LUISS Guido Carli
LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

Department of Political Science, Graduate School
Master's Degree in International Relations

Chair of International Organizations & Human Rights

The Notion of Genocide in the Practice of International Law: The Case of the Ad Hoc Criminal Tribunal for Rwanda

Prof. Francesco Cherubini
SUPERVISOR

Prof. Giuseppe Pascale
CO-SUPERVISOR

Cosimo Ceccarelli
ID No. 651852
CANDIDATE

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List of Acronyms

ACJHR	African Court of Justice and Human Rights
ACtHPR	African Court on Human and Peoples' Rights
AFRC	Armed Forces Revolutionary Council
AU	African Union
AUC	African Union Commission
CCL10	Control Council Law no. 10
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CIA	Central Intelligence Agency
CJAU	Court of Justice of the African Union
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
ECtHR	European Court of Human Rights
GA	United Nations General Assembly
GoS	Government of Sudan
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	High Court of Uganda International Crimes Division
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal

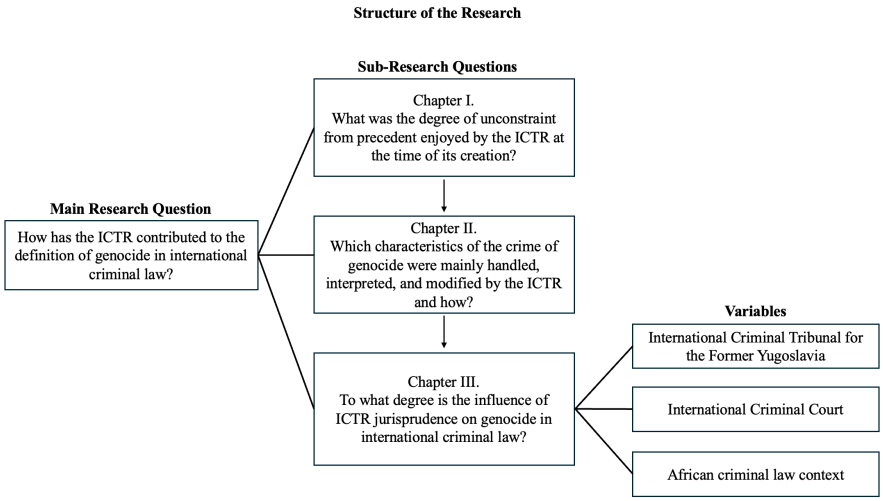
IMTFE	International Military Tribunal for the Far East
IPEB	International Panel of Eminent Personalities appointed by the Organization of African Unity to Investigate the 1994 Genocide in Rwanda and the Surrounding Events
LCGI	Rwandan Law on the Crime of Genocide Ideology and Related Crimes
LRA	Lord's Resistance Army
NGO	Non-Governmental Organization
NIA	National Intelligence Agency of The Gambia
NMT	Nuremberg Military Tribunals
NNCPL	Nazis and Nazi Collaborators (Punishment) Law 5710-1950
OAU	Organization of African Unity
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
PPPCG	Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination
PSC	Peace and Security Council of the African Union
PSSD	Pact on Security, Stability, and Development in the Great Lakes Region
RMICT	United Nations Residual Mechanism for International Criminal Tribunals
RPF	Rwandan Patriotic Front
RTLM	Radio Television Libre de Milles Collines
RUF	Revolutionary United Front
SC	United Nations Security Council
SCSL	Special Court for Sierra Leone
SD	Der Sicherheitsdienst des Reichsfuehrer SS

SS	Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei
TRRC	The Gambia's Truth, Reconciliation and Reparations Commission
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission to Sierra Leone
UNOSOM II	United Nations Operation in Somalia II
UNPROFOR	United Nations Protection Force
US	United States
USSR	Union of the Socialists Soviet Republics
VCLT	Vienna Convention on the Law of Treaties

Introduction

Thirty years ago, in the 'country of a thousand hills', a medium of five persons per minute were killed from April to July 1994, in the heinous massacre known as the Rwandan genocide. Over 800,000 people were killed in 100 days, 300,000 of them being children. Differently from the Holocaust, the genocidal perpetrators were not exclusively the armed forces and government officials. Rather, more than 120,000 people, mainly normal citizens, took part in the mass killings of the Tutsis and the Hutu moderates. Thus, the Rwandan population was involved in the genocide as a whole, being either victims or slaughterers. Still, in 2024, the scars left by the massacre are tangible, both in terms of the 'genocide generation', since 95,000 children were left orphaned and over one-third of them witnessed the deaths of their families, and the negligent or even absent response of the international community. This latter, i.e. the United Nations, considered necessary to remedy their failure in Rwanda by creating an ad hoc criminal tribunal entrusted to punish those responsible for planning and executing the Rwandan genocide, at least ensuring the enforcement of justice and revitalizing international criminal law, a domain virtually dormant since the trials post Second World War.
The thesis proposes a detailed analysis of the jurisprudence of the ad hoc International Criminal Tribunal for Rwanda (ICTR) on genocide-related cases, to understand how such a jurisdictional body embraced, interpreted, and reshaped the definition of genocide provided by the United Nations Genocide Convention. The ICTR interpretation of the definition of genocide had an unprecedented impact on international criminal law, as it created authoritative precedents available to both national and international courts and political bodies to deal with genocide. This thesis is centered on three sub-research questions, that combined provide an answer to the main research question, i.e. how the ICTR contributed to the definition of genocide in international criminal law. The three sub-research questions are the following. First, it is necessary to understand the legal framework existing before the establishment of the ICTR, i.e. the legal sources available to the ad hoc tribunal's judges to address cases of genocide primarily. Hence, in its first chapter, this thesis aims to investigate the degree of unconstraint from legal precedents enjoyed by the ICTR, as it is expected that international criminal law lacked a clear framework for genocide before 1994. Second, this thesis assesses the contribution of the ICTR to the definition of genocide. Thus, the objective of the second chapter is to detect which characteristics of the crime of genocide were mainly handled, interpreted, and modified by the ICTR and how, overall redefining the notion of genocide in international criminal law. Third, it is not possible to affirm that the ad hoc criminal tribunal for Rwanda impacted international criminal law without turning the analysis to international jurisprudence post-ICTR. Thereby, the third chapter seeks to understand the degree of influence of the ICTR's jurisprudence on genocide in international criminal law and to comprehend whether its case law is an authoritative precedent. To fulfill this objective, the thesis analyzes three variables compared

with the ICTR: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court, and the African criminal law context.



The study of the main research question and the three sub-research questions is chiefly based on the analysis of primary sources, i.e. judgments and documents of different courts, foremost among them the ICTR. Interestingly, delving into the sentences of various jurisdictional bodies offered a critical understanding of the existing literature, used as complementary in this thesis. The handling of primary sources allows this thesis to provide a novel perspective on the ICTR's contribution to the notion of genocide, setting the script into a literature framework that has been detected as often contrasting or inconsistent. It is worth stressing that the analysis concerning the impact of the ICTR's genocide-related jurisprudence on the African continent presented in paragraph 3.3 is of paramount originality, as no literature has extensively investigated the issue.

To properly address the main research question and the three sub-research questions, this thesis is structured as follows. In the first chapter, the long-lasting debate on the definition of genocide is introduced, emphasizing that there is no consensus on a proper notion of the 'G' word. Subsequently, the chapter investigates the Nuremberg and the Eichmann trials, the cases majorly impacting international criminal law before 1994. Finally, it examines the subsistence of other sources of law and genocide and explores the relationship between genocide and other mass atrocities crimes. The second chapter is centered on the analysis of the ICTR jurisprudence on genocide. After having provided a historical overview of the Rwandan genocide and examined the role and functioning of the ICTR, the chapter delves into the ad hoc tribunal's case law, filtering it into four main themes: the definition of the four protected group by the United Nations Genocide Convention, the genocidal

mens rea, and the criminalization of hate speech and rape as acts of genocide. As for the third chapter, it deals with the relevance and legacy of the ICTR's jurisprudence on genocide in international law. The chapter first draws a comparison of genocide-related cases between the ICTR and the ICTY, then examines the influence of the ICTR's case law on the ICC, and finally assesses the regional impact on African genocide-prevention mechanisms and special criminal courts.

Drawing a parallelism between the situation in 1994 Rwanda and nowadays massacres recorded in Africa, the Middle East, and Asia is not the purpose of this thesis. Moreover, this latter is centered on an *ex-post* response to genocide, namely the legal punishment of those responsible through the establishment of an ad hoc criminal tribunal, which unfortunately emerges only after the deaths of hundreds of thousands and theoretically lacks a preventive function. Although this thesis focuses on investigating the jurisprudential evolution of the notion of genocide in international criminal law, it is worth noting that punishment may have an impact on prevention. Apart from raising awareness on the venues to prosecute 'the crime of the crimes', the deep analysis of the jurisprudence on genocide provided in this script sheds light on the most concealed, intangible, almost imperceptible features of genocide. Acknowledging these characteristics impacts genocide prevention, as decision-makers, international lawyers, and judges may use them as a reference and threshold to evaluate the situation of ongoing conflicts, and therefore understanding the turn a conflict is heading and call for an intervention to stop the descent into genocide.

Chapter I. The Legal Framework of Genocide in International Law

Introduction

The concept of genocide represents one of the most serious criminal offenses against humanity as a whole, encapsulating a clear intent to destroy a specific group. History, through the centuries, has proven that humankind is capable of such extermination projects, but, despite this, international law required historical shocks in the form of a full-scale world war to generate the notion of the crime of genocide. The extermination of millions of people by the Nazi regime was necessary to induce the Polish lawyer Raphael Lemkin to coin the 'G' word and to signal to the international community the priority to create an adequate legal framework to prohibit and punish genocide. At Nuremberg, the military tribunals were not empowered to prosecute it, since the crime was not already codified. In 1948, the United Nations drafted the Genocide Convention, finally furnishing a preliminary legal framework to prosecute genocide, that still today represents the point of departure when adjudicating the crime. Being the result of a compromise, the Genocide Convention presented criticalities in its notion of the 'G' word, which the scholarship noted, criticized, and attempted to solve by proposing evolutive and innovative definitions of the crime of genocide. Even the Israeli courts were not able to use the term genocide in their prosecution of the former Nazi official Adolf Eichmann in 1961. Therefore, when the tragic events of Rwanda in 1994 occurred, the ad hoc tribunal was the first to deal with the application of the criminal offense of genocide, creating landmark precedents and strongly intervening in clarifying the existing legal framework on genocide. Therefore, this first chapter allows the reader to understand the perspective of the judges called to prosecute the crimes committed in Rwanda, furnishing a comprehensive overview of the legal framework of genocide in international law existing before 1994. It is in fact inconclusive to analyze and assess the jurisprudence of the ad hoc tribunal for Rwanda and its impact on international law without first having furnished a solid background on the previous legal framework, highlighting this latter's failures, ambiguities, contradictions, and need for judicial interventions.

This chapter is structured as follows. First, the problem of providing a unanimously accepted definition of genocide is presented through a literature review, stressing that the 'G' word is still under debate. Second, the chapter turns to the jurisdictional background of genocide, starting with an analysis of the Nuremberg trials, exploring if the concept of genocide was employed and how. Subsequently, the Eichmann trial in Israel is presented, stressing the similarities and differences with the precedents at Nuremberg in detecting the problems in concretely applying the crime of genocide (in that case, crimes against the Jewish population) and distinguishing it from crimes against humanity. Third, further sources of international law are explored, verifying the existence of customary international law and *jus cogens* on the prohibition of genocide. Fourth, and in conclusion, it is mandatory to distinct

between genocide and other mass atrocities crimes, namely war crimes, crimes against humanity, and ethnic cleansing.

1.1 The 'G' Word: Many Definitions

The term genocide can be considered relatively recent since it was coined in 1944. Through the years, many definitions of genocide have been produced, causing serious discordance among scholars, lawyers, and the jurisprudence of courts. As Gerlach notes, the discussion over such a notion "is endless and [has led] some […] [authors to advocate] instead alternative expression, such as 'extremely violent society'"[1]. Moreover, as Semelin states, the main problem of the term genocide "has to do with its various uses"[2]. Therefore, as the necessary premise of a thesis centered on the notion of genocide, this paragraph reviews the creation, evolution, and interpretations of its legal definition.

Before delving into the 'G' word and its many definitions and interpretations, it is mandatory to address two types of offenses that can be considered as the precursors of the legal notion of the crime of genocide. During a League of Nations conference held in Madrid in 1933, Raphael Lemkin, a Polish lawyer and future inventor of the word genocide, defined two crimes punishable by international law[3]. The first, named barbarism, included actions "motivated by hate against a racial religious, or social collectivity, or with the view of the extermination thereof, […] against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to that collectivity"[4]. Interestingly, the category of social collectivity is open to wide interpretations, thus allowing some degrees of elasticity in interpreting the notion of barbarism. As will be presented below, such flexibility will be formally restricted in 1948 to avoid heterogeneous interpretations of the notion of genocide. The second crime, named vandalism, dealt with the damaging and destruction of cultural heritage belonging to one of the said collectively. As Naimark and Nersessian argue, vandalism "created the idea of what [is currently] considered cultural genocide"[5].

Approximately for a decade, no signs of progress were made in elaborating a proper legal definition for crimes committed against a specific group or community. Considering the inability of the Allies to punish the Turks for the mass killings of Armenians[6] and in light of the Nazi extermination of Jews, in 1944 Lemkin published a book[7] that coined the term genocide. The new word derived "from the ancient Greek word *genos* (race) and the Latin *cide* (killing)"[8], presenting etymological similarities with other definitions of crimes implying the killing of specific categories, such as femicide. The Polish

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[1] GERLACH (2010: 26).
[2] SEMELIN (2012: 25).
[3] NAIMARK (2017).
[4] NAIMARK (2017: 2).
[5] NAIMARK (2017: 2); NERSESSIAN (2018).
[6] SCHALLER, ZIMMERER (2009).
[7] LEMKIN (1944).
[8] NAIMARK (2017: 3).

lawyer identified three types of genocide: "physical genocide, biological genocide, and cultural genocide"[9]. Moreover, two phases of the execution of the crime were recognized: "the destruction of the *national* pattern of the oppressed group, [and] the imposition of the national pattern of the oppressor"[10]. As for the social community indicated in the above-mentioned crime of barbarism, Lemkin adopted a broad term, national, to refer to the collectivity object of the notion of genocide. Marcelo argues that the category of the national group "refers to ethnic, racial and religious groups and something more"[11], thus allowing the inclusion of a wide range of collectivities.
On 9 December 1948, the United Nations (UN) created the first international legal instrument codifying the crime of genocide, named the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)[12]. It is worth clarifying that, notwithstanding the CPPCG is a convention binding upon states and it is set under the jurisdiction of the International Court of Justice (ICJ)[13], its definition of genocide has been the point of departure for the development of the jurisprudence of genocide in international criminal law. The CPPCG "represented the minimum common denominator on which a very broad consensus was reached in the aftermath of World War II"[14]. Indeed, at article II it proposes an extensive definition of genocide.

> "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: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group"[15].

Apart from the listing of actions constituting acts of genocide, the CPPCG identifies the four groups that it intends to protect: national, ethnical, racial, and religious. In striking contrast with Lemkin's wider definition of protected groups, the CPPCG formulates a strict categorization of them, which provoked criticism towards article II. First, by "expressly [omitting] political groups"[16], the CPPCG fails to mention the political goal behind the genocide[17]. It should be noted that the first and second drafts of article II mentioned the political groups, which were however "excluded from the final version due to [political] […] reasons"[18]. Von Schaak resumes such political motives as "a combination of the general wish to see the [CPPCG] pass quickly and the desire to shield political leaders from public scrutiny and criminal liabili-

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[9] LEMKIN (1944).
[10] LEMKIN (1944: 80, emphasis added).
[11] MARCELO (2013: 15).
[12] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 276. Hereinafter UN Genocide Convention or CPPCG.
[13] UN Genocide Convention, art. IX.
[14] VERDIRAME (2000: 580).
[15] UN Genocide Convention, art. II.
[16] MARCELO (2013: 8).
[17] SEMELIN (2012).
[18] MARCELO (2013: 8).

ty"[19]. As Marcelo stresses, such an absence "has made the [notion of genocide] difficult to apply […] [since] all genocides had political motives beyond how the perpetrators defined their victim"[20]. More broadly, Zaffaroni finds that "all over the world homicide is the killing of *any* human being"[21], thus underlying that the CPPCG's notion of genocide is discriminatory and not coherent with the common definition of crimes involving killings. Overall, Feierstein considers the restriction to four groups as violating the "equality before the law and the impossibility of creating a hierarchy of human life"[22], two fundamental principles of law. Conversely, other lawyers contend that "human rights and humanitarian law provide adequate ancillary protection"[23], an affirmation reinforced by the emergence of a *jus cogens*[24] prohibition of genocide which does not protect only certain categories[25]. The second main criticism of the CPPCG's article II is that it creates a limitation by requiring "*dolus directus* […] and excluding *dolus indirectus* or *dolus eventualis*"[26]. Indeed, the CPPCG's definition of genocide appears, in its wording, to assume that the perpetrators are aware of the consequences of their actions, whilst it does not account for wrongful acts carried out without the specific intent of committing genocide. As presented in chapter II of this thesis, the ad hoc International Criminal Tribunal for Rwanda (ICTR) will deal with the limitations underlined, considerably expanding the CPPCG's notion of genocide. Finally, the listing of acts constituting genocide contained in the CPPCG's article II[27] fails to mention any form of cultural genocide[28], thus denying the crystallization of the crime of vandalism elaborated by Lemkin in 1933.

Stemming from the CPPCG and its impact on both scholarship and international jurisprudence, Semelin identifies two "schools of thought"[29] concerning the interpretation of the notion of genocide. The first is defined as the "UN school"[30], and it is characterized by the belief that "[…] [the CPPCG] offers the most useable definition precisely because the scholarly community is unable to agree on a common definition of genocide"[31]. Therefore, the UN school completely considers the CPPCG's article II as a reference when dealing with alleged crimes of genocide, and even "make use of [such] legal definition as a research category in social science"[32]. Contrariwise, the second school of thought, critical of the UN school, aspires to "distance from

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[19] VON SCHAAK (1997: 2261).
[20] VON SCHAAK (1997: 2261).
[21] ZAFFARONI (2011: 424, emphasis added).
[22] FEIERSTEIN (2007: 42).
[23] BERES (1986 : 271).
[24] The issue of *jus cogens* as a source of law concerning the crime of genocide is analyzed *infra* subparagraph 1.4.2.
[25] VAN SCHAAK (1997).
[26] ZAFFARONI (2011: 424).
[27] UN Genocide Convention, art. II (a), (b), (c), (d), (e).
[28] KUNZ (1949).
[29] SEMELIN (2012: 27).
[30] SEMELIN (2012: 27).
[31] SEMELIN (2012: 27).
[32] SEMELIN (2012: 27).

the […] [CPPCG]"[33]. The main criticism presented by this school is that the CPPCG's definition of genocide cannot still be considered a reference when dealing with genocide, since it reflects an outdated convention "based on a political agreement"[34], thus not considered impartial. To counterbalance such inadequacy, the second school proposes to integrate contributions from other disciplines, i.e. "history, sociology, political science, [and] anthropology"[35]. In an attempt to reconcile the two main schools of interpreting the notion of genocide, Semelin proposes a definition of the crime by adopting a social scientific approach and defining genocide as a "particular process of civilian destruction that is *directed* at the total eradication of *a* group, the criteria by which it is identified is *determined by the perpetrator*"[36]. This definition first embraces the CPPCG's article II by recognizing the *dolus directus*, thus the direct intent of the perpetrators to annihilate and eradicate a targeted group. Second, this notion allows for a certain degree of flexibility in recognizing the targeted group, as the identification of such groups depends on the perceptions of the offenders. As will be seen in landmark cases adjudicated by the ICTR[37], the importance of subjective interpretations of the genocidal perpetrators constitutes a pivot to stretch the strict definition of genocide furnished by the CPPCG.

In recent years, Shaw's social definition of genocide has been largely considered innovative. The author defines genocide as a "form of violent social conflict, or war, between armed power organizations [aiming] to destroy civilian social groups and those groups and other actors who resist this destruction"[38]. Going further, Shaw considers genocidal actions perpetrated by armed organizations targeting civilians perceived by the perpetrators as social groups[39]. The importance attributed to perception stresses, as Semelin's definition did, the necessity of elasticity when defining and recognizing a targeted group. The main innovation brought by this definition is that it considers genocide as a form of social conflict and war. However, the framing of genocide in a bilateral or multilateral context of armed confrontation, i.e. "between armed […] organizations"[40], completely ignores one-sided genocides[41] and the eventual presence of power asymmetries that can facilitate the perpetration of genocide. Following Shaw's definition, a new terminology has emerged in international criminal law to allow certain groups uncovered by the CPPCG's article II to be considered targets of genocide: gendercide (gender groups), politicide (political groups), and sociocide (social groups)[42].

In conclusion, despite its limitations and criticism, the definition of genocide produced by the CPPCG's article II has been and is still considered domi-

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[33] SEMELIN (2012: 27).
[34] SEMELIN (2012: 27).
[35] SEMELIN (2012: 27).
[36] SEMELIN (2007: 340, emphasis added).
[37] See *infra* subparagraph 2.3.2.
[38] SHAW (2007a: 154).
[39] SHAW (2007a).
[40] SHAW (2007a: 154).
[41] BRIVATI (2007).
[42] SHAW (2007a).

nant. The ICTR, "the first international tribunal to enter a judgment for genocide as well as the first to interpret the definition of genocide"[43], will be called to curve and reinterpret such definition to allow the prosecution of the crimes committed during the Rwandan genocide in 1994. Hence, the tribunal's jurisprudence will demonstrate that, even if restrictive and produced in a different historical context, the CPPCG's definition of genocide can be extended and adapted to deal with different situations involving the partial or total destruction of a specific group. Indeed, the criticism of the CPPCG and the scholars' ambitions to furnish new definitions of genocide, though motivated by the noble purpose of providing greater protection, should be downsized and deemed under political realism. Considering the difficulties faced by the UN General Assembly in 1948 in finding a compromise to reach a unanimous consensus towards the CPPCG's article II, what are the chances that the international community will "accept, adopt and adhere to […] modified definitions [of genocide]?"[44]. Likely, the same states that rejected the inclusion of other groups under the CPPCG definition in 1948 would oppose the same resistance nowadays. Although theoretically maintaining article II of the CPPCG as a reference might sound conservative as well as authoritative, *de facto* the international criminal jurisprudence has the capabilities to extend such a definition, and it can serve as an instrument of modulating *de jure* strict notions. However, even if capable of furnishing different interpretations of law, it should be reminded that the creativity of courts and tribunals is restricted by the *nullum crimen sine lege* principle, thus requiring judicial interpretation to "expansively interpret, […] [and not broadening], […] the protected categories"[45]. Overall, judges dealing with genocide offenses are allowed to creatively interpret the CPPCG's definition of genocide in an attempt to include victims into one of the four protected categories. Conversely, it appears that new protected groups under the CPPCG cannot be created through judicial interpretation[46].

1.2 The Nuremberg Trials

The Nazi deportation and extermination of Jews, Poles, and Gypsies between the 1930s and 1945 constitute a turning point in international criminal law, requiring proper instruments to punish the commission of crimes against humanity, war crimes, crimes against peace, and the newly created concept of genocide. During the London Conference held between June and August 1945, the United States (US), United Kingdom (UK), the Union of Socialists Soviet Republics (USSR), and France agreed on establishing the first ad hoc international criminal tribunal to try high military and political Nazi officials, named International Military Tribunal (IMT). The IMT will be called to deal with all the said crimes, except for genocide. However, the IMT's jurisprudence contributes to the development of international criminal law, including in the field of genocide, as it furnished a definition of crimes

[43] STERIO (2019: 14).
[44] OZORÁKOVÁ (2022: 300).
[45] OZORÁKOVÁ (2022: 301).
[46] OZORÁKOVÁ (2022).

against humanity, allowing proper distinction between the most serious offenses. Therefore, the absence of IMT's jurisprudence on genocide should not be considered as a prejudice to the further evolution of international criminal jurisprudence, but a necessary point of departure to better understand how international courts have dealt with the crime of genocide.
This paragraph first clarifies why genocide was excluded from the crimes listed by the Charter of the International Military Tribunal[47], highlighting both the political and legal reasons behind such an omission. Second, by an analysis of the IMT indictment and the four prosecutor's final speeches, it is demonstrated that, though formally absent from the charges and not mentioned in any judgment of the IMT, the concept of genocide "appear[ed] in the records of the Nuremberg Trials"[48]. Third, key passages of the IMT judgment are presented, reviewing their wording to understand the underlying legal reasoning of the judges in sentencing the defendants with specific criminal offenses. Fourth, four landmark cases of the American-established Nuremberg Military Tribunal are examined, comparing such jurisprudence with the IMT's acts. Overall, it will be demonstrated that, despite the formal absence of a charge of genocide, the IMT often revolved around it, providing some guidance for future adjudications concerning such a crime and stressing the necessity to legally frame genocide as a separate criminal offense from crimes against humanity.

1.2.1 The Formal Exclusion of Genocide from the Nuremberg Trials

As anticipated, genocide was excluded from the list of punishable crimes by the IMT. However, the 'G' word was used since the beginning of the work of the London Conference to describe the actions of the Nazi regime. US Supreme Court Justice Robert Jackson, whose assistant in the War Crimes Office was Raphael Lemkin, distributed a planning memorandum at the opening of the conference in June 1945 listing the crimes to be included in the IMT's trials. Justice Jackson proposed to charge the Nazi officials with:

> "deliberate and systematic genocide, [i.e.] the extermination of racial and national groups, against the civilian populations of certain occupied territories […] to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies"[49].

Such a proposal was strongly influenced and propelled by Lemkin himself, who "hoped that the concept of genocide would ultimately be used to charge major war criminals prosecuted at the Nuremberg Trials"[50]. Notwithstanding the awareness of the existence of a new legal notion to define the crime of genocide, the Allied power insisted "upon a *nexus* between the war itself and the atrocities committed by the Nazis against their own Jewish

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[47] *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, 8 August 1945, 59 Stat. 1544, 82 UNTS 279. Hereinafter IMT Charter.
[48] EARL (2013: 319).
[49] SCHABAS (2007: 41); JACKSON (1949).
[50] OZORÁKOVÁ (2022: 285).

populations"[51]. Such a link between the commission of the most serious crimes and wartime was considered by the US, UK, USSR, and France as a necessary condition to be "entitled [of the authority to establish an ad hoc international military tribunal] […] and contemplate prosecution"[52]. It is appropriate to remark that the strict nexus between the crimes committed by the Nazi regime and a general situation of war was functional to avoid any dissenting position or criticism towards the two major powers, namely the US and the USSR. Indeed, if the *ratio* of the IMT had to be the prosecution of crimes targeting political, racial, or religious groups regardless of the existence of an ongoing conflict, then American and Soviet officials could have been exposed to prosecution for the treatment of certain minorities in their national territory, namely Afro-americans in the US and political dissenters in the USSR. In coherence with the political needs of national politicians to be shielded from the said potential accuses, Justice Jackson noted that:

> "Ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. […] We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states *only* because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal *war* in which we became involved"[53].

Therefore, such political considerations display the motives behind the adoption of the different types of criminal offenses, i.e. crimes against peace, crimes of aggression, and crimes against humanity as individual offenses under IMT's jurisdiction. When the Allied were called to sign the London Charter (IMT Charter) on 8 August 1945 establishing the principles guiding the prosecution and punishment of the major Nazi war criminals, genocide was excluded. Article IV of the IMT Charter listed crimes against peace, war crimes, and crimes against humanity as crimes under IMT's jurisdiction entailing individual criminal responsibility[54]. Crimes against humanity were defined as "murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population […] persecutions on political, racial, or religious grounds […]"[55]. From a legal perspective, "the omission of a specific reference [to the crime of genocide] in the [IMT] judgment or the [IMT] Charter"[56] finds basis in compliance with a previously mentioned legal pivot. Indeed, according to the *nullum crimen sine lege* principle, "no punishment can be carried out except in accordance with a certain and unequivocal law"[57]. At the time of the commission of the atrocities by the Nazi regime, though already defined by Lemkin in 1944, the crime of genocide was not yet recognized as "a distinct crime in international

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[51] SCHABAS (2007: 40, emphasis added).
[52] SCHABAS (2007: 40).
[53] JACKSON (1949: 333, emphasis added).
[54] IMT Charter, art. IV (a), (b), (c).
[55] IMT Charter, art. IV (c).
[56] MARCHUK (2014: 88).
[57] ENDO (2002: 206).

law"[58], thus there was not a certain and unequivocal law on genocide. Hence, the *nullum crimen sine lege principle* dominated the drafting of the IMT Charter and the listing of the crimes. Consequently, the IMT prosecutors were bound to employ "existing legal norms […] to prosecute the novel crimes committed by the Nazis"[59].

1.2.2 The Indictment and the Prosecution: Revolving Around the 'G' Word

On 18 October 1945, the IMT prosecutors formally presented the indictment[60] against twenty-four German defendants and six organizations[61]. The charges included conspiracy[62], crimes against humanity, war crimes, and crimes against peace. Of note, the punishment of crimes against humanity was subjected to the demonstration of their links with one of the two other crimes listed by the IMT Charter, crimes against peace and war crimes[63]. The wording of the indictment directly and indirectly refers to the notion of genocide, by stating that

> "[The defendants] conducted deliberate and systematic *genocide*, […] the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others"[64].

Although directly mentioning genocide, this passage of the Nuremberg Trial's indictment might be interpreted as foreshadowing the restrictive notion of genocide that will be given in 1948 by the CPPCG's article II. The targeted groups do not exhaust in Lemkin's 1944 wide reference to national groups. By explicitly listing national, racial, and religious groups, the indictment applies a restrictive definition of genocide, excluding political and social groups. Despite its legal irrelevance for the trial, as genocide was not under the IMT's jurisdiction, such a definition is crucial to understanding that Lemkin's notion of genocide was rejected not only during diplomatic and political negotiations in the GA in 1948 but even among prosecutors charging Nazi criminals with criminal offenses at the end of World War II. Apart from the indictment and a few statements by the prosecutors, the term genocide will not be mentioned in any of the IMT judgments[65].
Justice Jackson, in his conclusive statement of the presentation of the charges in July 1946, described the Nazi crimes against the Jews as a conspiracy and "the most far-flung and terrible racial *persecution* of all time"[66]. Here it

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[58] MARCHUK (2014: 88).
[59] EARL (2013: 320).
[60] *Indictment presented to the International Military Tribunal sitting at Berlin on 18th October 1945*, 18 October 1945. Hereinafter IMT Indictment.
[61] STILLER (2019).
[62] IMT Charter, art. VI.
[63] STILLER (2019).
[64] IMT Indictment, pp. 43-44.
[65] SEGESSER, GESSLER (2005).
[66] *Summation for the Prosecution by Justice Robert Jackson*, 26 July 1946, para. 404, emphasis added.

is worth noting that what could be legally classified as an act of genocide, since it targeted a specific group, was instead categorized as persecution. Justice Jackson's statement anticipated a critical distinction, implying a subsequent optional categorization, between acts of genocide and persecution that will constitute an everlasting question to be addressed by courts in international criminal law[67]. Conversely, the British prosecutor Sir Hartley Shawcross used Lemkin's 'G' word to describe the mass murders perpetrated by Nazi Germany. As a crucial difference with Justice Jackson's statement, Shawcross did not restrain the Nazi offenses only to the Jews. Instead, he "included it in the overall crimes of the Nazi regime"[68], defining it as a "mass [extermination] […] becoming a State industry"[69]. Explicitly, Shawcross noted that "[g]enocide was not restricted to the extermination of the Jewish people or the gypsies"[70]. The concept of state industry has to be considered as anticipating the recognition of the primary role of states and bureaucracy in genocides, as will be stressed during the *Eichmann* trial and demonstrated by the Rwandan case[71]. As a reinforcement of the considerations on the central role of the Nazi regime, the British prosecutor mentioned that what was perpetrated by Germany during World War II was a "systematic plan […] [and] a policy of genocide"[72]. The contextualization of mass killings and other inhumane acts targeting a specific group in the framework of an existing plan to annihilate a community is extremely relevant to demonstrate the genocidal intent of the offenders, i.e. the *mens rea* requirement for the attribution of responsibility. As Shawcross, the French prosecutor Auguste Champetier de Ribes directly mentioned the word genocide in his closing statement. The French jurist pronounced the word genocide six times, defining it as "the extermination of the races or people at whose expense [the Nazis] intended to conquer the living space they held necessary for the so-called Germanic race"[73]. De Ribes's definition of genocide stresses the bilateral relationship entailed by such a crime, identifying an oppressor who aims to exterminate a specific group to pursue a political objective, that, in the case of Nazi Germany, was the acquisition of the living space. In contrast with Justice Jackson and Sir Shawcross, the French prosecutor did not consider it necessary to contextualize the crimes as a part of a systematic plan of extermination, thus strongly stressing the "equal culpability of all [the defendants] in the crime"[74]. As the American delegation led by Justice Jackson, the Soviet prosecutor General Roman Rudenko defined the Nazi

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[67] The distinction between acts of genocide and persecution marks one of the main differences stemming from the comparison between the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR. Such a distinction is analyzed in various sections of paragraph 3.1 of this thesis.

[68] STILLER (2019: 156).

[69] *Summation for the Prosecution by Sir Hartley Shawcross*, 27 July 1946, para. 505.

[70] *Summation by Shawcross*, para. 497.

[71] See *infra* paras. 1.4 (Eichmann trial) and 2.1 (Rwandan genocide).

[72] S*ummation by Shawcross*, paras. 493, 508.

[73] *Summation for the Prosecution by M. Auguste Champetier de Ribes*, 29 July 1946, para. 561.

[74] STILLER (2019: 158).

crimes as a persecution product of a "fascist conspiracy"[75]. Thus, the Soviets reaffirmed the US's position supporting shreds of evidence of conspiracy, perpetrated by a criminal organization (the Nazi regime) with "criminal aims"[76]. Rudenko mentioned the 'G' word once, in the opening of his speech, to state that genocide was "[central] […] criminal aim [of the Nazis]"[77]. However, the term persecution was preferred to be associated with the extermination of Jews[78]. Hence, the term genocide was not used by Rudenko to explicitly describe the crimes executed by Nazi Germany.
Overall, the four prosecutor's closing statements displayed different interpretations of the crimes committed. France and the UK gave primary importance to genocide, directly mentioning the 'G' word in association with the actions of the Nazis. An important difference between the two delegations is that the UK framed genocide as part of a state policy and systematic plan, whilst France stresses the individual culpability of the defendants. The US and the USSR were united by recognizing the primary role of conspiracy and persecution. Although the Soviet prosecutor mentioned genocide, it was never used as a specific reference to the mass murder of Jews and other groups. As stated above, the American and Soviet aversion to openly refer to genocide found its reasons in political considerations and the necessity to be shielded by criticisms.

1.2.3 The IMT Judgment: Nazi Crimes as Persecution and Crimes Against Humanity

When the IMT judges pronounced the judgment on 30 September 1946, they refrained from categorizing the mass murder of specific groups as genocide. Instead, criminal offenses of crimes against humanity were preferred over genocide, and their connection with war crimes, and thus a context of conflict, was reaffirmed.

> "[F]rom the beginning of the war in 1939 *war crimes* were committed on a vast scale, which were also *crimes against humanity*; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in the execution of, or in connection with, the aggressive war, and therefore constituted *crimes against humanity*"[79].

In different paragraphs of the judgment, among the acts constituting crimes against humanity, persecution is the one that is more frequently juxtaposed with the mass deportation and murder of Jews[80]. Thus, the recognition of the Nazi crimes appeared to follow the American and Soviet prosecutor's per-

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[75] *Summation for the Prosecution by General Roman Rudenko*, 29 July 1946, para. 578.
[76] *Summation by Rudenko*, para. 571.
[77] *Summation by Rudenko*, para. 569.
[78] *Summation by Rudenko*, paras. 581, 585, 609.
[79] Judgment of the International Military Tribunal, 30 September 1946, 22 IMT 203, *France and ors v. Göring (Hermann) and ors*, para. 497, emphasis added.
[80] Judgment, *Göring*, paras. 490, 491, 492, 493, 497, 501, 504, 510, 514, 515.

spectives according to which persecution played a primary role in the actions perpetrated by the Nazi regime.
The judgment highlighted that the mass murder and extermination of Jews, Poles, Gypsies, and other groups were not the primary goal of the Nazi regime. Rather, such atrocities were interpreted as a necessary consequence of the conquest of the "living space"[81]:

> "[T]he mass murders and cruelties were not committed solely [to stamp out] opposition or resistance to the German occupying forces. In Poland and the Soviet Union, these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, *in order that* their territory could be used for *colonization* by Germans"[82].

The colonization plan of Nazi Germany was viewed as the primary scope motivating the crimes committed, thus preventing the framing of such crimes as led by a clear genocidal intent. Indeed, considering the wording of the judgment, the expulsion and annihilation of populations are directly linked to colonization, and they appear to constitute a crime only concerning such a political intent. Of note, no separate genocidal intent can be inferred from the IMT judgment. The timing of the commission of mass murder and extermination was also crucial in determining the omission of the term genocide. Indeed, even if Adolf Hitler already threatened the annihilation of the Jews in 1939, "[t]he plans for [such extermination] […] was developed [only] shortly *after* the attack on the Soviet Union"[83]. This passage emphasizes that the material execution of the said crimes occurred only after the escalation of the war when Hitler launched Operation *Barbarossa* on 22 June 1941. Here the legal reasoning of the judges displays the necessary link between conflict and crimes against humanity anticipated in the IMT indictment.
As for the French emphasis on the individual culpability of the defendants, different from the British perspective on the actual existence of a Nazi state industry, the judgment reconciled the two positions. By condemning "every single accused and every accused organization"[84], the IMT judges recognized the accused's *mens rea* both at the structural/institutional as well as the individual level. However, the tribunal wanted to create a hierarchy of culpability among the condemned, recognizing *Die Geheime Staatspolizei* (Gestapo), *Der Sicherheitsdienst des Reichsfuehrer SS* (SD), and the *Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei* (SS) as the primary perpetrators[85].
In conclusion, the IMT judgment did not recognize genocide as intentional. Rather, the 'G' word was used to "describe a policy consisting of different crimes […] attributed to the motive of the conquest and colonization of 'living space'"[86]. The persecution and extermination of the Jews and the other

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[81] STILLER (2019: 160).
[82] Judgment, *Göring*, para. 479, emphasis added.
[83] Judgment, *Göring*, para. 492, emphasis added.
[84] STILLER (2019: 160).
[85] Judgment, *Göring*, paras. 510, 515.
[86] STILLER (2019: 161).

groups targeted by the Nazis were not intended "as congruent with the concept of 'genocide'"[87], but as one of its components. Persecution and crimes against humanity were predominant in the wording of the judgment, still contextualized in and strictly linked to a situation of conflict. Interestingly, the American-established and led Nuremberg Military Tribunals (NMT) employed the concept of genocide in different trials, in some sort of sense being more open to embracing the 'G' word than the IMT.

1.2.4 The Notion of Genocide in the NMT Trials

The IMT ceased its activities after the pronouncement of the judgment in October 1946. However, the IMT did not adjudicate all the top Nazi officials captured by the Allies, and the US considered as necessary the establishment of new ad hoc tribunals, the NMT[88]. This latter consisted of twelve different tribunals presided over by US military courts. The functioning of the NMT was regulated by a charter that broke the IMT's strict nexus between crimes against humanity and war crimes[89] but still did not recognize genocide as a separate criminal offense. Following Stiller's suggestion[90], this subparagraph examines four cases adjudicated by the NMT relevant to the notion of genocide: the *Medical* trial, the *RuSHA* trial, the *Einsatzgruppen* trial, and the Pohl trial.

During the so-called *Medical* or Doctor's trial, adjudicating Nazi doctors responsible for experiments, castration, euthanasia, and sterilization on prisoners, the prosecutor defined those acts as "techniques of genocide"[91]. Moreover, these acts of genocide were framed as part of a wider and systematic "policy of the Third Reich"[92]. Notwithstanding an open mention and usage of the word genocide during the *Medical* trial, the court recognized the framing of the crimes in the Nazi policy, though without defining such a policy as genocidal[93].

In the *RuSHA* trial, targeting SS officials responsible for the implementation of racial policies, the prosecutor defined as "techniques of genocide"[94] the "deportations, forced Germanization, […] forced abortions, the abduction of children, [and] the prevention of marriages"[95]. Overall, the *Medical* and *RuSHA* cases developed a more detailed description of the crimes constituting techniques of genocide. The prosecutor in the *RuSHA* trial recognized two

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87 STILLER (2019: 161).
88 PRIEMEL, STILLER (2014).
89 Control Council Law no. 10, 20 December 1945, *Punishment of Persons Guilty of War Crimes, Crimes against Peace, and Crimes against Humanity.* Hereinafter (CCL10).
90 STILLER (2019).
91 LEMKIN (1947: 147).
92 Opening Statement of the Prosecution, 9 December 1946, Nuremberg Military Tribunals Case no. I, *United States. v. Karl Brandt et al.*, para. 38.
93 Opinion and Judgment of the Nuremberg Military Tribunals, 19 August 1947, Nuremberg Military Tribunals Case no. I, *United States. v. Karl Brandt et al.*, paras. 181, 183, 197, 278.
94 Opening Statement of the Prosecution, 20 October 1947, Nuremberg Military Tribunals Case no. VIII, *United States v. Ulrich Griefelt, et al.*, para. 626.
95 STILLER (2019: 162).

elements, positive and negative, composing the genocide perpetrated by the Nazis:

> "The positive side […] was the Germanization program by which they sought to strengthen themselves by adding to their population large. The negative side of this program, through which the so-called positive side was in equal measure accomplished, was the deliberate extermination and enslavement of the remaining population of these conquered territories"[96].

This twofold interpretation of genocide might resemble the IMT final judgment, since it recognizes as prevailing the Germanization scope of the actions, i.e. the acquisition of the vital space in the IMT's wording, and considers the extermination as a necessary means to achieve such objective. It is worth noting that the indication of a positive and negative component makes such a notion of genocide the "most elaborate of all Nuremberg trials"[97]. Yet again, the judges failed to recognize the existence of a crime of genocide, since the 'G' word was substituted with the term "Germanization program"[98].

The prosecutor responsible for the *Einsatzgruppen* trial, held simultaneously with the *RuSHA* trial and dealing with SS officers, defined the crimes committed by the accused as a 'plan of genocide'"[99]. Although the prosecutor emphasized the existence of a "crime of genocide [motivated by] racial ideology"[100], the *Einsatzgruppen* trial judgment in some sense downsized the scale of the alleged crimes in their definition. In fact, the judges noted that mass murder was not requiring "a separate element of an offense"[101], and that the only criminal offense at stake in the *Einsatzgruppen* trial had to be categorized as "murder"[102].

The only judgment that explicitly mentions the word genocide, though in a concurring opinion, was the one relative to the *Pohl* case, the prosecution of SS officers responsible for concentration camps. Judge Micheal Musmanno, when describing the 'industrial' method of extermination carried out in the concentration camps, noted that "[g]enocide [was] the *scientific* extermination of a race"[103]. This definition of genocide, to be referred to as the mass killings perpetrated in the concentration camps, deviates from the other NMT's interpretation of genocide as a consequence of German colonization.

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[96] Closing Statement of the Prosecution, 13 February 1948, Nuremberg Military Tribunals Case no. VIII, *United States v. Ulrich Griefelt, et al.,* para. 31.

[97] STILLER (2019: 163).

[98] Opinion and Judgement of the Nuremberg Military Tribunals, 10 March 1948, Nuremberg Military Tribunals Case no. VIII, *United States v. Ulrich Griefelt, et al.,* para. 90.

[99] Opening Statement of the Prosecution, 29 September 1947, Nuremberg Military Tribunals Case no. IX, *United States of America v. Otto Ohlendorf, et al.*, para. 30.

[100] Opening Statement of the Prosecution, 29 September 1947, Nuremberg Military Tribunals Case no. IX, *United States of America v. Otto Ohlendorf, et al.*, paras. 32-33.

[101] STILLER (2019: 163).

[102] Opinion and Judgment of the Nuremberg Military Tribunals, 8-9 April 1948, Nuremberg Military Tribunals Case no. IX, *United States of America v. Otto Ohlendorf, et al.*, para. 411.

[103] Concurring Opinion by Judge Musmanno of the Nuremberg Military Tribunals, 3 November 1947, Nuremberg Military Tribunals Case no. IV, *United States of America v. Oswald Pohl, et al.*, para. 1135, emphasis added.

Indeed, scientific extermination defers to a specific ideology, which has to be intended as something separate from the territorial conquest by Nazi Germany. Moreover, considering the reference to concentration camps, Musmanno's definition implies the contextualization of genocide as a part of a systematic policy, driven by the said ideology.
In conclusion, the NMT did not condemn any defendant recognizing the execution of the crime of genocide. As Stiller and Douglas pointed out, "it was easier to prove individual guilt in mass murders than participation in a criminal state policy"[104]. However, it is fair to remark on some attempts by prosecutors and Judge Musmanno to provide new interpretations of the crime of genocide, together with a modest enlisting of the set of actions categorized as acts of genocide.

1.2.5 Departing from Nuremberg: an Assessment of the IMT and NMT's Jurisprudence

The precedent subparagraphs briefly reviewed the main acts and jurisprudences produced by the IMT and NMT, in an attempt of stressing how the tribunal dealt with the Nazi crimes by referring to such offenses as genocide. In the wake of the Second World War, political considerations influenced the drafting of the IMT Charter, purposely omitting the criminal offense of genocide. Although formally absent from the charges, the IMT prosecutors, and in particular the British and French ones, were keen to remark the commission of acts of genocide as part of a wider genocidal plan or policy. In the judgment, no room for any consideration of genocide was left, and the only criminal offenses recognized were crimes against humanity, war crimes, and crimes against peace. Moreover, the sentencing for crimes against humanity was possible only because such actions were demonstrated to be strictly linked with war crimes and the context of wartime. The strict nexus between crimes against humanity and war crimes displays the idea of a tribunal that, as Naimark points out, was "[…] much more interested in the condemnation of aggressive war than in the mass murder of the Jews or anyone else"[105]. Overall, it is possible to infer from the jurisprudence of the IMT a certain degree of awareness concerning the perpetration of genocide. However, such perpetration was seen only as actions consequent to an expansionary and aggressive foreign policy of Nazi Germany. The works of the NMT somehow went beyond the IMT's jurisprudence by developing a wide range of actions that have to be intended as acts of genocide, such as enforced sterilization, abduction of children, and racial policies. Nevertheless, the NMT judges continued to adhere to the IMT's ruling stressing the Nazi acquisition of the 'vital space' as the primary driver of the mass killings. Only Judge Musmanno in its concurring opinion of the *Pohl* case furnished a more evolved notion of genocide, recognizing its systematic and ideological components.

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[104] STILLER (2019: 164); DOUGLAS (2012).
[105] NAIMARK (2017: 3).

Notwithstanding their failure to pronounce judgments condemning Nazi criminals for genocide, the IMT and NMT set a pivotal precedent in international law, by demonstrating that "individuals, including state leaders, could be held criminally accountable for war crimes and crimes against humanity"[106]. Moreover, the Nuremberg tribunals crystallized the idea that those responsible for serious human rights violations should face criminal liability, preferably before international courts[107]. In conclusion, by categorically excluding any responsibility for genocide, such omission can be intended as a point of departure, highlighting the need to "criminaliz[e] genocide as a separate international crime"[108].

1.3 The *Eichmann* Trial

Among the top Nazi officials captured by the Allies and tried before the Nuremberg tribunals, the great absent was Adolf Eichmann, the SS officer responsible for the transfer of prisoners to the concentration camps. Though not physically present at Nuremberg, the prosecutors identified Eichmann as "the sinister figure who had charge of the extermination program"[109], and considered the Holocaust as "Eichmann's plan for the extermination of the Jews in Europe"[110]. In its judgment, the IMT recognized the primary responsibility of Eichmann in the Nazi crimes in different passages[111], and considered him as the "direct recipient of Hitler's orders"[112].
This paragraph first examines the legal framework listing the criminal offenses adjudicated by the Israeli courts, stressing the contribution of the UN CPPCG to the creation of the unique category of crimes against the Jewish people. Second, the indictment of the *Eichmann* case is presented, stressing the existence of a problem in distinguishing between crimes against humanity and crimes against the Jewish people in their *mens rea* and *actus reus* components. Third, the *Eichmann* judgment is analyzed, still detecting the above-mentioned conflict between the attribution of the different charges and attempting to identify the main discriminants employed by the court to such an attribution. Finally, the overall contribution of the *Eichmann* case jurisprudence to the notion of genocide is assessed.

1.3.1 The Legal Framework: Crimes Against the Jewish People

Eichmann, who hid under a fake identity in Argentina after the war, was captured by the Israeli agents of the Mossad in 1960 and brought to Jerusalem. There, the Israeli government was firmly willing to prosecute Eichmann under its national law. The former SS officer was therefore tried before the District Court of Israel, whose jurisdiction was based on the Nazis and Nazi

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[106] STERIO (2019: 11).
[107] STERIO (2019).
[108] KING JR., FERENCZ, HARRIS (2007: 20).
[109] *Summation by Jackson*, para. 405.
[110] *Summation by Rudenko*, para. 110.
[111] Judgment, *Göring*, paras. 250, 252, 260.
[112] STILLER (2019: 160).

Collaborators (Punishment) Law 5710-1950 (NNCPL)[113]. The *ratio* of the NNCPL was to create a legal framework to serve as a basis for trying the surviving Jewish prisoners who cooperated with the Nazis in the concentration camps (the so-called *kapos*) and Nazi officials escaped and hid[114]. The NNCPL recognized crimes against humanity, war crimes, and crimes against the Jewish people as criminal offenses, together with other acts constituting crimes against persecuted persons[115]. Interestingly, the formulation of the crimes against Jews is almost identical to the UN CPPCG's art.II notion of genocide:

> "[…] crimes against the Jewish people means any of the following acts, committed with the intent to destroy in whole or in part: killing Jews; causing serious bodily or mental harm to Jews; placing Jews in living conditions calculated to bring about their physical destruction; imposing measures intended to prevent births among Jews; forcibly transferring Jewish children to another national or religious group; destroying or desecrating Jewish religious or cultural assets or values; inciting to hatred of Jews"[116].

The impact of the CPPCG on the NNCPL is notable since the former was elaborated only two years before the latter. Indeed, as even the District Court of Jerusalem noted[117], among the acts constituting crimes against the Jews, the majority of them are similar in wording to those of the CPPCG's article II. The two important exceptions concern the destruction of Jewish religious or cultural assets and the inciting of hatred of Jews. The first seems to reflect the existence of a crime of cultural genocide, thus presenting a definition of the crime more elaborated than the CPPCG. The second exception lies in the direct and explicit listing of incitement to hatred, absent in the CPPCG's notion of genocide. Indeed, though mentioned in the CPPCG's article III[118], the incitement to hatred, i.e. hate speech, will only be recognized as an integral component of the crime of genocide in international criminal law by the jurisprudence of the ICTR[119]. It is worth noting that the crimes against the Jewish people are a "*sui generis* crime"[120], and, in comparison with the CPPCG, applied only to one group (the Jews) and for a restricted period (1933-1945)[121]. In sum, despite *de facto* corresponding to the CPPCG's notion of genocide, *de jure* the Israeli legislator preferred to categorize such actions as crimes against the Jewish people. Likely, considering the salience of the mass murder of Jews in the atrocities committed by the Nazi regime, and to condemn more strongly such crimes in comparison with the Nuremberg tri-

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113 Law no. 64 of the First Knesset, 1 August 1950, *Nazis and Nazi Collaborators (Punishment) Law 5710-1950.* Hereinafter NNCPL.
114 BEN-NAFTALI, TUVAL (2006).
115 NNCPL, art. I (b), art. II.
116 NNCPL, art. I (b).
117 Judgment of the District Court of Jerusalem, 11 December 1961, Case no. 40/61, *Attorney General v. Adolf Eichmann*, para. 26.
118 UN Genocide Convention, art. III (c).
119 For the ICTR jurisprudential recognition of hate speech as incitement to genocide, see *infra* subparagraph 2.3.5.
120 BAZYLER (2012: 428).
121 NNCPL, art. XVI.

bunals[122], the term crimes against the Jewish people gave more emphasis on the targets rather than using the generic 'G' word. As noted by a journalist who assisted in the *Eichmann* trial, "among the many volumes of the Nuremberg judgments there were only six pages on the crimes committed against the Jews […]"[123], while Israel set up an entire tribunal specifically adjudicating the responsible for those crimes.

1.3.2 The Eichmann *Indictment*

The indictment, presented by prosecutor Gideon Hausner, charged Eichmann with fifteen crimes, including crimes against the Jewish people, crimes against humanity, and war crimes[124]. As for the charge of crimes against the Jews, the prosecutor first referred to Eichmann as responsible "for […] implementing the Final Solution"[125]. Second, Eichmann was accused of having placed Jews under living conditions "calculated to bring about their physical destruction"[126] and committed with the "intent of exterminat[ing] them"[127]. Third, by ordering the execution of the Final Solution, Eichmann was held responsible for "causing serious bodily and mental harm to Jews"[128]. Finally, the prosecutor pointed out Eichmann in adopting "devising measures intended to prevent births among Jews"[129].
Considering the charges for crimes against humanity, it is relevant to analyze the sixth count of the indictment, charging Eichmann "for persecuting Jews on national, religious, and political grounds"[130]. Crimes against humanity are defined by the NNCPL as the "murder, extermination, enslavement, starvation or deportation and other inhumane acts, committed against any civilian population, and persecution on the national, racial, religious, or political ground"[131]. According to the NNCPL definition, the sixth count of the indictment can be categorized as a crime against humanity. However, the prosecutor specified that such persecution was committed "with the [precise] object of exterminating the Jewish people"[132]. Of note, the indictment considered crimes against humanity the actions "committed against Polish and Slovene civilians"[133], but no explicit specification of an object of exterminating such populations was made. Conversely, such a precise objective of exterminating Jews constituted the *mens rea* of Eichmann, which could have been framed as a component of a crime against the Jewish people. Thus, the

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[122] BAZYLER (2012).
[123] MINERBI (2011: 13).
[124] Indictment presented by Attorney General to the District Court of Jerusalem, 15 April 1961, Case no. 40/61, *Attorney General v. Adolf Eichmann*, paras. 2, 244. Hereinafter *Eichmann* Indictment.
[125] *Eichmann* Indictment, para. 193.
[126] *Eichmann* Indictment, para. 196.
[127] BAZYLER (2012: 444).
[128] *Eichmann* Indictment, para. 199.
[129] *Ibidem*.
[130] *Eichmann* Indictment, para. 200.
[131] NNCPL, art. I (b).
[132] *Eichmann* Indictment, para. 201.
[133] *Eichmann* Indictment, paras. 207, 210.

sixth count of the indictment appears to present a discordance between an *actus reus* referred to as a crime against humanity, and a *mens rea* safely ascribable as a crime against the Jewish people. Likely, the prosecutor preferred to reconcile the *actus reus* and the *mens rea* to allow the prosecution of the crimes committed by Eichmann "[…] throughout the Nazi regime […] beginning in March 1938"[134].

1.3.3 The Eichmann *Judgment: Between Crimes Against Humanity and Crimes Against the Jewish People (or Genocide)*

Assuming a certain degree of interchangeability between the terms genocide and crimes against the Jewish people, in the *Eichmann* trial "the judges […] were the first to consider the definition of the crime of genocide"[135] in light of the UN CPPCG. In its judgment, the District Court of Jerusalem attempted to solve the tension between the crimes against the Jews, i.e. genocide, and crimes against humanity. The Court traced an evolutive pattern in the gravity of the crimes committed by the Nazi regime through the years:

> "[T]he third and final stage in the *persecution* of the Jews within the area of German influence, namely the stage of *total extermination*. From then onwards, all German actions against Jews in their places of abode, and their deportation to the east, were *aimed towards extermination*, which was by now regarded by all German authorities dealing with Jewish affairs as the Final Solution of the Jewish Question"[136].

In this passage of the judgment, the total extermination is framed as the final stage of the Nazi policy against the Jews, identified as persecution. Thus, physical extermination was the apex of the extermination plan, which began with the deportation and persecution of the Jews, i.e. "crimes against humanity"[137]. Here the discriminant might lie in the degree of physical violence applied to the targeted group since only the complete annihilation of the Jews is implicitly considered genocide. Nevertheless, it should be noted that, following the CPPCG's article II and even the NNCPL's article I, acts of genocide and crimes against the Jewish population do not necessarily consist of physical violence against a group. Hence, the court's "drawing [of] the line between physical extermination […] and deportation or persecution"[138], respectively defined by crimes against the Jewish people and crimes against humanity, seems not convincing, since it is contradicted by its juridical framework.
It appears that the main distinction between crimes against the Jewish people and crimes against humanity is found in the context in which such criminal offenses were perpetrated. Indeed, by examining the conviction of Eichmann, the court implicitly made clear that the principal discriminant between

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[134] BAZYLER (2012: 445).
[135] SCHABAS (2013: 671).
[136] Judgment, *Eichmann*, para. 79, emphasis added.
[137] SCHABAS (2013: 673).
[138] SCHABAS (2013: 673).

the two crimes and the subsequent conviction relied on the period in which the crimes were committed, i.e. the context:

> "We *acquit* the Accused of a *crime against the Jewish People*, by reason of the acts attributed to him in this count of the indictment during the period until August 1941. The criminal acts of the Accused *until that time* […] will be included in the conviction for *crimes against humanity* […].
> We *convict* the Accused pursuant to the second count of the indictment of a *crime against the Jewish People*, […] in that during the period from August 1941 to May 1945 […] he, together with others, subjected millions of Jews to living conditions which were likely to bring about their *physical destruction*, in order *to implement the plan* which was known as the "Final Solution of the Jewish Question," with *intent* to exterminate the Jewish People."[139]

Here, it is relevant to compare this passage with the *Göring* judgment of the IMT[140] to remark on a critical analogy and an evolutive difference. On the one hand, the execution of the most serious crime under the tribunal's jurisdiction, crimes against humanity for the IMT and crimes against the Jewish people for the District Court of Jerusalem, is linked to the escalation of the Second World War in the summer of 1941. Thus, the Israeli judges were quite conservative in recognizing a strict nexus between mass murder and extermination and wartime, as the IMT indictment and then judgment did. Conversely, the *Eichmann* judgment considerably expanded the application of the crimes against humanity. It is possible to affirm that the Israeli judges succeeded where the Nuremberg trial partially failed, namely in recognizing the perpetration of crimes against humanity even before the Nazi invasion of the Soviet Union in June 1941. Still, the Jerusalem court noted that the total extermination was "to a certain extent connected with the stoppage of emigration of Jews from territories under German influence"[141]. The reference to such German influence resembles the NMT's judgment in the *RuSHA* trial[142], where the criminal offenses were all connected to the German expansionary policy and Germanization program. The Israeli court's phrasing would almost seem to suggest that the judges framed the total extermination, thus the genocide, as a practical need of the Nazi regime, rather than recognizing its roots in the Nazi ideology.
The difficulties in identifying a clear genocidal intent are finally enshrined in a further statement made in the judgment. By referring to the period between the eruption of the conflict in September 1939 and the invasion of the URSS at the beginning of the summer of 1941, the judges pointed out that

> "[A] doubt remained […] as to whether there was that *intentional aim* to exterminate which is required for the proof of a crime against the Jewish People, and we shall, therefore, deal with these inhuman acts *as being crimes against humanity*"[143].

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[139] Judgment, *Eichmann*, para. 244 (1), (2), emphasis added.
[140] See Judgment, *Göring*, para. 492; *supra* subparagraph 1.2.2.
[141] Judgment, *Eichmann*, para. 80.
[142] See Closing Statement of the Prosecution, *United States v. Ulrich Griefelt, et al.,* para. 31; *Supra s*ubparagraph 1.2.4.
[143] Judgment, *Eichmann*, para. 186, emphasis added.

The court categorized as crimes against humanity the expulsion and deportation of Jews before 1941, resulting in "murderous consequences"[144]. Partially, such actions could have been felt under the category of crimes against the Jews, as they imposed living conditions that led to the death of Jews[145]. Yet, what was missing was the detection of a clear intent to murder, i.e. the calculation, *mens rea*, required by the NNCPL. The intentional aim, necessary to assess the grounds for crimes against the Jews, was exclusively justified by a further escalation of the conflict. The circumscription of the Nazi campaign to Western and Central Europe between 1939 and 1941 seems therefore to exclude any *mens rea* for convicting Eichmann for crimes against humanity, whilst the expansion of the conflict in mid-1941 offered the clear extermination intent.
Overall, the *Eichmann* judgment framed both crimes against humanity and crimes against the Jewish people, or genocide, in a situation of conflict. The decision to either convict Eichmann for crimes against humanity or crimes against the Jews stood on the degree reached by the Nazi expansionary policy, which was seen as the main motive behind the perpetration of persecutions and mass murders against the Jews.

1.3.4 Assessing Eichmann*'s Jurisprudence*

The *Eichmann* case represented the first trial sentencing an individual, even if not explicitly, for the crime of genocide. The NNCPL allowed the District Court of Jerusalem to deal with crimes against humanity and created the unique category of crimes against the Jewish population, similar to and even more sophisticated than the CPPCG's article II definition of genocide. As noted above, the choice of creating a new criminal offense under the Israeli jurisdiction rather than becoming the first court to explicitly adopt the CCPCG's notion of genocide was justified by the political salience of the trial and to offer a more targeted criminal offense and subsequent jurisprudence than the Nuremberg tribunals.
The indictment, when listing the charges for crimes against humanity in the sixth count, presented a subtle but critical ambiguity between the *actus reus* and the *mens rea.* Indeed, it identified certain criminal conducts as crimes against humanity, but at the same time considering their intent as clearly ascribable under the category of crimes against the Jewish people. In its judgment, the Court attempted to solve the conflict by attributing certain acts to criminal offenses of crimes against humanity or crimes against the Jews. As noted above, it furnished an apparent justification of such attribution by deconstructing the Nazi policy in different steps, with the final translated as crimes against the Jewish population. However, considering the wording of the NNCPL, a distinction between the two criminal offenses based on the degree of violence applied to the targeted group is neither convincing nor comprehensive. Indeed, the real factor influencing the distinction for the at-

[144] *Ibidem*.
[145] See NNCPL, art. I (b).

tribution of responsibility appears to be the wider German foreign policy and the program of Germanization. Since the Jerusalem court remarked on the NMT's judgment in the *RuSHA* trial supporting the strict link between extermination and the expansionary Nazi policy, the recognition of the crimes against the Jewish people, or genocide, found its reasons only as the final consequence of an escalated world conflict.
In conclusion, the *Eichmann* trial "remained the only significant [though implicit], judicial application of the [CPPCG] until the late 1990s"[146], and developed consistent jurisprudence on crimes against humanity. However, it presented a definition of the 'G' word strictly linked with a fully escalated armed conflict, still uncertain on specifically highlighting the *actus reus* and *mens rea* requirements. Such jurisprudence was still inadequate to deal with different situations susceptible to provoking genocide, such as civil wars and internal conflicts. The vacuum left first by Nuremberg, and then by *Eichmann*, would only be filled when the international community would be called to account for two new genocides in the 1990s.

