

To Prevent and To Punish: Genocidal Intent

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Executive summary

Genocide is an outrageous crime, prohibited by the international customary law, even absent a formal treaty obligation. The International community and the Contracting Parties of the Convention on the Prevention and Punishment of the Crime of Genocide have a direct obligation both to prevent and to punish genocide. However, they fail to do so. The reason for this lies in the unclear meaning of the *intent to destroy* as defined by the Convention.

Currently, there are two different understandings of intent; the knowledge-based and the purpose-based understanding. This thesis explores both interpretations by a comparative analysis method. It demonstrates that the *intent to destroy* should be interpreted in a manner which will ensure that the crime of genocide is both prevented and punished. The key findings show that both knowledge-based approach and the purpose-based approach perfectly fit together and which of them shall be applied depends on the degree of individual liability.

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List of Abbreviations

Abbreviation	Full name
BiH	Bosnia and Herzegovina
GA	UN General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
SC	UN Security Council
UN	United Nations

Table of Contents

INTRODUCTION.....	1
I. THE NOTION OF GENOCIDE AS A CRIME	10
II. STRUCTURE OF THE CRIME.....	15
2.1. Actus reus of genocide	16
2.2. Protected groups of genocide	18
2.3. <i>Mens rea</i> of genocide	19
2.3.1. Infer intent.....	21
2.3.2. To destroy	23
2.3.3. In whole or in part.....	25
2.3.4. A group as such, motive vs. <i>mens rea</i>	27
III. THE PROBLEMS OF GENOCIDE	30
3.1. Prohibited <i>actus reus</i>	30
3.2. Exclusive list of protected groups	34
3.3. The problems in identification of intent	38
3.3.1. The Situation in Darfur	39
3.3.2. Jelisić Trial.....	45
IV. INTENT TO DESTROY A GROUP	52
4.1. Knowledge based approach.....	53
4.1.1. State plan or policy	58
4.1.2. The Jurisprudence	62
4.2. Purpose based approach.....	67
CONCLUSION	73
Bibliography.....	76

INTRODUCTION

In the hierarchy of international crimes, the crime of genocide is the most savage and gravest of all, addressed as “an odious scourge”,¹ or as “the ultimate crime, the pinnacle of evil”,² popularly referred to as “the crime of crimes.”³ Raphaël Lemkin in 1944 wrote: “The destruction of a nation results in the loss of its future contributions to the world.”⁴ The International Court of Justice (hereinafter the ICJ) stated in its Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: “[Genocide is] a denial on the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.”⁵ The Appeal Chamber of the International Criminal Tribunal for Former Yugoslavia (hereinafter the ICTY) stated:

Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.⁶

¹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (hereinafter the Genocide Convention or Convention), The Preamble

² Steven R. Ratner, B.G Ramcharan, Payam Akhavan, Delissa Ridgway, 'The Genocide Convention after Fifty Years', in American Society of International Law, Vol. 92 (April 1-4, 1998), pp. 1-19, at page 7

³ See Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Trial Chamber, Judgment and Sentence, 4 September 1998, para 16; Prosecutor v. Goran Jelisić, Case No.: IT-95-10-A, ICTY, Appeal Judgment, 5 July 2001, para. 26; William A. Schabas used ‘crimes of crimes’ in the title of his book *Genocide in International Law: The Crime of Crimes*, 1st and 2nd ed. (New York, Cambridge University Press, 2000, 2009)

⁴ Raphaël Lemkin, *Axis rule in Occupied Europe* (Washington, Carnegie Endowment for International Peace 1944) at page 91

⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion: I.C.J. Reports 1951, p. 15, at p. 23, (hereinafter ‘ICJ Advisory Opinion’, , *Reservations to the Convention*, 1951’) available at <http://www.icj-cij.org/docket/files/12/4283.pdf>, last access date: 10.10.2010.

⁶ Prosecutor v. Radislav Krstić, Case No.: IT-98-33-T, Trial Judgment 02 August 2001, para. 36

Thus, genocide is a serious crime, serious in its core of inhuman attacks against a group with the purpose of destroying the group, but also with the purpose of depriving the “humanity of the manifold richness.”⁷ The seriousness of the crime led to the adoption and the wide ratification of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter ‘the Genocide Convention’ or ‘Convention’).⁸ Moreover, genocide was recognized as customary international law,⁹ as a norm of *erga omnes*,¹⁰ and in 2006 as a norm of *ius cogens*.¹¹ Nevertheless, genocide remained unpunished through history¹² and still continues to occur.¹³ The International Community fails both to prevent and to punish the crime of genocide. Why?

The thesis will show that there are political reasons for the non-prevention and non-prosecution of the crime of genocide, but also legal ones which lie in the Genocide Convention itself. Even when an act itself appeared criminal as a genocidal act, for example, mass killings of people who belonged to a certain group, like it was in the late 1960s with mass killings in Vietnam, Nigeria, Bangladesh, Burundi, Guatemala, and in the 1990s with Rwanda and Yugoslavia, genocide as defined by the Convention showed certain failures both to prevent and to punish the crime of genocide.¹⁴ Scholars, such as Frank Chalk and Kurt

⁷ Ibid.

⁸ 141 Countries have ratified the Genocide Convention, See:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en, last access date: 26.11.2010.

⁹ ICJ Advisory Opinion, *Reservations to the Convention*, 1951, supra note 5

¹⁰ ICJ, *Barcelona Traction, Light And Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, at page 32, paras. 32-34

¹¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 3, para. 64

¹² William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 1st ed., (New York, Cambridge University Press, 2000), at page 15

¹³ See: Matthew Lippman, ‘The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later’, in *Arizona Journal of International and Comparative Law*, Vol. 15, Spring 1998, pp.415-515, at p. 488. See also: Jeffrey Gettleman and Josh Kron, ‘UN Report on Congo Massacres Draws Anger’, *New York Times*, October 1, 2010, available at: http://www.nytimes.com/2010/10/02/world/africa/02congo.html?_r=1, last access date: 22.11.2010.

¹⁴ Matthew Lippman, ‘Fifty Years Later’, supra note 13, at page 476. See also: Leo Kuper, *Genocide: Its political Use in the Twentieth Century* (Yale University Press, 1981), at page 73; Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies*, (New Haven: Yale university

Jonassohn, criticize the Genocide Convention to be just a political agreement whereas member states of the UN drafted the Convention in a manner that it only applies to “the losers of World War II.”¹⁵ It is well known that the Genocide Convention was drafted after the Holocaust to acknowledge the failure of the international community to respond to Nazi regime but, also, to deter future genocide.¹⁶ Unfortunately, as Lippman rightly argues, “The Genocide Convention remains a museum piece—a symbolic punishment and atonement for the past rather than a document designed to prevent and punish future acts.”¹⁷ A clear-cut example is Rwanda, first labeled as non-genocide, but today called “the most efficient genocide in history”,¹⁸ which resulted in the death of 800,000 Tutsi and moderate Hutus in only three months.¹⁹ So what are the failures of the genocide as defined by the Convention?

Political leaders and scholarly commentary recognized several of them: the exclusion of social and political groups,²⁰ the numerical significance of a group - from explicitly refusing it as relevant to including the *quantitative criterion* as an element of the crime.²¹ Moreover, discourses about the territorial application of the Convention;²² what are the safeguards against genocide;²³ whether other acts than those defined can fall under the crime of genocide;²⁴ and the debate about the *intent to destroy*. This thesis will address some of these questions, but not all because of the limited space. It will argue that most of these

Press, c1990), at page 394; M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, (Irvington, N.Y. : Transnational Publishers, New York, c1996), at page 524

¹⁵ Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocide*, supra note 14, at page 11

¹⁶ Mai-Linh K. Hong, ‘A Genocide By Any Other Name: Language, Law, and the Response to Darfur’, in *Virginia Journal of International Law*, Vol. 49, Fall 2008, pp. 235-272, at page 266

¹⁷ Matthew Lippman, ‘Fifty Years Later’, supra note 13, at page 511

¹⁸ Mai Linh K. Hong, ‘A Genocide By Any Other Name’, supra note 16, at page 239

¹⁹ See: Samantha Power, ‘Bystanders to Genocide’, *The Atlantic Monthly*, 22 September 2001, available at: <http://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/4571>, last access date: 23.11.2010.

²⁰ See: Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocide*, supra note 14

²¹ See: Lawrence J. LeBlanc, ‘The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding’ in *The American Journal of International Law*, Vol. 78, No. 2, Apr., 1984, pp. 369-385,

²² See: Marko Milanović, ‘Territorial Application of the Genocide Convention and State Succession’ in Paola Gaeta (ed.) *The UN Genocide Convention – A commentary* (Oxford, 2009) pp. 473-493

²³ See: Helen Fein, ‘The three P’s of Genocide Prevention: With application to a Genocide Foretold – Rwanda’ in Neal Riemer (ed.), *Protection against Genocide. Mission Impossible?* (Praeger Publishers, 2000) pp. 41-67

²⁴ See: Gerhard Werle, in cooperation with Florian Jessberger [et al.], *Principles of International Criminal Law*, (TMC Asser Press, The Hague, c2005) marginal no. 604

questions have been answered and that it is the *intent to destroy* which is the main obstacle in preventing and prosecuting genocide. Simply, if the prosecutor does not prove the intent of the accused to destroy, in whole or in part, a protected group, then the accused is innocent on the charges of genocide.²⁵ It is a common principle in international as well as national criminal law: “There can be no crime large or small, without an evil mind.”²⁶ But, why is genocidal intent an obstacle?

The problem with genocidal intent is the ambiguity of what it means. Genocidal intent is not clearly defined: which circumstances, requirements, and elements does law require for the *intent to destroy a group* to be proved? Which state of mind is actually required: a personal aim, a collective goal, a purpose, a personal desire, or is knowledge of circumstances enough? This vagueness led many to blame intent to be a limit to “the scope of application of the Convention [as it] makes [...] very difficult to satisfy the evidentiary requirements of this element at a criminal trial.”²⁷ Steven Ratner and Jason Abrams agreed that intent is the most difficult element to prove²⁸ or as Helen Fein concluded, “intent will be hard to prove in the absence of written authorization or public statements.”²⁹ This happens to be the reason why many prosecutors, instead of charging a responsible individual for genocide, choose to charge for extermination as crime against humanity, or to label a crime of genocide as ethnic cleansing where the state of mind will not be so hard to prove.³⁰ But, why after all is it important to charge for genocide and not simply for crimes against humanity, and why is it important to label a crime as genocide and not as ethnic cleansing?

²⁵ William A. Schabas, *supra* note 12, at page 206

²⁶ Bishop, *Criminal Law*, 9th ed., (1930) at 287, quoted in Eugene J. Chesney, ‘The Concept of Mens Rea in the Criminal Law’, in *Journal of Criminal Law and Criminology*, (1931-1951), Vol. 29, No. 5 (Jan-Feb 1939), pp. 627-644, at p. 627

²⁷ M. Cherif Bassiouni and Peter Maniakas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 14, at page 533

²⁸ Steven R. Ratner, Jason S. Abrams, James L. Bischoff, *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 3rd edition (Oxford 2009) page 37

²⁹ Helen Fein, ‘Discriminating Genocide from War Crimes: Vietnam and Afghanistan Reexamine’ in *Denver Journal of International Law and Policy*, Vol. 22, (Fall, 1993), pp. 29-69, at page 41

³⁰ Mai-Linh K. Hong, ‘A Genocide By Any Other Name’, *supra* note 16, at page 262

There is no doubt that mass killing, rapes and other form of torture as crimes against humanity, and not genocide, carry weight.³¹ But, to call these atrocities against civilians ‘genocide’ carries a legal obligation for Contracting Parties of the Convention: “to prevent and to punish.”³² As Marshall Harris wrote:

[t]o call it [the Bosnian conflict] genocide would mean that there are victims ... [and] would also mean that we have a moral imperative to prevent the genocide ... [t]he administration was ever vigilant to diffuse pressure to act, and an admission of genocide would have created one of the greatest pressures.³³

The Genocide Convention does impose a legal obligation to act, but in addition “the word ‘genocide’ carries a historical and moral weight that is not present with other types of crimes and that therefore tends to create a moral obligation in the view of public.”³⁴ None other word causes it more than the word: genocide. David Luban writes: “With headlines such as Murder-But No Genocide, the motivation to intervene was gone. Murder is bad, to be sure – but murder is ordinary. [...] Foreigners murder each other all the time. Genocide sounds like it might be our business, but ‘mere’ murder is theirs.”³⁵

Moreover, as it was already mentioned, the seriousness of the crime of genocide gives it a special place amongst other crimes. In that aspect, William A. Schabas wrote: “The crime of genocide belongs at the apex of the pyramid [of all crimes].”³⁶

Finally, the core aim behind the importance of the prosecution of genocide is to protect and to assist victims as Mathew Lippman rightly wrote: “a failure to acknowledge and

³¹ Ibid., at page 238

³² The Genocide Convention, supra note 1, Article I

³³ Marshall Harris, *Introduction* in Francis Boyle, *The Bosnian People Charge Genocide Proceedings of the International Court of Justice concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide*, (Aletheia Press, 1996), at XI, XIX quoted in Matthew Lippman, ‘Fifty Years Later’, supra note 13, at page 512

³⁴ Mai-Linh K. Hong, ‘A Genocide By Any Other Name’, supra note 16, at page 238

³⁵ David Luban, ‘Calling Genocide by its Rightful Name: Lemkin’s word, Darfur, and the UN Report’, in *Chicago Journal of International Law*, Vol. 7. Summer 2006, pp. 303-320, at page 306

³⁶ William A. Schabas, *Genocide in International Law*, 1st ed., supra note 12, at page 9

condemn genocide further dehumanizes the victims”,³⁷ and:

To acknowledge contemporary genocides is to recognize that there are victims, victimizers, and morally responsible bystanders. It is to force the international community to concede that in a world of limited resources there are limits on compassion and concern. [...] This is a crime which offends the core concepts of human society. A delict which dehumanizes and denies the singularity and their right to exist. Of the victims it is a disavowal of the diversity of the human community.³⁸

Thus, the importance of calling a crime as genocide is; it is a serious crime; it carries legal and moral obligation to act in a manner that it will ensure the prevention and prosecution of genocide; it ensures the assistance of victims. The further question is why does this all depend on *intent*?

The relevance of intent is, particularly, its role as the key element of the crime. It is exactly the *intent to destroy* which distinguishes genocide from other crimes,³⁹ as David Alonzo-Maizlish commented:

The ‘intent to destroy in whole or in part’ a protected group [...] transforms a killing or rape into a genocidal act, war-time persecutions into genocide, or an otherwise legal population-control policy into genocidal practice, punishable by international law under the Convention and the statutes.⁴⁰

The same conclusion was reached by the ICTY in *Jelisić* judgment: “it is in fact *mens rea* which gives genocide its specialty and distinguishes it from ordinary crime and other crimes against international humanitarian law.”⁴¹ Or, in the words of Otto Triffterer: “It is the intent to destroy that makes the perpetrator so dangerous and the expected harm so tantamount, compared, for instance, with a mere murder, even mass murder.”⁴² Accordingly, *intent to destroy* is what makes genocide: ‘Genocide’.

³⁷ Matthew Lippman, ‘Fifty Years Later’, supra note 13, at page 511

³⁸ Ibid., at pp. 511-512

³⁹ William A. Schabas, *Genocide in International Law*, 1st ed., supra note 12, at page 219

⁴⁰ David Alonzo-Maizlish, ‘In Whole or in Part: Group Rights, the Intent Element of Genocide, and the “Quantitative Criterion”’, in *New York University Law Review*, Vol. 77, Nov. 2002, pp. 1369-1403, at page 1381

⁴¹ Prosecutor v. Goran Jelisić, Case No.: IT-95-10-T, Trial Judgment, 14 December 1999, para. 60

⁴² Otto Triffterer, ‘Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such’, in *Leiden Journal of International Law*, Vol. 14, 2001, pp. 399-408, at p. 404

It was already mentioned that *intent to destroy*, regardless of its importance, has not been clarified by the Convention. Thus, the scholarly literature, as well as the jurisprudence, has shaped the intent requirement in “creative ways.”⁴³

At the present, two different proposed interpretations have been argued in the scholarly literature on how to interpret *intent to destroy a group*. One of the proposals is that intent requires a knowledge-based interpretation, which William Schabas and Alexander Greenwalt argue for.⁴⁴ The knowledge-based interpretation is focused on the *mens rea* as defined in the Article 30 of the Rome Statute, where *mens rea* of genocide is twofold and consists of *intent and knowledge*.⁴⁵ On the other side of the table are scholars, such as Florian Jessberger and Otto Triffterer, who argue that intent can be understood only on a purpose-based interpretation.⁴⁶ The purpose based approach is focused on the aim, purpose or goal of the perpetrator to destroy a group: the knowledge of the perpetrator that his acts will contribute to the destruction of a protected group is not sufficient.⁴⁷

In the text of the Convention, which has been literally copied in Article 4(2) of the Statute of the International Criminal Tribunal for Former Yugoslavia (hereinafter the ICTY Statute),⁴⁸ and Article 2(2) of the Statute of the International Criminal Tribunal for Rwanda (hereinafter the ICTR Statute),⁴⁹ as well as in the Article 6 of the Rome Statute of the

⁴³ Steven R. Ratner (et al.), *Accountability for Human Rights Atrocities in International Law*, supra note 28, at page 27

⁴⁴ See: William A. Schabas: *Genocide in International law: the crime of crimes* (2nd edn, New York : Cambridge University Press 2009) at page 241; Alexander K.A. Greenwalt, ‘Rethinking Genocidal Intent: The case for a knowledge-based interpretation’, in *Columbia Law Review* Vol. 99, Dec. 1999, pp. 2259-2294

⁴⁵ Ibid.

⁴⁶ See: Florian Jessberger, ‘The Definition and the Elements of the Crime of Genocide’, in Paola Gaeta (ed), *The UN Genocide Convention – A commentary*, Oxford, (2009), pp. 87-110, at page 87. See also: Otto Triffterer, ‘Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such’, supra note 42, at page 402

⁴⁷ Florian Jessberger, ‘The Definition and the Elements of the Crime of Genocide’, supra note 46, at page 105

⁴⁸ Statute of the International Criminal Tribunal for Former Yugoslavia, (hereinafter the ICTY Statute) Updated version, September 2009, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, last access date: 19.02.2010.

