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Proving Genocidal Intent and the Policy Element – Genocide in Darfur?



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I. Declaration

I declare that *Proving Genocidal Intent and the Policy Element – Genocide in Darfur?* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Eva Bohle

October 2009

Signed:.....



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III. List of Abbreviations

Art.(s.)	Article(s)
Commission	International Commission of Inquiry on Darfur
Fn.	Footnote
Genocide Convention	<i>Convention on the Prevention and Punishment of the Crime of Genocide</i> of 9 December 1948, 78 <i>UNTS</i> (1949), 277
ICC	International Criminal Court
ICC Statute	<i>Rome Statute of the International Criminal Court</i> of 17 July 1998, 37 <i>ILM</i> (1998), 999 et seq
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994
ICTR Statute	<i>Statute for the International Criminal Tribunal for Rwanda</i> , UN Doc. S/RES/955 (1994)
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ICTY Statute	<i>Statute for the International Criminal Tribunal for the Former Yugoslavia</i> , UN Doc. S/RES/808 (1993)
ILM	International Law Materials
IMT	International Military Tribunal Nuremberg
London Agreement	<i>Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis</i> of 8 August 1945, in: 39 <i>American Journal of International Law</i> (1945), Suppl. 257 et seq
Nuremberg Charter	<i>Charter of the International Military Tribunal, Nuremberg</i> , in: 39 <i>American Journal of International Law</i> (1945), Suppl. 257 et seq
para.(s.)	paragraph(s)
Report	Report of The International Commission of Inquiry on Darfur, UN Doc. S/2005/60 (2005)
Res.	Resolution

Supp(l).

UN

UN Charter

UN Doc.

UNTS

Supplementum

United Nations

Charter of the United Nations

Documents of the United Nations

United Nations Treaty Series



I. Introduction

On 18 September 2004, the United Nations (UN) Security Council acting under Chapter VII of the UN Charter adopted Resolution 1564 to

“rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.”¹

The International Commission of Inquiry on Darfur (Commission) began its work in October 2004 and provided its final report only three months later on 25 January 2005.² There, it concluded, *inter alia*,

“that the Government of Sudan has not pursued a policy of genocide”

and that at least the central Government authorities did not act with genocidal intent.³ However, these findings would not exclude the possibility that the atrocities committed by individuals against victims were carried out with the specific intent to destroy and therefore could possibly fulfil all necessary requirements of the crime of genocide.⁴

Thus, the Commission was concerned with some of the most problematic aspects connected with the crime of genocide: firstly, the question whether this crime always requires a genocidal plan or policy by a state or organised authority and, secondly, the crucial problem of how to prove genocidal intent. This research paper will focus on these controversial

1 Resolution 1564 (2004), adopted by the Security Council at its 5040th meeting, on 18 September 2004, UN Doc. S/RES/1564 (2004), para. 12.

2 Report of the International Commission of Inquiry on Darfur, UN Doc. S/2005/60 (2005).

3 *Ibid.*, paras. 518, 640.

4 *Ibid.*, paras. 520, 641.

issues and their significance for the International Criminal Court (ICC) in dealing with the situation in Darfur/Sudan. Furthermore, another related issue that was addressed by the Commission will be analysed, namely which exact degree of *mens rea* is required for the special intent to destroy one of the protected groups.

Therefore, the history of the concept of the crime of genocide and its development from the Nuremberg judgement⁵ and the first legal formulation of the crime in the *Convention on the Prevention and Punishment of the Crime of Genocide* of 9 December 1948 (Genocide Convention)⁶ leading to one of its most recent codifications in the Rome Statute of the International Criminal Court (ICC Statute)⁷ will be outlined (II). Then, a short introduction to the basic structure and the legal elements of the crime will follow. This research paper will focus on a detailed description of the problematic aspects with an emphasis on analysing the relevant international case law (III). Finally, the situation in Darfur will be scrutinised. This chapter will primarily deal with the legal findings of the Commission and the decision of Pre-Trial Chamber I of the ICC regarding the arrest warrant against the Sudanese president *Omar Hassan Al Bashir* (IV).

5 IMT, judgement of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (22nd August, 1946 to 1st October, 1946).

6 *Convention on the Prevention and Punishment of the Crime of Genocide* of 9 December 1948, 78 UNTS (1949), 277.

7 *Rome Statute of the International Criminal Court* of 17 July 1998, 37 ILM (1998), 999 et seq.

II. The Crime of Genocide – History and Developments

1. The First Definition of the Crime of Genocide and the Nuremberg Trial

In 1944, Polish lawyer *Raphael Lemkin* introduced the definition of the crime of genocide into legal literature and created the term “genocide” as such by combining the Greek word “genos” for race or tribe and the Latin word “cide” (or caedere) for to kill.⁸ At that time, one of the most atrocious manifestations of the crime of genocide took place: the extermination of the European Jews during the Third Reich. After World War II and the victory over Nazi Germany, the four victorious powers decided to put the major German representatives of the Third Reich on trial and therefore concluded on 8 August 1945 the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (London Agreement) and, as its appendix, the *Charter of the International Military Tribunal at Nuremberg* (Nuremberg Charter).⁹ The London Agreement constituted the legal basis for the establishment of the International Military Tribunal. The Nuremberg Charter contained all the relevant provisions concerning the implementation of the trial. Article 6 (c) of the Nuremberg Charter listed the crimes under the subject-matter jurisdiction of the International Military Tribunal namely crimes against peace, war crimes and crimes against humanity.¹⁰ Interestingly, genocide was not included explicitly but was covered by war crimes and especially by the

8 Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation. Analysis of Government. Proposals for Redress*, Washington: Carnegie Endowment for International Peace, 1944, 79.

9 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal at Nuremberg*, 39 *American Journal of International Law* (1945), Suppl. pp. 257 et seq. See also Gerhard Werle, *Principles of International Criminal Law*, The Hague: TMC Asser Press, 2005, para. 17.

10 See Werle (2005), para. 19.

crimes against humanity of “extermination” and “persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal”.¹¹ The fact that crimes against humanity were only punishable if there existed a link to war crimes or crimes against peace prevented the prosecution of criminal acts perpetrated before the beginning of World War II because this special connection could not be proven in many cases.¹² Therefore, the International Military Tribunal did not deal with the heinous acts of persecution of Jews between the takeover of the Nazi party in 1933 and the aggression against Poland in September 1939. Even the atrocities committed during the war were not the centre of attention during the Nuremberg Trial; instead it mainly focused on the prosecution of the war of aggression and war crimes.¹³ Thus, the part of the Nuremberg judgement which exclusively deals with the persecution of the Jews before and during World War II is quite short and the term “genocide” was not used at all.¹⁴

2. The Genocide Convention

Due to the abhorrent atrocities committed against the Jews during the Nazi regime the world community came to a consensus on taking action on the international level and to appropriately criminalise such conduct, punish the perpetrators and establish a system of judicial cooperation

11 Antonio Cassese, *International Criminal Law*, 2nd edition, Oxford: Oxford University Press, 2009, 127; Guenael Mettraux, *International Crimes and the ad hoc Tribunals*, Oxford: Oxford University Press, 2005, 194; Frank Selbmann, *Der Tatbestand des Genozids im Völkerstrafrecht*, Leipzig: Universitätsverlag Leipzig, 2003, 39 et seq.; Gerhard Werle, *Principles of International Criminal Law*, 2nd edition, The Hague: TMC Asser Press, 2009, para. 697.

12 William A. Schabas, “National Courts Finally Begin to Prosecute Genocide, the Crime of the Crimes.” *Journal of International Criminal Justice* 1 (2003), 39 at 41; Selbmann (2003), 40; Werle (2005), para. 23.

13 Angela Paul, *Kritische Analyse und Reformvorschlag zu Art. II Genozidkonvention*, Berlin et al.: Springer, 2008, 32; Werle (2009), para. 697.

14 Mettraux (2005), 195 et seq.; Selbmann (2003), 39.

between states.¹⁵ Thus, the first formulation of the crime of genocide in an international legal document followed in 1948 when the Genocide Convention was unanimously adopted by the UN General Assembly and entered into force in 1951.¹⁶ However, it lasted 50 years until the provisions of the Genocide Convention were applied for the first time by an international court when the International Criminal Tribunal for Rwanda convicted *Jean-Paul Akayesu*, a former mayor of the Rwandan commune of Taba, for the crime of genocide and sentenced him to life imprisonment.¹⁷

Today, the prohibition of genocide is acknowledged under customary international law and constitutes *ius cogens*.¹⁸ The definition of Art. II of the Genocide Convention was reproduced almost word by word by each of the statutes of the international criminal courts, namely Art. 4 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), Art. 2 (2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), and Art. 6 of the ICC Statute. In addition, the statutes of the *ad hoc* Tribunals adopted Art. III of the Genocide Convention on punishable acts *verbatim* (Art. 4 (3) of the ICTY Statute; Art. 2 (3) of the ICTR Statute).

3. The *ad hoc* Tribunals

In the early 1990s, two international *ad hoc* Tribunals were established by

15 Cassese (2009), 127 et seq.; Paul (2008), 27 et seq.; Werle (2009), para. 693.

16 Paul (2008), 48; Selbmann (2003), 53 et seq.; Werle (2009), para. 698.

17 *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998.

