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## MENTAL AND MATERIAL ELEMENTS OF GENOCIDE

Sandra Fabijanić Gagro\*

**Abstract:** *The crime of genocide is one of the most severe crimes. Its commission always takes time, requires planning, and results in substantial human sacrifices. It is never a single or accidental act but always conscious and deliberate. The commitment of genocide requires performing one of the acts (actus reus) enumerated in the 1948 Genocide Convention and perpetrated specifically against the members of a protected group, which represents the material element of the crime. However, the element that makes genocide one of the worst crimes ever known to humankind is the perpetrator's special intention of destroying a protected group – the mental element of the crime, i.e., dolus specialis, whose complexity and severity has been confirmed before the international criminal ad hoc tribunals and the ICJ.*

**Keywords:** *genocide, actus reus, dolus specialis, individual responsibility, ICTY, ICTR*

### I. INTRODUCTION

Genocide is one of the most serious and the most complex crimes of nowadays. It is never considered as the result of misfortune, tragic accident, or oversight. On the contrary, it is always a deliberate, conscious, and intentional act that takes time and requires preparation and planning. It is never an isolated or single act, but a collection of acts committed by a number of people acting in consort in performing the ultimate goal – the destruction of a group.<sup>1</sup> Genocide is mainly a product of premeditated politics. It is hard to imagine (except in some exceptional circumstances) that a sole individual is capable of committing the crime of genocide; his acts are always a part of “systematic criminality.”<sup>2</sup>

Genocide is also the crime based on the “depersonalization of the victim,”<sup>3</sup> when a human being is not perceived as an “enemy” on account of individual characteristics or behavior, but only on account of his or her belonging to the chosen group. Genocide is considered as the “crime of crimes,”<sup>4</sup> “one of the worst crimes known to humankind,”<sup>5</sup> the

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<sup>1</sup> GOLDSMITH, K. The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach. *Genocide Studies and Prevention: An International Journal*. 2010, Vol. 5, Issue 3, Article 3, p. 252, [2019-12-16]. Available at: <<https://scholarcommons.usf.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1092&context=gsp>>.

<sup>2</sup> KREB, C. The Crime of Genocide Under International Law. *International Criminal Law Review*. 2006, Vol. 6, p. 470.

<sup>3</sup> CASSESE, A., GAETA, P., BAIG, L., FAN, M., GOSNELL, C., WHITING, A. *International Criminal Law*. Oxford: Oxford University Press, 2013, p. 118. METTRAUX, G. *International Crimes and the Ad Hoc Tribunals*. New York: Oxford University Press, 2005, p. 232.

<sup>4</sup> As referred in many criminal cases: Prosecutor v. Jean Kambanda, ICTR-97-23-S, Judgment and Sentence, 4 September 1998, para. 16; Prosecutor v. Jean de Dieu Kamuhanda, Judgment, ICTR-95-54A-T, 22 January 2004 (hereinafter: Kamuhanda Trial Judgment), para. 623; Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgment, ICTR-95-1-T, 21 May 1999 (hereinafter: Kayishema and Ruzindana Trial Judgment), para. 89; Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Judgment, ICTR-99-52-T, 3 December 2003 (hereinafter: Nahimana et al. Trial Judgment), para. 948; Prosecutor v. Emmanuel Ndingabahizi, Judgment and Sentence, ICTR-2001-71-I, 15 July 2004 (hereinafter: Ndingabahizi Trial Judgment), para. 454; Prosecutor v. Laurent Semanza, Judgment and Sentence, ICTR 97-20-T, 15 May 2003 (hereinafter: Semanza Trial Judgment), para. 315; Prosecutor v. Elizaphan and Gérard Ntakirutimana, Judgment, ICTR-96-10&ICTR-96-17-T, 21 February 2003, para. 783.

scourge which reiterates the need for the international community to be engaged in its elimination. The public conception of the word “genocide” is connected with the overall impression that some widespread, systematic, and frightening acts took place. In many situations, cases of mass murder, mass extermination, or any other serious grave violations of human rights have been declared as “genocidal” only because of the extent of the crimes committed. However, not every mass murder is considered as genocide, regardless of the horror it provides. The definition of a crime requires the accomplishment of the prescribed elements cumulatively, and the case-law of international courts indicates that genocide is one of the most complex crimes when the prosecution for its commitment is concerned. When looking for the reasons for its “complexity,” several arguments can be found within the definition of a crime prescribed by the Convention on the Prevention and Punishment of the Crime of Genocide<sup>6</sup> (hereinafter: Genocide Convention). It comprises a variety of actions (which are similar to some other core crimes), but – when genocide is concerned – they are encouraged by a very specific intention and focused on a very specific purpose.

The Genocide Convention defines the crime of genocide in two terms: a) as an act or *actus reus* and b) as intent or *mens rea*.<sup>7</sup> However, *mens rea* of genocide does not represent the general intent, but a special one – *dolus specialis*. Although analytically distinct, *actus reus* and *dolus specialis* are undoubtedly linked, and most judgments of the international courts confirm that genocide comprises both.

*Actus reus* is the material or physical element of genocide – the commitment of concrete act(s), previously enumerated in the Genocide Convention. These acts are directed very specifically and deliberately against the members of a protected group. In terms of the Genocide Convention, “group” is defined as national, ethnical, racial, or religious. One could say that one of the flaws and limitations of the Genocide Convention is the narrowness of such enumeration.

However, what really poses a special challenge in establishing genocide is the perpetrator’s ultimate goal – not only does the perpetrator want to commit a crime against some members of a protected group, but through their destruction, he aspires to the superior goal – the destruction of the *group*, in whole or in a part. Such intention of destroying national, ethnical, racial, or religious group(s) is called genocidal intent or *dolus specialis*. One could say that this particular intention itself is the mental element that makes genocide an exceptionally grave and horrifying crime – the “crime of all crimes.” Furthermore, mainly because of the severity of the *dolus specialis* and the complexity of its determination before the court, the case law of international courts indicates the crime of genocide as one that is very difficult to prove, although – as will be shown – not impossible.

As a consequence of atrocities committed during armed conflicts in the former Yugoslavia and Rwanda in the early 1990s, the crime of genocide has been well examined. The Statutes of the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR) include a provision for the crime

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<sup>5</sup> Prosecutor v. Radoslav Krstić, Judgement, IT-98-33-A, 19 April 2004 (hereinafter: Krstić Appeal Judgment), para. 134.

<sup>6</sup> Genocide Convention was adopted on December 9, 1948, 78 U.N.T.S. 277; came into a force on January 12, 1951.

<sup>7</sup> Most judgments of international courts comprise the notion that genocide (as defined in Article 2 of the Genocide convention) comprises “act,” on the one hand, and the “intent,” on the other.

of genocide.<sup>8</sup> The case-law of both tribunals confirms the existence of the crime itself and the investigation of individual criminal responsibility for the crime. Many of these cases and challenges of determining material and – even more importantly – mental elements of genocide will be presented in this paper. Although perpetrated by individuals, the involvement of the State as the real “orchestrator”<sup>9</sup> of genocide has also been examined on the international level.<sup>10</sup> However, the focus of this paper will be on individual criminal responsibility.