⁴⁹ Statute of the International Criminal Tribunal for Rwanda, (hereinafter the ICTR Statute), available at <http://www.un.org/ictt/statute.html>, last access date: 22.02.2010.

International Criminal Court (hereinafter the Rome Statute),⁵⁰ the knowledge-based or purpose-based standards are not mentioned.⁵¹ According to Article 30 of the Vienna Convention on the Law and Treaties (hereinafter ‘the Vienna Convention’), in a case where a treaty’s provision is not clear it should be interpreted “in context and in the light of its object and purpose.”⁵² Does the knowledge-based interpretation or purpose-based understanding or even both of them in combination meet the ‘object and purpose’ of the 1948 Genocide Convention? Does it limit the ‘object and purpose’ of the Convention? Or put it other way around: could new interpretation of the definition conflict with *nullum crimen sine lege*? And most important: how to ensure that genocide will be both prevented and prosecuted?

The purpose of the present research is to show that *intent to destroy* is an obstacle in not only the prosecution of genocide on a trial, but also in the prevention of genocide to happen at all. The aim is to give a solution on how to best interpret intent as to meet the object and purpose of the Genocide Convention. Therefore, this thesis will pursue a comparative analysis of both the knowledge-based understanding and purpose-based understanding of intent. Because of the reason that the International Tribunal for Rwanda (hereinafter the ICTR), the ICTY, and now the International Criminal Court (hereinafter the ICC) alongside with domestic courts and political bodies, such as the UN, play an important role in the elaboration of the importance and the interpretation of the intent element, it will be necessary to see how jurisprudence of international and national courts, and findings of political bodies applied the intent requirement.

This thesis will in its First chapter address the notion of genocide as a crime: its historical development from an idea to an international recognized crime. The Second chapter

⁵⁰ The Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (hereinafter the Rome Statute), available at <http://www.un.org/icc/part1.htm>, last access date: 21.02.2010.

⁵¹ Alexander Greenwalt, ‘Rethinking Genocidal Intent’, *supra* note 44, at p. 2259

⁵² Vienna Convention on the Law of Treaties 1969, Article 31, (hereinafter ‘The Vienna Convention’) available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, last access date: 19.02.2010.

will elaborate what is the structure of the crime, that is how genocide is defined in the International law and what are the elements of the crime. It will provide a definition of *actus reus*; it will explain the *protected group* requirement, and a special emphasis will be granted to the *mens rea* element of the crime. The purpose of the Third chapter is to identify problematic aspects of genocide: the enumeration of *actus reus*, the exclusiveness of protected groups, and it will initially analyze the problematic aspects of intent. This thesis will use the *Jelisić* case and the Darfur Situation as case-studies to show the difficulties the definition of intent causes in both prevention and the prosecution of the genocide. The Fourth chapter has for the purpose to address the *intent to destroy* in details and to present the two understandings of intent: the knowledge based approach and the purpose-based approach, and the judicial application of them. In the line of the knowledge-based approach, a policy or plan of genocide will be discussed. Finally, a reconciliation of different understandings of the *intent to destroy* will be given in a manner that it ensures that the object and purpose of the Convention is respected. This thesis will use a comparative study of the jurisprudence of International Tribunals, the ICC, the domestic jurisprudence of Germany and Bosnia and Herzegovina, and the findings of the UN Commission of Inquiry on Darfur. It will contribute to the field in the manner that important cases, which have not been discussed in the scholarly literature at the time of the writing of this thesis, will be discussed. Moreover, the reconciliation of different understandings of ‘intent to destroy’ will contribute in the manner that a proposed definition will ensure the effectiveness of the Genocide Convention.

I. THE NOTION OF GENOCIDE AS A CRIME

*“Genocide is as old as humanity [and] every case of genocide is a product of history and bears the stamp of the society which has given birth to it.”*⁵³

Jean-Paul Sartre

Throughout the history, individuals have been killed, tortured, and executed on mass scales only because of belonging to a certain group whose characteristics were to an extent ‘different’ from the characteristics of the group to whom the perpetrator belonged to. Take history’s examples common to us: the extermination of Ache Indians,⁵⁴ the persecution of Armenians,⁵⁵ and the tragic annihilation of the European Jews, the Holocaust.⁵⁶ Nevertheless, the notion of genocide is new. It was not until World War II, in 1944 that Raphaël Lemkin - a Polish Jew- in his book *Axis Rule in Occupied Europe*, coined the term *genocide*, by the combination of the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing) to describe the annihilation of a group.⁵⁷ According to him genocide is:

... the destruction of a nation or an ethnic group. [...] Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the

⁵³ 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. 534-549, at page 534

⁵⁴ See: R. Arens, *Genocide in Paraguay* (Temple University Press,U.S. 1976)

⁵⁵ See: Richard G. Hovannisian, ‘The Historical Dimension of the Armenian Question’, in Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocide*, supra note 14, at page 249

⁵⁶ See: Stephan Landsman, *Crimes of the Holocaust* (University of Pennsylvania Press Philadelphia, 2005)

⁵⁷ Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocide*, supra note 14, at page 8

national groups.⁵⁸

This implies that genocide, according to Lemkin, does not depend on the result, but resembles a plan with an aim to destroy the political, social, cultural, national, racial, religious and economical features of a group, and, consequently, to annihilate a group in total. An individual is targeted on the basis of his membership to a group.

Regardless of Lemkin's definition of genocide, the annihilation of Jews was not conceptualized as genocide before the International Military Tribunal, but instead as war crime and crimes against humanity of persecution and extermination under Article 6 (c) of the Nuremberg Charter.⁵⁹ The Indictment itself did use the term genocide but the Tribunal Judgment did not refer to it at all, simply because the Charter of the International Military Tribunal at Nuremberg did not recognize genocide as a separate crime, but what we know today as genocide: "murder, extermination, enslavement, deportation, and other inhumane acts [...] or persecution on political, racial or religious grounds"⁶⁰ fell under crimes against humanity.⁶¹

It was on Lemkin's incentive that the General Assembly in 1946,⁶² in its resolution 96 (I), declared that genocide is a crime under international law as "the denial of the right to existence of entire human group",⁶³ and authorized the UN Economic and Social Council to draft a proposal for a genocide convention.⁶⁴ Two years later, on 9 December 1948, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of

⁵⁸ Raphaël Lemkin, *supra* note 4, at page 79

⁵⁹ Kriangsak Kittichaisaree, *International Criminal Law*, (Oxford, 2001) at page 67, See also: *Agreement For The Prosecution And Punishment of the Major War Criminals Of The European Axis Powers And Charter Of The International Military Tribunal*, (hereinafter the Nuremberg Charter) Aug. 8, 1945, 5 Stat. 1544, 82 U.N.T.S. 284.

⁶⁰ See the Nuremberg Charter, *supra* note 59, Article 6(c). See also: Matthew Lippman, 'Fifty Years Later', *supra* note 13, at pp.426-430

⁶¹ *Ibid.*

⁶² Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocide*, *supra* note 14, at page 9

⁶³ UN General Assembly Resolution 96 (I) of 11 December 1946, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement>, last access date: 28.01.2010

⁶⁴ Gerhard Werle, *Principles of International Criminal Law* *supra* note 24, marginal no. 561

Genocide⁶⁵ and confirmed that “genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and punish.”⁶⁶ Article II defined genocide as:

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

- a) Killing the 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 group⁶⁷

Thus, the international legal definition of genocide was born. It took the shape of a crime of one or more prohibited acts committed against members of a national, ethnical, racial or religious group with the intent to destroy, in whole or in part, a certain group as such.⁶⁸ The Convention inflicts criminal liability for: “genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempt genocide, [and] complicity in genocide.”⁶⁹ Status such as “constitutionally responsible rulers, public officials or private individuals”⁷⁰ shall not be claimed as an excuse to avoid punishment for genocide.⁷¹ Further articles of the Convention impose; obligations upon State Parties to enact the necessary legislation,⁷² the national and international jurisdiction,⁷³ obligation of extradition,⁷⁴ the legal responsibility of the United Nations for the prevention and suppression of genocide,⁷⁵ and the authority of the International Court of Justice (hereinafter the ICJ) to decide on “the interpretation, application

⁶⁵ The Genocide Convention, supra note 1

⁶⁶ Ibid., Article I

⁶⁷ Ibid., Article II

⁶⁸ Ibid.

⁶⁹ Ibid., Article III

⁷⁰ Ibid., Article IV

⁷¹ Ibid.

⁷² Ibid., Article V

⁷³ Ibid., Article VI

⁷⁴ Ibid., Article VII

⁷⁵ Ibid., Article VIII

or fulfillment of the [...] Convention, including those relating to the responsibility of a State...”⁷⁶

Already in 1951, the ICJ used its authorization in the *Advisory Opinion on the Reservations to the Genocide Convention* to interpret the principles of the Convention as part of customary international law binding on all states, even absent a treaty obligation.⁷⁷

Further, the Court held:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.⁷⁸

In 1970, in the *Barcelona Traction Light and Power* case, the ICJ interpreted the Genocide Convention to impose obligations of prevention *erga omnes*,⁷⁹ and in 2006 genocide was recognized by the ICJ as a peremptory norm of *ius cogens*.⁸⁰ In the *Bosnia and Herzegovina v. Serbia and Montenegro* case, the Court reaffirmed the principle of the Vienna Convention of the Law of Treaties that the Genocide Convention should be read in “the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose.”⁸¹ Furthermore, the Court held:

To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion.⁸²

⁷⁶ Ibid., Article IX

⁷⁷ ICJ, Advisory opinion, *Reservations on the Convention*, 1951, supra note 5, at p. 23

⁷⁸ Ibid.

⁷⁹ ICJ, *Barcelona Traction, Light And Power Co., Ltd*, supra note 10, paras. 32-34

⁸⁰ ICJ, *Democratic Republic of the Congo v. Rwanda*, 2002, supra note 11, para. 64

⁸¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment of 26 February 2007, I.C.J. 91, para.160, available at: <http://www.icj-cij.org/docket/files/91/13685.pdf>, last access date:28.11.2010. See also: The Vienna

Convention, supra note 52, Articles 31 and 32.

⁸² Ibid.

Accordingly, the ICJ interpreted the Convention in this manner: it is binding on all states and on everyone⁸³; the reason for the adoption is to serve “humanitarian and civilizing purposes”;⁸⁴ its object is to protect certain groups and to support the principles of morality;⁸⁵ in order to ensure the correct interpretation of the principles of the Convention, it should be read “in their context and in the light of its object and purpose”;⁸⁶ and the *travaux préparatoires* and “the circumstances of its conclusion”⁸⁷ shall be the supplementary means of interpretation.⁸⁸

The creation of ad hoc international criminal tribunals (the ICTY and the ICTR) and the ICC introduced mechanisms for bringing individuals responsible for genocide before the international justice.⁸⁹

⁸³ ICJ, Advisory opinion, *Reservations on the Convention*, 1951, supra note 5, at p. 23 and ICJ, Barcelona Traction, Light And Power Co., Ltd, supra note 10, paras. 32-34

⁸⁴ ICJ, Advisory opinion, *Reservations on the Convention*, 1951, supra note 5, at p. 23

⁸⁵ Ibid.

⁸⁶ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, supra note 81, para. 160

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Security Council Resolution 827 of 25 May 1993, S/Res/827(1993) for the ICTY; Security Council Resolution 955 of 8 November 1994, S/Res/955 (1994) for the ICTR; and The Rome Statute, supra note 50, Part I (Establishment of the Court)

II. STRUCTURE OF THE CRIME

All crimes are structured of a conduct or *actus reus* and of a state of mind or *mens rea*; the first one is defined as “an act or omission, contrary to a rule imposing a specific behaviour”,⁹⁰ and the second as “a psychological element required by the legal order for the conduct to be blameworthy and punishable.”⁹¹ International crimes usually require an additional element, which gives them international dimension.⁹² For instance, a murder to constitute a crime against humanity, beside the conduct of the murder and the state of mind of the perpetrator to cause the murder, additional elements, such as: “a widespread or systematic attack directed against a civilian population”,⁹³ and an additional mental element: “knowledge of the attack”⁹⁴ are required.⁹⁵ For a crime of genocide, *intent to destroy in whole or in part a national, ethnic, racial or religious group, as such* constitutes ‘that’ additional element.⁹⁶ That means that in connection to individual acts and the underlying mental element of every individual act, the *intent to destroy a protected group* gives the genocide its specific characteristic and an international dimension. For instance, a murder to constitute genocide, it is necessary to establish a conduct of murder of the member(s) of a protected group, *mens rea* of the accused to cause murder, and the intent to destroy a specific protected group.

This chapter will firstly define the wrongful acts of genocide and the subjectivity of the protected groups. Mental element will be defined and a distinction between general intent

⁹⁰ Antonio Cassese, *International Criminal Law*, (2nd ed., Oxford, 2008) at page 53

⁹¹ Ibid.

⁹² Ibid., at page 54

⁹³ The Rome Statute, *supra* note 50, Article VII

⁹⁴ Ibid.

⁹⁵ See: Antonio Cassese, *International Criminal Law*, *supra* note 90, at page 54

⁹⁶ Ibid., at page 137

and special intent will be drawn.

2.1. Actus reus of genocide

The Convention defines in Article II the individual acts which will constitute genocide if committed with the *intent to destroy a protected group, as such*.⁹⁷ Gerhard Werle classified individual acts under forms of physical or psychological genocide, which includes *acts of killing, causing serious bodily or mental harm, and inflicting conditions of life on a group able to cause destruction of the group*.⁹⁸ The *measures intended to prevent births within a group* felt under the form of biological genocide and *forcible transfer of children from one group to another* as acts of cultural genocide.⁹⁹ Thus, according to Gerhard Werle, the acts of genocide might be physical, psychological, biological and cultural.

The victims of acts are always individuals belonging to a protected group¹⁰⁰ and genocide can be committed by an act or an omission.¹⁰¹ It must be noted that genocide does not ask for the actual destruction of the group: the crime is complete when the enumerated acts are committed with the requisite intent.¹⁰² The responsibility for genocide does not depend on the result: the perpetrator must act in a certain way with a particular *mens rea*.¹⁰³ It is the *mens rea* which makes these acts genocidal acts, as the core element of genocide.

In the jurisprudence, the *actus reus* of the crime of genocide under Article II is meant to cover:

⁹⁷ The Genocide Convention, supra note 1, Article II

⁹⁸ Gerhard Werle, supra note 24, marginal no. 587

⁹⁹ Ibid.

¹⁰⁰ Ibid., marginal no. 588

¹⁰¹ *Kambanda*, Trial Judgment, supra note 3, para. 40

¹⁰² Gerhard Werle, *Principles of International Criminal Law*, supra note 24, marginal no. 606

¹⁰³ Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', supra note 42, at page 402

- a. The act of *killing members of a group* means intentional murder¹⁰⁴ where the perpetrator deprives of life and is aware of his acts and wanted the act.¹⁰⁵
- b. *Causing serious bodily or mental harm* includes acts of both physical and mental torture, inhumane or degrading treatment, rape, sexual violence, persecution and deportation¹⁰⁶ and “it must be harm that results in grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”¹⁰⁷
- c. The ICTR defined *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part* as acts of “subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirements.”¹⁰⁸ The ICTY in *Brđjanin* included “creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.”¹⁰⁹ As both Werle and Lippman notes, all conducts that can result in death are prohibited under this act.¹¹⁰
- d. *Imposing measures intended to prevent births* was described by the ICTR as: “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes

¹⁰⁴ Prosecutor v. Jean-Paul Akayesu, Case no. ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 500

¹⁰⁵ Prosecutor’s Office of Bosnia and Herzegovina v. Miladin Stevanović, Case No.: X-KR-05/24-2, First Instance Verdict, 29 July 2008, at page 44

¹⁰⁶ See: *Akayesu*, Trial Judgment, supra note 104, para. 504; Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No.: ICTR-96-3-T, Judgment of 6 December 1999, para. 51

¹⁰⁷ *Krstić*, Trial Judgment, supra note 6, para. 513

¹⁰⁸ *Akayesu*, Trial Judgment, supra note 104, para. 506

¹⁰⁹ Prosecutor v. Radoslav Brđjanin, Case No.: IT-99-36-T, Judgment of 1 September 2004, para. 691

¹¹⁰ See: Gerhard Werle, *Principles of International Law*, supra note 24, marginal no. 59; Matthew Lippman, ‘Fifty Years Later’, supra note 13, at p. 456

and prohibition of marriages.”¹¹¹ Measures may be not only physical, but mental too,¹¹² and the Tribunal included rape as one of the measures.¹¹³

- e. The acts of *forcibly transferring children* includes transfer of children from one group to another with the aim to change their cultural identity by separating them from everything that makes group’s existence.¹¹⁴

2.2. Protected groups of genocide

The second element of the crime addresses the victims.¹¹⁵ As already mentioned, the targets of attack are always individuals of the protected group- members of *national, ethnic, racial, or religious group*.¹¹⁶ In the words of the International Tribunal “the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnic, racial or religious group.”¹¹⁷

Nationality was defined by the ICJ as “a legal bond having as its basis a social fact of attachments, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”¹¹⁸ The ICTR defined national groups as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”¹¹⁹ An ethnical group refers to “a group whose

¹¹¹ *Akayesu*, Trial Judgment, supra note 104, para. 507

¹¹² *Ibid.*, para. 508

¹¹³ *Ibid.*

¹¹⁴ Gerhard Werle, *Principles of International Law*, supra note 24, marginal no. 598-603

¹¹⁵ The Genocide Convention, supra note 1, Article II

¹¹⁶ *Ibid.*, marginal no. 588

¹¹⁷ *Akayesu*, Trial Judgment, supra note 104, para. 521

¹¹⁸ Nottebohn case (second phase), Judgment of April 6th, ICJ Reports 1995, p. 4, at page 23

¹¹⁹ *Akayesu*, Trial Judgment, supra note 104, at para 512

members share a common language or culture”;¹²⁰ a racial group is defined as “the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”;¹²¹ and a religious group is “one whose members share the same religion, denomination or mode of worship.”¹²²

