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A CRITICAL REASSESSMENT OF ARTICLE 2 OF THE GENOCIDE CONVENTION AGAINST THE BACKDROP OF RECENT DEVELOPMENTS

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INTRODUCTION

Genocide is a contested and multi-disciplinary concept. In addition to jurisprudence, historiography, political science, sociology, philosophy and international relations also use the term "genocide". The multiplicity of proposals has created ambiguity and confusion in the field of communication and public opinion, especially in the media world.

As a result, the use of the term genocide has been trivialized and applied to manifestations of violence that deserve other definitions. In fact, discrimination against minorities, policies of expulsion, or pogroms do not necessarily constitute genocide, although they contain its potentiality. For some of these manifestations, which take the form of systematic policies of oppression, but which do not have the elements to configure the crime of genocide, it would be more appropriate to invoke other offenses, such as crimes against humanity or war crimes.

Before examining the various uses of the term, it seems appropriate to give a brief account of the origin and development of the term "genocide". It is important to note that "genocide" does not belong to the ordinary language, but is a made-up word, coined by the Polish jurist Raphael Lemkin in the 1940s[1].

In fact, the word is composed of two roots: the Greek word *genos* ("people") and the Latin suffix *-cide*, which comes from the verb *caedo* ("to kill", "to exterminate"). The term therefore refers to the extermination of a people.

Subsequently, the term underwent a semantic evolution that attenuated its legal specificity, effectively transforming it into a word of common usage, often employed in meanings partially different from its original one.

The growing body of scholarly research on phenomena analogous to genocide, accompanied by the proliferation of thousands of publications on the subject, has progressively led to a conceptual reconfiguration of genocide that diverges from the legal definition codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This process has culminated in the emergence of alternative and broader definitions, reflecting the evolving understanding of mass violence in both historical and socio-political contexts.

Specifically, the notion of genocide has been reformulated along three principal axes. First, in response to the atrocities perpetrated by communist regimes, the concept has been expanded to

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[1] R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace Division of International Law, Washington 1944, p. 79; Id., *Genocide*, "American Scholar", Vol. 15, 1946, pp. 227 ff.; Id., *Genocide as a Crime under International Law*, "American Journal of International Law", Vol. 41, 1947, pp. 145 ff.; Id., *Soviet Genocide in Ukraine*, "Journal of International Criminal Law", Vol. 7, 2009, pp. 125-130. For a more in-depth analysis on Lemkin's work, see Chapter 1, par. 1.

encompass politically motivated mass killings, thereby challenging the Convention's exclusion of political groups. This has given rise to the inclusion of terms such as "politicide"[2] or "democide"[3] to capture the political dimensions of mass violence. Second, following Lemkin's pioneering reflections on "ethnocide", the concept has been further extended to include the systematic destruction of cultural identities, highlighting the cultural and symbolic dimensions of group eradication beyond mere physical annihilation. Third, some scholars have de-emphasized the requirement of specific intent, which is central to the legal definition, in favor of analytical frameworks that focus on the broader dynamics of social conflict and structural violence, of which genocide represents the most extreme manifestation.

These reformulations have given rise to three distinct usages of the term "genocide". The first adheres strictly to the legal definition enshrined in the 1948 Convention, centered on the *intent to destroy*, in whole or in part, a national, ethnic, racial, or religious group. The second extends the definition to include mass killings driven by political motivations, often framed under the aforementioned notions of "politicide" or "democide". The third, and most expansive interpretation, tends to generalize the term, applying it to virtually any large-scale massacre of civilians, especially in contexts where the victims belong to a marginalized or subjugated ethnic group. In addition, so-called "spurious" categories have emerged in academic and political discourse, such as "indirect genocide" through mechanisms like state-induced famine[4], which further challenge the boundaries of the conventional legal framework.

In recent years, a further process of trivialization of the term "genocide" has emerged, particularly within journalistic discourse and public opinion, in connection with the tragic events that have marked the last few decades. The term is increasingly employed to describe virtually any form of mass violence perpetrated against ethnic, racial, or religious groups, irrespective of the presence of the specific legal elements required to classify such acts as genocide under the 1948 Convention or other relevant international instruments.

This widespread and indiscriminate use of the term can be attributed largely to the powerful emotional charge it conveys and the inherent moral condemnation it entails. Labeling an atrocity as "genocide", rather than as "ethnic cleansing" or "denationalization", tends to provoke a stronger emotional response, as it evokes the image of an unparalleled barbarity that resists adequate expression through alternative terminology. In this context, the invocation of

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[2] B. Harff - T. R. Gurr, *Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945*, "International Studies Quarterly", Vol. 32, 1988, pp. 359-371.

[3] R. J. Rummel, *Democide. Nazi Genocide and Mass Murder*, Routledge, London, 2022.

[4] Reference is made to the famine in Ukraine that occurred as a result of Stalin's forced collectivization in the early 1930s. This topic is discussed in more detail in Chapter 1.

genocide within journalistic rhetoric serves primarily to elicit emotional engagement and to mobilize public opinion toward a stance of moral outrage and condemnation[5].

Essentially, for the general public, the term "genocide" serves to encapsulate, more powerfully than other expressions, the atrocities of history and current events, particularly any unjustified and large-scale mass killing. This reflects a use of the term that is more symbolic and emotional than cognitive or analytical, diverging significantly from its legal definition. It instead comes to denote a loosely defined category, predominantly employed within the context of mass media discourse.

Against this background, the present thesis seeks to re-center the analysis of genocide within its proper legal framework, without disregarding the insights offered by historical and socio-political scholarship. The primary purpose of this thesis is to critically examine the legal notion of genocide as codified in the 1948 Genocide Convention, with particular emphasis on the element of specific intent (*dolus specialis*), which represents the most distinctive and controversial component of the crime.

More specifically, the thesis pursues the objective of assessing whether, in certain recent and ongoing situations commonly described as genocidal in political journalistic, or even academic discourse, the legal requirements for the application of the Genocide Convention, are actually satisfied. Where such requirements appear to be met, the thesis further investigates the reasons why the Convention has not been formally applied, either through judicial proceedings before competent international courts or through the activation of the preventive and repressive mechanism provided by international law.

In this respect, the thesis, aims to explore a central paradox of contemporary international criminal law: despite the existence of a clear normative prohibition of genocide and the recognition of erga omens obligations under the Convention, the practical enforcement of these remains sporadic and uneven. The thesis therefore seeks to identify and analyze the factors that contribute to this gap between law in the books and law in action. These factors include, *inter alia*, the evidentiary difficulties inherent in proving genocidal intent, the high threshold established by international jurisprudence, political considerations influencing the actions of the States and international organizations, jurisdictional constraints affecting international courts, and structural limitations of the international criminal justice system.

[5] M. Flores, *Il Genocidio tra storia, diritto e politica*, in L. Zagato - L. Candiotto*, Il Genocidio. Declinazione e risposte di inizio secolo*, G. Giappichelli Editore, Torino, 2018, pp. 12-13.

Particular attention is devoted to the role of international judicial mechanisms, starting with the jurisdiction of the International Criminal Court (ICC). The thesis examines whether the absence of ICC proceedings in certain alleged genocide cases is attributable to the lack of jurisdiction *ratione temporis*, *ratione loci* or *ratione personae*, to the principle of complementarity, or to political obstacles linked to Security Council dynamics and State cooperation. At the same time, the thesis considers the complementary role of the International Court of Justice in adjudicating State responsibility under the Genocide Convention, as well as the contribution of *ad hoc* international criminal tribunals to the interpretation and application of the crime.

Ultimately, the objective of this thesis is not to propose an expansive or symbolic redefinition of genocide, but rather to assess the adequacy and effectiveness of the existing legal framework. By doing so, the thesis seeks to contribute to a more rigorous and legally grounded use of the term genocide, capable of preserving its normative force while ensuring that international law remains a credible instrument for the prevention and punishment of the most serious crimes affecting the international community as a whole.

From a structural perspective, the thesis is articulated into three chapters, each internally divided into paragraphs and sub-paragraphs that reflect the progressive development of the research question. The overall structure follows a logical sequence that moves from the normative foundations of the crime of genocide, to its judicial interpretation, to the institutional mechanisms for its enforcement, and finally to a critical assessment of the adequacy of the existing legal framework.

Chapter 1 lays the doctrinal and normative groundwork of the analysis. It is devoted to the definition of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, with particular emphasis on the subjective element of the offence.

Chapter 2 is devoted to an in-depth analysis of the interpretation and evidentiary construction of the *intent to destroy* (*dolus specialis*) within international criminal jurisprudence. While the 1948 Genocide Convention provides a normative definition of the crime, the chapter demonstrates that the concrete meaning of genocidal intent has been progressively shaped by judicial practice, particularly through the case law of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

Chapter 3 examines situations in which serious allegations of genocide have emerged in the absence of definitive international judicial determinations. The chapter aims to test the resilience and limits of the legal concept of genocidal intent when applied to contemporary mass atrocities that have not been adjudicated by international criminal tribunals.

The concluding section summarizes the main findings of the research and reiterates the central argument of the thesis: that the effectiveness of the prohibition of genocide depends not on the symbolic expansion of the concept, but on the consistent and legally rigorous application of the existing normative framework.

CHAPTER 1

The "intent to destroy" in the Convention on the Prevention and Punishment of the Crime of Genocide

1.1 The First Conceptual Elaboration of the Notion of Genocide: Raphael Lemkin

As anticipated in the introduction, the first occurrence of the term "genocide" can be found in Raphael Lemkin's work Axis Rule.

Lemkin was moved to introduce the term primarily by two events: the Nazi persecution of the Jews and the extermination of the Armenians by the Ottoman Turks. Indeed, he believed that these two events exemplified a specific crime that deserved to be identified by a specific term, which was lacking at the time[6].

Lemkin elaborates and describes the concept of genocide in the 1944 work Axis Rule, where he points out that the practice of exterminating peoples had been widespread throughout history since antiquity; what distinguishes modern phenomena from earlier ones in the use of more developed and sophisticated methods, with the specific and deliberate aim of destroying a nation or ethnic group. In fact, the term specifically refers to a "coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves"[7].

The objectives of such a plan are identified in disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Therefore, according to Lemkin, "genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group"[8].

The author distinguishes between the primary and secondary objectives of the plan: the former includes the suppression of a group's institutions, culture, language, national sentiments, religion and economy; the latter include attacks on the fundamental rights of individuals - security, life, freedom, health, dignity - who are identified as victims solely because they are members of the group. However, the destruction of the group as such is not always the final

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[6] R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace Division of International Law, Washington, 1944, p.79.

[7] *Ibid.*, p.79.

[8] *Ibid.*

outcome of the plan. In fact, genocide generally takes place in two phases: the first consists in the abolition of the identity of the oppressed group, the second in the imposition of the identity of the oppressor group on the members of the defeated group.
The concept of genocide thus differs from that of denationalization, understood as the destruction of the cultural identity of people, in that the latter stops at the first phase, while the former includes the second phase, which also has a biological dimension. In fact, genocide is the imposition of the identity of the hegemonic group on the oppressed group.
By studying the Nazi experience, Lemkin concluded that the techniques of genocide represented a coordinated and targeted attack on all elements of nationhood. Accordingly, genocide is being carried out in the following areas: political, moral, social, physical, religious, economic and biological.
In particular, the occupier seeks to weaken the spiritual resources of the oppressed nation by imposing its own social structure in order to prevent the development of the society itself. On the cultural level, oppression is manifested mainly through the prohibition of the use of one's own language in order to prevent the expression of one's own national sentiments. On a biological level, the methods used include mass sterilization or other means aimed at reducing the birth rate and inhibiting the demographic development of the oppressed nation[9]. On the physical level, genocide involves discrimination in food rations, endangerment of health and mass killings.
Lemkin returned to the concept of genocide in later writings. In *Genocide*[10], in particular, the author explains his decision to coin a new term by saying that neither the term "mass murder" nor the term "denationalization" adequately describes the destruction of a group, the first because it does not take into account the intentional character of the actor nor the racial, national or religious composition of the group; the second because it mostly refers to cultural rather than biological extermination or to processes of deprivation of citizenship.
Below, Lemkin lists the six principles which, in his opinion, should form the basis of a multilateral treaty to be drawn up between States with the participation of the United Nations; principles which would then be included in the 1948 Convention. The first two principles set out by Lemkin state that genocide, as a crime under international law which implements a plan for the destruction of a national, religious and racial group, can be punished in accordance with

[9] In *Genocide as a Crime under International Law*, "American Journal of International Law", 1947, Vol. 41.1, pp. 145 ff. Lemkin underscores that genocide can be perpetrated through various means, including, but not limited to, the deliberate destruction of life, the prevention of birth, such as forced abortion and sterilization, and the infliction of harm upon the health of the group, such as the imposition of forced labor or the dissemination of infections.
[10] R. Lemkin, *Genocide*, "American Scholar", 1946, Vol. 15, pp. 227 ff.

the principle of universal repression wherever the perpetrator is found; this implies that each State must introduce laws to repress the crime into its own legal system. The third principle postulates that genocide cannot be qualified as a political crime for the purposes of extradition, and that extradition can therefore only be granted if there is a guarantee that the accused will be prosecuted. Fourth, Lemkin identifies the principle that not only those who ordered or carried out acts of genocide, but also those who instigated them through the dissemination of ideas, as well as those in political or administrative positions who allowed such acts to take place, must be considered guilty of genocide. The fifth principle states that the multilateral treaty to be drawn up should enable the United Nations Security Council to assess the responsibility of the State in which acts of genocide are committed, using the advisory role of the International Court of Justice for the purpose of imposing sanctions. Lastly, Lemkin states the principle that the law of armed conflict must guarantee that in time of war an international body will conduct activities to monitor the conditions of the population in occupied territories.

The United Nations acknowledged the practical value of Lemkin's concept; however, it found it challenging to translate it into a legal notion that was precise and clear enough to serve as the foundation for International Law.

Nonetheless, the term "genocide", as introduced by Lemkin, has had a significant impact on the development of International Law. In addition, it has led to the exploration of related research areas by various disciplines, particularly from the mid-20th century onwards. Notably, the social sciences have incorporated the concept into their studies on ethnic conflicts and discrimination against minorities, as well as research on destructive impulses and aggression.

The 1970s witnessed an initial surge in scholarly interest in this field, largely influenced by events such as the civil war in Biafra and the massacres in eastern Pakistan[11]. However, it was the 1990s that marked a significant escalation in research activity, driven by the eruption of conflicts in former Yugoslavia and the tragic atrocities in Rwanda, leading to the establishment of two International Criminal Tribunals[12].

[11] The pioneering studies in this area were conducted by the Armenian historian and sociologist Vahakn Dadrian, the South African sociologist Leo Kuper, the American Jewish psychologist Israel Charny, the American sociologist Irwin Louis Horowitz, and the American sociologist and historian Helen Fein.

[12] International Criminal Tribunal for the former Yugoslavia, 1993 and International Criminal Tribunal for Rwanda, 1994; see Chapter 2.

1.2 The Preparatory Works of the Convention on the Prevention and Punishment of the Crime of Genocide (1948)

The foundational text for the definition of the crime of genocide is the 1948 United Nations Convention, the adoption of which was preceded by an intense phase of preparatory work during which the constituent elements of the offence were identified. The initiative was taken by the delegations of Cuba, India, and Panama, which submitted a request to the United Nations General Assembly to address the issue of genocide with the aim of providing a normative definition and, in conjunction, presented a draft resolution.

During the subsequent debate, on 26 November 1946, the delegation of Saudi Arabia proposed an additional protocol[13] listing genocidal acts, which were identified as follows: (a) mass killing of all members of a group,[14] a people, or a nation; (b) destruction of the essential life capacities of a group, people, or nation, or the intentional deprivation of basic necessities for health or existence; (c) organized disintegration of the political, social, or economic structure of a group, people, or nation; (d) systematic moral debasement of a group, people, or nation; (e) acts of terrorism committed with the specific intent to create a state of general insecurity and alarm within the group, people, or nation, with the aim of causing their political, social, economic, or moral disintegration.

Two days later, on 28 November, Chile submitted an amendment proposing that the Economic and Social Council be entrusted with the task of drafting an international treaty.[15]

Consequently, at the end of November, a Sub-Committee (No. 3) was established within the Economic and Social Council, composed of representatives from Chile, Saudi Arabia, Cuba, France, India, Panama, Poland, the United States, the United Kingdom, and the Soviet Union. This Sub-Committee developed a preliminary draft, the final version of which was submitted to the General Assembly on 9 December 1946. This process led to the adoption of Resolution

[13] *Draft Protocol for the prevention and punishment of the crime of genocide, proposed by the delegation of Saudi Arabia*, 26 November 1946, UN Doc. A/C.6/86.

[14] In the commentary to Article I, a list was provided identifying the human groups deemed to merit protection, which included racial, national, linguistic, religious, and political groups. This aspect proved particularly contentious, as the jurist Raphael Lemkin raised concerns about the advisability of including political groups among the protected categories. He argued, first, that political groups do not possess the same definitive and specific characteristics as the other listed groups, and second, that introducing a category over which States notoriously held divergent views risked undermining the entire project of the Convention. Nevertheless, the position of jurist Donnedieu de Vabres, who also participated in the preparatory work, ultimately prevailed. He contended that excluding political groups from the list of protected categories would significantly weaken the effectiveness of the legal safeguards envisaged by the Convention.

[15] *Amendment to the draft resolution on the crime of genocide*, 28 November 1946, UN Doc. A/C.6/94.

No. 96 on 11 December 1946, which defined genocide as a denial of the right of existence of a human group, analogous to how murder is the denial of the right to life of an individual.[16]

The resolution also emphasized the harm caused to humanity by genocide, as it deprives mankind of the moral and cultural contributions that a particular group could offer, thereby impoverishing the common heritage of humanity.

Starting from the premise that genocide is a crime under international law condemned by the civilized world, the resolution affirmed the need to prosecute those responsible and their possible accomplices. Member States were thus invited to enact appropriate legislation to ensure the prevention and punishment of the crime. Furthermore, the resolution recommended international cooperation among States in order to facilitate both the prevention and prosecution of genocide, and requested the Economic and Social Council to conduct the necessary studies for the drafting of a convention to be submitted at the next regular session of the General Assembly.

Although Resolution No. 96 lacked binding legal force, it was nonetheless significant in that it marked the first formal recognition of the international scope of the crime of genocide and of the principle of individual criminal responsibility.

With Resolution No. 47 of 28 March 1947, the United Nations Economic and Social Council, following its preliminary analysis and in accordance with the mandate received, tasked the UN Secretariat with drafting a Convention.[17] This draft, known as the "*Secretariat Draft*", was completed on 26 June 1947. It comprised 24 articles and already included in its Preamble a definition of genocide as the "*intentional destruction of human beings*", an affirmation of the international nature of the crime (paragraph 2), and the need for States to commit to its prevention and repression (paragraph 3).

The text may be divided into three sections: the first (Articles 1-5) specified the definition of the crime; the second (Articles 6-14) imposed obligations on States to ensure internal repression of the crime and called for the establishment of an international court; the third section (Articles 15-24) contained procedural provisions.

Of particular interest was article 1, paragraph 2, which listed the acts constituting the crime of genocide when directed against a group with the intent to destroy it. These included causing the death of group members, inflicting harm to their health or physical integrity, restricting births

[16] UNGA *The crime of Genocide*, 11 December 1946, UN Doc. A/RES/96(I).
[17] ECOSOC, *Resolution No. 47 (IV)*, 28 March 1947, UN Doc. E/325.

through sterilization, separation of the sexes, or limitations on marriage (biological genocide), and destroying the distinctive characteristics of the group (cultural genocide).
The latter category specifically included actions such as the forced transfer of children, the prohibition of the use of the national language, and the systematic destruction of books or religious texts published in said language.
Article 2 expanded the scope of punishable acts to include attempted genocide, preparatory actions, and participation in genocidal acts. Additionally, article 3 identified as punishable all forms of public propaganda that, in a systematic manner and with an explicit expression of hatred, aim to incite or legitimize genocide.
Articles 4 and 5, respectively, addressed the issue of individual responsibility, affirming the liability of both public officials and private individuals, and reiterating that the order of a superior can never justify the commission of genocidal acts by an individual.
The draft Convention thus prepared was submitted on 10 June 1947 to the Committee on the Progressive Development of International Law and Its Codification, as well as to the Member States. On 25 August of the same year, the Secretary-General of the United Nations decided to transmit the text to the General Assembly, which deemed it necessary to conduct further analysis of the subject matter. Accordingly, through Resolution No. 180 of 21 November 1947, the General Assembly tasked the Economic and Social Council with undertaking additional studies.[18]
In response, the Economic and Social Council adopted Resolution No. 117 on 3 March 1948, establishing an *Ad Hoc* Committee charged with drafting a second version of the Convention.[19]
This new draft, known as the "*Ad Hoc Committee Draft*", consisted of 19 articles which, in comparison to the previous version, provided a more concrete typification of the constitutive elements of the crime. Notably, article 1 specified that genocide constitutes a crime under international law regardless of whether it is committed in time of peace or in time of war.
Article 2, in contrast to the earlier draft, excluded linguistic groups from the list of protected categories and identified four specific genocidal acts: (a) killing members of the group; (b) impairing the physical integrity of group members; (c) subjecting members of the group to living conditions or measures intended to cause their death; (d) imposing measures aimed at preventing births within the group.

[18] UNGA, *Resolution No. 180 (II), Draft Convention on genocide* 21 November 1947, UN Doc. A/RES/180(II).
[19] ECOSOC, *Resolution No. 117 (VI)*, 3 March 1948, UN Doc. E/734.

From this list, the omission of the forcible transfer of children as a qualifying act is evident. As for cultural genocide, it remained among the punishable acts under article 3, albeit with a different formulation from that found in the 1947 draft.[20]

A significant difference in the matter of individual responsibility, compared to the Secretariat Draft, lay in article 4 of the second draft, which excluded preparatory acts from criminal liability. Furthermore, the new draft placed particular emphasis on the element of intent, as article 2 defined genocide as any deliberate act committed "*with intent to destroy a national, racial, religious, or political group*".

This formulation thus limited criminal liability to situations in which the destruction of the group was both total and intentional.

The new draft was approved by the Doc Committee on 30 April 1948 and transmitted to the General Assembly by the Economic and Social Council through Resolution No. 153 of 26 August 1948.[21] On 24 September 1948, the General Assembly submitted the text to the Sixth Committee, which initiated the final stage of the preparatory work.

Within the framework of the Sixth Committee, the work was carried out in three distinct phases. Between 28 September and 4 October, preliminary issues were discussed; from 5 October to 9 November, the articles were examined in detail, leading to the transmission of the text to the Drafting Committee; finally, from 29 November to 2 December, the final version, amended by the Drafting Committee, was reviewed.[22]

Article 1 was approved in a virtually unchanged form, clearly articulating the three fundamental principles underpinning the legal framework on genocide: (a) the recognition of genocide as an autonomous category of international criminal law, distinct from crimes against humanity; (b) the irrelevance of any link between genocide and armed conflict; and (c) the obligation of States to adopt both preventive and repressive measures.

Articles 2 and 3, by contrast, underwent significant amendments. First, in deviation from the *Ad Hoc* Committee's draft, it was expressly clarified that the destruction of the group is relevant even when only partial. Second, the adjective "*deliberate*" in relation to genocidal acts was removed, and the specification "*as such*" was inserted after the word "*groups*".

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[20] The new version of the Convention included within the notion of cultural genocide only those deliberate acts committed with the intent to destroy the language, religion, or culture of a national, racial, or religious group. Such acts were concretely expressed through the prohibition of the use of the group's national language, and the destruction of libraries, museums, schools, historical monuments, or other cultural institutions.

[21] ECOSOC, *Resolution No. 153 (VII)*, 26 August 1948, UN Doc. E/1049.

[22] UNGA, *Genocide: Draft Convention and report of the economic and social council. Rapporteur: Mr. J. Spiropoulos* 3 December 1948, UN Doc. A/760.

Regarding the enumerated acts, the expression "*impairment of physical integrity*" was replaced by "*serious bodily or mental harm to members of the group*", and the forcible transfer of children to another group was added as a punishable act.
The Drafting Committee introduced further modifications, including the removal of political groups from the scope of protection under article 2, and, despite opposition from the socialist countries, the incorporation into article 6 of an amendment proposed by the United States, France, and Belgium concerning the jurisdiction of an international court as an alternative to national courts.
On 1 December 1948, the draft, consisting of 19 articles, was approved by the Sixth Committee. On 9 December, during the 178th and 179th plenary sessions of the United Nations General Assembly, the final text was adopted by Resolution No. 260 (III) of 1948.[23]

1.3 The structure of the crime under the Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, establishes in article 1 that genocide constitutes a crime under international law, which shall be punished whether committed in time of peace or in time of war.
Article 2 of the Convention reveals that the structure of the crime is composed of two elements. The first, material or objective in nature, consists of the criminal conduct (*actus reus*), which must correspond to one of the acts enumerated in it. The second element concerns the subjective component, namely the specific intent (*dolus specialis*), which is established when the perpetrator carries out one of the aforementioned acts with the specific purpose of destroying, in whole or in part, a protected group.
Specifically, article 2 qualifies as genocide any act committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. The following acts fall within the scope of genocide: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.

[23] Resolution No. 260 (III) 1948, *Adoption of the Convention on the Prevention and Punishment of the crime of genocide, and text of the Convention*, UN Doc. A/RES/260(III)A; *Study by the International Law Commission of the question of an international criminal jurisdiction*, UN Doc. A/RES/260(III)B; *Application with respect to the pendent territories of the Convention on the Prevention and Punishment of the Crime of Genocide*, UN Doc. A/RES/260(III)C.

Article 3 addresses the subjective elements, clarifying that not only the actual commission of genocide is punishable, but also conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

Accordingly, article 2 establishes that, for conduct to be qualified as genocide, both the objective element, i.e., at least one of the enumerated acts, and the subjective element, namely, the specific intent to destroy one of the four protected groups as such, must be present. Notably, the Convention limits punishability to acts constituting physical or biological genocide, excluding from its scope both cultural genocide and political or social genocide. Cultural genocide refers to acts aimed at erasing the cultural identity of a specific group, while political or social genocide concerns the mass killing of members of a particular political or social group[24].

Regarding the individual acts that constitute the objective element of the crime, it should be noted that the killing of group members encompasses both mass or collective extermination and individual executions.

As for causing serious bodily or mental harm to members of the group, the Convention refers to all serious violations of fundamental rights not necessarily resulting in the victim's death, such as inhuman or degrading treatment, rape, enslavement, deportation, and persecution of group members. With specific reference to the infliction of mental harm, the Convention does not clarify whether such harm must be permanent but merely requires that it be serious. In this regard, the International Law Commission has clarified that the requisite seriousness is met when the harm inflicted upon members of the group is of such a nature as to threaten the destruction of the group, in whole or in part[25]. It should also be clarified, with regard to rape, that sexual violence may qualify as a genocidal act only if it is committed on account of the victim's membership in the targeted group and is, from an objective standpoint, directed toward the destruction of that group as such. In other words, genocidal rape is distinguishable from incidental sexual violence insofar as it reflects a deliberate discrimination based on ethnicity, race, religion, or nationality, not merely based on gender[26].

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[24] Although the Convention excludes political and social groups from its scope, certain States (Colombia, Costa Rica, Côte d'Ivoire, Ethiopia, Lithuania, Panama, Poland, and Slovenia) have incorporated into their national definitions of genocide the elimination of political groups. Others (Estonia, Latvia, Lithuania, Peru, and Slovenia) have gone further by extending the notion of genocide to include the extermination of social groups as well. See: P. Pustorino, *Lezioni di tutela internazionale dei diritti umani*, 2 ed., Cacucci Editore, Bari, 2020, pp. 124 f.

[25] *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, 6 May-26 July 1996, UN Doc. A/51/10 p. 91.

[26] See: C. D. Leotta, *Il Genocidio nel diritto penale internazionale. Dagli scritti di Raphael Lemkin allo Statuto di Roma*, Giappichelli, Torino, 2013, p. 283.

The provision concerning the deliberate infliction of conditions of life calculated to destroy the group in whole or in part is more interpretatively complex. Based on the preparatory works, this refers to subjection to living conditions which, due to a lack of adequate shelter, clothing, food, hygiene, or medical care, or as a result of forced labor or excessive physical exertion, are intended to lead to death or physical decline.

The last two acts enumerated in article 2 pertain to biological genocide. In particular, the imposition of measures intended to prevent births within the group includes sterilization, castration, and forced abortion. Conversely, the forcible transfer of children from one group to another results in the destruction of the group on both a social and biological level. Socially, the group ceases to exist because the children, having been raised with the language, traditions, and culture of the "receiving" group, will be estranged from the cultural identity of their group of origin or lose it irreversibly. Biologically, this conduct undermines the group's continuity, as the transferred children will no longer reproduce within their original group.

With regard to the list of punishable acts in article 3, it is clear that the Convention aims to criminalize all forms of participation in genocide. Specifically, conspiracy to commit genocide (Article 3(b)) is defined in the preparatory works as an agreement between two or more persons to commit the crime, even if the crime is ultimately not carried out. This refers to a knowing and voluntary conspiracy which must manifest in tangible actions and cannot be reduced to mere "psychological support" or moral endorsement. It may also include forms of external support, provided that such support is capable of contributing to the realization of genocide, regardless of whether the crime is eventually consummated[27]. From an evidentiary standpoint, demonstrating the existence of such an agreement poses significant challenges. In most cases, no documentary evidence exists of a conspiracy to commit the crime, thus requiring reliance on circumstantial proof, such as coordinated actions by individuals pursuing a common goal.

Fewer interpretative issues arise with respect to the provision under Article 3(c), which criminalizes direct and public incitement to commit genocide. In this case, it is not necessary for genocide to be actually perpetrated; it suffices that incitement occurred and was carried out with the specific intent to destroy the group as such[28]. From a probative perspective, demonstrating the public nature of the incitement is generally unproblematic, particularly where it occurs in public settings involving a broad audience. Conversely, proving the "direct" nature

[27] ICTR, Judgment and sentence of 1 December 2003, *Prosecutor v. Kajelijeli* (Case ICTR-98-44A-T), § 787.
[28] C. W. Schabas, *Genocide in International Law: The Crime of Crimes*, 2 ed., Cambridge University Press, New York, 2009, p. 326.

of the incitement is more challenging, as it depends on the linguistic and cultural content of the discourse, requiring a nuanced and contextual evaluation[29].

Significant difficulties also arise in relation to the attempt to commit genocide (Article 3(d)), as neither the Convention nor the preparatory works delineate the threshold beyond which conduct becomes criminal. Article 25(3)(f) of the Rome Statute provides clarity in this regard, establishing that an attempt is criminally relevant when the perpetrator undertakes acts that constitute a substantial step toward the execution of the crime, which nevertheless fails to materialize due to circumstances beyond the perpetrator's control.

Finally, complicity in genocide (Article 3(e)) must be deemed to exist, according to established jurisprudence, when an individual's participation is essential to the commission of the crime, even if the act is physically executed by others[30]. Evidentiary requirements demand proof that the alleged accomplice was aware, at the time of the act, of the principal perpetrator's specific genocidal intent[31].

In order to better understand this aspect, it is necessary to undertake a closer examination of the notion of intent and, in particular, of its possible interpretations which will be addressed in the following paragraph.

1.4 The Element of Intent and its Possible Interpretations

As previously noted, article 2, paragraph 2 of the Convention defines the subjective element of the crime of genocide as the "*intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*". Based on this formulation, international criminal law recognizes two mental elements in the crime of genocide: general intent and specific intent. While other international crimes require only the conscious commission of a prohibited act to establish criminal responsibility, genocide necessitates, in addition, proof that the accused intended to bring about the specific result that occurred. This distinction lies at the heart of the difference between general intent (*dolus generalis*) and specific intent (*dolus specialis*).

Scholars have further clarified that the wording of the Convention entails three essential components relating to mens rea. First, the perpetrator must act with the intention of causing a specific result (*intentional or direct intent*). Second, they must be aware of the connection between their conduct and a systematic plan of destruction, foreseeing the specific

[29] ICTR, Judgment of 28 November 2007, *Nahimana et al. v. Prosecutor* (Case ICTR-99-52-A), § 692.

[30] ICTY, Judgment of 15 July 1999, *Prosecutor v. Tadić* (Case IT-94-I-A), § 191.

[31] ICTR, Judgment of 13 December 2004, *Prosecutor v. Ntakirutimana* (Case ICTR-96-10-A and ICTR-96-17-A), § 364.

consequences of their unlawful acts with respect to the underlying crimes (*eventual intent*). Lastly, the acts must be committed with the specific purpose of effecting the total or partial destruction of a group (*dolus specialis*)[32]. In essence, establishing the crime of genocide requires more than demonstrating the existence of general intent, as defined by Article 30 of the Rome Statute of the International Criminal Court[33], which requires a person to mean to engage in the conduct, it also requires evidence of specific intent: the concrete will to achieve a particular outcome, namely, the destruction, in whole or in part, of a protected group. The "intent to destroy" thus constitutes an additional subjective requirement, which complements and exceeds the objective elements of the definition of the crime. From this perspective, specific intent is conceived as a surplus of intent, characterized by an additional mental component oriented toward a defined purpose (*purpose-based approach*).

This interpretation, which is supported by the predominant jurisprudence, is nonetheless contested in academic doctrine. Some scholars dispute the characterization of specific intent as an additional mental state. For example, Hans Vest identifies *dolus specialis* in the perpetrator's knowledge of the consequences of their conduct, provided there is a sufficient level of practical certainty. Such interpretations emphasize knowledge rather than purpose, thereby adopting a knowledge-based approach[34].

Vest's theory also conceptualizes the distinction between general and specific intent through the lens of conduct, suggesting that general intent pertains to the individual act, whereas specific intent implies the capacity to link the individual act to a collective genocidal plan[35]. This interpretation incorporates a contextual element into the definition of the mental element, with the result that assessing specific intent necessitates a proper understanding of the agent's status and role within the genocidal enterprise.

In an attempt to reconcile these differing views, a hybrid approach has emerged[36]. According to this view, the knowledge-based approach applies when the accused is a low-level individual with no significant decision-making role within the organization. In such cases, specific intent may be established when it is shown that the accused acted with clear knowledge that their

[32] A. Cassese, *Lineamenti di diritto penale internazionale*, Il Mulino, Bologna, 2006, p. 102.

[33] Art. 30(1): "*Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge*".

[34] H. Vest, *A structure-based concept of genocidal intent*, JICJ, Vol. 5, no. 4, 2007, pp. 781-797; Id., *Humanitätsverbrechen: Herausforderung für das Individualstrafrecht?*, ZStW, no. 113, 2001, pp. 457-498.

[35] Id., *A structure-based concept* quoted, pp. 785-786, 789-790.

[36] K. Ambos, *What does "intent to destroy in genocide mean"?*, "Selected Article on International Humanitarian Law", 91, 876, 2009, p. 858.

actions were part of a broader genocidal campaign. By contrast, the purpose-based approach is deemed more appropriate when the perpetrator held a position of leadership or influence within the organization and acted with the express goal of destroying a group in whole or in part. This differentiation also responds to practical evidentiary considerations, given the difficulty of proving that low-level individuals possessed the deliberate intention to destroy a group. In such instances, it is often more feasible to establish that they knew of the genocidal plan and intended their actions to contribute to it. In other words, the introduction of a knowledge-based standard has enabled the prosecution of lower-level perpetrators who might otherwise remain unpunished due to the impossibility of proving their genocidal intent.

Therefore, in order to establish the crime and assign individual criminal responsibility, courts must ascertain that the accused pursued a goal that extends beyond the mere commission of one of the criminal acts listed in the Convention. It must be demonstrated that, through such acts, the perpetrator deliberately sought to achieve the ultimate objective of group destruction.

This requirement of intent raises significant interpretive challenges, particularly in relation to the concept of destroying a group "in part." The matter has been examined by the International Court of Justice (ICJ), which has developed several interpretive parameters. First, the Court has held that the intent to destroy may be established when the subset of group members targeted by the attacks is "substantial enough to have an impact on the group as a whole." Accordingly, to satisfy the requirement of specific intent, the Court must determine that the targeted portion of the group constitutes a significant segment of it.

Second, the ICJ has clarified that specific intent may also be present when the intended destruction concerns a geographically limited area in which the group resides, without necessarily encompassing all members of the group worldwide.

Lastly, in interpreting the phrase "in part", the Court adopts a qualitative criterion, focusing on the role played by the targeted segment of the group in relation to the group's existence as a whole. This means that the number of victims must be assessed not in absolute terms, but rather in light of whether the specific portion of the group, though numerically small, represents an emblematic or essential component for the group's survival.

These interpretive elements demonstrate that the identification of genocidal intent is particularly complex in judicial practice, as it requires courts to verify, based on the prosecution's evidence, not only that one of the listed actus reus has occurred, but also that the corresponding *mens rea* is present. In genocide cases, the evidentiary burden concerning intent is considerably higher than for other crimes, as it necessitates proof of the accused's concrete intention to destroy a group. This element is often difficult to establish due to the lack of direct statements from the accused indicating such intent. Consequently, courts frequently rely on circumstantial evidence, including the general context in which the acts were committed, the systematic targeting of a particular group, the scale and gravity of atrocities, and the repeated commission of destructive or discriminatory acts.

One of the main difficulties encountered by jurisprudence lies in the frequent conceptual conclusion between the notions of intent and motive. It is therefore necessary to further explore the distinction between these two concepts through a specific analysis, which will be carried out in the following sub-paragraph. A further difficulty concerns the demonstration of genocidal intent at the State level, given the strictly individual character of the notion of *intent to destroy*. This issue will be addressed in the subsequent sub-paragraph 1.4.2 and in the related case studies.

1.4.1 The Difference between Motive and Intent

In the context of genocide, *intent*, as outlined in the previous paragraph, refers to the specific will to destroy, in whole or in part, a national, ethnic, racial, or religious group. It thus constitutes the essential subjective element that qualifies an act as genocide, pointing to the perpetrator's conscious aim to annihilate the physical existence of the targeted group.

By contrast, *motive* refers to the contingent and historically grounded reason that drives an individual or group to commit genocidal acts. Motives may include, by way of example, hatred, discrimination, ideology, political ambition, desire for domination, or fear. Moreover, motive may not necessarily consist of a single cause but may rather emerge as a combination of interrelated factors that collectively lead to the decision to perpetrate genocide. In other words, while intent denotes the specific will to destroy, motive identifies the cause that gives rise to such will. Furthermore, whereas intent is an indispensable element for the legal qualification of an act as genocide, motive is not a constituent component of the legal definition of the crime. Nonetheless, understanding the underlying motive may provide valuable insight into the dynamics and processes that culminate in the commission of genocide. Based on the underlying motive, five typologies of genocide can be historically identified: punitive genocide, institutional genocide, utilitarian genocide, despotic (or monopolistic) genocide, and ideological genocide[37].

Punitive genocide refers to acts of mass extermination driven by a retaliatory intent, carried out as a form of vengeance in response to previous social, religious, or racial conflicts. Early scholarship had already classified under this category the mass killings perpetrated in the ancient world, including those carried out by Genghis Khan during his conquests[38].

Institutional genocide typically arises in the context of territorial expansion and conquest, with a dual purpose: the annihilation of the subjugated population and the deterrence of other groups who might resist the hegemonic ambitions of the perpetrating entity[39].

Utilitarian genocide, by contrast, is motivated by the desire to exploit specific economic resources that are controlled by the targeted population. It goes beyond mere dispossession in violation of domestic or international law, as it is accompanied by the explicit intent to eliminate the group possessing the coveted assets. This typology has been widely used to categorize the systematic violence directed at the indigenous populations of Latin America, throughout the colonial era and well into the post-war period, in order to seize control of the region's natural wealth through the extermination of its original holders[40].

Despotic or monopolistic genocide is characterized by a drive to consolidate the power of a dominant group at the expense of rival factions. This form of genocide has often been associated with the ethnic massacres in multiethnic African states, where political representation and authority are structured around clan- or tribe-based systems. In such cases, despotic genocide blends the strategic pursuit of power with retaliatory action against groups that have obstructed the path to dominance[41].

Lastly, ideological genocide, a hallmark of the 20th century and particularly exemplified by Nazism, seeks to assert the foundational myths and intrinsic values of a despotic political order through the extermination of a specific group. Both the Armenian Genocide and the Holocaust fall within this category, as they involved the implementation of a systematic political

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[37] D. Bilotti, *Considerazioni sul Genocidio: ipotesi di comparazione e conseguenze nella tutela del diritto di libertà religiosa*, “Stato, Chiese e Pluralismo Confessionale”, 9, 2019, pp. 17-24.

[38] See E. R. Zaffaroni, *Alla ricerca del nemico: da Satana al diritto penale cool*, in E. Dolcini - C. E. Paliero (eds.), *Studi in onore di Giorgio Marinucci, Teoria del diritto penale, criminologia e politica criminale*, Giuffrè, Milano, 2006, pp. 757 and ff.

[39] R. W. Smith, *State Power and Genocidal Intent On the Uses of Genocide in the twentieth century*, in L. Chorbajian - G. Shrinian (eds.), *Studies in Comparative Genocide*, MacMillan - St. Martin’s Press Basingstocke - New York, 1999, p. 6.

[40] G. Carandini, *Racconti della civiltà capitalista. Dalla Venezia del 1200 al Mondo del 1939*, Laterza, Roma-Bari, 2012, p. 261.

[41] P. P. Portonaro, *L’imperativo di uccidere. Genocidio e democidio nella storia*, Laterza, Roma-Bari, 2017.

methodology rooted in ethno-religious rationales and aimed, inter alia, at fostering internal cohesion[42].

Although the distinction between intent and motive is well-established in legal doctrine, certain cases have revealed partial overlaps between the two concepts. For instance, in the *Niyitegeka case*, the Appeals Chamber of the International Criminal Tribunal for Rwanda used the term motive when referring to the intent to destroy the group. Similarly, in the *Akayesu case*, the intent to destroy was characterized as an "additional motive" underlying the crime. Such interpretations risk incorporating motive into the legal definition of genocide, despite its original conceptual separation[43]. This approach appears problematic, as it reduces the intent to destroy, a constitutive element of the crime under the Genocide Convention, to one of several possible motives. On the contrary, according to the Convention, intent is not merely a possible cause among others, but the defining mental element (*mens rea*) of the offence. Moreover, neither the text of the Convention nor its preparatory works permit an interpretation that equates motive with intent. A different scenario arises when the accused claims that their actions were not driven by an intent to destroy, but rather by an alternative motive, such as military necessity. In such cases, courts have generally recognized the possibility that multiple motives may coexist at the same level; these motives may contribute to the commission of the criminal act and even to the formation of genocidal *mens rea*, without constituting the foundation of the intent to destroy. Nevertheless, since the intent to destroy is the only motive that must be proven to establish the crime of genocide, the tribunal's analysis necessarily focuses on that element. Other motives may be relevant for understanding the broader context, but they are not decisive for the purposes of establishing guilt. In any case, the relationship between specific intent and motive can be complex and demands careful, case-by-case assessment. Understanding this interplay may significantly affect both prosecutorial and defense strategies, especially in situations where the accused does not deny the commission of the act itself, but attributes it to motives other than the intent to destroy.

1.4.2 Challenges in Proving Genocidal Intent at the State Level

According to article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, "disputes between the Contracting Parties relating to the interpretation, application

[42] D. B. MacDonald, *Identity Politics in the Age of Genocide. The Holocaust and Historical Representation*, Routledge-London-New York, 2008.

[43] Judgment *Niyitegeka,* (ICTR-96-14-A), Appeals Chamber, 9 July 2004, § 51; Judgment *Akayesu*, (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 522.

or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.” Furthermore, the general principles of international criminal law provide parameters for assessing under which conditions acts of complicity or incitement may give rise to State responsibility for genocide, as well as guidelines for identifying relevant evidentiary standards[44]. It is a well-established principle in international jurisprudence that while a State may be held responsible in connection with acts of genocide, it cannot directly commit genocide, since only individuals are subject to prosecution as perpetrators of the crime. However, their actions may be indirectly attributable to the State to which they belong. The most controversial issue lies in proving the *mens rea*, namely the attribution to the State of the specific intent to destroy a group. On this point, case law appears to be consistent in ruling out the possibility of attributing genocidal intent to a State, as such intent can only be held by an individual. The matter to be demonstrated in court, therefore, is that the acts committed by an individual with the clear intent to destroy a group can be attributed to the State, by establishing, for instance, the existence of extermination plans documented by official sources. In order to extend responsibility from the individual to the State, it is irrelevant whether the individual held a leadership position within the State apparatus, or whether the individual acted outside the scope of their authority or in contravention of orders. The State may still be held accountable if it contributed to the commission of genocide by creating the operational conditions for its occurrence or fostering a favorable climate. In other words, to establish State responsibility, it is not necessary to prove that the political or military leadership of the State shared the intent to destroy a group. Rather, it is necessary to demonstrate, first, that the individual perpetrator possessed genocidal intent, and second, that such intent was part of a coherent genocidal plan devised within the State framework. All things considered, while a State cannot be held directly responsible for the commission of genocide, it may nevertheless incur responsibility for acts of complicity or for direct and public incitement to genocide. Specifically, direct and public incitement is more readily provable, based on public speeches or documents that explicitly incite hatred against the targeted group. The “direct” nature of incitement can be inferred from the fact that the statements are clearly and unequivocally aimed at prompting others to undertake immediate criminal action. Conversely, proving complicity is more complex. Complicity can take various

[44] See M. Milanovic, *State Responsibility for Genocide*, “The European Journal of International Law”, 17.3, 2006, pp. 553-604, to which reference is also made for the relevant case law.

forms, ranging from support or specific incitement to genocidal acts, to the concealment of evidence of the crime. For a State to be found complicit, it is not necessary that it share the specific genocidal intent of the perpetrators. It is sufficient that the State had knowledge of the commission of genocide, i.e., the immediate intent to destroy animating the act. Moreover, responsibility arises in all cases in which it can be shown that the State had the capacity to exercise control over those individuals committing the acts and failed to do so. This aspect was particularly relevant in the case of *Bosnia v. Serbia*, where Bosnia accused Serbia of failing to exercise effective control over the military command structure responsible for the criminal acts. From the jurisprudence, the following principles emerge: firstly, a State cannot be held directly responsible for the commission of genocide, but it may be held accountable for genocidal acts committed by individuals if it is proven that those individuals possessed genocidal intent. Secondly, State responsibility can be established in three distinct cases: complicity in a genocidal plan; direct and public incitement to commit acts of genocide; and omission of control over individuals engaging in such acts. As for potential State responsibility arising from failure to prevent or punish genocide, it appears to be excluded that a State may be held responsible for failing to prevent or halt a genocide occurring outside its own territory. However, even in cases of genocides perpetrated abroad, a State may incur responsibility if its conduct goes beyond mere inaction and involves support for the genocide, for example, through the sale of weapons to the perpetrators or by allowing its territory to be used as a base for genocidal operations. Responsibility is less problematic in cases where a State fails to punish genocide, as this may be evidenced by the absence of appropriate domestic legislation criminalizing genocide, or by the failure to prosecute individuals accused of committing genocide. Even in such cases, however, the coercive tools available to international courts against a responsible State are limited. Remedies typically include orders to extradite or prosecute the individuals concerned, or to amend domestic legislation to include specific criminal sanctions for genocide. Another relevant issue is the existence of so-called ancillary obligations incumbent upon States, such as the duty to prevent and to punish genocide, established in article 1 of the Convention. Additionally, under article 5, States are required to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the Convention, particularly by providing effective penal sanctions against persons guilty of genocide.
A more detailed understanding of these elements will emerge from the following analysis of the case *Bosnia v. Serbia*.