## II. THE MENTAL ELEMENT OF GENOCIDE – *DOLUS SPECIALIS* AS A SPECIFIC INTENTION

### II.1 The element that makes genocide “the goal-oriented crime”

Genocide is always an intentional crime.<sup>11</sup> However, as already indicated, it is not a crime of “regular” intent. Genocide has two “separate mental elements”,<sup>12</sup> which are made explicit by the words “deliberately” and “intended.”<sup>13</sup> The first one is “general intent” or *dolus*, which “normally relates to all objective elements of the offense definition (*actus reus*).”<sup>14</sup> It is an “effective knowledge of the material elements of the offense and of the perpetrator’s intent to act.”<sup>15</sup> The general intent of genocide refers to the commitment of the five acts prescribed in Article 2 of the Genocide Convention. These acts “constitute conscious and deliberate acts, and cannot be the product of accident or oversight” nor “committed without knowing that certain consequences were likely to result.”<sup>16</sup>

<sup>8</sup> Article 2 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 4 of the Statute of the International Criminal Tribunal for Rwanda. The crime of genocide is also incorporated into Article 6 of the Rome statute of the International Criminal Court (hereinafter: ICC). So far, only one case open before the ICC is referred to as a crime of genocide, but the suspect is still at large. Since the ICC does not try suspects unless they are present, this case is still in the Pre-Trial stage. [2019-12-19]. Available at: <<https://www.icc-cpi.int/darfur/albashir>>.

<sup>9</sup> As noted in the *Kayishema and Ruzindana* case, it is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime. *Kayishema and Ruzindana* Trial Judgment, para. 94.

<sup>10</sup> Two cases exist so far, and two judgments were delivered before the International Court of Justice (hereinafter: ICJ). The first case was the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007 (hereinafter: 2007 ICJ Judgment). The second one was the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 3 February 2015 (hereinafter: 2015 ICJ Judgment).

<sup>11</sup> Even without the term “with intent,” it is improbable that such crime could be committed unintentionally. SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. New York: Cambridge University Press, 2009, p. 256.

<sup>12</sup> AMBOS, K. What does “intent to destroy” in genocide mean? *International Review of the Red Cross*. 2009, Vol. 91, No. 876, p. 834.

<sup>13</sup> It has to be noted that the preliminary text of the Genocide Convention read: “In this convention genocide means any of the following *deliberate acts* directed against...”. The word “intent” was added later on the proposal of the United States. On the drafting history and state’s proposals: SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. pp. 258–260.

<sup>14</sup> AMBOS, K. *What does “intent to destroy” in genocide mean?* p. 834.

<sup>15</sup> Dissenting opinion of Judge Mahiou (2007 ICJ Judgment), para. 68.

<sup>16</sup> Draft Code of Crimes against the Peace and Security of Mankind with commentaries. In: UN Office of Legal Affairs [online]. 1996 [2019-12-16]. Available at: <[https://legal.un.org/ilc/text/instruments/english/commentaries/7\\_4\\_1996.pdf](https://legal.un.org/ilc/text/instruments/english/commentaries/7_4_1996.pdf)>. See p. 44, para. 5.

However, the commitment of these acts does not suffice for the confirmation of the existence of genocide. It is not enough that these acts are committed and targeted against the members of a group. As mentioned, genocide is a unique crime, mainly because of its “special intent.” Special intent or *dolus specialis* is the second mental element of genocide, which furtherly requires the ultimate goal of the destruction of a protected group and makes genocide a goal-oriented crime.<sup>17</sup> Special intent is also the “key element of an intentional offence, [sic] which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.”<sup>18</sup> The perpetrator must be aware that his actions have an impact on one of the protected groups “since the group element is factual circumstances.”<sup>19</sup> The perpetration of genocide, therefore, “extends beyond its actual commission”<sup>20</sup> (of any of the acts prescribed under the *actus reus* of the crime). The core of the crime is the realization of an ulterior motive for “wider” destruction. It is essential to prove before the court that the perpetrator not only wanted to commit acts enumerated as *actus reus* of genocide, but, more importantly, that he was primarily focused on the destruction of a specific national, ethnical, racial, or religious group, in whole or in part, as such. With no existence of genocidal intent and its ulterior motive, one cannot speak of genocide.

It is a common belief that intent is the most difficult to prove in criminal law, and it becomes even harder when genocide is concerned because of the *dolus specialis*.<sup>21</sup> The gravity of genocide is “reflected in the stringent requirement” of *dolus specialis*.<sup>22</sup> One could agree with the assertion that “the bar is raised from intent to specific intent.”<sup>23</sup> Even prior to the first genocide cases before the *ad hoc* criminal tribunals and the ICJ, *Bassiouni* concluded that the *dolus specialis* requirement is too high and not in conformity with various conducts of genocide that have taken place since 1948.<sup>24</sup> What is more, it has been argued that the requirement of the genocidal special intent has actually “allowed many who have committed genocide to escape conviction for that crime.”<sup>25</sup>

*Dolus specialis*, in particular, makes genocide an exceptionally grave crime and distinguishes it from grave violations of human rights.<sup>26</sup> For example, in persecution, the perpe-

<sup>17</sup> AMBOS, K. *What does “intent to destroy” in genocide mean?* p. 835; Kayishema and Ruzindana Trial Judgment, para. 103.

<sup>18</sup> Prosecutor v. Jean Paul Akayesu, ICTR-96-4-T, Judgment, 2 September 1998 (hereinafter: Akayesu Trial Judgment), para. 518.

<sup>19</sup> AMBOS, K. *What does “intent to destroy” in genocide mean?* p. 834.

<sup>20</sup> Akayesu Trial Judgment, para. 522; See also Prosecutor v. Goran Jelisić, Judgment, IT-95-10-T, 14 December 1999 (hereinafter: Jelisić Trial Judgment), para. 79.

<sup>21</sup> ASUNCION, A. C. Pulling the Stops on Genocide: The State or the Individual? *The European Journal of International Law*. 2010, Vol. 20, No. 4, p. 1211.

<sup>22</sup> Krstić Trial Judgment, para. 134.

<sup>23</sup> KELLY, M. J. *Prosecuting Corporations for Genocide*. New York: Oxford University Press, 2016, p.75.

<sup>24</sup> “...it is not difficult to think of a number of contemporary conflicts, such as those in Cambodia and the former Yugoslavia, where there is obviously no paper trail and where the specific intent can only be shown by the cumulative effect of the objective conduct to which one necessarily has to add the inference of specific intent deriving from omission.” In BASSIOUNI, C. *Commentaries on the International Law Commission’s 1991 Draft Code of Crimes against the Peace and Security of Mankind*. Toulouse: Eres, 1993, p. 233.

<sup>25</sup> GOLDSMITH, K. *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach*. p. 244.

<sup>26</sup> About the relationship between genocide, war crimes, and crimes against humanity: KREß, C. *The Crime of Genocide Under International Law*. pp. 468–470; 472–473.

trator selects his victims because of their membership to a specific community but does not necessarily seek to destroy the community as such.<sup>27</sup> In crime against humanity, the focus is on the inference of “widespread or systematic attack against any civilian population”<sup>28</sup> with no regard for its identity or affiliation or any particular intent of destroying a specific group.<sup>29</sup> Cassese emphasized that the wording of the relevant provisions clearly shows that crimes against humanity encompass genocide,<sup>30</sup> and although they share several elements,<sup>31</sup> their objective and subjective elements “differ in many respects.”<sup>32</sup> The similarity between the genocide and crime against humanity has been emphasized in *Kayishema and Ruzindana* case, where the ICTR even noted that “genocide is a type of crime against humanity,” but – although some of their “discriminatory grounds coincide and overlaps”<sup>33</sup> – the requirement of the special genocidal intent makes the difference between them.

The conclusion can be made that if any grave violation of human rights or exterminations are not aimed at individuals on account of their belonging to a particular (previously enumerated by the Genocide Convention) protected group, and if there is no intention to destroy the group, one cannot speak of genocide within the terms of the Genocide Convention.