1.4 Other Sources of Law: Customary International Law and *Jus Cogens*

So far, this chapter has assessed the existence of a juridical basis to prosecute the crime of genocide, namely the CPPCG, and a first, though not explicit, jurisprudential precedent, the *Eichmann* trial. In this context, the Nuremberg trials have been presented as jurisdictional cases not directly dealing with the crime of genocide, but nonetheless reflecting on its definition and practical application. Thus, in the period between 1945 and 1961, two sources of international law were produced concerning the crime of genocide: a convention, and a judicial decision[147].
This paragraph aims to explore the contribution of two other sources, i.e. customary international law and *jus cogens*, in creating a legal framework for the crime of genocide. As for international customs, the status of genocide under customary international law is first reviewed, demonstrating that the CPPCG was a mere crystallization, rather than a generating instrument, of the crime of genocide under international law. Second, the existence of an international custom of genocide is then proved, by an analysis of ICJ advisory opinion and judgments. Third, the Eichmann appeal judgment highlights the existence of an international custom concerning universal jurisdiction over the crime of genocide, apparently conflicting with the disposition of the CPPCG. As for *jus cogens*, the dedicated subparagraph first introduces the definition of *jus cogens* norms, identifying their three fundamental dimensions. Subsequently, these latter will be used to demonstrate the existence of a *jus cogens* norm on the crime of genocide. Finally, it is shown that the status of the prohibition of genocide as a *jus cogens* norm is recognized by the jurisprudence of the ICTR. In conclusion, it is asserted that though the CPPCG represents the mandatory point of departure to develop any

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[146] SCHABAS (2013: 671).
[147] See *Statute of the International Court of Justice*, 18 April 1946, 33 UNTS 993, art. 38 (a), (d).

jurisprudence on genocide, other sources, i.e. customary international law, *jus cogens*, and precedents may assist courts to more comprehensively deal with such a criminal offense.

1.4.1 Customary International Law and the Crime of Genocide

An international custom can be defined as evidence of a general practice accepted by the subject of international law, primarily states, as law, thus binding[148]. A custom is composed of two elements: a widespread practice (*usus*), and the belief that such a widespread practice reflects an existing law (*opinio juris*) or is required by imperative social, economic, or political needs (*jus necessitatis*)[149]. It remains unclear if, for the crystallization of a custom, a balance between the *usus* and the *opinio juris* is required. Indeed, as the 1899 Hague Convention Preamble, known as the Martens clause, points out,

> "[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the *usages* established among civilized peoples, from the *laws of humanity* and the dictates of public conscience"[150].

The clause frames the laws of humanity on the same level as the usages established among civilized peoples, namely customs. From this passage, it is possible to infer that the *usus* does not constitute a mandatory requirement to assess the existence of an international custom concerning the laws of humanity, here interpreted as international human rights law and international humanitarian law[151]. Thus, as a necessary premise of this subparagraph, an international custom on genocide, considered the most serious crime in international law, does not require consistent evidence of its *usus*. Rather, the presence of the *opinio juris* seems sufficient.
The UN CPPCG can be first interpreted as a codification of genocide law as it existed in customary law"[152]. Indeed, in its article I, the CPPCG clarifies that "[t]he Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law"[153]. The term 'confirms' suggests that a crime of genocide, even if legally and etymologically undefined, existed prior to the drafting of the CPPCG in 1948. Thus, in this view, the CPPCG can be seen as the codification of an existing international customary law. Since the CPPCG is a convention, and therefore binding only the contracting parties, the existence of an international custom

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[148] CASSESE, FRULLI (2017).
[149] CASSESE, FRULLI (2017).
[150] *Convention with Respect to the Laws and Customs of War by Land and its Annex: Regulations Respecting the Laws and Customs of War on Land,* 29 July 1899, Preamble, emphasis added.
[151] CASSESE, FRULLI (2017).
[152] BETTWY (2011: 169).
[153] UN Genocide Convention, art. I, emphasis added.

on genocide is "significant because it determines the obligations of all states"[154], irrespectively of their ratification of the CPPCG. The ICJ, in the first advisory opinion given on the possibility of making reservations to the CPPCG, noted that the "principles of the [CPPCG] are principles recognized as binding on the states by civilized nations, even in the absence of a treaty obligation"[155]. Hence, being a contracting party to the CPPCG seems not to be relevant when considering the subjects bound by the convention: all the states recognized as such are called to respect it. When considering the codification of a custom, a question may arise concerning the persistence of such an international practice recognized as law. Once again, the ICJ clarified the issue in an advisory opinion, stating that the codification of a custom "in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions"[156]. Overall, as Lozada observes, an international custom concerning genocide has been progressively developed "under which the [CPPCG] binds all states"[157].

As for jurisdiction, the CPPCG's article VI establishes that individuals accused of genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal […]"[158]. Theoretically, such a provision rules out the trial of an individual by any tribunal under universal jurisdiction, where this latter has to be intended as "a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim"[159]. However, the jurisprudence has supported the existence of an international custom recognizing universal jurisdiction to try individuals charged with genocide. In the *Eichmann* judgment, the court affirmed that "states possess 'the universal power […] to prosecute for crimes of this type' under customary international law"[160]. According to the legal reasoning of the court, its competence to prosecute Eichmann "derive[d] from the *universal character* of the crimes committed, which gives every state the right to judge and punish [such crimes]"[161]. Thus, it appears that it is the salience of the crimes, their universal character, that determines the competent jurisdiction and the subsequent

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154 RATNER, ABRAMS, BISCHOFF (2009: 42-43).

155 Advisory Opinion of the International Court of Justice, 28 May 1951, ICJ Reports (1951), *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 24.

156 Judgment of the International Court of Justice, 26 November 1984, ICJ Reports (1984), *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, para. 73.

157 LOZADA (2009: 177).

158 UN Genocide Convention, art. VI.

159 Report of the International Law Association Committee on International Human Rights Law and Practice, 2000, *Final Report on the Exercise of universal jurisdiction in respect of gross human rights offenses*, p. 2.

160 BETTWY (2011: 170); Judgment of the Supreme Court of Israel, 29 May 1962, Appeal 336/61, *Attorney General v. Adolf Eichmann*, paras. 303-304. Hereinafter Appeal Judgment, *Eichmann*.

161 LIPSTADT (2011: 170, emphasis added).

"right to punish"[162]. Nevertheless, the Israeli judges preferred not to create a hierarchy between the CPPCG and international customary law, specifying that the CPPCG's article VI set a minimum threshold concerning jurisdiction, that "did not affect the existing jurisdiction of States under customary international law"[163]. The fact that, for example, Spain[164] and Germany[165] decided to adopt in their legal systems mechanism to allow the prosecution of genocide and crimes against humanity demonstrated that the existence of an international custom on universal jurisdiction on genocide "has gone relatively unchallenged"[166]. In sum, the CPPCG sets a territorial jurisdiction, whilst an international custom sanctions the extraterritoriality of jurisdiction over the crime of genocide, according to the universal jurisdiction principle. Thus, as Schabas notes, "customary law is capable not only of filling in the gaps but also of exerting overriding legal force [over the CPPCG]"[167].
As demonstrated, the existence of customary international law on genocide is closely intertwined with the CPPCG. The relationship between the CPPCG and customary law is twofold. First, the CPPCG represents the codification of an existing custom, thus highlighting that international customary law on genocide was already present before 1948 even if genocide did not exist as a notion. It follows that both a convention, the CPPCG, and a customs on genocide serve as sources for international criminal law when dealing with the crime of genocide. Second, the CPPCG is the point of departure for the development of international customs on genocide, specifically on jurisdiction in its extraterritorial dimension. Indeed, the *Eichmann* trial, which is important to remark will be the only precedent, though indirect, on genocide until the ICTR's trials, furnish consistent evidence of customary international law providing for the possibility for any state to prosecute individuals charged with genocide offenses.

1.4.2 Jus Cogens *and the Crime of Genocide*

Aiming to furnish adequate legal protection of the fundamental interests of the international community, the Vienna Convention on the Law of Treaties (VCLT) defines a peremptory norm of international law, i.e. *jus cogens*, as

> "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"[168].

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[162] Appeal Judgment, *Eichmann*, para. 12.
[163] Appeal Judgment, *Eichmann*, para. 11.
[164] See *Ley orgánica 1/2014, de modificación de la Ley orgánica 6/1985 del Poder Judicial relativa a la justicia universal*, 13 March 2014.
[165] *Völkerstrafgesetzbuch*, Code of Crimes against International Law, 26 June 2002 (Federal Law Gazette I, p. 2254), as last amended by Article 1 of the Act of 22 December 2016 (Federal Law Gazette I, p. 3150).
[166] SCHABAS (2009: 429).
[167] SCHABAS (2009: 429).
[168] *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S., Vol. 1155, 331, art. 53. Hereinafter VCLT.

If a hierarchy between sources of international law can be drawn, *jus cogens* has to be considered as the apex of it. Indeed, the VCLT's art. 53 specifies that no derogation to a peremptory norm of international law is admitted. Moreover, the VCLT rules that if a "new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates"[169]. All the sources of international law must not conflict with *jus cogens* norms, and these latter therefore ensure a certain degree of cohesion and adherence of international law to principles and norms recognized as imperative by the international community as a whole. The VCLT limits itself only in furnishing a definition of *jus cogens*, without providing any concrete example of such norms. Hence, the identification of peremptory norms of international law, led by VCLT's article 53, is set in charge of states, international courts, and scholars.

Three conditions are usually identified as necessary to classify an international norm as *jus cogens*[170]. First, the interested norm has to constitute customary international law, thus not mandatory only upon certain parties of a convention, but rather, "binding for the great majority of states"[171]. Second, the norm has to be recognized as non-derogatory, i.e. all the states, or at least the "vast majority [of them]"[172] recognized to be bound by such a norm. Specifically, this criterion appears to conflict with a general practice in international law, namely a decision-making approach based on consensus rather than majority. Indeed, it is generally recognized that an international norm cannot reflect the particular interests of a certain group of states, and that consensus prevents "a majority […] [to] bind a minority"[173]. However, since the *jus cogens* aims to protect certain interests of the international community as a whole, its eventual non-unanimous recognition is acceptable. Third, states must recognize that they cannot act contrary to the interested norm and they must conceive that any contrary action is unacceptable[174]. In this regard, *jus cogens* norm can be intended as *erga omnes* obligations, implying that "[s]tates have a legal interest in their protection in light of the importance of the rights involved"[175]. To remark on the relationship between *jus cogens* and *erga omnes*, it is possible to affirm that all the *jus cogens* norms entail *erga omnes* obligations, but not all *erga omnes* obligations can be classified as *jus cogens*[176]. Overall, the fundamental characteristics of a peremptory norm of international law are its bindingness upon all the states, its non-derogatory nature, and the inadmissibility of its violations, stemming from the *erga omnes* obligations involved.

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[169] VCLT, art. 64.
[170] WOUTERS, VERHOEVEN (2005: 4).
[171] WOUTERS, VERHOEVEN (2005: 4).
[172] WOUTERS, VERHOEVEN (2005: 4).
[173] WOUTERS, VERHOEVEN (2005: 4); ROZAKIS (1976).
[174] WOUTERS, VERHOEVEN (2005).
[175] Judgment of the International Court of Justice, 5 February 1970, ICJ Reports (1970), *Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain)*, para. 33.
[176] RAGAZZI (1997).

By adopting the aforementioned criteria to detect the existence of a peremptory norm of international law, the following section explores if a norm prohibiting genocide can be classified as *jus cogens*. In 1946, the GA recognized that "genocide is a crime under international law which the civilized world condemns"[177]. The fact that the resolution containing the mentioned passage was approved unanimously reflects that the whole international community recognized the gravity of genocide and its prejudice to the interest of all the states. Subsequently, and as demonstrated above, the CPPCG confirmed the existence of customary international law on the prohibition of genocide, thus fulfilling the first criteria to recognize it as *jus cogens*. Between the 1960s and the 1970s, two conventions displayed the non-derogatory nature of such a customary international law on genocide. Although considering genocide as a specific act constituting crimes against humanity, the UN Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity[178] of 1968 and the European Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity[179] of 1974 specified that "no statutory limitation shall apply to genocide"[180]. Concerning the inadmissibility of the crime of genocide, the ICJ has recognized that it implies an *erga omnes* obligation, i.e. "all states can be held to have a legal interest in [its] protection"[181]. Interestingly, the judges explicitly mentioned "acts of genocide"[182] as one of the most prominent examples of *erga omnes* obligations. To reinforce the statement of an ICJ's recognition of genocide as *jus cogens*, judge Ammoun specified in his separate opinion that *jus cogens* was strictly "linked […] to the concept of obligations *erga omnes*"[183].
Although it has been demonstrated that the prohibition of genocide meets all the requirements to be classified as *jus cogens*, a shred of additional evidence confirms the assumption. Indeed, the status of the prohibition of genocide as a peremptory norm of international law will be finally recognized by the jurisprudence of the ICTY in the early 2000s, stating that "[…] [international humanitarian law norms prohibiting] genocide are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogatory and overriding character"[184].

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177 Resolution of the United Nations General Assembly, 11 December 1946, A/RES/96(I), *The Crime of Genocide*, p. 189.
178 *Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity*, 26 November 1968, U.N.T.S., Vol. 754, 73.
179 *European Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity*, 25 January 1974, E.T.S. no. 82.
180 WOUTERS, VERHOEVEN (2005: 5).
181 Judgment, *Barcelona Traction*, para. 33.
182 Judgment, *Barcelona Traction*, para. 34.
183 WOUTERS, VERHOEVEN (2005: 8). See Separate Opinion Judge Ammoun, 5 February 1970, ICJ Reports (1970), *Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain)*, paras. 11, 19, 33.
184 Judgment of the International Criminal Tribunal for the former Yugoslavia, 14 January 2000, IT-95-16-T, *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić Drago Josipović, Dragan Papić, Vladimir Santić a/k/a "VLADO"*, para. 520.

1.4.3 Different Sources to Prohibit Genocide as a Wider Room of Maneuver for International Courts

The existence of an international norm prohibiting genocide, as it has been demonstrated, stems from different sources of international law. First, it exists as customary international law, as acknowledged by the CPPCG and the Eichmann trial jurisprudence. Second, the CPPCG represents the treaty-based source for the prohibition of genocide, furnishing a detailed notion of such a criminal offense. Third, due to its customary, non-derogatory, and *erga omnes* nature, as sanctioned by international jurisprudence of the ICJ and the ICTY, the prohibition of genocide is a peremptory norm of international law, i.e. *jus cogens*. Considering the relatively wide legal framework in which the prohibition of genocide is collocated, it derives that courts, when dealing with the crime of genocide, enjoy a certain degree of room of maneuver to tailor the notion of genocide to specific cases, as the ICTR jurisprudence prominently proves[185]. Furthermore, the existence of different sources on the prohibition of genocide can be intended as compensatory for the specificity of the CPPCG that is considered a gap in the legal framework for the prosecution of genocide, namely the territorial jurisdiction, apart from the establishment of ad hoc tribunals. Indeed, just by considering its *jus cogens* status, it becomes irrelevant if a state is a party of the CPPCG, and by including in the discourse the jurisprudence of the Eichmann trial, any member of the international community has a legal interest, i.e. the right to punish, any breach of the prohibition of genocide. However, it should be recalled that the CPPCG is the only source of international law that gives a notion of genocide and that lists the four protected groups. Considering the hierarchy of international law sources that sets *jus cogens* as its apex, theoretically, one possibility to overrule the CPPCG's notion of genocide and expand the protected groups would be the recognition and explicit formulation of a new definition of the 'G' word, categorized as *jus cogens*. Considering the political obstacles in the bargaining process to draft an eventual new convention on genocide, the role of redefining genocide and recognizing the new definition under *jus cogens* falls on international courts. However, such recognition must depart from a proof of wide state practice in that sense, namely increasing dissent towards the listing of four groups and their expansions, such as towards the inclusion of political and social groups. In conclusion, the CPPCG remains the point of departure to develop jurisprudence on genocide, a jurisprudence that regardless can resort to other sources to better deal with the prosecution of the crime.

1.5 The Relationship between Genocide and Other Mass Atrocities Crimes

Mass atrocities crimes are a specific category of crimes which includes genocide, war crimes, and crimes against humanity. The UN defines them as

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[185] See *infra* paragraph 2.3.

> "the most serious crimes against humankind, […] [and] the acts associated with them affect the core dignity of human beings, in particular, the persons that should be most protected by States, both in times of peace and in times of war"[186].

The specific gravity of the commission of such crimes stems from the fact that they target a specific, but wide, category: civilians. Indeed, mass atrocities crimes can be synthetically defined as "[…] large-scale, deliberate attacks against civilians"[187]. Due to their gravity, it is assumed that all states have a legal interest in ensuring that those responsible for mass atrocities crimes are persecuted under international criminal law[188]. Notwithstanding genocide, war crimes, and crimes against humanity are all included in the same category of mass atrocities crimes, they differ from each other, and such differences become critical when prosecuting individuals under international criminal law and charging them with different criminal offenses.
Since this thesis is focused on the jurisprudence of the ICTR, it takes into account the definitions of crimes against humanity and war crimes widely accepted before the establishment of the ad hoc tribunal in 1994. The methodological choice of establishing a time limit for the definition of crimes is functional in providing the legal framework that constituted the point of departure for the development of the ICTR's jurisprudence. This paragraph first deals with war crimes, distinguishing these latter criminal conduct from genocide based on context, intent, and targets, detecting problems in their attribution when genocide is committed during wartime. Subsequently, the relationship between genocide and crimes against humanity is rigorously analyzed, proving the difficulties in distinguishing between the two criminal offenses and the fundamental importance of the *mens rea* requirement. For completeness and clarity of exposition, this paragraph will include, though it is not officially recognized as a separate criminal offense, ethnic cleansing. Since this latter is often considered a notion interchangeable with genocide, is thus critical to stress the difference between them.

1.5.1 War Crimes and Genocide

War crimes are not specifically listed and categorized in a single international law document. It derives that there is not a unanimous definition of such a criminal offense. War crimes can be defined in relation to the specific international law norms that they breach. By considering the progressive codification and recognition of international customary law on the conduct of armies during wars, war crimes are "serious violations of the rules of customary and treaty law concerning international humanitarian law"[189]. The criminalization of war crimes is mainly given by specific treaties and conven-

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[186] UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT (2014: 1).
[187] LAVERY (2019: 1).
[188] LAVERY (2019).
[189] SHAW (2008: 433-434).

tions, namely the Hague Conventions of 1899[190] and 1907[191], and the 1949 Geneva Conventions and their Additional Protocols[192]. The Geneva Conventions are accepted as codifying customary international law, thus binding upon all the members of the international community and applicable in every situation of conflict. The fundamental characteristic of war crimes is that they "take place in the context of an armed conflict, either international or non-international"[193]. It follows that if no international or internal armed conflict occurs, or even is recognized, specific criminal conduct cannot be ascribed as war crimes. Due to the wide range of single acts constituting war crimes, this latter will not be examined in detail by this subparagraph. Indeed, as it will be understood if a genocide occurs in the context of an armed conflict, war crimes can likely be part of a genocidal plan. Concerning jurisdictional precedents on war crimes, the IMT Charter drafted a non-exhaustive list of specific acts considered war crimes:

> "murder, ill-treatment or deportation to wave labor or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation *not justified by military necessity*"[194].

Military necessity appears to be a pivotal factor in determining if a war crime has been committed or not. Indeed, if an action inflicts upon an enemy superfluous damage or useless struggle[195], it can be categorized as a war crime. The IMT Charter's definition of war crimes exercised considerable authority since both the Charter of the International Military Tribunal for the Far East[196] and the Israeli NNCPL[197] adopted it.
War crimes and genocide can be distinguished based on three elements: context, intent, and targets. As said, war crimes can occur in the context of an armed conflict, being international, between two or more states, or internal, between the regular forces of a state and non-state actors, or between two or more non-state actors. On the other hand, no specific context of war is required to ascribe certain conducts as acts of genocide. However, it appears clear that genocide is likely to occur during wartime. War and genocide are connected by context and therefore causality[198]. The contextualization of geno-

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[190] *Convention with Respect to the Laws and Customs of War by Land and its Annex: Regulations Respecting the Laws and Customs of War on Land*, 29 July 1899.
[191] *Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907.
[192] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.
[193] GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (2018: 1).
[194] IMT Charter, art. VI (b).
[195] SMITH, DEVINE, TADDEO, MCALISTER (2017).
[196] *Special Proclamation Establishment of an International Military Tribunal for the Far East*, 19 January 1946, Treaties and Other International Acts Series 1589, art. V (b). Hereinafter IMTFE Charter.
[197] NNCPL, art. I (b).
[198] SHAW (2007b).

cide during wartime was proved by the IMT's and NMT's jurisprudence[199], highlighting the execution of a genocidal policy during the escalation of the Second World War.
In this light, genocide appeared as a direct consequence of war, lacking the specific intent to commit extermination. Therefore, the strict linking of genocide and war is susceptible to leading to a misunderstanding, ascribing genocidal acts as war crimes. It is worth noting that war crimes are not necessarily committed with the intent to destroy in whole or in part a specific group. Rather, they can be carried out to terrorize the enemy's armed forces and civilian population, without considering necessary the total extermination of these two targets. On the other hand, genocide requires a specific *mens rea* to destroy the four protected categories by the CPPCG's article II.
In the attempt to solve such a blurred distinction, it is necessary to turn to the third difference between war crimes and genocide, i.e. the targets of the criminal offenses. Shaw defines genocide committed during wartime as a "fundamentally illegitimate variant of warfare - *directed against civilian social groups* as such rather than armed enemies"[200]. This definition appears problematic since social groups are not considered under the definition of genocide given by the CPPCG. The discriminant of targets displays a consistent difference between war crimes, targeting a wide range of victims during wartime, and genocide, committed only against national, ethnical, racial, or religious groups. In international and internal armed conflicts, international humanitarian law ensures protection for combatants and non-combatants, i.e. civilians. These two categories can include "wounded and sick members of armed forces […], prisoners of war, civilians, […] humanitarian workers and civil defense staff"[201]. Overall, the prohibition of war crimes protects individuals without any distinction, as long as the crimes are committed during wartime. Conversely, although genocide has no limitation regarding context, it only protects four specific groups.
In conclusion, distinguishing between genocide and war crimes is smooth when the crimes under scrutiny were not committed during wartime, since the context necessary to charge war crimes is not present. Problems arise when acts of genocide are committed during wartime, and thus there may be an overlapping between genocide and war crimes. The intent is useful in distinguishing between the two criminal offenses, but it requires specific shreds of evidence of genocidal intent. Concerning targets, genocide during wartime can be charged only if an intense fierceness against the four protected groups by the CPPCG is detected. In such a scenario, what initially is considered a war crime can evolve into a genocidal criminal offense.

1.5.2 Crimes Against Humanity and Genocide

As war crimes, crimes against humanity are first considered part of international customary law and emerged within international humanitarian law. Crimes against humanity are not codified in a single treaty in international

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[199] See *supra* paragraph 1.2.
[200] SHAW (2007b, emphasis added).
[201] GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (2018: 2).

law. Notwithstanding the absence of codification, different precedents have been set in prosecuting individuals for crimes against humanity. As a premise, this criminal offense can be committed at any time, as genocide, no matter the presence of a conflict, thus differing from war crimes[202]. However, crimes against humanity have been strictly linked to wartime by the IMT Charter, defining crimes against humanity as

> "murder, *extermination*, enslavement, deportation, and *other inhumane acts* committed against *any* civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"[203].

As for the notion of war crimes by the IMT Charter, this latter's definition of crimes against humanity exercised considerable authority since both the Charter of the International Military Tribunal for the Far East[204] and the Israeli NNCPL[205] adopted it. Apart from murder, extermination, enslavement, and deportation, the definition does not clearly list the precise acts falling under the category of crimes against humanity. This ambiguity led to some difficulties in charging and prosecuting individuals for crimes against humanity before the Military Tribunal for the Far East. There, no defendants were convicted for crimes against humanity, nor were those considered responsible for the Nanking rapes[206]. Indeed, such crimes were categorized as war crimes, preventing rape to be considered as a crime against humanity. Concerning the relationship between crimes against humanity and genocide, they differ in their intent, target, and possibly acts covered. However, as the Eichmann trial anticipated in its indictment[207], such a distinction is not always smooth and clear.

A fundamental characteristic of crimes against humanity is their contextualization in a "widespread or systematic attack against a civilian population"[208]. This feature prevents isolated inhumane acts from being ascribed as crimes against humanity. The systematization of criminal offense refers to a broader policy of perpetrating violence against civilians, to a certain degree similar to the presence of a clear genocidal policy to determine the *mens rea* requirement for prosecuting genocide. However, it is precisely in the intent that the first difference between crimes against humanity and genocide stands. Indeed, widespread or systematic attacks do not necessarily imply the destruction of a group. For example, considering torture as a crime against humanity[209], a government could use torture not to annihilate a group, but instead to subjugate and terrorize it.

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[202] METTRAUX (2005).
[203] IMT Charter, art. VI (c), emphasis added.
[204] *Special Proclamation Establishment of an International Military Tribunal for the Far East*, art. V (c).
[205] NNCPL, art. I (b).
[206] HIGURASHI (2008).
[207] See *supra* subparagraph 1.3.2.
[208] MARCELO (2013: 7).
[209] MARCELO (2013: 7).

Targets are usually considered the "main difference between crimes against humanity [and genocide]"[210]. By recalling the IMT's notion of crimes against humanity, these are carried out against any civilian population, whereas genocide specifically targets an ethnic, racial, religious, or national group. Therefore, indiscrimination is a fundamental feature of crimes against humanity, meaning that the "criminal action falls on anyone, regardless of their condition or circumstance"[211]. Conversely, genocide is based on discrimination, on the targeting of individuals chosen on their belonging to a specific group, thus differentiated and not perceived as generic civilians. In sum, it is the relevance of the targeted identities that distinguishes between genocide and crimes against humanity. Of note, crimes against humanity are also defined as persecutions on political, racial, or religious grounds, thus being directed against specific categories. Here, the distinction from genocide appears more complicated. Considering persecution as the "adoption of discriminatory measures designed to or likely to produce physical or mental suffering or economic harm"[212] and its targeting of a specific group, it could be highly susceptible to be ascribed as genocide, or vice versa. The degree of physical or mental violence and its outcome on the victims could help in distinguishing persecution from genocide. Indeed, as soon as persecution does not result in the death of the victims, it should be considered a crime against humanity. Instead, when it directly provokes the killing of the targets, and these latter are a racial or religious group, persecution blossoms into genocide.

The last passage has opened the discussion to the third possible distinction between genocide and crimes against humanity, based on the acts falling under those categories. This distinction appears problematic, since "all genocide involves the commission of crimes against humanity although the opposite is not always true"[213]. Considering the IMT's definition of crimes against humanity, extermination is an act falling under such criminal offense category. Yet, extermination is considered the action constituting genocide par excellence, and a distinction based on the degree of violence as for persecution and genocide here is not applicable, since extermination implies total violence to destroy the target. Hence, the key factor in distinguishing between genocide and crimes against humanity cannot reside in the *actus reus* itself. Rather, the identification of the *mens rea* and the targets is fundamental to navigating the different criminal acts and ascribing them as genocide or crimes against humanity, as the ICTR and ICTY will be called upon to do. It should be noted that extermination is a unique case since it is only possible to distinguish between extermination as a crime against humanity and extermination as genocide by considering the targets since the *mens rea* is always directed towards the destruction of the victims.

Genocide and crimes against humanity are closely intertwined. Genocide is discriminatory in its definition by targeting four groups, whilst crimes against humanity are generally indiscriminately directed against civilians. They

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[210] MARCELO (2013: 7).
[211] MARCELO (2013: 8).
[212] BASSIOUNI (1999: 327).
[213] MARCELO (2013: 7).

practically consist of the same criminal acts, and crimes against humanity in the form of persecution aimed at targeting specific groups, as genocide perpetrators do. The *mens rea* is a mandatory requirement to assess the categorization of specific criminal conduct, and it acts as a shifter for identical acts to be ascribed as crimes against humanity or genocide.

1.5.3 Ethnic Cleansing and Genocide

In the mainstream language, genocide is often confused with ethnic cleansing. The precise mention of ethnicity in the latter acts as a deceptive word since it reminds one of an ethnically targeted group, one of the protected groups under the CPPCG. However, genocide and ethnic cleansing are different, and their distinction is fundamental when addressing the categorization of specific acts as falling under the crime of genocide.
As a premise, ethnic cleansing is not recognized as an independent crime under international law, and therefore there is no unanimous consensus on its definition. This subparagraph adopts the notion of ethnic cleansing furnished by the UN Commission of Experts for Yugoslavia, defining it 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"[214]. Ethnic cleansing aims to 'clean' a delimited territory from a specific group. It appears that ethnic cleansing and genocide are partially related in terms of scope. Indeed, both crimes share the goal of getting rid of a targeted group, in this case, ethnic, to achieve purity[215]. However, they differ in the *mens rea*, with consequences on their material execution. Ethnic cleansing does not necessarily entail the extermination of the targeted group, since it 'only' aims at removing such a community from a territory. It should be noted that, though not intentionally, ethnic cleansing is prone to compromise the existence of a group by expelling it from the territory where it has based its historical, cultural, and economic roots[216]. On the other hand, genocide specifically requires the physical annihilation of the group, and its disappearance, regardless of its removal from a specific land. Thus, it is not possible to affirm, as Mann did, that genocide can be considered part of a "murderous ethnic cleansing"[217]. The relationship is indeed opposed: ethnic cleansing can be a means to achieve genocide, first removing a targeted population from a specific territory, and then exterminating it, as the Nazis did with the Jewish people in the occupied territory[218]. The distinct intent between genocide and ethnic cleansing leads to an additional difference concerning prosecution. In determining first-degree murder, the *mens rea* specifically highlighting a clear intent to kill, or exterminate, is

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[214] Report of the United Nations Secretary-General, 27 May 1994, S/1994/674, *Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council*, p. 33, emphasis added.
[215] LIEBERMAN (2010).
[216] SCHABAS (2003).
[217] MANN (2005: 17).
[218] HAYDEN (1996).

fundamental[219]. Thus, even if ethnic cleansing could result in murder, the *mens rea* requirement to charge a responsible for the crime of genocide is missing. Conversely, since genocide in its essence entails killing, no problems arise when assessing the existence of a clear murder intent.
The apparent similarity between genocide and ethnic cleansing opens a window of opportunity, politically speaking, to avoid reaction or even intervention to stop a genocide. Reminding that ethnic cleansing is not recognized as a separate criminal offense, labeling an actual situation of genocide as ethnic cleansing may serve as a justification to avoid intervention. Indeed, if it is accepted that, according to international law, states should intervene to prevent and punish genocide[220], the same cannot be said for ethnic cleansing. This latter thus allows states to concretely deny the existence of genocide and avoid any potential intervention[221]. Apart from prevention and intervention to stop genocide, if the term ethnic cleansing is used to define an actual genocide, "the duty to punish genocide could not be fulfilled"[222]. In other words, the prosecution of genocide is completely compromised if specific acts are not labeled by referring to the 'G' word. The naming of a situation as genocide is thus the prerequisite to ascertain "whether or not the definition of genocide is met in the specific case and to sensitize other States to the situation"[223].
Hence, the distinction between genocide and ethnic cleansing and its acknowledgment, not only by lawyers but especially by politicians and media, is critical to allow proper prevention, prosecution, and punishment of crimes of genocide. Ethnic cleansing, even if legally not aiming at destroying a targeted group, is inclined to be part of a wider genocidal plan, and evidence of it may signal and anticipate an imminent genocide[224]. Of note, though lacking the genocidal *mens rea*, ethnic cleansing does not exclude violence against the victims, since it can force a group to live under conditions likely to bring to its destruction.

Conclusion

This chapter has provided the legal framework for genocide that existed prior to the establishment of the ICTR in 1994 and that served as the point of departure for the ad hoc tribunal's jurisprudence. Through a literature review, it has been shown that the notion of genocide codified in the CPPCG is susceptible to criticism, particularly in the exclusion of certain groups from its protection. The scholarship has proposed different definitions of genocide, expanding the 'G' word to include a wider range of communities. However, the CPPCG notion of genocide still holds as authoritative, but the intense discussion on it and the jurisprudence of the ICTR examined in the next chapter shows that courts could evolve and expand such a definition. Tur-

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[219] NAIMARK (2002).
[220] SCHIFFBAUER (2018).
[221] BLUM, STANTON, SAGI, RICHTER (2008); SHAW (2007a).
[222] SCHIFFBAUER (2018: 87).
[223] SCHIFFBAUER (2018: 87).
[224] SCHABAS (2009).

ning to the jurisdictional background of the prosecution of genocide, between 1946 and 1947 the IMT's and NMT's jurisprudence did not have the chance to explicitly charge individuals with genocide, since this latter was not a criminal offense listed in their charters. Moreover, when genocide was explicitly mentioned in the indictments and certain passages of judgments, it was considered not as planned *a priori*, but rather a consequence of the Nazi expansionary policy and categorically contextualized in the escalation of the Second World War. However, the Nuremberg trials, by revolving around the 'G' word, anticipated the necessity to codify the crime to ensure its adequate punishment, happening in 1948 with the drafting of the CPPCG. In 1961, the District Court of Jerusalem was the first tribunal that could have theoretically dealt with the crime of genocide, in light of the CPPCG's notion of genocide. Despite this chance, Israel decided to create a unique category of criminal offenses, i.e. crimes against the Jewish people, resembling the definition of genocide provided by the CPPCG. Notwithstanding the sentencing of the former SS officer Adolf Eichmann for crimes against the Jews, the extermination was still viewed as the IMT and NMT did, i.e. a consequence of the Nazi policy of Germanization. Moreover, the *Eichmann* trial demonstrated the difficulties in the distinction between acts falling under the category of crimes against humanity and those intended as crimes against the Jewish people (considered as genocide). Together, the CPPCG and the examined trials, though these latter indirectly, are two sources of international law on genocide, namely convention and precedent. Concerning international customary law, it can be safely considered as a source for the prohibition of genocide. The CPPCG can be intended as a codification of an existing custom on genocide, and it even represents the base to develop further customary international law on the prohibition of genocide. Indeed, by referring to the CPPCG, the *Eichmann* trial proved that international customary law allows for the application of universal (extraterritorial) jurisdiction to genocide, thus overcoming the territorial dimension for jurisdiction over such a crime provided by the CPPCG. Subsequently, the prohibition of genocide can be considered a peremptory norm of international law, i.e. *jus cogens*, thus being set at the apex in the hierarchy of sources in international law. Its peremptory nature highlights that the prohibition of genocide protects the interests of the international community, is non-derogatory, and creates obligations *erga omnes*, thus legally making it irrelevant if a state is part of the CPPCG to prosecute genocide. Overall, the existence of different international law sources on genocide allows judges dealing with that criminal offense to enjoy room for maneuver to adapt the legal notion to different concrete situations. Finally, it has been necessary to clarify the distinction between genocide and other mass atrocities crimes, namely war crimes, crimes against humanity, as well as ethnic cleansing. The *ratio* of making these distinctions is to provide a necessary description and analysis of the different criminal offenses to allow a proper understanding of the ICTR's jurisprudence. It has emerged that in the occasion of mass atrocities, context, target, and intent are fundamental discriminators to detect if genocide has been committed or not. However, the examination of the difference between the abovementioned criminal offenses showed that such a distinction is particularly

difficult between crimes against humanity and genocide, and stresses the relevance of detecting the specific genocidal *mens rea.*

In conclusion, the ICTR will be called to be the first tribunal to explicitly and directly prosecute individuals for the crime of genocide, interpreting the definition of genocide provided by the CPPCG. The intense discussion in the scholarship on the notion of genocide, the necessity to draw clear distinctions among mass atrocities crimes, and the absence of clear judicial precedents on genocide, all elements that required the ICTR's judges to produce landmark jurisprudence on genocide, having the chance to clarify doubts concerning the interpretation of the CPPCG. Thus, this chapter represents all the judicial background available to the ICTR, and its problematics, contradictions, and blurred distinctions allowed the ad hoc tribunal to navigate across this legal framework and innovatively apply it to the specific case, the 1994 Rwandan genocide.

Chapter II. The Rwandan Case: the International Criminal Tribunal for Rwanda facing Crimes of Genocide

Introduction

The Rwandan genocide represents the most striking and tragic commission of mass killings since the end of the Second World War and the discovery of the Nazi concentration camps. What links the Holocaust and the Rwandan genocide is the ease with which such exterminations were committed, vis-à-vis the incapacity of the international community to promptly react. Conversely, it is worth remarking that whilst the Holocaust took years to be executed (1941-1945, or 1933-1945), the Rwandan genocide caused hundreds of thousands of deaths in 100 days. An implication of the absence of similar cases between the Holocaust and the Rwandan genocide is a vacuum in international criminal law on the adjudication of cases involving the commission of mass atrocity crimes. As will be seen below, the ICTR will be called to fill such a vacuum by becoming the first international tribunal to deal with specific issues such as hate speech and rape, prominently categorizing such conducts as acts of genocide. Apart from establishing landmark precedents, being the first tribunal to grasp genocide and genocide-related crimes implied several challenges for the ICTR, e.g. finding adequate definitions for specific criminal offenses and creating approaches to interpret the CPPCG and detect the existence of a unique genocidal *mens rea*. Therefore, this chapter acknowledges the ICTR's contribution in criminalizing certain conducts as genocidal acts, aiming not only at recognizing the efforts of the ICTR's judges but also to particularly understand the legal reasoning behind the ad hoc tribunal's jurisprudence. Understanding the ICTR's jurisprudence will finally represent the point of departure to deal with the next chapter, examining the legacy of the ad hoc tribunal's work in international criminal law.

This chapter is structured as follows. First, a historical overview of the Rwandan genocide is necessary to understand its deep causes and context, the events and phases of the mass killings, and the response provided by the international community. Second, by an examination of the ICTR's mandate, jurisdiction, and procedures, the reader is provided with the necessary tools to further understand the ad hoc tribunal's work. Third, the methodology employed to analyze the ICTR's jurisprudence is presented. Fourth, the analysis of the ICTR's jurisprudence began with the examination of the tribunal's re-definition of the four groups protected by the CPPCG. Fifth, the chapter deals with the ICTR's strategy to detect the genocidal *mens rea*, paving the way for the ability of the tribunal to categorize certain conduct as acts of genocide. Sixth, the ICTR's jurisprudence on hate speech and its connection with the crime of incitement to commit genocide is examined in detail. Seventh, and finally, the chapter concludes the analysis of the ad hoc tribunal's jurisprudence examining the case law related to rape and sexual violence.

2.1 Historical Overview of the Rwandan Genocide

This paragraph presents the historical context and the facts that led to and characterized the Rwandan genocide in 1994. When considering the events between April and July 1994, it is necessary first to make preliminary considerations. The roots of the hate and violence that exploded in Rwanda have their profound causes in the colonial heritage of the country, under German and especially Belgian rule. After examining the colonization process of Rwanda and its impact on the Rwandan society, this paragraph briefly addresses the political events after the independence in 1962. Subsequently, an examination of the genocide, the main actors involved, and the degree of violence reached is presented. Finally, the international response to the Rwandan Genocide is described, as a necessary premise to provide a conceptual framework in which the establishment of the ICTR has to be contextualized.

2.1.1 Causes and Context

The Rwandan Kingdom and the Social Divisions (15th - 19th Century)

Rwanda is a small country located in the Great Lakes Region in Africa. Before presenting a brief overview of the country's modern and contemporary history, a premise concerning the composition of the society is required. The Rwandan society has longly been divided into three different ethnicities, based on the physical aspect (mainly the height and the dimension of the nose) and their business: Hutu (85% of the population, farmers), Tutsi (14% of the population, breeders), and Twa (1% of the population, indigenous)[225]. Until the 15th century, the country was fragmented into small reigns, each governed by a different local monarch, and there was no centralization of power. In the half of the 15th century, King Gihanga incorporated neighboring reigns into a single political entity. The population was composed of 85% Hutus, mainly peasants, and 14/15% Tutsis, occupying political and leadership positions, including the right to become Mwami, the King of Rwandan reigns[226]. It should be noted that the composition mentioned above of the Rwandan society remained for almost six centuries (1400-1994). Due to the nature and economic returns of their activities, the Tutsi farmers rapidly became richer than the Hutu peasants, and such an economic divide between the two groups crystallized across the centuries. During the 19th century, political power became far more centralized, with the creation of the Kingdom of Rwanda. Such a centralization reinforced the differences between Hutus and Tutsis and started to escalate tensions between the two groups[227]. Specifically, King Rwabugiri raised taxes, which Tutsi administrators collected. The poor economic condition, together with seeing their money collected by the privileged Tutsis, inflamed feelings of resentment in the Hutu ma-

[225] SCAGLIONE (2018).
[226] POTTIER (2002).
[227] MAGNARELLA (2014).

jority. Additionally, only young Tutsis were allowed to be trained as warriors, and during their education, they were "indoctrinated […] with the idea of Tutsi supremacy"[228]. Due to their favored position in Rwandan society and the development of a sort of feudal system, the Tutsis began to perceive themselves as superior and the Hutus as second-class citizens[229]. All these features contributed to the eruption of the first Hutus rebellions, harshly repressed by the ruling Tutsi class. Overall, in the second half of the 19th century, Rwandan society was based on a "caste system"[230], which allowed future colonial rulers to manipulate the ethnicities for their administrative and control scopes.

The Colonial Rule (1884-1962)

In the German capital city of Berlin, European great powers reunited from November 1884 to February 1885 in a conference (Berlin Conference) to establish principles regulating the partition of the African continent and recognize formal spheres of colonial dominance[231]. The Kingdoms of Rwanda and Burundi were unified in the Ruanda-Urundi Territory, recognized as part of the German Empire, but the final settlement of the borders was not established until 1900. The German colonialists opted for an indirect rule model, that, tailored to the British experience in East Africa, relied on local elites to administer the territory and the population to serve the interests of the German Empire. To enforce stricter control over local leaders, Germany placed agents at their courts, overmatching their activities and collecting cash taxes[232]. Altogether, the German indirect rule increased the "Tutsi chiefly power"[233], causing a further deterioration of the Hutus within the Rwandan society. As said, until the late 19th century the division of Rwandan society had been based on political and class considerations. However, with the German colonial domination, this conception changed, with drastic long-term effects that played a key role in the genocide narrative almost a century later. Indeed, the Germans introduced the element of race in explaining the subordinate position of Hutus compared to the Tutsis. By supporting the artificial 'Hamitic' thesis stating that the Tutsis were a migrant population that originated in the Horn of Africa (in other words, closer to Europe than the Hutus), the Germans claimed the racial superiority of the Tutsi ruling class[234].
At the end of the First World War, the newborn League of Nations conferred an administrative mandate over Ruanda-Urundi to Belgium. Of note, the new administrators did not alter the manipulation of the Rwandan societal division, but rather, favored the Tutsis over the Hutu "even more so than the Germans had"[235]. The final crystallization of the triple ethnic structure oc-

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[228] MAGNARELLA (2014: 25).
[229] KEANE (1997).
[230] MAGNARELLA (2014: 29).
[231] MEDICI, PALLOTTI, ZAMPONI (2017).
[232] LOUIS (1963).
[233] PRUNIER (1997: 25).
[234] DALLAIRE (2003).
[235] MAGNARELLA (2014: 30).

curred in the early 1930s, with the introduction by the Belgians of an identity card system, indicating if a person was Hutu, Tutsi, or Twa. The ethnic structure was partially changed since the Belgians classified as Hutu those "who possessed less than ten cows"[236].
During the 1950s, the Belgians dramatically change the inter-ethnic balance of power in Rwanda, starting to support the Hutus instead of the Tutsis. The reason for this shift stemmed from the placement of Rwanda under a Belgian trusteeship by the United Nations (UN). The trusteeship required the former colonizer (Belgium) to assist its colony (Rwanda) in the transition towards independence and the building of democratic institutions. Since the Hutu were the majority, Belgium decided to finally meet their claims "to promote a democratic revolution"[237]. Pro-Hutu, pro-Tutsi, and integrationist parties started to emerge and struggled for who would dominate the other ethnic groups and the state[238]. While the Belgians replaced Tutsi chiefs with Hutu, Gregoire Kayibanda, leader of the Hutu party PARAMEHUTU won the elections in 1961 and became president-designated. After a referendum that sanctioned the independence of Rwanda on 1 July 1962, Kayibanda became the first president of Rwanda.

The Independence and the Road to Genocide (1962-1993)

Kayibanda rapidly became authoritative and forced many Rwandan Tutsi to flee to neighboring Burundi, where the Tutsi were in control of the government. From Burundi, the Tutsis attempted multiple times to launch incursions in Rwanda to overthrow the Kayibanda government. As a reappraisal, the PARAMEHUTU launched massive repressions between December 1963 and January 1964, which executed all the Tutsi politicians who remained in Rwanda[239]. The subsequent escalator of the conflict was the mass killings of Hutus perpetrated by Tutsi Burundi's government in 1972 in reaction to a rebellion. The events led to the killing of 100,000 Hutus in Burundi and the fleeing of 200,000 others, many into Rwanda. The Rwandan government assisted the expatriated Burundian Hutus and exploited the situation to force 100,000 Rwandan Tutsis to leave the country if they wanted to avoid extermination[240]. In 1973, Major Juvénal Habyarimana seized power through a coup, overthrowing Kayibanda and establishing a single-party dictatorship. Habyarimana completely excluded Tutsis from the political and public sphere, confining them only to the private sector. In the meanwhile, a growing number of Tutsis left the country and refuged to Uganda, where they allied with Uganda revolutionaries and received military training. In 1987, Tutsi militias, now organized in the Rwandan Patriotic Front (RPF), helped Yoweri Museveni overthrow the Ugandan dictator Milton Obote. Between 1988 and 1992, the RPF launched several attacks infiltrating Rwanda. The reaction to the RPF's operations was the increasing killings of Tutsis in Rwanda,

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[236] VASSAL-ADAMS (1994: 8).
[237] MAGNARELLA (2014: 32).
[238] GOUREVITCH (1998).
[239] PRUNIER (1997: 56).
[240] MAGNARELLA (2014).

and the spreading extremism influencing the Rwandan Hutus. The progressive radicalization of Hutus led to the formation of extremist journals, like *Kangura*, and parties, such as the Hutu Power, which insisted on the necessity to "clean Rwanda from the Tutsi invaders"[241]. In 1992, through the mediation of the Organization of African Unity, Habyarimana agreed to meet the RPF's leaders in Arusha (Tanzania), to sign a peace accord. The Arusha Accords concluded on 3 July 1993, implied a cease-fire, a power-sharing government, the return of refugees in Rwanda, and integration of the RPF within the Rwandan armed forces. For Habyarimana, the Accords constituted a "suicide note"[242], since they implied the weakening of Hutu elites in favor of the re-admission of Tutsi administrators and army officials.

2.1.2 Events and Phases

Shortly after the conclusion of the Arusha Accords, the United Nations Security Council (SC) approved the deployment of a peacekeeping mission to monitor the application of the peace treaty. The mission, named 'United Nations Assistance Mission in Rwanda' (UNAMIR), was placed under the command of Canadian General Romeo Dallaire and had strict rules of engagement, a legal detail that thwarted the mission's capabilities[243]. This legal particular played a fundamental role in the genocide, basically leaving *carte blanche* to the genocidal militias to commit atrocities in front of the eyes of the UN.
Discontent was growing among the Hutu extremists following the Arusha Accords, and the newly created *Radio Television Libre de Milles Collines* (RTLM) started to spread strong criticisms towards Habyarimana, whereas young militants organized in armed groups, namely the *Interahamwe* and the *Impuzamugambi*, under the auspices of Colonel Théoneste Bagosora, considered the architect of the Rwandan genocide[244]. On 6 April 1994, the presidential plane transporting Habyarimana was shot down by unknowns over Kigali's airport, causing the killing of the Rwandan president. Different theories have been advanced on the perpetrators of the attack, but even though many argue that the plane was shot down by Hutu extremists sabotaging the Arusha peace process, no guilty party has yet been found[245]. Immediately after the killing of the president, RTLM started to spread information reporting the assassination as a plot by Hutu moderates and Tutsis. The radio urged to get rid of all the Hutu moderates and the Rwandan Tutsis, through killings. The *Interahamwe* and *Impuzamugambi*, set up roadblocks, asking for identity cards, a heritage of the country's colonial past, and thus detecting Tutsis to be killed[246]. RTLM, Hutu extremist politicians, such as municipal and provincial governors, openly incited the population to commit crimes consisting of rape and killing against the Tutsi, and distributed machetes and

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[241] MAGNARELLA (2014: 34).
[242] GOUREVITCH (1998: 99).
[243] DALLAIRE (2003).
[244] WALLIS (2019).
[245] PRUNIER (1997: 213-229).
[246] DALLAIRE (2003).

rifles. “Neighbors hacked neighbors to death in their homes, and colleagues hacked colleagues to death in their workplaces. Doctors killed their patients, and schoolteacher killed their pupils”[247].

The political leadership of the country was assumed by Colonel Bagosora, who formed a provisional government composed of Hutu extremists, since “*all* the moderate leaders were killed”[248] by the militias and the presidential guard between 6 and 7 April 1994. The bureaucracy favored the mass killings, since it possessed registers of who was Hutu or Tutsis, thus furnishing real ready-made proscription lists to the assassins. Moreover, the prefectures distributed “weapons [pistols, rifles, and machetes, the arm symbols of the Rwandan genocide], rounds of ammunition, and alcohol to the militias"[249].

Hate speech played a fundamental role in the Rwandan genocide. Both politicians and media spread hate discourses, reminding the Hutus about the past Tutsi domination and their collusion with the German and Belgian colonizers. Moreover, RTLM and *Kangura* disseminated dehumanizing discourse, portraying the Tutsis as cockroaches to be exterminated[250]. The Rwandan media industry thus accelerated the radicalization of the majority group, persuading Hutus to commit genocide[251]. Overall, it is possible to affirm that the genocide was not a spontaneous bottom-up process. Rather, it followed “instructions from the highest levels of the political, military, and administrative hierarchies [and] at the intermediate level, huge numbers of people from all occupations were involved, both directly and indirectly”[252]. The major part of the Hutu population was involved in the genocide: Hutu children slaughtered their Tutsi peers, Hutu women incited men to rape Tutsi women and then stole their jewelry, Hutu elders revealed the names of their Tutsi friends and hideouts, and often assisted in the mass killings[253]. Apart from killing, those who targeted Tutsis were not limited to slaughtering their victims. Instead, they extensively practiced torture and mutilation. Rape was used to annihilate psychologically Tutsis women, whilst Tutsis men were subjected to penis mutilation. The degree of violence escalated up to the point when even Hutu women, pregnant with Tutsi men, were hunted down and killed, to avoid the birth and the enduring of the Tutsis. Moreover, testimonies reported a clear intent of rapists to transmit HIV/AIDS to the victims[254].

The RPF, led by Paul Kagame, invaded Rwanda from its northern border with Uganda in April 1994, attempting to stop the genocide and seize power. However, the advance of the RPF did not match “the pace at which militiamen were massacring civilians”[255], and so the killings continued until July when the Tutsi militants fully repelled the Hutu extremists from Rwanda.

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[247] Gourevitch (1998: 114-115).
[248] Scaglione (2018: 84, emphasis added).
[249] Scaglione (2018: 95).
[250] Des Forges (1999).
[251] Sterio, Scharf (2019: 114).
[252] Africa Rights (1995: 1-2).
[253] Scaglione (2018).
[254] Aginam (2012).
[255] Vassal-Adams (1994: 37).

Zaire, Tanzania, and Burundi were invaded by Hutus, and the extremists attempted to reorganize themselves and recruit Hutu refugees to launch new attacks in Rwanda. The RPF and the Hutu moderates formed a coalition government on 18 July 1994, committing to implement the Arusha dispositions, particularly the one concerning power-sharing between the two ethnicities. The government abolished the ethnic classification system based on colonial identity cards and opened a venue for national reconciliation by promoting trials before traditional courts (so-called *Gacaca*), amnesties, and pardons. To conclude this subsection, it is dutiful to provide data on the impact of the genocide. Altogether, at least 800,000 Tutsi and 30,000 Hutu (11% of the Rwandan population) were killed in Rwanda in 100 days from April to July 1994[256], approximately five persons every minute. The 80% of youths had at least one relative death, whilst the 40% lost the parents. 95% of the population witnessed acts of violence, the 70% killings or tortures, the 30% rapes[257]. The women victims of rape and sexual violence were estimated to be at least 250,000, and 70% of them have contracted HIV/AIDS[258]. Finally, the children born as a result of rape were between 2,000 and 5,000[259].

2.2.3 International Response

As anticipated in the previous section, the SC adopted Resolution 872 on 5 October 1993, deploying the UNAMIR to assist and monitor the Hutu government and the RPF in implementing the Arusha Accords, as well as support the transition government supposed to be created[260]. Moreover, the UNAMIR was entrusted to investigate and report ethnic violence perpetrated by the Rwandan security forces and militias. The UNAMIR's peacekeepers, from Bangladesh, Belgium, Ghana, and Tunisia, were strongly limited in the exercise of armed force: troops could open fire only in self-defense and did not have the authority to stop violence against civilians[261]. Overall, the mission was underfunded and lacked enough military and civilian personnel. The strict rules of engagement and the absence of adequate financial and human means to implement them stemmed from the timing of UNAMIR's approval. Two days before the SC debated on UNAMIR, 18 US soldiers were killed in Mogadishu by local militias during operation 'Gothic Serpent'. Such military action was part of the wider United Nations Operation in Somalia II (UNOSOM II), a peace-enforcement operation in which troops had the power to forcibly disarm militias. The death of US soldiers led President Clinton and the US Department of State to press the SC to limit UNAMIR's troops to no more than 500 troops, explicitly non-American[262].

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256 PRUNIER (1997: 265).
257 SCAGLIONE (2018: 126).
258 LANDESMAN (2002).
259 THE INTERNATIONAL PANEL (2000).
260 Resolution of the United Nations Security Council, 5 October 1993, S/RES/872, *Rwanda*.
261 DALLAIRE (2003).
262 SCAGLIONE (2018).

In January 1994, when General Dallaire received information about genocide plans and a weapons depot in Kigali, he requested the permit to intervene, but the UN did not authorize UNAMIR to act[263]. The reason was the mentioned lack of power to coercively exercise armed force. Between January and April 1994, the UNAMIR was unable to take concrete actions to stop the growing hate propaganda and violence against the Tutsis. On 5 April 1994, one day before the beginning of the mass killings, the SC discussed UN Secretary-General Boutros Ghali's request to renovate the mandate of the mission. The US argued that continuing "to keep blue helmets was just a waste of time and resources"[264]. Meanwhile, the Central Intelligence Agency advised President Clinton that a possible scenario for Rwanda was the killing of a million people[265].

After the shooting down of Habyarimana's plane on 6 April 1994, massacres in the streets were witnessed by UNAMIR soldiers. The Rwandan moderate prime minister Madame Agathe Uwiligiyimana managed to call the population to immediately stop the massacres, and General Dallaire decided to assign her an escort composed of Ghanaians and Belgian peacekeepers. However, the extremist presidential guard took control of the state radio and prevented the prime minister from giving her speech. Later, on 7 April 1994 afternoon, the Hutu extremists assassinated Madame Agathe and ten Belgian soldiers[266]. The killing of Belgian troops subsequently convinced Brussels to withdraw its peacekeepers from Rwanda and to adopt an obstructionist position in the SC. Between 9 and 12 April 1994, Belgian and French troops entered Rwanda to evacuate their nationals. The UNAMIR was ordered to assist in the extraction of foreigners, namely non-Africans, and to completely abstain from any coercive action to stop the massacres[267]. The evacuation operations were successfully completed, whilst thousands of Rwandans, even husbands and wives of Europeans and Americans, were left in Kigali. It should be noted that the unilateral interventions of European states, namely France, Belgium, and Italy, implied the damage of UNAMIR facilities at the Kigali airport, with reports of infrastructures and vehicles vandalized[268]. Overall, in "the three days in which 4,000 Europeans and Americans left Rwanda, approximately 20,000 Rwandans were killed"[269].

Meanwhile, political positions in the SC increasingly converged towards a mass withdrawal of UNAMIR troops from Rwanda. Particularly, the UK and US ambassadors supported a strong reduction of the peacekeepers, but not a full withdrawal, since this latter "would have caused serious image damage to the UN"[270]. Influenced by the Belgian pressures to terminate the mandate of the mission, on 21 April 1994 the SC adopted Resolution 912, withdrawing the major part of UNAMIR troops and leaving only 454 'blue helmets'

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263 DALLAIRE (2003).
264 SCAGLIONE (2018: 78).
265 GRAYHILL (2002).
266 DALLAIRE (2003).
267 THE INTERNATIONAL PANEL (2000).
268 DALLAIRE (2003: 316-318).
269 SCAGLIONE (2018: 93).
270 MELVERN (2009: 173).

in Rwanda[271]. In the following days, General Dallaire struggled with his troops to shelter Rwandans in hotels, churches, and stadiums, at the same time attempting to capture the attention of the international community by inviting non-governmental organizations (NGOs) and journalists to report the massacres, setting up a full-scale "media campaign"[272]. The 'weaponization' of the media led to the first result when, on 24 April 1994, the NGO Oxfam became "the first organization to use the term 'genocide' to describe what was happening in Rwanda"[273]. However, the SC still refused to label 'genocide' the situation in the country. On 30 April, the SC adopted a draft resolution, stating that "the systematic killing of an ethnic group, with the intent to destroy it in whole or in part, constitutes a *crime punishable under international law*"[274]. The term 'genocide' was purposely avoided due to the pressures of the UK delegation, which argued that using such a label without intervening would have ridiculed the SC[275]. Similarly, the US, Chinese, and Rwandan[276] delegations explained the mass killing of civilians as "a consequence of the civil war"[277]. The first head of state to use the word 'genocide' was Pope John Paul II on 3 May 1994, when he strongly condemned the attempt to eliminate the Tutsis[278]. The following day, the international community recognized the ongoing perpetration of genocide in Rwanda, through the words of the UN Secretary-General Boutros-Ghali interviewed on the American television channel Abc[279].

The international attention on the slaughters in Rwanda finally led the UN to expand the mandate of the UNAMIR on 17 May 1994, with the approval of Resolution 918[280]. The resolution increased the number of peacekeepers to 5,500, invited the UN member states to provide logistics to the mission, and established the necessary rules of engagement to establish "humanitarian areas […] and support the distribution of relief supplies and humanitarian relief operations"[281]. Moreover, the SC imposed an arms embargo on the Rwandan government and the RPF[282], circumvented by Colonel Bagosora through a "triangulation with Zaire"[283]. Notwithstanding the progress in evolving the UNAMIR to a peace-enforcement UNAMIR-II, the mission

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271 Resolution of the United Nations Security Council, 21 April 1994, S/RES/912, *Adjustment of the mandate of the UN Assistance Mission for Rwanda due to the current situation in Rwanda and settlement of the Rwandan conflict*.

272 DALLAIRE (2003: 332).

273 DALLAIRE (2003: 333).

274 BARNETT (2002: 20, emphasis added).

275 SCAGLIONE (2018).

276 At the time the Rwandan ambassador was Jean-Damascène Bizimana, a supporter of the Hutu extremists accused by General Dallaire of passing information of the SC discussions to the Rwandan government led by Colonel Bagosora.

277 SCAGLIONE (2018: 110).

278 THE INTERNATIONAL PANEL (2000).

279 BARNETT (1996).

280 Resolution of the United Nations Security Council, 17 May 1994, S/RES/918, *The expansion of the mandate of the UN Assistance Mission for Rwanda and imposition of an arms embargo on Rwanda*.

281 S/RES/918, para. 3.

282 S/RES/918, para. 13.

283 SCAGLIONE (2018: 119).

would not be deployed until late August, when the genocide would already be concluded. In the meantime, France proposed a unilateral deployment of French peacekeepers in Rwanda. The mission, named *Opération Turquóise*, was authorized by the SC on 22 June 1994 with Resolution 929[284], authorizing 2,500 French troops to impose peace coercively under Chapter VII of the Charter of the United Nations, thus rendering it a peace-enforcement operation. Although it is not possible to debate here the political impartiality of the *Opération Turquóise*[285], the French mission was contested by the RPF and Dallaire, whilst the Hutu extremists warmly welcomed it. RTLM propagandized the operation as a reinforcement, stating that "the true friends [the French] are rare, adversity brought them together"[286], whereas "*Viva* François Mitterand, *viva* the French-Rwandan cooperation, *viva* the French and the Rwandan military"[287] was printed on flyers distributed in the Butare Prefecture. The troops rapidly established a buffer area in southwestern Rwanda, known as *Zone Turquóise*, a haven for civilians, both Tutsis and Hutus. On the other hand, the protected area served as a safe passage for Hutu extremists to flee into neighboring Zaire and avoid arrests. Although it remains uncertain if the *Opération Turquóise* "saved ten thousand lives"[288], the French intervention indirectly allowed the Rwandan army and the genocidal militias to "avoid clashing with the RPF and to flee into refugee camps"[289]. It would only be when Paul Kagame declared the end of the civil war on 18 July, that the UNAMIR started to receive the needed material to properly provide security and humanitarian assistance to civilians.

Whilst the SC was discussing the expansion of UNAMIR in May 1994, the UN Commission on Human Rights appointed a special rapporteur and a commission of experts to investigate the crimes committed in Rwanda[290]. In October, the commission and the special rapporteur produced a detailed report highlighting the commission of "serious breaches of international humanitarian law, […] crimes against humanity, […] and acts of genocide"[291]. It should be noted that the commission attributed responsibility for crimes against humanity both to the former Rwandan government and the RPF[292]. In its final recommendations, the report suggested prosecuting the said crimes "before an independent and impartial international criminal tribunal"[293],

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[284] Resolution of the United Nations Security Council, 22 June 1994, S/RES/929, *Establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded UN Assistance Mission for Rwanda.*

[285] For a detailed analysis of the French-Rwandan relations, and the French role in the Rwandan genocide, see RESEARCH COMMISSION ON THE FRENCH ARCHIVES RELATED TO RWANDA AND THE TUTSI GENOCIDE (2021), *France, Rwanda and the Tutsi Genocide (1990-1994)*, Paris; DALLAIRE (2003: 421-461).

[286] HUMAN RIGHTS WATCH (1999: 625).

[287] HUMAN RIGHTS WATCH (1999: 625).

[288] POWER (2004: 380).

[289] SCAGLIONE (2018: 123).

[290] HUMAN RIGHTS WATCH (1999: 737).

[291] Report of the United Nations Secretary-General, 4 October 1994, S/1994/1125, *Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council*, pp. 1-2.