Protected groups under the Genocide Convention are national, religious, ethnic and racial group. Whether the groups, other than those explicitly defined, could fall under the protection against genocide will be discussed in details in Section 3.2. *Exclusive list of protected groups.*

2.3. *Mens rea* of genocide

*Actus non facit reum nisi mens rea*¹²³

Mens rea in international, as well as in domestic law systems is “the state of mind which must be established to have existed at the time of the offence.”¹²⁴ There’re different categories of *the state of mind*, such as intent, recklessness, or negligence,¹²⁵ and depending on “the category of the crime and the degree of responsibility international criminal law

¹²⁰ Ibid., para. 513

¹²¹ Ibid., para. 514

¹²² Ibid., para. 515

¹²³ Cf. G. Williams, *Textbook on Criminal Law* (2nd ed., 1983) at p. 70, Cited in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court, A Commentary*, (Oxford, 2002), at page 890

¹²⁴ Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, (London: Sweet & Maxwell 2003) at page 3

¹²⁵ Antonio Cassese defines levels of *mens rea* as : “(1) Intent (*dolus directus*): Intention –awareness that a certain conduct will bring about a certain result in the ordinary course of events, and will to attain that objective; (2) Recklessness (*dolus eventualis*): Awareness that undertaking a course of conduct carries with it an unreasonable or unjustifiable risk of producing harmful consequences, and the decision nevertheless to go and take that risk; (3) Advertent or culpable negligence (*négligence consciente*): Failure to pay sufficient attention to or to comply with certain generally accepted standards of conduct thereby causing harm to another person when the actor believes that the harmful consequences of his action will not come about, thanks to the measures he has taken or is about to take; and (4) Inadvertent negligence (*négligence inconsciente*): Failure to respect generally accepted standards of conduct without, however, being aware of or anticipating the risk that such failure may bring about a harmful effects.”, See: Antonio Cassese, *International Criminal Law*, supra note 90, at pp 55-59

envisages various modalities of the mental element.”¹²⁶ And, in the case of genocide, international criminal law recognizes two mental elements of the crime: *general intent – mens rea* of individual acts,¹²⁷ and *specific intent* or *dolus specialis*, which refers to *intent to destroy* a national, ethnical, racial or religious group.¹²⁸

General intent is established if the defendant is aware that his conduct will result in a certain consequence or is reckless as to a certain consequence; as for instance, for an act of murder, the accused must have knowledge or be reckless that his act will result in death.¹²⁹ But a murder to be a wrongful act of genocide, it is necessary to establish existence of *dolus specialis* in the mind of the accused. Without *intent to destroy* murder will remain just murder. As the ICJ held:

[Genocide] requires a further mental element. It requires the establishment of the ‘intent to destroy, in whole or in part... [the protected] group, as such’. It is not enough to establish, for instance [...] that deliberate unlawful killings of members of the group have occurred. The additional intent must be established, and is defined very precisely. It is often referred to as a special or specific intent.¹³⁰

Thus, *mens rea* of genocide is twofold and consist of general intent and *intent to destroy*. The general intent will not be the subject of this thesis as it does not pose any problems which would require a research. So in the further text, when this thesis refers to *mens rea* of genocide it talks about the *intent to destroy*. The terms such as *genocidal intent* or *specific intent* will be used to refer to the *intent to destroy*. The importance of the specific intent has already been discussed in the Introduction of this thesis as the main element which distinguishes genocide from the other crimes. The problematic aspects of it will be discussed

¹²⁶ Antonio Cassese, *International Criminal Law*, supra note 90, at page 60

¹²⁷ For a different opinion see: David L. Nersessian, ‘The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals’, in *Texas International Law Journal*, Vol. 37(Spring, 2002), pp 231-276, at page 271

¹²⁸ *Dolus specialis* was first time used by the Trial Chamber of the ICTR in the *Akayesu* judgment. See: *Akayesu*, Trial Judgment, supra note 104, paras. 121, 226-227, 245, and 268.

¹²⁹ William A. Schabas *Genocide in International Law* 2nd ed, supra note 44, at page 253

¹³⁰ ICJ, *Bosnia and Herzegovina v. Serbian and Montenegro*, supra note 8, para. 187

in the section 3.3. *The problems in identification of intent*. The next subsection will discuss how genocidal intent can be inferred. The meanings of the words ‘*to destroy*’, ‘*in whole or in part*’, and ‘*a group as such*’ will also be discussed.

2.3.1. Infer intent

The case of Jean Kambanda and the case of Omar Serushago are two rare cases where the accused confessed that he has committed the acts of genocide with the intent to destroy a protected group.¹³¹ Jean Kambanda pleaded guilty for the conspiracy to commit genocide, genocide, complicity in genocide, and direct and public incitement to commit genocide,¹³² while Omar Serushago pleaded guilty for committing genocide as a principal perpetrator.¹³³

In all other cases, in the absence of a confession from the accused, conviction for genocide will be difficult.¹³⁴ This is because the conviction plays around the subjective mental state, the *intent to destroy*,¹³⁵ which is “difficult, even impossible to determine.”¹³⁶ Because of that, the International Tribunals took the approach that “genocidal *dolus specialis* can be inferred either by the facts, the concrete circumstances, or a pattern of purposeful action.”¹³⁷ Some of these factors are: the scale and general nature of the atrocities committed;¹³⁸ the existence of a genocidal plan or policy;¹³⁹ “the perpetration of other culpable acts systematically directed against the same group”;¹⁴⁰ “the use of derogatory language towards members of the targeted group; the weapons employed and the extent of bodily injury [and]

¹³¹ *Kambanda*, Judgment and Sentence, supra note 3, paras. 3-4. See also: *The Prosecutor v. Omar Serushago*, Case No.: ICTR-98-39-S, Sentence, 5 February 1999, paras. 4-5

¹³² *Kambanda*, Judgment and Sentence, supra note 3, paras. 3-4

¹³³ *Serushago*, Sentence, supra note 131, para. 4-5

¹³⁴ David L. Nersessian, *The Contours of Genocidal Intent*, supra note 127, at page 265

¹³⁵ *Ibid.*

¹³⁶ *Akayesu*, Trial Judgment, supra note 104, para. 523

¹³⁷ *Prosecutor v. Stakić*, Case no.: IT-97-24-T, Trial Judgment of July 31, 2003, para. 526

¹³⁸ *Akayesu*, Trial Judgment, supra note 104, para. 523

¹³⁹ *Prosecutor v. Krstić*, Case No.: IT-98-33-A, Appeal Chamber Judgment 19 April 2004, para. 225

¹⁴⁰ *Ibid.*

the number of victims.”¹⁴¹ On the basis of some of these factors, the *intent to destroy* on a trial can be inferred, and, consequently, punished. But, what about prevention of the *intent to destroy* before it results in these consequences?

The responsibility for the crime of genocide does not depend on the result.¹⁴² And, the purpose of the Genocide Convention is to deter genocide from happening, to address any individual act before “guilty minds can realize their particular intent.”¹⁴³ Hitler shaped his *intent to destroy* even before occupation of foreign territories when he said, “Who, after all, thinks today of the Armenians?”¹⁴⁴ I believe the same applies to the events of the atrocities committed in Bosnia, when Karadžić, even before the war started, said, “They have to know that there are around 20, 000 armed Serbs around Sarajevo... it will be a black cauldron where 300,000 Muslim will die. [...] They will disappear. That people will disappear from the face of the Earth.”¹⁴⁵ The question of early prevention of genocidal intent is a question of great importance that the International Community has failed to give an answer to it.

¹⁴¹ Prosecutor v. *Kayishema and Ruzindana*, Case No.: ICTR-95-1-T, Trial Judgment of 21 May 1999, paras. 93

¹⁴² Otto Triffterer, ‘Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such’, supra note 42, at page 401

¹⁴³ Ibid.

¹⁴⁴ Ibid., at page 401

¹⁴⁵ David Charter, ‘Court hears Radovan Karadzic’s threats of Muslim slaughter’, *The Times*, (The Hague, 28 October 2009) available at: <http://www.timesonline.co.uk/tol/news/world/europe/article6892144.ece>, last access date: 23.11.2010.

2.3.2. To destroy

Words ‘*intent to destroy*’ of Article II brought the question as to whether it relates to physical and biological destruction of a group or it extends to social and cultural destruction as well.¹⁴⁶ When Lemkin coined the word genocide he had in mind the prevention of a group’s physical as well as cultural existence.¹⁴⁷ The General Assembly Resolution 96 (I) followed Lemkin’s conception, but, nevertheless, at the end of the day it was decided not to include a prohibition on cultural genocide.¹⁴⁸ The conclusion that the Genocide Convention only recognizes physical and biological destruction was also reached by the International Tribunals and the Court of Bosnia and Herzegovina.¹⁴⁹ In that view, the Trial Chamber of the ICTY held:

The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.¹⁵⁰

The same was reaffirmed by the Appeal Chamber of the ICTY, “The Genocide Convention and customary international law in general prohibit only the physical or biological destruction of a human group. The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition.”¹⁵¹ The ICTY concluded that the cultural destruction of the religious

¹⁴⁶ Claus Kress, 'The Crime of Genocide Under International Law', in *International Criminal Law Review*, Vol. 6, 2006, pp. 461–502, at page 486

¹⁴⁷ Raphaël Lemkin, “*Axis rule in Occupied Europe*”, supra note 4, at page 91

¹⁴⁸ See: Claus Kress, 'The Crime of Genocide Under International Law', supra note 146, at p. 486; Matthew Lippman, 'Fifty Years Later', supra note 13, at p. 464

¹⁴⁹ See: *Krstić*, Trial Judgment, supra note 6, para. 580; Prosecutor v. Laurent Semanza, ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 315; The Prosecution Office of Bosnia and Herzegovina v. Petar Mitrović, X-KR-05/24-1, First Instance Verdict, 29 July 2008, at p. 48

¹⁵⁰ *Krstić*, Trial Judgment, supra note 6, para. 580

¹⁵¹ *Krstić*, Appeal Judgment, supra note 139, at para. 25

objects and the property belonging to one particular group might be only an evidence of the intent.¹⁵²

Matthew Lippman criticized the failure to acknowledge the protection of a group's culture as "a conspicuous omission."¹⁵³ Furthermore, he wrote, "The protection of a group's culture, as well as its physical integrity, is consistent with the prophylactic intent of the Genocide Convention. Both effectively extinguish a collectivity."¹⁵⁴ Claus Kress also looked at the object and the purpose of the protection against genocide when he said, "the primary goal of the international rule against genocide [is] to protect the existence of certain groups in their contributions to world civilization, [and] a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal."¹⁵⁵

The German courts, with a ruling from the Constitutional Court, rightly held that the destruction of a group in social concept does constitute genocide:

the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group ... the intent to destroy the group ... extends beyond physical and biological extermination ... The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group. ...¹⁵⁶

The European Court of Human Rights, in an application lodged against the German ruling, confirmed the ruling of German courts and held:

The Court finds that the domestic courts' interpretation of "intent to destroy a group" as not necessitating a physical destruction of the group, which has also been adopted by a number of scholars [as for instance Matthew Lippman and Gerhard Werle], is

¹⁵² Ibid.

¹⁵³ Matthew Lippman, 'Fifty Years Later', supra note 13, at page 465

¹⁵⁴ Ibid.

¹⁵⁵ Claus Kress, 'The Crime of Genocide Under International Law', supra note 146, at page 486 (emphasis in original)

¹⁵⁶ Nikola Jorgić, Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000, para. (III)(4)(a)(aa) quoted in *Krstić*, Trial Judgment, supra note 6, para 579. See also: Ruth Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia', in *International Criminal Justice*, Vol. 3, May 2005, pp. 381-399, at page 398.

therefore covered by the wording, read in its context, of the crime of genocide in the Criminal Code and does not appear unreasonable.¹⁵⁷

Along this line, it can be concluded that the International Tribunals did not correctly assess the words ‘intent to destroy’ as to include acts of social and cultural genocide. A simple wording of ‘forcible transfer of children’ in the definition of crime implies that genocide can be committed in cultural sense.¹⁵⁸ In addition, it does not matter whether the group is destroyed on its physical, biological, social or cultural manner. The outcome is the same, the destruction “deprive[s] humanity of the manifold richness its nationalities, races, ethnicities and religions provide.”¹⁵⁹

2.3.3. In whole or in part

In order to convict someone for genocide, the Prosecutor would have to prove that the accused had the ‘*intent to destroy a group in whole or in part*’. The question was raised as to what does ‘*in part*’ means? Does it impose a numerical requirement on the side of the victims in order to prove intent? The Genocide Convention is silent on this issue. State Parties interpreted *in part* differently; for instance, the US proposed an understanding of *in part* to mean “substantial part”.¹⁶⁰ The Trial Chamber of the ICTY introduced the “quantitative criterion”,¹⁶¹ or number of group members victimized, as relevant element of the crime of genocide, concluding that *in part* means “reasonably substantial number relative to the total population of the group.”¹⁶² In *Krstić* it held:

It is well established that where a conviction for genocide relies on the intent to destroy a protected group ‘in part’, the part must be a substantial part of that group.

¹⁵⁷ Case of Jorgić v. Germany, Application No.: 76613/01, Judgment of 12 July 2007, para .105

¹⁵⁸ Gerhard Werle, *Principles of International Criminal Law*, supra note 24, marginal no. 606

¹⁵⁹ *Krstić*, Appeal Chamber Judgment, supra note 139, para 36

¹⁶⁰ Lawrence J. Le Blanc, ‘The Intent to Destroy in the Genocide Convention’, supra note 21, at page 377

¹⁶¹ Prosecutor v. Duško Sikirica, Case No.: IT-95-8-T, Trial Chamber Judgment of 3 September 2001, para. 76

¹⁶² *Ibid.*, para. 65

The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.¹⁶³

The Trial Chamber of the ICTR, on one hand, held that killing of one individual of a protected group may satisfy the ‘*in part*’ requirement,¹⁶⁴ and on the other, referred to “considerable number of individuals”.¹⁶⁵ Also, the Court of Bosnia and Herzegovina was of the opinion that even one victim is enough and that number of victims must not be large or significant.¹⁶⁶ Similarly, critics argue that adding ‘*a substantial*’ in the definition of the crime, makes the genocidal intent harder to prove and is counter the object and purpose of the Convention.¹⁶⁷ Lippman argues that the ‘*substantial part*’ offers “less protection”¹⁶⁸ and “establish[es] a vague and variable numerical threshold for adjudging acts of genocide.”¹⁶⁹ David Alonzo – Maizlish argues that any kind of numerical requirement of victims contradicts “the core values established by the Genocide Convention [and that] it will fail to uphold the group right to exist.”¹⁷⁰ Nevertheless, the International Law Commission (hereinafter ‘the ILC’) agreed with the approach of the ICTY and the US and held that “[...] the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.”¹⁷¹ The same did the International Commission of Inquiry on Darfur: “As clarified by international case law, the intent to destroy a group ‘in part’ requires

¹⁶³ *Krstić*, Trial Judgment, supra note 6, para. 8

¹⁶⁴ Prosecutor v. Emmanuel Nindabahizi, Case No.: ICTR-2001-71-I, Judgment, 15 July 2004, para. 471

¹⁶⁵ Prosecutor v. Kayishema and Ruzindana, Trial Judgment, supra note 142, para. 97

¹⁶⁶ *Mitrović*, First Instance Verdict, (Bosnia and Herzegovina), supra note 149, at page 45

¹⁶⁷ See: Lawrence J. Le Blanc, ‘The Intent to Destroy’, supra note 21, pp. 382-385. See also: Matthew Lippmann, ‘Genocide’, in Cherif Bassiouni, *International Criminal Law*, 3rd edition, (Vol 1, M., Martinus Nijhoff Publishers, 2008) page 421

¹⁶⁸ Matthew Lippman, ‘Fifty Years Later’, supra note 13, at page 484

¹⁶⁹ *Ibid.*, at page 464

¹⁷⁰ David Alonzo-Maizlish, ‘In Whole or in Part’, supra note 40, at page 1397

¹⁷¹ International Law Commission Report on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No10, at 89 quoted in: Alexander Greenwalt, ‘Rethinking genocidal intent’ supra note 44, at page 2290

the intention to destroy ‘a considerable number of individuals or a substantial part’, but not necessarily ‘a very important part’ of the group.”¹⁷²

Regardless of the critics from the scholarly commentary, it seems that the International Community has adopted the *quantitative criterion* as relevant for a genocide conviction. Taking into account the purpose of the Convention of early prevention of the guilty mind in the form of the ‘*intent to destroy*’, there remains only one conclusion to this kind of development of the International criminal law: it is contradictory to international human rights and international justice, and is contrary to the object and purpose of the Genocide Convention.

2.3.4. A group as such, motive vs. *mens rea*

Motive as an element of the crime of genocide was explicitly omitted during the drafting history of the Convention.¹⁷³ The reason for this was that some delegations argued that it was not necessary or relevant as “once the intent to destroy a group existed, that was genocide, whatever reasons the perpetrators of the crime might allege.”¹⁷⁴ Nevertheless, words of the definition ‘*a group as such*’ led to a wide discussion whether these words mean that motive is an element of the crime of genocide after all.¹⁷⁵ And if so, what is the nature of its relation to intent?