## II.2 How can the genocidal intention be proved?

The difficulty of proving facts lay beyond all the uncertain legal issues.<sup>34</sup> Looking from the case law, the proof that intent exists on the side of the perpetrator “is rarely a formal part of the prosecution’s case.”<sup>35</sup> As noted by *Schabas*, it is not so common to call psychiatrists as expert witnesses in order to determine the perpetrator’s real intention. In practice, intent is a “logical deduction that flows from evidence of the material acts”<sup>36</sup> and “refers to a person’s state of mind, a private thought process.”<sup>37</sup> However, since *dolus specialis* is the required element of the crime, it has to be proved. With no existence of the genocidal intent, one cannot speak of genocide. What is more, since *dolus specialis* is con-

<sup>27</sup> Nevertheless, it has to be noted that the notion of genocide, as fashioned by Raphael Lemkin in 1944, originally covered all forms of destruction of a group as a distinct social entity and, as such, genocide closely resembled the crime of persecution. See more at: Prosecutor v. Radislav Krstić, IT-98-33-T, Judgment, 2 August 2001, para. 553; Jelisić Trial Judgment, para. 79.

<sup>28</sup> For example, The Rome statute of the ICC, Art. 7 and Statute of the ICTY, Art. 5. Only the Statute of the ICTR in Art. 3 refers to widespread or systematic attack against any civilian population *on national, political, ethnic, racial, or religious grounds*.

<sup>29</sup> Laurent Semanza v. the Prosecutor, Judgment, ICTR-97-20-A, 20 May 2005 (hereinafter: Semanza Appeal Judgment), para. 318.

<sup>30</sup> CASSESE, A. Genocide. In: A. Cassese – P. Gaeta – J.R.W.D. Jones. *The Rome Statute of the International Criminal Court, A Commentary, Volume I*. New York: Oxford University Press, 2002, p. 335.

<sup>31</sup> In Cassese’s opinion, they share seriousness of offenses and large context, performed with the complicity, connivance, or at least the toleration of the authorities. See CASSESE, A. *Genocide*. p. 339.

<sup>32</sup> *Ibid.*, p. 339.

<sup>33</sup> *Kayishema and Ruzindana* Trial Judgment, para. 89.

<sup>34</sup> QUIGLEY, J. International Court of Justice as a Forum for Genocide Cases. *Case Western Reserve Journal of International Law*. 2008, Vol. 40, pp. 245–247.

<sup>35</sup> SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. p. 264.

<sup>36</sup> *Ibid.*, p. 264.

<sup>37</sup> GOLDSMITH, K. *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach*. p. 242.



sidered as the higher threshold for the determination of the crime, does it require even more proof? Some support a confirmative answer.<sup>38</sup>

Since the genocidal intent requires the ultimate goals to destruct not only sole individuals but also – through the genocidal *actus reus* – the extermination of the group itself, it is therefore obvious that such explicit manifestation of the ulterior mental factor is very difficult, “even impossible to determine.”<sup>39</sup> However, in the jurisprudence of the criminal tribunals, it was generally established that, in the absence of confession of the accused or direct evidence, the genocidal intention could be inferred from the facts or circumstances, words or deeds, perpetrator’s actions, or a pattern of purposeful action.<sup>40</sup> The finding of many factors, such as circumstantial evidence and the general context and pattern of extreme violence and destruction, may lead to the inference of genocidal intent.<sup>41</sup>

The proof of the perpetrator’s mental state “can serve as evidence from which the fact-finder may draw the further inference that the accused possessed the specific intent to destroy.”<sup>42</sup> According to *Boot*, a court could presume *dolus specialis* “largely by virtue of the fact that a perpetrator acts in a genocidal campaign.”<sup>43</sup> Special genocidal intent must have “an overall genocidal campaign as an objective point of reference”<sup>44</sup> and such an overall campaign becomes relevant for the determination of *dolus specialis*.<sup>45</sup>

However, when the existence of the genocidal intent is based on circumstantial evidence, any finding must be the “only reasonable inference” from the totality of the evidence.<sup>46</sup> If there is any other inference to be drawn from the evidence, it must be drawn.<sup>47</sup>

<sup>38</sup> KELLY, M. J. *Prosecuting Corporations for Genocide*. p. 76.

<sup>39</sup> Akayesu Trial Judgment, para. 523; Kayishema and Ruzindana Trial Judgment, para. 93; Prosecutor v. Ngirabatware, Augustin, Judgment, ICTR-99-54-T, 20 December 2012 (hereinafter: Ngirabatware Trial Judgment), para. 1327.

<sup>40</sup> Prosecutor v. Radoslav Brđanin, Judgment, IT-99-36-T, 1 September 2004 (hereinafter: Brđanin Trial Judgment), para. 704; Prosecutor v. Radislav Krstić, IT-98-33-A, Judgment, 19 April 2004, paras. 33, 34; Prosecutor v. Milomir Stakić, Judgment, IT-97-24-T, 29 October 2003 (hereinafter: Stakić Trial Judgment), para. 526; Kayishema and Ruzindana Trial Judgment, para. 93; Prosecutor v. Radovan Karadžić, Judgement, IT-95-5/18-T, 24 March 2016 (hereinafter: Karadžić Trial Judgment), para. 550; Prosecutor v. Simon Bikindi, Judgment, ICTR-01-72-T, 2 December 2008 (hereinafter: Bikindi Trial Judgment), para. 420; Prosecutor v. Jean-Baptiste Gatete, Judgment, ICTR-2000-61-T, 31 March 2011 (hereinafter: Gatete Trial Judgment), para. 583; Prosecutor v. Édouard Karemera and Matthieu Ndirumpatse, Judgment and Sentence, ICTR-98-44-T, 2 February 2012 (hereinafter: Karemera and Ndirumpatse Trial Judgment), para. 1607; Semanza Trial Judgment, para. 313.

<sup>41</sup> Dissenting opinion of Judge Trindade (2015 ICJ Judgment), paras. 136; 139.

<sup>42</sup> Krstić Appeal Judgment, para. 20; Brđanin Trial Judgment, para. 706; Popović et al. Trial Judgment, para. 823.

<sup>43</sup> It means that *dolus specialis* can be inferred from the material evidence submitted on a case-by-case basis, including the evidence that demonstrates a consistent pattern of conduct. See more: BOOT, Machteld. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. Antwerpen-Oxford-New York: Intersentia, 2002, p. 415. See also Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement and Sentence in the Trial Chamber, ICTR-96-3-T, 6 December 1999 (hereinafter: Rutaganda Trial Judgment), paras. 61-63.

<sup>44</sup> KREß, C. *The Crime of Genocide Under International Law*. p. 472.

<sup>45</sup> *Ibid.*, p. 472.

<sup>46</sup> Brđanin Trial Judgment, para. 970; Ngirabatware Trial Judgment, para. 1327; Prosecutor v. Callixte Kalimanzira, Judgment, ICTR-05-88-T, 22 June 2009 (hereinafter: Kalimanzira Trial Judgment), para. 731; Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Élie Ndayambaje, Judgment and Sentence, ICTR-98-42-T, 24 June 2011 (hereinafter: Nyiramasuhuko et al. Trial Judgment), para. 5732; Prosecutor v. Callixte Nzabonimana, Judgment and Sentence, ICTR-98-44D-T, 31 May 2012 (hereinafter: Nzabonimana Trial Judgment), para. 1704; Karadžić Trial Judgment, para. 5830; Prosecutor v. Radovan Karadžić, Judgement, MICT-13-55-A, 20 March 2019, paras. 630; 633.