[292] S/1994/1125, Annex, p. 9, 11, 15, 18, 19.

[293] S/1994/1125, Annex, p. 31.

established on the model of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[294]. Embracing such a recommendation, the SC established the ad hoc International Criminal Tribunal for Rwanda (ICTR) in November 1994, whose statute and functioning will be presented in the next paragraph.

2.2 The Role and Functioning of the ICTR

As anticipated above, after having failed to prevent and even interrupt the Rwandan genocide, the response of the international community to the mass atrocities committed was the establishment of an ad hoc international criminal tribunal, the ICTR. Having established another ad hoc tribunal in May 1993, the ICTY, the SC felt confident in being able to replicate the scheme for Rwanda with the ICTR. Thus, in less than two years, two ad hoc tribunals have been established by the SC to apply international criminal law and punish those responsible for the crimes committed in the territory of the former Yugoslavia and Rwanda. The creation of the ICTY and the ICTR thus offered the chance to finally deal with the crimes considered the most serious, particularly genocide. The prosecution of genocide, crimes against humanity, and war crimes required detailed drafting of the ICTR Statute, to avoid ambiguities and incongruences during the trials. The scope of this paragraph is to provide a brief description and analysis of such a Statute, highlighting innovations and criticalities.
The discussion is structured as follows. First, the establishment and mandate of the ICTR are introduced, stressing the prioritization of the punishment of genocide over crimes against humanity and war crimes. Second, the jurisdiction and main features of the tribunal. Beginning with the examination of the *ratione temporis, loci, materiae*, and *personae*, it is shown that the definition of crimes against humanity provided by the ICTR Statute is both innovative and problematic. Subsequently, considerations are made on individual responsibility, the superior-subordinate relationship, and the concurrent jurisdiction of the ICTR with national courts.

2.2.1 ICTR: Establishment and Mandate

Following the increasing reports on the facts that happened in Rwanda in 1994 received by the UN Secretary-General, the SC decided to respond to such serious violations of international humanitarian law by prosecution, i.e. through an ad hoc criminal tribunal. On 8 November 1994, the SC adopted Resolution 955[295], establishing the ICTR. The legal basis to establish such an ad hoc tribunal is found in chapter VII of the UN Charter. First, according to article 39 of the UN Charter, the SC has to detect any threat to or breach of

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[294] The ICTY was established by the SC in May 1993 to investigate the most serious crimes committed on the territory of the former Yugoslavia. The establishment and jurisprudence of the ICTR will be briefly reviewed in subsection 3.3.1 of this thesis.
[295] Resolution of the United Nations Security Council, 8 November 1994, S/RES/955, *Establishment of the International Criminal Tribunal for Rwanda (ICTR) and adoption of the Statute of the Tribunal*.

the peace, and subsequently "decide what measures shall be taken […] to maintain or restore international peace and security"[296]. The breach of the peace has been largely determined by the UNAMIR and subsequent reports of the above-mentioned commission of experts for Rwanda, thus empowering the SC to decide how to restore international peace. Interestingly, even if contextualized in an internal conflict, the Rwandan genocide was intended as a breach of international peace[297], due to the criminal offenses committed, i.e. mass atrocities crimes, that constituted an offense against the international community as a whole. Second, the SC acted under article 41 of the UN Charter, allowing the adoption of "measures not involving the use of armed force"[298] to restore peace. In this sense, the creation of the ICTR has to be intended to restore international peace and security through justice[299].
The SC wanted to stress the importance given to the will of prosecuting the crime of genocide when elucidating the ICTR's mandate. It was clear, in November 1994, that different mass atrocities crimes, not only genocide but also crimes against humanity and war crimes, had been committed in Rwanda. However, the SC decided to clarify the priority to prosecute acts of genocide in the wording of Resolution 955. Indeed, the mandate of the ICTR was indicated as "prosecuting persons responsible for *genocide* and *other* serious violations of international humanitarian law"[300]. The explicit mention of genocide and the implicit categorization of crimes against humanity and war crimes as other serious criminal offenses appeared to create a hierarchy of relevance between the crimes to be prosecuted, with genocide at its apex. It appears thus that the ICTR received a certain degree of political influence due to the wording of its mandate, implicitly requiring it to prioritize the prosecution of genocide. Since, as illustrated in the previous chapter of this thesis, no explicit jurisprudence on genocide has ever been made, the SC subtended that the ICTR had to be the first tribunal to deal with the CPPCG's notion of genocide and produce landmark precedents on that.
Resolution 955 represented the SC's full awareness of the criminal events that occurred in Rwanda in 1994. The elevation of an internal conflict to a breach of international peace and security due to the nature of the crimes committed highlighted the gravity of these latter, and the necessity of the international community to ensure adequate punishment.

2.2.2 ICTR: Jurisdiction and Procedures

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296 *Charter of the United Nations*, 26 June 1945, XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308, and 892 UNTS 119 Charter, art. 39. Hereinafter UN Charter.
297 S/RES/955, p. 1.
298 UN Charter, art. 41.
299 The legitimacy of the creation of an ad hoc criminal tribunal by the SC was ascertained by the ICTY in 1995. See Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, 2 October 1995, IT-94-1-T, *Prosecutor v. Dusko Tadić a/k/a "DULE"*, paras. 28-40.
300 S/RES/955, para. 1, emphasis added.

The ICTR Statute was contained as an annex in Resolution 955[301]. Composed of 32 articles, the Statute established the jurisdiction, composition, and procedures for the functioning of the ICTR.
The *ratione temporis* of the tribunal covered the period between 1 January and 31 December 1994[302]. The territorial jurisdiction, *ratione loci*, includes the Rwandan land surface and airspace, as well as the territory of the neighboring state if the crimes were committed by Rwandan citizens[303].
The *ratione materiae* of the tribunal concerned genocide, crimes against humanity, and war crimes, there defined as "violations of article 3 common to the Geneva Conventions and of Additional Protocol II"[304]. The definition of the crime of genocide and the single offenses classified as acts of genocide are identical to the one provided by the CPPCG's articles II and III[305]. Thus, the ICTR Statute was not innovative in defining genocide, completely adhering to the UN notion of genocide, and protecting national, ethnic, religious, and racial groups.
The first important change brought by the Statute is its definition of crimes against humanity. These latter are first contextualized as "part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*"[306]. In comparison with the definition of crimes against humanity provided by the IMT Charter[307], the ICTR Statute added the specific intent behind the crimes, i.e. targeting civilians for national, political, ethnic, racial, or religious motives. Conversely, the IMT Charter only included political, racial, or religious grounds for acts of persecution, still falling under the category of crimes against humanity. However, it is worth noting that even if *de jure* the wording of crimes against humanity of the ICTR Statute differed from the one of the IMT Charter, *de facto* the wide range of protection of civilians is identical since the political group is a category that can extensively be interpreted to expand its protection. Given the specific discriminant (the grounds) for crimes against humanity, the differentiation between these latter and genocide became far more complicated. Indeed, both criminal offenses now, to be categorized as such, are required to target specific groups. More in-depth, such a requirement is implicit for crimes against humanity. Since the ICTR Statute definition of crimes against humanity indicates the criteria, or motivational grounds, for the selection of the targeted group (national, political, ethnic, racial, and religious), it is consequential that the victims belong to such specific groups. The only remaining discriminant to distinguish crimes against humanity and genocide see-

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[301] *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, S/RES/955, (as last amended by the Resolution of the UN Security Council, 13 October 2006, S/RES/1717, *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouri*). Hereinafter ICTR Statute.
[302] ICTR Statute, art. VII.
[303] *Ibidem*.
[304] ICTR Statute, art. IV.
[305] ICTR Statute, art. II.
[306] ICTR Statute, art. III, emphasis added.
[307] IMT Charter, art. VI (c).

med to be the specific intent, the *mens rea*, of the offenders. Even if part of a widespread and systematic attack, crimes against humanity are not necessarily directed towards the extermination of their victims. Conversely, the precise intent of genocide to destroy the targeted group is its fundamental characteristic. Under the ICTR Statute, the following acts were categorized as crimes against humanity: "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds [and] other inhumane acts"[308]. The importance of the *mens rea* to ascribing acts as genocide or crimes against humanity anticipates and somehow eases the comprehension of the jurisprudence of the ICTR, specifically concerning the unprecedented categorization of acts traditionally falling under the category of crimes against humanity as acts of genocide, such as rape and sexual violence.

As clarified previously, there is no precise notion of war crimes in international law, and these latter as usually defined as breaches of international humanitarian law[309]. The ICTR Statute thus named war crimes as violations of the 1949 Geneva Conventions and its Additional Protocol of 1977. The characteristic of war crimes is to be executed in the context of an international or internal conflict, against members of the armed forces and civilians. A problem arises since the *ratione temporis* of the ICTR includes all the acts committed in 1994, not specifying if, in this temporal window, certain periods can be classified as conflict or not. Therefore, theoretically, all acts could be ascribed as war crimes, and the remaining element in guiding the judges of the ICTR to distinguish such crimes is the nature of the targets, i.e. the belonging of the victims to specific groups. For example, torture and rape are listed as both crimes against humanity and war crimes[310] by the ICTR Statute. If such acts were motivated by national, political, ethnic, racial, or religious grounds, they constituted crimes against humanity. Conversely, if no clear intent to carry out such crimes based on the said grounds was detected, they were ascribed as war crimes.

Concerning the ICTR's *ratione personae*, the tribunal had jurisdiction over all natural persons[311], regardless of their status as heads of state, government, or government officials, and even private Rwandan citizens[312]. The Statute explicitly noted that a person charged with criminal offenses under the tribunal's jurisdiction "[should have been] individually responsible for the crime"[313]. As regards the superior-subordinate relationship, the Statute pointed out that

> "[t]he fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate *does not relieve* his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to

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[308] ICTR Statute, art. III.
[309] See *supra* subparagraph 1.5.2.
[310] ICTR Statute, art. IV (a), (e).
[311] ICTR Statute, art. V.
[312] ICTR Statute, art. VI (2).
[313] ICTR Statute, art. VI (1).

> take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"[314].

This passage identified two possibilities to ascribe the responsibility of acts committed by a subordinate to its superior. First, if the superior could have expected the commission of wrongful acts by his or her subordinate, the superior was considered responsible. Second, if the superior tolerated the execution of criminal offenses or did not prevent their commission by his or her subordinate, the superior was considered responsible. Since the Rwandan genocide, as shown in the precedent paragraph, was largely based on the execution of a genocidal plan through the complicity of the bureaucracy and the armed forces, it is relevant that the ICTR Statute clarified how to deal with the so-called command responsibility. Finally, mitigations in the punishment were contemplated if a person was found to have committed a crime to fulfil an order imparted by a superior[315].

The Statute recognized the concurrent jurisdiction of the ICTR and national courts for the crimes committed in Rwanda and by Rwandans in neighboring territories during 1994[316]. It should be noted that the recognition of the authority of national courts (apart from Rwandan tribunals, which automatically have jurisdiction since the crimes were committed in Rwanda) to prosecute such offenses fully embodies the concept of universal jurisdiction for the most serious crimes, particularly genocide. Thus, the ICTR Statute implicitly recognized the existence of an international customary law allowing all the members of the international community to prosecute at least the crime of genocide, i.e. what this thesis has demonstrated in the previous chapter[317]. However, the ICTR Statute empowers the ad hoc tribunal to enjoy primacy over national courts to prosecute the crimes under its jurisdiction[318]. Due to the salience of the crimes and perhaps to stimulate the production of international criminal jurisprudence on genocide, the SC preferred to provide an international framework for the prosecutions. The *ne bis in idem* principle is guaranteed by the ICTR Statute, preventing individuals already sentenced by the ICTR from being prosecuted before national courts for the same crimes[319]. If a person was already sentenced by a national court, but this latter was found to have characterized the crime "as ordinary"[320] or the trials "were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted"[321], the ICTR had the authority to prosecute such individual.

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[314] ICTR Statute, art. VI (3), emphasis added.
[315] ICTR Statute, art. VI (4).
[316] ICTR Statute, art. VIII (1).
[317] See *supra* subparagraph 1.4.1.
[318] ICTR Statute, art. VIII (2).
[319] ICTR Statute, art. IX (1).
[320] ICTR Statute, art. IX (2) (a).
[321] ICTR Statute, art. IX (2) (b).

2.3 The Notion of Genocide in the Jurisprudence of the Ad-Hoc Tribunal for Rwanda: Methodology of Analysis

The following paragraphs, representing the core of this thesis, adopt a precise methodology to scrutinize and analyze the ICTR's jurisprudence concerning the notion of genocide and genocide-related criminal offenses. A methodology is necessary to navigate through the immense load of case law produced by the ICTR and the UN Residual Mechanism for International Criminal Tribunals (RMICT)[322], consisting of 93 individuals indicted, of whom 61 were sentenced[323].

To provide an adequate understanding of the points of departure for the legal reasoning of the ICTR's judges, the existing legal frameworks for each theme as of 1994 are first reviewed, often stressing the lack of precise norms on genocidal acts. Subsequently, the paragraphs investigate the presence of jurisdictional precedents on the themes, to evaluate the degree of the challenge for the ICTR to grasp and evolve notions of genocide and related criminal offenses. As it will be shown, the post-Second World War trials at Nuremberg and Tokyo are the most frequently examined. Getting *in medias res*, the analysis of the ICTR's jurisprudence is organized in chronological order, detecting the first case law on each theme and then scrutinizing further trials. The choice to organize the analysis of the cases chronologically is functional to detect the evolution of the ICTR's jurisprudence within the tribunal's trial and appeal chambers and understand if continuity is maintained, if evolution of the jurisprudence occurred, or if certain judgments were overruled. By taking as a reference the above-mentioned review of the existing legal framework and precedents, the analysis of the ICTR jurisprudence will clarify the ad hoc tribunal's contribution to the development of international criminal law on genocide.

For the purpose of analyzing the contributions of the ICTR to the notion of genocide, this thesis has selected four core themes extracted from the ad hoc tribunal's jurisprudence. It is necessary to premise that the ICTR's jurisprudence has been considered as a reference in international criminal law not only for its genocide-related trials but also for other themes, e.g. the doctrine of command responsibility, the doctrine of joint criminal enterprise and the defense of duress to killing innocents. However, this script had to be selective, excluding the thematics not closely related to the notion of genocide and genocide-related criminal offenses.

As a first theme, it is necessary to clarify how the ICTR re-defined the CPPCG's notion of genocide, shifting from an objective to a subjective interpretation of the four protected groups. The subjective interpretation was fundamental to allow the recognition of the commission of genocide in Rwanda, including the Tutsi in the category of ethnic groups. Second, when ascertaining the responsibility of the defendants, the ICTR had to detect not only the

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[322] Since the ICTR's closure on 31 December 2015, the UN Residual Mechanism for Criminal International Tribunals has performed several essential functions previously carried out by the ICTR and the ICTY. See Resolution of the United Nations Security Council, 22 December 2010, S/RES/1966, *International Criminal Tribunal for the former Yugoslavia (ICTY)*.

[323] UNITED NATIONS (2021).

actus reus element, a relatively smooth procedure since pieces of evidence of the atrocities were largely available, but also the *mens rea* requirement. Detecting a precise genocidal *mens rea* was crucial to categorize certain conducts as acts of genocide rather than crimes against humanity or war crimes, and the ICTR did so by resorting to an inferential approach. Of note, the presentation of the ICTR's interpretation of the genocidal *mens rea* is a necessary premise to analyze the following core themes. Third, the ICTR produced landmark precedents by, for the first time in international criminal law, categorizing hate speech as incitement to commit genocide. Since hate speech was largely employed by the Hutu extremist propaganda during the Rwandan genocide, the ICTR had to adjudicate several cases where the line separating freedom of speech and hate speech, and hate speech and incitement to commit genocide, was blurred, therefore establishing a clear strategy to ascertain those differences. Fourth, and finally, rape and sexual violence, poorly criminalized in international law, were used as a weapon during the Rwandan genocide against Tutsi and moderate Hutu women, hence requiring adequate punishment by the ICTR. Lacking true precedents, the ICTR became the first international tribunal to deal with those offenses, creating definitions and even criminalizing them as acts of genocide. Overall, the following paragraphs aim to allow the reader to understand how the ICTR was able to criminalize certain conducts as acts of genocide, even in the absence of a clear legal framework and precedents.

2.4 Re-defining the Protected Groups: Objective and Subjective Interpretations and the ICTR Hybrid Approach

The ICTR was the first tribunal to directly deal with the CPPCG's definition of genocide, translated identically in the ICTR Statute as illustrated above. Before dealing with the specific *actus reus* and *mens rea* of the individuals charged with genocide, the ICTR trial chamber had to preliminarily assess if the victims of the acts of violence, i.e. the Tutsis, fell under one of the four protected groups by the CPPCG, as "the *identity* of the victims is a fundamental element of the crime of genocide"[324]. In general, there are two strategies to determine the identity of the targets of crimes, one that applies objective criteria, and the other following subjective elements, i.e. the "subjective identification […] by the victims themselves of by the perpetrators of the crime"[325] The ICTR's interpretation of the protected groups progressively shifted from an objective to a subjective approach and finally to what this thesis labels as a hybrid approach, allowing the recognition of the Tutsis as an ethnic group.
This paragraph reviews the ICTR's jurisprudence in depth and is structured as follows. First, the issue of objectively assessing the membership of individuals to specific groups is presented through two landmark cases that constituted the precedents initially influencing the ICTR. Second, it is shown how the ICTR resorted to objective criteria in attempting to categorize the

[324] VERDIRAME (2000: 588, emphasis added).
[325] VERDIRAME (2000: 588).

Tutsis as one of the four protected groups by the CPPCG, though unconvincingly. Indeed, as a third point, this paragraph illustrates how the ICTR jurisprudence slightly shifted towards the inclusion of subjective criteria in the analysis. Fourth, it is stressed that the ICTR did not completely abandon the objective approach, but rather it opted to combine it with the subjective one. Concerning this latter, remarks are made on the relationship between the victims' and the perpetrators' perspectives. Fifth, and finally, the ICTR jurisprudence on the re-definition of the protected groups is overall assessed.

2.4.1 The Objective Criteria: Landmark Precedents

Precedents exercise a certain degree of influence on judicial decisions. The issue of assessing the belonging of groups of individuals to specific categories has been already addressed in international law by the Permanent Court of International Justice (PCIJ) and the ICJ in two landmark cases that illustrated the usage of objective criteria. In 1928, the PCIJ was called to deal with the verification of the respect of a German-Polish convention protecting linguistic minorities in Upper Silesia. Setting apart the specific instances brought by Germany against Poland before the PCIJ, the court had to determine the belonging of 7,000 children to a linguistic minority. Germany supported a subjective interpretation of the linguistic minority, stemming from the "subjective expression of the intention"[326] of the victims, whereas Poland argued that identity was "a question of fact and not one of intention"[327]. The court resolved the discussion by adopting objective criteria, thus following the Polish line of interpretation and stating that

> "[T]he prohibition of verification and dispute has as its object not the substitution of a new principle for that which in the nature of things and according to the provisions of the Minorities Treaty determines membership of a racial, linguistic or religious minority, but solely the avoidance of the disadvantages—particularly great in Upper Silesia—which would arise from a verification or dispute on the part of the authorities as regards such membership. [T]he principle […] provides for a declaration with regard to *a question of fac*t *(quelle est la langue d'un élève ou enfant?)* and *not* a declaration of intention"[328].

The determinant principle allowing the attribution of an individual to a specific group, in the opinion of the PCIJ, was highly objective since it consisted of determining the language spoken by the children. Thus, material, tangible, objective criteria prevailed over subjective perceptions of the victims. However, it should be noted that the PCIJ pointed out that subjective consideration should not be completely excluded, since they could complement objective criteria when these latter are "not […] clear and beyond doubt"[329]. The ICJ dealt with the interpretation of the links of a person to a group, specifically concerning the bond of nationality between an individual and a sta-

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[326] Judgment of the Permanent Court of International Justice, 2 January 1928, P.C.I.J Rep. Series A, No.12, *Rights of Minorities in Upper Silesia (Germany v. Poland*), at para. 32.
[327] *Ibidem*.
[328] *Ibidem*, emphasis added.
[329] Judgment, *Minorities in Upper Silesia*, paras. 40-41.

te, an issue which is also present under the CPPCG, since national groups are protected. In the 1950s, Liechtenstein presented a claim against Guatemala before the ICJ on behalf of Mr. Nottebohm, assuming he was its national. Since states can act only on behalf of their citizens, the ICJ was called to verify the existence of a link of nationality between Mr. Nottebohm and Liechtenstein. According to the court's views,

> "nationality is a *legal* bond having as its basis a *social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties*. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State"[330].

The ICJ, as the PCIJ in assessing the categorization of an individual as part of a linguistic group, adopted objective criteria in defining nationality and verifying its subsistence. By merely considering the definition of nationality as a legal bond, it appears clear that nationality cannot be deduced by subjective criteria. Indeed, any individual claim about being a national of a specific state could be denied by the absence of an identity card or a passport, entailing, as the court noted, reciprocal rights and duties. On the other hand, an ambiguity can be detected, since in its wording the court listed interests and sentiments as criteria to assess nationality. Interests and sentiments, though can be proved through tangible pieces of evidence, could theoretically be displayed by an individual's declaration, i.e. subjective criteria. However, as stated above, any subjective element could have been refuted by tangible objective criteria, namely the legal bond. In sum, the ICJ determined that "the concept of nationality […] [did] not indicate a person's ethnicity or sociological nationality but that person's political or legal nationality"[331], provable objectively.

2.4.2 The ICTR Objectively Defining the Protected Groups: the Akayesu *Case*

The PCIJ and ICJ rulings exercised considerable authority and influence since initially the ICTR "was reluctant to adhere to the subjective positions, not least because of the existence of the [said] precedents"[332]. In 1998, the ICTR became the first tribunal to convict an individual, Jean-Paul Akayesu, for the crime of genocide. Akayesu was the *bourgmestre*, i.e. the political authority, of the Taba commune. After having received instruction from senior officials of the Rwandan extremist government, Akayesu not only avoided any prevention of the murder of Tutsis in Taba, but rather he was aware of the killings, having directly witnessed them, and directly "participated, supervised,

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[330] Judgment of the International Court of Justice, 6 April 1955, ICJ Reports (1955), *Nottebohm (Liechtenstein v. Guatemala)*, p. 23, emphasis added.
[331] MARCELO (2013: 14).
[332] VERDIRAME (2000: 589).

and ordered killings"[333]. Being the first to deal with the crime of genocide as defined by the CPPCG, the ICTR trial chamber found that "since the special intent to commit genocide lies in the intent to 'destroy, in whole or in part, a national, ethnical, racial or religious group, as such', it is necessary to consider a definition of the group *as such*"[334]. A definition of protected groups as such means that the victims of the crime of genocide have to be linked to a racial, ethnic, national, or religious group by adopting objective criteria. The court, in the judgment, justified the adoption of objective criteria by referring to the preliminary drafting of the CPPCG[335], stating that

> "[o]n reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only '*stable*' groups, constituted in a *permanent* fashion and membership of which is *determined by birth*, with the *exclusion* of the more '*mobile*' groups which one joins through individual *voluntary* commitment, such as political and economic groups. Therefore, a *common* criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally *not challengeable by its members*, who belong to it automatically, by birth, in a continuous and often *irremediable* manner"[336].

The criterion that unites ethnic, racial, religious, and national groups under the CPPCG's article II is immobility in the membership. Being determined at the time of birth irremediably, in the perspective of the court there was no room for considering any shifting between the groups, thus making objective criteria dominate the interpretation of the CPPCG. Inter-group mobility was not contemplated, as the voluntary commitments, i.e. subjective perceptions, were not recognized as a valid criterion to assess the membership to a group. Here, the court confirmed the PCIJ rejection of the German position in *Minorities in Upper Silesia*, supporting the idea that the membership in a group was based on the "expression of the intention"[337] of the individuals. It is worth noting that the court partially misinterpreted the *ratio* behind the exclusion of certain groups from the CPPCG. The 'mobile' groups were not excluded from the CPPCG because they presented difficulties in their detection. Instead, political reasons making some influential states vulnerable to criticism, as illustrated in the previous chapter[338], led the GA to avoid the inclusion of political and economic groups. Thus, a preliminary criticism of the court's reasoning is that it inferred that the preliminary drafting of the CPPCG excluded political and economic groups because these latter were impossible to define based on objective criteria. Likely, the court considered the *travaux préparatoires* of the CPPCG as the most authoritative source on genocide apart from the CPPCG itself to find a justification for the adoption of objective criteria.

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[333] TRAHAN (2010: 1).

[334] Judgment of the International Criminal Tribunal for Rwanda, 2 September 1998, ICTR-96-4-T, *The Prosecutor v. Jean-Paul Akayesu*, para. 510, emphasis added.

[335] *Summary Records of the meetings of the Sixth Committee of the General Assembly*, 21 September - 10 December 1948, Official Records of the General Assembly.

[336] Judgment, *Akayesu*, para. 511, emphasis added.

[337] Judgment, *Minorities in Upper Silesia*, para. 32.

[338] See *supra* paragraph 1.1; MARCELO (2013); VON SCHAAK (1997).

After having determined objectivity as the leading criterion in interpreting the CPPCG, the court had to categorize the Tutsis as one of the four protected groups. For the whole work of the ICTR, "it was of paramount importance to correctly define the Tutsis victim group"[339]. Without a proper classification of the Tutsis as one of the victim groups, it would have been impossible to prosecute the crimes committed as genocide[340]. Therefore, the ICTR trial chamber in *Akayesu* first defined each of the four protected groups, and then determined under which of them the Tutsis fell in. The court began by defining national groups, explicitly pointing out the influence of the *Nottebohm* case. Hence,

> "[b]ased on the Nottebohm decision rendered by the International Court of Justice, the Chamber holds that a *national* group is defined as a collection of people who are *perceived* to share *a legal bond based on common citizenship, coupled with reciprocity of rights and duties*"[341].

The legal bond based on citizenship, rights, and duties was an objective criterion in determining nationality. Moreover, the court specified that the targeted persons are perceived to share such a legal bond, giving some importance to subjective perceptions. However, there was no doubt that, though making a point on perception and subjectivity, it was objectivity to determine nationality. The court made nationality correspond to citizenship, not without criticism. In fact, nation and nationality have been historically associated with a group of people who shared the same sentiment of belonging to a specific territory[342], without any consideration regarding legal bonds such as citizenship. According to Lemkin, "the idea of a nation […] [is] based upon genuine traditions, genuine culture, and well-developed national psychology"[343]. The father of the notion of genocide thus intended nationality as bereft of citizenship and legal bonds between an individual and a political entity, namely a state. The Tutsis could not have been categorized as a national group. Both the Tutsi and the Hutus possessed identity cards issued by Rwanda, fulfilling the criteria to be considered as part of the same national group. Therefore, it was impossible to consider the Tutsis as a separate national group from the Hutus.

Concerning the religious group, this was defined in *Akayesu* as "one whose members share the same religion, denomination or mode of worship"[344]. Since Christianity was largely diffused in Rwanda and practiced by both Hutus and Tutsis, it was difficult to frame a Tutsi as part of a separate religious group. Despite this, it is worth highlighting that religion played a role in the mass killings of Tutsis. The Hutu propaganda "*Kangura* and RTLM journalists referred to the Tutsis as demons"[345], as enemies of the Hutu god. The fact that propaganda apart, the Tutsis objectively practiced Catholicism as

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339 LINGAAS (2015: 5).
340 LINGAAS (2015).
341 Judgment, *Akayesu*, para. 512, emphasis added.
342 WEITZ (2003).
343 LEMKIN (1944: 91).
344 Judgment, *Akayesu*, para. 515.
345 SIMONSSON (2019: 165).

the Hutus[346], made not possible the distinction between the two groups based on religion.
Racial groups were defined by the ICTR trial chamber in *Akayesu* as following a widely accepted notion. As the court noted, "[t]he *conventional* definition of racial group is based on the hereditary *physical traits* often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors"[347]. In this definition, the court suggested adopting physical appearance as the objective factor. The problem here was that genetics proved that no race can be distinguished from genes, i.e. biologically or by physical appearance[348]. However, physical appearance did play a role in Rwanda, since the Tutsis were classified as such during the colonial rule not only for being herdsmen but even for their considerable height and thin noses[349]. The court did not embrace the colonial and genocidal perpetrators' physical criteria to identify the Tutsis, not recognizing them as a separate racial group.
Finally, the court dealt with the definition of ethnic groups. This category was defined as "a group whose members share a common language or culture"[350]. The ICTR classified the Tutsis as an ethnical group, notwithstanding they share language and culture with the Hutu majority, as admitted by the trial chamber[351]. In this classification, the court took "judicial notice of the fact that in Rwanda in 1994 the Tutsi were recognized as an ethnic group"[352]. The court discovered a piece of evidence that suggested the classification of Tutsis as a separate ethnic group, based on the situation in Rwanda in 1994. The court stressed that at the roadblocks set up by the genocidal militias in Kigali, "the systematic checking of identity cards indicating the ethnic group of their holders allowed the *separation* of Hutu from Tutsi"[353]. Subsequently, it was specified that "the Tutsi were killed solely on account of having been *born* Tutsi"[354], explicitly reminding the objective criterion which conceives groups as immutable categories whose membership is determined at the time of the birth. In sum, the classification as an ethnic group, though this was characterized by a distinct language and culture, was objectively verified through the presence of identity cards distinguishing the Rwandan population into three different ethnicities, i.e. Hutu, Tutsi, and Twa[355]. The qualification of Tutsis as an ethnic, and thus protected, group was then confirmed

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346 SIMONSSON (2019).
347 Judgment, *Akayesu*, para. 514, emphasis added.
348 LINGAAS (2015). See also YUDELL (2014).
349 RÉMI (2014).
350 Judgment, *Akayesu*, para. 513.
351 Judgment, *Akayesu*, para. 170.
352 HOPKINS (2019: 34).
353 Judgment, *Akayesu*, para. 123, emphasis added.
354 Judgment, *Akayesu*, para. 124, emphasis added.
355 Judgment, *Akayesu*, para. 170.

in subsequent trials before the ICTR[356]. Particularly, it was noted by the trial chamber that

> "[t]he *Defence does not dispute* the fact that in 1994 Rwandan citizens were divided into three ethnic groups, but merely points out that such division dates back to the colonial or pre-colonial period. Consequently, the Chamber concludes that during the period referred to in the Indictment, Rwandan citizens were categorized into three ethnic groups, namely Tutsi, Hutu, and Twa"[357].

The detail that neither the defendants refused the categorization of Tutsi as a separate ethnical group from the Hutu, but simply blamed the colonial period for this division, prominently supported the ICTR recognition of Tutsi as one of the four protected groups under the CPPCG's article II.
The definition provided in *Akayesu* of the four protected categories as stable and permanent, thus objective, presented different problems. First, the said features are in open contrast with the Universal Declaration of Human Rights, which recognizes the rights of any individual to change their nationality[358] and religion[359]. Second, culture and language, determining ethnicity are not innate. By transitivity, neither ethnicity is stable and permanent, and it is thus susceptible to change. The only category that, as defined by the ICTR in *Akayesu*, can be considered stable and permanent, is race. The reference to the Universal Declaration of Human Rights is critical since it proves that international law largely considers specific groups as not stable, but instead permeable to inputs and outputs of individuals voluntarily choosing to be members of such groups. Collectivities are not indisputably determinable as natural or biological events. Rather, "collective identities, and in particular ethnicity, are by their very nature social constructs […] entirely dependent on variable and contingent perceptions"[360]. The individual, intended as the perpetrator of the crime, has to be considered the producer of the group. It is the repressor "who, according to one set of criteria […], trace a circle around certain people"[361] and construct the group victim of genocide. As the ICTR observed in 2001 in *Bagilishema*, "the *perpetrators* of genocide may characterize the targeted group in ways that *do not* fully correspond to conceptions of the group shared generally"[362]. In this judgment, the trial chamber stressed the correspondence between how the genocidal offenders depicted the vic-

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356 See Judgment of the International Criminal Tribunal for Rwanda, 18 December 2008, ICTR-98-41-T, *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, para. 2117; Judgment of the International Criminal Tribunal for Rwanda, 13 December 2006, ICTR-2001-66-I, *The Prosecutor v. Athanase Seromba*, para. 339; Judgment of the International Criminal Tribunal for Rwanda, 28 April 2005, ICTR-95-1B-T, *The Prosecutor v. Mikaeli Muhimana*, paras. 509-511.
357 Judgment of the International Criminal Tribunal for Rwanda, 17 June 2004, ICTR-2001-64-T, *The Prosecutor v. Sylvestre Gacumbitsi*, paras. 27-28.
358 Resolution of the United Nations General Assembly, 10 December 1948, A/RES/217, *Universal Declaration of Human Rights*, art. XV (2).
359 *Universal Declaration of Human Rights*, art. XVIII.
360 VERDIRAME (2000: 592).
361 MARCELO (2013: 12).
362 Judgment of the International Criminal Tribunal for Rwanda, 7 June 2001, ICTR-95-1A-T, *The Prosecutor v. Ignace Bagilishema*, para. 65, emphasis added.

tims in terms of group membership and how the same victims were generally categorized. Since what matters in prosecuting a criminal offense, apart from the *actus reus*, is the intent, i.e. the *mens rea* that is embodied by the offender's perspective, turning to a subjective approach became a necessity for the ICTR.

2.4.3 Shifting to the Subjective Criteria

Given the said problems concerning adopting objective and restrictive criteria in determining the membership of victims to the four protected groups by the CPPCG, the ICTR progressively acknowledged the issue and departed from the position adopted in *Akayesu.* The beginning of the shift from objective to subjective criteria in the determination of the protected groups was inaugurated in 1999 when the ICTR was called to prosecute Clément Kayishema and Obed Ruzindana. Kayshema was the prefect of the Kibuye prefecture and he had the authority over the *Gendarmerie Nationale.* Under the command of Kayshema, the *Gendarmerie* attacked and killed thousands of unarmed Tutsis who had sought refuge in the Biserero area, at the Catholic Church and Home St. Jean Complex in Kibuye, and the Kibuye Stadium[363]. Ruzindana was a businessman operating in the Rwandan capital city of Kigali, who "directed and took part in a series of massacres and mass killings […] in concert with Clément Kayishema"[364]. In delivering the judgment against the two defendants, the trial chamber defined an ethnic group as

> "one whose members share a common language and culture; or, a group which distinguishes itself, as such (*self-identification*); or, a group identified as such by others, including perpetrators of the crime (*identification by others*)"[365].

Two considerations are necessary. First, the trial chamber did not completely overrule the adoption of objective criteria in defining an ethnic group, exactly repeating the definition of *Akayesu* stressing the common language and culture components. Second, this passage "opened up the definition of […] the ethnic [group] to a subjective construction"[366], offering a new perspective different from the landmark precedents *Minorities in Upper Silesia* and *Nottebohm* that influenced the *Akayesu* trial chamber. The judges in *Kayishema and Ruzindana* went even further, recognizing two approaches to the subjective interpretation of protected groups, one based on the self-identification of the victims, and the other on the identification of the victims as members of a specified group by the offenders. Although introducing the possibility of resorting to subjective criteria, the judges in *Kayishema and Ruzindana* did not specify which criteria prevailed over the other, thus avoiding any hierarchy between objective and subjective approaches.

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363 TRAHAN (2010: 5).
364 TRAHAN (2010: 9).
365 Judgment of the International Criminal Tribunal for Rwanda, 21 May 1999, ICTR-95-1-T, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, para. 98, emphasis added.
366 VERDIRAME (2000: 593)

A few months after the *Kayishema and Ruzindana* judgment, the ICTR confirmed the subsistence of subjective criteria in defining national, ethnic, racial, and religious groups, and recognized its primacy over objectivity. Georges Rutaganda was the former second vice-president of the *Interahamwe* militias, who directly participated in and directed the genocidal militants to commit mass atrocities against the Tutsis. During Rutaganda's trial, the ICTR purposely and extensively furnished its perspective on defining protected groups. As the trial chamber pointed out in the judgment,

> "[t]he concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, *there are no generally and internationally accepted precise definitions thereof*. Each of these concepts must be assessed in the light of a particular, political, social, and cultural context […]. [F]or the purposes of applying the Genocide convention, membership of a group is, in essence, a subjective *rather than* an objective concept. *The victim is perceived* by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, *the victim may perceive* himself/herself as belonging to the said group"[367].

By recognizing that there are no accepted definitions of the four protected groups by the CPPCG, the court underlined that it was consistently possible to both depart from the *Akayesu* definitions and consider subjective criteria valid. The context is of fundamental importance for the *Rutaganda* court. The judges suggested the inclusion in the analysis of political, social, and cultural issues, that may help the interpretation of specific situations. The twofold nature of the subjective approach provided by *Kayishema and Ruzindana* was confirmed since it explicitly recognizes that subjectivity concerning membership might stem from both victims and perpetrators. Finally, *Rutaganda* established what could be considered a hierarchy between subjective and objective criteria, assigning the preeminence of the former over the latter. Thus, after *Rutaganda* the ICTR's judgments were finally able to adopt the perspective of the victims and the perpetrators.

Recognizing the validity of the subjective approach, however, did not exhaust the complexities of determining the membership to a group. As said, the subjective approach may stem from the victims or the perpetrators, but no preference over these two sources was clarified in *Rutaganda*. It derives that the ICTR could adopt either the victim's self-identification, the perpetrator's perspective, or a combination of the two. The jurisprudence of the ad hoc tribunal is unfortunately not clear on the issue. The interpretation adopted in *Rutaganda* has been recognized as a "two-step analysis"[368], where first the victims are considered as members of a group from the perspective of the offenders, and subsequently, their self-identification in a group is taken into account[369]. More clearly, the judges in *Bagilishema* gave preeminence to the perpetrator's perspective, specifying that "if a victim was perceived *by a perpetrator* as belonging to a protected group, the victim should be conside-

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[367] Judgment of the International Criminal Tribunal for Rwanda, 6 December 1999, ICTR-96-3-T, *The Prosecutor v. Georges Anderson Nderumbuwe Rutaganda*, para. 56, emphasis added.
[368] HOPKINS (2019: 45).
[369] CASSESE (2008: 139).

red […] as a member of the protected group"[370]. Following this interpretative line, neither objective criteria nor the subjective perspective of the victim are relevant, whereas the perception of the perpetrators is a sufficient condition to determine the membership of an individual to a group.

2.4.4 Balancing Objective and Subjective Criteria: the Hybrid Approach

A common *modus operandi* in balancing objectivity and subjectivity can be detected by a further examination of the ICTR's jurisprudence. First of all, it was clear that excluding subjective or objective criteria was not appropriate, and that a combination of the two was deemed as necessary. In *Semanza*, the trial chamber found that "the determination of a protected group is to be made on a case-by-case basis, consulting *both* objective and subjective criteria"[371]. The ICTR made implicitly a link between objectivity and subjectivity, recognizing the former as the point of departure for the latter. In *Gacumbitsi*, the judgment pointed out that "the perpetrator, just like the victim, may believe that there is an *objective* criterion for determining membership of an ethnic group on the basis of an administrative mechanism for the identification of an individual's ethnic group"[372]. Following this reasoning, it appears not possible to assess the membership to a group exclusively on subjective grounds. Each perception is related to tangible elements, such as the identity cards in Rwanda, and therefore objective criteria are always present. However, their omnipresence should not have been considered sufficient, and the judges were encouraged to evaluate the subjective point of view of the perpetrators and the victims.
The combination of the said approach reveals the existence of a hierarchy between the victims' and the perpetrators' perspectives. In *Semanza*, the court first confirmed a certain degree of uncertainty in how to manage the different criteria, affirming that "[t]he Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused's genocidal intent is to be determined by objective or subjective criteria or by some hybrid formulation"[373]. Thereafter, the judgment identified the leading element in the analysis as the "objective particulars of a given social or historical context, and […] the subjective perceptions of the perpetrators"[374]. The choice of the judges to purposely omit the perceptions of the victims is relevant since it influenced further trials. Similarly, in *Kajelijeli*, the point of the victims was not considered, as the judgment declared that, to assess membership, the evidence had to show that the victims objectively belonged group or "were believed by the perpetrator to so belong"[375]. If the trial chamber expressed its preference for the perpetrator's perspective implicitly

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[370] Judgment, *Bagilishema*, para. 65, emphasis added.
[371] Judgment of the International Criminal Tribunal for Rwanda, 15 May 2003, ICTR-97-20-T, *The Prosecutor v. Laurent Semanza*, para. 317, emphasis added.
[372] Judgment, *Gacumbitsi*, para. 254.
[373] Judgment, *Semanza*, para. 317.
[374] *Ibidem*.
[375] Judgment of the International Criminal Tribunal for Rwanda, 1 December 2003, ICTR-98-44A, *The Prosecutor v. Juvenal Kajelijeli*, para. 813.

in *Semanza* and *Kajelijeli*, it made it explicit in *Ndindabahizi*. According to the court, when the judges are called to assess if an individual has to be considered a member of a protected group, "the subjective intentions of the perpetrators are of *primary* importance"[376]. In evaluating the ICTR jurisprudence before 2006, the judges in *Muvunyi* found that "the trial chambers have tended to decide the matter on a case-by-case basis, taking into consideration both the objective and subjective particulars, including the historical context and the perpetrator's intent"[377]. Since, as illustrated above, the ICTR included the victim's perspective when describing the subjective approach, the trial chamber in *Muvunyi* could have mentioned it. However, the judges preferred only to include the perpetrator's intent as the essential element to subjectively assess the membership of a victim to a group, confirming the position expressed in *Semanza*. Thus, it can be safely assumed that the ICTR, when adopting the subjective perspective, referred "most commonly [to the one] of the perpetrator"[378]

Overall, the ICTR jurisprudence developed a peculiar strategy to verify the membership of the victims to one of the four protected groups under the CPPCG's article II, here labeled as a hybrid approach. This latter consists of a case-by-case analysis, combining both objective and subjective criteria. The objective ones represent the point of departure, as any subjective consideration has to be based on tangible grounds. When the analysis turns to subjective perspectives, progressively the ICTR jurisprudence has excluded any consideration of the victim's perceptions, i.e. the self-determination of the membership, in favor of the ones of the perpetrators. Hence, a hierarchy was not created between objectivity and subjectivity, but rather between the victims' and the perpetrators' perspectives, namely the two possibilities of dealing with the subjective approach. Only the offenders' perceptions matter in the subjective approach, probably due to the circumstance that it is evidence of the *mens rea*.

2.4.5 Assessing the ICTR's Contribution to the Interpretation of the Protected Groups under the Prohibition of Genocide

To allow the prosecution of the crime of genocide, the ICTR had to identify the Tutsis as an ethnic, racial, religious, or national group, the four protected categories under the CPPCG's article II. Without a proper categorization of the victims in one of the said groups, the criminal offense of genocide would not have subsisted, since its fundamental characteristic stands in the targeting of a specific group. Thus, adopting a correct categorization of the Tutsis was prioritized by the ICTR. Regarding the interpretation and evaluation of group membership, two landmark cases influenced the preliminary work of the ICTR, namely the cases *Minorities in Upper Silesia* and *Nottebohm*. In those cases, both the PCIJ and the ICJ adopted an objective approach to the

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376 Judgment of the International Criminal Tribunal for Rwanda, 15 July 2004, ICTR-2001-71-I, *The Prosecutor v. Emmanuel Ndindabahizi*, para. 468, emphasis added.

377 Judgment of the International Criminal Tribunal for Rwanda, 12 September 2006, ICTR-2000-55A-T, *The Prosecutor v. Tharcisse Muvunyi*, para. 484.

378 CRYER, ROBINSON, VASILIEV (2007: 173).

interpretation of the groups, stating that membership could have been assessed only by basing the analysis on tangible elements, such as the language spoken or legal bonds. In *Akayesu*, the first case in international criminal law convicting an individual for the crime of genocide, the ICTR trial chamber followed an objective approach to make the Tutsis fall into the ethnic group category. However, the approach adopted in *Akayesu* appeared not convincing, and subsequent trials shifted the line of interpretation towards subjectivity, i.e. taking into consideration the victims and the perpetrators' perspectives. Between these latter, the perpetrator subjectivity was recognized as predominant, thus making it the necessary element to carry out the subjective analysis. It should be remarked that the ICTR did not abandon the objective approach. Instead, it progressively embraced what this thesis has defined as a hybrid approach to assess group membership, consisting of a preliminary objective analysis, completed by considering the subjective perspective of the perpetrators towards the victims. Overall, the ICTR has proved its capacity to produce an evolutive jurisprudence on the issue, considerably contributing to the complementation of the CPPCG's article II definition of the crime of genocide, which merely lists the four protected groups without furnishing their definition. Therefore, the vacuum of interpretation of the groups protected by the conventional prohibition of genocide was filled by the ICTR's hybrid approach.

2.5 The ICTR *Mens Rea* Requirement to Ascertain Responsibility for Genocide

The *mens rea* is the fundamental element, together with the *actus reus*, to ascertain the responsibility of an individual for the commission of a criminal offense. The *actus reus* refers to the physical component of the crime, i.e. the wrongful action or omission. The *mens rea* represents the specific intent to commit such a wrongful act or omission. The *mens rea* is "premised upon the idea that one must possess a guilty state of mind and be aware of his or her misconduct"[379]. Generally, *mens rea* is ordinated into four hierarchical categories: acting purposely, acting knowingly, acting recklessly, and acting negligently[380]. The ICTR produced a consistent jurisprudence on the *mens rea* requirement for genocide and related crimes, providing definitions, recognizing the genocidal intent as *dolus specialis*, and adopting an innovative approach based on inference to assess the *mens rea* of the defendants.
To provide an exhaustive overview and analysis of the ICTR's contribution to the *mens rea* requirement for genocide, this paragraph is structured as follows. First, the *Akayesu* case is taken as a reference to demonstrate the *dolus specialis* feature of the crime of genocide and its distinction with the *dolus generalis*. Second, the inferential approach for *mens rea* is presented, stressing its main features. Third, the paragraph reviews the concrete application of the inferential approach in cases concerning genocide, conspiracy to commit genocide, planning of genocide, and aiding and abetting genocide.

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[379] LEGAL INFORMATION INSTITUTE (2023).
[380] LEGAL INFORMATION INSTITUTE (2023).

Fourth, the ICTR contribution to the development of the genocidal *mens rea* is assessed.

2.5.1 The Genocidal Mens Rea*:* Dolus Generalis *and* Dolus Specialis

To ascertain the responsibility of the defendants for the crime of genocide, the ICTR had to detect the existence of the *mens rea* requirement. As for the definition of the protected groups, the *Akayesu* case represents the point of departure. *In casu*, the trial chamber recognized the unique status of the crime of genocide, recognizing a peculiar feature. Indeed, the court noted that "genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*"[381]. Further, the judges clarified that the

> "[s]pecial intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the *special intent* in the crime of genocide lies in "the *intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such"[382].

The crime of genocide "is characterized by its *dolus specialis*"[383], translated as the special intent, corresponding to the specific intent to destroy the target group protected by the CPPCG. Therefore, from *Akayesu* it follows that genocide is a crime "with a double mental element"[384], composed of a *dolus generalis* and a *dolus specialis*. *Dolus generalis* should be intended as the classical notion of *mens rea*, indicating a general intent, namely willingness and awareness, to commit the *actus reus*, i.e. the offenses representing acts of genocide as listed by the CPPCG. The *dolus specialis* complements the *dolus generalis*, representing the ulterior intent, not only to commit acts configurable as acts of genocide but to commit them with the "ultimate aim of the destruction of the group"[385]. Moreover, the ICTR specified that genocidal *dolus specialis* implied a "psychological relationship between the physical result and the mental state of the perpetrator"[386]. Thus, the *dolus specialis* is something that goes beyond the simple willingness and awareness to commit a specific *actus reus*. Such a criminal act, to imply a *dolus specialis*, has to be committed in light of a wider intent, in this case, the extermination of a group. As the *Akayesu* judgment explains, the *dolus specialis* manifests when "the offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group"[387]. To exemplify, a Hutu extremist killed a Tutsi. The intent to materially cause the death of the Tutsi, a member of a protected group under the CPPCG, is *dolus generalis*, indicating the *mens rea* to commit a homicide. However, if the killer

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[381] Judgment, *Akayesu*, para. 498.
[382] *Ibidem*, emphasis added.
[383] Judgment, *Akayesu*, para. 517.
[384] AMBOS (2009: 833).
[385] AMBOS (2009: 833).
[386] Judgment, *Akayesu*, para. 518.
[387] Judgment, *Akayesu*, para. 520. See also Judgment of the International Criminal Tribunal for Rwanda, 27 January 2000, ICTR-96-13-T, *The Prosecutor v. Alfred Musema*, para. 164.

intended such a murder as part of the wider project to exterminate the group through the progressive killing of its members, that intent is the *dolus specialis*. Clearly, proving the subsistence of the *dolus generalis* is relatively easier than ascertaining the *dolus specialis*. As the court pointed out in *Akayesu*, "the offender is culpable *only* when he has committed one of the offenses charged […] [as acts of genocide] with the clear intent to destroy, in whole or in part, a particular group"[388]. It derives from this passage that the *dolus specialis* is considered essential to determine the genocidal *mens rea* of the perpetrators.

In contrast with the definition of the protected groups presented above, the jurisprudence of *Akayesu* concerning the *dolus specialis*, i.e. specific intent to destroy, remained uncontested in the ICTR. Rather, subsequent cases confirmed and reinforced the twofold composition of the *mens rea* by the *dolus generalis* and *specialis*. In *Muvunyi*, the trial chamber recognized that the *dolus specialis* frames the crime of genocide as a "unique crime"[389]. Interestingly, while prosecuting Jean de Dieu Kamuhanda, former Rwandan Minister of Higher Education and Scientific Research, the judges stated that the "*mens rea* for genocide comprises the specific intent or *dolus specialis*"[390], avoiding any mention of the *dolus generalis*. This position was confirmed in *Gacumbitsi*, whose judgment defined the *mens rea* required for genocide as "the specific intent (*dolus specialis*)"[391], thus making implicit and even superfluous determining the *dolus generalis* and considering sufficient the evidence of *dolus specialis*. However, the appeal chamber in *Nahimana, Barayagwiza, and Ngeze* intervened in clarifying the hierarchal relationship between the *dolus generalis* and the *dolus specialis*. In fact, the court remarked that "an accused can be held responsible not only for committing the offense, but also under other modes of [responsibility], and the *mens rea* will *vary* accordingly"[392]. Such a variation of the *mens rea* can be interpreted as framing the *dolus generalis* as the point of departure for the determination of the *dolus specialis*, thus recognizing the necessity of considering both. In *Seromba*, the appeal chamber confirmed this view, noting that "the mental element of the crime *also* requires that the perpetrators have acted with the specific intent to destroy a protected group as such in whole or in part"[393].

In sum, *Akayesu* sanctioned the existence of a *dolus specialis* to ascertain the *mens rea* requirement to hold an individual responsible for genocide. Further, ICTR jurisprudence confirmed this view, but in some sense conflicted regarding the value of the *dolus generalis* and *dolus specialis*. If, in some cases, the *dolus specialis* was considered sufficient to determine the genocidal *mens rea*, in other rulings the ICTR recognized it as complementary to

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388 Judgment, *Akayesu*, para. 520, emphasis added.

389 Judgment, *Muvunyi*, para. 478.

390 Judgment of the International Criminal Tribunal for Rwanda, 22 January 2004, ICTR-95-54A-T, *The Prosecutor v. Jean de Dieu Kamuhanda*, para. 622.

391 Judgment, *Gacumbitsi*, para. 250.

392 Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 28 November 2007, ICTR-99-52-A, *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor (Media Case)*, para. 523, emphasis added.

393 Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 12 March 2008, ICTR-2001-66-A, *The Prosecutor v. Athanase Seromba*, para. 175, emphasis added.

the *dolus generalis*, thus requiring the determination of the existence of the latter. Certainly, it is possible to affirm that the *dolus specialis* automatically embodies the *dolus generalis*, since at the basis the commission of a wrongful act or omission is always present. On the other hand, the presence of a *dolus generalis* referred to acts theoretically constituting acts of genocide does not automatically entail the intent to destroy, i.e. the *dolus specialis*, hence requiring additional evidence by the court.

2.5.2 Ascertaining the Genocidal Mens Rea*: the ICTR Inference Strategy*

As anticipated above, determining the mental element of the crime of genocide, particularly the *dolus specialis*, represented a challenge for the ICTR. After having affirmed the existence of a *dolus specialis* for the criminal offense of genocide, the trial chamber in *Akayesu* observed that "intent is a mental factor which is difficult, even impossible to determine […], and in the absence of a confession from the accused, his intent can be *inferred* from a certain number of presumptions of fact"[394]. Therefore, the ICTR considered the possibility of using deduction, i.e. inference, to counterbalance the absence of confessions by the defendants and be able to determine their *mens rea.* Such an inference strategy was provided by the court in *Akayesu* with different elements to take as reference to deduct the *mens rea* of the accused. Among these, the court listed

> "[…] the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others […], the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"[395].

The general context is of paramount importance since it can furnish the specific evidence to infer the *dolus specialis*. Indeed, reminding that the *dolus specialis* consists of the intent to destroy, these latter has to be intended as considering a wider, general context of extermination, i.e. a genocidal plan. Considered in isolation, a single *actus reus* cannot lead to the detection of the *dolus specialis* required by the *mens rea*. The general context thus allows the court to link between similar *actus reus*, and subsequently infer the *mens rea*. Interestingly, the inference is permitted even taking into consideration similar acts committed by others. It appears that, if the *dolus specialis* could not have been inferred from a single defendant's *actus reus*, it could have emerged by considering similar criminal offenses perpetrated by others. The scale of the atrocities committed confirmed the importance of considering the actions of the accused in the wider context, attempting to frame them as part of a large-scale attack against victims recognized as members of a specific group. Relevantly, the *Akayesu* trial chamber decided to add further elements to facilitate inference, by explicitly referring to the ICTY jurispruden-

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[394] Judgment, *Akayesu*, para. 523, emphasis added.
[395] *Ibidem*.

ce. The "general political doctrine"[396] and "speeches or projects laying the groundwork for and justifying the [genocidal] acts"[397] were admitted by the ICTR as pieces of evidence of the specific intent to commit genocide, thus expanding the inference basis of the tribunal. In *Rutaganda*, the court added that "intent […] can be inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the accused"[398], therefore recalling the relevance of a retrospective evaluation of the defendant's behavior in the context under examination. The range of evidence at the disposal of the ICTR judges to reconstruct through inference the accused's *mens rea* was enriched by the trial chamber in *Kayishema and Ruzindana*. *In casu*, the court found that "[…] the weapons employed and the extent of bodily injury, the methodical way of planning, the systematic manner of killing […] [and] the number of victims"[399] were all proofs of genocidal intent. As regards the weapons employed, apart from firearms, the machete is unanimously recognized as the weapon par excellence of the Rwandan genocide[400]. Hence, following the inferential approach, the usage of machetes, together with other elements, could be considered as evidence of the genocidal *mens rea.* Concerning bodily injuries, specific types of mutilation were extensively carried out by the genocide perpetrators, such as sexual mutilation[401] and severing of the nose[402]. If the *actus reus* consisted, e.g. in the mutilation of the reproductive organs of the victim, it could have represented a consistent proof of *mens rea* required for genocide. Of note, the methodical planning and the systematic killings reiterated the relevance of setting the *actus reus* in a wider context and finding its nexus with other wrongful acts committed by the accused or others, as anticipated in *Akayesu*. Finally, the *Kayishema and Ruzindana* judgment affirmed that "circumstantial evidence […] may provide *sufficient* evidence of intent"[403]. Thereby, this passage elevated the status of inference as a sufficient proof of *dolus specialis*, critically expanding the interpretative power of the ICTR.

Further jurisprudence of the ICTR has proved the diffused consensus among the judges towards the inferential approach. The appeal chamber in *Rutaganda* acknowledged the inference strategy to "preven[t] perpetrators from escaping convictions simply because such manifestations are absent"[404]. Inference was considered by the ICTR as a tool to counter the denial of responsibility by the offenders. In *Gacumbitsi*, the judges argued that since the

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396 Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 11 July 1996, IT-95-5-R61 and IT-95-18-R61, *Prosecutor v. Radovan Karadžić* and *Prosecutor v. Ratko Mladić*, para. 94.

397 Consideration of the Indictment, *Karadžić* and *Mladić*, para. 95.

398 Judgment, *Rutaganda*, para. 63.

399 Judgment, *Kayishema and Ruzindana*, para. 93.

400 VERWIMP (2006).

401 See BURNET (2015).

402 See KRÜGER (2010).

403 Judgment, *Kayishema and Ruzindana*, para. 93, emphasis added.

404 Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 26 May 2003, ICTR-96-3-A, *Georges Anderson Nderumbuwe Rutaganda v. The Prosecutor*, para. 525.

accused were "unlikely to testify to [their] own genocidal intent […] [this latter] must usually be inferred"[405]. Inference was sanctioned as the best alternative for the ICTR in *Muvunyi*, in the case it was not possible to "adduce direct evidence of the perpetrator's intent to commit genocide"[406].
The inference strategy allowed a wide room of maneuver for the ICTR judges to discover the *mens rea* of the accused. However, in subsequent rulings, the trial and appeal chambers considered it necessary to establish limits to inference. In *Gacumbitsi*, notwithstanding it recognized the importance of inference vis-à-vis the accused denial of liability, the appeal chamber "emphasize[d] that the inferential approach [did] not relieve the prosecution of its burden to prove […] the genocidal intent beyond reasonable doubt"[407], a position reaffirmed by the trial chamber in *Rwamakuba*[408]. Thus, the threshold to accept a *mens rea* recognized as such through inference was its evidence beyond reasonable doubt. Furthermore, the judges in *Gacumbitsi* observed that inference was "simply a different means [to prove the genocidal intent]"[409], and not the only strategy to follow. This latter passage of the *Gacumbitsi* judgment openly restricted the *Kayishema and Ruzindana*'s recognition of inference as sufficient proof of *mens rea*.
In conclusion, the ICTR judges had to resort to inference only as a second-best strategy, since direct adduction of evidence was still perceived as at least the first attempt to be tried. Despite this, the inferential approach was embraced as the dominant one by the ICTR, which enjoyed a flexible strategy allowing the inclusion of several elements as pieces of evidence of an accused's *mens rea*, and specifically, the *dolus specialis*.

2.5.3 Application of the Inferential Approach: Genocide, Conspiracy to Commit Genocide, Planning Genocide, Aiding and Abetting Genocide

This subparagraph provides the analysis of the application of the inferential approach, beginning with the landmark case *Kayshema and Ruzindana* for committing genocide, and then moving to include in the discussion the *mens rea* for conspiracy, planning, and aiding and abetting for the crime of genocide. Conspiracy, planning, and aiding and abetting have been selected among the wrongful acts under the ICTR's jurisdiction since they presented interesting features in terms of jurisprudence produced on the *mens rea* requirement.
When called to assess the accused's *mens rea*, the trial chamber in *Kayshema and Ruzindana* premised that

> "for the crime of genocide to occur, the *mens rea* must [have been] formed prior to the commission of genocidal acts. The individual acts themselves,

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405 Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 7 July 2006, ICTR-2001-64-A, *Sylvestre Gacumbitsi v. The Prosecutor*, para. 40.
406 Judgment, *Muvunyi*, para. 480.
407 Judgment (Appeal), *Gacumbitsi*, para. 41.
408 See Judgment of the International Criminal Tribunal for Rwanda, 20 September 2006, ICTR-98-44C-T, *The Prosecutor v. André Rwamakuba*, para. 37.
409 Judgment (Appeal), *Gacumbitsi*, para. 41.

> however, [did] not require premeditation; the only consideration [was] that the act should [have been] done in furtherance of the genocidal intent"[410].

Here, the court clearly distinguished between the *dolus generalis* and the *dolus specialis*. The fact that the individual acts, constituting acts of genocide, did not require premeditation *per se* highlights that the *dolus generalis* was not necessarily planned *a priori*. Conversely, it is remarked that all the wrongful acts had to be carried out coherently with the genocidal intent, i.e. the *dolus specialis*. Overall, it is possible to affirm that in this passage the court intended as the *mens rea* formed before the commission of genocidal acts the *dolus specialis*, whereas the *dolus generalis* could have emerged incidentally.

In casu, the trial chamber applied an inferential analysis to assess Kayshema's *mens rea*, specifically the *dolus specialis*, based on the accused's role, the number of victims provoked as well as the indiscriminate character of their killing, the pattern of conduct, the weapons employed, and utterances. First, the court noted that there was "a genocidal plan in place *prior to* the downing of the President's airplane in April 1994"[411]. This finding coherently confirmed the existence of a genocidal plan, implying genocidal intent, thus a *dolus specialis*, before the material beginning of the exterminations. The court went on to state that "[the] national plan was implemented at the prefecture levels"[412], and due to his role as prefect, Kayshema "disseminated information to the local officials above and below him using the established hierarchical lines of communication"[413]. Therefore, the first element proving Kayshema's *mens rea* was the role he covered in the context of a governmental-based genocidal plan. Being set in a position in the hierarchical chain of command to both receive and issue orders, Kayshema was materially able to spread from the top down the premeditated intent to destroy stemming from Rwandan top officials. Subsequently, the court inferred Kayshema's intent to destroy from the number of victims provoked in the areas under his direct responsibility, esteemed to be "about 8,000 [Tutsis][414]. Apart from a quantitative perspective, the court specified that those victims were killed "regardless of their gender or age"[415], hence inferring an intent to destroy only based on the ethnicity of the targets. The ICTR found that the mass killings in Kibuye and Biserero "were carried out in a methodical manner"[416], consisting of programmatic and repetition of actions. The specific intent of Kayshema, according to the judges, emerged since he "was instrumental in executing this pattern of killing"[417], and directly participated in some massacres. Furthermore, witnesses reported Kayshema "carrying firearms at the crime sites"[418], where it was ascertained that those types of weapons were

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410 Judgment, *Kayshema and Ruzindana*, para. 91.
411 Judgment, *Kayshema and Ruzindana*, para. 528, emphasis added.
412 *Ibidem*.
413 *Ibidem*.
414 Judgment, *Kayshema and Ruzindana*, para. 531.
415 Judgment, *Kayshema and Ruzindana*, para. 532.
416 Judgment, *Kayshema and Ruzindana*, para. 534.
417 Judgment, *Kayshema and Ruzindana*, para. 535.
418 *Ibidem*.

employed to kill Tutsis. Finally, the court reported that Kayshema and the militias under his direction, spread hate messages and "encourag[ed] the extermination of the Tutsis"[419]. Similarly to Kayshema, Ruzindana "displayed his intent to rid the area of Tutsis by his words and deeds and through his persistent pattern of conduct throughout the Biserero area"[420]. The judgment in *Kayshema and Ruzindana* shows an interesting feature of the inferential approach concerning the subsistence of the *dolus specialis*. First, the court verified the context, "the existence of a genocidal plan"[421], that can be considered as a collective *dolus specialis*. Secondly, considering additional elements such e.g. the methodology, the number of victims, and the criteria of their targeting, etc., the judges infer the individual *dolus specialis*. Therefore, the context allows the detection of the collective *dolus specialis*, whereas additional elements generate the nexus between the accused and the collective intent to destroy, furnishing proof of the individual *dolus specialis*.