¹⁷² Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, International Commission of Inquiry on Darfur, (hereinafter Inquiry on Darfur), 25 January 2005, See para. 492, (Citations omitted), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf, last access date: 28.10.10

¹⁷³ Matthew Lippman, 'Fifty Years Later', supra note 13, at p. 454

¹⁷⁴ Gerald Fitzmaurice, UN Doc. A/C/6/Sr.69 See general: William Schabas, *Genocide in International Law*, 2nd ed., supra note 44, pp. 294-306

¹⁷⁵ See Cecile Tournaye, ‘Genocidal Intent before the ICTY’, in *International and Comparative Law Quarterly*, Cambridge University Press, Vol 52, No. 2 (Apr., 2003), pp. 447- 462, at page 451; William A. Schabas, *Genocide in International Law*, 2nd ed, supra not 44, at page 294, Steven R. Rotner, Jason S. Abrams, James L. Bischoff, *The accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, supra note 28, at page 39

Cecile Tournaye questioned whether *as such* lead to the requirement that “it is necessary to prove that the perpetrators sought the destruction of the group *because* of its national, racial, ethnic, or religious characteristics.”¹⁷⁶ If so, motive does not relate to the mind of perpetrators, in which case any personal motive is irrelevant, but to the discriminatory nature of the crime.¹⁷⁷ Accordingly, the motive is an element of the crime and will always require proof on a trial.¹⁷⁸ William Schabas makes a clear distinction between motive and intent and explicitly points out that motive and intent are not “interchangeable notions.”¹⁷⁹ Also, according to him, motive must be proved on a genocide trial.¹⁸⁰ He called it *discriminatory or hateful motive* but differently from Tournaye, he does relate it to the mind of organizers and planners.¹⁸¹ Furthermore, he argues that executors may have personal motives other than genocidal, but nevertheless, it should not be a standing defence to genocide.¹⁸²

The International jurisprudence is clear that personal motives must be distinguished from intent in which aspect the Appeal Chamber of the ICTR held: “...criminal intent (mens rea) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility...”¹⁸³ To interpret the words ‘*as such*’ the International Tribunals held it “to mean that the proscribed acts were committed against the victims *because of* their membership in the protected group, but not *solely* because of such membership.”¹⁸⁴ Therefore, words ‘*as such*’ do not respond to any of underlying motives of perpetrators, which are of no relevance, but responds the discriminatory nature of the crime.

¹⁷⁶ Cecile Tournaye, ‘Genocidal intent before the ICTY’, supra note 175, at page 451

¹⁷⁷ Ibid., at p. 453

¹⁷⁸ Ibid.

¹⁷⁹ William Schabas, *Genocide in International Law*, 2nd ed., supra not 44, at page 245

¹⁸⁰ Ibid., at page 305

¹⁸¹ Ibid.

¹⁸² Ibid., at p. 306

¹⁸³ See: Kayishema, ICTR-95-1-A, Appeal Judgment of 21 June 2001, para. 161, See also: Niyitegeka v. Prosecutor, Case No.: ICTR-96-14-A, Appeal Chamber Judgment of 9 July 2004, paras. 49-53; Prosecutor v. Tadić, Case No.: IT-94-1-A, Appeal Chamber Judgment of 15 July 1999, para 269; Jelisić, Appeal Judgment, supra note 3, at para. 49

¹⁸⁴ Niyitegeka Appeal Chamber Judgment, supra note 183, para. 53

It is important also to mention that premeditation¹⁸⁵ is not included in the crime of genocide as a legal requirement.¹⁸⁶ The General Assembly decided to omit the provision of the premeditation and later the International Tribunals affirmed that the premeditation is not an element of genocide.¹⁸⁷ Nevertheless, both motive and premeditation have been seen as aggravating circumstances in a case.¹⁸⁸

To observe, the crime of genocide requires proof of prohibited *actus reus* directed against a protected group and two distinct *mens rea*, the *mens rea* of the underlying acts and the genocidal *mens rea*. The genocidal *mens rea* may be inferred from certain circumstances and facts, and the perpetrator must act with the intent to physically, biologically, and socially destroy a group. Finally, a personal motive, other than genocidal, and premeditation are not of the relevance to the existence of genocide. The upcoming chapter will address the problematic aspects of genocide and will provide a general introduction of genocidal intent's problems.

¹⁸⁵ William A. Schabas defines premeditation as “degree of planning and preparation in the commission of a crime.” See William A. Schabas, *The Crime of Crime*, 2nd Ed, supra note 44, at page 267

¹⁸⁶ Ibid.

¹⁸⁷ Ibid. See also: *Kayishema*, Trial Judgment, supra note 142, para. 91, *Krstić*, Trial Judgment, supra note 6, para. 711

¹⁸⁸ *Krstić*, Trial Judgment, supra note 6, paras. 710-711. See also: *Tadić*, Appeal Judgment, supra note 183, para. 269

III. THE PROBLEMS OF GENOCIDE

The purpose of this chapter is to give an insight in some of the issues which have been discussed widely as problematic aspects of genocide. In the previous chapter the thesis has already discussed about some of them, such as whether cultural and social destruction of a group can constitute genocide, whether the number of victims is relevant to the establishment of the ‘*intent to destroy*’ and whether genocide requires proof of motive and premeditation. This chapter will deal with the enumeration of *actus reus* and the group requirement. The aim is to recognize these issues as relevant, but, as issues that have been answered, and that it is the intent part which makes the prevention and prosecution of genocide difficult.

3.1. Prohibited *actus reus*

Article II of the Convention specifies conducts which, if committed with the ‘*intent to destroy*’, will constitute acts of genocide.¹⁸⁹ Scholars, such as Florian Jessberger believe that the list of the acts is complete and that “other acts, which are not included in the list, are not genocide, even if the perpetrator acts with the intent to destroy a protected group.”¹⁹⁰ In the section *To Destroy* of the thesis, the question of cultural and social genocide was raised as an issue. In addition, the term *ethnic cleansing*, which was mentioned in the Introduction of the thesis raises question as to whether *ethnic cleansing* as “forcible expulsion of civilians belonging to a particular group from an area”,¹⁹¹ if committed with the ‘*intent to destroy*’, could fall within the *actus reus* of genocide as defined by Article II of the Convention. Also,

¹⁸⁹ The Genocide Convention, supra note 1, Article II

¹⁹⁰ Florian Jessberger, ‘The Definition and the Elements of the Crime of Genocide’, supra note 46, at pp. 89, 94

¹⁹¹ Antonio Cassese, *International Criminal Law*, supra note 90, at page 134

the question is whether forcible transfer of civilians, and not solely children, could fall under the *actus reus* provision of the Convention.

Ethnic cleansing is not a legal term.¹⁹² It was born as a term during the war in former Yugoslavia to label the practice of inhuman acts by Serb forces in Bosnia and Herzegovina against Bosniaks and Croats with the aim to expel them from a certain area in order to create a homogenous clean Serb territory.¹⁹³ The UN Commission of Experts on the former Yugoslavia defined ethnic cleansing as "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas."¹⁹⁴ The acts of massacre, mistreatment, sexual violence, arbitrary arrest, execution, and destruction of cities, cultural heritage, and places of worships fell under the label of *ethnic cleansing*.¹⁹⁵ The label '*ethnic cleansing*' was, also, used by the UN Commission of Inquiry on Darfur to describe acts of destruction and forced displacement of protected groups in Darfur.¹⁹⁶ So, is ethnic cleansing genocide or not?

According to Werle, Cassese and Kress, the pure classification of ethnic cleansing as genocide has no standing, because "ethnic cleansing does not follow the goal of destroying the protected group,"¹⁹⁷ its "primary goal [...] is expulsion",¹⁹⁸ and "not all conduct that takes place in the course of ethnic cleansing can be subsumed under the heading of genocide; this is the case, for example, of the destruction of houses or churches and pillaging and destruction

¹⁹² See Gerhard Werle, *Principles of International Criminal Law* supra note 24, marginal no. 604. See also: Mai Linh K. Hong, 'A Genocide By Any Other Name', supra note 16, at page 262

¹⁹³ Gerhard Werle, *Principles of International Criminal Law* supra note 24, marginal no. 604

¹⁹⁴ The Secretary-General, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), P 130, delivered to the Security Council, U.N. Doc. S/1994/674 (May 27, 1994)

¹⁹⁵ Ibid. See also: The Security Council's Commission of Experts on Violations of Humanitarian Law During the Yugoslav war, UN Doc. S/25274 (1993), para 56

¹⁹⁶ Inquiry on Darfur, supra note 172, paras. 194, 458, 459.

¹⁹⁷ Claus Kress, 'The Crime of Genocide Under International Law', supra note 146, at pp. 487-488

¹⁹⁸ Gerhard Werle, *Principles of International Criminal Law*, supra note 24, marginal no. 605. See also: Antonio Cassese, *International Criminal Law*, supra note 90, at pages 96-99,

of property.”¹⁹⁹ All three authors agree that ethnic cleansing can have genocidal features, which depends on the existence of *intent to destroy*, and it can be decided only on a case-by-case basis.²⁰⁰ That is true, but the same stands for other acts of genocide also.

In the beginning of 1992, the UN General Assembly characterized ethnic cleansing as a form of genocide.²⁰¹ Later, the ICTY in *Krstić* and *Stakić* held that ethnic cleansing is not equivalent to genocide,²⁰² and the ICJ held that “it can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention.”²⁰³ Nevertheless, the Higher Regional Court of Dusseldorf, by convicting Nikola Jorgić for genocide, recognized ethnic cleansing as a form of genocide.²⁰⁴

True, it is indisputable that all acts of ethnic cleansing cannot constitute genocide. However, as emphasized in the Introduction of the thesis, the International Community should avoid to label something as ethnic cleaning when true features of genocide exists. As for example in the case of Bosnia and Herzegovina, Destexhe, who argues that atrocities committed in Bosnia are not genocide but ethnic cleansing, wrote, “They killed Muslims on a large scale because they were Muslims (the Croats were not singled out in the same way, at least not systematically) but their intention was to get rid of Muslims not to exterminate them”.²⁰⁵ But, to get rid of a group from an area is to destroy the group from an area. The reason behind it, which in the aspect of Serb forces in Bosnia and Herzegovina was to “form a

¹⁹⁹ Ibid. See also: Claus Kress, 'The Crime of Genocide Under International Law', supra note 146

²⁰⁰ Ibid.

²⁰¹ UN General Assembly Resolution 47/121 (no. A/Res/47/121) of 18 December 1992, the Preamble;

²⁰² *Krstić*, Trial Judgment, supra note 6, para 562; *Stakić*, Trial Judgment, supra note 137, para. 519

²⁰³ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, supra note 81, para. 190

²⁰⁴ Nikola Jorgić, Oberlandesgericht Dusseldorf [Higher Regional Court of Dusseldorf], 26 September, 1997, IV-26/96, para. A.I.5.(Die ethnische Säuberung), para. A.I.7.(Die Beteiligung des Angeklagten und der Politik der “ethnische Säuberung” und seine Stellung in Doboj), para. D.III.1.

²⁰⁵ Alain Destexhe, *Rwanda and Genocide in Twentieth Century*, (New York, 1994), at page 19

new and smaller Yugoslavia [Greater Serbia] with a substantially Serb population”²⁰⁶ is of no relevance.

Forcible transfer or displacement of civilians as a possible act of genocide was addressed by the ICTY.²⁰⁷ In that aspect, the ICTY held that forcible transfer “does not in itself suffice for genocide”²⁰⁸ but that it could be “an additional mean by which to ensure the physical destruction of [a protected group].”²⁰⁹ Thus, the forcible transfer of civilians may amount to genocide if it has for the aim the physical destruction of a group. Following that, the Trial Chamber in *Krstić* held that forcible transfer of women, elderly and children together with the killings of men “would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.”²¹⁰

The scholarly literature seems to take the same view, as can be concluded from the words of Claus Kress:

There can be no doubt that the categorization as genocide of the forcible displacement of a protected group with the goal of the latter’s dissolution conforms with Lemkin’s original intention and with the overall goal of the Genocide Convention to preserve the existence of certain groups to ensure that they may continue to enrich world civilization by their cultural contributions.²¹¹

Hence, the list of acts is not exclusive and other acts, if committed with the ‘intent to destroy a group’ will be prohibited by the Genocide Convention. This is one more reason why the ‘intent to destroy’ has been argued to be the core element of the crime of genocide.

²⁰⁶ Prosecutor v. Duško Tadić, Trial Judgment, IT-94-I-T, 7 May 1997, para. 84

²⁰⁷ *Stakić*, Trial Judgment, supra note 137, para. 519; *Krstić*, Trial Judgment, supra note 6, para. 595 and Appeal Judgment, supra note 139, para 31; Prosecutor v. Blagojević, Case No.: IT-02-60-T, Trial Judgment of 17 January 2005, paras. 647-677

²⁰⁸ *Stakić*, Trial Judgment, supra note 137, para. 519

²⁰⁹ *Krstić*, Appeal Judgment, supra note 139, para 31

²¹⁰ *Krstić*, Trial Judgment, supra note 6, para 595

²¹¹ Claus Kress, ‘The Crime of Genocide Under International Law’, supra note 146, at page. 489

3.2. Exclusive list of protected groups

Protected groups under Article II are restricted to national, racial, religious, and ethnical groups.²¹² Is the object and purpose of the Genocide Convention to limit the protection from annihilation only to those named four groups or to offer protection to every existing group? According to Werle, the list is exclusive and “groups other than those named explicitly in the definition of the crime are not protected by either international treaty or customary law.”²¹³ He argues that national, ethnical, racial and religious groups are groups which are in need for a protection, as “individuals cannot separate themselves from the group [and] such stable communities groups are relatively easy to distinguish.”²¹⁴ Moreover, Werle argues that any inclusion of other groups, than those explicitly mentioned is in violation of the principle of *nullum crimen sine lege*.²¹⁵

Mathew Lippman suggested two alternatives: the first “to afford protection to any coherent collectivity which is subject to persecution”,²¹⁶ and the second, to include named groups such as “political groups and possibly women, homosexuals, and economic and professional classes”²¹⁷ under the protection. The rationale behind the inclusion of political groups lays in the fact that they “have historically been victimized and, like religious groups, are typically united by a common code and vision.”²¹⁸ Moreover, he rightly points out, “The failure to protect political groups permits regimes to claim that their genocidal acts are aimed

²¹² The Genocide Convention, *supra* note 1, Article II

²¹³ Gerhard Werle, *Principles of International Criminal Law*, *supra* note 24, marginal no. 585

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, marginal no. 586

²¹⁶ Matthew Lippmann, ‘Fifty Years Later’, *supra* note 13, at page 464

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

at decimating dissidents, rather than ethnic or religious.”²¹⁹ Notably, this is in accordance with the purpose of the Genocide Convention which is to afford protection against “a denial to the right of existence of an entire human group.”²²⁰ As long as the group differs itself by some characteristics from the group of *génocidaire*, is targeted on the basis of its special characteristics, and the required intent is demonstrated, it should be offered protection. As Johan D. van der Vyver explains it on the Rwanda case:

The distinction between Hutu and Tutsi in Rwanda falls between cracks. These two factions of the Rwanda population shared same nationality, race, and by large, the same religion. They could not be classified as distinct ethnic group: they share the same language and culture. The divide is based on material means (cattle owners and the other) and social status in the community.²²¹

How did international jurisprudence approach this issue?

The Trial Chamber of the ICTY in *Krstić* held that “the Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnical, racial or religious groups”,²²² and held in *Jelisić* explicitly that political groups are excluded from the protection.²²³

The Trial Chamber of the ICTR took another view by referring to *travaux préparatoires*, whose intent was to offer protection to “any stable and permanent group.”²²⁴ Thus, while the ICTY took a strict approach and did not offer a wide group protection, the ICTR correctly did not limit the protection to only the four mentioned groups. The ICTR approach is more in line with the international human rights evolution and international justice.

²¹⁹ Ibid.

²²⁰ ICJ Advisory Opinion, *Reservations to the Convention*, 1951, supra note 5

²²¹ Johan van der Vyver, ‘Prosecution and Punishment of the Crime of Genocide’, in *Fordham International Law Journal*, Vol. 23, December 1999, pp.286-355, at p. 304

²²² *Krstić*, Trial Judgment, supra note 6, para. 554

²²³ *Jelisić*, Trial Judgment, supra note 41, para 60

²²⁴ *Akayesu*, Trial Judgment, supra note 104, para. 516 and para. 701

As follows, it could be argued that the *nullum crimen sine lege* does not prohibit extension of the list. Nevertheless, the Genocide Convention is in need of a reform and until it is done, the national legislator of each country should define the genocide as to afford protection to any stable group.²²⁵

The Situation in Darfur²²⁶ is a great example where the UN Commission of Inquiry had to decide on whether tribal groups are protected by the Genocide Convention.²²⁷ Namely, in the Western world the situation in Darfur is described as a conflict between Sudanese Arabs and Sudanese black-Africans, whereas *Arabs* are perpetrators and *Africans* are victims.²²⁸ But the situation is much more complicated than that; *Arabs* and *Africans* “are neither internally cohesive nor fully distinct from each other.”²²⁹ They share the same religion, the same language and due to intermarriage mixing through centuries they physically look the same, making the ethnical or racial distinction difficult.²³⁰ The victims, called black-Africans “do not generally think of themselves as black first and foremost, but as members of their tribes [...] the Fur (‘Darfur’ meaning ‘land of the Fur’), Masseleit, and Zagawa.”²³¹ In order to address this complex situation in Darfur, the International Commission of Inquiry took into account that:

It is apparent that the international rules on genocide are intended to protect from obliteration groups targeted [...] which show the particular hallmark of sharing a religion, or racial or ethnic features, and are targeted precisely on account of their distinctiveness. In sum, tribes may fall under the notion of genocide set out in international law only if, as stated above, they also exhibit the characteristics of one of the four categories of group protected by international law.²³²

²²⁵ Ibid., at p. 306

²²⁶ Situation in Darfur will be discussed in details in 3.3.1. Section *The situation in Darfur*

²²⁷ Inquiry on Darfur, supra note 172, para. 495

²²⁸ Mai-Linh K. Hong, ‘A Genocide by Any Other Name: Language, Law, and the Response to Darfur’, supra note 16, at pp. 242-243

²²⁹ Ibid., at page 243

²³⁰ Ibid.

