party) was connected to their persecution in Myanmar, the Court may also have jurisdiction over the acts of persecution, since an element of this crime, i.e., the cross-border transfer, takes place in the State Party's territory.[31]

In a similar way, the Chamber pointed to crimes against humanity set out in Article 7(1)(k) of the Statute which covers '*Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*' The Chamber noted that following the deportation, the Rohingya people allegedly live in Bangladesh in appalling conditions and they are supposedly compelled by the authorities of Myanmar to remain in Bangladesh.[32] According to the Chamber, the Court thus may have jurisdiction over the crime against humanity in form of other inhumane acts, since one element of the crime, i.e., unlawfully compelling the victims to remain outside their own country, takes place on the territory a State Party.

This means that the Court broadened the scope of the territorial jurisdiction. According to its interpretation the jurisdiction stretches beyond the crime of deportation in which some elements, by definition, take place in different states. This also applies to other crimes if in fact one of their elements occurs on the territory of a State Party to the ICC.[33]

The Pre-Trial Chamber I remained silent as to the possible jurisdiction over the crime of genocide. But, as it has been already suggested, under this approach nothing limits the Court from asserting jurisdiction also over the alleged genocide of the Rohingya people. Specifically, over the form under Article 6(c) of the Statute '*Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in* part'[34] It is true that if it was established the Rohingya people are forced to move to Bangladesh in order to

30 ICC, *Decision on the Prosecution's Request*, *supra note* 16, para. 74.

31 *Ibid*, para. 76.

32 *Ibid*, paras. 77 – 78.

33 Heller, Kevin John, 'The ICC Has Jurisdiction over One Form of Genocide in the Rohingya Situation', *OpinioJuris blog* (7 September 2018).

34 *Ibid*.

subject them to conditions of life that would lead to their destruction while in Bangladesh, at least one element of such crime would occur on the territory of a state party. Thus, the Pre-Trial Chamber I test would be satisfied.

4 The Pre-trial Chamber III Decision on the Authorization of an Investigation into the Situation in Bangladesh / Myanmar

Less than a year after the decision of the Pre-Trial Chamber I, on 4 July 2019, the OTP filed its request for authorization of an investigation pursuant to Article 15 of the Statute.[35] With regard the jurisdiction and interpretation of Article 12(2)(a) of the Statute the OTP merely refed to the Pre-Trial Chamber I decision of 6 September 2018 and its conclusion that the Court may assert jurisdiction according to Article 12(2)(a) of the Statute "*if at least one element of a crime within the jurisdiction the Court is committed on the territory of a State Party to the Statute.*"[36] The OTP did not discuss the issue of territorial jurisdiction further.

Following the Pre-Trial Chamber's I conclusion, the OTP did not limit its request to the crime of deportation, but asserted that there were reasonable grounds to believe that crimes against humanity under Article 7(1)(d) of the Statute, i.e., deportation, under Article 7(1)(k) of the Statute, i.e., other inhumane acts, and under Article 7(1)(h), i.e., persecution by means of deportation and violation of the right to return, were committed, and partly on the territory of Bangladesh.[37]

The investigation into the situation in Bangladesh was authorized by the Pre-Trial Chamber III decision on 14 November 2019.[38]

The Pre-Trial Chamber III devoted rather significant part of its decision to the issue of jurisdiction. The Chamber was of the view that the first crucial question to solve was the exact meaning of the term 'conduct' in Article 12(2)(a) of the Statute. The second question the Chamber was concerned with was whether under the Statute it was required that all conduct must take place in the territory of a State Party.[39]

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35 ICC, *Request for authorisation of an investigation pursuant to article 15*, ICC-01/19-7 04-07-2019 1/146 RH PT OTP (4 July 2019).

36 *Ibid*, para. 73.

37 ICC, *Request for authorisation*, *supra note* 35, para. 85.

38 ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* ICC-01/19-27 14-11-2019 1/58 NM PT, PTCh III (14 November 2019).

39 *Ibid*, para. 45.

Addressing the first question, i.e., the meaning of conduct, the Pre-Trial Chamber III used several methods of interpretation. Firstly, it mentioned that textually the word 'conduct' refers to some sort of behaviour.[40] Then it proceeded to the contextual interpretation and noticed that Article 12(2)(a) of the Statute adopts different terminology when it is referring to a State territory, and when referring to vessels and aircraft registered in a state. While in the first case, the Statute uses the term 'conduct', in the latter it refers to the term 'crime'. The Pre-Trial Chamber III also made the note that the *travaux préparatoires* provided no explanation, and from those reasons the Chamber took the view that "*the use of both 'conduct' and 'crime' in the language of Article 12(2)(a) of the Statute indicates that the term conduct, short of crime, is a reference to criminal conduct absent legal characterization*," because, according to the Chamber, there was no reason why the "*threshold for territorial jurisdiction would be different based on whether the location of the conduct/crime is on land or vessel/aircraft*."[41]

First, the approach of the Pre-Trial Chamber III seems to represent a more developed analysis in comparison to the work conducted by the Pre-Trial Chamber I. That is because the Pre-Trial Chamber III actually made an effort to answer the question of what was the content of Article 12(2)(a) of the Statute. This question had been entirely ignored by the previous Chamber which was satisfied with the fact that its proposed interpretation of the Statute would not violate international law.

However, the conclusion that the words 'conduct' and 'crime' in Article 12(2)(a) of the Statute must refer to the same threshold for territorial jurisdiction because there is no reason why the threshold would be different also sounds a bit too simplistic. The logical and equally valid outcome of the contextual interpretation could also be that there is no reason for using a different terminology in one article of the Statute. Because a different terminology should signify a different meaning.

Moreover, the Pre-Trial Chamber III continued further stating that since the word 'conduct' refers to conduct absent legal characterization, the term 'conduct' captures the *actus reus* element of a crime.[42] This partial conclusion seems to lack a proper explanation, but it certainly proved to be quite convenient and useful material for the Chamber's conclusion. It allowed the Chamber to shift the attention from interpreting the term 'conduct' to the interpretation of 'actus reus', and consequently, it was enabled to reach the conclusion that

40 *Ibid*, para. 46.
41 *Ibid*, para. 48.
42 *Ibid*, para. 49.

"*the actus reus element of conduct may encompass within its scope, the consequences of such conduct. For instance, the consequence of an act of killing is that the victim dies. Both facts concerning the act and the consequence* (*i.e., the killing and the death*) *are required to be established.*"[43]

In the context of the Rohingya people and the crime of deportation, the Chamber was able to state that while the coercive acts of deportation took place in Myanmar, the consequence, i.e., the forced crossing of boarders, occurred in Bangladesh. And because, according to the Chamber, the consequence constituted part of the *actus reus*, which was equated with the term 'conduct' the Chamber could have concluded that part of the *actus reus* of the crime of deportation occurred in the territory of Bangladesh, i.e., in the territory of State Party.[44]

While the decision of the Pre-Trial Chamber III reflects a substantially deeper effort to analyse the content of the Court's territorial jurisdiction, it also leaves significant unanswered questions. The cornerstone of the Chamber's finding is the equation between the terms 'conduct' and 'actus reus.' It is this finding which made it possible for the Chamber to include 'consequences' of conduct into the scope of Article 12(2)(a) of the Statute. And, while it may be true that a consequence constitutes part of the *actus reus* of certain crimes, it may not be automatically true that a consequence of an act also constitutes a part of 'conduct'. Regardless of the significance of its decision, the proper explanation of this conflation is missing.

And more importantly, the Statute itself provides at least one example that speaks against such an equation between the terms conduct and *actus reus*. Article 30(2) of the Statute dealing with the mental element of a crime provides in para. 2 as follows:

> 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. (emphasis added).

Thus, the Statute obviously defines intent in relation to conduct and then separately in relation to consequence. This may represent an indication that consequence does not constitute a part of conduct, but that conduct and

43 *Ibid*, para. 50.
44 *Ibid*, paras. 50 – 53.

consequence do represent separate elements of the material elements of crime. Accordingly, this would mean that while a consequence is part of an *actus reus* (at least for some crimes e.g., killing where the death, as a consequence, is required), it is not an element of conduct itself. The term conduct could then refer to acts or omissions, but not to consequences.

The Pre-Trial Chamber III took Article 30(2) of the Statute into account to support its conclusion that term conduct is understood to refer to conduct absent legal characterization.[45] Unfortunately, the Chamber did not discuss Article 30(2) of the Statute at all while reaching its most significant finding that a conduct means an *actus reus* of the crime. The Statute itself does not contain a definition of the material element, and according to the commentators the definition was not incorporated because the delegations were unable to reach agreement.[46] Considering the difficulties of State Parties to agree on the definition of *actus reus* and taking into account the wording of Article 30(2) of the Statute, the finding of the Pre-Trial Chamber III seems to be achieved with a certain lightness.

5 Admissibility

Therefore, the Court confirmed that the ICC has jurisdiction over the Rohingya situation. However, in November 2019, the Burmese Rohingya Organization UK (Brouk) invoked the principle of universal jurisdiction and filed a criminal complaint in Argentina against those who may be criminally responsible for the crimes of genocide and crimes against humanity, committed against the Rohingya community in the territory of Myanmar between 2012 – 2018.[47] Although, the complaint had been initially rejected, in June 2020, the Brouk confirmed that Argentina's Federal Criminal Chamber No. 1 accepted its petition.[48]

Thus, the potential development of the criminal investigation and prosecution in Argentina can amount to the inadmissibility of the future case before

45 *Ibid*, footnote 91.

46 Saland, P., International Criminal Law Principles, in Lee, R.S.K., *The International Criminal Court: the Making of the Rome Statute – issues, negotiations, results* (The Hague/Boston: Kluwer Law International, 1999), p. 205.

47 For the criminal complaint in English see URL <https://burmacampaign.org.uk/media/Complaint-File.pdf>.

48 URL <https://www.aa.com.tr/en/americas/argentinian-court-decision-brings-hope-for-rohingya/1861967>.

the ICC in accordance with principle of complementarity.[49] This principle is enshrined in the tenth paragraph of the Rome Statute's Preamble, which provides that *"the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."* Similarly, Article 1 of the Statute declares that the Court *"shall be complementary to national criminal jurisdictions."* The complementarity of the ICC should have reflected the idea that the Court was considered to be an institution of last resort which was only supposed to actively step in if states failed to do so.[50]

Although the treatment of the principle by the Court has showed little deference towards the original expectation based on primacy of the states' jurisdiction,[51] the active investigation or prosecution in Argentina may still lead to inadmissibility of the case under Article 17(1)(a) of the Statute.

The admissibility will mostly depend on whether the State and the ICC shall investigate or prosecute the same person for substantially the same conduct.[52] The question whether this test shall be met cannot be answered at this moment when no case has emerged yet. But, since both investigations may target the political leaders (and therefore the same persons), a reasonable communication from the OTP with Argentinian organs seems to be highly advisable. Otherwise, the ICC may spend its financial resources and capacities on potentially inadmissible case and such result would be hardly appreciated by the State Parties.

6 Conclusion

The ICC thus confirmed that it has jurisdiction over the situation in Bangladesh/Myanmar. As it was shown the jurisdiction was initially connected to the deportation as a crime against humanity. However, it was later broadened to any crime within the jurisdiction of the Court committed at least partly on the territory of Bangladesh as a State Party to the Rome Statute.

49 URL <http://opiniojuris.org/2019/12/23/crimes-against-the-rohingya-icc-jurisdiction-universal-jurisdiction-in-argentina-and-the-principle-of-complementarity/>.

50 Urbanová, Kristýna, The Principle of Complementarity in Practice, in Šturma, Pavel (ed.) *The Rome Statute of the ICC at Its Twentieth Anniversary, Achievements and Perspectives* (Leiden/Boston: Brill/Nijhoff 2019), p. 164.

51 *Ibid*, p. 175.

52 The Appeals Chamber, *Ruto*, *supra note* 16, para. 41; The Appeals Chamber, *Kenyatta*, *supra note* 14, para. 40.

At the heart of the applied jurisdictional test is the conflation of the terms 'conduct' and '*actus reus*'. This equation allowed for the Chamber to include 'consequences' of conduct into the scope of Article 12(2)(a) of the Statute. While this construction has also raised some doubts over the persuasiveness of the applied jurisdictional threshold, it allowed the Court to assert jurisdiction over the situation and currently has not been challenged by subsequent case law.

While the confirmation of jurisdiction over the situation in Bangladesh/Myanmar could have provided the victims of the crimes in Myanmar with some hope, the applied test for territorial jurisdiction has also opened the doors, and quite widely, for the application of territorial jurisdiction for crimes which are primarily, but not entirely, committed on the territory of a non-State Party to the Rome Statute.

For example, it is conceivable that it could serve as a basis for establishing jurisdiction of the ICC over alleged crimes committed in the territory of Palestine. But the impact of the outlined decisions can be much more significant and broader. It could also lead for the Court's jurisdiction for the crimes primarily occurring on the territory of non-State Parties when the victims flee to a State Party's territory. It would be sufficient to establish that a consequence is still occurring on the territory of the State Party. With the current migrant situation (not only) in Europe this approach could significantly facilitate the ICC to establish its jurisdiction for crimes primarily committed in a number of non-State Parties, such as, for example, Syria. At the same time this can certainly lead to some controversies and backlash from non-State Parties which can see the described jurisdictional test as a threat of their sovereignty.

