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Genocide: Legal Precedent Surrounding the Definition of the Crime

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Summary

The current situation in Darfur, Sudan, and the surrounding debate over whether the Sudanese government's actions constitute genocide or ethnic cleansing provides the impetus for this report. This report presents a brief historical background on the U.N. Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), its ratification and implementation by the United States, and its incorporation into the Rome Statute creating an International Criminal Court (ICC). Decisions from the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) are analyzed to help determine when charges of genocide have been found to be legitimate.

For legal purposes, genocide is a highly specific offense, and to be liable for it an actor must commit certain acts against a designated group with an intent to *destroy* the group, in whole or in part. Accordingly, a number of serious human rights atrocities, such as the mass extermination of a civilian population, might not constitute genocidal acts in certain circumstances, though they may nevertheless constitute war crimes or crimes against humanity.

The mental and physical elements of the crime of genocide each present their own analytical requirements. This is primarily due to the crime's highly sensitive subject matter and the lack of cases prosecuting acts of genocide from the 1950s until the 1990s. Over the past decade, international tribunal decisions have created an influential understanding as to what constitutes genocide under international law. They have also provided a real world context to an otherwise academic debate regarding the applicability of the Genocide Convention. However, the legal definition of the crime of genocide remains in a formative state. Both tribunals still have many more cases to hear and judgments to render. Moreover, these decisions are not binding precedent on the ICC or national courts, including those of the United States. International legal developments concerning the crime of genocide will likely be largely based on these courts' approaches. This also applies to crimes against humanity, such as ethnic cleansing, as the debate concerning the substantive difference between genocide and ethnic cleansing continues to unfold.

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Introduction

The current situation in Darfur, Sudan, and the surrounding debate over what actions constitute genocide provide the impetus for this report.¹ The House, Senate, and Secretary of State Colin Powell have each stated that genocide is occurring in Darfur.² Nevertheless, there has been some dispute over whether the situation in Darfur actually constitutes genocide, as the term is understood under international law. This report provides an overview of international law and jurisprudence concerning the crime of genocide, and is provided to assist Congress in assessing when present or future humanitarian crises constitute genocide under international law.

After World War II (WWII), the Allied Powers established the Nuremberg and Tokyo tribunals to prosecute German and Japanese leaders for crimes against peace, war crimes, and crimes against humanity.³ Genocide was not expressly included as a ground for prosecution under either tribunal, as it had not yet officially been recognized as a distinct international crime.⁴ In 1946, however, the U.N. General Assembly passed a resolution declaring genocide to be a crime under international law and recommending international cooperation between States to prevent and punish such acts.⁵ Work thereafter began on the U.N. Convention on the Prevention

¹ For background on the situation in Darfur, see CRS Report RS21862, *Sudan: The Crisis in Darfur* and CRS Issue Brief IB98043, *Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and U.S. Policy*.

² See H.Con.Res. 467, 108th Cong. (2004); S.Con.Res. 133, 108th Cong. 2004; The Crisis in Darfur: Hearing Before the Senate Foreign Relations Comm. (Sept. 9, 2004) (statement of Secretary of State Colin L. Powell).

³ Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284 [*hereinafter* “Nuremberg Charter”]; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, *reprinted in* 4 Bevens 20 [*hereinafter* “Tokyo Charter”].

⁴ However, the Nuremberg and Tokyo Charters defined “crimes against humanity” in a manner that included many acts of genocide. See Nuremberg Charter art. 6(c) (defining crimes against humanity to include “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal ...); Tokyo Charter art. 5(c) (defining crimes against humanity in a manner similar to that in the Nuremberg Charter).

⁵ G.A. Res. 96(I), U.N. GAOR, 1st Sess., at 188-89, U.N. Doc. A/64/Add.1 (1946).

and Punishment of the Crime of Genocide (Genocide Convention), which entered into force in 1951.⁶

The Genocide Convention recognizes genocide as a serious violation of international law, defined by a set of physical elements (*actus reus*) and mental elements (*mens rea*),⁷ and subject to criminal penalties regardless of whether committed in times of war or peace,⁸ or by governmental or non-governmental actors.⁹ The international prohibition of genocide is widely understood to have the status of a *jus cogens* norm in international law — a peremptory rule which permits no derogation by States.¹⁰ In an advisory opinion issued in 1951, the International Court of Justice held that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”¹¹

However, various terms and phrases within the Convention remained undefined for several decades, largely due to an absence of cases prosecuting individuals for committing genocide.¹² Indeed, according to one commentator, for most of its existence the Genocide Convention was “the forgotten convention, drafted in the aftermath of the Holocaust but then relegated to obscurity as the human rights movement focused on more ‘modern’ atrocities: apartheid, torture, disappearances.”¹³

Only recently has the Convention received renewed attention, following the establishment of international tribunals by the U.N. Security Council to adjudicate claims of genocide in Rwanda and the former Yugoslavia. Unlike the Nuremberg and Tokyo tribunals established in the aftermath of WWII, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have express jurisdiction over the crime of genocide, in addition to other violations of international humanitarian law.¹⁴ Both tribunals are actively

⁶ Convention on the Prevention and Punishment of the Crime of Genocide, entered into force Jan. 12, 1951, 78 U.N.T.S. 277 [*hereinafter* “Genocide Convention”], art. 2.

⁷ See Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996) [*hereinafter* “ILC Report”], at 87.

⁸ Genocide Convention art. 1.

⁹ *Id.* art. 2.

¹⁰ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 702, cmt. n (1987).

¹¹ Reservations to the Convention on Genocide, Advisory Opinion, 1951 ICJ REP. 15,23 (May 28).

¹² DAVID HIRSH, LAW AGAINST GENOCIDE 49-56 (2003).

¹³ William Schabas, United States Institute for Peace, Special Report 41: The Genocide Convention at Fifty, Jan. 7, 1999 [*hereinafter* “USIP Report”], available at [http://www.usip.org/pubs/specialreports/sr990107.html].

¹⁴ See Statute of the International Criminal Tribunal for the Former Yugoslavia [*hereinafter* “Yugoslavia Statute”], arts. 2-5, available at [http://www.un.org/icty/basic/statut/statute.htm]; Statute of the International Criminal (continued...)

shaping international legal approaches to adjudicating the crime of genocide. In addition, in 2002 the International Criminal Court (ICC) was established with jurisdiction over the crime of genocide, but it has yet to decide its first case. Tribunal decisions create an influential understanding as to what constitutes genocide under international law, though none of their decisions are necessarily binding upon the United States or the courts of other nations that have not submitted to the tribunals' jurisdiction.

This report provides an overview of the current framework for prosecuting individuals for genocide and analyzes tribunal case law concerning the nature of this crime.

Obligations and Scope of the Genocide Convention

As of September 7, 2004, the United States and 134 other countries are Parties to the Genocide Convention, which entered into force in 1951 after being ratified by 20 States. Parties to the Convention recognize that “genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”¹⁵ Accordingly, if Member Parties declare an act or activity to constitute “genocide,” they would appear to have a clear obligation under the Genocide Convention to prevent and punish such action.¹⁶ Under the United States system of government, the President is the “sole organ of the federal government in the field of international relations,”¹⁷ and presumably the President (or the State Department acting with his authorization) would have ultimate authority as to whether or not to declare on behalf of the United States that a foreign act constitutes genocide.

The scope of this obligation to “prevent and punish,” however, remains unclear.¹⁸ At the very least, Parties have an obligation under Convention Article 5 “to provide effective penalties for persons guilty of genocide or any other acts enumerated.”¹⁹ Such “other acts” include (1) conspiring to commit genocide, (2) attempting to commit genocide, (3) inciting others to commit genocide, and (4) being complicit in the commission of genocide.²⁰ In accordance with their domestic laws and treaties, Parties to the Genocide Convention also pledge to make genocide an

¹⁴ (...continued)

Tribunal for Rwanda [*hereinafter* “Rwanda Statute”], arts. 2-4, *available at* [<http://www.ictr.org/ENGLISH/basicdocs/statute.html>].

¹⁵ Genocide Convention art. 1.