1.4.2.1 Bosnia v. Serbia

The *Bosnia v. Serbia* case marked the first time in history that a State was brought before an international court on charges of genocide. The proceedings essentially focused on the issue of ethnic cleansing allegedly carried out by Serbia in Bosnia between 1992 and 1995, during the war that followed the dissolution of the former Yugoslavia. A central point of contention was the extent to which Serbia could be held responsible, as a State, for the genocide committed. To this end, Bosnia presented a detailed account of the events in order to prove not that the Serbian leadership harbored genocidal intent, but that Serbia exercised direct control over those who perpetrated the genocide based on a specific intent to carry out ethnic destruction. The argument for State control over the perpetrators was supported by evidence of financial and logistical assistance provided by Serbia, as well as the fact that many of the generals and officers involved were later rewarded or promoted by the Serbian State in relation to their conduct during the war. According to the case record, the Serbian State appears to have had full and direct control in the initial stages of the conflict, but this control gradually weakened and became negligible by the end of the war. What is particularly relevant here, however, is to reconstruct the reasoning followed by the Court. The Court's approach shows that, had Bosnia failed to prove Serbia's overall control over those responsible for ethnic cleansing, it would have needed to demonstrate Serbia's effective control over at least one specific operation during which an act of genocide occurred, namely, the Srebrenica massacre. Overall, proving the element of control proved to be particularly challenging, as official sources did not clearly show direct oversight by the Belgrade government over the individuals who carried out the mass killing of Muslims in Srebrenica. By contrast, it appears less problematic to support the argument of Serbia's complicity in genocide, as substantial evidence suggests a strong involvement of the Serbian State in the actions of various paramilitary groups operating in Bosnia during the conflict. Similarly, Serbia could potentially be held responsible for direct and public incitement to genocide, given that Belgrade is known to have promoted ethnic cleansing, although its propaganda did not reach the intensity or scale of that seen in Nazi Germany or Rwanda. Moreover, Serbia could certainly be held responsible for failing to prevent the genocide. However, as noted earlier, the coercive or punitive powers available to international courts against States that fail to prevent genocidal acts remain limited. It could be argued that Serbia failed to stop its paramilitary forces from entering Bosnia to carry out criminal acts, but this would also require proof that the State had knowledge of the genocidal intent of those groups. What is clear, however, is that Serbia can be held accountable for its failure to punish or extradite individuals accused of genocide, and it does not appear to have provided a legally convincing justification on this point. What emerges, therefore, is that the *Bosnia v. Serbia* case illustrates the inherent complexity of establishing State responsibility for genocide. Proving a concrete link between genocidal acts and the political leadership of a State is a difficult and lengthy process, both for the claimant and for the Court. Nonetheless, the case provides valuable insight into the line of reasoning that international judges consider necessary in order to assess State responsibility. This reasoning essentially involves determining whether any of the various forms of responsibility outlined in the Genocide Convention, complicity, direct and public incitement, control over perpetrators, failure to prevent or punish genocide, or failure to suppress criminal conduct, can be attributed to the State. Only if at least one of these elements is substantiated can State responsibility for genocide be established.

1.5 Judicial Interpretation of Intent in Recent Cases

As clarified in the preceding paragraphs, genocide can only be established where the existence of a specific intent, or *dolus specialis*, on the part of the perpetrator can be proven. This crime, in fact, requires not only the general *mens rea* to commit one of the punishable acts, but also the specific intent to destroy, in whole or in part, a protected group.

In the past, the International Court of Justice addressed the issue of establishing genocidal intent in two landmark cases: *Bosnia v. Serbia* (2007) and *Croatia v. Serbia* (2015). In both cases, the Court refrained from affirming that Serbia had committed genocide but nonetheless concluded that the State had violated its obligation to prevent genocide in relation to the events in Srebrenica in July 1995.

In particular, the Court established an important precedent by holding that *dolus specialis* cannot be inferred solely from the atrocious nature of the acts committed. Rather, it must be clearly deducible from those acts that they were carried out with the specific intent to destroy, in whole or in part, a group. In the *Croatia v. Serbia* judgment, the Court emphasized that in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that the genocidal intent be reasonably inferred from the acts submitted for judicial review.

More recent case law, notably in the *Gambia v. Myanmar*, has expressed partially dissenting views with respect to this precedent, highlighting that the threshold established in the Serbian cases for inferring genocidal intent is so high as to make the recognition of the crime virtually impossible.

This difficulty is further compounded by the frequent coexistence of genocidal intent with other motives, particularly military ones. This makes it extremely difficult to prove that the intent to destroy the group is the only reasonable inference to be drawn from the acts in light of the available evidence.

Moreover, when other motives clearly underpin the genocidal intent, they become irrelevant, and only the genocidal intent is legally significant. However, when both motives appear to coexist on the same level, there is a risk that the military motive may overshadow or displace the genocidal intent, thus preventing the recognition of the crime. This means that the Court must always conduct a thorough assessment of all available evidence, with full awareness that military considerations may underpin, or coexist equally with, the genocidal intent. In the former case, the genocidal intent remains legally relevant; in the latter, the Court must evaluate the evidence to ensure that the coexistence of both motives does not obscure the *dolus specialis*, thereby undermining the determination of the mental element of the crime[45].

In any case, the fact that the ICJ has not fully clarified the meaning and application of the "*only reasonable inference*" standard has led to certain misinterpretations. According to some of these, the presence of additional motives, such as military ones in armed conflict, would automatically exclude the genocidal intent as the "*only reasonable inference*" that may be drawn from a pattern of conduct. Such a reading must be rejected, as international jurisprudence has consistently recognized that genocidal intent may coexist with other motives[46]. If the existence of secondary objectives were to automatically preclude a finding of genocidal intent, then the prohibition of genocide during armed conflict would become meaningless, an outcome clearly contrary to article 1 of the Genocide Convention, which explicitly prohibits genocide both in peacetime and in wartime.

Accordingly, the more correct and coherent interpretation is that a State's conduct may simultaneously pursue the specific intent to destroy a protected group and the objective of achieving certain military results, and, in some cases, genocide may even be employed as a means to achieve such military objectives. This is evident in the case of Srebrenica, where it was established that genocidal intent coexisted with other motivations, and that genocide was committed both concurrently with and as a method of pursuing other goals[47].

[45] R. M. Essawy, *The Attainability of the Evidentiary Standard for Genocidal Intent in Gaza*, "European Journal of International Law", 3 May 2024.

[46] Ch. J. Tams - L. Berster - B. Schiffbauer, *The Genocide Convention. Article-by-Article Commentary*, Bloomsbury Publishing, New York, 2024, p. 162.

[47] A. A. Haque, *The Amnesty International Report on Genocide in Gaza*, 16 December 2024, p. 33.

Furthermore, the proper interpretation of the "*only reasonable inference*" criterion requires that the object of the inference be the existence of genocidal intent itself. In other words, the available evidence must convincingly demonstrate that genocidal intent existed as part of the underlying purpose of the State's conduct. This means that genocidal intent need not be exclusive. What is essential is a balanced assessment of the interaction between genocidal intent and other motives, in order to determine whether those additional motives negate such specific intent, confirm it as the only reasonable inference, or at least remain consistent with it. It follows that if the pattern of conduct can be fully explained by a non-genocidal motive, the standard of proof is not met. Conversely, if the pattern of conduct can only be fully explained by a combination of genocidal and non-genocidal intent, then the standard is satisfied[48].

1.5.1 Gambia v. Myanmar

In the Republic of Myanmar, the Rohingya ethnic minority has been subjected for decades to severe discrimination, which has intensified in recent years to include systematic acts of violence and grave human rights violations. The Rohingya are not listed among the 135 officially recognized ethnic groups in Myanmar and are therefore unable to acquire Burmese citizenship, effectively rendering them legally invisible. Moreover, they are often perceived as a foreign or even hostile group due to their Muslim faith in a country with a Buddhist majority. The situation significantly deteriorated in October 2016, when the Burmese authorities launched what has been described as an ethnic cleansing operation against villages in Rakhine State, allegedly in response to an attack by a Rohingya group on several police checkpoints. After a brief pause, hostilities resumed in August 2017 following increased activity by the Arakan Rohingya Salvation Army. The Burmese military reacted with renewed and violent ethnic cleansing operations. The Burmese government has denied any systematic atrocities, claiming instead that it merely responded to provocations by armed Rohingya groups and attributing any casualties to unintended excesses of violence allegedly committed by both sides. However, two reports issued in September 2018 and August 2019 by the Independent International Fact-Finding Mission on Myanmar, mandated by the UN Human Rights Council, documented in detail the systematic atrocities committed by Burmese authorities in Rakhine State and identified serious human rights violations that undermined the dignity of the population living there. The September 2018 report highlighted that the more than 60,000

[48] N. Y. Barigye - M. Hendrickse - V. Todeschini, *Genocidal Intent in Armed Conflicts: Unpacking the ICJ's "Only Reasonable Inference" Standard*, "Opiniojuris.org", 26 May 2025.

Rohingya still residing in Myanmar at the time were in grave danger and that the treatment to which they were subjected could be qualified as genocide, crimes against humanity, and war crimes. This reading was confirmed by the 2019 report, which pointed to the implementation of a policy of segregation and explicitly accused Myanmar of breaching its obligation to prevent genocide and of failing to adopt effective legislation to criminalize and repress the crime of genocide. Both reports documented mass killings, rape and other forms of sexual violence, the systematic destruction of villages, and mass executions. They also underscored the role of incitement to violence through state-sponsored hate campaigns, revealing how various media platforms, including print, television, radio, and social networks, were used to construct a distorted narrative portraying the Rohingya as a threat to Burmese racial purity, Buddhist identity, and national security. The Gambia brought the matter before the International Court of Justice (ICJ), seeking a ruling that Myanmar is responsible for violations of the Genocide Convention. The initiative raises the preliminary question of whether a third State, not directly injured, may institute proceedings against another State for the commission of genocide. This case offers significant insights into the *erga omnes partes* nature of the obligations set forth in the 1948 Genocide Convention. In general, the initiation of proceedings before an international judicial body requires the existence of a dispute between two parties and that the applicant demonstrate a direct interest justifying its claim. The matter becomes particularly complex when *erga omnes* or *erga omnes partes* obligations are at stake. The former are obligations owed by every State to the international community, while the latter refer to obligations collectively owed by all States parties under a multilateral treaty. The Genocide Convention represents a special case, as its provisions aim to protect not a specific interest of the parties but rather a common interest of the international community. Already in its 1951 Advisory Opinion, the Court had noted that the standing of a third-party State to bring a case could be grounded in the collective interest of all State parties in securing the Convention's objectives[49]. In the present case, the Gambia did not claim to be an injured State but based its application on a general interest in upholding the Convention and protecting victims. The Court upheld the Gambia's interpretation, invoking its earlier reasoning in *Belgium v. Senegal* concerning the Convention against Torture. In that case, the Court emphasized the similarities between the Torture Convention and the Genocide Convention, characterizing both as generating *erga omnes partes* obligations, "in the sense that each State party has an interest in compliance with

[49] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports*, 1951, p. 23.

them in any given case". Accordingly, the Court affirmed that every State party has standing to invoke the responsibility of another State for an alleged violation of such obligations, solely for the purpose of bringing the breach to an end and without the need to demonstrate a specific interest in the matter[50]. Regarding the ICJ's jurisdiction, the Gambia argued that it is grounded in article 36(1) of the Court's Statute and article 9 of the Genocide Convention. The latter, to which Myanmar has made no reservations, provides that the Court has jurisdiction over disputes concerning the interpretation, application, or fulfillment of the Convention. Thus, establishing jurisdiction requires demonstrating the existence of a dispute between Myanmar and the Gambia. In its application, the Gambia referenced multiple communications in which it expressed concern over Myanmar's conduct, particularly a note verbale from October 2019. Myanmar objected, arguing that the note was insufficient to establish a dispute and that the lack of response could not give rise to any disagreement. The Court, however, emphasized the importance of the parties' conduct at the time of the application and held that, based on the contents of the note verbale, Myanmar could not have ignored the Gambia's intention to pursue accountability. Moreover, Myanmar's failure to respond could reasonably be interpreted as a rejection of the allegations, thus substantiating the existence of a dispute. The Court similarly dismissed Myanmar's preliminary objection that the Gambia lacked standing because it was allegedly acting as a representative of the Organization of Islamic Cooperation. The ICJ reiterated that it has jurisdiction only over disputes between States and clarified that the Gambia's association with a regional body did not preclude its standing as a sovereign State party to the Convention. Following a preliminary review of the Gambia's claims, and pursuant to article 75(2) of its Rules of Court, the ICJ granted almost all of the provisional measures requested. These included measures to prevent acts of genocide, to ensure that neither the State's military nor any irregular armed groups under its control or influence commit or support genocidal acts against the Rohingya, to preserve evidence, and to submit compliance reports, one within four months and thereafter every six months. However, the Court denied the Gambia's request to allow United Nations fact-finding bodies access to Myanmar's territory, considering such a measure unnecessary in the specific circumstances. This decision was likely influenced by political considerations, including Myanmar's prior refusal to cooperate with the UN Human Rights Council's Independent Investigative Mechanism for Myanmar, which it had deemed a violation of its sovereignty. The Court may have also viewed the obligation to grant

[50] See C. Candelmo, *Riflessioni a margine dell'Ordinanza della Corte Internazionale di Giustizia sulle misure provvisorie nel caso Gambia c. Myanmar*, "Ordine Internazionale e Diritti Umani", 2, 2020, pp. 356-363.

access as excessively burdensome, especially given the possibility of obtaining substantial documentation through alternative means, such as collecting testimonies from Rohingya refugees in neighboring countries like Bangladesh and Thailand. Another request from the Gambia, namely, the adoption of general measures to ensure that neither party aggravate the dispute, was also rejected. Although the Court did not provide detailed reasons, it likely considered such a broad measure superfluous, given the adoption of more specific measures already deemed adequate to ensure protection. In its assessment of whether provisional measures were necessary, the Court also addressed the issue of the plausibility of the rights invoked by the applicant. Myanmar argued that before granting any provisional measure, the Court should verify the full plausibility of the alleged genocide, including the presence of *dolus specialis*. The Court, however, held that a definitive finding on genocidal intent was not required at that stage, especially given the seriousness of the allegations. This suggests that the Court balanced the reputational interests of the respondent State against the need to protect victims from potentially irreparable harm. The Court found the reports of the Independent International Fact-Finding Mission on Myanmar sufficient to establish the plausibility of the alleged conduct. Nevertheless, while such findings were adequate to justify provisional measures, the merits phase will undoubtedly require significantly more robust evidence to establish genocidal intent and the existence of *dolus specialis* beyond reasonable doubt[51]. As a final note, while the judgment on the merits is still pending, violence against the Rohingya continues in Myanmar. Testimonies from refugees in the Cox's Bazar camp in southeastern Bangladesh, which currently hosts nearly one million Rohingya, confirm the persistence of segregation and abuses. Additional confirmation comes from the NGO Human Rights Watch, which reported that more than 1,000 Rohingya Muslim men and boys have been abducted and forcibly recruited by the Myanmar military across Rakhine State since February 2024.

1.5.2 Ukraine v. Russia

The Russian aggression against Ukraine began in 2014, when the Russian Federation illegally annexed Crimea and engaged in hostilities in the Donbas and Luhansk regions. On February 24, 2022, a full-scale invasion of Ukraine commenced, escalating the situation that had begun eight years earlier. Since 2022, numerous crimes committed by the Russian armed forces and other unofficial armed groups operating in Ukraine under Russian control have been reported.

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[51] L. Acconciamessa - F. Sironi De Gregorio, *Considerazioni critiche e di prospettiva sulle misure provvisorie della Corte Internazionale di Giustizia nel caso Gambia c. Myanmar*, "Quaderni di SIDIBlog", 2020, pp. 369-389.

In particular, scenes of mass killings perpetrated in Bucha, Irpin, Borodyanka, and other liberated areas of Ukraine have prompted politicians and lawmakers in several countries to declare that a genocide may be underway in Ukraine. On April 14, 2022, the Ukrainian national Parliament itself adopted a declaration openly qualifying the acts committed by Russian forces during the invasion as acts of genocide. Despite the understandable outcry caused by the Russian atrocities, the application of the notion of genocide to the acts committed in Ukraine remains controversial. The core of the debate focuses on the subjective element of intent. Officially, the declared objective of the Russian invasion was the "denazification" of the Ukrainian nation, and all statements made by Russian President Vladimir Putin before and immediately after the launch of the military campaign were directed toward this aim. What stands out in these statements is the open expression of hatred toward the Ukrainian nation, conveyed through the speeches of Putin and his close collaborators. Numerous derogatory terms aim to dehumanize and humiliate the adversary, portraying Ukrainians as Nazis and threats to Russian public security. Scholars have highlighted that Putin's article "On the Historical Unity of Russians and Ukrainians", along with his public speeches of February 21 and 24, 2022, contain a clear rhetoric of hatred that arguably demonstrates the existence of genocidal intent[52]. Specifically, nine key statements may suggest the subjective element of the crime of genocide. First, Putin claims that Russians and Ukrainians constitute one single nation and that Ukrainian territories are historically Russian. This implies, in his view, that the Ukrainian nation does not exist. Second, he argues that Ukraine was created by Lenin through the establishment of the Soviet Union in 1922, thereby denying Ukraine's prior historical existence. Third, Putin asserts that the right of a nation to self-determination, as well as the right to secede from the Soviet Union, were merely concessions made by the Bolsheviks to nationalists to maintain power. He considers these concessions errors and the rights they imply as utopian fantasies. Fourth, Putin criticizes Ukrainians for being ungrateful to Lenin for maintaining a Ukrainian state formation within the USSR, suggesting that Ukraine should have been integrated into Russia as a mere administrative unit. Fifth, he argues that if Ukrainians, by toppling Lenin's statue, aimed to decommunize their country, then they also implicitly rejected Lenin's concessions, including the right to self-determination and secession. Putin then makes a clear reference to Stalin's dictatorship and the terror by which Soviet authorities sought to correct Lenin's excessive concessions and configure the USSR as a strictly centralized state. This mention is significant,

[52] See in particular D. Azarov - D. Koval - G. Nuridzhanian - V. Venher, *Understanding Russia's Actions in Ukraine as the Crime of Genocide*, "Journal of International Criminal Justice", 21, 2023, p. 243.

as Stalin was responsible for orchestrating the Holodomor - the genocidal famine in Ukraine from 1932 to 1933. Seventh, Putin contends that nationalism caused the collapse of the Soviet Union, reiterating that the right to self-determination is a destructive fantasy that must be curbed. He thus believes it is his duty, in the interest of Russian security, to oppose the rise of Ukrainian nationalist extremism, which he characterizes as a Russophobic, neo-Nazi movement supported by NATO and Western powers. Finally, Putin states that the full-scale invasion of Ukraine constitutes a special military operation aimed at the denazification and demilitarization of Ukraine. Collectively, these statements suggest that the Russian political leadership does not recognize the existence of the Ukrainian nation or its right to self-determination and considers Ukrainian territory to be inherently Russian. Therefore, Putin's publicly expressed goal appears to be the complete subjugation of Ukraine and the correction of Lenin's perceived mistake in granting Ukraine autonomy. Simultaneously, the intent to commit genocide is arguably evident not only in official statements and propaganda but also in the material acts committed by Russian forces in Ukraine. These acts include killings and the infliction of severe physical or mental harm with the ultimate objective of physically destroying Ukrainians and forcibly transferring numerous children to Russia or occupied territories.

According to the International Court of Justice, "the characterization of the [material] acts [of the crime of genocide] and their mutual relationship can contribute to an inference of intent", and when assessing whether the intent to destroy a protected group exists, all available evidence must be considered together, "instead of considering separately whether an accused intended to destroy a protected group through each of the prohibited acts of genocide"[53]. Thus, from the Court's jurisprudence, it follows that individual war crimes and crimes against humanity, when assessed collectively, may amount to genocide "if they are part of a wider pattern of attack that is aimed at destroying a [protected] group"[54]. In the present case, evidence collected in Bucha, Borodyanka, Hostomel, Irpin, and Borzel points to mass executions, forced disappearances, sexual violence, and torture inflicted on Ukrainians. In May 2022, over 1000 civilian bodies were discovered in Bucha alone, and a Ukrainian officer testified that 650 civilians were executed. Many bodies showed signs of torture and were found kneeling, face-down, with hands tied behind their backs, clearly indicating deliberate executions. Numerous elements show that Russian forces targeted civilians as members of the Ukrainian nation to be destroyed. Investigative reports revealed that Russian authorities were compiling lists of influential

[53] *Croatia v. Serbia* Judgment of 3 February 2015, §130; *Stakić* (IT-97-24-A) Appeal Judgment, 22 March 2006, § 55.
[54] E. Von Joeden-Forgey, *The Ten Patterns of Genocide*, Lemkin Institute for Genocide Prevention 2002, p. 35.

Ukrainian citizens to be killed or deported. This suggests a clear and deliberate destructive intent and a systematically planned discriminatory campaign. The Office of the United Nations High Commissioner for Human Rights and the UN Independent International Commission of Inquiry on Ukraine reported intentional and arbitrary executions of civilians by Russian soldiers in the Kyiv, Chernihiv, and Sumy regions during the occupation[55]. Women were subjected to rape and other forms of sexual violence, as established in the October 2022 investigation by the Special Representative of the UN Secretary-General on Sexual Violence in Conflict[56]. Further, civilians in southern regions were forced to live in deplorable conditions without access to food, water, air, or light, amounting to torture and mistreatment. Torture chambers were later discovered in the Kharkiv region following its liberation in September 2022. In addition, the Russian armed forces have systematically and deliberately targeted civilian infrastructure. In March 2022, Russian forces bombed a theater in Mariupol sheltering hundreds of civilians. Similarly, the attack on Kramatorsk railway station resulted in the deaths of more than 4000 civilians, mostly women and children waiting to flee the Donetsk region. Numerous cases, well documented by Amnesty International, attest to indiscriminate bombing of residential buildings in Kharkiv, causing at least 600 civilian deaths and over 1200 injuries[57]. In summary, the blatant hate speech in public statements by Putin and his collaborators, targeting Ukrainians as a nation, the considerable number of civilian victims, the severity and cruelty of inflicted violence, and the planned targeting of societal leaders, all seem to indicate a clear genocidal intent. Further considerations concern actions intended to provoke the physical destruction of the Ukrainian nation. The ICJ has held that deliberately inflicting living conditions aimed at bringing about a group's physical destruction, e.g., slow death through deprivation of food, water, or health, can constitute genocidal intent[58]. Crucially, it is not necessary to prove that physical destruction was achieved; it suffices to show that inhumane living conditions were intentionally imposed with the aim of destroying the group in whole or in part. In this case, numerous testimonies point to large-scale acts aimed at causing serious harm to Ukrainian public officials, NGO representatives, journalists, activists, religious figures, and other influential members of Ukrainian civil society. Persecution of local leaders and activists is common in Russian-occupied territories. These acts serve not only to intimidate the population but also to create an

[55] OHCHR, *Report on the Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation, 24 February to 15 May 2022*, 29 June 2022, §80; *Report of the UN Independent International Commission of Inquiry on Ukraine to the UN General Assembly*, A/77/533, 18 October 2022, pp. 13-14.

[56] E. U. Ochab, *United Nations: Rape Is Part Of Russia's Military Strategy*, "Forbes", 14 October 2022.

[57] Amnesty International, *Ukraine: Anyone can die at any time: Indiscriminate Attacks by Russian Forces in Kharkiv, Ukraine*, 13 June 2022.

[58] *Croatia v. Serbia* Judgment of 3 February 2015, § 161.

environment where any expression of Ukrainian identity is rendered impossible, thus posing a direct threat to the very existence of Ukrainian civil society. Strategies such as the siege of civilian settlements, destruction of electrical infrastructure, blocking of humanitarian aid and evacuation routes are all deliberately aimed at inflicting suffering and physical destruction. The same goal is pursued through the sustained threat to Ukraine's economic infrastructure, including the bombing of agricultural lands and destruction of energy and industrial facilities, actions which have also caused devastating environmental damage and the collapse of entire ecosystems. A final consideration concerns the forced transfer and Russification of Ukrainian children. Article 2(e) of the Convention on the Prevention and Punishment of the Crime of Genocide recognizes that genocide can be committed through the forced transfer of children from a protected group to another group. The ICJ has clarified that the forced transfer of children constitutes evidence of genocidal intent, as it aims to undermine the group's capacity to reproduce and survive[59]. In June 2022, Russian authorities declared that 330.000 Ukrainian children had been transferred to various Russian regions. The UN Commission of Inquiry reported that this transfer was not justified by any relevant circumstance and appears to have been aimed solely at impairing the Ukrainian nation's ability to survive and reproduce[60]. Russian officials have openly stated their goal of ensuring that transferred Ukrainian children be educated in Russian-language schools, adopted by Russian families, and turned into Russian citizens[61]. A draft law has even been introduced in the Russian Parliament to simplify the adoption procedures for Ukrainian children by Russian families[62]. Moreover, an investigation conducted by the Yale School of Public Health's Humanitarian Research Lab confirmed that deported Ukrainian children were held in re-education camps under Russian control prior to transfer[63]. These facts clearly demonstrate an intent to permanently separate Ukrainian children from their families and national and ethnic group, thereby erasing their national identity.

On 26 February 2022, following the invasion it suffered, Ukraine brought a case before the International Court of Justice. Pursuant to article 9 of the Genocide Convention, the Ukrainian government raised two principal issues. First, it requested the Court to declare that Ukraine had not committed any act of genocide in the territories of Luhansk and Donetsk, as alleged by the

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[59] *Croatia v. Serbia* Judgment of 3 February 2015, §136.

[60] *Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council*, A/HRC/52/62, 16 March 2023, §98.

[61] *UN's Bachelet Concerned Over Ukraine Orphans "deported" to Russia for Adoption*, "UN News", 15 June 2022.

[62] *Ibid*.

[63] K. Khoshnood and others, *Russia's Systematic Program for the Re-education and Adoption of Ukraine's Children*, Humanitarian Research Lab at Yale School of Public Health, 14 February 2023, pp. 14-15.

Russian Federation in its justification for the so-called "special military operation" Second, Ukraine asked the Court to determine that Russia could not lawfully resort to military force to prevent alleged genocidal acts, highlighting instead that Russian armed forces were intentionally killing and inflicting serious bodily harm on Ukrainian nationals, thereby fulfilling the *actus reus of genocide under article 2 of the Convention. Ukraine also requested the indication of provisional measures. Russia did not participate in the oral proceedings initiated by Ukraine's request but submitted a written document arguing that the Court lacked jurisdiction and should therefore refrain from ordering any provisional measures. Russia's position was based on two main arguments. Firstly, it denied having invoked the Genocide Convention as a legal basis for its military intervention. Secondly, it invoked its right to self-defense under article 51 of the UN Charter, claiming that the rights of Russian nationals on Ukrainian territory were being violated by armed groups allegedly supported by the Ukrainian government. Therefore, since the central issue of the case concerned the right of self-defense rather than the crime of genocide, Russia contested the ICJ's jurisdiction, asserting that the Court was not competent to adjudicate matters concerning the right of self-defense under the UN Charter. The Court, however, responded that the invocation of self-defense under the UN Charter did not exclude its jurisdiction in this matter[64]. It observed that Russia itself, in its written statement, had asserted that it was exercising its right to self-defense in response to alleged acts of genocide committed by Ukraine against the Russian-speaking population. Accordingly, even if the Russian Federation framed its actions in terms of self-defense, the ICJ remained competent to address the issue of whether acts of genocide were in fact taking place in Ukraine. This was especially true given that Ukraine had invoked article 9 of the Genocide Convention, which expressly confers jurisdiction upon the Court. The Court further noted that any State acting to prevent genocide remains bound by the limits of international law. Consequently, even assuming the occurrence of isolated genocidal acts, Russia could not lawfully resort to the widespread use of military force as a preventive measure[65]. These elements collectively reinforced the Court's position on the existence of its jurisdiction over the matter. On this basis, on 16 March 2022, the Court ordered that the Russian Federation "must immediately suspend the military operations" it had commenced in Ukraine, pending a final decision on the merits. The Court's decision to grant provisional measures was grounded in the

[64] B. Bonafé, *The collective dimension of bilateral litigation: The Ukraine v. Russia case before the ICJ*, "QIL", 96, 2022, pp. 45-47.
[65] B. A. Bahiru, *Challenges of Dispute Settlement through International Court of Justice (ICJ): the Case of Ukraine v. Russian Federation the Decision on Provisional Measures on Alleged Violations of Genocide Convention*, "ESJ Humanities", 18.29, 2022, pp. 64-84.

widespread attacks carried out by Russian forces against the civilian population, including the destruction of residential buildings and public infrastructure. With regard to Russia's assertion that its military intervention aimed to prevent genocidal acts allegedly committed by Ukrainian armed groups against the Russian-speaking community, the Court reiterated that while Article 1 of the Genocide Convention obliges States to prevent and punish the crime of genocide, such actions must always comply with the principle of proportionality and take into account the alternative mechanisms available under the Convention, including recourse to the Court itself. In any case, each provision of the Genocide Convention must be interpreted in accordance with the purposes and principles of the United Nations. On the merits, the Court noted the absence of credible evidence supporting Russia's claim that Ukraine had committed genocide. The adoption of provisional measures was based on article 41 of the Statute of the Court, with the aim of preserving the rights of both parties and preventing irreparable harm. The risk of such harm was corroborated by the human and psychological toll suffered by the Ukrainian population as a result of the Russian invasion.

On 17 March 2022, the Russian Federation rejected the Court's order to cease its attack, once again disputing its jurisdiction. It argued that the concept of genocide to which it had referred regarding the actions of Ukrainian armed groups was not based on the 1948 Genocide Convention but rather on customary international law.

On 31 January 2024, the ICJ issued a preliminary judgment addressing related aspects of the case[66]. The Court found that Russia had violated article 9 of the ICSFT by failing to investigate individuals allegedly involved in the financing of terrorism, despite having received relevant information from Ukraine. It also found violations of articles 2(1)(a), 5(e), and 5(v) of the CERD concerning the implementation of Ukrainian-language education in Crimea. Although this ruling did not yet address the merits of the genocide case, it is noteworthy that the Court, in its conclusion, reiterated the distinction between its jurisdiction - based on the consent of States - and the substantive duty of all States to comply with their international legal obligations. This implies that even if the Court lacks jurisdiction to adjudicate certain alleged violations, its ruling should not be interpreted as an affirmation that such violations were not in fact committed by the Russian Federation[67].

[66] International Court of Justice 2024, 31 January, No. 166.

[67] I. Marchuk, *Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v. Russia (CERD and ICSFT)*, "EJIL:Talk! Blog of the European Journal of International Law", 22 February 2024.

Beyond the strictly procedural and legal aspects examined in the 2024 decision, the case therefore remains pending before the International Court of Justice, which has not yet ruled on the merits of the claim.

1.5.3 South Africa v. Israel

On 7 October 2023, during the so-called "Al-Aqsa Flood" operation, armed groups belonging to the terrorist organization Hamas launched a series of attacks from the Gaza Strip against the State of Israel, resulting in the killing of 1200 Israeli civilians and military personnel and the abduction of approximately 250 individuals. According to data provided by the Israeli military, Hamas also launched 4300 rockets into Israeli territory on the same day, which, despite the effectiveness of Israel's missile defense system, caused 16 additional deaths. In response, the Israeli government, led by Prime Minister Benjamin Netanyahu, immediately declared a state of war and initiated the aerial military operation known as "Iron Swords" over Gaza. Dozens of aircraft were deployed simultaneously to strike the Strip with the stated objective of destroying Hamas military infrastructure. On 27 October 2023, the Israeli ground offensive into Gaza also began, involving heavy fighting in densely populated urban areas, where Hamas was allegedly operating its facilities. Starting on 2 March 2025, Israel also imposed a total blockade on international humanitarian aid to Palestinian civilians, including food, water, and medicine. The involvement of the civilian population in both the airstrikes and ground combat - leading to mass displacement, casualties, and injuries - has resulted in a humanitarian crisis of significant proportions, prompting alarm from numerous humanitarian organizations and several governments. These actors have raised their concerns before the United Nations, particularly in light of the fact that an estimated 70% of the victims were women and children. According to figures released by Amnesty International on 7 October 2024, one year after the Hamas attacks, the Israeli assault on the Gaza Strip had caused the deaths of over 41500 people and the forced displacement of 1.9 million Palestinians[68]. To these casualties must be added those resulting from famine. According to data from the World Health Organization, released on 23 July 2025, starvation in Gaza has caused approximately the same number of deaths as the military operations themselves[69]. In this context, on 29 December 2023, South Africa instituted proceedings before the International Court of Justice against Israel, alleging violations of Israel's obligations under the Genocide Convention in relation to the Palestinian population of

[68] Amnesty International, *Israele/Territorio palestinese occupato: un anno dopo il 7 ottobre*, 7 October 2024.

[69] Statements by WHO Director-General Tedros Adhanom Ghebreyesus on 23 July 2025 during a press conference in Geneva.

the Gaza Strip. Specifically, South Africa accused Israel of five genocidal acts: mass killings of Palestinians, infliction of serious bodily and mental harm, forced displacement, attacks on Gaza's healthcare system, and the imposition of measures intended to prevent births within the group. South Africa claimed standing based on its status as a State party to the Genocide Convention, which imposes not only a right but also a legal obligation on States to prevent and repress genocide through appropriate domestic measures. Accordingly, the South African government argued that it had a legal duty to act to prevent genocide and was therefore entitled to invoke the jurisdiction of the Court, while also requesting the indication of provisional measures.

Oral proceedings were held on 11 and 12 January 2024 and culminated in the Court's Order of 26 January[70]. In that Order, the Court first established its *prima facie* jurisdiction under the Genocide Convention. According to article 9 of the Convention, the Court's jurisdiction depends on the existence of a dispute relating to the interpretation, application, or fulfilment of the Convention. To that end, the Court must ascertain whether such a dispute existed at the time of the application, a requirement which is substantive rather than merely procedural. In this regard, the Court noted that neither South Africa nor Israel had entered reservations to article 9, and that, as established in its previous case law, all States parties to the Convention have a common interest and obligation to ensure the prevention, repression, and punishment of the crime of genocide. This reflects the *erga omnes partes* character of the obligations in question and the reciprocal right of all States parties to invoke the responsibility of another State for alleged violations. Accordingly, the Court concluded that South Africa was *prima facie* entitled to bring the case. As for the existence of a dispute between South Africa and Israel concerning the interpretation of the Convention, the Court considered numerous public statements by senior South African officials addressed to the Israeli government regarding the alleged crimes committed in Gaza, to which Israel had failed to respond[71]. Moreover, the Israeli government

[70] International Court of Justice 2024, 26 January, No. 192.

[71] On 30 October 2023, the South African Department of International Relations and Cooperation issued a statement calling on the international community to hold Israel accountable for breaches of international law. On 7 November, addressing the South African National Assembly, South Africa's International Relations Minister warned that "the crime of genocide sadly looms large in the current situation in Gaza". On 10 November, the Director-General of South Africa's Department of International Relations and Cooperation conducted a formal diplomatic démarché of the Ambassador of the State of Israel to South Africa, advising him that "the response by Israel was unlawful", and that South Africa "wants the ICC to investigate the leadership of Israel" for crimes including genocide. On 13 November, the President of South Africa, speaking at a meeting with the leadership of the South African Jewish Board of Deputies, condemned the genocide "that is being inflicted against the people of Palestine, including women and children, through collective punishment and ongoing bombardment of Gaza". On 17 November, during a State visit to Qatar, the President of South Africa announced that his government was referring the situation in the State of Palestine to the ICC. On 21 November, addressing the extraordinary joint

had publicly rejected the characterization of its military actions in Gaza as genocidal, describing the accusation as "not only fully unfounded as a matter of fact and law, [but] morally repugnant and antisemitic"[72]. Thus, although no formal diplomatic exchange had taken place, the divergence in publicly expressed positions demonstrated a substantive disagreement over the interpretation of genocide under the Convention. Regarding the indication of provisional measures pending a final judgment, the Court clarified that such measures may be granted only if the acts invoked by the applicant appear capable of falling *ratione materiae* within the scope of the Genocide Convention. In this respect, the Court found that at least some of the acts attributed by South Africa to Israel could fall within the scope of the Convention and that, therefore, the conditions for ordering provisional measures were met. The Court specifically noted that Palestinians constitute a protected group under the Convention, and that the population of Gaza represents a substantial part of that group. The Court further observed that the military operation carried out by Israel following the 7 October 2023 attacks had resulted in a high number of civilian deaths and injuries, widespread destruction of residential buildings, and the forced displacement of most of the population. These conclusions were based in part on declarations made by international officials, including the UN Under-Secretary-General for Humanitarian Affairs[73], the World Health Organization[74], and the Commissioner-General of UNRWA[75]. The Court also took note of statements made by high-ranking Israeli officials, which appeared to be informed by rhetoric that was visibly genocidal and dehumanizing[76]. On

meeting of Brix Leaders the President of South Africa asserted that "the deliberate denial of medicine, fuel, food and water to the residents of Gaza tantamount to genocide". On 12 December, speaking at the 10th Emergency Special Session of the United Nations General Assembly, at which Israel was represented, the South African Ambassador to the United Nations stated that "the events of the past six weeks in Gaza have illustrated that Israel is acting contrary to its obligations in terms of the Genocide Convention". On 21 December, South Africa sent a Note Verbale to the Embassy of Israel in which South Africa raised its concerns about the events in Gaza, describing them in terms of genocide under the 1948 Convention.

[72] Israeli Ministry of Foreign Affairs, *The War Against Hamas: Answering Your Most Pressing Questions*, 15 December 2023.

[73] Statement made by the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Mr. Martin Griffiths, on 5 January 2024 (§ 47 of the ICJ Order).

[74] Following a mission to North Gaza, the WHO reported that, as of 21 December 2023, "an unprecedent 93% of the population of Gaza is facing crisis levels of hunger with insufficient food and high levels of malnutrition. At least 1 in 4 households are facing catastrophic conditions: experiencing an extreme lack of food and starvation and having resorted to selling off their possessions and other extreme measures to afford a simple meal. Starvation, destitution and death are evident" (§ 48 of the ICJ Order).

[75] Statement issued by the Commissioner-General of the UNRWA, Mr. Philippe Lazzarini, on 13 January 2024 (§ 49 of the ICJ Order).

[76] On 9 October 2023, Mr. Yoav Gallant, Defense Minister of Israel, announced that he had ordered a "complete siege" of Gaza City and that there could be "no electricity, no food, no fuel" and that "everything [was] closed". On 12 October, Mr. Isaac Herzog, President of Israel, stated, referring to Gaza: "We are working, operating militarily according to rules of international law. Unequivocally. It is an entire nation out there that is responsible. It is not true this rhetoric about civilians not aware, not involved. It is absolutely not true. They could have risen up. They could have fought against that evil regime which took over Gaza in a coup d'état. But we are at war. We

this basis, the Court found that at least some of South Africa's claims were plausible. The finding of plausibility, grounded in the "extreme vulnerability" of the Palestinian civilian population (§70 of the ICJ Order), has been interpreted by part of the legal doctrine as a development of the theory of "humanitarian stasis", whereby the ICJ is called to intervene with provisional measures whenever a situation of grave human vulnerability is established[77]. The Court then assessed whether there was a real and imminent risk of irreparable prejudice justifying the adoption of provisional measures under article 41 of its Statute. After reiterating that genocide constitutes a denial of the right of existence to entire human groups, the Court cited statements by senior UN[78], UNRWA[79], and WHO[80] officials regarding the seriousness of the situation in Gaza and recalled its previous findings regarding the plausibility of South Africa's claims. It also noted a recent statement by the Israeli Prime Minister indicating that the war would continue for an extended period[81]. Based on these elements, the Court found the risk alleged by the applicant to be real, thereby legitimizing the indication of provisional measures. The measures adopted included, first and foremost, an order to Israel to take all steps within its power to prevent acts falling within the scope of article 2 of the Genocide Convention against the Palestinian population of Gaza, and to ensure, with immediate effect, that its armed forces do not commit such acts. Secondly, Israel was ordered to take all necessary measures to prevent and punish public incitement to commit genocide, as well as to take effective steps without delay to facilitate the provision of humanitarian aid and basic services to the affected civilian population. Israel was also ordered to submit, pursuant to article 78 of the Rules of Court, a report within one month detailing the measures adopted. Finally, the Court reminded Israel of

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are at war. We are at war. We are defending our homes. We are protecting our homes. That's the truth. And when a nation protects its home, it fights. And we will fight until we'll break their backbone." On 13 October, Mr. Israel Katz, then Minister of Energy and Infrastructure of Israel, stated on *X* (formerly *Twitter*): "We will fight the terrorist organization Hamas and destroy it. All the civilian population in [G]aza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world."

[77] T. Sparks - M. Somos, *The Humanization of Provisional Measures? Plausibility and the Interim Protection of Rights before the ICJ*, in F. M. Palambino - R. Virzo - G. Zarra (eds.), *Provisional Measures issued by International Courts and Tribunals*, Springer, Berlin, 2021, pp. 77-105.

[78] On 5 January 2024, the Secretary-General wrote again to the Security Council, providing an update on the situation in the Gaza Strip and observing that "[s]adly, devastating levels of death and destruction continue" (§ 68 of the ICJ Order).

[79] The Court also takes note of the 17 January 2024 statement issued by the UNRWA Commissioner-General upon returning from his fourth visit to the Gaza Strip since the beginning of the current conflict in Gaza: "Every time I visit Gaza, I witness how people have sunk further into despair, with the struggle for survival consuming every hour" (§ 69 of the ICJ Order).

[80] The WHO has estimated that 15% of the women giving birth in the Gaza Strip are likely to experience complications and indicates that maternal and newborn death rates are expected to increase due to the lack of access to medical care.

[81] On 18 January 2024, the Prime Minister of Israel stated that the war "will take many more long months" (§ 70 of the ICJ Order).

its obligation to preserve evidence related to allegations of acts falling under articles 2 and 3 of the Convention committed against Palestinians in Gaza. Following the Court's decision of 5 April 2024 to establish the procedural timetable for the submission of the full written pleadings by South Africa and Israel, South Africa filed its Memorial on 28 October 2024, while the deadline for Israel's Counter-Memorial has been repeatedly extended. Initially set for 28 July 2025, the deadline was first postponed on 14 April 2025 to 12 January 2026. Subsequently, on 20 October 2025, the ICJ granted Israel a further extension until 12 March 2026. For the purposes of reconstructing the procedural course of the case, it will therefore be essential to assess the substance of the arguments that the Israeli government will advance in response to the more than 750 pages of submissions and over 4000 pages of annexes and supporting documents filed by South Africa.

In the meantime, another development of particular relevance occurred on 16 September 2025, with the release of the Conference Room Paper submitted by the United Nations Commission concerning the territories occupied by Israel. In this document, the Commission concludes that the conduct carried out by the occupying Power may be qualified as genocide within the meaning of the Convention. In particular, regarding the subjective element (*mens rea*), the Commission identifies its existence in statements made by President Herzog, Prime Minister Netanyahu, and Defense Minister Gallant, which are deemed to amount to clear incitement to genocide. Furthermore, insofar as both the public statements and the objectives underlying the acts and conduct of the authorities and the armed forces appear to converge toward the annihilation of the Palestinian population in Gaza, it would be possible to conclude that genocidal intent exists to destroy, in whole or in part, the Palestinian group in the Gaza Strip. This would entail the international responsibility of the State of Israel for failure to prevent genocide, for the commission of genocide itself, and for failure to punish the perpetrators of genocide.

As regards the objective element, the United Nations Commission finds that the mass killings of Palestinians, by reason of their duration, scale, and characteristics, amount to acts of genocide, particularly since attacks have occurred in areas that the authorities themselves had designated as safe zones. The gravity of the crimes is further exacerbated by the deliberate policy of destroying Gaza's healthcare system, the imposition of a total siege on the territory, and the obstruction of humanitarian aid, including the denial of access to medicines and basic life-saving supplies. These acts are compounded by violent conduct against Palestinian detainees, the psychological trauma inflicted on the civilian population, repeated forced transfers, and the deliberate destruction of the surrounding environment. Emphasis is also placed on gender-based and sexual violence, which is considered indicative of a clear intention to humiliate the Palestinian group and to punish it as such.

The Commission concludes its work with a set of recommendations aimed at halting the ongoing unlawful acts and preventing further violations. Among these, it calls upon States allied with Israel to cease the supply of weapons and fuel, to facilitate investigations and judicial proceedings, to adopt sanctioning measures against the State of Israel, and to cooperate fully with the ICC[82].

While the ICJ has yet to issue its judgment on the merits, it is appropriate to highlight several relevant aspects of the case initiated by South Africa from legal, political, practical, and social perspectives[83]. From a legal standpoint, the principal challenge lies in the complexity of proving the intent underlying the alleged genocidal acts. As previously noted, establishing the mental element of intent can be exceedingly difficult, particularly in a politically sensitive context such as the Middle East, where the documentation of human rights violations is frequently contested. At the same time, the political environment has a considerable impact on the proceedings, as many States have adopted divergent positions with respect to Israel and Palestine.