As established in the *Krstić* case, “convictions for genocide can be entered only where that intent has been unequivocally established.”<sup>48</sup>

It was confirmed before the international criminal *ad hoc* tribunals that the genocidal intent could be deduced from the massive scale and general nature of atrocities committed and their destructive effect for the existence of the protected group, methodical way of planning, as well as the fact that victims were deliberately and systematically targeted only because they belonged to a particular group (protected by the Genocide Convention),<sup>49</sup> while the members of other groups were excluded.<sup>50</sup>

The display of intent through derogatory public speeches or in meetings may also support an inference as to the requisite specific intent.<sup>51</sup> In order to be considered direct and public incitement to commit genocide, a speech must be a public and direct appeal to commit an act of genocide; it must be more than a vague or indirect suggestion.<sup>52</sup>

The best evidence of an intentional element lies in the plans, declarations, or written statements and other indications of genocidal intent. It could also be a number of facts, such as the general political doctrine. Although the existence of a plan or policy is not a legal ingredient of the crime or element of genocide, it would appear that it is not easy

<sup>47</sup> METTRAUX, G. *International Crimes and the Ad Hoc Tribunals*. p. 234.

<sup>48</sup> Prosecutor v. Radoslav Krstić, Judgment, IT-98-33-T, 2 August 2001 (hereinafter: Krstić Trial Judgment), para. 134.

<sup>49</sup> Akayesu Trial Judgment, paras. 523; 524; Kayishema and Ruzindana Trial Judgment, para. 93; Jelisić Appeal Judgment, para. 47; Kalimanzira Trial Judgment, para. 762; Prosecutor v. Augustin Nindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu, Judgment and Sentence, ICTR-00-56-T, 17 May 2011 (hereinafter: Nindiliyimana et al. Trial Judgment), para. 2073; Prosecutor v. Yussuf Munya, Judgment and Sentence, ICTR-97-36A-T, 5 July 2010 (hereinafter: Munya Trial Judgment), para. 494; Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Judgment and Sentence, ICTR-98-41-T, 18 December 2008 (hereinafter: Bagosora et al. Trial Judgment), para. 2116; Prosecutor v. Aloys Simba, Judgment and Sentence, ICTR-01-76-A, 27 November 2007 (hereinafter: Simba Appeal Judgment), para. 264; Prosecutor v. Sylvestre Gacumbitsi, Judgment, ICTR-2001-64-A, 7 July 2006 (Gacumbitsi Appeal Judgment), paras. 40-41; Semanza Appeal Judgment, para. 262; Prosecutor v. Athanase Seromba, ICTR-2001-66-I, Judgment, 13 December 2006 (hereinafter: Seromba Trial Judgment), para. 320; Ngirabatware Trial Judgment, para. 1327.

<sup>50</sup> As concluded in the *Akayesu* case, there was no doubt that the massacres were aimed at exterminating the protected group, considering the undeniable scale of massacres, their systematic nature, and their atrociousness. In this particular case, many facts showed that the perpetrators’ intention behind these killings was to cause the complete disappearance of the Tutsi. Before the Chamber, one expert witness stated that he believes: “... that [these] people had the intention of completely wiping out the Tutsi from Rwanda so that – as they said on certain occasions – their children, later on, would not know what a Tutsi looked like, unless they referred to history books.” The same conclusion on the intent to exterminate a protected group was given in some other cases. See *Akayesu* Trial Judgment, para. 118, but also *Kayishema and Ruzindana* Trial Judgment, paras. 89-93.

<sup>51</sup> Gacumbitsi Appeal Judgment, para. 43; Prosecutor v. Jean de Dieu Kamuhanda, Judgment, ICTR-95-54A-A, 19 September 2005, paras. 81-82; Prosecutor v. Zdravko Tolimir, Judgment, IT-05-88/2-T, 12 December 2012 (hereinafter: Tolimir Trial Judgment), para. 745; Karadžić Trial Judgment, para. 550.

<sup>52</sup> To determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration; specifically, the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, i.e. whether the members of the audience to whom the message was directed understood its implication. *Bikindi* Trial Judgment, para. 420; *Akayesu* Trial Judgment, paras. 557-558; Prosecutor v. Eliézer Niyitegeka, Judgment, ICTR-96-14-A, 9 July 2004 (hereinafter: Niyitegeka Trial Judgment), para. 431; Prosecutor v. Juvénal Kajelijeli, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (hereinafter: Kajelijeli Trial Judgment), para. 852; *Karemera and Ngirumpatse* Trial Judgment, para. 1593.



to carry out such a core crime without a certain degree of planning or organization.<sup>53</sup> Therefore, in the context of proving specific intent, the existence of a plan<sup>54</sup> or policy may become an important factor in most cases.<sup>55</sup> However, in practice, because of the nature of this crime, it is hardly conceivable that rulers might publicly state or put in writing that they have a genocidal plan; hence it is essential to proceed by deduction in order to establish *dolus specialis*.

It is unnecessary for an individual to have knowledge of all the details of the genocidal plan or policy.<sup>56</sup> In accordance with the ICTR's and ICTY's case-law, it is more important that a perpetrator seeks to destroy a protected group.<sup>57</sup> Special intent must be realistic, not just "a vain hope."<sup>58</sup> Furthermore, it is also unnecessary for an individual to have a personal motive. The Genocide Convention does not mention the motive of the perpetrator.<sup>59</sup> On the contrary, the existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.<sup>60</sup> Moreover, the perpetrator may intend more than he is realistically able to accomplish. As in the example made by *Ambos*, it is imaginable that a white racist intends to destroy a group of black people in some wider area (such as a large city), but since he is acting alone, he will only be able to kill a few members of that group. Even though he had not fulfilled his goal entirely, his genocidal intent would suffice to fulfil the offense elements if only one of the underlying acts have been accomplished.<sup>61</sup> In other words, for the existence of genocide, the intent to destroy a group is crucial, and the result of the act is not relevant in itself.<sup>62</sup>

<sup>53</sup> Kayishema and Ruzindana Trial Judgment, para. 94; Prosecutor v. Vidoje Blagojević and Dragan Jokić, Judgment, IT-02-60-T, 17 January 2005 (hereinafter: Blagojević and Jokić Trial Judgment), para. 656; Prosecutor v. Goran Jelišić, Judgment, IT-95-10-A, 5 July 2001 (hereinafter: Jelišić Appeal Judgment), para. 48; Brđanin Trial Judgment, para. 705.

<sup>54</sup> The Trial Chamber, in the *Akayesu* case, stressed that the genocide appears to have been meticulously organized; some witnesses testified of "centrally organized and supervised massacres" and some evidence supported the view that the genocide had been planned. The existence of lists of Tutsi to be eliminated had been confirmed by many testimonies. For example, the killings of patients and nurses committed by a soldier who had a list with their names were mentioned during the trial. *Akayesu* Trial Judgment, para. 126.

<sup>55</sup> Jelišić Appeal Judgment, para. 48; Krstić Trial Judgment, para. 572; Brđanin Trial Judgment, paras. 705; 980; Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević, Judgment, IT-05-88-T, 10 June 2010, para. 830.

<sup>56</sup> Kayishema and Ruzindana Trial Judgment, para. 94.

<sup>57</sup> Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement and Sentence in the Trial Chamber, ICTR-96-3-A, 26 May 2003, para. 524.

<sup>58</sup> KREß, C. *The Crime of Genocide Under International Law*. p. 472.

<sup>59</sup> For the drafting history and the discussions on inclusion or absence of motives in the genocide definition: KREß, C. *The Crime of Genocide Under International Law*. pp. 410–414; SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. pp. 294–306.

