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Current Development of the
Concept of Genocide in the
Jurisprudence of the Ad hoc
Tribunals and Its Possible
Further Impact on the Practice of
the International Criminal Court

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Summary

Though the practice of genocide traces its roots back to the atrocities committed in the ancient times, however, the international community has shown its reluctance to acknowledge the existence of that horrific crime. The impunity for the Armenian genocide perpetrated by the Young Turks of Ottoman Empire in 1915 had a significant impact on Adolf Hitler who referred to the Ottoman killings of Armenians in his political speeches justifying Nazi's brutal policy. His words "who, after all, speaks today of the annihilation of the Armenians?"¹ served as a guidance for all his followers to act brutally and without mercy. The scale of barbarous atrocities committed by Nazis during the World War II shocked the whole Europe. Consequently, reluctance was overcome by the desire to punish those responsible for grievous crimes. However, the Nuremberg and Tokyo trials following the World War II, often seen as the victor's justice over those defeated, did not acknowledge the crime of genocide regardless existing overwhelming evidence on genocide being perpetrated in large scale.

Though the crime of genocide had not been explicitly recognized by the Nuremberg and Tokyo International Military Tribunals, the idea of the possibility to render international justice influenced the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter – Genocide Convention)². Nevertheless, the Convention being in force had been dormant more than forty years and thus the rules applicable to the crime of genocide were not applied due to the non-existence of any international criminal tribunal having jurisdiction over the crime of genocide and non-interference principle to the sovereignty of states. It was believed that such horrific events that took place during the World War II would never be repeated again. Nevertheless, a temporary return to the past has been witnessed by the entire world community as a striking '*déjà vu*' during the Yugoslav war and the Rwandan conflict.

Ad hoc tribunals³, created as a challenging response to the gross human rights violations in Yugoslavia and Rwanda, have proved to play a key role in the establishment of the international criminal justice. The crime of

¹ <www.genocide1915.info/quotes>, retrieved on January 14, 2008.

² The Genocide Convention, 78 UNTS 277, opened for signature on December 8, 1948 and entered into force on January 12, 1951.

³ The 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, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY, is a body of the United Nations (UN) established to prosecute serious crimes committed during the wars in the former Yugoslavia, and to try their alleged perpetrators. <www.un.org/icty> retrieved on January 14, 2008.

The International Criminal Tribunal for Rwanda (ICTR) is an international court under the auspices of the United Nations for the prosecution of offenses committed in Rwanda during the genocide. <69.94.11.53> retrieved on January 14, 2008.

genocide has been construed and applied extensively by both ad hoc tribunals. The crime per se turned out to be applied as an effective tool to punish those who aimed at the destruction of a group simply on the basis of its ethnicity, and the concept of genocide stepped aside from being a purely legalistic non-applicable provision prior to the creation of the ad hoc tribunals.

Solid jurisprudence has been developed by the ad hoc tribunals in regard to *actus reus* of acts constituting the crime of genocide. Some progressive developments have been witnessed in the international criminal law such as singling out rape and sexual violence as a genocidal act. Historically the genocide has been seen in the light of the Holocaust committed by Nazi regime and thus it has been associated primarily with an organized mass killing campaign. However, the case law developed by the ad hoc tribunals has shown that genocide is not only about killings, it has a wider scope, especially in the era when the crime has taken various subtle forms. The chambers of the ad hoc tribunals have deliberated on *mens rea* of genocide primarily focusing on the interpretation of *dolus specialis*; other acts of genocide such as conspiracy, incitement to commit genocide, complicity in genocide. It is just a short overview of the hard work being conducted by the ad hoc tribunals.

Though the ad hoc tribunals are planned to complete their work in 2010⁴, the precious experience has already influenced and will definitely further influence the work of the ICC⁵ serving as a permanent international criminal justice mechanism. The genocide case might be brought before the ICC in the future and thus the Court would need to look into the jurisprudence developed by its ‘predecessors’ adopting positive experience and avoiding the pitfalls. Although “the fact of genocide is as old as a humanity”⁶, current developments of the crime are necessary to be studied carefully, for the appropriate punishment for the crime of genocide is serving as the deterrent effect to criminals contemplating to commit the crime and thus preventing the occurrence of the crime in future. Successful prosecution for the crime of genocide would prevent perpetrators to commit such a crime and help to punish those responsible for the crime of genocide leaving no ground for impunity.

The work poses many important questions and dilemmas that are of the great concern to both academicians and practitioners in the field of the

⁴ ICTY Completion Strategy, S/2007/469; ICTR Completion Strategy, S/2007/323

⁵ The International Criminal Court was established in 2002 as a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression, although it cannot currently exercise jurisdiction over the crime of aggression. The court came into being on July 1, 2002 — the date its founding treaty, the Rome Statute of the International Criminal Court, entered into force — and it can only prosecute crimes committed on or after that date. As of October 2007, 105 states are members of the Court. A further 41 countries have signed but not ratified the Rome Statute. <www.icc-cpi.int>, retrieved on January 14, 2008

⁶ Jean-Paul Sartre, “On Genocide”, in Richard A. Falk, Gabriel Kolko and Robert Jay Lifton, eds., *Crimes of War*, New York: Random House, 1971, pp. 534-49, at 534.

international criminal law. What is the crime of genocide? What kind of the *actus reus* standard is to be applied while qualifying the crime of genocide? What does suffice the mental element of the crime? What principles and standards are to be relied upon while defining and qualifying conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide? How is the current legal development of the crime of genocide in jurisprudence of the ad hoc tribunals would possibly affect the practice of the ICC? Will the ICC being not bound by the case law developed by its predecessors (apart from the case law that have become the part of the international customary law) consider the developed jurisprudence of the ad hoc tribunals on the crime of genocide? Therefore, the study provides in depth analysis of many important legal issues covering the legal definition of the crime of genocide as formulated in the Genocide Convention, ICTY, ICTR Statutes, and the Rome Statute; the material element of the crime (*actus reus*), the mental element of the crime (*mens rea*), other punishable acts of genocide, including, *inter alia*, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity of genocide, applicability of concepts of the joint criminal enterprise (hereinafter – JCE) and command responsibility to the crime of genocide, and the impact of the developed concept of genocide (extensively discussed in the Chapter I and II of the thesis) on the further practice of the ICC.

By examining the legal toolkit and jurisprudence of the ad hoc tribunals, the work concludes with the main challenges and contradictions facing the judges of the ICC who will interpret and apply the law and national jurisdictions who agreed to be included within the jurisdiction of the Court.

Abbreviations

Doc.	Document
GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILR	International Law Reports
IMT	Trial of the Major War Criminals before the International Military Tribunal
JCE	Joint Criminal Enterprise
OTP	Office of the Prosecutor
Res.	Resolution
SC	Security Council
TWC	Trials of War Criminals
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
WCR	War Crimes Reports

1 Introduction

1.1 Purpose

The purpose of the study is to explore the current development of the concept of genocide in international law relying primarily on the jurisprudence developed by the ad hoc tribunals. The solid jurisprudence of the ad hoc tribunals with regard to the crime of genocide is examined in the light of its further possible impact on the practice of the ICC. Much has been written about the crime of genocide in international law, however, genocide belongs to the category of crimes often being used as a political tool and thus the purpose of the studies focuses on application of strict legal terms while qualifying the crime as genocide. The jurisprudence of the ad hoc tribunals will be critically analyzed and assessed and thus both positive developments and pitfalls to be avoided in future genocide cases within the jurisdiction of both the ad hoc tribunals and the ICC will be carefully discussed.

The study is aiming to be as a valuable piece of academic writing that could be used not only as the theoretical material on acquiring the knowledge on the current development of the crime of genocide, but also as an alarming indicator of the significant development of certain concepts in the international criminal law theory, including, *inter alia*, complicity, attempt to commit a crime, JCE, and command responsibility. Moreover, the work has its practical value, for the study could successfully serve as a reference guide on the case law of the crime of genocide for practitioners of the international criminal law. Many academic works have been written on the crime of genocide, and many conferences have been held on the topic, however, the major part of the academic writing is dedicated to the analysis of the existing case law on the crime of genocide developed within the framework of the ICTY and ICTR. Undoubtedly, there is a lack of research on the prospects of the prosecution for the crime of genocide in the ICC. Though the ad hoc tribunals and ICC were established under totally different circumstances, the harmonization of the international criminal justice system embedding a range of the international legal instruments, principles and developed jurisprudence is inevitable. The ICC being a *sui generis* criminal justice institution cannot drastically deviate from the principles developed by its predecessors, for a vast majority of those principles have become the part of customary law. Therefore, the work has been an effort to conduct the detailed critical analysis of the jurisprudence of the ad hoc tribunals in regard to the crime of genocide by defining the positive and negative developments within the legal framework of both tribunals and to project how those developments might possible influence the ICC while charging, prosecuting, and convicting for the crime of genocide.

The work would be an asset to the existing academic writing on this issue because it is a crucial line for conviction and acquittal for the crime of genocide in the ICTY, ICTR, and ICC to work with precise legal terms to prosecute successfully those responsible for such a grievous crime as genocide. The crime of genocide has been extensively studied in the light of existing case law, however, it is of vital importance to project the current developments of the concept of genocide on further practice of the ICC that is supposed to serve as the leading institution to define, refine and reshape international criminal law and international humanitarian law.

1.2 Methodology

The entire thesis has been written relying upon the critical analysis of international legal instruments seeking to punish those responsible for the crime of genocide at the international level including, *inter alia*, the Genocide Convention, ICTY Statute, ICTR Statute, and Rome Statute. However, the research material was not limited to specific sources thus extending to books, law reviews, articles and relevant case law of the ad hoc tribunals.

The analysis was conducted from the historical perspective as well. *Travaux preparatoires* of the Genocide Convention, legacy of the Nuremberg and Tokyo International Military Tribunals assisted significantly while outlining the concepts of the international criminal law applicable to the crime of genocide. The comparative analysis has played a crucial role while foreseeing the role of the current development of the concept of genocide within the legal framework of the ad hoc tribunals in further ICC proceedings on the crime of genocide.

The work has been greatly influenced by the information acquired during the research conducted in the ICTY by working for the *Popovic et. al* (Srebrenica) case⁷ in the OTP. Most of the references to the existing case law on the crime of genocide (Chapter I and Chapter II of the thesis) were drawn from the Prosecution's Pre-Trial and Final Briefs in the *Krstic* case⁸, *Blagojevic* case⁹, and *Popovic* case.

1.3 Delimitation

This study is limited to the analysis of the legal instruments and jurisprudence of the ad hoc tribunals and its possible further impact on the practice of the ICC in the light of the Rome Statute¹⁰ and ICC Elements of

⁷ *Popovic et al.* Case No. IT-05-88. Note: The case is at the final stage of the prosecution phase.

⁸ Trial Chamber, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33.

⁹ Trial Chamber, *Prosecutor v. Vidoje Blagojevic*, Case No. IT-02-60.

¹⁰ Rome Statute of the International Criminal Court, 17 July 1998.

Crimes¹¹. The case law of the ad hoc tribunals used in the thesis is up to date of January 14, 2008. For the purpose of illustration of complex concepts and theories in international criminal law closely related to the crime of genocide, *travaux préparatoires* of the Genocide Convention, Rome Statute, relevant UN documents and reports along with the case law of the Nuremberg and Tokyo International Military Tribunals is referred to as well.

1.4 Structure

The master thesis is comprised of three chapters that give a comprehensive and detailed analysis of the chosen topic and research related issues. The first and the most fundamental Chapter of the thesis provides a general understanding of the concept of genocide in international law, the main international instruments seeking to punish the crime of genocide, and the *corpus delicti* of the crime. The general understanding of the crime provided in the first Chapter gives a solid theoretical and practical ground to comprehend applicability of complex and debated concepts to the crime of genocide in international law, including *inter alia*, conspiracy, attempt to commit a crime, complicity, joint criminal enterprise and command responsibility. The legal findings provided in the previous Chapters allow projecting current developments of the crime of genocide in the jurisprudence of the ad hoc tribunals on the further possible practice of the ICC. The structure of the master thesis appears to be fully coherent with the title and purpose of conducted research.

Chapter I explores the concept of genocide in international law analyzing international efforts to prosecute the crime of genocide in Nuremberg and Tokyo trials, prosecution of genocide in the ICTY and ICTR. The overview of legal instruments providing for jurisdictional ground for the prosecution of the crime of genocide is briefly given. The Chapter examines the definition of genocide, reviewing the physical element (*actus reus*) and the mental element (*mens rea*) of an offense. The analysis of *actus reus* and *mens rea* of a crime of genocide is based on the developed jurisprudence of the ad hoc tribunals.

Chapter II explores other punishable acts of genocide, including conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide. The Chapter surveys also *travaux préparatoires* of the Genocide Convention, normative activity within the United Nations related to aforesaid crimes falling under the category of genocide. Notions of joint criminal enterprise and command responsibility as a pathway to prosecute and convict of genocide are also under review in this Chapter.

¹¹ Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

Chapter III is summarizing the jurisprudence of the ad hoc tribunals on the crime of genocide focusing on the key points in the developed concept of genocide. The case law of the ad hoc tribunals is projected on the possible further ICC practice. The Rome Statute and ICC Elements of Crimes are carefully reviewed so to analyze whether said legal instruments are in line with the current development of the concept of genocide in international law.

Concluding remarks summarize the entire work and define the key problems facing the ICC in charging, prosecuting and convicting those responsible for the crime of genocide. Although no genocide case has been brought before the ICC yet, it is of vital importance to predict possible further obstacles to be encountered by the ICC and avoid pitfalls of the ad hoc tribunals who have been pivotal players in shaping the case law on the crime of genocide.

2 The Concept of genocide in International Law

2.1 Drafting history of the crime of genocide

What is the crime of genocide? Where do the roots go? Although genocide traces its roots back to the ancient times, the crime of genocide was not named by its proper name often being substituted with the term ‘mass murder’. Genocide has been always heavily politicized and thus recognition of genocide as a crime under international law has been ‘uncomfortable’ for states since times immemorial. The development of the international human rights law was an inevitable process after the World War II being associated primarily with the Holocaust.

In the midst of the horrific acts committed by the barbaric Nazi Germany, the entire Europe was petrified while observing the dominance of the army, weaponry and outrageous acts committed by the Nazi; the inhumane treatment became the widespread practice along with the extermination and persecution. The then British Prime Minister Winston Churchill thundered in a BBC broadcast: “We are in the presence of the crime without a name”¹².

Eventually, the crime got its name – genocide. The term genocide was coined by Raphael Lemkin¹³ in 1944 in his book “*Axis Rule in Occupied Europe*”¹⁴ as the world was confronted with new phenomenon. The term was purposefully invented by the author and it obviously succeeded to connote something evil in its scope. The word derives from the Greek ‘*genos*’ (race or tribe) and Latin ‘*cide*’ (to kill) and thus it literally means ‘killing of a race’.

Lemkin defines genocide as “the destruction of a nation or of an ethnic group” that implies the existence of “a coordinated plan of different actions

¹² Samantha Power, “A Problem from Hell: America and the Age of Genocide”, Paperback Edition. Perennial, 2003.

¹³ Raphael Lemkin (June 24, 1900 – August 28, 1959) was a lawyer of Polish-Jewish descent. Before World War II, Lemkin was interested in the Armenian Genocide and campaigned in the League of Nations to ban what he called “barbarity” and “vandalism”. He is best known for his work against genocide. <en.wikipedia.org/wiki/Raphael_Lemkin>, Retrieved October 15, 2007

¹⁴ Raphael Lemkin. *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Lawbook Exchange, 2005 (Originally published as Lemkin, Raphael. Washington: Carnegie Endowment for International Peace, Division of International Law, 1944).

aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves”¹⁵.

Though the legal concept of genocide goes back to the World War II, genocide was, unfortunately, neglected in the judgments of International Military Tribunals. None of the accused in Nuremberg was convicted of genocide and the word ‘genocide’ did not even appear in the text of any judgment. However, the Prosecution in its indictment presented to the IMT tried to press the charges on the crime of genocide despite the omission in the text of the Charter of the IMT defining the crime as “extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, in particular Jews, Poles and Gypsies and others”¹⁶. The same is true to the Tokyo Tribunal, war criminals were not charged with the crime of genocide¹⁷. In order to describe the nature of committed crimes, other terms and expressions were used, namely, extermination, mass murder, annihilation of certain groups of individuals or populations.

One of the reasons that the crime of genocide was not included in the IMT Charter as the punishable act could be the Allies’ reluctance to deal with individualized victim groups due to the concept accepted by the Nuremberg Trial that it was individuals who were victims but not groups or nations per se. Another reason of the exclusion of genocide could be the fear of manipulation of trial by certain groups of victims as a revenge tool. The IMT attempted to approach the situation in a way to show the destruction of millions of human beings but not of particular ethnical, national or religious group¹⁸. One more logical explanation could be provided that is the very absence of the crime of genocide as the crime per se; it was of unique nature and it was impossible to argue that the crime had existed under the international law before.

Nevertheless, the very absence of the reference to the crime of genocide in the IMT Charter and jurisprudence developed by the International Military Tribunals undoubtedly influenced the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁹

The Preamble of the Draft Genocide Convention referred to the IMT and its judgments stating “having taken note of the fact that the IMT at Nuremberg in Its Judgments of September 30-1 October 1946 has punished under a

¹⁵ *Supra note 10*, p. 79

¹⁶ Indictment presented to the IMT, the USA, The French Republic; the UK and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al., 18 October 1945, p. 43.

¹⁷ R.J. Pritchard and S. Magbanua. *The Tokyo War Crimes. The complete transcripts of the proceedings of the IMT for the Far East*, NY/London: Garland, 1981, vol. 1.

¹⁸ Bloxham D. *Genocide on Trial: War Crimes Trials and Formation of History and Memory*, Oxford University Press, 2001.

¹⁹ The Genocide Convention, 78 UNTS 277, opened for signature on December 8, 1948 and entered into force on January 12, 1951.

different legal description certain persons who have committed acts similar to those which the Present Convention aims at punishing”. However, the aforesaid provision was removed in the original convention text, for genocide not to be equated with the crimes against humanity considered by the IMT Charter²⁰.

2.2 Legal instruments

2.2.1 Convention on the Prevention and Punishment of the Crime of Genocide

The prohibition of the crime of genocide rests on the conventional and customary rules of international law. The centerpiece of the law of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the UN General Assembly in 1948²¹. Moreover, the ICJ in its *Advisory Opinion on Reservations to the Convention on Genocide Case* emphasized that “the origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law”²². The outcome arising from the conception is that principles underlying the Convention are principles recognized by civilized nations as binding on states, even without any conventional obligation and thus the rules applying to the crime of genocide are part of customary rules of international law which have reached the level of *jus cogens*²³. The obligation of states to prevent and punish the crime of genocide is *erga omnes* in its nature²⁴.