PART 5

Genocide Internationally and Domestically

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CHAPTER 12

The Czech (Czechoslovak) Experience with the Genocide Convention

Ondřej Svaček

1 Introduction

Until the adoption of the Genocide Convention, genocide, the crime of crimes, was rather a crime without name in international law, as famously noticed by W. Churchill. In 2020, the Convention comes to a respectable age of seventy, gradually extending the number of its State Parties (152 as of 30 November 2020), never facing a downgrade in that respect though created as non-perpetual treaty, enjoying coexistence with its customary counterpart, which has in its prohibitive part attained the status of peremptory norm, inexorably penetrating into domestic legal orders, and giving rise to a discrete field of study that attracts attention of scholars from all over the world.[1] This development must be simply applauded.

The seventieth anniversary of the Genocide Convention provides for an opportunity to assess the Czechoslovak and later the Czech experience with the law of genocide. Through the focus on Czechoslovakia, the contribution offers insight into the process of the creation of the Convention and reveals that the UN became a battleground of ideological confrontation between the Soviet Bloc and the West in which Czechoslovakia could have hardly played anything other than a completely subordinate role. It further refers to changes in this mandated position brought about by the end of the Cold War and reflected, among others, by the support of the International Criminal Court (endowed - among others - with jurisdiction over the crime of genocide) or withdrawal of the reservation to Article IX of the Convention. Finally, the contribution explores the relationship between international law and domestic (Czechoslovak and Czech) law of genocide.

To begin, the first chapter will focus on the Czechoslovak contribution to the discussion during the 1948 session of the UN GA Sixth Committee,

1 This latest aspect is projected into a massive scholarly production in the field. By the way of example, with the assistance of the catalogue of the Peace Palace Library, the keyword "genocide" contained in the title of a publication generates 6,306 results (as of 26 November 2020).

concerning the (second) Draft Convention prepared by the *ad hoc* committee of the United Nations Economic and Social Council (ECOSOC). The author's aim is to assess the Czechoslovak trace in *travaux préparatoires* and explain it in a wider historical context - in February 1948, the Communist *coup d'état* took place which firmly attached Czechoslovakia to the Soviet bloc what, as will be seen, unambiguously predetermined positions and preferences taken by the Czechoslovak delegation. The chapter also focuses on the related issue of reservations attached to the Convention at the moment of its signing by Czechoslovakia. The next chapter analyses and interprets the domestic legislation implementing the Convention and assesses its compatibility with international regulation. The final chapter also focuses on examples of the possible application, and even the attempted use of domestic implementing legislation – one has to speak only about attempted or possible cases as there has been no real case until recently where this legislation would be tested in practice.

This chapter therefore does not address one particular topic; it rather refers to various issues that have one common denominator: Czechoslovakia or the Czech Republic.

2 In the Shade of Big Brother – The Czechoslovak Contribution to Preparatory Works

The Genocide Convention was born mainly throughout the course of discussions over the second Draft Convention prepared by the ECOSOC (its Ad Hoc Committee on Genocide composed of the representatives of seven states) that took place before the Sixth Committee from 30 September 1948 (63rd meeting) to 9 November 1948 (110th meeting), followed by discussion over the text (the third Draft Convention) prepared by the Drafting Committee, composed of representatives of 13 states, including Czechoslovakia, between 29 November 1948 (128th meeting) and 2 December 1948 (134th meeting).[2] The chapter therefore focuses rightly on the discussions in the Sixth Committee as they

2 The first Draft Convention was adopted in June 1947 by the UN Secretary-General and was prepared with help of three experts - H. D. de Vabres, V. Pella, and R. Lemkin. *Cf.* Abtahi, Hirad, Webb, Philippa, *The Genocide Convention. The Travaux Préparatoires* (Leiden, Boston: Martinus Nijhoff, 2008), pp. 209–281. (*Travaux Préparatoires*). For the second draft prepared by the ECOSOC (the Ad Hoc Committee on Genocide) *cf. Travaux Préparatoires*, pp. 1161–1166. For the third draft prepared by the Sixth Committee's Drafting Committee *cf. ibid*, pp. 2011–2016.

were determinative for the drafting of the fourth and final Draft Convention which was unanimously adopted, without any amendments,[3] and approved at the historical 179th plenary meeting of the GA in Paris on 9 December 1948 and became the authentic and definitive text of the Genocide Convention.[4] The presented chapter does not inquire into documents and materials predating the 1948 meetings of the Sixth Committee, even though some interesting Czechoslovak traces are to be found here.[5]

It should be stressed from the very outset that the statements by the Czechoslovak delegation presented during the negotiation in the Sixth Committee reveal almost absolute conformity with the positions taken by the USSR. This aspect, defining and characterizing the very essence of the Czechoslovak participation in the negotiation process, is hardly surprising, given that so called people's democracies or satellites became subservient followers of the Soviet Union. As aptly described by A. Weiss-Wendt, "*during the General Assembly sessions,* [the socialist countries] *eagerly sought out a Soviet viewpoint on issues of substance so as to synchronize their positions* [...] *none of the socialist countries' delegations could run an independent agenda, let alone advance a position unsupported by Moscow*."[6]

This factor is best evidenced by rollcall voting in the Sixth Committee and the subsequent sessions of the GA. The preparatory works reveal that there were 14 instances of roll-call voting in the Sixth Committee and five such voting in the GA: the coincidence between Czechoslovak and Soviet position achieves 94.7 percent and shows only one instance of discrepancy, furthermore of a "soft character".[7] This proportion is more striking if comparison is

3 All Soviet proposals were rejected by the GA - *cf. infra*.

4 *Cf.* A/RES/3/260 A.

5 Enough is to mention role of J. Papánek, one of the 14 authors of the UN Charter, who served as President of the ECOSOC during its Fifth Session in 1947. He is remembered for his courageous stance at the UN during the 1948 communist *coup d'etat* in Czechoslovakia. On 17 March 1948, Papánek addressed the SC, stressing that changes occurred not due to a change of the will of the people, as it was claimed by Communists, but due to the violence of the Soviet supported Communist minority. *Cf.* UN Audiovisual Library. *268th and 272nd Meetings of Security Council*, available online at URL <https://www.unmultimedia.org/avlibrary/asset/8980/898008/> [last visited 27 November 2020].

6 Weiss-Wendt, Anton, *The Soviet Union and Gutting of the UN Genocide Convention* (Madison: The University of Wisconsin Press, 2017), p. 28.

7 This example concerns voting taken on the 99th meeting of the Sixth Committee on the joint draft resolution of the Netherlands and Iran [A/C.6/271] which invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of individuals charged with genocide. The USSR voted against while Czechoslovakia abstained. This draft resolution was later approved by the GA [A/RES/3/260 B]. *Cf. Travaux Préparatoires*, pp. 1708 and 2091.

made as between the US and Czechoslovakia where the coincidence amounts to zero.[8] Obviously, the position of the US and the USSR manifests the same zero result.[9]

An excerpt of the proposed invitation addressed to the ILC concerning consideration of the possible creation of an international criminal judicial organ endowed with jurisdiction over the crime of genocide, Czechoslovakia espoused exactly the same positions as the USSR. Delegations of both of these socialist states voted hand in hand against the retention of the political group in the list of groups protected by the Convention; against the exclusion of cultural genocide from the scope of the Convention, against the US amendment proposing the deletion of incitement to commit genocide; against the deletion of words originally included in Article III(c) of the Convention "whether such incitement be successful or not"; in favor of the inclusion in the Convention of provisions concerning the punishment of acts preparatory to genocide; in favor of the Soviet amendment adding to Article V a second paragraph providing that command of the law or superior orders shall not justify genocide; against the Syrian amendment to Article V proposing that it should be extended to include *de facto* heads of State and persons having usurped authority; in favor of the deletion of words "or by a competent international tribunal" from Article VII;[10] against the proposal of Belgium for the deletion of Article VIII; in favor of the amendment of the USSR, France, and Iran to Article VIII;[11] in favor of the proposal to reopen consideration of Article VIII; in favor of the preamble amendment of the USSR stating that genocide is organically bound up with Fascism, Nazism, and other similar race theories; abstained from the vote to the proposal to delete the mention of political groups from the enumeration contained in Article II; voted against reconsideration of Article VI (with respect to proposed reference to international penal tribunal); voted against the related amendment to Article VI jointly proposed by the US, France, and

8 Le Blanc, Lawrence J., *The United States and the Genocide Convention* (Durham, London: Duke University Press, 1991), p. 77.

9 *Ibid.*

10 Numbering of articles refers here to the second Draft Convention prepared by the ECOSOC. In the third draft and therefore also in the final text, the issue is covered by Article VI. This change in numbering is caused by the deletion of former Article III concerning cultural genocide.

11 The High Contracting Parties may call the attention of the Security Council or, if necessary, of the General Assembly to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security, in order that the Security Council may take such measures as it may deem necessary to stop that threat.

Belgium; and most importantly, abstained from the final vote on the draft resolution and the annexed draft convention to be presented to the GA.[12]

The Czechoslovak delegation entered the discussion in the Sixth Committee altogether 27 times. Its comments concerned various issues, starting from the opening contribution by Prof. V. Procházka,[13] continuing with statements on the need to deal firstly with drafting of the preamble which should stress the relationship between genocide and Nazi-Fascist ideology; the preference to delete Article I and transfer its contents to the preamble;[14] support in favour of retaining a statement of motives in the definition of genocide; further explanations as to the scope of the Greek amendment on the transfer of children; the inclusion of cultural genocide; retention of incitement to commit genocide; the penalization and punishing of preparatory acts; the impermissibility to invoke command of the law or superior orders; the inappropriateness to

12 *Travaux Préparatoires*, p. 1412 (A/C.6/SR.75), p. 1518 (A/C.6/SR.83), p. 1547 (A/C.6/SR.85), p. 1551 (A/C.6/SR.85), p. 1567 (A/C.6/SR.86), p. 1607 (A/C.6/SR.92), p. 1664 (A/C.6/SR.96), p. 1697 (A/C.6/SR.98), p. 1744 (A/C.6/SR.102), p. 1753 (A/C.6/SR.102), p. 1757 (A/C.6/SR.102), p. 1863 (A/C.6/SR.128), p. 1870 (A/C.6/SR.128), p. 1879 (A/C.6/SR.129), p. 1897 (A/C.6/SR.130), p. 1920 (A/C.6/SR.132). The same agreement between the USSR and Czechoslovakia was shown during the voting in the GA where - at the last possible occasion - the USSR unsuccessfully tried to push through its previously rejected proposals – *cf.* voting on amendment consisting in the addition of a new Article III on cultural genocide, pp. 2080–2081 (A/PV.179), voting on amendment consisting in the deletion from Article VI of the words "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction", pp. 2080–2081 (A/PV.179), voting on the amendment to Article X on obligation to disband and prohibit organizations which have participated in acts of genocide, p. 2081 (A/PV.179), voting on amendment to Article XII providing that the Convention shall extend equally to all territories in regard to which a State performs the functions of the governing and administering authority, pp. 2081–2082 (A/PV.179). Final voting on Resolution A with annexed text of the Convention was unanimous.

13 *Ibid*, pp. 1322–1323 (A/C.6/SR.66). In this opening address, prof. Procházka - member of the Czechoslovak parliament, founding father of the Communist constitution adopted in 1948, ambassador to the US in 1951–1952, and later the president of Charles University in Prague - did not forget to support criticism against the (second) Draft Convention presented by the USSR during the 64th meeting, and stressed it is important to connect convention with the historical events, introduce into domestic legislation not only provisions for the suppression of the crime but also for its prevention – emphasizing illegal character of propaganda – and to state explicitly that signatory States were responsible to the UN and particularly to the SC for implementing the convention.

14 This position fully reflected amendment proposed by the USSR. Nevertheless, the preparatory works reveal that whereas the USSR voted against Article I, Czechoslovakia only abstained – *cf.* statement of J. Žourek, the Czechoslovak delegate who later served as member of the ILC and special rapporteur on the issue of *Consular intercourse and immunities - Travaux Préparatoires*, pp. 1352–1353.

consider genocide to be a non-political crime only for the purpose of extradition; the discrepancy between the English and French text of Article VI concerning imposition of effective penalties for the persons guilty of genocide; its mistrust to creation of the International Criminal Court; a role of the SC in implementation of the Convention which was expected to be more effective than supervision through the International Court of Justice (ICJ); the disbanding the groups or organizations which have participated in acts of genocide as effective preventive measure; the impossibility to exempt territories administered by colonial powers from the provisions of the Convention; the removal of the reference to the Nurnberg judgment contained in preamble; the connection between genocide and theory of racial superiority which should be mentioned in the preamble; the need to discuss Article VI fully once the vote in favour of its reconsideration was taken; a critique concerning inclusion in the text of a reference to an international penal tribunal; the dangers inherent in the Swedish proposal on interpretation of Article VI;[15] procedural matters; and ultimately concluding with an explanation of its reasons for abstaining from the final vote.[16] Needless to say, every single statement fully complied with the official positions taken by the USSR, which were often explicitly mentioned and referred to by the Czechoslovak representatives.

Two such positions, the one concerning jurisdiction *ratione temporis* and the other dealing with the creation of the international criminal tribunal, deserve a brief look here.

2.1 Solving the Puzzle of Jurisdiction *Ratione Temporis*

In the opening statement of the Czechoslovak delegation presented during the 66th meeting of the Sixth Committee, Prof. Procházka stressed that,

> [s]uch a convention, if it were to be really effective, should not be based on abstractions nor drafted in vague and general terms, but should include

15 According to Sweden, Article VI should not be interpreted as depriving a State of jurisdiction in the case of crimes committed against its nationals outside national territory – *cf.* A/C.6/313.