The conspiracy was categorized by the ICTR Statute as an act of genocide[422] and defined by the trial chamber in *Musema* as "an *agreement* between two or more persons to commit the crime of genocide"[423]. Thus, the ICTR configured an agreement to commit the crime of genocide as the *actus reus* of conspiracy. Further, in *Musema* the *mens rea* emerging as *dolus specialis* of conspiracy was found in the "*concerted* intent to commit genocide"[424]. The term concerted was strictly linked to the *actus reus*, the agreement between two or more persons, configuring itself as a genocidal intent agreed in concert. In *Zigiranyirazo*, the conspiracy *mens rea* was the "*intent* to enter into […] an agreement [to commit genocide]"[425]. It derives that, in comparison to *Musema*, the ICTR in *Zigiranyirazo* downsized the threshold to ascertain the *mens rea* for conspiracy, considering sufficient the intent to agree to commit genocide, rather than the concerted intent stemming from the conclusion of such an agreement. In *Niyitegeka*, the trial chamber applied inference to determine the accused's *mens rea*. There, the court considered "the *organized manner* in which the attacks [against the Tutsis] were carried out […] [as signaling] the existence of an *agreement* between the Accused and others, including Kayshema and Ruzindana, to commit genocide"[426]. Thus, even if there was no direct evidence of such an agreement, e.g. in the form of transcripts of a meeting and correspondence between the accused and other perpetrators, the court was able to infer the genocidal *mens rea* from the organized pattern of the attacks.

As for planning genocide, *Semanza* defined the *actus reus* as "formulating a method of design or action, procedure, or arrangement for the accomplish-

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[419] Judgment, *Kayshema and Ruzindana*, para. 539.
[420] Judgment, *Kayshema and Ruzindana*, para. 541.
[421] VERDIRAME (1999: 588).
[422] ICTR Statute, art. II (3) (b).
[423] Judgment, *Musema*, para. 191, emphasis added.
[424] Judgment, *Musema*, para. 192, emphasis added.
[425] Judgment of the International Criminal Tribunal for Rwanda, 18 December 2008, ICTR-01-73-T, *The Prosecutor v. Protais Zigiranyirazo*, para. 389, emphasis added.
[426] Judgment of the International Criminal Tribunal for Rwanda, 16 May 2003, ICTR-96-14-T, *The Prosecutor v. Eliéner Niyitegeka*, para. 428, emphasis added.

ment of a particular crime"[427]. Thus, the formulation itself of such an arrangement to commit genocide is the *actus reus* of planning genocide. Similarly to conspiracy, the *mens rea* for planning consisted of "the *intent to plan* the commission of a crime or, at a minimum, the *awareness of substantial likelihood* that a crime will be committed in the execution of the acts or omissions *planned*"[428]. The planning *mens rea* could emerge from an intent to plan genocide, or from the accused's awareness that others could have committed genocide following the plan agreed by the accused. The *dolus specialis* was theoretically transferred from the accused to the plan, making the accused himself liable for genocide even if others committed genocidal acts in the execution of the said planning. Inference for detecting the planning *mens rea* was meticulously applied in *Gacumbitsi*. In different paragraphs of the judgment, the ICTR listed a series of actions committed by the accused in sequence.

> "On 9 April 1994, Sylvestre Gacumbitsi, as bourgmestre of Rusumo commune, convened a meeting of conseillers de secteurs and instructed them to organize meetings at the secteur level between 9 and 12 April, without the knowledge of Tutsi, and to incite Hutu to kill Tutsi. […] In the morning of 13 April 1994, at the Nyakarambi market, the Accused, using a megaphone, addressed a crowd of about one hundred people who had assembled at his request. He issued various instructions and asked the crowd not to let anyone escape. […] In the afternoon of 14 April 1994, the Accused, together with some armed communal policemen, went to the Kanyinya trading centre, where he told a group of about ten people: 'Others have already completed their work [of killing Tutsis]. Where do you stand?' […] Furthermore, the Accused met with various political and military officials, notably Colonel Rwagafirita from whom he received boxes of weapons that he had unloaded in various areas of the commune"[429].

The sequentiality of the listed actions carried out by Gacumbitsi is crucial. According to the reconstruction of the trial chamber, Gacumbitsi first met with other local officials and then engaged in a series of public meetings encouraging the killing of the Tutsis. Setting apart considerations on the encouragement and incitement to commit genocide, which will be analyzed below, those acts, carried out consequentially and methodically, together with the trafficking of weapons, suggested to the court the existence of precise planning. Therefore, the court inferred that such sequentiality was evidence of the *mens rea* requirement for planning genocide, assessing that "[those] facts [*amounted*] *to acts of preparation* for the massacres of the Tutsi in Rusumo commune"[430].

Aiding and abetting genocide were defined by the ICTR "as all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide"[431]. The *actus reus* of aiding and abetting can consist of the material aid to the execution of

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[427] Judgment, *Semanza*, para. 380.
[428] Judgment (Appeal), *Nahimana, Barayagwiza, Ngeze*, para. 479.
[429] Judgment, *Gacumbitsi*, paras. 271, 272, 275, 277.
[430] Judgment, *Gacumbitsi*, para. 278, emphasis added.
[431] Judgment, *Muvunyi*, para. 471.

the crime, or the encouragement to do so. Notably, the ICTR jurisprudence excised the two terms, considered "distinct legal concepts"[432] but simultaneously "used conjunctively"[433]. In *Ntakirutimana and Ntakirutimana*, the trial chamber defined the *mens rea* of aiding and abetting as "the accomplice's knowledge of the genocidal intent of the principal perpetrators"[434]. In *Seromba*, the appeal chamber specified that it was "not necessary to prove that the aider and abettor shared the *mens rea* of the principal"[435]. It should be noted that the responsible for aiding and abetting was not required to manifest a *dolus specialis*, but only the *dolus generalis*. Through the knowledge of the *dolus specialis*, i.e. intent to destroy, of the main genocidal perpetrators, though, the aider and abetter became liable for aiding and abetting genocide. Since the *mens rea* requirement concerning genocide includes a *dolus specialis*, as *Akayesu* sanctioned, aiding and abetting is, therefore, an exception, as it only considers a *dolus generalis* falling on the accused. However, it was required that the accused knew the subsistence of a *dolus specialis* of the main offenders. The latter observations are confirmed in the *Ndindabahizi*'s judgment, where the court pointed out that the aider and abetter "need not possess the principal's intent to commit genocide [*dolus specialis*], but must at the least [know] the principal's general [*dolus generalis*] and specific intent [*dolus specialis*]"[436].

The trial chamber in *Ntakirutimana and Ntakirutimana* was called to assess the degree of participation of the two accused in a large-scale massacre executed in and around the Mugonero Complex and the area of Biserero. First, the court found that the attack "specifically targeted the Tutsi population […], for the sole reason of their ethnicity […] [and] on the basis of an intent to destroy, in its whole, the Tutsi population at the Complex"[437]. Similarly, the court observed that in Biserero "attacks were carried out with the specific intent to destroy in whole or in part the Tutsi population […] for the sole reason of its ethnicity"[438]. Therefore, regardless of the *mens rea* of the defendants, the trial chamber found that the main perpetrators of the attacks in Mugonero and Biserero acted with an intent to destroy the Tutsis, i.e. the *dolus specialis* constituting the genocidal *mens rea*. Subsequently, the review of the evidence demonstrated that Gérard Ntakirutimana was involved in materially aiding the extremist militias by supplying ammunition and weapons, transporting them to different locations, and taking part in the killings with the "intent to destroy, in whole, the Tutsi ethnic group"[439]. In apparent

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[432] Judgment, *Muvunyi*, para. 470.

[433] Judgment of the International Criminal Tribunal for Rwanda, 13 April 2006, ICTR-00-60-T, *The Prosecutor v. Paul Bisengimana*, para. 32.

[434] Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 13 December 2004, ICTR-96-17-A, *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, para. 394.

[435] Judgment (Appeal), *Seromba*, para. 56.

[436] Judgment, *Ndindabahizi*, para. 457.

[437] Judgment of the International Criminal Tribunal for Rwanda, 21 February 2003, ICTR-96-10 & 96-17-T, *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, para. 785.

[438] Judgment, *Ntakirutimana and Ntakirutimana*, para. 826.

[439] Judgment, *Ntakirutimana and Ntakirutimana*, paras. 793, 834.

contradiction with the *mens rea* requirement set by the ICTR for aiding and abetting, the trial chamber in *Ntakirutimana and Ntakirutimana* considered it necessary to prove the accused *dolus specialis*. During the *Ntakirutimana and Ntakirutimana* appeal trial, the court observed that "it was an error to *limit* findings of responsibility for genocide to killings and harm personally inflicted, where Gérard Ntakirutimana was also charged with assisting others in committing genocide"[440]. In other words, the appeal chamber stated that it was an unnecessary exercise by the trial chamber to prove the direct involvement of the defendant in the attacks as to highlight his *dolus specialis* in aiding and abetting. The appeal chamber then found that the "reasonable *inference* from the circumstances described by the trial chamber […] [was] that Gérard Ntakirutimana had *knowledge* that his acts and conduct had a substantial effect upon the commission of genocide *by others*"[441]. Thus, the correct inference for the aiding and abetting *mens rea* was applied correctly only in *Ntakirutimana and Ntakirutimana* appeal trial. As shown, the appeal chamber did not require necessary to assess the accused *dolus specialis*. Rather, it simply inferred from Gérard Ntakirutimana's actions that he was aware of his contribution to attacks carried out by others with the intent to destroy the Tutsis, thus with *dolus specialis*. In *Zigiranyirazo*, by referring to the defendant's issuing of orders to check identity cards at roadblocks, the judges stated that "in light of the context of widespread and systematic attacks against Tutsi in Rwanda […] [Protais Zigiranyirazo] at the very least knew that those he encouraged and assisted possessed genocidal intent"[442]. Here, the court inferred from the context of diffused killings of Tutsis intercepted at roadblocks that the defendant was definitively aware that those receiving instructions to check identity cards had the intent to kill, i.e. *dolus specialis* for genocide.

The examined cases demonstrated the flexibility enjoyed by the ICTR when called to verify the subsistence of the genocidal *mens rea*. Taking into consideration elements such as the number of victims, the organized pattern of the attacks, and the weapons employed allowed the prosecution of different defendants for genocide and conspiracy to commit genocide. Inference in determining the *mens rea* for planning genocide revealed crucial, as the ICTR judges through the said approach were able to ascertain the *mens rea* from the consequentiality of actions in *Gacumbitsi*. Finally, the *mens rea* for aiding and abetting genocide showed a peculiarity, as the court did not have the burden to prove the *dolus specialis* of the accused's *mens rea*.

2.5.4 Assessing the ICTR's Contribution to the Definition and Application of the Mens Rea *Requirement for Genocide and Related Criminal Offenses*

Defining and assessing *mens rea* represented a priority for the ICTR. In *Akayesu*, the ad hoc tribunal split it into the *dolus generalis*, present in all criminal offenses, and the *dolus specialis*, representing the specific intent to destroy characterizing the crime of genocide. Differently from the *actus*

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[440] Judgment (Appeal), *Ntakirutimana and Ntakirutimana*, paras. 491-492, emphasis added.
[441] Judgment (Appeal), *Ntakirutimana and Ntakirutimana*, para. 509, emphasis added.
[442] Judgment, *Zigiranyirazo*, paras. 422, 424.

reus, detecting the *mens rea* was a difficult process for the ICTR, due to the non-cooperative behavior of the defendants and the difficulties in reconstruction of the facts by adducting evidence in each trial. Thus, the tribunal had to overcome these difficulties to allow the prosecution of the crimes under its jurisdiction and decided to do so by embracing an approach based on inference. The inferential approach empowered the ICTR to employ deduction, considering as a basis circumstantial pieces of evidence, e.g. among the most important the general context, words pronounced by and additional deeds of the defendants, the number of victims, the weapons employed, and the methodological pattern of conduct. Notwithstanding the ICTR remained constrained by attempting as a first strategy direct adduction of evidence, the ad hoc tribunal largely took advantage of using inference to detect the *mens rea*. Overall, the difficulty to prove the *dolus specialis* was counterbalanced by the flexibility of the inferential approach. Such flexibility has proved its efficiency in different cases, where the ICTR dealt with the crime of genocide, conspiracy to commit genocide, planning genocide, and aiding and abetting genocide. As for genocide itself, the ICTR adopted a two-step inferential approach. First, the existence of a collective *dolus specialis* was proved. Second, by considering circumstantial elements, the judges inferred from the collective *dolus specialis* and individual *dolus specialis*, generating the accused genocidal *mens rea*. Conspiracy to commit genocide was based on the intent to enter into an agreement to commit genocide. However, detecting clear and beyond reasonable doubt evidence of such an intent represented a hurdle for the ICTR. The challenge was overcome by considering the organized pattern of attacks as the basis to infer that such an organization was the result of a conspiracy. When dealing with charges of planning genocide, the ICTR considered the plan itself as embodying the *dolus specialis*, thus making the planners liable even if they did not directly execute the plan, but others did. Similarly to conspiracy, organization, as well as methodology in the attacks, represented clear circumstantial evidence used by the judges to infer the *mens rea* for planning genocide. Finally, aiding and abetting, scrutinized under its *mens rea* requirement, represented a unique offense related to genocide, as it did not require the *dolus specialis* of the offender. Rather, awareness of the existence of a *dolus specialis* of those receiving the support of the aider and abetter made this latter criminally responsible. In conclusion, the ICTR contributed to the definition of the *mens rea* requirement of genocide in international criminal law, sanctioning its *dolus specialis* feature and promoting its detection by adopting an interpretative approach based on inference from circumstantial evidence.

2.6 The ICTR Categorization of Hate Speech as Incitement to Genocide

The usage of language, in its written or verbal form, represented a weapon in the hands of the Hutu extremists before and during the Rwandan genocide in 1994. As the ICTR judges remarked, “if the downing of the [President Habyarimana] plane was the trigger, then [the media] were the bullets in the

gun"[443]. The newspaper *Kangura* spread Hutu propaganda daily prior to the Rwandan genocide, fueling a growing hatred of the population against the Tutsi minority. RTLM broadcasted songs, interviews, and political declarations about the need to get rid of the Tutsis. During the genocide, RTLM played a fundamental role in transmitting to the *Interahamwe* and the *Impuzamugambi* the names of the targets and the location of their houses and shelters. Moreover, the radio allowed the communication between the genocidal militias to be centralized and thus organized, guaranteeing a tragic efficiency in the mass killings. Not only the media, but even local and national politicians made use of language to incite the killing of the Tutsi minority and Hutu moderates. Overall, the weaponization of speech and its substantial contribution to the execution in Rwanda required a punishment. The ICTR was therefore called to address hate speech and incitement to genocide, in light of an international legal framework lacking precedent cases concerning the role of speech during genocides.
To exhaustively present how the ICTR dealt with the said themes and contributed to the development of international criminal law, this paragraph is structured as follows. First, the international legal framework on the freedom of speech and hate speech existing as of 1994 is reviewed. Second, Nuremberg's jurisprudence is scrutinized, stressing that the trials crystallized the idea of hate speech as persecution, i.e. a crime against humanity. Third, the *Akayesu* case, the first for incitement to commit genocide before the ICTR, is presented, analyzing the ICTR's definition of incitement and the recognition of its fundamental elements. Fourth, the application of *Akayesu*'s standards for incitement is explored, detecting its further developments. Fifth, the *Media Case* is introduced, deepening the content of its trial and appeal judgments to detect the strategy that the ICTR employed to criminalize hate speech as public and direct incitement to commit genocide. Sixth, the interesting case of song lyrics examined by the ICTR to assess the subsistence of incitement to commit genocide is reviewed. Seventh, the paragraph presents a remark on the distinction between instigation and incitement to commit genocide. Eight, and finally, the overall contribution of the ICTR to the notion of incitement to commit genocide and the criminalization of hate speech is assessed.

2.6.1 Hate Speech: an Overview of the International Legal Framework

Freedom of expression is widely recognized as one of the main characteristics of a democratic system, as such freedom is at the basis of a genuine political space based on confrontation between different opinions. Following the advent and fall of different authoritarian regimes who strongly repressed the freedom of expression to deter any form of political opposition, in 1948 the GA decided to give prominence to the right of every human being to freely express his or her own opinion. The UN Universal Declaration of Human Rights sanctioned the right to freedom of opinion and expression in

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[443] Judgment of the International Criminal Tribunal for Rwanda, 3 December 2003, ICTR-99-52-T, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Media Case),* para. 953.

article XIX, defining it as the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"[444]. In 1966, the UN International Covenant on Civil and Political Rights (ICCPR) reaffirmed the right to freedom of expression[445], but it even introduced a limitation to such right. According to the ICCPR, legal limitations to the freedom of expression were admitted "if they [were] necessary for the respect of the rights or reputations of others, and for the protection of national security or of public order, or of public health or morals"[446]. The limitations were intended to let the protection of the "public and private interests as well as [the strengthening of] equality and public order"[447] prevail over the individual right to freedom. This balance is typical of public law, according to which the public interest prevails and should not be compromised by the pursuit of the private one. Interestingly, the ICCPR prohibits certain types of discourses, defined as hate speech and consisting of "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"[448]. Thus, if the right to freedom of expression is exercised to discriminate, fuel hostility, or incite violence based on national, racial, or religious grounds, such a right has to be limited. Interestingly, the ICCPR avoided limiting the right of freedom of expression in the cases of hate speech motivated by political considerations. Stepping back to 1965, the UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD) listed the components of hate speech based on racial grounds: "dissemination of ideas based on racial superiority, the dissemination of ideas based on racial hatred, the inclement to racial discrimination and the incitement to commit acts of racially motivated violence"[449]. The usage of hate speech as incitement to commit racially motivated violence links the CERD to the CPPCG, as this latter explicitly protects racial groups and categorizes "direct and public incitement to commit genocide"[450]. Indeed, if hate speech on racial grounds is used to incite the destruction of the targeted racial group, such speech is not only prohibited by the CERD but it is also categorized as a criminal offense under the CPPCG. Furthermore, the CERD recognized that public authorities have a "special obligation to fight against and to abstain from [hate speech on racial grounds]"[451]. Overall, the UN Universal Declaration of Human Rights, the ICCPR, and the CERD furnished a comprehensive legal framework to guarantee and limit the right to freedom of expression.

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[444] *Universal Declaration of Human Rights*, art. XIX.

[445] Resolution of the United Nations General Assembly, 16 December 1966, A/RES/2200(XXI), *International Covenant on Civil and Political Rights*, art. XIX (2). Hereinafter ICCPR.

[446] ICCPR, art. XIX (3).

[447] CARLETTI (2014: 355).

[448] ICCPR, art. XX (2).

[449] Resolution of the United Nations General Assembly, 21 December 1965, A/RES/2106(XX), *International Convention on the Elimination of All Forms of Racial Discrimination*, art. IV (a). Hereinafter CERD.

[450] CPPCG, art. III (c).

[451] CERD, art. IV (c).

Three components of hate speech are recognized as fundamental, the intent, the incitement, and the prohibited results[452]. The intent consists of attempting to incite hatred, "covering also the public statement that has been pronounced"[453]. Here, the emphasis is set on the specific aim of the author to spread ideas based on discrimination against a specific target. The incitement is based on "the voluntary dissemination of ideas […] based on superiority and […] hatred"[454]. Specifically, a nexus is required between the dissemination of those ideas and the expected outcome of that incitement, i.e. raising and generating discrimination against the targets. In this regard, the context is considered fundamental, since the pronounce of specific words in a general context of discrimination may lead to further mental and physical violence against the targets. Hence, hate speech can be intended as an accelerator or driver of a wider hatred. As for the prohibited results stemming from hate speech, these are configurable as falling under a general rule in criminal law prohibiting incitement to commit a crime[455]. Overall, hate speech has a two-fold composition, standing "not only as an act but also as an opinion of an individual"[456]. This peculiarity entails a challenge for courts called to prosecute an individual charged with hate speech, as this latter is required to be different from offensive language targeting ideas. Indeed, hate speech consists of "abusive expressions targeted at human beings"[457], aimed at provoking a damaging result in a mental or physical form.
In conclusion, hate speech consists of the weaponization of words to incite others to commit a crime. Usually, the hate speech and the incited criminal offenses are motivated by ideas of superiority and discrimination based on racial, national, or religious ideas.

2.6.2 Setting the Precedent: Hate Speech as a Crime Against Humanity at Nuremberg

As anticipated in chapter I of this thesis, genocide was not a criminal offense neither under the IMT Charter nor the NMT Charter. Concerning hate speech in the context of the Nuremberg trials, it was thus considered only in relation to crimes against humanity in the form of persecution. Notwithstanding the legal limitation of considering hate speech only as a crime against humanity, the related trials constituted landmark precedents in assessing and prosecuting hate speech.
Before the IMT, the former Nazi propagandist Julius Streicher was charged with crimes against humanity for his role as a publisher of the anti-Semitic newspaper *Der Stürme.* The tribunal first remarked that Streicher had been engaged for "twenty-five years [in] speaking, writing, and preaching hatred of the Jews"[458]. Here, the IMT made an important point, clarifying that hate

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[452] FARRIOR (1996).
[453] CARLETTI (2014: 357).
[454] CARLETTI (2014: 357).
[455] CARLETTI (2014).
[456] CARLETTI (2014: 358).
[457] CARLETTI (2014: 358).
[458] Judgment, *Göring*, para. 501.

speech could take the form of written or spoken language. According to the court Streicher "incited the German people to active persecution"[459], and his *mens rea* was found in his call for the "annihilation and extermination in unequivocal terms [of the Jews]"[460]. The persecution with the final intent to exterminate the Jews was considered consequential to Streicher's propaganda activity, therefore establishing a nexus between the intent (*mens rea*) and the incitement (*actus reus*). As specified above, the context is fundamental when addressing hate speech. *In casu*, the IMT ascertained that the accused had acted through propaganda "with knowledge of the extermination of the Jews in the occupied Eastern territory"[461], i.e. Streicher exploited and fuelled the ongoing Nazi policy against the Jews through his articles and speeches. Finally, Streicher's propaganda and incitement were interpreted as a "persecution on political and racial grounds […] [constituting] a crime against humanity"[462]. In sum, despite hate speech as incitement was categorized as a crime against humanity, the IMT recognized what can be considered a clear genocidal *mens rea* behind the hate speech.

Having set a precedent in convicting an individual for hate speech under the criminal offense of persecution as a crime against humanity, the IMT proceeded to prosecute the Nazi propaganda officials. Hans Fritzsche, head of the Nazi propaganda ministry's official radio, was charged with crimes against humanity for his role in "falsifying news to arouse in the German people those passions which led them to the commission of atrocities"[463]. Although the court recognized that Fritzsche's "speeches [showed] definite anti-Semitism"[464], he was acquitted of the charges. The IMT failed to detect the intent to incite the commission of violence against the Jews. As the judgment stated, Fritzsche aimed to fuel "popular sentiment in support of Hitler and the German war effort"[465], regardless of the regime's genocidal policy. Thus, by recalling the above-mentioned criteria to consider hate speech as a crime, the court did not detect the specific intent, i.e. *mens rea* of Fritzsche to encourage Germans to exterminate Jews. The case demonstrated the relevance and the difficulty of determining the *mens rea* of individuals accused of hate speech as incitement to commit a crime.

In the *Ministries Trial*, the NMT also dealt with prosecuting hate speech as a crime against humanity. Otto Dietrich, the Reich press chief, was named by Hitler himself as responsible for the oversight of the propaganda, exercising an "ostensible control over the press so far as to what it should and should not publish"[466]. The court determined that Dietrich fostered and directed a "well thought-out, oft-repeated, persistent campaign *to arouse the hatred of*

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[459] *Ibidem*.
[460] Judgment, *Göring*, para. 502.
[461] *Ibidem*.
[462] *Ibidem*.
[463] Judgment, *Göring*, para. 526.
[464] *Ibidem*.
[465] *Ibidem*.
[466] Judgment of the Nuremberg Military Tribunals, 11 April 1949, Nuremberg Military Tribunals Case no. XI, *United States of America v. Ernst von Weizsäcker et al. (Ministries Trial)*, para. 565.

the German people against Jews"[467]. This finding underlined the specific intent of Dietrich, i.e. the *mens rea* to let hate speech be ascribed as persecution and therefore a crime against humanity. The court then pointed out that Dietrich's propaganda activities

> "[…] were not designed only to unite the German people in the war effort. Their clear and expressed *purpose was to enrage Germans against the Jews*, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial *persecution* to which Jews were to be subjected"[468].

In comparison with the IMT's acquittal of Fritzsche, the NMT in the *Ministries Trial* was able to distinguish a clear intent to encourage persecution against the Jews, rather than limiting the propaganda to spread support for the Nazi war efforts.
Overall, the IMT and NMT jurisprudence has generated a specific speech-related offense: persecution as a crime against humanity[469]. The IMT and NMT described the hate speech persecution's *mens rea* as a clear intent to promote the extermination of the Jews. As said, the Nuremberg trials were not legally able to prosecute genocide, but despite this, they furnished a *mens rea* for hate speech strictly linked to an intent to destroy. If such a *mens rea* is interpreted using the standards adopted by the ICTR in defining the specific intent of the genocide and genocide-related crimes perpetrators[470], the intent to promote the destruction of a targeted group can be assuredly interpreted as a *dolus specialis* requirement. Thus, the Nuremberg jurisprudence implicitly recognized, though referring to crimes against humanity, the *dolus specialis* of the hate speech's *mens rea*. However, such jurisprudence promoted the crystallization of the ascription of hate speech as persecution, letting the burden of its reinterpretation regarding genocide fall on the ICTR.

2.6.3 The ICTR Breaking the Jurisprudential Ice on Incitement to Genocide

The ICTR Statute, in defining individual criminal responsibility, stated that an individual shall be responsible if he or she instigated a crime under the Statute[471]. The ad hoc tribunal first dealt with incitement liability in the *Akayesu* case, which constitutes the point of departure to analyze the ICTR's development of the jurisprudence of hate speech and incitement to commit genocide.
Among the different charges, Akayesu was accused of having incited to commit genocide. The trial chamber premised that direct and public incitement or provocation is a form of complicity [to genocide][472]. The ICTR, by

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[467] Judgment, *Ministries Trial*, para. 574, emphasis added.
[468] Judgment, *Ministries Trial*, para. 575, emphasis added.
[469] GORDON (2013).
[470] See *supra* subparagraph 2.5.1.
[471] ICTR Statute, art. VI (1).
[472] Judgment, *Akayesu*, para. 553.

recalling the Rwandan Penal Code[473], defined incitement to commit genocide as

> "*directly* provoking the perpetrator(s) to commit genocide, whether through *speeches*, shouting or threats uttered in *public places or at public gatherings*, or through the sale or dissemination, offer for sale or display of written material or *printed* matter in *public places or at public gatherings*, or through the public display of placards or posters, or through any other means of *audiovisual* communication"[474].

The ICTR first clarified that incitement to genocide could be carried out either through means of speech, written material, or audiovisual communication. The court stressed the public nature of incitement to genocide, specifically referring to public places and public gatherings. A criterion was set to determine the publicity of incitement, lying in "the place where the incitement occurred"[475]. Concerning the place, this has to be considered a public place. The word public refers to the spaces that are labeled as public by their legal definition, such as squares. However, the ICTR specified that non-physical spaces that allow to reach a large audience, i.e. the ether where the radio and television broadcast, should have been considered as public spaces. Overall, for incitement to be public, this had to be carried out either in a physical public space or in the ether by means of the mass media. The publicity of incitement implicitly ruled out any form of criminal liability for incitement to genocide committed privately. The directness of provoking the perpetrators to commit genocide was analyzed by the judges, who argued that the incitement had to assume "a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement"[476]. Thus, in scrutinizing the language used by the inciter, the ICTR was called to verify is the words written or pronounced referred to committing genocide, recognizing a causal relation between incitement and the subsequent specific offenses committed. However, the directness of incitement was mitigated by the court's acknowledgment that an individual, in a specific context, could be able to implicitly incite others to commit genocide by creating "an atmosphere favorable to the perpetration of the crime"[477]. Moreover, another difficulty emerged in assessing the subsistence of a direct incitement, since "a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience[478]. In this regard, culture and language played a fundamental role. For example, as mentioned above, the Hutu extremists defined the Tutsis as *inyenzi* or *inzoka*, respectively cockroaches and snakes in Kynirwanda, the Rwandan language. The expression 'squash the cockroaches', decontextualized from Rwanda in 1994, generally can be interpreted as no more than an invite to kill an insect. However, given the said derogatory language against

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[473] *Codes et Lois du Rwanda*, 31 December 1994 Update, *Penal Code*, art. 91 (4).
[474] Judgment, *Akayesu*, para. 559, emphasis added.
[475] Judgment, *Akayesu*, para. 556.
[476] Judgment, *Akayesu*, para. 557.
[477] *Ibidem*.
[478] *Ibidem*.

the Tutsis, the Hutu propagandists employed the phrase 'squash the cockroaches' to incite the genocidal militias to kill the Tutsis. Being based on words, incitement is not always tangible and evident. After having recognized the problems in assessing its existence, the ICTR decided to verify the direct component of incitement by considering if the person incited "immediately grasped [its] implications"[479], with respect to the Rwandan culture and the specific context. Even though the passages of the *Akayesu* judgment presented seem to suggest that a clear nexus between incitement and the commission of acts of genocide exists to make an individual liable for incitement to genocide, in fact, it was not. The court observed that the subtended meaning of the CPPCG was to punish incitement to genocide, "whether or not it was successful [in leading an individual to commit acts of genocide]"[480]. Moreover, civil law was scrutinized to assess whether or not an act represented an offense *per se*, irrespective of its result. The court found that the category of *infractions formelles* that inspired the Rwandan Penal Code implied their punishment "even where they proved unsuccessful"[481]. Thus *infractions formelles* were considered by the ICTR, which nonetheless specified that they constituted an exception to the general rule that an offense "can only be punished in relation to the result envisaged by the lawmakers"[482]. The *ratio* behind that exception was that the offenses under discussion presented a "high risk they carry for society, even if they fail to produce results"[483]. The ICTR therefore considered it necessary to overcome a general rule of law to enable the court to prosecute public incitement as a crime *per se*, categorizing incitement to genocide as an *infraction formelle*, and breaking its causal nexus with subsequent commission of acts of genocide. It is worth specifying that the ICTR definition of the *mens rea* requirement for incitement to commit genocide reflects this latter's *infraction formelle* nature. The trial chamber in *Akayesu* enunciated that

> "[t]he *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to *directly* prompt or provoke another to commit genocide. It implies a *desire* on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the *specific intent* to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such"[484].

In light of the breaking of the causal nexus between incitement and the commotion of genocide by others, the directness had to be intended as a characteristic of the wording of the incitement, explicitly or implicitly (but coherent with a specific context that made the incitement nature of those words clear to offenders) calling for the commission of genocide. The intent of the

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[479] Judgment, *Akayesu*, para. 558.
[480] Judgment, *Akayesu*, para. 561.
[481] Judgment, *Akayesu*, para. 562.
[482] *Ibidem*.
[483] *Ibidem*.
[484] Judgment, *Akayesu*, para. 560, emphasis added.

genocide inciter corresponded to the specific intent to commit genocide, i.e. the *dolus specialis*. An individual responsible for incitement could be considered as willing to transfer, through written or spoken language, his or her *dolus specialis* to the audience, thus instilling a genocidal intent. Hence, the judges only needed to assess the existence of a genocidal *mens rea* of the inciter. Overall, though by definition being related to an audience, the lack of a requirement for a successful incitement and the presence of an inciter's *dolus specialis* made incitement to commit genocide an offense centered almost exclusively on the one committing the incitement.

The *Akayesu* trial chamber convicted the accused for incitement to commit genocide, explicating the legal reasoning to assess the subsistence of such a criminal offense[485]. First, it was ascertained that Akayesu was addressing an audience in a public space in Gishyeshye. Second, Akayesu urged the population to eliminate "the accomplices of the *Inkotanyi* [i.e. the RPF]"[486]. Drawing on the support of expert witnesses on linguistic matters, the ICTR concluded that "the population understood Akayesu's call as one to kill the Tutsi"[487], and that Akayesu, given the context of the ongoing mass killings in Rwanda at the time, was fully aware of the meaning and impact of his words. Then, the trial chamber found that in light of the speeches given publicly and directly, "Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such"[488]. To conclude, the court wanted to specify that such discourses led to the killing of several Tutsis in the Taba area. The ICTR strategy to ascertain an individual's liability for incitement to commit genocide is thus structured as follows. First, it was verified if the words were spread in a public space. Second, by considering cultural and linguistic criteria, it is assessed if the words were directly linked to inciting genocide, manifesting the inciter's *mens rea*, regardless of the intent expressed explicitly or implicitly. Third, it is ascertained if the audience was in the condition of fully acknowledging, implicitly or explicitly, the genocidal intent of the initiator. Fourth, and additionally, it is established a causal link between incitement and the commission of acts of genocide.

In conclusion, the trial chamber in *Akayesu* established the precedent to consider an individual responsible for inciting genocide even if no acts of genocide were committed as a direct consequence of the incitement. Hence, incitement was considered a criminal offense *per se*, regardless of its causal relations with further crimes. Publicity, directness (assessed using cultural and linguistic criteria), and the inciter *dolus specialis* were considered the three fundamental characteristics of incitement to commit genocide by the ICTR.

2.6.4 Application and Development of Akayesu*'s Standards for Incitement in the ICTR Jurisprudence*

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[485] See Judgment, *Akayesu*, paras. 673-675.
[486] Judgment, *Akayesu*, para. 673 (iii).
[487] Judgment, *Akayesu*, para. 673 (iv).
[488] Judgment, *Akayesu*, para. 674.

Two days after the *Akayesu* judgment, Jean Kambanda, the Rwandan prime minister at the time of the genocide, was charged, among other criminal offenses, with incitement to commit genocide. As part of a plea agreement between Kambanda and the ICTR prosecutor, the accused made full admission that he supported the Hutu extremist propaganda radio RTLM and "visited several prefectures […] to *incite* and *encourage* the population to commit these massacres including by *congratulating* the people who had committed these killings"[489]. Furthermore, Kambanda acknowledged that the phrase "you refuse to give your blood to your country and the dogs drink it for nothing"[490], largely broadcasted by RTLM, was directly aimed at fueling the genocide. The conviction of Kambanda for incitement to commit genocide based on the said evidence confirmed Akayesu's standards and revealed a further development of the ICTR's jurisprudence on incitement. The delivery of speeches in public spaces in several prefectures constituted the publicity requirement for incitement, whilst the directness was found in Kambanda's admission of having "directly […] [incited] the population to commit acts of violence against Tutsi and moderate Hutu"[491]. The directness was also proved to have manifested implicitly, since the reference to the blood and dogs was used as a metaphor, widely understood by the genocidal militias, to order the killing of Tutsis. Since that sentence was not formulated by Kambanda in the imperative form, i.e. as an order, the ICTR recognized that incitement was not required to be expressed through the issuing of precise orders to commit genocide[492]. Innovatively, the trial chamber in *Kambanda* considered congratulating offenders for the past commission of crimes as a form of incitement, with the effect of legitimizing such conduct and future criminal offenses. Furthermore, *Kambanda* established a nexus between supporting an inciter and incitement to commit genocide. Indeed, Kambanda's encouragement of RTLM, at a time when RTLM was inciting the commission of genocidal acts, was considered as "amounting to an independent act of incitement"[493].

In 2000, the ICTR tried the Belgian RTLM speaker Georges Ruggiu, the only European defendant. The *Ruggiu* case is relevant since the speaker largely employed euphemisms to incite RTLM's audience to commit genocide. Ruggiu referred to the Tutsis as *inyenzi*, a term that was used "in [the] sociopolitical context [of Rwanda in 1994 and] came to designate the Tutsis as 'persons to be killed'"[494]. Still, Ruggiu incited the public to "go to work"[495]. By considering the context, the court inferred that such an invitation was received by the RTLM's audience as an incitement to "go kill the Tutsis and

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[489] Judgment of the International Criminal Tribunal for Rwanda, 4 September 1998, ICTR-97-23-S, *The Prosecutor v. Jean Kambanda*, para. 39 (viii), emphasis added.

[490] Judgment, *Kambanda*, para. 39 (x). Original sentence in Kinyarwanda "Wima igihugu amaraso imbwa zikayanywera ubusa".

[491] *Ibidem*.

[492] GORDON (2019).

[493] GORDON (2019: 124).

[494] Judgment of the International Criminal Tribunal for Rwanda, 1 June 2000, ICTR-97-32-I, *The Prosecutor v. Georges Ruggiu*, para. 44 (iii).

[495] Judgment, *Ruggiu*, para. 44 (iv).

Hutu political opponents of the interim government"[496]. Finally, Ruggiu congratulated the genocidal militias via radio for their killings, implicitly intended as "ensuring the security of the Rwandan people"[497], and this conduct was considered a form of retrospective incitement to commit genocide, confirming the ICTR's position in *Kambanda*.
After having convicted Kambanda and Ruggiu for incitement to commit genocide, in 2003 the ICTR dealt with the case of Eliézer Niyitegeka, the minister of information during the Rwandan genocide. Niyitegeka was charged with incitement to commit genocide, concerning words pronounced during meetings and public rallies in Biserero and Muyira Hill. Similarly to Ruggiu, Niyitegeka employed the phrase "go to work"[498] to incite militias to kill the Tutsis, and "good work"[499] to congratulate the killers for their criminal conduct. The trial chamber determined that killings of Tutsis in the said areas were incited after Niyitegeka's speeches, thus reinforcing the charge of incitement to commit genocide with proof of a causal nexus between the accused's words and acts of genocide.
Overall, the *Kambanda*, *Ruggiu*, and *Niyitegeka* cases demonstrated that the ICTR's jurisprudence was consistent with the benchmarks set by *Akayesu* for incitement to commit genocide, particularly in confirming the usage of implicit language to incite the mass killings. Furthermore, the cases integrated the handling of the offense by recognizing that incitement did not necessarily have to be expressed in the form of orders (i.e. imperative verbs) and that congratulating was a retrospective form of incitement.

2.6.5 The Media Case*: Hate Speech as Incitement to Commit Genocide*

In the so-called *Media Case*[500], the ICTR dealt with the prosecution of Ferdinand Nahimana and Jean Bosco Barayagwiza, the founders of the Hutu extremist propaganda radio RTLM, and Hassan Ngeze, the editor-in-chief of the Hutu extremist newspaper *Kangura*. Both RTLM and *Kangura* were largely used by the extremists to call the genocidal militias to kill the Tutsis, furnishing lists of names and the location of the shelters to be raided. Specifically, RTLM was defined by the former Rwandan prime minister Kambanda as "an indispensable weapon in the fight against the enemy"[501]. Nahimana, Barayagwiza, and Ngeze were all charged with incitement to commit genocide. The trial chamber relied on *Akayesu*'s definition of incitement to commit genocide, recognizing its element of publicity, directness, and inciter's *dolus specialis*. The main challenge that the court was called to deal with was to "determine whether, in transmitting the content of the messages at issue, the relevant media outlets had engaged in the permissible exercise of free speech or in non-protected hate advocacy"[502]. In other words, the

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[496] *Ibidem*.
[497] Judgment, *Ruggiu*, para. 44 (v).
[498] Judgment, *Niyitegeka*, para. 432.
[499] Judgment, *Niyitegeka*, para. 433.
[500] See Judgment, *Media Case.*
[501] Judgment, *Kambanda*, para. 39 (vii).
[502] GORDON (2019: 125).

court was called to evaluate when hate speech became incitement to commit genocide.
The trial chamber in the *Media Case* defined hate speech as

> "a *discriminatory* form of aggression that *destroys the dignity* of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The *denigration* of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm"[503].

Hate speech is first discriminatory, i.e. written or pronounced based on discrimination, being ethnic, national, religious, etc. The objective of hate speech is to provoke moral damage, in the form of destroying the targets' dignity. The court in the definition of hate speech recognized this latter's impact on those exposed to it, being an audience susceptible to sharing the content of the hate speech or members of the targeted group who feel denigrated. In the *Media Case*, the judges clarified that hate speech fuelled by ethnic hatred in Rwanda did not necessarily represent a "call on [the audience] to take action against the Tutsi population"[504]. Subsequently, the ICTR established different criteria to classify speech targeting specific groups as legitimate or criminal advocacy: purpose, text, context, and the relationship between the speaker and subject[505]. Causation was excluded since the trial chamber in the *Media Case* followed *Akayesu*'s position on considering incitement regardless of its result[506].
The purpose criterion refers to the aim of the speech. The ICTR considered "historical research, dissemination of news and information and public accountability of government authorities"[507] examples of a legitimate usage of speech, whereas "appeals for carnage would evince a patently illegitimate purpose"[508]. The court integrated the analysis of the purpose by stressing the importance of the tone, particularly to verify if a statement was "intended to provoke rather than to educate those who receive it"[509]. Furthermore, the truthfulness of the news was intended as an indicator of the purpose. Indeed, the ICTR stressed that it was necessary to focus more on "the reality conveyed by the words rather than the words themselves"[510]. As the court reasoned, if a speaker has consciously spread fake news, e.g. about the inequitable distribution of wealth in Rwanda in favor of the Tutsis, the intent of divulging such news was "not to convey information but rather to promote unfounded resentment and inflame ethnic tensions"[511].

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[503] Judgment, *Media Case*, para. 1072, emphasis added.
[504] Judgment, *Media Case*, para. 1037.
[505] GORDON (2019); HEFTI, JONAS (2020).
[506] See Judgment, *Media Case*, para. 1015.
[507] Judgment, *Media Case*, para. 1001.
[508] GORDON (2019: 125).
[509] Judgment, *Media Case*, para. 1022.
[510] Judgment, *Media Case*, para. 1020.
[511] Judgment, *Media Case*, para. 1021.

The text criterion is strictly linked to the purpose, as it would "further assist in edifying the objective of the discourse"[512]. The ICTR referred to the *Faurisson* case[513] before the UN Human Rights Committee and the *Jersild* case[514] before the European Court of Human Rights (ECtHR), where these latter organs were called to deal with the right to freedom of expression and its limitation under the prohibition of national, racial, or religious discrimination. The ICTR noted from *Faurisson* that "actual language used in the media [was] often been cited as an indicator of intent"[515]. Thus, if a speaker reiterated a language that could be interpreted as fueling hatred against a specific group, and did not distance himself or herself from the hatred message, the language used could have confirmed the intent to spread hate speech[516]. In addition, the trial chamber in the *Media Case* clarified what had to be intended as ethnic hatred language, identifying as a fundamental characteristic its "stereotyping of ethnicity combined with its denigration"[517].
The evaluation of the context criterion was of primary importance in the work of the ICTR in the *Media Case* since it clarified the situation in which hate speech was likely to become incitement to commit genocide. By recalling the *Zana* case[518] before the ECtHR, the trial chamber noted that in light of a context of widespread violence targeting a specific group, the usage of hate speech against such a group might have escalated and encouraged further perpetration of violence. Turning to the facts under scrutiny, the judges applied the legal reasoning stemming from the *Zana* case to the propaganda of *Kangura* and RTLM noting that

> "[a] statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the *context* of a genocidal environment. It would be more likely to *lead* to violence. At the same time the environment would be an indicator that *incitement* to violence was the *intent* of the statement"[519].

Hence, the context was taken as the benchmark to evaluate the impact of the words constituting hate speech. The generalization referred to the mentioned stereotyping of ethnicity, which, in the context of genocide, had one and only one scope: provoking more violence. The provocation element, which derives from the contextualization of hate speech in a situation of genocide, was what turned hate speech itself into incitement. Accordingly, the genocidal context represented the basis to infer the speakers' *mens rea*, i.e. the intent to provoke further genocidal acts. Since virtually all the persons are exposed to

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512 GORDON (2019: 125).
513 See Communication of the United Nations Human Rights Committee, 8 November 1996, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996), *Robert Faurisson v. France*.
514 See Judgment of the European Court of Human Rights, 23 September 1994, Case no. 15890/89, *Jersild v. Denmark.*
515 Judgment, *Media Case*, para. 1001.
516 See Judgment, *Media Case*, para. 1023.
517 Judgment, *Media Case*, para. 1021.
518 See Judgment of the European Court of Human Rights, 25 November 1997, Case no. 69/1996/688/880, *Zana v. Turkey*.
519 Judgment, *Media Case*, para. 1022, emphasis added.

such a context, the audience becomes part of the context in the view of the court. The exposure to and sharing of genocidal practices by the public impacted hate speech, as this latter could be intended as an additional driver of violence, i.e. incitement. Combining the context and the audience, "the impact a statement [had] on a certain audience in a specific situation [was] another determining element for its criminalization [as incitement]"[520].

The relationship between the speaker and the subject was introduced by the ICTR as the fourth criterion to assess the criminalization of speeches. This criterion stemmed from the "importance of protecting political expression, particularly the expression of opposition views and criticism of the government"[521]. The court was called to find a balance between the freedom to express political opinions and speeches based on hatred and achieved it by analyzing the relationship between the speaker and the subject. In general, the judges held that if the speaker was part of a majority, and his or her critical speech was directed against a minority group, such speech was likely to incite the commission of criminal offenses. In this case, the analysis of the court had to be "less speech-protective"[522]. Conversely, if the speaker was part of a minority and the critic directed against a majority (e.g. the government), the judges should have acted "more speech-protective"[523].

The court applied the said criteria in reviewing the conduct of two defendants, and the following lines analyze such application towards certain conducts ascribed to Barayagwiza and Habimana. On 12 December 1993, Barayagwiza broadcasted through RTLM and explained to the audience that he was discriminated against by the Tutsis in his childhood[524]. The court found that, though amenable "to move listeners to want to take action to remedy the discrimination recounted"[525], the speech under scrutiny did not constitute an incitement to commit genocide. First, the purpose appeared to be informative, since before Rwandan independence in 1962, the Tutsis backed by the Belgian colonial ruler discriminated against the Hutus. Second, Barayagwiza did not use discriminatory language, as he only described the state of things at the time and the only reference to discrimination was against himself. Third, the speech was delivered in December 1993, when the genocidal had not already erupted. Considering the lack of these criteria, the court did not consider the fact that Barayagwiza belonged to the Hutu majority (the relationship between the speaker and the subject) and found that, on 12 December 1993, Barayagwiza did not commit incitement to genocide[526]. On the other hand, the court had no doubts in finding Habimana responsible for incitement to commit genocide for his speeches delivered through RTLM on 4 June 1994[527]. Habimana called for the extermination of the *Inkotanyi* "who

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[520] HEFTI, JONAS (2020: 24).
[521] Judgment, *Media Case*, para. 1006.
[522] GORDON (2019: 127).
[523] GORDON (2019: 127).
[524] See Judgment, *Media Case*, para. 1019.
[525] Judgment, *Media Case*, para. 1020.
[526] However, Barayagwiza was found guilty of incitement to commit genocide concerning other speeches delivered on RTLM. See Judgment, *Media Case*, para. 1034.
[527] See Judgment, *Media Case*, para. 1032.

would be known by height and physical appearance"[528] and encouraged the audience to "Just look at [their, referred to the Tutsis] nose and then break it"[529]. The court combined the words used, stereotyping the Tutsis for their physical appearance and using the derogatory term *Inkotanyi*, with the purpose of 'breaking noses', i.e. carrying out violence, and contextualized this combination in the ongoing genocide in June 1994 and Habimana's status as a Hutu. The result was that the court inferred a clear genocidal *dolus specialis* in Habimana's words, since "the identification of the enemy by his nose and the longing to break it vividly symbolize the intent to destroy the Tutsi ethnic group"[530].

The *Media Case* appeal judgment largely accepted the trial chamber's findings concerning hate speech and incitement to commit genocide[531]. The appeal chamber remarked on the difference between hate speech and incitement, stating that there was a

> "difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be *more than a mere vague or indirect suggestion.* In most cases, direct and public incitement to commit genocide *can be preceded or accompanied by hate speech*, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute"[532].

According to the perspective of the court, grasping the difference between hate speech and incitement to commit genocide was fundamental to adjudicating the related cases, since only incitement was prohibited under the ICTR Statute, and so punishable. In no case, hate speech itself could have been prosecuted before the ICTR. Thus, the legal challenge was to demonstrate a strict link between hate speech and incitement to commit genocide, with the first being complementary to the latter. Moreover, the hate speech contained in the incitement should have been a direct call to commit acts of genocide. However, it should be noted that directness did not correspond to explicit wording. As illustrated above, even an implicit call, but pronounced or written in a specific context, through certain words, for a precise purpose (*dolus specialis*), and by a member of a majority, could have been understood as direct.

It was precisely in relation to the criteria established by the trial chamber that the appeal judgment can be considered critical. As for the relationship between the speaker and the subject, the appeal chamber downsized its relevance, observing that "the relevant issue [was] not whether the author of the speech [was] from the majority […], but rather whether the speech in question [constituted] direct incitement to commit genocide"[533]. The primary

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[528] Judgment, *Media Case*, para. 1032.
[529] *Ibidem*.
[530] *Ibidem*.
[531] See Judgment (Appeal), *Media Case*, para. 696.
[532] Judgment (Appeal) *Media Case*, para. 692, emphasis added.
[533] Judgment (Appeal), *Media Case*, para. 713.

focus had to be placed on the content of the speech, in its wording and potential interpretation, rather than on the status of the subject, which could still be referred to as "a contextual element to assist the interpretation"[534]. The appeal chamber rediscussed the causal relation between incitement to commit genocide and the subsequent occurrence of acts of genocide. First, the court remarked that to consider hate speech as incitement it was not necessary to show that such a speech led to the actual commission of genocide[535]. However, it added that "in some circumstances, the fact that a speech [led] to acts of genocide could be an indication that in that particular *context,* the speech was understood to be an incitement to commit genocide and that this was indeed the *intent* of the author of the speech"[536]. Here, the appeal chamber underlined the role of causation as complementary and reinforcing proof of the inciter's genocidal *mens rea*. Although causation could not have been considered as the primary evidence to infer the *dolus specialis*, its combination with the context may have helped the judges to do so. The appeal judgment criticized the trial chamber's conviction of the defendants for hate speech, considered as incitement to commit genocide, pronounced or written before 1994. Indeed, the appeal chamber prominently recalled the *ratione temporis* of the ICTR, allowing only the prosecution of crimes committed from 1 January 1994 to 31 December 1994[537]. Therefore, even if the propaganda flew from 1993 into 1994 to fuel the genocide, the ICTR was bound by statute to prosecute only the criminal offenses in 1994. However, the appeal chamber emphasized the importance of considering speeches produced before 1994, "since they could be relevant and have probative value in certain respects"[538].

In conclusion, the *Media Case* trial and appeal judgments created a landmark precedent in the categorization of hate speech as public and direct incitement to commit genocide. By considering *Akayesu*'s standards of incitement to genocide, relying upon its characteristics of publicity, directness, and *dolus specialis*, the ICTR in the *Media Case* elaborated four criteria to detect the distinction between legitimate speech and hate speech, and between this latter and incitement to commit genocide. It emerged that the genocidal intent, i.e. *dolus specialis*, represented by the intent could have been inferred from the analysis of the words pronounced or written and their contextualization. The context can be considered as the dominant criterion, as it allowed the detection of a genocidal intent even in metaphors, euphemisms, and mild expressions. Additionally, as specified by the appeal chamber, the causal relation between the incitement and the commission of genocidal acts as well as the relationship between the speaker and the subject, could have served as additional proof. Thus, the appeal judgment hierarchized the criteria established by the trial chamber in the *Media Case*, giving greater prominence to the context and the text to determine when hate speech turned into incitement to commit genocide.

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[534] *Ibidem*.
[535] See Judgment (Appeal), *Media Case*, para. 766.
[536] Judgment (Appeal), *Media Case*, para. 709.
[537] ICTR Statute, art. VII.
[538] Judgment (Appeal), *Media Case*, para. 725.

2.6.6 The Crime of Incitement to Genocide and Music: the Relevance of the Publicity Element

The genocidal propaganda in Rwanda was so widespread that even the music played a role in spreading the Hutu extremist ideology and fomenting the mass killings of Tutsis. Simon Bikindi, a popular Rwandan songwriter and singer, "who often used politics as a source of inspiration for his music"[539], was charged before the ICTR with direct and public incitement to commit genocide, among other criminal offenses. Having spread hatred through his music, Bikindi's lyrics were scrutinized by the ad hoc tribunal to verify when his artistic production constituted hate speech and became incitement to commit genocide.

As reviewed by the court in *Bikindi*, no international legal framework mentioned songs as a form of speech. However, the ICTR considered "international definitions of expression and speech […] broad enough to include artistic expression such as songs"[540]. It derives that, under accurate scrutiny by the court, certain lyrics could have been criminalized, demonstrating that music lyrics could have constituted incitement to commit genocide. *In casu*, the trial chamber embraced the criteria identified by the trial chamber in the *Media Case* to determine when hate speech fell under the category of incitement to commit genocide[541]. Of note, the judges in *Bikindi* followed the hierarchization of the criteria provided by the appeal chamber in the *Media Case*, specifying that, among the criteria, "context [was] the principal consideration"[542]. Thus, the court took the context as a reference to interpret the content and impact of *Twasezereye*, *Nanga Abahutu*, and *Bene Sebahinzi*, songs composed and recorded by Bikindi before and during 1994. Although the songs reported accurate historical references to the pre-1959 period, when the Hutus were discriminated against by the Tutsis, the court noted that the lyrics were "not neutral […], painting Tutsi in a negative light and […] [advocating] Hutu unity against a common foe and [inciting] ethnic hatred"[543]. The lack of neutrality, apart from the language and expressions in the lyrics, was ascertained by contextualizing the songs vis-à-vis "historical ethnic differentiation and subjugation, [as well as] surrounding ethnic tension"[544]. Still, the court considered additional pieces of evidence regarding the audience, stating that Bikindi's songs were played at roadblocks and by the armed forces to boost the morale of the troops in the fight against the RPF[545]. Inferring from the said elements, the ICTR opined that Bikindi com-

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[539] GOWAN (2011: 51).
[540] Judgment of the International Criminal Tribunal for Rwanda, 2 December 2008, ICTR-01-72-T, *The Prosecutor v. Simon Bikindi*, para. 384.
[541] See Judgment, *Bikindi*, para. 387.
[542] Judgment, *Bikindi*, para. 387.
[543] Judgment, *Bikindi*, paras. 248-249.
[544] Judgment, *Bikindi*, para. 249.
[545] See Judgment, *Bikindi*, para. 253.

posed his songs "with the specific intention to disseminate pro-Hutu ideology and anti-Tutsi propaganda, and thus to *encourage ethnic hatred*"[546].
Relevantly, the court observed that the songs were not disseminated by Bikindi himself, but by RTLM and Radio Rwanda, whose speakers interpreted the songs and used them as a propaganda means to incite the killing of the Tutsis[547]. Notwithstanding the content of the songs was based on ethnic hatred, the fact that Bikindi did not contribute to their spreading was crucial. Bikindi was not found guilty of direct and public incitement to commit genocide concerning the composition of *Twasezereye*, *Nanga Abahutu*, and *Bene Sebahinzi*[548]. Since Bikindi 'only' composed and recorded such songs, publicity, a fundamental element of incitement, was missing. The publicity of Bikindi's songs arose only when the songs were transmitted on Radio Rwanda and RTLM, but in this case, Bikindi did not "play any role in [their] dissemination […] in 1994"[549], as instead the radio's speakers did. Thus, the ICTR concluded that the three songs did not constitute direct and public incitement to commit genocide *per se*.
Conversely, Bikindi was found guilty of direct and public incitement to commit genocide for his direct presence during the massacres. At the end of June 1994, Bikindi was traveling with a convoy of *Interahamwe* on the road between the Kivumu and Kayove areas in a vehicle equipped with speakers to broadcast songs, including Bikindi's[550]. On the road, Bikindi often stopped to ask through the speakers "if people had been killing Tutsi, who he referred to as *snakes*, […] [and called] on 'the *majority*' to 'rise up and look everywhere possible' and *not* to 'spare anybody'"[551]. Here, the court had no doubts that such speeches were ascribable to incitement to commit genocide. First, the usage of speakers made Bikindi's speeches public, in the context of the ongoing killings of the Tutsis between Kivumu and Kayove. Second, Bikindi employed a derogative language, e.g. referring to the Tutsis as snakes. Third, the Rwandan singer, calling not to spare anybody, implied that further massacres were necessary. Fourth, the reference to the majority was intended for the subjugation of the minority. These elements allowed the court to detect in Bikindi a clear intent "to destroy the Tutsi ethnic group"[552], i.e. the *dolus specialis* required by the genocidal *mens rea*.
In sum, the *Bikindi* case stressed the relevance of the contribution of the speaker to the dissemination of his or her speeches to categorize such conduct as public and direct incitement to commit genocide. The mere composing of songs, the content of which can also be considered hate speech, is not enough to bring out incitement since the element of publicity is missing. Thus, the dissemination of hatred songs *per se* does not imply the liability of the author for incitement to commit genocide. Theoretically speaking and following the ICTR reasoning, a singer can be held liable for public and di-

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[546] Judgment, *Bikindi*, para. 254, emphasis added.
[547] See Judgment, *Bikindi*, para. 250.
[548] See Judgment, *Bikindi*, para. 421.
[549] Judgment, *Bikindi*, para. 421.
[550] Judgment, *Bikindi*, para. 422.
[551] Judgment, *Bikindi*, paras. 422-423, emphasis added.
[552] Judgment, *Bikindi*, para. 423.

rect incitement to commit genocide only if he or she directly and personally sings and spreads his or her songs, containing hate speech, in a context of genocide.

2.6.7 Distinguishing between Public and Direct Incitement to Commit Genocide and Instigation

As a final remark on incitement to commit genocide, it is worth deepening its distinction with instigation, as drawn by the ICTR. In *Mpambara*, the trial chamber provided a detailed notion of instigation, defined as "urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed"[553]. From its wording, it appears that instigation is similar to incitement, as their *actus reus* consists of encouraging others to commit a crime, either in a written or verbal form. The instigation's *mens rea* defined in *Muvunyi* conceives the instigator as aiming "to provoke or induce the commission of the crime, or [that he or she] was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts"[554]. The *mens rea* is the first difference between instigation and incitement to commit genocide. The inciter's *mens rea* includes the *dolus specialis* in the form of a precise intent to destroy the targeted group, whereas instigation is not necessarily linked with the commission of genocidal acts.
Further, the ICTR jurisprudence recognized the necessity that the instigation had to substantially contribute to the commission of a crime, thus requiring a nexus between the two[555]. Although the appeal chamber in the *Media Case* specified that, in relation to a criminal offense, instigation did not "need [to] be a *sine qua non* condition for its commission"[556], instigation differs from incitement as this latter constituted a criminal offense *per se*. It should be noted that instigation was a mode of responsibility under the ICTR Statute[557], emerging only if the accused "substantially contributed to the commission [of a crime under the ICTR Statute]"[558]. Still, in *Ndindabahizi*, the trial chamber added that "instigation [did] not give rise to liability unless the crime [was] actually committed by a principal or principals"[559]. In this passage, confirmed in *Mpambara*[560], the court underlined that the instigated crime had to occur to let the instigation liability be considered. By contrast, public and direct incitement to commit genocide was considered by the ICTR both as an inchoate offense "punishable even if no act of genocide has resulted therefrom"[561], i.e. an *infraction formelle* in the wording of the

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553 Judgment of the International Criminal Tribunal for Rwanda, 11 September 2006, ICTR-01-65-T, *The Prosecutor v. Jean Mpambara*, para. 18.
554 Judgment, *Muvunyi*, para. 465.
555 See Judgment, *Muvunyi*, para. 464.
556 Judgment (Appeal), *Media Case*, para. 660.
557 ICTR Statute, art. VI (1).
558 Judgment (Appeal), *Media Case*, para. 678.
559 Judgment, *Ndindabahizi*, para. 456.
560 See Judgment, *Mpambara*, para. 18.
561 Judgment (Appeal), *Media Case*, para. 679.

Akayesu judgment[562]. In sum, instigation is strictly linked in its essence with the subsequent commission of the instigated crime by others, whilst such a link was not required by the incitement to commit genocide.
The final difference between instigation and incitement to commit genocide relied on publicity and directness. As the court ruled in *Semanza*, instigation was not required to be "direct and public"[563]. Conversely, directness and publicity are critical elements to consider liability for incitement, as above stressed by the analysis of the *Bikindi* case.
Overall, according to the ICTR's jurisprudence instigation lacked the three fundamental components of incitement to commit genocide, namely *dolus specialis*, publicity, and directness. Since their *actus reus* is similar, it could have occurred that instigation evolved into incitement to commit genocide. Indeed, if instigation was carried out directly and in public, spreading a genocidal intent (*dolus specialis*), these three elements could have led the court to configure an instigation as incitement to commit genocide, avoiding further considerations on the link between instigation and subsequent crimes. Therefore, the instigation requirement to be linked with the occurrence of an instigated crime disappears if the instigation preliminary satisfied the three constitutive elements of incitement to commit genocide.

2.6.8 Assessing the ICTR's Contribution to the Criminalization of Hate Speech as Incitement to Commit Genocide

The prosecution of hate speech and incitement to commit genocide naturally conflicts with the right to freedom of expression, universally recognized in different international legal instruments. However, those same legal sources provided a preliminary limitation to the freedom of expression, prohibiting the usage of speech for discrimination purposes based on racial, national, or religious ideas. The first jurisdictional precedents related to the criminalization of speech are found at Nuremberg, during the Allied trials against former Nazis responsible for the regime's propaganda. There, the IMT and NMT considered hate speech as persecution, i.e. a crime against humanity. Taking as a reference the ICTR's recognition of a *dolus specialis* in the incitement to commit genocide, the IMT and NMT implicitly anticipated it by recognizing a specific intent to promote the extermination of the Jews behind the hate speeches spread by the Nazi propaganda. However, no considerations on genocidal speech were made at Nuremberg. Thus, when called to deal with the role of speech during the Rwandan genocide, the ICTR was forced to completely reinterpret the existing legal framework and produce innovative jurisprudence to allow the prosecution of hate speech and its specific criminalization as direct and public incitement to commit genocide. As Gordon noted, "[the] *easily* demonstrable connection between hate speech and genocide in Rwanda transformed the ICTR into a virtual laboratory for the development of international speech crimes law"[564]. Nevertheless, it is fair to remark that the ICTR's connection between hate speech and genocide

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[562] See Judgment, *Akayesu*, para. 562.
[563] Judgment, *Semanza*, para. 381.
[564] GORDON (2019: 119, emphasis added).

was anything but easy and smooth. Indeed, the massive jurisprudence produced by the ad hoc tribunal on hate speech and genocide reviewed in this paragraph demonstrates the efforts not only to legally frame hate speech as a criminal offense but also to find a proper definition of incitement to commit genocide and distinguish this latter from instigation to commit genocide. The ICTR succeeded in these challenges, recognizing publicity, directness, and *dolus specialis* as fundamental elements of the criminal offense of incitement to commit genocide. Further, in convicting those responsible for the extremist and genocidal propaganda spread by *Kangura* and RTLM, the ICTR was able to identify specific criteria to assess when hate speech became incitement to commit genocide, thus prosecuting acts of speech as acts of genocide and establishing a landmark threshold in international criminal law. Even the music became an accomplice to genocide in Rwanda, and the ICTR was called to scrutinize extremist song lyrics to assess if these constituted incitement to commit genocide. In conclusion, the relationship between hate speech and genocide unprecedentedly evolved in the ICTR's trial and appeal chambers, enshrining their link in the criminal offense of public and direct incitement to commit genocide. Having furnished proper definitions of speech-related criminal offenses and having created a scrupulous strategy to detect the existence of incitement, the ICTR, and international criminal law, legally acknowledged that language could cause mass killings just like machetes.