One of the most significant political challenges for South Africa is the need to withstand diplomatic pressure from countries that offer unconditional support to Israel. Such countries may seek to influence the assessment of the case through their sway within international organizations, including by promoting resolutions favorable to Israel or obstructing those in support of South Africa’s claims in forums such as the United Nations. In addition, these States may exert economic pressure by reducing trade cooperation with South Africa. The most pressing difficulties, however, concern the collection of evidence relating to the alleged human rights violations committed in Gaza and other territories under Israeli control. South Africa must obtain reliable documentation in support of its allegations, including eyewitness accounts and internationally verifiable photo and video evidence. However, the prevailing security conditions and the practical impossibility of accessing the Gaza Strip currently prevent the collection of such evidence. Moreover, the South African government risks facing reputational backlash among certain social groups - such as Jewish communities worldwide - for whom Israel’s position is particularly significant. This could exacerbate domestic social tensions, as

[82] Human Rights Council, *Legal analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide*, Conference room paper of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/HRC/60/CRP.3, 16 September 2025.

[83] See Z. Mirnami - S. M. Hosseini, *Review of South Africa’s Complaint Regarding Israel’s Genocide in Gaza*, “Universal Journal of Research and Review Archives”, 4.2, 2025, pp. 1-11.

reflected in the growing number of pro-Israel demonstrations already occurring within South Africa.
Ultimately, the legal action initiated by South Africa illustrates how proceedings before the International Court of Justice may assume a role that extends well beyond the legal dimension of the dispute, directly engaging diplomatic and geopolitical considerations. In this regard, the case - precisely because it is situated within a context of intense political confrontation and diplomatic pressure - may serve as a precedent for future claims concerning alleged violations of the Genocide Convention within similarly complex political frameworks.

1.6 Concluding remarks

This chapter has reconstructed the conceptual and legal foundations of the intent to destroy element under the 1948 Genocide Convention, showing why *dolus specialis* constitutes the defining - yet most contested - element of the crime of genocide.
First, by revisiting Raphael Lemkin's original elaboration of genocide, the analysis has highlighted how the notion emerged as a response to historically paradigmatic episodes of group destruction and was conceived as a coordinated attack on the very foundations of group existence. Lemkin's broader understanding - encompassing political, social, cultural, biological and physical dimensions - was influential in shaping international awareness, yet it also revealed from the outset of the difficulty of translating a historically rich concept into a strictly legal definition.
Second, the chapter has examined the preparatory works of the Convention to clarify how the final treaty text reflects a process of deliberate narrowing. While early drafts included wider protected categories and forms of "cultural genocide", the final Convention ultimately confined criminalization to conduct amounting to physical or biological destruction of national, ethnical, racial and religious groups. This legislative trajectory is crucial to understanding the Convention's current limits and interpretative controversies.
Third, the chapter has outlined the structure of the crime as composed of *actus reus* and a heightened *mens rea* requirement. Genocide is not established by the mere commission of one of the enumerated acts: the perpetrator must act with the specific intent of destroying a protected group "as such" in whole or in part. This explains both the normative distinctiveness of genocide and the practical challenges that courts face in proving it.
Fourth, the chapter has addressed the competing doctrinal and jurisprudential approaches to *dolus specialis* - purpose-based, knowledge-based and hybrid models - and the interpretive

parameters developed to give meaning to “in part”. It has also clarified a recurring conceptual pitfall in case law: the conflation between intent and motive. While motives may illuminate context and dynamics, intent remains the indispensable legal threshold for the qualification of genocide.

Fifth, the analysis has explored the complexities of State responsibility under the Convention, emphasizing that genocide as a crime is perpetrated by individuals, yet responsibility may still arise for States through attribution frameworks and through breaches of ancillary obligations (notably prevention and punishment), as well as through forms of complicity or incitement.

Finally, by surveying recent and ongoing cases, the chapter has shown that the judicial determination of genocidal intent remains shaped by strict evidentiary standards - particularly the debate surrounding inference of intent and the “only reasonable inference” logic - while also being challenged by contemporary contexts in which genocidal intent may coexist with military or political objectives. These tensions frame the central problem that will guide the following chapters: how intent is operationalized in judicial reasoning, which evidentiary indicators are deemed sufficient, and whether current standards risk making the legal recognition of genocide exceptionally difficult in practice.

CHAPTER 2

The "intent to destroy" in the Rome Statute and in other International Conventions

2.1 The Legal Structure of the Crime of Genocide in the Rome Statute

The Statute of the International Criminal Court, which entered into force on 1 July 2002, includes genocide among the crimes falling within the Court's jurisdiction under article 5. Article 6 subsequently defines the crime of genocide, essentially reproducing the definition provided in article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This substantial continuity reflects the convergence of the historical developments that have characterized international criminal law over the past fifty years. During the negotiations leading up to the adoption of the Rome Statute, the definition of genocide was never subject to controversy, as the proposal to transpose article 2 of the Convention was unanimously accepted.

The version of the Statute drafted by the International Law Commission (ILC) and submitted to the General Assembly in 1994 already included genocide within the scope of the Court's jurisdiction, though it did not provide a specific definition. In 1995, the ad hoc Committee recommended maintaining the conventional definition, although some delegations advocated for extending protection to social and political groups, thereby departing from the Convention's definition. The same approach was followed by the Preparatory Committee in its 1996 report. The Working Group on the Elements of Crimes of the Preparatory Committee, at its February 1997 meeting, decided to reproduce the provision contained in the 1948 Convention, despite the presentation of various proposed amendments. Consequently, in the final version prepared by the Preparatory Committee, article 2 of the 1948 Convention was left unchanged, while article 3 of the Convention - referring to attempt, conspiracy, complicity, and direct and public incitement to commit genocide - was incorporated into the general provision on individual criminal responsibility in article 25(3) of the Statute.

During the Rome Conference, all delegations agreed on the appropriateness of maintaining the 1948 Convention's definition, which became the basis for the final wording of article 6[84]. It should be noted, however, that article 6 does not perfectly mirror articles 2 and 3 of the Genocide Convention, as the latter's article 3, as mentioned, was transferred to article 25(3) of the Statute on individual criminal responsibility.

[84] UN Doc. A/CONF.183/C.1/L.53, p.1.

Article 9 of the Rome Statute provides that the Elements of Crimes shall assist the Court in interpreting and applying articles 6, 7, and 8 of the Statute. The elements of the crime of genocide, like those of crimes against humanity and war crimes, are thus intended as tools for the prosecutor and defense to identify relevant components during proceedings. Given the importance of this issue, a Preparatory Commission was established to define the Elements of Crimes falling within the Statute's scope. The Commission worked from February 1999 until the end of 2000, producing a first version of the crime definitions, rules of procedure and evidence, and supporting documentation. The Elements were meant to describe the factual circumstances that establish criminal responsibility and justify prosecution for each offence covered by the Statute.

Regarding genocide specifically, the Commission focused initially on the subjective elements of responsibility. In line with the letter of article 6, it clarified that genocide could only be conceived as a crime committed by individuals. However, in practice, it was acknowledged that such a crime necessarily involves actions by groups of individuals. In other words, the conduct of the individual must correspond to that of a larger group, which is to be considered the effective perpetrator of the criminal acts. Genocide is thus a mass crime and a collective phenomenon. Accordingly, it becomes essential to assess, case by case, the relationship between the individual and the group, and to isolate the actions of the individual in order to assign personal responsibility. Even if the crime requires planning and execution by an organized structure or with its support, criminal responsibility ultimately lies with the individual.

Secondly, specific attention was given to identifying the victims of the crime. Genocide is characterized by the fact that victims are targeted as members of a particular national, ethnical, racial, or religious group.

More complex was the issue of identifying the legal interest protected by the norm on genocide. Generally, the prevailing view in doctrine and jurisprudence was that the protected interest is the existence of the group[85]. However, significant divergences emerged at the national level: for instance, in Spain, genocide is classified as a crime against the international community (Article 607 of the 1995 Criminal Code), whereas in France it is treated as a crime against humanity (Article 211.1 of the 1992 Penal Code), and in Germany as a crime against life (Article 220 of the 1975 Penal Code). In all cases, the protected interest has a collective nature - whether identified with a group, the international community, or the continuity of humankind.

[85] Cfr. ICTR, Akayesu Judgment (IT-96-4-T, 2 Sept. 1998), § 468.

The specific feature lies in the fact that, although the protected interest belongs to the community, it applies concretely to each member who becomes a victim of criminal acts targeting the group. Thus, the social relationship and the individual-group dynamic must be considered the starting point for identifying the protected interest, given that each member's life assumes a collective dimension. The Statute does not definitively resolve this issue, although it confirms the collective character of the protected interest.

Whereas international jurisprudence traditionally identified the protected interest as the group's existence - consistent with dominant anthropological and sociological theories viewing identity transmission as hereditary - this view is now considered overly rigid. Today, aligned with alternative sociological and historical approaches that understand group identity as a complex and evolving phenomenon, a broader notion of protected interest is adopted. Concepts such as "identity" or "group" are no longer seen as fixed but as fluid and relative, leading to the understanding that the genocide norm seeks to protect not merely the group's existence but its ability to develop. In many cases, the crime appears to harm not only one protected interest but a plurality, offending both the individual members and the group as a whole. In this sense, genocide may be seen not as an attack on the group's existence per se but on its freedom to exist[86].

According to the wording of article 6 of the Statute, the definition of genocide focuses on three fundamental elements: the material element, the psychological element (*mens rea*), and the identification of the victim.

Regarding the material element, article 6 lists acts that may constitute genocidal conduct, whether committed individually or in combination: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting conditions of life calculated to bring about the group's physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group. As for the killing of group members, even though the wording of article 6 may suggest that the killing of a single individual is sufficient to satisfy the material element, it is evident - based on the rationale behind criminalization and the specific psychological element - that an isolated or sporadic act of violence not part of a systematic plan to destroy a group cannot qualify as genocide[87].

[86] E. Fronza, *Genocide in the Rome Statute*, in W. Schabas - F. Lattanzi, *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Fontecchio (AQ), 1999, pp. 105-138.
[87] G. Grasso, *Genocidio*, in *Digesto delle discipline penalistiche*, Utet Giuridica, Torino, 1991, p. 403.

The conduct described in article 6(b) - causing serious bodily or mental harm to members of the group - refers to acts intended to inflict suffering without necessarily resulting in death. However, this provision raises interpretative challenges, as the Convention provides no definition of physical or mental harm. The prevailing view is that protection should be afforded only in cases of serious harm capable of contributing to the group's destruction, even though the provision does not explicitly require the harm to be permanent. Accordingly, some scholars recommend avoiding aprioristic limitations and favor an interpretation based on actual events[88]. In this respect, the Preparatory Committee's working group clarified that mental harm must exceed "minor or temporary impairment of mental faculties", and must be serious and lasting, such as that caused by drugs, torture, or specific methods of mental debilitation. As for the conduct under article 6(c) - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part - it was noted that this differs from the previously described acts in that it necessarily targets the entire group rather than individual members. The phrase "conditions of life" has generated interpretative uncertainty. It is generally understood to refer to measures that lead to slow death, such as detention in concentration camps. Physical or biological destruction may also result from deliberately imposed conditions such as starvation, systematic displacement, or denial of access to basic medical care below an acceptable minimum standard.

Another problematic expression is "deliberately inflicting", which appears to imply a degree of premeditation not expressly required for other acts[89]. However, it is widely held that the psychological element should be consistent across all forms of genocidal conduct listed in article 6.

The act under article 6(d) - imposing measures intended to prevent births within the group - refers to cases of biological genocide, as noted in the travaux préparatoires of article 2 of the Convention, including sexual mutilation, sterilization, birth control, separation of sexes, and prohibition of marriage[90]. Coercion is required, and such measures must target a specific group rather than the entire population.

Finally, article 6(e) identifies the forcible transfer of children of the group to another group as an act of genocide. This is considered a form of cultural genocide aimed at destroying the group's identity by erasing its language, religion, culture, and traditions.

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[88] N. Robinson, *The Genocide Convention. A Commentary*, Institute of Jewish Affairs, World Jewish Congress, New York, 1960, p. 18.
[89] P. N. Drost, *The Crime of State. Penal Protection for Fundamental Freedoms of Persons and Peoples*, AW Sythoff, Leyden, 1959, p. 82.
[90] ICTR, *Akayesu Judgment*, (IT-96-4-T, 2 Sept. 1998), § 507.

Particular attention has been devoted to the psychological element. Among the constituent elements of genocide, specific intent (*dolus specialis*) has posed the greatest interpretative challenges, primarily due to the difficulty of proving its existence and in light of genocide's character as a macro-criminal phenomenon. Nevertheless, specific intent is the defining feature of the crime of genocide under international law. It must be understood as the clear intention to bring about the total or partial destruction of a protected group as such. This element marks the boundary between genocide and other crimes against human beings, such as war crimes or crimes against humanity. The complexity of this element is further increased by the fact that specific intent may be found even when destruction is an expected or accepted consequence of the conduct, rather than its exclusive purpose[91]. While actual destruction is not required for the crime to be established, it must be shown that destruction was nevertheless the intended result. The difficulty in proving specific intent is heightened by the collective nature of genocide, which presupposes an organized structure in planning, preparation, and execution.

Thus, the challenge of proving specific intent lies in demonstrating that the accused intended to destroy one of the protected groups recognized by the Convention as such, and not merely to harm certain individuals. Such a construction of the mental element could have led to criminal liability based on command responsibility or the commission of specific acts in a genocidal context. However, in line with the 1948 Convention and its travaux préparatoires, the Rome Statute did not adopt this possibility.

Another relevant issue concerns the relationship between specific intent and motives; the latter generally being deemed irrelevant for the purposes of establishing the crime. Additional interpretative challenges arise from certain expressions used in article 6 and the Convention.

First, the phrase "to destroy" raises interpretive questions, as its scope determines which forms of conduct are included within the concept of genocide. Some scholars argue that the phrase "intent to destroy a group" also encompasses actions aimed not at the group's physical elimination, but at its erasure as an identity - for instance, through forced relocation or the suppression of cultural or religious symbols.

Second, the expression "in whole or in part" lacks quantitative criteria, making it difficult to determine the threshold at which the destruction of a part of the group constitutes genocide. A literal reading of the travaux préparatoires and the Convention suggests that the number of victims may vary depending on the group type and the proportion of victims relative to the

[91] E. Fronza, *Genocide in the Rome Statute*, in W. Schabas - F. Lattanzi, *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Fontecchio (AQ), 1999, pp. 105-138.

entire group[92]. Since specific intent is the decisive element, even harm to a single group member may qualify if destruction was the objective. However, this interpretation may conflict with the phenomenology of genocide, which typically involves organization and coordinated group action.

Lastly, the third element of the crime is the definition of the victims, identified as members of a specific ethnic, racial, national, or religious group. While the prohibition aims to protect the right to life of each member, the norm refers directly to the collective entity. Genocide law recognizes the group, its existence, and its values as distinct from individual rights. The main challenge lies in the fact that a group is not necessarily an objective reality but may be the result of subjective perception. Accordingly, two conditions have been proposed to identify a protected group under the Convention's definition: that the group be a collective entity identified as such and deemed worthy of protection. Nonetheless, identifying the protected group in specific contexts remains problematic.

An objective approach would consider the group as a stable social reality whose members belong by birth. Conversely, a subjective approach would define the group based on the perpetrator's perception or how individuals perceive themselves or are perceived by others. The prevailing view today treats the group as a fluid entity - never entirely fixed or permanent[93].

2.2 The Crime of Genocide in the Statutes of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Jugoslavia

The case law of the ad hoc tribunals has further contributed to the definition and interpretation of the crime of genocide, allowing for the clarification of numerous issues concerning the conduct encompassed by the offence and its relationship with other criminal figures.

2.2.1 The establishment of the Ad Hoc International Criminal Tribunals

In particular, the first conviction for genocide and incitement to commit genocide was delivered on 2 September 1998 by the International Criminal Tribunal for Rwanda (ICTR), established by the United Nations Security Council through Resolution 955 (1994). The tribunal was created to prosecute individuals responsible for war crimes, crimes against humanity, and genocide committed within the territory of Rwanda, or by Rwandan nationals in the territory of

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[92] B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, 2 July 1985, UN Doc. E/CN.4/Sub.2/1985/6, p. 19.

[93] E. Fronza, *Genocide in the Rome Statute*, in W. Schabas - F. Lattanzi, *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Fontecchio (AQ), 1999, pp. 105-138.

neighboring States, between 1 January and 31 December 1994. The tribunal, based in Arusha, concluded its work on 31 December 2015, having tried 75 individuals, with an additional 3 fugitives still at large.

The Rwandan genocide unfolded in a context marked by longstanding ethnic tensions between historically distinct groups. Traditionally, the Tutsi represented the aristocratic class in Rwanda: they owned land and livestock and exercised political power, while the Hutu engaged in agricultural labor and oversaw religious rites. Beginning in the mid-18th century, the Tutsi, through a process of conquest and assimilation, became the dominant clan, imposing a system of forced labor on the Hutu to regain access to lands that had been taken from them. This divide was exacerbated during the colonial period, particularly under Belgian rule from the late 19th century, when the Europeans allied themselves with the Tutsi and deprived the Hutu of religious authority as well.

In 1959, a Hutu uprising against the Tutsi monarchy led to the 1961 referendum and, subsequently, to Rwanda's independence in 1962. These events were accompanied by the killing of over 100000 Tutsi and the forced exile of many survivors to Uganda and Burundi. After a series of coups and civil conflicts, in 1990 the Rwandan Patriotic Front (RPF), composed of exiled Tutsi refugees in Uganda, launched an offensive to seize power, igniting a new civil war.

Within this context, on 6 April 1994, the plane carrying then-President Juvénal Habyarimana was shot down by a surface-to-air missile. Immediately following the crash, and even on the morning of 6 April itself, massacres began under the pretext of retaliatory action. The killings escalated on 7 April in Kigali and in regions controlled by government forces. A central role in inciting the violence was played by the president's ideologues, who propagated the notion that the Tutsi were a foreign race originating from the Nile and had to be exterminated to allow the Hutu people to reclaim their lost identity and dignity[94]. For one hundred days, massacres - often carried out with machetes - were perpetrated, resulting in the deaths of over one million Tutsi and moderate Hutu. To grasp the scale of the atrocity, it is enough to consider that in the Gikongoro massacre alone - home to a prominent national technical institute - 27000 Tutsi were killed in a single day.

The genocide was carefully planned and organized by the Rwandan government, which relied on a 30000-strong militia created specifically for this purpose, operating under national coordination and with representatives in every district. The massacres came to an end in July

[94] R. Kapuściński, *Ebano*, Feltrinelli, Milano, 2000, p. 155-156.

1994 with the victory of the RPF, which, upon taking control of the country, implemented a system of summary justice against alleged perpetrators of the genocide. This further exacerbated the humanitarian situation, prompting the flight of approximately one million Hutu to neighboring countries.

The tribunal, established in 1994, immediately raised concerns regarding its legitimacy, notwithstanding its unanimous ratification by UN Member States. Its credibility was questioned due to the circumstances of its creation, which was perceived as being strongly driven by the victorious ethnic group in the conflict[95]. As a result, the tribunal could not be regarded as truly impartial and independent. To overcome these legitimacy concerns, attempts were made to ground the establishment of the ICTR in the United Nations Charter. However, a portion of legal scholarship considers such a foundation insufficient for two main reasons.

First, as noted by Gaetano Arangio-Ruiz, the legal justification for the tribunal appears weak, since the combined reading of Article 29 and Chapter VII of the Charter - commonly invoked to support the establishment of the tribunal - does not, in fact, authorize the exercise of direct or indirect jurisdiction[96]. More broadly, the Charter does not contain provisions suitable for legitimizing the creation of international criminal tribunals. Second, Chapter VII of the United Nations Charter seems to pertain exclusively to conflicts between States, not to internal armed conflicts within a single State. Consequently, in the case of Rwanda - where the crisis manifested as a civil war - there would be no basis for establishing an ad hoc criminal tribunal[97].

As previously mentioned, on 2 September 1998, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) sentenced Jean Paul Akayesu to life imprisonment for having committed, *inter alia*, the crimes of genocide and direct and public incitement to commit genocide[98]. Akayesu, a former schoolteacher and mayor of the town of Taba, had reportedly delivered a public speech on the morning of 19 April 1994 in which he incited a crowd of over 100 people to eliminate the Tutsi population[99].

On 1 June 2001, the Appeals Chamber rejected Akayesu's appeal against the Trial Chamber's decision[100]. He is currently serving his sentence in a prison facility in Mali.

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[95] G. Della Morte, *Tribunali Penali Internazionali*, "Diritto Online", 7, 2014, p. 12.

[96] The considerations expressed by Arangio-Ruiz in relation to the tribunal for the former Yugoslavia are largely applicable to the tribunal for Rwanda as well; see G. Arangio-Ruiz, *The Establishment of the International Criminal Tribunal for the former Territory of Jugoslavia and the doctrine of implied powers of the United Nations*, in F. Lattanzi - E. Sciso (edd.), *Dai Tribunali penali internazionali ad hoc ad una Corte permanente*, Atti del Convegno - Roma 1995, Editoriale Scientifica, Napoli, 1996, p. 34.

[97] G. Della Morte, *Tribunali Penali Internazionali*, "Diritto Online", 7, 2014, p. 10.

[98] ICTR, Trial Chamber, *Prosecutor v. Jean Paul Akayesu Judgment*, ICTR-96-4-T, 2 September 1998.

[99] *Ibid*., §§ 14-15.

[100] ICTR, Appeals Chamber, *Prosecutor v. Jean Paul Akayesu Judgment*, ICTR-96-4-A, 1 June 2001.

The same Trial Chamber of the ICTR delivered a second conviction for incitement to genocide on 4 September 1998, against Jean Kambanda, who served as Prime Minister of the *interim* government during the 100 days of massacres. As will be further explored in the following paragraph, Kambanda was found to have incited the population, both through radio broadcasts and public speeches, to kill Tutsi civilians[101]. Arrested in Nairobi on 18 July 1997, Kambanda was subsequently tried and sentenced to life imprisonment. The conviction was upheld by the Appeals Chamber on 19 October 2000, and he is also currently serving his sentence in Mali[102]. Subsequently, the ICTR convicted other individuals for direct and public incitement to commit genocide. The distinctive feature of these additional cases was that the inciting acts were carried out through the use of mass media[103].

Many of the considerations previously discussed regarding the legitimacy of the International Criminal Tribunal for Rwanda were also raised in relation to the other ad hoc international criminal tribunal established to prosecute alleged cases of genocide - namely, the International Criminal Tribunal for the former Yugoslavia (ICTY). The latter was established by the United Nations Security Council through Resolution 827 (1993) with the purpose of prosecuting those responsible for alleged war crimes, crimes against humanity, and genocide committed within the territory of the former Socialist Federal Republic of Yugoslavia since 1 January 1991. The Tribunal, based in The Hague, tried over 160 individuals and concluded its mandate on 31 December 2017.

Following the dissolution of the former Yugoslavia - a process triggered by a political crisis that erupted after the death of Marshal Tito in 1980 and worsened between 1990 and 1991 - the Republics of Slovenia and Croatia declared their independence. In response to Croatia's secessionist aspirations, the Serbian military leadership, under Slobodan Milošević, mobilized armed forces and irregular militias, thereby sparking a civil war. In 1992, the center of the conflict shifted to Bosnia, which had also declared independence. The country, inhabited by a mixed population composed of a Muslim majority and Serbian Orthodox and Croatian Catholic minorities, became the theatre of an exceptionally bloody war characterized by acts of ethnic cleansing. These acts were largely orchestrated by Radovan Karadžić, President of the Bosnian Serb enclave, and Ratko Mladić, Commander of the Bosnian Serb army.

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[101] ICTR, Trial Chamber, *Prosecutor v. Jean Kambanda Judgment*, ICTR-97-23-T, 4 September 1998.

[102] ICTR, Appeals Chamber, *Prosecutor v. Jean Kambanda Judgment*, ICTR-97-23-A, 19 October 2000.

[103] ICTR, Trial Chamber, *Prosecutor v. Georges Ruggiu Judgment*, ICTR-97-32-I, 1 June 2000, § 44; ICTR, Trial Chamber, *Prosecutor v. Ferdinand Nahimana Judgment, Amended Indictment*, ICTR-99-52-I, 15 November 1999; ICTR, Trial Chamber, *Prosecutor v. Hassan Ngeze Judgment, Amended Indictment*, ICTR-99-52-I, 15 June 2005, § 31; ICTR, Trial Chamber, *Prosecutor v. Simon Bikindi Judgment*, ICTR-01-72-T, 2 December 2008, §§ 417-426.

Among the most infamous episodes of the conflict were the siege of Sarajevo, which lasted from 5 April 1992 to 29 February 1996 and involved the deliberate targeting of civilians, including by snipers, and the genocide of Srebrenica, during which General Mladić's troops executed 8372 Muslim men and boys, subsequently disposing of their bodies in mass graves. These crimes were committed despite the presence of a United Nations peacekeeping contingent from the Netherlands deployed in the area. A ceasefire was only reached after a series of NATO bombings carried out between May and September 1995. On 21 November 1995, the Dayton Peace Agreement, brokered by the United States, was signed, formally ending the hostilities but resulting in the division of Bosnia into two entities: a Serb Republic and a Croat-Muslim Federation.

The Serbian and Croatian perpetrators of the massacres were subsequently tried by the ad hoc tribunal established in 1993. However, as in the case of the ICTR, several doubts concerning the legitimacy of the ICTY's jurisdiction were raised. The first issue was that of retroactivity. Since the tribunal was created in 1993, some scholars argued that its jurisdiction over crimes committed between 1991 and 1993 violated the principle of *nullum crimen sine lege*, as the court would be adjudicating facts that predated its own establishment[104]. This objection was partially overcome by pointing out that the ICTY Statute provided for the application of international humanitarian law, a body of law that had been consolidated well before the breakup of Yugoslavia and that forms part of customary international law[105].

The second major objection related to the alleged lack of impartiality of the tribunal, which was said to have been heavily influenced by the United States and primarily aimed at prosecuting members of the Serb ethnic group[106]. Finally, the criticisms raised by Gaetano Arangio-Ruiz - previously mentioned in the context of the Rwandan Tribunal - also apply to the ICTY, particularly with regard to the alleged lack of jurisdictional foundation under the United Nations Charter.

Among the most significant rulings of the ICTY is the conviction of Radovan Karadžić, former President of the Republika Srpska of Bosnia and Herzegovina, for the crime of genocide committed during the siege of Srebrenica. Karadžić, who served as a leading figure in the Bosnian Serb leadership and commanded several operations against both military forces and

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[104] G. Endo, *Nullum crimen nulla poena sine lege and the ICTY and ICTR*, "Review Québécoise de Droit International", 15.1, 2002, pp. 205-220.

[105] V. Spiga, *Non-retroactivity of Criminal Law: A new chapter in the Hissène Habré Saga*, "Journal of International Criminal Justice", 9.1, 2011, pp. 5-23.

[106] G. Knezevic, *Despite Its Critiques, The Hague Tribunal Will Leave A Positive Legacy*, "RFERL.org", 23 November 2017.

civilian populations between 1992 and 1995, was sentenced to 40 years of imprisonment[107]. The conviction related, as previously mentioned, to the genocide in Srebrenica as well as various crimes against humanity and war crimes - including torture, rape, and the killing of prisoners - committed with the aim of systematically removing Muslim and Croat populations from the territories claimed by the Bosnian Serbs.

The Court also held that Karadžić's role in the siege of Sarajevo was so decisive that, without his involvement, it would not have been possible to terrorize the entire population of the Bosnian capital and subject it to indiscriminate attacks between 1992 and 1995. Karadžić was, however, acquitted of the charge of genocide in relation to the crimes committed in 1992 against Muslim and Croat populations in seven municipalities of Bosnia. On appeal, the original sentence was increased to life imprisonment in March 2019[108].

Particularly complex was the case of Ratko Mladić, who remained a fugitive for sixteen years. Arrested in Serbia on 26 May 2011, he had been wanted by the International Criminal Tribunal for the former Yugoslavia since 1995. The first indictment was issued on 25 July 1995, followed by a second in November of the same year, specifically addressing the genocide in Srebrenica. These two indictments were later consolidated into a single indictment in July 1996, which focused exclusively on the most serious charges, including two counts of genocide.

The trial began on 16 May 2012 and lasted 530 days, during which 591 witnesses were heard, and 11000 documentary exhibits were submitted. On 22 November 2017, the tribunal delivered its judgment, sentencing Mladić to life imprisonment and finding him guilty on 10 of the 11 counts[109]. The appeal filed by the general - after two postponements - was heard on 25 and 26 August 2020, and it upheld the conviction for genocide, persecution, extermination, murder, deportation, inhumane acts, forcible transfer, and unlawful attacks against civilians[110].

A comprehensive discussion of the notion of genocide cannot exclude an examination of the statutes of the two ad hoc tribunals, from which useful elements of reflection may be drawn for the purpose of a more precise definition of the offence, as will be discussed in the following sub-paragraph.

[107] ICTY, Trial Chamber, *Prosecutor v. Karadžić Judgment*, IT-95-5/18-T, 24 March 2016.
[108] ICTY, Appeals Chamber, *Prosecutor v. Karadžić Judgment*, IT-95-5/18-A, 20 March 2019.
[109] ICTY, Trial Chamber, *Prosecutor v. Ratko Mladić*, IT-09-92-T, 22 November 2017.
[110] ICTY, Appeals Chamber, *Prosecutor v. Ratko Mladić*, MICT-13-56-A, 8 June 2021.

2.2.2 The notion and interpretation of Genocide" in the Statutes and jurisprudence of the ICTY and ICTR

The Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY") was adopted on 25 May 1993 and subsequently amended on 13 May 1998 (Resolution 1166) and on 30 November 2000 (Resolution 1329). The Statute of the International Criminal Tribunal for Rwanda ("ICTR") was adopted on 8 November 1994 and later amended on 30 April 1998 (Resolution 1165), 30 November 2000 (Resolution 1329), 17 May 2002 (Resolution 1411), 14 August 2002 (Resolution 1431), 28 August 2003 (Resolution 1503) and 28 October 2003 (Resolution 1512).

Despite similarities in the adoption process, a fundamental difference emerges. In fact, because the ICTY was established in two phases (Resolutions 808 and 827 of 1993), the second of which saw a leading role for the UN Secretary-General, its Statute was largely the product of work by the Secretary-General and the Office of Legal Affairs. By contrast, in the case of the ICTR the Security Council established the tribunal and adopted its Statute in a single phase, with the draft resolution prepared and negotiated by New Zealand and the United States on behalf of the Security Council, using the ICTY as a model[111].

Both Statutes conform to the definitions in articles 2 and 3 of the 1948 Genocide Convention. Specifically, article 4(3) of the ICTY Statute and article 2(3) of the ICTR Statute reproduce article 3 of the Genocide Convention, while article 7(1) and (3) of the ICTY Statute and article 6(1) and (3) of the ICTR Statute - substantially identical - govern modes of liability. However, a significant innovation beyond the Convention is that both Statutes go further by introducing the concept of command responsibility for genocide - an element not considered in the drafting of the Convention. Article 4(3) of the ICTY Statute identifies as criminal conduct genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. As regards liability, article 7 of that Statute designates as individually responsible anyone who planned, instigated, ordered, committed, or in any way aided or encouraged the planning, preparation or execution of genocidal acts. Most notably, article 7(3) specifies that the fact that the acts were carried out by a subordinate does not relieve a superior of criminal responsibility if the superior knew or had reason to know that the subordinate was about to commit or had committed such acts and

[111] A. Obote - Odora, *Competence of the International Criminal Tribunal for Rwanda*, "Murdoch University Electronic Journal of Law", 6.3, 1999, p. 24.

failed to take necessary and reasonable measures to prevent those acts or to punish the perpetrator.

With respect to the crimes listed under article 4, a key doctrinal debate concerns whether the conduct described in sub-paragraphs (b) and (e) should be regarded as crimes in themselves or as forms of liability for the broader crime of genocide. The prevailing view is that the conspiracy, direct and public incitement, and attempt to commit genocide should be understood as inchoate offences rather than as modes of liability[112]. As such, these acts constitute independent offenses, and the commission of any one of them - regardless of whether genocide occurred - is sufficient to establish criminal liability. As for complicity in genocide (let. e), jurisprudence tends to treat it as a mode of liability, and thus it can be prosecuted only when genocide has been perpetrated. This is reflected in numerous judgments of the ICTY as well as in various ICTR decisions[113]. However, since it is rare for an accused to be charged simultaneously with genocide and complicity in relation to the same facts, charges of complicity have been of limited practical significance. Indeed, both tribunals have more frequently confirmed genocide charges and only rarely convicted for complicity alone. That said, ICTY jurisprudence has exhibited some inconsistency: in the *Popović case* the Trial Chamber found that "the inchoate offence of conspiracy" was absorbed into the genocide charge and that one individual could not be convicted of both charges, whereas in the *Tolimir case* the accused was found guilty of both crimes[114]. In ICTR appellate jurisprudence, an orientation appears to prevail permitting separate charges for genocide and complicity in genocide, as illustrated by the *Gatete case*, in which the accused was indeed convicted of both offences[115].

Turning to article 7 and individual criminal responsibility, extensive consideration has already been provided in the following section dedicated to that topic.

Regarding the ICTR Statute, many of the same observations made for the ICTY apply: article 2(3) enumerates genocide, conspiracy to commit genocide, direct and public incitement, attempt, and complicity. Likewise, scholars have questioned whether genocide must have been completed to trigger liability, with unanimous agreement that attempt, incitement, and

[112] G. Boas - J. L. Bischoff - N. L. Reid, *International Criminal Law Practitioner Library*, Vol. 1, *Forms of Responsibility in Criminal Law*, Cambridge University Press, Cambridge, 2007, pp. 282-284.

[113] ICTY, Trial Chamber, *Prosecutor v. Brdanin Judgment*, IT-99-36-T, 1 September 2004; ICTY, Trial Chamber, *Prosecutor v. Blagojevic and Jokic Judgment*, IT-02-60-T, 17 January 2005; ICTR, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998.

[114] ICTY, Trial Chamber, *Prosecutor v. Popović et al. Judgment*, IT-05-88-T, 10 June 2010; ICTY, Trial Chamber, *Prosecutor v. Tolimir Judgment*, IT-05-88/2-T, 12 December 2012.

[115] ICTR, Appeals Chamber, *Prosecutor v. Gatete Judgment*, ICTR-00-61-A, 9 October 2012.

conspiracy suffice for criminal responsibility in addition to actual perpetration of forbidden acts listed in the Convention and the ICTR Statute.

In all cases, both Statutes adopt the Genocide Convention's notion that genocide is conduct intended to destroy, in whole or in part, a national, ethnical, racial, or religious group as such. The Statutes thus conceive genocide as an act committed against individuals by virtue of their membership in a specific group. In other words, the victim is selected not based on individual identity but on group affiliation. Hence the target of the crime is the group itself, not merely individual members. Accordingly, both Statutes underscore the absolute importance of proving the specific intent, though in practice this element has been extremely difficult to establish in the absence of an accused's confession. Intent may only be inferred from factual circumstances, such as the scale and nature of atrocities, their systemic character, execution in a geographic area, and above all the deliberate and systematic targeting of victims due to their group membership while excluding others[116].

Specifically, the ICTY identified a case of genocide in the events at Srebrenica and Žepa in July 1995. Despite being under UN "Blue Helmet" protection, the two enclaves were assaulted by Bosnian Serb forces. Women and children were separated from men - then placed on buses and removed from the enclave - while men were detained in schools for months and subsequently transferred to detention centers controlled by Bosnian Serb forces. They were then systematically executed in just three to four days, more than eight thousand fatalities.

In *Prosecutor v. Popović* the Trial Chamber found that the acts at Srebrenica constituted genocide, as they involved the killing of members of the Bosnian Muslim group and inflicted serious physical and psychological harm on its members[117]. In establishing the crime, the judges considered: the scale and nature of the criminal operation; the targeted nature of the victims; the systematic and organized manner of execution; and the clear intent to eliminate every captured Bosnian Muslim male. These elements, the Chamber held, proved beyond reasonable doubt that Bosnian Serb forces intended to destroy Muslims in eastern Bosnia as a group[118]. As for the forced transfer of women and children, the judges observed that while that act alone did not constitute genocide, taken in context with the simultaneous killing of men it supported the finding of genocidal intent[119]. Conversely, in *Prosecutor v. Tolimir* - arising from the same

[116] A. Szpak, *National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals*, "The European Journal of International Law", 23.1, 2012, pp. 155-173.
[117] ICTY, Trial Chamber, *Prosecutor v. Popović Judgment*, IT-05-88-T, 10 June 2010.
[118] *Ibid*., §§ 841-847, 856-863.
[119] *Ibid*., §862.

events - the Trial Chamber held that the forced transfers from Srebrenica and Žepa could in themselves constitute genocide, insofar as they were aimed at inflicting serious psychological harm on group members and deliberately imposing living conditions designed over time to bring about the group's physical destruction[120].

In the case of Rwanda, the ICTR recognized the Tutsi as a protected group and accordingly confirmed that genocide had been committed in the country. The Trial Chamber determined that despite certain similarities, the Tutsi and Hutu were perceived as two distinct ethnic groups in social terms: Hutu were predominantly agriculturalists, Tutsi cattle-herders; they also exhibited physical differences - Tutsi being taller, thinner, with thinner lips, and Hutu shorter with fuller lips. The historical record under Belgian colonial rule - such as a 1931 law requiring ownership of more than nine cattle to be considered Tutsi - further entrenched these distinctions. Historically, the Tutsi minority held greater educational attainment and political power, while the Hutu majority experienced subordination. Based on these factors, the ICTR concluded that Tutsi and Hutu constituted distinct ethnic groups and grounded its findings of genocide against that premise.

However, this question has been controversial among scholars, some of whom argue that Tutsi should not be considered an ethnically distinct group from Hutu, as they share the same language, religion, and intermarry to the point that biological or cultural distinctions are effectively non-existent. In this view, current identification as Tutsi is a matter of self-perception, complicating the application of the "*protected group*" concept under the Genocide Convention and the Statute[121]. Therefore, scholars rather argue that the Tutsi were targeted as a political group, which would fall outside the Convention's definition of genocide and thus call for reliance on a broader customary law understanding of the crime - one not reflected in the Statute's sources[122].

A particular profile emerges in the *case of Nchamihigo*. Simeon Nchamihigo served as a public prosecutor in the Cyangugu prefecture, allegedly organizing and participating in a campaign targeting the Tutsi population, including compiling lists of influential Tutsi and opposition members; identifying individuals for execution; restricting movements to facilitate attacks; supervising checkpoints; and distributing weapons to militia. The Trial Chamber convicted Nchamihigo of genocide and sentenced him to life imprisonment. The Appeals Chamber

[120] ICTY, Trial Chamber, *Prosecutor v. Tolimir Judgment*, IT-05-88/2-T, 12 December 2012, §§ 753-766.
[121] A. Szpak, *National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals*, "The European Journal of International Law", 23.1, 2012, p. 160.
[122] S. Shah, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, "Emory Int'l L REV", 16, 2002, pp. 370, 384 and 387.

subsequently upheld convictions for genocide, extermination, murder, and crimes against humanity. In the trial judgment, judges emphasized that certain acts carried out by the accused were considered genocidal - even when committed against members of the Hutu group - because the accused mistakenly perceived them as Tutsi[123]. In other words, for a genocide conviction, it is sufficient that the perpetrator perceived the victim as belonging to the national, ethnic, racial, or religious group he intended to destroy; it is thus not necessary for the victim to actually be a member of that group.

Thus, two interpretative approaches to the notion of "*protected group*" emerge in jurisprudence. The first, objective approach - as adopted, for example, in the *Akayesu case* - considers the group a social fact, a stable and permanent reality, whereby membership is automatic and irreversible by birth. The second, subjective approach - as seen in *Nchamihigo* - presupposes that the group exists only insofar as its members self-identify or are perceived as belonging to it by the perpetrators. Scholars generally prefer the subjective approach because it extends protection to a broader category of victims - not only those who in fact belong to the protected racial, national, ethnic, or religious groups but also those perceived as such[124]. However, an alternative line in doctrine finds a purely subjective approach unsatisfactory, given that it could lead to an unacceptable expansion of the "*protected group*" notion based solely on the perpetrator's mindset. According to Nersessian, a purely subjective approach might produce group definitions with no connection to a pre-existing social reality, which would be incompatible with the purpose and object of the Convention and Statute, namely, to protect established categories of human groups from physical and biological destruction[125]. The conclusion reached is that a mixed approach is preferable: the perpetrator's perception must be considered, but there must also be tangible evidence that the victim group possesses some recognized existence as a racial, national, ethnic or religious group beyond the perpetrator's individual mindset. This ensures that the perpetrator's conception of the victim group bears a logical relationship to one or more of the four protected categories[126].

In this regard, it is worth noting that the ICTY, in the *Yelišić case*, adopted a purely subjective approach, holding that the stigmatization of a group as a distinct national, ethnic or racial entity

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[123] ICTR, Trial Chamber, *Prosecutor v. Nchamihigo Judgment*, ICTR-2001-63-T, 24 September 2008, §§ 329-338.

[124] G. Verdirame, *The Genocide Definition in the Jurisprudence of the ad hoc Tribunals*, "International and Comparative Law Quarterly", 49, 2000, pp. 578 and 592-594.

[125] D. L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, "Cornell International Law Journal", 36.2, 2003-2024, p. 296.

[126] *Ibid*., p. 312.

suffices to determine whether a population targeted by perpetrators constitutes a national, ethnic or racial group in their eyes[127].

Overall, the jurisprudence of the two ad hoc tribunals, in interpreting the provisions of their respective Statutes, has made a significant contribution to the understanding of genocide and its specific elements, such as protected group, specific intent to destroy the group, the "*in whole or in part*" standard, and the enumerated acts encompassed by the notion of genocide.

2.3 Individual Criminal Responsibility for Genocide

From the Statutes of the International Criminal Tribunals, six distinct forms of individual criminal responsibility emerge, which are particularly well delineated in article 7(1) and article 7(3) of the ICTY Statute. Specifically, individual criminal responsibility arises in relation to: (1) planning, (2) instigation, (3) ordering, (4) commission, (5) aiding and abetting, and (6) command or superior responsibility[128].

Responsibility for planning the crime of genocide refers to situations in which the individual has designed the commission of the act during its preparatory, as well as its execution, phases[129]. This form of liability presupposes that planning is conceptually distinct from execution, such that a possible indictment for genocide would refer solely to the commission of the crime and not also to its planning, which instead requires a specific charge. As regards the *mens rea*, the planner of the crime is understood to be a person who either intended that the crime be committed or was clearly aware that the crime would be committed in implementation of the planned acts or omissions.

With respect to instigation, it essentially consists in prompting another person to commit the crime. For purposes of evidence, it is sufficient to show that the instigation was a substantially decisive factor in the commission of the crime by another person[130]. As to the *mens rea*, it must be shown that the accused intended to provoke or induce the commission of the crime or, alternatively, was clearly aware of the probability that a criminal act or omission would occur because of their conduct.

Liability for issuing an order arises when a person in a position of authority uses that position to instruct another to commit a crime. For this form of liability, a formal superior-subordinate

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[127] ICTY, Trial Chamber, *Prosecutor v. Yelišić Judgment*, IT-95-10-T, 14 December 1999, §70.

[128] Y. Naqvi, *Enforcement of Violations of IHL: The ICTY Statute - Crimes and Forms of Liability*, "The University of Tasmania Law Review", 33.1, 2014, p. 12.

[129] ICTY, Trial Chamber, Prosecutor v. Bla*škić Judgment*, IT-95-14-T, 3 March 2000, §279.

[130] ICTR, Appeals Chamber, *Ferdinand Nahimana v. Prosecutor Judgment*, ICTR-99-52-A, 28 November 2007, § 480.

relationship is not required; it is sufficient to demonstrate that the accused possessed, in the specific circumstances, the authority to issue an order[131]. Such authority may be informal or purely temporary and may therefore exist in the absence of formalization[132]. Moreover, the order may be explicit or implicit and may be established through evidence directly related to the surrounding circumstances. Jurisprudence further shows that this form of liability may arise even in the absence of a written order, or one directed to the person who physically commits the crime, provided that its direct and substantial effect on the commission of the unlawful act is established. In any case, responsibility for ordering necessarily implies the commission of an act, and is excluded in relation to omissions, since jurisprudence has clarified that an order implies active conduct. As to the *mens rea*, it must be demonstrated that the person holding the power to order intended to bring about the commission of the crime or was, at a minimum, clearly aware of the substantial probability that a crime would be committed in execution of his or her order.

Responsibility for commission of the act is more complex and articulated, as it encompasses two distinct hypotheses. The first is *basic commission*, which covers both the material perpetration of the crime and culpable omissions in violation of criminal law. In the latter case, however, it must be shown that the omission had a significant and concrete influence on the occurrence of the crime[133]. Where, at a time when the crime is already under way or its execution has become concrete, there is an intentional omission by the superior to prevent the act, his or her liability would also fall under article 7(1) of the Statute, namely, command responsibility. The *mens rea* of basic commission requires awareness of the substantial probability that a criminal act or omission would occur as a consequence of the conduct.

The second hypothesis within commission of the crime is *commission through joint criminal enterprise* (JCE), which arises when several persons pursuing a common purpose jointly initiate an activity that is then carried out by only one or some of them[134]. This notion incorporates three distinct categories of collective criminal liability: 1) where all those acting on the basis of a common design possessed the same criminal intent; 2) the so-called "concentration camp" category, applicable where the crimes committed are attributable to members of organized military or administrative units; and 3) where, although there is a common design, one of the accused commits an act that falls outside the common design but which nevertheless appears

[131] ICTY, Appeals Chamber, *Kordić and Čerkez Appeal*, IT-95-14/2-A, 17 December 2004, § 388.

[132] ICTR, Appeals Chamber, *Setako v. Prosecutor Judgment*, ICTR-04-81-A, 28 September 2011, § 240.

[133] ICTY, Appeals Chamber, Prosecutor v. Naser Orić *Judgment*, IT-03-68-A, 3 July 2008, § 41.

[134] ICTY, Appeals Chamber, *Tadić Appeal*, IT-94-1-A, 15 July 1999, § 190.

as the natural and foreseeable consequence of that design[135]. These three categories share three common objective elements: a plurality of perpetrators; the existence of a common plan, i.e., a design or purpose that entails or includes the commission of an act of genocide; and the accused's participation in that common design[136].

