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THE CRIME OF GENOCIDE AND QUESTION OF GENOCIDAL INTENT IN INTERNATIONAL LAW

YÜKSEK LİSANS TEZİ

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MAYIS, 2019

PREFACE

Genocide is often mistakenly considered to have appeared for the first time in Nazi Germany against Jews. However it is estimated to have ravaged groups already 40,000 years ago. As in Raphael Lemkin's words, it is "*an old practice in its modern development*"[1] and it still continues its destruction path.

The recent history saw the Srebrenica and Rwandan Genocides in 1990's, which led into the setting up of the ad hoc criminal tribunals. Currently, the international case law on genocide is mostly established through the decisions rendered by these tribunals and International Court of Justice in the aftermath of these genocides. More developments are excepted to appear after the setting up of International Criminal Court (for example on Al Bashir case), although for the time being it has a limited jurisdiction since big world powers such as USA, China, Russia or Israel refuse to become party to the Rome Statute.

The recent genocidal campaigns in Srebrenica, Rwanda or Sudan have also proved that the crime of genocide, which is said to be "crime of the crimes", needs better preventive measures and the punishment of its perpetrators may be problematic because of the very high standard of proof required for genocidal intent. Does the solution lie in a revised genocide definition? The current definition is stipulated under the United Nations Genocide Convention and it reflects a complex negotiation process of the member states and is the outcome of a compromise culture. The need for a genocide convention had arisen in the aftermath of the Holocaust. It is not hard to imagine that obtaining the consensus of some 100 states over a delicate genocide definition would not be realistic considering how

[1] Raphael Lemkin**, Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress**, Publications of the Carnegie Endowment for International Peace, Division of International Law, Washington, United States of America, 1944, p.79

fragmented our current world is. The humanity cannot wait another big-scale human tragedy to have a revised definition of genocide. I believe the definition as contained in the Genocide Convention should remain, however a more liberal approach should be adopted to interpret its special intent requirement. This will not only lead to more fair judgments but also will support the objective of the United Nations to prevent further genocides.

I would like to thank to my supervisor Ms Vesile Sonay Evik for enabling me to work on this subject and her support. I feel lucky to have been able to research, learn and write my views on this important topic, which has not only criminal aspects but also social, economical, cultural, political and historical.

My last words are for my mother, whose support has made me always grateful throughout of my education, and Sid Vollebregt, to whom I want to thank for believing in me and creating the working atmosphere for me to be able to finish my thesis.

TABLE OF CONTENT

ABBREVIATIONS

UN: United Nations

ICC: International Criminal Court

ICJ: International Court of Justice

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for Former Yugoslavia

VRS: Army of Republica Srpska

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ICTR, Prosecutor v. Jean Kambanda, Trial Judgment, Case No. ICTR-97-23-S, Trial Chamber I, 4 September 1998

ICTR, Judgment, Prosecutor v. Gaspard Kanyarukiga, ICTR-02-78, Trial Chamber I, 8 May 2012

ICTY, Prosecutor v. Radovan Karadzic, Trial Judgment, Case No. IT-95-5-R61 Trial Chamber I, 24 Mar 2016

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ICTY, Prosecutor v. Radislav Krstic, Trial Judgment, Case No. IT-98-33-T, Trial Chamber I, 2 August 2001

ICTY, Prosecutor v. Radislav Krstic, Appeal Judgment, Case No. IT-98-33-A, Appeal Chamber, 19 April 2004

ICTY, Prosecutor v. Kupreskic, Trial Judgment, Case No. IT-95-16-T, Trial Chamber I, 14 January 2000

ICTY, Prosecutor v. Ratko Mladic, Trial Judgment, Case No. IT-09-92, Trial Chamber I, 22 November 2017

ICTR, Prosecutor v. Alfred Musema, Trial Judgment, Case No. ICTR-96-13-T, Trial Chamber I, 27 January 2000

ICTR, Prosecutor v. André Ntagerura, Trial Judgment, Case No. ICTR-99-46-T, Trial Chamber III, 25 February 2004

ICTY, Prosecutor v. Popavic et al, Trial Judgment, Case No. IT-05-88-T, Trial Chamber I, 10 June 2010

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ÖZET

Jean-Paul Sartre'ın dediği gibi “soykırım gerçeği insanlık kadar eskidir”. Soykırım, binlerce yıl önce toplumları yok etmeye başlayan ve “eskimeyen” ağır bir suçtur. Günümüzdeki çatışmalarda ve savaşlarda bu suçun işlenmesi; mağdurlar, toplumlar ve evrensel insan bilincinde onarılamaz bir hasara yol açmaktadır. Halihazırdaki tez, ilk bölümde, soykırımın tarihsel geçmişini göz önünde bulunduracak, ayrıca Soykırım Sözleşmesi ile soykırımın oldukça dar tanımını ve soykırıma yönelik eylemleri ölçmek için gereken özel kastı inceleyecektir. Aynı zamanda, ad hoc uluslararası ceza mahkemelerinin kurulmasına, Birleşmiş Milletler Uluslararası Adalet Divanı nezdinde davaların açılmasına ve ilk uluslararası daimi ceza mahkemesinin kurulmasına kadar giden yolu da kısaca gözden geçirecektir. İkinci bölümde, soykırım suçunun yapısı uluslararası hukuk çerçevesinde analiz edilecek, objektif ve sübjektif suç yapısı ile suçun özel görünüş biçimleri ele alınacaktır. Üçüncü bölümde, ayrıntılı olarak soykırım özel kastından bahsedilecek ve geçici mahkemeler ve Uluslararası Adalet Divanı'nın kararları ışığında bu özel kastın nasıl değerlendirildiği incelenecektir. Son bölümde, çağımızda yaşanan ihtilaflarda uluslararası ceza mahkemelerinin savcıları ve Uluslararası Adalet Divanı’ndaki davacı devletler için soykırım özel kastının kanıtlanması hususunun çok zor ve hatta imkansız olabileceği sonucuna varılacaktır. Öte yandan, özel kastın bilgiye dayalı ispat edilmesi yönteminin gelecekteki soykırım mahkumiyetlerini elde etmek için belki de tek yaklaşım olabileceği savunulacaktır.

Soykırım günümüzde belirli bir suç kategorisi olarak yer almaktadır ve ciddi insan kayıplarına neden olan diğer ağır suçlardan farklıdır. Örneğin, ilk olarak 1898 tarihli Lahey Sözleşmesi’nde yer alan ve daha sonra Nürnberg Davaları ile 1949 Cenevre Sözleşmesinde “olgunlaşan” savaş suçlarından farklıdır. Savaş suçlarının aksine soykırım barış zamanında da gerçekleşebilir. Soykırım, “suçların suçu” ve “nihai insan hakları sorunu” olarak adlandırılmaktadır, zira yasaklanması, doğrudan doğruya Birleşmiş Milletler Evrensel Beyannamesi gibi evrensel beyannamelerde

ve sözleşmelerde tanımlanan temel insan haklarından biri olan “temel yaşam hakkı”nı güvence altına almayı hedeflemektedir.

Soykırım yalnızca hukukçular tarafından kullanılan bir terim değildir. Aynı zamanda, tarihçiler tarafından herhangi bir hukuki standart uygulanmaksızın yaygın olarak kullanılan bir terimdir. Bununla birlikte, hukuki bir terim olarak soykırım, tarihçilerin kullandığı soykırım terimiyle önemli ölçüde farklılık gösterebilir. Bunun sebebi ceza hukukunda bir fiilin soykırım olarak kabul edilmesinin ancak belli şartların varlığına bağlı olmasıdır. Uluslararası hukukta soykırım suçunun oluşması için gerekli şartlar esas olarak 1948 yılında Birleşmiş Milletler tarafından kabul edilen Soykırım Sözleşmesi’nde yer almaktadır. Devletlerin çoğunun, kendi hukuk sistemlerinde Soykırım Sözleşmesi’ninkine benzer bir tanım uyguladığı görülmektedir. Bu tanım aynı zamanda ad hoc ceza mahkemelerinin ve Uluslararası Ceza Mahkemesi'nin statülerinde de yer almıştır.

Tarih bize, Soykırım Sözleşmesi’nin 1940'ların başlarındaki Nazi rejiminin işlediği korkunç suçlara karşı uluslararası toplumun bir tepkisi olarak doğduğunu göstermektedir. Soykırım Sözleşmesi’nin hazırlık çalışmalarına bakıldığında, bunun uzun bir müzakere sürecinin sonucu olduğu görülmektedir. Ardından, çok sayıda devletin farklı görüşlerine yer vermek amacıyla Soykırım Sözleşmesi’ndeki tanımının birçok yönden netleştirilmediği ve dolayısıyla suçun birçok unsurunun yorumlamaya açık bırakıldığı sonucuna varılmaktadır. Soykırım tanımının kabulü esnasında devletlerin tartıştıkları esas noktalardan biri de soykırım suçunun özel kastı olmuştur. Doktrinde birçok farklı görüşün ortaya çıktığı ve özellikle uluslarararası mahkemelerin yorum ve uygulamasının farklılaştığı görülmektedir.

Bu tezin amacı soykırım suçunun, özellikle de özel kast unsurunun, uluslararası mahkemelerin farklı yorumlarının ve bunun Soykırım Sözleşmesi’nin nihai hedefleri olan soykırımın cezalandırılmasını ve önlenmesini nasıl tehlikeye sokabileceğini anlamaktır.

Bu tez çalışmasında kullanılan metodoloji Eski Yugoslavya Uluslararası Ceza Mahkemesi, Ruanda Uluslararası Ceza Mahkemesi ve Uluslararası Adalet Divanı tarafından soykırım özel kastının nasıl yorumlandığı üzerine araştırma ve söz konusu mahkemelerce verilen önemli kararları incelemekten ibarettir. Ayrıca, uluslararası hukuktaki soykırım suçunda aranan katı özel kasttan dolayı ortaya çıkan sorunlara değinmeden önce, soykırımın tarihsel arka planına bir bütün olarak yer verilmiştir, zira bunun yeni bir olgu değil, insanları etkilemeye büyük ölçüde devam eden eski bir uygulama olduğunu anlamak önem arz etmektedir.

ABSTRACT

As Jean-Paul Sartre says, "*The fact of genocide is as old as humanity*"[2]. It is an atrocity crime that ravaged humanity thousands years ago and does not get 'old'. It continues in modern-day conflicts and wars to cause irreparable damages for the victims, their societies and the universal human consciousness. This thesis will, in the first part, consider the genocide's historical background, explore the Genocide Convention, its rather narrow definition of genocide, and the special intent required to amount the acts to genocide. It will also briefly review the developments that paved the way until the setting up of the ad hoc international criminal tribunals, the cases held before the United Nations' International Court of Justice and the setting up of the first international permanent criminal court. In the second part, I will analyze the structure of the crime of genocide under international law and elaborate on its objective and subjective structure, and special appearing forms. In the third part, I will focus on how genocidal intent operates and it has dealt with under international law in light of the jurisprudence by the ad hoc tribunals and International Court of Justice. In the last part, this work will conclude that in the conflicts in our era, it may be a very difficult or even impossible task to be satisfied for the Prosecutors of the international criminal courts and the claimant states before the International Court of Justice. Moreover it will argue that the method of knowledge-based intent, which requires knowledge and existence of other indirect circumstances, could be the only approach to obtain future genocide convictions.

Genocide is a particular category of crime and it differs from other grave crimes inflicting serious human losses. It is different from war crimes, for example, which were initially stipulated in the Hague Convention of 1898 and then 'matured'

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[2] William A. Schabas, **Genocide in International Law, The Crime of Crimes**, 2nd Edition, Cambridge, United Kingdom, Cambridge University Press, 2009, p.1

through the Nuremberg Trials and the Geneva Convention of 1949. In contrast to war crimes, genocide can also take place in peacetime. It is called “crime of crimes” and “ultimate human rights problem” as its prohibition is directly aimed at ensuring “the right to life”, one of the essential human rights defined in universal declarations and conventions such as United Nations’ Universal Declaration of Human Rights or Council of Europe’s European Convention on Human Rights.

Genocide is not a term that is used only legal scholars or law practitioners. It is a term that is also widely used by historians without applying any legal standards. However genocide as a legal term may differ significantly due to the requirements sought so as to qualify a certain criminal act as genocide. These requirement stem mainly from the Genocide Convention, which was adopted by the United Nations in 1948. It is seen that most states implemented in their own jurisdictions a similar definition to that of the Genocide Convention, if not its exact definition. This definition was also incorporated in the statutes of the ad hoc criminal tribunals and that of the International Criminal Court.

The history tells us that the Genocide Convention was a necessary reaction of the international community to the atrocities of the Nazi regime in the early 1940’s with a view to punish and prevent future genocides. When one looks at the *Travaux Préparatoires* of the Genocide Convention, it can be easily noted that this was an outcome of a long negotiation process. It followed that the definition of the Convention was not clear-cut in many aspects with a view to accommodate the different opinions of numerous states, and hence many elements of the crime were left open to interpretation. One of the main points of discussion regarding the adoption of the genocide definition was its special intent requirement. It is seen that there have appeared many different views in the academics, and in particular the interpretation and practice by the ad hoc criminal tribunals and International Court of Justice have differed at several aspects.

The aim of this thesis is to offer a thorough understanding of the crime of genocide, particularly its special intent component, different interpretations by the international tribunals and courts, and how this might jeopardize the punishment and prevention of genocide, which are the ultimate goals of the Genocide Convention.

The methodology used in this thesis is a research on how genocidal intent was interpreted by the International Criminal Tribunal for Former Yugoslavia, International Criminal Tribunal for Rwanda and International Court of Justice, by analyzing the landmark judgements rendered before them. Before dealing with the questions rose by the special intent as defined in the Genocide Convention, I also dedicated a whole section to the historical background of genocide since I believe it is important to understand that it is not a new phenomenon but an old practice, which continues affecting humans at a large scale.

RÉSUMÉ

Comme le dit Jean-Paul Sartre, «le fait de génocide est aussi vieux que l’humanité». C’est un crime d’atrocité qui a ravagé l’humanité il y a des milliers d’années et qui ne vieillit pas. Dans les conflits et les guerres modernes, les génocides continue de causer des dommages irréparables aux victimes, à leurs sociétés et à la conscience humaine universelle. Cette thèse examinera dans un premier temps le contexte historique du génocide, explorera la convention sur le génocide, sa définition plutôt étroite du génocide et l’intention particulière requise pour que ces actes soient qualifiés de génocide. Il passera également brièvement en revue les développements qui ont ouvert la voie jusqu’à la création des tribunaux pénaux internationaux ad hoc, aux affaires portées devant la Cour internationale de Justice des Nations Unies et à la mise en place du premier tribunal pénal international permanent. Dans la deuxième partie, j'analyserai la structure du crime de génocide au regard du droit international et développerai ses structures objective et subjective, ainsi que ses formes spéciales. Dans la troisième partie, je me concentrerai sur le fonctionnement de l’intention génocidaire. Ce droit a été traité en droit international à la lumière de la jurisprudence des tribunaux ad hoc et de la Cour internationale de justice. Dans la dernière partie, ce travail conclura que, dans les conflits de notre époque, il peut être très difficile, voire impossible, de satisfaire les procureurs des cours pénales internationales et les États demandeurs devant la Cour internationale de Justice. En outre, il soutiendra que la méthode de l'intention fondée sur la connaissance, qui nécessite la connaissance et l'existence d'autres circonstances indirectes, pourrait être la seule approche permettant d'obtenir de futures condamnations pour génocide.

Le génocide est une catégorie particulière de crime et il diffère des autres crimes graves infligeant de graves pertes en vies humaines. Il est différent des crimes de guerre, par exemple, qui avaient été initialement définis dans la Convention de La Haye de 1898, puis «maturés» par les procès de Nuremberg et par

la Convention de Genève de 1949. Contrairement aux crimes de guerre, le génocide peut également se dérouler en temps de paix. Le genocide s'appelle notamment «crime de crimes» et «problème ultime des droits de l'homme» car son interdiction vise directement à garantir «le droit à la vie», l'un des droits de l'homme essentiels définis dans les déclarations et conventions universelles telles que la Déclaration universelle des Nations Unies Droits de l'homme ou Convention européenne des droits de l'homme du Conseil de l'Europe.

Génocide n'est pas un terme qui est utilisé uniquement par des juristes ou des praticiens du droit. Ce terme est également largement utilisé par les historiens sans appliquer de normes juridiques. Cependant, le terme de génocide en tant que terme juridique peut différer considérablement en raison des exigences recherchées, de manière à qualifier un certain acte criminel de génocide. Ces exigences découlent principalement de la Convention sur le génocide, adoptée par les Nations Unies en 1948. On constate que la plupart des États appliquent dans leurs juridictions une définition similaire à celle de la Convention sur le génocide, si ce n'est sa définition exacte. Cette définition a également été intégrée aux statuts des tribunaux pénaux ad hoc et à ceux de la Cour pénale internationale.

L'histoire nous apprend que la convention sur le génocide est une réaction nécessaire de la communauté internationale face aux atrocités commises par le régime nazi au début des années 1940 en vue de punir et de prévenir les génocides à venir. Lorsqu'on examine les travaux préparatoires de la convention sur le génocide, on peut facilement constater qu'il s'agissait d'un résultat d'un long processus de négociation. Il s'ensuivait que la définition de la Convention n'était pas claire à de nombreux égards en vue de prendre en compte les opinions divergentes de nombreux États et, partant, de nombreux éléments du crime pouvaient être interprétés. L'un des principaux sujets de discussion concernant l'adoption de la définition du génocide était son exigence d'intention spéciale. On constate qu'il est apparu de nombreux points de vue différents dans la doctrine, et en particulier l'interprétation et la pratique des tribunaux pénaux ad hoc et de la Cour internationale de justice ont divergé à plusieurs égards.

Le but de cette thèse est de proposer une compréhension approfondie du crime de génocide, en particulier de son élément d'intention spéciale, des interprétations différentes des tribunaux internationaux et des tribunaux, et de la manière dont cela pourrait compromettre la répression et la prévention du génocide, objectifs ultimes de la convention sur le génocide.

La méthodologie utilisée dans cette thèse est une recherche sur l'interprétation de l'intention génocidaire par le Tribunal pénal international pour l'ex-Yougoslavie, le Tribunal pénal international pour le Rwanda et la Cour internationale de justice, en analysant les jugements historiques qui leur ont été rendus. Avant de traiter des questions soulevées par l'intention particulière telle que définie dans la convention sur le génocide, j'ai également consacré une section entière au contexte historique du génocide, car j'estime important de comprendre que ce n'est pas un phénomène nouveau, mais une pratique ancienne qui continue d'affecter les humains à grande échelle.

I. INTRODUCTION

This chapter analyses the origin and historical background of the crime of genocide with a view to provide a preliminary understanding the extent of the impact on mankind, and the process whereby the crime was stipulated in the Genocide Convention and acquired a jus cogens status under international law.

1. Historical background of the crime of genocide

Today, historical events that may fall under the category of genocide create frustration among scholars, lawyers, historians and politicians because recognition of a particular genocide in the history can have political, economical and social consequences (such as obligation to pay damages, pressure on the states alleged to have committed genocide, or relief for historical claims to be finally recognized worldwide).

The use of the word of “genocide” is relatively recent, and so is its definition under international law. However there are many other words that had been previously used in history and literature, underlying the massively destructive characteristic of the act: Mass killing, massacre, annihilation, eradication, ethnic cleansing and so on.

Humans have destroyed or attempted to destroy their own kind in whole or in-group in the cruellest ways in numberless occasions, expending to several continents. Genocide has taken place in different continents and regions of the globe, and in different kinds of civilisations, societies and cultures. Mass killings have occurred significantly in Europe but also in America, Africa or Asia throughout human history.

There is no particular reason to consider that our ancestors were different in the way they defied and eliminated their enemies. It was routine for clans and tribes to carry out "genocidal actions" against their opponents, similar to ancient empires and contemporary nation-states engaging in genocidal campaign to destroy their imaginary or actual enemies.[3]

Before considering the world history of genocide, one must understand the special character of genocide, which renders it distinct from other crimes such as war crimes or crimes against humanity. It is for instance routine for "genocide" to be mistakenly considered under the wide range of "war crimes"[4], which are severe breaches of international customary rules or conventions of international humanitarian law.[5] Genocide also differs from "crimes against humanity" classified as atrocious acts such as annihilation, extermination, deportation or large scale murder of civilians, and persecution on the basis of political, racial, or religious reasons.[6]

The Genocide Convention acknowledges, "*In all periods of history genocide has inflicted great losses on humanity*"[7]. Genocide does occur over time although the setting and circumstances are different. While drafting the following section, I benefited from sources that also assume that genocide is a universal historical fact dating back to the early beginnings of the human civilization.

Moreover when analyzing genocide in history, these sources primarily consider the definition in the Genocide Convention that provides that the acts should be committed against four protected groups; i.e., national*, ethnical, racial and religious groups*. In addition to these four groups, these sources also consider that *social and cultural groups* should be stipulated under the genocide definition as

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[3] Norman M. Naimark, **Genocide A World History**, New York, United States of America, Oxford University Press, 2017, p.1

[4] Schabas, Genocide in International Law, The Crime of Crimes, **op. cit.,** , p. 7

[5] Antonio Cassese / Paola Gaeta, **Cassese's International Criminal Law**, 3rd Edition, Oxford University Press, p. 65

[6] **Ibid**, p. 94

[7] https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf retrieved on 19 May 2019

they did fall under the United Nations Resolution no. 96(I)[8] of 1946 preceding the Genocide Convention and they had been placed originally in the draft definition of the Convention but taken out following political pressure from some of the states.

Lastly, I would like to add that the adjectif "genocidal" (as in genocidal violence or genocidal actions) is used in the following sections to mean "like or pertaining to genocide", although it does not necessarily translate into a fully established "genocide".

1.1. Before the 20th Century

Genocidal violence is not a phenomenon that emerged in 21st century. It is rather a practice that has been part of human history for so long.