²³¹ Ibid., page 260

²³² Inquiry on Darfur, supra note 172, para. 497

It referred to the ICTR case-law and “the objective criterion of ‘a stable and permanent group’ [and] the subjective standard of perception and self-perception as a member of a group.”²³³ In applying the objective criterion, the Commission reached a negative conclusion on whether the tribes’ victims make a protected group on the basis that both attackers and victims share the same language, religion, and look physically similar to each other.²³⁴ Then, the Commission proceeded to apply the subjective criterion, and held:

There are other elements that tend to show a self-perception of two distinct groups. In many cases militias attacking ‘Africans’ villages tend to use derogatory epithets, such as ‘slaves’, ‘blacks’, ‘Nuba’, or ‘Zurga’ that might imply a perception of the victims as members of a distinct group [...] As for the victims, they often refer to their attackers as *Janjaweed*, a derogatory term that normally designates ‘a man (a devil) with a gun on a horse.’ However, in this case the term *Janjaweed* clearly refers to ‘militias of Arab tribes on horseback or on camelback.’ In other words, the victims perceive the attackers as persons belonging to another and hostile group.²³⁵

The Commission concluded:

Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. The rift between tribes, and the political polarization around the rebel opposition to the central authorities has extended itself to the issues of identity. The tribes in Darfur supporting rebels have increasingly come to be identified as ‘African’ and those supporting the Government as ‘Arabs’.²³⁶

As to conclude, the International community did find a way on how to answer the question of protected groups in order to grant the effective protection under the Genocide Convention. But, as the next subsection will prove, it has failed to do the same with the ‘*intent to destroy*’.

²³³ Ibid., para 498

²³⁴ Ibid., para 508

²³⁵ Ibid., para. 511

²³⁶ Ibid., para 640

3.3. The problems in identification of intent

Intent is the core element of the crime of genocide and, as it was mentioned throughout the thesis, intent to destroy is what gives genocide its special dimension. Nevertheless, the understanding of intent proved to be difficult because of its unclear definition. Thus, genocidal intent became the main carrier of the responsibility for non prosecution and, moreover, non-prevention of genocide. This statement will be presented by analyzing the Situation in Darfur and the *Jelisić* case. In the Situation of Darfur, had the UN agreed with the United States Government Resolution on the existence of genocidal intent in Darfur and, consequently, genocide, and thus called upon international action, in the past five years approximately 500 – 1 000 lives per month would have been saved in Darfur.²³⁷ As to the second case, the *Jelisić* case was not only erroneously decided by the Trial Chamber of the ICTY on the basis of incorrect assessment of evidence in support of genocidal intent, but as a case where the Appeal Chamber, after finding the error of the Trial Chamber, did not remit the case back for a new trial.²³⁸ *Jelisić* is a famous case where the erred prosecution of genocide was ignored.

²³⁷ Alex Barnea Burnley, Yael Stein, Elihu D Richter, 'Darfur and Sudan: A Review and Analysis', *Genocide Prevention Now*, 29 October 2010, available at: www.genocidepreventionnow.org/2010/10/darfur-and-sudan-review-and-analysis.html, last access date: 28.11.2010.

²³⁸ *Jelisić*, Appeal Judgment, supra note 3, para. 77

3. 3.1. The Situation in Darfur

*“The sterile debate about whether the Darfur atrocities are genocide or “merely” crimes against humanity did not enhance justice, it did the opposite.”*²³⁹

William A. Schabas

The situation in Darfur, often referred to as “one of the worst ongoing humanitarian disasters”,²⁴⁰ is an example where *mens rea* of genocide showed its superfluous controversy, leading the United States Government to adopt a resolution declaring genocide in Darfur²⁴¹ and, on the other hand, the International Commission of Inquiry on Darfur to conclude that the genocide did not take place.²⁴² The factor which decided in both cases was the mental element of the crime: *intent to destroy*.²⁴³

The ongoing conflict in Darfur started in 2003 between the Khartoum government of Sudan, on the one hand, and rebel groups known as the Sudan Liberation Army and the Justice and Equality Movement, on the other.²⁴⁴ The backstage reason for the rebellion was “socio-economic and political marginalization of Darfur and its people.”²⁴⁵ Members of rebel movements were individuals belonging to the *Fur*, the *Massalit* and the *Zahgawa* tribes,

²³⁹ William A. Schabas, ‘Genocide, Crimes Against Humanity and Darfur: The Commission of Inquiry’s Findings on Genocide’, in *Cardozo Law Review* Vol. 27, 2006, pp. 1703-1727, at p. 1707

²⁴⁰ Philip Kastner, ‘The ICC in Darfur – Savior or Spoiler’ In *ILSA Journal of International and Comparative Law*, Vol. 14, Fall 2007, p. 145-188 at p. 146

²⁴¹ H.R. Congress Res. 467, 108th Congress, 2nd Session, 2004, available at <http://thomas.loc.gov/cgi-bin/query/D?c108:1:/temp/~c108EKgaKH>, last access date: 28.10.2010.

²⁴² Inquiry on Darfur, supra note 172, para 640

²⁴³ Ibid. See also : H.R. Congress Res. 467, 108th Congress, 2nd Session, supra note 241.

²⁴⁴ Philip Kastner, ‘The ICC in Darfur – Savior or Spoiler’ supra note 240, at page 155. More about the conflict in Darfur see: Jamie A. Mathew, ‘The Darfur debate: Whether the ICC Should Determine that the Atrocities in Darfur Constitute Genocide’, in *Florida Journal of International Law*, Vol.18, August 2006, p. 517-547, at pp. 524-529, Mai-Linh K. Hong, ‘A Genocide by Any Other Name’, supra note 16, pp 235-572.

²⁴⁵ Inquiry on Darfur, supra note 172, at para. 62

identified as *African* tribes.²⁴⁶ Immediately, the Government of Sudan, incapable to effectively respond to the rebels itself, called upon *Arab* nomadic tribes to fight on the side of the Government.²⁴⁷ Arab tribes responded to the call, and soon the militia *Janjaweed* was formed.²⁴⁸

The government and the *Janjaweed* countered the rebellion by brutal attacks on civilians in Darfur, particularly individuals belonging to the *Fur*, the *Masalit*, and the *Zahgawa* tribes,²⁴⁹ which led to the death of 200 000 – 500 000 civilians, entire villages being burned and destroyed, 2.7 million displaced civilians and, widespread and systematic rape and violence against women and young girls.²⁵⁰

On September 7, 2004, the United States responded to atrocities committed in Darfur by adopting a resolution declaring “atrocities unfolding in Darfur, Sudan are genocide.”²⁵¹ Two days later in the Testimony before the Senate, Secretary of State Colin Powell concluded, “ genocide has been committed in Darfur and the Government of Sudan and Jingawit [Janjaweed] bear responsibility- and that genocide may still be occurring.”²⁵² Further on, he said:

The totality of the evidence [...] shows that the Jingawit [Janjaweed] and Sudanese military forces have committed large-scale acts of violence, including murders, rape and physical assaults on non-Arab individuals. Second, the Jingawit and Sudanese military forces destroyed villages, foodstuffs, and other means of survival. Third, the Sudan Government and its military forces obstructed food, water, medicine, and other

²⁴⁶ Ibid.

²⁴⁷ Ibid., paras. 67-68

²⁴⁸ Ibid. The Commission of Inquiry on Darfur defines Janjaweed as “an armed bandit or outlaw on a horse or camel”, See: Inquiry on Darfur, *supra* note 172, para. 69

²⁴⁹ Jamie A. Mathew, ‘The Darfur Debate’, *supra* note 244, at p. 527

²⁵⁰ See: Human Rights Watch, ‘The Way Forward. Ending Human Rights Abuses and Repression across Sudan’, (Report) October 2009, available at <http://www.hrw.org/en/reports/2009/10/06/way-forward-0>, last access date: 11.09.2010. See also, Genocide Intervention, ‘Sudan’, at:

http://www.genocideintervention.net/areas_of_concern/darfur, last access date: 11.09.2010.

²⁵¹ H.R. Con. Res. 467, 108th Congress, 2nd Session, *supra* note 241, at page 3

²⁵² Secretary Colin L. Powell, The Crisis in Darfur: Testimony Before the Senate Foreign Relations Committee, 9 September 2004, (hereinafter Powell, Testimony), available at <http://www.state.gov/secretary/former/powell/remarks/36042.htm>, last access date: 10.09.2010.

humanitarian aid from reaching affected populations, thereby leading to further deaths and suffering. And finally, despite having been put on notice multiple times, Khartoum has failed to stop the violence.²⁵³

Nine days later, the U.N. Security Council adopted resolution 1564 requesting that the Secretary General “rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties [and] to determine also whether or not acts of genocide have occurred”²⁵⁴ As a result, the International Commission of Inquiry on Darfur was formed.²⁵⁵

After a conducted investigation, the findings of the Commission were on the existence of widespread and racially motivated attacks on civilians, which included mass killings, torture, mass sexual violence and displacement.²⁵⁶ On the question whether genocide has occurred in Darfur, the Commission’s finding was negative on the basis that the Government of Sudan did not have *intent to destroy*.²⁵⁷ In the words of the Commission:

...the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.²⁵⁸

The Commission did not exclude the possibility that individuals, even Government officials, may have acted with intent to destroy,²⁵⁹ but nevertheless, was reluctant to find the

²⁵³ Ibid.

²⁵⁴ U.N. Security Council Resolution 1564, S/Res/1564 (2004) 18 Sept 2004, at page 3, para. 12

²⁵⁵ Inquiry on Darfur, supra note 172, at page 2.

²⁵⁶ Ibid., para. 513

²⁵⁷ Ibid., para. 518

²⁵⁸ Ibid., para. 640

²⁵⁹ Ibid., para. 641

Government of Sudan responsible for genocide, directly or through the *Janjaweed*.²⁶⁰ What can be noted here is that the UN Commission made a distinction between the liability of a state and the liability of individuals on the basis of intent.²⁶¹ The finding of the Commission regarding the governmental intent became one of the one most criticized, as George Fletcher and Jens David Ohlin noted: “How one attributes genocidal intent to the group, since evidence of intent will almost always be found at the individual level”²⁶² and as has been argued by William Schabas, “States do not have intent.”²⁶³ The issue of collective versus individual responsibility of genocide will be mentioned in the section 4.1.1. *State Plan or Policy*, but nevertheless, as the issue itself requires much more space, this thesis will not discuss it in details.

As to the Commission’s findings on the individual liability, the Commission concluded that only a court was competent to decide whether individuals committed the crime of genocide.²⁶⁴ Following this, on March 31, 2005, the U.N. Security Council referred the situation in Darfur to the Prosecutor of the ICC to investigate the atrocities in Darfur.²⁶⁵ Meanwhile, widespread and systematic attacks on civilians belonging to African tribes continued.²⁶⁶ Three years later, the Prosecutor of the ICC, Luis Moreno-Ocampo, filed an application requesting the Pre-Trial Chamber of the ICC to issue a warrant of arrest for the

²⁶⁰ Ibid., para. 642

²⁶¹ See: Claus Kress, ‘The Darfur Report and Genocidal Intent’ in *Journal of International Criminal Justice*, Vol.3, July 2005, p. 562-578

²⁶² George P. Fletcher and Jens David Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, in *Journal of International Criminal Justice*, Vol. 3, July 2005, p 539-561, at p. 546

²⁶³ William A. Schabas, *Genocide in International Law*, supra note 44, Preface to the second edition (xiv)

²⁶⁴ Inquiry on Darfur, supra note 172, para. 641

²⁶⁵ U.N. Security Council Resolution 1593 (31 March 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>, last access date: 09.09.2010.

²⁶⁶ Human Rights Watch, ‘The Way Forward. Ending Human Rights Abuses and Repression across Sudan’, (Report), supra note 250. See also: Genocide Intervention, ‘Sudan’, supra note 250

Sudanese President Omar Hassan Ahmad Al Bashir for criminal responsibility for crimes against humanity, war crimes and genocide.²⁶⁷ The Prosecutor submitted in the Application:

Al Bashir intended to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such. To this end, he used the entire state apparatus, the Armed Forces and the Militia/ Janjaweed. Forces and agents controlled by Al Bashir attacked civilians in towns and villages inhabited mainly by the target groups, committing killings, rapes, torture and destroying means of livelihood. Al Bashir thus forced the displacement of a substantial part of the target groups and then continued to target them in the camps for internally displaced persons, causing serious bodily and mental harm – through rapes, tortures and forced displacement in traumatizing conditions – and deliberately inflicting on a substantial part of those groups conditions of life calculated to bring about their physical destruction, in particular by obstructing the delivery of humanitarian assistance.²⁶⁸

As evidence that Al Bashir acted with *intent to destroy* the Prosecutor submitted that a conscious plan or policy existed;²⁶⁹ that Al Bashir made explicit statements revealing his intention;²⁷⁰ and that he systematically targeted victims on the basis of their belonging to a particular group.²⁷¹ Moreover, the mass atrocities committed, including rape, sexual violence and forced displacement revealed the aim of Al Bashir to achieve actual destruction of protected groups.²⁷² The Prosecutor further submitted that Al Bashir's reluctance to investigate the acts of genocide is also evidence of the '*intent to destroy*'.²⁷³ It is obvious how the Prosecutor's finding is similar to what Colin Powell said already in 2004 in the Testimony before the US Senate.

On March 4, 2009, the Pre-Trial Chamber of the ICC issued a warrant of the arrest for Al Bashir indicating there are reasonable grounds to believe that Al Bashir was responsible

²⁶⁷ Situation in Darfur, the Sudan, Prosecution's Application (Public Redacted Version), 14 July 2008, ICC-02/05

²⁶⁸ Ibid, para. 10

²⁶⁹ Ibid, paras 358-383

²⁷⁰ Ibid, paras 384-386

²⁷¹ Ibid, paras 367-370

²⁷² Ibid, See generally paras 367-376; On forced displacement see paras. 387-392; On rape and sexual violence see paras. 393-394

²⁷³ Ibid, paras. 396-400

for war crimes and crimes against humanity, but not for genocide.²⁷⁴ The Pre-Trial Chamber, after the assessment of the evidence, decided to reject the Prosecution Application on the count of genocide on the basis that there was not enough evidence to reasonable infer the genocidal intent.²⁷⁵ Judge Ušacka dissented to the Majority's interpretation of Article 58,²⁷⁶ and said, "Requiring the Prosecution to establish that genocidal intent is the only reasonable inference available on the evidence is tantamount to requiring the Prosecution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt."²⁷⁷ The Prosecution filed an Appeal on the ground that the Pre-Trial Chamber "incorrectly required that genocidal intent be the only reasonable conclusion to be drawn on the basis of the evidence."²⁷⁸ The Appeal Chamber agreed both with the Prosecutor and the dissenting opinion of judge Ušacka that the Pre-Trial erroneously applied 'the standard of reasonable grounds to believe' under Article 58.²⁷⁹ Therefore, it reversed the Pre-Trial Decision.²⁸⁰ Following this, a second warrant of arrest against Al-Bashir was issued in July 2010, this time including that "there are reasonable grounds to believe that Omar Al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups."²⁸¹

It may take years for the ICC to decide whether the genocidal intent, and thus genocide, happened and is happening in Darfur, especially in the regard to the reluctance of

²⁷⁴ Prosecutor v. Omar Hassan Ahmad al Bashir, Case no. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad al Bashir, 4 March 2009,

²⁷⁵ Prosecutor v. Omar Hassan Ahmad al Bashir, Case no. ICC-02/05-01/09, Pre Trial Chamber I, Decision on Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paras. 151, 159, 204-206

²⁷⁶ Article 58 sets out rule for the Pre-Trial Chamber how to decide on a warrant of arrest, See The Rome Statute, supra note 50, Article 58.

²⁷⁷ *Al Bashir*, Decision on Prosecution's Application for a Warrant of Arrest, supra note 274, The Dissenting Opinion by judge Ušacka, para. 31

²⁷⁸ Prosecutor v. Al Bashir, Case no. ICC-02/05-01/09-OA, The Appeals Chamber, Judgment on the appeal of the Prosecution against the "Decision on the Prosecution Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, para. 16

²⁷⁹ *Ibid.*, para. 39

²⁸⁰ *Ibid.*, para. 41

²⁸¹ Prosecutor v. Omar Hassan Ahmad al Bashir, Case no. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad al Bashir, 12 July 2010, at page 8

Al Bashir to surrender himself to the ICC and the unwillingness of other countries to cooperate.²⁸² In the meanwhile, annihilation of the *Fur*, *Masalit* and *Zaghawa* continues.²⁸³

How many more years will pass before the International Community accepts atrocities in Darfur as genocide and, consequently, effectively responds to them?

3.3.2. Jelisić Trial

In May 1992 the paramilitary force ‘Arkan’s Tigers’ executed approximately 5,000 Bosnian Muslims in Luka camp, Brčko.²⁸⁴ One of the ‘*tigers*’, Goran Jelisić, before starting to beat and kill his victims presented himself as the “Serbian Adolf”²⁸⁵ declaring that “he had to execute twenty to thirty persons before being able to drink his coffee each morning.”²⁸⁶ He was driven by the hatred towards Bosnian Muslims and “... reportedly added that he wanted ‘to cleanse’ the Muslims and would enjoy doing so, that the ‘*balijas*’ [derogatory term for Bosnian Muslims] had proliferated too much and that he had to rid the world of them.”²⁸⁷

In July 1995 the Prosecutor of the ICTY issued an indictment against Jelisić on counts of violations of the laws or customs of war, crimes against humanity, grave breaches of the Geneva Convention of 1949, and genocide.²⁸⁸ Jelisić pleaded guilty on all counts, except the

²⁸² Both Chad and Kenya welcomed Al Bashir on their territory after the ICC issued two warrants of arrest against him. Moreover, the African Union has called its member states not to cooperate with the ICC in the arrest of Al-Bashir. See: Human Rights Watch, ‘Arrest Bashir or Bar Him Entry’, 27 August 2010, available at: <http://www.hrw.org/en/news/2010/08/26/kenya-arrest-bashir-or-bar-him-entry>, last access date: 27.11.2010. See also: The CNN wire staff, ‘Kenya, African Union defent Bashir visit’, *CNN*, 31 August 2010, <http://edition.cnn.com/2010/WORLD/africa/08/31/kenya.bashir.visit/>, last access date: 27.11.2010; Michael Chebund and Addis Ababa, ‘African Union against Indictment of Al-Bashir’, *IPS news*, 30 January 2009, available at: <http://www.ipsnews.net/Africa/nota.asp?idnews=45612>, last access date 27.11.2010.

²⁸³ Ibid.