As regards responsibility for commission through JCE, the case of *Đorđević* is particularly instructive[137]. This concerned the head of the Serbian police forces during the armed conflict in Kosovo in 1999. The accused had not personally committed any of the crimes charged, which had been perpetrated by members of the Serbian armed forces, partly belonging to the police and partly to the army. Of these, only the former were under his command. The Trial Chamber found that *Đorđević* had participated in a common plan of genocide aimed at altering the ethnic balance in the Kosovo region. Although this objective was not in itself criminal, it was, in the accused's intentions, to be achieved through criminal means, namely, a campaign of terror and widespread, systematic violence against the ethnic Albanian population of Kosovo. The Chamber considered this an instance of genocide committed through JCE.

It is noteworthy to reconstruct the reasoning followed by the judges in reaching this conclusion. In the case at hand, there was no document or written order demonstrating a plan targeting the Albanian population of Kosovo. However, the Trial Chamber relied on a number of factors sufficient to prove beyond reasonable doubt the existence of a JCE. The predominant factors were the essentially genocidal nature of the crimes and the circumstances in which they were committed, clearly showing that the intended target was the protected group of the ethnic Albanian population of Kosovo. The operations carried out were typically aimed at terrorizing the Albanian civilian population in towns and villages, through multiple acts including shelling populated areas with heavy weapons, threats, violence, killings, arson of civilian property, and destruction of villages.

Secondly, the Court identified a decisive factor for JCE liability in the close coordination of the actions carried out by the Serbian forces, which clearly confirmed the existence of a common plan[138]. Moreover, the Trial Chamber found that *Đorđević*'s participation in this plan had been crucial to its success since, as head of the police and assistant to the Minister of the Interior, he wielded significant powers, exercised effective control over the police in Kosovo, and played a key role in coordinating the activities of the armed forces in Kosovo in 1998-99. The judges

[135] *Ibid*., §§ 195-196, 202-204.
[136] *Ibid*., § 227.
[137] ICTY, Trial Chamber, *Prosecutor v. Đorđević Judgment*, IT-05-87/1-T, 23 February 2011.
[138] *Ibid*., §§ 2003-2128.

also noted his personal and direct involvement in organizing a paramilitary unit, the Scorpions, which cooperated with the regular police in 1999 and was responsible for the killing of 19 Albanian women and children in a single town. The Court further established *Đorđević*'s responsibility for police efforts to conceal the killings by transporting hundreds of bodies to Serbia, where they were buried in clandestine graves owned by the police[139].

The complexity of commission through JCE requires clarification of certain specific aspects. First, as regards the plurality of persons involved, jurisprudence does not require that the individuals be individually identified; it is sufficient to identify categories or groups of persons, whether or not organized in specific military, political, or administrative structures[140]. Regarding the existence of a common purpose, responsibility does not require that the plan or purpose have been previously conceived or formalized; indeed, the common plan or shared purpose may also have arisen spontaneously and may be inferred, in the absence of formalization, from the mere fact that several persons acted in unison to carry out a joint criminal enterprise.

As for participation in the common design, jurisprudence has clarified that JCE does not necessarily require that all participants have been physically involved in every element of the crime, nor that they were physically present at the scene and time of its commission[141]. Rather, participation may take the form of assistance, support, or contribution to the execution of the common plan, which need not involve committing an act criminalized under the Statute, but may consist in making a significant contribution to the realization of the crime.

When the physical perpetrator of the crimes encompassed in the common design is not a member of the JCE, to establish the responsibility of JCE members it is necessary to prove that the crime is substantially attributable to them or that they used the physical perpetrator to carry out their common design.

Finally, about *mens rea*, it varies for each of the three categories of JCE. In the first category, where all the accused possess the same criminal intent, it must be shown that, even if the accused did not personally commit the crime, he or she nevertheless intended to achieve that result[142]. In this respect, it may be decisive to prove that the individual knew of the commission of the crime and participated continuously - even if not materially - in it. In the second category,

[139] Ibid., §§ 2154-2158.

[140] ICTY, Appeals Chamber, *Prosecutor v. Krajišnik Judgment*, IT-00-39-A, 17 March 2009, § 156; ICTY, Appeals Chamber, *Tadić Appeal*, IT-94-1-A, 15 July 1999, § 227.

[141] ICTY, Appeals Chamber, *Prosecutor v. Kvočka Judgment*, IT-98-30/1-A, 28 February 2005, § 112.

[142] ICTY, Appeals Chamber, *Tadić Appeal*, IT-94-1-A, 15 July 1999, § 228.

personal knowledge of the existence of an organized system of ill-treatment is required. This knowledge may be shown by direct testimony or, alternatively, inferred from the position of authority held by the accused at the time of the events. To this knowledge must be added the intent to maintain and/or consolidate the system of ill-treatment, which may likewise be inferred from the position of authority[143].

In the third category, involving the commission of a crime which, although not included in the common design, appears as its natural and foreseeable consequence, *mens rea* comprises three distinct elements: 1) the intent to take part in the joint criminal enterprise and to expand, individually or jointly, the criminal objectives underlying the enterprise; 2) the foreseeability that other members of the group might commit crimes not envisaged by the common criminal design; and 3) a mental attitude in which the individual, while not intending to produce a specific result, was nevertheless aware that the group's actions would probably lead to that result and voluntarily accepted that risk[144]. This last circumstance requires more than mere negligence and is characterized in jurisprudence as *dolus eventualis*. In other words, within the third category of JCE, it is not necessary to show that the accused intended to commit the crime or knew with certainty that it would be committed; it suffices to prove that it was reasonably foreseeable to the accused that a genocidal act would be committed, even if he or she did not necessarily share the genocidal intent.

Turning to the remaining forms of individual responsibility, *aiding and abetting* constitutes an accessory form of liability consisting of making a substantial contribution to the commission of a crime. Specifically, "*aiding*" consists in providing assistance, while "*abetting*" entails facilitating the commission of the crime "through sympathy"[145]. For example, the *actus reus* of aiding and abetting may be satisfied by a commander who permits the use of resources - including human resources under his or her control - to facilitate the commission of the crime[146]. It should be noted that aiding and abetting may also occur by omission, provided that such omission is intended to assist, encourage, or support the commission of the crime and has a substantial effect upon it[147]. Even tacit approval or encouragement may be deemed a form of aiding and abetting, provided it can be shown that such conduct substantially contributed to the crime[148]. This implies that the accused held a position of authority, was physically present at

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143 *Ibid*.
144 ICTY, Appeals Chamber, *Prosecutor v. Brđanin Decision on Interlocutory Appeal*, IT-99-36-A, March 2004, §§ 5-6.
145 ICTY, Appeals Chamber, Prosecutor v. *Kvočka Judgment*, IT-98-30/1-T, 20 November 2001, § 254.
146 ICTY, Trial Chamber, *Prosecutor v. Blagojević Judgment*, IT-02-60-A, 9 May 2007, § 127.
147 ICTY, Appeals Chamber, *Orić Appeal*, IT-03-68-A, 3 July 2008, § 43.
148 ICTY, Appeals Chamber, *Brđanin Appeal*, IT-99-36-T, 1 September 2004, § 273.

the crime scene, and that their failure to intervene could be construed as tacit approval. Some jurisprudence, however, considers physical presence at the crime scene unnecessary, as participation may also arise from the mere fact of being "concerned with the killing"[149].

From a probative standpoint, the most problematic aspect emerging from ICTY jurisprudence is determining the precise meaning of the requirement that the *actus reus* of aiding and abetting be "*specifically directed*" towards the commission of the crime. The expression "*specific direction*" first appeared in the Appeals Judgment in *Tadić*[150]. Subsequently, in *Perišić*, the Appeals Chamber held that specific direction constitutes an element of the *actus reus* in cases of aiding and abetting liability[151]. This entails a nexus between the assistance provided by the accused and the crimes committed by the physical perpetrators, with such assistance being "specifically" directed towards the commission of relevant crimes.

Where the accused's acts occurred geographically close to the crimes committed by the physical perpetrator, "*specific direction*" may be implicitly demonstrated through other elements of liability, such as substantial contribution. Conversely, where the assistance provided occurred far from the location of the physical perpetrator's actions, "*specific direction*" must be explicitly established[152].

The *Perišić* case concerned the Chief of the General Staff of the Yugoslav Army. The Trial Chamber found that from September 1992 to November 1995, the Army of the Republika Srpska (VRS) had conducted a campaign of shelling and sniping in Sarajevo, causing the deaths of hundreds of civilians and injuries to thousands more. In the summer of 1995, the VRS had invaded the town of Srebrenica and carried out the forced transfer and massacre of hundreds of Muslim civilians and persons not actively taking part in hostilities. Similar crimes were found by the Trial Chamber in the city of Zagreb, where five persons were killed and 146 wounded on 2 May 1995, and a further two were killed and 144 wounded the following day.

The Trial Chamber found that Perišić had provided logistical assistance to the forces that had physically committed the crimes, which included supplying large quantities of ammunition and fuel, as well as technical assistance and training support. The Court also found that Perišić knew that the VRS operations included serious crimes against civilians, including the use of snipers during the siege of Sarajevo. However, it could not be proven beyond reasonable doubt that, based on his knowledge, Perišić could foresee that the VRS was implementing a radical and

[149] ICTY, Trial Chamber, *Tadić Trial*, IT-94-1-T, 7 May 1997, § 691.
[150] ICTY, Appeals Chamber, *Tadić Appeal*, IT-94-1-A, 15 July 1999, § 229.
[151] ICTY, Appeals Chamber, *Prosecutor v. Perišić Judgment*, IT-04-81/A, 28 February 2013, § 73.
[152] *Ibid.*, §§ 27, 37, 38, 73.

systematic plan to exterminate Muslims in Srebrenica[153]. In any case, the judges held that Perišić had nonetheless made a substantial contribution to these crimes and could therefore be found guilty of aiding and abetting, sentencing him to 27 years' imprisonment[154].

On appeal, however, the judges found that the "*specific direction*" of Perišić's conduct towards the events in Sarajevo and Srebrenica was not established, as the mere fact of providing assistance to the VRS military effort did not show that the assistance was specifically directed towards the commission of crimes of genocide[155]. Similar conclusions were reached by the Appeals Chamber in 2014 in *Šainović et al.*, where it annulled a previous conviction, clarifying that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime".

As for *mens rea*, proof is required of the intent to assist the crime's perpetrators and of knowledge of the nature of the actions committed by those perpetrators. In other words, the person responsible for aiding and abetting need not share the physical perpetrator's intent but must be aware of the essential elements of the crime, including the perpetrator's mental state[156]. Moreover, it is not necessary for the accused to know the precise nature of the crime committed; it is sufficient that he was aware that the commission of certain crimes was probably under way and that at least one was actually committed.

The sixth and final form of individual responsibility under the ICTY Statute is *command responsibility*, which is a unique legal construct without equivalent in any domestic legal system. This type of liability is grounded in the superior's power to control the acts of subordinates. In particular, for a person to incur superior responsibility for crimes committed by subordinates, three elements must be established: 1) the existence of a superior-subordinate relationship between the accused and the perpetrator of the crime; 2) the accused's actual or reasonably presumed knowledge that the crime had been committed or was about to be committed; and 3) the failure by the accused to take necessary measures to prevent or repress the commission of the crime.

Regarding the existence of a superior-subordinate relationship, jurisprudence has clarified that formal appointment is not necessary; authority may be *de facto* as well as *de jure*[157]. The relationship may be direct or indirect and may exist without immediate hierarchical proximity. Mere coordination is insufficient to establish such a relationship; it is necessary to demonstrate

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153 ICTY, Trial Chamber, Prosecutor v. *Perišić Judgment*, IT-04-81-T, 6 September 2011, §§ 1442-1579.
154 *Ibid*., §§ 1558-1650, 1840.
155 ICTY, Appeals Chamber, *Perišić Appeal*, IT-04-81-A, 28 February 2013, §§ 42-73.
156 ICTY, Appeals Chamber, *Prosecutor v. Aleksovski Judgment*, IT-95-14/1-A, 24 March 2000, § 162.
157 ICTY, Appeals Chamber, *Čelebići Appeal*, IT-96-21-A, 20 February 2001, §§ 192-194.

that the superior exercised effective control over subordinates, meaning the concrete ability to prevent or punish crimes[158]. An accused cannot be held responsible under article 7(3) of the Statute for failing to punish crimes committed by a subordinate before assuming control over that subordinate.

This position, however, is not without controversy in jurisprudence. In the *Popović et al.* Appeals Judgment, divergent views were expressed regarding Pandurević, commander of the Zvornik Brigade[159]. He had been absent from 4 to 15 July 1995 from command of the brigade, having been assigned to command a different group. On 14 July, the Zvornik Brigade had supported and facilitated the killing of about 500 Bosnian Muslim detainees in the Pilica Cultural Centre and later assisted in digging the mass grave and burying the bodies. The following day, Pandurević resumed command of the Zvornik Brigade and was immediately informed of the events. The Court found that he did not bear responsibility to investigate or punish his subordinates who had participated in the crimes, since at the time of their commission he was not designated as their commander.

The second element required for command responsibility is knowledge of the facts, which implies awareness that the crimes had been committed or were about to be committed. This may entail actual knowledge, to be proved through direct or circumstantial evidence, or presumed knowledge where the information available placed the superior in a position to know of the crimes[160]. Lack of knowledge does not serve as a defense if it results from negligence. Furthermore, relevant information must either be provided to the superior or be within his possession; it is not necessary that he has actually acquired it.

Regarding the duty to prevent and punish criminal conduct - the third element for command responsibility - jurisprudence consistently holds that the obligation to prevent arises when the superior becomes aware of the imminent commission of the crime by a subordinate, whereas the duty to punish arises after the crime has been committed. In any case, when a superior who, despite being aware of the imminent commission of the crime, fails to prevent it, he or she cannot rely in defense on having subsequently punished the perpetrators[161]. Where the superior lacks disciplinary power over subordinates, the duty to punish takes the form of an obligation to investigate, establish the facts, and report them to the competent authorities.

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[158] *Ibid.*, § 256.
[159] ICTY, Appeals Chamber, *Prosecutor v. Popović Judgment*, IT-05-88-A, 6 December 2013.
[160] ICTY, Appeals Chamber, *Čelebići Appeal*, IT-96-21-A, 20 February 2001, §§ 222-241.
[161] ICTY, Trial Chamber, *Blaškić Trial*, IT-95-14-T, 3 March 2000, §§ 335-336.

The foregoing, with reference to article 7 of the ICTY Statute, finds direct correspondence in article 6 of the ICTR Statute.
A further controversial issue, deserving of specific examination, concerns the not always straightforward distinction between perpetrators and accomplices, which therefore requires focused analysis in the following sub-paragraph.

2.3.1 Perpetrators and Accomplices: distinction and legal consequences

While the responsibility of perpetrators is undisputed, that of accomplices varies from jurisdiction to jurisdiction. In the specific case of genocide, an accomplice is the person who joins in a genocidal course of conduct perpetrated by another. Complicity can therefore exist only where the crime of genocide has actually been committed. Accordingly, proof of the occurrence of genocide must be established beyond reasonable doubt.
From the jurisprudence of the ad hoc international criminal tribunals, it emerges that establishing the crime of complicity in genocide requires the concurrent presence of two elements: *actus reus* and *mens rea*[162]. This is already apparent in the Statute of the International Criminal Tribunal for Rwanda, which in article 91 defines an accomplice as: 1) a person who, through gifts, promises, threats, abuse of authority or power, culpable machinations or artifices, directly incites the commission of such conduct or orders that such an act be committed; 2) a person who provides weapons, tools or other means to be used in the commission of the act with the clear awareness that they will in fact be used for that purpose; 3) a person who knowingly assists or aids the perpetrators of the genocidal act in preparing or planning the action or in carrying it out.
It follows that complicity in genocide may consist of three different forms of conduct: instigation, aiding and abetting, and providing means. It is worth noting that the ICTR Statute places particular emphasis on the accused's mental state, expressly requiring the prosecution to prove that the accused instigated or assisted in the commission of the act knowingly and voluntarily. This implies that it is not necessary to prove that the accused had the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such; it is sufficient to show that he was aware that the perpetrators were committing acts of genocide[163].

[162] J. W. Gold, *A Comparative Analysis Of The Mens Rea Requirement For Complicity As Applied In The International Tribunals And The Common Law Jurisdictions Of The United States, England & Australia*, "War Crimes Memoranda", 198, 2003, p. 7.
[163] *Ibid*., p. 9.

The *Akayesu* case illustrates, in particular, that the distinction between the crime of genocide and complicity in genocide rests precisely on intent and the mental element. The ICTR clarified that, pursuant to article 6(1) of its Statute, a person who aids or abets another in the commission of genocide can be considered guilty of genocide only if it is shown that he possessed the specific intent to destroy, in whole or in part, a protected group. Conversely, where a person lacks specific intent but is aware of the principal perpetrator's intent to commit genocide, he may be held responsible only for complicity. The Court expressly stated: "*the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the dolus especialis of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such*"[164].

While the Court thus clarifies the legal difference between genocide and complicity in genocide regarding subjective elements, it leaves open another issue by failing to provide a clear explanation of the difference between complicity and aiding and abetting - assuming such a distinction exists.

The International Criminal Tribunal for the former Yugoslavia provided a partial answer to this question in the *Stakić* case, the first international case to address directly the distinction between "*aiding and abetting*" and "*complicity in genocide*"[165]. The Trial Chamber took a position divergent from that adopted by the ICTR in *Akayesu*. While the ICTR considered there to be a distinction between the two, the ICTY took the opposite view, stating that such a distinction was "not sustainable in law"[166]. The Court clarified that, even for aiding and abetting, the only *mens rea* required was knowledge of the elements of the crime of genocide, including the genocidal intent of superiors or others, and acceptance of the course of events, taking into account also the foreseeable consequences of the support provided.

The result was that the legal distinction between the two offences collapsed, and aiding and abetting was deemed to be a form of complicity in genocide. This position is consistent with that expressed in *Tadić*, where the judge observed that "*in the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal*"[167].

The ICTY's position has been criticized, particularly regarding the idea that the *mens rea* for complicity in genocide could be lower than that of the principal perpetrator. Such criticism rests

[164] ICTR, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998, § 544.
[165] ICTY, Trial Chamber, *Prosecutor v. Stakić Judgment*, IT-97-24-T, 31 October 2002.
[166] *Ibid*., § 65.
[167] ICTY, Trial Chamber, *Prosecutor v. Tadić Judgment*, IT-94-1-T, 15 July 1999, § 229.

on the fact that, in cases of genocide, it is often the case that the accomplice possesses a clear genocidal intent, to the point where, according to some, there is no distinction between perpetrator and accomplice as regards intent. The view that the *mens rea* of the accomplice would consist solely of knowledge and not of intent is unconvincing. Indeed, a person who supplies a means to the perpetrator or incites him to act, knowing that an act of genocide will be committed, in fact fully intends to participate in the genocide. Therefore, the *mens rea* or specific intent of the accomplice would be entirely equivalent to that of the principal perpetrator, which justifies treating the culpability of the accomplice on the same footing as that of the perpetrator in criminal law[168].

Subsequently, both the ICTR and ICTY adopted an approach tending to exclude the distinction between the two offences. Both tribunals now agree that those who aid or abet genocide, and those complicit in genocide, must possess specific intent in the same way as the perpetrator. The risk inherent in this approach is that a person who knew that the acts committed would lead to genocide but for whom specific intent to destroy, in whole or in part, a group cannot be proven, would remain essentially unpunished[169].

Further insight may be drawn from a comparison between the terminology used in the Statutes of the ad hoc tribunals and that used in the Genocide Convention. As previously noted, in the Genocide Convention, liability applies exclusively to those who commit genocide, conspire to commit genocide, incite genocide, attempt to commit genocide, or are complicit in genocide. The drafters of the ICTR Statute chose a partially different phraseology: Article 6(1) of the Statute provides for liability for those who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, execution, or preparation of the crime. Based on this wording, liability also applies to those whose conduct does not meet the definitional threshold of the commission of the crime. This implies that the concept of culpability is broader in the ICTR Statute than in the Genocide Convention.

Interpretation of article 6 is further complicated by the fact that the notion of aiding and abetting appears largely to overlap with that of complicity in genocide, as noted above. A careful reading of the provision reveals that aiding and abetting is distinct from complicity in genocide. Indeed, from the combined reading of articles 6(1) and 2(3)(a) of the ICTR Statute, it follows that the perpetrator must possess the specific intent to destroy the group, which constitutes the *condicio*

[168] See W. A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, "International Review of the Red Cross", 83.842, 2001, p. 446.

[169] See D. M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters*, "Journal of Criminal Law and Criminology", 98.3, 2008, p. 929.

sine qua non of the crime of genocide; whereas, from the combined reading of articles 6(1) and 2(3)(e), it appears that complicity in genocide requires a less intense *mens rea*, namely a specific intent without a specific motive[170].

In other words, a person convicted of complicity in genocide must have known that his or her actions would contribute to the destruction, in whole or in part, of a national, ethnic, racial, or religious group; however, he must have acted not because of the victims' status, but in order to gain an economic, territorial, or political advantage, or for some other non-specific motive. Different still is the case of the person charged with aiding and abetting, for whom a conviction requires proof of the specific intent to destroy the protected group, and therefore the precise will to target the victims as members of that particular group.

In essence, while the person guilty of aiding and abetting shares the specific intent with the principal perpetrator - both intending to target the victims because they are part of the group to be destroyed - the accomplice, although aware of a plan to destroy the group, provides his assistance not to attack the victims as members of the group, but to derive some other form of advantage.

Once complicity in genocide is identified as conduct distinct from aiding and abetting, and characterized by a reduced *mens rea*, it becomes possible to encompass within it situations that would otherwise not be covered by international criminal law provisions on genocide. A proper interpretation of complicity in genocide as outlined above would capture the responsibility of individuals who contributed to the implementation of a genocidal plan with specific intent but without a specific motive. This would include, for instance, political leaders who planned or facilitated the commission of genocide not with the intent to destroy, in whole or in part, a group as such, but to obtain other forms of advantage. Similarly, international arms traffickers who become complicit in genocidal plans not with the intent to destroy groups, but solely for economic profit, could also be prosecuted[171].

It may therefore be concluded that, this latter interpretation is considered preferable because it would allow the crime of complicity in genocide to cover all those individuals who, lacking the nexus between specific intent and specific motive, could not otherwise be prosecuted for aiding and abetting genocide.

[170] *Ibid*., p. 943.
[171] *Ibid*., pp. 945-948.

2.4 Judicial Precedents on Individual Intent to Destroy

As highlighted in the preceding paragraphs, the subjective element of the intent to destroy constitutes an essential component of the offence of genocide. Consequently, this requires particular attention also at the evidentiary stage. Indeed, it becomes necessary to reconcile the evidentiary standard of *beyond reasonable doubt* with the concrete demands of justice and the effective possibilities of proof. In cases of indictment for genocide, therefore, the judicial determination of intent presents specific challenges, especially considering that the extraordinary and large-scale nature of the alleged events generally transcends the actions of a single individual. On the other hand, such actions are typically embedded in a complex context, one which even a single individual, including a head of State, is unlikely to be able to fully control.

From a legal and logical standpoint, two main categories of problems arise[172]. The first concerns the correct application of the inferential model, given that reliance on such a method must nevertheless be reconciled with the rights of the accused. On this point, as early as the *Akayesu* case of 1998, the judges stated that "*in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact*"[173]. In this regard, it should be clarified that within the terminology of the ICTR, the qualification of facts as "*presumptions*" must be understood in the sense of *praesumptiones iuris tantum* - that is, as guiding criteria for an assessment based on experience, which can of course be rebutted in the concrete case. The validity of inference, on which the Trial Chamber of the ICTR subsequently elaborated in later decisions, was also confirmed by the Appeals Chamber of the same tribunal. The latter, in the *Kayishema and Ruzindana* case of 2001, noting that explicit manifestations of criminal intent are rare for obvious reasons, held that "*in order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances*"[174].

This approach is widely shared by the ICTY, whose Appeals Chamber, in addition to generally admitting that proof of intent may be inferred both from facts and from circumstances, also identified the context in which the act is committed as the parameter to be considered in determining intent. As will be further explored below, in the *Krstić* case of 2004 the Chamber

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[172] See C. D. Leotta, *L'*intent to destroy *nel crimine di genocidio. Un esame della giurisprudenza internazionale*, "Archivio Penale", 3, 2012, pp. 1-25.

[173] ICTR, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998, § 523.

[174] ICTR, Appeals Chamber, *Prosecutor v. Kayishema and Ruzindana Judgment*, ICTR-95-1-T, 1 June 2001, § 159.

even admitted the possibility of validly inferring the existence of genocidal intent in circumstances where it was not possible to attribute such intent to individually identifiable persons[175].

Secondly, there arises the need to evaluate and correctly classify the facts from which intent may be deemed established. In this regard, a valuable source is the *Application for a Warrant of Arrest against Al Bashir* of 2008, in which the Office of the Prosecutor of the International Criminal Court provided a reasoned synthesis of the main criteria developed up to that time by the ad hoc Tribunals[176]. Among these criteria, eight stand out.

The first consists in the "*pre-existing historical and political background*", that is, the pattern of conduct displayed in previous years by the accused, his opponents, and his allies. Taking this element into account enables the placement of the alleged acts - and thus the formation of intent - within a well-defined historical context. From this perspective, for the purposes of assessing individual responsibility, analysis of the background is an indispensable step, although due to its overly general nature it cannot alone serve a conclusive evidentiary function.

The second criterion indicated by the Court is the "*systematic targeting of victims on account of their membership of a particular group*". This parameter considers both the manner of selecting victims and the systematic character of the attack. With regard to the former, the acts must appear to have been committed against one or more persons by virtue of their membership in a specific group, and not because of their individual identity[177]. As for the systematic nature of the attack, this may be demonstrated by the repetition of acts and by the "systematic manner of killing", which should be assessed primarily in light of the number of victims[178]. Finally, where the alleged facts are proven, they must also be evaluated in consideration of the hierarchical position of the accused and his capacity to exercise control.

The third criterion emerging from the Court's Application is the "*scale of the atrocities committed*", which may be understood as a synthetic assessment of the magnitude of all the atrocities committed.

Another criterion consists in the "*statements*" of individuals involved in the commission of genocide, meaning all declarations in which genocidal intent is manifested, whether more or less explicitly. Jurisprudence has clarified that such genocidal speeches may be relevant both

[175] ICTY, Appeals Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-A, 19 April 2004, § 34.
[176] ICC, Office of Prosecutor, *Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008*, ICC-02/05, 12 September 2008, Annex A, §§ 366-400.
[177] ICTR, Trial Chamber, *Prosecutor v. Rutaganda Judgment*, ICTR-96-3-T, 6 December 1999, § 60.
[178] ICTR, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998, § 524; ICTR, Trial Chamber, *Prosecutor v. Kayishema and Ruzindana Judgment*, ICTR-95-1-T, 1 June 2001, §§ 93 & 534.

when addressed directly to the victims and when directed to co-perpetrators of the crime, even independently of their qualification as incitement or advocacy. For example, in *Kayishema*, the ICTR, for the purpose of assessing intent, considered it relevant that public encouragement to commit acts of destruction described such acts as "work to be accomplished", and that chants or songs celebrating the destruction of the victim group were used[179]. Similarly, jurisprudence has emphasized that verbal abuse directed at victims during the execution of genocidal acts may serve as evidence of intent. Judges, for instance, have noted the frequent attribution to victims of animalistic or monstrous epithets, which indirectly reinforce calls for mass violence by diminishing the perception of atrocities[180].

The ICC further identifies as a fifth criterion the practice of "*forcible transfers*", traditionally understood in international law as movements within the borders of the State, distinct from deportations, which involve displacement across borders. Forcible transfers are of dual significance in genocide proceedings: on the one hand, they may constitute a typical act where they are directed toward the physical or biological destruction of the group; on the other, they may evidence intent. For example, in *Krstić* the ICTY Appeals Chamber held that the forced transfer of group members could be considered not as a typical act, but as relevant evidence of genocidal intent[181]. A synthesis of both aspects is found in the *Stakić* judgment, where the Trial Chamber noted that the forced transfer of persons may support proof of intent provided that, in the concrete case, methods aimed at group destruction are present[182].

As a sixth criterion, the Court identifies acts of "*sexual violence*", particularly rape, recognized as genocidal conduct since the *Akayesu* judgment, insofar as they may be characterized as acts aimed at causing serious physical and psychological harm to the victim or as measures intended to prevent births within the group. For the purpose of establishing the intent to destroy, the modalities in which sexual violence is perpetrated are of significance: for example, whether rape is accompanied by humiliating verbal expressions referring to the victim's ethnic origin, or by explicit statements invoking the destruction of the victim's group. Similarly, emblematic indicators of destructive intent include the selection of rape victims based on their ethnic or racial identity, and the commission of the act in public view, circumstances demonstrating that

[179] ICTR, Trial Chamber, *Prosecutor v. Kayishema and Ruzindana Judgment*, ICTR-95-1-T, 1 June 2001, §§ 538-540; ICTR, Trial Chamber, *Prosecutor v. Gacumbitsi Judgment*, ICTR-2001-64-T, 17 June 2004, § 252.
[180] ICTR, Trial Chamber, *Prosecutor v. Kayishema and Ruzindana Judgment*, ICTR-95-1-T, 1 June 2001, § 538; see also J. Sémelin, *Purifier et détruire. Usages politiques des massacre et génocides*, Le Seuil, Paris, 2005, Italian Translation, *Purificare e distruggere. Usi politici dei massacri e dei genocidi*, Einaudi, Torino, 2007, pp. 3-58.
[181] ICTY, Appeals Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-A, 19 April 2004, §§ 31-33.
[182] ICTY, Trial Chamber, *Prosecutor v. Stakić Judgment*, IT-97-24-T, 31 July 2003, § 557.

the act is not carried out for lust but as an instrument of annihilation[183]. In the *Al Bashir* case, the ICC Prosecutor emphasized the statements accompanying rapes - "*we would rape them again to change the color of their children*" - highlighting how such remarks clearly manifested the intent to destroy the group as such[184].

With regard to the analysis of evidence of intent, the ICC further assigns significance to the "*strategy to deny and conceal the genocide*", that is, the denial or attempted denial of genocidal acts already committed. In this respect, with reference to *Al Bashir*, the Court specified that the strategy of silence, practiced concurrently with or immediately after genocidal acts and enabled by complete control of the media and State structures, is especially relevant as a mechanism directly or indirectly facilitating the destruction of the group, since silence imposed by force and founded on fear ensures acceptance of violence against victims[185].

Finally, the ICC considers as relevant *presumptions of fact* "*attacks on the cultural and religious property*", which, though not qualifying as material acts of genocide, nevertheless merit evaluation as evidence of genocidal intent. The *Krstić* judgment provides a clear rationale on this point, explaining that "*where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group*"[186].

Beyond the guidance offered by the ICC in the important *Al Bashir* Application, further elements of interest emerge from jurisprudence in relation to the methods of proving intent. Notably, there is a prevailing tendency to consider the existence of a genocidal plan not as an element of the offence, but rather as evidence of intent. For example, in *Kayishema* the ICTR noted that, although the existence of a specific plan of destruction does not itself constitute an element of genocide, nevertheless "*it would appear that it is not easy to carry out a genocide without such a plan, or organization*"[187]. Similarly, in *Krstić*, the ICTY Appeals Chamber clarified that the existence of a plan to destroy the group, rather than being an element of the offence of genocide, may serve as evidence of the systematic and large-scale nature of the attack against civilian populations[188].

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[183] ICTR, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998, §§ 421-423 & 438.
[184] ICC, Office of Prosecutor, *Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008*, ICC-02/05, 12 September 2008, Annex A, § 395.
[185] *Ibid*., §§ 396-399.
[186] ICTY, Trial Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-T, 2 August 2001, § 580.
[187] ICTR, Trial Chamber, *Prosecutor v. Kayishema and Ruzindana Judgment*, ICTR-95-1-T, 1 June 2001, § 94.
[188] ICTY, Appeals Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-A, 19 April 2004, § 225.

The examination of several case studies, which will be conducted in the following sub-paragraphs, may contribute to a further classification of the issues outlined above.

2.4.1 Jean Kambanda's Admission of Intent to Destroy

The *Kambanda* case constitutes the first trial concluded before the International Criminal Tribunal for Rwanda, as well as the first case involving a confession of genocide. Jean Kambanda became Prime Minister of the Rwandan interim government on 9 April 1994, three days after the plane carrying then-President of Rwanda Juvénal Habyarimana and President of Burundi Cyprien Ntaryamira mysteriously crashed, an event which also marked the beginning of three months of massacres. The plane crash was likely caused by an attack carried out by Hutu extremists, who immediately thereafter unleashed a campaign of violence throughout Rwanda [189]. This campaign culminated in the killing of approximately 800.000 people, predominantly Tutsi, as well as the forced displacement of more than two million people within Rwanda and the flight of a further two million refugees to neighboring countries, including Zaire, Burundi, Tanzania, Kenya, and Uganda.

Immediately following Habyarimana's death, the presidential guard, the Hutu-dominated national army, and Hutu "death squads" launched a systematic campaign of killings and genocide against the Tutsi population and hundreds of moderate Hutu opponents. The genocide ended in July 1994, when the Rwandan Patriotic Front (RPF) defeated the Hutu militias and a new government was established, formed by a coalition composed of the RPF and four other political parties. With significant representation of both Tutsi and Hutu in senior positions, the new government committed itself to building a pluralist democracy and to abolishing the ethnic classification system previously used by the regime. On 1 July 1994, the United Nations Security Council adopted Resolution 935, mandating the Secretary-General to establish a Commission of Experts to investigate possible violations of humanitarian law, including the commission of acts of genocide in Rwanda. In October 1994, the Commission reported to the Security Council that widespread and systematic violations of international humanitarian law had been committed in Rwanda, amounting to acts of genocide.

During Kambanda's tenure as Prime Minister, which lasted until July 1994, the most dramatic events of the Rwandan genocide took place, with a significant number of crimes committed

[189] For the historical background see P. J. Magnarella*, Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, "Florida Journal of International Law", 11.3, 1997, pp. 517-538; *Id.*, *The U. N. Criminal Tribunal for Rwanda Concludes its First Case: A Monumental Step Towards Truth*, "African Studies Quarterly", 2.3, 1998, pp. 37-43.

against the Tutsi population. Shortly before the RPF seized control of the country, Kambanda fled to Kenya with his family. When the ICTR was established and its Statute adopted, the Tribunal requested the Kenyan authorities to arrest Kambanda, and six other Rwandan nationals suspected of genocide. He was arrested on 18 July 1997, together with the other suspects, and transferred to the ICTR detention facility in Arusha. Judge Yakov Ostrobsky of Russia, to whom the case was assigned, confirmed the detention and issued an indictment containing six counts: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity, specifically murder and extermination[190].

On 1 May 1998, at his first appearance before the Trial Chamber, Kambanda pleaded guilty to all six counts. While many suspects of genocide could argue in their defense that the killings of 1994 were part of an ordinary civil war, without the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, Kambanda admitted that the extermination of the Tutsi was attributable to the policy of his government. Just days earlier, on 28 April 1998, Kambanda had submitted to the same Chamber a document entitled "*Plea Agreement between Jean Kambanda and the Office of the Prosecutor*", in which, while requesting protective measures for his family, he acknowledged his guilt with respect to all relevant facts alleged against him[191].

First, he admitted that in Rwanda in 1994 there had been a widespread and systematic attack against the civilian Tutsi population with the intent to exterminate it, resulting in mass killings of hundreds of thousands of people, including women, children, and the elderly, in places where victims had sought refuge, such as churches and schools. Secondly, he admitted that, as Prime Minister of the interim government of Rwanda from 8 April to 17 July 1994, he presided over a Council of Ministers composed of twenty members and exercised *de jure* authority and *de facto* control over his government, which determined national policy and commanded the armed forces. He also admitted that, in his capacity as Prime Minister, he exercised *de jure* and *de facto* authority over both civilian and military officials.

Thirdly, Kambanda acknowledged that he had participated in Cabinet meetings, ministerial sessions, and conferences with prefects during which the course of the massacres was discussed, and that he had taken no measures to stop them. Moreover, he admitted having contributed to the removal of the prefect of Butare, who opposed the massacres, and to the appointment of a

[190] ICTR, Trial Chamber, *Prosecutor v. Kambanda Judgment*, ICTR-97-23-S, 4 September 1998.
[191] *Ibid.*, § III.A, 39 ff.

new prefect who ensured the continuation of the massacres in that area. He also admitted attending a security meeting held in Gitarama in April 1994 with the acting President, the Chief of Staff of the Rwandan Armed Forces, and other senior officials, at which support by the armed forces for the war against the RPF and its alleged accomplices - identified as Tutsi and moderate Hutu - was discussed.

He further acknowledged that he had conceived the contents of Civil Defense Directive 024-0273 of 25 May 1994 (published 8 June 1994), which encouraged the *Interahamwe* death squads, already engaged in mass killings of Tutsi civilians, to continue their operations. He also admitted that prior to 6 April 1994, in cooperation with the Rwandan armed forces, he had organized and initiated the military training of youth affiliated with the political parties supporting him, with the intent of using them in the massacres. In this context, he recognized that his government had distributed weapons and ammunition to armed groups and confirmed that he had arranged for roadblocks to be established by regular armed forces and death squads in Kigali and elsewhere as soon as Habyarimana's death was announced on the radio.

He admitted to the use of the media as part of the plan to mobilize and incite the population to commit massacres of Tutsi civilians and acknowledged the existence of groups within political, military, and paramilitary structures that had planned the elimination of the Tutsi and moderate Hutu. Concerning the media, he admitted that on 21 June 1994, in his capacity as Prime Minister, he had given explicit support to *Radio Télévision Libre des Mille Collines* (RTLM), knowing it to be a broadcasting station whose programs incited massacres, physical and psychological violence, and persecution of Tutsi and moderate Hutu. Speaking on the station, he encouraged it to continue inciting massacres, explicitly declaring that the station was "an indispensable weapon in the fight against the enemy".

In the plea agreement, Kambanda further admitted that the numerous Council of Ministers meetings held between 8 April and 17 July 1994 instigated, assisted, and supported prefects, mayors, and members of the population in committing massacres and killings of Tutsi and moderate Hutu civilians. He acknowledged that ministers of his government visited several prefectures - including Butare, Gitarama, Gikongoro, Gisenyi, and Kibuye - to encourage the population to continue the massacres. He specifically admitted that on 3 May 1994, when personally asked to take measures to protect children who had survived a massacre in a hospital, he refused to act; as a result, later that same day, after his meeting, the children were killed. He confessed to having ordered the establishment of roadblocks to identify Tutsi destined for elimination. Overall, he concluded by admitting that he was aware that persons under his responsibility were committing massacres of Tutsi, and that he had done nothing to prevent or

punish the perpetrators, stating further that he had himself been an eyewitness on several occasions to mass killings and had regularly received reports from prefects concerning them.
Upon this confession, given voluntarily and without threats or promises, the Trial Chamber found Kambanda guilty on all six counts and, on 4 September 1998, sentenced him to life imprisonment.
Kambanda's confession regarding the existence of a deliberate and premeditated governmental plan of genocide constituted a key development for the future work of the ICTR. Indeed, his admission destroyed the credibility of those who denied that genocide had taken place, including revisionist historians. It also had a significant impact on the defense strategies of other defendants and the approximately 100.000 genocide suspects imprisoned in Rwanda.

2.4.2 The Prosecutor v. Laurent Semanza

The *Semanza* judgment is of particular significance because it addressed, *inter alia*, crucial issues concerning serious violations of article 3 of the 1949 Geneva Conventions, as well as matters relating to complicity in genocide[192]. At the time of the massacres committed in Rwanda between May and July 1994 - during which, in approximately 100 days, more than 800.000 people were exterminated, all of them Tutsi or moderate Hutu - Laurent Semanza was mayor of Bicumbi, a town in central Rwanda. The ICTR Trial Chamber indicted Semanza on 14 counts: genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity, extermination, murder, torture, persecution, rape, as well as various violations of article 3 of the 1949 Geneva Conventions. At the conclusion of the proceedings, in its judgment of 15 May 2003, the Trial Chamber found Semanza guilty of complicity in genocide, crimes against humanity, extermination, murder, torture, and rape[193].
With respect to the genocide charges, the Court was called upon to examine the relationship between the commission of genocide and complicity in genocide. In this regard, the judges observed that, although the indictment did not frame the two charges as mutually exclusive, nonetheless "*the commission of a crime and the complicity in that crime are alternative charges*" and must be treated as such[194].
As to the charges relating to the commission of acts of genocide, the indictment did not specify Semanza's mode of participation in the genocidal plan but rather made a general reference to

[192] See R. Boed, *Current developments in the jurisprudence of the International Criminal Tribunal for Rwanda: Judgment of Trial Chamber in the case of* The Prosecutor v. Laurent Semanza, "International Criminal Law Review", 3, 2003, pp. 405-413.
[193] ICTR, Trial Chamber, *Prosecutor v. Semanza Judgment*, ICTR-97-20-T, 15 May 2003.
[194] *Ibid*., § 397.

his criminal responsibility under article 6(1) and (3) of the ICTR Statute. The Court observed that where an accused is charged with having committed genocidal acts, any additional indictment for complicity in genocide would be superfluous, "*as it charges the identical underlying criminal conduct as complicity to commit genocide*"[195]. The Court thus concluded that where an accused is charged with both direct responsibility and complicity in genocide for the same criminal acts, the Trial Chamber has a duty to narrow the scope of assessment so as to eliminate any overlap between the charges. This conclusion was also premised on the understanding that aiding and abetting in genocide, under articles 2(3)(a) and 6(1) of the ICTR Statute, must be considered equivalent to complicity in genocide under article 2(3)(e) of the same Statute[196]. In the context of genocide, no material distinction can be made between the two forms of conduct, and moreover the *mens rea* requirement is the same for both forms of participation: "*the accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide*"[197].

Having determined that Semanza could not be convicted simultaneously of both commission of genocide and complicity in genocide, the Court then assessed which of the two charges was supported by conclusive evidence. After examining the evidentiary record, the Chamber found that Semanza had aided and abetted the principal perpetrators of genocide and was therefore guilty of complicity in genocide. As previously noted, the Court, dissenting from earlier jurisprudence which had considered aiding and abetting materially distinct from complicity, held instead that complicity under article 2(3)(e) of the Statute incorporated acts of aiding and abetting genocide under articles 2(3)(a) and 6(1).

Regarding crimes against humanity and serious violations of article 3 of the 1949 Geneva Conventions, the Court found beyond reasonable doubt that Semanza had aided and abetted intentional killings in two locations. However, it could not be proven beyond reasonable doubt that he had instigated sexual violence and torture against one victim and the murder of another, nor that he had personally committed torture and murder against a third victim[198]. Of particular significance is the way in which the Court evaluated such conduct in light of article 3. Jurisprudence of both the ICTR and ICTY had consistently held that, for an act to qualify as a

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[195] *Ibid*., § 396.
[196] *Ibid*., § 394; See ICTR, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998, § 547.
[197] *Ibid*., §§ 394-395.
[198] ICTR, Trial Chamber, *Prosecutor v. Semanza Judgment*, ICTR-97-20-T, 15 May 2003, §§ 535 & 551.

serious violation of article 3, it must be shown that there existed a nexus between the alleged violation and the internal armed conflict in which it occurred[199].

Until the Semanza judgment, ICTR Trial Chambers had consistently applied a very high threshold in establishing such a nexus, requiring a direct connection between the alleged act and the armed conflict[200]. In Semanza, however, the judges adopted a partially different approach, guided by the ICTY Appeals Chamber in *Kunarac*, which held that "The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established […] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict"[201].

Applying this jurisprudential standard, the judges concluded that Semanza's acts were closely related to the armed conflict. In particular, the accused had participated in massacres of refugees in two communes by mobilizing militia from the death squads and government soldiers, transporting weapons to massacre sites, assisting in the identification and killing of civilian refugees, and encouraging subordinates, in the presence of both military and civilian officials, to rape women before killing them[202]. It further emerged that, in one instance, after interrogating a refugee about the progress of the Rwandan Patriotic Front forces and receiving no answer, Semanza and an accomplice struck the man repeatedly with a machete, killing him[203]. The Trial Chamber also found that civilian and military authorities, together with influential figures, had fueled the ongoing armed conflict between the Rwandan government forces and the RPF in order to kill and mistreat the Tutsi minority in the two communes. Evidence demonstrated specifically that government soldiers had played an active role in the attacks in which Semanza participated, and that their involvement significantly influenced the way the killings were perpetrated. The judges were thus able to conclude that the participation of government soldiers

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[199] See e.g. ICTR, Trial Chamber, *Prosecutor v. Bagilishema Judgment*, ICTR-95-1A-T, 7 June 2001, § 105; ICTR, Trial Chamber, *Prosecutor v. Musema Judgment*, ICTR-96-13-T, 27 January 2000, § 259; ICTY, Appeals Chamber, *Prosecutor v. Kunarac et al. Judgment*, IT-96-23-A, 12 June 2002, § 55; ICTY, Appeals Chamber, *Prosecutor v. Tadić Judgment*, IT-94-1-AR72, 2 October 1995, § 70.

[200] For analysis of this jurisprudence, see R. Boed, *Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda*, "Criminal Law Forum", 13.3, 2002, pp. 293-322, 317-320.

[201] ICTY, Appeals Chamber, *Prosecutor v. Kunarac et al. Judgment*, IT-96-23-A, 12 June 2002, § 58.

[202] ICTR, Trial Chamber, *Prosecutor v. Semanza Judgment*, ICTR-97-20-T, 15 May 2003, § 520.

[203] *Ibid*., § 521.

established the required nexus linking the massacres committed by Semanza to the armed conflict[204].

With respect to the cumulative charges of murder and extermination as crimes against humanity, the Court held that Semanza's participation in the two massacres mentioned above established his guilt also for these additional crimes, given that the factual basis was identical[205]. In this regard, the judges also referred to the "*reciprocal speciality test*" applied by the ICTR Appeals Chamber in *Musema*[206]. This test provides that cumulative charges under different provisions of the Statute, based on the same conduct, are permissible only if each provision requires proof of a materially distinct element. An element is materially distinct if it requires proof of a fact not required by the other provision.