¹⁶ *Id.* See MACHTELD BOOT, *GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES* 447 (2002).

¹⁷ *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936).

¹⁸ USIP Report, *supra* note 13.

¹⁹ *Id.* art. 5.

²⁰ *Id.* art. 3.

extraditable offense.²¹ Persons responsible for genocidal acts are required to be punished whether they are “constitutionally responsible rulers, public officials or private individuals.”²²

The obligation to “undertake to prevent and to punish” genocide might arguably be understood to impose an affirmative obligation upon a State to take other actions against those committing acts of genocide beyond providing effective criminal penalties against persons who commit genocidal acts. It does not appear certain that such preventive and punitive efforts would necessarily include military measures, given that the U.N. Charter generally prohibits Member States from engaging in armed attacks against other countries unless those attacks were either made in self-defense or authorized by the U.N. Security Council.²³ Convention Article 8 does provide that Convention Parties “*may* call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide,”²⁴ but this language appears to set forth a permissive option rather than a mandatory obligation.

Convention Article 2 defines genocide by stating both the mental elements and physical elements of the crime. Article 2 reads:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (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.

The introductory statement (*chapeau*) of Article 2 identifies four sub-parts to the mental element of the crime of genocide. These are (1) the intent, (2) to destroy, (3) in whole or in part, (4) a national, ethnic, racial, or religious group, as such. This is followed by a listing of five physical actions that may constitute genocide if coupled with the requisite intent. In order to demonstrate that an accused is guilty of genocide, the prosecution must prove that a required physical act was committed with the necessary mental intent.

²¹ Id. art. 7.

²² Id. art. 4.

²³ See U.N. Charter arts. 2(4), 42, 51.

²⁴ Genocide Convention art. 8 (ital. added).

U.S. Ratification of the Genocide Convention

The United States actively participated in drafting the Genocide Convention and signed the treaty on December 11, 1948, two years before it entered into force.²⁵ However, the Senate did not provide its advice and consent to Convention ratification until February 19, 1986.²⁶ Following the adoption of implementing legislation making genocide a criminal offense in the United States,²⁷ the United States deposited its instrument of treaty ratification to the United Nations and became a Party to the Genocide Convention on November 25, 1988.

The United States included certain reservations and understandings with respect to treaty interpretation and application within its instruments of Convention ratification, two of which are relevant to this report. The two conditions are:

- (1) That the term “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such” appearing in article [2 of the Genocide Convention, defining the mental element of genocide] means the *specific intent* to destroy, in whole or in *substantial part*, a national, ethnical, racial or religious group as such by the acts specified in article [2]; and
- (2) That the term “mental harm” in article [2](b) means *permanent impairment* of mental faculties through drugs, torture or similar techniques.²⁸

U.S. Implementation of Genocide Convention Requirements

As previously mentioned, in order to comply with Genocide Convention obligations, the United States was required to make genocide a criminal offense. Under the U.S. statute criminalizing genocide, genocide can only be prosecuted under U.S. federal law if (1) the offense was committed in the United States, or (2) the alleged offender is a national of the United States.²⁹ The United States has yet to use this statute to bring charges against a person for genocide, possibly because of the statute’s limited applicability.

There are a few notable differences between the scope of the Genocide Convention’s definition of genocide and that of the U.S. statute criminalizing genocide. Whereas the Genocide Convention states that a person may be found

²⁵ For additional background, see SEN. EXEC. REP. NO. 99-2 (1985), *reprinted in* 1987 U.S.C.A.N. 13626 (1989).

²⁶ *Id.* at 1.

²⁷ Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§1091-1093).

²⁸ U.N. Office of the High Commissioner for Human Rights, Convention on the Prevention and Punishment of the Crime of Genocide, List of Convention Participants, at [<http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>]. See also SEN. EXEC. REP. NO. 99-2, *supra* note 25.

²⁹ 18 U.S.C. § 1091. For purposes of subsection (d)(2), a national of the United States is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101).

guilty of genocide if he acted with the *intent* to destroy a protected group, the U.S. criminal statute defines the mental element of genocide as requiring the actor to possess the “*specific intent* to destroy ... a national, ethnic, racial, or religious group as such.”³⁰ Additionally, whereas the Genocide Convention states that this intent must be to destroy the group “in whole or in part,” the U.S. statute requires the actor’s intent to be the destruction of the group “in whole or *substantial* part.”³¹ As will be discussed later, both of these changes correspond with international tribunal precedent interpreting the Genocide Convention and are also in line with U.S. reservations to the Convention.

The acts covered under the U.S. statute criminalizing genocide are specified in greater detail than the acts covered by the Genocide Convention. The Convention lists the physical elements of the crime of genocide as including, *inter alia*, “causing serious bodily or mental harm to members of the [protected] group.”³² The U.S. statute criminalizing genocide divides this element into two parts, and it further specifies acts constituting mental harm of a genocidal nature. If the requisite genocidal intent is fulfilled, a person can be convicted under U.S. law for either (1) causing serious bodily injury to members of a protected group or (2) causing the *permanent* impairment of the mental facilities of members of the group through drugs, torture, or similar techniques.³³

Genocide is also an extraditable offense, meaning that the United States may surrender a person accused of committing genocide to another State if that State has jurisdiction over the offense and an extradition treaty with the United States that permits his or her transfer. Likewise, the United States may request a country to surrender a person so that the person may be prosecuted under the U.S. statute criminalizing genocide.

International Prosecution of the Crime of Genocide

International Tribunals. Although the Genocide Convention has been in force for over 50 years, it was not until the 1990s that international tribunals were established to adjudicate cases concerning genocide. In 1993, prompted by Serbian attacks targeted against Muslim and Croat civilians living in Bosnia and Herzegovina, the U.N. Security Council passed a resolution establishing the International Criminal Tribunal for the former Yugoslavia through the power granted to the Security Council under Chapter VII of the United Nations Charter.³⁴ The

³⁰ 18 U.S.C. § 1091(a) (*ital. added*).

³¹ *Id.* (*ital. added*).

³² Genocide Convention art. 2.

³³ 18 U.S.C. § 1091(a)(2)-(3).

³⁴ S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993). The U.N. Security Council is the primary U.N. organ responsible for the maintenance of international peace and security, and it is authorized to take measures necessary to maintain or restore international peace and security, including the authorization of military force by U.N. Member States. U.N. CHARTER chap. VII. The Security Council’s authority to establish
(continued...)

ICTY is composed of three separate organs: a prosecutorial organ, an adjudicative organ, and a secretariat.³⁵ The prosecutorial organ consists of the Prosecutor, legal advisors and investigators.³⁶ The adjudicative organ contains multiple trial chambers of three judges each, and one appellate chamber of seven judges.³⁷ The secretariat provides administrative services for the prosecutorial and adjudicative organs.³⁸

The ICTY's subject matter jurisdiction is divided into four areas relating to the situation in the former Yugoslavia: (1) grave breaches of the 1949 Geneva Conventions, (2) violations of the laws or customs of war, (3) genocide, and (4) crimes against humanity.³⁹ The Tribunal has personal jurisdiction over natural persons, but not over "organi[z]ations, political parties, administrative entities or other legal subjects."⁴⁰ The statute creating the ICTY defines responsible individuals as "person[s] who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of specified crimes in the former Yugoslavia.⁴¹ Heads of State or other responsible government officials are held fully accountable for crimes they commit,⁴² as well as crimes that their subordinates commit, provided that the Head of State "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."⁴³ Subordinates are not relieved of criminal responsibility if they were following orders to commit criminal acts. However, their punishment may be mitigated if justice so requires.⁴⁴ The ICTY has concurrent jurisdiction with national courts,⁴⁵ although it has primacy whenever such jurisdiction is conflicting.⁴⁶

³⁴ (...continued)

international tribunals also derives from Chapter VI, Article 29 of the U.N. Charter, which provides that "[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

³⁵ STEPHEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 192 (2001).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Yugoslavia Statute arts. 2-5.

⁴⁰ United Nations, *The ICTY At a Glance, General Information*, at [<http://www.un.org/icty/glance/index.htm>].