Regardless the extensive prohibition of the crime of genocide both under conventional and customary rules of international law, the Genocide Convention has not been applied for over forty years due to the principle of sovereignty of states and non-existence of an international criminal court or tribunal having the jurisdiction over the crime of genocide.

2.2.2 Statute of the ICTY, Statute of the ICTR, and developed case law

The establishment of the ICTY²⁵ and ICTR²⁶ under the Chapter VII of the UN Charter and the development of the case law of these ad hoc tribunals

²⁰ Official Record of the 3 Session of the GA, Part I, 6th Committee, Summary records of the Meetings, 21 September – 10 December 1958, UN Doc. A/C.6/SR.109

²¹ The number of states that have ratified the Convention is currently 137. <www.unhchr.ch>, retrieved January 14, 2008.

²² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, 1951, ICJ Reports 16, p. 23

²³ *Ibid.*

²⁴ *Ibid.* See also: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Bosnia-Herzegovina v. Yugoslavia* (July 11, 1996), ICJ Reports 595, para. 31.

²⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), of 25 May 1993, UN Doc. S/RES/827.

have demonstrated the applicability and enforceability of the rules governing the crime of genocide at the international level.

The international community has witnessed some landmark cases on the crime of genocide. Charges of genocide and punishment of individuals responsible for this grievous crime have been imposed effectively showing that there is no ground for impunity in future. However, there has been a large scale of condemnation of the international community that genocide has not captured enough attention to prevent and punish responsible perpetrators.

The latest developments of international criminal law and its allegiance to evolving international human rights law look promising enough that grotesque human rights violations will no longer be tolerated by the international community.

The practice of the ICTY and ICTR has contributed significantly to the development of the substantive body of the international criminal law on the crime of genocide. The said ad hoc tribunals, having the jurisdiction over the crime of genocide under their respective statutes, have interpreted and applied the provisions of the Genocide Convention, for the elements of the crime of genocide were definitely very vague and needed to be construed.

2.2.3 Rome Statute of the International Criminal Court.

The treaty-based approach was successfully deployed by the international community in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court when establishing the very Court. The Statute of the ICC²⁷ was successfully adopted by a majority vote of 120 States in favor, 7 states against and 21 states in abstention²⁸.

Pursuant to the Article 5 of the Rome Statute, the Court exercises its jurisdiction with respect to the crime of genocide, as well as crimes against humanity, war crimes, and the crime of aggression, being limited to the most serious crimes of concern to the international community as a whole.

²⁶ Statute of the International Criminal Tribunal for Rwanda (ICTR), of 8 November 1994, UN Doc. S/RES/955.

²⁷ Rome Statute of the International Criminal Court (ICC), of 17 July 1998, UN Doc. A/CONF.183/9.

²⁸ <www.un.org/icc>, retrieved on January 14, 2008 .

2.3 Legal definition of genocide

The definition of genocide, as provided in Article 2 (2) of the ICTR Statute, Article 4 (2) of the ICTY Statute, and Article 6 of the Rome Statute, cites, *verbatim*, Articles 2 of the Genocide 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 ICTR Trial Chamber in its *Musema* Judgment emphasized that for the crime of genocide to be established, it is necessary:

- a) firstly, that one of the acts listed under Article 2(2) of the ICTR Statute be committed;
- b) secondly, that such an act be committed against a national, ethnical, racial or religious group, specifically targeted as such;
- c) thirdly, that the “act be committed with the intent to destroy, in whole or in part, the targeted group²⁹”.

The offence of genocide is comprised of two components. First of all, the conviction of genocide requires the *actus reus* or material element of the offence, consisting of one or more of the acts enumerated in the Genocide Convention, ICTY Statute, ICTR Statute or Rome Statute. Secondly, the conviction of genocide requires the *mens rea* of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.³⁰

2.4 The material element (*actus reus*) of the crime of genocide

The material element of the offence (*actus reus*) is constituted by one or several acts enumerated in article 2 of the Genocide Convention, Article 2(2) of the ICTR Statute, Article 4(2) of the ICTY Statute or Article 6 of the Rome Statute. For the purpose of better understanding of the inclusion of each constitutive genocidal act in the Genocide Convention, the analysis of

²⁹ *Musema* Trial Judgment, para. 154

³⁰ *Krstic* Trial Judgment, para.542. *See also: Jelusic* Trial Judgment, para.62.

the *travaux préparatoires* of the Convention focusing primarily on the divergence of opinions towards some debated legal concepts has been conducted. Furthermore, the thorough overview of *actus reus* of each act constituting the crime of genocide relying primarily on the case law developed by the ad hoc tribunals is provided.

2.4.1 Killing members of the group

“Killing members of the group” is prohibited by the Genocide Convention and it constitutes the first mentioned punishable act under the Convention. The Draft Convention on the Crime of Genocide of the U.N Secretary General (hereinafter – Secretary General’s Draft) prohibits “causing the death of members of a group or injuring their health or physical integrity by group massacres or individual executions”³¹. The Report of the Ad hoc Committee on Genocide to the Economic and Social Council (hereinafter – Ad hoc Committee Draft) modifies the said provision and simplifies it penalizing ‘killing members of the group’³². The very same provision is incorporated into the Report of the Sixth Committee (hereinafter – Sixth Committee Draft). Mr. Maktos, the representative of the United States, defined that the term ‘killing’ was chosen by the Ad hoc Committee on Genocide to the Economic and Social Council because “the intention was an important factor and the destruction of a fraction of the group would constitute genocide provided that the intention was to destroy the group totally”³³ and thus unpremeditated killing cannot be recognized as an act of genocide.

Accordingly, Article 2 (2) of the ICTR Statute and article 4 (2) of the ICTY Statute comprise three specific elements of ‘killing members of the group’:

- a) killing one or more persons;
- b) such person or persons belonged to a particular national, ethnical, racial or religious group;
- c) the intent from the offender’s side to kill the person or persons³⁴.

The ICTR Chamber in its *Akayesu* Judgment was concerned that ‘killing’ as enumerated in the Genocide Convention and the ICTR Statute itself is broader than the crime of murder due to the fact that ‘killing’ includes all forms of homicide. The term ‘killing’ corresponds to the French word ‘*meurtre*’. The word ‘killing’ used in the English version is very general as it could include both intentional and unintentional homicides. The term

³¹ Draft Convention on the Crime of Genocide, Commentary, U.N Secretary-General, U.N Doc. E/447 (1947), [hereinafter Secretary-General’s Comment] Art. I(II)(1)(a), at 6.

³² 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, 7 U.N ESCOR, Supp. No 6, UN Doc E/794 (1948), [hereinafter Ad hoc Committee Report], Art. II (1), at 5.

³³ U.N GAOR 6th Comm., 3d Sess., 81 mtg., at 177 (1948). *Note*: Response of Mr. Maktos to the confusion over the meaning in French text.

³⁴ Those constitutive elements of the crime were reflected in the ICC Elements of Crimes, Article 6(a), however, not directly formulated in the text of the ICTY and ICTR Statute.

'*meurtre*' in the French version is more precise and under the French Penal Code it covers all forms of voluntary killing³⁵. The crime of '*meurtre*' implies more than '*assassinat*'. The '*assassinat*' covers only premeditated murder³⁶.

The reference to the members of the group could be interpreted in a way that an act must involve the killing of at least two persons. However, the term may apply to a single act of killing. The working group on Elements of Crimes of the Preparatory Commission for the International Criminal Court took the reference to members of the group meaning 'one or more persons'³⁷. It is reasonable to refer the quantitative dimension of genocide rather to *mens rea* involving the intentional destruction of a group 'in whole or in part' than to *actus reus*. The said issue would be further analyzed in the sub-chapter on the mental element of the crime of genocide.

Taking into consideration the presumption of innocence of the accused and general principles of the international law, the ICTR Chamber in its *Akayesu* Trial Judgment construes the Article 2(2)(a) of the ICTR Statute in accordance with the definition of murder given in the Penal Code of Rwanda that defines '*meurtre*' (killing) as the homicide committed with the intent to cause death³⁸. The interpretation of the ICTR is supported by the *travaux préparatoires* of the Genocide Convention where premeditation as a necessary condition for the crime of genocide was heavily criticized and rejected due to the fact that the very crime of genocide by its constitutive physical elements necessarily entails premeditation³⁹.

2.4.2 Causing serious bodily or mental harm to members of the group

The second provision of the Genocide Convention recognizes "causing serious bodily or mental harm to members of the group" as a constitutive act of the crime of genocide. The said provision provoked a heated debate both in U.N Secretary-General Office and the Ad hoc Committee while preparing the Draft Convention on Genocide questioning what exactly referred to 'causing serious bodily or mental harm'.

The Secretariat's Draft prohibits "causing the death of members of a group or injuring their health or physical integrity by mutilations and biological experiments imposed for other than curative purposes"⁴⁰. The Ad hoc Committee's Draft provides that "genocide impairs the physical integrity of

³⁵ Article 221-1 of the French Penal Code.

³⁶ *Akayesu* Trial Judgment, para.500.

³⁷ Discussion Paper Proposed by the Coordinator, Article 6: the Crime of Genocide, UN Doc. PCNICC/1999/WGEC/RT.1. See: Chapter IV, 4.3.1 'Genocide by killing in the ICC Elements of Crimes'.

³⁸ *Akayesu* Trial Judgment, para. 501.

³⁹ U.N. GAOR 6th Comm., 3rd Sess., 73d mtg., at 90 (1948).

⁴⁰ Secretary-General's Comment, *supra note* 27, art I(II)(1)(c), at 5.

members of the group”⁴¹. The Sixth Committee modifies aforesaid provision including both psychic and physical pain and thus the provision is formulated in a manner to prohibit serious bodily or mental harm to members of the group⁴².

The term ‘serious bodily or mental harm’ is not defined by either Statutes of the ad hoc tribunals. By its terms, article 4(2)(b) ICTY and article 2 (2)(b) of the ICTR are comprised of three elements as follows:

- 1) causing serious bodily or mental harm to one or more persons;
- 2) such person or persons belong to a particular national, ethnical, racial or religious group;
- 3) the intent from the offender’s side to cause harm to the person or persons.

The interpretation of ‘causing serious bodily or mental harm’ is provided in the ICC Elements of Crimes that was drawn from the jurisprudence of the ad hoc tribunals. The impact of the case law of the ad hoc tribunals with regard to every constitutive genocidal act on the further ICC practice is provided in the Chapter IV of the work.

The ICTY Chamber in its *Krstic* Trial Judgment construes *actus reus* of ‘serious bodily or mental harm’ as follows:

Serious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case-by-case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgment, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury⁴³.

The Trial Chamber in its *Krstic* Judgment ruled that “wounds and trauma suffered by those few individuals who managed to survive mass executions after the fall of Srebrenica enclave”⁴⁴ contributed to the serious bodily and mental harm within the meaning of the article 4(2)(b) of the ICTY Statute. Provided interpretation of the term ‘causing serious bodily and mental harm’ was not challenged on appeal.

⁴¹ Ad hoc Committee Report, *supra* note 28, art. II(2), at 5.

⁴² Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee, U.N. GAOR, 3rd Sess., U.N. Doc. A/760 (1948) [hereinafter Sixth Committee Report], art II(b), at 9.

⁴³ *Krstic* Trial Judgment, para.51., See also *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, 21 May 1999, (*Kayishema and Ruzindana* Trial Judgment), para.109.

⁴⁴ *Krstic* Trial Judgment, para. 514.

2.4.2.1 Rape and Sexual Violence as Genocide

Krstic Trial Judgment is in line with the *Akayesu* judgment recognizing that “rape and sexual violence may constitute genocide on both a physical and mental level”⁴⁵. The significant value of the finding lies in the fact that none of the instruments of international criminal law define the crime of rape as an act of genocide.

The discussion on the crime of rape is provided in the sub-chapter on ‘causing serious bodily or mental harm to members of the group’ due to the fact that rape and sexual violence have been recognized as possible constitutive elements of ‘causing serious bodily or mental harm’ in the jurisprudence of both ad hoc tribunals.

However, many problematic issues arise while defining rape as an act of genocide: namely, the definition of the rape per se in the international criminal law, *i.e.* whether the intent to destroy the group ‘in part’ requires the intent to destroy a substantial part, applicability of the concept of the JCE for rape as a genocidal act.

The study is also exploring developed definition of the crime of rape in the international criminal law with regard to the crime of genocide. Due to the space limitations of the thesis, the analysis of the crime of rape is presented to show how the developed definition of the crime of rape and sexual violence satisfies the legal criteria of the crime of genocide.

Summarizing the jurisprudence of the ad hoc tribunals on the crime of rape, one can undoubtedly conclude that there is a lack of unanimity on the definition of rape itself. Two concepts were developed by the ad hoc tribunals in totally different dimensions. The first concept was devised by the ICTR in its *Akayesu* case focusing on the violence element and offering the definition of rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”⁴⁶. However, the ICTR in its *Akayesu* case unreasonably stretched the definition of rape insisting that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”⁴⁷. The ICTY Chamber in the *Celibici* case agreed with the definition of a rape developed by the ICTR in its *Akayesu* case considering the expression of violence as the core element of the crime of rape.

Furundzija case was a landmark case, for it approached the concept of rape in the international criminal law applying the principles usually used in domestic criminal law and hence, it determined the definition of rape with regard to *actus reus* as follows:

i) the sexual penetration, however, slight:

⁴⁵ *Krstic* Trial Judgment, para. 514.

⁴⁶ *Akayesu* Trial Judgment, paras 598 and 688.

⁴⁷ *Akayesu* Trial Judgment, para. 688.

- a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- b) of the mouth of the victim by the penis of the perpetrator;

ii) by coercion or force or threat of force against the victim or a third person⁴⁸.

The definition of rape was followed by the ICTY in its *Kunarac* case and it expanded on “other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim” besides the factors of “coercion or force or threat of force against the victim or a third person” mentioned in *Furundzija*⁴⁹.

The second approach has contributed significantly to the definition of rape in the international criminal law, for it furnished the existing definition with specific legal characteristics of *actus reus*. The judges in *Furundzija* and *Kunarac* incorporated ‘forced oral penetration’⁵⁰ into the definition of rape, even though as a practice shows only vaginal and anal penetration is usually regarded as a punishable act under domestic criminal law.

Another debate in the analysis of rape as genocidal act concerns the minimum number of members of a protected group, which is intended for the destruction. As long as the destruction is directed against the group ‘in whole’, no questions arise. However, the term ‘in part’ encounters the issue of whether there is a minimum number of the members of the group to be destroyed to meet the criteria of genocide. There is no requirement that it has to be shown that the accused intended to destroy the group ‘in part’ by raping a substantial part. Whether targeted group for the destruction in part is ‘substantial’ should be rather referred to the genocidal intent of the perpetrator. Once the genocidal intent is proved, the manner of destruction does not matter as the genocide could be perpetrated by a combination of acts, namely killings, torture, rapes etc⁵¹.

The problematic issues arise while attaching the complicity along with other forms of criminal participation such as joint criminal responsibility to the crime of rape. As a matter of fact, it is proven before chambers of the ad hoc tribunals that the accused perpetrated, ordered, instigated, aided or abetted the crime of rape. Nevertheless, the concept of the JCE might be a useful tool in the prosecution of rape, notwithstanding the absence of apparent evidence that the accused perpetrated or assisted substantially to the commission of the crime. In *Akayesu* case, the accused was convicted of the crime of rape, as there was enough evidence proving that he had been clearly encouraging and ordering assailants to rape Tutsi women⁵². On the contrary, in *Kajelijeli* case, the ICTR Trial Chamber did not have enough

⁴⁸ *Furundzija* Trial Judgment, para.185.

⁴⁹ *Kunarac* Trial Judgment, para. 438.

⁵⁰ *Furundzija* Trial Judgment, para. 182 and 184.

⁵¹ Chile Eboe-Osuji, ‘Rape as Genocide: Some Questions Arising’, *Journal of Genocide Research* (2007), 9(2), June, 251-273, at 265.

⁵² *Akayesu* Trial Judgment, paras. 422 and 452.

evidence to support that the accused was guilty of rape, as the accused did not specifically order the assailants to commit the collateral crime of rape⁵³.

The prosecution both in *Akayesu* and *Kajelijeli* case failed to plea joint criminal enterprise in respective indictments and hence, the trial chambers have not expressed any opinion on the applicability of the joint criminal enterprise to the crime of rape.

The inclusion of rape and sexual violence as a genocidal act has been heavily criticized. The omission of that crime as genocide would ignore the use of rape and sexual violence as a tool of humiliation directed against victimized groups solely on the grounds of their ethnicity. *Akayesu* Trial Chamber with regard to counts of rape and sexual violence in the indictment emphasized:

Rape and sexual violence ...constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victim and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.

The Trial Chamber succeeded to infer the genocidal context of rape and sexual violence towards Tutsi women in the light of presented evidence before the Tribunal and respectively concluded:

In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole⁵⁴.

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

Article II (c) of the Genocide Convention prohibits “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”. The said paragraph is based on the provisions of Secretary-General’s Draft specifying that the crime of genocide includes “causing the death of members of a group or injuring their health or physical integrity by subjection to conditions of life which by

⁵³ Article 6 (1) and Article 7(1), respectively, of the ICTR and ICTY Statutes.

⁵⁴ *Akayesu* Trial Judgment, paras. 685-695.

lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals”⁵⁵. The Commentary provides “when members of a group of human beings are placed in concentration camps where the annual death rate is thirty to forty per cent, there can be no doubt that there is intention to commit genocide”⁵⁶.

On the contrary, Ad hoc Committee’s Draft does not provide the conditions ‘likely to result in death’. However, it defines that genocide involves ‘subjecting members of a group to measures or conditions of life aimed at causing their deaths’ and thus the conditions do not encompass those that are intended to weaken or enfeeble⁵⁷.

The Secretariat’s and Ad hoc Committee’s Drafts form the basis of the Article adopted by the Sixth Committee recognizing as the genocidal act ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’⁵⁸.

The amendment suggested by Uganda to include conditions, which result in ‘disease or weakening of members of the group’, was rejected⁵⁹.

It is necessary to note that the term ‘deliberate’ attached to the aforesaid provision was construed to refer rather to intentional creation of conditions of life than to intent to destroy a group or groups⁶⁰.

The ICTR Trial Chamber in its *Akayesu* Trial construed the expression “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” as “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction”⁶¹.

In the light of jurisprudence developed by the ad hoc tribunals, a genocidal act of ‘deliberately imposing conditions of life calculated to bring about the group’s destruction’ does not require the proof of result. It means that intended conditions must be calculated to bring about destruction, however, whether they do result or not result in the destruction, lies out of the legal framework of genocidal act defined in the said provision. If the destruction is actually achieved, the act would be qualified under genocidal acts of

⁵⁵ Secretary-General’s Comment, *supra note 27*, art. I (II)(1)(b), at 6.

⁵⁶ Secretary-General’s Comment, *supra note 27*, at 25.