Applying this test to Semanza, the judges concluded that under the ICTR Statute, crimes against humanity of extermination and murder are legally distinct: extermination requires proof of mass killings, whereas murder requires proof of premeditation, which is not required for extermination[207]. At the same time, the judges acknowledged the ICTY Appeals Chamber's warning against the mechanical and indiscriminate application of this test[208]. On this basis, the Court noted that in the present case it was difficult to imagine that the accused could have perpetrated mass killings of civilians, with the awareness of operating within a broader discriminatory attack, without a degree of intent that closely approached premeditation[209]. Consequently, given that in both cases some form of premeditation could be established, there was a risk that the same facts would serve to prove both the mental element of murder and that of extermination. For this reason, Semanza could not be convicted of both murder and extermination. Upon examining the evidentiary record, the charge of extermination as a crime against humanity was deemed more appropriate. The same test was applied to the other charges, guiding the Court's evaluation of the evidence.

Therefore, the Trial Chamber sentenced Semanza to 25 years' imprisonment, later increased to 35 years on appeal, as the Appeals Chamber found that he bore greater responsibility for the massacre and rape of Tutsi civilians in the Musha Church[210].

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[204] *Ibid.*, §§ 519 & 521.
[205] *Ibid.*, § 500.
[206] ICTR, Trial Chamber, *Prosecutor v. Musema Judgment*, ICTR-96-13-T, 27 January 2000, § 365.
[207] ICTR, Trial Chamber, *Prosecutor v. Semanza Judgment*, ICTR-97-20-T, 15 May 2003, §§ 334-339 & 500.
[208] ICTY, Appeals Chamber, *Prosecutor v. Kunarac et al. Judgment*, IT-96-23-A, 12 June 2002, §§ 168-174.
[209] ICTR, Trial Chamber, *Prosecutor v. Semanza Judgment*, ICTR-97-20-T, 15 May 2003, §§ 502-504.
[210] ICTR, Appeals Chamber, *Prosecutor v. Semanza Judgment*, ICTR-97-20-A, 20 May 2005.

2.4.3 The Prosecutor v. Radislav Krstić

As anticipated in the previous paragraphs, in mid-July 1995, during the armed conflict in the former Yugoslavia, members of the VRS massacred approximately 8.000 Bosnian Muslims in the town of Srebrenica, located in the eastern part of Bosnia-Herzegovina. This massacre had a profound impact because Srebrenica was within a United Nations safe area established to protect civilians from the violence of the ongoing armed conflict. At the time of the events, Radislav Krstić was a general of the VRS as well as a member of the Main Staff, and he was entrusted with command responsibilities over the Drina Corps, a subunit of the VRS stationed in Srebrenica. VRS soldiers expelled the Bosnian Muslim women, children, and elderly from the town and systematically murdered the remaining men, thereby executing a plan devised by the VRS Main Staff.

When the ICTY was established, Krstić was tried and convicted at first instance on 2 August 2001 for various crimes connected with his role in the Srebrenica massacre[211]. In particular, he was found guilty as a perpetrator of acts of genocide and, on this ground, was sentenced to 46 years of imprisonment. On 19 April 2004, the Appeals Chamber of the ICTY reviewed the conviction, finding that the evidence was insufficient to establish that Krstić himself possessed the specific genocidal intent[212]. More specifically, since the element of specific intent could not be demonstrated, the Appeals Chamber substituted the conviction for commission of genocide with a conviction for aiding and abetting genocide.

The Krstić appeal judgment constituted a turning point in the jurisprudence of international criminal courts, as it provided significant clarifications and new perspectives[213]. First, the ruling confirmed beyond reasonable doubt that genocide had been perpetrated in Srebrenica against the Bosnian Muslim population. This is particularly significant because, despite the widespread violence that characterized the conflict in the former Yugoslavia during the 1990s, the Srebrenica events remain the only episode officially recognized as genocide by the ICTY. Secondly, the Krstić case narrowed the scope of individual criminal responsibility for acts committed by collectively acting groups, while ensuring that individuals could still be held accountable for collective violence through charges of aiding and abetting.

Regarding the determination of the genocidal nature of the acts committed in Srebrenica, the Appeals Chamber clarified that the killing of the male members of a specific ethnic group in a

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[211] ICTY, Trial Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-T, 2 August 2001.
[212] ICTY, Appeals Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-A, 19 April 2004.
[213] See M. Drumbl, *Prosecutor v. Radislav Krstić: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting*, “Washington and the University School of Law”, 5.2, 2004, pp. 433-449.

given local community, with the intent to destroy that group, constitutes genocide. In his defense at both trial and appeal, Krstić argued that the massacred Bosnian Muslims represented a community too limited in scope for genocide to be established. However, both the Trial and the Appeals Chambers clarified that genocide may be found whenever the intent to destroy a protected group, in whole or in part, is proven, provided that the targeted part constitutes a substantial component of the group. In particular, the targeted part may be considered substantial when it is numerically significant, plays a meaningful role or function within the group, and when the perpetrators specifically and deliberately aim to destroy it in order to strike the group as a whole[214]. On this point, the Trial Chamber had already held that "the intent to kill the men [of military age] amounted to an intent to destroy a substantial part of the Srebrenica Bosnian Muslim group"[215]. The Appeals Chamber upheld this conclusion, while reinforcing it with four additional elements.

First, it emphasized the indiscriminate nature of the killings, as the evidence showed that the VRS made no distinction between combatants and civilians during the mass executions and even killed disabled persons who could never have fought[216]. Secondly, the judges noted that the expression "*men of military age*" used by the Trial Chamber was inappropriate, since among the victims were also very young boys not normally considered of military age[217]. Thirdly, the Appeals Chamber stressed the impact of the killing of the men on the survival of the community, observing that, given the patriarchal nature of Bosnian Muslim society in Srebrenica, the extermination of such a number of men would inevitably result in the physical destruction of the Bosnian Muslim population of the town[218]. Finally, the forced transfer of women, children, and the elderly was considered an additional means of achieving the physical destruction of the Srebrenica Bosnian Muslim community, eliminating any possibility of its reconstitution in the area.

On this last point, the Appeals Chamber observed that although forced transfer does not in itself constitute a genocidal act under the ICTY Statute, it can serve as evidence from which genocidal intent may be inferred[219]. Indeed, genocidal intent was attributed to the VRS Main Staff inferentially, on the basis of circumstantial evidence, under the principle that "the inference that

[214] ICTY, Appeals Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-A, 19 April 2004, § 12.
[215] ICTY, Trial Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-T, 2 August 2001, § 634.
[216] ICTY, Appeals Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-A, 19 April 2004, § 26.
[217] *Ibid.*, § 27.
[218] *Ibid.*, § 28.
[219] *Ibid.*, § 33.

a particular atrocity was motivated by genocidal intent may be drawn [...] even where the individuals to whom the intent is attributable are not precisely defined”[220].

The Appeals Chamber adopted the same dynamic and flexible approach as the Trial Chamber in reconstructing the specific intent to commit genocide and in characterizing the targeted group. On this basis, it identified a causal link between the approximately 8.000 killings and the intent to destroy the Bosnian Muslim community of Srebrenica, as well as a further causal connection between the destruction of that local community and the destruction of the protected group as a whole. This methodology highlights the limits of a purely quantitative approach to genocide, which would require that only numerically significant communities be affected, and instead favors a more complex and nuanced assessment that takes into account the substantial importance of the targeted part within the protected group as a whole.

A second key aspect of the appellate ruling concerns individual criminal responsibility for aiding and abetting genocide. This issue touches upon the proper assessment of liability in cases of *Joint Criminal Enterprise*, where intent is shared among co-perpetrators. In this case, the Appeals Chamber concluded that Krstić did not share genocidal intent, since the Drina Corps under his command were not directly involved in the massacres perpetrated. Consequently, in the view of the Appeals judges, the Trial Chamber erred in inferring genocidal intent from Krstić’s knowledge of the executions carried out in Srebrenica and from the use of resources under his command to support them. As the Appeals Chamber stated, “knowledge [...] without more, is insufficient to support the further inference of genocidal intent”[221].

An additional issue addressed by the Appeals Chamber concerned the relevance to be attributed to a possible plurality of charges connected to the same underlying conduct. In the specific case regarding General Krstić’s alleged liability for aiding and abetting, the Court concluded that multiple counts “entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other”[222].

This principle implies that, in certain circumstances, the Tribunal may examine multiple charges - for instance, for genocide, crimes against humanity, and war crimes - arising from the same conduct (*cumulative convictions*). Such an approach provides significant procedural advantages, as it ensures that the entire conduct of the accused is fully reconstructed and assessed. Moreover, it offers strategic benefits, since the inclusion of multiple charges, some of

[220] *Ibid*., § 34.
[221] *Ibid*., § 129.
[222] *Ibid*., § 218.

which require less stringent subjective elements, allows the prosecution to secure a conviction more easily in cases where not all the elements required for genocide are satisfied.

Once it was established that Krstić's liability was not direct but limited to aiding and abetting, the Appeals Chamber sentenced him to 35 years of imprisonment, a penalty lower than the one that would have been imposed had direct responsibility been proven.

About Krstić's involvement in the mass atrocities, the Appeals Chamber observed that "there was no evidence that Krstić ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them"[223].

These conclusions were justified by the context of widespread violence and brutality in which the events took place, where it was simply unrealistic to demonstrate precisely which soldiers killed specific victims or who issued the orders.

In such situations, the application of less demanding theories of liability allows tribunals to attribute individual criminal responsibility even when violence stems from multiple organizational sources. Similarly, the ICTR adopted an analogous approach when assessing individual responsibility in contexts of collective violence, including conspiracy, incitement, and complicity[224].

Substantially, both tribunals conceive individual criminal responsibility in a way that allows it to be attributed to a broad range of individuals, all of whom can be held accountable for their participation in a genocidal event, regardless of the degree of direct contribution.

Although this approach is often considered more cosmetic than structural, it presents a crucial advantage: it renders prosecutable those authoritarian leaders who, while not directly involved in the physical execution of genocidal acts, nevertheless facilitated or even provoked them through their conduct or omissions[225].

Furthermore, this broader framework makes it possible to establish the responsibility of foreign governments and international agents who, although not directly involved, nevertheless enabled genocide through their failures to act. This issue became particularly relevant in connection with the role of the United Nations peacekeeping forces stationed in Srebrenica at the time of

[223] *Ibid.*, § 144.
[224] For instance, the ICTR convicted Eliézer Niyitegeka, a Rwandan broadcaster and former Minister of Information on several charges, including conspiracy to commit genocide, and sentenced him to life imprisonment; ICTR, Trial Chamber, *Prosecutor v. Niyitegeka Judgment*, ICTR-96-14-I, 15 May 2003.
[225] M. Drumbl, *Prosecutor v. Radislav Krstić: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting*, "Washington and the University School of Law", 5.2, 2004, p. 447.

the massacres. For this reason, the decision of the ICTY Prosecutor not to investigate the omissions of the UN contingent and the Dutch officers who composed it, as well as the consequences that such inaction had on the Srebrenica tragedy, sparked significant debate.

2.5 Concluding Remarks

This chapter has examined how the intent to destroy element has been interpreted and operationalized within the framework of the Rome Statute and the jurisprudence of the *ad hoc* International Criminal Tribunals. While the Rome Statute formally preserves the definition of genocide contained in the 1948 Convention, its application in judicial practice reveals significant developments in the understanding of both the structural and subjective elements of the crime.

First, the Rome Statute confirms the continuity of the conventional definition of genocide, maintaining the centrality of the specific intent to destroy, in whole or in part, a protected group. At the same time, through the Elements of Crimes and the articulation of modes of liability in article 25, is situates genocide within a more sophisticated framework of individual criminal responsibility. The Statute reinforces the idea that genocide is, by definition, an individual crime, yet one that unfolds within the collective and organized structures. This tension between individual culpability and collective criminality emerges as a defining feature of contemporary international criminal law.

Second, the jurisprudence of the ICTY and the ICTR has played a decisive role in clarifying the scope of genocidal conduct, the meaning of “in whole or in part”, and the evidentiary standards for establishing specific intent. The tribunals have developed inferential models that allow genocidal intent to be reconstructed from patterns of conduct, scale of atrocities, systematic targeting and contextual factors. In doing so, they have sought to reconcile the strict standard of proof beyond reasonable doubt with the practical reality that explicit manifestations of genocidal intent are rare.

Third, the case law has significantly shaped the understanding of protected groups. Moving beyond rigid anthropological conceptions, the tribunals have oscillated between objective, subjective and mixed approaches to group identification. The prevailing tendency toward a mixed model reflects an effort to avoid both excessive rigidity and unbounded subjectivism, ensuring that the perpetrator’s perception of the group is anchored to a socially recognizable entity.

Fourth, the development of doctrines of individual criminal responsibility - particularly Joint Criminal Enterprise, aiding and abetting, command responsibility and complicity - has expanded the spectrum of prosecutable participation in genocidal processes. These doctrines reflect an awareness that genocide rarely results from isolated acts, but rather from coordinated systems of violence. However, they also expose ongoing tensions concerning the required *mens rea*, especially in relation to accomplices and secondary participants. This debate over whether complicity in genocide requires the same *dolus specialis* as the principal perpetrator remains emblematic of the broader difficulty in calibrating individual liability within collective criminal phenomena.

Fifth, judicial precedents such as *Akayesu*, *Kambanda*, *Semanza* and *Krstić* demonstrates that the proof of genocidal intent rests primarily on inferential reasoning grounded in contextual analysis. Factors such as systematic victim selection, scale of violence, sexual violence as a tool of destruction, forcible transfers, denial strategies and attacks on cultural and religious symbols have emerged as recurrent evidentiary indicators. At the same time, appellate jurisprudence - particularly in Krstić - has emphasized that knowledge alone is insufficient to establish genocidal intent, thereby reaffirming the distinctiveness of *dolus specialis* as the conceptual boundary separating genocide from other international crimes.

Overall, the Rome Statute and the jurisprudence of the ad hoc tribunals reveal a dual dynamic. On the one hand, they preserve the narrow and demanding structure of genocide as conceived in 1948. On the other, they progressively refine the evidentiary and doctrinal tools necessary to render that definition operational in practice. The central challenge that emerges is therefore not merely definitional, but methodological: how to attribute individual intent within complex systems of collective violence without diluting the specificity that makes genocide a distinct and exceptional crime under international law.

CHAPTER 3

The "intent to destroy" in cases lacking International Adjudication

3.1 From definition to prosecution

The arguments developed in the previous chapters highlight the significant challenges involved in applying the legal notion of genocide, as defined by the Genocide Convention, to concrete cases. These challenges are so substantial that, although the concept of genocide was drafted with specific reference to the Armenian massacres and the Nazi Holocaust, its effective application has proven problematic even with respect to those events. This is demonstrated by the fact that, in the case of the Nazi perpetrators themselves, charges of genocide were brought in only a limited number of cases, while in the vast majority of instances, prosecutions were based on crimes against humanity or war crimes, which require a less demanding evidentiary framework.

Further confirmation of these difficulties can be drawn from the fact that, despite the adoption of the Genocide Convention in 1948, the first conviction for genocide was handed down only in 1998, in the landmark Akayesu case before the ICTR. Similarly, during the brutal conflicts of the 1990s in the former Yugoslavia, the ICTY found that acts of genocide had been committed only in relation to the Srebrenica massacres. This assessment was made pursuant to article 4 of the ICTY Statute, which incorporates verbatim the definition of genocide contained in article 2 of the Genocide Convention.

The difficulty in applying the notion of genocide stems from two primary factors. First, there is the requirement to prove that the acts of violence were carried out with the intent to destroy, in whole or in part, a protected group. Second, there is the evidentiary challenge of demonstrating the existence of this specific intent through concrete and reliable proof.

For example, in the case of Srebrenica, where there was no dispute regarding the identification of the protected group, the difficulties arose mainly from the lack of evidence showing that the mass executions of non-Serbs were carried out not merely with the intent to forcibly displace them, but rather with the specific intent to destroy them as a group. For a massacre to qualify as genocide, it is not sufficient that the acts were committed intentionally; the conduct must also meet the additional threshold of being specifically aimed at causing the physical or biological destruction of the targeted group. The problem arises from the fact that, absent confessions or unequivocal documentary evidence, this special intent can only be inferred from the surrounding circumstances if it represents the only reasonable conclusion that can be drawn.

These evidentiary obstacles are largely the result of the historical context in which the legal notion of genocide was first introduced into international criminal law, namely, in relation to the Nazi Holocaust. In that context, prosecutors benefited from abundant evidentiary material, given that the concentration camps had only recently been discovered, and extensive documentation of the atrocities was still intact. However, such a scenario represents an exceptional and hardly replicable case in history. In the decades that followed, numerous episodes of mass violence have been labeled as genocides, yet in many of these instances, it has proven impossible to meet the strict evidentiary threshold required to eliminate any reasonable doubt as to the existence of the specific intent to commit genocide.

At present, the legal definition of genocide is formulated in such restrictive terms that it often fails to encompass even the most manifest cases of mass killings. In practice, International Courts and Tribunals have frequently favored the application of broader legal categories, such as war crimes and crimes against humanity, which are characterized by less stringent evidentiary and subjective requirements.

Consequently, to enhance the practical applicability of the concept of genocide, it may be necessary to proceed along two complementary paths. First, the definition of genocide could be broadened to include a wider range of protected groups, either by amending the text of the Genocide Convention or, alternatively, by adopting a more creative and purposive interpretative approach within the existing legal frameworks. Second, it would be necessary to relax the evidentiary threshold for proving genocidal intent, allowing such intent to be inferred from a broader and less rigid set of factual circumstances rather than requiring unequivocal direct evidence.

This chapter examines several events which, although broadly falling within the conceptual scope of the term genocide, have never been brought before international courts or, when adjudicated, were not legally classified as genocide. For each of these cases, a concise reconstruction of the facts will be provided, followed by a targeted analysis aimed at assessing whether the constitutive elements of the crime were present and identifying the possible reasons for the failure to classify the conduct as genocide.

The aim of this inquiry is to determine whether the Genocide Convention is objectively inapplicable in such cases due to evidentiary and legal constraints, or whether, instead, political, diplomatic, or other external considerations have prevailed, thereby obstructing the formal recognition of genocide before the appropriate judicial bodies.

3.2 The situation in the Xinjiang region

In the north-western area of Xinjiang, one of the five autonomous regions of China, lives a predominantly Turkic-speaking ethnic group known as the Uyghurs, Muslims of Turkish origin. An examination of the historical development of the Uyghur presence in Xinjiang reveals a progressive intensification of Chinese policies targeting this minority. Episodes of violence were not absent, such as the clashes of 5 July 2009 between police forces and members of the Uyghur community following the death of two workers, which resulted in 197 deaths and 1.684 injuries, as well as the imprisonment of approximately 4.000 Uyghurs, many of whom were subsequently sentenced to death.

The decisive turning point in the Chinese government's hostility toward the Uyghurs, however, coincided with the appointment of Chen Quanguo as Secretary of the Xinjiang Communist Party in August 2016. Already known for his reputation as an innovator in ethnic policy due to his work in the Tibetan Autonomous Region - where his leadership culminated in the establishment of an extensive and sophisticated security apparatus - Chen sought to replicate the same model in Xinjiang. This resulted in the creation of a surveillance system that included the collection of biometric data (including iris scans), DNA sampling, systematic and invasive interrogations, the regular presence of government officials inside private homes, an extensive network of street and residential entrance cameras, and frequent security checkpoints[226].

The collection of biometric data and the intrusive violations of personal privacy appear to conflict with international standards on the right to privacy, as articulated in conventional instruments such as the International Covenant on Civil and Political Rights, which expressly provides in article 17 that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence. However, although China has signed the Covenant, it has never ratified it, and therefore the People's Republic does not consider itself legally bound by its provisions.

At the same time, beginning in August 2016, anti-terrorism policies were implemented in Xinjiang that imposed severe restrictions on the freedom of movement of citizens belonging to Muslim minorities. Travel within and outside the region became subject to prior authorization by local authorities, and Uyghurs were required to undergo systematic security checks not only at airports and railway stations, but also at highway checkpoints. In this context, the passports

[226] P. Mozur - A. Krolik, *A Surveillance Net Blankets China's Cities, Giving Police Vast Powers*, "The New York Times", 2019; A. Ma, *China is reportedly tracking ethnic minorities by sticking QR codes with their personal information on their front doors*, "Business Insider", 2018.

of Muslim minority citizens also began to be confiscated on the basis of summary investigations claiming to identify suspected terrorist activities.

According to verified investigative sources, since 2017 the Chinese government has detained more than one million Uyghurs in what are described as “re-education camps”. Moreover, Turkic-speaking Muslim residents have, since then, been subjected to intense surveillance, forced labor, family separations, and coerced sterilizations, along with countless other human rights violations. Reports have documented cases of employment discrimination, demolition of mosques and Islamic holy sites, bans on religious attire, and enforced disappearances.

The majority of those detained in the re-education camps have never been formally charged with a crime nor granted access to any legal avenue to challenge their detention. Many victims reported having been subjected to torture during interrogations in order to extract confessions, and some stated that they had been hooded and handcuffed and forced into the “tiger chair”, a steel device equipped with iron bars and integrated restraints designed to immobilize detainees in painful positions. At the international level, the core content of the prohibition of arbitrary arrest and detention is set out in article 9(1) of the International Covenant on Civil and Political Rights, which also provides a series of procedural safeguards for detainees, including the right to be informed of one’s rights and of the reasons for detention, the right to legal assistance, and the right to be presumed innocent until guilt is established by an independent, fair, and impartial tribunal. Although China is not a Party to the Covenant and therefore cannot formally be held responsible for violations of its provisions, part of the scholarly literature considers the prohibition of arbitrary detention to constitute a rule of customary international law and, according to the United Nations Working Group on Arbitrary Detention, to have even acquired the status of *jus cogens* norm[227]. Media accounts indicate that members of the minority have been targeted and detained for trivial reasons such as contacting people from one of the twenty-six countries deemed “sensitive” by China (including Turkey and Afghanistan), attending religious services in mosques, having more than three children, or sending messages containing verses from the Qur’an.

Although information on life inside the re-education camps remains limited, numerous former detainees who escaped from China have described extremely harsh conditions. In 2022, the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a report based on interviews with former detainees, explicitly referring to patterns of torture and other forms of cruel, inhuman, or degrading treatment systematically applied between 2017 and

[227] *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/22/44, 24 December 2012.

2019[228]. Multiple testimonies confirmed that detainees were forced to swear allegiance to the Chinese Communist Party, renounce Islam, sing praises to communism, and learn Mandarin. Some described prison-like conditions, with cameras and microphones monitoring every movement or word, while women reported instances of rape and sexual abuse. As documented, detainees were classified into three categories, each of which corresponds to a different regime governing their treatment within the camp: normal, strict, and very strict. According to testimonies collected by Amnesty International, those who had committed ordinary offenses, such as downloading prohibited software, were placed under the normal regime, whereas individuals accused of offenses connected to religious practices were subjected to the strict regime[229]. Finally, those charged with terrorism-related offenses were placed under the very strict regime, which in practice entailed complete isolation from the outside world.

According to various reports, many detainees were subjected to forced labor and subsequently sent to factories across China connected to 83 global brands. In certain cases, factories were located within the camps themselves. Researchers from the *Centre for Strategic and International Studies* have argued that forced labor is a key component of the government's economic development plan for Xinjiang, aimed at transforming the region into a manufacturing hub for textiles and apparel.

The government of the People's Republic of China has also established the Xinjiang Production and Construction Corps (*Bīngtuán*), an economic and paramilitary entity that exercises administrative control over several areas of the region. This body compels members of the incarcerated population, as well as local communities, to perform labor in hazardous sectors such as mining, construction, manufacturing, food processing, and cotton harvesting. The goods and raw materials produced through such coerced labor enter global supply chains, thereby rendering numerous States around the world indirectly complicit in the system of forced labor implemented in Xinjiang[230]. At the international level, forced labor is prohibited under Article 2 of the 1930 Forced Labor Convention of the International Labor Organization. However, China ratified this Convention only on 12 August 2022, providing that it would enter into force on 12 August 2023, with the consequence that the People's Republic can be regarded as bound by its obligations only from that moment onward. Although Chinese authorities have

[228] United Nations Human Rights Office of the High Commissioner, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, 31 August 2022.
[229] Amnesty International, *"Like we were enemies in a war" China's mass internment, torture and persecution of muslims in Xinjiang*, 2021.
[230] U.S. Department of State, Office to monitor and combat trafficking in persons, *Forced Labor in China's Xinjiang Region*, 20 January 2025, p. 3.

consistently described the forced transfer of Uyghur individuals to industrial districts as measures aimed at combating unemployment and poverty, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), in its annual report published on 9 February 2022, expressed serious concerns regarding the methods applied in Xinjiang and their direct and indirect discriminatory effects on ethnic and religious minorities in the region. At the same time, the International Trade Union Confederation has accused the Chinese government of implementing a widespread and systematic program of forced labor involving Uyghurs and other Turkic and Muslim minorities, in violation of the universally recognized right to freely choose one's employment[231].

Simultaneously, since 2023 the Chinese Communist Party has promoted domestic tourism in Xinjiang, seeking to rebrand the region's image and commodify Uyghur culture. Tourists are encouraged to participate in the construction of an artificial version of Uyghur culture, with residents employed to perform traditional dances and work in the hospitality and catering sectors.

Outside the re-education camps, since 2017 the entire region has been subjected to a grid-management system dividing towns and villages into units of approximately 500 residents. Each unit contained a police station that closely monitored inhabitants by regularly scanning their identity cards, taking photographs, collecting fingerprints, and inspecting mobile phones. Although many of these checkpoints have been dismantled in recent years and replaced by more covert surveillance systems, the government continues to collect and store biometric data on Uyghurs through a mandatory program advertised as "Physicals for All". Much of this data is stored in a vast database known as the Integrated Joint Operations Platform, which uses artificial intelligence to compile lists of "suspicious" individuals. Over 15.000 residents of Xinjiang were reportedly detained in June 2017 alone after being flagged by the algorithm.

At the root of the persecution lies the government's intent to suppress the Muslim community, accused of exploiting religious activities to undermine the country's ethnic unity. This notion is clearly reflected in the revised *Regulations on Religious Affairs* promulgated by Xi Jinping in 2017. Although the policies of re-education targeting the Uyghurs were initiated by the Chinese government as early as 2014, the escalation occurred in 2017 following a series of violent attacks against civilians, including a mass stabbing at a railway station in Kunming and

[231] See *Application of International Labor Standards*, 2022 Report III (Part A) of the Committee of Experts on the Application of Conventions and Recommendations, International Labor Conference, 110th Session, 2022.

several bombings in Xinjiang's capital. These incidents were used by the government to justify its repressive campaign on the grounds of counterterrorism[232].

Regarding the re-education camps specifically, numerous sources have documented their expansion despite the strict information controls imposed by Chinese authorities. Reuters journalists, analyzing satellite imagery, discovered that 39 camps nearly tripled in size between April 2017 and August 2018, covering an area equivalent to about 140 football fields. Similarly, German anthropologist Adrian Zenz, a leading expert on Xinjiang, found through an analysis of local and national budgets that spending on security-related infrastructure in the region increased by approximately 20 billion yuan in 2017[233].

The United States and several other foreign governments have described China's actions in Xinjiang as genocide, while the OHCHR has qualified the violations more plausibly as crimes against humanity. Many countries have imposed sanctions on Chinese officials and entities linked to the abuses. The European Union also sanctioned Chinese officials in 2021, and in October 2024 the European Parliament adopted an emergency resolution condemning the persecution of the Uyghurs and urging the Chinese government to release those detained. The United States has banned all imports from the region under the *Uyghur Forced Labor Prevention Act*, while the United Kingdom has introduced measures to fine companies that fail to ensure their supply chains are free from forced labor.

Chinese officials, on the other hand, deny any violations of Uyghur rights, claiming that the facilities functioned merely as vocational education and training centers designed to teach Mandarin, Chinese law, and professional skills, as well as to prevent citizens from being influenced by extremist ideologies and to eradicate terrorism at its root. The Chinese government also claimed that individuals were always free to enter and leave the re-education program at any time, and that admission was, in any event, entirely voluntary. However, this assertion is contradicted not only by official documents, which contain instructions on how to suppress escape attempts, but also by satellite imagery revealing sensitive security and surveillance infrastructures, including perimeter walls, barbed wire fencing, reinforced windows, watchtowers, and armed police stations.

According to Chinese authorities, all re-education camps were closed in 2019. Although international reports have verified that many of these facilities were indeed shut down, evidence

[232] People's Republic of China, *The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang*, June 2022.

[233] A. Zenz, *Coercive Labor and Forced Displacement in Xinjiang's Cross-Regional Labor Transfer Program*, "Global Research & Analysis", March 2021, pp. 2-7.

suggests that some were converted into detention centers, indicating that the campaign of persecution continues under a different guise. This ongoing repression has been corroborated by research conducted by the *Australian Strategic Policy Institute*, which, using satellite imagery, identified more than 380 suspected detention facilities, some converted from former re-education camps and others newly constructed as prisons[234].
Several sources further indicate that Chinese authorities now increasingly rely on the formal judicial system to incarcerate Uyghurs rather than on extraordinary re-education policies. In 2022, for example, the Associated Press estimated that in a single county, one in twenty-five Muslims - all Uyghurs - had been sentenced to prison on terrorism charges. Moreover, according to a recent report by the United States Holocaust Memorial Museum, over half a million people remain detained in formal prisons or extrajudicial internment facilities across the country[235].
In any case, an accurate assessment of the current situation remains extremely complex, as the Chinese government severely restricts access to Xinjiang for foreign journalists and visitors.
In July 2020, several representatives of the Uyghur minority submitted a complaint, on behalf of the East Turkistan Government in Exile (ETGE) and the East Turkistan National Awakening Movement (ETNAM), to the Office of the Prosecutor of the International Criminal Court, requesting the initiation of investigations against senior officials of the Chinese government accused of crimes against humanity, and in particular of the unlawful deportation of Uyghur individuals from Tajikistan and Cambodia, both States Parties to the Rome Statute. Specifically, the ETGE and ETNAM argued that numerous crimes against the Uyghur population were not committed within China itself, but rather in the territory of Tajikistan and Cambodia, where Uyghurs were allegedly abducted and transferred to detention camps located in Chinese territory.
The following paragraphs will examine the legal aspects of this case, with reference to the possible application of the Genocide Convention and to the potential jurisdiction of the International
Criminal Court over crimes committed in the Xinjiang region.

[234] N. Ruser, *Documenting Xinjiang's detention system*, Australian Strategic Policy Institute, Canberra, 2020.
[235] United States Holocaust Memorial Museum, Simon-Skjodt Center for the Prevention of Genocide, *Eight years on, China's repression of the Uyghurs remains dire, how China's Policies in the Uyghur Region have and have not changed*, February 2025.

3.2.1 The possible application of the Genocide Convention to the crimes committed in Xinjiang

The prohibition of genocide constitutes a peremptory norm (*jus cogens*) that admits no derogation and is enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide, which China signed and ratified in 1949 and 1983 respectively. Consequently, China has undertaken the obligation to prevent, punish, and refrain from committing genocide *erga omnes*, that is, towards the international community as a whole. However, the Chinese government has expressly entered a reservation to the Convention, declaring that it does not consider itself bound by article 9 and therefore does not recognize the jurisdiction of the International Court of Justice regarding disputes relating to the interpretation, application, or implementation of the Convention. In this regard, it should be recalled that article 9 of the Genocide Convention, together with article 36 of the Statute of the International Court of Justice, forms the jurisdictional basis for the Court with respect to States that have ratified the Convention. In particular, the first paragraph of the aforementioned Article 36 establishes that the Court's jurisdiction extends to all cases which the parties refer to it, as well as to all matters specifically provided for in the Charter of the United Nations and in treaties and conventions in force. Member States of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice, while non-member States may accede under conditions determined, on a case-by-case basis, by the General Assembly upon recommendation of the Security Council, pursuant to article 93 of the United Nations Charter. Furthermore, article 35(2) of the Court's Statute provides that a State not party to the Statute may bring a case before the Court under conditions established by the Security Council.

In any event, since the Court's jurisdiction is based on consent, States must express their willingness to accept it either by means of *compromis* (special agreement) or through a compromissory clause contained in a treaty. Moreover, under the second paragraph of article 36 of the Statute, States may at any time declare that they recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Court in relation to any other State accepting the same obligation, with respect to all legal disputes concerning the interpretation of a treaty, any question of international law, or any fact which, if established, would constitute a breach of an international obligation. Finally, it should be noted that such unilateral declarations may be formulated with limitation *ratione temporis*, whereby jurisdiction is accepted only for a limited period; *ratione materiae*, only for disputes concerning certain subject-matters; or *ratione personae*, only vis-à-vis certain States. Against this background, with regard to disputes between State Parties to the Genocide Convention, it must be noted that these States may limit or exclude the jurisdiction of the International Court of Justice by entering a reservation to article 9 of the Convention. Consequently, the reservation formulated by China effectively precludes the possibility of the International Court of Justice intervening in the Uyghur situation, even if the acts in question were deemed to satisfy the legal definition of genocide.

The ICJ has already ruled in favor of the admissibility of reservations to article 9, emphasizing that even in disputes concerning alleged violations of peremptory norms, the Court's jurisdiction is nevertheless founded upon the consent of the parties[236]. Indeed, out of the 132 States Parties to the Convention, 11 have entered reservations to article 9, and in each instance the Court has recognized the permissibility of such reservations, notwithstanding the fact that inevitably diminish the substantive scope and effectiveness of the Convention.

Similarly, China does not recognize the jurisdiction of the International Criminal Court, as it is not a State Party to the Rome Statute. Moreover, China has adhered to the Vienna Convention on the Law of Treaties with an analogous reservation concerning the jurisdiction of the International Court of Justice in relation to the interpretation and application of that treaty. The reservation entered by the Chinese government with respect to the jurisdiction of international courts represents, as will be examined later, a crucial element in understanding the reasons behind the absence of judicial pronouncements on the matter.

In light of the foregoing, it is nonetheless appropriate to examine whether the definition of genocide contained in the Convention may, at least in abstract terms, be applicable to the situation of the Uyghurs. From an objective standpoint, article 2 of the Convention includes among the constitutive acts of genocide the killing of members of a protected group, the infliction of serious bodily or mental harm to members of the group, the deliberate subjection of the group to conditions of life calculated to bring about its physical destruction in whole or in part, the imposition of measures intended to prevent births within the group, and the forcible transfer of children of the group to another group.

A study conducted by the Newlines Institute for Strategy and Policy (ASPI), a United States-based research center that describes itself as non-partisan and independent, highlights that all the acts classified as genocidal under the aforementioned Convention have occurred in the Xinjiang region against the Uyghur minority. Specifically, with regard to the killing of group members, in 2020 a satellite image identified two concentration camps in north-western China

[236] ICJ, *Case concerning Armed Activities on the Territory of the Congo, New Application: 2022 (Democratic Republic Of The Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application*, 3 February 2006, §§ 64-65.

separated by a cemetery and a crematorium, suggesting an intent by the authorities to conceal deaths occurring within these facilities[237]. This inference appears to be corroborated by information reported by the Xinjiang Development and Construction Information Network, indicating that between March 2017 and February 2018 nine cremation centers were constructed in the region for the purpose of disposing of the bodies of detainees.

As for the second act listed in article 2 of the Convention, all sources concur that Uyghur detainees are subjected to systematic torture, sexual violence, and inhuman and degrading treatment, deprived of basic necessities, and severely humiliated[238]. In addition to physical pain, they are exposed to systematic psychological coercion, which takes the form of a daily routine of indoctrination in which they are forced to watch Chinese Communist Party propaganda, burn prayer mats, eat pork and consume alcohol, and are regularly interrogated and required to write confessional or self-criticism letters[239]. Methods of torture used during interrogations reportedly include beatings, electric chairs, and solitary confinement. The continuous use of surveillance devices, which eliminates any form of privacy, further contributes to intolerable levels of psychological stress[240].

With regard to the deliberate imposition of conditions of life calculated to bring about the group's physical destruction, this conduct is reflected in victims' accounts describing extreme overcrowding, malnutrition, and deprivation of sleep and medical care, to the extent that many detainees experienced severe weight loss and some did not survive the harsh conditions.

The fourth act identified in article 2 of the Convention - the imposition of measures intended to prevent births within the group - is likewise fully substantiated in Xinjiang based on significant evidence, including not only victims' testimonies but also government statistics clearly showing that China has undertaken a targeted program to prevent Uyghur births. In 2017, the government launched a special campaign to enforce birth-control policies in Xinjiang, while 2019 documents reveal plans for the mass sterilization of women in rural Uyghur-majority areas[241]. Budgetary records indicate that the program was sufficiently funded to perform hundreds of thousands of sterilization procedures, including tubal ligations. Contraceptive devices such as intrauterine devices were forcibly inserted into Uyghur women with the stated objective of

[237] Radio Free Asia, *Internment Camps in Xinjiang's Aksu Separated by Crematorium*, 2020.
[238] Amnesty International, *Like we were enemies in a war, China's mass internment, torture and persecution of muslims in Xinjiang*, 2021.
[239] *Ibid*.
[240] *Ibid*.
[241] A. Zenz, *Sterilizations, IUDs, and Mandatory Birth-Control: The CCP's Campaign to Suppress Uyghur Birthrates in Xinjiang*, in *James Town*, 2020, pp. 2-10.

sterilizing at least 80% of women of childbearing age by 2019[242]. According to research by the Australian Strategic Policy Institute, the birth rate in Xinjiang fell by almost half in the two years following the implementation of these policies[243].

Finally, as regards the forcible transfer of children, there is ample evidence that since 2017 the Chinese government has established a network of boarding schools and orphanages for Uyghur children whose parents were interned in camps or imprisoned. Institutionalized minors were subsequently transferred to other regions of the country without any legal justification, subjected to indoctrination, and compelled to learn Mandarin, sing propaganda songs, and renounce their ethnic and religious identity[244].

As far as the subjective elements are concerned, pursuant to article 2 of the Genocide Convention, the crime of genocide is established when at least one of the acts listed therein is committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group *as such*. In essence, three cumulative elements are required: the commission of one or more of the acts mentioned above, the targeting of a protected group, and the specific intent to destroy, in whole or in part, said group.

Accordingly, to establish the existence of genocide in the Xinjiang case, it must first be demonstrated that the Chinese government acted with the clear and deliberate intent to destroy the Uyghurs as a group. Certain studies indicate that such genocidal intent can be inferred from clear and objective evidence, reflected in a consciously implemented policy of extermination devised at the highest levels of the People's Republic of China[245].

Repeated directives from the Chinese government to "eradicate tumors", to "wipe them out completely [...] destroy them root and branch", to "round up everyone", to "show absolutely no mercy", and to "break their roots", when considered alongside consistent practices of implementation, appear to be expressly aimed at the complete destruction of the Uyghur minority. Any justification based on the purported prevention of terrorism does not suffice to exclude or mitigate State responsibility. According to the jurisprudence of the International Court of Justice, security concerns are irrelevant where violations of the Genocide Convention are at stake, as the obligations it imposes apply in both times of peace and war, and contextual factors cannot in any case justify destructive measures directed against protected groups[246].

242 *Ibid*., p. 12.
243 H. Davidson, *Xinjiang births plummeted after crackdown on Uyghurs, says report*, "The Guardian", 2021.
244 Human Rights Watch, *China: Xinjiang Children Separated from Families. Return Minors Housed in State-Run Institutions to Relatives*, 2019.
245 See R. Wallenberg (Newlines Institute for Strategy and Policy), Centre for Human Rights, *The Uyghur Genocide: An examination of China's Breaches of the 1948 Genocide Convention*, March 2021.
246 *Gambia v. Myanmar*, ICJ Order of 23 January 2020, § 74.

Furthermore, even a *prima facie* assessment of the facts reveals a series of sequential and cumulative acts - ranging from the collection of biometric data from Uyghur residents to the systematic destruction of cultural and linguistic identity, including forced abortions and sterilization of women - demonstrating the intent to eradicate the Uyghur population from the region. Such intent appears attributable to the highest organs of the State, including the President of the People's Republic and the leadership of the Communist Party, who directly coordinated and organized extermination policies, implementing an extensive bureaucratic apparatus responsible for managing detention camps. The structured and interconnected nature of these measures underscores the degree of State control over the genocidal process.

As is well established, in determining State responsibility under the Genocide Convention, genocidal intent is assessed exclusively on the basis of objective indicators: official statements, State policy, the existence of a general plan, recurring patterns of conduct, repeated destructive acts, and the systematic execution of interconnected measures aligned with a coherent strategic rationale. Based on survivor testimony and investigative findings, all these elements appear to be present in the Xinjiang case.

Concerning official statements and direct State involvement, one must recall the speeches delivered by President Xi Jinping since April 2014, in which a rigorously planned governmental campaign aimed at eradicating the Uyghur presence from Chinese territory was openly affirmed[247]. Testimonies further indicate that prison guards systematically informed detainees of the existence of a directive issued by the Central Committee of the Communist Party of China ordering the detention system to remain in place "until the whole nation, Kazakhs, Uyghurs and other Muslim nationalities would disappear […] until all Muslim nationalities would be extinct"[248].

In 2017, during a political campaign in Yarkand County - where nearly 900.000 residents were Uyghur - the local Communist Party Secretary delivered a public speech urging party members to "wipe them out completely". Other statements attributable to senior Party officials and President Xi himself are likewise characterized by metaphors invoking cancer, poison or disease, portraying the elimination of Uyghur identity as necessary for China's stability and prosperity. This rhetoric culminated in a directive from the Xinjiang government ordering authorities to "break their lineage, break their roots, break their connections, and break their origins".

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[247] "The weapons of the People's Democratic Dictatorship must be wielded without hesitation or wavering, showing absolutely no mercy" (April 2014).

[248] B. Dooley, *Inside China's Internment Camps: Tear Gas, Teasers and Textbooks*, "AFP", 30 January 2019.

In May 2013, a regional Party document, *Autonomous Region Party Committee Document No. 11*, laid the groundwork for the mass detention campaign by describing the purpose of the camps in terms of destroying the "infected" minority and re-educating the surviving population. Evidence of a general extermination plan may also be inferred from a manual issued by the Xinjiang Political and Legal Affairs Commission, setting forth detailed guidelines on the operation and administration of mass detention, known as the "Telegram". The document prescribes strict surveillance of dormitories, severe punishment for any infringement of daily rules, and outlines a complex bureaucratic hierarchy tasked with enforcing repressive measures across the camps.

Concurrently, other official sources confirm the existence of a government plan aimed at dismantling Uyghur cultural, religious, and linguistic identity, including measures designed to remove children from their families to prevent intergenerational transmission of culture. The government deliberately replaced bilingual education with a homogenized national Chinese curriculum, subjecting Uyghurs who refused to speak Mandarin to torture and inhumane treatment.

At the end of 2016, the Chinese Central Ethnic-Religious Affairs Department launched a campaign known as "Mosque Rectification", aimed at demolishing Islamic religious sites. It is estimated that approximately 16.000 mosques - around 65% of the total - were destroyed or damaged, while others were repurposed into commercial or civic facilities.

In early 2018, Communist Party officials in Xinjiang initiated a further campaign known as "Three News", promoting the introduction of a new lifestyle, a new atmosphere, and a new social order based on Chinese norms and on the complete erasure of Uyghur identity. This campaign led to the "Beautifying Spaces" program, which involved the destruction of Uyghur architecture, including housing and public buildings.

Given that the destructive intent clearly emerges both from the official statements of the leading organs of the People's Republic of China and from general policy documents, academic analyses have sought to further delineate the scope of applicability of the Genocide Convention by assessing whether such intent can be said to be directed against the Uyghur community "as such". In this regard, the interpreters of the International Law Commission have clarified that, under the Convention, the intent to destroy a group as such is established whenever actions are undertaken with the aim of eliminating a "substantial part" of that group within a geographically limited area. According to the Commission, therefore, the assessment of this element requires verifying, first, that the persecuted individuals represent a substantial part of the group, and second, that the geographical area in which the persecution occurs is sufficiently defined[249].

In the present case, there is no doubt regarding the identification of the location where the events took place, as this is officially recognized by the Chinese government itself as a distinct territorial entity, namely the Uyghur Autonomous Region. With regard to the numerical and substantive relevance of the persecuted group, data relating to the operation of the detention camps reveal extremely high figures, particularly in the years 2017-2018, during which approximately 40% of the adult Uyghur population in Xinjiang is estimated to have been subjected to repressive measures. Such a figure - amounting in practice to millions of individuals - must therefore be considered as constituting a substantial part of the group.

It is also necessary to emphasize that, according to the International Law Commission, the requirement of a "substantial part" must be understood not only in quantitative terms, but also with regard to the social significance of the targeted individuals in relation to the group as a whole[250]. In other words, it is necessary to consider whether the persecuted individuals constituted a particularly meaningful and emblematic component of the group, such that they were essential to the community's survival. From this perspective, too, the available evidence confirms the presence of the requirement. Chinese governmental documents indicate a deliberate effort by the authorities of the People's Republic to selectively identify the leaders and most authoritative figures of the Uyghur community, to imprison them, and to subject them to forms of persecution designed to have broad public resonance. A systematic strategy was also pursued to target the Uyghur middle class, considered crucial for the community's continued existence. As recalled in international jurisprudence, "the selective targeting of leading figures of a community" is highly probative of genocide and "indicative of genocidal intent"[251].

In light of the elements discussed above, it may therefore be concluded that the Genocide Convention is, in abstract terms, applicable to the Uyghur case, insofar as all three requirements set forth in article 2 appear to be satisfied.

3.2.2 The Jurisdiction of the International Criminal Court over the Xinjiang situation

As previously discussed, the International Criminal Court is competent to adjudicate individual criminal responsibility for the crime of genocide on the basis of the definition set out in article

[249] *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, § 45.7-45.8.
[250] *Ibid*.
[251] ICTY, Appeals Chamber, *Prosecutor v. Zdravko Tolimir Judgment*, IT-05-88/2-A, 8 April 2015, § 263.

6 of the Rome Statute, which aligns substantially with that contained in the 1948 Genocide Convention.

Accordingly, once it is established that China's repressive and persecutory policies against the Uyghur community may be characterized as genocidal acts, it becomes necessary to assess whether the conditions exist for the International Criminal Court to take action against Chinese authorities. However, three elements stand in the way of such an outcome.