18 ICJ, "Reservations to the Convention on the Prevention and Punishment on the Crime of Genocide, Gutachten v. 28. Mai 1951", *ICJ Rep.* 1951, 23; see also, for example, *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para 495; *Prosecutor v. Musema*, ICTR (Trial Chamber), judgement of 27 January 2000, para. 151; *Prosecutor v. Rutaganda*, ICTR (Trial Chamber), judgement of 6 December 1999, para. 46.

the UN Security Council acting under Chapter VII of its Charter.¹⁹

In 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in *The Hague* to deal with crimes under international law, namely grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide and crimes against humanity, committed on the territory of the former Yugoslavia since 1 January 1991.²⁰ Thus, the ICTY was the first international criminal court entrusted with subject-matter jurisdiction for the crime of genocide. So far, 23 persons, all of them Serbs, were indicted for the crime of genocide, but only two accused were convicted of this charge:²¹ *Radislav Krstic* was found guilty, *inter alia*, for aiding and abetting genocide and sentenced to 35 years of imprisonment. In this judgement, the Appeals Chamber confirmed the Trial Chamber's findings that genocide had been committed on the territory of Bosnia and Herzegovina, namely in the area of *Srebrenica* in July 1995 where male Bosnian Muslims of military age were executed on a large scale.²² Another accused, *Vidoje Blagojevic*, was also convicted on the count of complicity to commit genocide through aiding and abetting genocide by Trial Chamber I of the ICTY for his participation in the massacre of *Srebrenica*²³ but this conviction was quashed on appeal

19 See Werle (2005), paras. 45 et seq.

20 See, for example, Paul (2008), 60 et seq.; Werle (2005), paras. 48 et seq.

21 For further information see <http://www.icty.org/action/cases/4> (last accessed: 22 October 2009). See also Andreas Bummel and Frank Selbmann, "Genozid – Eine Zwischenbilanz der Rechtsprechung des Internationalen Strafgerichtshofes für das ehemalige Jugoslawien." *Humanitäres Völkerrecht – Informationsschriften* 19 (2006), 58 at 59 et seq. with a good overview of the ICTY case law until July 2005; Martin Mennecke and Eric Markusen, "The International Criminal Tribunal for the Former Yugoslavia and the Crime of Genocide" in: Steven L. B. Jensen (ed.), *Genocide: Cases, Comparisons and Contemporary Debates*, Kopenhagen: The Danish Center for Holocaust and Genocide Studies, 2003, 293 at 311 et seq.

22 *Prosecutor v. Krstic*, ICTY (Appeals Chamber), judgement of 19 April 2004, para. 37. Thus, the Appeals Chamber confirmed the findings of the Trial Chamber in this regard, *Prosecutor v. Krstic*, ICTY (Trial Chamber), judgement of 2 August 2001, para. 598.

23 *Prosecutor v. Blagojevic*, ICTY (Trial Chamber), judgement of 17 January 2005, para. 797.

for lack of evidence.²⁴ Similarly, in other cases the commission of genocide in other regions and times of the conflict could also not be proven beyond reasonable doubt.²⁵

While the ICTY mainly focuses on the prosecution of war crimes committed during the armed conflict on the territory of former Yugoslavia, the International Criminal Tribunal for Rwanda (ICTR) established in 1995 in *Arusha* primarily concentrates on the investigation and prosecution of genocidal acts directed against the Tutsi minority in Rwanda in 1994 when approximately 800,000 people were exterminated within three months.²⁶

The jurisdiction of ICTY and ICTR contributed to a great extent to the further development and specification of international criminal law but, at the same time, demonstrated some shortcomings, *inter alia*, regarding the crime of genocide.



4. The International Criminal Court

With the adoption of the ICC Statute on 17 July 1998 and its entry into force after its ratification by 60 State parties on 1 July 2002, the first permanent international criminal court was established in *The Hague* to try individuals for committing crimes under international law, namely genocide, crimes against humanity, war crimes and the crime of

²⁴ *Prosecutor v. Blagojevic*, ICTY (Appeals Chamber), judgement of 9 May 2007, paras. 119 et seq.

²⁵ See *Prosecutor v. Brdjanin*, ICTY (Trial Chamber), judgement of 1 September 2004, para. 989; *Prosecutor v. Stakic*, ICTY (Trial Chamber), judgement of 31 July 2003, para. 561; *Prosecutor v. Sikirica et al.*, ICTY (Trial Chamber), judgement on Defence Motion to acquit of 3 September 2001, para. 84 et seq; *Prosecutor v. Jelusic*, ICTY (Trial Chamber), judgement of 14 December 1999, para. 98, 108.

²⁶ See John R.W.D. Jones, "Whose Intent is it Anyway? Genocide and the Intent to Destroy a Group." in L.C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man*, The Hague: Kluwer Law International, 2003, 467 at 469 et seq.; Paul (2008), 62 et seq.; Werle (2005), paras. 54 et seq.

aggression.²⁷ Although a revision of the definition of the crime of genocide was discussed during the preparatory process for the ICC Statute, an essential modification of this crime had never been under consideration. Some delegations suggested to include social and political groups into the provision or to provide a legal definition of the special intent but finally none of these modifications were introduced. Thus, the wording of Art. 6 of the ICC Statute is the same – apart from the introductory phrase – as in Art. II of the Genocide Convention without any serious objections on the part of the State parties.²⁸

Today, the ICC is investigating four situations, all of them situated in Africa: those of the Democratic Republic of Congo, Uganda, the Central African Republic, and Darfur/Sudan. While the first three situations were referred to the ICC by the states concerned (self-referrals), the latter one was referred by the UN Security Council.²⁹



III. Legal Elements of the Crime of Genocide

1. Basic Structure of the Crime of Genocide

According to Art. 6 of the ICC Statute and the corresponding provisions of the statutes of the *ad hoc* Tribunals which are, as aforementioned,

verbatim adoptions of Art. II of the Genocide Convention, the crime of

²⁷ The ICC can exercise its jurisdiction over the crime of aggression not until the State parties agree on a definition of this crime and the conditions under which the Court shall exercise its jurisdiction (Art. 5 (2) of the Statute). See Werle (2005), paras. 56 et seq.

²⁸ Payam Akhavan, “The Crime of Genocide in the ICTR Jurisprudence.” *Journal of International Criminal Justice* 3 (2005), 989 at 999 et seq.; Claus Kress, “The Crime of Genocide under International Law.” *International Criminal Law Review* 6 (2006), 461 at 467; Valerie Oosterveld, in: Roy Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, Ardsley: Transnational Publishers, Inc, 2001, 41 et seq.; Paul (2008), 68 et seq.; William A. Schabas, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes. Article by Article*, 2nd edition, München: C.H. Beck, 2008, Art. 6, para. 2; Werle (2009), para. 698.

²⁹ For further information see <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last accessed: 22 October 2009).

genocide is defined as

“[...] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

Thus, the crime of genocide comprises an objective and a subjective side:

The *actus reus* (material elements) requires the perpetration of one of the punishable acts directed against one or more members of one of the protected groups. Although the wording of the provision alludes to “members” and “children”, it is widely accepted that an attack against, at least, one single individual can be sufficient.³⁰ The list of acts that constitute genocide as well as the enumeration of the four groups are exhaustive. Other groups, for example political, social or economic entities, are consequently not protected.³¹

30 See Elements of Crimes for ICC Statute, Art. 6 (a) to (e), no. 1; *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para 521; Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts. Volume I. Commentary*, The Hague et al.: Kluwer Law International, 2000, 125 et seq.; Paul (2008), 176; John Quigley, *The Genocide Convention: An International Law Analysis*, Aldershot, Hampshire et al.: Ashgate, 2006, 98 et seq.; William A. Schabas, *Genocide in International Law*, 2nd edition, Cambridge: Cambridge University Press, 2009, 158; Otto Triffterer, “Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender “Elements of Crimes” für alle Tatbestände des Völkermordes.” in: B. Schönemann et al. (eds.), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001*, Berlin et al.: de Gruyter, 2001, 1415 at 1433; Werle (2009), para. 725; critical view Cassese (2009), 134; other view Hans Vest, “Humanitätsverbrechen – Herausforderung für das Individualstrafrecht?” *Zeitschrift für die gesamte Strafrechtswissenschaft* 113 (2001), 457 at 477.

31 *Prosecutor v. Krstic*, ICTY (Trial Chamber), judgement of 2 August 2001, para. 554; Ilias Bantekas and Susan Nash, *International Criminal Law*, 3rd edition, London et al.: Routledge – Cavendish, 2007, 141; Kress (2006), 473; Selbmann (2003), 155; Werle (2009), paras. 707, 721 et seq. The *Akayesu* Trial Chamber held a different view: “protection of any stable and

The *mens rea* (mental elements) of the crime of genocide consists of two different aspects:³²

Firstly, the perpetrator has to commit the genocidal act with general intent in the sense of Art. 30 of the ICC Statute (intent and knowledge) regarding the material elements of the crime. The perpetrator must, at least, act with *dolus eventualis*, the mere negligent commission of the crime does not suffice.³³ However, the use of the words “deliberately” in Art. 6 (c) and “intended” in Art. 6 (d) of the ICC Statute clearly indicate that *dolus eventualis* does not fulfil the mental requirements of these underlying crimes.³⁴ In contrast, for the crime of forcibly transferring children of the group into another group, the Elements of Crimes on Art. 6 (e) of the ICC Statute rule that it is even sufficient that the perpetrator *should have known* that the person or persons he forcibly transferred were under the age of 18 years (“negligence standard”).³⁵

Secondly, the commission of genocide requires that the perpetrator acts with the intent to destroy, in whole or in part, one of the target groups as such. The actual annihilation of the group in its entirety is not required.³⁶

Furthermore, the destruction of the group must be the final goal of the perpetrator. In other words, it is required that the group's annihilation forms

permanent group”, *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, paras. 516, 701.