⁴¹ Yugoslavia Statute art.7(1).

⁴² *Id.* art. 7(2).

⁴³ *Id.* art. 7(3).

⁴⁴ *Id.* art. 7(4).

⁴⁵ *Id.* art. 9(1) ("[the ICTY] and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991").

⁴⁶ *Id.* art. 9(2) ("[the ICTY] shall have primacy over national courts. At any stage of the (continued...)

The ICTY completed its first case in January 2000.⁴⁷ As of July 2004, 103 accused have appeared in proceedings before the tribunal, with 51 accused having received a trial judgment and 30 persons having received a final sentence.⁴⁸

In 1994, the U.N. Security Council established the International Criminal Tribunal for Rwanda in response to the mass killing of Tutsis by Hutus in Rwanda.⁴⁹ The Tribunal's subject matter and personal jurisdiction generally mirror that of the ICTY with deviations reflecting situational differences.⁵⁰ Its organizational structure is identical to that of the ICTY, with both tribunals also sharing a common appellate chamber.⁵¹ The ICTR has concurrent jurisdiction with concerned States to prosecute persons for certain offenses relating to Rwanda, and has primacy over national courts whenever such jurisdiction is conflicting.⁵² As of July 2004, the ICTR has completed 22 cases.⁵³ Another 19 accused are currently on trial, and 23 accused are still awaiting trial.⁵⁴

The establishment of the ICC on July 1, 2002 created a permanent tribunal for the prosecution of international humanitarian crimes.⁵⁵ The ICC came into being after 60 States ratified the Rome Statute of the International Criminal Court.⁵⁶ The ICC has subject matter jurisdiction over the crime of genocide, crimes

⁴⁶ (...continued)

procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal”).

⁴⁷ International Criminal Tribunal for Yugoslavia, The ICTY At a Glance, Overview of ICTY Cases, at [<http://www.un.org/icty/glance/index.htm>].

⁴⁸ International Criminal Tribunal for Yugoslavia, Key Figures of ICTY Cases, at [<http://www.un.org/icty/cases/factsheets/procfact-e.htm>] (last accessed Aug. 9, 2004).

⁴⁹ S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc S/RES/955 (1994).

⁵⁰ Compare Yugoslavia Statute, arts. 1-6 with Rwanda Statute, arts. 1-5. See also WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 100 (2000) (“[the Rwanda] Statute closely resembles that of the International Criminal Tribunal for the Former Yugoslavia, although the war crimes provisions reflect the fact that the Rwandan genocide took place within the context of a purely internal armed conflict”); see RATNER, *supra* note 35, at chs. 2-4.

⁵¹ RATNER, *supra* note 35, at 202.

⁵² Statute of the International Criminal Tribunal for Rwanda [*hereinafter* “Rwanda Statute”], art. 8, *available at* [<http://www.ictt.org/ENGLISH/basicdocs/statute.html>].

⁵³ International Criminal Tribunal for Rwanda, Completed Cases, at [<http://www.ictt.org/ENGLISH/cases/completed.htm>] (last accessed Aug. 9, 2004).

⁵⁴ International Criminal Tribunal for Rwanda, ICTR Detainees — Status on 19 July 2004, at [<http://www.ictt.org/ENGLISH/factsheets/detainee.htm>] (last accessed Aug. 9, 2004).

⁵⁵ For an overview of the ICC, see CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*.

⁵⁶ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 [*hereinafter* “Rome Statute”], *available at* [<http://www.un.org/law/icc/statute/romefra.htm>].

against humanity and war crimes.⁵⁷ The ICC also has jurisdiction over the crime of aggression if a provision is adopted defining the crime and determining the Court's jurisdiction over it.⁵⁸ Unlike ad hoc tribunals which have concurrent jurisdiction with national courts and primacy over them, the ICC only has complementary jurisdiction. This means that the ICC cannot hear a case if a State with jurisdiction is investigating or prosecuting the matter, unless the State is unwilling or unable to take such actions in good-faith.⁵⁹

Article 6 of the Rome Statute incorporates verbatim the mental and physical elements of the crime of genocide as listed in the Genocide Convention. While the Rome Statute and the Genocide Convention share the same definition of "genocide," they might differ in their assessment of individual criminal responsibility for genocide. Unlike the Genocide Convention, the Rome Statute does not expressly recognize the crimes of conspiracy and complicity in the commission of genocide, though the Statute does recognize criminal liability for persons who commit genocide "through another person."⁶⁰ Additionally, whereas the Genocide Convention criminalizes attempted acts of genocide, the Rome Statute criminalizes both attempted acts of genocide and aiding and abetting acts (or attempted acts) of genocide.⁶¹ As of September 2, 2004, 139 States have signed the Rome Statute and 94 have ratified it.⁶² Although the United States signed the Statute on December 31, 2000,⁶³ on May 6, 2002, it formally renounced any obligations under the treaty.⁶⁴

Legal Elements of Genocide

Both the ICTY and ICTR have ruled upon the legal elements comprising the crime of genocide. As discussed below, these rulings concern both the mental and physical components of the crime of genocide. As mentioned previously, these holdings are not domestically binding upon the United States, but they may influence international legal trends concerning the determination of when genocide occurs.

Mental Elements. In order for a person to commit genocide, he or she must possess the requisite frame of mind.⁶⁵ For purposes of the Genocide Convention, a

⁵⁷ Id. art. 5(1).

⁵⁸ Id. art. 5(2)("[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted ... defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations").

⁵⁹ Id. art. 17.

⁶⁰ Compare id. art. 25(3) with Genocide Convention art. 3.

⁶¹ Rome Statute art. 25(3)(c).

⁶² A listing of States that have signed, ratified, and/or accepted the Rome Statute is available at [<http://www.un.org/law/icc/statute/romefra.htm>].

⁶³ Id.

⁶⁴ Id.

⁶⁵ Prosecutor v. Musema, Case No. ICTR 16-3-A, ICTR Trial Chamber I Judgment and (continued...)

person may be found guilty of genocide only if it is demonstrated that he acted with (1) the intent (2) to destroy, (3) in whole or in part, (4) a national, ethnic, racial or religious group, as such.⁶⁶ The following sections address each of these components of the mental element of genocide separately.

“Intent”. Under the Genocide Convention, to be found guilty of committing genocide the accused must have acted with the “intent to destroy, in whole or in part, a national, ethnic, racial or religious group.”⁶⁷ Tribunals discussing the intent requirement of the Genocide Convention have concluded that it is specific rather than general in nature, and have used terms such as special intent, specific intent, *dolus specialis*, particular intent, and genocidal intent to describe it.⁶⁸ This understanding coincides with the “specific intent” requirement of the U.S. genocide statute.⁶⁹ Specific intent “requires performance of the *actus reus* but in association with an intent or purpose that goes beyond the mere performance of the act.”⁷⁰

In practice, tribunals have found that specific intent can be inferred from actions taken by the accused, even if the accused’s specific intent to commit genocide was never proclaimed. In *Prosecutor v. Jelusic*, the ICTY Appeals Chamber stated that:

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 perpetuation 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 and discriminatory acts.⁷¹

⁶⁵ (...continued)

Sentence (Jan. 27, 2000) [*hereinafter* “Musema Judgment”], para. 164, *available at* [<http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm>] (“[a] person may be convicted of genocide only where it is established that he committed one of the acts referred to under Article 2(2) of the Statute with the specific intent to destroy, in whole or in part, a particular protected group”).

⁶⁶ Genocide Convention art. 2.

⁶⁷ *Id.*

⁶⁸ *Prosecutor v. Jelusic*, Case No. IT IT-95-10, ICTY Appeals Chamber Judgment (Jul. 5, 2001) [*hereinafter* “Jelusic Appeals Chamber”], para. 45, *available at* [<http://www.un.org/icty/jelusic/appeal/judgement/index.htm>]. See also *Musema Judgment*, paras. 164-167 (referring to specific intent and *dolus specialis* interchangeably); *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, ICTR Trial Chamber I Judgment (Sept. 2, 1998) [*hereinafter* “Akayesu Judgment”], para. 498, *available at* [<http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>] (“[g]enocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*”).