First, article 12(1) of the Rome Statute provides that a State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court. The People's Republic of China has never ratified the Statute; consequently, the Court lacks jurisdiction over cases involving this State. The only conceivable exception would be the possibility for China, as a non-party State, to accept the Court's jurisdiction through an ad hoc declaration pursuant to article 12(3) of the Statute. The likelihood of such acceptance, however, remains extremely low.

Second, the Security Council has the power to refer to the Prosecutor a situation concerning a non-party State. Yet the adoption of such a referral would require the approval of all five permanent members of the Council. Given that China is itself a permanent member, this avenue also appears highly improbable.

The only remaining option would be to invoke the Court's jurisdiction on the basis that part of the crimes was committed on the territory of a State Party to the Rome Statute. Indeed, in July 2020 a group of lawyers representing the government-in-exile of East Turkestan and the East Turkestan National Awakening Movement submitted a communication to the Prosecutor requesting the opening of an investigation against senior Chinese officials for genocide and crimes against humanity allegedly perpetrated against Uyghurs in Cambodia and Tajikistan, both of which are States Parties to the Statute. This request relied on an important precedent: *Bangladesh v. Myanmar*, in which the ICC affirmed its jurisdiction *ratione loci* under article 12(2)(a), clarifying that if at least part of the criminal conduct occurs on the territory of a State Party, the Court is competent to exercise jurisdiction[252]. In that case, upon the Prosecutor's request, the Pre-Trial Chamber recognized the Court's jurisdiction over the deportation of Rohingya people from Myanmar into Bangladesh, despite the fact that Myanmar is not a Party to the Statute.

Moreover, it should be recalled that the Prosecutor is empowered to initiate investigations on the basis of a *notitia criminis* concerning a situation in which international crimes falling within

[252] ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III*, 14 November 2019, § 43.

the Court's *ratione materiae* jurisdiction are alleged to have been committed. The Prosecutor may therefore open an investigation even *proprio motu*, following authorization by the Pre-Trial Chamber, particularly where communications have been submitted by individuals or organizations. In such cases, the Prosecutor must assess whether there is a "reasonable basis to proceed with an investigation into the situation" and whether "the situation meets the legal requirements of the Statute". In essence, the Prosecutor must determine whether the alleged crimes fall within the Court's jurisdiction pursuant to article 12, namely whether they were committed on the territory of a State Party, by nationals of a State Party, or on the territory of or by nationals of a non-party State that has accepted the Court's jurisdiction through an ad hoc declaration.

Despite these provisions and notwithstanding the Rohingya precedent, the request submitted by the East Turkestan lawyers was not accepted. In the Report on Preliminary Examination Activities of 14 December 2020, the Prosecutor stressed that the Court can exercise jurisdiction only if the *actus reus* was at least partially committed on the territory of a State Party - a condition which, in the Prosecutor's view, was not met in the present case. The Prosecutor noted that the alleged crimes against the Uyghur population described in the communication appeared to have been committed exclusively by Chinese nationals within the territory of the People's Republic of China.

With respect to the alleged crimes perpetrated in Cambodia and Tajikistan, the Prosecutor acknowledged that the transfer of individuals from those States back to China raised concerns regarding their compatibility with national and international law; however, such conduct did not amount to the crime against humanity of deportation under article 7(1)(d) of the Rome Statute[253]. The legal interest protected by the prohibitions of deportation and forcible transfer lies in the right of individuals to remain in the State in which they lawfully reside. In this regard, the Prosecutor recalled the ICTY *Popović* judgment, which emphasized that the protected interest is intrinsically connected to the right of victims to reside in their habitual homes and not to be deprived of property through forcible removal to a different location[254]. On this basis, the Prosecutor concluded that the acts described in the communication did not constitute deportation or forcible transfer, since the individuals in question were arrested "in order to be

[253] ICC, *Report on Preliminary Examination Activities, Office of the Prosecutor*, 14 December 2020, § 74.
[254] ICTY, Trial Chamber, *The Prosecutor v. Popović et al. Judgment*, IT-05-88-T, 10 June 2010, § 900. See ICTY, Trial Chamber, *Prosecutor v. Naletilic et al. Judgment*, IT-98-34-T, 31 March 2003, §§ 535-537.

detained and not to be transferred”[255]. The arrests were thus aimed at detention, not at relocation, and therefore did not satisfy the legal elements of either crime.
Considering the above considerations, the Prosecutor declined to initiate an investigation into the actions of the Chinese authorities.
Furthermore, it must also be clarified that the International Criminal Court is bound *ratione personae* and may exercise its jurisdiction solely over natural persons. Its jurisdiction does not extend to States or legal persons. The principle of personal criminal responsibility therefore precludes holding an entire national, ethnic, racial, or religious group responsible for acts committed individually by its members. This element further prevents any exercise of jurisdiction by the Court over the Chinese authorities.
In conclusion, the jurisdictional prerequisites for the Court to proceed against China do not, at present, appear to be satisfied.

3.2.3 The obligation of States to cooperate with the International Criminal Court

Victims’ protests against Chinese repressive policies, together with the studies conducted by various investigative bodies, have progressively enabled the international community to gain knowledge of the events occurring in Xinjiang. As a result, several actors, both individually and collectively, have adopted specific measures in response to the situation reported. In particular, in March 2021 the United States, Canada, the United Kingdom and the European Union undertook coordinated action against China through the imposition of sanctions consisting of travel bans and asset freezes against senior Xinjiang officials accused of human rights violations. These sanctions were favorably received by other States such as New Zealand and Australia. Prior to that, several States had already taken unilateral steps to condemn China’s human rights violations. Specifically, in 2020 President Trump designated a Chinese government-controlled company and two former officials connected to abuses in Xinjiang under Executive Order 131818, aimed at blocking the property of individuals involved in serious human rights violations. Subsequently, in 2021, under the Biden administration, the United States adopted the Uyghur Forced Labor Prevention Act, which prohibited the importation of goods from Xinjiang on the presumption that they were manufactured through forced labor.
As regards the European Union, in both 2020 and 2022 the European Parliament adopted resolutions condemning the situation in Xinjiang, referencing forced labor, arbitrary detention,

[255] ICC, *Report on Preliminary Examination Activities, Office of the Prosecutor*, 14 December 2020, §§ 73-76.

torture, the pervasive surveillance system, and the re-education camps. The resolutions also referred to the EU Strategic Framework and Action Plan on Human Rights and Democracy, as well as to the Council decision establishing a sanctions regime enabling the Union to adopt restrictive measures against specific individuals, entities, or groups - whether State or non-State actors - responsible for human rights violations, and to introduce protective measures for Uyghurs or other Muslim Turks seeking asylum[256].

Notably, in its 2022 resolution the European Parliament explicitly referred to the serious risk of genocide inherent in the policies of forced labor, mass sterilization, and the separation of children from their families. Member States were also urged to take all possible actions under the Genocide Convention and through international accountability mechanisms[257].

The call for State responsibility by EU institutions leads to another issue of particular relevance for the present analysis: the obligation of States to cooperate with the International Criminal Court. It should be clarified at the outset that, having been established by an international treaty, the Court binds only those States that are Parties to its founding instrument. Accession to the Rome Statute gives rise to legally binding obligations solely for States Parties, including a general duty to cooperate with the Court. Consequently, cooperation cannot be imposed upon third States unless a binding decision of the United Nations Security Council, adopted under Chapter VII of the Charter, places both Parties and non-Parties under the same obligations vis-à-vis the Court. There are indeed two exceptional circumstances in which the duty of cooperation may be imposed on all States as UN members: when the Security Council refers a situation involving the commission of a crime to the Court, or when there exists a threat to international peace.

With regard to the content of the duty of cooperation, the opening provision of Part IX of the Rome Statute states that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court" (Article 86). Based on this provision, the obligation appears to be a general duty to maintain a cooperative attitude toward the Court - that is, full willingness to comply with the Court's requests, orders, and warrants. Article 87 provides further clarification by establishing that the duty of cooperation is triggered upon request by the Court. This makes the ICC the central actor in the cooperation system, including with respect to the modalities and

[256] European Parliament, *Resolution No.2022/2700(RSP)*.
[257] European Parliament, *Resolution No.2020/2913(RSP)*.

mechanisms of full collaboration required from States for the repression of international crimes falling within the Statute[258].

Moreover, jurisprudence tends to interpret article 86 broadly, considering that the duty of cooperation does not end with compliance with specific requests from the Court but implies, more generally, an obligation on the part of States Parties to provide support and assistance to the Court in all its investigative and evidentiary activities.

Against this general framework, it is appropriate to examine potential avenues through which States might take action against Chinese authorities on the basis of the aforementioned duty to cooperate. In this regard, the Genocide Convention appears to provide two possible options for States to act in response to the violations committed in Xinjiang, taking into account the substance of that duty. The first option consists of referring the matter to the competent United Nations organs, which, under the UN Charter, may take appropriate measures to prevent and punish acts of genocide (Article 8). The second option would be to bring a case before the International Court of Justice, which is the judicial organ competent to adjudicate disputes between contracting parties concerning the interpretation, application, or fulfilment of the Convention (Article 9).

To date, beyond the imposition of sanctions by individual or grouped States, the only coordinated action taken by the international community has been the request for UN intervention through the deployment of a fact-finding mission or commission of inquiry. However, these mechanisms require the consent of the State concerned in order to operate on its territory. Moreover, even though fifty experts - both individually and as members of working groups - have openly denounced China's conduct in Xinjiang, the UN Secretary-General has never expressly addressed the matter. Thus, the UN mission option has not been pursued.

On the broader international front, the absence of reaction by majority-Muslim States geographically close to China, such as Malaysia or Indonesia, is striking, as these States have refused to take a clear position on the repression of the Uyghurs, including its religious dimension. The Palestinian authorities have adopted a similar stance, not only refraining from joining the significant number of States that denounced China's abuses against the Uyghur minority but even praising the policies implemented by the Chinese government in the region. Similarly, a motion presented by Cuba before the Third Committee of the UN General Assembly in September 2021 - which rejected genocide allegations against China on the basis

[258] B. Meoevoli, *L'obbligo di cooperazione degli Stati con la Corte Penale Internazionale*, "Centro Studi per la Pace", Roma, 2005, p. 70.

of non-interference in domestic affairs - was supported by numerous Islamic States, including Kuwait, Pakistan, Syria, and Iran.

The division within the international community therefore appears to favor China, which enjoys the backing of a majority of States, including many members of the Organization of Islamic Cooperation, despite its mission to protect Muslim minorities worldwide. Evidently, commercial and political interests prevail over the defense of shared Islamic identity. Turkey itself, from which the Uyghur minority originates, has assumed an ambiguous position - alternating between criticism of China's policies in Xinjiang and more conciliatory attitudes during periods of intensified Sino-Turkish economic relations. In 2009, Prime Minister Erdoğan explicitly referred to the situation in Xinjiang as genocide and long supported the Uyghur independence movement, granting asylum to persecuted Uyghurs and hosting their political leaders. Over time, however, Turkey's stance softened as economic ties with China deepened, particularly following a Chinese loan of USD 3.6 billion for Turkish energy and transport projects. Political considerations further reinforced this trend as Turkey, reacting to deteriorating relations with the West, strengthened its diplomatic ties with China. Consequently, Turkish solidarity with Uyghur refugees has progressively diminished, to the point that in 2017 the two States concluded an extradition agreement. Other majority-Muslim States have likewise signed extradition agreements or deported Uyghurs. It is estimated that since 2017 some 682 Uyghurs have been detained in Egypt, Indonesia, Kazakhstan, Pakistan, Qatar, Malaysia, Saudi Arabia, Syria, Tajikistan, Thailand, the United Arab Emirates, and Uzbekistan. These actions are largely attributable to Chinese loans to these States and China's commitment to import significant quantities of their petroleum.

Among the initiatives taken by the international community at the United Nations, it is also worth noting the joint declaration submitted by 39 States, led by Germany and the United Kingdom, condemning the violations committed against the population of Xinjiang, both before the Third Committee of the General Assembly and before the Human Rights Council. Yet even this initiative failed to produce meaningful follow-up.

Regarding the second option - that is, bringing proceedings before the International Court of Justice - the prospect of classifying the violations against the Uyghurs as genocide initially raised hopes for a case modelled on *The Gambia v. Myanmar Judgment.* However, as previously mentioned, China has entered a reservation upon ratification of the Genocide Convention, declaring that it does not consider itself bound by article 9, which grants the ICJ jurisdiction over disputes between contracting parties. This avenue is therefore also foreclosed.

In light of the foregoing, both pathways implied by the duty of international cooperation - recourse to United Nations organs and action before the International Court of Justice - appear either ineffective or unattainable. Thus, the only remaining option available to States, grounded in the classification of the prohibition of genocide as *jus cogens*, would be the establishment of domestic tribunals to ascertain violations committed by Chinese authorities in Xinjiang. This approach was pursued in the United Kingdom, where, in September 2020, following a request from the World Uyghur Congress, an independent tribunal chaired by Prosecutor Geoffrey Nice was established to examine evidence relating to ongoing human rights violations against the Uyghur people by the Chinese government and to assess whether such violations constituted genocide under the 1948 Convention.

In December 2021, the tribunal issued its final judgment, concluding that the government of the People's Republic of China had committed genocide against the Uyghurs through measures involving birth prevention and sterilization. The judges also presented substantial evidence of crimes against humanity, torture, and sexual abuse. However, despite generating significant international attention, the tribunal's decision did not bind any government, nor did it result in the expected response from States. This demonstrates that even the establishment of independent domestic tribunals provides no satisfactory solution, as such bodies, under the current legal framework, cannot go beyond identifying violations and cannot impose obligations or create binding effects on States.

3.3 The situation in Darfur

One of the bloodiest campaigns of ethnic violence on the planet unfolded in Darfur, a region in western Sudan, where since February 2003 more than 70.000 civilians have been killed and approximately 1.8 million people have been forcibly displaced from their areas of origin. The roots of the violence - described by many observers as genocidal in nature - are complex and, at present, not entirely clear. What is certain, however, is that the main perpetrators of the killings and expulsions were pro-government Arab militias, whereas the principal civilian victims were black Africans belonging to three distinct tribes.

The crisis essentially originated from three different conflicts that progressively intersected and overlapped over time[259]. The first was the civil war between Islamist groups supporting the national government in Khartoum and two rebel groups based in Darfur: the Sudan Liberation

[259] See S. Straus, *Darfur and the Genocide Debate*, "Foreign Affairs", Vol. 84.1, January/February 2005, pp. 124-126.

Army and the Justice and Equality Movement. These groups first emerged in February 2003 in open opposition to the political and economic marginalization imposed by the government in Khartoum against Darfur. The government, however, did not launch a genuine counter-offensive until April 2003, when the rebels carried out a spectacular attack on a Sudanese military air base, destroying several aircraft and taking a general hostage. At that point, Khartoum responded by arming irregular militias and deploying them to eradicate the rebellion. This triggered the first wave of mass violence perpetrated by government-aligned militias against civilians.

As previously noted, however, other conflicts contributed to the escalation in Darfur. The second focal point of hostility was the long-standing civil war in southern Sudan between pro-government Arab forces and black Christian and animist communities. This conflict had been ongoing since 1956, the year Sudan gained independence from the United Kingdom, and between 1956 and 1983 it caused the deaths of approximately two million civilians. Recently, the government and the principal rebel movement in the south had entered peace negotiations mediated by the Intergovernmental Authority on Development. Although, after numerous diplomatic rounds, the parties appeared close to concluding an agreement in June 2004, hostilities never effectively ceased. This was partly because Darfur was never genuinely represented at the negotiating table, prompting the local rebel movement - which felt its interests were not adequately protected - to continue carrying out violent protests in the region.

A third conflict, rooted in tribal dynamics, also contributed to the Darfur crisis. The region is essentially divided between two main groups: the native black African population, primarily sedentary farmers, and the population of Arab origin, largely semi-nomadic pastoralists. Although the distinction between the two groups has become increasingly blurred over decades of intermarriage, recent tensions over access to resources - particularly water - have reignited older disputes. Historically, during the dry seasons, conflicts over land between farmers and herders in Darfur had been resolved peacefully. Over the last two decades, however, prolonged drought and ongoing desertification have rendered water and arable land increasingly scarce, multiplying sources of conflict. Since the early 1980s, successive Sudanese governments have taken an openly partisan stance by supporting Arab groups and forcefully opposing Christian rebels. This led to extremely violent tribal clashes from the late 1980s throughout the 1990s: Arab groups formed militias, burned villages, and killed thousands of civilians; African groups formed self-defense units, which later evolved into the first Darfur insurgency movement that emerged, as noted, in 2003.

The violent conflict that erupted in spring 2003 was therefore fueled by all three civil wars that had unfolded in the country. It was in this context that the *Janjaweed* emerged - armed groups whose name is commonly translated as "evil men on horseback". These militias were deployed by the pro-government Arab faction to terrorize the villages. Indeed, Khartoum had instructed these militiamen to "eliminate the rebellion", as Sudanese President Omar al-Bashir openly acknowledged in a speech delivered in December 2003[260].

What followed was a systematic campaign of violence directed against black African civilians - many of whom were Christian or animist and largely belonged to the same tribes from which the anti-government rebellion had originate. In several instances, Janjaweed operations were directly supported by the regular Sudanese army, as militia leaders themselves admitted. In some cases, the government air force bombed targeted areas before the militiamen launched ground attacks, looted settlements, and destroyed villages - tactics that proved decisive during key phases of the conflict.

Satellite imagery revealed vast areas of Darfur burned, devastated, or abandoned. By late September 2003, a United States official reported that 574 villages had been destroyed and an additional 157 severely damaged. What most shocked the international community was that the vast majority of these attacks were intentionally directed at civilians, including villages where rebel groups had never maintained a real military presence. Khartoum's strategy appeared to be that of indiscriminately punishing black Africans as potential rebel supporters to prevent future uprisings. Witnesses interviewed at different times and places consistently reported that attacks targeted unarmed men with the intent to kill, and that women, children, and the elderly were not spared. Sexual violence was widespread throughout the conflict. Property destruction and appropriation were also pervasive, as militia members routinely seized civilian settlements.

This wave of mass violence produced what a team of medical researchers described as a demographic catastrophe in Darfur, with approximately 1/3 of the region's population forced to flee - mostly to neighboring Chad - or otherwise violently uprooted. Due to the tribal nature of the conflict, it is difficult to determine the exact number of casualties; journalistic sources estimated around 50.000 deaths, though the actual figure is likely much higher. In October 2004, a World Health Organization official estimated that 70.000 people who had disappeared in Darfur had died in the preceding six months from malnutrition and disease following their

[260] Associated Press, *Sudanese President Says War Against Outlaws Is Government Priority*, "Sudan Tribune", 31 December 2003. Omar al-Bashir first came to power through a military coup in 1989. He subsequently remained in office through three elections, the outcomes of which were largely secured through systemic corruption. Rather than pursuing an impartial approach to ethnic relations within the State, al-Bashir consistently supported the Arab faction in the conflict.

forced displacement, a figure apparently never included in official casualty counts[261]. In mid-2004, an unprecedented food crisis further caused, according to reliable journalists, an additional 350.000 deaths by the end of the year.

Most of these facts are incontrovertible, as they have been consistently documented by journalists and humanitarian workers present in the region. Nevertheless, the government of Khartoum persistently denied any direct involvement in attacks against civilians, and both the Arab League and the African Union rejected allegations of human rights violations in Darfur, attributing the violence to the brutal climate inherent in civil war. What is most relevant for the purposes of the present analysis is that, starting in March 2004, public debate in the United States and Europe focused intensely on whether the term *genocide* should be applied to the events unfolding in Darfur. The discussion was largely driven by a series of articles by Nicholas Kristof in *The New York Times*, accompanied by extensive photographic documentation of the atrocities[262]. Consequently, in July 2004 the United States Holocaust Memorial Museum declared a "genocide emergency" in Darfur, and other organizations such as MoveOn.org, the Congressional Black Caucus, various african-american civil rights groups, and numerous international humanitarian organizations began referring openly to genocide in Sudan. At the same time, editorialists for major newspapers - including the *Philadelphia Inquirer* and *The Boston Globe* - issued calls for action to stop the violence. Later, American evangelical churches urged the United States government to formally recognize the situation as genocide against black Christian populations in southern Sudan.

Finally, in July 2004, the United States Congress adopted Resolution 467, formally characterizing the situation in Darfur as genocide[263]. Subsequently, in early September, upon reviewing the findings of a government-sponsored investigation, Secretary of State Colin Powell and President George W. Bush likewise used the same term[264].

About the investigation commissioned by the United States, it is noteworthy that this marked the first time a sovereign State initiated an official inquiry into atrocities committed within the territory of another sovereign State for the explicit purpose of determining whether the crime of genocide had been perpetrated. The investigation was coordinated by the Coalition for International Justice, a non-governmental organization operating under the auspices of the U.S. Department of State's Bureau of Democracy.

[261] World Health Organization, News and Press Release, 2 June 2004.
[262] N. D. Kristof, *The secret genocide archive*, "The New York Times", 22 February 2005.
[263] Resolution H. Con. Res.467, *Declaring genocide in Darfur, Sudan*, 9 July 2004.
[264] S. Straus, *Darfur and the Genocide Debate*, "Foreign Affairs", Vol. 84.1, January/February 2005, p. 123.

The investigative team included experts in international law and sexual violence, a prosecutor from the U.S. Department of Justice, a New York City district attorney who had previously served as an investigator for the ICTY, two genocide specialists, and a London-based detective who had also worked on investigations related to crimes committed in the former Yugoslavia[265]. The team conducted its work primarily by collecting testimonies in settlements and UNHCR refugee camps located along the Chad–Sudan border, which hosted large numbers of black African refugees expelled from Darfur by the Janjaweed militias.

Overall, the investigation analyzed 1136 interviews, on the basis of which the investigators reported that “analysis of the refugee interviews points to a pattern of abuse against members of Darfur’s non-Arab communities”[266]. Specifically, the interviewees stated that they had personally witnessed the killing of a family member (61%), the killing of an acquaintance (67%), shootings (44%), deaths resulting from forced displacement (28%), beatings (21%), rape (16%), aerial bombardments (67%), destruction of private property (55%), and looting of personal belongings (47%)[267]. Significantly, interviewees also reported that the militiamen, while attacking African communities, systematically used ethnic slurs such as “kill the slaves” and “we have orders to kill all the blacks”[268].

Once the investigation was completed, its analyses and findings were transmitted to the U.S. Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper, and to Secretary of State Colin Powell. Based on the report, it was possible to conclude “that there was a deliberate targeting of the groups with the intent to destroy”[269]. In particular, the Janjaweed targeted members of three African tribes - the Fur, the Masalit and the Zaghawa - who were accused of allegedly supplying soldiers to the rebels.

The investigation commissioned by the U.S. Government constituted an important precedent, demonstrating for the first time that a single nation could undertake an inquiry aimed at determining whether a genocide was taking place in another part of the world. Moreover, the remarkably swift and efficient way the investigation was conducted shows that a determination regarding genocide can, in principle, be made rapidly and with relative effectiveness. The outcomes of the investigation, however, raise certain concerns. Although Powell’s statements, grounded in the findings of the inquiry, appeared to open the way to various courses of action

[265] S. Totten, *The US Investigation into Darfur Crisis and the US Government’s Determination of Genocide*, “Genocide Studies and Prevention”, Vol. 1.1, July 2006, p. 58.
[266] US State Department, *Documenting Atrocities*, § 3.
[267] *Ibid*., § 1.
[268] *Ibid*., § 4.
[269] *Ibid*., § 1.

- including potential legal or even military intervention to halt the genocide - no concrete measures were ultimately taken. Instead, the United States merely issued a formal appeal to the United Nations, which, however, produced no meaningful follow-up.

3.3.1 The possible application of the Genocide Convention to the crimes committed in Darfur

As discussed in the previous section, from the outset various civil society actors as well as U.S. governmental authorities employed the term *genocide* to characterize the violence perpetrated in Darfur. Several human rights organizations and numerous humanitarian agencies openly called for the application of the 1948 Genocide Convention. Even the Congressional Resolution expressly referred to the Convention, urging the United Nations Security Council to intervene in accordance with Article 8 and, in the event of inaction by the Council, calling for a concrete and targeted response by the U.S. administration "to seriously consider multilateral or even unilateral intervention to prevent genocide"[270].

By contrast, other world leaders showed reluctance to use the term *genocide* with respect to Darfur and, accordingly, to invoke the Convention. For instance, the Canadian and British governments, as well as European institutions, avoided referring to the crime of genocide, and even United Nations Secretary-General Kofi Annan preferred to describe the events in Darfur as "massive violations of human rights"[271].

Considering these differing positions, it is therefore necessary to assess whether the elements required for the potential application of the 1948 Convention to the violence committed in Sudan are indeed present. Two key points raised by proponents of the Convention's applicability must first be noted. The first concerns the clear identification, by the Arab militias, of a specific ethnic group (black Africans of Christian and animist faiths) as the object of total destruction; the second relates to the existence of a systematic and intentional plan aimed at carrying out such destruction.

Consequently, intervention by States Parties to the Convention was urged - either directly, to halt and punish the genocide, or indirectly through recourse to the United Nations Security Council. Both elements of the crime of genocide would therefore appear to be present in this case: the objective element (*actus reus*), consisting of a series of violent acts (killings, deportations, sexual violence, destruction, and actions aimed at eradicating the group's ethnic

[270] Resolution H. Con. Res.467, *Declaring genocide in Darfur, Sudan*, 9 July 2004, § 3.
[271] K. Annan, 25 June 2004, "UN News, Global perspective Human stories".

identity), and the subjective element (*dolus specialis*), which would be reflected in a systematic and far-reaching plan of extermination and/or territorial removal implemented through irregular militias.

In response to the U.S. initiative advanced by Secretary of State Colin Powell before the United Nations, accompanied by an explicit request for action, in October 2004 Secretary-General Kofi Annan established an International Commission of Inquiry on Darfur to determine violations of international humanitarian law and human rights law in Darfur, requiring the submission of a full report within three months. The Commission was duly constituted, carried out its activities within the prescribed timeframe, and produced a report which - while acknowledging the commission of serious violations of humanitarian law - nevertheless, as will be examined in detail, excluded the possibility of applying the Genocide Convention.

The Commission first affirmed the responsibility of the Sudanese government and the Janjaweed militias for war crimes and crimes against humanity, finding that both military and paramilitary forces had indiscriminately attacked civilians and committed inhumane acts - including murder, torture, rape, deportation, and pillage - targeting in particular members of the black African tribes of the Fur, Masalit, and Zaghawa. However, the investigators concluded that they lacked sufficient evidence to affirm that the Sudanese government and the Arab militias had pursued a policy of genocide, although "in some instances individuals, including government officials […] committed acts with genocidal intent"[272].

The Commission's negative conclusion regarding the Convention's applicability was therefore not based on the absence of the *actus reus*. Indeed, the Commission found that genocidal intent could be inferred from certain conduct perpetrated by the Sudanese government and the militias, including killings, acts intended to cause serious bodily or mental harm, and the imposition of conditions of life intended to bring about physical destruction. The Commission also openly acknowledged that a specific protected group had been identified as the target of the violence.

Thus, even according to the findings of the Commission of Inquiry, both the objective (conduct) and subjective (intent) elements required to characterize the violence in Darfur as genocide would appear to be present. The Commission's view that the Convention was inapplicable stemmed instead from a distinction between the collective and individual levels. At the collective level, the Commission held that "[…] one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. The policy

[272] *Report of the International Commission of Inquiry on Darfur to the Secretary General*, pursuant to S. C. Res.1568, 18 September 2004, Annex to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, §§ 494-501.

of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds"[273]. At the individual level, however, the Commission affirmed that "[…] one should not rule out the possibility that in some instances single individuals, including Government officials, may entertain a genocidal intent or, in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile group. If any single individual, including any Government official, has such intent, it would be up to a competent court to make such a determination on a case-by-case basis"[274].

From the arguments advanced by the Commission, it follows that, in its view, genocidal intent should be excluded at the collective level, whereas it may have been present in certain cases at the individual level - though not in a manner sufficiently widespread or systematic to justify the application of the crime of genocide. The Commission therefore recommended the establishment of a competent court to determine individual responsibility, evaluating in each specific case the presence or absence of the subjective element of intent.

The conclusions of the United Nations Commission of Inquiry thus resulted in the non-application of the Convention to the Sudanese situation. Meanwhile, the Security Council debated the possibility of imposing sanctions on Sudan's oil industry as a means of internationally condemning the ongoing violence, as well as the possibility of deploying armed forces to accelerate the end of hostilities. On the first point, the Council reached no result because China - given its significant commercial interests in Sudan - abstained, aligning itself with Algeria, Pakistan, and Russia, which were likewise keen to maintain favorable economic relations with the Sudanese government. Concerning peacekeeping intervention, the Security Council held an extraordinary meeting in Nairobi to discuss such a possibility or, at the very least, to attempt to agree on an international strategy capable of producing a peace agreement by the end of the year. However, the Commission's finding that the Genocide Convention was inapplicable effectively discouraged international actors - including the United Nations itself - from considering military intervention in support of peace in Sudan.

Following the renewed escalation of violence in Darfur during July and August 2006, the United Nations Security Council once again addressed the situation by adopting Resolution 1706 on 31 August 2006, establishing UNAMID, a peacekeeping force composed of 20.000

[273] *Ibid.*, § 518.
[274] *Ibid.*, § 520.

blue helmets tasked with supporting the 7.000 African Union troops already deployed in the region.

In February 2010, despite ongoing violence in Darfur, Sudanese President Omar al-Bashir and the Justice and Equality Movement - the main Darfur rebel faction - signed a truce. Nevertheless, a comprehensive peace agreement between the Sudanese government and the rebel faction leaders was reached only on 31 August 2020. Despite this, in April 2023 armed clashes resumed across Sudan, resulting in one of the highest mortality rates globally and widespread incidents of rape, massacres, and ethnic cleansing.

On 27 January 2025, the Prosecutor of the International Criminal Court announced that his office would issue arrest warrants for those accused of atrocities in the region; once again, however, the charges concerned human rights violations and crimes against humanity, without any reference to the crime of genocide[275].

For the assessment of the rulings of the International Criminal Court, reference is made to the following section.

3.3.2 The non-application of the Genocide Convention to the situation in Darfur

At the core of the Commission's assessment regarding the inapplicability of the Genocide Convention to the situation in Darfur lies an essentially restrictive interpretation of the terms "destroy" and "intent" as contained in the Convention.

Specifically, the Commission appears to construe the notion of "destroy" *exclusively* as the physical destruction of individuals constituting part of a protected group. This interpretation is evidenced by the repeated use of expressions such as "annihilate"[276], "eradicate"[277], and "extinction"[278], whereas alternative strands of jurisprudence allow for a broader approach that is not strictly confined to physical or biological extermination, but extends to the elimination of a group in its "social existence"[279]. In this respect, the Commission seemingly intended to align itself with the ICTY's ruling in the *Krstić* case, according to which "despite recent

[275] *ICC, prosecutor seeking arrest warrants for those accused of atrocities in Sudan's West Darfur region*, "AP News", 28 January 2025.

[276] *Report of the International Commission of Inquiry on Darfur to the Secretary General*, pursuant to S. C. Res.1568, 18 September 2004, Annex to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, §§ 515, 517, 518 and 520.

[277] *Ibid.*, § 515.

[278] *Ibid.*

[279] See R. Rissing-van Saan, *The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia*, "Journal of International Criminal Justice", Vol. 3, 2005, p. 381.

developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group"[280].

Such an interpretation, however, fails to take proper account of the multiple alternatives of genocidal *actus reus* expressly set out in the 1948 Convention, some of which - while not directly aimed at physical destruction - nonetheless encompass conduct that is deeply harmful to the group and therefore potentially destructive. The text of the Convention itself clearly reveals the drafters' intention to criminalize not only acts of direct physical violence, but a broader genocidal enterprise consisting of the repeated commission of one or more harmful acts capable, over time, of bringing about the total or partial destruction of a protected group.

With regard to the subjective element, the Commission maintains that the *mens rea* of genocide must be divided into two distinct components. The first consists of the general criminal intent to commit the prohibited acts, while the second entails the specific intent to destroy, in whole or in part, the group as such[281]. As clarified in the Report, this latter element is to be understood as an aggravated criminal intent, or *dolus specialis*, requiring the deliberate intention of the perpetrator to carry out prohibited acts directed at the total or partial destruction of the group, with full awareness of their destructive potential. Accordingly, the Commission posits the cumulative presence of both elements as a prerequisite for the establishment of genocidal intent.

With respect to the second component, the Commission aligns itself with Krstić's judgment in which is stated that "the perpetrator [must] consciously desire […] the prohibited acts he committed to result in the destruction, in whole or in part, of the group" and suggests that this formulation should be reconsidered in light of the fact that "the gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration" [282]. In other words, the Commission considers it unrealistic that a single perpetrator could, acting alone, desire the destruction of a protected group as the outcome of their individual conduct. Rather, it appears more realistic that such destruction would be envisaged as the result of a collective campaign to which the individual contributes. The Commission nonetheless expresses reservations as to whether the requirement of a "conscious desire to destroy" can be satisfied in cases where the individual perpetrator does not intend to commit genocide alone but acts with the awareness of contributing to a collective genocidal campaign carried out by multiple actors.

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[280] ICTY, Trial Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-T, 2 August 2001, § 580.

[281] *Report of the International Commission of Inquiry on Darfur to the Secretary General*, pursuant to S. C. Res.1568, 18 September 2004, Annex to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, § 491.

[282] ICTY, Trial Chamber, *Prosecutor v. Krstić Judgment*, IT-98-33-T, 2 August 2001, § 549.

In adopting this position, the Commission aligns itself once again with jurisprudential orientations developed by the ad hoc international criminal tribunals, particularly in the *Akayesu* and *Krstić* cases, which reached similar conclusions. This line of reasoning is characteristic of the *purpose-based approach*, formerly dominant in international criminal jurisprudence, but increasingly challenged by the so-called *knowledge-based approach*. According to the latter, the genocidal intent requirement should be deemed satisfied where the perpetrator acted within the context of a campaign directed against a protected group and had knowledge that the aim or manifest effect of that campaign was the total or partial destruction of the group[283].

By disregarding these more recent interpretative developments, the Darfur Commission chose instead to adhere to the approach prevailing at the time, as exemplified by the *Akayesu* judgment. In particular, the *Akayesu* Trial Chamber, with regard to *dolus specialis*, stated that "[it] is a well-known criminal law concept in the Roman continental legal systems […] and demands that the perpetrator has the clear intent to cause the offence charged"[284]. It is noteworthy that in this judgment the restrictive interpretation of *dolus specialis* is supported through an argument grounded in comparative criminal law. This reliance, however, raises several concerns. First, it appears unduly narrow to confine the comparative analysis to Roman-continental legal systems alone. Second, even within such systems, the comparison does not fully support the interpretation advanced.

In French criminal law, for instance, the distinction between *dol général* and *dol spécial* does not relate to the *intensity* of intent, but rather to its *object*. While *dol général* refers to the perpetrator's awareness of acting in violation of criminal law, *dol spécial* denotes the specific intent to bring about a particular result[285]. From this perspective, the French notion of *dol spécial* would appear capable of encompassing situations in which the perpetrator intends to bring about the genocidal outcome not solely through their own conduct, but also by contributing to a collective genocidal action.

Alternatively, if the reference in Akayesu to Roman-continental systems was intended to encompass the legal orders of Germany, Austria, and Switzerland, the comparison remains

[283] See A. K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, "Columbia Law Review", Vol. 99, 1999, pp. 2259-2288; A. Gill, *Derecho Penal Internacional: Especial consideración del delito de genocidio*, Editorial Tecnos, Madrid, 1999, pp. 259 ff.; Id., *Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermords im Römischen Statut des Internationalen Strafgerichtshofs*, "Zeitschrift für die gesamte Strafrechtswissenschaft", Vol. 112, 2000, p. 395.

[284] ICTY, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998, § 498.

[285] See F. Le Gunehec, *Élément moral de l'infraction*, "Juris-Classeur Pénal. Code Pénal", Vol. 1, 1998, artt. 121-123, fasc. 20, §§ 19 ff. and 29 ff.

problematic. These systems, which do not distinguish between general and special intent, embrace a broad conception of "*Absicht*" that appears to include cases in which the perpetrator's objective is to contribute to a collective action planned and implemented by others[286]. In any event, a genuine comparative approach would also require an examination of common law systems. In this respect, it should be noted that common law does not provide a clear and uniform definition of specific intent, nor does it offer a fixed catalogue of crimes of specific intent[287]. It follows that, even in common law jurisdictions, the intent requirement for genocide cannot reasonably be construed as satisfied only where the perpetrator seeks to bring about genocide exclusively through their individual conduct.

As anticipated, however, the Darfur Commission grounded its restrictive interpretation of genocidal intent not only on Akayesu, but also on certain considerations emerging from the Krstić judgment, likewise rooted in a purpose-based approach. The ICTY Judges expressed doubts as to the compatibility of the knowledge-based approach with customary international law, which, in their view, appeared to confine genocide to acts aimed at producing, through the individual perpetrator's conduct, the total or partial destruction of the group. More recent jurisprudence has nevertheless highlighted that the ICTY failed to adequately specify and substantiate its reference to customary international law, thereby leaving the matter highly controversial[288]. Moreover, it is far from self-evident that customary international law should govern all aspects of genocide in the presence of a treaty - namely, the Genocide Convention - that specifically regulates the offence.

The Darfur Commission thus elected to conform to the aforementioned precedents without engaging with more innovative jurisprudential developments. Such an approach remains open to criticism, at least insofar as the Genocide Convention appears to distinguish, within genocidal activity, between a collective and an individual level[289]. Consequently, the element of intent ought to be interpreted in a sufficiently broad manner so as to encompass situations in which the perpetrator acts with the awareness that their conduct, while not sufficient in itself to bring about genocide, nonetheless contributes to a genocidal campaign carried out by others.

Taken as a whole, the most salient feature of the Darfur Commission's work is the exceedingly cautious stance adopted by the investigators, who chose to adhere strictly to the consolidated jurisprudence of the *ad hoc* international criminal tribunals without extending their analysis to

[286] See G. Jakobs, *Strafrecht. Allgemeiner Teil*, Walter de Gruyter, Berlin-New York, 1991, p. 280.
[287] See C. Kress, *The Darfur Report and Genocidal Intent*, "Journal of International Criminal Justice", Vol. 3, 2005, p. 569.
[288] *Ibid.*, pp. 570 f.
[289] *Ibid.*, pp. 572 f.

more recent and innovative judicial approaches. This has resulted in a constricted reading of the concept of genocide, thereby limiting the potential to include a wider range of factual scenarios and forms of collective criminality within its legal scope.

3.3.3 The International Criminal Court on the situation in Darfur

Sudan is *not* a State Party to the Rome Statute and is therefore not subject to the jurisdiction of the International Criminal Court. Nevertheless, as a result of the referral of the situation in Darfur to the Court by the United Nations Security Council through Resolution No. 1593 of 31 March 2005, the Court acquired jurisdiction over the crimes listed in the Rome Statute committed in the territory of Darfur as from 1 July 2002. Consequently, the International Criminal Court initiated an investigation into the situation in Sudan, focusing in particular on allegations of genocide, war crimes, and crimes against humanity.

The investigation, opened in June 2005, concentrated on a limited number of high-profile suspects - including Sudanese government officials, leaders of the Janjaweed militia, and leaders of resistance movements - and involved extremely serious allegations relating to all three categories of crimes. With specific regard to the charge of genocide, the alleged conduct concerned genocide by killing, genocide through the infliction of serious bodily or mental harm, and genocide through the deliberate imposition of conditions of life calculated to bring about the physical destruction of each targeted group. None of these allegations, however, was ultimately confirmed. As a result, the criminal proceedings progressed to the issuance of arrest warrants exclusively in relation to conduct amounting to crimes against humanity and war crimes.

The Darfur situation is of particular significance in the history of international criminal justice, as it was the first situation referred to the International Criminal Court by the United Nations Security Council. It also constituted the Court's first investigation conducted on the territory of a State not party to the Rome Statute, as well as its first investigation involving allegations of genocide.

Following the investigations, several arrest warrants were issued, most of which remain unenforced to date. On 27 April 2007, an arrest warrant for alleged war crimes and crimes against humanity was issued against Ahmad Harun, former Sudanese Minister of the Interior; however, he absconded with the complicity of the domestic authorities, which refused to initiate proceedings against him. On 4 March 2009 and 12 July 2010, two further arrest warrants were issued against former Sudanese President Omar Hassan Ahmad al-Bashir, who likewise remains at large. Similarly, Abdallah Banda, a member of the United Resistance Front, subject to an arrest warrant of 7 March 2011, and Abdel Raheem Mohammad Hussein, former Minister of National Defense, sought under a warrant issued on 1 March 2012, are still fugitives. By contrast, Saleh Mohammed Jerbo Jamus, Chief of Staff of the Sudanese regular militia and subject to an arrest warrant of 4 October 2013, has since deceased. The charges against Abu Garda, leader of the United Resistance Front and subject to an arrest warrant of 8 February 2010, were instead not confirmed[290].

By contrast, criminal proceedings were instituted against Ali Muhammad Ali Abd-Al-Rahman, at the time of the arrest warrant an alleged leader of the Janjaweed militia. He was first subject to an arrest warrant on 27 April 2007 and to a second warrant on 11 June 2020 and was suspected of 31 counts of war crimes and crimes against humanity allegedly committed in Darfur between August 2003 and March 2004. Abd-Al-Rahman was transferred to the International Criminal Court on 9 June 2020, following his voluntary surrender in the Central African Republic. His initial appearance before the Court took place on 15 June 2020.

The confirmation of charges hearing was held from 24 to 26 May 2021, and on 9 July 2021 the Pre-Trial Chamber confirmed all charges against the accused and committed him to trial. The trial opened before Trial Chamber I on 5 April 2022 and involved the testimony of 56 witnesses during the prosecution's case. Of particular significance was the participation of the common legal representatives of the victims, who delivered their opening statement on 5 June 2023 and were subsequently authorized to call one witness and several victims of violence to testify before the Chamber. The defense, by contrast, called 18 witnesses and based its strategy primarily on a claim of mistaken identity, consistently denying that the accused had been a high figure within the Janjaweed militia or had participated in mass violence in Darfur. Having fled to the Central African Republic in February 2020, following the announcement by Sudan's new government of its intention to cooperate with the Court's investigations, Abd-Al-Rahman justified his flight by claiming that he had acted out of desperation and fear that the authorities might kill him.

The closing statements in the trial were heard from 11 to 13 December 2024. On 6 October 2025, Trial Chamber I found Abd-Al-Rahman guilty of 27 counts of crimes against humanity and war crimes committed in Darfur between August 2003 and March 2004, in particular in relation to his role in attacks against the Fur, the Masalit, and other non-Arab communities in

[290] ICC-02/05, *Darfur, Sudan, Situation in Darfur, Sudan*.

the western part of the region[291]. The crimes included murder, rape, persecution, torture, and attacks against civilians in the towns of Kodoom, Bindisi, Mukjar, and Deleig. In a 355-page ruling, Presiding Judge Joanna Korner, together with Judges Reine Alapini-Gansou and Althea Violet Alexis-Windsor, concluded beyond reasonable doubt that the accused had ordered, supported, and participated in widespread and systematic terror attacks resulting in mass killings and forced displacement[292].

On the same date, 6 October 2025, a decision on the scheduling of sentencing proceedings was issued, and a reparations phase for the victims was opened.

Although the conviction did not concern acts of genocide, but solely war crimes and crimes against humanity, it nevertheless represented a major milestone for international justice. It constituted the first judgment of the International Criminal Court in relation to the situation in Darfur, the first case referred by the United Nations Security Council to result in a conviction, and the first conviction ever rendered by the Court for persecution on gender grounds.

A significant limitation of the judicial proceedings lay in the strict confinement of the investigation to events occurring in Darfur, notwithstanding the fact that large-scale violence had affected other regions of Sudan as well. This limitation became particularly evident in 2023, when, in addition to a campaign of ethnic cleansing in West Darfur, widespread sexual violence and other serious abuses were perpetrated in parts of the capital Khartoum and in South Kordofan. However, since the 2005 Security Council referral concerned solely events within the territory of Darfur, the Court's jurisdiction remains limited to that region.

In its reports of September and October 2024, a United Nations investigative mission documented widespread crimes throughout Sudan and accordingly called on the Security Council to extend the jurisdiction of the ICC to the entire country[293]. The mission further urged governments to make use of all available mechanisms of international justice, including the establishment of an internationalized judicial mechanism for Sudan and the initiation of proceedings based on universal jurisdiction before domestic courts, as a complement to the work of the International Criminal Court. These appeals, however, have thus far gone unheeded.

[291] *Ibid.*
[292] ICC, Media Advisory, *Trial Judgment in Adb-Al-Rahman Case on 6 October 2025 - Practical information*, 25 September 2025.
[293] United Nations Human Rights Office of the High Commissioner, *Sudan: UN Fact-Finding Mission outlines extensive human rights violations, international crimes, urges protection of civilians*, 6 September 2024; *Id.*, *Sudan: UN Fact-Finding Mission documents large-scale sexual violence and other human rights violations in newly issued report*, 29 October 2024.

As a result, precisely at a time when violence is once again spreading across Sudan, the only abuses potentially subject to judicial scrutiny by the ICC remain those occurring in Darfur.