<sup>60</sup> Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement, ICTR-95-1-A, 1 June 2001, para. 161; Niyitegeka Trial Judgment, paras. 49; 52; Nyiramasuhuko et al. Trial Judgment, para. 5730; Brđanin Trial Judgment, para. 696; Jelišić Appeal Judgment, para. 49; Karadžić Trial Judgment, para. 554; Ngirabatware Trial Judgment, para. 1325; Nzabonimana Trial Judgment, para. 1702; Gatete Trial Judgment, para. 582; Karemera and Ngirumpatse Trial Judgment, para. 1606; Prosecutor v. Gaspard Kanyarukiga, Judgment and Sentence, ICTR-2002-78-T, 1 November 2010 (hereinafter: Kanyarukiga Trial Judgment), para. 636; Kalimanzira Trial Judgment, para. 158; Munya Trial Judgment, para. 493; Bagosora et al. Trial Judgment, para. 2115; Simba Appeal Judgment, para. 269; Ndindiliyimana et al. Trial Judgment, para. 2072.

<sup>61</sup> AMBOS, K. *What does "intent to destroy" in genocide mean?* p. 835.

<sup>62</sup> BOOT, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. p. 407.

### III. THE MATERIAL ELEMENT OF GENOCIDE – *ACTUS REUS*, AS THE REALIZATION OF THE *DOLUS SPECIALIS*

#### III.1 Physical and biological destruction only

The determination of genocidal *actus reus* is generally perceived as “not so difficult and can at least be objectively verified.”<sup>63</sup> The Genocide Convention exhaustively enumerates acts that constitute the *actus reus* of a crime, the acts of material destruction of a group. Such material destruction can be performed either by physical or by biological means, and customary international law, in general, accepts that division.<sup>64</sup> The material element of genocidal definition refers to the exhaustive enumeration of the five acts that constitute genocide: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group, and e) forcibly transferring children of the group to another group.<sup>65</sup> In this context, acts under a), b), and c) represent the physical genocide, while acts under d) and e) represent the biological genocide<sup>66</sup> although the latter still opens up some discussions.<sup>67</sup>

Some other types of destruction, such as e.g., linguistic or cultural, or another identity of a group have not been included in the Genocide Convention.<sup>68</sup> Although the term of cultural genocide was contained in two drafts and seriously contemplated,<sup>69</sup> it was excluded from the main text.<sup>70</sup> The reason was the conception of cultural genocide as a “nebulous concept”,<sup>71</sup> which is too vague and too removed from physical or biological destruction.<sup>72</sup> In *Boot’s* opinion, cultural genocide would rather fall within the scope of the protection of minorities.<sup>73</sup>

<sup>63</sup> KELLY, M. J. *Prosecuting Corporations for Genocide*. p.76.

<sup>64</sup> Krstić Appeal Judgment, para. 25; Blagojević and Jokić Trial Judgment, para. 657; Tolimir Trial Judgment, para. 746; Semanza Trial Judgment, para. 315; Kalimanzira Trial Judgment, para. 730.

<sup>65</sup> Genocide Convention, Article 2. The punishable acts are: commission, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide (Article 3). The document was primarily directed against individuals, no matter their position – whether they are constitutionally responsible rulers, public officials, or private individuals (Article 4).

<sup>66</sup> *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*. p. 46, para. 12.

<sup>67</sup> See *infra* III.1.5.

<sup>68</sup> NOVIC, E. Physical-Biological or Socio-Cultural ‘Destruction’ in Genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations. *Journal of Genocide Research*. 2015, Vol. 17, No. 1, pp. 63–82.

<sup>69</sup> THAKE, A. M. The Intentional Destruction of Cultural Heritage as a Genocidal Act and a Crime Against Humanity. *European Society of International Law (ESIL) 2017 Annual Conference (Naples)*. 2018, pp. 6–8, [2019-12-16]. Available at: <<https://ssrn.com/abstract=3163108>>.

<sup>70</sup> The term “cultural genocide” was meant to cover any deliberate act committed with the intent to destroy the language, religion, or culture of a group, such as prohibiting the use of the language of the group in daily communication or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

<sup>71</sup> CASSESE, A. et al. *International Criminal Law*. p. 113.

<sup>72</sup> Krstić Trial Judgment, para. 576; Prosecutor v. Milomir Stakić, Judgment, IT-97-24-A, 22 March 2006, para. 23.

<sup>73</sup> BOOT, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. p. 440.

However, as concluded in the *Krstić* Trial Judgment, although the physical destruction is the most obvious method, one may also conceive of destroying a group through purposeful eradication of its culture,<sup>74</sup> which may lead to the eventual extinction of the group.<sup>75</sup> Furthermore, since physical or biological destructions are often connected with simultaneous attacks on the cultural and religious properties, such attacks “may legitimately be considered as evidence of intent to physically destroy the group.”<sup>76</sup>

The group as the “object” of genocide is very narrowly determined in the Genocide Convention. The crime itself – as frightening as it is, cannot be committed against a group which does not correspond with the requirements from the Genocide Convention. If the group of people cannot be identified (exclusively) as national, ethnical, racial or religious, one cannot speak of genocide.<sup>77</sup> If, e.g., the perpetrator commits a mass murder of his political opponents, group of homosexuals, or a group of women, and performs that crime in order to destroy the whole group only because of what they are (i.e., his political opponents/homosexuals/women), his actions do not constitute a crime of genocide. One could even say that such group “exclusivity” and narrowness of the Genocide Convention with regards to the object of protection represents a clear restrictive element. By embracing this enumeration while excluding some other groups, the protection from genocide may be perceived as not sufficient enough; it leaves many unprotected.<sup>78</sup> The inapplicability of the Genocide Convention in such situations, merely because the victims do not represent a “proper” group, could be recognized as one of the major flaws<sup>79</sup> of the Convention.

### III.1.1 Killing members of the group

It seems quite understandable what does the term “killing” mean. However, during the drafting process of the Genocide Convention an interesting discussion had been led on its meaning.<sup>80</sup> A similar discussion appeared before the ICTR years later; the Trial Chamber in the *Akayesu* case noted that the Article 2(a) of the Genocide Convention states *meurtre* in the French version, while the English version states *killing*. The Trial Chambers followed

<sup>74</sup> See for example: Popović et al. Trial Judgment, para. 822; Karadžić Trial Judgment, para. 553; Tolimir Trial Judgment, para. 746; NOVIC, E. *Physical-Biological or Socio-Cultural ‘Destruction’ in Genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations*, pp. 65; 73–75; THAKE, A. M. *The Intentional Destruction of Cultural Heritage as a Genocidal Act and a Crime Against Humanity*. pp. 13–14.

<sup>75</sup> *Krstić* Trial Judgment, para. 574.

<sup>76</sup> *Krstić* Trial Judgment, para. 580. That opinion was later confirmed in other ICTY’s cases. The ICJ, however, took a different approach. In the 2007 ICJ Judgment, the Court considered that there was conclusive evidence of the deliberate destruction of the historical, cultural, and religious heritage of the protected group. However, in Court’s view, such destruction – although it may be highly significant as it is directed to the elimination of all traces of the cultural or religious presence of a group – cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. A similar conclusion was made in the 2015 ICJ Judgment. See: 2007 ICJ Judgment, para. 344; 2015 ICJ Judgment, paras. 389, 390; *Prosecutor v. Zdravko Tolimir*, Judgement, IT-05-88/2-A, 8 April 2015 (hereinafter: Tolimir Appeal Judgment), para. 230; Karadžić Trial Judgment, para. 553.

<sup>77</sup> Tolimir Appeal Judgment, para. 182.

<sup>78</sup> FABIJANIĆ GAGRO, S. Protection of “exclusive” groups only – an essential element of genocide. *Russian Law Journal*, 2018, Vol. 6, No. 3, p. 120.

<sup>79</sup> FABIJANIĆ GAGRO, S. *Protection of “exclusive” groups only – an essential element of genocide*. p. 105.