2.7 The ICTR's Categorization of Rape and Sexual Violence as Acts of Genocide

Just as rifles, pistols, and machetes, rape and sexual violence were weapons in the hands of the Hutu extremists during the Rwandan genocide in 1994. Tutsi and moderate Hutu women were seen as accomplices of the RPF, thus justifying, from the perspective of the *Interahamwe*, *Impuzamugambi*, and the Rwandan armed forces, the mass execution of rapes and sexual violence[565]. Moreover, it is fundamental to stress that the weaponization of rape was functional to pursue the Hutu racial supremacy ideology, aiming at interrupting the reproduction of the Tutsi ethnicity. Therefore, Tutsi women were no longer considered as persons, but "objects to be dominated, humiliated, dehumanized, and destroyed"[566], and rape "was the rule and its absence the exception"[567]. Among the acts of sexual violence, the victims suffered the cut of their breasts, the infliction of serious injuries to their reproductive organs that prevented them from having children, and the insertion of farm implements into their genitals[568]. The harms inflicted by the rapist did not exhaust in the rapes themselves, which targeted between 250,000 and

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[565] ODORA (2005).

[566] ODORA (2005: 140); GREEN (2002).

[567] Report of the UN Commission on Human Rights, Subcommittee on the Prevention of Discrimination & Protection of Minorities, 29 January 1996, E/CN.4/1996/68, *Report on the Situation of Human Rights in Rwanda*, para. 16.

[568] HUMAN RIGHTS WATCH (1996).

500,000 women[569]. Indeed, the victims of sexual abuse suffered from HIV/AIDS, practiced self-abortion following pregnancies caused by rapes, and committed infanticide on children born as a result of rapes[570]. Overall, it was undoubtedly that rape and sexual violence were an integral part of the process of destruction of the Tutsi group, i.e. genocide. Therefore, the ICTR became the first tribunal to provide a legal definition of rape and sexual violence adequate to legally frame those offenses as acts of genocide, allowing the prosecution of rapists and sexual offenders.
To provide a clear framework of the ICTR contribution to the development of international criminal jurisprudence on rape and sexual violence, and particularly their categorization as acts of genocide, this paragraph is structured as follows. First, the existing international legal framework as of 1994 is reviewed, stressing the absence of a legal definition of rape and sexual violence and the association of those acts with wartime. Second, through an examination of the trials against war criminals after the Second World War, it is demonstrated that the international criminal jurisprudence lacked a true precedent on rape and sexual violence. Third, the first case involving rape before the ICTR is presented, analyzing the ad hoc tribunal's definition of rape and sexual violence and the legal reasoning at the basis of their categorization as acts of genocide. Fourth, further trials before the ICTR dealing with rape and sexual violence are reviewed, to understand their contribution to further development of the notions of those criminal offenses. Fifth, the overall jurisprudence of the ICTR regarding rape and sexual violence is assessed.

2.7.1 Rape and Sexual Violence: an Overview of the International Legal Framework

The crimes of rape and other forms of sexual and gender-based violence have been associated with wartime for centuries, as troops often engaged in those criminal conduct against civilian women. Indeed, in ancient times "women were viewed as spoils of war"[571], i.e. preferential sexual targets for soldiers after battles and during raids. Being crimes emerging during conflicts, rape was prohibited by the law of wars since the Middle Ages. As Meron noted, "[rapists] have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419)"[572]. However, the dissemination of codification and categorization of rape as an international criminal offense "is relatively new"[573], dating back to the 19th century. In the attempt to codify customary international law of war, the United States Lieber Instructions of 1863 explicitly prohibited rape. In article 44, the Lieber Instructions expressly ruled that "all pillage or sacking, […] all rape […] [were] prohibited under the penalty of death, or such other seve-

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[569] ODORA (2005).
[570] HUMAN RIGHTS WATCH (1996); SMITH (2004).
[571] MERON (1993: 425).
[572] MERON (1993: 425).
[573] ELLIS (2007: 227).

re punishment as may seem adequate for the gravity of the offense"[574]. The death penalty for rape provided by the Lieber Instructions signaled the gravity of the crime, suggesting that the prohibition of rape was part of customary international law[575]. However, it should be noted that the wording of the Lieber Instructions reflected the common association of rape with crimes related to property, such as pillage and sacking. Still, at the half of the 19th century, rape remained "a property crime perpetuated against a man's honor"[576], and not against a person *per se*.

A further implicit recognition of rape as a crime is found in the Hague Convention of 1907. The document stipulated that "family *honor* and rights, the lives of persons and private property […] must [have been] respected"[577].

The term honor offered a wide range of interpretations, making lawyers argue that it included the prohibition of wartime rape[578]. However, had this interpretation been established in practice, it would have allowed the prosecution of war criminals responsible for rape crimes during the Second World War, which was not the case[579]. Hence, the Hague Convention confirmed the conception of rape as intended in the Lieber Instructions, linking it with crimes against property, and not explicitly mentioning the targeting of women. On the edge of the First World War, neither a definition nor a clear and proper prohibition of rape was provided by any international legal instrument.

After the Second World War, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War became the first international treaty containing a provision establishing the protection of women against rape. At article 27, it stated that women had to be "especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault"[580]. Innovatively, the convention not only prohibited rape but even any other form of indecent assault, interpreted as sexual violence other than rape. A shortcoming was that such convention only applied during wartime between two high contracting parties[581], i.e. an inter-state conflict. Notwithstanding certain provisions of the convention had to be applied even in cases of internal conflicts, rape was not mentioned among them[582], thus creating a vacuum concerning the prohibition of rape in internal conflicts. Moreover, rape was not listed as a grave breach under the

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574 General Orders No. 100 by President Lincoln, 24 April 1863, *Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber*, art. XLIV.

575 MITCHELL (2005).

576 MITCHELL (2005: 236).

577 *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, art. 46, emphasis added.

578 See MITCHELL (2005).

579 See MERON (1993); BASSIOUNI (1999).

580 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, art. 27.

581 See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, art. 3.

582 See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, art. 4.

Geneva Conventions[583], implicitly downsizing its relevance vis-à-vis those norms "that [gave] rise to universal jurisdiction and [obligated states] to pursue and prosecute violations"[584], i.e. peremptory norms of international law.
The II Additional Protocol of 1977 to the Geneva Conventions maintained the linking of rape to dignity, prohibiting "outrages upon personal *dignity*, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"[585]. The maintenance of the strict link between rape and honor suggested that rape was intended as provoking moral damage, failing to capture its violent nature against the target and the subsequent physical damage. As Niarchos rightly observed, "[the] failure to recognize the violent nature of rape is one reason that it has been assigned a *secondary* status in international humanitarian law"[586].
In conclusion, the international legal framework existing in 1994, when the ICTR was established, guaranteed the protection of women from rape and other forms of sexual violence during international and internal armed conflicts. However, a fundamental lack was the absence of an internationally accepted definition of rape, thus requiring the ad hoc tribunal to provide it. Furthermore, rape needed to be categorized as a specific criminal offense, taking into account its moral and physical dimension concerning the typology of violence stemming from sexual violence.

2.7.2 Lacking a True Precedent: Rape and Sexual Violence at Nuremberg and Tokyo

Although rape and sexual assaults were largely committed by the Nazi German forces of occupation in Belgium and France and the allied established "a commission to investigate allegations of mass rape"[587], they were not considered criminal offenses under the IMT Charter, and therefore not prosecuted before the IMT. Conversely, Control Council Law no. 10 (CCL10), the legal basis of the NMT jurisdiction, considered rape as a crime against humanity[588], but none of the defendants in the twelve trials held before the NMT were convicted of rape and sexual violence. From an analysis of the CCL10[589], it emerged that the systematic methodology of rape made this latter ascribable as a crime against humanity, whereas "isolated cases [of rape] would [have been] prosecuted as a war crime"[590]. Therefore, the CCL10 established a benchmark guiding the jurisprudence in distinguishing

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583 See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, art. 147.
584 MITCHELL (2005: 238-239).
585 *Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S 609, art. 4 (2) (e), emphasis added.
586 NIARCHOS (1995: 675-676).
587 MACDONALD (2001: 676).
588 See CCL10, art. II (a).
589 The following findings can be implicitly found in Judgment of the Nuremberg Military Tribunals, 4 December 1947, Nuremberg Military Tribunals Case no. III, *United States of America v. Josef Altstoetter et. al.*
590 NIARCHOS (1995: 677).

rape as a war crime from rape as a crime against humanity. This distinction appears particularly relevant as it jurisprudentially allowed the prosecution of rape in peacetime, as the CCL10 did not consider crimes against humanity as subsisting exclusively during conflicts[591]. Moreover, when it was configured as a crime against humanity, rape entailed the liability not only of the military personnel but even of "any persons occupying key positions"[592]. Thus, the CCL10 sanctioned the punishment of rape at any time and stressed its specific categorization as a crime against humanity.

Analogously to the IMT Charter, the Charter of the International Military Tribunal for the Far East (IMTFE) did not mention rape or sexual violence. However, sexual enslavement[593] and rape were practiced on a large scale in the occupied Chinese territory by Japan, as tragically proved at Nanjing between December 1937 and January 1938, when approximately 20,000 women were raped and at least 150,000 persons killed by the Japanese, making the massacre "one of the worst wartime atrocities"[594]. Recalling the IMFTE Charter, war crimes were defined as "violations of the laws or customs of war"[595], implicitly including rape and sexual violence. This criminal conduct emerged in the indictment, explicitly mentioning the commission of rape of civilians and prisoners and framing them as war crimes committed by the Japanese soldiers under the direct authority of their commanders[596]. The IMTFE considered General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota responsible for mass rapes committed under their authority[597] and convicted them of "conventional war crimes"[598], making rape fall under this category. In sum, notwithstanding the IMTFE judgment "[established a clear precedent for the international prosecution of rape as a war crime"[599], rape was interpreted by the IMTFE as part of the Japanese policy of submissions of the population living in the occupied territory[600], i.e. as a consequence of military expansion lacking a specific *mens rea*.

Overall, although rape was only mentioned in the IMTFE judgment, it appears that the CCL10 provided a greater contribution, by clearly distingui-

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591 See *supra* subparagraph 1.2.4.

592 NIARCHOS (1995: 678).

593 Sexual enslavement was considered an accepted practice by the Japanese armed forces in the occupied territories of Australia, Burma, China, the Netherlands, the Philippines, Japan, Korea, and Indonesia. The sexually enslaved women and girls were called in jargon 'comfort women', see ARGIBAY (2003). Sexual enslavement remained largely unpunished in Japan and in 2000 an ad hoc tribunal, called 'The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery' was established in Tokyo, aiming at obtaining justice against the Japanese officials responsible for sexual enslavement during the Second World War, including Emperor Hirohito, and reparations. See CHINKIN (2020).

594 YAMAMOTO (2000: 193).

595 IMFTE Charter, art. V (b).

596 *Indictment presented to the International Military Tribunal for the Far East sitting at Tokyo on 3 May 1946*, 3 May 1946, Annex A-6 to the Judgment of the International Military Tribunal for the Far East, p. 31.

597 See Judgment of the International Military Tribunal for the Far East, 4 November 1948, *United States et al. v. Araki et al.*, paras. 445-454.

598 Judgment, *Araki*, ch. VII.

599 ASKIN (2003: 180).

600 PICART (2011).

shing between wartime rape, constituting a war crime, and peacetime rape, ascribed as a crime against humanity. The IMTFE judgment confirmed the liability for war crimes in relation to rape but failed to make considerations on other forms of sexual violence. Both the tribunals did not provide a definition rape, its *actus reus,* and *mens rea*. Therefore, when the ICTR was called to deal with rape and other forms of sexual violence, it had a *carte blanche* before it, entailing the burden of creating a precedent for the prosecution of rape in international criminal law.

2.7.3 The ICTR's Criminalization of Rape and Sexual Violence as Acts of Genocide

Under the ICTR Statute, rape was classified as a crime against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds[601], and as a war crime, intending it as a violation of the laws and customs of war[602]. The ICTR Statute therefore confirmed the distinction between wartime rape and peacetime rape as listed by the CCL10. Rape was consequently legally destined to be prosecuted as a crime against humanity or a war crime. However, as shown above, the ICTR considered widespread rape practiced in the context of genocide as contributing to the genocide itself, thus categorizing it as an act of genocide.
Still, the ad hoc tribunal created a landmark precedent on rape with *Akayesu*, constituting a reference case to analyze the ICTR's further generation of jurisprudence on rape and other forms of sexual violence. Akayesu was not initially charged with rape, but during the trial evidence of massive sexual violence in the Taba community[603], of which the accused was the bourgmestre, emerged, hence rape and sexual violence were added to the charges[604]. Of note, with the addition of rape and sexual violence to the Akayesu indictment, the Office of the Prosecutor (OTP) "ended the traditional stance in international criminal law prosecutions of not indicting the crimes of rape and sexual violence"[605]. Therefore, the ICTR was called to directly handle the charge of rape, without a clear precedent to use as a reference or point of departure. First, the ICTR had to provide a notion of rape. The trial chamber in *Akayesu* noted that rape was not defined by international law, whilst it was by national penal codes. Notwithstanding national legislation agreed that rape was a form of "non-consensual sexual intercourse"[606], the court observed that there was no unanimity on the specific acts characterizing rape, as "variations on the act of rape [included] acts which [involved] the insertion of objects and/or the use of bodily orifices not considered to be intrinsically

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601 ICTR Statute, art. III (g).
602 ICTR Statute, art. IV (e).
603 See Judgment, *Akayesu*, paras. 416-460.
604 Indictment presented to the International Criminal Tribunal for Rwanda on 13 February 1996 as amended on 17 June 1997, 17 June 1997, ICTR-96-4-T, *The Prosecutor v. Jean-Paul Akayesu*.
605 ODORA (2005: 136).
606 Judgment, *Akayesu*, para. 686.

sexual"[607]. In light of the variety of acts committed by rapists and the genocidal militias against Tutsi females, such as "the insertion of a piece of wood into the sexual organs"[608], the trial chamber acknowledged that a flexible definition of rape was necessary to ensure the punishment of all the acts of a sexual nature that were committed during the Rwandan genocide. Hence, the ICTR defined rape through its *actus reus*, consisting of

> "[a] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:
> a) as part of a wide spread or systematic attack;
> b) on a civilian population;
> c) on certained catalogued discriminatory grounds: namely national, ethnic, political, racial, or religious grounds"[609].

The coercive nature of rape did not imply the usage of physical violence to subjugate the target of the rapist. Instead, the court specified that "forms of duress which prey on fear or desperation"[610] could have constituted coercion, and this latter could have been "inherent in certain circumstances, such as […] the presence of *Interahamwe*"[611]. Thus, extortion, threats, and intimidation, even represented by the mere presence of genocidal militias, may have facilitated the conduct of the rapists, applying a form of psychological violence against the victim preluding the commission of rape. Concerning the three criteria to assess the subsistence of rape, these were coherent with the categorization of crime against humanity in the widespread and systematic dimension of the criminal offense against a civilian population on national, ethnic, political, racial, or religious grounds. As for the purposes of rape, i.e. the *mens rea* of the rapist, the ICTR traced a common line with torture, listing "intimidation, degradation, humiliation, discrimination, punishment, control, or *destruction* of a person"[612] as the scope of rape. The destruction scope is crucial in the ICTR's jurisprudential engineering to let rape be considered an act of genocide. To ensure the greatest protection possible for victims of sexual violence, the trial chamber stated that this latter was "not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact"[613]. Therefore, the *actus reus* of rape and sexual violence covered all the possible criminal conduct regarding sexual abuse, regardless of the subsistence of the penetration of the victim to create, rather than a precise listing of wrongful acts, a "conceptual framework"[614].

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[607] Judgment, *Akayesu*, para. 596.
[608] Judgment, *Akayesu*, para. 686.
[609] Judgment, *Akayesu*, para. 598.
[610] Judgment, *Akayesu*, para. 688.
[611] *Ibidem*.
[612] Judgment, *Akayesu*, para. 597, emphasis added.
[613] Judgment, *Akayesu*, para. 688.
[614] Judgment, *Akayesu*, para. 687.

The trial chamber in *Akayesu* applied the established criteria for rape, and after having ascertained that rape and sexual violence have been committed systematically, it turned to the verification of the discriminatory grounds. The judges, taking as a reference the Hutu extremist propaganda, concluded that the "sexualized representation of ethnic identity graphically [illustrated] that Tutsi women were subjected to sexual violence *because they were Tutsi*"[615]. The court verified that Tutsi women were targeted because of their ethnicity, and thus inferred that rape, contextualized in the ongoing genocide, "was a step in the process of destruction of the Tutsi group - the destruction of the spirit, of the will to live, and of life itself"[616]. It derived that the rapist considered rape as functional to the destruction of the Tutsi community, and that acted with a precise *mens rea* consisting of the genocidal *dolus specialis*. Due to the detection of a *dolus specialis*, the ICTR concluded that "sexual violence and rape [could] amount to genocide in some circumstances"[617]. Since the ICTR Statute considered causing serious bodily or mental harm to members of the group as an act of genocide[618], and determined that rape and sexual violence were carried out to "destroy the Tutsi group while inflicting acute suffering on its members in the process"[619], the judges in *Akayesu* found that those criminal offenses had to be considered as acts of genocide. Therefore it was clear beyond any reasonable doubt to the trial chamber in *Akayesu* that rape and sexual violence constituted "the factual elements of the crime of genocide"[620].
In sum, the ICTR Statute categorized rape and sexual violence as crimes against humanity and war crimes, depending on the context. However, the ad hoc tribunal in *Akayesu* pointed out that when a *dolus specialis* is detectable in the minds of the rapists and sexual violence perpetrators, i.e. the intent to commit such criminal offenses to pursue a genocidal plan of destruction of a targeted group, rape and sexual violence had to be considered as acts of genocide under the ICTR Statute article II. Thus, the *dolus specialis* was the element that caused the shifting of rape and sexual violence from the categories of crimes against humanity and war crimes to genocide. Of note, Akayesu was not convicted for having directly committed rape and sexual violence, but to have failed to prevent the commission of such crimes as he was the highest authority in the Taba community, and to have actively "ordered, instigated, aided and abetted […] acts of sexual violence"[621].

2.7.4 Further Developments of the ICTR's Jurisprudence on Rape and Sexual Violence

The trial chamber in *Akayesu* recognized the non-physical entity of the harms provoked by rape and sexual violence, as it acknowledged that these

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615 Judgment, *Akayesu*, para. 732, emphasis added.
616 *Ibidem*.
617 VERDIRAME (1999: 595).
618 See ICTR Statute, art. II (b).
619 Judgment, *Akayesu*, para. 733.
620 Judgment, *Akayesu*, para. 734.
621 Judgment, *Akayesu*, para. 692.

conducts were ascribable as "acts of serious bodily and mental harm […] [reflecting] the determination to make Tutsi women suffer […] even before killing them"[622]. Thereby, rape and sexual violence entailed psychological violence against Tutsi women that the court considered relevant to make those offenses fall under the category of acts of genocide. However, it should be noted that the recognition of mental harm for rape conflicted with the US interpretative declaration to article II of the CPPCG, specifying that "the term 'mental harm' in article II (b) means *permanent impairment* of mental faculties […]"[623]. Therefore, from the perspective of the US, rape could have been ascribable to an act of genocide only if it had provoked permanent mental harm to the victim, an unlikely scenario. Though rape entails psychological traumas to victims and even their "permanent impairment of the mental faculties"[624], those who have experienced rape should not have been considered victims from the US perspective if they recovered from or did not suffer mental trauma. This apparent contradiction was solved by the ICTR in two further cases, *Rutaganda* and *Musema*, pointing out that "rape [and] sexual violence […] [needed] not to entail permanent or irremediable harm"[625], thus allowing their categorization as acts of genocide.

In *Musema*, the trial chamber adopted the definitions of rape and sexual violence provided in *Akayesu*, highlighting that the "essence of rape [was] not the particular details of the body parts and objects involved, but rather the aggression that [was] expressed in a sexual manner under conditions of coercion"[626]. Here the judges, considering that the ICTR was the first international tribunal to grasp the definition of rape, intended to stress the importance of providing a "conceptual definition [of rape]"[627] for the evolution of norms of international criminal law. Moreover, in *Musema* the court willed to make the difference between rape and sexual violence clearer in substantive terms. Sexual violence, in the perspective of the court, amounted to "any act of a sexual nature which [was] committed on a person under [coercive] circumstances"[628]. Conversely, rape was characterized by a "physical invasion of a sexual nature"[629], implying the necessity of a form of penetration. Therefore, all rape were acts of sexual violence, whereas this latter could have been ascribed as rape only if implying the penetration of the victim, i.e. a physical invasion of a sexual nature.

In *Rutaganda* and by referring to the ICTR Statute, the ad hoc tribunal categorized rape and sexual violence not only as acts of genocide "causing serious bodily or mental harm to members of the group"[630], but even as "mea-

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[622] Judgment, *Akayesu*, para. 733.

[623] *Reservation of the United States of America to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide*, 25 November 1988, U.N.T.S. 78 277, Understandings (2), emphasis added. See UN Genocide Convention, art. II (b).

[624] VERDIRAME (1999: 580).

[625] Judgment, *Rutaganda*, para. 51; Judgment, *Musema*, para. 156.

[626] Judgment, *Musema*, para. 226.

[627] Judgment, *Musema*, para. 228.

[628] Judgment, *Musema*, para. 227.

[629] *Ibidem*.

[630] Judgment, *Rutaganda*, para. 51. See ICTR Statute, art. II (b).

sures intended to prevent births within the group"[631], when they entailed "sexual mutilation, enforced sterilization, and forced birth control"[632]. Here, it is worth specifying that the *Interahamwe* and other Hutu extremist militias targeted Tutsi and moderate Hutu women to rape them with "the specific intent to destroy their reproductive competence"[633]. Thus, the trial chamber allowed an expansion of the genocidal acts deriving from acts of sexual violence, when this latter included practices such as genital mutilation.

As for the contextualization of single acts of rape in the wider context of a systematic attack against the Tutsi population, in *Gacumbitsi* the defendant contested before the appeal chamber that the rape that he carried out had a personal motivation in raping, different from the genocide and extermination campaign[634]. Gacumbitsi argued that the victim "had known her attacker previously"[635], thus intending the preexistence of a relation between the aggressor and the victim as an element excluding the subsistence of a *dolus specialis* in the rape. The appeal chamber categorically rejected Gacumbitsi's argument, stressing that "[the] genocide and extermination campaign in Rwanda was characterized in significant part by neighbors killing and raping neighbors"[636], making clear that the knowledge of the victim by the perpetrator was not an anomaly in the widespread and systematic attacks against the Tutsis, and did not prevent the defendant to be considered liable for rape as genocide or a crime against humanity.

Still, in the *Gacumbitsi* appeal judgment, the defendant attempted to introduce evidence reporting the consent of the victim, thus contesting the non-consensual nature of the sexual intercourse between him and the victim detected by the trial chamber and denying the subsistence of rape or sexual violence[637]. The appeal chamber contested this argument by recalling the ICTR's Rules of Procedure and Evidence, stating that the consent could not constitute a defense if the victim "has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear"[638]. Since the ICTR considered that "[force] or threat of force [provided] clear evidence of non-consent"[639], Gacumbitsi's argument was rejected, demonstrating that when proofs of rape were clear, the defendant was not able to recall consent as a defense. Indeed, since rape always implied an element of violence, the "victim's free will [to be] assessed in the context of surrounding circumstances"[640] was destined to be vitiated and thus inadmissible before the court.

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631 Judgment, *Rutaganda*, para. 53. See ICTR Statute, art. II (d).

632 *Ibidem*.

633 ODORA (2005: 135).

634 See Judgment (Appeal), *Gacumbitsi*, para. 103.

635 *Ibidem.*

636 *Ibidem*. See also Judgment, *Gacumbitsi*, para. 107.

637 See Judgment (Appeal), *Gacumbitsi*, para. 156.

638 *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda adopted on 29 June 1995*, as last amended on 10 November 2006, art. 96 (ii). Hereinafter ICTR Rules of Procedure and Evidence.

639 Judgment, *Bagosora*, para. 2199.

640 Judgment, *Gacumbitsi*, para. 151. See also Judgment, *Bagosora*, para. 2199.

2.7.5 Assessing the ICTR's Contribution to the Criminalization of Rape and Sexual Violence as Acts of Genocide

Notwithstanding rape and sexual violence have been a constant feature of conflicts, international law lacked a clear legal framework and jurisprudential precedents on the issue, implying a vacuum that needed to be fixed by the ICTR. Rape has been committed during the Second World War in Belgium, France, and the Asian territories occupied by the Japanese Empire. The NMT provided a distinction between wartime and peacetime rape, respectively categorized as war crimes and crimes against humanity, whereas the IMTFE recognized rape only as a practice of war stemming from the Japanese expansionary policy, somehow reminding the NMT and the Jerusalem District Court's consideration of genocide as a consequence of the Nazi policy of Germanization[641]. As for the sources of international law, international instruments provided a certain degree of protection for women from rape and sexual violence during armed conflict, both international and internal. What was missing was the recognition of rape and sexual violence as criminal offenses *per se*, together with their definition and the consideration of subsequent psychological damages. In *Akayesu*, the ICTR made a turning point in international criminal law, creating a conceptual framework in which rape and sexual violence were inserted, allowing a certain degree of flexibility in handling cases involving those criminal conducts. The ICTR considered sexual violence as a basis to then assess the subsistence of rape, stemming from the physical invasion of the victim by the aggressor. The major contribution of the ICTR to the development of jurisprudence on rape and sexual violence resides in the recognition that those acts could have amounted to acts of genocide, thus breaking their exclusive consideration as crimes against humanity or war crimes. By recognizing the subsistence of a *dolus specialis* in the intent of the rapists during the Rwandan genocide in *Akayesu*, the ICTR unprecedentedly recognized rape and sexual violence as acts of genocide, functional to the extermination project against the Tutsi population. Despite the *Akayesu* approach was confirmed and enriched in the cases *Rutaganda* and *Musema*, further ICTR 's jurisprudence on rape and sexual violence first began to deviate from *Akayesu*, preferring to embrace the ICTY's narrower definition of rape, and then attempted to reconcile the two ad hoc tribunal's approaches[642].

Conclusion

This chapter has presented the Rwandan genocide of 1994 and the subsequent legal response of the international community, i.e. the ICTR. The deep causes of the Rwandan genocide are to be found in the country's colonial past, as first the German and then the Belgian colonizer adopted a *divide et impera* strategy to administer the territory. By exacerbating physical diffe-

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[641] See *supra* subparagraphs 1.2.4 and 1.3.3.

[642] See *infra* subparagraph 3.1.5.

rences between the Rwandans, the colonizer manipulated the issue of ethnicity, recognizing a primacy of the Tutsis (minority) over the Hutus (majority), and causing this latter's discontent. The antagonism erupted after Rwanda's independence in 1962 when the Hutus seized power and began decades of discrimination and growing hate against the Tutsis, who still maintained a high degree of economic welfare in comparison with the Hutu population. Concurrently with the explosion of a conflict between the Hutu government and the RPF, extremist political parties, armed militias, and propaganda media were created to fuel the hatred against the Tutsis. After the incident of 6 April 1994, the Hutu extremists gathered such dissent and used it to instigate the population to kill the Tutsis and the moderate Hutus, leading to the genocide. The international community, i.e. the UN, was conscious of the commission of mass atrocities in Rwanda between April and July 1994 but did little to stop them, with only a few hundred soldiers commanded by General Dallaire attempting to protect shelters. Having failed to prevent and stop the genocide, the SC understood that at least a legal response was necessary, to avoid the responsible to enjoy impunity. The ICTR Statute gave preeminence among the criminal offenses listed as its *ratione materiae* to the necessity to punish genocide and established specific jurisdiction and procedures. Through the analysis of the ICTR's statute, this thesis has detected that the only discriminant to distinguish between genocide and crimes against humanity was the offender's *mens rea*. Prospectively, this detail explains why the ICTR was able to ascribe certain conducts, i.e. hate speech and sexual violence, traditionally considered as crimes against humanity, under the category of crime of genocide. Through the years the literature has emphasized that the ICTR adopted a subjective approach towards the CPPCG's protected groups, i.e. the adoption of the genocidal perpetrator's understanding of their targets as part of a specific group, rather than an objective approach based on factual elements, such as language and physical traits. Nevertheless, the analysis of the cases pertaining to the topic has led to conclude that the ad hoc tribunal did not abandon the objective approach. Rather, it maintained it as a preliminary analysis of the protected groups, complemented by subjective consideration and therefore creating what this thesis has labeled as a hybrid approach to the interpretation of the CPPCG's article II. As for the detection of the genocidal offender's *mens rea*, the ICTR has first stressed its *dolus specialis* component, requiring a specific intent to destroy in whole or in part the targeted group. In verifying the subsistence of such a *dolus specialis*, the ICTR adopted an approach based on inference from circumstantial evidence. Since the defendants rarely admit their responsibility for the crimes committed, the inferential approach allowed the ICTR to counter the absence of pleas guilty, as demonstrated not only in relation to acts of genocide, but also in aiding and abetting, planning, and conspiracy to commit genocide. Concerning hate speech, the ICTR treated this as a weapon employed by the genocidal perpetrators, in some sense as a 'verbal machete' to provoke the mass killings of the Tutsis. The criminalization of speech was not a relative procedure for the ad hoc tribunal, due to the universally recognized right to the freedom of expression enjoyed by all individuals. Therefore, after having ascertained when speech constituted hate

speech, the ICTR developed specific criteria to verify the evolution of this latter into direct and public incitement to commit genocide, scrutinizing songs, journal articles, radio broadcasts, and speeches delivered during Hutu extremist rallies. The ICTR approach to the criminalization of hate speech evolved through the years, reaching the adoption of a sophisticated strategy to deal with the issue. Its main result was not only to create precedents allowing the distinction between a free use of speech and incitement to genocide but even to raise awareness of the devastating effect of propaganda in a certain context. Finally, the ICTR had to prosecute cases involving rape and sexual violence and did so by first creating out of the void a conceptual framework to define those offenses. The ad hoc tribunal acknowledged the gravity of rape and sexual violence by criminalizing them as acts of genocide, recognizing that even if not entailing permanent damages to the victims, sexual abuses may be part of a genocidal plan of extermination.

In conclusion, the ICTR established a landmark jurisprudence on genocide, that, as it will be shown in the next chapter, will influence both the drafting of statutes and treaties as well as the jurisprudence of other international courts, particularly in the African continent. However, it is worth mentioning that the work of the ICTR did not remain uncontested, as the ICTY dealt with similar facts but ascribed them as different criminal offenses. The discordance between the ICTR and ICTY on specific topics will therefore constitute the first theme examined in the following chapter.

Chapter III. The Relevance and Legacy of the ICTR's Jurisprudence on Genocide in International Law

Introduction

Notwithstanding the mass killings of 800,000 persons in 100 days, the Rwandan genocide represents just one tragic event on the list of the most heinous massacres committed worldwide after the end of the Cold War. To be even more precise, mass atrocities had already been executed in the territory of the former Yugoslavia since 1992, then escalated into an actual genocide in 1995. Subsequently, civil wars shook the African continent, often coupled with the commission of crimes against humanity and war crimes. Notably, some of these conflicts seem to reach the level of actual genocide, although this labeling is still politically, scholarly, and juridically debated. Setting apart these considerations, what remains constant is the commission of crimes, which requires adequate punishment not only under national legislation but even by international criminal law, to avoid impunity to legitimize further atrocities. Therefore, international criminal law has evolved and is still evolving since the 1990s, reflecting an increasingly conflictual international context. The main difference in prosecuting international crimes before and after the 1990s is the availability of precedents. If, as remarked in several passages of the precedent chapter, the ICTR had to 'break the ice' on several matters due to the absence of legal precedents, such a vacuum was filled by the ICTR and the ICTY themselves, providing a massive case law to courts operating afterward. Hence, the ICTR's jurisprudence has to be considered an authoritative source of international criminal law, exercising influence on different political and legal bodies. To provide a comprehensive evaluation of the legacy of the ICTR's jurisprudence on genocide in international law, this chapter proposes an analysis based on three different levels: ad hoc tribunal (similar tribunal in terms of structure and crimes prosecuted), centralized international criminal court, and African courts. First, a comparison between the ICTR and the ICTY on genocide-related cases is drawn. This 'parallel' analysis is functional to detect the main difference between the ICTR's and ICTY's jurisprudence, though the two tribunals dealt with similar criminal offenses, and to explain the reasons for such discordant case law. Since both the ad hoc tribunals created a consistent jurisprudence that still holds as authoritative precedents in international criminal law, their comparison is even necessary to raise awareness of the venues available to international courts to prosecute international crimes, as it will be shown in the following level of analysis. Second, the International Criminal Court (ICC) is presented, scrutinizing its statute and jurisprudence to detect and evaluate the degree of influence of the ICTR. Since nowadays the ICC represents the centralized court entrusted to prosecute international crimes, it is expected that it is and will be called to reconcile the discordant jurisprudence of the ICTR and the ICTY previously mentioned. Therefore, reviewing its statute and jurisprudence is critical to understanding the long-lasting impact

and legacy of the ICTR in international criminal law and its preeminence vis-à-vis the ICTY's jurisprudence both in terms of impact on statutes and case law. Third, the influence of the ICTR is conceptualized in the African continent, including African international organizations' policies, regional legal instruments for the prevention and punishment of genocide, and the jurisprudence of an African hybrid court. Of note, this level of analysis is the most innovative of the thesis, as it reviews African legal instruments from the perspective of the ICTR, a specific issue poorly discussed by the literature. Moreover, it illustrates the potential applicability of the ICTR's jurisprudence on ongoing or upcoming trials and the elaboration of legal and political documents.

3.1 The ICTR & the ICTY: a Comparison of Genocide-related Cases

As recalled repeatedly in this thesis, international criminal law lacked jurisdictional precedents after the Nuremberg and Tokyo trials in the 1940s. Suddenly, two ad hoc criminal tribunals, the ICTY and the ICTR, were created by the SC between 1993 and 1994 to punish the most serious crimes committed in the territory of the former Yugoslavia and Rwanda. The ICTY and the ICTR were called to deal with the prosecution of those atrocities, establishing landmark precedents. Notwithstanding the two ad hoc tribunals were entrusted to deal with similar crimes, i.e. genocide, war crimes, and crimes against humanity, they produced a consistently different jurisprudence. Therefore, this paragraph aims to explore such discordance, understating the reason why the ICTY and the ICTR dealt differently with similar issues, with particular regard to genocide-related cases. To highlight the outstanding contribution of the ICTR to the notion of genocide and the prosecution of genocidal acts, comparing its jurisprudence with the ICTY's is of primary importance since it allows to understand different approaches in international criminal law.
To provide an adequate comparison between the ICTR and the ICTY, this paragraph is structured as follows. First, the ICTY Statute is reviewed, stressing similarities and differences with the ICTR Statute. Second, the ICTY's strategy to interpret the category of groups protected by the CPPCG is analyzed. Third, the ICTY's approach to the *mens rea* requirement is described, detecting relevant and impactful differences in comparison with the ICTR's position on the issue. Fourth and fifth, the ICTY's jurisprudence regarding respectively hate speech and rape is scrutinized, highlighting pivotal peculiarities of the ad hoc tribunal for the former Yugoslavia vis-à-vis the ICTR. Finally, a comprehensive assessment of the two ad hoc tribunals' jurisprudence is presented.

3.1.1 The ICTY: Overview and Statute

War characterized the history of the Balkans after the fall of the Soviet Union and the dissolution of Yugoslavia. The conflict had a complex ethnic dimension, involving Croatians, Bosnian Serbs, and Bosnian Muslims. In 1991 Slovenia and Croatia declared their secession from Yugoslavia, and

Bosnia Herzegovina followed in 1992. The ethnic tensions erupted in a civil war in Bosnia: the Bosnian Serbs were backed by Serbia, the Croatians by Croatia, whereas the Bosnian Muslims fell into isolation and became the main targets. In July 1995, around 8,000 Bosnian Muslims were killed at Srebrenica by Serb militia while they were under the protection of Dutch UN peacekeepers. The massacre has widely been considered a genocide, and shed light on the mass atrocities committed from 1991 to 1995 (the year in which an agreement for the cease of the hostilities was reached). Concerning the responsibility, the CIA esteemed that approximately 90% of the crimes committed during the Yugoslav wars were perpetrated by Serb militias[643].
During the intensification of the Yugoslav wars in 1992, the SC decided to deploy a peacekeeping mission, named United Nations Protection Force (UNPROFOR), entrusted to create safe havens for civilians and create the conditions to launch a mediation initiative between the parties in conflict[644]. As said, the presence of UN peacekeepers did not prevent the commission of mass atrocity crimes. In light of the increasing proofs of massacres and serious crimes committed against civilians, the SC decided to ensure an adequate punishment to the perpetrators. Thereby, in February 1993, the SC decided to create an ad hoc international criminal tribunal, the ICTY, for the "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"[645]. The SC decision was followed by a report from the UN Secretary-General[646], who drafted the ICTY Statute, then confirmed by the SC itself[647]. Differently from the ICTR's mandate, the SC did not explicitly mention the crime of genocide in indicating the objectives of the ICTY[648] but generally referred to serious violations of international humanitarian law. Thus, a preliminary consideration stemming from the comparison of the ICTR and ICTY mandates is that the former has been politically encouraged by the SC to prosecute genocide, whereas the latter has not. The ICTY Statute, as the ICTR's, had jurisdiction over the crime of genocide, and its definition of genocide was identical to the CPPCG's article II[649]. As for war crimes, the ICTY considerably expanded their notion and recognition, listing under the categories of "grave breaches of the Geneva Conventions of 1949"[650] and "violations of the laws or customs of war"[651] 13 criminal conducts. Conversely, the ICTR Statute exhausted the notion of war crimes under the category

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643 MEŠTROVIĆ (1996).
644 See Resolution of the United Nations Security Council, 21 February 1992, S/RES/743, *Socialist Federal Republic of Yugoslavia.*
645 Resolution of the United Nations Security Council, 22 February 1993, S/RES/808, *International Criminal Tribunal for the former Yugoslavia (ICTY)*, para. 1.
646 Report of the United Nations Secretary-General, 3 May 1993, S/25704, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993).* Hereinafter ICTY Statute.
647 See Resolution of the United Nations Security Council, 25 May 1993, S/RES/827, *International Criminal Tribunal for the former Yugoslavia (ICTY).*
648 Compare S/RES/808 with S/RES/955.
649 See ICTY Statute, art. IV.
650 ICTY Statute, art. II.
651 ICTY Statute, art. III.

of "violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II"[652], listing eight related crimes. Finally, the ICTY's and ICTR's Statute enumerated the same wrongful acts under the category of crimes against humanity, yet with a fundamental difference in their definition. The ICTY Statute defined crimes against humanity as those "committed in armed conflict, whether international or internal in character, and directed against any civilian population"[653], whilst the ICTR Statute stressed the nature of those crimes "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[654]. Therefore, the ICTY could have only prosecuted crimes against humanity if committed during wartime, clearly resembling the nexus required by the IMT Charter[655]. At the same time, the ICTR was not bound by such a context provision but rather by assessing the discriminatory motives behind their commission. Overall, the ICTY Statute reflected an ad hoc tribunal structured to give preeminence to wartime crimes, primarily dealing with war crimes, accurately listed, and allowing the prosecution of crimes against humanity, though necessitating their link with conflict. Otherwise, the ICTR Statute was less restrictive, giving preeminence to the prosecution of genocide and crimes against humanity committed with a discriminatory aim.

3.1.2 Interpretation of Protected Groups: the ICTY in the Wake of the ICTR

The ICTY first dealt with a genocide-related case in 1999, prosecuting Goran Jelišić, a former Bosnian Serb police officer accused of having violated customs of war at the Luka camp in Brčko during the Bosnian War. When called to grasp the CPPCG and furnish an interpretation of the four protected groups in *Jelišić*, the ICTY recognized the inadequacy of adopting a purely objective approach, stating that attempting to define national, ethnical, racial, or religious groups using "objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the *perception* of the persons concerned by such categorization"[656]. By observing the possibility of discordance between objectivity and subjectivity considerations towards the group, the trial chamber made clear the ICTY's preference towards a subjective approach to interpreting the CPPCG's article II. Thus, as of 1999, the ICTR embraced an objective approach in *Akayesu*[657], whilst the ICTY moved towards a subjective one. The ICTY evaluated the subjective criterion by referring to the stigmatization of a group by the community, noting that it was "the stigmatization of a group as a distinct […] unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group *in*

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652 ICTR Statute, art. IV.
653 ICTY Statute, art. V.
654 ICTR Statute, art. III.
655 See *supra* subparagraphs 1.2.1 and 1.2.2.
656 Judgment of the International Criminal Tribunal for the former Yugoslavia, 14 December 1999, IT-95-10-T, *The Prosecutor v. Goran Jelišić*, para. 70, emphasis added.
657 See Judgment, *Akayesu*, para. 511.

the eyes of the alleged perpetrators"[658]. Here, the ICTY moved forward emphasizing the importance of considering the perspective of the offenders vis-à-vis the group, to understand if they targeted specific victims due to these latter's membership to the group in object, aligning with the ICTR's positions in *Kayishema and Ruzindana* and *Rutaganda*[659]. Before the choice of considering either the victim's or the perpetrator's perspective, the ICTY therefore gave preeminence to the latter, as confirmed in *Brđanin*, clarifying that the "subjective criterion […] [was furnished] by the perpetrators of the crime"[660]. Still in *Brđanin*, and coherently with what this thesis has labeled as a hybrid approach[661], the trial chamber noted that the assessing of group membership required a certain degree of objective considerations[662].
Stepping back to *Jelišić*, the ICTY attempted to elaborate a twofold, sophisticated subjective approach, acknowledging that a group could

> "be stigmatized […] by way of positive or negative criteria. A 'positive approach' would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A 'negative approach' would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group"[663].

The positive approach reflected the 'classic' definition of the subjective approach as described above for the ICTR and ICTY jurisprudence, considering how individuals external to a group depict such a group for its characteristics. Conversely, the negative approach is based on the exclusion of individuals from a group, because they are perceived as different, i.e. defining "the group [composed of the excluded individuals] by what is not"[664]. However, subsequent ICTY's rulings rejected the possibility of negatively defining a group, holding that "it [was] not appropriate to define the group in general terms, [e.g.] 'non-Serbs'"[665]. The ad hoc tribunal justified the rejection of the negative approach by recalling the term "as such"[666] associated with the four protected groups by the CPPCG. Such wording underlined that individuals were targeted because they possessed a particular identity, and not because they lacked specific national, religious, ethnic, or racial characteristics. In sum, despite an attempt to recognize a negative-subjective ap-

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[658] *Ibidem*, emphasis added.
[659] See Judgment, *Kayishema and Ruzindana*, para. 98; Judgment, *Rutaganda*, para. 143.
[660] Judgment of the International Criminal Tribunal for the former Yugoslavia, 1 September 2004, IT-99-36-T, *The Prosecutor v. Radoslav Brđanin*, para. 683. This position was further confirmed by the Judgment of the International Criminal Tribunal for the former Yugoslavia, 12 December 2012, IT-05-88/2-T*, The Prosecutor v. Zdravko Tolimir*, para. 735.
[661] See *supra* subparagraph 2.4.4.
[662] See Judgment, *Brđanin*, para. 684.
[663] Judgment, *Jelišić*, para. 71.
[664] LINGAAS (2015: 15).
[665] Judgment, *Brđanin*, para. 685. Of note, this position was confirmed by the Judgment of the International Court of Justice, 1 September 2004, ICJ Reports (2004), *Case on the Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 193.
[666] UN Genocide Convention, art. II.

proach, the ICTY maintained a positive categorization for assessing the membership of individuals to one of the groups listed by the CPPCG's article II.
Overall, concerning the definition of the four protected groups by the CPCG, the ICTY followed in the wake of the ICTR. If this latter witnessed a progressive shift in its jurisprudence from a purely objective approach established in *Akayesu* to a subjective and finally a hybrid one, this evolution did not manifest in the ICTY jurisprudence, as it remained coherent starting from *Jelišić* with the subjective approach. Further, the ICTY accepted the ICTR recognition of the preeminence of the genocide perpetrators' perspective towards the groups over the victims' perceptions.

3.1.3 The ICTY's Definition of the Genocidal Mens Rea*: the Shortcomings of Complexity*

Still beginning with the *Jelišić* case, among the charges against the defendant, depicted by the ICTY OTP as the "Serbian Adolf"[667], he was charged with genocide for atrocities committed against civilians. As the ICTR, the ICTY trial chamber in Jelišić recognized the unique nature of the genocidal *mens rea*, i.e. the *dolus specialis*, stating that the genocide perpetrator possessed a "special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[668]. Relevantly, the ICTY recognized that the genocidal *dolus specialis* could have manifested in two different forms:

> "[it] may consist of desiring the extermination of a *very large number* of the members of the group, in which case it would constitute an intention to destroy a group *en masse*. However, it may also consist of the desired destruction of a *more limited number of persons selected* [i.e. leadership of the group] for the *impact* that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group 'selectively'"[669].

The first version of the genocidal *dolus specialis* is the one embraced by the ICTR, considering the specific intent to exterminate a consistent number of members of the targeted group. Indeed, the ICTR in *Kayshema and Ruzindana* even considered the killing of a large number of victims as clear evidence to infer the genocidal *mens rea*[670]. As for the selective version, here the ICTY went further compared with the ICTR's jurisprudence on the genocidal perpetrator *dolus specialis*, acknowledging that this latter could manifest even if the offenders target a few individuals, but essential for the survival of the group. Thus, the discriminant was not the quantity, but rather the quality, the status of the specific targets on which the groups depend. Overall, the ICTY distinguished between a quantitative *dolus specialis*, the one even found in the ICTR's jurisprudence, and a qualitative *dolus specialis*, an

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667 Judgment, *Jelišić*, para. 102.
668 Judgment, *Jelišić*, para. 62. See also Judgment (Appeal) of the International Criminal Tribunal for the former Yugoslavia, 5 July 2001, IT-95-10-A, *The Prosecutor v. Goran Jelišić*, paras. 45-46.
669 Judgment, *Jelišić*, para. 82, emphasis added.
670 See Judgment, *Kayishema and Ruzindana*, para. 93; *supra* subparagraph 2.5.2.

exclusive feature of the working of the ICTY's trial chamber in *Jelišić* and then confirmed in *Krstič*[671].
Interestingly, the ICTY recognized a geographical dimension of the genocidal *mens rea*, specifying that

> "the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue"[672].

The geographical contextualization of the *mens rea* for genocide counterweighted the general consideration of genocide as a wider mass extermination of a targeted group. By recognizing the importance of geography, the ICTY expanded the chances of detecting a genocidal *mens rea* even in the absence of a large-scale commission of genocidal acts. This criterion was further developed in *Krstič* when the trial chamber noted that the *dolus specialis* could have been "limited to the size of a region or […] a municipality"[673]. In comparison with the ICTR's jurisprudence, it appeared that the ad hoc tribunal for Rwanda did not consider it necessary to specify that genocide could have been committed in specific areas to be recognized as such since it safely categorized conduct committed in different areas as acts of genocide. Perhaps, the ICTR did not acknowledge the geographical dimension of the genocidal *mens rea* due to the extension of the acts of genocide in almost every municipality and prefecture of Rwanda.
In *Jelišić*, the trial chamber found that the accused acted with a discriminatory intent, purposely targeting Bosnian Muslims[674]. The court added that such discrimination was motivated by "a wider plan to *destroy*, in whole or in part, the group *as such*"[675]. However, regarding the wider plan, the court clarified that genocidal intent could not have been inferred in the absence of widespread attacks and if the crime charged was "not backed by an organization or a system"[676]. Further, the above-mentioned geographical criterion for the genocidal *mens rea* played a role in limiting the court's finding, as the judges were not able to conclude "beyond all reasonable doubt that there existed a plan to destroy the Muslim group *in Brčko*"[677]. Implicitly, the ICTY stated that even in the presence of a wider genocidal plan (yet not proved *in casu*), the court was bound to assess if such a plan specifically required the commission of acts of genocide in a certain area, a consideration that is not found in any judgment of the ICTR. Thus, the ICTY required a stricter criterion to assess the subsistence of a genocidal *mens rea*. Despite the trial chamber found that the *actus reus* of genocide was present[678] and Jelišić spe-

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671 See Judgment of the International Criminal Tribunal for the former Yugoslavia, 2 August 2001, IT-98-33-T, *The Prosecutor v. Radislav Krstič*, para. 634.
672 Judgment, *Jelišić*, para. 590.
673 Judgment, *Krstič*, para. 590.
674 See Judgment, *Jelišić*, paras. 74-75.
675 Judgment, *Jelišić*, para. 79.
676 Judgment, *Jelišić*, para. 101.
677 Judgment, *Jelišić*, para. 98, emphasis added.
678 Judgment, *Jelišić*, para. 100.

cifically targeted Muslims, it concluded that "he killed *arbitrarily* rather than with the clear intention to destroy a group"[679]. Overall, it can be observed that the ICTY required a two-step procedure to ascertain the genocidal *dolus specialis*. First, the existence of a wide genocidal plan manifesting through widespread attacks. Second, the existence of a specific plan, part of the wider one, requiring the commission of genocidal acts in the geographical area where the offenses under scrutiny were committed. This approach was partially contested in the *Jelišić* appeal judgment since the appeal chamber observed that "[the] existence of a plan or policy is not a legal ingredient of the crime […] [but] may facilitate proof of the crime [*mens rea*]"[680]. Nevertheless, the appeal chamber did not overrule the trial chamber's judgment, confirming the acquittal of Jelišić for the genocide charges. In its dissenting opinion, Judge Shahabuddeen argued that the existence of a genocidal plan, and therefore the accused's *mens rea*, was to be inferred by considering the context. As the dissenting opinion reported, Jelišić "was associated with other military personnel […] and could not have done what he was alleged to have been doing over a period of time without the sanction of authorities above him"[681]. Here Judge Shahabuddeen followed the ICTR approach in *Akayesu*, stressing the importance of the context to infer the accused's *dolus specialis*[682].

After the *Jelišić* trial and appeal judgments, the ICTY "has continued to treat the existence of a plan as significant evidence of genocidal intent"[683]. In *Stakić*, the accused was charged with genocide and complicity in genocide. However, the trial chamber held that "there [was] insufficient evidence in this case to prove that a genocidal campaign was being planned *at a higher level*"[684]. The verticality of the genocidal plan reflected the idea that the ICTY did not consider genocidal acts to be carried out *per se*, out of an agreed and wider genocide policy executed through a hierarchization of acts. Despite it being necessary to remind that the ICTR too considered of paramount importance the subsistence of a genocidal plan[685], it adopted a less restrictive approach in comparison with the ICTY. Whereas this latter viewed as necessary to precisely being aware of the content of the conversation between the accused and others responsible for criminal offenses to infer the *dolus specialis*[686], the ICTR considered sufficient to take into account weapons employed and the systematic way of killing[687].

In 2010, the ICTY finally acknowledged that a genocide was perpetrated at Srebrenica in July 1995 during the *Popović et al.* trial. The court inferred the

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679 Judgment, *Jelišić*, para. 108, emphasis added.

680 Judgment (Appeal), *Jelišić*, para. 48.

681 Partially Dissenting Opinion of Judge Shahabuddeen, attached to the Judgment (Appeal) of the International Criminal Tribunal for the former Yugoslavia, 5 July 2001, IT-95-10-A, *The Prosecutor v. Goran Jelišić*, para. 16.

682 See Judgment, *Akayesu*, para. 532.

683 CLARK (2015: 504).

684 Judgment of the International Criminal Tribunal for the former Yugoslavia, 31 July 2003, IT-97-24-T, *The Prosecutor v. Milomir Stakić*, para. 549, emphasis added.

685 See *supra* subparagraph 2.5.2.

686 See Judgment, *Stakić*, para. 549.

687 See Judgment, *Kayishema and Ruzindana*, para. 93.

genocidal *dolus specialis* by considering "the scale and nature of the murder operation, the targeting of the victims, [and] the systematic and organized manner in which it was carried out"[688], literally replicating the ICTR's findings in *Kayshema and Ruzindana*[689]. By noting that the conduct of the Serbian militias was "concerted and coordinated"[690], the ICTY assessed that a specific genocidal plan was executed at Srebrenica. Further, the court inferred from the systematic manner of the attacks the subsistence of a prior agreement "and thus a conspiracy to commit genocide"[691]. By taking systematicity as the basis to infer the conspiracy element, the ICTY embraced the ICTR's inferential approach for the criminal offense in object employed in *Niyitegeka*[692]. It should be noted that in *Popović et al.* the ICTY downsized the threshold to assess the subsistence of a *dolus specialis*. As priorly said, in *Stakić* the trial chamber was not able to convict the accused for genocide since it had "no knowledge of what was discussed during any […] meeting [between Serbs militants]"[693], i.e. specific proofs to adduct the *mens rea*. Conversely, in *Popović et al.* the ICTY considered sufficient the organized pattern of the attacks to infer the genocidal *dolus specialis*.

In the *Popović et al.* appeal trial, the defense used the ICTY's jurisprudence against the ad hoc tribunal itself, arguing that the "trial chamber erred in law by failing to identify state policy as an essential element of the crime of genocide"[694], referring to the strict standards applied in *Jelišić*, *Krstič*, and *Stakić*. The appeal chamber rejected the argument by recalling the ICTR's position in the *Kayishema and Ruzindana* appeal judgment: "a genocidal plan [was] not a constituent element of the crime of genocide, [though] the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide"[695]. Thus, the appeal judgment in *Popović et al.* created a "disconnect"[696] between the ICTY's jurisprudence, nevertheless recognizing the importance attributed to the existence of a state-level genocidal plan as a clear proof of the individual's *dolus specialis*. As Kress observed, "the individual act which forms the basis for a conviction of genocide is […] typically part of *systemic* criminality"[697], thus often requiring evidence of a systemic intent, i.e. a genocidal plan.

In sum, as the ICTR, the ICTY recognized that the unique nature of the crime of genocide relied upon its intent, i.e. the *dolus specialis*. Of note, the ICTY appears to have developed more the *dolus specialis* in comparison

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688 Judgment of the International Criminal Tribunal for the former Yugoslavia, 10 June 2010, IT-05-88-T, *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolič, Ljubomir Borovčanin, Radivoje Miletič, Milan Gvero, Vinko Pandurevič*, para. 856.

689 See Judgment, *Kayishema and Ruzindana*, para. 93.

690 Judgment, *Popović et al.*, para. 886.

691 *Ibidem*.

692 See Judgment, *Niyitegeka*, para. 428.

693 Judgment, *Stakić*, para. 549.

694 Judgment (Appeal) of the International Criminal Tribunal for the former Yugoslavia, 30 January 2015, IT-05-88-A, *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolič, Ljubomir Borovčanin, Radivoje Miletič, Milan Gvero, Vinko Pandurevič*, para. 427.

695 Judgment (Appeal), *Kayishema and Ruzindana*, para. 138.

696 CLARK (2015: 506).

697 KRESS (2006: 471, emphasis added).

with the ICTR, as it recognized that the intent to destroy may be limited to key figures among the group (qualitative *dolus specialis*) and a certain geographical area (geographical *dolus specialis*). Whilst in *Jelišić*, *Krstič*, and *Stakić* the ICTY adopted a strict inferential approach to assess the defendant's *dolus specialis*, in *Popović et al.* it moved closer to the ICTR's jurisprudence, allowing a wider consideration of circumstantial pieces of evidence to infer the genocidal *mens rea*. Of note, the ICTY referred to the ICTR to mitigate the discordance among its jurisprudence concerning the importance attributed to the subsistence of a genocidal plan.
In sum, as the ICTR, the ICTY recognized that the unique nature of the crime of genocide relied upon its intent, i.e. the *dolus specialis*. Of note, the ICTY appears to have developed more the *dolus specialis* in comparison with the ICTR, as it recognized that the intent to destroy may be limited to key figures among the group (qualitative *dolus specialis*) and a certain geographical area (geographical *dolus specialis*). Whilst in *Jelišić*, *Krstič*, and *Stakić* the ICTY adopted a strict inferential approach to assess the defendant's *dolus specialis*, in *Popović et al.* it moved closer to the ICTR's jurisprudence, allowing a wider consideration of circumstantial pieces of evidence to infer the genocidal *mens rea*. Of note, the ICTY referred to the ICTR to mitigate the discordance among its jurisprudence concerning the importance attributed to the subsistence of a genocidal plan.

3.1.4 Bound by Statute and Jurisprudence: the ICTY's Difficult Dealing with Hate Speech and its Criminalization

Although on a smaller scale compared with the Rwandan genocide, hate speech played a fundamental role during the commission of mass atrocities crimes in the context of the 1990s wars in the territory of the former Yugoslavia. The "pervasive use of hate speech"[698] constituted a key component of the Bosnian Serb ethnic cleansing operation against the Bosnian Muslims and Croats. As the ICTY noted in *Brđanin*, the Bosnian Serb propaganda "openly incited people to kill non-Serbs"[699]. Still, *in casu*, the trial chamber scrutinized the content of the Bosnian Serb propaganda and concluded that

> "[the] propaganda campaign achieved its goals with respect to both the Bosnian Serb and the non-Serb inhabitants of the Bosnian Kraijna. While influencing the Bosnian Serb population to perceive and treat the non-Serb inhabitants as enemies and *preparing* the Bosnian Serb population for the crimes that were committed later, it also *instilled fear* among the non-Serb population and created an atmosphere of terror, which contributed to the subsequent massive exodus of non-Serbs"[700].

The ICTY recognized a direct and indirect effect of the propaganda campaign. First, the use of speech actively encouraged the Bosnian Serb population to commit crimes. This form of instigation will then be ascribed according to the nature of the crime instigated. Second, the propaganda strategy terrorized

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[698] GORDON (2019: 107).
[699] Judgment, *Brđanin*, para. 82.
[700] Judgment, *Brđanin*, para. 83, emphasis added.

the non-Serb community, threatening their survival and pushing them to evacuate the territories where the conflict was ongoing, thus indirectly contributing to ethnic cleansing. Therefore, as it will be analyzed below, the prosecution of hate speech before the ICTY was largely linked with ethnic cleansing, and the ICTY's jurisprudence was overall "less focused on hate speech *per se* than the ICTR"[701]

As mentioned, the IMT convicted Streicher and Fritzsche for their use of propaganda containing hate speech, ascribing the conduct as a crime against humanity of persecution, as well as the NMT did in the *Ministries case* against Dietrich[702]. Reminding that the commission of crimes against humanity was strictly linked with wartime under the IMT Charter, this latter influenced the ICTY Statute, which maintained the said nexus, encouraging statutorily for categorizing hate speech as a crime against humanity of persecution. As a premise for entering into the analysis of the ICTY's jurisprudence on hate speech therefore it should be noted that the legacy of the IMT was stronger on the ad hoc tribunal for the former Yugoslavia rather than on the ICTR, whose statute did not contain any nexus between crimes against humanity and wartime.

Before delving into the ICTY's jurisprudence on hate speech, it is mandatory to specify how the ad hoc tribunal defined persecution, the criminal offense under the category of crimes against humanity which constituted the reference for criminalizing hate speech. In *Tadić*, the ICTY enunciated two constitutive elements of the *actus reus* of persecution: "the occurrence of a persecutory act or omission and discriminatory basis for that act or omission on one of the listed grounds, specifically race religion or politics"[703]. Thus, persecution consists of discriminatory conduct or omission based on specific grounds. As for its *mens rea*, the trial chamber in *Tadić* stressed that the persecutor intends to provoke "an infringement on an individual's enjoyment of a basic or fundamental right"[704]. In *Kupreškić*, the ICTY defined a four-step test to allow the classification of certain conduct as the *actus reus* of persecution as defined in *Tadić*. The trial chamber indeed enumerated the "gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in [article V of the ICTY Statute]"[705]. This characteristic of persecution permitted to elaborate a quite wider definition of the *actus reus* of persecution, including "a wide spectrum of acts"[706], since such a criminal offense, according to the ICTY, had to be considered for the cumulative acts composing it[707], including hate speech.

The ICTY was first called to assess whether hate speech could turn into persecution as a crime against humanity in 2001. This occurred during the trial

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[701] GORDON (2019: 119).

[702] See *supra* subparagraph 2.6.2.

[703] Opinion and Judgment of the International Criminal Tribunal for the former Yugoslavia, 7 May 1997, IT-94-1-T, *The Prosecutor v. Dusko Tadić a/k/a "DULE"*, para. 715.

[704] *Ibidem*.

[705] Judgment, *Kupreškić,* para. 621.

[706] Judgment, *Kupreškić*, para. 597.