16 *Ibid*, p. 1331 (A/C.6/SR.66), p. 1345 (A/C.6/SR.68), pp. 1423–1424 (A/C.6/SR.76), pp. 1496–1497 (A/C.6/SR.82), p. 1498 (A/C.6/SR.82), p. 1501 (A/C.6/SR.82), p. 1517 (A/C.6/SR.83), pp. 1537–1538 (A/C.6/SR.85), pp. 1562–1563 (A/C.6/SR.86), pp. 1600–1601 (A/C.6/SR.92), p. 1632 (A/C.6/SR.94), pp. 1669–1670 (A/C.6/SR.97), pp. 1690–1691 (A/C.6/SR.98), pp. 1740–1741 (A/C.6/SR.101), pp. 1773–1774 (A/C.6/SR.103), pp. 1809–1810 (A/C.6/SR.106), pp. 1818–1819 (A/C.6/SR.107), pp. 1847–1848 (A/C.6/SR.110), p. 1853 (A/C.6/SR.110), p. 1880 (A/C.6/SR.129), p. 1883 (A/C.6/SR.130), p. 1900 (A/C.6/SR.131), pp. 1915, 1919 (A/C.6/SR.132), p. 1931 (A/C.6/SR.133).

> express provisions asserting the peoples' desire to punish all those who, in the future, might be tempted to repeat the appalling crimes which had been committed.[17]

This statement with its emphasis on punishment of future crimes turned out to be very significant for the discussion concerning the temporal scope of the Convention. The practical issue at stake here is whether a state party to the Convention is bound to punish acts of genocide that occurred before that state became bound by the Convention, respectively whether there is therefore an obligation to enact retroactive penal legislation.

Jurisdictional reach of the Convention was extensively discussed in *Croatia v. Serbia* before the ICJ. The Court concluded that whereas a treaty obligation that requires a state to prevent something from happening cannot logically apply to events that occurred prior to the date on which that state became bound by that obligation, there is no similar logical barrier to a treaty imposing upon a state an obligation to punish acts which took place before that treaty came into force for that state.[18] Nevertheless, with respect to the Genocide Convention, it ruled out that its drafters would have intended to require states to enact retroactive legislation. According to the ICJ,

> the negotiating history of the Convention also suggests that the duty to punish acts of genocide, like the other substantive provisions of the Convention, was intended to apply to acts taking place in the future and not to be applicable to those which had occurred during the Second World War or at other times in the past.[19]

To support its argument, the ICJ then referred directly to the statement made by Prof. Procházka.

This trace is therefore very significant as it found its way into the case law of the ICJ, where it was employed in the sense of Article 32 of the Vienna Convention on the Law of Treaties (VCLT) as a subsidiary argument leading to the conclusion that the substantive provisions of the Convention do not impose obligations upon a state in relation to acts that occurred before that state became bound by the Convention.

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17 *Cf. supra*.

18 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015, p. 49, paras. 95–96.

19 *Ibid*, para. 97.

At the same time, it is fair to mention that the temporal jurisdictional scope of the Convention might get complicated (and extended) in situations where new states are created, as the issue of succession to state responsibility enters the floor here. It was exactly this particular question dividing the ICJ in *Croatia v. Serbia*, which by 11 to 6 majority found that it has jurisdiction to examine the responsibility of Serbia for genocide allegedly committed by the Socialist Federal Republic of Yugoslavia (that is before 27 April 1992 when the Federal Republic of Yugoslavia became a party to the Convention) by virtue of succession to state responsibility.[20]

2.2 *International Penal Tribunal*

The discussion concerning the possibility of the prosecution of persons charged with genocide before international penal tribunal turned to be a symptomatic object of contention between the USSR and the US.

As indicated before, this issue experienced a turbulent evolution as it was repeatedly brought back to agenda. The possibility of the creation of international court was envisaged both in the first Draft Convention (Article X) and the second Draft Convention (Article VII). The third draft prepared by the Drafting Committee, as a follow-up to the previous general debate in the Sixth Committee, included only the possibility of prosecution before domestic courts (on the basis of territoriality principle).[21] The reasons for the deletion of an international tribunal were summarized by the British delegate G. Fitzmaurice who explained that "*he had voted for deletion not because he was opposed to an international tribunal in principle, but because an international criminal court did not exist and because it was impossible to vote for an organization as yet non-existent and whose powers were unknown.*"[22] Czechoslovakia voted against the inclusion on similar grounds, stressing that states would have to agree to submit to the jurisdiction of such an international criminal tribunal to be established only by means of a separate international convention and also pointing to practical problems with extradition and cooperation on the part of states.[23] The Soviet delegation was even stricter and argued that international jurisdiction was a violation of the sovereign right of every state to judge crimes committed in its territory.[24]

20 *Ibid*, para. 117.

21 At the 98th meeting, the Sixth Committee decided by 23 votes to 19, with 3 abstentions, to adopt the Soviet amendment and to delete the words "or by a competent international tribunal" from Article VII.

22 *Travaux Préparatoires*, p. 1699.

23 *Ibid*, pp. 1690–1691.

24 *Ibid*, p. 1695.

At the later stage, during the 129th meeting of the Sixth Committee, the issue arose again, as the US proposed amendment to Article VI consisting of the addition of the words at the end of this article "or by a competent international penal tribunal subject to the acceptance at a later date by the contracting party concerned of its jurisdiction".[25] Obviously, the position of the USSR was very critical once again: Soviet delegates argued that the establishment or engagement of the international penal tribunal had already been discussed at length and the Committee had settled the question by referring it to the ILC. Nevertheless, the proposal for reconsideration of Article VI was adopted despite the Soviet opposition by 33 votes in favour to 9 against (including Czechoslovakia and the USSR), with 6 abstentions.

At the next meeting of the Sixth Committee, the Czechoslovak delegate, Z. Augenthaler, emphasized that his country will vote against the amendment as it is not possible to insert into the Convention reference to body which not yet exists. Further, he interpreted usage of the conjunction "or" in the proposed amendment to possibly mean that the criminals have the alternative of choosing whether they will be prosecuted domestically or internationally. Czechoslovakia also opined that reference to international criminal tribunal in the text of the Convention expresses mistrust to domestic courts.[26] The amendment was adopted by 29 votes to 9 (including Czechoslovakia and the USSR), with 5 abstentions. As it was already mentioned, the possibility of prosecution of genocide before international penal tribunal remained part of the final text (Article VI) as the last Soviet attempt to its removal was rejected by the GA.

All the arguments put forward by Czechoslovakia directed against any mention in the Convention of an international penal tribunal showed nothing but mistrust towards international judicial institutions which were - in the line with the Soviet stance - perceived as threats to national sovereignty, all the more so if the exercise of criminal jurisdiction was at stake. Fortunately, this mandated and pre-determined mistrust disappeared with the end of the Cold War. It is enough to mention that the Czech Republic supported the creation

25 The US mentioned two factors that led to proposal of this amendment. The first factor was that a number of representatives had voted against any mention of an international penal tribunal because of the wide scope of protection given to political groups. The US called attention to the fact that at the 128th meeting it had been decided to delete all mention of political groups from the Convention. Secondly, other delegations voted against, because they had not wished to bind themselves before the statute and powers of such a tribunal were known. The US amendment took these latter anxieties into account. *Cf. ibid*, p. 1877.

26 *Ibid*, p. 1883.

of the International Criminal Court (ICC) (endowed with the jurisdiction over the crime of genocide), forming part of the group of like-minded states which advanced the obligatory character of the ICC's jurisdiction and possibility of *proprio motu* action by the ICC's Prosecutor. The Czech Republic became a State Party to the Rome Statute in 2009.[27]

3 Genocide Convention and Czechoslovakia/Czech Republic – International Legal Aspects

Czechoslovakia signed the Convention on 28 December 1949 by the hands of the ambassador to the US, Prof. V. Outrata. Prior to the signature, Czechoslovakia made a statement introducing reservations to Article IX and Article XII.[28] These reservations were also confirmed at the time of ratification on 21 December 1950.[29] Attaching reservations to the Convention, which contains no clause permitting reservations, became a common practice. Only before its entry into force (12 January 1951) were the reservations by Philippines, Bulgaria, Romania, and Poland also submitted. These reservations were objected to by Australia,

27 Delays with ratification of the Rome Statute were caused predominantly by unclear position of the Rome Statute in the Czech legal order and its compatibility with the constitutional order. These problems were overcome by qualification of the Rome Statute as an international treaty under Article 10a of the Czech Constitution which stands for *leges speciales* in relation to potentially incompatible provisions of the constitutional order. *Cf.* Svaček, Ondřej, Mezinárodní trestní soud (2005–2017) [International Criminal Court (2005–2017)] (Praha: C. H. Beck, 2017), p. 9.

28 V. Outrata was the first communist ambassador to the United States where he served in years 1948–1951. Later, he held the position of the head of Dpt. of international law at Charles University, Faculty of Law.

29 UN, *Treaty Series*, vol. 78, 1951, pp. 303, 316. The same reservations were presented also by the USSR, Byelorussian SSR, and Ukrainian SSR. Reservation to Article IX was submitted also by the US. Czechoslovakia made following statements: As regards Article IX: Czechoslovakia does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, Czechoslovakia will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

As regards Article XII: Czechoslovakia declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories.

Ecuador, and Guatemala. The assessment of the legality of the reservations and the legal effects of objections was an issue of primary importance for the Secretary-General of the UN, as a depositary to the Convention, who must have determined as to whether or not such reserving states were actually a party to the Convention. For this reason, the Secretary-General reported the GA, which later (20 November 1950) decided to request an advisory opinion from the ICJ.

The first judicial application of the Convention therefore concerned the *Reservation to the Genocide Convention* case. In its written statement, Czechoslovakia advanced the argument of its sovereignty and claimed that because Article 1(3) of the UN Charter provides that it is one of the purposes of the UN to achieve international co-operation in the social and humanitarian field, and to promote and encourage respect for human rights and fundamental freedoms, it would be contrary to this purpose to prevent countries from becoming parties to such a convention as the Genocide Convention because other states objected to the reservations which those countries wished to make. Czechoslovakia criticized the restrictive approach to reservations, according to which a state wishing to make a reservation had to obtain the consent of all the other parties to the treaty, as it would mean that a single state objecting to a submitted reservation was entitled to exclude the other state from participation in the multilateral international treaty.[30]

In its Advisory Opinion, rendered on 28 May 1951, the ICJ famously endorsed a permissive regime for reservations, preferring wider participation of states to extent of their obligations, and departed from the restrictive approach hitherto followed by the Secretary-General of the UN (and previously the League of Nations). The Court held that "*a state which has made and maintained a reservation which has been objected to by one or more parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention.*"[31] The Court's finding on this point was later codified in Article 19 (c) of the VCLT. Compatibility, in the Court's opinion, could be decided by states individually since it was noted that if a party to the Convention objects to a reservation which it considers incompatible with the object and purpose of the Convention, it can consider that the reserving state is not a party to the Convention, although this situation would be confined to the bilateral relationship between the reserving and the objecting state.[32] Finally, on the third question, the Court said an objection to

30 ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, Written Statements, pp. 286–287.

31 ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 29.

32 *Ibid*, p. 26.

a reservation made by a signatory state that had not yet ratified the Convention could have legal effect with regard to the reserving state only upon ratification. In *Armed Activities on the Territory of the Congo,* the ICJ confirmed that a reservation to Article IX, which is meant to exclude a particular method of settling a dispute relating to the interpretation and application or fulfilment of the Convention, is not to be regarded as being incompatible with the object and purpose of the Convention.[33]

The reservation concerning Article IX was withdrawn by Czechoslovakia only on 26 April 1991, effectuating the acceptance of the compulsory jurisdiction of the ICJ in relation to the Genocide Convention and abandoning the axiom that the international judiciary is a bourgeois relic biased against socialistic states, which dominated the Czechoslovak doctrine and practice of foreign policy in between 1948–1989.[34] The USSR made the same decision in 1989.[35]

33 ICJ, *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006, p. 6, para. 67.

34 *Cf.* Malenovský, Jiří, *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. [Public International Law: General Part and Relation to Other Legal Systems] (Brno, Plzeň: Doplněk, Aleš Čeněk, 2014), p. 430. This positive trend towards acceptance of international judiciary and quasi-judiciary is further evidenced by accession of Czechoslovakia to the Optional protocol to the ICCPR and the European Convention on Human Rights in 1991 and 1992 which is associated with acceptance of jurisdiction of the Human Rights Committee, European Commission of Human Rights, and the European Court of Human Rights. *Cf.* also C.N.98.1991.TREATIES-1 (Depositary Notification). It is interesting to note that the withdrawal did not concern reservation related to Article XII which is therefore still effective. It might be explained by the fact that precise legal significance of this reservation was unclear from the very beginning. As commented by W. Schabas, use of the word *should* in this statements (unlike the word *shall* in the text of the rejected Soviet amendment to Article XII) indicates that the reserving States did not consider the Convention to be automatically applicable to non-self-governing territories, in the absence of a declaration. It is possible to treat these "reservations" as mere political statements that do not affect the rights and obligations arising from the Convention and that therefore do not require any subsequent withdrawal. *Cf.* Schabas, William, *Genocide in International Law. The Crime of Crimes* (Cambridge: CUP, 2009), p. 608. Moreover, even if these statements were considered as reservations in legal terms, given the gradual shortening of the list of non-self-governing territories and extension of the Convention's application through unilateral declarations (such as that of the UK issued in 1970), their practical effect significantly diminished.

35 *Cf.* Schweisfurth, Theodor, 'The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Convention', *European Journal of International Law,* 1990, vol. 2, issue 1, pp. 110–117.