⁵⁷ Ad hoc Committee Report, *supra note 28*, art II (3), at 5 and at 11 (*Mr. Maktos*)

⁵⁸ Sixth Committee Report, *supra note 37*, art II (c), at 9. See: UN GAOR 6th Comm., 3rd Sess., 82 mtg., at 183 (1948)

⁵⁹ *Ibid.* 81st mtg, at 180.

⁶⁰ *Ibid.*, 82 mtg, at 182.

⁶¹ *Akayesu* Trial Judgement, paras. 505-506. Destruction must be material, either physical or biological. See also *Brdanin* Trial Judgment, para. 694, *Krstic* Appeal Judgement, para.25, Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, UN Doc.A/51/10, pp.90-91.

‘killing members of the group’ or ‘causing serious bodily or mental harm to one or more persons’ discussed in the previous sub-chapters of the Chapter.

It is quite interesting to look at the oral arguments of Yugoslavia before the ICJ in the case of *Yugoslavia v. Belgium* where Yugoslavia attempted to press genocide charges against NATO states motivating it by the fact of “continued bombing of the whole territory of the state, pollution of soil, air and water, destroying the economy of the country, contaminating the environment which depleted uranium” contributed to causing “conditions of life on the Yugoslav nation calculated to bring about its physical destruction”⁶².

The provision of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” seeks to punish methods of destruction apart from direct killings, including, *inter alia*, creation of circumstances that would lead to a slow death.

The jurisprudence of the ICTY and ICTR have established that such acts as the systematic expulsion of members of the group from their homes⁶³, the lack of proper housing⁶⁴, subjection to a subsistence diet⁶⁵, denial of proper clothing, hygiene and medical care⁶⁶ contribute to the conditions of life calculated to bring about physical destruction of a group in whole or in part.

2.4.4 Imposing measures intended to prevent births within the group

Article II (d) of the Genocide Convention embodies “imposing measures intended to prevent births within the group”. The Secretary-General’s Draft provides that the said genocidal act encompasses “restricting births by sterilization and/or compulsory abortion, segregation of the sexes or obstacles to marriage”⁶⁷. The Commentary is referring to the ‘biological’ genocide that is aimed at the extinction of a group of human beings by systematic physical, legal or social restrictions on births without which the group cannot survive⁶⁸.

Nevertheless, the Ad hoc Committee’s Draft does not refer to the biological genocide. It refers to “imposing measures intended to prevent births within

⁶² Legality of Use of Force (*Yugoslavia v. Belgium et al.*), Verbatim Record, 10 May 1999 (Rodoljub Etinski)

⁶³ *Brdanin* Trial Judgment, para.691, Prosecutor v. Rutaganda, Judgment and Sentence, para.52. Also here, pasted!

⁶⁴ *Brdanin* Trial Judgment, para.691, Kayishema and Ruzindana Trial Judgment, paras.114-116.

⁶⁵ *Brdanin* Trial Judgment, para.691, Rutaganda Judgment, para.52

⁶⁶ *Brdanin* Trial Judgment, para.691, *Kayishema and Ruzindana* Trial Judgment, paras.114-116.

⁶⁷ Secretary-General’s Comment, *supra note 27*, art. I (II) (2), at 6.

⁶⁸ *Ibid.*, at 26.

the group”. This provision is interpreted broadly including castration, compulsory abortion and the segregation of sexes.

The interpretation of the Ad hoc Committee was incorporated into the Sixth Committee’s Draft that is comprehensive enough to include sterilization and forced abortion.

Accordingly, the article 4(2)(d) of the ICTY Statute and article 2(2)(d) of the ICTR Statute comprise three elements:

- 1) measures must be imposed on one or more members of a group;
- 2) measures must be imposed intentionally;
- 3) measures must be intended to prevent births within the group.

The ICTR Trial Chamber in its *Akayesu* Judgment ruled that measures can be both physical and mental, including, *inter alia*, sexual mutilations, sterilization, forced birth control, separation of sexes, and prohibition of marriages⁶⁹. The measures need to be intended to prevent births. An example of such measures could be forced separation of the males and females⁷⁰.

Nevertheless, the measures intended to prevent births within a group should be interpreted in the light of the historical, social and cultural environment of the group. In its *Akayesu* Judgment, the ICTR Chamber defined rape as a measure intended to prevent birth, when “a woman of the 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”⁷¹.

In the light of the evidentiary circumstances, the ICTR convicted an accused of “causing serious bodily and mental harm” but not of “imposing measures intended to prevent births within the group”. It was recognized that the acts of rape and sexual violence were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation and thus rapes resulted in physical and psychological destruction of Tutsi women and the Tutsi group as a whole⁷².

2.4.5 Forcibly transferring children of the group to another group

Article II (e) of the Genocide Convention penalizes “forcibly transferring children of the group to another group”. The Secretary General’s Draft

⁶⁹ *Akayesu* Trial Judgment, para. 507, *Musema* Trial Judgment, para. 158, *Rutaganda* Trial Judgment, para. 53, *Kayishema and Ruzindana* Trial Judgment, para. 117

⁷⁰ *Rutaganda* Trial Judgment, para. 507.

⁷¹ *Akayesu* Trial Judgment, para. 507.

⁷² *Akayesu* Trial Judgment, para. 731.

contains the provision of “destroying the specific characteristics of the group by forced transfer of children to another human group”⁷³. The Commentary emphasizes that the forced separation of children from their parents entails “forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents” and as a result, the process of separation “tends to bring about the disappearance of the group as a cultural unit in a relatively short time”⁷⁴.

The Ad hoc Committee’s Draft does not refer the forcible transfer of children of the group to another group to the form of physical genocide. However, the forcible transfer of children is encompassed within prohibition on cultural genocide⁷⁵. The latter is defined as an act causing the members of a group to disappear and abolishing specific traits of the group⁷⁶.

The representative of Venezuela during the Sixth Committee proceedings reasonably stated that “if the intent of the transfer had been the destruction of the group, a crime of genocide would undoubtedly have been committed”⁷⁷.

The ICTR Chamber expressed its opinion in the *Akayesu* case that the objective of forcibly transferring children of the group to another group is “not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another”⁷⁸.

It is absolutely necessary to mention that none of the accused has been ever convicted of the forcible transfer of children by both ad hoc tribunals.

Antonio Cassese⁷⁹ criticized the ICTR for making law beyond the facts wisely suggesting that the Court “should refrain from expressing opinions which are beside the question actually to be decided”⁸⁰.

2.4.6 Is the list of crimes constituting the crime of genocide exhaustive?

The drafters of the Genocide Convention agree on the fact that the list of crimes enumerated in the Article II of the Genocide Convention is exhaustive but, however, not limited in its scope⁸¹.

⁷³ Secretary-General’s Comment, *supra note 27*, art. I(II)(3)(a), at 6.

⁷⁴ Secretary-General’s Comment, *supra note 27* at 27.

⁷⁵ Ad hoc Committee Report, *supra note 28*, at 27.

⁷⁶ *Ibid.*, Observations at 6-7.

⁷⁷ Sixth Committee Report, *supra note 37*, 82 mtg., at 195.

⁷⁸ *Akayesu* Trial Judgment, para.509. See also: *Musema* Trial Judgment, para 159, *Rutaganda* Trial Judgment, para. 54; *Kayishema and Ruzindana* Trial Judgment, para. 118

⁷⁹ Italian jurist, former President of United Nations Criminal Tribunal for the Former Yugoslavia, Chairperson for the United Nations Commission of Inquiry for Darfur.

⁸⁰ Cassese, Antonio, ‘International Criminal Law’, Oxford University Press, 2003.

Rape, torture, forced disappearances can be regarded as the genocidal offences if they meet the requirements of, for example, “killing”, “causing serious bodily or mental harm to members the group” or “imposing measures intended to prevent births within the group”.

Aforesaid crimes could be regarded sooner or later as the part of international customary law as discrete categories of underlying offences⁸².

2.5 The *mens rea* of the crime of genocide

Mental element or *mens rea* of the crime of genocide comprises two components:

- 1) knowledge;
- 2) *dolus specialis*.

2.5.1 Knowledge

‘Knowledge’ as the constitutive element of *mens rea* means awareness that a circumstance exists or a consequence will occur in the ordinary course of events and thus accused must have knowledge of the circumstances of the crime⁸³. The constitutive element ‘knowledge’ provided in the Rome Statute is analyzed in the Chapter IV of the work.

Some scholars argue that genocide could be hardly committed by a single individual, for this serious international crime requires a particular plan, even though the plan is not mentioned as a separate characteristic of the crime in the Genocide Convention⁸⁴.

The practice developed by the ad hoc tribunals supports the aforementioned requirement of a plan. In the *Jelisić* case the opinion was expressed by the Trial Chamber that “while it is theoretically possible for genocide to be committed by an individual acting in the absence of some more general plan, in practice it would be impossible to make proof of such a situation”⁸⁵. The ICTY in its further jurisprudence, in particular, in the Ruling on the Sufficiency of Evidence in the case of *Karadžić* and *Mladić*, confirms the

⁸¹ N. Robinson, *The Genocide Convention: A commentary*. New York: Institute of Jewish Affairs, 1960, pp. 57, p. 64.

⁸² Mettraux, Guenael, *International Crimes and the Ad hoc Tribunals*, Oxford: Oxford University press, 2005 p. 244.

⁸³ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Art. 30.

⁸⁴ Schabas William. *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press, 2000. *See also*: Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for World Peace, 1944, p. 79.

⁸⁵ *Jelisić* Trial Judgment, para. 655.

requirement of a plan as an evidentiary matter, though it is not explicitly part of the definition within the framework of the Genocide Convention⁸⁶.

In *Kayishema and Ruzindana*, the ICTR ruled that “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without a plan or organization”⁸⁷. Moreover, it emphasized that “the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide”⁸⁸.

The extent of the knowledge of the details of a plan or a policy to carry out the genocide would vary depending on the position of the perpetrator in the governmental hierarchy or military command structure. However, a subordinate who actually carried the genocidal plan cannot be exempted from the responsibility simply because he did not possess the same degree of knowledge regarding the overall plan as his superiors⁸⁹. Though individuals do not necessarily need to participate in devising the genocidal plan, the mere fact of the commitment of the acts of genocide with knowledge of the plan is enough for the requirements of the Genocide Convention to be met⁹⁰.

The accused must have the knowledge of the consequences of his/her act in the ordinary course of events and thus if the genocidal act is killing, the logical consequence will be death and the accused must be aware that this will be the result or at least be reckless to the occurrence of the act in general.

In the case of the direct and public indictment to genocide and conspiracy to commit genocide, the consequences are not the part of the *corpus delicti* and hence, no proof of knowledge of the consequences is required.

The ICTR in its *Akayesu* Judgment defined that “the offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group”. This legal construction of *mens rea* defined by the ICTR is referred often as the indirect intent (*dolus eventualis*) in the criminal law theory.

International criminal law has adopted the interpretation of the term ‘malice’ used at the common law system. However, there is a strong danger of misunderstanding and confusion when some categories applied in one or another legal system are transferred into the context of international law. In most common law jurisdictions, the *mens rea* requirement of murder is

⁸⁶ *Prosecutor v. Karadzic and Mladic*, Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.

⁸⁷ *Kayishema and Ruzindana* Trial Judgment, para. 94.

⁸⁸ *Kayishema and Ruzindana* Trial Judgment, para. 276.

⁸⁹ Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May – 26 July 1996, note 13 above, p. 90.

⁹⁰ UN Doc. PCNICC/1999/WGEC/DP.4, p. 4.

satisfied “where the accused is aware of the likelihood or probability of causing death or is reckless as to the causing of death”⁹¹.

The civil law concept of *dolus* describes the voluntariness of an act and incorporates both direct and indirect intention. Under the theory of indirect intention (*dolus eventualis*), should an accused engage in life-endangering behavior, his killing is deemed intentional if he ‘makes peace’ with the likelihood of death. In many civil law jurisdictions the foreseeability of death is relevant and the possibility that death will occur is generally sufficient to fulfill the requisite intention to kill⁹². Currently, the ad hoc tribunals are applying the concept of *dolus eventualis* shifting towards reception of some theories developed in the continental legal system. The application of the *dolus eventualis* has been challenged before the ICTY, however, the *Stakic* Appeals Chamber concluded that the application of *dolus eventualis* does not violate the principles of *nullum crimen sine lege* and *in dubio pro reo*⁹³. The concept of *dolus eventualis* has potential prospects in international criminal law but it is still doubtful whether it could be applicable to determine threshold of knowledge towards the crime of genocide due to the peculiarity of the mental element of the crime of genocide singling it out from war crimes and crimes against humanity.

The degree of knowledge of consequences is a delicate issue and it provided a heated debate during the work of the Preparatory Commission for the ICC. It was argued by Professor Schabas that the term ‘should have known’ usually refers to the crimes of negligence and as a result, it cannot be applicable to the crime of genocide. Therefore, the term ‘recklessness’ should be differentiated from the term ‘willfulness’, whilst excluding mere negligence from its scope⁹⁴. The opinion of Professor Schabas is very reasonable on the inappropriateness of the term ‘should have known’ in regard to the crime of genocide, for it is an indicator of *dolus eventualis*.

Some scholars argue that criminal knowledge can also be determined in cases of so called ‘willful blindness’ that refers to the situation when an individual deliberately fails to inquire the consequences of the certain behavior and where the person knows that such inquiry should be undertaken⁹⁵.

⁹¹ *Delalic* Trial Judgment, para. 434.

⁹² *Ibid.* 434.

⁹³ *Stakic* Appeal Judgment, para. 103.

⁹⁴ *Supra* note 80, p. 212.

⁹⁵ Glanville Williams, *Criminal Law: The General Part*, 2nd ed., London: Stevens & Sons Ltd., 1961, p. 159.

2.5.2 Intent (*dolus specialis*) to destroy, in whole or in part, a national, ethnical, racial and religious group

The crime as a perilous illegal to society act is an organic combination of interrelated and interdependent elements of a crime (*actus reus* and *mens rea*). To constitute the crime of genocide, an act must necessarily be comprised of the intent to destroy, in whole or in part, a national, ethnical, racial and religious group, as such. This very specific requirement of the crime of genocide distinguishes it from war crimes and crimes against humanity. Even if committed act appears to have all the attributes of the crime of genocide but the intent is absent, the accused cannot be charged with the crime of genocide and thus this act even resulting in the destruction of the group does not meet the specific intent requirement. Nevertheless, the act will remain punishable being qualified either as the crime against humanity or a crime under domestic criminal law.

The formulation of the crime of genocide in the Genocide Convention clearly shows that the genocide is a crime of intent. Article 2 of the Genocide Convention provides a clear description of the intent, namely, “to destroy, in whole or in part, a national, ethnical, racial or religious group as such”. The reference to the intent means that the prosecution must go beyond the reasonable doubt establishing that the offender suffices requisite mental state.

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is absolutely required as a constitutive element of certain offences and demands that the perpetrator has the clear intent to cause the offence charged⁹⁶. *Akayesu* Trial Chamber referred to various academic works while devising special intent in the international criminal law and it showed its adherence to the approach defining special intent as a key element of an intentional offence characterized by a psychological relationship between the physical result and the mental state of the perpetrator⁹⁷.

By its terms, the required “intent to destroy, in whole or in a part, a national, ethnical, racial and religious group”, as such requires three specific components:

- 1) degree or quality of the requisite mental state;
- 2) scope of the requisite mental state;
- 3) the term ‘in whole or in part’.

⁹⁶ *Akayesu* Trial Judgment, para. 518

⁹⁷ See: Roger Merle et André Vitu, ”Traité de droit criminel”, Cujas, 1984, (first edition, 1967), p.723 et seg.

2.5.2.1 Degree or quality of the requisite mental state

The approach taken towards the degree or quality of the requisite mental state applied by the ICTY in the *Krstic* case is a good standpoint for the evaluation of the culpability of a perpetrator for a crime of genocide. The Trial Chamber in its *Krstic* case consents that a definition of genocidal intent encompasses acts “committed with the goal of destroying all or part of the group”⁹⁸. However, following the argument of the *Krstic* Trial Chamber, the goal of destruction of a group rather might be formulated at some later point during the implementation of a military operation whose primary objective was totally unrelated to the fate of the group and thus genocidal acts need not to be premeditated over a long period⁹⁹.

2.5.2.2 Scope of the requisite mental state: “a ... group, as such”

Both ad hoc tribunals in their Trial Judgments in *Krstic*¹⁰⁰, *Akayesu*¹⁰¹, and *Kayishema and Ruzindana*¹⁰² have adopted the interpretation of a ‘group as such’, set forth in the ILC Draft Code of Crimes:

The group itself is the ultimate target or intended victim of this type of massive criminal conduct. [...] the intention must be to destroy the group ‘as such’, meaning as separate and distinct entity¹⁰³.

There are four types of victimized groups, namely national, ethnical, racial or religious groups. As it is defined by the ICTR “a national group is a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”¹⁰⁴.

An ethnic group is generally defined as a group whose members share a common language or culture¹⁰⁵.

The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors¹⁰⁶.

The religious group is one whose members share the same religion, denomination or mode of worship¹⁰⁷.

⁹⁸ *Krstic* Trial Judgment, para. 571.

⁹⁹ *Ibid.*

¹⁰⁰ *Krstic* Trial Judgment, para. 552.

¹⁰¹ *Akayesu* Trial Judgment, para. 522.

¹⁰² *Kayishema and Ruzindana* Trial Judgment, para. 99.

¹⁰³ ILC Draft Code of Crimes, 1996, at 88.

¹⁰⁴ *Akayesu* Trial Judgment, para. 512.

¹⁰⁵ *Ibid.*, para. 513.

¹⁰⁶ *Ibid.*, para. 514.

¹⁰⁷ *Ibid.*, para. 515.

However, the discretion to construe what exactly constitutes a particular group is given to the court. The ICTR *Akayesu* Trial Chamber explored that issue in depth looking back to the *travaux préparatoires* of the Genocide Convention and it ruled that “the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups”¹⁰⁸.

The important legal characteristic of the crime of genocide is that “the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group ... [it] means that the victim of the crime of genocide is the group itself and not only the individual”¹⁰⁹.

*Krstic*¹¹⁰ and *Jelusic*¹¹¹ Trial Judgments emphasize that the element pertaining to group ‘as such’ makes genocide an exceptionally grave crime, which is distinct from other serious crimes – such as persecution – where the perpetrator selects his victims because of their membership in a specific community, but does not necessarily seek to destroy the community as a distinct entity. The same position is reaffirmed in the *Stakic* Appeals Chamber defining that the term ‘as such’ has a great significance, for it shows that the offense requires intent to destroy a collection of people who have a particular group identity¹¹².