⁶⁹ 18 U.S.C. § 1091(a).

⁷⁰ SCHABAS, *supra* note 50, at 218. See also BLACK’S LAW DICTIONARY 814 (7th ed. 1999) (defining “specific intent” as “the intent to accomplish the precise criminal act that one is later charged with”).

⁷¹ *Jelusic Appeals Chamber*, para. 47.

In *Jeliscic*, the defendant was accused of systematically killing Muslims in the detention camp of Lucka and the town of Brcko.⁷² After reviewing evidence on the accused's actions, the Trial Chamber stated that "the material element of the crime of genocide has been satisfied."⁷³ However, the Trial Chamber held that "although [Jeliscic] obviously singled out Muslims," he did not demonstrate the necessary specific intent.⁷⁴ This is mostly due to evidence that he randomly released detainees,⁷⁵ and that his personality revealed "opportunistic and inconsistent behaviors."⁷⁶ Therefore, the Trial Chamber concluded that the Prosecutor had not demonstrated that the defendant possessed genocidal intent, since "the Prosecutor has not provided sufficient evidence allowing it to be established . . . that there existed a plan to destroy the Muslim group."⁷⁷ The Appeals Chamber disagreed with this reasoning, stating that "the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases."⁷⁸ The Appeals Chamber then inferred an intent by the accused to commit genocide from the facts and circumstances of the case.⁷⁹

This approach has also been applied by the ICTR. In *Prosecutor v. Akayesu*, the ICTR Trial Chamber stated:

[I]t is possible to infer the genocidal intention . . . of a particular act, *inter alia*, from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators.⁸⁰

In *Akayesu*, the accused oversaw and participated in the widespread massacre of Tutsi civilians.⁸¹ In determining the defendant's specific intent, the *Akayesu* Trial Chamber looked to ICTY decisions that inferred intent "from a number of facts such as the general political doctrine which gave rise to the acts . . . or the repetition of destructive and discriminatory acts."⁸²

⁷² Prosecutor v. Jeliscic, Case No. IT IT-95-10, ICTY Trial Chamber I Judgment (Dec. 14, 1999) [*hereinafter* "Jeliscic Trial Chamber"], para. 3, *available at* [<http://www.un.org/icty/jeliscic/trialc1/judgement/index.htm>].

⁷³ Id. para. 65.

⁷⁴ Id. para. 108.

⁷⁵ Id. paras. 94,106.

⁷⁶ Id. para. 105.

⁷⁷ Id. para. 98.

⁷⁸ Jeliscic Appeals Chamber, para. 48.

⁷⁹ Id. para. 47.

⁸⁰ Akayesu Judgment, para. 728.

⁸¹ Id. para. 193.

⁸² Id. para. 524, *citing* Prosecutor v. Karadzic and Mladic, Case Nos. ICTY-95-5/18, (continued...)

Both the ICTY and ICTR have also inferred intent “from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list in [Article 2 of the Genocide Convention] but which are committed as part of the same pattern of conduct.”⁸³ This includes the “combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.”⁸⁴

Another issue in determining specific intent is whether to consider the accused’s personal motives.⁸⁵ Although the Genocide Convention does not list applicable motives, the issue was widely debated during the Convention’s formation.⁸⁶ The Ad Hoc Committee of 1948 included a list of motives in its draft of the Genocide Convention. It stated that genocide must be committed “on grounds of the national or racial origin, [or] religious belief ... of [the] members [of the group].”⁸⁷ Although this language was not included in the final text, some countries sought to include the words “as such” at the end of the *chapeau* to incorporate a motive requirement.⁸⁸

⁸² (...continued)

Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence (Jul. 11, 1996) [*hereinafter* “Karadzic and Mladic”], para. 94.

⁸³ *Id.*, *citing* Karadzic and Mladic, para. 95.

⁸⁴ *Id.* para. 524.

⁸⁵ See SCHABAS, *supra* note 50, at 245 (summarizing the role of motive in criminal law). Schabas explains “It should be noted at the outset that:

[I]ntent and motive are not interchangeable notions. Several individuals may intend to commit the same crime, but for different motives. Domestic criminal law systems rarely require proof of motive, in addition to proof of intent, as an element of the offence. Under ordinary circumstances, a motive requirement unnecessarily narrows the offence, and allows individuals who have intentionally committed the prohibited act to escape conviction. This is not to say that motive is irrelevant. Evidence of motive or lack of it may always be germane to the outcome of a trial. If an accused can prove lack of motive, this will colour assessment of ostensibly inculpatory factors, especially if the evidence is indirect. Finally, motive will normally be taken into account in assessing the appropriate penalty once the offender’s guilt has been determined ... A crime driven by passion will not be punished as severely as one motivated by avarice or pure sadism.

⁸⁶ SCHABAS, *supra* note 50, at 245-256 (detailing the debate over the inclusion of a motive requirement in the Genocide Convention); BOOT, *supra* note 16, at 410-11.

⁸⁷ Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from April 5 to May 10, 1948, U.N. ESCOR, 7th Sess., Supp. No. 6, U.N. Doc. E/794 (1948) [*hereinafter* “Ad Hoc Committee Draft”], art. 2.

⁸⁸ SCHABAS, *supra* note 50, at 250. Venezuela, which proposed the inclusion of the words as such, argued that the phrase “as such” would “give wider powers of discretion to the judges who would be called upon to deal with cases of genocide The adoption of the
(continued...)

Although the words were included, their official meaning was not agreed upon and remains open to debate.⁸⁹

The International Tribunals have not decided this issue conclusively, although it has been addressed. In *Prosecutor v. Tadic*, the ICTY Appeals Chamber, in an effort to strengthen jurisprudence on this issue, discussed hypothetical scenarios where a defendant would be unjustly acquitted simply by asserting a personal motive behind his or her efforts to destroy members of a group protected under the Genocide Convention.⁹⁰ In *Tadic*, the accused severely injured and inhumanely treated a number of Muslims.⁹¹ The accused was not charged with genocide but with war crimes and crimes against humanity.⁹² However, the Chamber explicitly discussed the crime of genocide in making its determination of the significance of the accused's personal motives in assessing intent:[http](http://www.un.org/icty/tadic/appeal/judgment/index.htm)

Imagine a high-ranking SS official who claims that he participated in the genocide of the Jews and Gypsies for the “purely personal” reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason Similarly, if the same man said that he participated in the genocide only for the “purely personal” reason that he feared losing his job, he would also be entitled to an acquittal In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of “non-personal” motives.⁹³

In making its decision, the *Tadic* Chamber stated that “under customary law, ‘purely personal motives’ do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.”⁹⁴ Moreover, even if the accused could prove a personal motive, specific intent would still be met “provided . . . that the crimes [were] committed in the context of widespread or systematic crimes directed against a civilian population and that the accused [knew] that his acts . . .

⁸⁸ (...continued)

Venezuelan amendment would enable the judges to take into account other motives than those listed [expressly by the Convention].” *Id.*, quoting U.N. GAOR 6th Comm., 3rd Sess., U.N. Doc. A/C.6/SR.77 (1948) (Perez-Perozo, Venezuela).

⁸⁹ *Id.* at 251-56 (providing overview of academic writing and tribunal case law on the relevance of the term “as such” in the Genocide Convention, and concluding that the issue remains unresolved).

⁹⁰ *Prosecutor v. Tadic*, Case No. IT-94-1, ICTY Appeals Chamber Judgment (Jul. 15, 1999) [*hereinafter* “*Tadic Appeals Chamber*”], para. 270, available at <http://www.un.org/icty/tadic/appeal/judgment/index.htm>].

⁹¹ *Prosecutor v. Tadic*, Case No. IT-94-1, ICTY Trial Chamber II Opinion and Judgment (May 7, 1997), para. 730, available at <http://www.un.org/icty/tadic/trialc2/judgment/index.htm>].

⁹² *Id.* paras. 722-765.