4 Genocide Convention and Czechoslovakia/Czech Republic – Domestic Legal Aspects

Under the domestic procedure contained in the 1948 Constitution, ratification of the Convention required consent to be given by the National Assembly.[36] Parliamentary Committee on Foreign Affairs and Committee of Constitutional and Legal Affairs recommended giving consent to ratification that should have been nevertheless subjected to both the aforementioned reservations presented by Czechoslovakia prior to signing the Convention. The Convention was discussed during the 41st meeting of the National Assembly on 22 February 1950. The Convention was introduced by no one else than V. Procházka who did not forget to mention some "*serious flaws*"[37] in the treaty, including the failure to organically bind the Convention with Fascism and Nazism, and prohibit organizations which have participated in acts of genocide. Nevertheless, it was mentioned that "*despite all these imperfections, we consider basic principles of the Convention, basically found on ideas promulgated by the Soviet delegation, to be correct.*"[38] The subservient approach towards the USSR - without any surprise – also resonated in the Czechoslovak Parliament. Without any further discussion, the National Assembly granted its consent to ratification of the Convention. President K. Gottwald ratified the treaty domestically on 24 October 1950.

Given the fact that publication of international treaties was not mandatory in Czechoslovakia between 1948–1989, during which period international treaties were domestically promulgated - once it was necessary or purposeful - in the form of a mere decree (sic!) issued by the Ministry of Foreign Affairs,[39] and given that according to the then prevailing opinion such promulgation had only an informative meaning,[40] it was possible to postpone official domestic publication of the Convention to 1955.[41]

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36 Under Section 74(1)(1) of the 1948 Constitution, prior to the ratification, political treaties […] and treaties whose implementation necessitates adoption of statute, requires consent of the National Assembly.

37 *Cf.* 1948–1954 Národní shromáždění republiky Československé. *Společná česko-slovenská digitální parlamentní knihovna: Dokumenty českého a slovenského parlamentu*, available online at URL <https://www.psp.cz/eknih/1948ns/stenprot/041schuz/s041003.htm> [last visited 29 November 2020].

38 *Ibid.*

39 *Cf.* Czechoslovakia, Act No. 24/1948 Coll., on collections of laws, Section 1(e). Promulgation in the form of a sub-statutory act guaranteed that in the case of any normative conflict between international and domestic statutory regulation, the latter must have prevailed.

40 Malenovský, *supra note* 34, p. 429.

41 *Cf.* Czechoslovakia, Decree of Minister of Foreign Affairs No. 32/1955 Coll.

From the moment the Convention entered into force for Czechoslovakia, which corresponds with the date of objective validity of the Convention (12 January 1951), Czechoslovakia was obliged to implement the Convention into its domestic legal order. This obligation is specified in Article V of the Convention which speaks about enactment, in accordance with respective constitutions, the necessary legislation to give effect to the provisions of this treaty. Such legislation was nevertheless adopted, but only in 1961 (with effect from 1962) causing that for more than eleven years, Czechoslovakia acted in breach of its Article V obligation. This is in a stark contradiction with heated statements made during the negotiation in the Sixth Committee where the Czechoslovak delegation stressed the importance of the introduction into domestic legislation the necessary provisions for the suppression of the crime of genocide.[42]

The first definition of genocide introduced into the domestic legal order by Section 259 of the 1961 Penal Code (Act No. 140/1961 Sb.) complied with the definition provided in Article II of the Convention, with only slight differences that can be overcome by interpretation referring to the case law of international criminal tribunals.[43] The current regulation contained in Section 400 of the 2009 Penal Code (Act No. 40/2009 Sb.) employs the principle of gold-plating and stipulates a definition that is wider then its international counterpart.[44] In this respect, it is enough to say that the implementation technique used by the Czech legislature is not *per se* unlawful, as there is no rule in international law that would prohibit it. At the same time, it should not be forgotten that where broad domestic definitions of genocide are connected with exercise of universal jurisdiction, such approach might give rise to valid protests by affected states that there exists no genuine jurisdictional principle of universality supporting the wider domestic version of the crime.[45]

The definition in the 2009 Penal Code introduces an extensive enumeration of a protected group: besides categories included in the Convention, it speaks also about "class group" and - as a residual clause - about "any other similar group". Available domestic commentary literature describes this broadening as

42 *Cf. supra* the introductory address by prof. Procházka.

43 *Cf. infra.*

44 *Cf.* Hoffman, Tamás, The Crime of Genocide in Its (Nearly) Infinite Domestic Variety, in Odello, Marco, Łubinski, Piotr, *The Concept of Genocide in International Criminal Law – Developments After Lemkin* (London: Routledge, 2020), pp. 67–97.

45 Saul, Ben, The Implementation of the Genocide Convention at the National Level, in Gaeta, Paola (ed.), *The UN Genocide Convention: A Commentary* (Oxford: OUP, 2009), p. 64.

a "*clear reaction to experience with totalitarian past*".[46] The explanatory report to the Penal Code presented in 2009 is also very optimistic with its anticipation "*that international legal regulation will be expanded in that direction*".[47] Such optimism is definitively not well-founded. During the conference in Rome leading to adoption of the ICC Statute, only Cuba proposed an expansion of the definition to also include social and political groups. This proposal was rejected. In the interpretation of residual clause (other similar group) commentaries usually refer to affiliation to political party or to gender or sexual orientation.

Another departure from the international definition of genocide concerns the underlying offences of killing and causing serious harm. Whereas the Czech regulation defines victim in a singular form, meaning that the crime is completed by killing or harming of just one member of the group, the Convention uses plural form and speaks about killing and causing harm to members of the group. This discrepancy might be nevertheless overcome by interpretation and does not pose any serious legal difficulty.

Still, scholars treated this issue variably. Some commentaries to the ICC neglect it entirely,[48] others stress importance of this element and conclude that more than one member of the protected group must be killed (or harmed) to consummate the crime,[49] while others reject this strict interpretation and refer to the subsequent practice that does not require a plurality of victims.[50] This aspect is minutely elaborated by Schabas who admits that the reference to "members of the group" may, at first sight, suggest that the act itself must involve the killing/harming of at least two members of the group, but continues that such an interpretation would be a bit absurd. Using grammatical interpretation, he concludes that single act of killing/harming might fit into the definition (words "members of the group" would simply mean one or more persons of that group).[51] A thesis that a completion of genocide requires only one victim is also confirmed by international case law.[52]

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46 Herczeg, Jiří, Genocidum, in Šámal, Pavel a kol. *Trestní zákoník*. [Penal Code] (2nd edition. Praha: C. H. Beck, 2012), p. 3488.

47 *Ibid*.

48 Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008).

49 Cassese, Antonio *et al*., *Cassese's International Criminal Law* (Oxford: OUP, 2013), p. 117.

50 Kreß, Claus, 'The Crime of Genocide under International Law', *International Criminal Law Review,* 2006, vol. 6, issue 4, pp. 480–481.

51 Schabas, *supra note* 34, p. 179.

52 ICTR, *Prosecutor v. Mpambara* (Judgment), ICTR-01-65-T, TChI (11 September 2006), para. 8.

In the opinion of the present author, the quantitative dimension of the crime - meaning that genocide involves the intentional destruction of a group in whole or in part - belongs to the mental and not to the material element. The definition therefore also covers cases of killing/harming of a single victim, what is properly reflected both in the Czech implementing legislation and relevant international judicial practice.

The Czech Penal Code also contains a provision on prescriptive universal jurisdiction (Section 7). It therefore considers genocide a crime even if there is no territorial link (either objective or subjective) or personal link (either active or passive). In that respect, the majority of commentaries to the Penal Code refer to the Convention as a legal basis for universal prescriptive jurisdiction.[53] This conclusion is nevertheless not warranted as the only provision in the Convention that speaks about jurisdiction of domestic courts refers to the principle of territoriality. Without any closer analysis, it suffices to say that Article VI has been interpreted in a threefold manner: (*i*) Article VI establishes jurisdiction only on a territoriality basis and at the same time prohibits any other heads of jurisdiction, including universal jurisdiction, (*ii*) Article VI establishes territorial jurisdiction on an obligatory basis, while remaining open to other heads of jurisdiction except of universal jurisdiction, whose inclusion was rejected during the negotiations,[54] and finally (*iii*) Article VI provides a duty to exercise universal jurisdiction as it must be read in conjunction with Article I which stresses the obligation to prevent and to punish the crime of genocide.[55]

The author of this chapter subscribes to the opinion that a rule to assert universal criminal jurisdiction in relation to genocide on permissive (i.e., not obligatory) basis cannot be inferred from the Convention but stems directly from customary international law.[56]

Last but not least, the Czech penal regulation provides for the possibility of prosecution *in absentia*.[57] In such a situation, it must be established that the accused is avoiding criminal proceedings by their stay in foreign countries or

53 *Cf.* Draštík, Antonín, Zásada ochrany a zásada univerzality. [Principle of Protection and Principle of Universality], in Draštík, Antonín a kol., *Trestní zákoník. Komentář.* [Penal Code. Commentary] (Praha: Wolters Kluwer), p. 6; Šámal, Pavel, Zásada ochrany a zásada universality, in Šámal, Pavel a kol., Trestní zákoník (2nd edition. Praha: C. H. Beck, 2012), p. 80.

54 *Travaux Préparatoires*, p. 944.

55 Thalmann, Vanessa, National Criminal Jurisdiction Over Genocide, in Gaeta, Paola (ed.), *The UN Genocide Convention: A Commentary* (Oxford: OUP, 2009), pp. 231–233.

56 O'Keefe, Roger, *International Criminal Law* (Oxford: OUP, 2015), pp. 23–24.

57 Czech Republic, Act No. 141/1961 Coll., Code of Criminal Procedure, para. 302.

by hiding themselves. It is also necessary to provide the accused with all guarantees of fair trial, including obligatory representation by counsel. Proceedings in the absence of the accused would be possible only on subsidiary basis, when the presence of the accused cannot be provided by other means (e.g., by extradition request).

4.1 *Application of Implementing Legislation: Attempted, Proposed,* (*and Failed*) *Examples*

It was already mentioned that until recently, the domestic penal regulation concerning the crime of genocide has not been applied in practice. The cases given and briefly discussed here have one feature in common: practically, they ended before they began.

Viewed in the chronological order of factual background, the first and in fact a very desperate attempt to trigger the application of genocide at domestic level appeared directly before the Czech Constitutional Court.[58] In this case, the petitioner asked the Court to declare that the mass murder of 14 people (including petitioner's father) which took place in the Czechoslovak village of Tušť in 1945 was genocide.[59] Given that the petitioner's request went too far beyond the competences of the Constitutional Court as laid out in Article 87 of the 1993 Constitution, Judge Rapporteur (J. Malenovský) acting as a single judge had no other option then to dismiss the case.

This crime would clearly come outside of the Convention's jurisdictional ambit which cannot be stretched beyond the year 1948. It is also possible to remind the ICJ's judgment in *Croatia v. Serbia* confirming that state parties have no obligation to enact retroactive penal legislation. Another obstacle would be the principle of legality (*nullum crimen sine lege praevia*) that would preclude application of domestic penal regulation introduced in 1961 to events that occurred in 1945. The same conclusion might be put forth with respect to the Romani genocide committed in the Protectorate of Bohemia and Moravia by Nazis during the Second World War.

Another "case" is linked with R. Lemkin and his comments on the process with R. Slánský, an infamous show trial conducted by Communists in 1952, which was depicted as a genocide against Jews.[60] Even if this case satisfies the requirements of the Convention's temporal jurisdiction, it would be very

58 Czech Republic, Constitutional Court, Decision II. ÚS 222/02 (20 May 2002).

59 This horrific crime was depicted in the recent movie by Bohdan Sláma *Krajina ve Stínu* (Shadow Country).

60 Out of 14 defendants on trial, 11 of them were Jews. *Cf.* Cooper, John, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave Macmillan, 2008), p. 214.

difficult to prove that the process was conducted with intent to destroy the Jewish community or its part as such in Czechoslovakia. It seems that the process primarily targeted political opponents - real or virtual - who fell outside of the groups protected by Article II of the Convention.

The last possible cases prove to have more realistic contours. They deal with Romani women receiving forced sterilizations which were undertaken in Czechoslovakia and the Czech Republic as between 1970–2009. Shamefully, in lot of cases, no effective investigation has been carried out, in the majority of cases victims have never received any compensation (a relevant bill is still pending the legislative process). For the purpose of this chapter - and without assessment of a criminal-law remedy provided to victims of forced sterilization - it is relevant to refer to the final report summarizing the inquiry of the Public Defender of Rights (Ombudsman) who concluded that "*suggested findings do not indicate that one could speak about an organized sterilization campaign of genocidal nature prior to 1989* [...] *it is impossible to attribute to state a goal of destroying the Romani community by avoiding births.*"[61]

5 Conclusion

This chapter introduced the experience of Czechoslovakia and the Czech Republic with the Genocide Convention. Starting with the process of negotiation and drafting, with reference to the preparatory works, it has been shown that Czechoslovakia played a rather inferior and dependent role and consistently coordinated its positions with those of the USSR. The agreement reached between these two countries was almost of an absolute character, with the only exception - concerning the consideration by the ILC in the creation of an international penal tribunal - described as the example of "soft disagreement". It has also been shown that the stance taken by Czechoslovakia towards the Convention revealed a "socialistically driven and mandated" mistrust towards international judicial institutions which has fortunately disappeared with the end of Cold War. With respect to the adoption of implementing legislation which criminalizes genocide at a domestic level, it was concluded that the approach taken is unproblematic and complies with requirements provided in Article V of the Convention. At the same time, it was indicated that the only

61 Czech Republic, Public Defender of Rights. Final Statement of the Public Defender of Rights in the Matter of Sterilizations Performed in Contravention of the Law and Proposed Remedial Measures. Brno, 23 December 2005, available online at URL <https://www.ochrance.cz/fileadmin/user_upload/ENGLISH/Sterilisation.pdf> [29 November 2020].

difficulty that might eventually arise with respect to prosecution at a domestic level on the basis of the universality principle of the broader form of genocide (protecting class group and any other similar group) as it might lead to valid protests by the affected states. Nevertheless, it seems that such concerns are not realistic given the fact that the crime of genocide has never been applied at a domestic level even in its internationally recognized form (Article II of the Convention) since its introduction to the Czechoslovak penal legislation in 1961. It is therefore reasonable to anticipate that this balance will not change, at least with the prospect of near future.