2.5.2.3 The term ‘in whole or in part’

A perpetrator of genocide does not necessarily need to seek the destruction of the entire group. In order to determine the proportion of a targeted group intended to be destroyed constituting the requirement ‘in part’, it is of vital importance to consider such criteria as the scope or geographical expansion of the group and the perpetrator’s subjective perception of the nature of the targeted group as a distinct entity. The ICTY and ICTR elaborated on the situation when a part of the group could be perceived as a distinct entity being concentrated within a limited geographic area in *Jelusic*¹¹³ and *Akayesu*¹¹⁴ Trial Judgments. The said approach was reaffirmed in the *Krstic* Trial Judgment where the Trial Chamber construed that: “the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide

¹⁰⁸ *Ibid.*, para. 511.

¹⁰⁹ Nehemiah Robinson, "The Genocide Convention. Its Origins as Interpretation", 1950, p.15.

¹¹⁰ *Krstic* Trial Judgment, para. 553.

¹¹¹ *Jelusic* Trial Judgment, para. 79.

¹¹² *Stakic* Appeal Judgment, para. 20.

¹¹³ *Jelusic* Trial Judgment, para. 83.

¹¹⁴ *Akayesu* Trial Judgment, para. 675.

if carried out with the intent to destroy the part of the group as such located in this small geographical area”¹¹⁵.

The ICTY Trial Chamber in its *Krstic* Judgment contributed significantly to the interpretation of the definition of genocide by defining boundaries of *mens rea*. The issues arising in the *Krstic* case are of great importance. The first issue concerns whether ‘the protected group’ within the meaning of the definition of genocide is constituted of ‘Bosnian Muslims of Srebrenica’ or Bosnian Muslims as a group in general? The Chamber construed that the group of Bosnian Muslims of Srebrenica and Bosnian Muslims constituted group protected under the Genocide Convention. The intent to destroy a group living in particular geographical area could be regarded as the crime of genocide because “the perpetrators of genocide need not seek to destroy the entire group, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such”¹¹⁶.

Therefore, the total context of the physical destruction should be taken into account. There could be several outcomes in regard to the qualification of a crime of genocide:

- If a killing campaign takes place in different places in a broad geographical area, it cannot be qualified as a genocide because the campaign itself does not show the intent of the perpetrators to target the very existence of the group as such;
- If a killing campaign takes place against the members of a group living in a relatively small geographical area, it could be qualified as a genocide if carried out with the genocidal intent.

The second raised question is whether the genocidal intent suffices in the situation where only men of military age are killed. The Chamber holds the opinion that the selective destruction of the group would have a lasting impact on the entire population. It is also stated in the Judgment that “the killings of the men of military age were executed, while the rest of Bosnian Muslims population was subjected to the forcible transfer”¹¹⁷. Furthermore, the Bosnian Serbs knew that the combination of the killings with the forcible transfer would result in the physical disappearance of the Bosnian Muslims population of Srebrenica.

In a sum, the term ‘in part’ could be construed in the sociological context of the targeted group. The *Jelusic* Trial Chamber found out that intent could be regarded as genocidal if it seeks to destroy “the most representative members of the targeted community”¹¹⁸.

¹¹⁵ *Krstic* Trial Judgment, para. 590.

¹¹⁶ *Krstic* Trial Judgment para 590.

¹¹⁷ *Ibid.*, 595

¹¹⁸ *Jelusic* Trial Judgement, para.82.

The intent of the perpetrator to destroy a particular group ‘in whole or in part’ must be distinguished from the destruction directed against the whole population. Genocide and extermination are two distinct crimes falling under different categories; genocide targets a particular group while the extermination targets the whole population. The requisite specific intent to destroy a national, ethnical, racial and religious group must be proven beyond the reasonable doubt to qualify the crime of genocide.

2.5.2.4 Means to infer the requisite intent

The specific intent (*dolus specialis*) of genocide is the necessary constituent element of *mens rea* of the crime of genocide. However, it is extremely difficult to prove *dolus specialis* in certain cases and as a matter of practical necessity, specific intent of the crime of genocide may be inferred from certain facts and circumstances, including *inter alia*, the general context of the perpetration of other culpable acts systematically directed against that same group, and whether or not those acts were committed by the accused or by others, the scale of atrocities committed etc¹¹⁹.

The Trial Chamber in *Kayishema and Ruzindana* endorsed the approach as follows:¹²⁰

Regarding the requisite intent the Trial Chamber acknowledges that it may be difficult to find explicit manifestations of intent by the perpetrators. The perpetrator’s actions, including circumstantial evidence, however may provide sufficient evidence of intent.

The Appeals Chamber in *Kayishema and Ruzindana* re-affirmed the Trial Chamber’s approach:

As noted by the Trial Chamber, explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials. In order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances.¹²¹

The Commission of Experts in the Final Report on the Situation in Rwanda, noting the practical necessity of inferring specific intent, suggested that the requisite specific intent could be inferred from sufficient facts, such as the number of victims from the group¹²².

¹¹⁹ *Akayesu* Trial Judgment, para. 523

¹²⁰ *Kayishema and Ruzindana* Trial Judgement, para.93.

¹²¹ *Kayishema and Ruzindana* Appeal Judgement, para.159.

¹²² *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994)*, Annex to the Letter from the Secretary-General to the President of the Security Council transmitting the final report of the Commission of Experts, UN Doc.S/1994/1405, 9 December 1994, paras. 160-168. *See also, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc.E/CN.4/Sub.2/1985/6, para.29: “... relative proportionate scale of the actual or attempted destruction of a group, by any of the means listed in Articles II and III of the Convention, is certainly strong evidence to prove the necessary intent to destroy a group, in whole or in part.”

The ad hoc tribunals have determined that the specific intent for genocide may be inferred from facts such as:

- (i) the seriousness of discriminatory acts;¹²
- (ii) the gravity of the ‘ethnic cleansing’;¹²
- (iii) the general political doctrine giving rise to the acts;¹²
- (iv) acts which violate or which the perpetrators themselves consider to violate the very foundation of the group;¹²
- (v) the destruction or attacks on cultural and religious property and symbols of the targeted group;¹²
- (vi) destruction or attacks on houses belonging to members of the group;¹²
- (vii) the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such which would constitute an intention to destroy the group “selectively”;¹²⁹
- (viii) the perpetration of other acts systematically directed against the same group,¹ whether these acts were committed by the same offender or by others;^{1 1}
- (ix) the scale of atrocities committed, their general and widespread nature, in a region or a country;^{1 2}
- (x) systematically targeting victims on account of their membership of a particular group while excluding the members of other groups;¹
- (xi) the repetition of destructive and discriminatory acts;¹
- (xii) the existence of a plan or policy;¹
- (xiii) the scale of the actual or attempted destruction;¹
- (xiv) the methodical way of planning the killings;¹

¹²³ *Nikolic* Rule 61 Decision, para.34.

¹²⁴ *Karadzic & Mladic* Rule 61 Decision, para.4.

¹²⁵ *Karadzic & Mladic* Rule 61 Decision, para.94; *Sikirica* Trial Judgement, paras 46 and 61.

¹²⁶ *Karadzic & Mladic* Rule 61 Decision, para.94.

¹²⁷ *Krstic* Trial Judgment, paras 580 and 595.

¹²⁸ *Krstic* Trial Judgement, para.595.

¹²⁹ *Jelasic* Trial Judgement, para.82.

¹³⁰ *Jelasic* Appeal Judgement, para.47; *Akayesu* Trial Judgement, paras.519 and 726.

¹³¹ *Akayesu* Trial Judgement, paras.519 and 726.

¹³² *Akayesu* Trial Judgement, para.522 . See also *Musema* Trial Judgement, para.166; *Rutaganda* Trial Judgement, paras 61 and 398; *Bagilishema* Trial Judgement, para.62; *Sikirica* Judgement, paras 46 and 61.

¹³³ *Akayesu* Trial Judgement, para.522. See also *Musema* Trial Judgement, para.166;

Rutaganda Trial Judgement, paras 61 and 398; *Bagilishema* Trial Judgement, para.62.

¹³⁴ *Jelasic* Appeal Judgement, para.47. *Karadzic & Mladic* Rule 61 Decision, para.94.

¹³⁵ *Jelasic* Appeal Judgement, para.47.

¹³⁶ *Ibid.*

- (xv) the systematic manner of killing¹ and disposal of bodies;^{1 9}
- (xvi) the discriminatory nature of the acts;¹
- (xvii) the discriminatory intent of the accused;^{1 1}
- (xviii) all acts or utterances of the accused,^{1 2} in particular the use of derogatory language towards members of the targeted group;¹
- (xix) a pattern of purposeful action;¹ and
- (xx) the weapons employed and the extent of bodily injury.¹

The aforementioned list of facts is not exhaustive and other facts can be adjudicated as those assisting to infer the requisite intent.

¹³⁷ *Sikirica* Trial Judgement, paras 46 and 61; *Kayishema and Ruzindana* Trial Judgement, para.93.

¹³⁸ *Sikirica* Trial Judgement, paras 46 and 61.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Sikirica* Trial Judgement, paras 46 and 61.

¹⁴² *Akayesu* Trial Judgement, para.726, *Kayishema and Ruzindana* Trial Judgement, paras 93 and 527; *Bagilishema* Trial Judgement, para.63.

¹⁴³ *Kayishema* Trial Judgement, para.93.

¹⁴⁴ *Bagilishema* Trial Judgement, para.63.

¹⁴⁵ *Kayishema* Trial Judgement, para.93.

3 Other acts of genocide

3.1 Conspiracy to commit genocide

Conspiracy to commit genocide is recognized as a distinct crime under the Genocide Convention¹⁴⁶, the ICTY¹⁴⁷, and ICTR¹⁴⁸ Statutes. The peculiarity of the crime is that it could be committed only collectively, as it requires minimum two offenders. Common law and civil law apply different standards towards the concept of conspiracy.

Common law approaches the aforementioned concept in a way that the agreement of two or more persons to commit a crime of genocide will constitute committed conspiracy. The consequences of the crime are out of the legal framework of the crime. The crime is committed upon the agreement of two or more persons, even if the crime itself has not been carried out¹⁴⁹.

The civil (continental) law system approaches the concept of conspiracy in another way, defining conspiracy as the form of participation in the crime itself and recognizing it punishable to the extent the crime is committed¹⁵⁰.

3.1.1 Drafting history

The discussion on the conspiracy rests on the legacy of the Nuremberg trial. The Charter of the Nuremberg Tribunal penalized conspiracy under Article 6 of the Charter. The judges of the Nuremberg Tribunal were of opinion that the wording of the Article 6 did not add a new and separate crime for those already listed, but was simply designed to establish the responsibility of persons participating in a common plan¹⁵¹.

“Planning, preparation, initiation or waging of a war of aggression or war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”¹⁵² were recognized as punishable acts under the Charter of the IMT.

¹⁴⁶ Art. III (b)

¹⁴⁷ Art. 4 (3) (b)

¹⁴⁸ Art. 2(3)(b)

¹⁴⁹ *Musema* Trial Judgment has been a crucial case while defining the crime of conspiracy to commit genocide. The Chamber summarized existing approaches towards the crime both in common and continental legal systems. For more detailed overview see: *Musema* Trial Judgment, paras. 184-198.

¹⁵⁰ *Ibid.*

¹⁵¹ Yearbook of the ILC 1986, volume 2, part I, [hereinafter Yearbook], para. 122.

¹⁵² Charter of the IMT, 1951, 82 UNTS 279, Art. 6 (a)

American and British trials on the administration of the Nazi concentration camps also added to the interpretation of the scope of liability for conspiracy. In the *Dachau Concentration Trial*¹⁵³, forty accused were convicted of having actively and knowingly participated in a common enterprise to abuse, starve, torture and murder the inmates of the camp.

Having construed the Charter of International Military Tribunal, in particular, Article 6 of the Charter; the Tribunal came to the conclusion that conspiracy cannot stand as an autonomous crime. Furthermore, the Tribunal set aside the charge of conspiracy for war crimes and crimes against humanity and retained it only for crimes against peace¹⁵⁴. In other words, the tribunal regarded it solely as a crime of responsible government officials, for a crime against peace can be committed only by such officials¹⁵⁵.

In accepting the concept of conspiracy only for crimes against peace and rejecting it for war crimes and crimes against humanity, the Nuremberg Tribunal accepted only the ‘complot’ aspect of the concept of conspiracy.

In fact, where crimes against peace are concerned as defined by the Nuremberg Charter, the agents who are responsible governmental officials could be held responsible linked to each other by their joint action. By the nature, they are co-perpetrators but not accomplices, and their action may be seen as a plot against the external security¹⁵⁶.

The Nuremberg Tribunal outlined the concept of conspiracy very broadly:

The conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision or action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in “*Mein Kampf*” in later years. The tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

However, it is complicated to determine whether conspiracy is related closer to the concept of ‘complot’ or concept of complicity.

Conspiracy encompasses the notion of complicity when the plan is executed within an organization involving hierarchical relations between the leaders and the actual perpetrators, for complicity in this case may operate between leaders and subordinates¹⁵⁷.

¹⁵³ *The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-Nine Others* (1949), XI Law Reports.

¹⁵⁴ See: *France et la v. Goering*, 1946, 22 IMT 203, p. 469.

¹⁵⁵ Yearbook, *supra* note 145, para. 125.

¹⁵⁶ *Ibid.*

¹⁵⁷ Yearbook, *supra* note 145, para. 126.

The Nuremberg Tribunal recognized a criminal organization as a form of conspiracy defining that “a criminal organization is analogous to a criminal conspiracy in the essence of both cooperation for criminal purposes”¹⁵⁸. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.

Nevertheless, the membership in the organization is insufficient to prove the conspiracy. It is of great importance to determine the threshold of existing ‘knowledge’. If the members do not possess the knowledge of the criminal purposes or acts of the organization, they cannot be found guilty of conspiracy¹⁵⁹.

3.1.2 Developed case law of the ad hoc tribunals

Although the Genocide Convention specifically recognizes conspiracy to commit genocide as a distinct crime, various interpretation problems arise when they involve concepts whose limits are not clearly determined. Complicity and conspiracy are undoubtedly different at the conceptual level, but there is always a certain degree of complicity among the members of a conspiracy.

According to the ICTR and ICTY Statutes, both Tribunals have the power to prosecute persons charged with the crime of conspiracy to commit genocide. The crime of conspiracy to commit genocide was incorporated from the Genocide Convention. None of the accused has been ever convicted of conspiracy to commit genocide in the ICTY¹⁶⁰, while it has been charged several times in the ICTR¹⁶¹.

¹⁵⁸ *France et la v. Goering*, 1946, 22 IMT 203, p. 528.

¹⁵⁹ *Ibid.*

¹⁶⁰ First time the crime of conspiracy to commit genocide is charged by the OTP of the ICTY in the case of *Popovic et al.* (IT-05-88). See: *Prosecution’s Filing Of Pre-Trial Brief pursuant to Rule 65 ter and List OF Exhibits pursuant to Rule 65 ter (E) (v)*, date filed 28 April 2006.

“**Zdravko TOLIMIR, Vinko PANDUREVIĆ, Ljubiša BEARA, Vujadin POPOVIĆ, Drago NIKOLIĆ, Milorad TRBIĆ, and Ljubomir BOROVIĆANIN** are charged in Count 1 of the Amended Indictment with Conspiracy to Commit Genocide under Article 4(3)(b) of the Statute of the Tribunal. The Accused are charged with violations of 4(3)(b) under different theories of liability. **Zdravko TOLIMIR, Ljubiša BEARA, Vujadin POPOVIĆ, Drago NIKOLIĆ, and Milorad TRBIĆ** are individually liable for committing conspiracy to commit genocide under 7(1). **Vinko PANDUREVIĆ and Ljubomir BOROVIĆANIN** are liable for committing conspiracy to commit genocide under 7(1) and 7(3)”, para. 386.

¹⁶¹ See e.g., *The Prosecutor v. Jean-Paul Akayesu*, *The Prosecutor v. Ignace Bagilishema*, *The Prosecutor v. Jean-Bosco Barayagwiza*, *The Prosecutor v. Jean Kambanda*, *The Prosecutor v. Clement Kayishema*, *The Prosecutor v. Alfred Musema*, *The Prosecutor v. George Anderson Nderubumwe Rutaganda*, *The Prosecutor v. Obed Ruzindana*, *The Prosecutor v. Omar Serushago*.

The ICTR Chamber in its *Musema* Trial Judgment tried to show the differences between the concept of conspiracy used in the common law system and civil law system. It deliberated that “common law systems tend to view “*entente*” or conspiracy as a specific form of criminal participation, punishable in itself”¹⁶². On the contrary, under the civil law system conspiracy or ‘complot’ derogates from the principle that a person cannot be punished for mere criminal intent (*‘resolution criminelle’*) or for preparatory acts committed. Complot is punishable only where its purpose to commit certain crimes considered as extremely serious, in particular, undermining the security of the state¹⁶³.

With respect to the constitutive elements of the crime of conspiracy, the ICTR is in favor of the common law doctrine of conspiracy. As it is summarized by the ICTR, the crime of conspiracy is committed when two or more persons agree to a common objective, the objective being criminal under the common law system¹⁶⁴.

Under civil law, there are two existing levels of ‘complot’ or conspiracy based on the level of gravity of a crime. The first level concerns simple conspiracy and the second level conspiracy followed by material acts. Simply conspiracy is usually defined as a concerted agreement to act, decided upon by two or more persons while the conspiracy followed by preparatory acts is an aggravated form of conspiracy where the concerted agreement to act is followed by preparatory acts. However, both forms of complot require: 1) an agreement; 2) concerted wills; 3) common goal to achieve substantive offence¹⁶⁵.

The ICTR admitted that the constitutive elements of conspiracy as defined under both legal systems, are very similar and the Court defines it as an agreement between two or more persons to commit the crime of genocide¹⁶⁶.

Regarding the *mens rea* of the crime of conspiracy to commit genocide, it rests on the concerted intent to commit genocide that is intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Hence, in the view of the ICTR Chamber in *Musema* Judgment, the “requisite intent for the crime of conspiracy to commit genocide is *ipso facto*, the intent required for the crime of genocide, that is *dolus specialis* of genocide”¹⁶⁷.

The Court underlines that both under civil and common law systems, conspiracy is an inchoate offence (*‘infraction formelle’*) which is punishable by virtue of the criminal act as such and not as a consequence of the result of that act. The crime of conspiracy to commit genocide is punishable, even

¹⁶² *Musema* Trial Judgement, para. 186.

¹⁶³ *Ibid.* 186.

¹⁶⁴ *Ibid.* 190.

¹⁶⁵ *Ibid.* 189.

¹⁶⁶ *Ibid.* 191.

¹⁶⁷ *Musema* Trial Judgement, para.192.

if it fails to produce a result, even if the substantive offence has not actually been perpetrated¹⁶⁸.

The important issue has been raised by the ICTR whether an accused could be convicted of both genocide and conspiracy to commit genocide. There are various approaches regarding the qualification of the crime of conspiracy under civil and common law systems.