32 See Cecile Aptel, “The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda.” *Criminal Law Forum* 13 (2002), 273 at 275; Kress (2006), 484; Quigley (2006), 101; Ulrich Roßkopf, *Die innere Tatseite des Völkerrechtsverbrechens*, Berlin: BWV, 2007, 109 et seq.; Selbmann (2003), 165; Werle (2009), paras. 748 et seq.

33 Paul (2008), 240; Werle (2009), para. 751.

34 Kress (2006), 485; Werle (2009), para. 750.

35 Kress (2006), 485; Werle, para. 752.

36 *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para. 497; see also Aptel (2002), 280; Nina H. Jorgensen, “The definition of genocide: Joining the dots in the light of recent practice.” *International Criminal Law Review* 1 (2001), 285 at 299; Werle (2009), para. 701.

the (preliminary) objective of the criminal conduct.³⁷ It is essential for the crime of genocide that the victim is not attacked for any reason of its “individual identity” but because of its membership in a national, ethnical, racial or religious group.³⁸ The intent to destroy is the crucial element which distinguishes it from other crimes under international law (in particular from persecution as a crime against humanity) as well as murder, serious assault or other “ordinary” offences under domestic law³⁹ and “lends the crime its international dimension”.⁴⁰ Different terms are used to label this particular subjective element like “genocidal intent”, “special intent/intention“, “specific intent/intention“ or “*dolus specialis*”.⁴¹

2. Problematic Aspects

Although the wording of the provision against genocide has not been changed since its formulation in 1948 there still remain ambiguities as to the exact definition of the crime. This paper will focus on three aspects:

- Firstly, it has to be analysed whether the crime of genocide requires some kind of objective contextual element.
- Secondly, the related problem of proving genocidal intent will be discussed; this problem has caused some difficulties to the *ad hoc*

³⁷ *Prosecutor v. Jelisic*, ICTY (Appeals Chamber), judgement of 5 July 2001, paras. 46, 50 et seq; *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para. 520; see also Mettraux (2005), 210; Werle (2009), para. 754.

³⁸ *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para. 521; for further references see Werle (2009), para. 756.

³⁹ Akhavan (2005), 992; Bantekas/Nash (2007), 141; Barbara Lüders, *Die Strafbarkeit von Völkermord nach dem Römischen Statut für den Internationalen Strafgerichtshof*, Berlin: BWV, 2004, 91; Mettraux (2005), 209; Roßkopf (2007), 112.

⁴⁰ Werle (2009), para. 701; see also Kai Ambos, “Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes.” in: L.C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man*, The Hague: Kluwer Law International, 2003, 11 at 18; Lüders (2004), 93.

⁴¹ See Aptel (2002), 277 with further references.

Tribunals.

- Thirdly, the controversial issue which degree of intent is required regarding the special intent of the crime merits discussion.

a) Genocidal plan or policy – A legal element of the Crime of Genocide?

In recent years, it has increasingly been argued that some kind of objective contextual element is needed as a legal ingredient of the crime of genocide. *Schabas*, for example, submits that the original concept of this crime as it was envisaged by its creator *Lemkin* would comprise a planned genocidal campaign as a *sine qua non*.⁴² Indeed *Lemkin* stated the following:

“[Genocide] is intended [...] to signify a coordinated plan or different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”⁴³

In addition, the need for a circumstantial requirement is often deduced from the fact that the commission of genocide is almost inconceivable if there is no genocidal plan or policy on the part of a state or an associated organisation.⁴⁴ A single perpetrator who does not act in a broader organised context would simply not be in the position to threaten the existence of a protected group, in whole or in part. Therefore, his criminal prosecution falls not in the responsibility of the international community.⁴⁵

42 Schabas (2009), 246; William A. Schabas, “The *Jelisc* Case and the *Mens Rea* of the Crime of Genocide.” *Leiden Journal of International Law* 14 (2001), 125 at 134.

43 Lemkin (1944), 79.

44 See, for example, Bummel/Selbmann (2006), 66; Claus Kress, “The Crime of Genocide and Contextual Elements.” *Journal of International Criminal Justice* 7 (2009), 297 at 300; Schabas (2009), 246; Schabas (2001), 134; Hans Vest, “A Structure-Based Concept of Genocidal Intent.” *Journal of International Criminal Justice* 5 (2007), 781 at 784; Vest (2001), 482.

45 Kress (2009), 301; Vest (2001), 482.

In this regard, it is further argued that the subsumption of isolated acts that are (unrealistically) aimed at the destruction of a protected group under the definition of genocide would trivialise this crime.⁴⁶

The supporters of a policy element further stress the character of genocide as a mass or collective crime⁴⁷ and draw a parallel to other crimes under international law. All three of them – crimes against humanity, war crimes and the crime of aggression – would entail a real threat to internationally protected values in the form of a widespread or systematic attack, an armed conflict or an aggression as such.⁴⁸ Genocide – as the “crime of crimes”⁴⁹ – could not have a broader scope and should also include an actually existing danger for one of the protected groups. Some authors also allude to the ICC Statute where both crimes against humanity and war crimes are directly linked to a state or organisational plan or policy: While Art. 7 (2) (a) of the ICC Statute defines “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts [...] pursuant to or in furtherance of a State or organizational policy to commit such attack”, Art. 8 (1) of the ICC Statute states that the court's jurisdiction shall be activated in particular when war crimes were “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁵⁰

46 Kress (2009), 302; Kress (2006), 471; Oesterveld, in: Lee (2001), 45; Schabas (2001), 138.

47 Claus Kress, “The Darfur Report and Genocidal Intent.” *Journal of International Criminal Justice* 3 (2005), 562 at 566; Kress (2006), 470; Jones, in Vohrah *et al.* (2003), 468; Schabas (2009), 244; Vest (2007), 784 et seq.; Vest (2001), 482.

48 Kress (2009), 301.

49 *Prosecutor v. Serushago*, ICTR (Trial Chamber), judgement of 5 February 1999, para. 15; *Prosecutor v. Kambanda*, ICTR (Trial Chamber), judgement of 4 September 1998, para. 16.

50 Schabas (2009), 243; Schabas, “Has Genocide Been Committed in Dafur? The State Plan or Policy Element in the Crime of Genocide.” in: R. Henham and P. Behrens (eds.), *The Criminal Law of Genocide*, Aldershot *et al.*: Ashgate, 2007, 39 at 45; Triffterer, in Schünemann *et al.* (eds.) (2001), 1417, 1434; Vest (2007), 784 et seq.

Another point that is consistently mentioned is the special relationship between crimes against humanity and the crime of genocide which is partly regarded as a special type of the former.⁵¹ Therefore, some authors demand that both crimes should provide a similar contextual requirement.⁵²

However, pursuant to the mere wording of Art. II of the Genocide Convention the crime of genocide does not require an objective contextual element. The special intent to destroy does also not refer to an overall genocidal pattern that has to be covered by the perpetrator's mind. There is no indication contained in this provision that a genocidal plan or policy on the part of governmental authorities or any other organisation is needed. Proposals concerning this matter were not able to achieve acceptance during the drafting process of the Genocide Convention.⁵³

The case law of the *ad hoc* Tribunals is also quite clear on that issue: in its *Jelisić* judgement of 1999, the Trial Chamber of the ICTY stated in reference to the Genocide Convention

“that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime”.⁵⁴

This view was confirmed on appeal (“the existence of a plan or policy is not a legal ingredient of the crime”⁵⁵) and almost consistently held by

51 Schabas, in: Henham/Behrens (2007), 40; Vest (2001), 475; similarly Kress (2006), 469; other view Cassese (2009), 144; Jorgensen (2001), 288; Werle (2005), para. 631.

52 Jones, in Vohrah *et al.* (2003), 468, 479; Kress (2005), 575 et seq.; Kress (2009), 301; Kress (2006), 472 (“[...] variation lies in the fact that the collective activity constitutes an objective contextual element in the case of crimes against humanity while it forms an objective point of reference of the intent requirement in the case of genocide”).

53 Lüders (2004), 164; Paul (2008), 267, 270; Schabas (2001), 133 et seq (citing: UN Doc. E/AC.25/SR4, at 3 – 6).

54 *Prosecutor v. Jelisić*, ICTY (Trial Chamber), judgement of 14 December 1999, para. 100.

55 *Prosecutor v. Jelisić*, ICTY (Appeals Chamber), judgement of 5 July 2001, para. 48.

different chambers of both *ad hoc* Tribunals.⁵⁶ In consideration of the fact that genocidal acts need not necessarily be committed within the course of other similar deeds nor have to be part of a genocidal plan or policy, the chambers of the *ad hoc* Tribunals concluded that it is at least theoretically conceivable that one single individual commit the crime of genocide (concept of the lone *genocidaire*).⁵⁷

An exception of this otherwise uniform jurisdiction is contained in one decision of the ICTY. While dealing with the distinction between crimes against humanity and genocide, the *Krstic* Trial Chamber ruled that

“[...] acts of genocide must be committed in the context of a manifest pattern of similar conduct, or themselves constitute a conduct that could in itself effect the destruction of the group, in whole or part, as such.”⁵⁸

Here, the chamber was apparently oriented on the Finalized Draft Text of the Elements of Crimes on Art. 6 of the ICC Statute of 2 November 2000⁵⁹ and almost perfectly reproduced their wording. However, the Appeals Chamber vehemently rejected this view and took up the position that a contextual element was not part of international customary law at the time of the commission of the crimes under consideration⁶⁰ and that

56 See, for example, *Prosecutor v. Simba*, ICTR (Appeals Chamber), judgement of 27 November 2007, para. 260; *Semanza v. Prosecutor*, ICTR (Appeals Chamber), judgement of 20 May 2005, para. 260; *Prosecutor v. Sikirica et al.*, ICTY (Trial Chamber), judgement on Defence Motion to Acquit of 3 September 2001, para. 62; *Prosecutor v. Krstic*, ICTY (Appeals Chamber), judgement of 19 April 2004, paras. 222 et seq.; *Prosecutor v. Kayishema and Ruzindana*, ICTR (Appeals Chamber), judgement of 1 June 2001, para. 138. The *Kayishema and Ruzindana* Trial Chamber was the first that took up this position by stating that “a specific plan to destroy does not constitute an element of genocide”, *Prosecutor v. Kayishema and Ruzindana*, ICTR (Trial Chamber), judgement of 21 May 1999, para. 94.