CHAPTER 13

Universal Jurisdiction and the Crime of Genocide

Milan Lipovský

1 Introduction

When universal jurisdiction is discussed (and though it is discussed often, it does not necessarily always lead to clarification[1]), the crime of genocide frequently comes to mind as an example of a crime that might be prosecuted either domestically or internationally based on that principle. Indeed, the Convention on Prevention and Punishment of the Crime of Genocide ("Genocide Convention")[2] is sometimes surprisingly referred to as an example of evidence of both permission as well as prohibition of universal jurisdiction over the crime. Thus, the various explanations of the mechanism of universal jurisdiction must be understood and explained. Because genocide belongs among the core crimes under international law, it is important to understand the interplay between the crime and universal jurisdiction. In order to do so, domestic jurisdiction plays a significant role.

Though the amount of case law on the crime of genocide is not as vast as it is on other crimes, doctrinal discussions contain no less controversies. Comparison and analysis of various attitudes is thus necessary.

Except for part 5, the practice of the International Criminal Court ("ICC") is intentionally left out of this chapter because the ICC is not based on universal jurisdiction.[3]

1 Colangelo, Anthony J., 'The Legal Limits of Universal Jurisdiction', (2006) *Virginia Journal of International Law*, vol. 47, no. 1, p. 149.

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

3 One might claim that the exercise of jurisdiction based on the UN Security Council resolution is a case of universal jurisdiction but there is a strong argument against such a claim – the Security Council may only do it because states have transferred their territoriality and personality principles titles.

2 Universal Jurisdiction

Unfortunately, universal jurisdiction has not been properly dealt with by an international tribunal yet. The International Court of Justice ("ICJ") famously chose not to deal with it in the *Arrest Warrant Case*[4] and instead relied on the immunities of foreign officials to solve the dispute.[5] Not that immunities did not play an important role in the case but it was still a mistake to omit the topic of jurisdiction and skip directly to immunities because "[i]*f there is no immunity* [from jurisdiction] en principe, *then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise*."[6] It is thus necessary to rely mainly on separate opinions of judges in the case, doctrine, and also domestic decisions (and legislation of course).

2.1 *Jurisdiction to Prescribe, to Adjudicate/Prosecute and to Enforce*

To properly understand the concept of universal jurisdiction, the differences between theoretical aspects must be understood. International (and indeed domestic) law recognizes basically three types of exercising jurisdiction differentiated on the basis of the phase of the (criminal) proceedings they regulate:

- to prescribe
- to prosecute/adjudicate, and
- enforcement jurisdiction.

It must be stressed that universal jurisdiction is jurisdiction to prescribe, not to enforce.[7] In other words, "*State A* may*, on its own territory, prosecute offences committed in State B* (permissive rule)*; failing a permission, State A* may not *act on the territory of State B.*"[8]

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4 ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, I.C.J. Reports 2002, p. 3 ("Arrest Warrant").

5 Judges Higgins, Kooijmans and Buergenthal critically comment on it in the first part (paras. 2–16) of their joint separate opinion to Arrest Warrant Judgment.

6 ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 3.

7 O'Keefe, Roger, 'Universal Jurisdiction. Clarifying the Basic Concept', (2004) *Journal of International Criminal Justice*, vol. 2, p. 737. The argument was also implicitly stressed by the ICC when it mentioned that art. 27 (2) RS deals with both prescription/adjudicatory and enforcement jurisdiction when dealing with 'national jurisdiction'; thus, it was necessary to stress the applicability to both which is not automatic based on general international law. Though the Appeals Chamber was discussing the vertical level, it in fact made a hint as to the horizontal level in inter-state relationship and enforcement jurisdiction: ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Judgment) ICC-02/05-01/09-397, ACh (6 May 2019), para. 125, available online at URL <https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF>.

8 ICJ, Arrest Warrant Judgment, dissenting opinion of Judge Van Den Wyngaert, para. 49.

So, while prescriptive and adjudicative jurisdiction might be territorial as well as extraterritorial, the jurisdiction to enforce is purely territorial. Even when the power of one state is executed within the territory of another state, it must generally be with the latter's consent, otherwise international law is violated.

Though our focus is on jurisdiction to prescribe and adjudicate, some authors do not distinguish these two categories and only discuss the jurisdiction to prescribe and jurisdiction to enforce.[9] I would suggest treating jurisdiction to adjudicate separately because it is justified by its characteristics. It is true that adjudication jurisdiction is more or less just application of prescription jurisdiction but, as it is described below, the distinction is reasoned.

If we focus on criminal law (as this entire contribution does) the jurisdiction to prescribe in fact means that the state in question is entitled to legislate on the prohibited act, i.e., to include the prohibited act into its domestic legislation and into their criminal code. The jurisdiction to adjudicate/prosecute means the possibility to investigate the crime and to commence and maintain judicial proceedings against an alleged perpetrator; thus, it relies on jurisdiction to prescribe. The jurisdiction to enforce means the possibility to execute the criminal law and its sanctions to the perpetrator. The problem is that even acts structurally falling within adjudicative jurisdiction (such as arrest for example)[10] might fit the characteristics of enforcement jurisdiction.

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9 E.g., Judge van den Wyngaert in her dissenting opinion to ICJ, Arrest Warrant Judgment, dissenting opinion of Judge Van Den Wyngaert; Roger O'Keefe claims that distinguishing prescription and adjudication jurisdiction is not necessary in criminal law: O'Keefe, *supra note* 8, pp. 736–737. Author of this contribution would rebut that though there are links between them, as it is discussed below, the distinction is still favourable, if not necessary. The distinction would actually help to solve the first trouble Roger O'Keefe had with the opinion of Judges Higgins, Kooijmans and Buergenthal described at O'Keefe, *supra note* 8, pp. 754–755.

10 It is also an issue whether an issued but not executed arrest warrant is a kind of prescriptive/adjudication jurisdiction or jurisdiction to enforce. If executed, the answer would clearly be the latter. But without its execution and if it was even non-executable, the opinions vary. The ICJ was clearly against its legality but Judge Van Den Wyngaert was of a different opinion: ICJ, Arrest Warrant Judgment, dissenting opinion of Judge Van Den Wyngaert, paras. 68–80. Particularly strong is her question asking whether (if issuing an arrest warrant that was not enforced is a violation of immunity) investigation upon criminal charges is enforcement too? para. 75. Author of this article leans to Judge Van Den Wyngaert's arguments as long as the arrest warrant was not enforceable (it is even stated so - para. 73 of the dissenting opinion). But the problem is whether there was a possibility of its enforcement abroad (outside Kongo and Belgium). Because if it was, it was an enforcement - addressed by the judge too in paras. 76–79 though not so convincingly as previous point. Even if the arrest warrant was only enforceable upon validation by the third state, should it do so (regardless of whether in compliance or in contradiction to international law), the original source of wrongdoing would remain in Belgium.

The entire issue is further complicated by various opinions regarding the legality of trial in absentia. Thus, it would be helpful to distinguish the jurisdiction to adjudicate in its investigation form (probably not requiring the presence of the suspect/accused) and in its prosecution form per se (likely requiring the presence of the accused). While the investigation form is a subject of a regime similar to the jurisdiction to prescribe, the prosecutorial part might be (e.g., if in absentia trial is prohibited, for a discussion see below) equated to the regime of jurisdiction to enforce.

This difference is actually supported by the wording of a resolution of the Institute of International Law,[11] which claims in Article 3b) that:

> Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender.

It is not a purely theoretical matter because as it was already stated, universal jurisdiction is not a matter of enforcement. Thus, the prosecutorial part of adjudication might fall outside the scope of applicability of the universality principle. Whether it is so, will be discussed below.

2.2 *Pure/Properly So-Called/True and Treaty Based/Contractual Universal Jurisdiction; Jurisdiction by Representation*

It must be stressed from the start that universal jurisdiction is only related to crimes of a certain degree of seriousness. It does not relate to 'ordinary crimes', in other words it does not relate to crimes that only affect states within whose territory the crime was perpetrated or only those states where the perpetrator or victims were nationals. The threshold of the seriousness of the crimes, which is required to be fulfilled in order even to discuss the possibility of universal jurisdiction, is often the declaration of the crimes/offences to be of a concern to the international community.[12]

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11 Institute of International Law, Resolution: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes. Resolution of 26 August 2005, available online at URL <https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf>.

12 Cassese, Antonio, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) *Journal of International Criminal Justice*, vol. 1, no. 3, p. 591.

Another important comment is that universal jurisdiction is a matter outside of the regular basis/principles of jurisdiction. The regular principles are nationality (when the perpetrator or victim are nationals of the state entitled to jurisdiction), territoriality (when the crime occurred within territory of the state entitled to jurisdiction), and the protective principle.

Thus, universal jurisdiction is often defined as an exercise of a state's jurisdiction without a link/nexus to perpetrator or victim (nationality either actively or passively) nor the territory of the crime,[13] i.e., when neither the perpetrator nor the victims were nationals of the prosecuting state and the crime did not occur within its territorial jurisdiction.[14] These mentioned principles are generally accepted as allowing states to exercise jurisdiction in compliance with international law. Among these regularly accepted principles establishing jurisdiction, there is also a protective principle[15] added which extends jurisdiction of a state over acts directed against its security. Because the issue of security is connected to the territorial integrity and safety of its citizens, one may subsume it under 'a link to a national or a territory' as the phrase is used further.[16]

Because exercising state's powers to matters generally falling within the sovereign rights of another state would likely violate the sovereignty of the other

13 Roger O'Keefe defines universal jurisdiction as "*assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus* [than territoriality, personality, or protection] *at the time of the relevant conduct.*" O'Keefe, *supra note* 8, p. 745.

14 Institute of International Law, Resolution: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes. Resolution of 26 August 2005, available online at URL <https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf>, para. 1; ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 6.

15 Peters, Craig, 'The Impasse of Tibetan Justice: Spain's Exercise of Universal Jurisdiction in Prosecuting Chinese Genocide', (2015) *Seattle University Law Review*, vol. 39, no. 1, p. 170.

16 It is also worth mentioning that some states seem to be over-exaggerating their rights in this regard. An example seems to be the new law on prosecuting destruction of WW2 memorials abroad in front of Russian courts: <https://abcnews.go.com/International/wireStory/russia-aims-prosecute-destruction-war-monuments-abroad-70047228>.

Because if the law is applied to foreign nationals and memorials abroad without any international law based link to Russia (as there is none in case of removal of the statue of Ivan Stepanovich Konyev from a square in Prague 6 as a result of public debate on Konyev's role both in fighting against the Nazi forces in Czechoslovakia in 1945 but also later building the Berlin Wall, occupation of Hungary in 1956 and his role in occupation of Czechoslovakia by the Soviet-led armies in 1968, <https://www.dw.com/en/prague-removes-statue-of-soviet-general-konev/a-53010658>), prosecution of the Prague representatives in this case would be an over-stepping of boundaries of international law. Not even mentioning the issue of immunities.

state, there needs to be a legal basis in international law (the domestic law is only its reflection) for exercising jurisdiction, including the basis of universal jurisdiction principle.

It must be kept in mind that, unlike the principles of nationality, territoriality, and protective principle, the principle of universality is somewhat special and much more specific. Even its legality (although accepted by author of this paper) is being challenged by some. To address those issues (and to add the mechanism applying in this field to the crime of genocide) is the purpose of this contribution.

The opinion presented in this text is that we must differentiate between purely customary law based universal jurisdiction (so-called pure universal jurisdiction)[17] and a treaty based/contractual one.[18] The need to differentiate between them is confirmed by the statement of Argentina in the General Assembly's 6th committee papers.[19] Of course, some crimes prohibited by customary law are *also* prohibited by treaty law. That is why their treaty regulation contains even typical characteristics of the 'contractual' crimes - the aut dedere aut judicare principle (the obligation to either prosecute or extradite). However, that in itself is not a proof that the obligation to prosecute or extradite is inherent to every kind of universal jurisdiction, even the customary one.

Unlike contractual jurisdiction, which is obligatory, customary (pure) jurisdiction is permissive.[20]

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17 It is called pure because it does not require any additional approval (in addition to the customary principle of universal jurisdiction) from the state actually possessing a traditional link/nexus to the crime or its perpetrator.

18 This type actually requires approval from the state with a link to either the perpetrator or the crime - consent to the treaty establishing the jurisdiction. The need exists because customary law does not contain the entitlement to universal jurisdiction over crimes prohibited by these treaties.

19 Statement of the Republic of Argentina, UNGA 6th committee, 73rd session (2018), *The scope and application of the principle of universal jurisdiction* (Agenda item 87), available online at URL <https://www.un.org/en/ga/sixth/73/universal_jurisdiction/argentina_e.pdf>.