Under civil law system, if the conspiracy is successful and the crime has been committed, the accused will be convicted only of the substantive offence but not of conspiracy. Once the substantive offence has been accomplished, there is no reason to punish accused for his/her mere *resolution criminelle* (criminal intent), or even for the preparatory acts committed in furtherance of the substantive offence. Therefore, an accused can only be convicted of conspiracy if the substantive crime has not been realized or if accused was part of a conspiracy, which has been perpetrated by his/her co-conspirators, without his/her direct participation¹⁶⁹.

Under the common law system, an accused can, in principle, be convicted of both conspiracy and a substantive crime, in particular, where the objective of the conspiracy extends beyond the offences actually committed.

In *Musema* Judgment the Court adopted the definition of conspiracy where accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts. This judgment is in line with the intention of the Genocide Convention. *Travaux préparatoires* of the Convention show that conspiracy to commit genocide was included to punish the acts that did not constitute genocide. The implication of that is that no purpose would be served in convicting an accused if he/she has been found guilty of genocide, of conspiracy to commit genocide¹⁷⁰.

On the other hand, in *Kambanda* case, the ICTR Appeals Chamber convicted the accused of both genocide and conspiracy to commit genocide and allowed the defendant's sentence to incorporate both crimes¹⁷¹.

¹⁶⁸ The crime of conspiracy to commit genocide is to that extent akin to the crime of direct and public incitement to commit genocide. In its findings on the crime of incitement to commit genocide in paragraph 52 of the *Akayesu* Judgment, the Chamber stated with respect to inchoate offences that: "[...] In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.

¹⁶⁹ *Musema* Trial Judgment, para.196.

¹⁷⁰ *Musema* Trial Judgment, para.198.

¹⁷¹ *Kambanda* Appeal Judgment, para.112.

3.2 Direct and public incitement to commit genocide

Direct and public incitement to commit genocide is recognized as a separate crime under Article II (II)(2) of the Genocide Convention, Article 4(3)(c) of the ICTY Statute and Article 2(3)(c) of the ICTR Statute.

3.2.1 Drafting history

The Secretary General's Draft prohibits "direct public incitement to any act of genocide, whether the incitement be successful or not"¹⁷². The Ad hoc Committee's Draft defines the crime in the same terms penalizing "direct incitement in public or in private to commit genocide whether such incitement be successful or not"¹⁷³.

The Sixth Committee incorporated the provision of the Secretary General's Draft penalizing "direct and public incitement to commit genocide"¹⁷⁴. The terms 'or in private' and 'whether such incitement was successful or not' were excluded. However, the exclusion of the term 'whether such incitement was successful or not' was criticized. Mr. Bartos, the representative of the Former Yugoslavia reasonably noted that "the first step in the campaign against genocide would be to prevent incitement to the crime"¹⁷⁵. Mr. Morozov of the USSR supported his point of view questioning "how the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed"¹⁷⁶. On the other hand, Mr. Maktos, the representative of the USA, opposed the prohibition of the crime of incitement to genocide stating that "incitement may be punishable, in many instances, as an attempt or an overt act of conspiracy to commit genocide"¹⁷⁷.

The scope of incitement under the Genocide Convention could be illustrated by the trial of Julius Streicher¹⁷⁸. An accused being one of the first members of the Nationalist Socialist Party and publisher of an anti-Semitic weekly in Nazi Germany was convicted of the crimes against humanity by the International Military Tribunal at *Nuremberg*. Taking into account Streicher's provocation of hatred against Jews, the Tribunal concluded that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constituted persecution on political and racial grounds in connection with

¹⁷² Secretary-General Comment. *supra note 27*, art. II (II)2, at 7.

¹⁷³ Ad hoc Committee Report, *supra note 28*, art IV (c) at 8.

¹⁷⁴ Sixth Committee Report, *supra note 37*, art III (c).

¹⁷⁵ U.N. GAOR 6th Comm., 3rd Sess., 84th mtg., at 216.

¹⁷⁶ U.N. GAOR 6th Comm., 3rd Sess., 84th mtg., at 219.

¹⁷⁷ U.N. GAOR 6th Comm., 3rd Sess., 84th mtg., at 213.

¹⁷⁸ 14 Trial of the Major War Criminals Before the International Military Tribunal (1947), at 547 (Judgment)

war crimes, as defined by the Charter, and a crime against humanity”¹⁷⁹. However, the Genocide Convention does not require the incitement to genocide to be connected with war crimes or crimes against peace and thus incitement to exterminate a racial, religious, ethnic or national group would constitute a violation of Article III (c)¹⁸⁰.

The International Law Commission while working on the Draft Code of Crimes discussed whether the crime of incitement to genocide should have been recognized as a distinct crime. After all the discussions held within the International Law Commission, latter penalized a general offense of direct and public incitement applicable to all crimes in the Draft Code of Crimes. The Commission defined that “the incitement is punishable only when the crime in fact occurs”¹⁸¹. Making the incitement dependant upon the occurrence of the crime, the International Law Commission created the confusion between the concepts of ‘aiding’ related to the complicity in genocide and the crime of incitement per se.

3.2.2 Developed case law of the ad hoc tribunals

The ad hoc tribunals penalize direct and public incitement to genocide. Nevertheless, nobody has been indicted by the Prosecutor of the ICTY for direct and public incitement to commit genocide. The ICTR has several indictments charging with the direct and public incitement. Jean-Paul Akayesu and Jean Kambanda were convicted of the crime of the incitement to commit genocide.

The ICTR conducted a comparative legal analysis in regard to the crime of incitement. Under the common law, incitement is defined as encouraging or persuading another to commit an offense¹⁸². Under civil law system, incitement could be defined as an act intended to directly provoke another to commit a crime or misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication¹⁸³.

The ICTR deliberated on the ‘public’ and ‘direct’ elements of incitement. The ICTR defines that the ‘public’ element of incitement to commit genocide may be appreciated in the light of two factors: the place where the incitement occurred and whether or not assistance was selective or

¹⁷⁹ 14 Trial of the Major War Criminals Before the International Military Tribunal (1947), at 549.

¹⁸⁰ Matthew Lippmann, The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later, Temple International and Comparative Law Journal, Vol. 8, 1994 at 44.

¹⁸¹ Report of the ILC on the Work of Its Forty-Eighth Session, 6 May – 26 July 1996, note 3 above, pp. 26-27.

¹⁸² *Akayesu* Trial Judgment, para. 555.

¹⁸³ *Ibid.* para. 555.

limited¹⁸⁴. Under civil law system, words could be regarded public whether they are spoken aloud in a place that they were public by definition¹⁸⁵.

The ‘direct’ element of incitement implies a direct form specifically provoking another to engage in a criminal act¹⁸⁶. The Chamber holds the opinion that the ‘direct’ element of incitement should be viewed in the light of its cultural and linguistic content¹⁸⁷. Indeed, a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience.

Based on all arguments used both in civil law system and common law system, the Trial Chamber came to the conclusion that incitement could be defined as “directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication”¹⁸⁸.

The dilemma before the Trial Chamber was whether the crime of direct and public incitement to commit genocide could be punished even where such incitement was unsuccessful. Though the Genocide Convention did not explicitly provide the consequences of incitement, the Trial Chamber concluded “genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator”¹⁸⁹.

In regard to *mens rea* of the crime, the crime of incitement to commit genocide must be intentional. As the Trial Chamber ruled in its *Akayesu* case “*mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide and it implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging”¹⁹⁰. The person who is inciting to commit genocide must be in possession of *dolus specialis*, namely, the intent to destroy, in whole or in part, a national, ethnical, racial and religious group, as such.

¹⁸⁴ *Ibid.* 556.

¹⁸⁵ French Court of Cassation, Criminal Tribunal, 2 February 1950, Bull, Crim. No. 38, p. 61.

¹⁸⁶ “The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion”. Draft Code of Crimes Against the Peace and Security of Mankind, art. 2(3)(f); Report of the International Law Commission to the General Assembly, 51 U.N. ORGA Supp. (No. 10), at 26, U.N. Doc. A/51/10(1996).

¹⁸⁷ *Akayesu* Trial Judgment, para. 557.

¹⁸⁸ *Akayesu* Trial Judgment, para. 559.

¹⁸⁹ *Akayesu* Trial Judgment, para. 562.

¹⁹⁰ *Akayesu* Trial Judgment, para. 560.

3.3 Attempt to commit genocide

Article III (d) of the Genocide Convention penalizes any “attempt to commit genocide”. The original provision on the crime was amalgamated in the Secretary-General’s Draft¹⁹¹ and later incorporated in the Ad hoc Committee’s Draft¹⁹². The same provision on the attempt to commit genocide was unanimously adopted by the Sixth Committee¹⁹³.

The Draft Code of Crimes contains a general provision on the attempt to commit a crime applicable to all crimes, including the crime of genocide:

“an individual shall be responsible for a crime of genocide if that individual attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions”¹⁹⁴.

Attempt to commit genocide is enlisted as a punishable act under the ICTY¹⁹⁵ and ICTR¹⁹⁶ Statutes. However, there is no case law on the attempt to commit genocide because there has never been prosecution for an attempted genocide.

The difficulty in interpretation of an attempt lies in the fact that domestic law in regard to the concept of an attempt to commit a crime varies greatly. It appears problematic to draw a clear borderline when a preparatory act to commit a crime becomes punishable. Almost all legal systems require that “attempt must involve something going beyond mere preparation and showing the beginning of execution of the crime”¹⁹⁷.

3.4 Complicity in genocide

Nearly all criminal law systems recognize complicity as a punishable act and thus those who aid, abet, procure or otherwise participate in criminal offences should bear the criminal responsibility for the latter, even though they did not act as principal perpetrators of the crime. Many concepts applied in domestic criminal law have been embedded into international criminal law, and the concept of complicity is not an exception of a rule. Such a transposition of certain concepts could result in the ambiguity and incoherence and sometimes the meaning of concepts applied in international law could change substantially from those applied in domestic criminal law systems.

¹⁹¹ Secretary-General Comment, *supra note 27*, Art. II (I)(1), at 7.

¹⁹² Ad hoc Committee Report, *supra note 28*, Art. IV (d), at 7

¹⁹³ U.N. GAOR 6th Comm., 3rd Sess., 91st mtg., (1948), at 301.

¹⁹⁴ Report of the ILC on the Work of Its Forty-Eighth Session, 6 May-26 July 1996, note 3 above, p.18.

¹⁹⁵ ICTY Statute, Art 4(3)(d).

¹⁹⁶ ICTY Statute, Art. 2(3)(d) .

¹⁹⁷ Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/398 (1986), paras. 132-141.

3.4.1 Drafting history

Complicity in the most serious violations of international humanitarian law was recognized as a crime in the “*Nuremberg Principles*”, formulated by the ILC, defining that: “Complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law”¹⁹⁸.

Though International Military Tribunals recognized the complicity as a separate crime under the international law, the Tribunals took the limited content approach to the interpretation of the concept of complicity. Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter singled out “leaders, organizers, instigators and accomplices”¹⁹⁹ separating accomplices from leaders, organizers and even instigators.

The provision of the Law No. 10 of the Allied Control Council establishes the criminal responsibility of a person who:

- a) was a principal;
- b) was an accessory to the commission of a crime or ordered or abetted the same;
- c) took a consenting part therein;
- d) was connected with plans or enterprises involving the commission of a crime;
- e) was a member of any organization or group connected with the commission of a crime;
- f) with the reference to paragraph 1 (a), i.e. crimes against peace, held a high political, civil or military position or a high position in financial, industrial or economic life²⁰⁰.

The language provided both in Nuremberg Charter and Law No. 10 of the Allied Control Council appears to be very vague and the question remains of what an accomplice is if he is not the instigator or the person, who ordered, directed, organized, or took a consenting part in the crime. Does complicity include only aiding and abetting or the provision of means as those acts were clearly referred to in the aforementioned legal provisions?²⁰¹

It appears that the “drafters of the text were concerned primarily for the principle of efficiency”²⁰² and tried to criminalize all acts possible not to let any act remain unpunished. The principle of legal rationality was left aside and hence, many synonymous and overlapping terms are found in the respective texts.

¹⁹⁸ Principles of the Nuremberg Charter and Judgment Formulated by the ILC, GA Res. 177A (II); “Report of the ILC Covering Its Second Session, 5 June to 29 July 1950”, UN Doc. A/1316, p.12, Art. VII.

¹⁹⁹ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, note 22 above, Art. 6.

²⁰⁰ Law. No. 10 of the Allied Control Council, Art. 2, para. 2.

²⁰¹ Yearbook of the ILC, Documents of the thirty-eighth session, A/CN.4/SER.A/1986/Add.1 (Part I), para. 103

²⁰² *Ibid.* 104.

In time where the crime had taken the most varied and insidious forms, the group crime prevailed and it was extremely difficult to separate accomplices from all those who participated in the mass action.

Therefore, the respective texts have limited substantially the content of the complicity by distinguishing various forms of participation autonomously.

GA in its Resolution 96 (I) reaffirms that genocide is a crime under international law for “the commission of which principals and accomplices” are to be punished²⁰³.

The General-Secretariat’s Draft penalizes “willful participation in acts of genocide of whatever description”²⁰⁴ encompassing both principals and accessories²⁰⁵. The Drafts of the Genocide Convention submitted by different countries including, *inter alia*, USA, Soviet Union, China and France contained the provisions penalizing the complicity in genocide.

U.S draft defined that “it shall be unlawful and punishable to commit genocide or to willfully participate in an act of the genocide”²⁰⁶. Soviet Draft referred that “Convention should establish the penal character on equal terms with genocide of deliberated participation in genocide in all its forms and complicity or other forms of conspiracy for the commission of genocide”²⁰⁷. France and China expressed themselves strongly in favor of including complicity reaffirming that “principals and accomplices shall be punishable for the commission of the crime of genocide”²⁰⁸.

The Ad hoc Committee’s Draft prohibits “complicity in any of the acts enumerated in this article”²⁰⁹. Originally, the Ad hoc Committee’s Draft penalized “conspiracy or any other form of complicity conducing to the commission of genocide”²¹⁰. However, the phrase “or any other form of complicity” was removed from the draft text. The representative of the USA recognized that “in agreeing to the conclusion of ‘complicity’, he understood it to refer to accessoryship before and after the fact and to aiding and abetting in the commission of crimes enumerated in the article”²¹¹.

The Sixth Committee adopted the definition proposed by the Ad hoc Committee slightly modifying it to “complicity in any act of genocide”²¹².

²⁰³ GA Resolution 96(I).

²⁰⁴ Secretary-General Comment., *supra note 27*, Art. II(II)(1) at. 7.

²⁰⁵ *Ibid.* at 30.

²⁰⁶ UN Doc. E/623.

²⁰⁷ UN Doc. E/AC.25/9.

²⁰⁸ *See*: UN Doc. 623/Add.1, Art. I; UN Doc. E/AC.25/9, Art. II.

²⁰⁹ *Ad Hoc* Committee Report, *supra note 28*, Art. IV(e), at 7.

²¹⁰ U.N. ESCOR *Ad Hoc* Comm. On Genocide, 6th Session., 16th mtg., at 4, U.N.Doc. E/AC.25/SR.16 (1948) (Mr. Morozov, USSR).

²¹¹ *Ad hoc* Committee Report, Observations at 8.

²¹² U.N. GAOR 6th Comm., 3rd Sess., 87th mtg., (1948), at 259.

Despite extensive recognition of the crime of complicity as a punishable act under international criminal law, many issues were evolved on the nature of the complicity per se. It was noted that complicity entailed “the rendering of accessory or secondary aid, or simply of facilities, to the perpetrator of an offence and thus accomplices were punished only if the crimes were actually committed”²¹³. The Representative of Venezuela approached the problem from a different angle by arguing that “complicity should apply equally to acts carried out before the crime was committed and to those performed subsequently, to acts assisting the culprits to escape the punishment they deserved”²¹⁴.

The centerpiece of complicity is the provision of assistance or encouragement with the intent that such aid is used to commit a criminal offence²¹⁵. A good example of complicity could be illustrated by *Zyklon B* case, where Bruno Tesch was convicted and sentenced to death by a British Military Court²¹⁶. The evidence presented before the Court was enough to prove that Bruno Tesch was the accessory to war crimes committed by Nazi. Being the owner of a firm, the accused supplied two tons of gas to Auschwitz every month, though he had knowledge that the gas was used for mass extermination²¹⁷. In contrast, the U.S war crimes tribunal acquitted German industrialists in the absence of necessary threshold of knowledge ruling that “neither volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put”²¹⁸.

Accessory liability could also take place when an individual intentionally assists another to avoid apprehension or punishment or when a governmental official knowingly fails to fulfill a duty to intervene, to halt or to punish criminal activity²¹⁹. The Tokyo Criminal Tribunal found Foreign Minister Koki Hirota guilty in the atrocities committed during so-called ‘*Rape of Nanking*’, for he “was derelict in his duty in not insisting before the cabinet that immediate action be taken to put end to the atrocities, failing any other action open to him to bring about the same result” and consequently, “his inaction amounted to criminal negligence”²²⁰.

The ILC Draft Code of Crimes defines that an individual shall be punishable for the crime of genocide if an individual:

²¹³ U.N. GAOR 6th Comm., 3rd Sess., 87th mtg., at 259 (1948), *Mr. Pescatore* of Luxembourg.

²¹⁴ *Ibid.*, 84th mtg., at 209.

²¹⁵ Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* (3rd ed. 1982) at 766-769.

²¹⁶ Trial of *Bruno Tesch* and Two Others (Case No.9), 1 Law Reports of Trials of War Criminals, at 93.

²¹⁷ *Ibid.* at 94.

²¹⁸ *United States v. Krauch*, 8 Trials of War Criminals, at 1081.

²¹⁹ *Supra* note 209.

²²⁰ The Tokyo War Crimes Trial (1948), in 2 *The Law of War: A Documentary History* (Leon Friedman ed., 1972), at 1134.

- b) orders the commission of such a crime which in fact occurs or is attempted;
- c) fails to prevent or repress the commission of such a crime in the circumstances set out in Article 6;
- d) knowingly aids, abets or otherwise assists, directly or substantially, in the commission of such a crime, including providing the means for its commission;
- e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
- f) directly and publicly incited another to commit such a crime which in fact occurs...²²¹

The definition of the complicity provided in the ILC Draft is too vague and ambiguous. The Commentary of the ILC Draft shows that the Commission did not understand the term ‘abetting’²²².

Although the ILC concluded that “complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of a crime”, the Commission’s provision is of a contradictory nature. The term ‘abetting’ enlisted in paragraph (d) includes inciting, instigating or encouraging the commission of a crime itself. However, the paragraph (f) defines the incitement as set above and thus the ILC code codified extensive number of acts constituting the crime of complicity that overlap in different sections. Hence, the obsessive codification resulted in the “mechanistic application of the *nullum crimen sine lege* principle”²²³.

The ILC Draft Code draws legal findings on *mens rea* of complicity from the Nuremberg trial and customary law, and concludes that “an accused may be found culpable if it proved that he intentionally commits such a crime”, or “he knowingly aids, abets or otherwise assists, directly or substantially, in the commission of such a crime”²²⁴.