[707] See Judgment, *Kupreškić*, para. 615.

of Dario Kordić, a Bosnian Croat politician accused of "encouraging, instigating and promoting hatred, distrust, and strife on political, racial, ethnic or religious grounds, by propaganda, speeches and otherwise"[708]. As Gordon correctly observes, a "significant information vacuum"[709] is present in the *Kordić* judgment, since no analyses of the speeches subjected to the charges of persecution were examined, an unusual praxis in comparison with the ICTR's hate speech jurisprudence, that precisely scrutinized the content of each journal article, speech, and song produced by the accused. Having been charged with persecution, the trial chamber applied the four-step test elaborated in *Kupreškić* to assess the criminalization of Kordić's hate speeches. Before *Kordić*, all the ICTY's jurisprudence on persecution was centered on conducts entailing physical consequences on the victims. Therefore, the judges opted to point out that persecution "[encompassed] both bodily and mental harm and infringements upon individual freedom"[710], theoretically allowing the prosecution as persecution of offenses not entailing physical damages. Two of the *Kupreškić* criteria were critical to preventing the categorization of hate speech as persecution in *Kordić*. First, hate speech "[did] *not* rise to the same level of gravity as the other acts enumerated in [article V of the ICTY Statute]"[711]. In the view of the court, hate speech was not comparable in terms of gravity to torture, rape, extermination, murder, and so on[712]. However, it is worth disputing that the ICTY did not specify the minimum threshold of gravity to be considered at the same level as the acts enumerated in article V of the ICTY Statute. Particularly, it is deductible that gravity corresponded to the entity of the damages, likely physical, thus contradicting the clarification that conduct considered as persecution could entail mental harm. Second, according to the *Kordić* judgment, "the criminal prohibition [of hate speech] has *not* attained the status of customary international law"[713]. The court reinforced the latter statement by concluding that "[the] criminal prosecution of speech acts falling short of incitement [found] *scant* support in international case law"[714]. The ICTY referred to the IMT's prosecution of Streicher, as it constituted a precedent on hate speech, stating that in that case the IMT "convicted the accused of persecution [because this latter] […] amounted to incitement to murder and extermination"[715]. Ironically, the ICTY failed to correctly catch the legal reasoning of the IMT in prosecuting Streicher. First, the IMT carefully reviewed the content of Streicher's propaganda, while the ICTY did not scrutinize Kordić's speeches. Second, the IMT criminalized Streicher's hate speech by taking into consideration the context where the propaganda impacted, i.e. the ongoing extermination of Jews. Conversely, the ICTY's criteria to assess the subsistence of persecu-

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[708] Judgment of the International Criminal Tribunal for the former Yugoslavia, 26 February 2001, IT-95-14/2-T, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Annex V, para. 37.
[709] GORDON (2019: 141).
[710] Judgment, *Kordić*, para. 198.
[711] Judgment, *Kordić*, para. 209, emphasis added.
[712] See ICTY Statute, art. V.
[713] Judgment, *Kordić*, para. 209, emphasis added.
[714] *Ibidem*, emphasis added.
[715] *Ibidem*.

tion made no reference to the context, although the ethnic cleansing of the Bosnian Muslims was ongoing as ascertained by the ICTY in several paragraphs of the *Kordić* judgment[716]. It should be even noted that the ICTY categorized ethnic cleansing as an act of persecution[717], i.e. crime against humanity. Therefore, if the ICTY had contextualized hate speech in the ongoing ethnic cleansing operation at the time, it could have been safely criminalized as persecution, coherently with the IMT's position in convicting Streicher. Third, the ICTY could have noted that the propaganda on political, racial, or grounds has been considered persecution by the IMT[718]. As Streicher targeted Jews, Kordić targeted Bosnian Muslims, thus satisfying the targeting of individuals on certain grounds. In sum, although the ICTY was influenced by the IMT in dealing with crimes against humanity starting from their nexus with wartime, the ad hoc tribunal missed the chance to correctly apply the IMT's jurisprudence to criminalize hate speech as persecution, as Kordić was acquitted from such a charge.

The omission of the context to criminalize hate speech set a clear divergence between the ICTR's and ICTY's jurisprudence on the issue. The ICTR in three judgments[719] produced before *Kordić* emphasized the relevancy of context, specifically to infer the intent to incite the commission of criminal offenses. Although the ICTR was dealing with direct and public incitement to commit genocide, thus with a *mens rea* characterized by a *dolus specialis*, its jurisprudence could have nonetheless guided the ICTY in dealing with hate speech. In fact, the ICTY took into account *Akayesu* as a counterargument, stating that the existing jurisprudence of the ICTR on hate speech had to be considered only in relation to incitement to commit genocide[720], avoiding any discussion on the legal reasoning made by the ad hoc tribunal for Rwanda.

The ICTY dealt once again with hate speech in 2016 while prosecuting Vojislav Šešelj, a Serb politician and an extremist anti-Muslin/Croatian inciting "to hatred against non-Serbs"[721]. The indictment established a nexus between Šešelj's incitement and the execution of ethnic cleansing[722], thus foreshadowing the degree of gravity as required by *Kupreškić*'s criteria. However, since the court did not detect a widespread and systematic nature of the attacks against Bosnian Serbs and Muslims, Šešelj was acquitted. Specifically, the ICTY did not assess the subsistence of targeting of civilians based on ethnic grounds, but "an armed conflict between opposing military factions with

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716 See Judgment, *Kordić*, paras. 396, 492, 493, 557, 602, 664, 666, 717, 852.

717 See Judgment, *Kordić*, para. 492.

718 See Judgment, *Göring*, para. 502.

719 See Judgment, *Akayesu*; Judgment, *Kambanda*; Judgment, *Ruggiu*. Generally, see *supra* subparagraphs 2.5.3 and 2.5.4. The relevancy of context concerning the criminalization of hate speech was then sanctioned by the ICTR in the *Media Case*, see Judgment, *Media Case*; *infra* subparagraph 2.6.5.

720 See Judgment, *Kordić*, footnote 272, quoting Judgment, *Akayesu*, paras. 672-675.

721 Judgment of the International Criminal Tribunal for the former Yugoslavia, 31 March 2016, IT-03-67-T, *The Prosecutor v. Vojislav Šešelj*, para. 5. Since the judgment is available only in French, its text has been translated by the author of this thesis.

722 GORDON (2019).

some civilian elements involved"[723], i.e. a civil conflict involving civilians from all ethnicities in the area. The *Šešelj* trial judgment was challenged one year later before the appeal chamber of the RMICT. During the appeal trial, the judges finally recognized the missing consideration of the context in the ICTY's jurisprudence, noting that the *Šešelj* trial judgment, "only addressed a limited number of speeches *without* assessing the evidence in its proper context, offering little, if any, reasons or analysis"[724]. By fully embracing the ICTR's jurisprudence regarding hate speech in setting the context as a reference, the RMICT noted that Šešelj's metaphor "rivers of blood"[725] was "undoubtedly capable of creating fear and emboldening perpetrators of crimes against the non-Serbian population"[726]. Here, the RMICT replicated the ICTR's approach to speeches in *Kambanda* and in *Ruggiu*[727], interpreting euphemisms and metaphors in light of the existing context at the time. Further, the judges quoted the ICTR appeal judgment in the *Media Case*, arguing that "speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes *actual discrimination*"[728]. The actual discrimination, in light of *Kupreškić*'s criteria, was critical to pave the possibility of ascribing hate speech to persecution. Indeed, the appeal chamber stated that "Šešelj's speech [rose] to a level of gravity amounting to the *actus reus* of persecution as a crime against humanity"[729]. In stark contrast with the ICTY's position in *Kordić*, the RMICT assessed that the hate speech *in casu* reached the threshold set by *Kupreškić*'s criteria, considering it as comparable to the other acts listed under article V of the ICTY Statute. Further, the RMICT considered Šešelj's speeches as "part of a widespread or systematic attack against the civilian population"[730], definitively allowing the ascription of the defendant's verbal conduct to persecution as a crime against humanity. In conclusion, the appeal chamber argued that the persecutory hate speech constituted a "violation of the right to security"[731], entailing the discrimination of the targeted victims[732].

In conclusion, the jurisprudence of the ICTY and the ICTR on hate speech completely diverged. This thesis argues that the ICTY's jurisprudence of hate speech is scarce and not effective in criminalizing such conduct (as a crime against humanity and incitement to commit genocide) for two main reasons, which have been identified through a comparison with the ICTR's case law. First, the ICTY was 'bound' by its statute to limit the criminalization of hate speech as a crime against humanity. The ICTY Statute, drafted in

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[723] Judgment, *Šešelj*, para. 192.
[724] Judgment (Appeal) of the Residual Mechanism for International Criminal Tribunals, 11 April 2018, MICT-16-99-A, *The Prosecutor v. Vojislav Šešelj*, para. 123, emphasis added.
[725] Judgment (Appeal), *Šešelj*, para. 133.
[726] *Ibidem*.
[727] See Judgment, *Kambanda*, para. 39 (x); Judgment, *Ruggiu*, para. 44 (iii).
[728] Judgment (Appeal), *Šešelj*, para. 133, quoting Judgment (Appeal), *Media Case*, para. 985.
[729] Judgment (Appeal), *Šešelj*, para. 163.
[730] Judgment (Appeal), *Šešelj*, para. 164.
[731] Judgment (Appeal), *Šešelj*, para. 165.
[732] See Judgment (Appeal), *Šešelj*, paras. 163-164.

1993, still reflected the 1945 nexus between wartime and crimes against humanity established by the IMT Charter. Such a strict link implied that the offenses categorizable as crimes against humanity had to provoke harms of a consistent gravity, as clearly notable in the cases of extermination, murder, and torture. Thus, considering that hate speech *per se* did not entail any consistent damage to the targets, but is 'only' susceptible to provoke further crimes, was not believed to reach the gravity threshold set by *Kupreškić* and referring to article V of the ICTY Statute. The fact that hate speech was considered persecution, i.e. a crime against humanity, only in 2018 by the RMICT appeal chamber in *Šešelj* leaves no doubts on the statutory and jurisprudential limitation preventing the criminalization of speech. Further, the ICTY failed to properly refer to the ICTR's jurisprudence to incorporate this latter's approach to deal with hate speech, e.g. the scrutiny of speeches, journal articles, radio broadcasts, and the primary importance attributed to their contextualization. Second, regarding the potential criminalization of hate speech as public and direct incitement to commit genocide, sanctioned by the ICTR in *Akayesu*, its limitation has to be found in the ICTY's jurisprudence. As illustrated above, the ICTY adopted a strict approach in verifying the subsistence of a *dolus specialis*, requiring evidence of both a national and a targeted/local genocidal plan. Since the detection of the *dolus specialis* behind a hate speech was the element that allowed the ICTR to categorize speeches, articles, and radio programs as public and direct incitement to commit genocide, a similar smooth process was not possible before the ICTY chambers. Hence, the strict requirements to identify a defendant's *dolus specialis* limited the detection of such a *dolus* in the *mens rea* of the hatred inciters, creating an entire vacuum in the relation between speech and genocidal acts during the wars in the territory of the former Yugoslavia.

3.1.5 Rape before the ICTY: a Narrow Approach and Lack of Genocidal Intent

Rape and sexual violence were largely employed by armed militias against civilians in the former Yugoslavia. The scale of such practices was so extensive that "rape as a demoralizing weapon of war became an institutionalized practice"[733]. Bosnian Muslim women were the primary targets of Serb militias, aiming to spread fear, oppression, and humiliation[734]. Of note, part of the rapes were motivated by an ideology of ethnic superiority, since "Serbs used forced pregnancy against Muslim rape victims as a demoralizing means of increasing the Serbian population"[735]. The ICTY Statute categorized rape as a separate criminal offense under the category of crimes against humanity[736], whilst the ICTR Statute did include rape as a crime against humanity[737]

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[733] RAY (1997: 803).
[734] RAY (1997).
[735] PRATT, FLETCHER (1994: 86).
[736] See ICTY Statute, art. V (g).
[737] See ICTR Statute, art. III (g).

but also contained a provision ascribing sexual offenses of rape, enforced prostitution, and any form of indecent assault as war crimes[738].
The ICTY, in *Furundzija*, contested the ICTR's definition of rape furnished in *Akayesu*[739], arguing that a definition of a criminal offense should not be found in a wide, conceptual framework, but rather, in a narrow and accurate notion based on national legislation, to respect the *nullum crimen sine lege stricta* principle, i.e. the principle of specificity required by criminal law[740]. Thus, the trial chamber in *Furundzija* objectively defined rape, highlighting its elements:

> (i) the sexual penetration, however slight:
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
> (ii) by coercion or force or threat of force against the victim or a third person[741].

Apparently, the difference between *Furundzija* and *Akayesu* relied upon the wording, as the former used sexual penetration whereas the latter physical invasion. Such a different wording in reality offered two different perspectives on the crime of rape. The *Akayesu* definition "embraces the victim's view of the crime"[742], setting the focus on the mental and physical harm provoked by the rapist. The *Akayesu* approach was, therefore, suitable to allow the categorization of rape as an act of genocide, as it shifted the attention to the victim and the harms coherently with the CPPCG's notion of genocide considering inflicting serious bodily and mental harm to the members of a targeted group as genocidal conduct. It should be noted that a relevant shortcoming of the *Furundzija* definition of rape was the exclusion of the categorization as a rape of acts such as the "penetration of a victim's vagina by a perpetrator's fingers or tongue"[743]. Indeed, the ICTY in *Furundzija* exclusively considered an 'instrument' of penetration the penis or objects, categorically excluding other parts of the body.
The *Furundzija* approach was partially challenged by the ICTY trial chamber in *Kunarac*, noting that it was "more narrowly stated than […] required by international law"[744]. According to the judges in *Kunarac*, the coercion and threat elements of *Furundzija*'s definition of rape were unable to capture its "non-consensual or non-voluntary [nature] on the part of the victim"[745]. Hence, *Kunarac* modified the *Furundzija* approach, elaborating a test centered on the non-consent of the victim to ascertain when relevant sexual acts

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738 See ICTR Statute, art. IV (e).
739 See *supra* subparagraph 2.7.3.
740 See Judgment of the International Criminal Tribunal for the former Yugoslavia, 10 December 1998, IT-95-17/1-T, *The Prosecutor v. Anto Furundzija*, paras. 176-177.
741 Judgment, *Furundzija*, para. 185.
742 ODORA (2005: 151).
743 DE BROUWER (2005: 115).
744 Judgment of the International Criminal Tribunal for the former Yugoslavia, 22 February 2001, IT-96-23-T&IT-96-23/1-T, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vucović*, para. 438.
745 *Ibidem*.

could have been classified as the crime of rape. Thus, according to the view of the *Kunarac* trial chamber, three elements suggested that sexual acts constituted rape:

> (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
> (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
> (iii) the sexual activity occurs without the consent of the victim[746].

It should be noted that the first and second elements clearly refer to a context of coercion to which the victim of sexual violence and rape is exposed, being in the form of an explicit display or threat of force or a circumstance entailing what could be defined as contextual violence. Having set these criteria to verify the subsistence of rape, the ICTY handled the *Furundzija* definition of rape, maintaining the first paragraph on sexual penetration and deleting the second concerning coercion[747]. The choice to exclude the coercion element from the definition of rape appeared logical since it had to be assessed preliminary through the three elements delineated above allowing the categorization of sexual violence as rape. Finally, the judges in *Furundzija* defined the rapist's *mens rea* as "the intention to effect […] sexual penetration, and the knowledge that it occurs *without* the consent of the victim"[748]. Of note, the *Kunarac* appeal judgment attempted to reconcile the ICTR's definition of rape in *Akayesu* with the ICTY's one in *Furundzija*, observing that rape categorized "as either war crimes or crimes against humanity *will be almost universally coercive*"[749]. Thus, despite the perspective (*Akayesu* or *Furundzija*) from which rape was scrutinized, coercion, i.e. absence of the consent of the victim, represented the common thread.
Relevantly, the ICTY's definitional approach to rape impacted on the ICTR's jurisprudence on the matter. Indeed, the ICTR's post-*Akayesu* jurisprudence on rape, apart from the cases *Musema* and *Rutaganda*[750], seemed to have embraced the *Furundzija* and *Kunarac* approaches. In 2003, the ICTR trial chamber in *Semanza* adopted the *Kunarac* definition of rape, stating that "other acts of sexual violence that [did not] satisfy this narrow definition may be prosecuted as other crimes against humanity, […] [such as] torture and persecution"[751]. It derived that the acts falling outside the stricter definition of rape given by the ICTY's jurisprudence had not to be considered as rape. Conversely, if *Semanza* had adopted the *Akayesu* conceptual framework, other acts of sexual violence could probably have been categorized as rape anyhow. In *Kamuhanda*, the ICTR trial chamber considered *Furund-*

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[746] Judgment, *Kunarac*, para. 442.
[747] See Judgment, *Kunarac*, para. 460.
[748] *Ibidem*, emphasis added.
[749] Judgment (Appeal) of the International Criminal Tribunal for the former Yugoslavia, 12 June 2002, IT-96-23 & IT-96-23/1-A, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vucović*, para. 130, emphasis added.
[750] See *supra* subparagraph 2.7.4.
[751] Judgment, *Semanza*, para. 345.

zija's and *Kunarac*'s definitions of rape "of persuasive authority"[752], indicating that these ICTY cases completely overruled *Akayesu*'s notion. The ICTR's *Gacumbitsi* judgment implicitly recognized the preeminence of jurisprudence over the ICTR Statute concerning rape. The judges adopted the ICTY's approach to rape, stressing the preeminence of the act of penetration vis-à-vis the fact that the ICTR Statute allowed a "definition of rape […] not limited to such acts alone"[753]. Thus, among different interpretations of acts constituting rape, the ICTR in *Gacumbitsi* held that the one entailing sexual penetration, minted by the ICTY, had to be preferred. The ICTR finally reconciled the different notions of rape in 2005, affirming that "the *Akayesu definition* and the *Kunarac elements* [were] not incompatible or substantially different in their application"[754]. The ICTR judges observed that the conceptual framework given in *Akayesu* represented a broad definition, complemented by *Furundzija* and *Kunarac,* "providing additional details on the constituent elements of acts considered to be rape"[755]. This reconciliation was then sanctioned in *Muvunyi* when the court found that the commonality between the approaches in *Akayesu*, *Furundzija*, and *Kunarac*, was the fact that "the victim did not agree to the sexual act or was otherwise not a willing participant to it"[756]. In conclusion, by transitivity and centering the reasoning of the lack of the victim's consent, it can be argued that even if the *actus reus* of rape has been formulated differently by the ICTR and the ICTY, the constant and unanimously agreed element of the crime remained the rapist's *mens rea*, i.e. "the intent of the perpetrator to effect such sexual penetration with the knowledge that it occurs without the consent of the victim"[757].

Under the ICTY's jurisdiction, rape could have been prosecuted either as a criminal offense *per se* or as a component of other crimes falling under the category of grave breaches and violations of the laws or customs of war, crimes against humanity, and genocide[758]. By referring to existing case law, the ad hoc tribunal for the former Yugoslavia tended to consider rape and sexual violence as acts constituting the crime of torture. In *Delalić*, the ICTY referred to international jurisprudence to identify the circumstances making rape ascribable as torture[759]. By considering the standards set forth by the Inter-American Court of Human Rights in *Mejia v. Peru*[760], the ICTY recognized that as constitutive of torture any intentional act inflicting physical or mental pain to a person motivated by a specific purpose to provoke pain, "by a public official or by a private person acting at the instigation of a public

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752 Judgment, *Kamuhanda*, para. 709.
753 Judgment, *Gacumbitsi*, para. 321.
754 Judgment, *Muhimana*, para. 550, emphasis added.
755 Judgment, *Muhimana*, para. 549.
756 Judgment, *Muvunyi*, para. 522.
757 *Ibidem*.
758 SELLERS, OKIZUMI (1997: 57-58).
759 Judgment of the International Criminal Tribunal for the former Yugoslavia, 16 November 1998, IT-96-21-T, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić a/k/a "PAVO", Hazim Delić, Esad Landzo a/k/a "Zenga"*, paras. 466, 478, 482.
760 See Judgment of the Inter-American Court of Human Rights, 1 March 1996, Case 10.970, Report No. 5/96, *Raquel Martí de Mejía v. Perú*.

official"[761]. Further, the ICTY acknowledged that rape could entail non-physical damages[762] by recalling the ECtHR judgment in *Aydin v. Turkey*[763]. In *Delalić* the court found Delić, one of the defendants, guilty under articles II and III of the ICTY Statute, respectively grave breaches and violations of the laws or customs of war[764]. Hence, the court considered rape not as a crime *per se* but as a form of torture, categorizing this latter criminal offense as a war crime, a position then confirmed in *Furundzija* and *Kunarac*[765]. It should be noted that different scholars contest the consideration of rape as torture according to the standards adopted in *Delalić*, which in turn drew from *Mejia v. Peru*. It is indeed argued that the involvement of a public official, either as a perpetrator or instigator, set an "unreasonably high standard for torture"[766], making it difficult to establish the subsistence of rape and its prosecution[767]. However, a deeper scrutiny of the ICTY's jurisprudence on the matter contradicts those positions. In *Kunarac*, the trial chamber held that "the presence of a state official or of any other authority-wielding person in the torture process [was] not necessary for the offense to be regarded as torture under international humanitarian law"[768]. Moreover, the judges noted that the perpetrator's *mens rea* characterized the crime of torture, defining it as "aim at obtaining information or a confession, or at punishing, intimidating or *coercing* the victim or a third person, or at discriminating, on any ground, against the victim or a third person"[769]. The intent to coerce was coherent with the definition of rape embraced by the ICTY, recognizing the importance of such an element vis-à-vis the physical sexual act of penetration. Thus, in *Kunarac* the ICTY made clear that the involvement of public officials was not necessary, as it was even in contrast with the application of individual criminal responsibility[770].

Rape was also prosecuted by the ICTY as a crime against humanity, either *per se* or as persecution. In *Češić*, the trial chamber applied the *Kupreškić* 'gravity test'[771], assessing the degree of seriousness in terms of physical and moral damages inflicted by the rapist on the victim. The judges observed that "violation of the moral and physical integrity of the victims [justified] that the rape [had to] be considered particularly serious as well"[772]. The fact that the rapes were committed in the presence of others entailed further humiliation of the victim[773], aggravating the seriousness of the crime and reaching

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[761] Judgment, *Delalić*, para. 483.
[762] Judgment, *Delalić*, paras. 466-468.
[763] See Judgment of the European Court of Human Rights, 25 September 1997, Case no. 57/1996/676/866, *Aydin v. Turkey*.
[764] See Judgment, *Delalić*, paras.1253-1269.
[765] See Judgment, *Furundzija*, paras. 176, 185; Judgment, *Kunarac*, para. 408.
[766] GREEN, COPELON, COTTER, STEPHENS (1994: 219).
[767] See ASKIN (1997); COAN (2000).
[768] Judgment, *Kunarac*, para. 496.
[769] Judgment, *Kunarac*, para. 497 (iii), emphasis added.
[770] See Judgment, *Kunarac*, para. 494.
[771] See *supra* subparagraph 3.1.4; Judgment, *Kupreškić,* para. 621.
[772] Judgment of the International Criminal Tribunal for the former Yugoslavia, 11 March 2004, IT-95-10/1-S, *The Prosecutor v. Ranko Češić*, para. 35.
[773] See Judgment, *Češić*, paras. 53, 107.

the threshold to consider the acts of sexual violence perpetrated by Češić as rape under the category of crimes against humanity. Concerning the prosecution of rape as persecution, this criminal conduct was associated with murder, torture, and inhumane condition of detention in the Omarska, Keraterm, and Trnopolje detention camps[774]. In *Kvočka*, the court detected the discriminatory purpose characterizing the crime of persecution, noting that "rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp and that they were committed solely against women"[775]. The ICTY decided to prosecute rape not *per se* but as persecution due to the joint criminal enterprise model of liability applied *in casu*, convicting the defendants for the actions carried out together, and not singularly[776]. In conclusion, the discordance between the definition of rape furnished by the ICTR and the ICTY was solved by considering the former's approach as a wide framework, and the latter's as a specification of the constitutive elements, while maintaining a common *mens rea*. The ICTY prosecuted rape either as torture ascribable as a war crime, or as a crime against humanity, *per se,* or as persecution depending on the model of liability adopted in the different trials. It is worth remarking that the ICTY did not consider any room for criminalizing rape and sexual violence as acts of genocide. As for hate speech, the strict approach adopted by the tribunal for detecting the *dolus specialis* prevented its recognition in association with rape. However, this thesis argues that the ICTY had the objective capability to consider rape as a genocidal act. As explained above, a consistent part of the rapes were executed to increase the percentage of the Serbian population. This motive was not solely ideological but instead had a strong, tangible impact. According to Islamic law, "the ethnicity of children is determined by the ethnicity of the father"[777], i.e. if a woman was raped by a Serbian man and impregnated by a Serbian man, then the child would have been considered no longer a Muslim but rather as a Serbian. In the wording of the CPPCG, such a consequence could be safely considered the result of "imposing measures intended to prevent births within the group"[778]. Such a genocidal act was linked with rape and sexual violence by the ICTR, recognizing a *dolus specialis* in raping a woman to stop the procreation of her ethnicity[779]. Overall, the judges of the ICTY could have delved into the motivations behind the rapes and thereby highlighted the underlying *dolus specialis*, which would have enabled the criminalization of rape as an act of genocide.

3.1.6 The ICTR and the ICTY: Two Discordant Jurisprudences

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774 Judgment of the International Criminal Tribunal for the former Yugoslavia, 2 November 2001, IT-98-30/1-T, *The Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić, Zoran Žigić*, paras. 171, 183, 320.

775 Judgment, *Kvočka*, para. 560.

776 Judgment, *Kvočka*, para. 573.

777 DAVIS (2000: 1237).

778 UN Genocide Convention, art. II (d).

779 See Judgment, *Rutaganda*, para. 53.

So far, this paragraph has provided a review of the ICTY's jurisprudence on themes linked with the main contribution of the ICTR to international criminal law, namely the interpretation of the CPPCG's article II, the genocidal *mens rea*, hate speech, and sexual violence. By an examination of the resolution establishing the ICTY, it has been detected that the word genocide was not mentioned by the SC, underlying the absence of willingness to primarily prosecute acts of genocide as instead explicitly expressed in the constitutive resolution of the ICTR. The comparison between the statutes of the ICTR and the ICTY showed that the latter contained more provisions regarding war crimes and maintained the IMT Charter's strict link between wartime and the prosecution of crimes against humanity. A common element was detected between the two ad hoc tribunals' approaches to the interpretation of the four protected groups by the CPPCG. Both the ICTY and the ICTR indeed embraced a mainly subjective approach, yet including objective elements, i.e. a hybrid approach favoring the genocide perpetrators' perspective. The difference stems from the evolution that the ICTR's jurisprudence witnessed for its interpretative strategy, whilst the ICTY adopted such an approach from the onset. The *mens rea* requirement for genocide is the element that this thesis has detected as the main cause of discordant jurisprudence over the criminalization of similar acts, i.e. hate speech and rape, as it will be recalled below. The ICTY agreed on the ICTR's recognition of a genocidal *dolus specialis*, but went further by elaborating a more sophisticated notion of *mens rea* for genocide. First, the ICTY increased the possibility of prosecuting genocidal acts by adopting a qualitative *mens rea*, meaning recognizing as a genocidal intent the killing of specific individuals fundamental for the survival of a group. According to this version of the *mens rea*, quality (the status of the target within the group) was prioritized over quantity (the number of victims, regardless of their status within the group). Second, the ICTY considerably limited the chance to prosecute genocide with the geographical *mens rea*, i.e. the need to prove the existence of a genocidal plan targeting the specific area where the crimes under trial were committed. Further, the ICTY longly considered the existence of a wider genocidal plan as necessary evidence to assess the subsistence of genocidal acts. This position was then clarified by the ICTY by referring to the ICTR's jurisprudence, holding that a wide genocidal policy could have constituted a useful basis for inference, but not a strict requirement to prosecute acts of genocide. However, the strictness, uncertainty, and discordance among the ICTY's jurisprudence on the genocidal *mens rea* requirement generated an obstruction to allow the categorization of certain conducts as acts of genocide. The ICTY's approach to the *mens rea* of genocide led the ad hoc tribunal's jurisprudence on hate speech and rape to completely diverge from the ICTR's one. The hate speech's potential to cause damage was underscored by the ICTY since it did not reach the gravity threshold set by *Kupreškić* referring to article V of the ICTY Statute. Further, the strict approach to the genocidal *mens rea* prevented any consideration regarding the subsistence of a *dolus specialis* for hate speech, which might instead have brought the ICTY closer to the ICTR regarding the criminalization of hate speech as direct and public incitement to commit genocide. It is therefore possible to argue that the ICTY

was more skeptical in criminalizing hate speech, particularly in linking it to genocidal acts. The complete avoidance of the context as well as the scrutiny of speeches, journal articles, and radio broadcasts by the ICTY reinforces this statement, as it did not take into account the ICTR's accurate and contextual approach to hate speech. As for rape, the ICTY contested its definition given by the ICTR, adopting a stricter one. Still, the same problem for hate speech emerged when dealing with rape, i.e. the lack of serious consideration of the potential *dolus specialis* motivating acts of rape and sexual violence. Consequently, rape was categorized either as a crime against humanity or as a war crime.
Although some authors argue that the two ad hoc tribunals established the idea that "the violation of the most basic human rights standard - the protection of human life - should never remain unpunished"[780], it is fair to remark on this statement. It is undoubtedly true that the ICTR and the ICTY produced landmark jurisprudence in international criminal law, finally providing precedents in relation to mass atrocity crimes. However, whilst the ICTR through the criminalization of hate speech and rape as genocidal acts ensured a wide coverage and punishment of criminal conduct perpetrated in Rwanda in 1994, the ICTY left a vacuum in Europe, failing to recognize the weaponization of speech and sexual violence to execute a genocide during the wars in the territory of the former Yugoslavia. As this thesis has argued and proved, the ICTY had the concrete possibility to replicate the ICTR's criminalization of hate speech and rape under the category of genocide, but this was prevented by the tribunal's statute and jurisprudence. In conclusion, it appears that the 'decentralization' of jurisdiction in international criminal law during the 1990s through the creation of the ICTY and the ICTR led to discordant jurisprudence, creating two different approaches to similar issues, entailing different impacts and influence on international criminal courts.

3.2 The Impact of the ICTR's Jurisprudence on the Rome Statute and the International Criminal Court's Jurisprudence

After an unprecedented decade for international criminal law in which two ad hoc tribunals were created, at the end of the 1990s the ICC was established. The ICC represents the international body entrusted to prosecute individuals responsible for mass atrocities crimes, and, as of 2024, 31 cases have been presented before the court and 42 arrest warrants have been issued by the ICC judges[781]. This paragraph aims to explore and assess the impact of the ICTR's jurisprudence on the statutory document of the ICC and on the court's jurisprudence. As a necessary premise, the following sections will focus exclusively on the ICTR's contributions, but comparisons between the ICTR and the ICTY will often be recalled to furnish a comprehensive analysis. This tripartite comparison is particularly relevant in demonstrating certain findings of the ICTR that were rejected by the ICTY but finally found their sanctioning in the ICC's jurisprudence.

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[780] Sterio (2019: 14); Robinson, MacNeil (2016)
[781] International Criminal Court (2024).

To properly address these issues, this paragraph is structured as follows. First, a background on the ICC is provided, to understand how and why the court emerged. Subsequently, the ICTR's impact on the ICC Statute and the ICC Elements of crimes is assessed, detecting similarities, differences, and critical points. Second, among the ICC's jurisprudence, the *Al-Bashir* case is selected, examining the majority decision and detecting its coherence and discordance with the ICTR's case law. Third, the dissenting opinion in *Al-Bashir* is scrutinized, determining the degree of influence of the ICTR's jurisprudence in leading it to reach a different conclusion compared with the majority decision. Fourth, the overall contribution of the ICTR's jurisprudence in *Al-Bashir* is assessed, inferring a likely attitude of the ICC in dealing with genocide and genocide-related crimes cases.

3.2.1 The ICC: Background and the ICTR's Impact on the Rome Statute and the ICC Elements of Crimes

The ICC was created in 1998 through the adoption of the Rome Statute (ICC Statute) and became operational in 2002. The idea of a centralized court responsible for prosecuting international crimes already emerged after the First World War, when the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties proposed the establishment of an international body composed of jurists from different countries, entrusted to apply "international law to judge the actions of individuals accused of violations of the laws of war"[782]. By 1922, appeals to create a "permanent international criminal court"[783] came from prominent voices inside the international lawyers community. Although the IMT, NMT, and IMTFE represented the first jurisdictional instrument for the punishment of violations of international criminal law, the tribunals dissolved when they concluded their trials, thus continuing to leave a vacuum concerning the establishment of a permanent court. During the Cold War, "the political will [to create such a court] of the world's major powers has been lacking"[784], and only at the end of the bipolar confrontation the East and the West were able to cooperate as the establishment of the ICTY and ICTR demonstrated. Overall, the ICTY and the ICTR indirectly promoted the creation of the ICC in three ways[785]. First, the two ad hoc tribunals demonstrated that international criminal courts were a concrete and viable option to prosecute international crimes. Second, they raise awareness that creating ad hoc tribunals to respond to the commission of mass atrocities was expensive in time and monetary terms, i.e. "not a sustainable solution"[786]. Third, it was legally impossible to employ the ad hoc tribunals as permanent courts, since their *ratione loci* and *temporis* circumscribed their work geographically and temporally. Therefore, having acknowledged that international criminal courts were an option, the international community mobilized to establish a permanent one during the Rome Diplo-

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782 FORD (2019: 307).
783 BELLOT (1922: 75).
784 BASSIOUNI (1991: 11).
785 FORD (2019).
786 BASSIOUNI (1995: 57). See also ZACKLIN (2004).

matic Conference (15 June - 17 July 1998). As a result of the conference, the ICC Statute was approved, constituting the statutory instrument of the ICC. The ICC Statute provides a *ratione temporis* starting from the entrance into force of the Statute in the interested legal systems, e.g. for the funding members the ICC has jurisdiction from crimes committed after 2002[787]. As for the *ratione loci*, the ICC's jurisdiction is based on the principles of nationality and territoriality. The first allows the court to prosecute crimes committed by nationals of its state parties, whilst the second permits the prosecution of criminal offenses committed in the territory of the ICC's state parties[788]. However, the ICC can exercise its jurisdiction in the territory of a non-state party if this latter provides its consent[789]. The ICC has jurisdiction *ratione personae* over "all persons without any distinction based on official capacity"[790], but it often prosecutes representatives of states and armies. Finally, the ICC exercises its jurisdiction based on the principle of complementarity[791], i.e. it can prosecute a crime only if such a crime has not been prosecuted domestically by a state party or if such a state party has been unwilling or unable to do so.

It is necessary to remark that at the time of the discussions and drafting of the ICC Statute, the ICTR was fully operational and producing jurisprudence. Therefore, it appears natural that elements of the Rome Statute were "influenced by or simply borrowed from the ICTR"[792]. The ICC has *ratione materiae* over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression[793]. The definitions of genocide provided by the ICTR and ICC statutes are identical, as both the tribunals directly referred to the CPPCG's article II[794]. The influence of the ICTR's jurisprudence on genocide primarily manifests in the ICC Elements of Crimes, an instrument created in 2002 to assist the ICC in the "interpretation and application of articles VI, VII and VII, consistent with the Statute"[795]. In association with each of the acts constituting genocide enumerated by the ICC Statute's article VI, the ICC Elements of Crime specify that "the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction"[796]. Here, the document stresses the relevance of context, i.e. to contextualize the conduct

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787 *Rome Statute of the International Criminal Court*, 17 July 1998, U.N.T.S. Vol. 2187, no. 38544, art. XI. Hereinafter ICC Statute.

788 ICC Statute, art. XII (2) (a), (b).

789 ICC Statute, art. XII (3).

790 ICC Statute, art. XXVII (1).

791 ICC Statute, preamble.

792 FORD (2019: 313).

793 ICC Statute, arts. V, VI, VII, VIII, VIII*bis*.

794 Compare UN Genocide Convention, art. II, with ICTR Statute, art. II, and ICC Statute, art. VI.

795 Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002, United Nations Publications, Sales no. E.03.V.2, part. II.B., as reviewed by the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010, International Criminal Court publications RC/11, *Elements of Crimes*, p. 1. Hereinafter ICC Elements of Crimes.

796 ICC Elements of Crimes, art. VI (a) (4), (b) (4), (c) (5), (d) (5), (e) (7).

of the accused to establish if the *actus reus* is ascribable to an act of genocide. Moreover, the reference to the context allows the ICC to infer the accused's *mens rea* with its *dolus specialis* component. Of note, the ICC Elements of Crimes explicitly allow the ICC to infer the *mens rea* "from relevant facts and circumstances"[797]. The ICTR first recognized the relevance of the context when dealing with genocide in 1998 with the *Akayesu* case, since the individual *dolus specialis* was detectable only if considering an existing and ongoing similar genocidal conduct[798]. The ICTR further elaborated this legal reasoning in *Kayshema and Ruzindana*, as the existence of a genocidal plan (i.e. a manifest pattern of similar conduct in the wording of the ICC Elements of Crimes) was evidence of a collective *dolus specialis*, in which the defendant's conduct had to be contextualized to infer the individual *dolus specialis*[799]. When dealing with genocide, it is therefore sanctioned by the ICTR's jurisprudence that context is the nexus between the collective and individual *dolus specialis*, and the ICC embraced this approach in its Elements of Crimes. Overall, the relevance attributed to the context by the ICC Elements of Crimes follows the ICTR's jurisprudence on the issue, considering contextual consideration as of primary importance when assessing the accused's liability for genocide. The ICTR's jurisprudence impacted the ICC Elements of Crimes in shaping the ICC's consideration of acts causing serious or bodily mental harm. Since the ICTR demonstrated in different trials that rape and sexual violence could amount to an act of genocide[800], proving the rapist's *dolus specialis*, the drafters of the ICC Elements of Crimes specified that causing serious bodily or mental harm "may include, but is not necessarily restricted to, acts of torture, *rape*, *sexual violence* or inhuman or degrading treatment"[801]. Thus, the bold criminalization of rape and sexual violence as acts of genocide by the ICTR found its sanctioning in the ICC Elements of Crimes.

As for hate speech and genocide, the ICC Statute holds that a person shall be liable before the ICC if "[in] respect of the crime of genocide, *directly* and *publicly* incites others to commit genocide"[802]. The requirements for hate speech to entail responsibility under the crime of genocide are therefore its publicity, directness, and connection with the crime of genocide itself, i.e. the inciter's *dolus specialis*. Here the ICC Statute sanctioned the ICTR's position in *Akayesu*[803], which in turn interpreted and developed the CPPCG[804]. However, the ICC Statute creates "confusion"[805] in international criminal law on hate speech, since it considers this latter (in the form of incitement to commit genocide) as a mode of liability, rather than a crime *per se* as the

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[797] ICC Elements of Crimes, art. III (general introduction).
[798] See Judgment, *Akayesu*, para. 523; *supra* subparagraph 2.5.2.
[799] See Judgment, *Kayshema and Ruzindana*, paras. 528, 531, 532, 534, 535, 539, 541; *supra* subparagraph 2.5.3.
[800] See *supra* paragraph 2.7; Judgment, *Akayesu*; Judgment, *Rutaganda*; Judgment, *Musema*; Judgment, *Gacumbitsi*; Judgment (Appeal), *Gacumbitsi*; Judgment, *Bagosora.*
[801] ICC Elements of Crimes, art. VI (b), footnote 3, emphasis added.
[802] ICC Statute, art. XXV (e), emphasis added.
[803] See Judgment, *Akayesu*, paras. 559, 560; *supra* subparagraph 2.6.3.
[804] See UN Genocide Convention, art. III (c).
[805] WILSON, GILLET (2018: 45).

CPPCG and ICTR Statute did[806]. According to different authors, considering incitement to commit genocide as a mode of liability rather than a criminal offense undermines "the full effectiveness of the criminalization of incitement"[807], as it implicitly requires genocide to be committed[808]. Logically, since incitement is a type of responsibility under the ICC Statute, it underlines the previous commission of a crime, but since incitement to commit genocide is not a crime *per se* under the said statute, to be prosecuted it required the occurrence of genocide. This consequence of the ICC Statute concerning incitement to commit genocide contradicts the landmark ICTR's jurisprudence on the issue, which first considers incitement as a criminal offense *per se* according to the ICTR Statute, and then recognizes its inchoate character, i.e. the fact that it is "punishable even if no act of genocide has resulted therefrom"[809]. Since the ICC has not already been called (as of 2024) to deal with individual responsibility for public and direct incitement to commit genocide, it remains unclear how the court will overcome the contradiction between its statute and the ICTR's jurisprudence. Instead, it is certain that the preventive function of the CPPCG and the ICTR's jurisprudence of creating a norm prohibiting public and direct incitement to genocide is weakened by the ICC Statute, requiring the actual commission of genocide as a prerequisite to prosecute incitement to commit genocide.

For the purpose of comparing the ICC and ICTR statutes and understanding the ICC options to prosecute genocide, a digression on crimes against humanity is mandatory. As elucidated above, in the ICTR Statute the main discriminant between genocide and crimes against humanity was the offender's *mens rea*[810]. Since the ICTR's definition of crimes against humanity was strictly linked to discriminatory grounds (targeting of civilians belonging to specific groups), it corresponded *de facto* to the genocidal *actus reus* targeting specific groups. Given a similar *actus reus*, it was the *dolus specialis* the element allowing the ICTR to categorize crimes considered crimes against humanity under the category of genocide, as demonstrated by the criminalization of hate speech and rape as genocidal acts. This blurred distinction between genocide and crimes against humanity was eliminated by the ICC Statute. Crimes against humanity are defined by the ICC Statute as acts "when committed as part of a widespread or systematic attack directed against any civilian population"[811]. This definition appears "closer to that of the ICTR"[812], as it eliminates the nexus between crimes against humanity and wartime established by the IMT Charter and translated in the ICTY's Statute[813] and maintains the widespread and systematic nature of the crimes as affirmed by the ICTR Statute. However, the discriminatory intent of cri-

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[806] See UN Genocide Convention, art. III (c); ICTR Statute, art. III (c).
[807] DAVIES (2009: 245).
[808] See SCHABAS (2000); OHLIN (2009); WILSON, GILLET (2018).
[809] Judgment (Appeal), *Media Case*, para. 679. See also Judgment, *Akayesu*, para. 562; *supra* subparagraphs 2.6.3, 2.6.5, 2.6.7.
[810] See *supra* subparagraph 2.2.2.
[811] ICC Statute, art. VII.
[812] FORD (2019: 314).
[813] Compare ICC Statute, art. VII, with ICTR Statute, art. III, and ICTY Statute, art. V.

mes against humanity as defined by the ICTR is absent in the ICC Statute's definition. Under the ICC Statute, crimes against humanity and genocide are distinguished not only by the *dolus specialis* but also by the fact that they are committed indiscriminately. Hence, the flexibility and room for manoeuvre to transfer certain conduct from the category of crimes against humanity to genocide given by the *mens rea* discriminant enjoyed by the ICTR are absent under the ICC jurisdiction, since it is counterbalanced by the indiscrimination inherent in crimes against humanity as defined by the ICC Statute. It should be noted that the only discriminatory acts categorizable as a crime against humanity under the ICC Statute remained persecution[814]. As this thesis argues, the ICTY's jurisprudence employed persecution to list hate speech and rape as crimes against humanity because it avoided any contextualization of those acts, as sanctioned by the RMICT[815] , and therefore prevented the detection of a *dolus specialis*. This scenario is not likely to occur before the ICC, as the court is bound to consider the context to infer the *mens rea*, as enunciated above. Hence, if the ICC is called to deal with a suspect crime of persecution, based on discrimination towards specific groups, it will be bound by statute to infer the intent from the context, virtually[816] raising the chances to detect a *dolus specialis* and thereby categorize conducts initially considered persecution as genocidal acts.

Still regarding crimes against humanity, the ICTR's jurisprudence on rape and sexual violence, though related to genocide, influenced the ICC listing of sexual abuses. Despite the ICTR Statute only mentioned rape, in *Rutaganda* the ad hoc tribunal dealt with other acts of sexual violence, e.g. sexual mutilation, enforced sterilization, and forced birth control[817], whose gravity has been highlighted during the trials. The ICC Statute acknowledged such gravity and embraced the ICTR's jurisprudence on sexual abuses, exhaustively listing "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"[818] as crimes against humanity. Facing the disagreement regarding the definition of rape given by the ICTR in *Akayesu* and the ICTY in *Furundzija*[819], the ICC embraced the approach of the ad hoc tribunal for Rwanda. Indeed, the ICC Elements of Crimes hold that the *actus reus* of rape subsist when

> "[the] perpetrator *invaded* the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
> The invasion was committed by force, or by threat of force or *coercion*, such as that caused by fear of violence, duress, detention, psychological oppression

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814 ICC Statute, art. VII (h).

815 See Judgment (Appeal), *Šešelj*, para. 123; *supra* subparagraph 3.1.4.

816 As it will se below, the ICC in *Al-Bashir* distinguished between a genocidal *dolus specialis* and a persecutory *dolus specialis*, thus jurisprudentially limiting the shift of acts of persecution under the category of the crime of genocide. See *infra* subparagraph 3.2.2.

817 See Judgment, *Rutaganda*, para. 53.

818 ICC Statute, art. VII (g).

819 See *supra* subparagraph 3.1.5.

> or abuse of power, against such person or another person, or by taking advantage of a *coercive environment*, or the invasion was committed against a person incapable of giving genuine consent"[820].

The ICC's definition of rape, by emphasizing the 'invasive' nature of rape and a victim's perspective, clearly reflects the *Akayesu* notion of rape as a "physical invasion of a sexual nature"[821]. Moreover, the subsequent ICC Elements of Crimes' paragraph on the non-consensual nature of rape follows the ICTR's consideration of "certain circumstances"[822] as likely to psychologically coerce the victim of rape. The ICC defined sexual violence as "an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by the threat of force or coercion"[823]. If compared with the ICTR's definition in *Musema*, "any act of a sexual nature which [was] committed on a person under [coercive] circumstances"[824], it appears clear that the ICC Elements of Crime maintained the coercion as the common thread to categorize any acts of sexual nature as acts of sexual violence.
In conclusion, the ICTR's jurisprudence did impact and influence the ICC Statute and Elements of Crimes. The ICTR's inferential approach was adopted by the ICC, attributing primary importance to the context to infer the *mens rea*. Specifically, it appears that in stressing the relevance of contextual consideration the ICC embraced the ICTR's strategy to infer an individual *dolus specialis* starting from the subsistence of a collective *dolus specialis*, i.e. a contextual *dolus specialis*. The ICC sanctioned the ICTR's finding about the chance of rape and sexual violence to constitute acts of genocide and adopted their definition as established by the ad hoc tribunal for Rwanda. Two main shortcomings have been drawn from the comparison between the ICC Statute and Elements of Crimes and the ICTR's Statute and jurisprudence. First, the ICC Statute configures public and direct incitement to commit genocide as a mode of liability rather than a criminal offense *per se*, thus jeopardizing the preventive role of the CPPCG and broadly international criminal law[825]. Second, the ICC Statute does not consider discriminatory grounds to be a prerequisite for the subsistence of crimes against humanity, thus eliminating the blurred distinction between that category and the crime of genocide present in the ICTR Statute which allowed the ad hoc tribunal a certain degree of flexibility in categorizing traditionally considered crimes against humanity as genocidal acts centering their reasoning on the *dolus specialis* of the offender's *mens rea*.

3.2.2 The Al-Bashir *Case: Analogies and Discordances with the ICTR's Jurisprudence on Genocide*

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[820] ICC Elements of Crimes, art. VII (1) (g)-1, 1, 2, emphasis added.
[821] Judgment, *Akayesu*, para. 598.
[822] Judgment, *Akayesu*, para. 688.
[823] ICC Elements of Crimes, art. VII 7 (1) (g)-6, 1.
[824] Judgment, *Musema*, para. 227.
[825] See ASHWORTH AND ZEDNER (2014).

As of 2024, the ICC has not convicted any individual for genocide or genocide-related crimes. However, the ICC referred to the ICTR's jurisprudence in different trials[826], though not strictly related to genocide. Since the ICC directly handled counts of genocide only in the *Al-Bashir* case, this section will exclusively examine it among the available jurisprudence of the ICC. This thesis considers the pre-trial decision in *Al-Bashir* as a proxy to assess and in a certain measure predict how the ICC deals and will deal with cases involving genocide and genocide-related offenses. Of note, given the almost total absence of the ICC's jurisprudence on genocide and relative literature, this section directly handled the ICC's documents, including decisions, dissenting opinions, OTP indictment, and witness reports.

On 4 March 2009, the ICC issued an arrest warrant against Omar Al-Bashir, former head of state of Sudan accused of war crimes, crimes against humanity, and genocide. As regards genocide, the ICC OTP accused Al-Bashir of having "masterminded and implemented a plan to destroy in substantial part the Fur, Masalit, and Zaghawa groups, on account of their ethnicity"[827]. When called to handle the charge of genocide against Al-Bashir, the ICC pre-trial chamber first premised that for considering an individual responsible for acts of genocide it was not required to prove the subsistence of a "genocidal policy or plan"[828]. Here the ICC embraced the ICTR approach in considering a context of genocidal policy as a useful, yet not necessary, element to prove the individual's responsibility for genocidal acts. As recalled above, and in contrast with the ICTY's position in different trials[829], the ICTR in the *Kayishema and Ruzindana* appeal judgment held that "a genocidal plan [was] not a constituent element of the crime of genocide"[830], though remarking that in *Akayesu* it considered it as an element to infer the indivi-

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826 See Judgment (Appeal) of the International Criminal Court, 15 December 2022, ICC-02/04-01/15 A, *Situation in Uganda in the Case of The Prosecutor v. Dominic Ogwen*, paras. 304, 363, 1019, 1623, 1635; Judgment of the International Criminal Court, 8 July 2019, ICC-01/04-02/06, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Bosco Ntaganda*, paras. 52, 71, 73, 703, 935, 1010, 1202, 1203; Judgment (Appeal) of the International Criminal Court, 8 March 2018, ICC-01/05-01/13 A6 A7 A8 A9, *Situation in the Central African Republic in the Case The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, paras. 85, 129; Judgment of the International Criminal Court, 7 March 2014, ICC-01/04-01/07, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga*, paras. 789, 1105, 1123, 1124, 1635; Judgment (Appeal) of the International Criminal Court, 30 May 2012, ICC-01/04-01/10 OA 4, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Callixte Mbarushimana*, paras. 18, 43; Judgment of the International Criminal Court, 14 March 2012, ICC-01/04-01/06, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, paras. 7, 10, 584, 618, 946, 997.

827 International Criminal Court Press Release, 2008, ICC-OTP-20080714-PR341, *ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur.*

828 Decision of the International Criminal Court on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09, *Situation in Darfur, Sudan, in the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir ("Omar Al-Bashir")*, para. 119.

829 See Judgment, *Jelišić*, para. 101; Judgment, *Stakić*, para. 549.

830 Judgment (Appeal), *Kayishema and Ruzindana*, para. 138.

dual *dolus specialis*[831]. Further, the ICC noted that the constitutive element of the crime of genocide is the individual intent, disentangled from "a concrete threat to the existence in whole or in part of that group"[832]. In this passage, the ICC transposed the ICTR's *Akayesu* judgment, which noted that the "specific intention, required as a constitutive element of the crime […] [demanded] that the perpetrator clearly [sought] to produce the act charged"[833], but did not refer to the actual commission of the crime, as confirmed in *Musema*[834]. Thus, as the ICTR, the ICC acknowledged that the crime of genocide is "a crime of *mens rea*"[835].

Regarding the definition of the protected groups, the ICC noted that these have to be defined positively, i.e. "who the targeted are, not who they are not"[836]. The rejection of a negative interpretation of the four protected groups by the CPPCG is coherent with the ICTR's jurisprudence in *Akayesu*[837], then sanctioned by the ICTY in *Brđanin*[838]. Called to categorize the Fur, Masalit, and Zaghawa as either national, ethnic, religious, or racial groups, the ICC deviated from the ICTR's hybrid approach. Indeed, the ICC defined those groups based on their "own language, […] tribal customs and […] traditional links to [their] lands"[839], thus adopting a purely objective approach and excluding any subjective strategy of interpretation, considered as "unnecessary"[840].

Turning to the genocidal *mens rea*, the ICC followed the ICTR's jurisprudence in detecting two subjective elements, i.e. a *dolus generalis* (willingness and awareness) and a *dolus specialis* (intent to destroy the targeted group)[841]. Thereby, the ICC sanctioned the twofold nature of the genocidal *mens rea* as previously established by the ICTR in *Akayesu*. As recalled above by the analysis of the ICC Statute, this latter's formulation of genocide and crimes against humanity contains a potential overlapping between the crime of persecution and genocide[842]. In *Al-Bashir* the pre-trial chamber detected this issue, stressing the importance of providing an adequate distinction between the two crimes[843]. To overcome the potential confusion, the ICC referred to the ICJ rulings in *Case on the Application of the Genocide Convention*, which in turn recalled the ICTY in *Jelišić*, stating that "when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecu-

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831 See See Judgment, *Akayesu*, para. 532.
832 Decision, *Al-Bashir*, para. 120.
833 Judgment, *Akayesu*, para. 498.
834 See Judgment, *Musema*, para. 164.
835 CASSESE (2002: 338).
836 Decision, *Al-Bashir*, para. 135.
837 See Judgment, *Akayesu*, paras. 510-516.
838 See Judgment, *Brđanin*, para. 685; *supra* subparagraph 3.1.2.
839 Decision, *Al-Bashir*, para. 137.
840 Decision, *Al-Bashir*, footnote 52.
841 See Decision, *Al-Bashir*, paras. 138-139. Compare with Judgment, *Akayesu*, paras. 498, 518, 520
842 See *supra* subparagraph 3.2.1.
843 See Decision, *Al-Bashir*, paras. 141-142

tion amounts to genocide"[844]. Thus, though targeting on discriminatory grounds, persecution did not aim at destroying a group in whole or in part as genocide. Rather, it is centered on inflicting physical or mental harm to the individual for membership in a discriminated group. To reinforce this distinction, the ICC referred to the ICTR's criteria drawn in *Seromba*. *In casu*, the ICTR detected several elements constituting the basis to infer the specific genocidal *dolus specialis*, e.g. the scale of the atrocities committed and "the perpetration of acts which violate the very foundation *of the group* or considered as such by their perpetrators"[845].

The pre-trial chamber in *Al-Bashir* accepted the OTP suggestion to adopt an inferential strategy to ascertain the accused's *dolus specialis*. In determining how to correctly apply such an approach, the ICC made explicit reference to the ICTR's case law in *Akayesu*, *Kayishema and Ruzindana*, and others. In *Akayesu*, the ICTR observed that inference becomes a necessity for a tribunal "in the absence of a confession from the accused"[846]. Since Al-Bashir was not present during the pre-trial phase, the chamber was obliged to resort to inference. Relevantly, in *Kayishema and Ruzindana* the ICTR judges considered inference as sufficient to prove the accused's *dolus specialis*, stating that "circumstantial evidence […] may provide *sufficient* evidence of intent"[847]. Finally, in several other trials, the ICTR stressed the relevance of the context as the primary basis for inference[848]. The OTP presented nine different elements serving as the basis to infer the accused's *dolus specialis*. In evaluating them, the ICC adopted the already mentioned strategy to infer the individual *dolus specialis* from the collective *dolus specialis*, i.e. Al-Bashir's intent to destroy was attempted to be inferred from the Sudanese leadership's *dolus specialis.* Thus, the pre-trial chamber engaged in the attempt to detect a collective genocidal *mens rea*[849]. The court divided the nine elements suggested by the OTP into three different categories:

> i. the alleged existence of a [Government of Sudan] (GoS) strategy to deny and conceal the crimes allegedly committed in the Darfur region against the members of the Fur, Masalit and Zaghawa groups;
> ii. some official statements and public documents, which, according to the Prosecution, provide reasonable grounds to believe in the (pre) existence of a GoS genocidal policy;
> iii. the nature and extent of the acts of violence committed by GoS forces against the Fur, Masalit, and Zaghawa civilian population[850].

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[844] Decision, *Al-Bashir*, para. 142, quoting Judgment, *Case on the Application of the Genocide Convention*, para. 188, quoting Judgment, *Jelišić*, paras. 62, 66.

[845] Judgment, *Seromba*, para. 320, emphasis added.

[846] Judgment, *Akayesu*, para. 523.

[847] Judgment, *Kayishema and Ruzindana*, para. 93, emphasis added.

[848] See Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 1 June 2001, ICTR-95-1-A, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, para. 159; Judgment (Appeal), Rutaganda, para. 525; Judgment (Appeal), Gacumbitsi, paras. 40, 41; Judgment, *Seromba*, para. 320; Judgment (Appeal), *Media Case*, para. 524; Judgment (Appeal), *Seromba*, para. 176.

[849] See Decision, *Al-Bashir*, paras. 163-208.

[850] Decision, *Al-Bashir*, para. 164.

As for the first category, the court noted that the general notion of 'crimes' potentially included not only genocide but even crimes against humanity and war crimes. Thus, even if a strategy of denial of crimes had been discovered, a genocidal intent would not have been the only option resulting from inference[851]. Regarding the second category, consisting of intelligence documents, Al-Bashir's decrees, and armed forces' memorandums, the court inferred only an intent to discriminate against the targeted groups, directed at "excluding them from the federal government and implementing political arrangements aimed at limiting their power in their homeland (Darfur)"[852]. Here the court implicitly made reference to the distinction mentioned above between a persecutory *dolus specialis* and a genocidal *dolus specialis*. According to the court, the political exclusion of the targeted groups was therefore not ascribable as an intent to destroy. Although finding "a close coordination among the military, the police, the intelligence services and the civil administration, as well as among the federal, the state and the local levels of government"[853] linked to the targeting of the Fur, Masalit, and Zaghawa groups, the court did not refer neither to conspiracy nor planning, as the ICTR probably would have done instead[854]. Further, the pre-trial chamber scrutinized official statements. Al-Bashir publicly said that "he had given the Sudanese Armed Forces *carte blanche* in Darfur not to take prisoners or inflict injuries"[855] and that he "did not want any villages or prisoners, only scorched earth"[856]. In analyzing the content of public speeches, the ICC embraced the ICTR's approach to review hate speech, conversely not adopted by the ICTY[857]. However, the judges recognized that those speeches "[provided], *at best*, *indicia* of Omar Al Bashir's alleged individual criminal responsibility […] for war crimes and crimes against humanity"[858]. In this passage, the ICC Statute problem of considering public and direct incitement to commit genocide as a mode of liability emerged[859], as the pre-trial chamber linked incitement to war crimes and crimes against humanity, for which Al-Bashir was already been considered responsible[860]. As anticipated above, considering incitement to commit genocide implies the previous actual commission of genocide[861], and in the absence of substantial proof of such a criminal offense, neither the individual responsibility nor a *dolus specialis* in connection to hate speeches incitement to commit genocide could be detected. Thus, the review of speeches by the ICC pre-trial chamber has been a pointless exercise, since it was bound by statute not to recognize a genocidal *dolus specialis* from hate speech in the absence of the actual commission of

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[851] Decision, *Al-Bashir*, para. 165.
[852] Decision, *Al-Bashir*, para. 167.
[853] Decision, *Al-Bashir*, para. 169.
[854] See *supra* subparagraph 2.5.3.
[855] Decision, *Al-Bashir*, para. 171.
[856] Decision, *Al-Bashir*, para. 170.
[857] See *supra* subparagraph 3.1.4.
[858] Decision, *Al-Bashir*, para. 172, emphasis added.
[859] See ICC Statute, art. 25 (3) (e).
[860] See Decision, *Al-Bashir*, paras. 55-78, 79-109.
[861] See *supra* subparagraph 3.2.1.

genocide. In sum, hate speech was *in casu* considered as motivated by a "persecutory intent"[862]. Finally, concerning the third category of the nature and the extent of violence against the targeted group, the OTP considered rape as evidence of genocidal intent[863]. Interestingly, the OTP referred to the ICTR's jurisprudence on rape but applied *a contrario* reasoning. If the ICTR first identified the *dolus specialis* of the rapists and then considered the rapes as acts functional to that intent[864], the OTP in contrast considered the execution of rapes in a context of widespread acts of violence against specific groups as evidence of genocidal intent. In other words, according to the ICTR, the genocidal *mens rea* allowed the categorization of the *actus reus* of rape as genocide, whereas the OTP in *Al-Bashir* departed from the *actus reus* of rape, considered in a determinate context, to detect a genocidal *mens rea*. It appears that the OTP, drawing from the ICTR's unprecedented categorization of rape as an act of genocide, felt safe to claim that rape directly constituted evidence of genocide. Still, the ICC pre-trial chamber did not consider sufficient proof of a genocidal intent the degree of violence, and the hindrance of humanitarian aid. The main reason was that the intensity of violence and the frequency of the denial of humanitarian aid were not constant over time, thus not reflecting a constant policy of inflicting harm to the targeted groups[865]. It derives that the ICC indirectly established a requirement to verify the subsistence of evidence to infer a *dolus specialis*, i.e. a constant pattern of alleged genocidal acts, such as killing members or inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part[866]. As a last point, the OTP attempted to detect evidence of *dolus specialis* from the nature and extent of the war crimes and crimes against humanity allegedly committed in Darfur[867]. However, the court noted that although there could be evidence of the commission of large-scale mass atrocities crimes, it did not "automatically lead to the conclusion that there exist reasonable grounds to believe that [the Sudanese government] intended to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups"[868]. Since the ICC Statute clearly distinguishes between genocide and crimes against humanity, the pre-trial chamber *in casu* probably relied on the absence of a blurred distinction between the said categories, as instead was present in the ICTR Statute, to stress the disconnect between them. In conclusion, the judges observed that the commission of crimes in Darfur "[could have] reasonably [been] explained by reasons *other than* the existence of a GoS's genocidal intent to destroy in whole or in part the Fur, Masalit, and Zaghawa groups"[869]. By recalling once again the statutory clear distinction between the crimes under the *ratione materiae* of the ICC, it seems consequential that

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[862] Decision, *Al-Bashir*, para. 176.
[863] See Decision, *Al-Bashir*, para. 178.
[864] See Judgment, *Akayesu*, paras. 732, 734; Judgment, *Rutaganda*, para. 53; *supra* subparagraphs 2.7.3, 2.7.4, 2.7.5.
[865] See Decision, *Al-Bashir*, para. 189.
[866] See UN Genocide Convention, art. II (a), (c).
[867] Decision, *Al-Bashir*, paras. 190-192.
[868] Decision, *Al-Bashir*, para. 193.
[869] Decision, *Al-Bashir*, para. 204 (v), emphasis added.

the court in *Al-Bashir* was able and willing to primarily detect a *mens rea* for crimes against humanity and war crimes, whose *actus reus* have been proved previously in the pre-trial, and rejecting a genocidal *dolus specialis* in the absence of a proved genocide. Thus, the ICC issued an arrest warrant for Omar Al-Bashir, charging him with crimes against humanity and war crimes, and excluding genocide from the counts.

3.2.3 The Al-Bashir *Dissenting Opinion: Getting Closer to the ICTR's Jurisprudence*

In its separate and partly dissenting opinion, Judge Anita Ušacka reached a conclusion radically different from the majority, detecting Al-Bashir's genocidal *mens rea*. Regarding the definition of the protected group, the judge found that "there [were] reasonable grounds to believe that the Fur, Masalit, and Zaghawa population itself was targeted as the result of a *perception* of an affiliation between the Fur, Masalit and Zaghawa and the rebel groups"[870]. Ušacka criticized the majority's approach, contesting that it considered purely objective elements, rather than resorting to a case-by-case analysis based on "subjective criteria, such as the stigmatization of the group by the perpetrators, as well as objective criteria, such as the particulars of a given social or historical context"[871]. Here the judge referred to what this thesis has labeled as the ICTR's hybrid approach, largely employed by the ad hoc tribunal for Rwanda in several trials, e.g. *Semanza* and *Gacumbitsi*[872]. By relying on the material provided by the OTP, Judge Ušacka did not find three separate ethnic groups as the majority did. Rather, based on the fact that these populations were perceived and targeted as unitary, an entity of African tribes emerged, comprising the three ethnic groups[873]. This finding demonstrates that adopting an objective or a hybrid approach in interpreting the four categories protected by the CPPCG's article II is likely to lead to different conclusions, with substantial effects on the prosecution of genocide.