²⁸⁴ Mark S. Martins, Conference paper, “War Crimes” During Operations Other Than War: Military Doctrine and Law Fifty Years after Nuremberg – And Beyond”, in *Military Law Review*, Vol. 149 (Summer 1995), pp.145-187, at p. 150

²⁸⁵ *Jelisić*, Appeal Judgment, supra note 3, para 62

²⁸⁶ Ibid, para. 63

²⁸⁷ Ibid, para. 62

²⁸⁸ *Jelisić*, Trial Judgment, supra note 41, para. 4

genocide count.²⁸⁹ The Trial Chamber, before even hearing the closing arguments of the Prosecution,²⁹⁰ found Jelisić not guilty on the count of genocide.²⁹¹ The Chamber firstly examined whether a plan to destroy Bosnian Muslim existed, and in that case whether Jelisić can be found guilty of having aided and abetted in the crime.²⁹² After reaching a negative conclusion both as to the existence of a plan and thus Jelisić's guilt, the Chamber proceeded to consider whether Jelisić can be found guilty as a perpetrator of the crime.²⁹³ The Trial Chamber decided this question also in negative and concluded:

All things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed in Brčko during the period covered by the indictment. Furthermore, the behavior of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the *clear intention* to destroy a group. The Trial Chamber therefore concludes that it has not been proven beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisić must be found not guilty on this count.²⁹⁴ (Emphasis added)

The question is what exactly did the Trial Chamber refer to when it talked about the *clear intention*? Or better formulated, what evidence was the Trial Chamber actually looking for?

The *Jelisić* case is about a man who represented himself before the Court as “Serbian Adolf”.²⁹⁵ The acts he performed as one of ‘Arkan’s tigers’, the derogatory language used by him, the systematic manner of killing, and the number of victims are just some of circumstances which are, without doubt, evidence of Jelisić’s *intent to destroy*.²⁹⁶ According to the Trial Chamber, but also to professor Schabas, for a conviction of Jelisić to take place, a greater broader context, a plan was needed.²⁹⁷ But, in the Genocide Convention there is

²⁸⁹ *Jelisić*, Appeal Judgment, supra note 3, para. 11

²⁹⁰ Prosecutor’s first ground of appeal was the denial of the opportunity not to be heard. The Appeal Chamber held: “The prosecution therefore had a right to be heard on the question of whether the evidence was sufficient to sustain a conviction.” See: *Jelisić*, Appeal Judgment, supra note 3, para. 28

²⁹¹ *Jelisić*, Trial Chamber Judgment, supra note 41, para 108

²⁹² *Ibid.*, para. 87

²⁹³ *Ibid.*, paras. 98-99

²⁹⁴ *Ibid.*, para. 108

²⁹⁵ *Ibid.*, para.102

²⁹⁶ *Ibid.* See paras. 64, 72, 74-77

²⁹⁷ *Ibid.*, para. 108. See also: William A. Schabas, ‘The *Jelisić* Case and *Mens Rea* of the Crime of Genocide’ in *Leiden Journal of International Law*, Vol. 14, 2001, pp. 125-139

nothing that implies a plan requirement. Also, Schabas argues that Jelisić could not have been convicted as an individual guilty on the crime of genocide.²⁹⁸ But, is not the international justice about the individual responsibility? And to take into account, the Trial Chamber did convict Jelisić on the count of the crimes against humanity, for which he pleaded guilty.²⁹⁹ Thus, a broader context did exist. The case of Jelisić is not a random disturbed person going out on the street to kill all Muslims because he wants to destroy them; this is a case in a war that resulted in the death of 200 000 people. The testimony of a witness, collected by the Commission of Experts, reveals that during first weeks of his detention in Luka camp, more than 2 000 men were killed and thrown into Sava River,³⁰⁰ and a post-war examination of a mass grave proved these allegations to be true.³⁰¹

Not a surprise then that, just two days after the Trial Judgment was released, the Prosecution filed an appeal against the acquittal of Jelisić on three grounds; first two regarding procedural matters³⁰² and third on the genocidal intent.³⁰³ Moreover, the Prosecutor asked for a new trial.³⁰⁴

In the Prosecution's third ground of appeal, it was argued that the Trial Chamber "erred in law to the extent it is proposing that the definition of the requisite mental state for genocide [...] include the *dolus specialis* standard, and not the broader notion of general intent."³⁰⁵ The second argument was that "the Trial Chamber erred in law and fact when it

²⁹⁸ William A. Schabas, *Genocide in International Law*, 2nd Ed, supra note 44, at page 244

²⁹⁹ *Jelisić*, Trial Chamber Judgment, supra note 41, para.58

³⁰⁰ Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101 and United States State Department Dispatch, in 'ICJ, Bosnia and Herzegovina v. Serbia and Montenegro', supra note 81, para. 271

³⁰¹ *Ibid.*

³⁰² Grounds for procedural appeals were: 1. "The Trial Chamber made an error of law under Article 25 of the Statute by not giving the Prosecution an opportunity to be heard on a *proprio motu* decision of the Trial Chamber under Rule 98bis" 2. "The Trial Chamber erred in law by adopting the standard of guilt beyond a reasonable doubt for the purposes of a Rule 98bis determination of the sufficiency of the evidence to sustain a conviction." See *Jelisić*, Appeal Judgment, supra note 3, at para. 11

³⁰³ *Jelisić*, Appeal Judgment, supra note 3, paras. 6, 11

³⁰⁴ *Ibid.*, para 12

³⁰⁵ *Ibid.*, para. 11

decided [...] that the evidence did not establish beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Brčko.”³⁰⁶ Finally, the Prosecutor maintained that “the Trial Chamber erred in law and fact when it decided [...] that the acts of Goran Jelisić were not the physical expression of an affirmed resolve to destroy in whole or in part a group as such, but rather, were arbitrary acts of killing resulting from a disturbed personality.”³⁰⁷

The Appeal Chamber rejected the Prosecutor’s suggestion that the *mens rea* of genocide exists if the accused “consciously *desired* the committed acts to result the destruction [...] of the group [...] or he *knew* that his acts were destroying [...] the group, as such or he, acting as an aider or abettor, commits acts *knowing* that there is an ongoing genocide which his acts form part of, and that the likely consequences of his conduct would be to destroy, in whole or in part, the group as such.”³⁰⁸ (Emphasis added) Instead, the Appeal Chamber held that the genocide does require the existence of *dolus specialis* meaning “the intent to accomplish certain specified types of destruction”³⁰⁹ and “the specific intent [or *dolus specialis*] requires that the perpetrator, by one of the prohibited acts [...] seeks to achieve the destruction [...] of a [protected] group.”³¹⁰ Moreover, the Appeal Chamber held “that the existence of a plan or policy is not a legal ingredient of the crime”³¹¹ and that it might only be “an important factor”³¹² to prove genocide. This part of the judgment is important in the way that the Appeal Chamber of the ICTY explicitly rejected knowledge as genocidal intent, and a plan as an additional element of the crime of genocide.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Ibid., para 42

³⁰⁹ Ibid., para. 45

³¹⁰ Ibid., para. 46

³¹¹ Ibid., para. 48

³¹² Ibid.

The most important part of the Judgment was that the Appeal Chamber agreed with the Prosecution that the Trial Chamber did make an error in assessing the evidence to find a conviction for genocide and held:

The Appeals Chamber considers that this evidence and much more of a similar genre in the record could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group in Brčko.”³¹³

Nevertheless, the Appeal Chamber decided that it will not grant a retrial as “it is not in the interests of justice”³¹⁴ Mennecke and Markusen rightly noted that the decision of the Appeal Chamber “must appear to the victims like a slap in the face.”³¹⁵ In a similar manner, Judge Shahabuddeen in his dissenting opinion said:

[...]a Trial Chamber would have to pay regard to the character of the offence and in particular to the fact that it is generally considered to be “the crime of crimes”. It is indeed very grave. [...] the need to describe the true extent of his criminal conduct on that specially important charge would justify a decision to remit.³¹⁶

Moreover, he said, “What is *in the interests of justice* must also *be in the public interest*. [...] it is hard to see how any process of weighing the interest of the individual against the general interest can come out in favour of the individual.”³¹⁷ (Emphasis added) He concluded:

A court of law ought not to be astute to use the public interest to stop a case on grounds which can be adequately accommodated through penalty in the ordinary way. In this case, there is nothing in the considerations advanced which enables me to discern how the interest of the international community in the judicial examination of an allegation of a serious breach of international humanitarian law is served by a finding that, although the proceedings on as grave a charge as one of genocide were erroneously terminated by the Trial Chamber, they should nevertheless not continue. I would remit.³¹⁸

Judge Wald in her dissenting opinion criticized the majority and said:

³¹³ Ibid., para. 68

³¹⁴ Ibid., para. 77

³¹⁵ Martin Mennecke and Eric Markusen, ‘The International Criminal Tribunal for the Former Yugoslavia and the Crime of Genocide’, in Steven J.B. Jensen (ed), *Genocide: Cases, Comparisons and Contemporary Debates* (The Danish Center for Holocaust and Genocide Studies, 2003) p. 293-359, at page 338

³¹⁶ *Jelisić*, Appeal Judgment, supra note 41, (Judge Shahabuddeen, Dissenting Opinion) para. 26

³¹⁷ Ibid., para. 28

³¹⁸ Ibid., para. 29. For a critical analysis see paras. 23-29

“ [...] in such circumstances, I cannot see that the Appeals Chamber has any choice but to remand the case to a Trial Chamber for further proceedings there. I cannot discern any authority in the Tribunal’s Statute or in the Rules of Procedure and Evidence for the Appeals Chamber, on its own, to decide that the genocide count should be rejected, even though there is sufficient evidence to support it.”³¹⁹

In the Introduction of this thesis it was written about the importance of international justice to punish the crime of genocide and especially genocide because of the stigma the crime carries; its effect on victims, history, and the legal and moral obligation it imposes. For sure, in this author’s view, the *Jelisić* judgment is a black spot on the reputation of the International Tribunals and thus on international justice. Many questions of concern arise. A number of 5 000 men were targeted and killed because of belonging to a certain religious group and the perpetrator clearly sought their destruction. These facts are indisputable. Still, not only did the Trial Chamber erroneously interpreted the ‘*intent to destroy*’, but the Appeal Chamber basically rejected a retrial even though reasonable grounds did indicate that Jelisić indeed did possess the requisite intent. Further question is, could a different outcome of this case have given Bosnian victims something more than Srebrenica genocide? Or, what impact will the *Jelisić* case’s judgment have on charges against Karadžić on counts of genocide committed elsewhere except Srebrenica?³²⁰ Finally, it must be concluded that the International Community failed to punish a clear-cut case of genocide.

This thesis, by discussing the Situation in Darfur, proved that the hazy definition of ‘*intent to destroy*’ did not add to the respect of human rights and in fact it allowed the international community to avoid its obligation under the Convention to prevent genocide. The *Jelisić* Trial Judgment, on the other hand, showed that the unclear ‘*intent to destroy*’ failed to meet the other object and purpose of the Genocide Convention: to punish. So, what

³¹⁹ *Jelisić*, Judge Wald, Appeal Judgment, supra note 3, (Judge Wald, Dissenting opinion) para. 1

³²⁰ The Prosecutor v. Radovan Karadžić, Case No.: IT-95-5/18-PT, Prosecution marked up Indictment, 19 October 2009

can be done? What are the proposals on how to resolve the issues of intent and to ensure that object and purpose of the Genocide Convention will be followed?

The upcoming chapter will present existing scholarly proposals on how to solve the problem of intent: the knowledge-based understanding and the purpose-based understanding. A comparative analysis of the international and national jurisprudence will be explored.

IV. INTENT TO DESTROY A GROUP

*“Genocide is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself.”*³²¹

Alexander K.A. Greenwalt

This thesis has discussed on several places of the key element of the crime of genocide, ‘*intent to destroy*’, without which the commission of individual acts will not constitute the crime of genocide. Regardless of its importance, *intent to destroy* has not been clearly defined by the Genocide Convention and the international jurisprudence has found that “intent [...] is difficult, even impossible to determine [...] in the absence of a confession from the accused.”³²² As it has been elaborated from the cases presented in the previous chapter, the various understanding of intent has made it to an obstacle in prosecution and prevention of genocide. Certainly, this thesis does not undermine the importance of political will for the prevention and prosecution, but the failure not to define intent properly gave the space for intent to be maneuvered. So what can be done?

Scholarly literature and the international community have been focused on intent ever since the Convention was drafted. The debate heated after Rwanda, Bosnia, Darfur, and now Congo. The debate spins around the knowledge-based understanding of the intent and the purposive-based understanding.³²³ This chapter will explore both ways of interpreting the

³²¹ Alexander Greenwalt, ‘Rethinking Genocidal Intent’, supra note 44, at page 2269

³²² *Akayesu*, Trial Judgment, supra note 104, para 523

³²³ For knowledge-based approach See: Alexander Greenwalt, ‘Rethinking Genocidal Intent’, supra note 44, at pp. 2259-2294; William A. Schabas, *Genocide in International Law*, 2nd Ed, supra note 44, at pp. 241-256;

intent to destroy and it will show how different jurisdictions interpreted the intent. First part will discuss the knowledge-based approach, and the requirement of a policy or plan. The second section will be devoted to the issue of purpose based understanding of intent.

4.1. Knowledge based approach

The axis of the knowledge based approach is that the words *intent to destroy* implies that a perpetrator is criminally responsible for the crime of genocide if he either *sought* the destruction of a group or he or she *knew* that his acts will have destructive consequences on a protected group.³²⁴ Hence, before considering the knowledge-based approach in relation to the genocidal intent, it is necessary to define the basis of knowledge as *mens rea* in the international and national criminal law.

Knowledge as a category of *mens rea* is a common notion of mental element of a crime in common law countries.³²⁵ For instance, the Model Penal Code of the US states:

A person acts knowingly with respect to a material element of an offence when:

1. If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exists; and
2. If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.³²⁶

Claus Kress, 'The Crime of Genocide Under International Law', supra note 146, pp. 461–502. For a purpose-based approach See: David L. Nersessian, 'The Contours of Genocidal Intent', supra note 127, at pp. 231-276; Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide', supra note 46, pp. 87-111; Otto Triffterer, 'Genocide, its particular intent to destroy', supra note 42, pp 399-408

³²⁴ Alexander Greenwalt, 'Rethinking Genocidal Intent', supra note 44, at pp. 2259-2294

³²⁵ Antonio Cassese, *International Criminal Law*, supra note 90, pp. 61-62

³²⁶ Model Penal Code and Commentaries (Official Draft and Revised Comments), Part III, Vol.2 (Philadelphia, Pa.: The American Law Institute, 1985) pp. 225-6, quoted in Antonio Cassese, *International Criminal Law*, supra note 90, at page 62

According to the interpretation by Antonio Cassese, knowledge in this aspect has two different notions depending on what the law prescribes as the substantive element for a crime to materialize; whether it is a particular fact or circumstance or the result of one's conduct.³²⁷ In the first aspect, if a particular *circumstance* or a *fact* is the substantive element of the crime to exist, the perpetrator acts with knowledge if he is aware of that fact or circumstance.³²⁸ In this aspect "knowledge is part of intent."³²⁹ On the other side, if the law is focused on the *result of one's conduct*, knowledge exists if the perpetrator is aware that the conduct he undertakes may have destructive results, and nevertheless "is taking the high risk of causing that result."³³⁰ In this aspect knowledge coincides with recklessness.³³¹

International law applies both versions.³³² As for instance, provision on command responsibility under Article 28 of the Rome Statute is focused on the circumstance.³³³ In that aspect, a commander is criminally responsible if the commander either knew or should have known that forces under his command have committed a crime - *knowledge of circumstance* and the commander nevertheless fails to prevent or repress that crime.³³⁴ On the other hand, violation of international humanitarian law under the First Additional Protocol 1977 is focused on the result of one's conduct.³³⁵ In that aspect, the law prescribes criminal liability for the those who are "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects"³³⁶ In addition, as it was mentioned earlier, the Rome Statute

³²⁷ Antonio Cassese, *International Criminal Law*, supra note 90, at page 82

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid., at page 62

³³³ Ibid., at page 64. See also: The Rome Statute, supra note 50, Article 28

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ See: First Additional Protocol to Geneva Conventions, of 1977, Article 85(3)(c) available at: <http://www.icrc.org/ihl.nsf/WebART/470-750111?OpenDocument> last access date: 23.02.2010.

provides a general definition of *mens rea* of international crimes in Article 30, stretching mental element to constitute *knowledge* and *intent*:

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 mental elements are committed with intent and knowledge.
2. For the purpose 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.³³⁷

The Statute specifies that “knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”³³⁸ According to Cassese, mental element under Article 30 brings two issues.³³⁹ The first one is that Article 30 does not define recklessness or culpable negligence; although, the international law, as it was showed with command responsibility, recognizes both recklessness and culpable negligence as states of mind.³⁴⁰ The solution to this is to apply ‘*unless otherwise provided*’, which implies that “whenever a provision of the Statute or a rule of international customary law requires a different mental element, this will be considered sufficient by the Court.”³⁴¹ The problem remains in cases when the international rule does not specify what form of *mens rea* is required.³⁴²

The second concern is that Article 30 “always requires both intent and knowledge”,³⁴³ even though there are crimes when only knowledge or only intent is the required state of

³³⁷ The Rome Statute, *supra* note 50, Article 30

³³⁸ *Ibid.*

³³⁹ Antonio Cassese, *International Criminal Law*, *supra* note 90, at pp. 73-74

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*, at page 74

³⁴² *Ibid.*

³⁴³ *Ibid.* See also: David L. Nersessian, ‘The Contours of Genocidal Intent’, *supra* note 127, pp. 231-276

mind.³⁴⁴ According to Cassese, this problem can easily be avoided by logical interpretation instead of grammatical reading.³⁴⁵

International law, in addition, is familiar with a third notion of knowledge as a distinct element of a crime, as for instance in crimes against humanity, i.e., in addition to mental elements of one's acts, the perpetrator must know of a widespread or systematic attack against a civilian population.³⁴⁶ It is necessary now to go back to the focal point; in which aspect has knowledge been perceived as a mental state of mind in relation to genocide?