Although it is impossible to know with certainty whether pre-historical humans committed genocide[9], there are hypotheses that advance that genocidal violence may have appeared as early as about 40,000 years ago. It is sometimes claimed that genocidal actions may have been the root cause that generated the extinction of the last Neanderthals by Homo sapiens.[10] The burial sites of the clans and tribes of Stone and Bronze Age also provide evidence for eradication of large groups, although pre-historical archaeological facts are very rare and the archaeological facts are restricted when it comes to the nature and scale of the mass killings.[11]

[8] The resolution 96(I) provides that "*The genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices – whether private individuals, public officials or states, and whether the crime is committed on religious, racial, political or any other grounds – are punishable.*" Resolution 96(I), 55th Plenary Meeting, UN Doc. A/RES/96(I), 11 December 1946 https://undocs.org/A/RES/96(I), retrieved on 07/04/2019

[9] Naimark, **op. cit**., p.7

[10] Ronald Wright, **A Short History of Progress**, Toronto, House of Anansi Press, 2004, p. 24-37.

[11] Naimark, **op. cit**., p.7

There are however more reliable historical sources. According to Thucydides, the members of the Melos community were brutally murdered in the Peloponnesian War once they declined to surrender to the Athenians.[12]

Genocidal violence was no stranger to the religious books. In the Old Testament, which is the first part of Christian Bible and based predominantly on the Hebrew Bible, the Hebrew God is depicted as a ruler insisting on mass murder at several occasions. For example, attacking the Israelites, the Amalekites become the target of the Hebrew God for a war that would last “from generation to generation”.

The book of Samuel tells one of the strongest “stories of genocide” in the Old Testament, whereby the prophet Samuel explains that God orders Saul to attack and kill the Amalekites due to their wrongdoing against Israelites. Saul then “*utterly destroys all of the people with the edge of the sword*” and spares only their king and gives the best of their livestock to Israelites. God becomes furious because Saul does not follow his orders and, in his presence, Samuel brutally kills the king. In the words of the Old Testament this was depicted as him “hewing Agag in pieces”. Later on, King David also gets engaged in a mass killing action against the Amalekites and destroys their towns, kills their men and boys, and enslaves their women. The Amalekites are not the only group that infuriates the Hebrew God because of their “wrongdoings” against the Israelites: also the Hittites, the Amorites, the Perizzites etc. are on his list for eradication.[13] Considering the Hebrew-Christian traditions and culture rooted in societies, it is impressive to note the aggression ordered by the Hebrew God towards other racial groups.

Yet, it would be wrong to conclude that it was only the Israelites, who engaged in a genocidal campaign as told in the biblical stories. Archaeological findings suggest that the neighbours of the Israelites, i.e. the Phoenicians, Arameans, Philistines etc., also pursued similar genocidal actions aiming at wiping out entire group of peoples and burning down their cities including their religious sites.[14]

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[12] https://www.britannica.com/topic/genocide, retrieved on 23/02/2019

[13] Naimark, **op. cit.,** p.8-9

[14] **Ibid**, p. 10

Iliad of Homer and other Greek poets in the 8th and 7th centuries BCE also tell the stories of mass destruction as a practice in ancient Greek civilisations. One of the most powerful narrative is the slaughtering of the people of Troy, where Agamemnon, King of Mycenae, orders a massive violence campaign so that the city should be completely destroyed and "*the whole people must be wiped out of existence*" to the point that his soldiers will not "*leave a single one of them alive, down to the babies in their mother's wombs –not even they must live*" [15].

Another example for the mass destruction campaign in human history is the extermination of very large groups of people by the armies under Cengiz Khan in the 13th century. The Mongol empire ruled on the vast territories between Pacific Ocean, Central Europe, the lands of Arabia and India and Siberia. It was clearly one of the mot successful empires in human history. Yet historians consider them also as one of the most brutal political formations ever.[16] Their impact can be illustrated in the city of Merv, currently in Turkmenistan, where Cengiz Khan's youngest son is said to have killed 700,000 people except some 80 craftsmen, or in Hungary where, the Mongol warriors massacred more than half of its population. [17]

The Mongols were not the only destructive force in the Middle Age. The Crusaders, fighting in the name of Jesus Christ, also engaged in massive destruction, rape, pillage and murders, while the Pope had given the assurance that "*there could be no sin in a campaign blessed by Christ.*" [18]

The arrival of the Spanish to the "New World" following the voyage of Christopher Colombus in 1492 was an irreparable disaster against the indigenous people of the continent. Some academicians consider that the number of the indigenous people who got killed between1490s and the early1900s was some 70 million. This is quite a substantial death toll, bearing in mind that the total population was estimated to be around 80 million. Although millions of them died

[15] **Ibid**, p. 11

[16] **Ibid**, p. 17

[17] **Ibid**, p. 23-24

[18] **Ibid**, p. 25

because of diseases brought by the Spanish to the continent, the latter imposed living and working conditions that made them more vulnerable: exploitation of the natives as forced labourers, concentration camps, forced deportations from ancestral territories, sexual abuse, forced living conditions whereby they were deprived of proper sanitary, shelter and food, and destruction of cultural sites, torture, wide-range massacres, terror, systematic military occupations etc.[19]

The Spanish and Portuguese settlements in America and Africa initiated an era, where the overseas empires extended to greater areas in the world. The period between late 17th century and First World War witnessed in North American, Southeast Asian, African, Australian and New Zealander territories several "settler genocides" following colonial claims and destructive actions of the British, French, Dutch, German and Italian against the indigenous peoples of the occupied lands.

European settlers believed that they rightfully inherited the land of the natives, who were the "aliens" and that they were entitled to exploit it for livestock, agriculture or precious metals to the natives' detriment, by massacring thousands of them if they had not been earlier killed by the European men's diseases.[20] On the of the first known mass killings in North America took place in New England between 1637 and 1640, which cost the lives of some 3,000 Pequot tribe.[21] The terrible destiny of the indigenous peoples in the globe was marked with countless massacres, forced deportations and terror from California to Tasmania until the 19th century.[22]

The 19th century saw other atrocities ranging from Anatolia to Algeria. It remains highly debatable whether all of the above mass destruction campaigns would be all labelled as "genocide" that is a criminal law offense as stipulated under the Genocide Convention. Nonetheless they show to us that they were each one of the many examples of the mass killing committed by humans against other

[19] **Ibid**, p. 34-36

[20] **Ibid**, p. 48-64

[21] **Ibid**, p. 56

[22] **Ibid**, p. 55-58

groups of humans under the pretext of race, ethnicity and religion. And we will never really find out if these massacres were really "genocides" as such.

1.2. The 20th Century

The genocides throughout the 20th century are not only recent for the human consciousness and memory, but also resulted in huge numbers of life loss affecting many generations and demographical status of the populations. The number of casualties caused by genocide during the 20th century, reaching 262 million people according to some historians, is sufficient to demonstrate the scale of human misery.[23] Again, although the term genocide has been often used to depict these tragedies, their facts are open to debate and it may be that not all of them fall under a strictly defined genocide term.

The 20th century events that are often cited as '*universally accepted genocides*' comprise the nearly complete extermination of Jews, Roma, and other groups by Nazis throughout the World War II, and in the 1990's, the killing of Tutsi by Hutu in Rwanda and Bosnian Muslims in Srebrenica. In addition to these, although political, social or cultural groups fall outside of the definition of Genocide Convention, our previous century was marked by some of the highest death tolls in the "communist genocides" and "anti-communist genocides". The former includes the mass killings by the regimes of Stalin in Soviet Union, Khmer Rouge in Cambodia and Great Leap regime in China by extermination, forceful deportation, dreadful prison conditions, starvation etc.[24] The latter is alleged by scholars to have been committed against the peoples of Vietnam, Guatemala, Indonesia and East Timor.[25]

This part of the thesis does not engage in a detailed historical research about the genocidal acts that took place in human history, but it rather aims to provide an insight on the historical background of the crime to have a better understanding of

[23] Kristen Renwick Monroe, **Ethics in an Age of Terror and Genocide: Identity and Moral Choice**, Princeton University Press, 2012, p. 14-15

[24] **Ibid**, p. 86

[25] **Ibid**, p. 104-121

the circumstances and facts that preceded the Genocide Convention and establishment of ad hoc tribunals of ICTR and ICTY, which relate to the subject of this thesis, i.e. the crime of genocide and its component of special intent under international law. For this reason the next pages will only describe the atrocities that paved the way for the crime of genocide to be criminalized and punished under international law, namely the Holocaust, the Rwandan and Srebrenica genocides.

1.2.1. The Holocaust

The term ‘holocaust’ is composed of the Greek hólos, meaning ‘whole’ and kaustós, meaning ‘burnt’. Encyclopedia Britannica defines is as “*The systematic state-sponsored killing of six million Jewish men, women, and children and millions of others by Nazi Germany and its collaborators during World War II”*.[26]

Leaving behind atrocities and shaking the conscious of nations, the extermination of European Jews in the 20th century caused a greater international awareness and public sensitivity in relation to the severity of the acts committed. Nazi Germany systematically murdered some 6 million European Jews, which was around two-thirds of the Jewish population of Europe at that time, between 1941 and 1945.

Genocide against the Jews occurred as part of Hitler’s attacks on mentally and physically disabled Germans, homosexuals and Roma as they were accused of threatening the healthy, pure and integral German society.[27] The estimated numbers of murdered disabled and Roma victims are each about 200,000.[28]

The Nazis managed to systematically murder their victims with the help of their SS force and used technology to develop a sophisticated railway system to take the victims to the concentration camps.[29] They also vastly used industrial methods of killings (extermination by gas vans, use of gas chambers and crematoria for

[26] https://www.britannica.com/event/Holocaust, retrieved on 23/02/2019

[27] Naimark, **op. cit.,** p.83

[28] **Ibid**, p. 85

[29] **Ibid**, p. 84-85

disposal of the bodies), which distinguished them from the previous *genocidaires*. During the "industrial phase", they were able to kill some 2 million Jews only in gas chambers. Shooting, starvation and diseases killed another 3.5 million. The killings continued even when it became clear that Germany lost the war. [30]

The aftermath of the Holocaust was so intense that it paved the way to Genocide Convention, which is at present regarded as the basis of international law on genocide.

1.2.2. Balkan Wars

The death of Yugoslav lifetime leader Josip Borz Tito in 1980 set off a number of events, which finally destroyed the Yugoslav state. It was a multinational state, composed of six republics.[31] Fuelled by an explosion of nationalist ideologies, the disintegration of the multinational former Yugoslavia occurred in 1990's with "genocidal consequences".[32] The first signs of severe conflict appeared in Slovenia. The Serbian-Croat war also showed the first "warnings of genocide".[33] However it was over Bosnian Muslims that the effects of the Serbian nationalism were most detrimental in terms of human loss and scale of human tragedy.

Supported by the newly established Republic of Serbia and equipped with the Former Yugoslavia's weaponry, the Bosnian Serbs run a massive ethnic cleansing campaign in some 3,600 towns and villages in Bosnia and Herzegovina against hundreds of thousands of Bosnian Muslims. Equipped only with poor arms, Bosnian Muslims were no match for the Bosnian Serbs under the destructive leadership of Radovan Karadžić. Ethnic cleansing was about expulsion of the Muslims from the territories claimed by the Serbs but also about punishment. The acts committed included periodic killing, raping (sometimes in "designed rape camps", torturing,

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[30] **Ibid**

[31] These republics were: Socialist Republic of Serbia, Socialist Republic of Bosnia and Herzegovina, Socialist Republic of Slovenia, Socialist Republic of Croatia, Socialist Republic of Macedonia, and Socialist Republic of Montenegro.

[32] **Ibid.**, p. 124

[33] **Ibid.**, p. 123-124

beating and other degrading treatments.[34] The estimated numbers of death toll is about 100,000, while the number of displaced people was about 2.2 million in Bosnia and the majority were the Muslims.[35]

The situation became worse in Srebrenica in April 1993, when the Army of the Republika Srpska (“VRS”) gained control over the enclave, which had been declared a "safe area" for civilians under the safeguard of the United Nations. Muslims from villages, who had no choice but seek refuge against Bosnian Serbs in Srebrenica, filled the enclave. Later some 20,000 refugees arrived without being able to enter the premises, hoping to be rescued by the United Nations soldiers. When the Serbian soldiers under the command of General Ratko Mladic started their march towards the town, United Nations Protection Force’s 570 lightly armed Dutch Battalion soldiers could not (or did not)[36] prevent them from capturing the town and carrying a massacre that followed with a huge death toll.

Today the term “Bosnian genocide” mostly indicates the genocide that occurred in Srebrenica. It refers to the slaughter of about 7,000-8,000 Bosnian Muslim men, the deportation of some 25,000–30,000 Bosnian civilians committed

[34] **Ibid.**, p. 126-127

[35] **Ibid.**, p. 128

[36] The Dutch soldiers were found partly responsible by the Hague Court of Appeals in the Netherlands in 2017 for approximately 300 deaths in Srebrenica as it was found that the soldiers “*knew or should have known that the men were not only being screened … but were in real danger of being subjected to torture or execution … by having the men leave the compound unreservedly, they were deprived of a chance of survival*”. Citation on https://www.theguardian.com/world/2017/jun/28/dutch-soldiers-let-300-muslims-die-in-bosnian-war-court-rules

In my opinion, next to the responsibility of the Dutch Battalion, the Western forces, in particular those sitting in the United Nations Security Council are principally to be blamed for the human loss and tragedy in Srebrenica but also in the rest of Bosnia. They chose to deploy very insufficient numbers to protect an area declared “safe”, shut their eyes for long time to the atrocities while they were being committed at their “door” and failed to substantially intervene at an adequate speed to prevent genocide, other acts of crimes against humanity and war crimes.

by the units of the VRS under the charge of General Ratko Mladić. It was known that, a paramilitary force unit from Socialist Republic of Serbia (part of the Ministry of Interior Affairs), “the Scorpions” also militarily supported the VRS in the commission of the slaughters.

1.2.3. Genocide in Rwanda

When Germans and Belgians established their colony in Rwanda, they also introduced a system based on stereotypical division of the two races: on an end Hutus, who were short, farmer and “negroid”; and on the end Tutsis, who were seen as tall, intelligent, racially superior to Hutus. Not surprisingly, the colonial powers favored the ruling of the Tutsi aristocracy over Rwanda and supported them to be socio-economically better positioned than Hutu. The Belgians went on issuing identity cards whereby the race would be mentioned as either Hutu or Tutsi, destroying the social, economical and cultural exchanges between the two groups.[37]

After the independence of Rwanda in early 1960’s, the post-colonial history saw that violence hit the relations between Hutu and Tutsi for about 40 years. Although there was no real civil war until 1994, a disaster broke off when the plane of the Presidents of Rwanda and Burundi was attacked over Kigali in April 1994. Not only the plane crashed, but also the fragile peace established by the Arusha Accords between Tutsi and Hutus groups of the country collapsed.[38]

During the days that followed, unimaginable violence overtook Rwanda and made the Great Lakes area witness one of the most intense mass destruction campaigns of the last century. Soldiers, gendarme, politicians and ordinary citizens committed genocide, crimes against humanity and war crimes primarily against Tutsi civilians and moderate Hutus. The number of men, women and children massacred by Hutu extremists was between 800,000 and 1,000,000. The rate of slaughter was four times higher compared to when the Holocaust had reached its killing peek [39], which demonstrates the scale of the human carnage.

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[37] Naimark, **op. cit.,** p.131

[38] Ibid., p. 132-133

[39] http://unictr.irmct.org/en/genocide

2. The 8 stages of genocide

Each of the genocides described above followed the pattern of "8 stages" as described by Gregory H. Stanton.[40] It is thus important to have structural understanding of these stages before examining the foundations and components of the crime. These are "*classification, symbolization, dehumanization, organization, polarization, preparation, extermination, and denial*"[41].

Classification, although essentially required by all languages and cultures around the world, is the first step towards genocide. For instance the Nazis had very detailed laws to classify Jewish. In Rwanda there was also a clear distinction between the Tutsi and Hutu as no one was mixed in the society. Although there were mixed marriages, children born out of these marriages would not be mixed but their ethnicity would be defined according to their fathers. "Bipolar societies", as in the words of Gregory H. Stanton, are where it is most likely for genocide to occur.

Symbolization is used when referring to a certain classification. In Rwanda, the Hutu was a symbol, just like Muslim was in ex-Yugoslavia.

Once the stages of classification and symbolization have been reached, the next step is dehumanization of the group in question. Denial of their humanity is a mean to make the killing possible without being punished. To incite to genocide the targeted group can be referred to as names of animals or diseases that disgust societies. For instance in Rwanda the Hutu called the Tutsi 'inyenzi'[42], meaning cockroaches, and thereby dehumanizing and in their minds reducing them to animals. This would allow the Hutu to kill the Tutsi. It is also not a coincidence that bodies of the genocide victims would be mutilated, an expression of the denial of

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[40] Gregory H. Stanton, "The 8 Stages of Genocide", Working Paper (GS 01), **Yale Program in Genocide Studies**, 1998

[41] **Ibid**

[42] ICTR, Prosecutor v. Jean Paul Akayesu, Trial Judgment, Case No. ICTR-96-04-T, Trial Chamber I, 2 September 1998, para.147-151

the victim's humanity.[43] This was exemplified in Rwanda but also in other genocides such as the Bosnian genocide.

Moreover genocide is always organized and the result of a collective work of one part of the society who drives its impetus from group identification. Planning and means used to carry out the killing do not need to be elaborate. In Rwanda, the Tutsi were killed with basic objects such as machetes, clubs and small axes [44].

The next step is polarization, where the targeted group is polarized from the targeting group and moderate figures in the society are systematically eliminated. This makes it possible for the mass murders to happen. In Rwanda the Hutu Prime Minister and Chief Justice of the Supreme Court were one of the first public figures who were killed, as they were moderate, opposing to the extremist Hutus.[45]

Preparation for genocide means identifying the target group. For example, houses can be marked, the target group can be forced to wear certain identifying symbols or carry identification cards showing their ethnicity or which religious faction they belong to. Preparation can also include concentration of the target group. A notorious example for this is the Nazi regime forcing the Jewish community to concentrate at certain ghettos and building extermination camps.

Genocide is realized once one reaches the stage of extermination. This is followed by the eight and last stage; namely denial of genocide. Mass murders are hidden in mass graves and local historical records are altered to allow a scenario of non-genocide.

3. Foundations of the crime of genocide under international law

The period after the First World War saw some first efforts to internationally criminalize and punish war crimes and crimes against humanity. Although these

[43] Stanton, The 8 Stages of Genocide, **op. cit**., p.3

[44] ICTR, Akayesu, supra note. 42, para. 19

[45] Stanton, The 8 Stages of Genocide, **op. cit**., p.3

turned out to be "catastrophes", they also served to initiate an international movement.[46]

The progress in the international legal foundations on genocide concretized with the United Nation's Convention on genocide, and later institutionally established with the set-up of international ad-hoc criminal tribunals and the permanent International Criminal Court. Following modern atrocities, in particular after the genocidal civil wars that broke out in Former Yugoslavia and Rwanda, the foundations were strengthened with the jurisprudence delivered by the ad-hoc tribunals and International Court of Justice.

3.1. Developments between two world wars

In the aftermath of the First World War, the international criminal law specialists, such as the Advisory Committee of Jurists (nominated in 1920, by the Council of the League of Nations) and The International Law Association and the International Association of Penal Law made a number of proposals. Their efforts led in 1937 to the adoption by the League of Nations of the "Convention for the Creation of an International Criminal Court", although this failed to come into force due to lack of state ratifications.[47]

Although the failures, where were also developments that provided some sort of early protection to the victimized minority groups. For instance in 1919, United States of America, the British Empire, France, Italy, and Japan signed a "Treaty of Peace" with Poland, building a system of protection for national minorities, whereby it was stated that "*Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion*."[48]

Although the "system of Minorities Treaties" in between the two world wars did not deliver a sufficient protection in obvious violations, they remained as a

[46] Schabas, Genocide in International Law, op. cit., p.26

[47] **Ibid.**, p.27

[48] **Ibid.**

precursor of the contemporary international human rights law. It sheltered the Jews in Poland and Germany at least until 1937, the expiry of the bilateral treaty between the two countries. These treaties also contributed to the groundbreaking work on genocide of Rafael Lemkin, a lawyer who would become a survivor of the Holocaust.[49]

Raphael Lemkin had already been known worldwide as a scholar of international criminal law, and attended important worldwide summits like "Conferences on the Unification of Criminal Law". As a Polish Jew, he sought refuge first in Sweden in 1939 and settled finally in the United States of America. Determined to promote the criminalization and punishment of genocide, he started off a global movement to prohibit this crime.[50]

In 1944, he published his book with the title "Axis Rule in Occupied Europe", and documented Nazi German strategies to methodically destroy national and ethnic groups. In this book, joining together "genos" (a Greek prefix that means 'race', 'tribe' or 'nation') and "cide" (a Latin suffix that means 'killing'), he coined the term "genocide".[51] Noting the necessity of new terms by new concepts, he provided a definition of genocide as follows:

> "[A] *coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against*

[49] **Ibid.**, p.27-28

[50] **Ibid.**, p.28

[51] **Ibid.**

> *individuals, not in their individual capacity, but as members of the national group."*[52]

Raphael Lemkin's definition appears to be narrow at first glance as genocide can be directed only against a "national group". Yet, it is at the same time broad in so far as it includes not only physical disintegration but also considers as genocide when the victimized group's culture and living circumstances are destroyed. The definition would later prove its importance while drafting the Genocide Convention, subject of my next section.

3.2. Genocide Convention

3.2.1. Drafting process

In 1945, the high rank Nazis were found guilty by the Nuremberg International Military Tribunal of the crimes against humanity. Raphael Lemkin travelled to Nuremberg to pitch his ideas motivated by his own personal life experience. He was not glad with the outcome, as the Tribunal did not pick up the newly coined word of "genocide" in the way he was campaigning for.