57 *Prosecutor v. Jelusic*, ICTY (Trial Chamber), judgement of 14 December 1999, para. 100.

58 *Prosecutor v. Krstic*, ICTY (Trial Chamber), judgement of 2 August 2001, para. 682.

59 PCNICC/2000/1/Add.2 (available at <http://www.alhaq.org/pdfs/ecICC.pdf>; last accessed: 22 October 2009). The Trial Chamber repeatedly refers to this draft (*Prosecutor v. Krstic*, ICTY (Trial Chamber), judgement of 2 August 2001, paras. 498, 509, 541).

60 *Prosecutor v. Krstic*, ICTY (Appeals Chamber), judgement of 19 April 2004, para. 223 et seq.

“[t]he intent requirement of genocide [...] contains none of the elements the Trial Chamber read into it.”⁶¹

It remains to be seen if the ICC will follow this approach. While the text of Art. 6 of the ICC Statute does not include any substantive modification to the Genocide Convention, the associated Elements of Crimes in reference to Art. 6 of the ICC Statute stipulate that

“[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”⁶²

Thus, at least the Elements of Crimes require a certain genocidal context of which the individual act has to form part. It appears that the concept of the lone *genocidaire* can not be accommodated apart from the unlikely scenario of an isolated perpetrator in possession of a weapon of mass destruction that could cause the annihilation of a protected group, in whole or in part.

However, it is imperative to consider the legal character of the Elements of Crimes to appreciate their impact on the definition of the crime of genocide as it is acknowledged under customary international law. According to Art. 21 (1) (a) of the ICC Statute, the Elements of Crimes belong to the sources of law that shall be primarily applied by the court. Art. 9 (1) of the ICC Statute states, on the other hand, that they shall only “assist the Court in the interpretation and application” of the crimes under its jurisdiction. Furthermore, they need to be consistent with the provisions of the ICC

61 *Prosecutor v. Krstic*, ICTY (Appeals Chamber), judgement of 19 April 2004, para. 222.

62 See Elements of Crimes for the ICC Statute, Art. 6 (a) to (e), last element listed for each crime.

Statute, Art. 9 (3) of the ICC Statute. In case of contradictions between the Elements of Crimes and the ICC Statute, the latter prevails.⁶³ Thus, the function of the Elements of Crimes is confined to the systematisation and clarification of Arts. 6, 7 and 8 of the ICC Statute.⁶⁴ They shall give a guideline for the interpretation of these provisions but can not add any material elements if there is no respective indication in the wording of the ICC Statute.⁶⁵

Moreover, it has to be taken into account that even the ICC Statute itself as an international treaty is in principle only applicable among the State parties.⁶⁶ The ICC Statute certainly codifies to a great extent international rules which were considered by the member states to be customary law at the time of its adoption.⁶⁷ However, Art. 10 expressly states that

“[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

Thus, neither the ICC Statute nor the Elements of Crimes have the power to modify existing rules of customary international law; in particular they can not change *ius cogens*. Rules in the Statute or the Elements of Crimes that deviate from customary law are in principle exclusively valid within the jurisdiction of the ICC.⁶⁸

63 Lüders (2004), 99 et seq.; Werle (2005), para. 138.

64 Ambos, in Vohrah *et al.* (2003), 12.

65 Paul (2008), 70; Werle (2009), para. 746.

66 By July 2009, 110 countries are State parties to the ICC Statute but some countries like the United States of America, India or China are still not included (<http://www.icc-cpi.int/Menu/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm>; last accessed: 22 October 2009).

67 See Triffterer, in: Schünemann *et al.* (eds.) (2001), 1420; Werle (2005), paras. 139, 141.

68 Akhavan (2005), 996.

Nevertheless, both legal instruments constitute expressions of the *opinio iuris* of the State parties and are therefore crucial for the development of customary law. As above mentioned, the State parties decided without further discussion to adopt the wording of Art. II of the Genocide Convention almost unchanged in the ICC Statute.⁶⁹ The inclusion of some kind of objective contextual element only arose during the preparatory work for the Elements of Crimes. The United States of America strongly argued in favour of such an element to place emphasis on the severe character of the crime of genocide. First, they suggested that the *mens rea* should include a “plan to destroy such group in whole or in part”. In the further course of the drafting process, they modified their proposal and demanded the incorporation of “a widespread or systematic policy or practice” concept which was strongly criticised by other delegations.⁷⁰ Finally, the State parties agreed on the above cited circumstance requirement and integrated it into the Elements of Crimes. However, it is moot whether the intention of the member states was the creation of an additional material element or rather the limitation of the ICC's jurisdiction to serious cases committed in a greater context while isolated acts of genocide should be left to national courts. According to the introduction of the Elements of Crimes on genocide, the court has to decide on a case-by-case basis on

“[...] the appropriate requirement, if any, for a mental element regarding this circumstance [...]”

69 Akhavan (2005), 999 et seq.; Kress (2006), 467; Paul (2008), 68 et seq.; Schabas, in: Triffterer (ed.) (2008), Art. 6, para. 2; Werle (2009), para. 698.

70 Oesterveld, in: Lee (ed.) (2001), 45 et seq; Paul (2008), 271; Schabas (2009), 250 et seq.; Schabas, in: Triffterer (ed.) (2008), Art. 6, para. 5 (with further references).

Thus, the drafters of the Elements of Crimes shied away from determining the perpetrator's state of mind in respect of the contextual element and hence left its legal character undefined. The decision whether a subjective element is required at all and, if so, how it should be defined is left at the disposal of the judges.⁷¹

The discussion above demonstrates that an objective contextual element is not acknowledged under customary law as a legal ingredient of the crime of genocide.⁷² Although the inclusion of such an element was disputed during the negotiations of both the Genocide Convention and the ICC Statute, the State parties in both instances finally refrained from doing so. The reluctance to determine a *mens rea* requirement for the last common element in the Elements of Crimes on genocide also indicates the uncertainty of its legal character and its general existence. Thus, there is no consensus among the states in this regard.

Actually, there is no need to supplement the crime of genocide – whose specific systematic element is contained in its *mens rea*⁷³ – by adding an objective contextual element, even less in form of a state plan or policy. This would rather restrict the scope of a crime whose wording remained unchanged since 60 years and that is perfectly acknowledged under customary law. As shown above, the *ad hoc* Tribunals also strongly rejected the existence of a policy requirement.

71 See Ambos, in Vohrah *et al.* (ed.) (2003), 13; Roberta Arnold, “The *Mens Rea* of Genocide under the Statute of the International Criminal Court.” *Criminal Law Forum* 14 (2003), 127 at 31; Lüders (2004), 159; Oesterveld, in: Lee (ed.) (2001), 48 et seq.; Triffterer, in: Schünemann *et al.* (eds.) (2001), 1435.

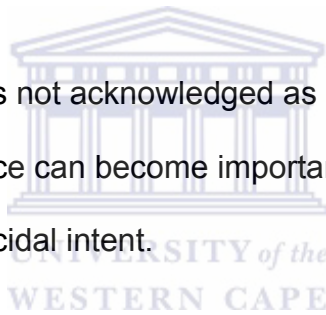
72 Werle (2009), para. 746.

73 Lüders (2004), 164; Werle (2009), para. 743.

The criminalisation of genocide is aimed at the prevention of the commission of genocidal acts at the earliest point in time. Thus, it is indispensable to include “initial acts in an emerging pattern”⁷⁴ even though they did not (yet) form part of an overall genocidal plan or policy of a state or organisation.⁷⁵ Besides, it is not absolutely unthinkable that isolated perpetrators who do not act within the framework of a genocidal campaign are able to impose a serious threat to the existence of one of the protected groups. Here, cases of emerging tensions between different groups that escalate without premeditation or the assassination of charismatic leaders should be kept in mind.⁷⁶

b) Proof of Genocidal Intent

While a genocidal plan or policy is not acknowledged as a legal element of the crime of genocide, its existence can become important in another context namely the proof of genocidal intent.



The intent to destroy is the essence of the crime of genocide but, at the same time, it is quite difficult to prove this subjective element beyond reasonable doubt. The Trial Chamber of the ICTR stated in its *Akayesu* judgement

“that intent is a mental factor which is difficult, even impossible, to determine”.⁷⁷

In the absence of direct evidence⁷⁸ like confessions, authorised documents

74 According to the Introduction of the Elements of Crimes on Art. 6 of the ICC Statute these initial acts are covered by the term “in the context of”.