The commentary to the ILC Draft Code states that “accomplice must knowingly provide assistance to the perpetrator”. The Commentary clarified on the important issues providing that an individual cannot be held accountable if he provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime”²²⁵.

The interpretation of the words ‘directly’ and ‘substantially’ was provided in order to qualify the degree of contribution to the commission of a crime.

The commentary explains that “an accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing means which enable the perpetrator to commit a crime”. Hence, the form of participation of an accomplice must

²²¹ Report of the ILC on the Work of Its Forty-Eighth Session, 6 May -26 July 1996, note 3 above, p. 18.

²²² *Ibid*, p. 24.

²²³ *Supra* note 80, at 291.

²²⁴ Report of the ILC on the Work of its 48th Session, 6 May-26 July 1996 (commentary on Art. II).

²²⁵ *Ibid*.

entail assistance which facilitates the commission of a crime in some significant way”²²⁶.

Even though the commentary does not clearly define what is ‘substantially’, the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. A good example of the ‘substantial’ contribution could be the supplies of poison gas in the *Zyklon B* case that was used for the purpose of mass exterminations.

The accused is found criminally culpable for any conduct where he/she knowingly participated in the commission of an offence violating international humanitarian law and his/her participation directly and substantially affected the commission of a criminal offence through supporting the actual commission before, during or after the incident.

The concept of complicity has been developed in a different dimension in the Statutes of the ICTY and ICTR. Both instruments have incorporated the definition provided in the article III (e) of the Genocide Convention of the substantive genocide provision. In addition, both Statutes contain a general complicity provision that is applicable to all offences falling under tribunals’ subject matter jurisdiction.

The criminal liability applies to persons who have “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime within the tribunal’s jurisdiction”²²⁷.

3.4.2 Elements of complicity

There are three recognized basic requirements for establishment of the guilt of an accomplice.

First, the crime must have been committed. As it was ruled in *Jelusic* case, complicity requires proof that the underlying or predicate crime has been committed by another person²²⁸. Nevertheless, the principal offender does not necessarily need to be charged or convicted in order of the liability of an accomplice to be established²²⁹.

Secondly, there must be a material act (*actus reus*) by which the accomplice actually contributes to the perpetration of the crime. However, the degree of the participation remains a debated issue. It appears that the ICTY endorsed the approach proposed by the International Law Commission requiring that the assistance should be substantial. In *Tadic* case, the Trial Chamber ruled that participation could be considered being substantial if “the criminal act

²²⁶ *Supra* note 218.

²²⁷ ICTY Statute, Art. 7 (1), ICTR Statute, Art. 6 (1).

²²⁸ *Jelusic* Trial Judgment, para. 87.

²²⁹ *Akayesu* Trial Judgement, para. 531.

most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed”²³⁰.

Thirdly, *mens rea* of the accomplice should be defined, for the accomplice’s act must be carried out with intent and knowledge of the perpetrator’s act. The Trial Chamber in the *Tadic* case stated that “there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime”²³¹.

3.4.3 Forms of complicity

Forms of complicity are discussed in the following sub-sections showing distinctions between various forms of secondary participation and problems of practical application in the case law.

3.4.3.1 Planning

It was recognized by the ICTR in its *Akayesu* judgment that “planning within the meaning of the statutes of the ad hoc tribunals is only criminal if the underlying crime is committed”²³². The ICTR indicated problematic issues while applying the law. Planning is very similar to the notion of complicity in civil law system or conspiracy under common law system. The difference lies in the fact that one person can commit planning, unlike complicity of plotting. Taking into consideration, the ICTR ruled that planning could be defined as “implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases”²³³.

Guenaël Mettraux recognizes the approach to the planning provided by the ICTR Trial Chamber in *Akayesu* case as the one “to be based on a misunderstanding as to the required degree of realization of the offence of ‘planning’. His arguments are based on the fact that “planning constitutes in most legal systems, an inchoate crime and it is realized and complete, once all of its elements are met, without being a need for the offence planned to have been committed”²³⁴. It is difficult, however, to suggest which motives were behind the aforesaid legal finding of the Court.

²³⁰ *Tadic* Trial Judgment, para. 209.

²³¹ *Tadic* Trial Judgment, para. 674.

²³² *Akayesu* Trial Judgment, para. 473.

²³³ *Akayesu* Trial Judgment, para. 479.

²³⁴ Mettraux, Guenaël, ‘International Crimes and the Ad hoc Tribunals’, Oxford : Oxford University press, 2005 p. 244.

The level of the participation should be substantial, such as it was defined in *Bagilishema* Trial Judgment “formulating as criminal plan or endorsing a plan proposed by another”²³⁵.

Concerning the mental element of ‘planning’, an accused must in addition be shown to have possessed the required intent for the underlying offence in question, that he/she directly or indirectly intended that the crime in question be committed²³⁶.

The ICTY ruled that an individual may be found responsible for the commission of the crime and not, apparently, for its planning and thus it means that an accused cannot be convicted both of planning and execution of the crime that has been planned²³⁷.

3.4.3.2 Instigating

According to the practice of both ad hoc tribunals, instigation involves “prompting another to commit an offence if his actions are shown to have been causal to the actual commission of the crime”²³⁸. Instigation is synonymous with the term ‘incitement’²³⁹ used and widely applied in English law. The ICTR recognized that instigation in the light of criminal participation differs from “direct and public incitement”, for latter constitutes a distinct crime, but not a form of complicity. Instigation does not need to be ‘public’ or ‘direct’ in the sense those terms are applied to “direct and public incitement to commit genocide”²⁴⁰. Incitement to commit a crime is some form of inducement, encouragement, or persuasion to perpetrate the crime.

The legal findings of the ICTR rest on the fact that instigation constitutes complicity only when it is accompanied by “gifts, promises, threats, abuse of authority or power, machinations or culpable artifice”²⁴¹. In sum, unless the instigation is accompanied by one of aforesaid elements, the mere fact of prompting another to commit a crime does not constitute the complicity, even if the person committed the crime as a result.

²³⁵ *Bagilishema* Trial Judgment, para. 30.

²³⁶ *Semanza* Trial Judgment, para. 381, *Krstic* Trial Judgment, para 601, *Blaskic* Trial Judgment, para. 280, *Ndindabahizi* Trial Judgment, para 456.

²³⁷ *Bagilishema* Trial Judgment, para 30, *Kordic and Cerkez* Trial Judgment, para 386.

²³⁸ *Akayesu* Trial Judgment, para. 481, *Rutaganda* Trial Judgment, para. 38, *Musema* Trial Judgment, para. 120.

²³⁹ Incitement to commit a crime is some form of inducement, encouragement, or persuasion to perpetrate a crime. See also: *Blaskic* Trial Judgment para. 280, *Kordic and Cerkez* Trial Judgment para. 387.

²⁴⁰ *Akayesu* Appeal Judgment. Paras. 478-482., *Kajelijeli* Trial Judgment, para. 762.

²⁴¹ *Akayesu* Trial Judgment, para. 534.

The instigator must be shown to have possessed the requisite criminal intent; in particular, “he directly or indirectly intended that the crime in question be committed”²⁴².

3.4.3.3 Ordering

Ordering is a form of complicity through instructions given to the direct perpetrator of an offence. As it was defined in the *Krstic* Trial Judgment “ordering entails a person in a position of authority using that position to convince another to commit an offence”²⁴³.

The order may be given either implicitly, or explicitly and the fact of its existence may be established circumstantially²⁴⁴.

The ICTY Chamber in its *Blaskic* Trial Judgment held the opinion that “the order does not need to be illegal in general on its face to engage the responsibility of the person who has issued it, nor it has to be given directly or personally to the individual who issued it to be criminally responsible”²⁴⁵.

Regarding *mens rea* of ordering, what really matters is the state of mind of the person giving the order, not that of the person who is obeying it.

The ad hoc tribunals have not expressed their point of view whether an illegal order to commit a crime could be regarded as criminal, even though the order was not carried out.

3.4.3.4 Aiding and abetting

The form of complicity involving aiding and abetting refers rather to the concept developed by the common law system. According to the jurisprudence developed by the ICTR, aiding means giving assistance to someone, while abetting involves facilitating and commission of an act being sympathetic thereto²⁴⁶. The Tribunal declared that it is sufficient to prove one or other form of participation and thus aiding and abetting are two disjunctive terms²⁴⁷.

The ICTY construed aforementioned problem in a different manner treating aiding and abetting as if they had a collective meaning. The Court did not offer distinct meaning for both terms defining in *Tadic* case that “aiding and

²⁴² *Blaskic* Trial Judgment, para. 278, *Bagilsihema* Trial Judgment, para. 31.

²⁴³ *Krstic* Trial Judgment, para 601, *Rutaganda* Trial Judgment, para. 39.

²⁴⁴ *Blaskic* Trial Judgment, para. 281.

²⁴⁵ *Blaskic* Trial Judgment, para. 282.

²⁴⁶ *Akayesu* Trial Judgment, para. 423

²⁴⁷ *Kayishema and Ruzindana* Trial Judgment, para. 197.

abetting included all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present²⁴⁸.

In *Furundzija* case, the Trial Chamber holds that “*actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime”²⁴⁹.

A person may participate in a crime without sharing the criminal intent of the principal intent of the perpetrator; therefore, the mental element of the crime rests on the accessory knowledge that “his actions assist the perpetrator in the commission of the crime”²⁵⁰.

3.4.3.5 Co-perpetrator or aider (abettor) to genocide?

The general concept of complicity has been analyzed in previous sub-chapters for better understanding of applicability of the concept specifically to the crime of genocide. A range of judgments with regard to genocide was produced by the ICTY and ICTR. The first case dealing with genocide in Srebrenica (*Krstic* case) was a remarkable milestone for the subsequent cases on genocide. The *Krstic* Trial and Appeals Chambers clarified on important aspects of complicity in genocide.

The Trial Chamber held the opinion that *Krstic* was a co-perpetrator of genocide in its Judgment. Nevertheless, in its Appeal Judgment, the Court partially overturned the previous ruling and recognized *Krstic* as aider (abettor) to genocide²⁵¹. The analysis of rendered decisions in *Krstic* case is provided in this sub-chapter to illustrate practical challenges while convicting the person either of co-perpetration in genocide or aiding (abetting) to genocide.

In the Appeals Chamber it was argued by the defense that Radislav Krstic could not do anything to prevail upon General Mladic and stop the executions²⁵².

Based on the evidence, the Trial Chamber concluded that Radislav Krstic had knowledge of the genocidal intent of the VRS Main Staff members²⁵³.

The findings of the Chamber rested on the facts that Krstic was aware that VRS main staff had insufficient resources without the use of the Drina

²⁴⁸ *Tadic* Trial Judgment, para. 689.

²⁴⁹ *Furundzija* Trial Judgment, para. 235.

²⁵⁰ *Furundzija* Trial Judgment, paras. 190-249, *Musema* Trial Judgment, para. 126, *Aleksovski* Trial Judgment, para. 63, *Kunarac* Trial Judgment, para. 391.

²⁵¹ *Krstic* Appeal judgment, para. 144.

²⁵² *Krstic* Trial Judgment, para. 416.

²⁵³ *Krstic* Appeal judgment, para. 137.

Corps resources and as a result the Main Staff would have not been able to carry out the executions on the large scale and implement its genocidal plan.

The conclusion of the ICTY Chamber was that Krstic was aware that he would substantially contribute to the commission of a crime, namely, execution of Bosnian Muslim prisoners if he allowed using the resources of Drina Corps²⁵⁴.

The Appeals Chamber overruled the Trial Judgment by arguing that Krstic aided and abetted in the planning, preparation and execution of genocide against the Bosnian Muslims in Srebrenica.

Based on the factual examination, the Appeals Chamber stated that:

- there was no evidence that Krstic ordered any of the murders of Bosnian Muslims;
- there was no evidence that he directly participated in aforesaid murders;
- he knew that those murders were occurring;
- he permitted the Main Staff to use personnel and resources under his command.

Hence, Krstic was recognized as an aider and abettor to murders, extermination and persecution, but not as a principle co-perpetrator of genocide²⁵⁵.

The Court clarifies also on *mens rea* of the crime defining that a defendant may be convicted for having aided and abetted a crime, which requires specific intent, even where the principal perpetrators have not been tried or identified. This conclusion was drawn in the light of previous judgments, namely, *Krnjelac* Trial Judgment²⁵⁶ where the accused was found liable for having aided and abetted the crime of persecution, which required the specific intent to discriminate, where the principal perpetrators of the crime were not identified, and *Stakic* Trial Judgment, where the Court defined that “an individual can be prosecuted for complicity even where the perpetrator has not been tried”²⁵⁷.

3.4.4 *Mens rea* of the complicity in genocide

Should an accomplice to genocide possess *dolus specialis*, namely intent to destroy in whole or in part a national, racial, ethnical or religious group as such, to be found complicit in genocide? This question concerning the

²⁵⁴ *Ibid*, para. 137.

²⁵⁵ *Krstic* Appeal Judgment, para. 144.

²⁵⁶ *Krnjelac* Trial Judgment, paras. 489-490.

²⁵⁷ *Stakic* Trial Judgment, para. 534.

presence of genocidal intent when a person assists in the commission of the crime is still open.

In general terms, the ICTY Trial Chamber in its *Tadic* case recognized that a requirement of intent “involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing or otherwise aiding and abetting in the commission of a crime”²⁵⁸.

Drawing the conclusion from a general complicity provision, an accomplice to genocide must possess *dolus specialis*. However, jurisprudence of the ad hoc tribunals tend to show different requirements for the *mens rea* standard taking into account the form of complicity in genocide.

In contrast, the ICTR Trial Chamber stated that “an accomplice to genocide does not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such”²⁵⁹. In its *Akayesu* Judgment the ICTR concluded that in order for an accused to be found guilty of complicity in genocide, it must be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed²⁶⁰. The confusion evolves whether to undertake the approach provided by the *Akayesu* Trial Judgment considering only the knowledge of the circumstances but ignoring *dolus specialis* requirement.

In a sum, the intent of an accomplice to genocide is not identical to that of a principal perpetrator. Nevertheless, an accomplice shares genocidal intent if he/she is aware of the principal perpetrator’s *dolus specialis*, namely the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

3.4.5 Other forms of criminal participation

3.4.5.1 Joint Criminal Enterprise

The concept of the JCE was originally developed in the jurisprudence of post Second World War military tribunals and commissions. In addition to the theory of accomplice liability while prosecuting and convicting Nazi supporters, the new concept of criminal liability evolved of “acting with a common design”.

The JCE is a *sui generis* concept that combines elements of common law and continental system. It is difficult to assess to which extend the JCE is closer to the accomplice liability than to the co-perpetration. Attempts to look at the JCE as a separate concept developed in international criminal

²⁵⁸ *Tadic* Trial Judgment, para. 674.

²⁵⁹ *Akayesu* Trial Judgment, para. 540-541.

²⁶⁰ *Ibid.*

law and to analyze said concept on the basis of its applicability to the crime of genocide in international criminal law are given in this sub-chapter.

The ‘group crime concept’ rests on the theory of English common law. Originally the concept of common design liability was interpreted in the Nuremberg Tribunal as one that required proof of awareness on the part of the defendant (*mens rea*) that in some way his/her conduct contributed to the crime (*actus reus*)²⁶¹. Nevertheless, it is absolutely necessary to distinguish accomplice liability from the common design liability. As it was discussed in the previous sub-chapters on the complicity, accomplice must have substantially contributed to the commission of the crime. On the contrary, common design liability requires lower degree of participation and hence, it is not necessarily substantial. Furthermore, there is no distinction to be made between the perpetrator and the accomplice as all individuals involved in the commission of the crime are considered to be participants of a crime.

The concept of the JCE has been applied actively in the ICTY having a significant impact on the jurisprudence of the ICTR. Nevertheless, the scope of the JCE is still uncertain and the JCE liability along with its application towards the crime of genocide remains as contentious as undetermined²⁶².

The JCE articulates a mode of individual criminal responsibility, in which the acts of one person can give rise to criminal culpability of another where both participate in a common criminal plan²⁶³.

The JCE encompasses three distinct categories of crime, namely:

- a basic form (First Category JCE);
- a systematic form (Second category JCE);
- an extended form of common purpose (Third Category JCE).

The first category requires a plurality of persons that must be involved in the commission of a crime²⁶⁴. However, said persons do not need to be organized in a military, political or administrative structure²⁶⁵.

The second category requires the existence of a common purpose, which amounts to or involves the commission of the crime per se. The purpose

²⁶¹ *Werner Rohde & Eight Others*, United Nations War Crimes Commission, Law Reports of War Criminals (UNWCC) (London: HMO 1947-1949), Vol. V, 56; *Bruno Tesch & Others (Zyklon B case)* UNWCC, Vol. I, at 101.

²⁶² Ellies van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting for Genocide*, Vol. 5, No.1, Oxford: Oxford University Press, 2007, pp. 184-207.

²⁶³ *Tadic* Appeal Judgment, paras. 185, 196, 222-223, 228, *Krstic* Trial Judgment, para. 602.

²⁶⁴ *Stakic* Trial Judgment, para 64, *Tadic* Appeal Judgment, para 227.

²⁶⁵ *Tadic* Appeal Judgment, para 227.

could be materialized extemporaneously. It also may be inferred from the fact that a plurality of persons is acting together in order to put into effect a joint criminal enterprise²⁶⁶. The plan of a joint criminal enterprise can be agreed upon at the early stages or it can be developed through the acts performed by the persons involved. The objective of a joint criminal enterprise can possibly escalate over time²⁶⁷.

The last but not least category of the JCE encompasses the participation of an accused in the common design involving the perpetration of a crime. However, such participation does not necessarily involve the commission of the crime per se, but may include, *inter alia*, assistance in, or contribution to, the execution of the common plan or purpose²⁶⁸.

3.4.5.1.1 *Mens rea* of the JCE

The first and the second categories of the JCE require “an intention to participate in and further the criminal activity or purpose of the group”²⁶⁹. This provision can be interpreted in a way that all participants must possess the same intent. *A contrario*, the third category of the JCE in regard to *mens rea* differs substantially from the first and the second categories. A participant can be held responsible for the crimes falling outside the framework of the JCE provided that he/she is in possession of *dolus eventualis* and it was foreseeable that such a crime might be perpetrated by one or another member of the group and the accused willingly took the risk.²⁷⁰

To illustrate the application of the JCE in the international criminal law, one can mention *Tadic* case. The Trial Chamber ruled that the accused could not be sentenced for the killing of five men in the village of Jaskici since there was no evidence that he had taken part in these killings²⁷¹. Nevertheless, the Appeals Chamber partially overturned the judgment of the Trial Chamber in this part, and convicted Tadic for those killings relying on the concept of the JCE. The third category of the JCE was applied in *Tadic* case for the accused shared the intent to remove people from Jaskici and consequently, perpetration of killings was considered as the predictable consequence of the removal.