Relevantly, the dissenting opinion downsized the threshold for inferring the *mens rea*. Since inference was taking place in a pre-trial chamber to decide the issuing of an arrest warrant, and not convicting an individual, Judge Ušacka specified that the OTP "[needed] not demonstrate that such an inference [was] the only reasonable one at the arrest warrant stage"[874]. Thus, the benchmark was that the inference at least provided a reasonable scenario to infer the *mens rea*, even if such a finding was not the only option. Subsequently, the dissenting opinion examined the pieces of evidence provided by

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[870] Separate and Partly Dissenting Opinion of Judge Anita Ušacka, attached to the Decision of the International Criminal Court on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09, *Situation in Darfur, Sudan, in the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir ("Omar Al-Bashir")*, para. 22, emphasis added.

[871] Separate & Dissenting Opinion, *Al-Bashir*, para. 23.

[872] See Judgment, *Semanza*, para. 317; Judgment, *Gacumbitsi*, para. 254.

[873] See Separate & Dissenting Opinion, *Al-Bashir*, para. 25.

[874] Separate & Dissenting Opinion, *Al-Bashir*, para. 32.

the OTP to infer Al-Bashir's *dolus specialis*, and in doing so it considerably expanded the inferential strategy employed by the majority by referring to the ICTR's jurisprudence. The formation of the intent, i.e. the *dolus specialis*, was first detected in "[various] forms of communication, including discrete words and utterances by the accused, statements of the accused, and evidence tending to show that the accused ordered attacks on the target group"[875]. Here the judge referred to the ICTR's attribution of relevance to "the use of derogatory language toward members of the targeted group"[876]. Generally, the ICTR justified its heavy reliance on inference centered on the context by counterweighting it "with the actual conduct of the accused"[877]. Such conduct was thus functional to corroborate the findings inferred from the context, and it could have manifested in different forms, including statements. As for the position of authority of the accused vis-à-vis the commission of genocidal acts by his or her subordinate soldiers or militias, the ICTR considered such a situation as clear evidence of the commander's *dolus specialis*[878]. By considering Al-Bashir's speeches already illustrated by the majority decision[879] and his role as the Sudanese head of state, Judge Ušacka assumed those elements to be relevant to infer the accused's genocidal *mens rea*[880]. Then, the dissenting opinion drew a parallelism between the hate speech targeting the Tutsis during the Rwandan genocide and the one against the Fur, Zaghawa, and Masalit, considering to infer an individual's *dolus specialis* from speeches given by others[881]. The judge referred to the ICTR's case *Niyitegeka* and its finding that the accused was in a position of authority during the attacks in Bisesero, "where the *Interahamwe* were chanting 'let's exterminate them' being a reference to the Tutsi"[882]. Similarly, a witness in Darfur belonging to one of the targeted groups reported that the *Janjaweed*, a pro-government Sudanese militia, during the attack "said clearly that they had permission from the government so as to wipe us out, to kill us, to chase us away, and that we women who were there were their wives"[883]. Since the *Janjaweed* were under the control of Al-Bashir, as the *Interahamwe* were under the control of Niyitegeka in Biserero, Judge Ušacka felt legitimate to consider the clear genocidal intent of the militias as transferrable to their commander thus detecting this latter's *dolus specialis*, a sophisticate inferential strategy created by the ICTR. Further elements allowing inference were

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[875] Separate & Dissenting Opinion, *Al-Bashir*, para. 37.
[876] Judgment, *Kayishema and Ruzindana*, para. 93. See also Judgment, *Muhimana*, para. 496; Judgment, *Gacumbitsi*, paras. 252-253; Judgment (Appeal), *Kayishema and Ruzindana*, para. 148.
[877] Judgment, *Bagilishema*, para. 63. See also Judgment, *Akayesu*, para. 728.
[878] See Judgment, *Gacumbitsi*, para. 259; Judgment, *Semanza*, para. 429; Judgment, *Kayishema and Ruzindana*, para. 542; Judgment, *Rutaganda*, para. 399.
[879] See Decision, *Al-Bashir*, paras. 170-171.
[880] Separate & Dissenting Opinion, *Al-Bashir*, para. 39.
[881] See Separate & Dissenting Opinion, *Al-Bashir*, paras. 40-41.
[882] Judgment, *Niyitegeka*, para. 419.
[883] *Witness Statement*, DAR-OTP-0088-0187 (Annex 20), attached to ICC-02/05-151-US-Expand ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2. Public redacted version of the Prosecution Application, ICC-02/05-157-AnxA, para. 47. Hereinafter Al-Bashir Indictment.

indicated by the dissenting opinion, e.g. the involvement of public officials, the provision of vehicles for the militias, the mobilization of militant groups, and the distribution of weapons to civilians to carry out the attacks[884]. Once again, the Rwandan genocide and the ICTR's jurisprudence constituted the point of reference for the dissenting judge. In *Kayishema and Ruzindana*, the trial chamber held that the typology of weapons employed and their distribution by the offenders could have constituted proof of genocidal intent[885]. As for the involvement of public officials, this was an element recurring often during the trials before the ICTR, since different accused were local and national political authorities[886]. Moreover, in *Kamuhanda* the ICTR stressed the role of security forces, regular troops who receive orders from their commander, i.e. Al-Bashir for the Sudanese armed forces, and implicitly emphasized that since they and the armed militias were receiving orders by the same commander, there was no difference between the responsibility for acts of regular or irregular troops[887]. Thus, when handling the OTP evidence of the involvement of the Sudanese armed forces and the *Janjaweed*, the dissenting judge did not doubt using it as a reference to infer their commander's genocidal *mens rea*[888]. In listing "the existence of execution lists targeting the protected groups; the dissemination of extremist ideology; and the screening and selection of victims on the basis of their membership in the protected group"[889], the dissenting opinion aligned with the ICTR's observations concerning the accurate execution of the genocide in Rwanda in 1994. Indeed, the ICTR in the *Kayishema and Ruzindana* appeal judgment noted that in the case of the impossibility of the OTP to present official documents proving the existence of a genocidal plan, this latter could have "[been] inferred from the existence of such sufficient *indicia*"[890], i.e. those elements listed in the *Al-Bashir* dissenting opinion. Thus, a wide and relevant contextual element such as a genocidal policy, which is worth recalling did not constitute sufficient proof of the *dolus specialis* but still was considered relevant to detect a genocidal *mens rea*, could have been inferred from minor pieces of evidence such as selection of victims and the existence of lists containing the identity of the targets. As for the *modus operandi* of the offenders, Judge Ušacka referred to the systematicity of the attacks as evidence to infer the *dolus specialis*[891]. According to the ICTR, systematicity can be detected from the programmatic and repetition of actions[892], and such a precise methodology, in the view of the ad hoc tribunal for Rwanda, found its *ratio* only in executing an intent to destroy a targeted group. Notably, in *Akayesu* the court specified that systematicity was detectable "whether these [crimi-

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[884] See Separate & Dissenting Opinion, *Al-Bashir*, paras. 42, 44.
[885] See Judgment, *Kayishema and Ruzindana*, paras. 93, 298.
[886] See Judgment, *Kayishema and Ruzindana*, para. 309.
[887] See Judgment, *Kamuhanda*, para. 644.
[888] See Separate & Dissenting Opinion, *Al-Bashir*, para. 43.
[889] Separate & Dissenting Opinion, *Al-Bashir*, para. 46.
[890] Judgment (Appeal), *Kayishema and Ruzindana*, para. 139.
[891] See Separate & Dissenting Opinion, *Al-Bashir*, para. 48.
[892] See Judgment, *Kayishema and Ruzindana*, para. 534; Judgment, *Muhimana*, para. 496.

nal] acts were committed by the same offender or by others"[893], establishing a link between the main offender under prosecution and potential accomplices. This relation was then clarified in *Kayishema and Ruzindana*, holding that the conduct of accomplices or co-perpetrators constituted a basis for inference only if the defendant "was instrumental in executing [the] pattern of killing"[894]. Since the OTP demonstrated the systematic pattern of the killings in Darfur by the Sudanese armed forces and the *Janjaweed* militias, Judge Ušacka was satisfied that Al-Bashir, by exercising control over them, was instrumental in the killings of the targeted groups[895].

Relevantly, the *Al-Bashir* dissenting opinion combined two of the main contributions of the ICTR to international criminal law, i.e. the criminalization of hate speech and rape as acts of genocide. According to the evidence submitted by the OTP, "the *Janjaweed* and government soldiers [employed rape and sexual violence] as a deliberate strategy with a view to achieve certain objectives"[896]. Concerning the usage of derogatory language, the women raped were defined as animals, dirt, "little dogs"[897], and "slaves or Tora Bora"[898] by their sexual aggressors. Of note, the designation of members of a group as collaborators or supporters of rebels was recognized as evidence of a genocidal *mens rea* by the ICTR in *Kayishema and Ruzindana* and in *Niyitegeka*[899]. By associating the systematicity of rape with the usage of hate speech, Judge Ušacka increased their level of gravity, implicitly considering those criminal conduct as evidence of genocidal acts in Darfur. Interestingly, the dissenting opinion made such consideration not by precisely scrutinizing several speeches and rape witnesses, but by taking for granted the ICTR's criminalization of those acts and combining them. Implicitly, the *Al-Bashir* dissenting opinion created a new threshold to infer the *mens rea*, i.e. the association of hate speech and rape was evidence of the rapist's *dolus specialis*.

In conclusion, remarking that Judge Ušacka did not consider that in the pretrial phase the *dolus specialis* had to be the only possible inference from the proofs furnished by the OTP, the dissenting opinion held that all the circumstantial evidence presented and analyzed in light of the ICTR's jurisprudence "[demonstrated] that the possession of genocidal intent [was] *one* reasonable

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[893] Judgment, *Akayesu*, para. 523.

[894] Judgment, *Kayishema and Ruzindana*, para. 535.

[895] See Separate & Dissenting Opinion, *Al-Bashir*, paras. 49-50.

[896] Al-Bashir Indictment, Annex 17, 0095, para. 353. See also Separate & Dissenting Opinion, *Al-Bashir*, paras. 94-96.

[897] *Witness Statement*, attached to Al-Bashir Indictment, Annex H, 0158, paras. 45-46. See also *Witness Statement*, attached to Al-Bashir Indictment, Annex J16, 0784, para. 12.

[898] Al-Bashir Indictment, Annex 17, 0090, para. 333. The name 'Tora Bora' was used by the government militias to designate the Darfurian rebels. Since these latter used to hide in caves in Jebel Marra, they were compared to the Afghan Mujahedeen and al-Qaeda militants, who hid in the caves in the Tora Bora region of Afghanistan to escape United States airstrikes. See HUMAN RIGHTS WATCH (2004).

[899] See Judgment, *Kayishema and Ruzindana*, para. 309; Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 9 July 2004, ICTR-96-14-A, *Eliézer Niyitegeka v. The Prosecutor*, para. 53.

inference to be drawn from the available evidence"[900]. Once determined that Al-Bashir possessed a genocidal intent[901], the dissenting opinion turned to the *actus reus* and smoothly demonstrated that the mass killings[902] and rape[903] constituted acts of genocide. Hence, having recognized the responsibility of Al-Bashir for genocide, Judge Ušacka contested the majority position "not to issue an arrest warrant on the basis of genocide"[904].

3.2.4 Assessing the Impact of the ICTR's Jurisprudence on the ICC in Al-Bashir

The examination of the *Al-Bashir* majority decision and the separate and dissenting opinion of Judge Ušacka showed that the ICC frequently referred to the ICTR's jurisprudence to deal with the counts of genocide against the defendant, though with different conclusions. Both the majority decision and the dissenting opinion recognized the unique feature of the genocidal *mens rea*, i.e. the *dolus specialis* originating from the intent to destroy in whole or in part the targeted group. Of note, the majority's position implicitly created an additional element necessary to verify the subsistence of a *dolus specialis*, i.e. a constant pattern of alleged genocidal acts. Indeed, a decrease in the intensity of violence for a certain period led the court not to infer a clear genocidal intent. As for the interpretation of the four protected groups by the CPCCG's article II, the majority decision adopted a purely objective approach, deviating from the ICTR's hybrid approach, instead embraced by the dissenting opinion. The comparison between this latter and the majority position in terms of interpretative approach reveals the opposed results of adopting a purely objective or a hybrid approach. The objective approach led the majority to recognize three different ethnic groups targeted, thus creating the burden to prove a specific intent to destroy each of them. Conversely, the hybrid approach of Judge Ušacka grouped the three ethnic communities, reducing the threshold to prove the genocidal *mens rea* to the intent to destroy a wider group comprising the three ethnic communities. Hence, this comparative analysis displays the flexibility of the ICTR's hybrid approach and its adequacy to deal with complex cases in terms of group identification and interpretation.

By the analysis of the majority's position, it is possible to understand that incitement to commit genocide, in light of the ICC Statute's consideration of it as a mode of liability rather than a crime *per se*, has no value to infer the genocidal *dolus specialis*. Indeed, to recognize incitement the ICC Statute requests the previous assessment of genocidal acts. It derives that in the absence of a clear and distinct verification by the court of the actual commission of genocide, hate speech can not serve as proof of genocidal intent. This position has been implicitly challenged by the dissenting opinion, as it deepened the scrutiny of Al-Bashir's speeches and considered this latter as a

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[900] See Separate & Dissenting Opinion, *Al-Bashir*, para. 84, emphasis added.
[901] See Separate & Dissenting Opinion, *Al-Bashir*, para. 86.
[902] See Separate & Dissenting Opinion, *Al-Bashir*, paras. 92-93.
[903] See Separate & Dissenting Opinion, *Al-Bashir*, paras. 94-96.
[904] See Separate & Dissenting Opinion, *Al-Bashir*, para. 105.

valid element to infer the *dolus specialis* from, thus strictly applying the ICTR's approach to hate speech. As anticipated in the analysis of the ICC Statute, it clearly distinguishes between crimes against humanity and genocide, not allowing the room of manoeuvre enjoyed by the ICTR in categorizing crimes traditionally falling under the category of crimes against humanity as instead genocide, leveraging on the detection of a *dolus specialis*. The only blurred distinction between genocide and crimes against humanity provided by the ICC Statute consisted of the crime of persecution and genocide, being both based on discriminatory conduct. However, the majority decision clarified this ambiguity by detecting a persecutory *dolus specialis*, damaging the individual as such based on discrimination, and a genocidal *dolus specialis*, damaging the whole group by targeting one of its members. Hence, the ICC in *Al-Bashir* deviates from the ICTR's approach, as it unambiguously separates by statute and jurisprudence the category of crimes against humanity from genocide. It can therefore deduced that the ICC, in handling cases of genocide, is not likely to replicate the ICTR's jurisprudence in making crimes listed by statute as crimes against humanity falling under a genocide conviction. Differently, the dissenting opinion in *Al-Bashir* safely considered hate speech and rape as both the *actus reus* of genocide and a basis to infer the genocidal *mens rea*, fully and unquestionably embracing the ICTR's jurisprudence.
In conclusion, in *Al-Bashir,* both the majority decision and the dissenting opinion applied the ICTR's jurisprudence on genocide. Whilst the majority appeared to be more skeptical regarding the possibility of safely inferring a *dolus specialis* from the scrutiny of contextual and circumstantial elements, especially in the absence of recognized genocidal acts, the dissenting opinion was bolder in embracing the ICTR's jurisprudence, not contesting the ad hoc tribunal for Rwanda's approach. Overall, it is expected that the ICC will be less ambitious in handling cases of genocide compared with the ad hoc criminal tribunal for Rwanda, and the precedent created by the majority decision in *Al-Bashir* considerably raised the threshold to infer a genocidal *mens rea*, thus negatively departing from the ICTR's jurisprudence.

3.3 The Regional Impact of the ICTR's Jurisprudence: Genocide-Prevention Mechanisms & African Special Courts

After having compared the ICTR's jurisprudence with the ICTY's, and examined the influence of the ad hoc tribunal for Rwanda over the ICC, this chapter turns to a regional scale analysis, i.e. Africa. Being composed of 54 states (55 if the Saharawi Republic is included), Africa is a heterogeneous continent, with different legal systems, forms of government, and socio-political contexts. Africa is the theater of numerous wars, with 35 non-international armed conflicts active on the continent (excluding North Africa)[905]. As the number of armed conflicts rises, the probability of recording the commission of mass atrocities tragically increases too. This paragraph aims to explore the regional impact of the ICTR's jurisprudence on regional organi-

[905] GENEVA ACADEMY (2023).

zations' political declarations and legal instruments, as well as on a jurisprudential level. The delimitation of the analysis on a geographical criterion is not only related to the fact that the ICTR was an ad hoc tribunal called to deal with a genocide that occurred in Africa. Rather, Africa represents a central area for the development of international criminal law "because of the large scale of atrocities committed on the continent"[906]. In support of this consideration, it is sufficient to remind that the majority of the closed and pending cases before the ICC concerns African states[907]. It logically derives that, since the ICTR prominently contributed to international criminal law, the African continent represents the natural empirical application of the ad hoc criminal tribunal for Rwanda's jurisprudence.
To provide a comprehensive political and legal framework on the impact of the ICTR's jurisprudence in the African continent, this paragraph is structured as follows. First, it is demonstrated that the first continental organization in Africa, the Organization of Africa Unity (OAU) lacked genocide prevention and punishment instruments, thus preventing any effort by the organization to deal with the Rwandan genocide. Second, the influence of the ICTR's jurisprudence on regional instruments for the prevention and punishment of genocide is analyzed, demonstrating that the ad hoc criminal tribunal for Rwanda's case law constituted a point of reference for the successor of the OAU, the African Union (AU). Third, the problem of the relationship between hate speech and genocide in Africa and in the AU regional policy is introduced, proposing a definition of genocidal hate speech drawing from the ICTR's jurisprudence and Rwandan national legislation. Fourth, the Special Court for Sierra Leone (SCSL) Statute and jurisprudence is reviewed, assessing the degree of influence of the ICTR on the hybrid court. Fifth, and finally, the regional impact of the ICTR's jurisprudence is comprehensively evaluated, providing empirical African cases for its future applicability.

3.3.1 The Organization of African Unity and the Rwandan Genocide: Lacking Genocide Prevention and Punishment Instruments

1960 is considered the 'year of Africa', the time when 17 former African colonies became independent and began the process of state-building. In 1963, the independent African countries created the first continental instrument for inter-state cooperation, the OAU. Among the different objectives of the organization, Ghanaian President Kwame Nkrumah expressed the intent to establish a framework to deal with security problems. However, the OAU Charter was centered on three principles that materially prevented the organization from meeting President Nkrumah's auspices: national sovereignty, non-interference in internal affairs, and territorial integrity[908]. The newly independent African states (or rather, their leaders) did not want to relinquish the sovereignty for which they had fought so hard. Therefore, it appeared unlikely that, just three years after the 'year of Africa', a supranational orga-

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[906] BA (2023: 3).
[907] See *supra* footnote 184.
[908] *Charter of the Organization of the African Unity*, 25 May 1963, U.N.T.S. 1963 no. 6947, art. III (1), (2), (3).

nization with powers to interfere in the internal affairs of members would be created. In the years following the OAU's creation, member states would in many cases shelter behind adherence to the principle of non-interference "to justify their reluctance to intervene or pressure national governments to end violence or conflict and promote respect for human rights"[909]. Overall, through the decades of the Cold War, a strong distrust towards collective peace efforts of the OAU can be detected[910], intending peace both in terms of the absence of armed conflicts and safeguarding of human rights.
This short premise on the OAU and the attitude of African countries towards supranational means to end violence is functional to raise awareness on the absence of continental mechanisms for the protection of human rights and the prevention of mass atrocities crimes at the time of the Rwandan genocide. In 1990, the OAU Secretary-General Salim Ahmed Salim published a report containing a project to reform the organization's institutions centered on promoting the respect of human rights in the OAU's member states[911]. Two years later, Salim presented another report, according to which the principle of non-interference in internal affairs hitherto dominating the OAU would have been subordinated to the general desire to facilitate conflict prevention and resolution, particularly for humanitarian reasons[912]. Still, the African leaders rejected a more proactive role of the OAU, arguing it was the UN the organization entrusted to ensure the protection of human rights[913]. In this perspective, the subsequent failure of the UN to stop the Rwandan genocide[914] acted as a shock on the beliefs of the OAU member states, highlighting the urgent need to create a continental mechanism for the prevention of mass atrocities and the protection of human rights[915].
In 1998, the OAU established the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (IPEP) to carry out an independent inquiry on the causes of and the actors involved in the Rwandan genocide[916]. The IPEB released its report in 2000, criticizing the work of the ICTR. Specifically, the IPEP report contested that the ad hoc tribunal for Rwanda failed to prosecute members of the RPF for the abuses committed on the civilian population, yet not ascribable as geno-

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[909] PALLOTTI, ZAMPONI (2010: 39).
[910] GRILLI, GERIST (2020).
[911] See *The Report of the Secretary-General on the Fundamental Changes Taking Place in the World and their Implications for Africa*, approved by the Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, 11 July 1990, AHG/Decl.1 (XXVI).
[912] See *The Report of the Secretary-General on Conflicts in Africa: Proposals for an OAU Mechanism for Conflict Prevention and Resolution*, adopted by the 28th Ordinary Session of the Assembly of Heads of State and Government, 1 July 1992, AHG/Decl. 1 (XXVIII), art. 33.
[913] LULIE, CILLIERS (2015).
[914] See *supra* subparagraph 2.1.3.
[915] MAYS (2003).
[916] See Decision of the Organization of African Unity Council of Ministers, 7 June 1998, CM/2063 (LXVIII), *Establishment of the Panel of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*.

cidal acts but rather as crimes against humanity and war crimes[917]. However, the IPEP report acknowledged the ICTR's "[attempt] to evolve a system of international criminal justice out of nothing"[918]. Turning to the role of the OAU, the report criticized the organization for having failed to define the events occurring in Rwanda as genocide[919], and that "the silence of the OAU and a large majority of African heads of state constituted a shocking moral failure"[920]. Overall, the IPEP report stressed the urgency to strengthen the OAU capabilities to prevent violations of human rights in Africa and called for a "or a 'substantial re-examination' of the Genocide Convention including the definition of the term genocide"[921]. It is possible to affirm that the ICTR jurisprudentially met the IPEP report's request to review the CPPCG, as it interpreted this latter's article II and considerably expanded the range of acts categorizable as genocide[922]. In conclusion, at the end of the 1990s, the African states finally understood that they needed to establish a new continental mechanism for preventing the commission of mass atrocities and responding to conflict situations.

3.3.2 African Solutions to African Problems: the Influence of the ICTR on Regional Legal Instruments for Genocide Prevention and Punishment

Between 2000 and 2002, the OAU was transformed into the AU, the new continental organization dedicated to fostering the unity of the African states, promoting democracy and socio-economic development, defending the national sovereignty and territorial integrity of its members, and ensuring the protection of human rights[923]. Interestingly, the AU Constitutive Act broke the impermeability of the OAU attitude towards the respect of national sovereignty, as the AU enjoys "the right […] to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, *genocide* and crimes against humanity"[924]. In 2008 the AU decided to merge two jurisdictional bodies created between 1998 and 2003, i.e. the African Court on Human and Peoples' Rights (ACtHPR)[925] and the Court of Justice of the African Union (CJAU)[926], into a new institution, the

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[917] See *Special Report of the Panel of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*, 7 July 2000, 40 ILM 141, ch. 22. Hereinafter IPEP Report.
[918] *Ibidem*.
[919] MURRAY (2001).
[920] IPEP Report, ch. 15, para. 87.
[921] MURRAY (2001: 133).
[922] See *supra* paragraphs 2.4, 2.5, 2.6, 2.7.
[923] See *Constitutive Act of the African Union*, 11 July 2000, OAU Doc. CAB/LEG/23.15, art. III. Hereinafter AU Constitutive Act.
[924] AU Constitutive Act, art. IV (h), emphasis added.
[925] See *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998, 34th ordinary session of the Assembly of the Heads of State and Government of the Organization of African Unity.
[926] See *Protocol of the Court of Justice of the African Union*, 11 July 2003, 2nd ordinary session of the Assembly of the African Union.

African Court of Justice and Human Rights (ACJHR)[927]. The ACJHR initially had a twofold jurisdiction[928]: general affairs consisting of inter-state disputes between the AU member states, previously managed by the CJAU, and human rights, a precedent task of the ACtHPR[929]. It is worth remarking that a wide range of entities can access the court, i.e. a number of actors enjoy *locus standi* vis-à-vis the ACJHR: member states of the AU, the organs of the AU, the staff of the AU, the African Commission on Human and People's Rights, the African Committee of Experts on the Rights and Welfare of the Child, African intergovernmental organizations, NGOs as well as national human rights institutions accredited to the AU, and finally, individuals[930]. It should be noted that the ACJHR Protocol did not provide for a victim requirement, thus implicitly allowing the *actio popularis*[931]. However, the ACJHR lacked jurisdiction over international crimes, including genocide. Thus, as of 2008, Africa was still lacking a regional criminal court to punish the commission of the most serious crimes. It should be noted that at the time of the creation of the ACJHR, different European states started to prosecute African high officials by relying on the principle of universal jurisdiction[932]. From the perspective of African leaders, such trials were part of a "foreign-imposed justice from universal jurisdiction"[933], and the need to regionally counterweight such a trend emerged. Thus, in 2009 the AU embraced the idea of "African solutions to African problems"[934] and started to explore the option of creating a permanent regional criminal court[935]. Finally, in 2014 the AU adopted the Malabo Protocol[936], amending the protocol of the ACJHR by integrating the court with a criminal law section[937]. The Malabo Protocol incorporated 14 international crimes in the ACJHR's *ratione materiae*[938], including the four core crimes under the ICC Statute, i.e. genocide, crimes against humanity, war crimes, and the crime of aggression. Of note,

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927 See *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, 11th ordinary session of the Assembly of the African Union. Hereinafter ACJHR Protocol.

928 For a precise listing of the matters under the jurisdiction of the ACJHR, see ACJHR Protocol, art. XXVIII.

929 JALLOH (2019).

930 ACJHR Protocol, arts. XXIX, XXX. For a discussion on the status of access to justice before the ACJHR, see RUDMAN (2021).

931 VILJOEN (2012).

932 See e.g. Judgment of the International Court of Justice, 14 February 2002, ICJ Reports (2002), *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of Congo v. Belgium*. See also JALLOH (2010).

933 JALLOH (2019: 88).

934 BA (2023: 4).

935 See Decision of the Assembly of the African Union, 3 February 2009, Assembly/AU/Dec. 213 (XII), *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction.*

936 See *Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014, 23rd ordinary session of the Summit of the African Union. Hereinafter Malabo Protocol.

937 For reasons of conciseness, this section cannot explore the wide criticism of the creation of a criminal chamber within the ACJHR, particularly concerning ACJHR-ICC relations. For a comprehensive discussion on the shortcomings of the Malabo Protocol, see BA (2023); MUTUA (2016); MURUNGU (2011); RAU (2012); SARKIN (2020); ABASS, ADEMOLA (2013).

938 See Malabo Protocol, art. XXVIII A.

the first regional impact of the ICTR can be detected in the Malabo Protocol's definition of genocide. Indeed, it expanded the CPPCG's lists of acts of genocide by including acts of rape and any other form of sexual violence[939], fully embracing the ICTR's categorization of rape as an act of genocide[940]. By directly listing rape and sexual violence as acts of genocide, the Malabo Protocol "points towards a more progressive and up-to-date document reflecting more recent jurisprudence and definitions of genocide"[941] in comparison with the ICC Statute, since the ICC only considered the issue in a footnote in its Elements of Crimes[942]. Indeed, notwithstanding the Malabo Protocol has not already entered into force as of 2024, it is safely deductible that the inclusion of rape as an act of genocide will exercise a 'push' factor on the ACJHR judges in adjudicating mass atrocities crimes, influencing them to give preeminence to the ICTR's jurisprudence over other sources in international law when called to adjudicate cases involving rape and sexual violence. As for crimes against humanity, the Malabo Protocol combined the definition provided by the statutes of ICTR and the ICTY[943]. Indeed, as the ICTY Statute, it eliminated the discriminatory grounds contained in the ICTR Statute but kept this latter's recognition of two features of crimes against humanity: systematicity and widespread nature[944]. The Malabo Protocol listing of crimes against humanity contained a list of sexual crimes, i.e. "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity"[945]. This detailed listing reflected the ICTR's finding in *Rutaganda*, which expanded the criminal law's concept of sexual crimes traditionally limited to rape and sexual violence to other types of criminal offenses, e.g. sexual mutilation and enforced sterilization[946]. Of note, the reference to *Rutaganda* in defining sex-related crimes was previously adopted by the ICC Statute[947].

The ICTR's jurisprudence did impact another African organization, the International Conference on the Great Lakes Region (ICGLR)[948]. The ICGLR is an intergovernmental organization originating from the Pact on Security, Stability, and Development in the Great Lakes Region (PSSD) adopted in 2006[949]. The PSSD is composed of ten protocols, including the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes

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939 See Malabo Protocol, art. XXVIII B (f).
940 See *supra* subparagraphs 2.7.3, 2.7.4.
941 AMNESTY INTERNATIONAL (2016: 16).
942 See ICC Elements of Crimes, art. VI (b), footnote 3; *supra* subparagraph 3.2.1.
943 See ICTR Statute, art. III; ICTY Statute, art. V.
944 See Malabo Protocol, art. XXVIII C (1).
945 Malabo Protocol. Art. XXVIII C (g).
946 See Judgment, *Rutaganda*, para. 53.
947 See ICC Statute, art. VII (g); see *supra* subparagraph 3.2.1.
948 The organization is composed of twelve member states: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia.
949 *Pact on Security, Stability, and Development in the Great Lakes Region*, 15 December 2006, 2nd summit of the International Conference of the Great Lakes Region.

and Crimes Against Humanity and all forms of Discrimination (PPPCG)[950]. Having been influenced by the instability brought by the Rwandan genocide into the Great Lakes Region[951], the PPPCG provides a mechanism for preventing and punishing the commission of mass atrocities, intended as causes and effects of armed conflicts. The PPPCG adopted the definition of genocide provided by the ICC[952], thus excluding the listing of rape as an act of genocide, differently from the Malabo Protocol. Further, it recognized the importance of condemning, repressing, and punishing discriminatory ideologies, particularly those "ideas or theories based on the superiority of a race or a group of people of a particular ethnic origin, or which try to justify or encourage any form of racial hatred and discrimination"[953]. Here the PPPCG reflects the ICTR's acknowledgment of the weaponization of speech, likely to lead to the commission of mass atrocities crimes including genocide[954]. Interestingly, the PPPCG proposed the criminalization of hate speech as a crime *per se*, rather than a mode of liability as set forth by the ICC Statute[955]. Indeed, it stated that "any incitement to hatred or discrimination and any act of violence or provocation to such acts directed against any race or any group of people of a given ethnic origin […] *is an offense* punishable by law"[956]. Implicitly, the criminalization of hate speech is linked to genocide, as the PPPCG is incorporated into the PSSD's provision on the prevention and punishment of mass atrocities crimes[957]. Theoretically, it can be expected that if the ICGLR member states are called to prosecute hate speech in the context of genocide, they will refer to jurisprudence criminalizing hate speech as an offense *per se* as established by the PPPCG. Since the ICTR's jurisprudence is the sole provider of the criminalization of hate speech in relation to genocide, it is therefore likely that the ad hoc tribunal for Rwanda will constitute a central reference for the work of criminal courts in the Great Lakes Region states.

3.3.3 Defining Hate Speech in Africa: Why the ICTR's Jurisprudence May Lead the African Union Efforts

As scrutinized above, the ICTR's jurisprudence contributed to the criminalization of hate speech as an act of genocide, i.e. direct and public incitement to commit genocide, in international criminal law, creating landmark precedents[958]. The Peace and Security Council (PSC), the standing decision-ma-

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950 *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination*, 29 November 2006. Hereinafter PPPCG.

951 INTERNATIONAL CONFERENCE ON THE GREAT LAKES REGION (2022). On the spill-over effects of the Rwandan genocide in the Great Lakes Region, particularly in the Democratic Republic of the Congo, see MARTIN (1998); QUINN (2004); KOVRAS (2011).

952 PPPCG, art. I (a).

953 PPPCG, art. VI (1).

954 See *supra* para. 2.6.

955 See ICC Statute, art. XXV (e).

956 PPPCG, art. VI (2) (a), emphasis added.

957 See PSSD, art. VIII.

958 See *supra* subparagraphs 2.6.3, 2.6.4, 2.6.5, 2.6.6, 2.6.7, 2.6.8.

king organ of the AU for the prevention, management, and resolution of conflicts[959], acknowledged the relation between hate speech and genocide in 2017, stressing the need for a collective commitment "to prevent the recurrence of […] mass atrocities, hate crime and ideologies of genocides throughout the African continent"[960]. The PSC underlined the need to create proper definitions and terminology, not only to categorize and recognize criminal offenses ascribable as genocide, but even "to avoid falling into the problem of denials"[961]. During its last meeting on the prevention of the ideology of hate, genocide and hate Crimes in Africa held on 6 April 2023, the PSC urged the AU Commission (AUC), the administrative and executive branch of the secretariat of the organization, to "develop a shared working definition of what constitutes 'hate speech' and 'hate crimes', in order to enable member states to enact the necessary legislation to combat these scourges"[962].
As of 2024, neither the PSC nor the AUC has coined a definition of genocidal hate speech, thus leaving a critical vacuum in the continental system of prevention of genocide. To provide a proper definition of hate speech in connection with genocide, this thesis suggests that it could be formulated by referring both to international criminal law, i.e. the ICTR's jurisprudence, and national law, specifically Rwandan legislation. In 2018, Rwanda adopted a law criminalizing genocide ideology (LCGI)[963]. Since this latter is spread by means of written or spoken words, it is implicitly linked with hate speech and genocide and was influenced by the ICTR's jurisprudence in different passages. The LCGI acknowledged the importance of the publicity element[964], including the ether and the web, clearly embracing the ICTR's consideration of radio broadcasts, video documentaries, and television transmissions as public[965]. However, the Rwandan legislation contradicts the ICTR in considering "a message sent to a person"[966] as public. In *Bikindi*, the ICTR was unable to consider discriminatory songs recorded by Bikindi as genocidal hate speech, as he did not contribute to their spread, i.e. the recording of discriminatory or hatred songs constituted an act carried out in the private sphere[967]. Similarly, a message sent to a person remains private as long as it is not shared, e.g. on social media or shown to an audience. Recalling that freedom of speech is counterweighted by the need to protect against discrimination and incitement to commit a criminal offense[968], regarding private hate speech the ICTR let freedom of speech prevail, whilst the LCGI acted

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[959] See *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002, 1st ordinary session of the Assembly of the African Union.
[960] *Communiqué of the 678th Meeting of the Peace and Security Council of the African Union*, 11 April 2017, PSC/PR/COMM.(DCLXXVIII), para. 2.
[961] *Ibidem*.
[962] *Communiqué of the 1147th Meeting of the Peace and Security Council of the African Union,* 6 April 2023, PSC/PR/COMM.1147 (2023), para. 6.
[963] See Law no. 59 of 2018, 25 September 2018, *Law on the Crime of Genocide Ideology and Related Crimes*. Hereinafter LCGI.
[964] See LCGI, art. II.
[965] See Judgment, *Akayesu*, paras. 556, 559.
[966] LCGI, art. II (4).
[967] Judgment, *Bikindi*, para. 421.
[968] See *supra* subparagraph 2.6.1.

on the contrary. The LCGI defined the crime of genocide ideology by ruling that

> "[a] person who, in public, either verbally, in writing, through images, or in any other manner, commits an act that manifests an ideology that supports or advocates for destroying, in whole or in part, a national, ethnic, racial, or religious group, commits an offense"[969].

The *mens rea* of the crime genocide ideology stems from the genocidal *dolus specialis*. Indeed, the main legal reasoning for categorizing an act of speech, written or spoken, as genocide is the detection of the *dolus specialis* in the intent of the person who spread the genocidal ideology, as sanctioned by the ICTR in *Akayesu* and in the *Media Case* appeal judgment[970]. The *actus reus* of genocide ideology is the spread of such ideology, by means of written or spoken words. Here it is necessary to draw a distinction between direct and public incitement to commit genocide and genocide ideology. Notwithstanding the two criminal offenses are related by the *dolus specialis*, the first is centered on the incitement to the commission of crimes led by the intent to destroy, i.e. acts enumerated by the CPPCG's articles II and III, whilst the latter aims to spread the ideology *per se*, regardless if criminal offenses are likely to be committed or not. Further, the LCGI criminalizes the denial, minimization, and justification of genocide[971]. Since the LCGI is tailored to be applied in Rwanda, it does not appear unreasonable that the lawmakers adopted an approach restricting the freedom of speech in relation to genocide. Turning to elaborating a proper definition of genocidal hate speech, the combination of the ICTR's jurisprudence and the LCGI may serve this purpose. This thesis defines genocidal hate speech as

> the public usage of a verbal or written speech to explicitly or implicitly spread an intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, or even legitimize and incite to the commission of acts motivated by such intent, in a socio-political context of discrimination against a group.

First, the definition embraces the publicity element established by the ICTR in *Akayesu*[972] and sanctioned by the LCGI. With public has to be intended to expose an audience to genocidal hate speech in three different dimensions: physically (speeches and written words in journals, books, songs, etc.)[973], through the ether (radio and television)[974], and by means of the web[975]. Second, the genocidal hate speech can be delivered either directly or indirectly. As for indirectness, this feature according to the ICTR's judgment in *Ruggiu* is strictly linked to the socio-political context of discrimination against a group[976]. Since discrimination is the main motivation of hate speech, this

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969 LCGI, art. IV.
970 See Judgment, *Akayesu*, para. 560; Judgment (Appeal) *Media Case*, para. 692.
971 See LCGI, arts. V, VI, VII.
972 See Judgment, *Akayesu*, para. 559; Judgment, *Bikindi*, para. 38
973 Judgment, *Media Case*, para. 953.
974 *Ibidem*.
975 See LCGI, art. II (1), (2), (3), (6).
976 See Judgment, *Ruggiu*, para. 44 (iii).

latter should take place in a discriminatory context[977]. Emphasizing implicitly in the definition and mentioning the discriminatory nature of the context furnishes an opportunity to correctly contextualize the usage of indirect language, i.e. metaphors, euphemisms, and allusions, and detect their genocidal hate speech content[978]. Context is therefore of paramount importance since it constitutes the benchmark to assess the impact of speech regarding its genocidal nature[979]. Third, the element par excellence constituting genocidal hate speech is the *dolus specialis* of the offender's *mens rea*, i.e. the intent to destroy, in whole or in part, one of the groups protected by the CPPCG. As for the *actus reus*, this latter can take the form of spreading, legitimizing, or inciting. As for spreading a genocidal intent, this conduct corresponds to the LCGI's definition of the crime of genocidal ideology, i.e. "manifests an ideology that supports or advocates for destroying [a national, ethnic, racial, or religious group]"[980]. As clarified above, spreading does not directly aim to provoke the actual commission of criminal offenses against the discriminated group. Regarding legitimization, this can take the form of denial, minimization, and justification of genocide[981], but also "*congratulating* the people who had committed [genocidal acts]"[982]. Finally, incitement corresponds to the crime of public and direct incitement to commit genocide, a direct provocation to commit genocide, though not requiring the actual commission of genocide[983]. Overall, the *actus reus* of genocidal hate speech according to the definition provided by this thesis ranges from the crime of genocidal ideology to direct and public incitement to commit genocide, thereby harmonizing the LCGI and the ICTR's jurisprudence and creating a notion stemming from national and international criminal law.
In sum, this thesis has demonstrated that the PSC's request for defining genocidal hate speech can be satisfied by referring to Rwandan national legislation and the ICTR's jurisprudence, generating a comprehensive definition of the said criminal offense, considering the importance of the context as a leading factor in the criminalization of speech.

3.3.4 The Special Court for Sierra Leone: Partially Influenced by the ICTR

Sierra Leone was the theater of an intense civil war between 1991 and 2002, erupting from a political conflict between the Liberian-backed Revolutionary United Front (RUF), allied with the Armed Forces Revolutionary Council (AFRC), and the government led by Joseph Momo. Apart from the control of Sierra Leone's institutions, the RUF aimed at conquering territories rich in alluvial diamonds, to economically exploit them to finance their political

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977 See Judgment, *Media Case*, para. 1072
978 See Judgment, *Akayesu*, paras. 557, 673 (iii); Judgment, *Kambanda*, para. 39 (x); Judgment, *Ruggiu*, paras. 44 (iv), 44 (v); Judgment, *Media Case*, para. 1032; Judgment, *Bikindi*, paras. 248, 249, 387, 422, 423; Judgment, *Niyitegeka*, para. 432, 433.
979 See Judgment, *Media Case*, para. 1022.
980 LCGI, art. IV
981 See LCGI, arts. V, VI, VII.
982 Judgment, *Kambanda*, para. 39 (viii), emphasis added.
983 See Judgment, *Akayesu*, paras. 559, 561; Judgment, *Media Case*, para. 1015; Judgment (Appeal), *Media Case*, para. 766.

war[984]. Thus, during the Sierra Leone civil war, the control of alluvial diamonds was functional to pursue the political objectives of the belligerents[985]. In July 1999, the belligerents reached a peace agreement, and the UN decided to intervene in Sierra Leone to restore peace through two different means, i.e. military and jurisdictional. In October 1999, the SC approved the deployment of the United Nations Mission to Sierra Leone (UNAMSIL), to maintain the peace, assist the disarmament process, and enforce the terms of the peace agreement[986]. In 2000, Sierra Leonean President Ahmad Tejan Kabbah requested the SC to establish "a strong court in order to bring and maintain peace and security in Sierra Leone and the West African subregion"[987]. The SC immediately acknowledged the need to establish a special criminal court in Sierra Leone not only to ensure justice and adequate punishment, but also to "[ensure] lasting peace"[988]. Thus, in 2002 the UN reached an agreement with the government of Sierra Leone to establish a special criminal court, the SCSL, to prosecute those responsible " for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law"[989]. The SCSL is defined as a hybrid court because both its "institutional apparatus and the applicable law consist of a blend of the international and the domestic"[990], with a *ratio* of ensuring greater accountability and reconciliation. The SCSL had *rationae loci* in the territory of Sierra Leone, *rationae temporis* since 30 November 1996, *rationae personae* on private citizens and leaders[991], and *rationae materiae* on crimes against humanity, war crimes, and crimes against children and property under the Sierra Leonean law[992]. Notwithstanding genocide was not a criminal offense under the SCSL Statute, the ICTR did impact the Sierra Leonean special court. The definition of crimes against humanity in the SCSL Statute is partially influenced by the ICTR, as it defined this category as "crimes […] part of a widespread or systematic attack against any civilian population"[993]. This definition is similar to the ones provided by the ICC Statute and the Malabo Protocol[994], which consider the systematic and

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984 ABDULLAH (2004).

985 On the role of alluvial diamonds in the civil war in Sierra Leone, see RICHARDS (1996); HIRSCH (2000); CAMPBELL (2004); GBERIE (2005); ERBRICK (2012).

986 See Resolution of the United Nations Security Council, 22 October 1999, S/RES/1270, *The situation in Sierra Leone*, para. 8.

987 *Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council*, 10 August 2000, S/2000/786, p. 2.

988 Resolution of the United Nations Security Council, 14 August 2000, S/RES/1315, *The situation in Sierra Leone*, preamble.

989 *Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone*, 16 January 2002, U.N.T.S 38342, preamble.

990 DICKINSON (2003: 295). See also JALLOH (2020).

991 See *Statute of the Special Court for Sierra Leone attached to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone*, 16 January 2002, U.N.T.S 38342, art. I. Hereinafter SCSL Statute.

992 See SCSL Statute, arts. II, III, IV, V.

993 SCSL Statute, art. II.

994 Compare SCSL Statute, art. II, with ICC Statute, art. VII, Malabo Protocol, art. XXVIII C (1).

widespread nature of the crimes as the ICTR Statute, but eliminate this latter's importance attributed to discriminatory grounds and the nexus between crimes against humanity and wartime set forth by the ICTY Statute[995]. Regarding the listing of crimes of sexual nature under the category of crimes against humanity, the SCSL embraced their detailed description furnished by the ICTR in *Rutaganda*[996]. Overall, it is possible to detect a flow of the ICTR's influence on providing a comprehensive listing of crimes of sexual nature through the ICC Statute, the SCSL Statute, and the Malabo Protocol[997]. Interestingly, the ICTR Rules of Procedure and Evidence were fully incorporated by the SCSL Statute[998], thus ensuring a certain degree of coherence between the criminal procedure between the ICTR and the SCSL. As for instigation and incitement, the SCSL Statute followed the ICC Statute approach, not considering those acts as criminal offenses *per se* but rather as an individual mode of liability, with all the limitations illustrated above[999]. Although unrelated to the ICTR's Statute and jurisprudence, it is worth remarking that the SCSL became the first court to consider the conscription of children into the armed forces as a war crime[1000]. In sum, the SCSL was influenced by the ICTR regarding the definition of crimes against humanity and the listing of sexual crimes under such a category. However, since genocide was not a crime under the jurisdiction of the SCSL, it is necessary to delve into the hybrid court for Sierra Leone's jurisprudence to detect further contributions of the ICTR's case law on genocide implicitly translated into the prosecution of the crimes constituting *ratione materiae* of the SCSL.
The analysis of the SCSL's jurisprudence is based on three main cases: the *AFRC Accused*[1001], the *RUF Accused*[1002], and the *Taylor* case[1003]. Of note, apart from referring to the ICTR's jurisprudence for procedural matters[1004], the SCSL made use of the ad hoc criminal tribunal for Rwanda's case law on three main themes: planning systematic attacks, extermination, and rape. In dealing with crimes against humanity, the trial chamber in the *AFRC Accused* had to provide a definition of attack and detect the elements to verify the subsistence of systematicity[1005]. *In casu*, the court observed SCSL Statute's

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995 See ICTR Statute, art. III; ICTY Statute, art. V.
996 See Judgment, *Rutaganda*, para. 53.
997 See ICC Statute, art. VII (g), SCSL Statute, art. II (g), Malabo Protocol, art. XXVIII C (g).
998 See SCSL Statute, art. XIV. See also ICTR Rules of Procedure and Evidence.
999 Compare SCSL Statute, art. VI, with ICC Statute, art. XXV. For a discussion on the shortcomings of considering instigation and incitement as a mode of liability, see *supra* subparagraph 3.2.1.
1000 SCSL Statute, art. IV (c).
1001 See Judgment of the Special Court for Sierra Leone, 20 June 2007, SCSL-04-16-T, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barber Kanu (AFRC Accused)*.
1002 See Judgment of the Special Court for Sierra Leone, 2 March 2009, SCSL-04-15-T, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbabo (RUF Accused)*.
1003 See Judgment of the Special Court for Sierra Leone, 18 May 2012, SCSL-03-01-T, *The Prosecutor v. Charles Ghankay Taylor*.
1004 See Judgment, *AFRC Accused*, paras. 24, 25, 46, 89, 132, 136; Judgment, *RUF Accused*, paras. 62, 65; Judgment, *Taylor*, paras. 99, 103, 107, 108, 127, 130, 137, 169, 171, 177, 183, 194, 195, 203, 208.
1005 See Judgment, *AFRC Accused*, paras. 210-239.

definition of crimes against humanity differed from the ICTR's due to the absence of discriminatory grounds[1006], and in the RUF Accused it specified that "customary international law [did] not presuppose a discriminatory or persecutory intent for all crimes against humanity"[1007]. Subsequently, the court in the *AFRC Accused* turned to the notion of attack itself. First, the judges noted that "[the] concepts of 'attack' and 'armed conflict' [were] distinct and separate notions"[1008]. This distinction is relevant in light of the ICTY's strict link between crimes against humanity and wartime, i.e. armed conflict. Since the ICTY's case law, as the ICTR's, constituted a jurisprudential precedent for the SCSL, this latter considered necessary to distinguish between the two terms to finally conclude that an attack was an action that could "precede, outlast, or continue during an armed conflict"[1009]. Therefore, the SCSL considered it necessary only to assess the subsistence of an attack, rather than an armed conflict, to contextualize the commission of crimes against humanity. The trial chamber in the *AFRC Accused* referred to the *Akayesu* case to detect the main element of an attack[1010]: unlawfulness, i.e. its prohibition under the court's statute, physical or non-physical violence, and generally, "exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a *massive scale* or in a *systematic manner*"[1011]. This position was confirmed in the *RUF Accused* case, which complemented the reference to the ICTR's jurisprudence by quoting the *Kayishema and Ruzindana* judgment, stating that an attack could consist of "inflicting conditions of life calculated to bring about the destruction of part of a population"[1012]. It derives that the widespread nature (massive scale) and systematic manner were the dominant criteria to qualify single criminal offenses as crimes against humanity. Coherently, the SCSL proceeded to verify the subsistence of the said criteria, still referring to the ICTR's jurisprudence. In *Kayishema and Ruzindana*, the ad hoc tribunal for Rwanda defined a widespread attack as one "directed against a multiplicity of victims"[1013], whilst "a preconceived policy or plan"[1014] was evidence of systematicity, regardless it had been "adopted formally as the policy of a state"[1015]. However, as remarked above[1016], the ICTR did not consider the existence of a wider plan as a precondition for genocide and crimes against humanity, differently from the ICTY.

As for extermination, the SCSL heavily relied upon the ICTR's jurisprudence. It is worth reminding that the ICTR had the chance to leverage the *dolus specialis* to transfer certain conducts from the category of crimes against

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[1006] See Judgment, *AFRC Accused*, para. 212.
[1007] Judgment, *RUF Accused*, para. 79.
[1008] Judgment, *AFRC Accused*, para. 214.
[1009] *Ibidem*.
[1010] *Ibidem*.
[1011] Judgment, *Akayesu*, para. 581, emphasis added.
[1012] Judgment, *RUF Accused*, para. 130. See also Judgment, *Kayishema and Ruzindana*, paras. 146-147.
[1013] Judgment, *Kayishema and Ruzindana*, para. 123. See Also Judgment, *Akayesu*, para. 580.
[1014] *Ibidem*.
[1015] Judgment, *Akayesu*, para. 580.
[1016] See *supra* subparagraph 3.1.3.

humanity to genocide, as in the case of extermination. The SCSL embraced the ICTR's definition of extermination, defining it as "the intentional mass killing or destruction of part of a population as part of a widespread or systematic attack upon a civilian population"[1017]. Of note, the SCSL sanctioned the ICTR's position in *Ntakirutimana*, stating that "a numerical minimum [did] not exist to establish the *actus reus* of extermination"[1018]. Theoretically, the SCSL adopted a definition of extermination likely to resemble the *actus reus* par excellence of the crime of genocide, especially considering that the hybrid court for Sierra Leone followed the ICTR's approach in describing extermination as a "mass killing event"[1019]. Due to the potential overlapping between extermination and the crime of genocide in cases of a discriminatory context, the SCSL referred to the ICTY, which, in contrast with the ICTR, was more skeptical towards transferring certain conduct from crimes against humanity to genocide. Hence, the SCSL observed that "[unlike] the crime of genocide, the crime of extermination [did] not require a discriminatory intent"[1020].

Concerning rape, the SCSL merged the ICTY's and ICTR's definitions of the crime and referred to the ICTR's inferential approach. In the *AFRC Accused* case, the SCSL defined rape as a "non-consensual penetration […]"[1021], embracing the ICTY's definition provided in *Furundzija*[1022] and integrated by the *Kunarac* appeal judgment[1023], which stressed its non-consensual nature. Notwithstanding the SCSL adopted the same definition in the *RUF Accused* case, *in casu* the trial chamber deemed it necessary to remark that rape could have been considered "a constitutive act with respect to genocide"[1024], thus acknowledging one of the main contributions of the ICTR jurisprudence to international criminal law. Moreover, in the *RUF Accused* judgment, the court specified that the *actus reus* of rape consisted of an "invasion"[1025], thus adopting the ICTR's wording in *Akayesu*[1026]. It appears that the SCLS followed a broader definition of rape in the *RUF Accused* in comparison with the *AFRC Accused*, "broad enough to be gender neutral as both men and women can be victims of rape"[1027]. It is therefore possible to affirm that the SCSL indirectly recognized that the ICTR's definition of rape permitted more flexibility and adaptability to the court when handling cases of rape in compari-

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[1017] Judgment, *AFRC Accused*, para. 683. See also Judgment, *Akayesu*, paras. 590-592; Judgment, *Kayishema and Ruzindana*, paras. 137-147; Judgment, *Rutaganda*, paras. 82-84.

[1018] Judgment, *AFRC Accused*, para. 687. See also Judgment (Appeal), *Ntakirutimana*, paras. 588, 516.

[1019] Judgment, *AFRC Accused*, para. 683. See also Judgment, *Kayishema and Ruzindana*, para. 147.

[1020] Judgment, *AFRC Accused*, para. 683. This position was confirmed by the SCSL in Judgment, *RUF Accused*, para. 135. See also Judgment, *Stakić*, para. 640; Judgment, *Krstic*, para. 500.

[1021] Judgment, *AFRC Accused*, para. 692.

[1022] Judgment, *Furundzija*, para. 185.

[1023] Judgment (Appeal), *Kunarac*, paras. 129-130.

[1024] Judgment, *RUF Accused*, footnote 283.

[1025] Judgment, *RUF Accused*, para. 146.

[1026] Judgment, *Akayesu*, para. 598.

[1027] Judgment, *RUF Accused*, para. 146.

son with the ICTY's jurisprudence on the matter. However, the element of penetration was omitted in a subsequent trial before the SCSL, the *Taylor* case, thus suggesting that the *RUF Accused* approach to rape, i.e. the ICTR's influence on the matter, was an exception[1028]. Notwithstanding defining rape embracing the ICTY's view, the SCSL in the *AFRC Accused* case followed the ICTR's jurisprudence in *Akayesu*[1029] by specifying the purposes of rape, i.e. "intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person"[1030]. Overall, the *AFRC Accused* judgment presents a discrepancy between an *actus reus* of rape coherent with the ICTY's case law, whilst the *mens rea* of the sexual criminal offense followed the ICTR's findings[1031]. As anticipated, when dealing with rape and sexual violence in the *AFRC Accused*, the *RUF Accused*, and the *Taylor* case, the SCSL acknowledged the relevancy of circumstantial elements to infer the *actus reus* of rape[1032], as previously sanctioned by the ICTR in different judgments[1033]. Interestingly, both the *RUF Accused* and the *Taylor* case recalled the "social stigma which is borne by victims of rape in certain societies"[1034], stressing its relevance when assessing the impact of rape. The evaluation of the social consequences on a person who has been raped is of paramount importance, particularly regarding the criminalization of rape as an act of genocide. This thesis has criticized the ICTY's dealing with rape due to the tribunal's lack of consideration towards children born from a Muslim mother raped by a Serbian, acquiring the ethnicity of the father instead of the mother and therefore diminishing the reproductive capacity of the Bosnian Muslim group[1035]. In this scenario, the SCSL's jurisprudence on rape may furnish a sort of guidance in considering the social stigma of rape as an element to be taken into consideration. Such a social impact became even more relevant when dealing with alleged cases of genocide in which rape has been likely used as a genocidal weapon, inducing the court to even infer a *dolus specialis* from the expected social stigma resulting from rape.
In conclusion, the SCSL was statutorily, procedurally, and jurisprudentially influenced by the ICTR. Remarking that the crime of genocide was not *ratione materiae* of the SCLS, the hybrid court referred the ICTR, transplanting this latter's jurisprudence on genocide into judgments dealing with crimes against humanity and war crimes. This thesis has anticipated that the

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[1028] See Judgment, *Taylor*, paras. 415-417.
[1029] See Judgment, *Akayesu*, para. 597.
[1030] Judgment, *AFRC Accused*, para. 717.
[1031] It is worth remarking that the intimidation, degradation, humiliation, discrimination, punishment, control, or destruction of a person correspond to the *dolus generalis* of the crime of rape. The discussion presented *supra* at para. 2.7 dealt with the *mens rea* of rape and sexual violence focusing on the offenders' *dolus specialis*, i.e. the intent to destroy, in whole or in part, the targeted group, thus assuming rape as instrumental for the destructive purpose.
[1032] See Judgment, *AFRC Accused*, para. 695; Judgment, *RUF Accused*, para. 149; Judgment, *Taylor*, para. 416.
[1033] See Judgment (Appeal), *Gacumbitsi*, para. 115; Judgment (Appeal) of the International Criminal Tribunal for Rwanda, 21 May 2007, ICTR-95-1B-A, *The Prosecutor v. Mikaeli Muhimana*, para. 49.
[1034] Judgment, *RUF Accused*, para. 149; Judgment, *Taylor*, para. 416.
[1035] See *supra* subparagraph 3.1.5.

jurisprudence of the ICTY and the ICTR created discordant precedents related to similar issues[1036], and the SCLS demonstrated this shortcoming in dealing with rape and sexual violence. Indeed, among its case law on rape, the SCSL presents a certain degree of incoherence between the *AFRC Accused* and the *Taylor* case on one side, and the *RUF Accused* on the other, stemming from the usage of either ICTY's or ICTR's precedents. Overall, as sanctioned by the SCSL in the *RUF Accused*, the ICTR's jurisprudence was theoretically the best option to allow a gender-neutral approach to rape, though the ICTY's definition of rape was preferred. Hence, the SCSL's jurisprudence might be considered as a proxy to evaluate the long-lasting impact of the case law produced by the ICTY and the ICTR on international criminal law, as well as the flexibility of the ICTR's approach to rape and its gender neutrality.

3.3.5 Assessing the ICTR's Influence on African Legal Instruments and Regional Jurisprudence and its Future Applicability

So far this paragraph has presented the influence of the ICTR on a heterogeneous sample of targets, namely African international organizations, legal and political instruments, and regional as well as hybrid courts. Before 1994, the OAU lacked instruments to either prevent or punish the crime of genocide, implying the organization's immobility vis-à-vis the Rwandan genocide. This latter then acted as a shock on the system, with two major impacts. First, African states understood that they had to abandon their intransigent position regarding the defense of national sovereignty to allow a major political and judicial cooperation to prevent further commission of mass atrocities in Africa. Second, the failure of the UNAMIR and the disinterest of the international community during the Rwandan genocide made African leaders aware that they had to elaborate African solutions to African problems, i.e. regional mechanisms for the prevention and punishment of the most serious international crimes. Relying on precedents, international criminal law was strongly influenced by the jurisprudence of the ICTR during the shift from the OAU to the AU. Hence, when the newly created African organization began to elaborate mechanisms to prevent and punish genocide, crimes against humanity, and war crimes, it turned to the work of the ICTR as a point of reference. It is therefore unsurprisingly that the PPPCG and the Malabo Protocol referred to the ICTR's jurisprudence, determining the ad hoc criminal tribunal for Rwanda's authoritative influence over the AU, the ACJHR, and the ICGLR. Notably, the AU acknowledged the strict link between speech and genocide, detecting as a priority elaborating a definition of genocidal hate speech. Although this proposal was first presented in 2017, as of 2024 no definition has been produced. Thus, this thesis has proposed to turn to the ICTR's jurisprudence on the criminalization of hate speech in combination with Rwandan national legislation to formulate a proper definition of genocidal hate speech. By referring to the said international and national sources, the outcome is a definition that encompasses a different range of hate spee-

[1036] See *supra* subparagraph 3.1.6.

ch, from spreading ideology to direct and public incitement to commit genocide, emphasizing the relevance of context and remarking on the possibility of genocidal hate speech to be indirect, as the ICTR's jurisprudence clearly demonstrated. By an analysis of the SCSL's jurisprudence, it was not possible to detect a constant influence by the ICTR, as the hybrid court's trial chambers in the *AFRC Accused*, *RUF Accused*, and *Taylor* cases differently referred to the jurisprudence of the ad hoc tribunal for Rwanda, particularly in dealing with rape and sexual violence. However, it is fair to remark that notwithstanding the SCSL did not deal with genocide offenses, it referred to and transplanted ICTR's findings related to genocide into its judgment to deal with crimes against humanity and war crimes. It derives that the ICTR's jurisprudence provides a consistent legal framework possessing a certain degree of flexibility to be adapted to crimes ranging from war crimes to crimes against humanity to genocide. The work of the ICTR thus presents certain features, typically linked to genocide under the ad hoc tribunal's jurisdiction, that other national, hybrid, and international criminal courts can use to adjudicate different cases involving mass atrocities crimes.

Having demonstrated such adaptability and flexibility of the ICTR's jurisprudence, two further cases could serve as an empirical test for its jurisdictional application in Africa: Uganda and Gambia In July 2008, the High Court of Uganda established the International Crimes Division (ICD) to prosecute the crimes committed by the militants of the Lord's Resistance Army (LRA). The LRA is a Christian extremist armed organization which mainly operates in Northern Uganda since the 1980s, aiming at establishing a political system in Uganda based on the Ten Commandments[1037]. According to the ICC, which issued an arrest warrant for five LRA leaders including its founder Joseph Kony in 2005, the organization is responsible for murder, abduction, mutilation, sexual slavery, and recruitment of child soldiers, i.e. crimes against humanity and war crimes[1038]. The ICD has to be considered complementary with respect to the ICC, and it has jurisdiction over war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy, and other international crimes[1039]. Presenting a similar context in terms of typology of criminal offenses committed with the Sierra Leone, as the SCSL the ICD could refer to the ICTR's jurisprudence to prosecute the LRA militias. Interestingly, having set the crime of genocide as *ratione materiae* of the ICD, the Ugandan court can directly employ the ICTR's case law on genocide, likely concerning sexual abuses. Of, the ICD already referred to the ICTR in one judgment, using the ad hoc tribunal's jurisprudence in *Akayesu* to define crimes against humanity[1040].

[1037] BORGER (2012).

[1038] International Criminal Court Press Release, 2005, ICC-CPI-20051014-110, *Warrant of Arrest unsealed against five LRA Commanders (The Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen)*.

[1039] The High Court (International Crimes Division) Practice Directions, 2011, *Legal Notice No. 10*, sect. VI.

[1040] See Judgment of the International Crimes Division of the High Court of Uganda, 30 August 2018, HCT-00-WCD-Criminal Case No. 0002 OF 2010 (Arising from Criminal Case No. BUG RD. Court Case 09/2010), *The Prosecutor v. Thomas Kwoyelo Alias Latoni*, para. 64 (c).