75 Arnold (2003), 133; Paul (2008), 270.

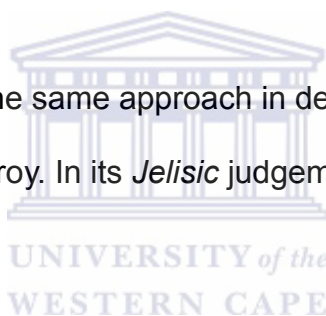
76 Boris Burghardt and Julia Geneuss, “Der Präsident und sein Gericht. Die Entscheidung des Internationalen Strafgerichtshofs über den Erlass eines Haftbefehls gegen Al Bashir.” *Zeitschrift für Internationale Strafrechtsdogmatik* 4 (2009), 126 at 134; Lüders (2004), 163; Paul (2008), 270 et seq.; Triffterer, in Schünemann *et al.* (eds.) (2001), 1434.

77 *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para. 523.

78 “Direct evidence is evidence that is direct to a fact in issue [...]”, Kirk McDonald/Swaak-

or public statements of the perpetrator in which he explicitly expresses his intention to annihilate a targeted group, in whole or in part, the prosecution may resort to factual circumstances.⁷⁹ This was declared in *Akayesu*⁸⁰ and consistently confirmed by other Trial Chambers of the ICTR.⁸¹ Thus, the special intent to destroy was often inferred from the large scale of atrocities, the great number of victims and the systematic manner in which the Tutsi minority was targeted and attacked. Other indirect evidence⁸² considered by the judges were, *inter alia*, the kind of weapons employed, the destruction of property, the use of derogatory language against members of the victim group or other discriminatory or racial utterances of the accused.

The chambers of the ICTY took the same approach in dealing with the proof of the specific intent to destroy. In its *Jelisić* judgement the Appeals Chamber of the ICTY stated:



“As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive

Goldman (eds.) (2000), 126.

79 See, for example, Lüders (2004), 152 et seq.; Mettraux (2005), 233 et seq.; Werle (2009), para. 765.

80 *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para. 523, 729 et seq.

81 See, for example, *Prosecutor v. Semanza*, ICTR (Trial Chamber), judgement of 15 May 2003, paras. 313, 314; *Prosecutor v. Bagilishema*, ICTR (Trial Chamber), judgement of 7 June 2001, paras. 62, 63; *Prosecutor v. Musema*, ICTR (Trial Chamber), judgement of 27 January 2000, paras. 166, 167, 928 et seq.; *Prosecutor v. Rutaganda*, ICTR (Trial Chamber), judgement of 6 December 1999, paras. 61 et seq.; *Prosecutor v. Kayishema and Ruzindana*, ICTR (Trial Chamber), judgement of 21 May 1999, paras. 93, 531 et seq.

82 “Indirect or circumstantial evidence [...] is evidence of facts from the existence of which a court may infer the existence of the principal fact in issue or *factum probandum*.”, Kirk McDonald/Swaak Goldman (eds.) (2000), 126.

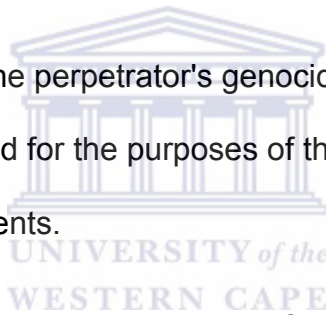
and discriminatory acts.”⁸³

In this evidentiary context, the existence of a genocidal plan or policy drawn up by governmental authorities or other organisations gains significance in so far as it can be taken into account as one of the circumstantial facts that indicate the perpetrator's special intent to destroy.⁸⁴

By now, no. 3 of the General Introduction to the Elements of Crimes of the ICC Statute explicitly sets that the

“[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances.”

Thus, the approach to establish the perpetrator's genocidal intent used by the *ad hoc* Tribunals was assumed for the purposes of the ICC and will likely be applied in future judgements.



c) The Special Intent to Destroy – What Degree of Intent is Needed?

Those who support the view that a contextual element is a legal ingredient of the crime of genocide often address another related issue namely the required level of intent for the special intent to destroy. Some of them argue that the mere knowledge of the destructive effect on the targeted

83 *Prosecutor v. Jelusic*, ICTY (Appeals Chamber), judgement of 5 July 2001, para. 47. See also *Prosecutor v. Krstic*, ICTY (Trial Chamber), judgement of 2 August 2001, paras. 595 et seq.

84 *Prosecutor v. Krstic*, ICTY (Trial Chamber), judgement of 2 August 2001, para. 572; *Prosecutor v. Jelusic*, ICTY (Appeals Chamber), judgement of 5 July 2001, para. 48; *Prosecutor v. Kayishema and Ruzindana*, ICTR (Trial Chamber), judgement of 21 May 1999, paras. 276, 527 et seq. See also *Prosecutor v. Karadzic and Mladic*, ICTY (Trial Chamber), Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, paras. 94, 95.

group⁸⁵ or even *dolus eventualis*⁸⁶ were sufficient. The genocidal context of which the individual act had to form part built the respective point of reference.⁸⁷ Kress proposes a combination of both aspects and states that

“the individual genocidal intent requires (a) *knowledge* of a collective attack directed to the destruction of at least a part of a protected group, and (b) *dolus eventualis* as regards the occurrences of such destruction.”⁸⁸

In the following, it will be examined if a wide concept of genocidal intent is convincing. Therefore, the position of the *ad hoc* Tribunals in this regard will be analysed in particular.

The mere word “intent” can be used to describe different states of mind⁸⁹ but it is questionable if the phrases “*dolus specialis*”, “special intent” or “specific intent” which are frequently used by the *ad hoc* Tribunals to characterise the intent to destroy indicate a certain degree of intent.⁹⁰

While it would be conceivable that these terms mean intent in the narrow sense of (direct) purpose⁹¹ they presumably just emphasise that apart from the general intent regarding the material acts of genocide a supplemental element is needed, the particular intent to destroy.⁹² Thus, it remains in

85 Alexander K. A. Greenawalt, “Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation.” *Columbia Law Review* 99 (1999), 2259 at 2288; Jones, in Vohrah *et al.* (eds.) (2003), 468, 479; Paul (2008), 262 et seq.; Quigley (2006), 119; Vest (2007), 791; Vest (2001), 485.

86 Alicia Gil Gil, “Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs.” *Zeitschrift für die Gesamte Strafrechtswissenschaft* 112 (2000), 381 at 395; Triffterer, in: Schünemann *et al.* (eds.) (2001), 1440 et seq.

87 Kress (2009), 304; Kress (2005), 566; Vest (2007), 784 et seq, 790.

88 Kress (2005), 577.

89 Greenawalt (1999), 2266 et seq.; Kress (2005), 572; Paul (2008), 249; Dinah L. Shelton (ed. in chief), *Encyclopedia of Genocide and Crimes against Humanity, Vol. 2*, Detroit: Thomson Gale, 2005, 525; Quigley (2006), 111.

90 See Paul (2008), 249; Schabas, in: Triffterer (ed.) (2008), Art. 6, para. 7.

91 So indeed Akhavan (2005), 992; Selbmann (2003), 166.

92 See Cassese (2009), 137; Lüders (2004), 102 (“überschießende Innentendenz”); Schabas (2001), 129.

question whether the conduct of the perpetrator must be aimed at the destruction of the group (*dolus directus* of the first degree) or if it suffices that the perpetrator acts with foresight of the destructive effect (*dolus directus* of the second degree).

Lemkin who coined the original definition of genocide stated that genocide is

“aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”⁹³

Thus, the concept of genocide was originally construed narrowly and should only cover conduct that was clearly directed at the destruction of a protected groups.

Likewise, the International Law Commission in its commentary on the 1996 *Code of Crimes against the Peace and Security of Mankind* took up the position that

“a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide.”⁹⁴

So far, the international case law of the two *ad hoc* Tribunals is slightly ambiguous on that matter. The position held by the Trial Chamber of the ICTR in its basic *Akayesu* judgement is not clear and to some extent even inconsistent. On the one hand, it stated the following:

“Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a

93 Lemkin (1944), 79.

94 Report of the International Law Commission on the Work of its Forty-Eight Session, UN Doc. A/51/10 (1996), at 87.

constitutive element of the crime, which demands that the perpetrator *clearly seeks* to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".⁹⁵

It further emphasised that the perpetrator has to act with "the clear intent to cause the offence charged"⁹⁶ or respectively "with the clear intent to destroy, in whole or in part, a particular group".⁹⁷ Insofar, it seems as if the chamber would construe the special intent element on a purpose-based approach. However, another statement of the same judgement contravenes this conclusion by saying that

"[t]he offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group."⁹⁸

At this point, the chamber rather alludes to the state of knowledge of the perpetrator than to the objectives he tried to achieve through his conduct. Thus, the chamber did not reach a definite decision about the quality of the special intent. However, other chambers of the ICTR declared that the perpetrator must "clearly [have] intended the result charged"⁹⁹ or respectively that the act has to be committed "in realisation of the purpose of the perpetrator, which is to destroy the group in whole or in part."¹⁰⁰ Hence, the ICTR tends to interpret the special intent requirement more narrowly as *dolus directus* of the first degree.

95 *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para 498.

96 *Ibid.*, para 518.

97 *Ibid.*, para 520.

98 *Ibid.*, para. 520.

99 See *Prosecutor v. Musema*, ICTR (Trial Chamber), judgement of 27 January 2000, para. 164;

Prosecutor v. Rutaganda, ICTR (Trial Chamber), judgement of 6 December 1999, para. 59.