20 As it was correctly claimed by Belgium in the Arrest Warrant case. ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 8; similarly the German courts claimed customary universal jurisdiction to be permissive under article VI of the Genocide Convention because "*the absence of a rule concerning universal jurisdiction only means that the states that are parties to the Convention are under no obligation to prosecute, although they have the opportunity to pursue criminal prosecutions on this basis.*" Germany, Federal Constitutional Court, order of 12 December 2000, 2 BvR 1290/99, available in English online at URL <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212_2bvr129099en.html>, para. 40; also see Werle, Gerhard, Jeßberger, Florian, *Principles of International Law* (4th ed., Oxford: Oxford University Press, 2020), p. 95.

2.2.1 Pure Universal Jurisdiction

There are heated arguments opposing the very existence of pure universal jurisdiction, i.e., a jurisdiction existing without a necessary treaty law establishing it and allowing states to exercise prescription and adjudication over certain crimes. In fact, some eminent professionals have openly rejected it and instead wondered whether there is (along with its contractual form) also a customary obligation to prosecute or extradite[21] rather than a general principle of pure universal jurisdiction. It is fair to note that the above-quoted joint separate opinion also states that there are indications that international law does not prohibit the exercise of pure universal jurisdiction over crimes under international law but again uses the aut dedere aut iudicare treaties as evidence.[22] To the author of this article, that is an unfortunate mixing of the two distinct basis.

To address those claims, there are two counterarguments. Firstly, the practice of pure universal jurisdiction without a treaty confirming it, actually exists (see the following chapters about examples in, e.g., Spain and Germany). And secondly, the treaties establishing contractual universal jurisdiction are qualitatively different as the judges themselves said. They do not establish nor prove pure universal jurisdiction, rather a contractual basis for inter partes obligation to prosecute or extradite.

It remains to be said that though states are allowed to exercise pure universal jurisdiction, they tend to do it when there is at least some kind of link between the crime/perpetrator/victim and the state.[23] Not of a sense of obligation because if it was considered as an obligation, it would turn the jurisdiction into one based on territorial/personal/protective principle. The states tend to look for the link for rather practical reasons, such as judicial economy and possible political tensions with countries of origin of the crimes/perpetrators.

21 ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 42–45.

22 ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 46.

23 After all the Tibet Case (referred to below) in Spain was started among others also due to the ties between Spain and Tibet represented by Tibetan immigrant to Spain - Peters, *supra note* 15, p. 167.

2.2.2 Contractual Universal Jurisdiction[24] and Its Comparison to the Pure One

There is a number of multilateral treaties that actually establish the obligation to either prosecute or extradite a person that is accused of a crime prohibited by such treaty[25] regardless of nationality of the perpetrator or the location of the crime. And because these treaties actually create *an obligation* to prosecute or extradite the alleged perpetrator, it seems as if universal jurisdiction was connected with the obligation to prosecute (or extradite for prosecution) in every form.

That must be clarified. Not all of these treaties are a codification (in the relevant parts) of 'pure' or true universal jurisdiction for several reasons. Firstly, as previously mentioned, pure universal jurisdiction is not based on treaty law, rather on customary international law. And, with the exception of treaties that contain the aut dedere aut judicare principle and at the same time codify already existing customary prohibition of crimes (e.g., the Convention against torture, "CAT"),[26] it is highly questionable whether other mentioned conventions actually deal with crimes based in customary law or whether they are treaty law based only.[27] Secondly, though some might argue that even the

24 It is questionable whether it is even correct to call it universal jurisdiction. Judges Higgins, Kooijmans, Buergenthal called it "*an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere*." ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 41. Though one must keep in mind that neither their definition is actually correct due to mixing of territorial and universal principle and disregarding the time aspect (of when does the link have to be established; the answer actually is when the crime occurred, not when the adjudication jurisdiction is exercised) as Roger O'Keefe points out in O'Keefe, *supra note* 8, pp. 755–756.

25 E.g., UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, adopted on 10 December 1984, entered into force on 26 June 1987, art. 7(1); UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1035 UNTS 107, adopted on 14 December 1973, entered into force on 20 February 1977, art. 7; UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 201, adopted on 10 March 1988, entered into force on 1 March 1992, art. 10(1); UN Convention against the Taking of Hostages, 1316 UNTS 21931, adopted on 17 December 1979, entered into force on 3 June 1983, art. 8(1); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 12325, adopted on 16 December 1970, entered into force on 14 October 1971, art. 7.

26 But one must keep in mind that the basis of exercise of jurisdiction between states over the crime of torture may vary according to whether they are both state parties to the CAT, only one is or none is. The details and examples of possible span of jurisdiction are well described by Colangelo, *supra note* 1, pp. 166–169.

27 Kreß, Claus, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*', (2006) *Journal of International Criminal Justice*, vol. 4, no. 3, p. 567.

other above-mentioned treaties encompass a codification of customary international law, state practice (or lack thereof) of prosecuting these other crimes without a treaty basis actually proves otherwise. Last but not least, even if the other treaties created a customary reflection of their jurisdictional basis, it would be a different norm than that of a purely universal jurisdiction. It would be obligatory (to prosecute or extradite), not permissive. Also, as already mentioned, customary universal jurisdiction is only related to (although not completely exclusively) crimes under international law and some of the crimes prohibited by the conventions containing the contractual universal jurisdiction do not fit into this category.

To counter what was just stated, piracy is often used as an example of other crime than a crime under international law that 'gained' the pure universal jurisdiction. But one must keep in mind that piracy is a sui generis example. A very special case. Because of its unique regime, it should not be used to make assumptions about other crimes.[28]

Last but not least, (pure) customary universal jurisdiction is permissive, not obligatory, unlike the contractual form of universal jurisdiction. Though, for example, torture is indeed a crime under international law, its customary form of universal jurisdiction is still permissive, despite the CAT actually adding a treaty obligation (to prosecute or extradite).[29]

Thus, what may be called pure or true universal jurisdiction is principle in general related to the crimes under international law (war crimes, crime of genocide, and crimes against humanity - I would add torture)[30] in question

28 *Ibid*, p. 569.

29 That is also how we may interpret the opinion of Lord Browne-Wilkinson in United Kingdom, House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet/Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, Judgment of 24 March 1999, available online at URL <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>. Though Lord Browne-Wilkinson does not explicitly say so, he claims that torture has been a crime long before the convention, all that was needed was an instrument to punish it. And because he hints that such instrument is the Convention against Torture establishing the aut dedere aut judicare principle (but the crime existed even before it was adopted) and there were in fact domestic prosecutions (though not necessarily for torture or torture only) before 1984 as well, consequently, permissiveness of the exercise of customary jurisdiction is implied.

30 Universal jurisdiction in relation to crimes against humanity is supported by Judges Higgins, Kooijmans and Buergenthal in their opinion in ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 62; similarly, it was claimed so (and torture added) by Cassese in Cassese, *supra note* 12, p. 592. Contrarily, Werle and Jeßberger deny the principle applying to torture (outside the scope of crimes under international law) - see Werle and Jeßberger, *supra note* 20, p. 98. Additionally,

prohibited by customary international law,[31] regardless of their treaty status. "Only" treaty law of crimes obliging state parties (and that is important) to prosecute or extradite in fact does not establish a pure universal jurisdiction as such. Because the obligation only relates to parties.

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slavery is added among crimes to which universal jurisdiction applies. Basically, customary universal jurisdiction is considered to be allowed to be exercised over core crimes (crimes against humanity, war crimes and genocide) since WW2: Cormier, Monique, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge: Cambridge University Press, 2020) ISBN: 9781108588706, pp. 164–166. In relation to the crime of aggression, the situation is more complicated as it is questionable whether it reflects customary international law. Customary law prohibits crimes against peace, i.e., a war of aggression, but customary nature of crime of "single" act of aggression is questioned. So even if there is a universal jurisdiction principle related to the crime of aggression, it might be that it relates only to a narrow definition of the crime that does not extend outside the definition of crimes against peace. See, e.g., Princeton Principles on Universal Jurisdiction, available online at URL <https://www.icj.org/princeton-principles-on-universal-jurisdiction/>, principle 2(1) claiming crimes against peace are one of serious crimes over which it is possible to exercise universal jurisdiction. It is also fair to note that there are arguments that customary universal jurisdiction is not supported by state practice: ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 20–21 for legislation/prescriptive jurisdiction and paras. 22–23 for adjudication jurisdiction.

31 Such as genocide, crimes against humanity and war crimes - Werle and Jeßberger, *supra note* 20, p. 95. Very likely crimes against peace as well with a questionmark over complete scope of the crime of aggression. Due to the unclear 'edges' of some crimes under international law, we might rather use the term universal crimes for referring to crimes over which states are allowed to exercise universal jurisdiction. That term also helps us to solve the fact, that piracy is certainly a universal crime but at the same time not a crime under international law. The customary nature of crimes against humanity, war crimes and crimes against peace was confirmed in the Nuremberg Principles and by the resolution of the UN General Assembly (UNGA Res. 95(I) from 11 December 1946). Genocide was added into the list of crimes under international law by UN General Assembly resolution UNGA Res. 96(I) from 11 December 1946. Customary nature of majority of provisions of the Geneva Conventions (including their penal provisions) was confirmed by the ICJ in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 82. Subsequent practice of states in the form of their domestic case-law includes, e.g., Eichmann judgment: Israel, Israeli Supreme Court, *Attorney General v. Eichmann*, 336/61, judgment of 29 May 1962, available online at URL <http://www.internationalcrimesdatabase.org/Case/185>. Customary nature of crimes against humanity was also confirmed in: United States of America, United States Court of Appeals, Second Circuit, *United States v. Yousef* 327 F.3d 56 (2d Cir. 2003), available online at URL <https://casetext.com/case/us-v-yousef-4>, p. 106.

Colangelo provides other examples of domestic prosecutions in his above-mentioned article.

Consequently, it is necessary to differentiate between true universal jurisdiction and treaty based/contractual (universal?) jurisdiction. Unfortunately, these two are often conflated by case law and doctrine.

It would of course be possible for states to enlarge the list of crimes under international law and include even the crimes that are, up to this point, only prohibited by treaty law. Then it would be possible (though not automatic!) for pure universal jurisdiction to be exercised over them as well. Until then, it will remain an inter-partes universal jurisdiction over what may be called transnational crimes.[32]

Additionally, representative jurisdiction, a term sometimes used when discussing universal jurisdiction, must be treated as a type of treaty-based jurisdiction. Though the prosecuting state does not have any link to either the crime or perpetrator, it is in fact acting "*as a surrogate for the territorial state*"[33] that gave consent to this 'delegation'. It is typically linked to the aut dedere aut judicare principle but conditioned by "*receipt and denial of a request for extradition from a state directly connected with the crime*"[34] and is, for example, present in the treaties establishing the aut dedere aut judicare principle adopted prior to 1970.[35]

2.3 *Presence of the Accused within Territory of the Prosecuting State*

The fact that the contractual universal jurisdiction establishing treaties require the presence of the accused within the territory of the prosecuting (or extraditing) state, further enhances confusion. Of course, it is necessary for the accused to be present within the contracting state, otherwise the extraditory obligation would not make sense. However, some authors claim that this obligation (of presence) became general, i.e., even applying to pure universal jurisdiction. And because adjudicative pure universal jurisdiction may often only be exercised without the perpetrator present (for political or other reasons), it seems as if pure universal jurisdiction was 1) equated to trial in absentia,[36] and

32 Kreß, Claus, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International', supra note* 27, p. 568.

33 Colangelo, *supra note* 1, p. 158, footnote 26.

34 Kreß, Claus, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International', supra note* 27, p. 567.

35 For an example of domestic legislation based upon representation, see section on the Czech Republic.

36 Such equation is wrong (apart from reasons suggested further) from a purely theoretical view. It would be a conflation of "*state's jurisdiction to prescribe its criminal law with the manner of that law's enforcement*." O'Keefe, *supra note* 8, p. 749. Unlike Roger O'Keefe I would however refrain from using the word 'enforcement' because its use at this place seems to suggest that adjudicative jurisdiction is always enforcement jurisdiction.

2) often prohibited due to the allegedly general requirement of presence of the accused within prosecuting state.

2.3.1 Trial *in Absentia*

First of all, whether an accused is present within the territory of the prosecuting state or not is not a defining aspect of jurisdiction. It is just a description of the proceedings. Whether it is legal is addressed below.

Still though it is useful to find out at what stage of the proceedings it may be legal to conduct the process in absentia of the accused. That is also why the differentiation of the two parts of the adjudicative jurisdiction suggested above becomes handy now. These two stages include an investigative stage (including investigation and even possible issuance of an arrest warrant) and a prosecutorial stage. Similarly, some domestic legal systems divide prosecution into several stages - investigatory not in front of a court and under the supervision of a prosecutor - and trial itself, before a court, and allowing for appeal).[37] As quoted above, the *Institut de Droit International* ("IDI") supports this differentiation in article 3b) of Resolution of 26 August 2005.

As it is clear from the IDI rule that the proceedings in absentia is more typical for the investigative stage of the adjudicative jurisdiction but not for trial. Though we may have a different opinion as to the correctness of the requirement of presence during trial in relation to pure universal jurisdiction (see next section), it is certainly true in relation to the contractual adjudicative universal jurisdiction. Thus, equating universal jurisdiction as a whole with in absentia trial is incorrect (assuming that pure customary version exists).

2.3.2 Presence of the Accused as a General Rule

The IDI also suggests that even the prosecutorial stage of adjudication (on the universal jurisdiction principle) requires the presence of the accused within the territory of the prosecuting state. While the first part of the statement (not requiring the presence of the suspect during the investigatory stage) is in line with the lack of an international rule prohibiting the in absentia investigation,[38] the very same could however, and contrary to the IDI statement, be said even about a trial in absentia. There simply are states that allow for an in

37 The author of this article can point to the Czech Criminal Procedure Act No. 141/1961 Co.; preparatory stage is generally dealt with in paras. 157–179h and the trial before court in paras. 180–365. The breaking point between them is the indictment.