The term "genocide" did not play an important role as it was not one of the crimes stipulated in the rules and it was not perceived as an international crime yet. The Charter of the International Military Tribunal only mentioned "crimes against humanity", which was confined to the acts committed in the aftermath of the Second World War, to hear the allegations of persecution and physical extermination of the victimized groups. The Nazi policy of extermination was not the main point of attention. Rather the Nuremberg Trials' focus was on the war crimes and crimes against humanity, while dealing with the persecution and physical annihilation of national, ethnic, racial and religious groups. [53]

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[52] Lemkin, Axis Rule in Occupied Europe, **op. cit.,** p.79

[53] William A. Schabas, "Convention for the Prevention and Punishment of the Crime of Genocide", **United Nations Audiovisial Library of International Law**, retrieved on 05/04/2019 http://legal.un.org/avl/ha/cppcg/cppcg.html

The term merely appeared in the indictment under the head of "war crimes" and "crimes against humanity", despite that it was used only as a description and not as a legal term. In relation to war crimes, the indictment accused the defendants of committing *"deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian population 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*".[54] Moreover the charges in relation to crimes against humanity contained, amongst others, the systematic persecution of Jews, "*deprived of liberty, thrown into concentration camps where they were murdered and ill-treated*".[55] The term was not mentioned in the conclusive judgement in autumn 1946.[56]

Raphael Lemkin later concentrated his focus on lobbying by the recently established United Nations and pressing for the adoption of the term genocide in an international, legal instrument, which would define and prohibit the act. Some countries also raised their voices as the Nuremberg Trials failed to punish the committed acts, which would fall under "genocide". In late 1946, during the initial session of the United Nations General Assembly, some countries (Cuba, Panama and India) submitted a draft resolution with two objectives: genocide should be declared as a crime both during peacetime and war time and states should have universal jurisdiction to prosecute and penalize those who commit genocide.[57] This led to talks between member states on whether genocide ought to be criminalized under the system of international law.

In December 1946, the General Assembly accepted the resolution 96(I) and declared that "*The genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices – whether private individuals, public officials or states, and whether the crime is*

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[54] Johan D. van der Vyver, "Prosecution and Punishment of the Crime of Genocide", **Fordham International Law Journal**, Volume 23, Issue 2, 1999, Article 2, p.286

[55] **Ibid.**

[56] Schabas, **Convention for the Prevention...,** p.1

[57] **Ibid**, p. 1

committed on religious, racial, political or any other grounds – are punishable."[58] The matter was thereafter forwarded to the Economic and Social Council for creation of a draft convention.

The drafting of the text took place in a couple of principal steps. Initially the United Nations Secretariat prepared a basic draft text with the support of legal specialists. These experts were Raphael Lemkin (the father of the term "genocide"), Vespasian Pella (a Romanian legal expert, who advocated the establishment of an international criminal court and commencement of international criminal proceedings against heads of state guilty of crimes against humanity) and Henri Donnedieu de Vabres (a French jurist, who also served the primary French judge during the Nuremberg Trials). Established under the Economic and Social Council of the Untied Nations, the Ad Hoc Committee issued a draft that was later presented to the Sixth Committee of the General Assembly for negotiations. Once the text final version of the Convention was agreed it was presented to the plenary General Assembly for its formal adoption.

Finally on 9 December 1948, the UN General Assembly adopted the "Convention on the Prevention and Punishment of the Crime of Genocide" ("the Genocide Convention" or "the Convention"), which established genocide as an international crime that the states "*undertake to prevent and punish".*[59] Genocide was thereby for the first time recognised to be an international independent crime.

3.2.2. Important provisions

The preamble of the Convention refers to the Resolution 96(I) of the United Nations General Assembly and acknowledge that "*genocide is a crime under international law, contrary to the spirit and aims of the United Nations and*

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[58] "The Crime of Genocide", Resolution 96(I), 55th Plenary Meeting, UN Doc. A/RES/96(I), 11 December, the text retrieved on 19 May 2019 on https://www.un.org/documents/ga/res/1/ares1.htm

[59] The text of the Genocide Convention can be accessed via https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf, retrieved on 19 May 2019. It came into effect on 12 January 1951 (Resolution 260 (III)) following ratification by twenty countries in line with the requirement of Article 13.

condemned by the civilized world" and that a cooperation between states is needed to "*liberate mankind from such an odious scourge*" that caused great losses throughout all human history.[60]

Originally, the main idea behind the Convention, as shown in its name "Convention on the Prevention and Punishment of the Crime of Genocide", was "prevention". However, except the two express references to "prevention" in the text (Article 1 and 8), the rest of the provisions focus mostly on the "punishment".[61]

Pursuant to Article 1, genocide is a crime under international law "*whether committed in time of peace or in time of war*", and that the Contracting States "*undertake to prevent and punish the crime"*. It is established that the crime of genocide may take place in the context of an armed conflict, international or non-international, but also in the context of a peaceful situation. The latter is less common but still possible.

Moreover Article 8 provides that "*Any Contracting Part may call upon the competent organs (...) for the prevention and suppression of acts of genocide (...)*". It is commonly interpreted that this provision only confers a contracting party the right to refer a situation to one of the competent organs of the United Nations, although it does not stipulate what actions need to be taken by that competent organ once referred.

In the "heart" of the Convention lie Articles 2 and 3. Since I will elaborate further in detail on the scope of Articles 2 and 3 under the chapter on the "structure" of the crime of genocide, for the time being I would like to provide only brief explanation: Article 2 defines genocide as "*acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*", while Article 3 lists five punishable acts. During the negotiations at the Sixth Committee, the core of the discussions were the definition of the mental element of the crime

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[60] **Ibid.**

[61] Eyal Mayroz (and several authors), "Genocide, To prevent and punish 'radical evil'*",* **International Criminal Law in Context**, Routledge, New York, United States of America, 2018, p.81

and whether cultural genocide[62] shall be treated as an act of genocide. In this context the Sixth Committee made four important amendments to the draft presented by the Ad Hoc Committee. First, it removed the word "deliberate" before "acts". Secondly, it added that the destruction of the group should not be necessarily total but also "in part". Thirdly, it added "ethnical group" and removed "political group" from the sphere of the protected groups. Lastly, it substituted the suggestion to add that genocide was committed on grounds of the "*national or racial origin, religious belief, or political opinion of its members*" with the words "*as such*".[63]

Article 4 states that persons who commit the crime shall be punished regardless of whether they are "*constitutionally responsible rulers, public officials, or private individuals*", whereby refusing to allow heads of states or other officials to benefit from the defence of "official capacity".[64]

The Convention is not self-executing, i.e. the states parties to the Convention shall criminalize and punish the crime of genocide in their own criminal national legal systems in line with Article V. Although the states were not obliged to take the genocide provision in verbatim, it is interesting that most of Contracting Parties (such as Belgium[65], Brazil[66], Denmark[67], Israel[68] etc.) rephrased the concept as

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[62] The division between the groups of the *Travaux Préparatoires* became obvious when discussing the draft of the convention at the Sixth Committee. The words of the delegates of Pakistan and Denmark will suffice to show the extent of their opposing views. Pakistan stated that "*Some representative appeared to consider cultural genocide as a less hideous crime than physical or biological genocide (…) [F]or millions of men in most Eastern countries the protection of sacred books and shrines was more important that life itself; the destruction of those sacred books or shrines might mean the extinction of spiritual life. Certain materialistic philosophies prevented some people from understanding the importance which millions of men in the world attached to the spiritual life.*" On the other hand Denmark argued that "*[I]t would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries.*" Eventually, the text of the Convention excluded "cultural genocide" and included the listed acts falling under the category of 'physical' or 'biological' genocide. Reference from Hirad Abtahi and Philippa Webb, "Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention, **Arcs of Global Justice**, Oxford University Press, United Kingdom, 2018, p. 308

[63] Schabas, **Genocide In Internatianal Law…,** p.86

[64] Supra note 59

[65] http://www.preventgenocide.org/fr/droit/codes/belgique.htm retrieved on 26/02/2019

[66] http://www.preventgenocide.org/pt/direito/codigos/brasil.htm retrieved on 26/02/2019

[67] http://preventgenocide.org/dk/folkedrab1955.htm retrieved on 26/02/2019

stipulated in the Convention. Moreover some states (such as France[69] and Finland[70]) broadened the scope of the definition by extending protected groups.

Moreover the Convention does not recognize universal jurisdiction but only territorial jurisdiction of an international penal tribunal. Article 6 of the Convention provides that "*Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed* [71]*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*" It is worthwhile to add that the reference of an international tribunal as such in the definition kicked off a "sporadic work" that, in the long run, led to the adoption of the Rome Statute that established the International Criminal Court.[72]

Article 7 affirms that the contracting states shall "*grant extradition in accordance with their laws and treaties in force*".[73]

Article 8 provides that any contracting state may ask the competent organs of the United Nations to initiate an action under the Charter of the United Nations to preclude and repress the acts listed as crime in the Convention. As, William A. Schabas states, this is a very unnecessary provision since the member states are already entitled to appeal to the organs of the United Nations.[74]

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[68] http://preventgenocide.org/il/law1950.htm retrieved on 26/02/2019

[69] For example French Penal Code, in addition to the 4 protected groups, provides in article 211-1, "*un groupe déterminé à partir de tout autre critère arbitraire*" meaning "*a group established by reference to by other arbitrary criterion*", http://www.preventgenocide.org/fr/droit/codes/france.htm retrieved on 26/02/2019

[70] The Finnish Criminal Code, in Chapter 11 Section 6, adds "*another comparable group*" to the 4 groups protected by the Convention's provision http://www.preventgenocide.org/fi/rikoslaki.htm retrieved on 26/02/2019

[71] In the case Israel v. Adolf Eichmann, the Israeli courts however rejected the argument of the accused for the principal of territorial jurisdiction under Genocide Convention and held that they had jurisdiction to hear the case of the accused, as the customary international law allowed the exercise of universal jurisdiction over genocide. Schabas, **Convention for the Prevention...**, p.3

[72] **Ibid.**, p. 2

[73] Supra note 59

[74] Schabas, **Convention for the Prevention...**,p.4

An important provision lies under Article 9 as it grants jurisdiction to the International Court of Justice to hear "*disputes between the Contracting States relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3*".[75]

The remainder of the provisions are mostly technical, such as the language of the texts and entry into force process of the Convention.

3.2.3. Significance, role and flaws

Once the United Nations General Assembly adopted the Genocide Convention in 1948, as Antonio Cassese expressed, "[G]*enocide acquired autonomous significance as a specific crime*".[76]

As a human rights treaty, the Convention's primary aim is to protect the four groups of (national, racial, ethnic and religious) minorities from attempt, conspiracy, incitement, complicity and the completed form of the crime of genocide. It means that the Convention protects the very existence of these groups.[77]

The Convention has many virtues. It stipulates a "careful" definition of the crime of genocide, accepts that genocide is a crime irrespective of whether it is during war or peace time, enables states to be responsible for the crime.[78]

Moreover its norms can be, to a large extent, considered as declaration of the existing customary international law on genocide. This was set forth by the International Court of Justice in its "Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951".

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[75] Supra note 59

[76] Cassese / Gaeta, **Cassese's International…,** p.109

[77] Schabas, **Convention for the Prevention...**, p.4

[78] Cassese / Gaeta, **Cassese's International…,** p.113

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946).

The first consequence arising from this conception is that the principles underlying the Convention are principles, which are recognized by civilized nations as binding on States, even without any conventional obligation.

A second consequence is the universa1 character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention).

The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope."[79]

The International Court of Justice has since then frequently declared that the Convention incorporates principles that are part of "*general customary international law*". It follows that, irrespective of whether a state ratified the Genocide Convention or not, it must comply (as a matter of law) with by the rule that genocide is a crime under international law. As also recalled by United Nations' Secretary-General in his Report on the Establishment of the International Criminal

[79] International Court of Justice, Reservations To The Convention On The Prevention And Punishment Of The Crime of Genocide, Advisory Opinion on May 28th 1951, page 12, https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf

Tribunal for the former Yugoslavia[80], the criminalization of the crime of genocide has a jus cogens status, as such no derogation from it is allowed in international law.

The Convention's importance lies not only in its jus cogens statute but also it enables the contracting states to put forward a situation before the International Court of Justice of the United Nations, which has jurisdiction to hear disputes between state parties concerning the interpretation and application of the Convention.

The Convention has merits but also flaws. Since its adoption, the Convention has been criticized on a number of points. The most obvious ones are the following. (i) Genocidal intent, which is vital to amount the act committed to genocide, is not unambiguous. The effect of this lack will be detailed in the chapters that follow. (ii) Moreover "cultural genocide" and "political genocide" are excluded from the scope of Article 2. The latter exclusion was an intentional preference of the drafters of the Convention. (iii) The four groups protected under the definition (namely, "national, ethnical, racial, and religious") are not defined. (iv) Moreover, the enforcement mechanism is not ineffective, mostly due to political discussions. It is true that an there is no efficient enforcement mechanism that would impose on the states to criminalize and prosecute criminals, or a monitoring mechanism that would prevent that the crime is committed. Also, the "territorial jurisdiction" set out in the Convention may be a hindrance to the prosecution of the crime since the prosecutors of the states where the allegations of genocide arise will not be willing to open investigations. Lastly, despite Article 8[81], the United Nations General Assembly only once declared a mass killing [82] as "an act of genocide".[83]

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[80] Secretary General's Report pursuant to paragraph 2 of Resolution 808 (1993) of the Security Council, 3 May 1993, S/25704, http://repository.un.org/handle/11176/51122

[81] The article provides that "*Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article 3*." Supra note 59.

[82] The case of "Sabra and Shatila" concerned the massacre of Palestinians in Lebanon on 18 September 1982 by a Christian "phalange" militia, supported by Israel.

[83] Resolution 37/123D of 16 December 1982, https://www.un.org/documents/ga/res/37/a37r123.htm, retrieved on 07/04/2019

The pledge, which was given in the preamble of the Genocide Convention "*to liberate mankind from such an odious scourge in order to avoid for the future such great losses on humanity*"[84], was failed as the period that follows the adoption of the Genocide Convention unfortunately proved that humanity did not learn their lessons from the genocidal violence committed in 1940's.

After entering into force in 1951, the Convention was not effective to prevent genocide or to prosecute those who are accused of committing genocide. This changed in early 1990's when mankind witnessed several examples of different forms of genocidal cruelty that labelled 20th century as "century of genocide". Aside Rwanda or Ex-Yugoslavia, there are also many other countries, which were tagged with genocidal label such as Democratic Republic of China, Bangladesh, Brazil, East Timor, Cambodia, Indonesia, Sudan and Iraq.

Despite the extent of atrocities committed after its adoption, the Genocide Convention is still a milestone for the progress of international law on genocide. This is both on national and international level. A couple of national courts commenced to exercise their universal jurisdiction in prosecuting the crime of genocide.[85] In addition, there have been also several subsequent developments through international institutions to build further on the Convention, ranging from setting up of international ad hoc criminal tribunals to the first cases heard by

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[84] Supra note 59

[85] In the case of *van Anraat*, the District Court of The Hague and the Court of Appeal of the Netherlands considered whether the accused person, who sold chemical substances to Iraq prior to Saddam Hussein's regime allegedly used them against the Kurds, was responsible for complicity to genocide and war crimes. Both courts found that he did not have the intent required to amount his act to complicity to genocide. Another example is the case of *Jorgić*, where the Higher Regional Court in Germany (Düsseldorf) held that Jorgić was responsible for committing genocide as he set up a paramilitary group and he actively participated in the ethnic cleansing campaign with the intent to destroy the protected group, i.e. Muslim Bosnians in Doboj area in the Former Yugoslavia. The Federal Constitutional Court rejected his appeal and found that Genocide Convention does not prohibit states to apply their local jurisdiction in trying the crime of genocide. Karolina Wierczynska, "The Evolution of the Notion of Genocide in the Context of the Jurisdiction of the National Courts", **Polish Yearbook of International Law**, XXVIII, 2006-2008, p. 88-91.

International Court of Justice, all implementing the same definition brought by the Genocide Convention.

3.3. International developments subsequent to the Genocide Convention

The next two sections will review the international efforts to build on the norms of the Genocide Convention. The establishment of the International Criminal Court and the ad hoc tribunals for the former Yugoslavia and Rwanda require particular attention on this topic as their statutes are important legal instruments that may assist the interpretation of the Genocide Convention.[86]

3.3.1. Establishment of a permanent international criminal court: The International Criminal Court

When the Genocide Convention was adopted in 1946, the General Assembly of the United Nations adopted on the same day a resolution, addressing the drafting of a statute for an international criminal tribunal as referred to in Article 6 of the Convention. This resolution expressed that the adoption of the Convention "*raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal*", and that there was "*an increasing need of an international judicial organ for the trial of certain crimes under international law*".[87] The International Law Commission was subsequently assigned to work under the mandate of article VI of the Convention.[88]

Following this initial step, it however took four decades for the United Nations to concretize its actions. It is seen that this was mostly due to the Cold War circumstances and blockage by the world's "big powers" such as Soviet Union.[89] Finally, the International Law Commission issued a draft in 1994 on the setting up of a permanent international criminal court. Article 20 of the draft stated that the

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[86] Schabas,**Genocide in International...**, p.90

[87] http://legal.un.org/icc/general/overview.htm, retrieved on 19 May 2019

[88] **Ibid.**, p.101

[89] **Ibid.**, p.102

Court has jurisdiction in relation to a group of crimes, one of which is the crime of genocide. There was no detail stipulated following the listing of the crime, but only a reference to the Genocide Convention's "authoritative definition".[90]

In 1995, the General Assembly set up the Ad Hoc Committee on the Establishment of an International Criminal Court and the year after the Preparatory Committee to revise the initial draft of the International Law Commission.[91] Having not agreed with the approach of the Commission in leaving the genocide definition out, the Ad Hoc Committee opted to incorporate the genocide definition of the Genocide into its revised draft, and after discussions, the Preparatory Committee adopted the same approach to incorporate the text of article II of the Convention in verbatim and add that of article III in "square brackets", to show that there was no consensus yet on these points.[92]

Once a revised draft was ready, in July 1998, the General Assembly of the United Nations held a diplomatic conference in Rome. The purpose of the conference was to "*finalize and adopt a convention on the establishment of an international criminal court*".[93] The Statute of the International Criminal Court, also called "the Rome Statute" after the city where the conference took place, was adopted by 120 votes in favour, 7 against, and 21 abstentions.[94]

It is worth to note that the drafting process of the genocide article at the conference in Rome was not discussed "in substance" and that it was an easy task due to the "authoritative nature" of the definition as set out in the Genocide Convention.[95] However discussions did take place with regard to the forms of participation as provided by Article 3 of the Genocide Convention. Finally this was transfused in Article 25 of the Statute with some differences, which will be mentioned in further detail in the thesis.

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[90] **Ibid.**, p.103

[91] U.N. Doc. A/49/10 (1994), https://www.legal-tools.org/doc/49194a/pdf/ retrieved on 24/02/2019

[92] **Ibid.**, p.107

[93] U.N. Doc. A/CONF.183/10, http://legal.un.org/icc/statute/finalfra.htm retrieved on 24/02/2019

[94] **Ibid.**

[95] http://legal.un.org/icc/statute/finalfra.htm retrieved on 24/02/2019

3.3.2. The International Ad Hoc Criminal Tribunals

The great violence that devastated former Yugoslavia in the 1990's helped opened a new era in international law on genocide. Albeit criticised to have been passive and ineffective against the atrocities; western powers finally initiated concrete actions through United Nations, which led to the establishment of the first ad hoc international criminal tribunal to try the crimes committed in former Yugoslavia. A couple of years later, in 1994, the massive destruction campaign of about nearly one million Tutsi in Rwanda set in motion the establishment of the second international criminal tribunal. [96]

The establishment of the ad hoc tribunals follows the same pattern: international powers fail to prevent massive atrocities due to reasons, which can surely be the subject of a Ph.D thesis, and then they seek to set up tribunals to prosecute the responsible persons. I believe the decision to establish jurisdiction for a particular international criminal tribunal is a political one since the decision is taken in the United Nations Security Council. It is hard to deny the fact that the representatives of the states having permanent seats such as United States of America, China, France, Russia or United Kingdom, or the non-permanent members elected by the General Assembly do not have political agendas when they take decisions to set up an international criminal court. It is noticeable that the Council set up a tribunal for former Yugoslavia or Rwanda, but not for example for war crimes or crimes against humanity committed in Palestine. Impossible to disagree with William Schabas' comment on this: "*the Security Council does not create tribunals when they conflict with the agendas of its permanent members*"[97].

Nonetheless the setting up of these tribunals is an improvement since, unlike in Nuremberg where the defeater was prosecuting the defeated, it was the international community that sought to impose legal accountability for the crimes in

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[96] Jonathan Hafetz, **Punishing Atrocities Through a Fair Trial, International Criminal Law from Nuremberg to the Age of Global Terrorism**, Cambridge, United Kingdom, Cambridge University Press, 2018, p.27

[97] http://www.intellectum.org/articles/issues/intellectum7/en/Int%27l%20Protection%20of%20Human%20Rights%20and%20Politics_English%20co-edited%20WS%20&%20VT3.pdf, retrieved on 11/04/2019

former Yugoslavia or Rwanda. Also, these tribunals prove to be effective in respecting human rights through the prosecution of the most serious crimes, and promoted the international criminal law to a large audience.[98] Therefore they made significant contributions to the development of international law and procedure but, importantly from the perspective of this thesis, they did also contribute quite largely to the interpretation of the Genocide Convention.