100 *Prosecutor v. Bagilishema*, ICTR (Trial Chamber), judgement of 7 June 2001, para. 61.

In its *Jelisić* judgement, the Trial Chamber of the ICTY also addressed the question of the requisite degree of intent but finally did not give a clear decision on that issue. After describing the position of the Prosecutor who perceived the special intent in a broad sense including cases where the accused just “*knows* that his acts will inevitably, or even only probably, result in the destruction of the group”,¹⁰¹ an examination of the findings in *Akayesu* followed. In the ICTY chamber's interpretation of this judgement, the Trial Chamber of the ICTR held the view

“that any person accused of genocide for having committed, executed or even only aided and abetted must have had “the specific intent to commit genocide”, defined as “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”. The *Akayesu* Trial Chamber found that an accused could not be found guilty of genocide if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of a group. It declared that such an individual must be convicted of complicity in genocide.”¹⁰²

Here, the ICTY chamber cited a part of the *Akayesu* judgement where the ICTR chamber is not dealing with the required level of intent but with the distinction between aiding and abetting genocide according to Art. 6 (1) of the ICTR Statute and complicity in genocide punishable under Art. 2 (3) (e) of the ICTR Statute. At this, the ICTR chamber declared that one of the differences between these two modes of criminal participation is the existence of genocidal intent: If the perpetrator acted with the special intent to destroy he can be held liable under Art. 6 (1) of the ICTR Statute, while accomplice liability in the sense of Art. 2 (3) (e) of the ICTR Statute

101 *Prosecutor v. Jelisić*, ICTY (Trial Chamber), judgement of 14 December 1999, para. 85.

102 *Ibid.*, para. 86.

may be considered if the special intent is lacking but the accused knowingly aided and abetted the genocidal act of another person.¹⁰³ The issue of the requisite mental state of a person who contributes to the crime of genocide committed by another person has no direct bearing on the issue of the required level of the special intent to destroy as such.¹⁰⁴ Thus, the *Jelusic* chamber in some way misinterpreted the findings of the *Akayesu* chamber irrespective of the fact that it did not even mention the part of the ICTR judgement where it expressly stated that it is sufficient if the accused should have known that the act committed would destroy one of the protected groups.¹⁰⁵

However, the accused, *Goran Jelusic*, who operated at the Luka detention facility in *Brcko* in 1992 and called himself “Serbian Adolf” was finally acquitted of the charge of genocide. On the one hand, the ICTY Trial Chamber found that genocide had not been committed in *Brcko* as such so that the accused could not be held liable as an accomplice. On the other hand, the chamber refrained from convicting *Jelusic* as a principal perpetrator because the Prosecutor was not able to prove beyond reasonable doubt that he acted with the required intent to destroy. Evidentially, *Jelusic* himself killed several inmates at *Luka* camp and caused serious bodily harm to some of the detainees. In addition, he often spoke about his killings and repeatedly revealed his intention to execute a high number of Muslims. But the trial chamber argued that he rather had chosen his victims randomly and had even released some of them for

103 *Prosecutor v. Akayesu*, ICTR (Trial Chamber), judgement of 2 September 1998, para. 544 et seq.

104 Other opinion Schabas (2001), 131.

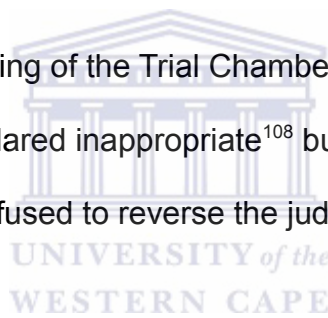
105 See Quigley (2006), 114.

incomprehensible reasons. Hence, his deeds had more been caused by his disturbed personality than “the clear intention to destroy a group”.¹⁰⁶ The use of the term “clear intention” could indicate a purpose-oriented interpretation of the special intent requirement but the Trial Chamber did not provide an in-depth discussion on the issue of the required level of intent.

However, the *Jelusic* Appeals Chamber more precisely declared that

“[t]he specific intent requires that the perpetrator [...] seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.”¹⁰⁷

On appeal, the disputable reasoning of the Trial Chamber concerning the proof of genocidal intent was declared inappropriate¹⁰⁸ but for various reasons the Appeals Chamber refused to reverse the judgement and send the case back to trial.¹⁰⁹



In its *Krstic* judgement one ICTY Trial Chamber dealt a little more detailed with the relevant question but finally also shied away to locate a generally accepted position. Thus, the chamber held, *inter alia*, that the drafters of the Genocide Convention regarded the crime of genocide as an

“enterprise whose goal, or objective, was to destroy a human group, in whole or in part”

and that this view was also upheld by the International Law Commission.

Then, the chamber mentioned that some legal commentators contend the

¹⁰⁶*Prosecutor v. Jelusic*, ICTY (Trial Chamber), judgement of 14 December 1999, para. 108.

¹⁰⁷*Prosecutor v. Jelusic*, ICTY (Appeals Chamber), judgement of 5 July 2001, para. 46.

¹⁰⁸*Ibid.*, para. 69 et seq.

¹⁰⁹*Ibid.*, para. 74 et seq.

view that even

“acts whose foreseeable or probable consequence is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act”

can constitute the crime of genocide. Finally, it concluded that the status of customary international law is not settled but

“[f]or the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompass only acts committed with the *goal* of destroying all or part of a group.”¹¹⁰

Nevertheless, the Trial Chamber primarily referred to the certain state of knowledge regarding the occurrences at *Srebrenica* and their unavoidably destructive effect on the Bosnian Muslim population to establish the genocidal intent of the Bosnian Serbs in general¹¹¹ and *Krstic* in particular.¹¹² Thus, in fact it rather relied on a knowledge-based interpretation of the special intent requirement than on the pronounced goal oriented understanding. While the Trial Chamber convicted *Krstic* for the commission of genocide as a principal perpetrator, the Appeals Chamber was not convinced that he committed his crimes with the special intent to destroy.¹¹³ *Krstic* was finally found guilty for aiding and abetting genocide.¹¹⁴

Other trial chambers of the ICTY interpreted the special intent to destroy consistently purpose oriented. Thus, in *Sikirica et al.*, *Stakic* and

110 *Prosecutor v. Krstic*, ICTY (Trial Chamber), judgement of 2 August 2001, para. 571.

111 *Ibid.*, para. 595.

112 *Ibid.*, para. 634, 635, 644.

113 *Prosecutor v. Krstic*, ICTY (Appeals Chamber), judgement of 19 April 2004, para. 134.

114 *Ibid.*, para. 135 et seq.

Blagojevic the Tribunal referred to the definition of specific intent established by the *Jelusic* Appeals Chamber.¹¹⁵ In the two latter judgements, the ICTY Trial Chambers additionally underlined that the mere knowledge about the “inevitably or likely” destructive effect on the protected group” or genocide as a “natural and foreseeable consequence” of an enterprise” does not suffice but that it is rather necessary that the perpetrator aims for the annihilation of the target group.¹¹⁶

In conclusion, although the jurisprudence of both *ad hoc* Tribunals is not free of inconsistencies they rather understand the intent to destroy narrowly as *dolus directus* of the first degree which means that the perpetrator has to desire the destruction of a national, ethnic, racial or religious groups in whole or in part, as such.¹¹⁷

Thus, the original concept of the crime of genocide as well as the jurisprudence of the *ad hoc* Tribunals argue for a narrow interpretation of the *dolus specialis*.¹¹⁸ In other words, the specific genocidal intent must have the quality of *dolus directus* of the first degree (direct intent). The whole spirit and purpose of the prohibition of genocide is to comprise and penalise certain conduct that is directly aimed at the denial of a protected group's right to exist.¹¹⁹ Thus, the special intent to destroy is the unique feature of genocide and its key element. The aspired annihilation of one of

115 *Prosecutor v. Blagojevic*, ICTY (Trial Chamber), judgement of 17 January 2005, para. 656; *Prosecutor v. Stakic*, ICTY (Trial Chamber), judgement of 31 July 2003, paras. 520, fn. 1100; *Prosecutor v. Sikirica et al.*, ICTY (Trial Chamber), judgement on Defence Motion to acquit of 3 September 2001, para. 59, fn. 165.

116 *Prosecutor v. Blagojevic*, ICTY (Trial Chamber), judgement of 17 January 2005, para. 656; *Prosecutor v. Stakic*, ICTY (Trial Chamber), judgement of 31 July 2003, paras. 530, 558.

117 Paul (2008), 242; Selbmann (2003), 166. Other interpretation of the case law of the *ad hoc* Tribunals Quigley (2006), 112.

118 See also Arnold (2003), 142; Werle (2009), para. 755.

119 Werle (2009), para. 755.

the protected groups builds the specific characteristic of the crime and distinguishes it from other – international and ordinary – offences.¹²⁰ To widen its meaning and accept *dolus directus* of the second degree or even *dolus eventualis* as sufficient for the genocidal intent, would blur the difference between genocide and crimes against humanity.¹²¹ Besides, the distinction between the intent of the principal offenders and the intent of accomplices could be confused.¹²² Actually, other crimes under the statutes of the international criminal courts are adequate to cover criminal conduct where the clear intention to destroy is lacking (or just impossible to prove). Hence, the knowledge-based approach has to be rejected.