Professor William Schabas in the introduction to the chapter 'The Mental Element or Mens Rea of Genocide' in his book *Genocide in International Law, The Crime of Crimes* says, "Even where an act appears criminal, if it was purely accidental, or committed in the absence of intent to do harm *or knowledge* of the circumstances, then the accused is innocent [of charges of genocide]"³⁴⁷ (Emphasis added) Schabas talks about intent or knowledge of circumstances as two notions of *mens rea* of the crime of genocide.³⁴⁸ The Genocide Convention refer only to intent and in the definition itself there is nothing that implies that *knowledge of circumstances* is an element of the crime.³⁴⁹ But, according to Schabas, Article 30 of the Rome Statute is a ground for knowledge of circumstances to be an additional element of genocide.³⁵⁰

Alexandar Greenwalt, also, makes a move to include knowledge as *mens rea* of genocide.³⁵¹ He argues: "culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the

³⁴⁴ Antonio Cassese, *International Criminal Law*, supra note 90, at pp. 73-75

³⁴⁵ Ibid.

³⁴⁶ Ibid., at page 62

³⁴⁷ William A. Schabas, *Genocide in International Law*, 2nd ed., supra note 44, at page 241

³⁴⁸ Ibid.

³⁴⁹ The Genocide Convention, supra note 2, Article II

³⁵⁰ William A. Schabas, *Genocide in International Law*, 2nd ed., supra note 44, at page 242. See also: The Rome Statute, supra note 50, Article 30

³⁵¹ See: Alexander Greenwalt, 'Rethinking Genocidal Intent', supra note 44, at pp. 2259-2294

destructive consequences of their actions for the survival of the relevant victim group.”³⁵² In this fashion, knowledge based approach does not eliminate genocidal aim which is often claimed to be the intent of genocide, but adds to it the knowledge of destructive consequences. Moreover, Greenwalt refers to the existence of a campaign against a protected group, and in that aspect he says:

In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.³⁵³

Schabas goes even further and see genocide only as the “archetypical crime of State”,³⁵⁴ a crime of organization and plan, refusing a lone *génocidaire* theory.³⁵⁵ In his words, “We can transfer the finding to the individual not by asking if he or she had the specific intent to perpetrate the crime, like some ordinary murderer, but rather whether he or she had knowledge of the policy and intended to contribute to its fulfillment.”³⁵⁶ In his submission to the counsel in the *Popović et al.* case he points out:

[w]here there is a State policy to commit genocide, and where the accused has knowledge of the policy and commits punishable acts in furtherance of the policy, then the crime of genocide is committed. Where there is no State policy, it is irrelevant whether an individual harbours some ‘specific intent’ to physically destroy a protected group.³⁵⁷

As a result, according to Schabas, two main elements constitute the crime of genocide: a state policy or plan and knowledge of that plan; the mere intent is not sufficient. The existence of a plan, policy or a campaign is framed both by Schabas and Greenwalt in relation to ‘*intent to*

³⁵² Ibid., at page 2265

³⁵³ Ibid., at page 2288

³⁵⁴ William A. Schabas, *Genocide in International Law*, 2nd Ed, supra note 44, at page 244

³⁵⁵ Ibid.

³⁵⁶ Ibid., Preface to the second edition (xiv)

³⁵⁷ William A. Schabas, ‘State Policy as an Element of the Crime of Genocide’, *A Report on the role of State policy in the interpretation of the crime of genocide, with special reference to the case law of the ICTY*, Submitted to counsel for *Vujadin Popović et al.* See Prosecutor v. Vujadin Popović et al. Case No.: IT-05-88-T, Public Redacted Version of the Final Brief on behalf of Drago Nikolić, 30 July 2010, para. 93 fn 30

destroy'. Could this be an unnecessary burden for the prosecutors to bring *genocidaires* to trial or, as Schabas argues, it is in correlation to "the new orientation of human rights law, and of the human rights movement, which is aimed at the eradication of impunity and the assurance of human security?"³⁵⁸ The next section will discuss in details the theory of a plan, policy or campaign.

4.1.1. State plan or policy

*"Despite the severe suffering resulting from genocide, there has been a reluctance to charge governments with the commission of this crime."*³⁵⁹

Matthew Lippman

In the subsection *The Situation in Darfur* it has been mentioned that the UN Commission made a distinction between the individual and the state responsibility for the crime of genocide. This thesis will not deal in details with the state responsibility, but for the purpose of a better understanding of the theory of a state plan or policy and the knowledge based approach, several remarks will be given.

The first one is that, according to most scholars, genocide is a collective crime which requires some action or support of a state, a government or a state-like body and an individual per se cannot commit genocide.³⁶⁰ The second one is that, until now, not one government of a

³⁵⁸ William A. Schabas, *Genocide in International Law*, 1st edition, supra note 12, at page 10

³⁵⁹ Mathew Lippman, 'Fifty Years Later', supra note 13, at page 511

³⁶⁰ See: Hans Vest, 'A Structure-based Concept of Genocidal Intent', in *Journal of International Criminal Justice*, Vol. 5, September 2007, pp. 781-797; Claus Kress, 'The Darfur Report and Genocidal Intent' in *Journal of International Criminal Justice*, Vol.3, July 2005, p. 562-578, at p. 566; William A. Schabas, *Genocide in International Law*, supra note 44, pp. 241-256; William A. Schabas, 'State Policy as an Element of International Crimes', in *The Journal of Criminal Law and Criminology*, Vol. 98, No. 3, pp. 953-982; William A. Schabas, 'The Jelisić Case and the Mens Rea of the Crime of Genocide', supra note 295, see pp. 133-139; René Lemarchand, 'Comparing the Killing Fields: Rwanda, Cambodia and Bosnia' in Steven J.B. Jensen (ed.) *Genocide: Cases, Comparisons and Contemporary Debates*, (The Danish Center for Holocaust and Genocide Studies, 2003) pp.141-174, at p. 143

state has been held responsible for committing or aiding and abetting the crime of genocide.³⁶¹ The reason for this, according to professor William A. Schabas, who referred to the report of the Commission of Inquiry on Darfur as well as to the judgment of the ICJ in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, lays in the fact that: “both [institutions] looked at genocide through a lens that included State responsibility within its scope”³⁶² and “they were looking for the specific intent of a State. [...] States, however, do not have specific intent. Individuals have specific intent. States have a policy.”³⁶³ And finally, the third remark is that “all prosecutions [for genocide] have involved the offenders [individuals] acting on behalf of a State and in accordance with a State policy, or those acting on behalf of an organization that was State-like.”³⁶⁴ Indeed, to take the most obvious examples; the ICC Warrant of Arrest for Al Bashir, the President of Sudan; indictments against Milošević, and now Karadžić are all prosecutions against the individuals acting on the behalf of a State or on the behalf of a State-like entity.³⁶⁵

Taking into account these three remarks, Schabas urges international community to adopt state policy or plan as a legal ingredient and the knowledge as the *mens rea* of genocide.³⁶⁶ As a result, the state responsibility for genocide would lay in the existence of a plan or a policy and the individual’s liability in the knowledge of that plan.³⁶⁷

It is important to note here that a policy or a plan, for the purpose of this thesis, will not be discussed in details as possible legal elements of the crime of genocide in order to

³⁶¹ As it has been already discussed in the subchapter 3.1. (The Situation in Darfur) the UN Commission of Inquiry on Darfur did not find that the Government of Sudan has committed genocide. See also: ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, supra note 33

³⁶² William A. Schabas, ‘State Policy as an Element of International Crimes’, supra note 360, at page 968

³⁶³ Ibid., at page 970

³⁶⁴ Ibid., at page 954

³⁶⁵ See: *Al Bashir*, Warrant of Arrest, supra note 281 and Karadžić, Prosecution marked up Indictment, supra note 320

³⁶⁶ See: William A. Schabas, *Genocide in International Law*, 2nd Ed, supra note 44, at pp. 241-256; ‘State Policy as an Element of International Crimes’, supra note 360, at pp 953-982; ‘The Jelisić Case and the Mens Rea of the Crime of Genocide’, supra note 297, at pp. 133-139

³⁶⁷ William A. Schabas, *Genocide in International Law*, 2nd ed., supra note 44, at Preface to the second edition (xiv)

adjudge the state responsibility, but will be discussed in the light of the individual responsibility for the crime of genocide and the knowledge-based approach. So, what are the scholarly views on the existence of a plan or policy as the components of genocide?

William Schabas starts his proposal by challenging the theory of a lone *génocidaire* and argues that genocide cannot occur without a plan.³⁶⁸ He does note that according to the Genocide Convention, a plan or policy is not an element of the crime, and a proposal during the drafting of the Convention to include premeditation as an element was actually explicitly rejected.³⁶⁹ But, according to him, the preparatory work of the Convention does not imply that there was intent to exclude the possibility that a plan or policy could be a legal ingredient of the crime.³⁷⁰ Schabas says that the words, "...in context of a manifest pattern of similar conduct..."³⁷¹ of the Elements of Crimes of the Rome Statute implies a policy element, and "clearly reject the 'lone *génocidaire* approach."³⁷²

Furthermore, he argues that Raphaël Lemkin's words that "[genocide] is intended rather to signify a coordinated plan of different actions",³⁷³ and the International Tribunals judgments' emphasizes on the existence of a plan or a policy are clear indicators of a plan or policy to be a legal ingredient of the crime.³⁷⁴ As a result he proposes:

[...] The first issue to be resolved in a determination as to whether the genocide is being committed, is whether the State policy exists. If the answer is affirmative, then the inquiry shifts to the individual, with the central question being not the individual's intent, but rather the individual's knowledge of the policy. Individual intent arises, in any event, because the specific acts of the genocide, such as killing, have their own mental element, but as far as the plan or the policy is concerned, knowledge is the key to

³⁶⁸ Ibid., at page 244

³⁶⁹ William Schabas, 'State Policy as an Element of International Crimes', supra note 360, at page 966

³⁷⁰ William Schabas, *Genocide in International Law*, supra note 44, at pp. 244-245

³⁷¹ Ibid., at page 251

³⁷² William A. Schabas, 'State Policy as an Element of the Crime of Genocide', supra note 360, page 15 of the Submission

³⁷³ Raphaël Lemkin, *Axis rule in Occupied Europe*, supra note 4, at page 79. See William Schabas, *Genocide in International Law*, 2nd ed., supra note 44, at page 246

³⁷⁴ William Schabas, 'State Policy as an Element of International Crimes', supra note 360, at page 966

criminality.³⁷⁵

In this author's view, it is hard to agree with professor Schabas that the first determinant of the genocide would be the existence of a State policy or a plan. The reason is that I doubt a 'Final Solution' or clear-cut cases, such as Rwanda, where a plan or policy will be easy proved, will repeat. In addition, the findings of the Inquiry on Darfur were that the genocidal policy did not exist in Darfur.³⁷⁶ Thus, if we would apply Schabas' theory, we would not have shifted the inquiry to individuals, as for example in the case of Al Bashir.³⁷⁷ In that manner Claus Kress wrote: "Starting from the premise that the Sudanese Government and the militias under their control did not act pursuant to a collective goal (physically) to destroy at least part of the tribal group in question, no individual genocidal intent can have been formed."³⁷⁸

Professor Antonio Cassese, another scholar who analysed whether a genocide policy or plan is required or not, takes another point of focus: *actus reus* of genocide.³⁷⁹ In view of that, individuals may commit certain acts of genocide without a plan, such as acts of killing and causing serious bodily or mental harm, but nevertheless these acts will hardly constitute genocide as isolated conducts.³⁸⁰ The remaining *actus reus* (deliberately inflicting conditions of life calculated to bring about a group's physical destruction, imposing measures intended to prevent births, and forcible transfer of the children) according to Cassese, require a collective action or a common plan, and cannot be carried out by individuals.³⁸¹ Cassese does not discuss what would be the nature of the relation between the individual liability and a common plan. However, the Commission of Inquiry on Darfur was led by professor Cassese, and it seems that the Commission added to the purpose-based understanding of '*intent to*

³⁷⁵ Ibid., at page 971

³⁷⁶ Inquiry on Darfur, supra note 172, at para. 518

³⁷⁷ Claus Kress, 'The Darfur Report and Genocidal Intent' supra note 261, at page 577

³⁷⁸ Ibid.

³⁷⁹ See Antonio Cassese, *International Criminal Law*, supra note 90, at pp. 140-141

³⁸⁰ Ibid.

³⁸¹ Ibid.

destroy’ the knowledge based approach in defining the individual liability.³⁸² In that aspect, the Commission held: “[...]the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such.”³⁸³ Thus, intent in this aspect is a desire accompanied with the knowledge of the perpetrator. Now, when the scholarly review regarding the knowledge based approach has been discussed, this thesis will move on to discuss in which aspect did the national and international jurisprudence apply or did not apply the knowledge based approach.

4.1.2. The Jurisprudence

The jurisprudence of the International Tribunals and national courts explicitly refused to include a policy or plan as a legal ingredient of the crime. The Appeal Chamber of the ICTY held in *Jelisić* that “the existence of a plan or a policy is not a legal ingredient of the crime.”³⁸⁴ The same conclusion was reaffirmed in *Krstić* adding that, “[genocidal plan or policy] remains only evidence supporting the inference of the intent, and does not become a legal ingredient of the offence.”³⁸⁵

The Pre-trial chamber of the ICC in the Decision to issue a Warrant of Arrest for the Sudanese President Al Bashir referred to the existence of “counter-insurgency campaign,”³⁸⁶ “genocidal plan”,³⁸⁷ and “the common plan”,³⁸⁸ but did not apply it as a legal ingredient of the crime, more as fact which supports the criminal liability of Al Bashir for genocide.³⁸⁹

³⁸² Inquiry on Darfur, supra note 172, at para. 492

³⁸³ Ibid., para 492

³⁸⁴ *Jelisić*, Appeal Judgment, supra note 3, at para. 48

³⁸⁵ *Krstić*, Appeal Judgment, supra note 139, at para. 225

³⁸⁶ *Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, supra note 281, at page 6

³⁸⁷ Ibid., page 7

The Higher Regional Court of Dusseldorf in its judgment against Nikola Jorgić for the crime of genocide committed in Bosnia and Herzegovina referred to the policy of ethnic cleansing, holding that the accused, in cooperation with the Serbian rulers, actively participated in the policy of ethnic cleansing, but nevertheless did not mention it as a legal ingredient of the crime.³⁹⁰ In fact, its holding that individuals can commit acts of genocide was confirmed by the The Federal Supreme Court.³⁹¹

The Court of Bosnia and Herzegovina devoted most of the space in the *Stevanović* judgment to the issue of the existence of a genocidal plan.³⁹² In that view, the Panel firstly considered the existence of a “genocidal plan”.³⁹³ When the Panel concluded that a genocidal plan existed, and that “genocide was committed in Srebrenica in accordance with this plan”,³⁹⁴ it proceeded to examine the individual criminal responsibility.³⁹⁵ For a Penal to first look into the existence of a plan before examining the individual criminal liability is exactly what Schabas’ proposal was.

In an another case the Court of Bosnia and Herzegovina referred both to the plan and the knowledge requirement, and held that “there is no requirement under the [international] law that genocide involves a plan [and] where such a plan exists, the extent to which the accused know of the plan is relevant to the question of genocidal intent, that is, as to whether they acted with the aim to destroy a protected group.”³⁹⁶ In this aspect, even though Panel excluded a plan to be a legal requirement of the crime, it held that it might exist, and in that

³⁸⁸ Ibid., page 8

³⁸⁹ Ibid.

³⁹⁰ Nikola Jorgić, Oberlandesgericht Dusseldorf [Higher Regional Court of Dusseldorf], 26 September, 1997, IV-26/96, para. A.I.5.(Die ethnische Säuberung), para. A.I.7.(Die Beteiligung des Angeklagten und der Politik der “ethnische Säuberung” und seine Stellung in Doboj), para. D.III.1.

³⁹¹ Ruth Rissing-van Saan, ‘The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia’, supra note 142, at page 391

³⁹² *Stevanović*, First Instance Verdict (Bosnia and Herzegovina), supra note 105, pp. 45-86

³⁹³ Ibid. page 45

³⁹⁴ Ibid. page 84

³⁹⁵ Ibid.

³⁹⁶ *Mitrović*, First Instance Verdict, supra note 149, at page 96

case, the knowledge of the accused of the plan would be a fact by which intent could be inferred. The Panel concluded that:

[...]there was a genocidal plan in place, and [...] the Accused knew the fundamentals of that plan before 13 July, and that during the time leading up to the killings at the Kravica warehouse, he witnessed activities that confirmed that knowledge. His acts at the warehouse, when viewed together with that context, provide proof of the requisite genocidal intent.”³⁹⁷

In this case, we can recognize the implementation of the knowledge based approach alongside the policy and the plan requirement through a backdoor of the intent.

However, in June 2010, the Trial Chamber of the ICTY in the *Popović et al.* case had to give a clear response to Schabas’ theory when one of the defendants, Drago Nikolić, submitted that a state policy or a plan is a legal ingredient of the crime.³⁹⁸ Drago Nikolić, in support of his submission, referred explicitly to Professor Schabas’ theory of a state policy and knowledge-based approach.³⁹⁹ As it was mentioned earlier, Schabas’ theory firstly contest the lone *génocidaire* concept of genocide; then it argues that according to both the preparatory work of the Genocide Convention and the Elements of Crimes of the Rome Statute a state policy is a legal ingredient of genocide; and finally, that the intent element requires knowledge as the state of mind on the side of an individual.⁴⁰⁰ The Trial Chamber examined all these questions and refused all of them.⁴⁰¹ The Trial Chamber stated:

This jurisprudence [the ICTY and the ICTR] has made clear that a plan or a policy is not a statutory element of the crime of genocide [...] and recalls the Appeals Chamber’s ruling in Krstić that ‘the offence of genocide, as defined in the Statute and in the international customary law, does not require the proof that the perpetrator of genocide participated in a widespread and systematic attack against the civilian population’ [and] dismisses as speculation, Professor Schabas’ view that the issue of

³⁹⁷ Ibid., at page 103(Citations omitted)

³⁹⁸ Prosecutor v. Vujadin *Popović et al.*, Case No.: IT-05-88-T, Public Redacted Version of the Final Brief on behalf of Drago Nikolić, 30 July 2010, paras 77- 99

³⁹⁹ Ibid., paras. 79-99

⁴⁰⁰ Ibid.