3.3.2.1. International Criminal Tribunal for former Yugoslavia

At the time when the International Law Commission was working on its draft to establish a permanent international criminal court, tragic events forced the establishment of an ad hoc criminal tribunal to tackle the massacres that were taking place in the former Yugoslavia since 1991. The Security Council of the United Nations set up a Commission of Experts in late 1992, which recognized that a number of war crimes were being committed in Bosnia. Following its advice on the establishment of an international criminal tribunal, the Security Council adopted a resolution, by which it expressed that in view of "*continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of "ethnic cleansing*", "*an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991*."[99]

Having acted under Chapter VII (with the title "Action with respect to threats to the peace, breaches of the peace, and acts of aggression) of the Charter of the United Nations, the Security Council set up the International Criminal Tribunal for the former Yugoslavia ("ICTY") in May 1993 for the only purpose to prosecute "*persons responsible for the serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January and a date to be determined by the Security Council upon restoration of peace*", and to try their

[98] Hafetz, **Punishing Atrocities Through…,** p.28

[99] UN Doc. S/RES/808 (1993) https://undocs.org/S/RES/808(1993) retrieved on 08 April 2019

perpetrators.[100] The draft statute drawn up by the Secretary-General entered into force as it was without being modified.[101]

The report of the Secretary-General expressed that the tribunal should apply the rules of international humanitarian law, which are part of the customary law. The report went on stating that that "*The part of the conventional international humanitarian law, which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in; (...) the Convention on the Prevention and Punishment of the Crime of Genocide of 09 December 1948 (...)*". Under the section "genocide", the report also emphasized that the Convention was "*considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion (...)"*.[102]

Despite the clear references to the Genocide Convention, it was the Security Council that set up the tribunal by not following a "treaty approach".[103] The tribunal foreseen under the system of Article 6 of the Genocide Convention is a court to which the contracting states give their consent for its jurisdiction. As Schabas says, the tribunal was not a tribunal that was contemplated by the states who drafted the Convention. First and foremost, the jurisdiction was not accepted by Yugoslavia, the territory over which the jurisdiction of the tribunal would be exercised.[104]

Article 2 of the ICTY statute[105] with the title "Genocide" has three parts. First part sets out the jurisdiction of the tribunals; second part provides a definition of

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[100] UN Doc. S/RES/827 (1993) https://undocs.org/S/RES/827(1993) retrieved on 08 April 2019

[101] Schabas, **Genocide in International…**, p.114

[102] UN Doc. S/25704 (1993) https://undocs.org/S/25704, retrieved on 08 April 2019

[103] The treaty approach would require that a tribunal is set up and its statute is drawn up under a treaty. In principle, an international body should prepare and adopt a treaty, which should then be signed and ratified by the states. However the report of the Secretary-General (UN Doc. S/25704 (1993)) explained why this approach was not adopted: "*the disadvantage of requiring considerable time to establish an instrument and then to achieve the required umber of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those states which should be parties to the treaty if it is to be truly effective*."

[104] Schabas, **Genocide in International…**, p.114

[105] http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf retrieved on 09/04/2019

genocide in verbatim from the Genocide Convention; and the third part stipulates the special appearing forms of the crime, also a verbatim production from the Genocide Convention.

3.3.2.2. International Criminal Tribunal for Rwanda

Having received a request[106] from the government of Rwanda for the establishment of an international tribunal to try the crimes committed in Rwanda in 1994, the United Nations Security Council decided to take action. Following various Secretary-General and Commission of Experts reports indicating that "*genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda, acts of genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda*", the Security Council concluded that the situation in Rwanda was a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter. By a resolution of November 1994, the International Criminal Tribunal for Rwanda ("ICTR") was established "*for the sole purpose of prosecuting 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 such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994*."[107]

It is noted that the statute of the ICTR [108] is very similar to that of the ICTY, except the provisions related to the war crimes that provide that the genocide in Rwanda was committed within a civil war.[109] The provisions for genocide are otherwise the same both in the statute of the ICTR and that of the ICTY.

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[106] https://undocs.org/S/1994/1115 retrieved on 09/04/2019

[107] https://undocs.org/S/RES/955(1994)

[108] http://legal.un.org/avl/pdf/ha/ictr_EF.pdf

[109] Schabas, **Genocide in International…**, p.114

II- STRUCTURE OF THE CRIME OF GENOCIDE UNDER INTERNATIONAL LAW

The academics working in relation to genocide have so far provided various different definitions of what genocide is. The universal understanding of what constitutes genocide contains a wide spectrum of acts, while the definition of genocide under international law is narrow. In international law, there is merely one definition of genocide since 1948 and it remains unchanged.

As mentioned in earlier pages, the Statues of the International Criminal Court for Rwanda and the International Criminal Tribunal for the Former Yugoslavia adopted the Genocide Convention's definition of genocide in verbatim. Also the Rome Statute establishing the International Criminal Court provides the exact same definition as it was provided in the Genocide Convention.[110]

Article 2 of the Genocide Convention defines genocide as follows:

"*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;

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[110] Since the adoption of the Genocide Convention, international law has undergone substantial transformation, in particular in the development of human rights law. It however raises curiosity on why the states did not opt to enlarge the definition in view of the developments in international law or changes of perceptions. It may have been a safer and quicker solution to adopt the Genocide Convention's definition with a jus cogens status, rather than going through the path of renegotiating a brand-new or improved definition of the crime under international law when each state has its own views on what the crime is.

(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."

The definition as stipulated in Article 2 is the "condensed" version of the draft text prepared by the United Nations Secretariat. The Secretariat originally contemplated the crime of genocide under three categories as in "physical, biological and cultural genocide". The Sixth Committee, who later revised the initial draft of the Secretariat, chose to leave "cultural genocide" out of the of the Convention. The Secretariat also voted against an amendment to add another punishable act to the article: "*Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment*".[111]

At first glance the definition appears to be actually rigid. One must meanwhile remember that the definition of the crime of genocide in the Genocide Convention is the outcome of a discussion process, and it demonstrates the mid-point whereby the states had to meet to create an international convention. Such process, where numerous states having different views on what constitutes genocide, had the inevitable outcome of formulating a text based on compromise.[112]

It is seen that the strictness of the definition has been diminished through jurisprudence of the ad hoc tribunals during the 1990's in the aftermath of the tragic civil wars raged in several parts of the world. On the other hand, the vagueness of the definition appears to be still causing discussions in the doctrine and has paved the way for different interpretations by different courts for certain elements of the crime.[113] One of the most discussed topics on the crime of genocide is the scope of the genodical intent and this is the subject of the current thesis.

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[111] Schabas, **Convention for the Prevention…,** p. 2

[112] Cassese / Gaeta, **op. cit.**, p.110

[113] Katherine Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Towards a Knowledge-Based Approach", **Genocide Studies and Prevention: An International Journal**, Issue 3, Article 3

Before I elaborate on the genocidal intent, next I would like to touch upon the structure of the crime to have a thorough understanding of its components. For a crime to occur several elements must be present and these elements appear in the definition of the crime. Unless all these elements are present, a certain act cannot amount to a crime.

The definition of the crime of genocide provides three important elements. First, the victims must constitute a national, ethnic, racial, or religious group. Second, the definition stipulates that certain enumerated acts must be committed against the members of such a group. Next to these two (objective) elements, also a mental element (special intent) needs to be present for the committed act to amount to genocide. These elements will be dealt in the sections below, followed by the special appearing forms of the crime.

1. Objective structure

Under this title I am going to briefly answer the questions on who can be the perpetrator, what are the groups protected by the definition, what the material subject, conduct (hareket) and consequence (netice) of the crime.

1.1. Perpetrator

The Genocide Convention provides in Article 4 that "*Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.*"

At the time the Genocide Convention entered into force there was no customary international law criminalizing and punishing the criminal acts of natural persons. Therefore, one should accept that Article 4 referred only to the duty of states to penalize the crime of genocide under their own national legal systems. This however has changed since genocide became a jus cogens. Today it is possible to hold natural persons responsible for acts of genocide under international law.[114]

A strict interpretation of Article 4 would suggest that the liability for the relevant acts should be confined to natural persons as it refers to the perpetrator "*whether they are constitutionally responsible rulers, public officials or private individuals*". However, it was found by the International Court of Justice in Bosnia and Herzegovina v. Yugoslavia[115] that the Genocide Convention did not reject the concept of state responsibility. The court discarded Yugoslavia's argument that states were responsible under the Genocide Convention only as a duty to prevent and penalize the acts of genocide, and found that Article 4 of the Genocide Convention, although it considers that "*rulers, public officials or private individuals*" can be the perpetrators of the acts, did not prevent the responsibility of the states in this regard.[116]

Criminal liability of states is however expressly excluded from the Statute of the International Criminal Court, limiting its jurisdiction ratione personae to natural persons.

1.2. Actus reus

Article 2 of the Genocide Convention defines the conduct of the crime of genocide in five classes of action through (a) to (e):

(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;

[114] Van der Vyver, **Prosecution and Punishment…,** p.295

[115] Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide" (Bosnia & Others v. Yugoslavia (Serbia and Montenegro)) International Court of Justice, 08/04/1993, http://www.un.org/law/icjsum/9328.htm retrieved on 25/02/2019

[116] **Ibid,** p.297

(e) Forcibly transferring children of the group to another group."

The actus reus can be acts of either commission or omission. The stated criminal law rule extends to all of the acts enumerated under Article 2. The act of omission is most expressly stated in Article 2(c). The intentional decrease of the quantity of food by the Nazi officials decreased in the occupied countries was observed to be a "*negative violence*" and illustration of an act of omission.[117] Omission may be also relevant for the other acts of genocide. The International Criminal Court for Rwanda found in Prosecutor v. Kambanda that the accused (Jean Kambanda, ex-Prime Minister of Rwanda) was personally asked at a meeting to protect the children who had survived a hospital attack. After the meeting ended, on the same day, the children were murdered. By not responding to the request to ensure the safety of the children, he became responsible for their killing.[118]

The International Court of Justice held in the Bosnia Herzegovina v. Yugoslavia that the respondent must stop and abstain from "*all acts of genocide and genocidal acts (...), including but not limited to murder; summary executions; torture; rape; mayhem; so-called "ethnic cleansing"; the wanton devastation of villages, towns, districts and cities; the siege of villages, towns, districts and cities; the starvation of the civilian population; the interruption of, interference with, or harassment of humanitarian relief supplies to the civilian population by the international community; the bombardment of civilian population centres; and the detention of civilians in concentration camps or otherwise*."[119]

Regarding the scope of the acts, their meaning has become clear under international law following several judgments rendered at the ICTR and ICTY. In particular the judgement delivered at the Case Prosecutor v. Jean-Paul Akayesu[120]

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117 Schabas, **Genocide in International…**, p.177

118 ICTR, Trial Chamber Judgement, Prosecutor v. Kambanda, Case No.ICTR 97-23-S, 04 September 1998, para.39

119 Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide" (Bosnia & Others v. Yugoslavia (Serbia and Montenegro)) International Court of Justice, 08/04/1993 , http://www.un.org/law/icjsum/9328.htm retrieved on 25/02/2019

120 ICTR, Akayesu, supra note 42

before the ICTR considered in detail the different components of the crime of genocide's material element and provided importance guidance for interpretation thereof. It is useful to add that different circumstances beget different modality of acts. A conduct, which is defined as genocidal act in Rwanda, may differ from the one in another country. It follows that the examples cited should not be considered exhaustive.

(a) Killing members of the group

This is the most express conduct that can amount to genocide. It was noted by the Akayesu Trial Chamber that the term "killing" used in the English version of the Genocide Convention is too broad as it could mean both intended and unintended homicides. The French edition of the Convention, on the other hand, states "meurtre" for "killing", which can be translated as "murder". It is accepted that there is "murder" of a human being when death is unlawfully brought about with the intention. The international community today accepts that "killing" within the meaning of genocide should therefore be taken to denote "*homicide committed with the intent to cause death*".[121]

The act of killing can occur by both direct and indirect methods. Direct includes shooting to death, killing with machetes or grenade, shelling or beatings causing death, while indirect killing can occur because of conditions of life in detention centres, deportations, deprivation of medical services or destruction of villages and crops.

Furthermore, paragraph (a) of Article 2 speaks of the killing of "*members of the group*". It follows that for the act of killing to be a constitutive element of genocide, the killing should be committed against "members" of a group and not only a member of a group. The Trial Chamber of Akayesu expressed a different view on this as it concluded; "*the act must have been committed against one or several individuals because such individual or individuals were members of a specific group and specifically because they belonged to this group*".[122] Bearing in

[121] **Ibid.,** para. 500

[122] **Ibid.**,, para. 521

mind that the definition under Article 2 expressly mentions “members” of a group and not “a member” of a group, an interpretation so as to consider as constituent element of genocide the killing against merely “an individual of a group” would be too broad to accept.

The Akayesu judgement also emphasized that the victim of the crime of genocide was not the individuals forming the group, however the group itself by finding that “*Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual*."[123]

(b)Causing serious bodily or mental harm to members of the group

As in paragraph (a), paragraph (b) also speaks of “members of a group”. It follows that for a constituent element of genocide to occur the act should be committed against more than one member of a group.

In the case Government of Israel v. Adolf Eichmann (District Court of Jerusalem, Israel, 1961), the Israeli court held that serious bodily or mental harm could be inflicted upon the members of a group “*by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture*."[124]

Moreover, by referring to the above-mentioned judgment, the Akayesu Trial Chamber held that “*serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution*”.[125]

[123] **Ibid**

[124] Schabas, **Genocide in International…,** p.182

[125] ICTR, Akayesu, supra note 42, para.504

Furthermore, with regard to rape and sexual violence, the Akayesu Trial Chamber held that these acts "*(...) constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm.*"[126]

It is worth to mention that the harm within the meaning of this article does not have to be lasting and irreparable.[127] However the harm should be more than momentary unhappiness or humiliation: "*A distinction must thus be drawn between serious mental harm and emotional or psychological damage or attacks on the dignity of the human person not causing lasting impairment*."[128] As a result of the harm, the person's ability to have an ordinary and productive life should suffer from a severe and enduring disadvantage.[129]

As the stipulation provides the bodily or mental harm must be "serious". This seriousness should be evaluated depending on the particularities and circumstances of each case.[130] This harm may include but is not limited to acts of torture, whether they are bodily or mental, cruel or humiliating conduct or persecution.[131]

(c)Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

This conduct includes the so-called "slow death measures", which do not actually require that the group conditions of life cause physical destruction of the group in whole or in part but they should aim to achieve that result.[132]

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[126] Ibid, para. 731

[127] Ibid, para. 502

[128] ICTY, Prosecutor v. Radislav Krstić , Trial Judgement, IT-98-33-T, Trial Chamber I, 2 August 2001, para. 510.

[129] **Ibid.,** para. 513

[130] ICTR, Krstić, supra note 128, para. 513

[131] ICTR, Akayesu, supra note 42, para. 503

[132] Cassesse/Gaeta, **op. cit**., p. 116

This was exemplified in Akayesu as "*subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement*"[133], in Kayishema and Ruzindana as "*the deliberate deprivation of resources indispensable for survival, such as food or medical services*"[134], and in Brdanin as "*lack of proper housing, clothing and hygiene or excessive work or physical exertion*".[135]

(d)Imposing measures intended to prevent births within the group;

This act has the purpose of preventing the biological reproduction of the targeted group. It can be committed by sterilizing women (in particular in matriarchal societies where the ethnicity is determined through mother), raping women (when the goal is to change the ethnic composition in patriarchal societies), separating the sexes, conducting sexual mutilation, prohibiting marriages, and forcing birth control or sterilization.[136]

This element is not limited to only the physical sense. The measures taken can be also mental, as in "*acts of threats or trauma which would lead to the forcible transfer of children from one group to another*". These may include "rape" as an act directed to prevent births as a result of which the woman raped refuses to reproduce.[137]

(e) Forcibly transferring children of the group to another group.

When one forcibly relocates children of the victim group in another group, this may not necessarily lead to biological or physical destruction of that group. Nevertheless, as a result of this the victim group may disappear, as the ties between

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[133] ICTR, Akayesu, supra note 42, para. 505

[134] ICTR, Prosecutor v. Clément Kayishema and Obed Ruzindana, Trial Judgment, Case No. ICTR-95-01-T, Trial Chamber II, 21 May 1999, para. 115

[135] ICTY, Prosecutor v. Radoslav Brdanin, Trial Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2014, para. 691

[136] **Ibid.,** para. 507

[137] ICTR, Akayesu, supra note 42, para. 508

children and the rest of the population get broken while children lose their cultural identity linking them to their original group.[138]

In the meantime it appears that Article II does not include the term "ethnic cleansing". Coined following the war in Yugoslavia, the term today is described as "the forcible expulsion of civilians belonging to a particular group from an area, a village or a town". During the drafting of the Genocide Convention, Syria proposed an amendment to add another act under Article 2 stipulating "*Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment*".[139] This proposal was dismissed. So far, we see that some courts considered the forced expulsion under certain circumstances as genocide[140], while others held that it would not be a material element of genocide[141].

1.3. Ethnic cleansing as an example of an act not punishable under the Convention

Polish and Czechs, who had the intention to "cleanse" their countries of Germans and Ukrainians after the Second World War, were the first nations to use the term "ethnic cleansing".[142] In fact, a direct translation of "*etnicko ciscenje" from Serbian-Croatian into English,* "ethnic cleansing" started to be rather widely employed in the early 1990's to describe the mass killings in the former Yugoslavia during the Bosnian War. The term has been also employed to refer to the actions against the groups in East Timor in 1999, and to Chechens while they had to flee Chechnya after Russian attacks during the 1990s.[143]

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[138] Cassese, **op. cit**., p. 117

[139] **Ibid,** p. 117

[140] ICTY, Trial Judgment, Karadžić, Mladić, Jorgić

[141] ICTY, Prosecutor v. Goran Jelisić, Trial Judgment, Case No. IT-95-10-T, Trial Chamber I, 14 December 1999

[142] Schabas, **Genocide in International…**, p.221

[143] **Ibid.**

The term appeared in international law further to the first interim report of the Commission of Experts, who was set up by the United Nations in order to review the violations of international humanitarian law committed against Muslims and Croats in Bosnia by the Serbs. The report stated the following:

> "*The expression 'ethnic cleansing' is relatively new. Considered in the context of the conflicts in the former Yugoslavia, 'ethnic cleansing' means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. 'Ethnic cleansing' is contrary to international law.*
>
> *Based on the many reports describing the policy and practices conducted in the former Yugoslavia, 'ethnic cleansing' has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention."*[144]

The final report defined the ethnic cleansing as "*a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.*"[145]

Furthermore, following the dreadful events that took place in former Yugoslavia, several authorities such as Security Council and General Assembly of the United Nations referred to "ethnic cleansing" that was carried out by the Bosnian Serb army as genocide in their resolutions. In its Resolution of 18

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[144] Interim report, S/25274, para. 55 and 56, https://undocs.org/(S/25274), retrieved on 23/02/2019

[145] Final report S/1994/674, https://undocs.org/S/1994/674, para. 130, retrieved on 23/02/2019.

December 1992 Concerning The Situation In Bosnia and Herzegovina, the United Nations General Assembly stated the following:

> *"Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of "ethnic cleansing", which is a form of genocide, (...)"*[146]

In Bosnia v. Yugoslavia, the International Court of Justice stated further that ethnic cleansing could be a mode of genocide under international law only if it falls under one of the acts listed in Article 2 of the Genocide Convention, for example direct infliction on the "group conditions of life calculated to bring about its physical destruction in whole or in part". The Court also stated "*Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is ' to destroy, in whole or in part ' a particular group, and deportation or displacement of the members of the group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement*."[147]

There were also convictions on ethnic cleansing and genocide in some national courts. One good example is the German courts, which did not specifically qualify ethnic cleansing a general remark as genocide, but held that the defendant

[146] UN General Assembly, Resolution 47/121 (no. A/RES/47/121) http://www.un.org/documents/ga/res/47/a47r121.htm, retrieved on 24/02/2019

[147] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, International Court of Justice, Judgment of 26 February 2007, para.190

was responsible for genocide taking into account the circumstances of the case. The conviction was later taken to the international instance. In the case of Jorgić v. Germany, the European Court of Human Rights in July 2017 upheld the judgement of Düsseldorf Court of Appeal[148], which had found that the applicant had set up a paramilitary group, with whom he had participated in the ethnic cleansing ordered by the Bosnian Serb political leaders and the Serb military in the Doboj region and that that he had acted with intent to commit genocide under the German Criminal Code.[149] The European Court of Human Rights said "*The applicant's acts, which he committed in the course of the ethnic cleansing in the Doboj region with intent to destroy the group of Muslims as a social unit, could reasonably be regarded as falling within the ambit of the offence of genocide".*[150]

The majority of the scholars, like William A. Schabas, consider that ethnic cleansing, as it was carried out by the Serb forces in Bosnia in order to force out Bosnian Muslims and Croats from their habitat, was not "genocide".

In line with this view, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Court of Justice (ICJ) have also consistently found that, for acts to amount to genocide, there should be physical or biological destruction of a target group and a specific intent to bring about such destruction. In Prosecutor v. Krstić, the Trial Chamber stated in 2001, by referring to the above-mentioned 1992 General Assembly Resolution and a judgement of

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[148] Nicola Jorgić was a Serb from Bosnia and Herzegovina who lived in Germany. When the war started in the former Yugoslavia he went there. He was arrested in Germany in 1995 and was suspected of committing the crime of genocide. After trial before the Higher Regional Court in Düsseldorf, he was punished with life imprisonment. In 1999 the court held that Jorgić was guilty of genocide as he established a paramilitary group and together with this group he took part in the ethnic cleansing campaign in the Doboj region. The court stated that Jorgić had the intent to commit genocide, namely to destroy the group. The judgment available on-line: http://www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_26-9-1997.pdf. On 30 April 1999, the Federal Court of Justice confirmed those findings by stating that it was sufficient to intend the destruction of a target group as a social unit and that it was not necessary to intend its physical destruction.

The judgement available on-line: http://www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_30-4-1999.pdf.

[149] **Ibid**,, para. 18

[150] **Ibid,,** para. 108

Federal Constitutional Court of Germany, that "*it must interpret the Convention with due regard for the principle of nullum crimen sine lege. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group*".