<sup>80</sup> SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. pp. 287–288.

the opinion that the English term *killing* is too general since it could very well include both the intentional and unintentional meaning.<sup>81</sup>

However, the Trial Chamber in *Kayishema and Ruzindana* case concluded that there is virtually no difference between the terms in English and French when the implementation of the Genocide Convention is concerned. Both should be considered along with the specific intent of genocide.<sup>82</sup> There is no possibility that the crime of genocide is made by accident or as a result of mere negligence.<sup>83</sup> If an act of genocide consists of homicide committed with intent to cause death,<sup>84</sup> it must be an intentional homicide.<sup>85</sup> Furthermore, murder as an act of genocide requires proof of a result,<sup>86</sup> but does not require a numeric assessment of the number of people killed to be established.<sup>87</sup>

### III.1.2 Causing serious bodily or mental harm to members of the group

Bodily harm involves some kind of physical injury, while mental harm involves some kind of impairment of mental faculties.<sup>88</sup> This phrase could be construed to mean harm that seriously injures the health, causes disfigurement, or any serious injury to the external, internal organs, or senses<sup>89</sup> and should be determined on a case-by-case basis.<sup>90</sup> Causing serious bodily or mental harm to the members of the group does not necessarily mean that the harm is permanent and irremediable.<sup>91</sup> However, it must be intentional<sup>92</sup> and of such a serious nature<sup>93</sup> as to threaten the destruction of the group in whole

<sup>81</sup> Akayesu Trial Judgment, para. 501.

<sup>82</sup> Kayishema and Ruzindana Trial Judgment, para. 104.

<sup>83</sup> Kayishema and Ruzindana Trial Judgment, para. 104.

<sup>84</sup> Prosecutor v. Ignace Bagilishema, Judgment, ICTR-95-1A-T (hereinafter: Bagilishema Trial Judgment), 7 June 2001, paras. 57-58; Prosecutor v. Alfred Musema, Judgment and Sentence, ICTR-96-13-T, 27 January 2000 (hereinafter: Musema Trial Judgment), para. 155; Seromba Trial Judgment, para. 317.

<sup>85</sup> Blagojević and Jokić Trial Judgment, para. 642 (note 2057), referring to Jelisić Trial Judgment, para. 63; Krstić Trial Judgment, para. 543.

<sup>86</sup> Brđanin Trial Judgment, para. 688; Stakić Trial Judgment, para. 514; Karadžić Trial Judgment, para. 542.

<sup>87</sup> Karadžić Trial Judgment, para. 542.

<sup>88</sup> Semanza Trial Judgment, paras. 321-322; Blagojević and Jokić Trial Judgment, para. 645; Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, Judgment and Sentence, ICTR-99-46-T, 25 February 2004 (hereinafter: Ntagerura et al. Trial Judgment), para. 664.

<sup>89</sup> Kayishema and Ruzindana Trial Judgment, paras. 108-109; Blagojević and Jokić Trial Judgment, para. 645; Gatete Trial Judgment, para. 584; Prosecutor v. Athanase Seromba, ICTR-2001-66-A, Judgment, 12 March 2008 (hereinafter: Seromba Appeal Judgment), para. 46; Semanza Trial Judgment, para. 320; Karemera and Ngrumpatse Trial Judgment, para. 1609; Ntagerura et al. Trial Judgment, para. 664; Bagosora et al. Trial Judgment, para. 2117; Kanyarukiga Trial Judgment, para. 637; Ndindiliyimana et al. Trial Judgment, para. 2074.

<sup>90</sup> Kayishema and Ruzindana Trial Judgment, paras. 110; 112; Krstić Trial Judgment, para. 513; Popović et al. Trial Judgment, para. 738; Karadžić Trial Judgment, para. 545; Kanyarukiga Trial Judgment, para. 637; Tolimir Trial Judgment, para. 738; Tolimir Appeal Judgment, para. 201.

<sup>91</sup> Akayesu Trial Judgment, paras. 502-504; Kajelijeli Trial Judgment, paras. 814-816; Ntagerura et al. Trial Judgment, para. 664; Kamuhanda Trial Judgment, para. 634; Bagilishema Trial Judgment, para. 59; Prosecutor v. Tharcisse Muvunyi, Judgment and Sentence, ICTR-2000-55A-T, 12 September 2006, para. 487; Krstić Trial Judgment, para. 513; Stakić Trial Judgment, para. 516; Tolimir Trial Judgment, para. 738; Popović et al. Trial Judgment, para. 811; Karadžić Trial Judgment, para. 543; Semanza Trial Judgment, paras. 320, 322; Ndindiliyimana et al. Trial Judgment, para. 2075.

<sup>92</sup> Brđanin Trial Judgment, para. 690; Krstić Trial Judgment, para. 513; Blagojević and Jokić Trial Judgment, para. 645.

or in part. It must go “beyond temporary unhappiness, embarrassment or humiliation” and result “in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”<sup>94</sup>

Acts that amount to serious bodily harm are acts of sexual violence, rape, mutilations, and interrogations combined with beatings, threats of death, the harm that damages health, or causes disfigurement or serious injury to members of the targeted group, etc.<sup>95</sup> As concluded in several cases before the ICTR, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings.<sup>96</sup>

### III.1.3 Deliberately inflicting on the group in whole or in part conditions of life calculated to bring about its physical destruction

The Genocide Convention also includes specific intent to inflict conditions of life that is deliberately calculated to destroy a protected group. *Schabas* emphasizes that the phrase “calculated” adds an important concept to the offense, implying not only intent and even premeditation, but also indicating that the imposition of the condition must be the principal mechanism used to destroy the group.<sup>97</sup> It is the method of destruction by which the perpetrator does not require proof of result<sup>98</sup> or immediately kill members of the group. However, the perpetrator ultimately seeks their physical destruction,<sup>99</sup> mainly by the creation of circumstances that would lead to a slow death.<sup>100</sup> Such methods could be: subjecting a group of people to a subsistence diet, systematic expulsion from homes, reduc-

<sup>93</sup> For example, as found in the *Blagojević and Jokić* case, the fear of being captured, the sense of utter helplessness, extreme fear for their family or friends’ safety, or own safety, is a traumatic experience from which one will not quickly – if ever – recover. Furthermore, having their identification documents taken away from them, seeing that they would not be exchanged as previously told, etc., all these elements constitute serious bodily or mental harm. *Blagojević and Jokić* Trial Judgment, para. 647. See also: *Brdanin* Trial Judgment, para. 690; *Stakić* Trial Judgment, para. 516; *Tolimir* Trial Judgment, para. 756; *Kajelijeli* Trial Judgment, para. 184; *Seromba* Appeal Judgment, para. 46; *Ngirabatware* Trial Judgment, para. 1326; *Gatete* Trial Judgment, para. 584; *Karemera and Ngirumpatse* Trial Judgment, para. 1609; *Nzabonimana* Trial Judgment, para. 1703; *Nyiramasuhuko et al.* Trial Judgment, para. 5731; *Ndindiliyimana et al.* Trial Judgment, para. 2075.

<sup>94</sup> *Krstić* Trial Judgment, para. 513; *Karadžić* Trial Judgment, para. 543.

<sup>95</sup> *Akayesu* Trial Judgment, paras. 706-707; 711-712, 731-734. This conclusion was later used in many cases before the *ad hoc* tribunals: *Krstić* Trial Judgment, para. 513; *Stakić* Trial Judgment, para. 516; *Blagojević and Jokić* Trial Judgment, para. 646; *Rutaganda* Trial Judgment, para. 51; *Musema* Trial Judgment, para. 156; *Bagilishema* Trial Judgment, para. 59; *Prosecutor v. Sylvestre Gacumbitsi*, Judgment, ICTR-2001-64-T, 17 June 2004, para. 291; *Kajelijeli* Trial Judgment, para. 815; *Tolimir* Trial Judgment, para. 737; *Brdanin* Trial Judgment, para. 690; *Popović et al.* Trial Judgment, para. 812; *Karadžić* Trial Judgment, para. 545; *Karemera and Ngirumpatse* Trial Judgment, para. 1609.