3.4 The situation in Yemen

Yemen, one of the poorest countries in the Arab world, has since 2014 been engulfed in a devastating civil war that has claimed the lives of more than 100.000 people since the outbreak of the conflict, including approximately 12.000 individuals - among them 7.500 children - killed in targeted attacks. According to the United Nations, when deaths caused by hunger and disease are added to those resulting directly from violence, the total number of victims between 2014 and 2020 alone exceeds 230.000. The civil war involves the armed Houthi movement, supported by Iran and currently controlling the capital Sana'a and much of north-western Yemen, and an international coalition led by Saudi Arabia backing the internationally recognized central government. In 2019, the United Nations declared that both the Houthis and the Yemeni government had committed numerous war crimes, including arbitrary killings, rape, torture, and the recruitment of child soldiers[294]. In parallel, Genocide Watch issued a genocide emergency alert concerning the local population, which has been subjected to systematic bombardment and deprived of food, water, and essential services by the Saudi-led coalition[295]. The conflict, whose roots lie in the failure of the political transition following the 2011 protests associated with the so-called Arab Spring, began, as noted, at the end of 2014. It initially involved the Yemeni government led by President Abdrabbuh Mansur Hadi and the armed Houthi movement, both of which sought to be recognized as the country's legitimate government. On the one hand, the newly appointed President Hadi was immediately confronted with a range of deeply entrenched challenges undermining national security, including jihadist attacks, the rise of the southern separatist movement, the continued loyalty of elements of the security forces to former President Ali Abdullah Saleh, endemic corruption, unemployment, and widespread food insecurity. On the other hand, the Houthi movement, claiming to represent the Shiite minority, capitalized on the weakness of the new government by occupying parts of Saada province and the surrounding areas. Disillusioned by the failed political transition and severely affected by the economic crisis, many Yemenis - including segments of the Sunni population - began to support the Houthis. As a result, between late 2014 and early 2015, the

[294] United Nations Refugee Agency Italia, Comunicati Stampa, *Quasi 100 vittime civili a Settimana in Yemen nel 2018*, 7 March 2019.
[295] Genocide Watch, *Genocide Emergency: Yemen*, July 2020.

rebels gradually succeeded in capturing the capital Sana'a, forcing President Hadi to flee abroad.
At this stage, Saudi Arabia and eight other Sunni Arab States, alarmed by the rise of a group they believed to be militarily backed by the Shiite government of Iran, launched an aerial campaign aimed at defeating the Houthis and restoring Hadi's government. The Saudi-led coalition received logistical and intelligence support from the United States, the United Kingdom, and France.
Convinced that Houthi power could be dismantled through a swift military campaign, Saudi forces attempted a ground offensive, landing in the southern port city of Aden in August 2015 and regaining control over much of southern Yemen. However, the conflict soon proved far more protracted and complex than anticipated. To this day, the Houthis retain control over Sana'a and large parts of north-western Yemen, to the extent that President Hadi, although formally reinstated, has remained resident in Saudi Arabia. From the north, the Houthis have also besieged Taiz, the country's third-largest city, and have launched regular ballistic missile and drone attacks against Saudi Arabia. The situation has been further complicated by the involvement of Al-Qaeda militants, who have carried out deadly attacks in the Aden area and seized control of certain territories in the south of the country.
With the stated objective of preventing arms smuggling from Iran to the Houthis, the Saudi-led coalition intensified its blockade of Yemen in 2017. These restrictions led to dramatic increases in the prices of food and fuel, significantly exacerbating food insecurity among the civilian population.
Initially, considerable hope was placed in the United Nations-mediated Stockholm talks held in December 2018, which, *inter alia*, provided for a ceasefire in the strategic city of Hudaydah, through which supplies for approximately 2/3 of the Yemeni population pass. However, these agreements proved fragile from the outset, and the prospect of a political resolution to the conflict appeared increasingly remote.
Indeed, although the ceasefire has largely been upheld, fighting has continued elsewhere, particularly in Taiz, which has remained a key focal point of the conflict. In 2020, the United Arab Emirates officially withdrew from Yemen, yet it has continued to exercise substantial influence within the country. In February 2021, Houthi rebels launched an offensive to seize Marib, the last stronghold of the internationally recognized Yemeni government, and in early March carried out missile and aerial attacks against Saudi Arabia, targeting oil tankers, infrastructure, and international airports. The Saudi-led coalition responded with airstrikes against Sana'a, killing hundreds of fighters and severely undermining the peace process.

At present, although large-scale clashes between the Houthis and the Saudi-led coalition have largely subsided, the rebels continue to attack vessels transiting the Red Sea in response to Israel's war against Hamas. At the same time, two major sources of tension further diminish the prospects for peace: on the one hand, attacks carried out by Al-Qaeda in the Arabian Peninsula, and on the other, the demands advanced by the Southern Transitional Council (STC) - an entity established in 2017, emerging from the southern separatist movement and controlling south-western areas around Aden - for the creation of an independent state in the south of the country.

In particular, the separatist group, indirectly supported by the United Arab Emirates, has taken control of Yemen's two largest governorates, Hadhramaut and al-Mahrah, while the internationally recognized government has faced increasing difficulties on the ground. Against this backdrop, long-standing rivalries between the UAE and Saudi Arabia have intensified. Most notably, the loss of influence over Hadhramaut has represented a significant setback for the Saudi government, which had invested substantial resources in infrastructure, tourism, and industry in the region. The situation in the governorate has been further aggravated by the resistance of Hadhrami tribal forces led by Amr bin Habrish, who have opposed the Southern Transitional Council's aggressive strategy by leveraging control over oil fields, thereby causing severe electricity outages in Aden and other areas.

Similarly, in the other territory controlled by the STC - the eastern governorate of al-Mahrah - the local population has resisted the separatists and has called for assistance from neighboring Oman.

In December 2025, a joint Saudi–Emirati delegation attempted to broker a solution. Saudi Arabia called for the withdrawal of the STC's forces and their replacement with the National Shield Forces, a unit established with Saudi support in 2023 and placed under the direct authority of the internationally recognized president. Conversely, the Southern Transitional Council, in an effort to secure the approval of the United States, declared its willingness to recognize Israel and to accede to the Abraham Accords. Despite these initiatives, the overall situation remains far from stabilized, particularly as the Southern Transitional Council's forces have refused to withdraw from the strategically important regions of Hadhramaut and al-Mahrah.

Meanwhile, the Secretary-General of the United Nations has undertaken a mediation effort that has proven extremely weak, effectively amounting to an appeal for the parties to exercise maximum restraint, reduce tensions, and resolve their differences through dialogue[296].

Like his predecessors, the current United Nations Special Envoy, the Swedish diplomat Hans Grundberg, lacks in-depth knowledge of Yemen's regional realities and has therefore confined his efforts to promoting ceasefire negotiations, with the hope of subsequently initiating peace talks between the Houthis and the internationally recognized Yemeni government. However, tensions arising from the war between Israel and Palestine have further narrowed the prospects for a comprehensive agreement. At present, it is envisaged - under the auspices of the United Nations - the establishment of an international working group tasked with drafting a framework agreement involving those foreign States that exert influence over Yemen, in particular Oman, Saudi Arabia, the United Arab Emirates, and Iran, while also providing for an active role for the United Nations Security Council and the European Union[297].

Against this backdrop, the most alarming aspect of the conflict remains the suffering of the civilian population. A report by Mwatana, one of Yemen's leading human rights organizations, documented 1.605 cases of arbitrary detention, 770 cases of enforced disappearance, and 344 cases of torture perpetrated by the Houthis, the Yemeni government, and affiliated armed groups between May 2016 and April 2020[298]. Both sides to the conflict have also been accused of violently attacking, raping, and torturing migrant workers and asylum seekers from the Horn of Africa. At present, approximately 20 million Yemenis lack regular access to nutritious food, and of these, around 10 million are on the brink of famine. More than 2 million children suffer from severe malnutrition-related illnesses, and while cholera continues to spread across the country, the healthcare system has collapsed, with hospitals turning patients away due to a lack of basic medical supplies.

The ongoing economic crisis continues to exacerbate the humanitarian emergency. As early as the end of 2019, the conflict led to the fragmentation of Yemen's economy into two distinct zones, respectively under the control of the Houthi authorities and of the government backed by Saudi Arabia. In the autumn of 2021, the sharp depreciation of the Yemeni currency - particularly in areas under government control - significantly eroded the population's

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[296] H. Lackner, *Yemen's Civil War Has Taken a Dangerous New Turn*, "Jacobin", Vol. 12, 2025, p. 23.

[297] P. Salisbury, *Snakes and Ladders: The Regional and International Dimensions of Yemen's Civil War*, "PeaceRep Peace and Conflict Resolution Evidence Platform", University of Edinburgh, Edinburgh, 2024, pp. 43 f.

[298] Mwatana for Human Rights, Report, *Legacy of Gunpowder. Human Rights Situation in Yemen 2023*, 18 July 2024.

purchasing power and rendered basic necessities even more difficult to obtain. This development triggered widespread protests across cities in southern Yemen, to which security forces responded with violence[299].

3.4.1 The possible application of the Genocide Convention to the crimes committed in Yemen

The report by the Yemeni human rights organization Mwatana highlights that, from the very outset of the conflict, a systematic strategy adopted by the Saudi-backed coalition consisted in targeting civilian objects - particularly farms, water supplies, markets, and fishing vessels - with the purpose of causing civilian casualties. As the report emphasizes, the way these attacks were carried out "indicates intent to destroy not only the food sources themselves, such as crops grown on agricultural land and livestock, but all possibility of farming the land in the future without a considerable influx of capital to repair the damage to the farms' infrastructure"[300]. On this basis, the authors of the report conclude that "members of the Saudi/UAE-led Coalition […] intended to use starvation as a method of warfare, in that they deprived civilians of objects indispensable to survival with intent to starve civilians or with knowledge of the virtual certainty that such deprivations and conduct would […] lead to starvation"[301].

In essence, from the earliest phases of the conflict, Saudi Arabia is alleged to have pursued a military strategy whose foreseeable and deliberate outcome was the death of hundreds of thousands of individuals through famine, as well as severe physical and mental harm inflicted upon millions more.

Although international attention to the food crisis that erupted in Yemen was initially significant, the legal qualification of the acts committed in the country as genocide has rarely been invoked. This circumstance has attracted the attention of several scholars, including Dirk Moses, who in his essay *The Problems of Genocide* specifically examines the Yemeni case[302]. Moses argues that a Western-centric perspective has, to some extent, distorted the interpretation of events in Yemen, insofar as the fact that arms supply to Saudi Arabia were largely of US and European origin contributed to a reluctance within Western public opinion to characterize the conduct in question as genocide. Instead, the emphasis has been placed on framing the crimes

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[299] Global Conflict Tracker, Center for Preventive Action, *Conflict in Yemen and the Red Sea*, 12 November 2025.

[300] Mwatana for Human Rights, Report, *Legacy of Gunpowder. Human Rights Situation in Yemen 2023*, 18 July 2024, p. 127.

[301] *Ibid.*, pp. 129 and 217.

[302] A. D. Moses, *The problems of genocide: Permanent Security and the Language of Transgression*, Cambridge University Press, Cambridge, 2021.

as acts of self-defense or as collateral damage associated with an ongoing armed conflict. According to Moses's analysis, the large-scale killing of civilians was thus justified on the basis of purportedly legitimate security concerns, without attributing to it any clear ethnic connotation linked to an intent to destroy a protected group[303].

The scholarly observations advanced with respect to the Yemeni case raise fundamental questions concerning the potential applicability of the Genocide Convention and the actual fulfilment of its objective and subjective requirements in relation to the crimes committed in Yemen. With regard to the former, it should be noted that Yemen ratified the Genocide Convention in 1989, thereby undertaking to prevent and punish the crime. However, Yemen entered a reservation to article 9 of the Convention concerning its interpretation, application, and fulfilment, asserting that the parties to a dispute must expressly confer jurisdiction upon the International Court of Justice on a case-by-case basis, thus rejecting its automatic jurisdiction. This reservation already constitutes a potential obstacle to the application of the Convention to the Yemeni case.

As far as the objective element is concerned, there appears to be little doubt as to the existence of conduct falling within the scope of genocidal acts, insofar as the available documentation consistently points to mass killings, the infliction of serious bodily and mental harm upon the civilian population through the use of famine as a weapon, as well as torture and violence aimed at destroying a substantial segment of the Yemeni population. Greater difficulties arise, however, with respect to the subjective element. Although there was an intent to destroy part of the civilian population, such intent does not appear to have been directed against a specific ethnic group. Racial hatred has never played a significant role in the Saudi intervention in Yemen, which was instead primarily driven by geopolitical considerations, largely connected to the rivalry with Iran and to the broader Sunni-Shiite divide within the Arab world. Moreover, the Saudi government has consistently justified its strategy by invoking national security concerns, portraying attacks against the civilian population as a legitimate form of self-defense against a perceived threat to its territorial integrity, while deliberately avoiding any reference to ethnic or racial motivations.

Saudi strategic considerations were further influenced by fears that an excessive strengthening of the Houthis might encourage Shiite minorities within Saudi territory to rebel against the regime, as well as by the historical circumstance that certain Saudi border provinces - namely Jizan, Asir, and Najran - had formed part of Yemen prior to their cession to Saudi Arabia under

[303] *Ibid.*, pp. 6 and 41.

the 1934 Treaty of Ta'if[304]. In light of these motivations, the Saudi government was able from the outset to reject allegations of genocide - primarily advanced by Iran - by invoking political considerations, such as its rivalry with Iran, and national security imperatives, including the need to safeguard territorial integrity against the risk of internal insurgency by Houthi-affiliated groups or the secession of border regions. In any event, the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" would appear to be entirely absent. Consequently, the subjective requirement of genocidal intent necessary to qualify the conduct perpetrated in Yemen as genocide is lacking.

3.4.1.1 Starvation, Indirect Killings and the Limits of the Genocide Concept: The Yemeni Case

A further controversial issue concerns the applicability of the notion of genocide to deaths resulting from starvation and disease rather than from direct killing. Although Lemkin himself emphasized famine as a possible instrument of mass destruction, both jurisprudence and doctrine have expressed reservations as to the classification of such conduct as genocidal[305]. Within the academic debate, there are nonetheless positions supporting the application of the concept of genocide to similar scenarios, on the grounds that famine not only produces lethal outcomes in itself, but also accelerates the spread of disease, hinders child development, and causes severe physical and mental harm, to the extent that it may constitute a means of destroying specific groups[306]. By contrast, other scholars argue that where death results from famine or disease, it is not clearly demonstrable that the perpetrators intended to bring about the destruction of the group, given the absence of a direct causal link between their conduct and the victims' deaths[307].

In the Yemeni context, the lack of a direct connection between deaths caused by famine and the military strategy of the Saudi-led coalition has been particularly emphasized in Western public discourse, largely because the coalition has benefited from the support of democratic States such as the United States and the United Kingdom. Consequently, within the collective imagination, the notion of genocide has been deliberately avoided, with civilian deaths being attributed to an unavoidable food crisis resulting from war, rather than to a targeted strategy

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[304] S. Lederman - Z. Lederman, *(Un)Noticing Yemen: The Forgotten War in Yemen and Critical Genocide Studies*, "Journal of Genocide Research", Vol. 27.3, 2025, pp. 434 f.

[305] See Chapter 1.

[306] N. Milaninia, *Understanding Serious Bodily or Mental Harm as an Act of Genocide*, "Vanderbilt Journal of Transnational Law", Vol. 51.5, 2018, pp. 1381-1420.

[307] See, in particular, S. P. *Rosenberg, Genocide is a Process, not an Event*, "Genocide Studies and Prevention: An International Journal", Vol. 7.1, Article 4.

pursued by the military coalition. Even within the United Nations, the Yemeni tragedy has often been described as collateral damage stemming from the broader confrontation with Iran[308]. The willingness of democratic powers to frame the massacres perpetrated in Yemen as consequences of armed conflict rather than as deliberate genocide is also clearly reflected in media coverage of the war. Major European and US media outlets have devoted limited attention to Yemen and, when addressing the conflict, have tended to employ neutral language devoid of moral condemnation, thereby obscuring the actual dynamics of the war or implicitly legitimizing them[309]. Media narratives consistently emphasize the responsibility of the Houthis and Iranian influence in the conflict, while giving comparatively little prominence to the humanitarian catastrophe and the related Saudi responsibilities.

Another factor frequently cited as an obstacle to qualifying the Yemeni massacres as genocide is the fact that the Saudis, alleged perpetrators of genocidal conduct, have never exercised effective territorial control sufficient to implement a deliberate extermination strategy[310]. By contrast, the Houthis have maintained firm territorial control in several regions, where they themselves have committed numerous atrocities against the civilian population. The dynamics of violence in Yemen therefore appear to fit within the tragic logic of warfare rather than within a carefully orchestrated genocidal plan.

An even more decisive element supporting the rejection of a genocide qualification lies in the absence of any religious or ethnic distinction between the groups perpetrating the atrocities and those suffering from them[311]. The victims of famine, the armed forces operating on the ground, and the Houthis themselves all belong to the same ethnic group. Accordingly, the atrocities committed are more appropriately characterized as war crimes or crimes against humanity, rather than as genocide.

In conclusion, the application of the Genocide Convention to the Yemeni case is precluded not only by Yemen's reservation to article 9 of the Convention, but also by specific considerations that militate against the existence of the subjective requirement of intent to destroy, in whole or in part, a protected group. Nonetheless, Yemen remains a borderline case that leaves unresolved a broader and fundamental question: namely, to what extent the notion of genocide may be

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[308] As noted by United Nations official: "Yemen is the collateral damage of the Iran deal"; cited in G. Hill, *Yemen Endures: Civil War, Saudi Adventurism and the Future of Arabia*, Oxford University Press, Oxford, 2017, p. 285.

[309] S. Lederman - Z. Lederman, *(Un)Noticing Yemen: The Forgotten War in Yemen and Critical Genocide Studies*, "Journal of Genocide Research", Vol. 27.3, 2025, pp. 436 f.

[310] S. Straus, *Destroy Them to Save Us: Theories of Genocide and the Logics of Political Violence*, "Terrorism and Political Violence", Vol. 24.4, 2012, pp. 544-560.

[311] A. De Waal, *Mass Starvation: The History and Future of Famine*, Polity Press, Oxford, 2018, p. 23.

expanded so as potentially to encompass massacres not directly perpetrated, but occurring as an indirect consequence of famine or humanitarian blockades.

3.4.2 The Yemeni Immunity Law in light of International Law

Irrespective of whether the acts committed in Yemen are characterized as genocide, war crimes, or crimes against humanity, it is necessary to emphasize that the repression of such conduct is, in any event, seriously hindered by the law adopted in Yemen on 21 January 2012 on the *Granting of Immunity from Legal and Judicial Prosecution* (hereinafter, the "Immunity Law"). This legislation grants former President Ali Abdullah Saleh, as well as his associates, full immunity for acts carried out in the exercise of their official duties, insofar as such acts are deemed "politically motivated acts".

In this regard, Amnesty International has highlighted the concrete risk that the Immunity Law may have the effect of shielding perpetrators of crimes such as torture, extrajudicial executions, and enforced disappearances from accountability, thereby denying victims access to justice and the possibility of obtaining adequate reparations[312]. This concern is particularly significant in light of the fact that, as noted in the preceding sections, numerous war crimes and crimes against humanity have been perpetrated during the conflict on Yemeni territory. The core legal difficulty lies in the fact that immunity before domestic courts does not exclude international criminal responsibility for crimes against humanity[313]. Indeed, amnesties for genocide, crimes against humanity, and war crimes are generally regarded as incompatible with international and customary international law, given that States are under an explicit obligation to prosecute such crimes and to ensure truth, justice, and reparations for victims.

This position has been reaffirmed in the report of the United Nations Commission on Human Rights entitled *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, which states that, with regard to the victims' right to justice, States are obliged to "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators"[314]. The same document further clarifies that amnesties, even when adopted with the aim of promoting national reconciliation, may in no

[312] Amnesty International, *Yemen's Immunity Law: Breach of International Obligations*, Amnesty International Publications, London, 2012.
[313] ICJ, *Judgment of 14 February 2002*, ICJ Reports 2002, § 60.
[314] UN Economic and Social Council, Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, (E/CN.4/2005/102/Add.1), 8 February 2005, p. 12 (Principle 19).

circumstances be applied to individuals responsible for serious crimes under international law[315].

Moreover, several international human rights treaties expressly impose on States Parties the obligation to conduct effective investigations and ensure the effective prosecution of such crimes, as well as to guarantee victims the right to an effective remedy, truth, and reparations[316]. In this respect, the Human Rights Committee, in its authoritative interpretation of article 2 of the International Covenant on Civil and Political Rights (ICCPR), has confirmed that this provision entails a duty on States Parties to investigate and prosecute violations[317].

Accordingly, any measure - including amnesties - that obstructs the prosecution of crimes recognized as such under international treaties must be regarded as a violation of the obligations assumed by the contracting States. This is particularly relevant in the case of Yemen, which is a party to both the ICCPR and the Convention against Torture, and which has also incorporated the Universal Declaration of Human Rights into article 6 of its amended 1994 Constitution. The Immunity Law therefore constitutes a breach of Yemen's international legal obligations.

The position of the United Nations on this matter is also significant, beginning with the observations made by the former UN Secretary-General's Special Adviser, Jamal Benomar, in the report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, which states that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights"[318]. It follows that, from the perspective of the United Nations, the Yemeni Immunity Law must be condemned insofar as it precludes the effective enjoyment of victims' rights.

By contrast, UN Security Council Resolution 2014 on Yemen, adopted on 21 October 2011, contains internally inconsistent elements. On the one hand, it emphasizes "the need for a comprehensive, independent and impartial investigation consistent with international standards into alleged human rights abuses and violations, with a view to avoiding impunity and ensuring full accountability[319]".

On the other hand, it reiterates its support for "the engagement of the Gulf Cooperation Council" and affirms that the implementation of "a settlement agreement on the basis of the

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[315] *Ibid.*, p. 14 (Principle 24.a).

[316] The UN Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (Articles 4.1, 4.2, 7.1, 14); the International Convention for the Protection of all Persons from Enforced Disappearances (Articles 3, 4); and the Convention on the Prevention and Punishment of the Crime of Genocide (Articles 1, 4, 5, 6).

[317] UN Human Rights Committee, CCPR General Comment No. 20, 10 March 1992, § 15.

[318] Report of the UN Secretary-General on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (S/2004/616), 23 August 2004, § 10.

[319] UN Security Council, Resolution 2014 (2011) (S/RES/2014(2011)), 21 October 2011, Preamble.

Gulf Cooperation Council initiative is essential" for political transition in Yemen, calling upon all parties to commit themselves to a political settlement grounded in that initiative[320].

Nevertheless, other United Nations officials have publicly criticized the Immunity Law and have urged Yemeni legislators to repeal the measure, underscoring its incompatibility with international standards on accountability and victims' rights[321].

3.4.3 Jurisdictional constraints and alternative accountability mechanisms in the Yemeni conflict

Although international law formally provides protections against war crimes, crimes against humanity, and genocide, the Yemeni case illustrates how the implementation of such protections in conflict settings often proves inadequate. Issues of jurisdiction, combined with the lack of genuine political will on the part of the international community, constitute significant obstacles to the repression of these violations through the instruments offered by international law. This is all the more so given that the parties to the conflict are not fully bound by, or engaged in, the relevant treaties governing international humanitarian law and international human rights law[322].

Regarding violations of international humanitarian law, recommendations have primarily focused on the need to ensure jurisdiction for the International Criminal Court. In particular, the Group of Eminent Experts on Yemen, established to report on violations and abuses committed in the country, called upon the United Nations Security Council to take action and advocated, inter alia, the establishment of an international-Yemeni hybrid tribunal or an impartial international investigative mechanism under United Nations auspices, similar to those created in relation to the conflicts in Syria and Myanmar[323]. These appeals, however, went unheeded, and in 2021 the Group's mandate was not renewed.

As for the possibility of seizing the International Court of Justice, neither Yemen nor Saudi Arabia has accepted the Court's compulsory jurisdiction, nor is it likely that either State would consent to jurisdiction in the present context. The only remaining avenue would therefore be the existence of a compromissory clause contained in a relevant treaty. Given that Yemen is a party to numerous international human rights treaties, existing jurisprudence recognizes the

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320 *Ibid.*, § 4.

321 Specifically, UN High Commissioner for Human Rights, Navi Pillay, *No Amnesty for gross human rights violations in Yemen*, UN OHCHR, 6 January 2012.

322 See L. Kehil *et all.* (edd.), *Torture and the Yemen Civil War*, Yemen Accountability Project, Global Accountability Network, April 2025, pp. 37 ff.

323 *Statement by Group of Experts on Yemen on HRC Rejection of Resolution to Renew Their Mandate*, OHCHR, 8 October 2021.

possibility for States not directly injured by Yemen's conduct to invoke responsibility for violations of treaty obligations, meaning that any State party to those treaties could in principle challenge Yemen's conduct on an *erga omnes partes* basis. Nevertheless, because Yemen has entered a reservation to article 9 of the Genocide Convention - requiring the express consent of all States involved in the dispute to confer jurisdiction upon the ICJ - this avenue likewise appears foreclosed.

Conversely, the option of an impartial international investigative mechanism under United Nations auspices does not seem capable of addressing the issue of accountability either, insofar as such a mechanism would not provide a basis for determining individual criminal responsibility. The ICJ, to which recourse would ultimately have to be made, is competent only to adjudicate disputes between States.

Regional human rights mechanisms could, in principle, offer an alternative avenue for establishing responsibility for human rights violations. For instance, the Arab Human Rights Committee, which monitors the implementation of the Arab Charter on Human Rights - ratified by Yemen, Saudi Arabia, and the United Arab Emirates - could potentially play a role in assessing the conduct at issue[324]. However, while the Charter provides a normative framework for identifying human rights violations committed in Yemen, it does not establish enforcement mechanisms or judicial procedures capable of repressing such violations or resolving disputes. Its operation is limited to obliging States Parties to submit periodic reports to the Committee and empowering the Committee to issue non-binding recommendations[325].

About the possible initiation of domestic criminal proceedings for human rights violations, it should be noted that in 2016 - following international pressure and several United Nations resolutions - the National Commission to Investigate Alleged Violations of Human Rights (NCIAVHR) was established to investigate and monitor human rights violations in Yemen. As of September 2024, the Commission had documented more than 29.000 human rights violations committed on Yemeni territory, in addition to the approximately 2000 cases already referred to the Yemeni Public Prosecutor in March 2023[326]. However, no convictions have been rendered to date. Moreover, the above-mentioned Group of Eminent Experts observed in its 2020 report the Yemeni judicial system's substantial inability - already prior to the outbreak of the conflict - to prosecute crimes in accordance with international humanitarian law. This

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[324] Arab Charter on Human Rights, 22 May 2004, 12 Int'l Hum. Rts. Rep.893.

[325] *Ibid.*, Article 48.

[326] International Centre for Transitional Justice, *Opening Space for Transitional Justice in Yemen*, Vol. 30, 2025; N. E. B. Noureddine, *Accountability in Yemen Requires a Comprehensive Transitional Justice Process*, International Centre for Transitional Justice, Vol. 28, 2023.

situation has further deteriorated during the years of armed conflict due to corruption, discrimination against women, and attacks and threats directed at judicial actors[327].

A further possible avenue could be the exercise of universal jurisdiction, as many States have enacted legislation allowing them to prosecute certain international crimes before their domestic courts. This option has been employed, for example, by German courts in proceedings against a former Syrian government official responsible for crimes against humanity committed in Syria. It should be noted, however, that in a comparable case the French Supreme Court annulled a prior domestic conviction against a former Syrian official on the basis of the dual criminality rule, holding that Syria does not explicitly criminalize crimes against humanity under its domestic law[328]. In addition, even where universal jurisdiction is available under domestic legislation, a further practical obstacle arises from the requirement that the alleged perpetrator be present within the territory of the prosecuting State or, at a minimum, that those responsible be represented within a State possessing a jurisdictional nexus grounded in universal jurisdiction for human rights violations.

As previously noted, neither Yemen nor the members of the coalition involved in the conflict have fully adhered to the relevant treaty frameworks, with the result that the exercise of universal jurisdiction in relation to Yemen encounters significant legal barriers. In an attempt to overcome these obstacles, efforts have been made to bring cases before domestic courts against States that support the coalition through arms sales, particularly in light of repeated appeals by non-governmental organizations urging national governments to prohibit arms sales to the coalition or, at the very least, to restrict the granting of export licenses to manufacturers whose supplies sustain the conflict[329]. Nevertheless, given that the principal arms suppliers to the coalition are major international powers capable of exerting considerable political influence, these initiatives have so far produced no tangible results and are unlikely to do so in the foreseeable future.

At present, therefore, formal accountability mechanisms for human rights violations in Yemen do not appear to be realistically operational. The failure to renew the mandate of the Group of Eminent Experts constitutes a clear indication of the lack of political will in this regard. Consequently, the numerous resolutions adopted by the United Nations Security Council, the Human Rights Council, and the UN Secretariat have gone no further than issuing general

[327] UN High Comm'r Human Rights, *Report of the Group of Eminent International and Regional Experts on Yemen*, UNDoc. A/HRC/45/6/2020, §§ 9 and 98.

[328] See B. Jeannerod - A. Reidy, *Fighting Impunity for Crimes in Syria: Victory in Germany, Setback in France*, "Human Rts. Watch", 27 January 2022.

[329] ICJ, *Democratic Republic of the Congo v. Belgium Judgment*, 35/2022, 14 February 2002.

condemnations of the violence and have not resulted in the determination of specific responsibilities. The sole remaining option lies in the imposition of targeted sanctions against Yemeni authorities implicated in the situation, an option that must nevertheless be pursued with extreme caution in order to avoid further exacerbating the already dire conditions of the civilian population. Sanctions could instead be imposed on States and corporate actors involved in the supply of weapons, thereby holding internationally accountable those who indirectly contribute to human rights violations. Finally, it is widely hoped that sustained pressure from international non-governmental organizations - which have for years documented violations committed in Yemen - may induce the Yemeni authorities to introduce effective mechanisms for the prevention and repression of all forms of human rights violations.

3.4.4 The jurisdiction of the International Criminal Court over the situation in Yemen

Regarding the potential jurisdiction and referral of the International Criminal Court, a primary obstacle lies in the fact that neither Yemen nor most members of the coalition involved in the conflict - including Saudi Arabia, the United Arab Emirates, and Iran - are parties to the Rome Statute. Yemen signed the Statute in December 2000 but never proceeded to ratification; consequently, it is not currently subject to the ICC's jurisdiction. Even if Yemen were now to ratify the Rome Statute, the Court's jurisdiction would not apply retroactively, unless Yemen were to submit a declaration expressly accepting retroactive jurisdiction. Should Yemen issue such a declaration, it would be required to recognize the ICC's jurisdiction over its entire territory from the outset of the conflict, namely from September 2014. In this respect, several precedents may be cited, including Côte d'Ivoire's 2003 declaration and Ukraine's declarations concerning the events of 2013–2014. At present, however, there appear to be no political or legal conditions conducive to a comparable declaration by the Yemeni government.

Alternatively, the ICC could in principle exercise jurisdiction over individuals belonging to States suspected of having committed, or contributed to the commission of, international crimes falling within the Court's jurisdiction. Such competence would arise if a State Party to the Rome Statute were to refer the situation in Yemen to the Court, or if the Prosecutor were to initiate an investigation *proprio motu*. In this scenario, the exercise of jurisdiction would not require Yemen to be a State Party to the Statute nor to have accepted jurisdiction by means of an ad hoc declaration. In the present case, although Saudi Arabia and the United Arab Emirates - the leading members of the coalition - are not parties to the Rome Statute, other coalition members, such as Jordan and Senegal, are States Parties and could therefore, in principle, trigger the jurisdiction of the ICC. To date, however, none of these States has chosen to act accordingly. Similarly, the ICC Prosecutor has not initiated an investigation *proprio motu*, despite the numerous communications and complaints submitted by humanitarian and human rights organizations, including the European Center for Constitutional and Human Rights, Amnesty International, and Mwatana for Human Rights[330].

A third avenue for activating the jurisdiction of the ICC would consist in a referral by the United Nations Security Council acting under Chapter VII of the UN Charter. Such a referral would require the consent of all five permanent members of the Council. Given the indirect involvement of some of these members in the conflict through arms sales to the coalition, this option appears impracticable. Nevertheless, several recent resolutions have underscored the need to ensure accountability for violations committed in Yemen. In 2021, the United Nations Panel of Experts on Yemen (UNPoE) also recommended that the Security Council begin "exploring mechanisms of accountability to secure justice and redress for victims"[331]. To date, however, the Council's approach has focused exclusively on the imposition of sanctions against individual actors linked solely to the Houthi faction, notwithstanding the fact that both the UNPoE and the UN Group of Eminent Experts (UNGEE) have documented violations committed by all parties to the conflict and have therefore called for the application of comparable measures to all sides[332].

From a strictly legal perspective, the conditions for ICC intervention would in fact be met, insofar as the requirement of complementarity appears satisfied. Under the principle of complementarity, the Court's jurisdiction over international crimes is triggered where national authorities are unwilling or unable genuinely to investigate and prosecute those responsible. In the present case, the Yemeni judicial system has manifestly demonstrated its inability to conduct effective investigations and prosecutions in relation to the violations committed, despite repeated appeals by human rights organizations since at least 2019. This circumstance not only precludes any form of coordinated approach between the Office of the Prosecutor and the Yemeni judicial system under the rubric of so-called positive complementarity but would also fully justify the exercise of jurisdiction by the ICC. Nonetheless, the political considerations outlined above have rendered this option unviable in practice.

[330] See ECCHR, *Made in Europe, Bombed in Yemen: ICC Must Investigate European Responsibility in Alleged War Crimes in Yemen*, 2 May 2023.
[331] UNSC, *Final Report of the Panel of Experts on Yemen*, UNDoc. S/2021/79, 25 January 2021, § 159(a).
[332] UNGEE, *Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014*, UNDoc. A/HRC/45/CRP7, 29 September 2020, § 402 and Recommendation 7(b).

Finally, there remains the theoretical possibility of establishing an *ad hoc* international criminal tribunal at the initiative of the United Nations Security Council under Chapter VII of the UN Charter, following the model of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Such an option would offer the dual advantage of ensuring an independent and impartial judicial body and of allowing for the adoption of measures specifically tailored to the Yemeni context, as opposed to broader and more generic accountability mechanisms. Moreover, the establishment of such a tribunal would not require Yemen's consent and would enable proceedings to be conducted independently of the domestic judicial system, which has proven to be highly politicized and manifestly inadequate to address the violations committed[333]. However, even in this case, the creation of an *ad hoc* international criminal tribunal would require the agreement of all permanent members of the Security Council vested with veto power - a condition that, as noted, appears unattainable at present.

In this connection, it is worth recalling that, in the past, proposals have been advanced - particularly regarding international crimes committed in Syria - to overcome Security Council deadlock by recognizing a power of the United Nations General Assembly to establish an *ad hoc* international criminal tribunal. This possibility remains highly controversial in light of the provisions of the UN Charter, especially with respect to the Assembly's authority to adopt binding resolutions for Member States and to establish judicial bodies endowed with compulsory jurisdiction over individuals or States[334].

3.5 The Tigray conflict and mass atrocities in Ethiopia

Within the broader landscape of mass violence directed against specific ethnic groups, mention must also be made of the Tigray case, which constitutes a paradigmatic episode of the severe civil and humanitarian crisis affecting the Horn of Africa. The conflict addressed in this section concerns Ethiopia, a State whose population is marked by significant ethnic diversity. The region's political instability can be traced back to 1974, when the government of Haile Selassie I was overthrown in a coup and replaced by a Provisional Military Administrative Council, which appointed Colonel Mengistu Haile Mariam as President. While continuing his predecessors' centralizing policies, Mengistu adopted a Marxist-Leninist socialist model for

[333] CEASEFIRE Centre for Civilian Rights, *The Struggle for Justice. The Situation of Impunity and accountability avenues for violations committed in Yemen*, Report, June 2023, p. 67.
[334] See D. Jinks, *Does the UN General Assembly Have the Authority to Establish an International Criminal Tribunal for Syria?*, "Just Security", 22 May 2014.

nearly two decades, initiating profound social transformations. During this period, deep discontent emerged, culminating in 1989 in the formation of an anti-government alliance composed of four parties: the Tigray People's Liberation Front (TPLF), the Oromo People's Democratic Organization, the Amhara National Democratic Movement, and the Southern Ethiopian People's Democratic Movement. The first of these political formations gradually gained dominance within the coalition and, between 1991 and 1994, consolidated power, thereby bringing to an end socialist centralization and establishing a transitional government led by Prime Minister Meles Zenawi. Zenawi launched a process of democratization that included formal recognition of Ethiopia's ethnic heterogeneity. This development, however, also laid the groundwork for territorial and ethnic fragmentation, as Eritrea conceived secessionist projects for the first time, while the system of ethnic federalism effectively legitimized the organization of each ethnic group into its own autonomous regional State[335].

In 1994, a new Constitution was adopted establishing a political system based on an ethnic federal democracy comprising nine regions, structured as a parliamentary republic. The first elections under the new constitutional arrangement took place in 1995 and resulted in Zenawi's appointment as Prime Minister until 2000.

The first major internal tensions emerged after 2012 under the government of Hailemariam Desalegn, amid violent protests by the Oromo and Amhara communities. Initially, dissent centered on land rights and specific democratic demands; soon, however, protests began to target the Tigrayan community, regarded as the social base of the political class that had long governed the country. From 2016 onwards, throughout Ethiopia - and especially in the Amhara region - Tigrayans were subjected to ethnically motivated attacks and were frequently forced to abandon their homes and return to Tigray.

The situation deteriorated in 2018, when a state of emergency was declared and Prime Minister Desalegn was forced to resign. In the subsequent election of 2 April 2018, Abiy Ahmed Ali, leader of the Oromo Democratic Party, prevailed and was appointed Prime Minister. He sought to curb secessionist pressures through a renewed centralizing strategy aimed at national reconciliation, reducing the autonomy of regional councils and replacing local governors with loyal appointees. This approach immediately triggered intense protests in Tigray - a region with a deeply rooted tradition of autonomy - and centralization largely failed.

[335] R. Mingolla, *Espansione o riduzione delle guerre civili nel mondo? Un conflitto trascurato: la guerra del Tigray*, Convegno DPCE, Pescara 2023, "DPCE Online", Vol. 1, 2024, pp. 369-386.

When the Prime Minister sought to overcome resistance by reorganizing his coalition into a new party, the Prosperity Party, including smaller political formations that had previously remained outside the coalition, the TPLF reacted strongly against the dissolution process and refused to participate in the party's transformation. In response, Prime Minister Ali undertook military action in the northern province of Tigray as an act of defiance and political displacement directed at the TPLF, which had governed the region for decades. This set the stage for the conflict that would soon engulf the territory of Tigray.

More specifically, the origins of the war are connected to the Ethiopian Parliament's decision, in the context of the global pandemic in August 2020, to postpone general elections. The TPLF proposed the formation of a technocratic government upon the expiry of the legislative mandate, considering the parliamentary postponement decision illegitimate and unconstitutional. Consistent with this position, on 9 September 2020 the Tigray region proceeded with elections for its parliamentary representatives, notwithstanding the federal government's declaration that the vote was illegal and void. The regional elections - won by the TPLF - triggered open confrontation with the central government, which retaliated by drastically cutting funding to Tigray. This was interpreted by Tigrayan forces as a *de facto* declaration of war, and all reconciliation efforts failed. When the federal government dispatched a newly appointed brigadier-general to Tigray with a mandate to restore order, Tigrayan forces prevented him from assuming office; legislators subsequently designated the TPLF a terrorist organization.

Armed conflict began on the night of 3-4 November 2020, when the first clashes occurred between TPLF federal security forces and the Ethiopian National Defense Forces stationed at the northern headquarters near the regional capital, Mekelle. In the following days, national military offensives intensified both in and around the capital and at the bases of Adigrat, Agula, Dansha, and Sero, with the stated aim of restoring the rule of law and the authority of the federal government. The situation rapidly escalated: banking services, medical services, transport, and telecommunications were suspended throughout Tigray, while the federal counteroffensive proceeded with airstrikes across the territory. Already in the earliest days of the war, significant numbers of victims and injuries were reported among civilians. The war continued with fluctuating military developments over subsequent months, and Tigrayan forces immediately alleged the commission of war crimes by the national defense forces.

On 2 November 2022, after a prolonged period of violence and multiple failed mediation attempts, the Ethiopian federal government and the TPLF signed a peace agreement in Pretoria, which, *inter alia*, required Tigrayan troops to relinquish heavy weaponry upon the withdrawal of federal forces from the region.

The Pretoria Agreement, however, did not involve foreign States that had participated indirectly in the conflict by deploying troops in Tigray in support of the federal government. In particular, Eritrea was excluded from the peace process; its troops therefore continued operating in Tigray after the agreement was signed and were reportedly responsible for multiple acts of violence, looting, abductions, killings, and arrests. At the same time, Somali troops allegedly joined the Ethiopian-Eritrean military campaign. The continuation of hostilities produced catastrophic humanitarian consequences along the north-eastern border of Tigray, where millions attempted to flee into Sudan, thereby reigniting long-standing Sudan-Ethiopia tensions over control of a border area historically inhabited by Ethiopians but administratively controlled by Sudan. Sudan used the Tigray war and related migration flows as a pretext to expel Ethiopian farmers from the disputed territory, particularly after attacks attributed to Amhara militias. These offensives resulted in casualties and injuries among both combatants and civilians. The war further intersected with additional hostility linked to Ethiopia's construction of the Grand Ethiopian Renaissance Dam on the Blue Nile, which provoked strong protests from neighboring States, notably Egypt and Sudan. In any event, migration flows from Tigray into Sudan and the population's desperate attempts to flee were tragically documented by a 2021 Associated Press report describing mutilated bodies found in the Tekezze River, which separates Tigray from Sudan[336].

From a humanitarian perspective, the consequences of the Tigray conflict were devastating. International organizations quickly accused the belligerents of committing numerous offences, war crimes, crimes against humanity, and acts of genocide. Reports documented widespread sexual violence, torture, arrests, confiscations of livestock and food, looting of critical infrastructure (schools, factories, agricultural fields, potable water facilities, and places of worship), and summary and extrajudicial executions of civilians and religious figures, alongside the destruction of property and the region's environmental and cultural heritage. At the end of the war, reports referred to between 700.000 and 800.000 deaths as a result of hostilities; however, credible testimonies suggest the actual number may be substantially higher, reaching approximately one million victims in the first two years alone[337].

[336] M. Awad - C. Anna, *At river where Tigrayan bodies floated, fierce of - many more* -, Associated Press, 2021: "From time to time, a body floating down the river separating Ethiopia's troubled Tigray region from Sudan was a silent reminded of a war conducted in the shadows. But in recent days, the corpses became a flow. Bloated, drained of color from their journey, the bodies were often mutilated: genitals severed, eyes gouged, a missing limb. The Sudanese fishermen who spotted them, and the refugees from Tigray who helped pull them to shore, found many corpses' hands bound. Some of them had been shot".

[337] L. Freedman, *The forgotten wars: This century's deadliest conflicts aren't taking place in Ukraine or Gaza*, "The new Statesman", 27 February 2024.

On the basis of a joint report by Human Rights Watch and Amnesty International, the Ethiopian and Eritrean governments were accused of targeting the Tigrayan people with the aim of carrying out a form of ethnic cleansing[338]. Such intent allegedly became particularly evident during the massacre in the town of Mai Kadra, where mass killings of Tigrayan civilians were carried out with machetes and knives, reportedly resulting in approximately 600 deaths, most of them civilians. In parallel, the Ethiopian government reportedly worsened the humanitarian situation by restricting aid destined for Tigray, thereby jeopardizing food assistance, medical support, and shelter for the local population, as well as the restoration of essential services, including potable water, transportation, and critical infrastructure.

Despite denunciations by Tigrayan actors and international humanitarian organizations, the federal government consistently denied responsibility for violence, war crimes, human rights violations, or acts of genocide. On the night of 3-4 November 2020, when hostilities began, Prime Minister Ali addressed the nation, describing the operation in Tigray as a "law-and-order mission", assuring that it would be brief and would spare civilians[339]. Three weeks later, following the capture of Mekelle, he declared that the operation had concluded without civilian harm or destruction of private property - contrary to statements by Tigrayan leadership and international media reporting[340]. In reality, Amnesty International and Human Rights Watch reports, as well as survivor testimonies, contradicted these claims by documenting the destruction of entire villages, massacres, rape, and multiple other atrocities[341].

Although testimony and evidence converge in indicating systematic human rights violations and mass violence in Tigray - one of the most violent and bloody conflicts of this century - the conflict received only limited attention from international media to the extent that it was described as a "forgotten war" and a "forgotten genocide".

This was facilitated by the Ethiopian government's deliberate strategy of imposing, from the beginning of the war in November 2020, an almost total communications blackout to prevent news of human rights violations from emerging. During a televised interview in June 2021, Prime Minister Ali compared the war to a football match, explaining that when it becomes impossible for one team to contain an opponent's offensive talent through technical play and in compliance with the rules, the next option is to prevent the goal through a foul while ensuring

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338 Amnesty International - Human Rights Watch, *Crimes against Humanity and Ethnic Cleansing in Ethiopia's Western Tigray Zone*, 6 April 2022.

339 See T. G. Weldemichel, *Tigray war: Modern geographies of mass violence and the invisibilization of populations*, "Political Geography", Vol. 118, 2025, p. 1.

340 *Ibid.*

341 Amnesty International, *Ethiopia: the massacre in Axum*, 26 February 2021; Human Rights Watch, *Ethiopia: Unlawful shelling of Tigray urban areas*, 11 February 2021.

the referee does not notice the violation; and if it becomes impossible to conceal the foul, to rely on the referee's discretion, who may even deem the conduct lawful[342]. The central message is the emphasis on concealing crimes from observers and, where concealment proves impossible, persisting with the conduct even under observation. Consistent with this strategy, Ali and his allies initially prevented information about the war from reaching the media and the international community, firmly denying allegations of human rights violations made by victims. Once media outlets, humanitarian organizations, and witnesses confirmed the occurrence of abuses, the regime adopted a tactic of "active denial", constructing an alternative narrative through government field reports and "fact-checked information" designed to present a conflict narrative aligned with governmental interests and cleansed of violations.

The effectiveness of this strategy is reflected in the response given by UN Secretary-General António Guterres on 9 December 2020 to a journalist who asked about reports of mass violence perpetrated by Eritrean forces in Tigray. Guterres stated that he had no proof of Eritrean troops' presence in Ethiopia and that the Ethiopian Prime Minister had assured him that Eritrean forces had never entered Tigray and were present only in a disputed area long contested between the two States[343]. Eritrean forces were already widely present in Tigray and even in the capital Mekelle and were implicated in some of the most serious atrocities reported during the war. A joint Amnesty International and Human Rights Watch report published only a few weeks later confirmed that Eritrean troops had carried out a brutal massacre in the ancient city of Axum, in central Tigray, killing hundreds of civilians within 24 hours in late November 2020 - just over ten days before Guterres's statement[344]. Silence on Tigray was further reinforced by the systematic destruction of local infrastructure, which produced a total blackout of communications with the outside world across the affected region, to the extent that observers described the information embargo as "the longest uninterrupted internet shut down in history". Land routes and airspace were also blocked through the destruction of bridges and roads and the closure of the skies. The resulting inability to access conflict zones led many accounts to be dismissed as fictitious and not taken seriously. In the absence of telecommunications and under physical embargo, one major source of evidence became videos recorded by soldiers themselves while committing atrocities. In this way, for instance, the massacre at Mahbere Dego, a small village in central Tigray where Ethiopian soldiers killed dozens of young civilians in early 2021, became known.