IV. Genocide in Darfur?

1. Historical Background

Recently, massive atrocities committed on the territory of Darfur – a Western Sudanese region – have captured the attention of the international community. The long-lasting conflict between nomad cattle herders – mainly Arab tribes – and settled agriculturalists of African descent escalated in 2003. The ethnic diversity was not the origin of this conflict but rather the struggle for scarce resources like water or land.¹²³ In the course of time, the tensions more and more became ethnically motivated with the influence of the Sudanese government playing a significant role in this process.¹²⁴ In 2003, rebel groups mainly composed of members of so-called “African” tribes attacked El Fasher, the capital of

120Lüders (2004), 112, 114; Roßkopf (2007), 112.

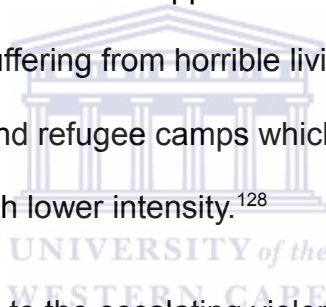
121Lüders (2004), 114.

122Jorgensen (2001), 294.

123Report of the International Commission of Inquiry on Darfur, UN Doc. S/2005/60 (2005)., para. 55.

124*Ibid.*, paras. 57 et seq; Burghardt/Geneuss (2009), 126 et seq.

the Federal State North-Darfur.¹²⁵ The central Sudanese government responded with massive military violence. For this, they did not only use “official” armed forces but also the so-called *Janjaweed* militias. These militias are well organised, mounted and armed Arab groups which are closely connected to the government in Khartoum.¹²⁶ The governmental forces did not only combat the aggressive rebels but primarily the civilian population. Villages were firstly attacked by extensive air raids through the army. Then, the *Janjaweed* showed up to pillage the houses and to rape and kill the fleeing inhabitants.¹²⁷ Today, nearly 75 per cent of the villages in Darfur are destroyed by fire and between 200.000 and 500.000 victims were killed. Until February 2005, there were approximately 2,5 million displaced persons who are still suffering from horrible living conditions and ongoing attacks on settlements and refugee camps which are occurring down to the present day albeit with lower intensity.¹²⁸



As already mentioned, in reaction to the escalating violence and the grave breaches of humanitarian law in Darfur the UN Security Council established an independent commission of experts to investigate the incidents with *Antonio Cassese* as its chairman – the Commission of Inquiry. In consequence of the Commission's findings and its recommendation, the UN Security Council – acting under Chapter VII of the UN Charter – referred the situation in Darfur to the ICC by Resolution 1593 in March 2005, in accordance with Art. 13 (b) of the ICC Statute.¹²⁹

125Report of the Commission of Inquiry, para. 65; Burghardt/Geneuss (2009), 127.

126Report of the Commission of Inquiry, paras. 69, 98 et seq.; Adam Jones, *Genocide. A Comprehensive Introduction*, London et al.: Routledge, 2006, 253 et seq.

127Report of the Commission of Inquiry, paras. 186, 241 et seq.; Burghardt/Geneuss (2009), 127.

128Report of the Commission of Inquiry, paras. 72, 196, 226 et seq.; Burghardt/Geneuss (2009), 127.

129Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on 31 March

Thus, the crimes committed in Darfur are subject to the court's jurisdiction although the Republic of Sudan is not a State party to the ICC Statute (Arts. 13 (b), 12 (2) of the ICC Statute).

On 1 June 2005, the Prosecutor decided to initiate investigations according to Art. 53 (1) of the ICC Statute. So far, Pre-Trial Chamber I which has been assigned to the respective situation issued warrants of arrests against *Ahmad Harun*, the Former Minister of State for the Interior, *Ali Kushayb*, an alleged leader of the *Janjaweed* militias¹³⁰ and *Omar Hassan Al Bashir*, President of Sudan since 16 October 1993.¹³¹ Each of these warrants is related to several counts of crimes against humanity and war crimes but none of them contains the charge of genocide. However, the Prosecutor's application for the warrant of arrest against *Al Bashir* actually included the accusation of genocide.

In the following, the report of the Commission as well as the decision of Pre-Trial Chamber I regarding the arrest warrant against *Al Bashir* will be scrutinized particularly with regard to the pertinent question of a genocidal plan or policy requirement.

2. The Report of the Commission of Inquiry

The mandate of the Commission was focused on four key tasks, namely

“(1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international

2005, UN Doc. S/RES/1593 (2005).

¹³⁰*Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”)*, ICC (Pre-Trial Chamber I), decision of 27 April 2007.

¹³¹*Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, ICC (Pre-Trial Chamber I), decision of 4 March 2009.

humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations are held accountable.”¹³²

The report submitted to the Secretary-General on 25 January 2005 provides a short overview on the role of the Commission and the historical and social background of the conflict. The main part deals with the findings regarding the pivotal issues mentioned above. Finally, conclusions and recommendations are given.

Section II of the report exclusively discusses the decisive question whether the heinous atrocities committed in the Darfurian region constitute crimes under international law and particularly whether they must even be considered as genocide. After a short introduction to the general structure of the crime of genocide, a more detailed analysis regarding the scope of protected groups is given.¹³³ Here, the Commission examines whether tribal groups are protected by international rules proscribing genocide and concludes that

“tribes may fall under the notion of genocide set out in international law only if [...] they also exhibit the characteristics of one of the four categories of group protected by international law.”¹³⁴

Furthermore, it is briefly mentioned that the specific genocidal intent could be inferred from circumstantial evidences¹³⁵ and that there was no hierarchy of crimes under international law.¹³⁶

After these general remarks, the report addresses the concrete issue of

¹³²Report of the Commission of Inquiry, Executive Summary, p. 2, see also paras. 2 et seq.

¹³³*Ibid.*, paras. 489 et seq.

¹³⁴*Ibid.*, para. 497.

¹³⁵*Ibid.*, paras. 502 et seq.

¹³⁶*Ibid.*, paras. 505 et seq.

genocide in Darfur. It states that the Commission had gathered enough evidence to proof without any doubt that individual acts constituent of the crime of genocide had been committed on the territory of Darfur – namely systematic killings, large-scale causing of serious bodily or mental harm as well as massive and deliberate infliction of conditions of life bringing about physical destruction of a protected group like the destruction of villages and crops or the plunder of cattle.¹³⁷ It further states that the conflicting tribes could at least subjectively be regarded as distinct ethnic groups.¹³⁸ However, while the Commission took the objective elements of the crime of genocide for granted, it denied the existence of the specific intent to destroy on the part of the Sudanese government due to the following reasons: Although the large scale and the nature of atrocities committed against members of African tribes as well as “racially motivated statements” could indicate the genocidal intent of the perpetrators, there would also exist converse evidence. The fact, that the government forces and militias in several instances had not executed all inhabitants of the attacked villages but only men they had considered to be rebels would clearly demonstrate that they had not act with the aim to annihilate an ethnic group as such.¹³⁹ In addition, the survivors of attacks had also not been killed but collected in camps for internally displaced persons. Although the living conditions in these camps had been dreadful they had not been “calculated to bring about the extinction of the ethnic group”.¹⁴⁰

Thus, the Commission came to the conclusion that though “two elements

¹³⁷*Ibid.*, para. 507.

¹³⁸*Ibid.*, para. 512.

¹³⁹*Ibid.*, paras. 513 et seq.

¹⁴⁰*Ibid.*, para. 515.

of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control”, the decisive criterion of the crime, the special intent to destroy, would seem to be lacking “at least as far as the central Government authorities are concerned.” The attacks against villages and members of some tribes in Darfur were not executed with the purpose of annihilating these tribes but rather on grounds of counter-insurgency warfare.¹⁴¹ Hence, the Commission hold the view that although punishable acts in the sense of Art. 6 (a) - (c) of the ICC Statute were committed against members of one of the protected groups they can not be labelled as genocidal conduct. Therefore,

“the Commission concluded that the Government of the Sudan has not pursued a policy of genocide.”¹⁴²

However, the Commission emphasised that other crimes under international law namely war crimes and crimes against humanity had been committed in Darfur and that these crimes are not necessarily of less serious or heinous character than genocide.¹⁴³

The Commission established a correlation between the question whether genocide had been committed in Darfur and the existence of a genocidal plan or policy by putting this question in the centre of its analysis. Some authors took the Commission's report as a reason to “reopen” the debate whether a state plan or policy is a legal element of genocide.¹⁴⁴ *Schabas*,

141*Ibid.*, para. 518.

142*Ibid.*, para. 518.

143*Ibid.*, paras. 519, 522.

144Kress (2005), 562 et seq.; Schabas, in: Henham/Behrens (eds.) (2007), 43.

for example, concludes that the findings “helped to confirm the existence of an implicit or unspoken element in the crime of genocide”.¹⁴⁵ This view has to be rejected. The report explicitly states that

“[t]he Commission [...] recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur [...] is a determination that only a competent court can make on a case by case basis.”¹⁴⁶

Although a genocidal plan or policy on part of the Sudanese government had not been determined, the Commission did not exclude that genocidal acts were committed by individuals or even by state officials on Darfurian territory. Quite contrary, it explicitly took this possibility into account.

Hence, the Commission did obviously not consider the existence of a genocidal plan or policy as a legal ingredient of the crime. Otherwise, the commission of genocide in Darfur would be impossible due to the fact that one of its legal elements – namely the contextual element – was lacking.¹⁴⁷

3. The Warrant of Arrest against *Omar Hassan Al Bashir*

As mentioned above, on 14 July 2008 the ICC's Prosecutor, *Luis Moreno-Ocampo*, applied for the issuance of a warrant of arrest against the incumbent President of Sudan, *Omar Hassan Al Bashir*, “for his alleged criminal responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from 2003 to 14 July 2008.”¹⁴⁸ The assigned

¹⁴⁵Schabas, in: Henham/Behrens (eds.) (2007), 47.