Genocide and ethnic cleansing overlap in the sense that their perpetrators may pursue the same goal to eradicate the victim group from a territory. Hitler wished to eradicate all the Jews in Europe, while Milosevic wanted Muslims off Kosovo, albeit he appeared not concerned if they lived elsewhere. According to Professor Schabas, the material acts committed may be similar but it is the intents that separate the two.[151]

On ethnic cleansing, the Trial Chamber in Krstić further stated the following:

> "[*T]he plan to ethnically cleanse the area of Srebrenica escalated to a far more insidious level that included killing all of the military aged Bosnian Muslim men of Srebrenica. A transfer of the men after screening for war criminals - the purported reason for their separation from the women, children and elderly at Potocari - to Bosnian Muslim held territory or to prisons to await a prisoner exchange was at some point considered an inadequate mode for assuring the ethnic cleansing of Srebrenica. Killing the men, in addition to forcibly transferring the women, children and elderly, became the object of the newly elevated joint criminal enterprise of General Mladić and VRS Main Staff personnel. The Trial Chamber concluded that this campaign to kill all the military aged men was conducted to guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica and therefore constituted genocide.*"[152]

Indeed, often the lines between ethnic cleansing and genocide may be blurry. However, I agree with scholars like Professor Schabas, in that there should be a

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[151] Schabas, **Genocide In International…**, p.234

[152] ICTY, Krstić, supra note 128, para. 619

"meaningful difference" between the intent to purify a territory of a group by displacement and to destroy in whole or in part. On the other hand, as shown in the above-mentioned judgment, although ethnic cleansing does not directly fall under the categories of acts within the meaning of the Genocide Convention, it may well be "*a warning sign of genocide to come*" and "*the last resort of the frustrated ethnic cleanser*".[153]

1.4. Protected groups (victims)

Article II of the Genocide Convention provides an exhaustive list of four the protected groups towards whom the genocidal intent of the perpetrator must be directed: national, ethnical, racial, religious groups, targeted "as such".

Although during the *travaux preparatoires* of the Genocide Convention, some states attempted to include cultural and political groups into the definition, the list finally became an exhaustive one consisting of only the stable national, ethnical, racial and religious groups. Some note that the definition of genocide became limited following the efforts of the Soviet Union during the negotiations of the convention. This was further to Joseph Stalin's mass elimination of his political opponents, as the Soviet Union prevented political groups from being a protected group under the Genocide Convention.[154]

It is noted that Article II does not provide any specific definition, but states that the targeted groups can be only national, ethnical, racial, religious groups. Rafael Lemkin referred to "groups" as an entity having the merit of protection by the law of genocide,[155] which seems vague, while the *travaux preparatoires* of the Convention did not reveal any particular discussion about the "group". However expecting a definition or guideline on how to establish a "group" may not be realistic. The four groups mentioned in the definition of the crime are referred to as "social entities". As Cassese stated, "*it would therefore be useless to try to describe the protected groups by applying rigorous scientific or objective notions, also*

[153] Schabas, **Genocide In International…**, p.234

[154] Jeffrey L. Dunoff et al, **International Law: Norms, Actors, Processes**, 4th edition, 2015, p.47.

[155] Schabas, **Genocide in International…**, p.121

because by so doing one may find that some groups do not scientifically and objectively exist."[156]

It is worth to mention that in certain cases it may be an "easier" task to define what a group is, such as in the Holocaust where what the "Jewish group" was never contested. Defining imprecise terms such as race, ethnicity or a national group may be however also a challenge, in particular in certain cases. The difficulties of application of the term "group" were illustrated in the case of the Rwandan genocide.[157]

The first question raised was what the notion of the "targeted group" was. The notion of the group was clarified by the case law of the ICTR by applying "subjective tests". In Akayesu, the Trial Chamber emphasized that the word "group" refers only to "*stable and permanent groups*".[158] Second main issue was how these groups could be identified. In Rwanda, the Tutsis and Hutus had common language, religion and culture, and were living in the same territory. Also, mix marriages were very often. The ICTR applied a subjective test to solve the question of how these groups could be identified, and considered that the Tutsi constituted an ethnic group that was different from the Hutu. This was because they were referred to as ethnic group in the official classifications, and when asked, the Rwandans were able to pinpoint their ethnicities without any hesitation.[159]

2. Subjective structure

2.1. General intent

Criminal liability arises when a proscribed act is committed with a given state of mind. This mental element, which appears in the form of "general intent", is

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[156] Cassese, **op. cit.**, p. 117

[157] **Ibid**., op. cit., p.124-125

[158] Also the German Federal Court of Justice concluded in Jorgic that a person victim of genocide is not targeted in "his capacity as individual", but is seen by the perpetrator only as a member of the persecuted group, which endorses the group element of the crime. Cassese, **op. cit.**, p.

[159] Cassese, **op. cit.**, p.121

necessary to punish the conduct. A general intent in principle applies to all objective elements of the crime in question.

There are three forms of intent: 1) *Dolus directus*, where the perpetrator foresees and desires the wrongful consequences of his/her act. For example A, who has the desire to kill B and foresees the outcome of his/her action, directs a gun to B and pulls the trigger. As a consequence B dies. A has direct intent to commit the act. 2) *Dolus directus* differs from *dolus indirectus*, in that in the latter the perpetrator foresees the wrongful consequences of his/her act but he/she does not necessarily desire the outcome. 3) Moroever *dolus eventualis* can be illustrated where A, in the example set above for *dolus directus*, shoots C who was right in front of B. A foresees that in the event he pulls the trigger C may possibly also get injured or killed. Despite this he carries on and pulls the trigger, as consequence of which C gets injured. In this case A is aware that a consequence will happen in the ordinary course of events such as to harm C and he/she will be judged to have acted with *dolus eventualis* in respect of the injury inflicted on C.[160]

The Rome Statute was the first international criminal law instrument to codify the mens rea of serious international crimes, including genocide. Article 30 of the Rome Statute reads for intent, "*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*." The requirement of intent and knowledge is further defined in Article 30(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.*"

It is noted that the way the article was stipulated provides that the level of intent can be *dolus directus* or *dolus inderectus,* but not *dolus eventualis* as the perpetrator is required to mean to bring about the relevant consequence or he has awareness that it will occur in the ordinary course of events.[161] Moreover, under the

[160] Van der Vyver, **Prosecution and Punishment…**,p.306-307

[161] **Ibid.**, p.308

Rome Statute, it is seen that the general intent does not only relate to the acts listed in article 2 of the Genocide Convention, but it should be also directed against one of the protected groups. The perpetrator must know, for instance, that his acts are targeting one of the victim groups.[162]

2.2. Intent and other mental elements

2.2.1. Motive

First of all, intent differs from motive, which is derived from the latin word *motivum* meaning reason, impulse, cause.[163] Intent is the basic element to render a person liable for the crime. Motive, on the other hand, is the incentive, for which an individual acts, and it describes the strength of mind with which he acts. Motive is the cause that moves a perpetrator to commit a certain act. While intention means *the purpose* of inducing an action, motive shows *the reason* for it. Intention differs from motive in that it specifically indicates the mental state of the accused (in other words what he is thinking while he/she is committing the act) whereas motive implies the motivation (in other words the drive of a person to induce a certain act).[164]

The international criminal tribunals usually do not investigate the motive of a perpetrator since the crimes as stipulated generally do not have any reference to the 'goals' for an unlawful conduct.[165] Similarly, the definition of the crime of genocide in the Genocide Convention does not expressly require any 'motive': *"with intent to destroy (...), as such: (...)"*.

It was the Venezuelan representative, who had suggested the insertion of the phrase 'as such' during the negotiations of the Convention with a view to wrap up a discussion regarding the questions of intent and motive in the definition of

[162] Kai Ambos, "What does 'intent to destroy' in genocide mean?", **International Review of the Red Cross**, Volume 91, Number 876, December 2009, p. 334

[163] Paul Behrens, "Genocide and the Question of Motives", **Journal of International Criminal Justice**, Issue 10, 2012, p.503

[164] **Ibid**., 503-504

[165] **Ibid**

genocide. According to the Venezuelan representative, the listing of motives would be ineffective but could be also risky as the perpetrators could abuse this by avoiding being charged with genocide. For instance, they could contend that their offenses had been committed for reasons other than those stated in Article 2.[166]

Presence or lack of motive can be a substantial element for the outcome of a genocide trial[167], in particular if one accepts that the genocide definition requires a motive. Schabas states that for some scholars one cannot withdraw a definite conclusion from the debate on 'as such' and that it is left to interpretation, while for some others the *Travaux Préparatoires* are an indication of the fact that 'as such' signifies a motive requirement.[168] It is also argued that if we were to reject a motive requirement embedded in the definition, the term 'as such' would have otherwise no meaning.[169]

Schabas concludes that interpreters of the Genocide Convention cannot disregard the addition of 'as such', as it was placed as a compromise to reflect the views of several states favouring a motive requirement. Genocide, which is a collective crime, is committed through the cooperation of several perpetrators. If a racist or discriminatory motive is absent, one cannot speak of the crime of genocide. Moreover genocide is usually directed by a state. The organizers within a state ought to have such a 'genocidal motive' and this will be an element to prove a 'genocidal policy', which may lead to 'special intent'. [170]

On the other hand, the ICTY and ICTR rejected interpretations that may suggest that the words 'as such' may indicate a motive requirement. To illustrate, the Trial Chamber of the ICTY in Prosecutor v. Krstić stated, "*Although the motive of each participant may differ, the objective of the enterprise remains the same*."[171]

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[166] Milena Sterio, "The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide", **Cleveland State University Law Faculty Articles and Essays** , 2017, p.275

[167] Schabas, **Genocide in International…**, p.295

[168] **Ibid**., p.301

[169] Cécile Tournaye, **Genocidal Intent Before the ICTY**, p.451

[170] **Ibid**., p.305

[171] ICTY, Krstić, supra note 128, para. 549

Moreover the Appeals Chamber of Kanyarukiga found that "*motive, as opposed to mens rea, is not an element of any crime. The question whether Kanyarukiga lacked a motive to participate in the crimes for which he was convicted thus does not have the potential to invalidate the verdict and the Appeals Chamber declines to consider it.*"[172]

2.2.2. Malice

One needs to mention "malice", which is most common in the jurisdictions derived from English common law systems. Malice is a legal term that refers to a person's intention to do harm to another. It addresses the question of why the perpetrator acted wrongfully. Despite the fact that it is not a special component of the crime of genocide, it can have a substantial evidentiary value to prove cases of genocide.[173]

2.2.3. Premeditation

Lastly, as far as the premeditation is concerned, the Committees drafting the Convention and the international criminal tribunals dealing with genocide also rejected that the crime requires "planning and preparation of the prohibited act". As the Trial Judgement of Jelisić held, premeditation is not required given the special intention[174] by referring to the work of the drafting Committees:

> "*In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the ad hoc committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective*

[172] ICTR, Prosecutor v. Kanyarukiga, Trial Judgment, Case No. ICTR-02-78-A, 8 May 2012, para.262

[173] Van der Vyver, **Prosecution and Punishment…**, p.309

[174] ICTR, Jelisić, supra note 141, para. 100

as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such."

2.3. Special intent

Since the main focus of this thesis is the special intent requirement of the crime of genocide under international law and I will be touching on this point in detail in the coming pages.

3. 'Other acts' of genocide: Four forms of participation

Article 3 of the Genocide Convention, next to genocide defined in article 2, provides 'other' acts of the crime as in four forms of participation: conspiracy, direct and public incitement, complicity and attempt. Except the latter, they are 'inchoate offenses'.[175]

For an offense to be 'inchoate' it must satisfy three conditions: it should be preparatory to a prohibited offense, it should not have been completed (so no harm caused yet), and it should be separately criminalized. Many legal systems punish both completed crimes and inchoate crimes, and they are punishable due to the criminal act alone, and whether or not there is a result thereof. Under civil law systems, the inchoate offenses are known as *infractions formelles*.[176]

The objective of penal law is to protect the society and by preventing the commission of 'future crimes', the protection can be further enhanced. The underlying principle is that, through intervention at an early stage during preparation, the harmful consequences of a crime can be prevented.[177] Inchoate offenses therefore play an important role in the oppression of genocide due to their preventive nature.[178]

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175 Schabas, **Genocide in International…**, p.308

176 Cassese, **op. cit.**, p. 199

177 **Ibid.**

178 Schabas, **Genocide In International…**, p.308

The Genocide Convention and the Statutes of the ICTR and ICTY followed the common law system and stipulated attempt, incitement, complicity and conspiracy as a 'distinct offence'. On the other hand, the Rome Statute of the ICC relies on general principles for individual liability that apply to all the offenses that are punishable. Departing significantly from the system set by its precursors, it enumerates the 'other acts' as 'separate modes of a crime', and merges them into a general provision dealing with criminal participation applicable to all crimes punishable under the statute. [179]

It is important to note that the fact that the 'other acts' of genocide are set as 'stand-alone crimes' and not 'modes of liability for the crime', the crime of genocide and the 'other acts' of genocide will have different mens rea requirements.[180]

In the following section, I will deal with the three main group of inchoate offenses; conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and lastly complicity as 'other acts of genocide'.

3.1. Conspiracy to commit genocide

Conspiracy is a crime committed by two or more persons following an agreement. It is a form of criminality penalized in anglo-saxon countries, and is mostly unknown to civil law countries. It became part of customary international law, and the drafters of the Genocide Convention stipulated it under Article 3(b), which was later taken verbatim by the Statutes of the ICTR and ICTY. The reason must be that the terrifying nature of the crime of genocide requires the global community to penalize even the mere agreement to commit genocide.[181]

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[179] **Ibid.**

[180] Daniel M. Greenfield, "The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters", **Journal of Criminal Law and Criminology**, 2008, Issue: 98, p. 935

[181] **Ibid.**, p. 201-202

On the other hand, conspiracy is not expressly included into the Rome Statute due to disagreement of its drafters, who were mostly civil law countries. It follows that conspiracy is a crime under the Genocide Convention and the Statutes of the ICTR and ICTY, but not under the Rome Statute.[182]

The ICTR Appeals Chamber defined in Ntagerura and others [183] conspiracy as "*an agreement between two or more persons to commit the crime of genocide*". The punishable conduct is the act of forming an agreement to commit genocide and it does not require the proof of a formal agreement. Since it is an inchoate crime, conspiracy to commit genocide is to be punished even though the intended result, i.e. harming the members of the targeted group, does not take place.

In the cases, where the genocide takes place following conspiracy, the ICTR appears to have reached inconsistent conclusions on how to merge the crime of "*conspiracy to commit genocide with committing genocide*". In some cases, the ICTR convicted for both crimes[184], and in some held the view that it is not necessary to separately convict for the conspiracy to commit genocide since the commission of the crime of genocide was completed and it would no longer serve a preventative purpose.[185]

3.2. Direct and public incitement to commit genocide

Incitement to genocide is, as defined by Antonio Cassese, the act of prompting others to commit the crime of genocide.[186] As an inchoate crime, it is to

[182] Jens David Ohlin, "*Attempt, Conspiracy, and Incitement to Commit Genocide*", **Cornell Law Faculty Publications**, 2009, paper 24, p. 199

[183] ICTR, Prosecutor v. Ntagerura and others, Appeal Judgment, Case No. ICTR-99-46-A, Appeals Chamber, 7 July 2006, para.92

[184] ICTR, Prosecutor v. Gatete, Appeal Judgment, Case No. ICTR-00-61-A, Appeals Chamber, 9 October 2012, para.260-4

[185] ICTR, Prosecutor v. Musema, Appeal Judgment, Case No. ICTR-96-13-T, Appeals Chamber, 16 November 2001, para.195-8

[186] Cassese, **op. cit.**, p. 203

be punished even though genocide has not been committed following the direct and public incitement. Anglo-saxon systems define ‘incitement’ as an act that encourages or persuades a person to commit a crime and it is treated as a specific form of a punishable criminal act. However in most civil law systems, incitement is considered to be a mode of complicity.[187]

The incitement provision Article 3(c) of the Genocide Convention was taken verbatim into the ICTY and ICTR Statutes. The Rome Statute provides for a similar provision criminalizing direct and public incitement. It is worthwhile to note that direct and public incitement can be punished by the ICTY, ICTR and ICC only when it is to commit genocide. The courts obviously treat genocide and other crimes that fall under their jurisdictions differently following the international community’s willingness to punish preparatory acts of incitement due to genocide’s extreme hideous nature.

For the act to incite to be punished it must be direct and public. This requirement also distinguishes incitement from instigation, which is listed as a mode of liability under article 7(1) of the ICTY Statute and article 6(1) of the ICTR Statute.

Incitement is ‘public’ depending on where the incitement occurs and whether or not assistance was selective or limited. It must be performed in a public place or through mass media that can largely reach the general public.[188] Incitement would not qualify as public if it were more similar to a private conversation rather than communication by means of mass media as in a public speech. [189]

Moreover incitement is ‘direct’ when it specifically provokes or induces another person to engage in genocide. Mere vague suggestions are not sufficient to amount to incitement. Implicit messages may amount as long as the targeted listeners can promptly understand them.[190] In Akayesu the Trial Chamber held that

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[187] **Ibid.**

[188] ICTR, Akayesu, supra note 42, para.556

[189] ICTR, Prosecutor v. Kalimanzira, Appeal Judgment, Case No. ICTR-05-88-T, Appeal Chamber, 20 October 2010, para.56-159

[190] Cassese, **op. cit**., p. 203

although civil law systems view provocation, which is the equivalent of incitement, as direct once it is aimed at bringing about an offence to be perpetrated; the directness of incitement should be considered within the cultural and linguistic content. For instance the Tribunal held that the use of *inyenzi,* meaning cockroaches to refer to the Tutsi community as targets of the genocide, was 'direct incitement'.[191]

3.3. Attempt to commit genocide

Attempt, as separate offense, is committed when a person acts with the intent to commit an offense but it becomes unsuccessful. It occurs when a person takes the initial steps but is then prevented or when the perpetrator's actions do not generate the intended result due to exterior conditions.[192]

All national criminal systems stipulate that attempt is to be penalized either as a form of criminal liability (such as in the Netherlands, Turkey etc.) or a separate crime (mostly in common law countries). This shows that there is a rule of customary international law on attempt.

The provision of the Genocide Convention regarding attempt to commit genocide in Article 3(d) was directly replicated in the ICTY and ICTR Statutes, respectively in Articles 10.

The drafters of the ICC Statute departed from the Genocide Convention by stipulating a general attempt provision under article 25(3)(f), which is applicable to all the crimes falling under the court's jurisdiction:

> "*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*

[191] ICTR, Akayesu, supra note 42, para. 557

[192] Cassese, **op. cit**.,, p. 199

liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose."

We note that the Rome Statute has been the first international law instrument to pronounce the existence of a 'test' for attempt: according to the above-mentioned article, attempt occurs when the accused "*commences its execution by means of a substantial step*", which places a rather low threshold.[193]

It is worthwhile to add that so far the international courts, either ad hoc or permanent, have not tried any case on 'attempt to commit genocide'. For this reason one may consider how these tribunals treated attempts in relation to other crimes stipulates under their statutes. However, even for war crimes, there are only a few prosecutions regarding attempt.

3.4. Complicity

Complicity, which is considered to be a form of criminal participation by both common law and civil law systems, can be defined as the participation in a completed criminal act of an accomplice, who aids, abets, counsels and procures other perpetrators, and who share intent to commit the crime.[194]

When it comes to the material elements of complicity in genocide, under civil law systems (which appear more or less in the same line with their civil law counterparts), there are mainly three forms of complicity that are recognized: 'instigation', 'aiding and abetting', and 'procuring means'.[195] Instigation is when a person, although not directly taking part in the commission of the crime, is liable for knowingly giving instructions to commit genocide by means of presents, threats, or exploitation of authority. Aiding and abetting entail a positive action, while it principally rejects omissions. Procuring is when an accomplice supplies for example

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[193] Schabas, **Genocide In International Law…**, p. 338

[194] **Ibid**., p.339

[195] ICTR, Akayesu, supra note 42, para.535

weapons to be used while committing the crime, with the knowledge that they would be used therein.[196]

While the mental element is that the person provides assistance knowing that it is used in the commission of the principal crime, his or her lack of interest to the outcome of the crime does not cancel out her or his participation in the crime. In other words the accomplice does not have to wish or show willingness that the principal offense be committed.[197] If the accomplice knew or had grounds to identify that the principal perpetrator had genocidal intent, and he knowingly took part in the crime by one of the above-mentioned three forms of complicity, this is sufficient to amount his or her act to complicity in genocide although the accused may not have shared the principal's intent to destroy in whole or in part the group.[198]

As a stand-alone crime, 'complicity in genocide' is enumerated amongst acts to be punishable under article 3 of the Genocide Convention, and again the Statutes of the ICTR and ICTY took this stipulation in verbatim.[199]

It is important to note that 'complicity in genocide by aiding and abetting' differs from 'aiding and abetting genocide' stipulated specifically under article 6(1) of the ICTR and article 7(1) of the ICTY Statutes entitled "Individual Criminal Liability": "*A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime*." It follows that for the act of an accused to amount to 'aid and abet genocide' it must be established that he acted with the genocidal intent; whereas there is no such requirement to prove culpability for 'complicity in genocide by aiding and

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[196] **Ibid.**, para.536-537

[197] **Ibid.**, para.538-539

[198] **Ibid.**, para.545

[199] Greenfield, **op. cit**., p.923

abetting'. Therefore complicity in genocide differs from aiding and abetting genocide because of the reduced level of the mens rea requirement.[200]

Similar to "Individual Criminal Liability" provisions of the ICTR and ICTY Statutes, the Rome Statute of the ICC provides a provision under article 25 with the title "*Individual criminal responsibility*". Article 25(3)(c), which stipulates that "*For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission",* aims at punishing the acts of aiding, abetting or assisting in its commission or attempted commission. It also differs from 'conspiracy in genocide by aiding and abetting' that seeks the genocidal intent of the accused himself and not merely his or her knowledge.[201]

Article 25(3)(d) of the Rome Statute goes on providing that "*In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime."*[202] The (ii) provision seems to be in line with the provisions in the Statutes of the ICTR and ICTY as it only requires the knowledge of the principal perpetrator's intention to commit genocide.

4. Sentencing, Aggregation of crimes and Penalties

Unlike in national laws, there are, in principle, no sentencing guidelines or tariff that apply to international crimes.