⁹³ *Tadic Appeals Chamber*, para. 169.

⁹⁴ *Id.* para. 270.

‘fitted into such a pattern.’”⁹⁵ The *Jelusic* Appeals Chamber concurred and stated that the specific intent required for genocide could potentially be met even if the perpetrator’s personal motivation was “to obtain personal economic benefits, or political advantage, or some form of power.”⁹⁶

“To Destroy”. For purposes of the Genocide Convention, the intent to “destroy” a protected group refers only to the intent to cause its *material destruction by physical or biological means*,⁹⁷ and not an intent to destroy the “national, linguistic, religious, cultural or other identity of a particular group.”⁹⁸ For example, the intent to exterminate an ethnic group could constitute an element of the crime of genocide, while the intent to require an ethnic group to speak a different language would not.

This element was discussed extensively in the ICTY case of *Prosecutor v. Krstic*. In *Krstic*, the accused displaced and systematically murdered Muslims living in Srebrenica, a town in eastern Bosnia and Herzegovina.⁹⁹ The Trial Chamber found the defendant guilty of murder, persecution, and genocide.¹⁰⁰

On appeal, the defense argued that the group was not physically destroyed since only men posing a military threat were killed,¹⁰¹ and the targeted women, children and elderly were only geographically displaced.¹⁰² However, the Appeals Chamber affirmed the conviction, holding that the accused intended to physically destroy the group.¹⁰³ Evidence indicated that the accused killed civilian males, many of whom were unable to fight due to age or physical disability, as well as professional soldiers.¹⁰⁴ Therefore, the Chamber concluded that men in Srebrenica were “deliberately and methodically killed . . . solely on the basis of their identity.”¹⁰⁵ With respect to the geographical displacement of Muslim women, children, and elderly, the Chamber stated that removing “all Bosnian Muslims from Srebrenica, [and] thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself,” may indicate an intent to destroy for purposes

⁹⁵ *Id.* para. 255.

⁹⁶ *Jelusic* Appeals Chamber, para. 49.

⁹⁷ *Prosecutor v. Krstic*, Case No. IT-98-33-A, ICTY Appeals Chamber Judgment (Apr. 19 2004) [*hereinafter* “*Krstic* Appeals Chamber”], para. 25, *available at* [<http://www.un.org/icty/krstic/Appeal/judgement/index.htm>].

⁹⁸ ILC Report, *supra* note 7, at 90.

⁹⁹ *Krstic* Appeals Chamber, para. 2.

¹⁰⁰ *Prosecutor v. Krstic*, Case No. IT-98-33-A, ICTY Trial Chamber I Judgment (Aug. 2, 2001) [*hereinafter* “*Krstic* Trial Chamber”], para. 719, *available at* [<http://www.un.org/icty/krstic/TrialC1/judgement/index.htm>].

¹⁰¹ *Krstic* Appeals Chamber, para. 30.

¹⁰² *Id.* para. 24.

¹⁰³ *Id.* paras. 26-7.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* para. 37.

of the Genocide Convention.¹⁰⁶ Given the Bosnian Muslim community’s dependence on men for survival and religious prohibitions on a Muslim woman’s ability to remarry, an intent to destroy existed since actions taken against the community “potentially consigned [it] to extinction.”¹⁰⁷

“In Whole or in Part”. Once an intent to destroy a group has been determined, the court hearing a claim of genocide must assess whether the scope of the intended destruction was extensive enough to constitute genocide.¹⁰⁸ The words “in whole or in part” make clear that an intent to completely destroy a group protected by the Genocide Convention is not necessary for a person to be guilty of genocide. According to the International Law Commission, a U.N. body established to promote the codification and progressive development of international law, “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. Nonetheless, the crime of genocide by its very nature requires the intention to destroy at least a *substantial part* of a particular group.”¹⁰⁹

Both the ICTY and ICTR have discussed the meaning of “substantial part” for purposes of the Genocide Convention. In the ICTR case of *Prosecutor v. Bagilishima*, the Trial Chamber agreed with the International Law Commission and stated, “[a]lthough the destruction sought need not be directed at every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group.”¹¹⁰ In *Prosecutor v. Kayishema and Ruzindana*, the ICTR Trial Chamber defined ‘in part’ as “the intention to destroy a considerable number of individuals who are part of the group.”¹¹¹ It also reiterated a statement from the U.N. Expert Study on Genocide, which said that “‘in part’ would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. Hence, both proportionate scale and total number are relevant.”¹¹²

The ICTY expounded upon the U.N. Expert Study’s meaning of “in part” in *Prosecutor v. Sikirica*. In that case, the ICTY Trial Chamber divided its analysis of

¹⁰⁶ Id. para. 31.

¹⁰⁷ Krstic Appeals Chamber, para. 28.

¹⁰⁸ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, ICTY Trial Chamber III Judgment (Jun. 16, 2004) [*hereinafter* “Milosevic Trial Chamber”], para. 127, *available at* [<http://www.un.org/icty/milosevic/trialc/judgement/index.htm>].

¹⁰⁹ ILC Report, *supra* note 7, at 89 (ital. added).

¹¹⁰ *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber I (Jun. 7, 2001), para. 64, *available at* [<http://www.ictr.org/ENGLISH/cases/Bagilishema/judgement/index.htm>].

¹¹¹ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, ICTR Trial Chamber II Judgment (May 21, 1999) [*hereinafter* “Kayishema and Ruzindana Judgment”], para. 97, *available at* [<http://www.ictr.org/ENGLISH/cases/KayRuz/judgement/index.htm>].

¹¹² Id. para. 96, *quoting* Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Benjamin Whitaker, U.N. ESCOR, 38th Sess., U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) [*hereinafter* “U.N. Study on Genocide”], at 16.

whether the accused intended to destroy a group “in whole or in part” into two elements: (1) whether the defendant intended to destroy a “reasonably substantial number relative to the total population of the group,” and (2) whether the defendant intended to destroy a “significant section of the group, such as its leadership.”¹¹³ The Chamber explained that when the evidence is insufficient “in relation to each element in isolation,” intent can also be determined by considering the evidence from both factors “as a whole.”¹¹⁴

In the *Sikirica* case, the defendant detained and killed male Muslims and Croats from the Prijedor municipality of Bosnia and Herzegovina.¹¹⁵ Although the defendant did not seek to destroy the entire group of Muslims and non-Serbs living in Bosnia and Herzegovina,¹¹⁶ he was charged with “the intent to eliminate Muslim and non-Serb males in the [municipality of] Prijedor in part.”¹¹⁷ The prosecution argued that the defendant committed genocide by intending “to destroy not only a substantial part of the community of Bosnian Muslim detainees in Keraterm and Omarska Camps, but also the leadership of that group, including those members defending non-Serbs.”¹¹⁸ Although several camps existed in the Prijedor municipality, the court’s analysis was limited to one camp, Keraterm, since the number of detainees was not known for the other camps.¹¹⁹ In determining the first element of whether a reasonably substantial number of people were destroyed relative to the total population of the group, the Chamber found that only 2 to 2.8% of Muslims and a “very small” number of Croats from the Prijedor municipality were detained at Keraterm, and they would therefore “hardly qualify as a ‘reasonably substantial’” part of the group.¹²⁰

¹¹³ Prosecutor v. Sikirica, Case No. IT-95-8, ICTY Trial Chamber III Judgment on Defense Motions to Acquit (Sept. 3, 2001) [*hereinafter* “Sikirica Trial Chamber Judgment on Defense Motions to Acquit”], para. 65, *available at* [<http://www.un.org/icty/sikirica/judgement/index.htm>]. Unlike the U.N. Study on Genocide, “[t]he [Sikirica Trial] Chamber believes that it is more appropriate to speak of a ‘reasonably substantial’ rather than a ‘reasonably significant’ number.” This corresponds to the first condition in the U.S. ratification legislation on the Genocide Convention requiring that “the acts specified in article II . . . affect a substantial part of the group concerned.” *Id.* See also Jelusic Trial Chamber, para. 81 (“[t]he intention demonstrated by the accused to destroy a part of the group would therefore have to affect either a major part of the group or a representative fraction thereof, such as its leaders”).