¹⁴⁶Report of the Commission of Inquiry, para. 641.

¹⁴⁷Kress (2005), 577 et seq.; Andrew B. Loewenstein and Stephen A. Kostas, “Divergent Approaches to Determining Responsibility for Genocide.” *Journal of International Criminal Justice* 5 (2007), 839 at 852.

¹⁴⁸ICC-02/05-151-US-Exp and ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2. Public redacted

Pre-Trial Chamber therefore examined the three issues required for the issuance of an arrest warrant: first, whether the case falls in the jurisdiction of the court and its admissibility, second, whether there are reasonable grounds to believe that *Al Bashir* at least committed one crime under the court's jurisdiction and, third, whether the procedural requirements according to Art. 58 of the ICC Statute are given. While the chamber decided to issue the requested arrest warrant in relation to crimes against humanity and war crimes, the Majority of the chamber did not follow the Prosecutor's application regarding the crime of genocide.¹⁴⁹ Concerning this matter, it is stated that

“[...] the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the [Government of Sudan] acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3.”¹⁵⁰

However, the chamber emphasised the possibility to amend the existing arrest warrant to the count of genocide, pursuant to Art. 58 (6) of the ICC Statute, if the Prosecutor would provide additional evidence regarding the special intent.¹⁵¹

The main part of the decision deals with the decisive question whether reasonable grounds exist to assess the commission of genocide on the territory of Darfur. The chamber opened its respective explanations with a

version of the Prosecution Application, ICC-02/05-157-AnxA; *Prosecutor v. Al Bashir*, ICC (Pre-Trial Chamber I), decision of 4 March 2009, para. 4.

¹⁴⁹*Prosecutor v. Al Bashir*, ICC (Pre-Trial Chamber I), decision of 4 March 2009. Judge Anita Usacka dissents from the findings of the Majority in relation to genocide. See Partly Dissenting Opinion of Judge Anita Usacka.

¹⁵⁰*Prosecutor v. Al Bashir*, ICC (Pre-Trial Chamber I), decision of 4 March 2009, para. 206.

¹⁵¹*Ibid.*, para. 207.

reference to Art. 6 of the ICC Statute and the corresponding Elements of Crimes as the legal basis for convictions on this count. Here, it explicitly ruled, *inter alia*, that one of the requirements that had to be met for the existence of the crime of genocide under the Statute is the last (common) element in the Elements of Crimes on genocide. In other words, the individual genocidal acts always had to take place "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".¹⁵²

Then, some remarks on this contextual element follow – in form of an *obiter dictum* – which are of utmost significance for the question under consideration in this paper. First of all, the chamber recognised that neither the Genocide Convention nor the ICTY, the ICTR or the ICC Statute contained any kind of circumstance requirement in form of an overall genocidal campaign and that the case law of the *ad hoc* Tribunals had also rejected the existence of such an element.¹⁵³ Then, the chamber alluded to the circumstance requirement included in the Elements of Crimes and stated – contrary to the ICTY and ICTR case law – that the individual acts must indeed be committed as a part of a genocidal pattern and that

“[...] the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof.”¹⁵⁴

Hence, the Majority of Pre-Trial Chamber I subscribed to the view that the crime of genocide comprised an objective contextual element and –

¹⁵²*Ibid.*, para. 113.

¹⁵³*Ibid.*, paras. 117 et seq.

¹⁵⁴*Ibid.*, para. 124. Judge Usacka disagreed with this view, Separate and Partly Opinion of Judge Anita Usacka, paras. 16, 20.

beyond that – even required the existence of a real threat to the existence of a protected group. The chamber's argumentation was the following:

First, it underlined the character of the crime of genocide as an “*ultima ratio* mechanism” which was aimed at the preservation of “the highest values of the international community”. These values were only be touched if the existence of a targeted group was concretely threatened.¹⁵⁵

In the chamber's view, this interpretation was “fully consistent with the traditional consideration of the crime of genocide as the “crime of the crimes””.¹⁵⁶

In awareness of the existing controversy regarding the acceptance of a contextual element, the chamber alluded to Art. 21 (a) of the ICC Statute and stressed that the court had to apply the sources of law listed in this article in the first place. Only in cases where the ICC Statute itself, the Elements of Crimes and the Rules of Procedure and Evidence revealed a *lacuna* that could not be filled by means of interpretation in accordance with Arts. 31 and 32 of the *Vienna Conventions on the Law of Treaties* and Art. 21 (3) of the ICC Statute, other sources of law mentioned in Art. 21 (b) and (c) of the ICC Statute – like the case law of the *ad hoc* Tribunals – became relevant.¹⁵⁷

The chamber further pointed out that the Elements of Crimes may be applied without restrictions as long as they are not irreconcilable to the provisions of the ICC Statute. In the chamber's opinion, the context element does by no means contradict Art. 6 of the ICC Statute. Quite

¹⁵⁵*Ibid.*, para. 124.

¹⁵⁶*Ibid.*, para. 133.

¹⁵⁷*Ibid.*, paras. 125 et seq.; see also Burghardt/Geneuss (2009), 132.

contrary, the Elements of Crimes would rather provide an “*a priori* legal certainty on the content of the definition of the crimes” under the court’s jurisdiction and are therefore indispensable with a view to the *nullum crimen sine lege* principle laid down in Art. 22 of the ICC Statute. This principle “would be significantly eroded” if the application of the Elements of Crimes were not compulsory for the chambers of the court.¹⁵⁸

The reasoning of the Majority was not convincing. First of all, it is exclusively concentrated on methodological considerations but did not take material aspects of the crime of genocide and its controversial definition into account.¹⁵⁹ It must be strongly criticised that the chamber regarded the ICTY and ICTR case law as absolutely irrelevant unless there exists a legal loophole in the sources of law listed in Art. 21 (a) of the ICC Statute. The decisions of the *ad hoc* Tribunals are of significant relevance for defining and specifying international criminal law as such.¹⁶⁰ Thus, the chambers of the ICC should at least take them into consideration to avoid inconsistencies between its findings and the existing body of international criminal law.¹⁶¹ Besides, it is quite disappointing that the chamber – without any further explanations – established that the Elements of Crimes did not contravene Art. 6 of the ICC Statute. In consideration of the fact, that there is no indication of a circumstance requirement in the wording of Art. 6 of the ICC Statute this finding is surprising. Here, another problematic aspect of the chamber’s decision arises, namely the addition of a new requirement – the existence

158 *Prosecutor v. Al Bashir*, ICC (Pre-Trial Chamber I), decision of 4 March 2009, paras. 128 et seq.

159 Werle (2009), para. 746.

160 See, for example, Mettraux (2005), 199.

161 Burghardt/Geneuss (2009), 133.

of a real threat to the targeted group – that does not even occur in the Elements of Crimes.¹⁶²

V. Conclusion

Both, the report of the Commission of Inquiry as well as the decision of Pre-Trial Chamber I on the issuance of a warrant of arrest against *Al Bashir* are of high importance in respect of the question under consideration in this paper namely whether a genocidal plan or policy is a legal element of the crime of genocide. However, as demonstrated above, they took up contradictory positions: While the Commission assumed that a genocidal plan or policy is no legal element of the crime of genocide, the ICC chamber held the view that the individual conduct of a *genocidaire* had to be committed in the context of a genocidal pattern and even required a concrete threat to the existence of the targeted group. The position taken by the chamber is open to criticism beyond the already mentioned aspects:

First, it is inconsistent with present customary international law that does not acknowledge a circumstance requirement as a legal ingredient of the crime of genocide. Although the court is not obliged to apply exclusively rules of customary law but is only bound by its Statute, it should abstain from substantially dissenting decisions. This would probably result in unintended inconsistencies between customary international law and the law developed by the court which again could be disadvantageous for the desired worldwide acceptance of the ICC.

¹⁶²*Ibid.*, 133.

Furthermore, it has to be taken into account that in cases of referrals by the UN Security Council, the court's jurisdiction even comprises situations occurred in states that did not accede to the statute – as recently happened in the Darfur case. Although this procedure is authorised by the UN Security Council acting under Chapter VII of its Charter, it is not entirely unproblematic to interpret and apply provisions of the ICC Statute in a manner that do not comply one-to-one with rules of customary international law to non-State parties.

The decision of Pre-Trial Chamber I is also precarious due to the fact that it disregards the intention of the State parties which decided against – or at least did not agree on – the incorporation of a contextual element into the ICC Statute itself. Even though the drafters of the Elements of Crimes finally settled on the inclusion of such an element, they left its legal character undefined. The reasoning of the chamber in this regard is by no means sufficient. Anyway, it should not be possible to add any legal elements to the crimes under the court's jurisdiction through the backdoor of the Elements of Crimes. Their function should be limited to specifying Arts. 6, 7 and 8 of the ICC Statute but they should not be used to supplement these crimes when there is no basis in their wording. The Majority of the chamber even set a requirement that does not appear in the Elements of Crimes which is completely unacceptable.

For the future, the ICC should strictly stick to the provisions of its Statute defined by the State parties at the Rome Conference and, at the same time, should not lose sight of the rules recognised under customary international law. Certainly, it is thinkable that a contextual element will

prove to be part of the crime of genocide. However, to facilitate this process it seems to be indispensable to formally incorporate such an element into the statutes of the international criminal courts or even to agree on a modification of the Genocide Convention.

Words: 10.000 (excluding footnotes)



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