38 Kreß, Claus, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*,' *supra note* 27, p. 577.

absentia trial[39] and so such a prohibition is not supported by practice. In relation to pure universal jurisdiction (as opposed to contractual), the IDI's rule prohibiting it is more likely a de lege ferenda, rather than de lege lata.

The fact that treaties establishing contractual universal jurisdiction require the presence of the accused within their territory has no influence upon general international law.[40] Indeed, there are states that require the presence of the accused within their territory for the entire proceedings but the reasons are more practical, thus "*no prohibition in international law on prosecuting suspects* in absentia *can be derived from the more restrictive domestic rules containing a requirement of presence* [footnote omitted]."[41]

Conversely, it must also be kept in mind that despite the lack of such a rule, the trial in absentia has been rejected[42] but more as a voluntary decision rather than as an obligation. The rejection is not necessarily evidence of practice because "*abstinence may be attributed to other factors than the existence of an* opinio iuris."[43]

3 The Genocide Convention

There are very few items so uncontroversial in international criminal law as the definition of the crime of genocide articulated in art. II of the Genocide Convention that was taken into the statutes of the ICTY ,[44] ICTR ,[45] ICC ,[46] and many domestic jurisdictions verbatim. With very little doubt, the definition reflects customary international law.[47]

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39 "*Some jurisdiction provide for trial* in absentia*; others do not.*" ICJ, Arrest Warrant Judgment, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 56; examples of both positive and negative treatment of this matter are present in para. 55 of ICJ, Arrest Warrant Judgment, dissenting opinion of Judge Van Den Wyngaert; additionally the Czech Criminal Procedure Act also allows for trial in absentia in its § 202, though under very limited circumstances that would in fact likely prevent exercise of pure universal jurisdiction, in particularly the requirement of the accused having already being interrogated by an organ of criminal proceedings (§ 202(2)(b)) would.

40 O'Keefe, *supra note* 8, p. 752.

41 Werle and Jeßberger, *supra note* 20, pp. 99–100.

42 Kreß, Claus, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*,' *supra note* 27, pp. 578–579, 580–581.

43 ICJ, Arrest Warrant Judgment, dissenting opinion of Judge Van Den Wyngaert, para. 56.

44 Statute of the ICTY, UNSC Res. 827 (1993) of 25 May 1993 (as amended).

45 Statute of the ICTR, UNSC Res. 955 (1994) of 8 November 1994 (as amended).

46 Rome Statute of the International Criminal Court, 2187 UNTS 3, adopted on 17 July 1998, entered into force on 1 July 2002.

47 For an extensive number of sources: Cormier, *supra note* 30, pp. 170–172.

That much may be said about substantive law. Confusion remains regarding the procedural aspects, particularly about the scope of jurisdiction conferred upon states and international tribunals. The Genocide Convention is not exactly clear when it comes to the principle of universal jurisdiction over the crime. And, it is no coincidence because due to fears over possible interference with state sovereignty, the principle of universal jurisdiction was intentionally left out of the Convention.[48] The closest provision to this we may find in it is article VI that states:

> Persons charged with genocide or any of the other acts enumerated in article III 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.

In relation to crimes of genocide committed within territories of State Parties to the Genocide Convention, the provision clearly confirms a non-controversial principle of territorial jurisdiction and even obliges states to establish their prescriptive jurisdiction over the crime in their domestic law. Additionally, it expects an international tribunal to be established for the exercise of international criminal justice. Until the establishment of the ICTY, ICTR, and ICC, there was no international tribunal of such kind for decades.

The article simply does not establish pure universal jurisdiction in any explicit way. But neither does it prevent it.[49] The Spanish Audiencia National, a court that played significant role in the proceedings described below, confirmed that interpreting the article contrarily (as prohibiting other grounds of

48 Adanan, Amina, Symposium on the Genocide Convention: Reflecting on the Genocide Convention at 70: How genocide became a crime subject to universal jurisdiction, available online at URL <https://www.ejiltalk.org/symposium-on-the-genocide-convention-reflecting-on-the-genocide-convention-at-70-how-genocide-became-a-crime-subject-to-universal-jurisdiction/>.

49 Germany, Federal Constitutional Court, order of 12 December 2000, 2 BvR 1290/99, available in English online at URL <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212_2bvr129099en.html>, para. 40; Werle and Jeßberger, *supra note* 20, pp. 97–98. Quite a disappointing attitude was taken by the ILC when it adopted the Draft Code of Crimes against Peace and Security of Mankind in 1996. On one hand it confirmed that genocide (and except for aggression, also other crimes covered by the draft code) are subject to universal jurisdiction (see p. 29, para. 7 of commented version) but on the other hand it suggested to restrict its use by the aut dedere aut iudicare principle (the same paragraph of commented text).

jurisdiction than those explicitly mentioned in it) would go against the spirit of the Convention.[50]

The Genocide Convention does not contain a provision establishing the aut dedere aut iudicare principle. As the customary nature of the obligation to prosecute (as opposed to the authority to do so willingly) is in question and the Genocide Convention does not contain it, we may conclude that there is no such customary obligation in relation to genocide.[51]

4 Prescriptive Jurisdiction and Adjudication in Certain States with Focus on Genocide

This section attempts to show the exercise of prescriptive and (in some cases) adjudicative jurisdiction over the crime of genocide in certain states. It is of course not an exhaustive list, there have been other studies that focused that way.[52] The following text is intended to focus primarily on some of the famous genocide related legislation and case law in order to evaluate the above-stated arguments.

4.1 *Individual Countries*

4.1.1 Belgium

The originally quite broad approach to universal jurisdiction under Belgian domestic law[53] led to the famous Arrest Warrant Case. The relevant legislation was however amended, and the exercise of extraterritorial jurisdiction was first conditioned by the decision of the Federal Prosecutor and later the scope of jurisdiction was limited by active/passive nationality principle (and similarly by residence within Belgium).[54]

Due to the amendments, although the Belgian legislation is probably the most famous in the world due to the Arrest Warrant Case, the following examples actually show how genocide-related prosecutions, became much more of an issue in other countries.

50 Peters, *supra note* 15, p. 176.

51 Werle and Jeßberger, *supra note* 20, p. 106.

52 Including NGO reports, e.g., Trial International NGO, URL <https://trialinternational.org/>.

53 Belgium, Act no. 1993/99.

54 Cassese, *supra note* 12, pp. 589–590.

4.1.2 Spain

The evolution of prescriptive universal jurisdiction in Spain is interesting in itself. The Ley Orgánica 6/1985[55] established the jurisdiction of the Spanish courts over certain acts, including genocide in its article 23(4)(a).

It must be stressed however that the law has been amended and since the changes of 2013/2014 it has not really allowed for pure universal jurisdiction anymore because (in relation to genocide) it required the accused to be Spanish or a foreigner but with residency in Spain, alternatively, against a foreigner present in Spain and whose extradition was refused.[56]

4.1.2.1 *Guatemala Generals Case*

Before the latest above-mentioned amendments restricting the jurisdiction, the Spanish Supreme Court conditioned the exercise of universal jurisdiction by the principle of subsidiarity[57] and a link between the offence and Spain.[58] Specifically, the second limit would seriously hamper the point of universality. It was however overruled in 2005 by the Spanish Constitutional Court that quashed the necessary link.[59] The Constitutional Court also reasoned that to require the victims to be Spanish in order to establish jurisdiction would not make sense because the Genocide Convention does not protect only the Spanish.[60] Though the argument is of course interesting, one cannot stop thinking that the Court in fact mixed the substantive scope of protected groups and the procedural issue of scope of jurisdiction.

4.1.2.2 *The Tibet Case*

In 2005, the famous Audiencia National, a Spanish tribunal, caused a huge international dispute when it found a popular action against several former

55 Spain, Ley Orgánica 6/1985, available in Spanish online at URL <https://www.boe.es/buscar/pdf/1985/BOE-A-1985-12666-consolidado.pdf>.

56 Article 23(4)(a), available at <https://www.boe.es/buscar/pdf/1985/BOE-A-1985-12666-consolidado.pdf>.

57 It should also be added that like many treaties establishing the contractual universal jurisdiction explicitly require, even pure universal jurisdiction under customary international law requires the prosecuting state to act 'as a default jurisdiction' Cassese, *supra note* 12, p. 593, meaning that first the chance should be upon the territorial/national state of the crime/perpetrator/victim.

58 Cassese, *supra note* 12, p. 590.

59 Spain, Constitutional Court, judgment no. 237/2005 of 26 September 2005, available in Spanish online at URL <http://hj.tribunalconstitucional.es/en/Resolucion/List>; Bakker, Christine A.E., 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work?', (2006) *Journal of International Criminal Justice*, vol. 4, no. 3, p. 596.

60 Peters, *supra note* 15, p. 180.

Chinese officials (including former Chinese president Jang Zemin) admissible for the purported participation in alleged genocide in Tibet.[61] Other charges were later added.

The decision had its reasoning based on article VI of the Genocide Convention and rejected the alternative path in the (non)existence of an international tribunal with jurisdiction over the alleged acts. If there was such a tribunal, the Spanish jurisdiction would be subsidiary to it. The complaint was found admissible also taking into account that "*no judicial remedy exists before Chinese courts with respect to the alleged crimes*".[62] Quite an important matter was that the Audiencia National found the facts described in the complaint prima facie prove genocide.

The reaction of the Chinese government was aggressive. Sadly, some democratic states also resorted to criticism.[63]

Following the changes in Spanish legislation, the proceedings was discontinued, and available sources confirm that fact. Though, the complainant was also a Spanish national, and thus the new conditions of jurisdiction were seemingly still fulfilled (under passive personality principle as opposed to universality), it was already established that the link (of passive personality this time) would have to be established when the crime occurred, not later.

4.1.2.3 *Pinochet Case*

The Augusto Pinochet Case is famous mostly for the decisions of the United Kingdom's House of Lords regarding the extradition of the former Chilean dictator to Spain. Among others (and that is also what the cases are often referred to for), the House of Lords was strongly preoccupied with the matter of immunities for alleged crimes and decided the matter upon the waiver of immunities present in the CAT.[64] However there is also a 'genocide' aspect throughout the entire proceedings.

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61 Spain, Spanish Audiencia Nacional, rollo de apelación 196/2005, decision of 10 January 2006, available in Spanish online at URL <http://www.poderjudicial.es/search/indexAN.jsp?org=an&comunidad=13>; Bakker, *supra note* 59, p. 596.

62 Bakker, *supra note* 59, p. 599.

63 The proceedings and reactions were described in Peters, *supra note* 15, pp. 185–187.

64 E.g., opinion of Lord Browne-Wilkinson in UK House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet/Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, Judgment of 24 March 1999, available online at URL <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>.

The request to extradite Mr. Pinochet was issued by Spain based on a complaint regarding, among others, genocide, where the allegedly targeted group was a political group. Though such group was present in the Spanish legislation on genocide, it is an expansion of the definition present in the Genocide Convention and customary international law that 'only' protect national, ethnical, racial, and religious groups. Consequently, "*had the case gone forward on these grounds* [there would be a strong] *legal claim to reject Spanish jurisdiction since the definition the court employed was plainly exorbitant*."[65]

The fact that Pinochet was in the end released back to Chile on humanitarian grounds instead of extradition to Spain, does not change the significant impact of the entire proceedings.

4.1.3 Germany

Regarding prescriptive jurisdiction, Germany was among the active European countries that introduced universal jurisdiction into its legislation. According to its section 1, the German Code of Crimes against International Law ("CCAIL")[66] applies to crimes committed abroad and have no link to Germany. Sections 6–12 define the core crimes (genocide, war crimes, and crimes against humanity) that the law applies to.

The CCAIL was only the second piece of legislation introducing crimes under international law into German domestic law following the 1954 Act transforming the definition of genocide.[67]

Though quite relaxed and flexible, the German prosecutorial system of crimes under international law is based on the principle of subsidiarity and also allows the prosecutor a discretion when it comes to possible exercise of universal jurisdiction.[68]

4.1.3.1 *Jorgić Case*

Before the CCAIL was introduced, the German courts prosecuted the charge of genocide in the case of a Bosnian Serb, Nikola Jorgić. After his arrest when

65 Colangelo, *supra note* 1, p. 156.

66 Germany, Code of Crimes against International Law [Völkerstrafgesetzbuch] of 2002, available in English online at URL <https://www.iuscomp.org/wordpress/wp-content/uploads/2014/03/voestgb.pdf>.

67 Gropengießer, Helmut, 'The Criminal Law of Genocide. The German Perspective' (2005) *International Criminal Law Review*, vol. 5, 2005, p. 331.

68 Universal Jurisdiction Law and Practice in Germany. Briefing Paper, available online at URL <https://www.justiceinitiative.org/uploads/cc4f8190-8afa-4513-9603-25ab7bc5bb46/universal-jurisdiction-law-and-practice-germany-20190417.pdf>, pp. 17–18.

he returned to Germany, he was accused of having committed genocide within Bosnia and Herzegovina.[69]

The case was even decided by the German Constitutional Court and there was an interesting difference between the Federal Court of Justice's and the Constitutional Court's reasoning regarding the necessary link/nexus to Germany. The FCJ required a link to Germany for jurisdiction to be established and found it in the fact that the accused resided in Germany for decades.[70] The Constitutional Court was much more flexible and declared the constitutional complaint inadmissible to meritory decision among others because "*the principle of universal or world jurisdiction constitutes such a sensible nexus.*"[71]

The German prosecution clearly intends to keep its exercise of universal jurisdiction and the previous case is no exception as the prosecution of a former Syrian official for crimes against humanity and his recent conviction suggest.[72]

4.1.4 Argentina – the Rohingya

One of the currently most discussed violations of human rights that are being placed under scrutiny as to whether they fulfil the definition of genocide, are the events taking place in Burma/Myanmar against the Rohingya.