<sup>96</sup> *Seromba* Appeal Judgment, para. 46; *Nzabonimana* Trial Judgment, para. 1703; *Nyiramasuhuko et al.* Trial Judgment, para. 5731.

<sup>97</sup> *SCHABAS*, W. A. *Genocide in International Law, The Crimes of Crimes*. p. 290. As noted in the *Stakić* case, that phrase replaced the phrase “aimed at causing death” proposed by Belgium in the UN General Assembly’s Sixth (Legal) Committee. See also *Stakić* Trial Judgment, para. 518.

<sup>98</sup> *Brdanin* Trial Judgment, para. 691; *Stakić* Trial Judgment, para. 517; *Popović et al.* Trial Judgment, para. 814; *Karadžić* Trial Judgment, para. 546.

<sup>99</sup> *Akayesu* Trial Judgment, para. 505, 506. See also *Kayishema and Ruzindana* Trial Judgment, para. 116; *Stakić* Trial Judgment, para. 517; *Karadžić* Trial Judgment, para. 546.

<sup>100</sup> *Brdanin* Trial Judgment, para. 691; *Stakić* Trial Judgment, para. 517; *Popović et al.* Trial Judgment, para. 815; *Karadžić* Trial Judgment, para. 546.

tion of essential medical services below the minimum requirement,<sup>101</sup> lack of proper housing, clothing, and hygiene, or excessive work, or physical exertion.<sup>102</sup>

A clear distinction must be drawn between physical destruction and the mere dissolution of a group. The deportation or expulsion of a group or its part does not suffice for genocide.<sup>103</sup> It could be seen as ethnic cleansing – a policy of a particular group of persons to systematically eliminate another group from a given territory (an area, village, or town), usually by their forcible expulsion from that area.<sup>104</sup> Ethnic cleansing was treated as a feature of a distinctive type of war.<sup>105</sup> Although the UN General Assembly in 1992 (when referring to the situation in Bosnia and Herzegovina) described ethnic cleansing as “a form of genocide”<sup>106</sup> and although there are obvious similarities between a genocidal policy and the policy of ethnic cleansing, it may not *per se* amount to genocide.<sup>107</sup> The necessary genocidal intent may not be derived *ipso facto* from proof that ethnic cleansing had occurred.<sup>108</sup> Neither the intent, as a matter of policy, to render an area “ethnically homogeneous” nor the operations that may be carried out to implement such policy can, *as such*, be designated as genocide.<sup>109</sup> The intent that characterizes genocide is the destruction of a particular group. Deportation or displacement of its members, even if effected by force, is not necessarily equivalent to the destruction of that group. However, it is not to say that acts described as ethnic cleansing may never constitute genocide. It is the existence or non-existence of *dolus specialis*, which creates genocide out of a particular operation described as ethnic cleansing.<sup>110</sup> If the actions of a perpetrator are connected with the intention to destroy a group, one can talk of genocide.

#### III.1.4 Imposing measures intended to prevent births within the group

Intention to biologically destroy the group could be defined as a set of “measures calculated to decrease the birth rate” within the group.<sup>111</sup> Imposing these measures indicates the necessity of an element of coercion, but not the intent to prevent births totally; it will be sufficient that even partial prevention is the purpose of these measures.<sup>112</sup> By such restrictions of births, the group may also eventually disappear.

<sup>101</sup> Akayesu Trial Judgment, para. 505, 506.

<sup>102</sup> Brđanin Trial Judgment, para. 691; Stakić Trial Judgment, para. 517; Popović et al. Trial Judgment, para. 815.

<sup>103</sup> Stakić Trial Judgment, para. 519; Brđanin Trial Judgment, paras. 692, 694; Karadžić Trial Judgment, para. 546.

<sup>104</sup> CASSESE, A. *Genocide*. p. 338. See also Security Council Resolution S/Res/827, 25 May 1993.

<sup>105</sup> SHAW, M. *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World*. New York: Cambridge University Press, 2013, p. 134.

<sup>106</sup> UN General Assembly Resolution, The situation in Bosnia and Herzegovina, A/Res/47/121, 18 December 1992.

<sup>107</sup> BOOT, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. p. 448; CASSESE, A. *Genocide*. p. 338.

<sup>108</sup> CASSESE, A. *Genocide*. p. 342.

<sup>109</sup> Krstić Appeal Judgment, para. 33; Stakić Trial Judgment, para. 519; Karadžić Trial Judgment, para. 545; See also 2007 ICJ Judgment, para. 190.

<sup>110</sup> 2007 ICJ Judgment, para. 162.

<sup>111</sup> LEMKIN, R. *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for International Peace, 1944; reprinted in New Introduction by POWER, S., Clark, New Jersey: The Lawbook Exchange, Ltd., 2005, p. 86, [2019-12-16]. Available at: <[https://books.google.hr/books?id=y0in2wOY-W0C&pg=PA63&hl=hr&source=gbs\\_toc\\_r&cad=3#v=onepage&q&f=false](https://books.google.hr/books?id=y0in2wOY-W0C&pg=PA63&hl=hr&source=gbs_toc_r&cad=3#v=onepage&q&f=false)>.

<sup>112</sup> BOOT, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. p. 449.



Some of these measures are sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages, etc.<sup>113</sup> In patriarchal societies, where the membership to a group is determined by the identity of the father, an example of such a measure can be even the rape and impregnation of a woman from the protected group that have been committed by a man of another group. The child that is to be born will consequently not belong to his/her mother's group.<sup>114</sup>

Furthermore, measures intended to prevent births within the group may not be only physical; they could also be mental.<sup>115</sup> As concluded in the *Akayesu* case, rape can be a measure intended to prevent births when the woman who was raped subsequently refuses to procreate, in the same way that the members of a group can be forced not to procreate as a consequence of threats or trauma.<sup>116</sup> This opinion was confirmed in some other cases before the ICTR.<sup>117</sup>

### III.1.5 Forcibly transferring children of the group to another group

This paragraph, which covers an act with regards to the future viability of a group, has an interesting history of adoption; it was clearly considered a form of cultural genocide. However, since the term cultural genocide had been excluded from the Genocide Convention, the forcible transfer of children from one group to another could only be considered as the physical or biological genocide.<sup>118</sup> The International Law Commission supports the conclusion on the biological genocide.<sup>119</sup> However, there are some opinions that confirm that the forcible transfer of children from one group to another arguably represents an act of cultural genocide.<sup>120</sup> *Schabas* argues that paragraph (c) is somewhat anomalous because it contemplates what is in reality a form of cultural genocide, despite a clear decision of drafters to exclude cultural genocide from the scope of the Convention.<sup>121</sup>

As concluded in the *Akayesu* case and confirmed the in *Kayishema and Ruzindana* case,<sup>122</sup> the objective of this provision is not only to sanction a direct act of forcible physical transfer but also to sanction acts of threats or trauma, which would lead to the forcible transfer of children from one group to another.<sup>123</sup>

<sup>113</sup> *Akayesu* Trial Judgment, para. 507; Tolimir Trial Judgment, para. 743.

<sup>114</sup> *Akayesu* Trial Judgment, para. 507.

<sup>115</sup> *Akayesu* Trial Judgment, para. 508; Rutaganda Trial Judgment, para. 53; Popović et al. Trial Judgment, para. 818.

<sup>116</sup> *Akayesu* Trial Judgment, para. 508. Rape has been described as a “quintessential example of serious bodily harm.” Seromba Appeal Judgment, para. 46; Nyiramasuhuko et al. Trial Judgment, para. 5731; Ndindiliyimana et al. Trial Judgment, para. 2075; Nzabonimana Trial Judgment, para. 1703.