The judges of the Appeals Chamber were very reasonable in the judgment, as it was obvious that the accomplice liability could not have been applied to Tadic. It was impossible to prove beyond the reasonable doubt that the accused “specifically directed at assisting, encouraging or lending moral support to the killings while the support must have had a substantial effect on the underlying crime”.

²⁶⁶ *Tadic* Appeal Judgment, para. 227, *Stakic* Trial Judgment, para. 64.

²⁶⁷ *Krstic* Trial Judgment paras. 619, 633.

²⁶⁸ *Tadic* Appeal Judgment, para. 228.

²⁶⁹ *Ibid.*

²⁷⁰ *Tadic* Appeal Judgment, para. 228.

²⁷¹ *Tadic* Trial Judgment, para. 373.

3.4.5.1.2 Genocidal intent and the JCE

As it was ruled by the ICTR in its *Akayesu* case “special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged”²⁷². This approach applied to the *dolus specialis* is known as the purpose-based interpretation²⁷³.

The interpretation was challenged by the OTP of the ICTY²⁷⁴ and the new approach to the genocidal intent was proposed known as the ‘knowledge-based interpretation’²⁷⁵. It is argued that genocide should encompass acts that one knows lead to the destruction of the group, or whose foreseeable or probable consequence is the destruction of the group. The current approach used by the ad hoc tribunals relies on the purpose-based approach.

The advantage of applying the concept of *dolus specialis* to the JCE lies in the fact that the lower *dolus specialis* standard is applied but the direct link with the actual perpetrators should be proved in any case. On the one hand, it seems that the concept of the JCE should be applicable to the ‘intellectual perpetrators’ where there is not enough proof of a full genocidal intent and the person cannot be convicted of the incitement or conspiracy to commit genocide²⁷⁶. On the other hand, it may be problematic to prove the direct link with the actual perpetrators.

In a sum, an accused can be held liable for genocide while applying the concept of the JCE, when his/her knowledge extends to: the genocidal act and principal’s genocidal intent. It can be construed that a participant must have knowledge of the genocidal intent and he/she willingly takes the risk that such intent may possibly materialize.

3.4.5.2 Command responsibility and genocide

Originally, the concept of command responsibility developed in a military context was applied solely to war crimes. The concept was expanded to genocide and war crimes in the jurisprudence of the ad hoc tribunals.

In this sub-chapter the applicability of the concept of command responsibility towards the crime of genocide is explored along with problems in extending command responsibility to the crime of genocide that necessarily entails *dolus specialis* requirement.

²⁷² *Akayesu* Trial Judgment, para. 498.

²⁷³ C.Kress, ‘The Darfur Report and Genocidal Intent’: 3 *Journal of International Criminal Justice* (2005) 562-578, at. 566.

²⁷⁴ Prosecution’s *Jelisić* Appeal Brief, paras. 4 and 22.

²⁷⁵ A.K.A Greenwalt, “Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation”, 99 *Columbia Law Review* (1999) 2259-2295, at 2288.

²⁷⁶ Ellies van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting for Genocide’, Vol. 5, No.1, Oxford: Oxford University Press, 2007, pp. 184-207, at 206.

Command responsibility is a form of criminal participation when a person in a hierarchically responsible position can be held liable for the acts of subordinates. In the case of direct command responsibility, a superior should be regarded liable as an accomplice, for he/she ordered, instigated or planned the criminal acts committed by his subordinates and failed to take measures to prevent or repress the unlawful conduct of his/her subordinates. Another category of command responsibility defined as so-called imputed responsibility is set out in Article 7 (3) of the ICTY Statute and Article 6(3) of the ICTR Statute when a superior knew or had reason to know that the subordinate was about to commit crimes 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.

Primarily, the focus is made on the concept of the indirect command responsibility due to the fact that the applicability of the complicity to the crime of genocide has been discussed in the previous paragraphs.

Drawing the elements of the command responsibility from Article 7(3) and 6(3) of the ICTR and ICTY Statutes, the essential elements are as follows:

the existence of a superior-subordinate relationship between the accused and the perpetrator of the offence;

the accused knew or had reason to know that the perpetrator was about to commit the offence or had done so; and

the accused failed to take the necessary and reasonable measures to prevent the offence or to punish the perpetrator.²

3.4.5.2.1 Superior-subordinate relationship

To determine whether a person held superior authority over the perpetrator is necessary to establish the very existence of ‘effective control’². In the jurisprudence of the ad hoc tribunals effective control is defined as “the material ability to prevent and punish the commission of these offences.”^{2 9} The persons under temporary command of the superior are regarded as subordinates if “at the time when the acts charged in the indictment were committed, these persons were under the effective control of that particular individual.”² The *Celebici* Trial Chamber ruled that criminal responsibility under Article 7(3) of the Statute could be attributed: “(...) on the basis of either their *de facto* or their *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should not be understood to preclude the imposition of such

² *Aleksovski* Appeal Judgement, paras.71-72; *Krnojelac* Trial Judgement, para.92 *Kvočka* Trial Judgement, para.314; *Krstic* Trial Judgement, para.604; *Kordic* Trial Judgement, para.401; *Kunarac* Trial Judgement, para.395; *Blaskic* Trial Judgement, para.294.

² *Celebici* Appeal Judgement, paras.196-98.

^{2 9} *Celebici* Trial Judgement, para.378; *Blaskic* Appeal Judgement, para.69.

² *Kunarac* Trial Judgement, para.399. Note: The Trial Chamber found that in this case, the Prosecutor failed to prove that *Kunarac* exercised effective control over the soldiers (which were under his command on a temporary ad hoc basis) at the time they committed the offences. (*Kunarac* Trial Judgement, para.628).

responsibility.”^{2 1} It is important to emphasize that the term ‘superior’ is not limited to commanders who are directly superior to the perpetrators within the regular chain of command; rather a ‘superior’ is defined to relate to any person who exercises effective control over subordinates.^{2 2}

3.4.5.2.2 Knowledge and Intent

It must be proven beyond a reasonable doubt that a superior “knew or had reason to know that a subordinate was about to commit a prohibited act or had done so.”² The mental state requirement can be met either by actual knowledge, *i.e.*, ‘actual notice’, or by ‘notice of the risk of such offences’,² *i.e.*, ‘inquiry notice’. Actual knowledge is “defined as the awareness that the relevant crimes were committed or were about to be committed,”² and can be established through either direct or circumstantial evidence.²

The peculiarity of the crime of genocide is in the presence of *dolus specialis* being necessary constituent of *mens rea* and distinguishing the crime of genocide from war crimes and crimes against humanity. The ‘knowledge’ element does not suffice requisite mental state in regard to the crime of genocide. The way command responsibility is outlined in both Statutes clearly refers command responsibility to the crime of negligence. One can just wonder how such a specific intent crime as genocide can be committed by negligence.

Applicability of the concept of command responsibility as a form of criminal participation is not contemplated in any legal instrument with regard to the crime of genocide. Nevertheless, the ICTR has applied command responsibility towards the crime of genocide in its judgements. In *Akayesu* case the ICTR Trial Chamber acquitted the accused on command responsibility charges of the indictment due to the absence of clear superior-subordinate relationship²⁸⁷. In the *Serushago* case the ICTR convicted the accused pursuant Article 6 (3). The indications in the judgment were clear enough to convict the accused of being an accomplice pursuant Article 6 (1), for “he gave orders to execute several victims”²⁸⁸. Similarly, the motivations of the Court were vague and inconsistent in the *Kayishema* and *Ruzindana* case where the accused was found guilty of command responsibility genocide, only after the Trial Chamber had acknowledged that he had planned, instigated, ordered, committed or otherwise aided and abetted in the planning, perpetration or execution of the crimes²⁸⁹. The concept of command responsibility will show its efficiency in future

^{2 1} *Celebici* Trial Judgement, para.354.

^{2 2} *Blaskic* Trial Judgement, paras.300-301.

² *Celebici* Appeal Judgement, para.222; *Celebici* Trial Judgement, para.383.

² *Celebici* Appeal Judgement, para.222.

² See: *Kordic* Trial Judgement, para.427-8 and *Celebici* Trial Judgement, para.383, 386.

² *Kordic* Trial Judgement, paras. 427-428.

²⁸⁷ *Akayesu* Trial Judgement, para. 689.

²⁸⁸ *Serushago* Trial Judgment, para. 29.

²⁸⁹ *Kayishema and Ruzindana* Trial Judgement, para. 473.

genocide cases only when the accused is found guilty due to the fact that he 'had reason to know' about predicate crime.

Although command responsibility has been applied in genocide cases, the ad hoc tribunals did not express their opinion on the *mens rea* standard with regard to *dolus specialis*. The ICTY has just attempted to approach said problem in Rule 61 Hearing in Karadzic and Mladic²⁹⁰. It is reasonably argued by William Schabas that in the case of command responsibility, the prosecution must prove beyond reasonable doubt the genocidal intent of the subordinate, not that of the commander. If the commander's genocidal intent is established then complicity is a proper basis of guilt rather than command responsibility²⁹¹.

3.4.5.2.3 Necessary and reasonable measures

A superior must take 'necessary and reasonable measures' to meet his/her obligation to prevent offences or punish offenders under Article 7(3) of the ICTY Statute and Article 6 (3) of the ICTR Statute. The adequacy of these measures is commensurate with the material ability of a superior to prevent or punish.²⁹²

The Trial Chamber should consider 'actual ability or effective capacity' of the superior to take action, rather than his/her legal or formal authority.²⁹ "A superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations."²⁹ The duty to prevent or to punish "includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself."²⁹ Whether the superior's effort to prevent or punish the crimes committed by subordinates reaches the level of 'necessary and reasonable measures' is at the discretion of the Trial Chamber to evaluate taking into account the facts of the particular case.²⁹

It is difficult to predict the prospects of applicability of the concept of command responsibility towards the crime of genocide when the boundaries of knowledge and specific intent are not clearly defined in the jurisprudence of the ad hoc tribunals.

²⁹⁰ Rule 61 : Orders for Review of the Indictments/ *Article 61 : Ordonnances aux Fins de l'Examen des Actes d'Accusation*, Cases No IT-95-5-R61 & No IT-95-18-R61.

²⁹¹ *Supra note 80*, at 312.

²⁹² *Blaskic* Trial Judgement, para.335; *Celebici* Trial Judgement, para.395.

²⁹³ *Kordic* Trial Judgement, para.443; *see also Blaskic* Trial Judgement, para.335; *Celebici* Trial Judgement, para.395; *Blaskic* Appeal Judgment, para.72.

²⁹⁴ *Krnjelac* Trial Judgement, para.95.

²⁹⁵ *Kordic* Trial Judgement, para.446; *see also, Blaskic* Trial Judgement, para.302, 335.

²⁹⁶ *Celebici* Trial Judgement, para.394. *See also Kvočka* Trial Judgement, para.316.

4 The impact of the developed concept of the crime of genocide in the jurisprudence of the ad hoc tribunals on the ICC practice

4.1 The crime of genocide in the Rome Statute and ICC Elements of Crimes²⁹⁷

The concept of establishment of the permanent international criminal court has been debated by the international community for many years. However, the implementation of such an idea involved considerable efforts of the international community. Why did it take such a long time to create the permanent institution of criminal jurisdiction aimed to achieve the global justice?

The idea of global justice was finally achieved with the adoption of the Rome Statute at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome in July 1998. Although the establishment of the ICC “marked an important milestone in the quest for an international criminal justice system”²⁹⁸, the important questions remain to what extent the system could be self-sustaining and how it would be able to harmonize existing and developing international criminal law.

The key element of the international criminal justice system that operates under the Rome Statute is the principle of complementarity. The Court exercises its jurisdiction only when a member state to the Rome statute is unable or unwilling to carry out an investigation or prosecution²⁹⁹. Comparing to the ad hoc tribunals, the ICC does not have primacy over domestic courts while applying its jurisdiction and it is aimed merely to supplement domestic proceedings.

The states drafting the Rome Statute agreed that the crime of genocide needed to be absolutely included within the jurisdiction of the Court as the

²⁹⁷ See: *Aksar, Yusuf*, ‘Implementing International Humanitarian Law: From the *Ad hoc* Tribunals to a Permanent International Criminal Court’, Routledge Taylor & Francis Group, London & New York, 2004.

²⁹⁸ *Selected Basic Documents Related to the International Criminal Court (ICC Publication, 2005)*.

²⁹⁹ Rome Statute, Article 17(1)(a).

Rome Statute itself aimed that “the most serious crimes of concern to the international community as a whole must not go unpunished”³⁰⁰.

Article 6 of the Rome Statute is *verbatim* article II of the Genocide Convention. Of regret is the fact that the article III of the Genocide Convention has not found its reflection in any provision of the Rome Statute and hence, conspiracy, incitement, attempt and complicity in regard to the crime of genocide have not been taken into account.

Different explanations could be offered on the exclusion of aforesaid terms in the text of the Rome Statute. Nevertheless, the general provisions on incitement³⁰¹, attempt³⁰² and complicity³⁰³ are provided in the Rome Statute and consequently, they could be applied to all criminal offences enlisted in the Rome Statute.

The first genocide cases have been tried before the ad hoc tribunals and thus the ICC cannot undermine their role in the development of the substantial body of international criminal law. The ICC will definitely rely upon the practice developed by the ad hoc tribunals as latter not only applied the elements of the crime of genocide, but also clarified the substantive content of the crime of genocide.

The Elements of the ICC³⁰⁴ elaborate on the definition of the crimes enumerated in the Rome Statute defining *actus reus*, *mens rea* and providing both general and specific introduction to the elements of the crime. The Elements give detailed description of each of five genocidal acts enumerated in the Rome Statute. In the introductory part to the crime of genocide, it is defined that mental element towards the crime of genocide will be decided by the Court on a case-by-case basis³⁰⁵.

While drafting the Elements, the delegates of the Preparatory Commission looked in depth at the jurisprudence of the ad hoc tribunals. *Akayesu* case was a pivotal case with regard to the conviction for the crime of genocide being recognized by the former UN Secretary-General as a “landmark decision bringing to life, for the first, the ideals of the Genocide Convention, adopted 50 years ago”³⁰⁶. The decisions rendered by the ad hoc tribunals are crucial in terms of providing guidance on the elements of genocide and the ICC as the court of the ‘last resort’ will play an important role in further application of the legal provisions on the crime of genocide.

³⁰⁰ Rome Statute, Preamble.

³⁰¹ Rome Statute, Article 25 (3) (e).

³⁰² Rome Statute, Article 25 (3) (f).

³⁰³ Rome Statute, Article 25 (3) (d).

³⁰⁴ ICC Elements of Crimes adopted by the Assembly of States Parties, 3-10 Sep 2002, Official records, ICC-ASP/1/3.

³⁰⁵ *Ibid.*, Introduction, Art. 6.

³⁰⁶ Statement by U.N. Secretary-General Kofi Annan on the Occasion of the Announcement of the First Judgment in a Case of Genocide by the International Criminal Tribunal for Rwanda, UN Doc. PR/10/98/UNIC, 1998.

The ad hoc tribunals have been working with the skeletal definitions of crimes. The judges are in discretion to develop and construe necessary elements of the crime. *A contrario*, another approach prevails towards the ICC as latter has a broad jurisdiction over all states parties that are signatories to the Rome Statute and hence, it is in the interest of states parties to construct a fully-fledged system when all the crimes are defined in the precise terms. How precise the definitions of crimes should be? This question was debatable in the Preparatory Committee for the Establishment of an International Criminal Court. The delegates of the Committee compromised and recognized that the definitions of crimes in the Rome Statute were ones to be applied and the Court had a reasonable discretion in the interpretation. Moreover, the binding force of the Rome Statute and the Elements is not equal. The ICC Elements of Crimes are meant to be necessary guidelines for the judges to apply the provisions of the Rome Statute. Elements must be consistent with the Rome Statute and in the case of inconsistency according to Article 9 (3) the Statute should prevail.

The state parties to the Rome Statute tried to establish a fully-fledged system of criminal law through clear and specific definitions of the elements of crimes. In spite of compromises and consensus achieved on some important theoretical issues, the question still remains to what extent aforesaid 'fully-fledged system' could be effective and applicable in practice.

4.2 Protected Groups and the Rome Statute

The very first requirement of the crime of genocide is that the genocidal acts must be directed against a national, ethnic, racial or religious group. Although these groups are mentioned in such international instruments as the Genocide Convention, the Statutes of the ICTY and ICTR, Rome Statute, the definitions of the groups are not provided. The discretion has been given to the ad hoc tribunals to interpret the definition of targeted groups and in fact, the ICTR clearly defined the interpretation applicable to the concepts of national, ethnic, racial and religious groups in *Akayesu*, *Kayishema* and *Ruzindana*, and *Rutaganda* Judgments. As the interpretation of the targeted groups developed by the ad hoc tribunals is consistent with the international law, it seems that the ICC would take the same approach to the concepts of protected groups that are not limited only to national, ethnic, racial or religious group but encompass also any groups as long as they are stable and permanent.

4.3 *Actus reus* of the crime of genocide in the Rome Statute and ICC Elements of Crimes

The second requirement is met if the crime of genocide must be constituted of acts enumerated in the Genocide Convention, ICTY and ICTR Statutes, or Rome Statute. The ad hoc tribunals have contributed significantly to the interpretation of the constitutive genocidal acts and the ICC would definitely work with respective jurisprudence developed by the tribunals. Though the list of acts constituting genocide is exhaustive, however, it is not limited in its scope, for example, the practice of the ad hoc tribunals recognized the crime of rape and sexual violence as the genocidal act under the categories of “causing serious bodily or mental harm to the members of the group” and “imposing measures intended to prevent births within the group”.

The concept of genocide developed in the jurisprudence of the ad hoc tribunals was taken as a basis while drafting the Rome Statute, ICC Elements of Crimes and thus many innovative developments found the direct reflection in the text of the Statute and Elements.

4.3.1 Genocide by killing in the ICC Elements of Crimes

This work analyzes how the jurisprudence of the ad hoc tribunals with regard to the acts constituting the crime of genocide has influenced the contents of the Rome Statute along with the ICC Elements of Crimes and how it would possibly influence the further practice of the ICC.

“Killing members of the group” is one of the most obvious acts constituting the crime of genocide and the world community witnessed killings taken place in Rwanda and former Yugoslavia. There has been enough evidence presented before the ICTY and ICTR that such killings took place and the process of identification of missing persons is still ongoing. As it was interpreted in *Akayesu* judgment ‘killing’ as the genocidal act must be committed against one or several individuals because such individual or individuals were members of a specific group, and specifically because they belonged to this group³⁰⁷, the same approach was followed in the Elements³⁰⁸. The Genocide Convention provides that genocide constitutes “killing of members of the group”³⁰⁹ and thus the term ‘members’ is used in plural and cannot be applicable to one person. The important question arises as whether the definition has been broadened while applied in the ad hoc tribunals and adopted by the Elements. Is the interpretation provided in the *Akayesu* case consistent with the definition in the Genocide Convention and

³⁰⁷ See: Chapter I, 2.4.1 Killing members of a group.