¹¹⁴ Sikirica Trial Chamber Judgment on Defense Motions to Acquit, para. 65.

¹¹⁵ Prosecutor v. Sikirica, Case No. IT-95-8, ICTY Trial Chamber III Sentencing Judgment (Nov. 13, 2001), *available at* [http://www.un.org/icty/sikirica/judgement/index_2.htm], paras. 1,18.

¹¹⁶ Sikirica Trial Chamber Judgment on Defense Motions to Acquit, para. 33.

¹¹⁷ *Id.* para. 30.

¹¹⁸ *Id.* para. 32.

¹¹⁹ *Id.* para. 71.

¹²⁰ *Id.* para. 72-3.

Under the second part of the analysis, the *Sikirica* Chamber assessed whether “the destruction [was] related to a significant section of the group, such as its leadership.”¹²¹ In defining the group’s leadership, the Chamber explained that it was “looking for Bosnian Muslims who, whether by reason of their official duties or by reason of their personality, had this special quality of directing the actions or opinions of the group in question, that is those with significant influence on its actions.”¹²² The *Sikirica* Chamber found that “very little evidence has been adduced as to the leadership status [of those whose professions were known] [They did] not appear to have been persons with any special significance to their community, except to the extent some of them were of military age”¹²³

Although the *Sikirica* Chamber upheld the defendant’s motion for acquittal based on the foregoing evidence, the court noted that the extent of the actual destruction did not in itself indicate whether the defendant intended to destroy a group in whole or in part.¹²⁴ However, the Chamber concluded that “when [these facts are] considered along with other aspects of the evidence, it becomes clear that this is not a case in which the intent to destroy a substantial number of Bosnian Muslims or Bosnian Croats can properly be inferred.”¹²⁵ Subsequently in the *Krstic* case, the ICTY Appeals Chamber stated that, “[i]n addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial”¹²⁶

“A National, Ethnic, Racial, or Religious Group, as Such”. Although genocidal acts target individuals, these individuals are chosen because of their membership in a larger group.¹²⁷ In *Sikirica*, the ICTY Trial Chamber stated that “[w]hereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, the individuals belonging to that group.”¹²⁸ This is also emphasized by the phrase “as such” in the Genocide Convention’s definition of protected groups, which is understood to mean that “the evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group.”¹²⁹

¹²¹ Id. para. 76.

¹²² *Sikirica* Trial Chamber Judgment on Defense Motions to Acquit, para. 78.

¹²³ Id. para. 80.

¹²⁴ Id. para. 75.

¹²⁵ Id.

¹²⁶ *Krstic* Appeals Chamber, para. 12.

¹²⁷ *Milosevic* Trial Chamber, para. 123.

¹²⁸ *Sikirica* Trial Chamber Judgment on Defense Motions to Acquit, para. 89. See also *Akayesu* Judgment, para. 521.

¹²⁹ *Sikirica* Trial Chamber Judgment on Defense Motions to Acquit, para. 89.

The Genocide Convention's application is limited to the protection of national, ethnic, racial or religious groups.¹³⁰ Other groups, such as political groups, were excluded from the listing of protected groups.¹³¹ One reported reason for their omission was because the Convention was intended to protect permanent and "stable" groups joined at birth, as opposed to "mobile" groups based on voluntary membership.¹³²

In *Akayesu*, the ICTR attempted to define the Convention's four enumerated groups. The *Akayesu* Trial Chamber defined nationality as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."¹³³ The Chamber defined an ethnic group as "a group whose members share a common language or culture."¹³⁴ Racial groups were determined by "the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."¹³⁵ A religious group was understood to be "one whose members share the same religion, denomination or mode of worship."¹³⁶

One area of continuing ambiguity is whether permanent and stable groups that are entered into at birth but are not clearly of a national, ethnic, racial or religious nature are also protected by the Convention.¹³⁷ In *Akayesu*, the Trial Chamber concluded that the Tutsi did not constitute an "ethnic group" distinct from the Hutu because they shared the same language and culture.¹³⁸ Nonetheless, the Trial Chamber held that the Tutsi were a stable and permanent group protected by the Genocide Convention, since Hutu and Tutsi group members and local authorities *treated* the Tutsi as a distinct ethnicity.¹³⁹ The subjective approach employed in *Akayesu* to determine whether persons constituted a protected group under the Genocide Convention was expanded in the ICTY case of *Kayishema and Ruzindana*, where the Trial Chamber defined an ethnic group as one which "distinguishes itself,

¹³⁰ Genocide Convention art. 2.

¹³¹ See generally SCHABAS, *supra* note 50, at 134-45; BOOT, *supra* note 16, at 426. The original Convention drafts presented by the U.N. Secretariat and the Ad Hoc Committee listed political groups among the groups protected against the crime of genocide (the Secretariat's draft also included linguistic groups), but these groups were omitted in the final text of the Convention. Draft Convention on the Crime of Genocide, U.N. Secretary-General, U.N. Doc E/447, at art. 1 (1947); Ad Hoc Committee Draft art. 2.

¹³² *Akayesu* Judgment, para. 511 (*citing* Summary Records of the Meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly). See ILC Report, *supra* note 7, at 89; BOOT, *supra* note 16, at 426.

¹³³ *Akayesu* Judgment, para. 512.

¹³⁴ *Id.* para. 513.

¹³⁵ *Id.* para. 514.

¹³⁶ *Id.* para. 515.

¹³⁷ BOOT, *supra* note 16, at 431.

¹³⁸ See *Akayesu* Judgment, para 170-72, 702.

¹³⁹ *Id.*

as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others).”¹⁴⁰

The ICTY took the subjective approach used by the ICTR even further in *Prosecutor v. Jelsic*. In this case, the ICTY Trial Chamber stated that for purposes of determining whether persons constitute a “group” covered by the Genocide Convention, groupings should not be defined objectively but instead through the alleged perpetrators’ perspective.¹⁴¹ Such analysis can be made using either a positive or negative approach.¹⁴² Under a positive approach, victims are identified through “characteristics which [the perpetrators] deem to be particular to a national, ethnic, racial or religious group.”¹⁴³ A negative approach identifies the victimized group as one which the perpetrators recognize as different from their own group along national, ethnic, racial or religious lines.¹⁴⁴ Under the negative approach, “all individuals thus rejected would, by exclusion, make up a distinct group.”¹⁴⁵

The negative approach to defining group membership established by the ICTY in *Jelsic* was later rejected by another ICTY Trial Chamber in *Stakic*. The *Stakic* Trial Chamber stated that “[the Genocide Convention] protects national, ethnic, racial or religious groups. In cases where more than one group is targeted, it is not appropriate to define the group in general terms, as, for example, “non-Serbs.”¹⁴⁶ Although both the ICTR and ICTY have tried to determine group identity for purposes of assessing coverage under the Genocide Convention, debate continues as to the proper approach to use in assessing whether a group is protected by the Convention.

Physical Elements. The Genocide Convention lists five physical acts that may constitute genocide if coupled with the requisite intent:

- (1) Killing members of the group;
- (2) Causing serious bodily or mental harm to members of the group;
- (3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (4) Imposing measures intended to prevent births within the group; or
- (5) Forcibly transferring children of the group to another group.¹⁴⁷

¹⁴⁰ Kayishema and Ruzindana Judgment, para. 98.

¹⁴¹ Jelsic Trial Chamber, para. 70.

¹⁴² *Id.* para. 71.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Prosecutor v. Stakic*, Case No. IT-97-24-T, ICTY Trial Chamber II Judgment (Jul. 31, 2003) [*hereinafter* “*Stakic Judgment*”], para. 512, *available at* [<http://www.un.org/icty/stakic/trialc/judgement/index.htm>].

¹⁴⁷ Genocide Convention art. 2.

The commission of any one of these physical acts is sufficient for a person to be found guilty of committing genocide, provided that the requisite mental element is also present. Jurisprudence concerning each of these acts will be discussed separately.