⁴⁰¹ Prosecutor v. *Popović et al.*, Case No.: IT-05-88-T, Trial Judgment, 10 June 2010, paras 826-827

the State policy was not addressed by the drafters of the Convention because it was self-evident.⁴⁰²

Furthermore, the Trial Chamber recalled the ruling in *Krstić* that the Elements of Crimes “are not binding rules, but only auxiliary means of interpretation”.⁴⁰³ Then the Trial Chamber went on to conclude that:

[...] a plan or a policy is not a legal ingredient of the crime of genocide [...] However, the Trial Chamber considers the existence of a plan or a policy can be an important factor in inferring the genocidal intent. When the acts and the conduct of an accused are carried out in accordance with an existing plan or a policy to commit genocide, they become evidence relevant to the accused’s knowledge of the plan; such knowledge constitutes further evidence supporting an inference of the intent.⁴⁰⁴

The courts explicitly refused to apply a genocidal plan or policy as a legal requirement of genocide, but the importance which is granted to the existence of a plan or a policy, for a conviction to take place, cannot be undermined. Even the Trial Chamber of the ICTY in *Popović et al.* case firstly examined whether ‘members’ of Bosnian Serb Forces had intent to destroy, and thus whether genocide was committed in Eastern Bosnia.⁴⁰⁵ After answering this question in positive it proceeded to examine whether individuals possessed the genocidal intent.⁴⁰⁶ Also, the Trial Chamber referred to the “detailed knowledge of the killing operation”⁴⁰⁷ of the accused Beara to infer his ‘intent to destroy’, and, consequently, to convict him on the charge of conspiracy to commit genocide.⁴⁰⁸ For a conviction for the crime of conspiracy to commit genocide,⁴⁰⁹ the perpetrators “must possess the same specific intent required for the commission of genocide, namely, the intent to destroy, in whole or in

⁴⁰² Ibid, para. 828

⁴⁰³ *Krstić*, Appeal Judgment, supra note 139, at paras. 224 fn 366

⁴⁰⁴ *Popović et al.*, Trial Judgment, supra note 401, at para. 830

⁴⁰⁵ Ibid., paras. 856- 863

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid., para. 1313

⁴⁰⁸ Ibid., paras. 1313,1314,1317

⁴⁰⁹ The ICTR defined the crime of conspiracy to commit genocide as “an agreement between two or more persons to commit genocide” See: Prosecutor v. Musema, Case No.: ICTR-96-13-A, Judgment and Sentence, 27 January 2000, para. 191

part, a national, ethnic, racial or religious group, as such.”⁴¹⁰ The Trial Chamber examined Beara’s intent, and said, “Steeped in knowledge, Beara became a driving force behind the murder enterprise. His vigorous efforts to organise locations and sites, recruit personnel, secure equipment and oversee executions all evidence his grim determination to kill as many as possible as quickly as possible.”⁴¹¹ The Trial Chamber concluded: “From his knowledge, his actions and his words, the Trial Chamber is satisfied beyond reasonable doubt of Beara’s genocidal intent.”⁴¹²

Certainly, the jurisprudence has explicitly refused to include a plan or policy as the legal ingredient of the crime. However, in each and single case discussed in this thesis, a policy or a plan was the driving force in finding the ‘*intent to destroy*’.

⁴¹⁰ *Popović et al.*, Trial Judgment, supra note 401, at para. 868

⁴¹¹ *Ibid.*, para. 1314

⁴¹² *Ibid.*, para. 1317

4.2. Purpose based approach

The purpose based approach focuses on the aim, purpose, desire or goal of the perpetrator to destroy a group.⁴¹³ No previous plan or a policy is required and the perpetrator's mere knowledge that his acts will contribute to the destruction of a protected group is not sufficient.⁴¹⁴ The knowledge may be sufficient only in the cases of liability for aiding and abetting in the crime,⁴¹⁵ and, in the absence of a desire *to destroy*, an individual cannot be convicted as the principal perpetrator.⁴¹⁶

The purpose based scholars contest the knowledge-based approach on the account that mental element as described in Article 30 of the Rome Statute fits to the corresponding *mens rea* of the underlying acts, and that *intent to destroy* is a second key subjective element, falling outside the scope of Article 30.⁴¹⁷

The jurisprudence of the International Tribunals adopted the purpose based approach in defining the intent, so the Trial Chamber of the ICTR in *Akayesu* held: "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."⁴¹⁸ Moreover, the Tribunal talks about "the clear intent to destroy"⁴¹⁹ which, according to Nersessian, "[cannot] be equated

⁴¹³ See Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide', supra note 46, pp. 87-111; Otto Triffrerer, 'Genocide, its particular intent to destroy in whole or in part the group as such', supra note 42, at page 402

⁴¹⁴ Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide', supra note 46, at page 106

⁴¹⁵ Ibid.

⁴¹⁶ Claus Kress, 'The Crime of Genocide Under International Law', supra note 146, at page 493

⁴¹⁷ Otto Triffrerer, 'Genocide, its particular intent to destroy in whole or in part the group as such', supra note 42, at page 400

⁴¹⁸ *Akayesu*, Trial Chamber Judgment, supra note 104, para. 498

⁴¹⁹ Ibid., at para. 521

with mere knowledge that certain acts will destroy the group.”⁴²⁰ On the contrary, as Claus Kress notes, this wording of the ICTR is not consistent with another holding in the same judgment which says: “The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.”⁴²¹ This wording of the ICTR corresponds with the knowledge-based approach.

The Trial Chamber of the ICTY in *Jelisić* focused on the goal and held that the perpetrator must “share the goal of destroying in part or in whole [and cannot be guilty of genocide] if he knew that he was contributing to or thought his acts might be contributing to the partial or total destruction of a group.”⁴²² In this aspect, the ICTY by referring to a *shared goal* implies a collective aspect of the intent to which a perpetrator contributes to. That the *intent to destroy* implies a goal was reaffirmed by the Trial Chamber in *Krstić* case, “For the purpose of this case, the Chamber will therefore adhere to the characterization of the genocide which encompass only the acts committed with the *goal* of destroying all or a part of a group.”⁴²³

The Criminal Code of Bosnia and Herzegovina, which defines genocide as “whoever, with an *aim* to destroy, [...] orders perpetration or perpetrates any of the following acts...”,⁴²⁴ led the First Instance Panel of the Court of Bosnia and Herzegovina in *Mitrović* case to focus on the aim: “Genocidal intent can only be the result of a deliberate and conscious aim. The destruction, in whole or in part, must be the *aim* of the underlying crime(s)”⁴²⁵ and “the

⁴²⁰ David L. Nersesian, ‘The Contours of Genocidal Intent’ supra note 127, at page 264

⁴²¹ *Akayesu*, Trial Judgment, supra note 104, at para. 520. See also Claus Kress, ‘The Crime of Genocide under International Law’, supra note 146, at page 493

⁴²² *Jelisić*, Trial Chamber Judgment, supra note 41, para. 86

⁴²³ *Krstić*, Trial Chamber Judgment, supra note 6, para 571

⁴²⁴ See: Criminal Code of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina 3/03, Article 171, available at: <http://www.iccnw.org/documents/criminal-code-of-bih.pdf>, last access date: 28.11.2010.

⁴²⁵ *Mitrović*, First Instance Verdict, The Court of Bosnia and Herzegovina, supra note 149, at page 47

necessary intention is the aim to destroy a protected group in whole or in part.”⁴²⁶ Thus, the jurisprudence of Bosnia and Herzegovina focuses on an inner aim of the perpetrator.

Taking into account what has been said, the *intent to destroy*, according to the purpose-based approach, is an individual’s inner desire, an aim, a wish or a goal to achieve the destruction of a group. Also, a shared goal might be important.

Many scholars criticized this kind of interpretation from different aspects. In that manner, Cherif Bassiouni focused on the evolution of the general principles of the law since the drafting of the Genocide Convention, and argues that the intent must go beyond the aim which can only be established on the level of the decision-makers.⁴²⁷ He suggests that ‘*intent to destroy*’ of the executors of the crime, as defined by the Genocide Convention, should include “the intent, the knowledge, or reasonable belief.”⁴²⁸

The individual criminal liability was also the starting point of Greenwalt’s critique of the purpose based approach.⁴²⁹ According to him, the executors could easily claim that they were only “carrying out the genocidal directives of their superiors.”⁴³⁰ Furthermore, Greenwalt argues that the purpose based approach has little standing due to the lack of an *ideology* to destroy a group which is, according to him, an important component of the intent as a goal, an aim, or a desire.⁴³¹ Namely, even when a group has been discriminatory exterminated, if the goal was in the name of the ‘communist ideology’, as it was with Cambodia mass killings, or the goal was ‘economic development’ as in the case of Aché

⁴²⁶ Ibid, at page 49

⁴²⁷ Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, supra note 14, at page 529

⁴²⁸ Ibid.

⁴²⁹ Alexander Greenwalt, ‘Rethinking Genocidal Intent’, supra note 44, at page 2264

⁴³⁰ Ibid., at page 2279

⁴³¹ Ibid., at page 2285

Indians, the required genocidal intent is lacking.⁴³² Nevertheless, the group is destroyed.

Under which motives should not be relevant and in cases such as Cambodia and Aché, “genocidal liability should not depend on the contingencies of ideological or political motives.”⁴³³ This issue is in accordance with what has been said on the ethnic cleansing in the section 3.1. *Prohibited actus reus*, where it was suggested that ‘creating a greater Serbia’ is an ideology, but however, is not of importance to establish the genocidal liability.

Finally, the critics contest the purpose based approach as it would not recognize the liability for those who do not have a desire, an aim or a goal to commit genocide, but still they do either aid or abet in the crime.⁴³⁴ In that contest, Claus Kress notes: “there may be no criminal responsibility for the genocide at all where the prohibited act is committed in knowledge of the overall genocidal campaign but without sharing the overall goal of group destruction.”⁴³⁵ Both the ICTR and the ICTY reached up on this critic.⁴³⁶

The ICTR held firstly that for a conviction on the complicity in genocide, “it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed.”⁴³⁷ But, it does not mean that a person who aided and abetted in the crime of genocide cannot be tried “even where the perpetrator of the principal offence himself has not being tried.”⁴³⁸ The next issue on which the ICTR decided was the *mens rea* required for the complicity, and held:

As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific

⁴³² Ibid.

⁴³³ Ibid., at page 2287

⁴³⁴ Claus Kress, 'The Crime of Genocide Under International Law', supra note 146, at page 493

⁴³⁵ Ibid.

⁴³⁶ *Akayesu*, Trial Judgment, supra note 104, paras. 530-540; *Krstić*, Appeal Judgment, supra note 139, paras. 134-144

⁴³⁷ *Akayesu*, Trial Judgment, supra note 104, para. 530

⁴³⁸ Ibid., para. 531

intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.⁴³⁹

The Trial Chamber of the ICTY convicted Krstić as a principal perpetrator of the crime of genocide on the basis of his awareness that acts of killings the military-aged Bosnian Muslim men of Srebrenica would lead to the destruction of the Bosnian Muslim community in Srebrenica.⁴⁴⁰ On the basis of his knowledge and the acts he performed, the Trial Chamber concluded that Krstić “shared the genocidal intent”,⁴⁴¹ and, consequently, found him guilty for committing genocide.⁴⁴² At the Appeal, conviction on the criminal liability of Krstić as a principal perpetrator was set aside, because, according to the Appeal Chamber, his mere knowledge was not enough to infer *intent to destroy*.⁴⁴³ Then the Appeal Chamber proceeded to examine whether his knowledge is sufficient for conviction for aiding and abetting in the crime of genocide.⁴⁴⁴ The Chamber formed the question, “...whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator’s specific genocidal intent, or whether he must share that intent.”⁴⁴⁵ The Appeal Chamber was of the opinion that knowledge of intent is sufficient, in the words of the Chamber, “... an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime.”⁴⁴⁶ The same approach was made in *Popović et al.* case, where Nikolić was convicted for aiding and abetting genocide on the basis of that he “knew of that intent on the part of other.”⁴⁴⁷

⁴³⁹ Ibid., para. 540

⁴⁴⁰ *Krstić*, Trial Judgment, supra note 6, para.622, 623, 625-633

⁴⁴¹ Ibid., para. 633

⁴⁴² Ibid., paras. 644-645

⁴⁴³ *Krstić*, Appeal Judgment, supra note 139, para. 134

⁴⁴⁴ Ibid. para. 140

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid., paras. 140-144

⁴⁴⁷ *Popović et al.*, Trial Judgment, supra note 401, para. 1415. See also: ‘ICJ, Bosnia and Herzegovina v. Serbia and Montenegro’, supra note 33, para. 421

Thus, for aiding and abetting in the crime of genocide, an accomplice does not have to possess the specific intent, but knowledge of the intent of the principal perpetrator.

The Convention stipulates that acts of committing “genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide [and] complicity in genocide”⁴⁴⁸ shall be punishable. This thesis can reach the answer that, according to the purpose-based approach, for the commission of the crime of genocide and for the conspiracy to commit genocide an aim, goal or desire is the required ‘*intent to destroy*’. For acts of aiding and abetting in the crime of genocide, knowledge of the intent of the principal perpetrator is sufficient. A policy or a plan is not required. Critics argue that “it is not really very realistic to expect an individual to know the intent of another, especially when it is specific intent that is being considered.”⁴⁴⁹ In this author’s view, this critic has proved not to have a strong standing as the ICTY in both *Krstić* and *Popović et al.* case did not have difficulties to establish that Krstić and Beara were aware of the intent to destroy of others.⁴⁵⁰

⁴⁴⁸ The Genocide Convention, supra note 1, Article III

⁴⁴⁹ William Schabas, ‘State Policy as an Element of International Crimes’, supra note 360, at page 971

⁴⁵⁰ *Krstić*, Appeal Judgment, supra note 139, para. 134; *Popović et al.*, Trial Judgment, supra note 400, para. 1415.

CONCLUSION

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

*Article I of the Genocide Convention*⁴⁵¹

Genocide remains unpunished and continues to occur; the Contracting Parties to the Genocide Convention and the International Community fail both to prevent and to punish genocide.⁴⁵² The reason behind is the unclear definition of intent to destroy.⁴⁵³

Currently, there are two interpretations of genocidal intent: the purposive-based and the knowledge-based interpretation.⁴⁵⁴ The first understands ‘*the intent to destroy*’ as an aim, a desire or a goal,⁴⁵⁵ while the second understands genocidal intent as knowledge of circumstances, and a plan or policy is a legal ingredient of the crime.⁴⁵⁶ Scholars contest these two approaches against each other.

Discussion of existing approaches reveals that they do not necessarily have to contest each other, but that both of them in combination meet the object and purpose of the Genocide Convention. Also, neither do the knowledge-based approach nor does the purpose-based approach conflict with the principle *nullum crimen sine lege*, because these two interpretations are not a new definition, but simply a clarification of the *intent to destroy*,

⁴⁵¹ The Genocide Convention, supra note 1, Article I

⁴⁵² See supra note 12 and accompanying text. See also supra note 237-250 and accompanying text.

⁴⁵³ Ibid., See also: supra note 28 and accompanying text.

⁴⁵⁴ See supra note 323 and accompanying text.

⁴⁵⁵ See supra note 413 and accompanying text.

⁴⁵⁶ See supra note 347-362 and accompanying text.

which has not been clearly defined in the Convention. Which of the approaches should be applied depends on what degree of individual liability is at stake.

For a conviction on the count of committing the crime of genocide and for the conspiracy in genocide, intent to destroy should be understood as an aim, desire or a goal because the principle perpetrator must possess something more than ‘knowledge of circumstances’.⁴⁵⁷ To recall, genocide is “the ultimate crime, the pinnacle of evil”,⁴⁵⁸ because of a perpetrator’s strong intent to destroy a group, and exactly because of the high status the crime carries, more than mere knowledge is required. The existence of a genocidal plan or policy should continue to be only an inference of genocidal intent, no matter the importance it has on a genocidal conviction.⁴⁵⁹ Simply, if a plan or policy was a legal ingredient of the crime, it would always require proof, and, consequently, make genocide prosecutions more difficult.

For the complicity in genocide, the knowledge of circumstances that there exists *intent to destroy a group* is sufficient for an accomplice to be charged for genocide.⁴⁶⁰ Simply, if a perpetrator knows that there is an aim or a goal (collective or individual, it does not matter) to destroy a group, and he willfully commits *actus reus* of genocide, for instance killing members of a group, he aids and abets to genocide, and, thus, is criminally liable.⁴⁶¹

For the prevention of the crime, a less strict genocidal intent, then what is required on a trial, should be applied.⁴⁶² This is in the line with the International Court of Justice

⁴⁵⁷ See supra note 413-417 and accompanying text.

⁴⁵⁸ Steven R. Ratner et al., ‘The Genocide Convention after Fifty Years’, supra note 2, at page 7

⁴⁵⁹ See supra note 390-404 and accompanying text.

⁴⁶⁰ See supra note 437-447 and accompanying text.

⁴⁶¹ Ibid.

⁴⁶² See supra note 142 and accompanying text.

interpretation of the object and purpose; “humanitarian and civilizing”,⁴⁶³ which has for the aim “to safeguard the very existence of certain human groups.”⁴⁶⁴ This reveals that it is justified to interpret *intent to destroy* in a way which would ensure that genocide is effectively prevented. The proposal is to focus more on the atrocities happening, than on the *intent to destroy*. If there is a clear indication that gross human rights violation against a group are occurring, there is *intent to destroy*, and the Contracting Parties and the International Community should act to prevent the perpetrator, or perpetrators, to realize their guilty mind. Also, the political will should pay less attention to self-interest, and more to “the alleviation of individual suffering”.⁴⁶⁵

This thesis did not, because of its constraints, explored in details the responsibility of a state or a state-like entity for the crime of genocide. Whether the *intent to destroy* should be changeable with a policy or a plan is a question that requires further research.⁴⁶⁶ Also, a further research is needed on what would be needed for a policy or plan to be inferred on a trial.

⁴⁶³ ICJ Advisory Opinion, Reservations to the Convention, , 1951, supra note 5, at p. 23

⁴⁶⁴ Ibid.

⁴⁶⁵ Mathew Lippman, 'Fifty Years Later', supra note 12, at page 511

⁴⁶⁶ See supra note 354-357 and supra note 363-365 and accompanying text

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