³⁰⁸ ICC Elements of Crimes, Elements, Art. 6(a).

³⁰⁹ Genocide Convention, Art. II (a).

customary law? Killing as a genocidal act must be approached from the angle of individual criminal responsibility. If the individual, with necessary *mens rea*, agrees with 999 others that they will carry out one killing each – and each does it, surely, then each of them should be guilty of genocide rather than simple murder³¹⁰. Professor Schabas reasonably argues that “the killing of one member of the protected group would support a count of genocide, provided the killing was done with the genocidal intent”³¹¹.

In the ICC Elements of Crimes killing as the genocidal act takes place when such criteria are met:

1. the perpetrator killed one or more persons;
2. such person or persons belonged to a particular national, ethnical, racial or religious group;
3. the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such;
3. the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction³¹².

The paragraph 4 defines that the act of perpetrator needs to take place “in the context of a manifest pattern of similar conduct directed against the group” and it appears to be inconsistent with the Genocide Convention and Rome Statute itself for it slightly expands the definition of genocide. The inclusion of this element to the ICC Elements of Crimes was motivated by the fact that such an element was absolutely needed as it could capture adequately the notion of the scale or threat to a group required to amount to the genocide.

The introductory part of the Elements construes the contextual element requirement. The term ‘in the context of’ as defined includes ‘initial acts in an emerging pattern’³¹³ providing that at the initial stage of the commission of the crime perpetrators can be charged and convicted of the crime of genocide. The term ‘manifest’ is an objective qualification used to avoid referring to the isolated crimes committed over long period of time.

It is still questionable whether the inclusion of the contextual element requirement was absolutely necessary. Anyway, it is hard to imagine that the Office of the Prosecutor would ever charge a person or persons with the crime of genocide in the absence of a genocidal context. The applicability of this provision in the further ICC practice is equivocal. However, it is difficult to assess the role of provided element until the genocide case is actually brought on trial to the ICC.

³¹⁰ Leanne McKay, Characterizing the System of the International Criminal Court: an Exploration of the Role of the Court through the Elements of Crime and the Crime of Genocide, *International Criminal Law Review*, 6 (2006):2, 254-274, at 262.

³¹¹ *Supra note*, p. 234.

³¹² ICC Elements of Crimes, Elements, Art. 6(a).

³¹³ ICC Elements of Crimes, Introduction, Genocide.

It is of vital importance that the ICC Elements of Crimes recognize killing of one person as the genocidal act not requiring the destruction to be ‘substantial’. The horrific crime of genocide should be halted in progress until the destruction becomes ‘substantial’. It is absolutely needful that genocide must be prevented in future bearing in mind enormous suffering of victims of genocide in the past.

4.3.2 Genocide by causing serious bodily or mental harm in the ICC Elements of Crimes

The approach taken by the ICC in its Elements of Crimes towards constitutive act of genocide “causing serious bodily or mental harm” is reflecting the interpretation of said genocidal act in the jurisprudence of the ad hoc tribunals. The interpretation of rape and sexual violence as genocidal acts under the category of “causing serious bodily and mental harm” firstly developed by the ICTR in *Akayesu* and further by the ICTY in *Krstic* was reaffirmed in the Elements and hence, the further ICC practice would be consistent with current developments in international criminal law.

4.3.3 Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction and the ICC Elements

The genocidal act of “deliberately inflicting conditions of life calculated to bring about physical destruction” in the ICC Elements of Crimes is in line with the developed case law of the ad hoc tribunals. The ICTR provided the methods of destruction by which the perpetrator does not immediately kill the members of the group but which seeks for their physical destruction. The ICC Elements of Crimes recognize that ‘conditions of life’ to bring about the physical destruction may include deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes³¹⁴. Provided list is neither exhaustive nor limited in its scope and the ICC judges are authorized to evaluate, which conditions of life contribute to the physical destruction.

4.3.4 Genocide by imposing measures intended to prevent births and ICC Elements

The main achievements of the ad hoc tribunals are inclusion of rape into the category of “imposing measures to prevent births” and recognition of the measures not only of physical but also of mental character. The ICC Elements of Crimes do not determine which specific measures constitute

³¹⁴ ICC Elements of Crimes, Art. 6(c).

this genocidal act³¹⁵. Nevertheless, the approach taken by the ad hoc tribunals has a precedential value for the ICC.

4.3.5 Genocide by forcibly transferring children in the ICC Elements

Another important interpretation of the ICTR in its *Akayesu* and *Rutaganda* Judgments in regard to such a genocidal act as “forcibly transferring children” is reflected in the text of the Elements as well. The ICTR in its *Rutaganda* judgment concluded that the term ‘forcibly’ was not restricted only to physical violence, but it also included acts of threats of trauma which would lead to the forcible transfer of children³¹⁶ and hence, the ICC in its Elements reinforced the approach stating that the term ‘forcibly’ may include, along with physical force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment³¹⁷.

4.4 Intent

The very specific requirement of the crime of genocide distinguishing it from war crimes and crimes against humanity is the presence of *dolus specialis*, namely the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. The ad hoc tribunals have contributed significantly to the clarification of *dolus specialis* applicable to the crime of genocide showing interrelation of ‘intent to destroy’ and ‘in whole or in part’ in regard to a protected group, differentiating genocidal intent from discriminatory intent of the crime of persecution falling under the category of crimes against humanity, and clarifying on circumstances when the genocidal intent could be inferred from a number of facts.

Mens rea of the crimes falling under the ICC jurisdiction is encompassed in Article 30 of the Rome Statute:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

³¹⁵ ICC Elements of Crimes, Art. 6(d).

³¹⁶ *Rutaganda* Trial Judgment, para.54.

³¹⁷ ICC Elements of Crimes, Elements, Art. 6(e).

How does the general provision on *mens rea* in the Rome Statute apply to the crime of genocide? Taking into consideration the peculiarity of the crime of genocide that requires *dolus specialis*, it appears unreasonable to apply general *mens rea* criterion requirement provided in Article 30 of the Rome Statute. Hence, the special intent is only subject to Article 6 of the Rome Statute. In this case, more specific provision applies to the crime of genocide rather than default rule set in Article 30 of the Statute³¹⁸.

Obviously, the Rome Statute failed to address properly the *mens rea* requirement for the crime of genocide. There is no explicit answer in the Statute whether the general and specific intent should be considered separately or jointly.

The legal approach to the crime of genocide should be cured of its shortcomings; thus, drawing clear boundaries of *mens rea* of the crime of genocide is the priority task for the ICC to avoid confusion in possible future genocide cases.

4.5 Other acts of genocide and the ICC

Under the ICTY³¹⁹ and ICTR³²⁰ Statutes, a person can be held responsible for conspiracy to commit genocide. There is no clear provision neither in the Genocide Convention, nor in the ICTY and ICTR Statutes what is the definition of the crime of conspiracy to commit genocide, and consequently, the ad hoc tribunals have been in discretion to construe this term.

In the light of the spirit and purpose of the Genocide Convention, conspiracy to commit genocide could be understood as an agreement between two or more persons to commit genocide. The existence of a mere agreement is sufficient to convict a person of a crime of genocide irrespective of the occurrence of the crime of genocide itself³²¹. Inclusion of the crime of conspiracy to commit genocide is aimed at the prevention of the crime of genocide as it can be clearly inferred from the full name of the Convention that its purpose is not only to punish individuals for the crime of genocide but also to prevent the occurrence of said horrific crime as the priority task. The Statutes of the ad hoc tribunals are consistent with the interpretation of the concept of conspiracy in the Genocide Convention. However, the developed jurisprudence is ambiguous, inasmuch as it still remains unclear which approach towards the conspiracy to commit genocide should prevail – applicable in common law system or continental law system.

³¹⁸ See: Arnold, Roberta, 'The *Mens Rea* of Genocide under Statute of the International Criminal Court', *Criminal Law Forum: an International Journal*, 14(2003):2.

³¹⁹ ICTY Statute, Art.4(3)(b)

³²⁰ ICTR Statute, Art.2(3)(b)

³²¹ See: Chapter III, 3.1 Conspiracy to commit genocide.

Conspiracy is not punishable under the Rome Statute, as majority of the civil law countries present at the Rome Diplomatic Conference did not express themselves in favor of including the concept of conspiracy to the text of the Rome Statute.

Antonio Cassese holds the opinion that the Rome Statute is out of line with international customary law³²² as the exclusion of the conspiracy to commit genocide is falling out of the scope of the Rome Statute.

The Rome Statute is a major step backward due to the exclusion of the conspiracy to commit genocide and thus one of the most preventive tools of the occurrence of the crime of genocide was totally ignored by the international community. Despite that lacuna in the text of the Rome Statute, the further practice of the ICC will show whether the Court can ignore totally the jurisprudence of the ad hoc tribunals and developed concepts of international criminal law that have become the part of international customary law.

The concept of direct and public incitement to commit genocide constitutes a crime under both Statutes of the ad hoc tribunals. The ICTR has greatly contributed to the interpretation of the crime. The definition of the crime provided by the ICTR creates guidance for international community. The ICTR has clearly construed *mens rea* of the crime defining the ‘intent to directly prompt or provoke another to commit genocide’ and solved out the issue whether the crime of direct and public incitement to commit genocide is punishable if the incitement is not successful³²³. The Tribunal took the same approach as towards conspiracy to commit genocide making the incitement punishable due to the serious gravity of the crime of genocide as such.

The view taken by the ad hoc tribunals complies with the spirit and purpose of the Genocide Convention, for the prevention of the occurrence of the crime of genocide is an important issue facing the entire international community. The ICC could not ignore the developed jurisprudence of the ad hoc tribunals and the crime of direct and public incitement to commit genocide took explicitly its place in the Rome Statute³²⁴. Undoubtedly, the ICC will consider the jurisprudence developed by the ad hoc tribunals in regard to the crime of direct and public incitement to commit genocide in its further case law.

The Genocide Convention and ad hoc tribunals singled out an attempt to commit genocide as a distinct crime showing a significant difference between an attempt to commit genocide and an attempt to commit any other crime. Of regret is the fact that the ICC ignored that interpretation defining the concept of attempt applicable to all crimes. A person shall be criminally responsible and liable for punishment of a crime within the jurisdiction of

³²² Antonio Cassese. *International Criminal Law*, Oxford University Press, 2003.

³²³ See: Chapter II, 3.2 Direct and public incitement to commit genocide.

³²⁴ Art. 25 (3)(e).

the ICC if the person attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime did not occur because of circumstances independent of the person's intention³²⁵. Furthermore, the Rome Statute states that a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment for the attempt to commit the crime if that person completely and voluntarily gave up the criminal purpose³²⁶. Undoubtedly, as far as such a serious crime as genocide is concerned, said provision should not be applicable even if the person completely and voluntarily gave up the criminal purpose to commit genocide. Nevertheless, it could be considered as a mitigating factor in defining the sentence to be imposed but not the factor excluding the criminal responsibility. In this sense, the Rome Statute is definitely step backward and one can just wonder how such important interpretations developed by the ad hoc tribunals could have been ignored while drafting and adopting the Rome Statute.

Complicity in genocide has provoked many heated debates in the ad hoc tribunals and perhaps remains the most controversial concept in international criminal law. As the definition of complicity is absent in both Statutes of the ad hoc tribunals, it has been greatly developed and construed in the jurisprudence of the ad hoc tribunals. The Rome Statute followed the same approach in regard to the complicity in genocide as towards the attempt to commit genocide not distinguishing the concept of complicity generally from the concept of complicity in genocide specifically³²⁷. It could be also recognized as a step backward from the practice of the ad hoc tribunals. The concept of complicity in genocide should be singled out from the concept of complicity in general due to the peculiarities of *mens rea* and *actus reus* of the crime of complicity in genocide. As it was ruled by the ad hoc tribunals, the crime of complicity in genocide does not necessarily require the existence of the specific intent (*dolus specialis*) and merely the presence of knowledge of the genocidal plan is sufficient in order to establish individual criminal responsibility³²⁸. Under Article 6 (1) and 7 (1) of the ICTY and ICTR Statutes *actus reus* of complicity in the form of aiding and abetting to genocide could be in the form of omission, namely, failure to act or refrain from action³²⁹. In contrast, other forms of complicity do require a positive action.

The aforesaid specific legal characteristics of the complicity in genocide stand apart from the general concept of complicity, and consequently, the approach towards complicity in genocide developed by the ad hoc tribunals is consistent with the development of international criminal law. Summarizing aforementioned analysis of the concept of complicity towards the crime of genocide as provided in the Rome Statute, one can conclude that ICC has failed to adopt the progressive concept developed by its

³²⁵ Rome Statute, Art.25 (3).

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Akayesu* Trial Judgement, paras. 540

³²⁹ *Akayesu* Trial Judgment, para. 548, *Tadic* Trial Judgment, para. 689.

predecessors and as a result, the confusion while applying the law is inevitable in future proceedings.

5 Concluding remarks

The establishment of the ad hoc tribunals more than one decade ago was met with skepticism and doubts from the international community whether those tribunals could be effective mechanisms to combat international crimes including genocide, war crimes and crimes against humanity. Despite numerous structural and procedural problems, the ad hoc tribunals have contributed significantly to the new evolving culture of human rights reaffirming the “link between an established system of individual accountability and the maintenance of international peace and security”³³⁰. The advancement of the idea of global justice has been reflected in the establishment of the ICC.

The legal provisions of the Genocide Convention on the crime of genocide seen as an effective tool to prosecute perpetrators were not internationally applied prior to the establishment of the ad hoc tribunals that were empowered to exercise the jurisdiction over the crimes of the greatest concern to the humankind including the crime of genocide, war crimes and crimes against humanity. Over the years tribunals have proven capability to charge, prosecute and convict those responsible for the heinous crime of genocide developing a substantive body of international criminal law.

The ICC in its Rome Statute has incorporated various criminal law conceptions and solutions from the jurisprudence of the ad hoc tribunals. Hence, it is helpful to look back at the tribunals’ experience with regard to the crime of genocide to foresee further applicability of certain concepts developed by the ICC predecessors including possible obstacles to be encountered by the ICC while incriminating the crime as genocide in possible future criminal proceedings.

Concluding words aim to summarize the analysis conducted in the previous chapters and point out at the key points of the whole study. The work has been an effort to clarify on the current development of the concept of genocide in international law. The analysis was limited to the study of legal instruments and case law of the ad hoc tribunals and ICC, for the crime of genocide has been analyzed from the perspective of the individual criminal responsibility and thus the state responsibility for the crime of genocide within the framework of the ICJ has been excluded from the scope of study.

It has been challenging to write on the topic due to abundance of material available on the crime of genocide within the practice of the ad hoc tribunals and the lack of the research and material on the prospects of the effective prosecution of the crime of genocide in the ICC.

³³⁰ Ralph Zacklin, *The Failings of Ad hoc International Tribunals*, *Journal of International Criminal Justice* 2 (2004), 541-545, at 541.

The material provided in the first two chapters of the study has served as a solid ground to define the key issues that ICC might be facing while implementing the law of genocide. Many concepts outlined in first two chapters were discussed from the drafting history standpoint so the applicability of those concepts to the crime of genocide and respective interpretation of the ad hoc tribunals on the crime would be understood from a better perspective to the reader.

The current concept of the crime of genocide as developed by the ad hoc tribunals could be reflected in the key legal aspects as follows:

- The prohibition of the crime of genocide rests on the conventional and customary rules of international law.
- The centerpiece of the law of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide; other legal instruments seeking to punish the crime of genocide are accordingly the ICTY Statute, ICTR Statute, and the Rome Statute of the ICC.
- The definition of genocide, as provided in Article 2 (2) of the ICTR Statute, Article 4 (2) of the ICTY Statute, and Article 6 of the Rome Statute, cites, *verbatim*, Articles 2 of the Genocide Convention.
- The conviction of genocide requires the *actus reus* or material element of the offence, consisting of one or more of the acts enumerated in the Genocide Convention, ICTY Statute, ICTR Statute or Rome Statute.
- The conviction of genocide requires the mental element (*mens rea*) of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
- Conspiracy to commit genocide is recognized as a distinct crime along with the direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide pursuant to the provisions of the Genocide Convention, the ICTY, and ICTR Statutes.
- An accused can be held liable for genocide while applying the concept of the JCE, when his/her knowledge extends to the genocidal act and principal's genocidal intent.
- The concept of command responsibility can be applied in genocide cases, however, the ad hoc tribunals did not express their opinion on *mens rea* standard with regard to *dolus specialis*.

The conclusions in the last Chapter have been predominantly drawn from the critical legal analysis conducted in the previous Chapters discussing the

legal definition of the crime of genocide along with other punishable crimes of genocide.

However, many questions posed in the given work on possible applicability of certain concepts and approaches of the ad hoc tribunals in the ICC remain unanswerable prior to commencement of trials on the crime of genocide.

The extensive analysis of the aforementioned legal aspects of the crime of genocide in the context of the international legal instruments and case law along with the analysis of *travaux préparatoires* of the Genocide Convention has obviously assisted while working on the very last Chapter of the work. Of regret is the fact that the conclusions drawn in the last Chapter are not promising enough, for it appears that the ICC failed to incorporate some progressive developments and cure the legal approach to the crime of genocide of its major shortcomings, in particular:

- The boundaries of *mens rea* requirement towards the crime of genocide remain blurring – the interrelation between categories of ‘knowledge’ and ‘special intent’ is undefined in a precise and coherent manner.
- The concept of conspiracy to commit genocide was ignored in the text of the Rome Statute excluding one of the most preventive tools to combat the crime of genocide at the early stages.
- The Rome Statute embedded general provisions on complicity and attempt to commit an offense applicable to all crimes penalized under the Statute failing to show a significant difference between complicity in general and complicity in genocide; attempt to commit a crime and attempt to commit genocide.
- The applicability of concepts of the joint criminal enterprise and command responsibility towards the crime of genocide requiring special *mens rea* standard remains to be seen in further ICC jurisprudence.

The work has drawn an attention to some existing inconsistency in the development of the international criminal theory touching upon the crime of genocide together with other concepts that appear to be applicable to the crime. The well-developed international criminal law theory entitling to work with the precise definitions of the crime is the *sine qua non* condition for the successful trial and thus the crime of genocide outlined in the clear and coherent manner would be of great help to all actors in the criminal justice system.

In a sum, the ICC unfettered by the restraints of its predecessors has a greater opportunity to strengthen, refine and develop the body of international law on the crime of genocide. Although some of the failings of the Rome Statute are obviously seen (it has been extensively discussed in

the text body of the work and singled out in the conclusion), the final outcome depends upon the manner in which judges of the Court perceive their role and the role of the Court in the development of international law. Due to the fact that ICC's powers to prosecute are limited to states parties of the Rome Statute, much will depend upon traditional inter-state cooperation in criminal matters.

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