Killing Members of a Group. In *Akayesu*, the ICTR identified three elements for determining whether the accused could be punished in accordance with the Genocide Convention for “killing members of a group.” These elements are:

- (1) the victim is dead;
- (2) the death resulted from an unlawful act or omission of the accused or a subordinate; and
- (3) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased.¹⁴⁸

The third element listed by the *Akayesu* Trial Chamber was the most contentious because it required the Chamber to determine when a killing constituted a prohibited murder under the Genocide Convention. The Trial Chamber looked at both the English and French language texts of the Genocide Convention to determine the precise scope of this prohibition. The Chamber concluded that the English language text’s use of the word “killing” was too general, as it could potentially apply to acts that the Convention drafters did not intend to be covered under the Genocide Convention, such as *unintentional* homicides.¹⁴⁹ Therefore, the Chamber looked to the official French language version of the Genocide Convention, which uses the word “*meurtre*,” meaning intentional killing.¹⁵⁰ Relying on the French language text of the Genocide Convention, the ICTR concluded that the Convention’s provisions relating to “killing members of the [protected] group” were intended to cover only *intentional* killings.¹⁵¹

Causing Serious Bodily or Mental Harm to Members of the Group.

Over the years, the ICTY and ICTR have tried to identify actions constituting “serious bodily or mental harm” under the Genocide Convention. The *Akayesu* Trial Chamber stated that “serious bodily or mental harm, without limiting itself thereto, . . . [means] acts of torture, be they bodily or mental, inhumane or degrading treatment, [or] persecution.”¹⁵² However, the *Akayesu* Trial Chamber stated that serious bodily or mental harm “does not necessarily mean that the harm is permanent and irremediable.”¹⁵³ With respect to mental harm, this understanding appears to diverge from the U.S. statute criminalizing genocide, which covers only “the

¹⁴⁸ *Akayesu* Judgment, para. 589.

¹⁴⁹ *Id.* para. 500.

¹⁵⁰ *Id.* para. 501.

¹⁵¹ *Id.* para. 500.

¹⁵² *Id.* para. 504.

¹⁵³ *Id.* para. 502.

permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques.”¹⁵⁴

In *Karadzic and Mladic*, the ICTY Trial Chamber stated that torture and inhumane or degrading treatment causes serious bodily or mental harm and therefore could be considered genocidal acts if the requisite mental element was fulfilled.¹⁵⁵ In the ICTR decision in *Kayeshema and Ruzindana*, the Trial Chamber said that this element “could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”¹⁵⁶

The *Kayeshema and Ruzindana* Trial Chamber stated that the meaning of “the phrase serious bodily and mental harm should be determined on a case-by-case basis, using a common sense approach.”¹⁵⁷ It also concurred with the *Akayesu* Chamber’s inclusion of rape and sexual violence as causes of both serious bodily and mental harm.¹⁵⁸ In explaining this decision, the *Akayesu* Trial Chamber had stated that acts of rape “resulted in the physical and psychological destruction of Tutsi women, their families, and their communities. Sexual violence was an integral part of the process of destruction, specifically contributing to the destruction of targeted Tutsi women and to the destruction of the Tutsi group as a whole.”¹⁵⁹

Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part. The text of the Genocide Convention does not provide clear guidance as to what actions constitute deliberate infliction upon a group of conditions likely to bring about its physical destruction in whole or in part. However, the *Akayesu* Chamber distinguished this element from more direct methods of destroying a group of people which were clearly enumerated under the Convention, such as directly killing group members. The *Akayesu* Chamber explained that “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction” are covered by the Genocide Convention’s prohibition against the creation of conditions of life calculated to bring about the physical destruction of a group in whole or in part.¹⁶⁰ This would include, *inter alia*, “subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”¹⁶¹

¹⁵⁴ 18 U.S.C. § 1091(a)(3) (*ital. added*).

¹⁵⁵ See *Karadzic and Mladic*, para. 93. See also SCHABAS, *supra* note 50, at 160-1.

¹⁵⁶ *Kayishema and Ruzindana Judgment*, para 109. See also SCHABAS, *supra* note 50, at 160.

¹⁵⁷ *Kayishema and Ruzindana Judgment*, para. 108.

¹⁵⁸ *Id.* See also *Akayesu Judgment*, para. 731; SCHABAS, *supra* note 50, at 164.

¹⁵⁹ *Akayesu Judgment*, para. 731.

¹⁶⁰ *Akayesu Judgment*, para. 505.

¹⁶¹ *Id.* para. 506.

The ICTR Trial Chamber has approvingly cited an explanation included within a draft of the Genocide Convention, defining the deliberate infliction of conditions calculated to bring about group destruction as including “circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene, medical care or excessive work or physical exertion.”¹⁶² The Chamber has also found that in some circumstances “rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period ... [c]ould lead to the destruction of the group in whole or in part.”¹⁶³

Some commentators have suggested that the Convention’s use of the word “deliberately” with respect to the imposition of life-threatening conditions indicates a requirement that the imposition of such conditions is premeditated.¹⁶⁴ The word “calculated” also connotes an additional consideration, and might suggest that the imposition of life-threatening conditions must be the perpetrator’s principal method of destroying the group in whole or in part, and not merely the incidental result of other destructive acts.¹⁶⁵

Imposing Measures Intended to Prevent Births within the Group.

This provision of the Genocide Convention was originally meant to apply to acts such as compulsory sterilization and abortion intended to prevent a group from adding new members.¹⁶⁶ In recent years, international jurisprudence interpreted this provision more broadly. The *Akayesu* Trial Chamber considered “sexual mutilation, . . . forced birth control, separation of the sexes and prohibition of marriages” as genocidal actions intended to prevent births within the Tutsi group.¹⁶⁷ The Chamber stated that the forced impregnation of a victimized group member could also constitute a genocidal act if “during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.”¹⁶⁸ The Chamber noted that such actions pose a particular threat in “patriarchal societies where membership of a group is determined by the identity of the father.”¹⁶⁹ In addition, the Chamber concluded that the mental harm of rape without impregnation could also fall under this category if “the person raped refuses subsequently to procreate, in the

¹⁶² Kayishema and Ruzindana Judgment, para. 115. See also NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 123 (1960).

¹⁶³ Kayishema and Ruzindana Judgment, para. 116. See also SCHABAS, *supra* note 50, at 167.

¹⁶⁴ See SCHABAS, *supra* note 50, at 167.

¹⁶⁵ *Id.* at 243-4.

¹⁶⁶ BOOT, *supra* note 16, at 449; SCHABAS, *supra* note 50, at 172-73.

¹⁶⁷ *Akayesu* Judgment, para. 507.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

same way that members of a group can be led, through threats or trauma, not to procreate.”¹⁷⁰

It is unclear whether actions taken to prevent births within a group must succeed in order to constitute an offense under the Genocide Convention.¹⁷¹ However, for such actions to constitute genocide, it must be proven that the perpetrator *intended* to prevent births and destroy the group through these measures.¹⁷²

Forcibly Transferring Children of the Group to Another Group.

Although transferring children from one group to another group threatens the affected group’s ability to continue its traditions and way of life, cultural destruction is not covered by the Genocide Convention. However, the transferring of children could amount to biological genocide, since the taking and potential killing of children would destroy the group’s newest generation of members. In *Akayesu*, this offense was interpreted to cover not only “direct act[s] of forcible physical transfer, but also . . . acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”¹⁷³ The *Kayishema and Ruzindana* Chamber of the ICTR subsequently agreed with this interpretation.¹⁷⁴

With respect to this action’s mental requirement, the perpetrator must specifically intend to forcibly transfer children for this action to constitute genocide.¹⁷⁵ In addition, it appears that the perpetrator must know that the children are members of a victim group and are being transferred to a different group.¹⁷⁶

Ethnic Cleansing

Background. Recent debates over the situation in Darfur, Sudan have included whether the inhumane acts in question constituted genocide or ethnic cleansing. Therefore, in deciding whether genocide is occurring, it is important to understand how ethnic cleansing is defined and how it differs from genocide. Unlike genocide, “there is no generally recognized text defining ethnic cleansing,”¹⁷⁷ a term which gained recognition during the conflict in the former Yugoslavia. However, it has been widely accepted that ethnic cleansing “is aimed at displacing a population in order to change the ethnic composition of a given territory, and generally to render

¹⁷⁰ *Id.* para. 508.