[342] Abiy Ahmed Ali, Interview with Fana Television, 20 June 2021.
[343] UN Secretary-General António Guterres, 9 December 2020.
[344] Amnesty International - Human Rights Watch, *Ethiopia: The Massacre in Axum*, 26 February 2021.

At the same time, the government's propaganda campaign portraying Tigrayans as a minority of terrorists and rebels opposed to democratic reforms contributed to distancing international public opinion from solidarity with the oppressed group and, in some respects, also helped to justify limited UN attention to the ongoing humanitarian crisis.

Another strategy employed by the Ethiopian federal government to render Tigray's violence "invisible" was to leverage the credibility of international agencies, including UN offices present in the country, to legitimize the government's account of the conflict. To this end, upon becoming Prime Minister in 2018, Ali formed an elite government composed of figures who had previously worked in international organizations and thus enjoyed global prestige and credibility[345]. This also helps explain why, when initial allegations of widespread violence in Tigray emerged in 2021, UN officials based in Addis Ababa reportedly systematically minimized or even rejected witness accounts as sensationalist or exaggerated media narratives[346].

Finally, from the first half of 2021, the Ethiopian government sought to shift media attention from Tigray to the broader northern part of Ethiopia, framing the crisis not as an issue confined to the Tigrayan ethnic group but as a severe socio-economic problem affecting a significant portion of the country[347]. In this way, the humanitarian crisis was stripped of ethnic connotations, and the war deprived of any potential genocidal characterization.

3.5.1 Assessing Genocide Allegations in Tigray under the Genocide Convention

From the earliest days of the conflict, international organizations levelled genocide allegations against the Ethiopian government - claims echoed by a significant segment of academic scholarship and even by religious and political leaders. In a May 2021 intervention, for instance, the Patriarch of the Ethiopian Orthodox Church, His Holiness Abune Mathias, described the massacres, enforced famine, and destruction of churches as a "genocide on the people of Tigray"[348].

Beyond these initial statements - understandably shaped by the shock generated by mass killings - reservations nevertheless emerged within academia about qualifying the events in

[345] T. G. Weldemichel, *Tigray war: Modern geographies of mass violence and the invisibilization of populations*, "Political Geography", Vol. 118, 2025, p. 7.

[346] See R. Gramer - C. Lynch, *U.N. Officials downplayed sexual violence in Ethiopia in leaked call*, "Foreign Policy", 27 August 2021, p. 35.

[347] T. G. Weldemichel, *Tigray war: Modern geographies of mass violence and the invisibilization of populations*, "Political Geography", Vol. 118, 2025, p. 8.

[348] *News: Ethiopian Orthodox Patriarch Says War in Tigray "Barbarism" and "Attempt to Erase Tigrayans"; Says His Repeated Pleas "Censored"*, "Addis Standard", 8 May 2021.

Tigray as genocide, essentially for two reasons. First, Tigray is not the only Ethiopian region affected by ethnically inflected violence: in the past, Amhara, Gumuz, Qemant, and Oromo communities were also subjected to persecution and massacres, with a persistent aftermath of genocide allegations and reciprocal claims. Second, scholars note that the practices observed in Tigray (sexual violence, mutilation, forced executions, and starvation strategies) are not unusual in African conflicts; they are widely reported across the continent and, taken alone, may be considered insufficient to demonstrate the existence of genocide. Moreover, it is emphasized that comparable mass atrocities were committed in Africa by premodern political systems and were then systematically reiterated during the era of imperial competition - by revolutionaries, counterrevolutionaries, and even European colonial powers[349].

Against this background, and consistently with the analytical approach adopted in relation to the cases discussed above, it is appropriate to examine whether the conditions and requirements for the application of the Genocide Convention are met. It is worth recalling at the outset that judicial bodies - including the International Criminal Court - have clarified, as a general matter, that genocide is not merely an "ethnic massacre" but necessarily requires the element of intent. Consequently, even a single killing may constitute genocide if there is sufficient evidence to establish the specific intent to target a protected group through that act; conversely, a mass killing cannot be characterized as genocide in the absence of the specific intent to destroy, in whole or in part, the group through such conduct.

At the same time, because the subjective element of intent is often concealed and difficult to prove, a number of fact-finding bodies - such as UN expert mechanisms - have been reluctant to label the atrocities committed in Tigray as genocide. In other instances, experts have identified evidence that could, in the abstract, be indicative of genocidal intent, yet they have not been able to conclude that genocide was in fact committed. As a result, the international community has displayed considerable caution in applying the genocide label to the Tigray events.

From a legal perspective, determining whether the Genocide Convention could apply requires answering three questions: (i) whether the acts committed by Ethiopian forces and their Eritrean allies fall within the prohibited acts listed in the Convention; (ii) whether the Tigrayan community constitutes a protected group under the Convention; and (iii) whether genocidal intent can be established. As to the first question - the objective element - there appears to be

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349 R. Ibrech - A. de Waal, *Introduction: Situating Ethiopia in Genocide Debates*, "Journal of Genocide Research", Vol. 24.1, 2021, pp. 83-96.

little serious doubt that an affirmative answer is at least plausible. Sources consistently document killings and exterminatory patterns accompanied by intense hate propaganda. Evidence converges around certain especially brutal massacres, such as that in Mai Kadra, a north-western Tigrayan town of approximately 45.000 inhabitants, where, as noted above, on 9 November 2020 assailants armed with machetes and knives reportedly stabbed hundreds of residents over nearly 24 hours, resulting in some 600 civilian deaths[350]. The UN High Commissioner for Human Rights also reported, from the outset, the killing of civilians, looting, artillery attacks on populated areas, and deliberate assaults on defenseless persons[351]. Similarly, the forced displacement of entire segments of the population -systematically implemented in Tigray - may fall within Convention-prohibited conduct. Survivor testimony documents the mass displacement of approximately 100.000 persons from Tigray, about 55.000 of whom fled to Sudan. Witnesses further report that, before crossing the border, refugees were systematically attacked by armed groups, robbed of their belongings and basic necessities. Many arrived in Sudan with only the clothes they were wearing, exhausted by forced marches and unable to procure food, medicine, or other emergency supplies.

Sexual violence, practices aimed at preventing births, and acts intended to cause serious bodily or mental harm likewise correspond to conduct recognized as genocidal under the 1948 Convention. Yet certain difficulties remain - similar to those noted in the Yemen section - regarding whether deaths caused indirectly by starvation, deprivation, or lack of medical assistance (rather than by direct killing) can be treated as genocidal. On the one hand, some jurisprudence tends to treat “killing” and “causing death” as functionally interchangeable, noting that the term “killing”, as used in article 2 of the Genocide Convention and article 6(a) of the Rome Statute, is linguistically neutral and could encompass both intentional and negligent homicide[352]. On the other hand, genocide cannot entail negligent homicide, because intent is constitutive of the crime itself; accordingly, “killing” can only be interpreted as intentional killing. If killing is invoked as a genocidal act, the specific intent must therefore be demonstrated with particular care[353].

With specific reference to Tigray, some scholars argue that famine and denial of medical care may nonetheless fall within (i) acts causing serious bodily or mental harm to members of the

[350] K. Houreld - M. Georgy - S. Aloisi, *How Ethnic Cleanse Exploded from an Ethiopian Town*, “Reuters”, 7 June 2021.
[351] UN News, 22 December 2020.
[352] ICC, *Elements of Crimes*, 2013, p. 9, footnote 31.
[353] A. H. Tefera, *Genocidal Intent in the Tigray War: Establishing Reasonable Grounds Based on Evidence*, in M. Van Reisen - M. Mawere (eds.), *Tigray. The Hysteresis of War*, Vol. 1, Langaa, Bamenda, 2024, pp. 561-602.

group, or alternatively (ii) the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction, in whole or in part - both of which are explicitly recognized in article 2 of the Convention. In this regard, article 6(c) of the Rome Statute is relevant, and ICC jurisprudence has treated as illustrative (though not exhaustive) examples of such "conditions of life" the deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes. Similarly, ICTR Trial Chamber I in *Akayesu* observed that the phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" encompasses methods by which the perpetrator does not immediately kill group members but ultimately seeks their physical destruction. In the specific context of the Tigray war, the Ethiopian government's imposition of a rigid siege preventing access to humanitarian aid - including food and medicines - could satisfy the objective element of genocidal conduct as a measure calculated to bring about the group's destruction, provided that the subjective element of intent can be established. Likewise, the expulsion of Tigrayan civilians may be characterized as "systematic expulsion" and thus potentially qualify, given that shelter and housing are often considered indispensable conditions of life. Comparable arguments have also featured in ICTY proceedings in *Karadžić* and *Mladić*, where the Prosecution relied, *inter alia*, on the forced removal of Bosnian Muslims from large areas of Bosnia and Herzegovina[354].

Rape and the deliberate transmission of HIV to members of a protected group may also be considered as acts that inflict conditions of life conducive to physical destruction. Reports from Tigray have alleged that some militiamen infected with the virus used it as a weapon with the intention of causing delayed death. Finally, the imposition of measures intended to prevent births within the group - explicitly listed as genocidal under the Convention - is also documented in Tigray, where evidence and testimony refer to practices such as the insertion of stones, sand, metal, and sticks into women's uteruses and gang rape aimed at causing genital injuries of a kind capable of preventing childbirth within the group[355].

Accordingly, while doubts may persist regarding whether "caused death" (in the sense of indirect fatalities) can be treated as genocidal killing, it is nevertheless clear that many practices reported in Tigray - enforced famine, the imposition of inhuman conditions of life, mutilations, and rape - can be subsumed under Convention-prohibited acts intended to inflict harms or deprivations conducive to the group's total or partial destruction.

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[354] ICTY, Trial Chamber, *Prosecutor v. Karadžić & Mladić Judgment*, IT-95-5/18, 25 July 1995.

[355] A. H. Tefera, *Genocidal Intent in the Tigray War: Establishing Reasonable Grounds Based on Evidence*, in M. Van Reisen - M. Mawere (eds.), *Tigray. The Hysteresis of War*, Vol. 1, Langaa, Bamenda, 2024, pp. 571-572.

Turning to the second question - whether the Tigrayan community constitutes a protected group under article 2 of the Genocide Convention - some preliminary considerations are necessary. As is well known, article 2 identifies protected groups as "national, ethnical, racial or religious" groups, yet offers no concrete criteria for determining when a group falls within these categories. This has generated difficulties in multiple genocide proceedings. For example, one of the most contested issues in relation to alleged atrocities against the Rohingya in Myanmar has been whether the Rohingya constitute a distinct ethnic group[356]. Similarly, as discussed above, the ICTR Trial Chamber in *Akayesu* faced challenges in determining whether the Tutsi constituted a protected group, given that Hutu and Tutsi share language and culture[357]. International criminal tribunals have sought to address this challenge by recognizing that group existence may be established both objectively and subjectively. As articulated in international jurisprudence, objective existence refers to the group's factual presence and distinguishing features; subjective existence, by contrast, depends on the perpetrator's perception that the targeted population belongs to a distinct group. In other words, a group may be protected when it is not objectively distinct in strict sociological terms yet is perceived and stigmatized as such by perpetrators based on perceived national, ethnic, racial, or religious traits[358].

Against this framework, Tigrayans - while sharing certain features with the broader Ethiopian population - possess, internally, a sufficiently distinct language, history, and lineage that they may be perceived externally as a specific and distinct group, thus capable of qualifying as a protected group under the Convention[359].

The third element - and the most problematic - concerns the subjective requirement of specific intent to destroy, in whole or in part, the protected group. In this respect, a substantial series of statements attributed to Ethiopian authorities has been cited as indicative of an exterminatory intent towards Tigrayans. On 8 November 2020, Ethiopian military leaders reportedly announced that there would be "no mercy for Mekelle's residents" once the city was encircled. The message was reiterated on 22 November 2020 by Prime Minister Ali, who urged the inhabitants of Mekelle to surrender within 72 hours and warned them not to cross the "point of no return". At the same time, the Ethiopian government reportedly continued mass discrimination against Tigrayans that had been underway for years: many were removed from

[356] *Ibid.*, p. 573.
[357] ICTR, Trial Chamber, *Prosecutor v. Akayesu Judgment*, ICTR-96-4-T, 2 September 1998.
[358] R. Cryer - H. Friman - D. Robinson - E. Wilmshurst, *An introduction to international criminal law and procedure*, Cambridge University Press, Cambridge, 2020, p. 127.
[359] A. H. Tefera, *Genocidal Intent in the Tigray War: Establishing Reasonable Grounds Based on Evidence*, in M. Van Reisen - M. Mawere (eds.), *Tigray. The Hysteresis of War*, Vol. 1, Langaa, Bamenda, 2024, p. 129.

governmental and security positions; others were arrested under pretexts such as corruption or conspiracy. Outside Tigray, Tigrayan citizens were allegedly subjected to ethnic profiling aimed at arresting and persecuting them as traitors. As reported by Ezekiel Gebissa, President of the Ethio Multinational Federalist Support Force, Tigrayans "are illegally dismissed from jobs, their properties destroyed, their assets frozen and travels restricted. Mass arrest, arbitrary detention, and enforced disappearance of Tigrayans in Addis Ababa and in other towns have intensified, aggravating the precariousness of their life in Ethiopia"[360].

Even prior to the outbreak of war, following a bomb explosion during a public rally in Addis Ababa on 23 June 2018, Prime Minister Ali reportedly accused Tigrayans of conspiring against peace and labelled them "daylight hyenas", associating them with evil and thereby encouraging their persecution and removal. Anti-Tigrayan propaganda also dominated social media, where Tigrayans were systematically portrayed - before and during the war - as "daylight hyenas" and enemies of democratic reforms. A documentary broadcast by state television, titled "The Torment of Justice" (*Yefith Sekoka*), attributed cruel crimes to the Tigrayan community against Amhara and Oromo populations. Other profiling and dehumanizing terms were reportedly employed by officials, media outlets, and the Prime Minister himself, including *tsegure liwutoch* ("alien", "strange being"), as well as "cancer", "devil", and "weed to be uprooted"[361]. Such violent rhetoric was reportedly followed by widespread detention and killing of Tigrayan civilians across Ethiopia between 2020 and 2022, suggesting - according to some accounts - the existence of an organized genocidal project. This claim was further reinforced by a report attributed to the EU Special Envoy Pekka Haavisto, according to which senior Ethiopian officials allegedly stated that they "are going to wipe out the Tigrayans for 100 years"[362]. Public statements by officials and politicians that label and dehumanize the targeted group may, under a consolidated line of jurisprudence, amount to direct incitement to commit genocide. In light of the foregoing, one may argue that Ethiopian leadership shared and promoted a genocidal plan against the Tigrayan community through the action of allied militias. Accordingly, killings and crimes committed against Tigrayan civilians could be understood as specifically directed at the ethnic community, with the intent to destroy it or, at minimum, to uproot it from its territory. The Prime Minister's statements indicating the government's willingness to prevent

[360] M. Abai, *War in Tigray and Crimes of International Law*, "Canadian Centre for Victims of Torture", 6 January 2021, p. 16.
[361] S. E. Geb - D. Tesfa, *Weaponizing the media: Exploring the role of Ethiopian national media in the Tigray War*, in M. Van Reisen - M. Mawere (eds.), *Tigray. The Hysteresis of War*, Vol. 1, Langaa, Bamenda, 2024, pp. 321-335.
[362] C. Anna, *"Clean Out Our Insights", Ethiopia Detains Tigrayans Amid War*, "Associated Press", 29 April 2021.

humanitarian aid from reaching Tigray have similarly been invoked to suggest that the siege was deliberately imposed with the aim of bringing about the total or partial destruction of the local population. On this view, genocidal intent may be inferred both from explicit statements and from the systematic and repetitive nature of the orders issued.

If, therefore, the existence of a genocidal plan may be argued with relative force at the level of political and military leadership, the principal difficulty for the concrete application of the Genocide Convention lies in the fact that many established acts were carried out by rank-and-file soldiers, in relation to whom demonstrating specific intent is more complex. For such perpetrators, at a minimum, it would be necessary to show awareness that their conduct contributed to a broader genocidal campaign - i.e., that they acted with knowledge of the overarching plan. If an individual participates in acts enumerated by the Convention yet lacks knowledge of an overall genocidal plan, the individual may seek to defend themselves on the basis of ignorance. However, such a defense should fail where the accused claims not to have known what any reasonable person would have known. In the specific context of Tigray, this implies that a soldier cannot credibly argue that they participated in the killing or rape of civilians without awareness of the broader anti-Tigrayan campaign, given that governmental and military declarations made that campaign publicly discernible. Accordingly, even if not treated as principal perpetrators of genocide, those involved in the established conduct could still potentially incur liability on the basis that they were, at least, aware of a governmental project aimed at the total or partial destruction of the Tigrayan community[363]. Indeed, survivors from several localities have reportedly stated that Ethiopian and Eritrean soldiers, while committing sexual violence against Tigrayan women or conducting extrajudicial executions, declared their intention "to cleanse the bloodline"[364]. This suggests that the specific intent articulated by political leadership was disseminated and operationalized by commanders and rank-and-file soldiers on the ground.

In sum, despite persisting difficulties in establishing the psychological element of the crime, a combined analysis of (i) official statements, (ii) propaganda and dehumanizing discourse, and (iii) the modalities and context in which the acts were committed indicates that there are substantial grounds for considering the applicability of the Genocide Convention to the events in Tigray, given that Ethiopia has signed and ratified the Convention without entering any

[363] A. H. Tefera, *Genocidal Intent in the Tigray War: Establishing Reasonable Grounds Based on Evidence*, in M. Van Reisen - M. Mawere (eds.), *Tigray. The Hysteresis of War*, Vol. 1, Langaa, Bamenda, 2024, pp. 576 ff.

[364] B. Feleke - E. Mackintosh - G. Mezzofiore - K. Polglase - K. Elbagir - B. Arvantidis - A. Platt, *Practically this has been a genocide*, CNN, 22 March 2021.

reservations. Nevertheless, as in other contexts, political considerations appear to have favored a posture of caution, with the consequence that genocide allegations against Ethiopian authorities and allied forces have not produced tangible accountability outcomes.

3.5.2 The Absence of International Criminal Jurisdiction and the Search for Accountability in Tigray

Ethiopia is not a State Party to the Rome Statute and therefore does not recognize the jurisdiction of the International Criminal Court. As a consequence, alleged acts of genocide, war crimes, and crimes against humanity committed on Ethiopian territory may, in principle, be prosecuted only before domestic courts. In this regard, it should first be noted that Ethiopian criminal legislation - the Criminal Code and the Penal Code - does provide for the criminalization of international crimes, and that four major sets of proceedings have already taken place in Ethiopia in relation to events predating the Tigray conflict. These include: the Dergue trials (1992-2010), concerning the regime that governed the country between 1974 and 1991 and exercised systematic violence against the population; the Anuak-Nuwer trials (2004-2005), relating to attacks perpetrated by members of the Anuak ethnic group against defenseless Nuwer refugees from southern Sudan; the CUD trials (2005-2008), involving members of the Coalition for Unity and Democracy accused of violence against civilians during the federal and regional parliamentary elections of 15 May 2005; and the Oromo-Gumuz trials (2008-2010), concerning clashes between Oromo and Gumuz communities in western Ethiopia between 16 and 31 May 2008 over a territorial dispute.

In all four proceedings, charges of genocide were explicitly brought, and defendants were prosecuted not only for domestic crimes such as murder, rape, and serious bodily harm, but also for international crimes, in particular genocide and war crimes. Overall, 5.492 individuals suspected of international crimes were tried in these proceedings. Nevertheless, despite the scale of the prosecutions and the seriousness with which they were conducted, none of the death sentences imposed were ultimately carried out, nor does it appear that Ethiopian courts enforced alternative penalties. Moreover, two of the aforementioned proceedings - most notably the Dergue and CUD trials - attracted significant criticism, as they were widely perceived as forms of victor's justice imposed by the prevailing political forces on defeated opponents[365].

[365] Y. A. Mohammed, *International Criminal Court and Ethiopia: Comparative Overview and Trends of Current Development*, "Journal of International Relations and Political Science Studies", Vol. 6, 2022, pp. 11-13.

In light of these precedents, and considering Ethiopia's non-membership in the Rome Statute system, the international community has called for domestic judicial proceedings to be initiated by Ethiopian courts under the national Criminal and Penal Codes against those responsible for the atrocities committed in Tigray, which have been extensively documented by reports of the Office of the United Nations High Commissioner for Human Rights, as well as investigations conducted by Amnesty International and Human Rights Watch. Initially signaling willingness to investigate the events, the Ethiopian government established the Ethiopian Human Rights Commission (EHRC) to examine alleged violations of international humanitarian law, refugee law, and suspected war crimes and crimes against humanity in Tigray. The Commission was mandated to conduct joint investigations with the UN High Commissioner for Human Rights. The two bodies subsequently issued a joint report presenting compelling evidence of serious violations. At that point, however, although the Ethiopian government formally accepted the report on the basis that it involved an Ethiopian authority, it nevertheless questioned its impartiality, criticized its conclusions, and ultimately refused to initiate judicial proceedings against the alleged perpetrators.

Subsequently, both the African Commission on Human and Peoples' Rights and the UN Human Rights Council established an inquiry and an international commission of human rights experts for Ethiopia. These bodies likewise produced reports documenting repeated war crimes and crimes against humanity committed by all parties to the Tigray conflict. It should be noted that, although the African Commission lacks jurisdiction to determine individual criminal responsibility, it is empowered to advance the cause of justice and promote peace. On this basis, it could order the Ethiopian government to cease violations, allow humanitarian access to Tigray, provide formal justification for breaches of the African Charter on Human and Peoples' Rights, and facilitate the voluntary return of displaced persons. The UN expert commission, for its part, issued recommendations urging, *inter alia*, that the UN Security Council "place the situation in Ethiopia on its agenda and take action aimed at restoring peace, stability and security in the region", explicitly invoking the application of Chapter VII of the UN Charter[366]. Once again, however, the Ethiopian government rejected the allegations emerging from these reports, expressing dissatisfaction with the experts' conclusions and characterizing them as political acts disguised as investigative reports. Consequently, it declined to renew the experts' mandate or establish further investigative mechanisms.

As a result, domestic judicial remedies have never been activated.

[366] ICHREE, *Report of the International Commission of Human Rights Experts on Ethiopia*, 5 November 2022.

Several alternative avenues remain theoretically available and warrant examination. First, one might envisage the establishment of a special chamber within the Ethiopian criminal justice system with a specific mandate to prosecute crimes characterized by extreme gravity, following consultations with Ethiopia's various communities regarding the temporal and geographical scope of such proceedings. Given the complexity of the crimes at issue, such an initiative would require substantial international support, including technical assistance and training for Ethiopian prosecutors and judges. To date, however, this option has not been seriously considered.

A second possibility lies in the deployment of transitional justice mechanisms, such as reparations, guarantees of non-recurrence, and truth-telling mechanisms, comparable to those implemented in other contexts, notably Gambia, where the establishment of a truth commission enabled victims to uncover the truth and identify individual responsibilities. At present, however, this option also appears unfeasible, as such mechanisms would require a degree of cooperation and engagement by state institutions that does not seem forthcoming.

Third, proceedings could be initiated abroad for atrocities committed in Ethiopia under the principle of universal jurisdiction, which allows States to investigate and prosecute perpetrators of international crimes irrespective of territorial or nationality links. Precedents exist, notably in Sweden and Germany, where courts have exercised universal jurisdiction in relation to crimes against humanity committed in Syria. In theory, similar proceedings could be initiated in an African State willing to apply universal jurisdiction; however, many African States have expressed opposition to this principle.

A fourth option would be the creation of an *ad hoc* international criminal tribunal to prosecute crimes committed in Ethiopia. This solution has been supported by segments of the international community, which have proposed situating such a tribunal in an African State - such as Kenya, Tanzania, or South Africa - on the grounds that geographical proximity would facilitate access to victims and witnesses. Both the African Union Peace and Security Council and the UN Security Council possess the authority to establish such a tribunal unilaterally, yet this approach appears politically unlikely.

As a further alternative, the UN Security Council could refer the situation directly to the ICC pursuant to article 13(b) of the Rome Statute. However, internal divisions within the Council and the likelihood of vetoes render this option largely impracticable. Likewise, Ethiopia could voluntarily accept ICC jurisdiction through an *ad hoc* declaration under article 12(3) of the Rome Statute, but this possibility also appears remote.

In conclusion, although recourse to the International Criminal Court remains unavailable, certain avenues for accountability for crimes committed in Tigray do exist. While each of the options outlined above presents significant practical and political challenges, they need not be viewed as mutually exclusive. On the contrary, a combined and coordinated approach could mitigate individual shortcomings and enhance the overall effectiveness of efforts to secure justice for the victims[367].

3.6 Concluding Remarks

The analysis of the situations that have occurred in China, Darfur, Yemen, and Tigray reveals a framework of objective difficulties in the prosecution of crimes characterized by an exceptional degree of gravity, the qualification of which as genocide remains highly controversial for several reasons.

First, significant legal obstacles emerge in the application of the Genocide Convention for two main reasons. On the one hand, several of the States involved, although having ratified the Convention, have entered reservations to specific provisions, most notably article 9, which in practice preclude the activation of the jurisdiction of the ICJ. On the other hand, the extremely restrictive legal characterization of the crime of genocide constitutes an obstacle to the application of the Convention where clear objective and subjective elements cannot be established. In this regard, it must also be emphasized that the definition of genocide set forth in Article II of the Convention is, on the one hand, formulated in terms so vague and general as to allow for multiple interpretations depending on the specific circumstances, and, on the other hand, appears in certain respects outdated and therefore difficult to apply in its entirety to the situations that arise in the contemporary international context. Moreover, as previously highlighted, the Convention requires, as an indispensable condition, the existence of the specific intent (*dolus specialis*), as defined in the preceding paragraphs, which is not always easily ascertainable in concrete cases. These difficulties are further compounded, in several instances, by the objective challenge of reconstructing responsibility due to deliberate silence or obstruction carried out by the regimes involved, which frequently seek to isolate the territories affected by violence from international media and reporting, reaching the extreme case of a total internet shutdown, as occurred in Tigray.

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[367] S. Mcintosh, *Justice Options for Ethiopia: Eight Options to Provide Redress for Ethiopia's Victims*, "United States Holocaust Memorial Museum. Simon-Skjodt Center for the Prevention of Genocide", October 2022.

Second, resistance can be observed in qualifying as genocide crimes that, although marked by extreme violence against protected groups, take place in regions characterized by fragile geopolitical balances. Such contexts often induce international actors to adopt a cautious approach and to refrain from undertaking repressive measures against perpetrating governments. In certain situations, these considerations are further compounded by economic interests that hinder the pursuit of accountability before appropriate judicial *fora*. The case of China is emblematic in this respect, as it clearly illustrates the interest of certain States in maintaining stable diplomatic relations with the perpetrating government - namely, the People's Republic of China - in order to avoid jeopardizing consolidated commercial ties. Reference may be made to the conduct of Turkey, which shifted from an initial stance of denunciation to a position of substantial acquiescence toward the policies implemented by the Chinese government in Xinjiang, due to the prevalence of economic considerations.
Third, it is noteworthy that the protected groups allegedly targeted by genocidal campaigns are frequently portrayed by perpetrating governments as terrorists or supporters of terrorist organizations and, as such, as legitimate targets of authoritarian measures aimed at safeguarding public order and national or global security. Through this narrative, perpetrators seek to legitimize their conduct in the eyes of the international community, which in turn often proves receptive to such arguments. This is exemplified by the public statements made in relation to Tigray by the Secretary-General of the United Nations, António Guterres, who, when questioned by a journalist about the situation in the region, stated that the Tigrayans were terrorists and that the government's actions, albeit particularly harsh, were to be regarded as substantially legitimate insofar as they were aimed at protecting security against a terrorist threat. Such narratives foster both domestic complicity and international indifference, effectively creating the conditions for widespread impunity.
Last but not least, an element that should not be underestimated is the influence of global - and Western in particular - public opinion, which tends not to apply an even-handed standard to criminal conduct perpetrated in different regions of the world. Once again, the Chinese case may be considered paradigmatic, insofar as the persecution carried out against the Muslim minority in Xinjiang does not appear to have elicited a strong emotional response within Western public opinion, such as might reasonably have been expected had the protected group belonged to a religion other than Islam and attracted greater media attention. By contrast, the impact of the media has been particularly evident in the case of Gaza, where a strong media campaign in support of the Palestinian population has significantly shaped international public opinion in favor of Palestine and against Israeli policies. No comparable reaction has been

observed more recently with regard to the criminal conduct of the Iranian government against dissenting civilians, once again demonstrating a lack of impartiality and objectivity on the part of the media and, consequently, of public opinion. More generally, it can be observed that where an alleged genocide involves groups that are ethnically similar to the perpetrators and distant from the Western experience, public opinion tends to remain disengaged or unwilling to engage with questions of responsibility. Conversely, when the interests of States located within areas of influence that are geographically or politically proximate, or openly antagonistic, are implicated, public interest in the alleged victims appears to be revived, accompanied by hostility toward the alleged perpetrators. This further demonstrates that political and economic considerations frequently prevail over a clear and objective assessment of crimes and responsibilities, both at the level of international actors endowed with effective decision-making and enforcement powers, and at the level of civil society and public opinion.

CONCLUSION

The research conducted has shown that, paradoxically, the notion of genocide is frequently misused in journalistic discourse and in the expression of public opinion, where it is often invoked in relation to conduct that would more properly be classified as crimes against humanity or war crimes. At the same time, the application of the relevant international legal framework encounters numerous obstacles that ultimately undermine its effectiveness.

In order to investigate this paradox, the present study has sought to analyze the crime of genocide in light of the provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and, with regard to individual criminal responsibility, of the Rome Statute of the ICC as well as the Statutes of the ad hoc ICTY and ICTR. A concise examination of the most relevant case law has also been undertaken, with the aim of identifying the most controversial and problematic aspects arising from the interpretation and application of the relevant legal framework.

Specifically, Chapter 1 has laid the doctrinal and normative groundwork of the analysis. Paragraph 1.1 concerns the origin of the term genocide and Lemkin's studies on the subject. Paragraph 1.2 examines in detail the preparatory works (*travaux préparatoires*) of the Convention. This section reconstructs the political and legal debates that preceded the adoption of the final text, highlighting the tensions between universalist aspirations and State sovereignty concerns. Particular attention is devoted to the progressive restriction of the scope of the crime, including the exclusion of political and social groups and the abandonment of cultural genocide as an autonomous category. The paragraph demonstrates how these choices continue to shape the contemporary interpretation and application of the Convention.

Paragraph 1.3 focuses on the structure of the crime of genocide as codified in Articles 1-3 of the Convention. It provides an analytical breakdown of the objective element (*actus reus*), examining each of the enumerated genocidal acts, and clarifies their material scope through reference to jurisprudence and doctrinal commentary. This paragraph also situates genocide within the broader system of international crimes, distinguishing it from crimes against humanity and war crimes in terms of both material elements and protected legal interests.

Paragraph 1.4 is dedicated to the analysis of the subjective element (*mens rea*), and in particular to the concept of "intent to destroy, in whole or in part, a protected group". The paragraph explores the distinction between general intent and specific intent (*dolus specialis*), and reviews the main doctrinal approaches to genocidal intent, including purpose-based, knowledge-based, and hybrid interpretations. Sub-paragraphs address the evidentiary implications of these approaches and their impact on prosecutorial strategies.

Paragraph 1.4.1 further refines the analysis by addressing the distinction between intent and motive. This section clarifies why motive, while relevant for contextual understanding, is not a constitutive element of the crime, and examines the risks associated with conflating these concepts in judicial reasoning. It also provides an overview of the main typologies of genocide identified in the literature, linking underlying motives to recurring historical patterns.

Paragraph 1.4.2 examines the challenges involved in proving genocidal intent at the State level. This section analyses article 9 of the Convention and the principles governing State responsibility, focusing on attribution, complicity, incitement, and the duty to prevent and punish genocide. A dedicated sub-paragraph is devoted to the case of *Bosnia v. Serbia*, which is analyzed as a paradigmatic example of the difficulties inherent in establishing State responsibility for genocide.

Finally, Paragraph 1.5 shifts the focus from normative analysis to judicial practice. It examines how international courts and tribunals have interpreted and applied the Genocide Convention, with particular regard to the evidentiary standards developed for establishing genocidal intent. This section examines landmark cases in which the tribunals addressed the definition of genocide, the assessment of *dolus specialis*, and the use of circumstantial evidence. The analysis centers on *Bosnia v. Serbia* and *Croatia v. Serbia*, with particular attention to the judicial interpretation of the "*intent to destroy*" requirement and the standard of the "*only reasonable inference*". The paragraph critically assesses whether this standard has contributed to legal certainty or has instead raised the evidentiary threshold to a level that risks undermining the effectiveness of the Convention.

The discussion focuses on three recent and significant international disputes: *Gambia v. Myanmar*, *Ukraine v. Russia*, and *South Africa v. Israel*.

Chapter 2 examines the interpretation and evidentiary construction of the intent to destroy within international criminal jurisprudence. In fact, a central portion of the chapter is dedicated to the evidentiary challenges associated with proving genocidal intent. Given that genocidal policies are rarely accompanied by explicit declarations of intent, international courts have consistently recognized that *dolus specialis* may be inferred from circumstantial evidence and from the overall context in which the crimes are committed.

The chapter reconstructs the judicial methodology developed by international tribunals, whereby intent may be deduced from a combination of factual elements, including: the scale, systematic nature, and brutality of the acts; the selective targeting of victims based on their membership in a protected group; the repetition of acts enumerated in article 2 of the Genocide Convention; the existence of a coordinated plan or policy, even if not formally articulated; the broader political, military, or ideological context.

Through an examination of landmark ICTR cases, the chapter shows how Trial Chambers have inferred genocidal intent from patterns of conduct rather than from direct evidence. The *Akayesu* judgment is particularly significant in this respect, as it was the first international decision to articulate in detail how genocidal intent may be established through inference, emphasizing that intent may be deduced from the general context of the perpetration of other culpable acts systematically directed against the same group.

At the same time, the chapter warns against an overly expansive use of contextual inference that would risk collapsing the distinction between genocide and other international crimes. The requirement of specific intent remains the decisive criterion that distinguishes genocide from crimes against humanity or war crimes, regardless of the scale or cruelty of the violence.

The final section of Chapter 2 addresses the complex issue of genocidal intent at the State level. While article 9 of the Genocide Convention allows disputes concerning State responsibility for genocide to be submitted to the International Court of Justice, international jurisprudence has consistently held that a State, as an abstract entity, cannot itself possess genocidal intent. Only individuals can form the *dolus specialis* required for genocide.

The chapter explains that State responsibility may nevertheless arise indirectly, through attribution of individual conduct to the State or through failures to prevent or punish genocide. However, proving that State organs acted with genocidal intent remains exceptionally difficult, as demonstrated by ICJ case law. This evidentiary threshold significantly limits the effectiveness of the Convention’s enforcement mechanisms and reveals a structural gap between individual criminal responsibility and State accountability.

Finally, Chapter 3 examines situations in which serious allegations of genocide have emerged in the absence of definitive international judicial determinations. Through a series of case studies - Xinjiang, Darfur, Yemen, and Tigray - the chapter evaluates the resilience and limits of the legal notion of genocidal intent when applied to contemporary mass atrocities.

The Chapter begins, in Paragraph 3.2, with an analysis of the situation in the Xinjiang Uyghur Autonomous Region, focusing on the treatment of the Uyghur population by Chinese authorities. Drawing on reports by United Nations bodies, independent research institutes, and human rights organizations, the thesis documents a widespread and systematic campaign of repression directed against Uyghurs and other Muslim minorities.

The conduct described includes arbitrary mass detention in so-called “re-education camps”, systematic torture and inhuman treatment, sexual violence, enforced disappearances, constant surveillance, and the destruction of religious and cultural identity. Particular emphasis is placed on coercive assimilation policies, such as forced ideological indoctrination, prohibition of religious practices, and the suppression of the Uyghur language and traditions.

A specific sub-paragraph assesses whether the acts committed in Xinjiang fall within the scope of article 2 of the Genocide Convention. The analysis proceeds act by act, demonstrating that all five enumerated forms of genocidal conduct appear to be present. Evidence suggests the killing of members of the group, inferred from satellite imagery of detention facilities adjacent to crematoria and cemeteries, as well as from reports of unexplained deaths in custody. The infliction of serious bodily or mental harm is substantiated by extensive documentation of torture, sexual abuse, psychological coercion, and degrading treatment. The deliberate imposition of conditions of life calculated to bring about physical destruction is reflected in extreme detention conditions, deprivation of medical care, malnutrition, and forced labor. Most significantly, the chapter highlights the imposition of measures intended to prevent births within the group. Government data and investigative reports reveal a systematic program of forced sterilizations, compulsory insertion of contraceptive devices, and birth-control enforcement disproportionately targeting Uyghur women, with the explicit aim of drastically reducing Uyghur birth rates.

On the basis of these elements, the chapter argues that the material component of genocide is plausibly satisfied. The intent to destroy, while not explicitly declared, may be inferred from the systematic, coordinated, and group-targeted nature of the policies implemented, particularly those aimed at the biological destruction of the group.

Nonetheless, the jurisdictional prerequisites for the International Criminal Court’s jurisdiction over Xinjiang to proceed against China do not, at present, appear to be satisfied. Similarly, the other theoretically possible options for ensuring justice for victims of atrocities in the region have proved impracticable.

The Chapter then turns, in Paragraph 3.3, to the conflict in Darfur, situating it within the broader context of Sudanese internal politics. It recounts the campaign of violence conducted since 2003 by Sudanese government forces and allied Janjaweed militias against non-Arab ethnic groups, notably the Fur, Masalit, and Zaghawa. The atrocities documented include mass killings, widespread sexual violence, forced displacement, village destruction, and the deliberate targeting of civilians based on ethnic identity. These acts were carried out on a large scale and in a highly coordinated manner, resulting in hundreds of thousands of deaths and millions of displaced persons.

Then, a specific sub-paragraph examines whether the Darfur atrocities meet the legal threshold of genocide. The chapter notes that many acts enumerated in article 2 of the Convention - killing, serious bodily and mental harm, and the imposition of destructive conditions of life - are clearly present.

However, the central issue remains the proof of genocidal intent. While the pattern of violence strongly suggests ethnic targeting, the chapter explains that international bodies have diverged in their legal characterization. Some investigations have pointed to crimes against humanity and war crimes, while others have cautiously raised the possibility of genocide. The chapter critically analyzes the reasons why genocide has not been conclusively established in Darfur by international judicial bodies. The key obstacle lies in the evidentiary threshold required to demonstrate *dolus specialis*. Although the violence was ethnically selective, international commissions have often concluded that the primary objective was forced displacement rather than the physical or biological destruction of the targeted groups as such. So, this section underscores how the strict interpretation of genocidal intent, while legally coherent, may result in the exclusion of extreme cases of mass violence from the scope of the Convention.

The analysis then turns to the intervention of the International Criminal Court, following the UN Security Council's referral of the Darfur situation. The ICC issued arrest warrants against several individuals, including Sudanese President Omar al-Bashir, charging him with genocide, crimes against humanity, and war crimes. The chapter examines the legal reasoning underpinning the genocide charges, noting that the ICC adopted a more expansive approach to inferring intent from patterns of conduct. Nonetheless, the practical impact of ICC proceedings has been severely limited by non-cooperation and political resistance, illustrating the fragility of international criminal enforcement.

The chapter proceeds to analyze, in Paragraph 3.4, the conflict in Yemen, characterized by a complex interplay of internal strife and international involvement. It documents widespread violations of international humanitarian law by all parties to the conflict, including indiscriminate airstrikes, blockades, starvation of civilians, and attacks on essential infrastructure, with catastrophic humanitarian consequences.

A specific sub-paragraph evaluates whether the Yemeni conflict could be legally framed as genocide. While acts such as killing civilians and imposing life-threatening conditions are present, the chapter emphasizes the difficulty of establishing the specific intent to destroy a protected group. The violence in Yemen is primarily linked to political and military objectives rather than to the destruction of a national, ethnic, racial, or religious group as such. As a result, despite the scale of suffering, the legal threshold for genocide remains unmet.

The chapter then explores the jurisdictional barriers preventing international adjudication. Yemen is not a party to the Rome Statute, and Security Council referral is politically unfeasible. This section also assesses alternative mechanisms, including domestic prosecutions, universal jurisdiction, and the creation of *ad hoc* tribunals, concluding that none have been effectively implemented to date.

Finally, Chapter 3 examines the recent conflict in Tigray (Paragraph 3.5), outlining extensive allegations of war crimes and crimes against humanity committed by Ethiopian and allied forces. These include massacres of civilians, sexual violence, forced displacement, and the deliberate obstruction of humanitarian aid.

Again, a specific sub-paragraph applies the legal framework of the Genocide Convention to the Tigray context. While the material acts listed in article 2 appear to be present in multiple instances, the chapter highlights the ongoing debate concerning genocidal intent. The absence of explicit evidence of an intent to destroy the Tigrayan group as such complicates legal qualification. Lastly, the final section addresses the lack of effective accountability mechanisms.

Chapter 3 ultimately demonstrates that the requirement of *intent to destroy*, while essential for preserving the legal specificity of genocide, constitutes the principal barrier to accountability in contemporary mass atrocity situations. The study highlights a persistent tension between doctrinal rigor and the moral imperative to respond to extreme violence, revealing a structural gap between international criminal law and the realities of modern conflicts, which are often influenced by geopolitical and economic interests that prevent accountability.

Beyond the geopolitical and economic considerations that, as extensively discussed, often influence the assessment of whether the legal requirements for genocide are met, it should be noted that the principal reason for the difficulty in applying the Genocide Convention lies in the exceptionally high evidentiary burden required to establish the existence of the specific intent (*dolus specialis*) to destroy, in whole or in part, a protected group - national, ethnic, racial, or religious - as such. In order to prove such intent, it is not sufficient to demonstrate the occurrence of mass killings; rather, it must be shown that the acts were committed with the specific purpose of annihilating the protected group, in whole or in part, or at least of contributing to the implementation of a broader plan of destruction devised by others. Concrete cases demonstrate that establishing such a precise and specific subjective intent is often extremely difficult in situations of armed conflict or widespread violence.

A further critical issue arises from the particularly restrictive definition of protected groups contained in the Convention. The Convention, in fact, affords protection only to groups defined on national, ethnic, racial, or religious grounds, thereby excluding political groups or broader cultural identities. As a result, the application of the genocide label is not automatic for many instances of mass atrocity, which are more frequently characterized as ethnic cleansing rather than genocide.

On a different level, there are objective difficulties in activating judicial remedies, since, as highlighted, recourse to such mechanisms is subject to a series of conditions - starting with the recognition of the jurisdiction of the ICC and the ICJ by the alleged perpetrator States - which rarely materialize in practice. An examination of the various scenarios shows that, in most cases, the failure to ratify the Convention or the formulation of reservations to specific provisions prevents the activation of the competent jurisdictions.

Moreover, even where judicial proceedings are successfully instituted against alleged perpetrators before the appropriate international *fora*, the determination of responsibility remains extremely complex. This is due not only to the aforementioned difficulties in proving specific intent, but also to the challenges inherent in establishing the direct involvement of individual perpetrators in genocidal acts. Such determinations require lengthy and complex investigations that would necessitate a cooperative attitude on the part of the governments concerned. Instead, these governments frequently invoke their internal sovereignty to avoid external scrutiny, engaging in systematic obstruction and deliberate distortion of facts.

Finally, attention must be drawn to the absence of an international enforcement mechanism capable of ensuring compliance with judicial decisions. Although judgments rendered by international courts are formally binding, effective coercive instruments to compel States to comply with them are lacking. Therefore, impunity prevails in the vast majority of cases.

From a prospective perspective, it is appropriate, in concluding the present analysis, to advance some reflections on possible remedies.

First and foremost, there is a clear need for an update of the applicable legal framework, beginning with the definition of the crime of genocide set forth in article 2 of the Convention. It is evident that a definition formulated in the 1940s and specifically tailored to two historical campaigns of persecution - the Holocaust and the Armenian genocide - characterized by an explicit genocidal intent directed against clearly identifiable protected groups, is difficult to apply in the contemporary context. Today, situations frequently arise in which the protected group is not easily identifiable and in which the reasons advanced for persecution are framed in terms that fall outside an explicit intent to destroy a national, ethnic, or religious identity. In many cases, alleged perpetrators, while deliberately targeting specific groups with the aim of annihilating or uprooting them, wholly or partially, from a given territory, justify their actions by invoking national security or global security concerns. This further complicates the application of the Convention, particularly regarding the subjective element of the crime. These difficulties are exacerbated by the increasing sophistication of propaganda techniques, which often result in a distortion of reality and further hinder the establishment of legal prerequisites and responsibility.

Any normative update should therefore include not only a redefinition of the offence itself, but also a clearer delineation of the notion of specific intent, to better circumscribe its characteristics, nature, and scope of application. To this end, it would be appropriate to draw upon the extensive body of jurisprudence developed over the decades precisely in an effort to overcome the principal interpretative and applicative challenges associated with the element of intent.

As far as institutional remedies are concerned, it would be necessary to reform decision-making processes within the United Nations so as to overcome the obstacle posed by the veto power, which currently paralyses the Security Council and renders it effectively powerless in the face of manifest situations of violence. In practical terms, this would require the introduction of majority voting within the Security Council, accompanied by the complete exclusion of the veto power. It is evident that the veto has been systematically used by permanent members as a means of blocking decisions based on particular interests, whereas the primary institutional mandate of the United Nations is to resolve international disputes peacefully and to ensure respect for human rights and fundamental values as a basis for the peaceful coexistence of peoples and nations.

Finally, consideration should be given to integrating the Convention, or the applicable international legal framework more broadly, through the explicit provision of effective sanctioning mechanisms against States that openly obstruct the establishment of responsibility in judicial proceedings. While recognizing the legitimacy of reservations to international agreements, it remains essential to ensure that, once judicial proceedings are underway, the actors involved are effectively compelled - where necessary through the use of sanctions - to cooperate with the competent courts.

In conclusion, a comprehensive rethinking of the international legal framework, as well as of decision-making mechanisms within the United Nations, appears necessary in order to ensure the effective implementation of the existing instruments.

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