There are three major proceedings currently on going, one in front of the International Court of Justice,[73] the other investigation by the Prosecutor of the ICC ,[74] and last but not least, a domestic investigation in Argentina. The domestic investigation was commenced by the Burmese Rohingya Organisation UK (aka BROUK) with help of local Argentinian NGOs in 2019 when they filed a criminal complaint, using the universal jurisdiction possibilities of the Argentinian judiciary. The complaint is focused on charges of

69 International Crimes Database, *The Prosecutor v. Nikola Jorgić*, available online at URL <http://www.internationalcrimesdatabase.org/Case/1088/Jorgi%C4%87/>.

70 Germany, Decision of the [Bundesgerichtshof] of 30 April 1999, 3 StR 215/98; International Crimes Database, *The Prosecutor v. Nikola Jorgić*, available online at URL <http://www.internationalcrimesdatabase.org/Case/1088/Jorgi%C4%87/>.

71 Germany, Federal Constitutional Court, order of 12 December 2000, 2 BvR 1290/99, available in English online at URL <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212_2bvr129099en.html>, para. 38.

72 See NY Times, URL <https://www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html>.

73 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar).

74 ICC, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19.

genocide and crimes against humanity allegedly committed by the civilian and military leaders of Burma/Myanmar.[75]

Though the case has not yet proceeded any further, it also shows an example of the exercise of universal jurisdiction as Argentina supports this principle's application by its Constitution.[76]

4.1.5 The United Kingdom

4.1.5.1 *Nteziryayo and Others Case*

Due to numerous acts dealing with universal jurisdiction in UK's legislation, I will restrict myself to adjudicative jurisdiction only.

The Rwandan genocide from the 1990s currently resonates in front of the British criminal investigative bodies. In 2017, the Queen's Bench Division of the High Court of Justice decided in the case of *Nteziryayo and others*[77] that the suspects may not be extradited to Rwanda to face charges based on genocide due to fear of denial of fair trial.[78] However, the Court was explicit (though in media statement only) regarding three of the suspects, that they can be tried in the UK if "*they are not returned to Rwanda* [and] *provided that the Government of Rwanda cooperates*."[79]

Unfortunately, the judgment does not mention the citizenship of the suspects at the time of the crimes they allegedly participated in. But based on media reports, at least one of them gained British citizenship much later. Thus, the British courts have also confirmed the possibility of exercising universal jurisdiction.

4.1.6 The Czech Republic

Though, there has not been a case of exercising pure universal jurisdiction for the crime of genocide in front of the Czech courts, it is worth describing its legislation.

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75 United States Commission on International Religious Freedom, Factsheet Burma, March 2020, available online at URL <https://www.uscirf.gov/sites/default/files/2020%20Factsheet%20-%20Burma.pdf>.

76 Particularly by art. 118 - Statement of the Republic of Argentina, UNGA 6th committee, 73rd session (2018), *The scope and application of the principle of universal jurisdiction* (Agenda item 87), available online at URL <https://www.un.org/en/ga/sixth/73/universal_jurisdiction/argentina_e.pdf>.

77 United Kingdom, High Court of Justice, *Government of Rwanda v. Nteziryayo and others* [2017] EWHC 1912 (Admin).

78 *Ibid*, para. 499.

79 United Kingdom, Case Press Summary, available online at URL <https://www.judiciary.uk/wp-content/uploads/2017/07/rwanda-v-nteziryayo-and-others-press-summary.pdf>.

The Czech Criminal Code ("CCC")[80] is in fact very generous in relation to the jurisdiction of the Czech Republic. Paragraph 7 of the CCC allows for Czech law to be applied to enumerated crimes[81] even when committed abroad by a national of another state or by a stateless person (without a permit for permanent residency in the Czech Republic).

Additionally, paragraph 8 (its chapeau calls it subsidiary universal jurisdiction)[82] adds that Czech law (without limit to particular enumerated crimes) will *also* be applicable to offences committed abroad by foreigners or stateless person without a permit for permanent residency in the Czech Republic, if:

a) the act is also punishable under the law applicable in the territory where it occurred,
b) the perpetrator was apprehended in the Czech Republic, but was neither extradited nor transferred to criminal prosecution or punishment to another state or other entitled body, and
c) the foreign state or other entitled body that asked for extradition/transfer for the purpose of prosecution or punishment, asked for the prosecution in the Czech Republic.

Paragraph 7 has quite a large-scale potential within the framework of pure universal jurisdiction. However, it needs to be kept in mind that though an individual may inform the police and prosecutorial bodies of the Czech Republic about an alleged criminal offence, it is up to them (while respecting the law) to decide whether the investigation and prosecution will begin. And, for an investigation to begin, there needs to be sufficient suspicion and evidence. Thus, when it comes to crimes committed abroad by foreigners, the likelihood of sufficient evidence is not high. Consequently, the potential is not as large as it was in Spain, for example, in the Tibet Case described above.

4.2 *Partial Conclusion*

The aforementioned legislation and cases confirm that differentiating between pure and contractual universal jurisdiction is the correct attitude. States do in fact treat them differently. Regarding pure universal jurisdiction, it is also correct to conclude that it is permissive rather than obligatory, as opposed to

80 Czech Republic, Criminal Code, Act No. 40/2009 Co. (the CCC is described as it was by the date of 10 December 2020).

81 Including e.g., genocide (§ 400), torture and other inhuman or cruel treatment (§ 149), terrorist attack (§ 311).

82 One might add that incorrectly because though it certainly works with the principle of subsidiarity, it is not subsidiary universal jurisdiction but rather subsidiary representative jurisdiction.

contractual universal jurisdiction. Last but not least, both pure and contractual universal jurisdiction are exercised.

Based on amendments to domestic legislation, it might be suggested that states are retracting from pure universal jurisdiction (as seen in Belgium and Spain). On the other hand, there are examples of pure universal jurisdiction in other countries.[83] And also, the fact that some states changed their legislation to require a more common nexus, is not necessarily an indication of an opinion on pure universal jurisdiction being prohibited.

Also, in relation to the argument that Belgium and Spain leaned back to a traditional nexus, one must take into account two distinct situations: a) if the traditional nexus is required to be existent when the crime was perpetrated, then the amendments indeed reject the universality principle; while b) if they require the traditional nexus to exist now but not necessarily when the crimes occurred, the principle of universality is not rejected explicitly, it was just decided not to be used limitlessly.

The practice of adjudicative jurisdiction based on the pure universality principle is however much scarcer. Additionally, even states that exercise it, very often require the principle of subsidiarity of prosecution and presence of the accused within their territory. Regarding the principle of subsidiarity, we might conclude that it is reaching customary status. But the same may not be said about the presence of the accused within the prosecuting state.

Thus, a lot remains unclear, but the fact that pure universal jurisdiction is allowed as a customary rule is sufficiently established. Its particularities are not that clear and the exercise remains mostly unregulated by international law.

5 The International Criminal Court

So far only universal jurisdiction before domestic courts has been mentioned. This section deals with it on the international level and particularly in relation to the International Criminal Court.

The ratione loci and ratione personae scope of the jurisdiction of the International Criminal Court is limited by article 12 of the Rome Statute ("RS") and basically, in order for the ICC to be endowed with jurisdiction over a crime (in ratione materiae jurisdiction), it means that either the perpetrator is a national of a State Party to the RS, or the crime took place within territory of a

83 One might even talk about 'quiet expansion' of the universal jurisdiction, see Langer, Máximo, Eason, Mackenzie, 'The Quiet Expansion of Universal Jurisdiction' (2019) *European Journal of International Law*, vol. 30, no. 3.

State Party to the Rome Statue, or both. There is of course a different regime for new crimes under article 121(5) RS but it is also based on the premise of transfer of territorial and nationality-based jurisdiction by the State Parties upon the Court. Similarly, the jurisdiction conferred upon the ICC by the United Nations Security Council under article 13b) RS is established upon the transfer of the right to exercise this kind of jurisdiction by the Members of the United Nations upon the Security Council. Universal jurisdiction was actually refused as a basis for the ICC. The question however remained whether article 12 is an indication of State Parties not being able to confer their right to exercise universal jurisdiction or whether it is actually only a compromise between the delegations regarding scope of jurisdiction for the ICC in particular.[84]

The Appeals Chamber of the ICC could have hinted its opinion regarding this issue when it was dealing with the immunities of Omar al Bashir[85] in 2019 but it refrained from doing so. Perhaps, the ICC was not ready to openly accept the argument that State Parties delegated their jurisdiction titles to the court because the same could have been said about waiver of immunities. And, because the International Court of Justice refused waiver of immunities between States in the Arrest Warrant Case, i.e., on the horizontal level (as opposed in relation to an international court, i.e., on the vertical level), it could lead to the conclusion that the ICC could not require member states to arrest and surrender al-Bashir simply because they did not have the right to do so, and by delegation could not transfer it to the ICC.

So much for the more traditional view. Along the 'delegation concept', doctrine also discusses an alternative theory about existence of a ius puniendi inherent to the international community (and not really states) as a whole over crimes under international law and this right (ius) was created by customary international law.[86] Because jurisdiction over core crimes is universal, one might assume that it means the jurisdiction of the ICC is in fact only limited for political reasons but the Court is otherwise (for example, when it is triggered by the Security Council) actually exercising this universal right independent from (delegation by) States Parties.

84 Cormier, *supra note* 30, pp. 159, 167–168.

85 ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Judgment) ICC-02/05-01/09-397, ACh (6 May 2019).

86 Kreß, Claus, 'Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal', (2019) *Occasional Paper Series*, available at <https://www.toaep.org/ops-pdf/8-kress>, p. 19.

I am afraid this alternative theory[87] (though certainly supported by interesting arguments) underestimates the will (or rather lack thereof) of states to give up their primary role in international law, including their role in exercising jurisdiction. The idea of a right inherent to a theoretical entity (the international community) not even endowed with international personality is strange. Maybe I am too conservative.

Anyway, this discussion will remain purely theoretical because regardless of whether the basis for ICC's jurisdiction are rights delegated by states or universal right (limited by voluntary decision of delegations when negotiating the RS), the scope of jurisdiction of the ICC is not capable of extending over boundaries that the (possibly) delegated rights set. Thus, we may not find a reliable argument in the practice of the ICC to support the jurisdiction's universality of the Court.

6 State Succession

While studying universal jurisdiction, one may also come to deal with prosecutions of crimes under international law that take place within states that are successors of their predecessors in whose territory the crimes occurred. It is particularly an issue in post-Yugoslav states. It may also be a significant issue for new states, a typical example is Israel that exercised jurisdiction over Adolf Eichmann even though the crimes he was accused off occurred before the state of Israel even existed (so of course not a matter of succession but still a matter of how general international law applies).

The International Law Commission has come to study the topic of state succession in relation to state responsibility[88] and one of the questions that needs to be addressed in this topic is also whether customary law of succession includes the passage of the obligation to prosecute crimes (such as, for example, those contained in international treaties) from predecessors to successors.

If there was no such customary obligation and if a successor state would not become bound by treaties of its predecessor and if (based on the previous parts it is unlikely) pure universal jurisdiction was prohibited by international law, it would be possible that some perpetrators of crimes under international law might have escaped justice if domestic legislation decided not to establish

87 For a study in the viability and sense of the alternative argument see Cormier, *supra note* 30.

88 Basic information available at the webpage of the ILC <https://legal.un.org/ilc/summaries/3_5.shtml>.

prescriptive jurisdiction over them or limit it ratione temporis only to the moment of coming to existence of the successor state.

Consequently, it was interesting to see whether states actually do prosecute crimes under international law, including genocide, perpetrated within the borders of their predecessors. However, such practice of prosecuting, particularly genocidal charges, based upon acts that have been alleged to be committed before succession of states, are very scarce. One might take into account two cases in Croatia.[89] Otherwise, the available sources do not include any other.

Thus, the prosecutions of the crime of genocide are not capable of significantly helping the establishment of any possible customary law of state succession into the discussed obligation to prosecute. Also taking into account the fact that prosecutions of other crimes under international law that took place within territory of predecessors of the prosecuting state are rather limited, the conclusion is that there is definitely not enough practice to establish any custom of such kind.

7 Conclusions

Building upon the research presented in this contribution, it is possible to conclude that the distinction between pure and contractual universal jurisdiction is legitimate and both exist as distinct instruments. Both are also confirmed by practice by various states.

Despite the argument of states seemingly retracting from pure universal jurisdiction, the situation is not so clear, and the practice remains. Though, admittedly in different countries and conditioned by the principle of subsidiarity.

For the first time in history, there is also an established universal international criminal tribunal capable of prosecuting and punishing crimes under international law. Some might consider it a step back that its jurisdiction is not based on the principle of universality.

There is a lot still to do till international justice will become truly effective and there are some setbacks. On the other hand, the will of the international

89 Though the original charge was changed, genocide was charged in Crime in Tovarnik (<https://www.centar-za-mir.hr/en/ps/zlocin-u-tovarniku/>). Another possibly relevant case might be the Miklusevci case (<https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-6-genocide.pdf>, pp. 60–61 and https://www.centar-za-mir.hr/en/ps/zlocin-u-miklusevcima/).

community remains as firm as it has ever been to maintain and improve the situation. Hopefully, it will stay this way and even improve.

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