¹⁷¹ SCHABAS, *supra* note 50, at 173. The United States suggested in the drafting of the Rome Statute’s section on genocide that the prosecution must establish that “measures imposed [by the offender] had the effect of preventing births within that group.” *Id.*, *quoting* U.N. Doc. PCNICC/1988/DP.4, p. 8.

¹⁷² Genocide Convention art. 2(d); SCHABAS, *supra* note 50, at 244.

¹⁷³ *Akayesu* Judgment, para. 509.

¹⁷⁴ *Kayishema and Ruzindana* Judgment, para. 118.

¹⁷⁵ SCHABAS, *supra* note 50, at 245.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 199.

the territory ethnically homogeneous or ‘pure.’”¹⁷⁸ Although genocide and ethnic cleansing “may share the same goal . . . to eliminate the persecuted group from a given area,” differences exist in the respective perpetrators’ intent.¹⁷⁹ Genocide requires the intent to *destroy* the group, whereas ethnic cleansing requires only the intent to *displace* it.¹⁸⁰ Ethnic cleansing is not listed under the Genocide Convention as an act of genocide, though some warn that it could presage genocidal acts, since genocide may become “the last resort of the frustrated ethnic cleanser.”¹⁸¹ Regardless, the forced “deportation” or transfer of populations is recognized by various tribunals as both a crime against humanity and (depending upon the circumstances) a war crime.¹⁸² It is important to note that *deportation* and *forcible transfer* of populations are distinct, though overlapping, concepts. A number of ICTY decisions define *deportation* as “the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, *across a national border*, without lawful grounds.”¹⁸³ In contrast, *forcible transfer* has been described as “a forced removal or displacement of people from one area to another which take may place within the same national borders.”¹⁸⁴

For purposes of this report, ethnic cleansing will only be discussed in relation to crimes against humanity. The term “crime against humanity” was first used in the London Charter creating the Nuremberg Tribunal.¹⁸⁵ The term was later defined more specifically in the Rome Statute. Article 7 of the Rome Statute lists *both* deportation and the forcible transfer of a population as crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁸⁶ Although the Statutes

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 200.

¹⁸⁰ SHABAS, *supra* note 50, at 200.

¹⁸¹ *Id.* at 201.

¹⁸² See Rome Statute art. 7(1); Yugoslavia Statute art. 5(d); Rwanda Statute art. 3(d). See also BOOT, *supra* note 16, at 446-9.

¹⁸³ Milosevic Trial Chamber, para. 45. See Prosecutor v. Simic, Case No. IT-95-9-T, ICTY Trial Chamber I Judgment (Oct. 17, 2003) [*hereinafter* “Simic Judgment”], para. 122, *available at* [<http://www.un.org/icty/simic/trialc3/judgement/index1.htm>]; see also Prosecutor v. Nalatellic and Martinovic, Case No. IT-98-34-T, ICTY Trial Chamber I Judgment (Mar. 31, 2003) [*hereinafter* “Nalatellic and Martinovic”], para. 670, *available at* [<http://www.un.org/icty/naletilic/trialc/judgement/index.htm>]; Prosecutor v. Krnojelac, Case No. IT-97-25-T, ICTY Trial Chamber II Judgment (Mar. 15, 2002) [*hereinafter* “Krnojelac Trial Chamber”], para. 476, *available at* [<http://www.un.org/icty/kjnojelac/trialc2/judgement/index.htm>]; Krstic Trial Chamber, paras. 521, 531-532.

¹⁸⁴ Milosevic Trial Chamber, para. 45. See Simic Judgment, para. 122; see also Krnojelac Trial Chamber, paras. 474, 476; Krstic Trial Chamber, para. 521.

¹⁸⁵ CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, at 14.

¹⁸⁶ Rome Statute art. 7(1).

establishing the ICTY and ICTR list *deportation* as a crime against humanity,¹⁸⁷ neither Statute lists *forcible transfer* as a crime against humanity. However, the ICTY has concluded that its statutory authority to adjudicate “other inhumane acts” not expressly listed as crimes against humanity provides the Tribunal with authority to hear cases concerning forcible transfers.¹⁸⁸ Indeed, the ICTY has heard several cases dealing with the deportation and forcible transfer of groups in the former Yugoslavia.¹⁸⁹

Legal Elements of Ethnic Cleansing. In assessing whether deportation or forcible transfer occurred, the ICTY has considered three elements:

- (1) Whether the transfer was across borders;
- (2) Whether movement was involuntary; and
- (3) The intent of the perpetrator.¹⁹⁰

With respect to the first element, as previously mentioned, the ICTY has taken the position that “deportation requires the displacement of persons across a national border, to be distinguished from forcible transfer, which takes place within national boundaries.”¹⁹¹ The one exception to this approach occurred in the *Stakic* case, where the ICTY Trial Chamber held that forced displacement over “de facto boundaries, such as constantly changing frontlines, which are not internationally recogni[z]ed” also constitutes deportation.¹⁹² It does not appear, however, that other Chambers within the ICTY have taken this approach.

With respect to the second element of ethnic cleansing, that the movement is involuntary, the *Milosevic* Trial Chamber of the ICTY recently stated that the involuntary nature of deportation or forcible transfer depends on whether the persons transferred had any real choice in the matter.¹⁹³ It also stated that such an assessment should be made on a case-by-case basis examining the context of all relevant circumstances.¹⁹⁴ This becomes particularly important in determining whether transferees’ expressions of consent to movement are authentic. In the *Krnjelac* case, the ICTY Appeals Chamber stated that “when analyzing the evidence concerning [such expressions], it is necessary to put it into context and to take into account the situation and atmosphere that prevailed”¹⁹⁵ In the *Krnjelac* case, the

¹⁸⁷ Yugoslavia Statute art. 5(d); Rwanda Statute art. 3(d).

¹⁸⁸ *Milosevic* Trial Chamber, para. 41.

¹⁸⁹ *BOOT*, supra note 16, at 189-90.

¹⁹⁰ *Milosevic* Trial Chamber, para. 46.

¹⁹¹ *Id.* para. 59. See also *Krnjelac* Trial Chamber, para. 474; *Krstic* Trial Chamber, para. 531.

¹⁹² *Stakic* Judgment, para. 679.

¹⁹³ *Milosevic* Trial Chamber, para. 76. See also *Nalatellic and Martinovic*, para. 519.

¹⁹⁴ *Milosevic* Trial Chamber, para. 76.

¹⁹⁵ *Id.* See also *Prosecutor v. Krnjelac*, Case No. IT-97-25-T, ICTY Appeals Chamber (continued...)

Trial Chamber had held that evidence of certain detainees' express desire to be released and thereafter travel across the border to Montenegro prevented a finding of involuntary displacement.¹⁹⁶ However, the Appeals Chamber disagreed and held that "the illegal detention [of the victims], the threats, the use of force and other forms of coercion, the fear of violence and the detainees' vulnerability" negated a finding of genuine consent.¹⁹⁷

With respect to the third element, deportation and forcible transfer require the same state of intent from the perpetrator.¹⁹⁸ The *Milosevic* Trial Chamber required that the perpetrator of the displacement "either directly intended that the victim would leave or that it was reasonably foreseeable that this would occur as a consequence of his action."¹⁹⁹

¹⁹⁵ (...continued)

Judgment (Sept. 17, 2003) [*hereinafter* "Krnojelac Judgment"], *available at* [<http://www.un.org/icty/krnojelac/appeal/judgement/index.htm>], para. 229.

¹⁹⁶ Krnojelac Judgment, para. 227.

¹⁹⁷ *Id.* para 229.

¹⁹⁸ Milosevic Trial Chamber, para. 78.

¹⁹⁹ *Id.*