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[200] Daniel M Greenfield, "The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters", **Journal of Criminal Law and Criminology**, Volume 98, Issue 3, Spring 2008, p. 943-945

[201]Text of the Rome Statute can be found on https://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe79cdc7cf02886/283503/romestatuteng1.pdf retrieved on 19 May 2019.

[202] **Ibid.**

The Genocide Convention states in article 4 that any person or group committing the crime "*shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals*." However the Convention does not lay down the modalities of a conviction from genocide.

Usually, international ad hoc tribunals' statutes refer to the sentencing practice in the countries that would have jurisdiction if they did not exist. The ICTY Statute in article 24(1) states "*In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia*."[203] Moreover The ICTR Statute has a similar provision in article 23(1) by referring to Rwandan courts.

Article 76 (1) of the ICC Statute with the title 'Sentencing' provides that "*In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence."*

Moreover article 77of the Rome Statutes provides for the applicable penalties the following:

> "*1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5* [204] *of this Statute:*

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[203] The Criminal Code of Former Yugoslavia provided that the perpetrators committing genocide "*shall be punished by imprisonment for not less than five years or by the death penalty*".

[204] Article 5 provides: "*Crimes within the jurisdiction of the Court*

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the *(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or*

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties."

Furthermore the sentence is determined as per the rules set under Article 78 of the Rome Statute:

"*1. In determining the sentence, the Court shall, in accordance with the Rules of*

Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b)".

Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

III – SPECIAL INTENT OF THE CRIME OF GENOCIDE IN THE LIGHT OF THE INTERNATIONAL CASELAW

Chapter III of this thesis aims to review the special intent, discuss the difficulties arising from the 'intent' definition of the Genocide Convention, analyze the different approaches developments to interpret the requirement as set in the Genocide Convention, and illustrate how the international tribunals and courts interpret the same.

1. Introduction

While criminal rules do not usually require special intent for each particular crime ('general intent crime'), for some crimes it may be necessary to have it expressly stated. An exception to the usual inexistence of express mental element for a specific crime is indeed the definition of the crime of genocide under the Genocide Convention, which provides that a person has to have the "*intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.*"[205] This extended mental element is regularly associated with 'special intent' or 'specific intent' (a term used in common law jurisdictions to differentiate crimes of 'general intent'), or *dolus specialis* (a well-known Roman-continental criminal law term). For the sake of clarity, I will only use 'special intent' and 'genocidal intent' in the sections that follow.

For a general intent crime, what matters is the fact that the criminal act is committed "and *no ulterior intent or purpose need to be proven*". A special intent crime[206], however, requires that a criminal act is committed but together "*with an*

[205] Definition of the crime of genocide in the Genocide Convention, supra note 59

[206] As Johan D. van der Vyver states, while intent arises under mens rea in three forms (as mentioned in the above sections, namely *dolus directus, dolus inderectus and dolus eventualis*); special intent, as an element

intent or purpose that goes beyond the mere performance of the act".[207] It is an aggravated form of intent where the requirement is that the perpetrator has the specific intent to bring about the destruction of the group as he is carrying out one of the those acts and it does not matter if he accomplished the act he intended to realize his fundamental goal.[208] This requires that the perpetrator additionally have a specific objective to overpass the result of his or her conduct.[209] It is therefore not enough for the person to intend for example to commit acts or omissions, which would fall under the definition of the crime of genocide (such as by "killing members of the group", or "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"[210]). In addition it must be also demonstrated that the person in question did all these with the additional intention of destroying a group stated in the definition in whole or in part.[211]

The International Court of Justice confirmed in Bosnia v. Serbia that Article 2 of the Genocide Convention requires an additional mental element, next to the general intent required for each crime stipulated in the article, and expressed the following:

> "*In addition to those mental elements, Article 2 requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part,... [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or dolus specialis; in*

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of genocide, is limited to *dolus directus.* The special intent component of the crime of genocide excludes liability in cases of *dolus inderectus*. The exception is in case of complicity in the crime as it can apply to secondary consequences other than the ones in fact hoped for by the perpetrator. Van der Vyver, **Prosecution and Punishment…**, p.306-308

[207] Schabas, **Genocide in International…**, p.260

[208] Cassese, **op. cit.**, p.118

[209] **Ibid.**, p.45

[210] Definition of the crime of genocide in the Genocide Convention, supra note 59

[211] **Ibid.**, p.39

the present Judgment it will usually be referred to as the "specific intent (dolus specialis)". It is not enough that the members of the group are targeted because they belong to that group that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group."[212]

Moreover, according to the Trial Chamber of the ICTR in Prosecutor v. Kambanda, the exceptionality of the crime of genocide is due to its special intent requirement:

"*The crime of genocide is unique because of its element of dolus specialis (special intent), which requires that the crime be committed with the intent 'to destroy in whole or in part, a national ethnic, racial or religious group as such; hence the chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence."*[213]

This uniqueness also serves to differentiate the crime of genocide from other crimes such as crimes against humanity, which will be reviewed in the next section.

1.1. Genocide and Crimes Against Humanity

Because the definition of genocide under Genocide Convention is narrow and it has a special intent requirement, if the perpetrator is found to have no special intent for genocide, he can be still held responsible for other serious crimes. The acts stipulated by the Genocide Convention's definition could be, for instance, encountered in other crimes penalized under international law for crimes against humanity. I will briefly touch upon the link and differences between genocide and crimes against humanity below to illustrate the importance of the 'genocidal intent'.

[212] ICJ, Bosnia v. Serbia, supra note 134, para.187

[213] ICTR, Prosecutor v. Kambanda, ICTR-97-23-S, 4 September 1998, para.16

Mass murder of ethnic or religious groups was initially penalized as a sub-class under crimes against humanity. However after the adoption of the Genocide Convention, genocide acquired a status of a crime on its own, with its specific actus reus and mens rea.[214]

If we are to compare the crime of genocide and crimes against humanity, we can conclude that both share at least three common elements: First, they are major crimes that shake our humanity as they attack the most essential aspects of human dignity; secondly, they are not remote events that are distinct from each other but they are part of a similar environment; thirdly even if the perpetrators do not need to be officials of a state or entities like insurgents, both crimes are mostly carried out with complicity, involvement or tolerance of the authorities.[215]

On the other hand, the elements of actus reus and mens rea of the two crimes differ in many ways. Yet, from an actus reus point of view the acts punished as genocide may still overlap. For instance, murder of an individual can lead to "killing members of the group" as stipulated under 2(a) of the Genocide Convention. Similarly; acts of torture, mental, inhuman or degrading treatment, persecution[216], rape and sexual violence[217] can be defined "causing serious bodily or mental harm to members of the group" as provided under Article 2(b).[218]

However, the mens rea element of the crimes remains always distinct from each other. For the crimes against humanity, under international law one has to have the intent to commit the relevant acts, and knowledge of the widespread or systematic practice; whereas genocide requires that one has, in addition to the underlying acts that can give rise to genocide, the special intent "*to destroy, in*

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[214] Cassese, **op. cit.**, p.127

[215] **Ibid.**, p.127-128

[216] ICTR, Trial Chamber, Akayesu, supra note 42

[217] **Ibid.**

[218] Yusuf Aksar, "The Specific Intent (Dolus Specialis) Requirement of the Crime of Genocide: Confluence or Conflict between the Practice of Ad Hoc Tribunals and ICJ", **Uluslararası İlişkiler**, Volume 6, No:23, p.116

whole or in part, a particular group".[219] It is often said that one of key elements that separate the two crimes is therefore the specific intent.

As also recalled by the International Court of Justice in the judgement Croatia v. Serbia "*the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such*" is the essential characteristic of genocide and it distinguishes it from other crimes.[220] Furthermore, the Trial Chamber of the International Criminal Tribunal held in the case Kupreskic et al. that "... *from the viewpoint of mens rea, genocide is an extreme and most inhumane form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide*." [221]

Genocide also protects a collective good, which is the group as such, and although it may involve mass killing or serious bodily harm, it is much more than these individual offenses. The underlying specific intent is therefore a substantial factor to distinguish the crime of genocide from persecution and all the crimes against humanity.

1.2. Difficulties arising from the requirement of special intent

As far as the genocidal intent is concerned, the definition of genocide under the Convention does not provide any further insight other than "*intent to destroy, in whole or in part, a (...) group, as such*". All that can be deduced from reading the definition is that commission of the enumerated acts such as killing members of the group is not sufficient, and the perpetrator should have additionally "*intent to destroy a group in whole or in part".* The lack of an unambiguous definition has

[219] Cassese, **op. cit.,** p.128

[220] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), International Court of Justice, Judgment of 18 November 2008, para.132

[221] Prosecutor v. Zoran Kupreskic et al, Trial Judgement, Case no: IT-95-16-T, Trial Chamber, 14 January 2000, para. 636

caused debates and it has been argued that this hampered the Convention being more effective.[222]

The requirement of special intent raised a number of complexities as all of its components necessitated interpretation of the ad how international criminal tribunals and International Court of Justice. Some of the judgments delivered in relation to genocide received criticism due to the level of genocidal intent sought by the judges. The major difficulty with special intent as interpreted by the ad hoc international criminal tribunals and International Court of Justice is that obtaining a proof "*beyond reasonable doubt*" is a very difficult task to accomplish, if not impossible in some very rare cases such as the Holocaust. The Nazi's intent to commit genocide against Jews was obvious and could be easily depicted from the official state documentation and propaganda papers. However, in most cases, evidencing a person's "*state of mind*" is an enormous issue, in particular when there is obviously no paper trail and the special intent can only be demonstrated "*by the cumulative effect of the objective conduct to which one necessarily has to add the inference of specific intent deriving from omission*".[223]

In the context of genocide there were also several national courts, which rendered decisions. However, while doing so, they each applied the general rules inherent to their own legal system. They interpreted the notion of "intent" according to their legal tradition, which generated different versions of it. [224]

Raphael Lemkin and the drafters of the Genocide Convention, keeping the Holocaust in mind, sought to develop the extermination of a group of people through destruction of their culture, property and children under the crime of genocide. Considering the available evidence, it would not be difficult to infer the Nazis' intent from their acts due large volume of documents including their plans

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[222] Goldsmith, **The Issue of Intent in the Genocide Convention…,** p.240

[223] **Ibid.**, p.242

[224] Cassese, **op. cit.**, p.40

and anti-Semitic propaganda.[225] However states do not, in principle, declare or put in writing their genocidal plans and strategies in the way that the Nazi regime did. It follows that inferring genocidal intent may be very difficult.

The drafters of the Convention also expected this outcome. The French delegate argued that the language used in relation to intent would raise a possibility for the intent requirement to be used as a pretext to get away with mass killings on the basis that the act lacked the specific intent.[226]

However the *travaux préparatoires* of the Genocide Convention do not reveal concrete information that would reveal the intent of its drafters on the approach to adopt while considering the proof of special intent, i.e. whether the accused must commit an act that would fall under the Convention with the purpose or desire to destroy, or his or her knowledge on the destruction campaign would be sufficient.

Most of the academics today consider that the language of the Genocide Convention requires special intent, in which the perpetrator deliberately seeks the whole or partial destruction of a victim group. The prevailing interpretation presumes a special intent of a perpetrator particularly targeting a victimized group with an express intention to destroy the group.[227] This approach has been also called 'purpose-based'. However, there are a growing number of scholars writing in favour of an approach, in which "*in defined situations, principle culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions*".[228] The latter is described 'knowledge-based approach', aiming better prevention of the crime, which was one of the main goals of the Genocide Convention. These two approaches will be analyzed in detail in the following section.

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[225] Joy Gordon, "When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide", **Yale Human Rights and Development Journal**, 2014, Volume 5, Issue 1, Art. 2, p. 60

[226] **Ibid**, p. 62

[227] Alexander A.K. Greenawalt, "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation", **Pace Law Publications** , Volume 99, 1999, p.2259

[228] Ibid., p.2264

1.3. Approaches towards special intent based on 'purpose' and 'knowledge'

For the acts to amount to genocide is it necessary for the perpetrator to know that the objective of the acts is "*to destroy a protected group in whole or in part*" or is it sufficient that he or she has committed the acts with the purpose to contribute to "*to destroy a protected group in whole or in part*"? The answer given will determine whether one adopts the purpose-based or knowledge-based approach.

1.2.1. Purpose-based approach

Purpose-based intent entails proof that the genocidal outcome was expected and wanted by the perpetrator.[229] Kirsten J. Fisher states that the aim of the prosecutor should be to prove purpose-based intent and in doing so, he should very much limit his dependence on knowledge as proof of genocidal intent. Proof should drive from "*first-hand support of the indictee's purpose-based intent*". [230]

Today, most of the academics assert that the required standard of intent for the crime of genocide is a 'purpose-based intent'. The Courts must prove the purpose of the accused so as to be able to amount the committed acts to genocide.

The purpose-based approach accompanies the following remarks: First, even though there is no 'desire to destroy', this does not necessarily imply that the perpetrator cannot be found responsible for all appearing forms of genocide. It merely rules out the possibility of a conviction of a person as a principal perpetrator of the crime of genocide. Otherwise he can still be convicted of for example aiding and abetting as long as the applicable law allows. Secondly, 'the desire to destroy' may be found through the facts of the case, while a person accused of genocide does not express this desire.

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[229] Kirsten J. Fisher, "Purpose-based or knowledge-based intention for collective wrongdoing in international criminal law?", **International Journal of Law in Context**, Volume 10, 2014, p.167

[230] **Ibid.,** p.173

It is noted that the requirement of proof as purpose-based intent is today the standard practice in international criminal law. Since it is the 'highest level' of criminal intent, its proof can well be also ambiguous and complex, and in most cases impossible to infer. Hans Vest states that, using the term 'purpose' leads to a 'narrow understanding' as it emphasizes "*the volitional element of intending a consequence in the sense of desiring the latter*". According to William A. Schabas, the mental element is a "*concept transplanted from national justice systems where it is applied to ordinary crimes*" and its "*migration from one system to the other, which is not without difficulty*" causes the probable complexity for interpretation.

Today there is a growing number voices amongst the academics in favour of a knowledge-based approach.

1.2.2. Knowledge-based approach

It was Alexander Greenawalt, who developed in 1999, the concept of a 'knowledge-based' threshold for the genocidal intent. [231] His concept has been referred to and quoted in several articles on the threshold required to demonstrate the genocidal intent. Although the prevailing interpretation of genocide under the Convention assumes a 'special intent', in his words "*this approach has difficulty translating from the level of general characterization to that of individual criminal liability*".[232]

It was also argued that defining intent as 'purpose' pose major problems illustrated in the following:

1) Subordinates acting under the orders of a superior may escape liability for genocide if they invoke these orders as a defense. This however does not mean that a person can never be found responsible for genocide if he stated that he had acted under the orders of his superior. A person can be still found responsible for genocide if his orders still required a genocidal intent. However the standard

[231] Greenawalt, **Rethinking Genocidal Intent…**,p. 2259

[232] **Ibid**., 2264

required by special intent can make it very difficult in genocide cases. Alexander Greenawalt gave an example of someone who was the head of a concentration camp, and whose role was to watch over the daily activities of the camp, including the killing of the prisoners. A person having such position should have full knowledge that he is personally contributing to the destruction of a targeted group, although his daily tasks do not require him to directly commit any of the acts stipulated under the Genocide Convention. If one accepts 'purpose-based approach', the only way to hold this person liable for genocide would be to show that he was personally motivated by a wish to take part in genocide.

2) Another implication was stated to be 'ambiguous motives' of the perpetrators. If one assumes that the special intent "*to destroy the group as such*, indicates that the perpetrator must want to destroy a protected group only because they belong to the group and for no other reason, but the perpetrator's desire has any other element to it (for instance, economic or political objetives) then the intent will not be to destroy the group 'as such'. In this case, the acts occur against a targeted group only because they happen to be there or because the perpetrator's act involves other objectives. "*Berlin, London, and Tokyo were not bombed because their inhabitants were German, English, or Japanese, but because they were enemy strongholds.*"[233]

Some scholars, like Leo Kuper and Joy Gordon, argue that the Genocide Convention allows "*fragmentation of intent*" in an implicit way. The Convention does not forbid the destruction of a national, racial, ethnic or religious group as long as the destruction is carried out with another purpose, for example economic, political or military reason. The Convention prohibits the acts listed in Article 2 from (a) to (e) against the protected groups if these acts are committed "*because of who they are*", but not *"because of where they are*", or "*because of what they have*".[234]

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[233] Gordon, **When Intent Makes All the Difference…,** p. 63

[234] This 'division' was shown in the case of the Ache Indian tribe in Paraguay. Most of them were killed in the 1950's and 1960's by the government by means of "*organized Indian hunts*", captured for slavery, persecuted, or forcibly transferred to areas without medical facilities, proper food sources or shelter, and their cultural identity was destroyed via suppression of their language, traditions and religious beliefs. The

The approach proposed by Alexander Greenawalt seeks to establish culpability in cases where a perpetrator has committed a genocidal act within a campaign targeting the members of a group, and he knew that the aim or express outcome of the campaign would be the destruction of the group in whole or in part.[235] This approach ensures that, once this has been established, subordinate perpetrators and those who have 'ambiguous motives' do not escape liability for genocide. Otherwise, the high threshold set by the purpose-based intent will only lead to problems when it comes to the evidence, and that the courts will be compelled to "*squeeze ambiguous fact patters into the specific intent paradigm*."[236]

Whilst Alexander Greenawalt believes that intent will be present if the perpetrator targets a group of people based on their membership to that group, and knowledge that the outcome of the acts will be the destruction of the group, Hans Vest also follows the knowledge-based approach; additionally he expands it further to a "*practical certainty*".

According to Hans Vest, the destruction of the targeted group depends on a "*collective effort*". Genocidal intent has a "*twofold structure*", which consists of making a distinct,on between the individual and the contextual aspects. The general intent refers to the individual acts, while the genocidal intent refers to the individual acts. Genocidal intent will be established when the knowledge of the perpetrator

motive of the Paraguayan government was 'economical' as the Ache Indians were domiciled in the areas where the military and foreign enterprises wanted to have access to the resources of oil, hydroelectric, livestock and forestry. It was stated that the killings against the victims were committed because of their residency and not because of their race. In the words of the Paraguayan officials, "*Although there are victims and victimizers, there is not the third element necessary to establish the crime of genocide – that is "intent". Therefore as there is no intent, one cannot speak of "genocide"*". This was probably an outcome that the drafters of the Genocide Convention wished to avoid. These examples show that depending on how one interprets the genocidal intent, the judgments punishing the crime may be very limited. **Ibid.,64-65**

[235] Alexandar Greenawalt, **Rethinking Genocidal Intent…**, p.2288

[236] **Ibid.**, p.2281

regarding the destructive outcome of the acts reaches "*the level of practical certainty*".[237]

Kai Ambos suggests another reading of the intent requirement: his approach is based on a combination of the 'structure based' of Hans Vest and 'knowledge-based' approaches. According to him, while a purpose-based reading can be possible regarding "*top and mid-level perpetrators*", applying a knowledge-based standard to "*low level perpetrators*" may be more sensible.

2. Practice and interpretation by international courts

Half century after the Genocide Convention, genocide, as a crime of an individual, was first prosecuted and punished by International Criminal Court for Former Yugoslavia and ICTR. Both Statues of the ICTR and the International Criminal Court for Former Yugoslavia (respectively in Articles 2(2) and 4(2)) incorporate Article 2 of the Genocide Convention. The tribunals were therefore under the obligation to interpret and apply the specific intent requirement of the crime of genocide in the cases brought before them. The first cases handled by the respective courts have particular importance, in that they had to interpret the Genocide Convention and set rules that would establish jurisprudence for future cases.

Next to the ad hoc international criminal tribunals trying the individual responsibility, the state responsibility also arose in the context of the crime of genocide at the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide.[238] It is the interpretation by, on one hand, ad hoc tribunals of International Criminal Court for Former Yugoslavia and International Criminal Court for Rwanda, and on the other hand, the permanent tribunal of International Court of Justice and International Criminal Court that outline the context of the crime of genocide.

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[237] Hans Vest, "A Structure-Based Concept of Genocidal Intent", **Journal of International Criminal Justice**, p.789-790

[238] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, supra note 134

Proof of special intent required to alleviate the crime to genocide can appear in an extended array of actions, words of the perpetrator, documentation or other circumstantial evidence. In an ideal world, intent can be proven if there are written statements or orders by the perpetrator. However more often one ought to deduce the intent from the regular examples of the acts and find a pattern that can only stem from the specific intent.

Courts essentially respond to three questions while they consider whether a crime has been committed: what are the facts, which are the crimes that were committed and can the accused be held responsible for any of the crimes? Further, while they reflect on whether the alleged crime amounts to genocide they endeavour to satisfy the requirement of "*the intent to destroy, in whole or in part, a protected group as such*". The satisfaction of this requirement raises a number of complex issues since the components of the genocidal intent (i.e. 'intent', 'destroy', 'in whole or in part', and 'a protected group') remain difficult to interpret.

International Criminal Tribunal for Former Yugoslavia and Rwanda issued numerous judgements in cases where the accused was charged, amongst others, with genocide. In addition to these ad hoc tribunals, International Court of Justice ruled in two instances in relation to state responsibility for genocide. Lastly, the International Criminal Court is expected to commence its trials in the case against Al Bashir once his arrest warrant for war crimes, crimes against humanity and genocide will be executed.

This chapter seeks to analyze the approach of the international courts when considering the genocidal intent throughout their main judgments and the issuance of the arrest warrant in the case of Al Bashir. For each ad hoc tribunal I will analyze in detail, one of the most substantial judgements to have an in-depth understanding of the matter, secondly, I will summarize the tribunals' approaches as set by the remainder of the substantial cases. Regarding the International Court of Justice, I will examine the two cases Bosnia and Herzegovina v. Serbia and Montenegro and Croatia v. Serbia and Montenegro with a view to analyze how the court considered the genocidal intent. Lastly, as far as the International Criminal Court is concerned, I will mention the pending case of Al Bashir.