After the authoritarian ruling of Yahya Jammeh over Gambia which lasted for 22 years, in 2016 Adama Barrow was democratically elected President. As one of the first acts, in 2017 the Gambian parliament established The Truth, Reconciliation and Reparations Commission (TRRC), to promote reconciliation, address impunity, and "prevent a repetition of the violations and abuses suffered by making recommendations for the establishment of appropriate preventive mechanisms including institutional and legal reforms"[1041]. Specifically, the TTRC was called to investigate the abuses committed by the *Junglers* militias and the National Intelligence Agency (NIA) under Jammeh's regime, including "extrajudicial killings, rape, torture, enforced disappearances, and numerous grievous human rights violations"[1042]. Since the TRRC Report recommended the prosecution of the responsible and the crimes involved are categorizable as mass atrocities crimes, it is consequentially reasonable that eventual trials could take the ICTR's jurisprudence as a reference, particularly regarding the punishment of rape and sexual violence. Indeed, the TRRC Report highlighted that "sexualized violations, forced nudity and rape were adopted as *organizational policy* of the former regime"[1043] and thus committed "through a 'sophisticated system' using state institutions and resources"[1044]. In these passages the TRRC stressed the weaponization of rape as a regime tool to control the population and instill fear among women, resembling the mass rape systematically committed during the Rwandan genocide. Therefore, presenting a similar context of state-sponsored sexual violence, the trials following the TRRC Report should refer to the ICTR's jurisprudence on the matter[1045]. Moreover, the TRRC Report emphasized the fact that "men took advantage of their positions of authority, the vulnerability of the women and girls, and the *climate* of fear"[1046]. This description of the climate of coercion established by governmental militias is relevant since coercion itself is a constitutive element of rape as established by the ICTR[1047]. Therefore, by referring to the ICTR's jurisprudence which takes into account the coercion created by the context[1048], Gambian courts would be able to infer the rape perpetrators' *mens rea* from their position of authority.

In sum, the analysis of the regional impact of the ICTR has demonstrated that the ad hoc criminal tribunal for Rwanda's jurisprudence constituted, constitutes, and will potentially constitute in the future a point of reference for criminal courts in adjudicating mass atrocities crimes, notwithstanding the involvement of the crime of genocide or not. Of note, the ICTR's juri-

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[1041] *Government White Paper on the Report of The Truth, Reconciliation and Reparations Commission*, 25 May 2022, p. 2. Hereinafter TRRC Report.
[1042] TRRC Report, p. 1.
[1043] TRRC Report, para. 302, emphasis added.
[1044] TRRC Report, para. 299.
[1045] See Judgment, *Akayesu*, paras. 597, 732; Judgment, *Gacumbitsi*, para. 107; Judgment (Appeal), *Gacumbitsi*, para. 103.
[1046] TRRC Report, para. 303, emphasis added.
[1047] See Judgment, *Akayesu*, para. 598.
[1048] See Judgment, *Akayesu*, para. 688.

sprudence appears particularly suitable to deal with the crimes of rape and sexual violence.

Conclusion

This chapter has first presented a comparison of genocide-related cases between the two ad hoc criminal tribunals created by the SC between 1993 and 1994, the ICTY and the ICTR. The two jurisprudence mainly differ in relation to the criminalization of two specific conduct: hate speech and rape. Whilst the ICTR innovatively criminalized rape and hate speech as offenses under the notion of genocide, the ICTY embraced a conservative approach, still considering those offenses as crimes against humanity. This thesis has identified the *mens rea* requirement for genocide, i.e. the *dolus specialis*, as the element which caused the ICTR's and the ICTY's jurisprudence to diverge on hate speech and rape. Indeed, the ICTR heavily leveraged the *dolus specialis* as a shifter for hate speech and rape from crimes against humanity to genocide, whereas this operation was not permitted before the ICTY, due to the ad hoc tribunal's statute and jurisprudence. It is highly likely that an 'ICTR approach' to an 'ICTY context' would have led to a different conclusion, criminalizing the mass rape of Bosnian Muslims and the Serbs militias' and leadership' hate speech as acts of genocide. The main conclusion stemming from this comparison is that criminal courts called to prosecute mass atrocities crimes have the chance to choose two different approaches to prosecution, the ICTR's innovative, and the ICTY's conservative, thus weakening the certain degree of uniformity inherently required by international law, a system characterized by its functional decentralization.
As for the ICC jurisprudence on genocide in *Al-Bashir*, a preliminary consideration is that the ICTR's jurisprudence was largely taken as a reference. However, the ICC's position split between the majority decision and the dissenting opinion, due to a different application of the ICTR's precedents. Although the majority referred to the ICTR to define the genocidal *mens rea*, it refused to embrace a hybrid approach to the interpretation of the four protected groups by the CPPCG's article II, whilst the dissenting opinion interpreted them following the ICTR's jurisprudence. The critical omission of the ICC Statute, i.e. the consideration of public and direct incitement to commit genocide as a mode of liability instead of a crime *per se*, completely prevented the ICC from taking hate speech as a circumstantial evidence to infer the genocidal *dolus specialis*, completely deviating from the ICTR's work. Conversely, the dissenting opinion embraced the same degree of relevance attributed to hate speech by the ICTR, using verbal and written speeches as fundamental evidence to detect a genocidal *mens rea*. The ICC jurisprudence in *Al-Bashir* clarified an additional ambiguity detected by this thesis in the ICC Statute, i.e. the blurred distinction between genocide and the crime against humanity of persecution. Indeed, though genocide and crimes against humanity are well distinguished under the ICC Statute, persecution and genocide are theoretically likely to overlap, as the only discriminant between the two remains the *mens rea*. To overcome this ambiguity, the ICC could have used the *mens rea* as a shifter (like the ICTR) to consider persecutory offenses as

acts of genocide, the pre-trial chamber in *Al-Bashir* distinguished between a persecutory *dolus specialis* and a genocidal *dolus specialis*. Moreover, this distinction prevented any categorization of rape and sexual violence as acts of genocide, thus aligning the ICC with the ICTY's jurisprudence. Though with different means, the ICC majority position in *Al-Bashir* and the ICTY were skeptical towards the criminalization of traditional crimes against humanity as genocide, whereas the ICTR developed a new approach, sanctioned by the dissenting opinion in *Al-Bashir*. Still, the divide on genocide created by the discordance between the ICTR and ICTY perpetuated in international criminal law, being made even more complex by the ICC's jurisprudence in *Al-Bashir*.

Finally, the detection of the ICTR's influence on the African continent has led this thesis to argue that the ad hoc criminal tribunal for Rwanda not only impacted the drafting of legal instruments for the prevention and punishment of the crime of genocide and on the jurisprudence of the SCSL but even to consider the ICTR as a suitable solution for legal problems affecting the region. If the Rwandan genocide has been the shock raising awareness on the need to establish mechanisms to prevent and punish genocide, the ICTR's jurisprudence has constituted and still constitutes the response to such a shock, providing a case law tailored to a scenario often recurring in the African continent, i.e. an escalating internal conflict contextualized in preexisting ethnic, religious, racial, or national tensions. From the analysis of different cases, it has emerged that the most frequent crimes committed in Africa are rape and other forms of sexual violence. It is thus safe to assume that the ICTR may furnish a certain degree of guidance in the prosecution of those criminal offenses since the ICTR reviewed the notion of rape in detail and produced a consistent jurisprudence on it. For this reason, this thesis has proposed that the Ugandan ICD and the Gambian criminal jurisdiction should embrace the ICTR's jurisprudence as a pillar to address and punish mass atrocities crimes.

In conclusion, the ICTR's jurisprudence on genocide exercises an authoritative influence over criminal courts, from the ICC to the African continent. The ad hoc tribunal for Rwanda's legacy consists of a hybrid approach for interpreting the CPPCG, a sophisticated inferential methodology to detect the *dolus specialis*, and the criminalization of hate speech and rape as acts of genocide. Whether this legacy has been fully embraced or contested, what emerges is that the ICTR provided an interpretation of the CPPCG and jurisprudence that still holds authority and may lead to further developments, both in international criminal law and in a perspective of regional instruments for the prevention and punishment of the crime of genocide. Moreover, as the ICC and the SCSL cases have demonstrated, the ICTR's jurisprudence is such a breakthrough that its findings, which originally emerged in relation to genocide, have been translated by other jurisdictional bodies into cases concerning crimes against humanity and war crimes. Therefore, although this thesis is centered on the notion of genocide provided by the ICTR, this latter jurisprudence has proved to possess the necessary flexibility to be adapted to all the categories of mass atrocities crimes.

Conclusion

This thesis has explored the notion of genocide in international criminal law through the jurisprudence of the ICTR, acknowledging the ad hoc tribunal's main contributions to its development. As anticipated in the introduction and investigated through the three chapters, the study of the notion of genocide was developed through three sub-research questions. In the first chapter, the existing legal sources on genocide before 1994, the year of the establishment of the ICTR, were examined to evaluate the degree of unconstraint enjoyed by the ad hoc tribunal for Rwanda. The literature review has first been necessary to demonstrate the absence of a unanimous definition of genocide, notwithstanding its codification by the CPPCG. Further, it has been stressed that genocide finds its legal roots not only in convention and legal precedents but also in customary international law and *jus cogens*, thus emphasizing a theoretically wide range of sources available to tribunals. During the Nuremberg trials, the IMT and the NMT did not directly handle the crime of genocide, as this latter was not set under their jurisdiction. When genocide was mentioned in the indictments and judgments, it was perceived as a consequence of war, i.e. the Nazi expansionary plan, rather than a clear genocidal policy previously planned and then executed by the state apparatus. Thus, the IMT and NMT left a vacuum in considering genocide as a crime *per se* and as a cause of mass killings, eventually untied with wartime. The Eichmann trial convicted the defendant for crimes against the Jewish people, a unique criminal offense resembling genocide. However, if crimes against the Jewish people are considered a proxy to evaluate the jurisdictional handling of genocide, a problem emerges. As the Eichmann jurisprudence proves, tribunals may have difficulties in distinguishing between genocide and crimes against humanity, as the ultimate discriminant remains relies upon the offender's *mens rea*. This latter problem has been confirmed by the comparison, in terms of definition by other legal sources between genocide and other mass atrocities crimes, namely war crimes, crimes against humanity, and ethnic cleansing. In sum, the ICTR began its work bound by a well-defined and elaborated, in terms of sources, notion of genocide. However, this latter has been poorly jurisdictionally addressed after the Second World War, letting the ICTR be considered completely unbound by legal precedents in dealing with genocide-related crimes. Hence, the absence of binding legal precedents has been detected as the premise to explain the wide expansion and evolution of the notion of genocide, starting from the CPPCG, by the ICTR, examined in the following chapter.

The second chapter was centered on the ICTR's jurisprudence, to comprehend which characteristics of the crime of genocide were mainly handled, interpreted, and modified by the ICTR and how. This thesis has identified four main features of genocide which have been evolved by the ICTR: the interpretation of the four protected groups by the CPPCG's article II, the genocidal *mens rea*, the criminalization of hate speech as public and direct incitement to commit genocide, and the criminalization of rape and sexual vio-

lence as acts of genocide. In examining how the ICTR categorized the Tutsis according to the CPPCG's article II, it has emerged that the tribunal did not employ a purely objective approach, as argued by the literature. Rather, it combined objective elements with the subjective perspective of the genocide perpetrators in what has been labeled by the thesis as a hybrid approach, allowing flexibility and adaptability to different cases. As a consequence, the strictness of the CPPCG which only protects national, ethnic, religious, and racial groups is counterbalanced by the hybrid approach, able to expand what has to be intended as one of those groups. The genocidal *mens rea* requirement is of paramount relevance for the evolving jurisprudence on genocide of the ICTR. This latter recognized the unicity of genocide, as its *mens rea* is composed not only of a *dolus generalis* but also of a *dolus specialis*, i.e. the intent to destroy. The *dolus specialis* has been detected during the trials before the ICTR through a sophisticated inferential strategy from circumstantial evidence, foremost among them the context. It is worth remarking that inference allowed the ICTR judges to enjoy a certain degree of flexibility in assessing the genocidal *mens rea*, considerably expanding the discretionary power of the ad hoc tribunal. The ICTR then was able to criminalize hate speech as incitement to commit genocide and rape and sexual violence as acts of genocide. Traditionally, hate speech and rape were considered crimes against humanity, as sanctioned by the IMT, NMT, and IMTFE. This thesis, by a detailed analysis of the ICTR's case law, has extracted the legal strategy employed by the ad hoc tribunal to criminalize the said offenses as genocide. Since crimes against humanity were statutorily defined as executed on discriminatory grounds, i.e. targeting specific groups, the *actus reus* of genocide and crimes against humanity were theoretically identical, and the only discriminant between the two categories of crimes remained the *mens rea*. Hence, the ICTR initially handled hate speech and rape as crimes against humanity, and subsequently, it detected their *dolus specialis* through the inferential strategy. Finally, the attribution of the *dolus specialis* to the *actus reus* of hate speech and rape allowed these latter to be categorized under the category of genocide. In sum, the ICTR exploited the similarity between the *actus reus* of crimes against humanity and genocide to use the *mens rea* as a bridge, transferring single conduct, hate speech, or rape, from crimes against humanity to genocide. Overall, the ICTR's jurisprudence produced a flexible notion of genocide, both in terms of ensuring the protection of different communities through the hybrid approach and of criminalizing a wide range of conducts as genocide, by relying on inference to detect the *dolus specialis* characterizing the genocidal *mens rea*. Of note, the criminalization of hate speech and rape demonstrates that acts of genocide do not necessarily correspond to lethal conduct provoking the death of the targets. Instead, hate speech and rape may serve as drivers for the extermination, not only physically but even, and specifically, in its psychological and moral dimension.

Finally, the authority and validity of the ICTR's genocide-related jurisprudence have been tested in the third chapter. First, the ICTR's jurisprudence has been compared with that of the ICTY, stressing that the two ad hoc tribunals' findings on genocide-related cases completely diverged. The compa-

rative analysis has detected the handling of the genocidal *mens rea* as the main difference between the two courts, with the ICTY adopting a more restrictive approach to it, implicitly preventing the criminalization of rape and hate speech as acts of genocide. Reasoning *a contrario*, the said findings on the ICTY's jurisprudence demonstrate the flexibility of the ICTR and its considerable expansion of the notion of genocide. Having assessed that the ICTR was more innovative on genocide compared with the ICTY, the former's 'rival' in terms of value as legal precedent, the thesis turned to the ICC. The ICC Statute and its criminal procedural document, the ICC Elements of Crimes, were heavily influenced by the ICTR, e.g. by acknowledging that rape could amount to genocide and the relevance of context to infer the *mens rea*. Jurisprudentially, in *Al-Bashir,* the ICC split between a majority decision aligning with the ICTY, and a dissenting opinion completely embracing the ICTR's jurisprudence on genocide. Since only the dissenting opinion recognized Al-Bashir's liability for genocide, it demonstrated once again the flexibility of ICTR's approach, adapted to a case different from the Rwanda 1994 but still involving suspected acts of genocide. It should be noted that the ICC's division in *Al-Bashir* confirmed the result of the discording jurisprudence of the ICTR and the ICTY detected by this thesis. This latter has the effect of providing a strict (ICTY) and a wide (ICTR) approach to genocide, creating a burden on courts to choose one of them and weakening consistency in international criminal law. The study of the impact of the ICTR's jurisprudence on the African criminal law context revealed that the ad hoc tribunal for Rwanda did influence regional legal mechanisms for the prevention and punishment of genocide, i.e. PPPCG and the Malabo Protocol, and the work of different institutions, namely the AU, the AUCJHR, and the ICGLR. However, taking into account the regional agenda for the prevention of genocide particularly in defining genocidal hate speech, this thesis has suggested that African institutions should rely more on the guidance provided by the ICTR's jurisprudence. Indeed, such an objective could be achieved relatively smoothly, as this script elaborated from that source a definition of genocidal hate speech embracing the notion of genocide studied in chapter two stemming from the ICTR's jurisprudence. The examination of the SCSL's case law then suggested that the ICTR's jurisprudence on genocide is sufficiently flexible that it can be translated and applied to prosecute other mass atrocities crimes, particularly crimes against humanity. Having acknowledged such flexibility, this thesis has proposed the adoption of the ICTR's case law to guide the future work of the Ugandan ICD and the Gambian criminal jurisdiction concerning the crimes listed in the TRRC Report.

In conclusion, this thesis has provided an extensive analysis of the notion of genocide in international criminal law. It can be argued that in terms of conventional, customary, and *jus cogens*, criminal tribunals face a similar point of departure to prosecute the crime of genocide. The detailed examination of the ICTR's jurisprudence revealed that the ad hoc tribunal consistently contributed to the evolution of the notion of genocide in international criminal law and the prosecution of the 'crime of the crimes', particularly by providing a hybrid approach to interpret the protected groups and an inferential strategy to assess the genocidal *dolus specialis*, as well as recognizing non-

lethal acts, i.e. hate speech and rape, as acts of genocide. Comparing the work of the ad hoc tribunal for Rwanda with other tribunals and evaluating its influence on the African criminal framework highlights the far-reaching impact of the ICTR's jurisprudence. Still, challenges in achieving consistency in international criminal law are noticeable, as divergent approaches to genocide stem from the discordant jurisprudence of the ICTY and the ICTR. Nevertheless, this thesis endorses a continuous adoption and adaptation of the ICTR's jurisprudence to prosecute mass atrocities crimes, thus assisting the achievement of justice and accountability globally.

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Abstract

Following the killing of at least 800,000 persons between April and July 1994 in Rwanda and acknowledging the failure of the international community to prevent and stop the atrocities, the United Nations (UN) established the International Criminal Tribunal for Rwanda (ICTR), firmly determined to punish those responsible for the factual commission of genocide. Attributing etiquette to events such as the mass killing that occurred in Rwanda is of vital importance for criminal law to allow a proper prosecution and punishment of the crimes. Being certain beyond any reasonable doubt that a genocide was committed in the African 'country of a thousand hills', the ICTR had nevertheless defined what genocide actually meant vis-à-vis the existing legal framework as of 1994. This thesis explores such effort, investigating the evolution of the notion of genocide in international criminal law through the jurisprudence of the ICTR. To properly address this main research question, the thesis is divided into three chapters, each centered on a sub-research question. The first chapter aims to provide an understanding of the legal framework existing before the establishment of the ICTR in 1994, which is necessary to assess the degree of unconstraint from legal precedents enjoyed by the ad hoc tribunal for Rwanda. The second chapter, the core of this thesis, furnishes an evaluation of the ICTR's contribution to the definition of genocide in international criminal law, determining which characteristics of the crime of genocide were mainly handled, interpreted, and modified by the ICTR and how. The third chapter examines the legacy of the ICTR's jurisprudence on genocide in international criminal law, comprehending whether its case law is an authoritative precedent. Specifically, this study is carried out by comparing the ICTR's jurisprudence with the work of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC), and the African criminal law context.
Defining genocide has largely been challenging, and still in 2024 scholarship is divided and unable to find a unanimously shared notion of the 'G' word. Following Raphael Lemkin's formulation of the word 'genocide' in 1944 to properly define the crimes committed by the Nazi regime that were perceived as something different from the traditionally recognized categories of crimes against humanity and war crimes, the crime of genocide was codified by the UN in the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) in 1948. The CPPCG defines genocide in its article II through different acts, committed with the intent to destroy in whole or in part national, ethnic, religious, or racial groups. The CPPCG has been widely criticized for having excluded social and political groups, thus applying a discriminatory principle in ensuring the protection against the 'crime of the crimes', and for not taking into account the so-called cultural genocide, i.e. the destruction of the cultural heritage of a group. Departing from these shortcomings of the CPPCG, scholarship has proposed other definitions of genocide, attempting to expand its conventional notion. Notwithstanding that the CPPCG remains the exclusive point of departure for international crimi-

nal courts to adjudicate cases involving genocide, its criticisms by the literature represent a call for judges to jurisprudentially expand the conventional definition of genocide.

After the Second World War, the Allied established the International Military Tribunal (IMT) and the Nuremberg Military Tribunals (NMT, managed exclusively by the Americans) to prosecute Nazi criminals. For political reasons of shielding against potential backlashes, the crime of genocide was excluded by the *ratione materiae* of the two tribunals, which therefore had jurisdiction over two other mass atrocities crimes: crimes against humanity and war crimes. It is relevant to remark that the commission of crimes against humanity had to be proven in strict connection with the context of wartime, creating an additional burden on the prosecution. Although formally absent from the charges, the IMT prosecutors, and in particular the British and French ones, were keen to remark the commission of acts of genocide as part of a wider genocidal plan or policy. The IMT judgment in *Göring* did mention genocide and was aware of its commission, though failing to recognize its nature as a crime *per se*. Indeed, the tribunal conceived the perpetration of genocide as actions consequent to an expansionary and aggressive foreign policy of Nazi Germany. In other words, the IMT failed to identify a Nazi genocidal *mens rea*, almost as if it had been planned and committed unintentionally by the Nazi armed forces and officials. This position was confirmed by the NMT in several trials, e.g. the *Medical* case, the *RuSHA* trial, and the *Pohl* case. However, it is worth noting that the NMT went somehow further in comparison with the IMT's jurisprudence, as it developed a wide range of actions that have to be intended as acts of genocide, such as enforced sterilization, abduction of children, and racial policies. In the attempt to evaluate the contribution of the IMT and NMT to the development of international criminal law, it is relevant to stress that the two tribunals, by their non-prosecution of genocide, implicitly called for the criminalization of genocide as a crime *per se*, demonstrating that without an evolution of the existing legal framework, genocide was destined not to be adjudicated before courts. Following the Nuremberg trials, the state of Israel hunted former Nazi high officials who escaped prosecution, including Adolf Eichmann, the SS officer responsible for the transfer of prisoners to the concentration camps. Deciding to prosecute former Nazis before its national court, the District Court of Jerusalem, Israel established the Nazis and Nazi Collaborators (Punishment) Law 5710-1950 (NNCPL), which created a new category of crime, labeled as crimes against the Jewish people. Of note, this latter was legally defined by duplicating the CPPCG's definition of genocide, allowing this thesis to argue that 'crimes against the Jewish people' could consistently amount to genocide in examining how the Israeli judges prosecuted Eichmann in 1961. The *Eichmann* trial first anticipated a permanent issue in international criminal law, i.e. the blurred distinction between crimes against humanity and genocide. Indeed, the *actus reus* of the two crimes overlaps and the discriminant between the two remains the *mens rea*, considerably more difficult to prove beyond reasonable doubt. This apparent conflict was solved by recognizing that crimes against the Jewish people (genocide) represented the final stage of an escalating conflict. This finding is of paramount importance,

as it draws a common thread between the IMT, NMT, and the District Court of Jerusalem since this latter strictly linked the commission of the most serious crimes to the final stage of the Second World War, i.e. the German aggression to the Soviet Union as already recognized during the Nuremberg Trials. However, it is fair to remark that the *Eichmann* trial remained the only jurisdictional application, even if indirect, of the CPPCG before the establishment of the ICTY and the ICTR between 1993 and 1994. Overall, considering the IMT, NMT, and *Eichmann* case, the existing jurisprudence on genocide available to the ICTR judges was poor and, most importantly, still uncertain on specifically highlighting the *actus reus* and *mens rea* requirements. Further, genocide was recognized only as the ultimate escalation of an international conflict, leaving a vacuum for considering the commission of such crimes during internal conflicts and civil wars.

Jurisprudence is only one of the sources of international law recognized by the Statute of the International Court of Justice (ICJ). Together with case law, conventions, customs, and *jus cogens* form the framework of international legal sources available to lawyers and courts. As for customary international law, this thesis identifies the close and twofold relationship between this source and the CPPCG. First, the CPPCG represents the codification of an existing custom, thus highlighting that international customary law on genocide was already present before 1948 even if genocide did not exist as a notion. It follows that both a convention, the CPPCG, and a customs on genocide serve as sources for international criminal law when dealing with the crime of genocide. Second, the CPPCG is the point of departure for the development of international customs on genocide, specifically on jurisdiction in its extraterritorial dimension. Indeed, the *Eichmann* case provides consistent evidence of customary international law establishing the chance for any state to prosecute individuals charged with genocide offenses, i.e. the principle of universal jurisdiction allowing states to prosecute mass atrocities crimes no matter where committed. Concerning *jus cogens*, this script has assessed the existence of a peremptory norm of international law prohibiting genocide testing its customary, non-derogatory, and *erga omnes* nature on the jurisprudence of the ICJ and the ICTY. In sum, recognizing the existence of sources other than jurisprudence on genocide is of paramount importance to acknowledge that international courts enjoy a quite wide room of maneuver to prosecute such crime.

As anticipated above, genocide, together with war crimes and crimes against humanity is comprised in the wider category of mass atrocities crimes. To allow a proper understanding of the difference between the crimes considered mass atrocities, this thesis compares the definitions of genocide, crimes against humanity, and war crimes existing as of 1994. First, genocide is distinguished from war crimes for context, intent, and targets. War crimes are chargeable only in the context of war, whilst genocide can occur during peacetime. Further, whilst genocide has a precise intent to destroy its targets as a group, war crimes may include acts not necessarily directed to annihilation. Finally, genocide targets members of a racial, national, religious, or ethnic group, whereas war crimes are mainly directed indiscriminately against civilians. It derives that distinguishing between genocide and war crimes is

smooth when the crimes under scrutiny were not committed during wartime since the context necessary to charge war crimes is not present. Problems arise when acts of genocide are committed during wartime, and thus there may be an overlapping between genocide and war crimes. In this case, courts should resort to a more specific scrutiny of the offender's intent and targets. Distinguishing between genocide and crimes against humanity seems even harder, as the former and the latter largely share the same *actus reus*, such as extermination. A preliminary distinction is drawn by relying on the fact that crimes against humanity are committed indiscriminately, whereas genocide targets by discriminating. However, crimes against humanity as persecution, thus targeting victims on discriminatory grounds, are theoretically identical to genocide. Hence, the sole factor allowing their distinction is the *mens rea*, as conversely to genocide and similarly to war crimes, crimes against humanity are not necessarily aimed at destroying in whole or in part the group their victims belong to.

In sum, the first chapter reveals that the ICTR faced a legal framework on genocide quietly rich in terms of sources, i.e. jurisprudence, convention, customs, and *jus cogens*, though poorly addressed jurisprudentially. It derives that the notion of genocide has not been reviewed and evolved in the period between its formulation by Lemkin in 1944 and the establishment of the ICTR in 1994, thereby allowing this latter to be theoretically unconstrained by jurisprudence in handling cases of genocide. This finding largely explains why the ICTR was able to considerably expand and evolve the definition of genocide provided by the CPPCG, as examined and demonstrated in the following chapter of this thesis.

From 6 April to the end of July 1994, the Hutu genocidal militias, backed by the Rwandan extremist government and armed forces, slaughtered at least 800,000 Tutsis and moderate Hutus, with the precise intent to exterminate the Tutsi minority. However, it is fair to remark that ethnic tensions were already present in the decades before the Rwandan genocide, and, most importantly, the interethnic conflict stemmed from the colonial heritage of Rwanda. Indeed, since the 19th century Rwanda was colonized by the Germans and then the Belgians, who exploited different physical traits among the Rwandan population to divide this latter into three ethnicities: the majority Hutu, the minority Tutsi, and the Twa. The colonial rules empowered the Tutsis to administrate Rwanda in a strategy of *divide et impera*, causing the discontent of the Hutus, who saw them, as a majority, politically subjugated by the Tutsi minority. The Hutus had the chance to conquer power in 1962 when Rwanda finally became independent. Years of growing discrimination against the Tutsi followed, and in 1973, Major Juvénal Habyarimana seized power through a coup, overthrowing Kayibanda and establishing a single-party dictatorship. Meanwhile, an increasing number of Tutsis began to flee Rwanda for Uganda, where they organized a paramilitary group named the Rwandan Patriotic Front (RPF), led by Paul Kagame, who aimed at returning to Rwanda and stop the abuses against the Tutsis (and possibly retook power). A conflict then erupted between the RPF and the Rwandan armed forces, and only in 1993 with the Arusha Accords the two combatants reach an agreement for a ceasefire and the formation of a transition government in

Rwanda. It is fundamental to highlight that in the years prior to 1994 the Hutu extremists, those aiming at 'cleaning' Rwanda from the Tutsis, started to organize into armed militias such as the *Interahamwe* and the *Impuzamugambi*. Moreover, extremist propaganda media were created, namely the newspaper *Kangura* and the radio broadcasting channel *Radio Television Libre de Milles Collines* (RTLM). Overall, the extremist militants and propaganda media were under the control of Colonel Théoneste Bagosora, considered the architect of the Rwandan genocide. On 6 April 1994, the presidential plane transporting Habyarimana was shot down by unknowns over Kigali's airport, causing the killing of the Rwandan president. Immediately after the killing of the president, RTLM started to spread information reporting the assassination as a plot by Hutu moderates and Tutsis. The radio urged to get rid of all the Hutu moderates and the Rwandan Tutsis, through killings: it was the beginning of the genocide. Children and women were the primary targets of the killers, as they were seen as the procreators of the Tutsi ethnicity. Apart from the mass killings mainly carried out with machetes, rape was extensively used to impregnate women with a Hutu fetus, destroy the reproductive organs of the victims, and spread HIV/AIDS infection. The *Interahamwe* and the *Impuzamugambi* received information on the shelters by radio, and with the support of the Rwandan armed forces and local politicians attacked the unarmed civilians seeking refuge. Sadly, the international community did not prevent or stop the mass atrocities, despite a peace-keeping mission, the United Nations Assistance Mission in Rwanda (UNAMIR), was present in the country and witnessed the genocide. The UNAMIR was underfunded and lacked peace-enforcement rules of engagement. More importantly, the UN Security Council (SC) was at the time locked by the United States (US) obstructionism, as Washington DC suffered heavy casualties during a UN mission in Somalia in October 1993, and thereof the American public opinion was not supportive of new military missions in Africa. Hence, in the first weeks of the killings in Rwanda, the international community avoided dealing with the situation, leaving General Romeo Dallaire, the UNAMIR commander, and his peacekeepers to protect Rwandans sheltering in UN facilities. Only at the end of May 1994 the UN recognized that genocide was actually carried out in Rwanda, and began to discuss the reinforcement of the UNAMIR. Simultaneously, the SC approved the unilateral deployment of French troops in Rwanda under *Operation Turquóise*, seeking to create a buffer zone to favor the flow of refugees into the neighboring Zaire (today's Democratic Republic of the Congo). The impact of *Operation Turquóise* remains debated still today: if one can argue that the French troops avoided mass killings in the areas under their control, it is also true that they favored the escape of genocidal militias into the North Kivu region of Zaire. Of note, the instability brought by the massive flow of refugees in eastern Zaire destabilized the region as a whole, and such a destabilization has been detected as one of the main causes of the First and Second Congolese wars (1996-2003. As of 2024, North Kivu is the main cluster of extremist Hutus who target Congolese Tutsis and still represent a threat to Rwanda.

Having failed to prevent the genocide, the UN decided to mobilize to ensure at least the punishment of those responsible by creating an ad hoc criminal

tribunal similar to the ICTY (established in 1993), the ICTR. The mandate of the ICTR gave preeminence to the punishment of genocide vis-à-vis other mass atrocities crimes, and it can be argued that it influenced the extensive work of the tribunal in producing jurisprudence on genocide. The main element of interest detected by the analysis of the ICTR Statute is the blurred distinction between the definition of genocide (which replicated the CPPCG's) and crimes against humanity, defined as committed on discriminatory grounds. Thus, in the statutorily perspective of the ICTR, both genocide and crimes against humanity were executed discriminately, targeting individuals for their belonging to an ethnic, racial, religious, or national group. It derives that the only difference between the two categories of criminal offenses remained the offender's *mens rea*, which for genocide took the form of a precise intent to destroy. As it is demonstrated through the scrutiny of the ICTR's jurisprudence, the ad hoc criminal tribunal for Rwanda leveraged the *mens rea* to transfer crimes against humanity's conduct under the category of genocide. This thesis argues that the ICTR consistently evolved the notion of genocide in international criminal law in four different features of the crimes: the interpretation of the four protected groups by the CPPCG's article II, the genocidal *mens rea*, the criminalization of hate speech as public and direct incitement to commit genocide, and the criminalization of rape and sexual violence as acts of genocide.

To permit the prosecution of the crime of genocide for those responsible for the Rwandan genocide, the ICTR was primarily entrusted to identify the Tutsis as an ethnic, racial, religious, or national group, the four protected categories under the CPPCG's article II. Without a proper categorization of the victims in one of the said groups, the criminal offense of genocide would not have subsisted, since its fundamental characteristic stands in the targeting of a specific group. In international law, the interpretation of groups was influenced by the Permanent Court of International Justice (PCIJ)'s position in the *Minorities in Upper Silesia* case and by the ICJ's ruling in the *Nottebohm* case. The common thread between the said cases was the embracement of a purely objective approach to interpreting group membership, i.e. an analysis based on tangible elements, such as the language spoken or legal bonds. The opposing approach is the subjective one, considering how the victims or the perpetrators of a crime interpret and understand group membership. Of note, this approach was never adopted by an international court before the establishment of the ICTR. In its first genocide judgment, the *Akayesu* case, the ICTR followed an objective approach, making the Tutsis fall under the category of ethnic group. Nevertheless, the approach adopted in *Akayesu* appeared not convincing, and subsequent trials shifted the line of interpretation towards subjectivity, i.e. taking into consideration the victims and the perpetrators' perspectives. Between these latter, the perpetrator subjectivity was recognized as predominant, thus making it the necessary element to carry out the subjective analysis. However, the detailed analysis of the ICTR's jurisprudence in *Semanza*, *Gacumbitsi*, *Kajelijeli*, *Ndindabahizi*, and *Muvunyi*, revealed that the ad hoc tribunal for Rwanda did not embrace a fully subjective approach, as the literature as often argued. Instead, it adopted what this thesis labels as a hybrid approach, consisting of a preliminary objective ana-

lysis, completed by considering the subjective perspective of the perpetrators toward the victims. In sum, the ICTR hybrid approach appears to counterbalance the CPPCG's vacuum concerning the definition of the four protected groups by its article II.

The definition of the genocidal *mens rea* by the ICTR is considered the pivotal element that allowed the ad hoc tribunal to evolve the notion of genocide. The *mens rea* is the perpetrator's intent to commit a wrongful act or omission, that together with the *actus reus*, the tangible element of a wrongful act or omission, generates criminal liability. The ICTR first examined the genocidal *mens rea* in the *Akayesu* case, recognizing its twofold nature. Indeed, the crime of genocide, from the *mens rea* perspective, was not limited to its *dolus generalis*, i.e. the intent to commit acts of genocide, such as killings. Instead, the *dolus generalis* was accompanied by a *dolus specialis*, the specific intent to destroy in whole or in part a group; if the *dolus generalis* has to be considered the basis of the *mens rea*, this latter becomes genocidal when the *dolus specialis* is detected. Hence, detecting the *dolus specialis* was prioritized by the ICTR, as it was the only venue to ascertain responsibility for the commission of genocide. However, detecting the *mens rea* was a difficult process for the ICTR, due to the non-cooperative behavior of the defendants and the difficulties in reconstruction of the facts by adducting evidence in each trial. Thus, the ad hoc tribunal had to overcome these difficulties to allow the prosecution of the crimes under its jurisdiction and decided to do so by embracing an approach based on inference, mainly developed in the *Akayesu*, *Rutaganda*, *Kayishema and Ruzindana*, and *Gacumbitsi* trials. The inferential approach empowered the ICTR to employ deduction, considering as a basis circumstantial pieces of evidence, e.g. among the most important the general context, words pronounced by and additional deeds of the defendants, the number of victims, the weapons employed, and the methodological pattern of conduct. Overall, the difficulty to prove the *dolus specialis* was counterbalanced by the flexibility of the inferential approach. The thesis demonstrates the efficiency of such flexibility by analyzing different cases (*Kayshema and Ruzindana*, *Musema*, *Zigiranyirazo*, *Niyitegeka*, *Semanza*, *Gacumbitsi*, and *Ntakirutimana and Ntakirutimana*) in which the ICTR dealt with the crime of genocide, conspiracy to commit genocide, planning genocide, and aiding and abetting genocide. In conclusion, the ICTR contributed to the definition of the *mens rea* requirement of genocide in international criminal law, sanctioning its *dolus specialis* feature and promoting its detection by adopting an interpretative approach based on inference from circumstantial evidence.

The propaganda media industry in Rwanda played a fundamental role in inciting, supporting, and leading the extermination of the Tutsis and the Hutu moderates in 1994. The criminalization of a written or verbal act of speech naturally conflicts with the right to freedom of expression, universally recognized in different international legal instruments. Thus, the ICTR's consideration of hate speech as a criminal offense found limitations in terms of international law sources, such as the International Covenant on Civil and Political Rights (ICCPR) and the UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Yet, the ICCPR and the

CERD provided a preliminary limitation to the freedom of expression, prohibiting the usage of speech for discrimination purposes based on racial, national, or religious ideas. Speech has been already criminalized at Nuremberg, during the Allied trials against former Nazis responsible for the regime's propaganda. There, the IMT and NMT considered hate speech as persecution, i.e. a crime against humanity, during the *Göring* and *The Ministries* cases. Hence, the available legal precedents to the ICTR concerning the criminalization of hate speech ascribed this latter conduct as a crime against humanity of persecution. Of note, the IMT and NMT implicitly recognized a specific intent to promote the extermination of the Jews behind the hate speeches spread by the Nazi propaganda, somehow resembling a *dolus specialis* but avoiding any discussion on the relationship between hate speech and genocide. Thus, when called to deal with the role of speech during the Rwandan genocide, the ICTR was forced to completely reinterpret the existing legal framework and produce innovative jurisprudence to allow the prosecution of hate speech and its specific criminalization as direct and public incitement to commit genocide. The ICTR, in *Akayesu*, defined the core elements allowing the criminalization of hate speech as incitement to commit genocide, namely its *dolus specialis*, directness, and publicity. Further, the ICTR recognized the inchoate nature of incitement, as no causal relation with the commission of further crimes was requested to entail responsibility. Hence, hate speech as public and direct incitement to commit genocide was considered a criminal offense *per se*, criminalizable when direct, public, and aiming at inciting the destruction of a protected group. The *Akayesu*'s standards were then integrated by the *Kambanda*, *Ruggiu*, and *Niyitegeka* cases, recognizing that incitement did not necessarily have to be expressed in the form of orders (i.e. imperative verbs) and that congratulating was a retrospective form of incitement. In the trial and appeal judgments of the *Media Case*, prosecuting the directors of RTLM and *Kangura*, the ICTR created a landmark precedent in the categorization of hate speech as public and direct incitement to commit genocide. By considering *Akayesu*'s standards of incitement to genocide mentioned above, relying upon its characteristics of publicity, directness, and *dolus specialis*, the ICTR in the *Media Case* elaborated four criteria to detect the distinction between legitimate speech and hate speech, and between this latter and incitement to commit genocide: purpose, text, context, and the relationship between the speaker and subject. It emerged that the genocidal intent, i.e. *dolus specialis*, represented by the intent could have been inferred from the analysis of the words pronounced or written and their contextualization. The context can be considered as the dominant criterion, as it allowed the detection of a genocidal intent even in metaphors, euphemisms, and mild expressions. Additionally, as specified by the appeal chamber, the causal relation between the incitement and the commission of genocidal acts as well as the relationship between the speaker and the subject, could have served as additional proof. Thus, the appeal judgment hierarchized the criteria established by the trial chamber in the *Media Case*, giving greater prominence to the context and the text to determine when hate speech turned into incitement to commit genocide. In *Bikindi*, the ICTR was called to deal with music, as songs were composed before and during the

Rwandan genocide to incite the mass killings of the Tutsis through the usage of derogatory language. The *Bikindi* case stressed the relevance of the contribution of the speaker to the dissemination of his or her speeches to categorize such conduct as public and direct incitement to commit genocide. In the view of the court, the mere composition of songs, which can include hate speech in their lyrics, is not a crime of incitement, as the element of publicity is missing. Hence, the dissemination of hatred songs *per se* does not imply the liability of the author for incitement to commit genocide. A composer and singer of a hateful song can therefore be held liable for public and direct incitement to commit genocide only if he or she directly and personally sings and spreads his or her songs, containing hate speech, in the context of genocide. In conclusion, the ICTR's jurisprudence unprecedentedly stressed the relationship between hate speech and genocide, enshrining their link in the criminal offense of public and direct incitement to commit genocide. The ad hoc tribunal for Rwanda properly defined hate speech and elaborated a chief strategy to detect its evolution into incitement to commit genocide, allowing international criminal law to acknowledge that language could cause mass killings just like machetes.

Finally, prosecuting adequately rape was fundamental to ensure justice, since the widespread execution of sexual violence in 1994 was employed as a weapon of terror by the extremist militias. The international legal framework existing as of 1994 provides a certain degree of protection from rape and other forms of sexual violence for women both during internal and external armed conflicts. However, a fundamental vacuum was present, as no international legal source provided an internationally accepted definition of rape, thus requiring the ad hoc tribunal to formulate it. Furthermore, rape needed to be categorized as a specific criminal offense, taking into account its moral and physical dimension concerning the typology of violence stemming from sexual violence. The International Military Tribunal for the Far East (IMT-FE) during the sentencing of Japanese war criminals mentioned rape, considered as a war crime, and peacetime rape, categorized as a crime against humanity. More relevantly, the Control Council Law no. 10 (CCL10, the legal basis of the NMT jurisdiction) distinguished between wartime rape as a war crime and peacetime rape as a crime against humanity. However, the NMT did not prosecute any individual for rape and sexual violence charges. Hence, when the ICTR was called to deal with rape and other forms of sexual violence in 1994, it had a *carte blanche* before it, entailing the burden of creating a precedent for the prosecution of rape in international criminal law. The distinction between rape as a war crime or as a crime against humanity depending on the context was embraced by the ICTR Statute, thus ensuring continuity with the CCL10. The ICTR defined rape in the *Akayesu* judgment, stressing its invasive and coercive nature. Of note, the *Akayesu*'s notion of rape will be contested by the ICTY, and this latter's definition of rape will be embraced in further cases by the ICTR. Setting apart discussions on the definition of rape, the ICTR in *Akayesu* criminalized the act as genocide. The ad hoc tribunal pointed out that when a *dolus specialis* is detectable in the minds of the rapists and sexual violence perpetrators, i.e. the intent to commit such criminal offenses to pursue a genocidal plan of destruction of

a targeted group, rape and sexual violence had to be considered as acts of genocide under the ICTR Statute article II. Thus, the *dolus specialis* was the element that caused the shifting of rape and sexual violence from the categories of crimes against humanity and war crimes to genocide. The *Akayesu* approach to rape and sexual violence was then enriched by the *Rutaganda* and *Musema* judgments. In *Musema*, the court distinguished between rape and sexual violence, with the latter defined as any act of sexual nature committed coercively, not necessarily entailing penetration as instead required by rape. In *Rutaganda*, the ICTR expanded the list of acts allowing the categorization of sexual violence and rape as genocide, including sexual mutilation, enforced sterilization, and forced birth control. Overall, the ICTR in *Akayesu*, *Musema*, and *Rutaganda* finally provided a comprehensive framework not only to define and prosecute rape and sexual violence as war crimes and crimes against humanity but even to criminalize those conducts as acts of genocide by recognizing their *dolus specialis*.

Overall, the second chapter finds that the ICTR's jurisprudence produced a flexible notion of genocide, both in terms of ensuring the protection of different communities through the hybrid approach and of criminalizing a wide range of conducts as genocide, by relying on inference to detect the *dolus specialis* characterizing the genocidal *mens rea*. Of note, the criminalization of hate speech and rape demonstrates that acts of genocide do not necessarily correspond to lethal conduct provoking the death of the targets. Instead, hate speech and rape may serve as drivers for the extermination, not only physically but even, and specifically, in its psychological and moral dimension.

Assessing the long-lasting impact of the ICTR's jurisprudence in terms of influence in international criminal law requires comparison, and such a process must begin with comparing the ad hoc criminal tribunal for Rwanda with another tribunal of the same typology, the ICTY. As a premise, this thesis compares the ICTR and the ICTR on five different themes: statute and mandate, interpretation of the four protected groups by the CPPCG's article II, the *mens rea* requirement for genocide, and the criminalization of ate speech and rape as genocidal acts. Following the eruption of wars during the dissolution of Yugoslavia, in 1993 the SC decided to create an ad hoc tribunal to punish those responsible for the mass atrocities increasingly reported in the Balkans. Differently from the ICTR, the ICTY was not politically entrusted by mandate to give preeminence to the prosecution of genocide. Rather, the ad hoc tribunal for the former Yugoslavia was requested to generally prosecute serious violations of international humanitarian law. Subsequently, the ICTY Statute did include in its *ratione materiae* genocide, but the main emphasis was set on war crimes and crimes against humanity. Thus, a preliminary consideration stemming from the comparison of the ICTR and ICTY mandates is that the former has been politically encouraged by the SC to prosecute genocide, whereas the latter has not. Notably, the ICTY Statute linked the commission of crimes against humanity (not defined on discriminatory grounds, thus differing from the ICTR Statute) to wartime, clearly resembling the nexus required by the IMT Charter. Overall, the ICTY Statute reflected an ad hoc tribunal structured to give preeminence to wartime crimes, primarily dealing with war crimes, accurately listed, and allowing the

prosecution of crimes against humanity, though necessitating their link with conflict. Otherwise, the ICTR Statute was less restrictive, giving preeminence to the prosecution of genocide and crimes against humanity committed with a discriminatory aim. In terms of jurisprudence concerning the interpretation of the four protected groups by the CPPCG, both the ICTY and the ICTR indeed embraced a mainly subjective approach, yet including objective elements, i.e. a hybrid approach favoring the genocide perpetrators' perspective. This thesis then argues that the *mens rea* requirement for genocide is the element that provokes a discordance between the ICTY's and ICTR's jurisprudence over the criminalization of similar acts, i.e. hate speech and rape. Notwithstanding the ICTY agreed on the ICTR's recognition of a genocidal *dolus specialis*, it went further by elaborating a more sophisticated notion of *mens rea* for genocide in different trials (*Jelišić*, *Krstič*, *Stakić*, *Popović et al.*). First, the ICTY increased the possibility of prosecuting genocidal acts by adopting a qualitative *mens rea*, meaning recognizing as a genocidal intent the killing of specific individuals fundamental for the survival of a group. According to this version of the *mens rea*, quality (the status of the target within the group) was prioritized over quantity (the number of victims, regardless of their status within the group). Second, the ICTY considerably limited the chance to prosecute genocide with the geographical *mens rea*, i.e. the need to prove the existence of a genocidal plan targeting the specific area where the crimes under trial were committed. Further, the ICTY longly considered the existence of a wider genocidal plan as necessary evidence to assess the subsistence of genocidal acts. This position was then clarified by the ICTY by referring to the ICTR's jurisprudence in *Kayishema and Ruzindana*, holding that a wide genocidal policy could have constituted a useful basis for inference, but not a strict requirement to prosecute acts of genocide. However, the strictness, uncertainty, and discordance among the ICTY's jurisprudence on the genocidal *mens rea* requirement generated an obstruction to allow the categorization of certain conducts as acts of genocide.

The ICTY's approach to the *mens rea* of genocide led the ad hoc tribunal's jurisprudence on hate speech and rape to completely diverge from the ICTR's one. This thesis argues that the ICTY's jurisprudence of hate speech is scarce and not effective in criminalizing such conduct (as a crime against humanity and incitement to commit genocide) for two main reasons, which have been identified through a comparison with the ICTR's case law. First, the ICTY was 'bound' by its statute to limit the criminalization of hate speech as a crime against humanity. The ICTY Statute, drafted in 1993, still reflected the 1945 nexus between wartime and crimes against humanity established by the IMT Charter. Such a strict link implied that the offenses categorizable as crimes against humanity had to provoke harms of a consistent gravity, as clearly notable in the cases of extermination, murder, and torture. Thus, considering that hate speech *per se* did not entail any consistent damage to the targets, but is 'only' susceptible to provoke further crimes, was not believed to reach the gravity threshold set by the ICTY in *Kupreškić* and referring to article V of the ICTY Statute. Of note, according to the gravity threshold, the acts not listed by the statute could have been prosecuted by the tribunal only if they were of a gravity similar to those of crimes against hu-

manity. The fact that hate speech was considered persecution, i.e. a crime against humanity, only in 2018 by the Residual Mechanism for International Criminal Tribunal (RMICT) appeal chamber in *Šešelj* leaves no doubts on the statutory and jurisprudential limitation preventing the criminalization of speech. Further, the ICTY failed to properly refer to the ICTR's jurisprudence to incorporate this latter's approach to deal with hate speech, e.g. the scrutiny of speeches, journal articles, radio broadcasts, and the primary importance attributed to their contextualization. Second, regarding the potential criminalization of hate speech as public and direct incitement to commit genocide, sanctioned by the ICTR in *Akayesu*, its limitation has to be found in the ICTY's jurisprudence. As illustrated above, the ICTY adopted a strict approach in verifying the subsistence of a *dolus specialis*, requiring evidence of both a national and a targeted/local genocidal plan. Since the detection of the *dolus specialis* behind a hate speech was the element that allowed the ICTR to categorize speeches, articles, and radio programs as public and direct incitement to commit genocide, a similar smooth process was not possible before the ICTY chambers. Hence, the strict requirements to identify a defendant's *dolus specialis* limited the detection of such a *dolus* in the *mens rea* of the hatred inciters, creating an entire vacuum in the relation between speech and genocidal acts during the wars in the territory of the former Yugoslavia. Overall, it is possible to argue that the ICTY was more skeptical in criminalizing hate speech, particularly in linking it to genocidal acts. The complete avoidance of the context as well as the scrutiny of speeches, journal articles, and radio broadcasts by the ICTY and the underscoring of the capacity of hate speech to cause damage of a certain gravity corroborate this statement, stressing that the ICTY did not take into account the ICTR's accurate and contextual approach to hate speech. Similarly to Rwanda, rape was largely weaponized during the wars in the territories of the former Yugoslavia, mainly employed by Serbs militias against Bosnian Muslim women. The ICTY Statute categorized rape as a separate criminal offense under the category of crimes against humanity, whilst the ICTR Statute did include rape as a crime against humanity but also contained a provision ascribing sexual offenses of rape, enforced prostitution, and any form of indecent assault as war crimes. In the *Furundzija* case, the ICTY contested the definition of rape provided by the ICTR in *Akayesu*, arguing that the ad hoc tribunal for Rwanda violated the *nullum crimen sine lege stricta* principle by setting the notion in a wide and conceptual framework. The ICTY defined the main *actus reus* of rape using the word 'penetration' rather than 'physical invasion' as the ICTR did, exclusively considering an 'instrument' of penetration the penis or objects, categorically excluding other parts of the body. In *Kunarac*, the ICTY complemented its position on rape expressed in *Furundzija* by adding a test to verify the non-consensual nature of sexual intercourse, i.e. the subsistence of rape. Of note, the ICTY's rulings on rape influenced the ICTR in cases such as *Semanza, Kamuhanda*, and *Gacumbitsi*. Finally, in the *Muhimana* and *Muvunyi* cases, the ICTR reconciled the two approaches to rape by recognizing that such a criminal offense differed in terms of *actus reus* according to the two ad hoc tribunals' definitions but was coherent as for its *mens rea*. The ICTY prosecuted rape either as torture ascribable as a war

crime, or as a crime against humanity, *per se,* or as persecution depending on the model of liability adopted in the different trials. It is worth remarking that the ICTY did not consider any room for criminalizing rape and sexual violence as acts of genocide. As for hate speech, the strict approach adopted by the tribunal for detecting the *dolus specialis* prevented its recognition in association with rape. However, this thesis argues that the ICTY had the objective capability to consider rape as a genocidal act, considering that the rapists specifically target Muslim women for their belonging to the Bosnian Muslim ethno-religious group. Overall, the judges of the ICTY could have delved into the motivations behind the rapes and thereby highlighted the underlying *dolus specialis*, which would have enabled the criminalization of rape as an act of genocide. In conclusion, it appears that the 'decentralization' of jurisdiction in international criminal law during the 1990s through the creation of the ICTY and the ICTR led to discordant jurisprudence, creating two different approaches to similar issues, entailing different impacts and influence on international criminal courts.

Having introduced the theme of the 'decentralization of international criminal law' began in the 1990s, it is necessary to remark that a certain degree of centralization was restored between 1998 and 2002 with the creation of the ICC. At the time of the establishment of the ICC, the ICTR was fully operational and prosecuting individuals, hence influencing the drafting of the ICC Statute (Rome Statute) and the ICC Elements of Crimes. Indeed, the ICTR's inferential approach was adopted by the ICC, attributing primary importance to the context to infer the *mens rea*. Specifically, it appears that in stressing the relevance of contextual consideration the ICC embraced the ICTR's strategy to infer an individual *dolus specialis* starting from the subsistence of a collective *dolus specialis*, i.e. a contextual *dolus specialis*. The ICC sanctioned the ICTR's finding about the chance of rape and sexual violence to constitute acts of genocide and adopted their definition as established by the ad hoc tribunal for Rwanda, i.e. the ICC is statutorily allowed to consider rape as an act of genocide. Nevertheless, two main shortcomings are detected by this script stemming from the comparison between the ICC Statute and Elements of Crimes and the ICTR's Statute and jurisprudence. First, the ICC Statute configures public and direct incitement to commit genocide as a mode of liability rather than a criminal offense *per* se. This detail jeopardizes the preventive role of the CPPCG and broadly international criminal law, as liability emerges only after a crime is committed. Second, the ICC Statute does not consider discriminatory grounds to be a prerequisite for the subsistence of crimes against humanity, thus eliminating the blurred distinction between that category and the crime of genocide present in the ICTR Statute which allowed the ad hoc tribunal a certain degree of flexibility in categorizing traditionally considered crimes against humanity as genocidal acts centering their reasoning on the *dolus specialis* of the offender's *mens rea*.

This thesis considers the ICC pre-trial decision in *Al-Bashir* as a proxy to assess and in a certain measure predict how the ICC deals and will deal with cases involving genocide and genocide-related offenses, as such case represents the only chance the court had to pronounce on genocide. As a premise, the ICC produced a majority decision and a concurring and partially dissen-

ting opinion (by Judge Ušacka), both referring to the ICTR's jurisprudence to deal with the counts of genocide against the defendant, the former head of state of Sudan Omar Al-Bashir, though with different conclusions. Coherently with the ICTR, both the majority decision and the dissenting opinion in *Al-Bashir* recognized the unique feature of the genocidal *mens rea*, i.e. the *dolus specialis* originating from the intent to destroy in whole or in part the targeted group. Of note, the majority's position implicitly created an additional element necessary to verify the subsistence of a *dolus specialis*, i.e. a constant pattern of alleged genocidal acts. Indeed, a decrease in the intensity of violence for a certain period led the court not to infer a clear genocidal intent. As for the interpretation of the four protected groups by the CPCCG's article II, the majority decision adopted a purely objective approach, deviating from the ICTR's hybrid approach, instead embraced by the dissenting opinion. The comparison between this latter and the majority position in terms of interpretative approach reveals the opposed results of adopting a purely objective or a hybrid approach. The objective approach led the majority to recognize three different ethnic groups targeted, thus creating the burden to prove a specific intent to destroy each of them. Conversely, the hybrid approach of Judge Ušacka grouped the three ethnic communities, reducing the threshold to prove the genocidal *mens rea* to the intent to destroy a wider group comprising the three ethnic communities. Hence, this comparative analysis displays the flexibility of the ICTR's hybrid approach and its adequacy to deal with complex cases in terms of group identification and interpretation. By the analysis of the majority's position, it is possible to understand that incitement to commit genocide, in light of the ICC Statute's consideration of it as a mode of liability rather than a crime *per se*, has no value to infer the genocidal *dolus specialis*. Indeed, to recognize incitement the ICC Statute requests the previous assessment of genocidal acts. It derives that in the absence of a clear and distinct verification by the court of the actual commission of genocide, hate speech can not serve as proof of genocidal intent. This position has been implicitly challenged by the dissenting opinion, as it deepened the scrutiny of Al-Bashir's speeches and considered this latter as a valid element to infer the *dolus specialis* from, thus strictly applying the ICTR's approach to hate speech. Further, the absence of a blurred distinction between crimes against humanity and genocide in the ICC Statute prevented the ICC from enjoying the same degree of flexibility as the ICTR in categorizing crimes traditionally falling under the category of crimes against humanity as instead genocide, leveraging on the detection of a *dolus specialis*. The only blurred distinction between genocide and crimes against humanity provided by the ICC Statute consisted of the crime of persecution and genocide, being both based on discriminatory conduct. However, the majority decision clarified this ambiguity by detecting a persecutory *dolus specialis*, damaging the individual as such based on discrimination, and a genocidal *dolus specialis*, damaging the whole group by targeting one of its members. Hence, the ICC in *Al-Bashir* deviates from the ICTR's approach, as it unambiguously separates by statute and jurisprudence the category of crimes against humanity from genocide. It can therefore deduced that the ICC, in handling cases of genocide, is not likely to replicate the ICTR's juri-

sprudence in making crimes listed by statute as crimes against humanity falling under a genocide conviction. Differently, the dissenting opinion in *Al-Bashir* safely considered hate speech and rape as both the *actus reus* of genocide and a basis to infer the genocidal *mens rea*, fully and unquestionably embracing the ICTR's jurisprudence. In sum, in *Al-Bashir,* both the majority decision and the dissenting opinion applied the ICTR's jurisprudence on genocide. Whilst the majority appeared to be more skeptical regarding the possibility of safely inferring a *dolus specialis* from the scrutiny of contextual and circumstantial elements, especially in the absence of recognized genocidal acts, the dissenting opinion was bolder in embracing the ICTR's jurisprudence, not contesting the ad hoc tribunal for Rwanda's approach. Overall, it is expected that the ICC will be less ambitious in handling cases of genocide compared with the ad hoc criminal tribunal for Rwanda, and the precedent created by the majority decision in *Al-Bashir* considerably raised the threshold to infer a genocidal *mens rea*, thus negatively departing from the ICTR's jurisprudence.

Tragically being a continent affected by a number of civil wars and internal conflicts often involving the commission of mass atrocities crimes, Africa represents a laboratory for the application of international criminal law. The African organization existing at the time of the Rwandan genocide, the Organization of African Unity (OAU) was unable to prevent and stop the mass killings due to the absence of legal and political mechanisms to intervene in member states. Furthermore, the inability of the international community and its disinterest in African internal conflicts led the OAU to gradually evolve into the African Union (AU), a new continental organization entrusted by its member states with stronger instruments in terms of prevention and punishment of mass atrocities. Being called to establish those instruments, the AU did refer to the ICTR's jurisprudence. The examination of the impact of the ICTR's case law on the African criminal law context reveals that the ad hoc tribunal for Rwanda did influence regional legal mechanisms for the prevention and punishment of genocide, such as the Malabo Protocol and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination. Further, the ICTR's jurisprudence impacts the work of different African institutions, namely the AU, the African Union Court of Justice and Human Rights, and the International Conference on the Great Lakes Region. However, as of 2024, African institutions still struggle to define genocidal hate speech, as demonstrated by the annual meetings of the AU on the matter. This thesis suggests that African institutions should rely more on the guidance provided by the ICTR's jurisprudence. Indeed, such an objective could be achieved relatively smoothly, as this script elaborates from that source a definition of genocidal hate speech embracing the notion of genocide studied in chapter two stemming from the ICTR's jurisprudence. Although the Special Court for Sierra Leone (SCSL) did not adjudicate charges of genocide, the court differently referred to the jurisprudence of the ad hoc tribunal for Rwanda, particularly in dealing with rape and sexual violence. It is therefore fair to remark that notwithstanding the SCSL did not deal with genocide offenses, it referred to and transplanted ICTR's findings related to genocide into its

judgment to deal with crimes against humanity and war crimes, as detectable in the *AFRC Accused*, *RUF Accused*, and *Taylor* cases. It derives that the ICTR's jurisprudence provides a consistent legal framework possessing a certain degree of flexibility to be adapted to crimes ranging from war crimes to crimes against humanity to genocide. The work of the ICTR thus presents certain features, typically linked to genocide under the ad hoc tribunal's jurisdiction, that other national, hybrid, and international criminal courts can use to adjudicate different cases involving mass atrocities crimes.

The detection of the ICTR's influence on the African continent leads this thesis to argue that the ad hoc criminal tribunal for Rwanda not only impacted the drafting of legal instruments for the prevention and punishment of the crime of genocide and on the jurisprudence of the SCSL but even to consider the ICTR as a suitable solution for legal problems affecting the region. If the Rwandan genocide has been the shock raising awareness on the need to establish mechanisms to prevent and punish genocide, the ICTR's jurisprudence has constituted and still constitutes the response to such a shock, providing a case law tailored to a scenario often recurring in the African continent, i.e. an escalating internal conflict contextualized in preexisting ethnic, religious, racial, or national tensions. From the analysis of different cases, it has emerged that the most frequent crimes committed in Africa are rape and other forms of sexual violence. It is thus safe to assume that the ICTR may furnish a certain degree of guidance in the prosecution of those criminal offenses since the ICTR reviewed the notion of rape in detail and produced a consistent jurisprudence on it. For this reason, this thesis proposes that the Ugandan International Crimes Division and the Gambian criminal jurisdiction should embrace the ICTR's jurisprudence as a pillar to address and punish mass atrocities crimes.

Overall, the third chapter highlights that the ICTR's jurisprudence on genocide exercises an authoritative influence over criminal courts, from the ICC to the African continent. The ad hoc tribunal for Rwanda's legacy consists of a hybrid approach for interpreting the CPPCG, a sophisticated inferential methodology to detect the *dolus specialis*, and the criminalization of hate speech and rape as acts of genocide. Whether this legacy has been fully embraced or contested, what emerges is that the ICTR provided an interpretation of the CPPCG and jurisprudence that still holds authority and may lead to further developments, both in international criminal law and in a perspective of regional instruments for the prevention and punishment of the crime of genocide. Moreover, as the ICC and the SCSL cases have demonstrated, the ICTR's jurisprudence is such a breakthrough that its findings, which originally emerged in relation to genocide, have been translated by other jurisdictional bodies into cases concerning crimes against humanity and war crimes. Therefore, although this thesis is centered on the notion of genocide provided by the ICTR, this latter jurisprudence has proved to possess the necessary flexibility to be adapted to all the categories of mass atrocities crimes.

In conclusion, this thesis provides an extensive analysis of the notion of genocide in international criminal law. It can be argued that in terms of conventional, customary, and *jus cogens*, criminal tribunals face a similar point of

departure to prosecute the crime of genocide. The detailed examination of the ICTR's jurisprudence revealed that the ad hoc tribunal consistently contributed to the evolution of the notion of genocide in international criminal law and the prosecution of the 'crime of the crimes', particularly by providing a hybrid approach to interpret the protected groups and an inferential strategy to assess the genocidal *dolus specialis*, as well as recognizing non-lethal acts, i.e. hate speech and rape, as acts of genocide. Comparing the work of the ad hoc tribunal for Rwanda with other tribunals and evaluating its influence on the African criminal framework highlights the far-reaching impact of the ICTR's jurisprudence. Still, challenges in achieving consistency in international criminal law are noticeable, as divergent approaches to genocide stem from the discordant jurisprudence of the ICTY and the ICTR. Nevertheless, this thesis endorses a continuous adoption and adaptation of the ICTR's jurisprudence to prosecute mass atrocities crimes, thus assisting the achievement of justice and accountability globally.

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