2.1. Ad hoc international criminal tribunals

Both Statues of the International Criminal Court for Rwanda and the International Criminal Court for Former Yugoslavia (respectively in Articles 2(2) and 4(2)) incorporate Article II of the Genocide Convention. The tribunals were therefore under the obligation to interpret and apply the specific intent requirement of the crime of genocide in the cases brought before them. The first cases handled by the respective courts have particular importance, in that they had to interpret the Genocide Convention and set rules that would establish jurisprudence for future cases.

2.1.1. International Criminal Court for Rwanda (International Criminal Court for Rwanda)

Since the first trial the tribunal has so far finished almost 60 trials. The most significant one remains the judgement rendered at the first trial of Jean-Paul Akayesu. The judgement was the first conviction of a person for his individual criminal responsibility for the crime of genocide, and it delivered some landmark comments, amongst others, on the intent requirement.

a) Prosecutor v. Jean-Paul Akayesu

The charges pressed against Jean-Paul Akayesu included murder, his failure to prevent the killings of at least 2000 Tutsis, committing and facilitating acts of physical and sexual violence while he had executive functions as “bourgmestre” in the Taba commune and exclusive control over the communal police and gendarmerie.[239] For what it concerns the crime of genocide, the Prosecutor’s indictment stated that he was criminally responsible for genocide, complicity in genocide and direct and public incitement to genocide punishable by Article 2(3) of

[239] ICTR, Akayesu, supra note 42, para.55

the Statute of the Tribunal that was taken verbatim from the Genocide Convention.[240] The accused pleaded not guilty to any of the charges against him.

Trial Chamber Judgment:

When in 1998 the Trial Chamber of International Criminal Court for Rwanda convicted Jean-Paul Akayesu of genocide, this marked an important step in the history of international criminal law: this was the first ever conviction where the Genocide Convention was applied by means of its genocide definition that was taken in verbatim in the International Criminal Court for Rwanda Statute.

While applying the definition, the Tribunal had to also interpret the elements of the crime including the genocidal intent.

The Trial Chamber held that, contrary to the popular belief, genocide does not involve the real extermination of the whole group but it is committed once one of the acts stated in Article 2(2) of the Statute is committed with the genocidal intent to destroy in whole or in part a specifically targeted group, i.e. national, ethnical, racial or religious group.[241]

"An intent": Genocidal intent was then described by the Trial Chamber as "*the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged"* and distinguishes genocide from other crimes. [242]

The Trial Chamber stated the findings on the acts provided in Art 2(2) of the Statute and then considered the special intent required for the crime to take place. It was held that special intent is an essential component of certain crimes and requires that the perpetrator act with an apparent intent to commit the crime. "*The crime of genocide is characterized by its dolus specialis, or special intent, which lies in the*

[240] **Ibid**., para. 13-14

[241] **Ibid**., para. 497

[242] **Ibid.**, para. 498

fact that the acts charged (...) must have been committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[243]

"Group at such": First the Trial Chamber considered the definition of the "the group as such". It was found that the four types protected by the Genocide Convention, namely national, ethnical, racial or religious group, had in common the fact that their membership "*would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner*."[244]

It was held that genocide is a crime, which targets its victims not because of their qualities or characteristics or who they are but because they are part of a group. The definition of the genocide provides that victims belong to a "*national, ethnical, racial or religious group*".[245]

The Trial Chamber defined an ethnic group as "*a group whose members share a common language or culture."*[246] Although originally the terms Hutu and Tutsi were used in early 20th century to refer to individuals on basis of their lineage, evidence showed that the Tutsi at the time of the incidents constituted an ethnic group in official classifications. For example the identity cards used at the time indicated the ethnicity. Moreover when the witnesses who appeared before the Tribunal were asked to which ethnic group they belonged it was noted that this was a clear question and all witnesses knew immediately the answer.

Adopting a more expansive reading of the Genocide Convention, the Trial Chamber therefore held that the Tutsi constituted "*a stable and permanent group and were identified as such by all*"[247]. It follows that, as long as a membership to a

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[243] **Ibid.**, para. 517

[244] **Ibid**., para. 511

[245] In the Akayesu case, the ICTR described racial groups to be "*based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors*." The ICTR also found that an ethnic group is "*one whose members share a common language and culture*."

[246] **Ibid.,** para. 513

[247] **Ibid.,** para. 702

victim group arises automatically by birth and its members do not normally challenge it, this group (although being other than the four groups enumerated in the Genocide Convention) should be protected.

"Destruction": The Trial Chamber, importantly, also held that rape and sexual violence was one of the worst ways to inflict harm on the victim and this can well constitute genocide if it is committed with genocidal intent just as the other acts.[248] These can be an essential element of genocide as long as they are committed with genocidal intent.[249]

In current case the victims, who were systematically and exclusively targeted, suffered both physical and mental harm. The acts of rape and sexual violence reflected the decisiveness of the perpetrators to cause in the psychological state of the Tutsi women, their families and their communities (in most of the cases these acts were accompanied with the intent to kill the women, which endorses the intent to destroy the Tutsi group), but also psychological destruction by inflicting acute suffering to the members of the Tutsi group. [250] Rwanda is a patriarchal society, meaning that a child's membership to a group will be determined by the membership of his/her father. In other words, the child born as a result of a rape of a Tutsi woman by a Hutu man will belong to the Hutu group. It can be said that the rape would then bring about the outcome of annihilating the Tutsi identity by Hutu men impregnating Tutsi women,[251] and contributing to the destruction of the group.

Further, on the issue of special intent, the Tribunal described it as the key element of an intentional offence that is "*characterized by a psychological relationship between the physical result and the mental state of the perpetrator*". [252]

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[248] **Ibid.,** para. 731

[249] Van der Vyver, **op. cit.**, p. 310

[250] ICTR, Akayesu, supra note 42, para. 731-733

[251] **Ibid.,** para. 507

[252] **Ibid.,** para. 518

How to determine the perpetrator's specific intent? The Trial Chamber deemed that intent is a mental factor and it is complicated, sometimes impossible to establish.

The Trial Chamber referred in its judgement to the deductions of the Trial Chamber of the International Criminal Court for Former Yugoslavia in Karadzić and Mladić cases with a view to demonstrate occurrences where the specific intent can be inferred. In addition, the Trial Chamber stated that the following list could be taken into account when considering the special intent:

(i) General political doctrine giving rise to the acts referred to,

(ii) Repetition of destructive and discriminatory acts,

(iii) Perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators;

(iv) A particular act charged from the general context of the other acts committed systematically against the same group (whether the same or other perpetrators commit these) [253],

(v) Scale and general nature of atrocities,

(vi) And the fact of deliberately and systematically targeting victims on account of their membership of a particular group while excluding the individuals belonging to other groups [254]

In light of above, the Trial Chamber considered the acts and utterances of the accused and held that the accused incurred individual criminal responsibility for having ordered, committed or otherwise aided and abetted in the commission of the acts[255], and direct and public incitement to commit genocide. This was established

[253] **Ibid**., para. 728

[254] **Ibid**., para. 523

[255] **Ibid**., para. 724

by means of the speeches that he made on several occasions whereby he more or less openly called for the commission of genocide. [256] Moreover the genocidal intent of the accused is, beyond reasonable doubt, inferred from the very high number of atrocities committed against the victim group, the widespread nature of the same throughout the country, the fact that the victims were deliberately and systematically selected since they belonged to a certain group and the others were excluded. [257]

The cases that were subsequently tried at International Criminal Court for Rwanda principally followed the findings of the Akayesu case regarding the establishment of the genocidal intent.

b) Comments and other important cases

It is noted that Akayesu judgment interpreted the "intent to destroy" as a special intent and defined it as "*the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged*".[258] According to the Trial Chamber, genocidal intent is a 'key element' and "*characterized by a psychological relationship between the physical result and the mental state of the perpetrator*".[259] Akayesu judgment therefore provides a 'strict reading' of the intention requirement and illustrates the prevailing understanding: the perpetrator must target a group because they belong to a group and he must have the desire to bring destruction to the group[260].

Despite the 'strict reading' of the special intent, the tribunal still emphasized that it "*is a mental factor which is difficult, even impossible, to determine*"[261] and this end, depicted a long list of evidentiary standards where it would be possible to deduce the intent. It is also worthwhile to note that in Akayesu the tribunal dealt

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[256] **Ibid**., para. 729

[257] **Ibid**., para. 730

[258] **Ibid.,** para. 518

[259] **Ibid.**

[260] Greenawalt, **Rethinking Genocidal Intent…,** p. 2265

[261] **Ibid.,** para. 523

with a ‘clear’ case of genocide, while the intent to destroy was inferred without causing debates.

The case law of the International Criminal Tribunal for Rwanda followed Akayesu judgment in its findings and required that “*the aim to destroy one of the protected groups”* be present to amount the committed act to genocide.[262] To illustrate a few, the judgement issued in the Musema casealso followed the purpose-based approach of the Akayesu judgment.[263] Moreover, in the Kayishema and Ruzindana case the Chamber agreed with the judgment of Akayesu that intent might be tricky to ascertain, that the accused person’s “*actions, including circumstantial evidence, however may provide sufficient evidence of intent*,” and that “*intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action*.”[264]

2.1.2. International Criminal Court for Ex-Yugoslavia (International Criminal Court for Former Yugoslavia)

a) Prosecutor v. Radislav Krstić

Although established in 1993, the Tribunal held its first judgement with a conviction for genocide 8 years later, in 2011, during the Krstić case. The conviction of General Radislav Krstić was the first senior official associated with the mass killings of the enclave Srebrenica.

Krstić was charged under Articles 7(1)(1) and 7(3)(2) of the Statute of genocide or complicity of genocide, persecution, extermination, murder and forced transfer or deportation based on his role in the events that took place further to the attack of the Serbian forces on the town of Srebrenica between July and November 1995.

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[262] Ambos, **What does ‘intent to destroy’ mean…**, p.337

[263] ICTR, Musema, supra note 185, para.166.

[264] ICTR, Kayishema and Ruzindana, supra note 134, para.93 and 527

In the words of the Trial Chamber his story was "*one of a respected professional soldier who could not balk his superiors' insane desire to forever rid the Srebrenica area of Muslim civilians" and who had finally "participated in the unlawful realisation of this hideous design.*" [265]

It is worthwhile to note that during the trials the Defense did not dispute the fact that serious bodily harm or mental harm was inflicted on the Bosnian Muslims or that they were murdered. The underlying facts were not contested. However the main point of both parties was on mens rea and whether there was special intent.

The Prosecution's allegation was that "*the Bosnian Serb forces planned and intended to kill all the Bosnian Muslim men of military age at Srebrenica and that these large scale murders constitute genocide*"[266]. To demonstrate the special intent of the accused, the Prosecution used an interpretation technique that is based on the 'knowledge' of the accused. This was noted as the Prosecutor stated that "*The acts have been committed with the requisite intent if "the accused consciously desired his acts to result in the destruction, in whole or in part, of the group, as such; or he knew his acts were destroying, in whole or in part, the group, as such; or he knew that the likely consequence of his acts would be to destroy, in whole or in part, the group, as such*", and the accused "*consciously desired their acts to lead to the destruction of part of the Bosnian Muslim people as a group*".[267]

The Defence counter-argued that not all Muslims were killed; the women, children and old people were transferred and but not killed, and that the Bosnian Muslim men of fighting age did not constitute a group as such protected by the Genocide Convention. Moreover, by contrast to the Prosecution, the Defense argued that the level of intent that the perpetrator should have is dolus specialis, which is a "higher form of premeditation".[268]

Trial Chamber Judgment:

[265] ICTY, Krstić, supra note 128, para. 724

[266] **Ibid.,** para. 545

[267] **Ibid**., para. 569

[268] **Ibid.,** para. 570

The question for the Tribunal was therefore to consider whether there was "*intent to destroy, in whole or in part, a group as such*" as defined by the Genocide Convention so as to amount the killings to genocide.

"A protected group": Emphasizing the interpretations made earlier before International Criminal Tribunal for Rwanda, and adopting that genocide requires a specific intent to annihilate a victim group, the Trial Chamber said that genocide "*encompasses only acts committed with the goal of destroying all or part of a group".*[269]

"Destruction": The Trial Chamber discussed the manner in which the destruction of a group can happen in a genocidal environment. It was found that the customary international law limits it to the physical and biological destruction of all or part of the group. However "*where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group*." It was thus concluded that the deliberate destruction of mosques and homes belonging to the Bosnian Muslims was in fact an evidence of intent to destroy the group. [270]

"Whole or in part": The Trial Chamber also discussed how to interpret the expression "in whole or in part". The question was whether the primary killings of the Bosnian Men of military age would constitute a group "in part". According to the Prosecution the expression in whole or in part meant a substantial part in quantities or qualitative terms." However for the Defence, the killings of some 7,000 out of 40,000 (Bosnian Muslim population in Srebrenica) was not substantial enough to bring the victims under the Genocide definition.

The Trial Chamber held that the targeted group should be "*a distinct part of the group*" on the contrary to "*an accumulation of isolated individuals within it*"[271] and that the military aged Bosnian Muslim men and boys of Srebrenica constituted

[269] **Ibid.,** para. 571

[270] **Ibid**., para. 580

[271] ICTY, Krstić, supra note 128, para. 590

a substantial part of the Bosnian Muslim group as it is inevitable that the killing of these men would bring about the annihilation of the entire Bosnian Muslim community in the area, as such "*The intent to kill the men amounted to an intent to destroy a substantial part of the Bosnian Muslim group*." [272]

"Intent": The Trial Chamber considered that the Serbian forces' use of mass graves, practices of mutilation of the victims' bodies and their reburial in other mass graves far away, which caused dreadful grief to the survivors who were taken away also the right to perform a decent burial as per traditions and religious rituals were "*a strong indication of the intent to destroy the group as such*".[273] It was found that Krstić had played an important role in the forcible transfer of the remainder of the population and that he had undeniably been "*aware of the fatal impact that the killing of the men would have on the ability of the Bosnian Muslim community of Srebrenica to survive, as such*."

The Trial Chamber concluded that the Drina Corps sought to eradicate all of the Bosnian Muslims in Srebrenica as a community, "*what was ethnic cleansing became genocide*", and that the accused had participated in the genocidal acts of '*killing members of the group'*" under Article 4(2)(a) of the Statute "*with the intent to destroy a part of the group*."

Appeal judgment:

The Appeals Chamber overruled the Trial Chamber's judgment for genocide. It found that "*Even accepting that Krstić was aware, on the basis of these reports, that executions were being carried out in the Zvornik Brigade's area of responsibility, this knowledge cannot support an inference of genocidal intent on his part. There was no evidence that Radislav Krstić was in fact directing those executions or supervising their commission by the Zvornik Brigade.*"[274] Against the findings of the Trial Chamber regarding the allocation of the sources and personnel

[272] **Ibid.,** para. 634

[273] **Ibid.,**, para. 596

[274] ICTR, Prosecutor v. Radislav Krstić, Appeal Judgment, Case No. IT-98-33-A, Appeal Chamber, 19 April 2004, para. 111

to the realization of the killings, the Appeals Chamber held that "*the only inference this evidence is capable of sustaining is one of knowledge on the part of Krstić, not of shared genocidal intent*"[275], and that *"In conclusion, Radislav Krstić's contacts with those who appeared to be the main participants in the executions establish, at most, that Krstić was aware that those executions were taking place. Radislav Krstić's knowledge of those executions is insufficient to support an inference that he shared the intent to commit genocide."*[276]

In light of the above argumentation, the Appeals Chamber set aside the conviction for genocide, and held that he was criminally responsible for aiding and abetting genocide, which requires a lesser threshold of intent.

b) Comments and other important cases

It is noted that in the Krstić case, the Trial Chamber held a judgement on basis of 'knowledge-based approach' and concluded that the perpetrator's knowledge of the outcomes of actions, and the long-term effect of those actions inflicted on a targeted group was satisfactory to prove genocidal intent.[277]

The Trial Chamber convicted Krstić based on him being "co-perpetrator in a joint criminal enterprise". It was found that he knew that Drina corps and its funds were used to murder Bosnian Muslims, and that he did not punish his inferiors who took part in the commission of those actions. The Appeals Chamber, however, overruled this finding, as it ruled that the mere knowledge of the outcome of the inferiors' acts would not be sufficient to prove genocidal intent.

Although Krstić was the first case where the Trial Chamber pronounced a conviction for genocide, there were other Trial Chamber judgments that made additional comments regarding genocidal intent.

[275] **Ibid.**, para. 113

[276] **Ibid**., para. 121

[277] Fisher, **Purpose-based or knowledge-based…**, p.168

According to Trial Chamber judgments in Karadžić[278] and Mladić[279] specific intent can be inferred from the following: (i) "the *general political doctrine giving rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts*" or (ii) "*perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct*." or (iii) "*the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.*"

Another substantial judgment was delivered in the Jelisić Trial Chamber, which concluded the following:

> "*The words and deeds of the accused demonstrate that he was not only perfectly aware of the discriminatory nature of the operation but also that he fully supported it. It appears from the evidence submitted to the Trial Chamber that a large majority of the persons whom Goran Jelisic admitted having beaten and executed were Muslim. Additionally, many of the elements showed how Goran Jelisic made scornful and discriminatory remarks about the Muslim population. Often, Goran Jelisic insulted the Muslims by calling them "balijas" or "Turks". Of one detainee whom he had just hit, Goran Jelisic allegedly said that he must be have been mad to dirty his hands with a "balija" before then executing him*."[280]

Rejecting a mere 'knowledge-based' approach, the Jelisić Trial Chamber applied a 'purpose-based' standard and, despite its findings above, found that the accused was not "motivated" by the genocidal intent as he committed the acts only

278 ICTY, Trial Judgment, Prosecutor v. Radovan Karadžić , Case No. IT-95-5-R61, Trial Chamber, 24 March 2016

279 ICTY, Trial Judgment, Prosecutor v. Ratko Mladić, Case No. IT-95-18-R61, Trial Chamber, 22 November 2017

280 ICTY, Jelisić, supra note 141, para. 75

randomly, acting under a "*disturbed personality*".[281] The Trial Chamber also stated that he did not have the genocidal intent as the killings were at random and he did not have a clear intent to destroy a protected group.[282] The Appeals Chamber, however, held that the existence of a personal motive or a disturbed personality does not reject the fact that he can be able to develop intent to destroy, and that the randomness of acts does not exclude the intent.[283]

Another relatively recent judgment was issued in 2010 in the case of Popović. The Tribunal confirmed that intent is not in general can be directly proven as only the accused has the direct knowledge of his own 'mental state' and that it is not likely for an accused to admit his genocidal intent.[284]

In support of a purpose-based approach, the Tribunal went on stating that, in case of lack of direct proof:

> "*The intent to destroy may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts. Further, proof of the mental state with respect to the commission of the underlying act can serve as evidence from which to draw the further inference that the accused possessed the specific intent to destroy.*"[285]

[281] **Ibid.,** para.108

[282] **Ibid.**, para.105-106

[283] Ambos, **What does 'intent to destroy'…,** p.337

[284] ICTR, Trial Judgment, Prosecutor v. Vujadin Popovic et al., Case IT-05-88-T, Trial Chamber I, 10 June 2010, para.823

[285] **Ibid.**

2.2. Practice and interpretation by International Court of Justice (ICJ)

The Court delivered two judgments, which illustrates a purpose-based approach in relation to the genocidal intent.

2.2.1. Republic of Bosnia and Herzegovina v. Federal Republic of Yugoslavia (Republic of Serbia)

a) Case

In March 1993, the Government of the Republic of Bosnia and Herzegovina (hereinafter referred to as "Bosnia and Herzegovina") filed an action against the Federal Republic of Yugoslavia [286] (hereinafter referred to as "Serbia") on the grounds of breach of the Genocide Convention, as well as various matters that were claimed by Bosnia and Herzegovina to be connected. The application related to the acts committed in Bosnia and Herzegovina in 1991-1995.[287] This was the first time that a state responsibility for the crime of genocide was put into question.

Bosnia and Herzegovina asked the Court to rule and declare under Article 9 of the Genocide Convention, which provides that the International Court of Justice shall have jurisdiction on all the disputes arising under the Convention, that Serbia violated the Convention by destroying in part and attempting to destroy in whole the national, ethnical and religious groups. Moreover Bosnia and Herzegovina requested that Serbia be held responsible for planning, aiding, conspiring, abetting, inciting, failing to prevent and failing to punish genocide.

Serbia disputed some of the material allegations, for instance the death toll in Srebrenica. However it did not object to the fact that the alleged crimes were committed during the war and cited that certain acts could be "*characterized as war*

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[286] The Federal Republic of Yugoslavia was succeeded by Serbia and Montenegro as from 04 February 2003 and the latter by the Republic of Serbia as from 03 June 2006.

[287] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, supra note 147

crimes and certain even as crimes against humanity."[288] It is worthwhile to note that the Court was seized in order to hold a judgment on whether Serbia was responsible for genocide only (therefore, excluding the possibility to rule for crimes against humanity or war crimes).

Serbia, on the other hand, rejected the allegation that these acts had been committed with the genocidal intent and argued that they could not be attributed to Serbia since those acts had been committed by the VRS, and that the Bosnian Serb forces obtained de facto control over an important area following the independency of Bosnia and Herzegovina.[289]

Judgment:

As highest judicial organ of the United Nations, the International Court of Justice issued its first substantive judgement interpreting the Genocide Convention in February 2007, almost 14 years later after the case was filed by Bosnia and Herzegovina. The Court, having followed the two-step approach of the ad hoc tribunals, first considered whether the crime of genocide took place in the given geographical area and, secondly whether the state (instead of a person) was responsible for the alleged crime.

It was held that the homicide of about 5,000-8,000 Bosnian men and boys in Srebrenica was an act of genocide as it had been committed with "*the intent to destroy a protected group in whole or in part*". It was however found that the other acts committed in several regions in Bosnia (except Srebrenica) did not constitute genocide within the meaning of Article 2, as the genocidal intent of the perpetrators was not present in the case: "*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 2 must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group*."[290] Moreover it was held that Serbia had

[288] **Ibid.,** para. 249

[289] **Ibid.,** para. 278

[290] **Ibid.,** para. 187

violated the Convention as it failed to prevent the mass killings in areas in Bosnia other than Srebrenica and to punish the responsible persons for the Srebrenica killings.

While considering the genocidal intent, the Court held that the "Strategic Goals" of the Serbian Forces did not refer to eradication of the Bosnian Muslim population and did not evidence genocidal intent, but concluded that the goals "*were capable of being achieved by the displacement of the population and by territory being acquired*". It was also found by the Court that the motive of creating a Greater Serbia "*did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion*". Moreover, it was stated that in cases before the ICTY, where the Prosecutor had put forward the same document as evidence, it was not considered as proof of genocidal intent by the tribunal. As such the Court concluded that the same failed to demonstrate the genocidal intent of the perpetrators.[291]

The ICJ's elevated standard for proof is noted as it held that "*The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive*."[292] According to the Court, the specific intent "*has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist, and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent*."[293]

The Court went on stating that the above-mentioned proposition did not comply with the findings of the International Criminal Court for Former Yugoslavia in relation to genocide or with the actions of the Prosecutor where it was agreed not to charge genocide offences or withdraw the genocide-related charges. [294]

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[291] **Ibid.,** para. 372

[292] https://www.icj-cij.org/files/press-releases/3/14123.pdf

[293] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, supra note 147, para. 373

[294] **Ibid.,** para. 374

The Court also made a distinction between persecution as a crime against humanity and genocide. Referring to the ICTY Kupreškić case, the Court stated that "*[w]hile in the case of persecution the discriminatory intent can take multifarious inhumane forms . . . in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong*."[295]

Furthermore, the Court underlined the difference between ethnic cleansing and genocide as it defined ethnic cleansing as "*rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area*" and stated that ethnic cleansing can be a form of genocide only if it falls within one of the categories of acts prohibited by Article 2 of the Genocide Convention. "*Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous,' nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.*"[296]

After concluding that only the acts committed in Srebrenica constituted genocide, the Court considered whether Serbia and Montenegro could be held responsible as a state for these acts. The Court concluded that there was no state responsibility. [297]

[295] **Ibid.,** para. 188

[296] **Ibid,** para. 190

[297] The Court took into account the effective control test stemming from the ICJ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA) of 1986 and held that there was no sufficient ground to prove that a de jure organ of the state was involved in the genocide, or that there were de facto organs acting in complete dependence on the state. The fact that the Court did not follow the jurisprudence of ICTY dated 1999 in Tadic Case and apply the "overall control test" generated criticism.

b) Comments

The judgement received many reactions: positive, negative or mixed. Since it is a landmark ruling in the sense that it is the first ever judgment by the United Nations' highest judicial organ, delivered on the interpretation of the Genocide Convention, it is worthwhile to mention some of the praise and criticism on the judgment.

The initial reactions were mostly mixed. A Washington Post's article had the title "*U.N. Court Clears Serbia of Genocide*", while a New York Times' article summarized the judgment as "*Court Declares Bosnia Killings Were Genocide*". While for some the Court's ruling was "*another betrayal by the international community*", for others it marked the conclusion of the debate on whether Serbia was liable for *genocide in Bosnia*.[298]

However it is seen that many academics have so far severely criticized the judgment on its methodology and findings. Since the subject of this thesis relates the genocidal intent, I will hereinafter elaborate on the criticism that was only in relation to the Court's failure to establish special intent of the crime of genocide.

The criticism vis-à-vis the Court's findings and methodology in relation to the special intent focuses mainly on a) the Court's assessment to fail to request the most paramount likely proof, b) a high level of proof regarding the genocidal intent and failure to carry out an over-all analysis of the submitted evidence, and c) the Court's inconsistent reliance on the findings of the ICTY. Out of these I will only mention further on the level of proof applied by the Court as it relates to the subject of my thesis.

As far as proof of the genocidal intent is concerned, the Court dismissed Bosnia's claim on the grounds that the claimant failed to prove its case on the

[298] Susana SaCouto, "Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case Against Serbia and Montenegro", **Human Rights Brief**, Volume 15 (1), 2007, p.1

"*balance of probabilities*."[299] Instead, the Court relied on its earlier jurisprudence (*Corfu Channel, United Kingdom* v. *Albania, Judgment, ICJ, 1949)* and held that, "*claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive*."[300] The Court stated that it had to "*be fully convinced*" that allegations of genocide, or complicity in genocide, have been "*clearly established*".[301] Some scholars criticize the Court to have adopted a standard of proof that is even higher when considering the evidence submitted by Bosnia in support of its claim for Serbia's state responsibility.

As mentioned above, it is also seen that the Court relied on the jurisprudence of the ICTY to reject genocidal intent. However the Court did not consider that the ICTY was prevented to hear the charges in relation to the whole Bosnia as its jurisdiction was limited to the area where the operations of the accused persons took place. Also the ICTY Prosecutor's agreement to plea bargain or his failure to put forward additional genocide charges should also not have a bearing on the case the ICJ since the Prosecutor may be often limited by practicality in his actions during the pre-trials or trials.[302]

The ICJ differed from the ICTY in terms of approach regarding the analysis of genocidal intent and set a higher standard of proof as "*fully conclusive evidence*". The Tribunal's established jurisprudence allows saying that, when obvious proof of intent is missing, the Tribunal could draw genocidal intent from relevant facts and circumstances.[303] The Appeal Chamber in Krstić found that the pattern of conduct qualifying as ethnic cleansing could be used as proof of the genocidal intent in certain circumstances[304]. The Appeal Chamber in Jelisić also held that proof of specific genocidal intent "*may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group,*

[299] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, supra note 147, para. 208

[300] **Ibid.,** 209

[301] **Ibid.**

[302] Dissenting opinion of Vice-President Al-Khsawneh para. 42, https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-01-EN.pdf

[303] SaCouto, **Reflections on the Judgment…,** p.3

[304] ICTR, Appeal Chamber, Prosecutor v Radislav Krstić , Case No.IT-98-33-A, Appeal Chamber, 19 April 2004, para. 133

the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."[305]

Furthermore it is maintained that the Court failed to assess the evidence in 'cumulative manner', and that this caused a very restricted deduction to analyze the genocidal intent. An example to illustrate is when the Court said that it was "fully convinced" that the proof demonstrated a regular mistreatment (including "*beatings, rape, and torture causing serious bodily and mental harm*") of Bosnian Muslims in other areas in Bosnia, however it went on to conclude that showing genocidal intent by means of the "*very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims*" could not be accepted."[306] It is striking for the Court to reach this conclusion, while Serbia had failed itself to submit unedited copies of the state documents. Judge al-Khasawneh, who dissented to the findings of the Court, stated that in the light of its Corfu Channel Judgment[307], the Court could have adopted a more moderate standard of proof and "*it would normally be expected that the consequences of the note taken by the Court would be to shift the onus probandi or to allow a more liberal recourse to inference as the Court's past practice and considerations of common sense and fairness would all demand."*[308]

To conclude in the words of Ruth Wedgwood, it may be that "*It is all to the good that Serbia may soon rejoin Europe. But it does not facilitate that reunion to disguise what happened in the past.*"[309] Staying out of politics might not be as straightforward as it seems for the highest judicial organ of the United Nations.

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[305] ICTR, Jelisić, supra note 141, para. 47, 73

[306] ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, supra note 147

[307] Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 18

[308] Dissenting opinion of Vice-President Al-Khsawneh para.35 https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-01-EN.pdf

[309] Wedgwood, Slobodan Milošević's Last Waltz, 12 March 2007, https://www.nytimes.com/2007/03/12/opinion/12wedgwood.html

2.2.2. Croatia v. Serbia and Montenegro (Republic of Serbia)

In the early 1990s, Serbs and Croats had systematically committed the acts of killing, torture and rape against each other in the Croats' land.[310]

In 1999, Croatia brought a case against Serbia before the ICJ on the grounds of breach of the Genocide Convention between 1991 and 1995, while Serbia counter-claimed ten years later that it was Croatia that was responsible for the breaches of the Convention in 1995.

Croatia contended that the intent required by genocide was not limited to the physical destruction of the group but genocide also occurs when there is intent t prevent the protected group from performing as a entity.[311] One of Croatia's arguments was that Serbia's systematic policies to eradicate Croats from the territories in question demonstrated dolus specialis,[312]. Croatia provided 17 grounds (e.g. "Serbian expansion") and asserted that "[a]*ll these elements indicate [...] the existence of a pattern of conduct from which the only reasonable inference is an intent to destroy, in whole or in part, the Croat group*."[313]

Serbia, on the other hand, argued that the paramount issue is the intent to bring about a physical destruction although the acts stipulated under Article 2 may not always generate the same.[314]

The ICJ dismissed both claims in its entirety, while delivering a judgement that dealt with, amongst others, the question of what the "specific intent" is in relation to the destruction of a group as stipulated under the Genocide Convention.[315] It was held that "*[I]n order to infer the existence of dolus specialis*

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310 ICJ, Croatia v. Serbia and Montenegro, para. 208 and 295

311 **Ibid.,** para. 134

312 **Ibid.,** para. 408

313 **Ibid.,** para. 409

314 **Ibid.,** para.135

315 Judgement available at https://www.icj-cij.org/files/case-related/118/118-20150203-JUD-01-00-EN.pdf

from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question."[316]

Some argued that this benchmark set by the Court was placing the standard too high for the required special intent. In fact the Court dismissed the claimant's allegations of genocide as it ruled that the acts committed by the Serbs were only "*forcible displacement*" but no "*killings*". The Court came to the conclusion that the Serbs aimed only to drive out the Croats, not to generate their destruction destroy, which was stated to be required to amount the acts to the level of genocide.

Like the Bosnia v. Serbia judgment, the ICJ in Croatia v. Serbia did not do much to enlighten the legal vagueness around the standard of required evidence for special intent when this concerns states. States are complicated blend of distinct institutions and populations, which makes it even more complex to estalish the special intent when considering a state's actions.[317]

The judgment followed the standard established by earlier jurisprudence and concluded that if there is no direct proof, one may need to deduce specific intent for states and individuals in a similar manner. However, the Court could have made used of facts and circumstantial evidence to consider the genocidal intent, instead of applying a strict the "only reasonable inference" test. It is challenging to deem that the persons committing the acts did not have (as a minimum) the knowledge that their actions causing the brutal circumstances mentioned in the ICJ's judgment would not cause the group to be destroyed in whole or in part. Since having knowledge is not considered sufficient to amount to genocidal intent, it will be accepted by the authorities that the genocidal intent was not proved.

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[316] ICJ, Croatia v. Serbia and Montenegro, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 3 February 2015, para. 147

[317] Tara Zivkovic, **An Impossible Standard of Intent?: Croatia v. Serbia at the International Court of Justice**, The Yale Journal of International Law, p.426

2.3. Future: Practice and interpretation by International Criminal Court (ICC)

As seen in above sections, the ad hoc tribunals of ICTY and ICTR have been pioneers in the field of international criminal law and they successfully paved the way for the setting up of a permanent court in 1998 with a universal jurisdiction to prosecute international crimes. The Court became active in 2002, and today it has more than 120 member states. It delivered its first judgement in 2012 and issued many arrest warrants.

One of the arrest warrant relates to a high profile accused, Omar Al Bashir, the former president of Sudan, due to mass violence committed against the ethnic groups in Darfur, Sudan.

Problems in Darfur arose from the clashes between the rebellious groups from South and the government based in Khartoum, due to unbalanced distribution of power and wealth between South and North. The rebellious groups' attacks at government installations triggered retaliation from the government causing an unprecedented mass violation in Darfur area. Entire villages were attacked under the bombs of Sudanese planes, government troops and armed militia. Women were raped, water was intentionally polluted, and massive killing campaign took place.[318]

The Report to the UN Secretary-General[319] described the gravity of the brutality as follows:

> "*Since it erupted in 1983, the internal conflict between the North and the South has had a significant impact on the Sudan in many ways. It is the longest conflict in Africa involving serious human rights abuses and humanitarian disasters. During the conflict, more than 2 million persons have died and 4.5 million persons have been forcibly displaced from their homes.*"

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[318] Report to the UN Secretary-General, issued by the UN International Commission of Inquiry on Darfur, para. 62, https://www.un.org/News/dh/sudan/com_inq_darfur.pdf

[319] **Ibid.,** para. 62

On basis of a deep analysis of the collected information during the investigation, the report concluded the following:

> *"[t]he Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African' tribes."*[320]

The conclusion of the report was very important since it was going to indicate the position of the UN in relation to the acts of violence by the Sudanese government in Darfur. The report came to the conclusion that the government of Sudan had not been engaged in a genocidal campaign and grounded its reasoning on basis of the lack of genocidal intent of the government authorities, ruling out the state responsibility for genocide but enabling the competent courts to comment on the possibility of a genocide in Darfur by individuals:

"*Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evidence a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages*

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[320] **Ibid.,** p.3

pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare."[321]

According to Katherine Goldsmith there were several points that were ignored by the Commission. While the Commission stated that the authorities lacked genocidal intent, they failed to show what would be required to prove the same. Moreover, the Commission should have taken into account the jurisprudence of Akayesu, which demonstrated that intent should be proven from actions. Next to this, considering that the Commission did not have access to all military documents, it was impossible to show proof for intent, which would satisfy the purpose-based standard. [322]

In addition, although the motive of the violence might have been a desire to displace the victimized group, this cannot be mixed with 'intent'. It was argued that the government intended to destroy a group in whole or in part and that their acts were genocide.[323]

Five years later, in 2009, the atrocities committed in Darfur, the International Criminal Court prepared an arrest warrant against Al Bashir for war crimes and crimes against humanity in Darfur, albeit dismissing the Prosecutor's application for genocide as there were no reasonable grounds to consider that the individuals in question had acted with genocidal intent. The decision was criticized due to the high standard of required intent.[324] Following the Prosecutor's appeal, the Pre-Trial Chamber delivered a second arrest warrant in February 2010, also for genocide as it was content with the existence of reasonable grounds this time. The charges included, amongst others, genocide by means of article 6(a) (genocide by killing), 6(b) (genocide by causing serious bodily or mental harm, and 6(c) of the Rome

[321] **Ibid.,** p.4

[322] Goldsmith, **The Issue of Intent…**, p.243

[323] **Ibid**

[324] Claus Kreß, The Crime of Genocide and Contextual Elements, A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case, **Journal of International Criminal Justice**, Volume 7, 2009, p.304-306

Statute (genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction).[325]

The Rome Statute demonstrates a somehow lesser strict structure of intent required for the crime of genocide. Article 30 provides under the title 'Mental Element', the following:

> "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*."

It is argued that the above stipulation shows a shift towards knowledge-based approach. [326] The case of Al Bashir will provide insight on the Court's further approach to the genocidal intent. However, his case will stay put in the 'Pre-Trial stage' until he is arrested and brought to the courtroom.

Until now Sudan has refused to cooperate with the ICC, which put the case against Al Bashir on hold. It is worth to mention that ICC's arrest of warrant differs from the arrests of warrant issued by the ad hoc tribunals in terms of permanence and effectiveness in the long run. Ad hoc tribunals are temporary although they may

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[325] https://www.icc-cpi.int/darfur/albashir

[326] Goldsmith, **The Issue of Intent…**, p.254

run for 20 years, whereas the ICC is permanent and the Prosecutor of the ICC can "wait." Following the recent *coup d'état* in Sudan, it will be of interest to follow the steps of the international law to ensure his arrival to the Netherlands, from the politically boiling, post-coup Sudan, and thereafter his trial. This case will be probably the latest legal development on the interpretation of the crime of genocide and evidence of genocidal intent required. The international criminal law scholars will, certainly, be curious to see the interpretation of the genocidal intent that the judgement will deliver.

IV- CONCLUSION

Although genocide is a crime that plagued the World for centuries, it was labelled as genocide only in the 20th century. The period from the Holocaust onwards saw positive changes for the punishment of the crime, although halted by Cold War. The UN's Genocide Convention was a milestone for the development of international law in the context of genocide. However it would be also hard to deny its narrow and ambiguous definition stipulating the crime of genocide. It can be argued that given the circumstances in 1940's and considering that the text had to be negotiated by numerous states with different legal traditions and political views and standpoints, it would not be possible to agree on an improved text. Nonetheless this does not disguise the fact that the definition of the crime of genocide lacks substantive clarifications and it leaves many components of a crime of such importance to interpretation of international courts: What is an racial or ethnic group? What is the meaning of the additional words "as such"? How one can define a group? What is the level of threshold required for the genocidal intent? And other questions have had to be answered by the international courts at the cost of different interpretations for certain important components of the crime. The Convention could have served a better guideline for the international community had it contained clearer dispositions.

The Convention was first implemented at international level via ad hoc tribunals of Rwanda and Former Yugoslavia, thereafter cases heard by the ICJ. A first case is now about to be heard before the ICC provided that the warrant of arrest for Al Bashir can be enforced. Amongst others, it is clear that there is no real consistency between the interpretation of genocidal intent by the ad hoc tribunals and ICJ. Yet, several judgements delivered so far indicate an obvious inclination for a ‘purpose-based approach’. Since the Akayesu, it has been accepted that special intent has to be established by ‘external evidence’, i.e. indirect or circumstantial evidence. Although Akayesu adopted a more knowledge-based approach when the perpetrators were convicted on basis of their ‘involvement and foresight’, the ICTY took a narrower approach for genocidal intent.

When one tries to establish that a perpetrator’s intent to destroy a group in whole or in part goes ‘beyond reasonable doubt’ this may cause problems in terms of proof. This is because intent refers to a person’s state of mind, and unless that person expressly puts his thoughts out (such as in Nazi propaganda) or admits his genocidal intent (which would be, in a balance of probabilities, quite exceptional), it becomes very difficult to prove, and in most cases it would be even impossible.[327] Intent relates to the mental state of the perpetrator and it is hard to deduce it unless there is no documentation and express statements. As stated by Cherif Bassiouni, “*it is not difficult to think of a number of contemporary conflicts, such as those in Cambodia and the former Yugoslavia, where there is obviously no paper trail and where the specific intent can only be shown by the cumulative effect of the objective conduct to which one necessarily has to add the inference of specific intent deriving from omission.”* [328]

It is asserted that a purpose-based approach embraced by the ICTY enabled perpetrators to escape full conviction. One example of this is the Krstić case, where the Trial Chamber confirmed that genocide took place in Srebrenica but Kristić was convicted of the lesser form of crime, ‘aiding and abetting genocide’ although he had given direct instructions to commit genocide and eagerly took part in the genocidal campaign.[329]

Another important example is from the Jelisić case. Even though the perpetrator admitted to have committed the genocidal acts, that he was calling himself “Serbian Adolf” and other present evidence demonstrating his state of mind, the ICTY that he did not have the genocidal intent and as such he was not found

[327] **Ibid**., p.242

[328] Cherif Bassiouni, “Commentary on the International Law Commission’s 1991 Draft Code of Crimes against the Peace and Security of Mankind”, **Nouvelles Etudes Pénales**, 1993, p.233

[329] Goldsmith, **The Intent To Commit…,** p. 244

responsible for genocide but convicted for other crimes such as crimes against humanity.[330]

The judgment held by the ICJ in Bosnia and Herzegovina v. Serbia also demonstrated that the reasoning of the decision was purely on a purpose-based approach and, amongst others, this prevented issuance of a decision for state responsibility for committing genocide. The ICJ set an even higher threshold for the genocidal intent, and in addition it adopted a rather passive approach to compel the defendant to submit important original state documents, which might have shed light to the genocidal intent. Although the onus probandi lies with the claimant state, the defendant should have been adequately required to hand in the official documents that can exist only in their own records and that be crucial to establish the intent.

The high level of standard for genocidal intent appears to have negative effects on the prevention of genocide. It is imperative to remember that the Genocide Convention has two goals: prevention and punishment, both stated in its full title. It is seen that there has been little to note regarding the prevention of genocide under the international law. The genocides of Rwanda and Darfur are all examples where the UN failed to issue adequate reports and timely act to prevent the 'crime of crimes'. If the risk cannot be assessed because of the very high level of the required genocidal intent, preventive action cannot be taken on time. It follows that the interpretation of intent should respond in such a way to this challenge that one of the main objectives of the Genocide Convention should be fulfilled.[331] I believe, save in flagrant genocide cases (such as in the Holocaust or in Rwanda), the objective of prevention (just like punishment) can be achieved only by a knowledge-based interpretation of the genocidal intent.

Raphael Lemkin, who coined the term genocide, considered that the destruction of the group was a crime because the humanity would have been deprived of the irreplaceable contribution that the group would add to the world. For

[330] **Ibid.,** p.245

[331] Ekkehard Strauss, "Reconsidering Genocidal Intent in the Interest of Prevention", **Global Responsibility to Protect**, 2013, volume 5, p.153

him, the main goal of the Genocide Convention was to make sure that the group would carry on living. The Convention's focus was indeed to protect the groups and the element of 'intent' was intentionally left open to interpretation.[332]

It would be true to say that adopting a general intent would be obviously a very low standard to amount the acts of Article 2 of the Genocide Convention to genocide. However if a perpetrator commits an act that falls under the genocide definition, possessing the knowledge that this will assist a continuing plan for destruction of a group should be a satisfactory proof to demonstrate the existence of the intent to commit genocide.

It is also worthwhile to add that it would be hard to conclude that the tribunals set up by Security Council or the ICJ did not get any impact from the politics, or that the dismissal judgment of the latter regarding Bosnia's genocide claims did not have any politic pressure behind. In our world run by the 'big powers', it is still true that "*the strongest antidote to genocide is justice.*" [333] The question is whether the way the international courts and the UN interpret the genocidal intent serves justice or it is an impediment for the punishment and prevention of the perpetrators.

[332] Goldsmith, **The Intent To Commit…**, p.253

[333] Stanton, The 8 Stages of Genocide, **op. cit**.

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Enstitü : SOSYAL BİLİMLER ENSTİTÜSÜ

Hazırlayanın Adı Soyadı : Bilge KOÇKAYA

Tez Başlığı : The Crime of Genocide and Question of Genocidal Intent in International Law

Savunma Tarihi : 13/06/2019

Danışmanı : Doç. Dr. Vesile Sonay EVİK

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