<sup>117</sup> *Kayishema and Ruzindana* Trial Judgment, para. 117.

<sup>118</sup> BOOT, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. p. 450.

<sup>119</sup> *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*. p. 46, para. 12.

<sup>120</sup> BOOT, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. p. 439. See more about the debate on whether the transfer of children is “cultural genocide” in: AKHAVAN, P. Cultural Genocide: Legal Label or Mourning Metaphor? *McGill Law Journal*. 2016, Vol. 62, No. 1, pp. 253–266.

<sup>121</sup> SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. p. 294.

<sup>122</sup> *Kayishema and Ruzindana* Trial Judgment, para. 118.

<sup>123</sup> *Akayesu* Trial Judgment, para. 509.

The offender must have had the knowledge that the children belonging to one group were being transferred to another and that children are members of a protected group.<sup>124</sup>

### III.2 Destruction of a substantial part of the group – how many victims suffice for “substantial”?

The Genocide Convention does not stipulate any quantitative threshold for the crime of genocide. Therefore, the question arises: is it possible to commit the crime of genocide even when performing one of the forbidden acts against a sole member of the protected group? Starting from the point that any genocide (or any other type of mass extermination) starts with the first murder, one could then ask whether this is sufficient for genocide to be established.

One could even go so far as to say that “a single murder, a single assault causing bodily harm to a member of the group would suffice, provided that they are accompanied by the specific intent of the perpetrator.”<sup>125</sup> As concluded in the *Akayesu* case, genocide must have been committed against “one or several individuals”<sup>126</sup> who are members of the protected group. Furthermore, Elements of crimes of the International Criminal Court<sup>127</sup> also use the phrase “one or more persons” in the context of every example of genocidal *actus reus*.

However, it is obvious that – despite larger numbers of victims in some cases – the proving *dolus specialis* is always a difficult task to achieve. Therefore, turning toward the opinion that the genocidal *actus reus* committed against only one member of the group could obviously make this mission even more difficult. Although no numeric threshold exists,<sup>128</sup> there is a wide acceptance that genocide has to target a sufficiently large number of individuals or a substantial part of the protected group.<sup>129</sup> Referring to the importance of the number of victims,<sup>130</sup> the Trial Chamber in the *Kayishema and Ruzindana* case stated that

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<sup>124</sup> SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. p. 294.

<sup>125</sup> Dissenting opinion of Judge Mahiou (2007 ICJ Judgment), para. 72.

<sup>126</sup> *Akayesu* Trial Judgment, para. 521. Similarly, in several cases before the Tribunal, it confirmed that the act of genocide exists when intentional killings of *one or more members* of the protected group occurs. Karemera and Ndirumpatse Trial Judgment, para. 1608; Kalimanzira Trial Judgment, para. 159; Bagosora et al. Trial Judgment, para. 2117; Ndindiliyimana et al. Trial Judgment, para. 2074; Prosecutor v. Aloys Simba, Judgment and Sentence, ICTR-01-76-T, 13 December 2005 (hereinafter: Simba Trial Judgment), para. 414.

<sup>127</sup> INTERNATIONAL CRIMINAL COURT. The Elements of Crimes. In: *International Criminal Court* [online]. 2011 [2019-12-18]. Available at: <<https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>>.

<sup>128</sup> Bagosora et al. Trial Judgment, para. 2115; Ndindiliyimana et al. Trial Judgment, para. 2072; Seromba Appeal Judgment, para. 175; Gacumbitsi Appeal Judgment, para. 44; Simba Trial Judgment, para. 412; Semanza Trial Judgment, para. 316.

<sup>129</sup> Bagilishema Trial Judgment, para. 64; Krstić Appeal Judgment, para. 12; Brđanin Trial Judgment, para. 701; Blagojević and Jokić Trial Judgment, para. 668; Tolimir Trial Judgment, para. 749; Semanza Trial Judgment, paras. 312-316; Nahimana et al. Trial Judgment, para. 948; Ndindabahizi Trial Judgment, para. 454; Gatete Trial Judgment, para. 582; Karemera and Ndirumpatse Trial Judgment, para. 1606; Kanyarukiga Trial Judgment, para. 635; Kalimanzira Trial Judgment, para. 730; Seromba Trial Judgment, para. 319; Munya Trial Judgment, para. 493. See also 2007 ICJ Judgment, para. 198.

<sup>130</sup> *Kayishema and Ruzindana* Trial Judgment, para. 93.

the intent to destroy a part of a group must affect a considerable number of individuals.<sup>131</sup> Where genocide involves the destruction of a large number of members of a group, the logical deduction will be more obvious. If there are only a few victims, this deduction will be far less evident.<sup>132</sup>

How to define or count the “substantial” or “considerable” number of victims? Some authors define the term “substantial” as “a number of circumstantial aspects like the strategic importance of the group members’ area of settlement.”<sup>133</sup> As concluded in the *Jelisić* case, a targeted part of a group “would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community.” Genocidal intent may, therefore, be manifested in two forms: either a) through the desire to exterminate a very large number of people or b) through the desire to exterminate a more limited number of persons who are selected because of their impact on the group in general. The impact has to be of such importance that their disappearance would have an influence on the survival of the group as such.<sup>134</sup> The second example mainly refers to the leaders of a group.

Such interpretation has been supported by a number of scholars. *Lemkin* explained that the “destruction in part must be of a substantial nature, so as to affect the entirety.”<sup>135</sup> The International Law Commission stated that “the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.”<sup>136</sup> *Cassese* also supports such conclusions.<sup>137</sup> Some authors, therefore, accentuate the view that the number of victims does not seem to be a relevant criterion for defining genocide since the intent to destroy has to be proven, not the result of the crime. However, the result of the act(s) committed could be used to prove genocidal intent, which may be indicated by a large number of victims.<sup>138</sup>

Contrary to the usual public conception, genocide does not require the actual extermination of a group.<sup>139</sup> It is enough to have committed any of the prohibited acts, with the clear intention of bringing about the total or partial destruction of a protected group as such.<sup>140</sup> Nevertheless, the *de facto* destruction of the group may constitute evidence of the specific intent.<sup>141</sup> Furthermore, it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. At least a substantial part of the group must be targeted.<sup>142</sup>

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<sup>131</sup> Kayishema and Ruzindana Trial Judgment, para. 97. See also at Semanza Trial Judgment, para. 316.

<sup>132</sup> SCHABAS, W. A. *Genocide in International Law, The Crimes of Crimes*. p. 276.

<sup>133</sup> TAMS, C. J., BERSTER, L., SCHIFFBAUER, B. *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*. Munich/Oxford/Baden-Baden: C.H. Beck, Hart, Nomos, 2014, p. 149, para. 133.

<sup>134</sup> Jelisić Trial Judgment, para. 82; Tolimir Trial Judgment, para. 749; Karadžić Trial Judgment, para. 555.

<sup>135</sup> Jelisić Trial Judgment, para. 82; Krstić Appeal Judgment, para. 10.

<sup>136</sup> Report of the International Law Commission on the work of its forty-eighth session (6 May – 26 July 1996), Official Records of the General Assembly, Fifty-first session, Supplement No. 10, UN Doc. A/51/10, p. 45.

<sup>137</sup> CASSESE, A. *Genocide*. p. 348.

<sup>138</sup> BOOT, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. pp. 421, 422.

<sup>139</sup> METTRAUX, G. *International Crimes and the Ad Hoc Tribunals*. p. 216.

<sup>140</sup> *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*. p. 46, para. 18.

<sup>141</sup> Brdanin Trial Judgment, para. 697; Stakić Trial Judgment, para. 522.

<sup>142</sup> Bagilishema Trial Judgment, para. 64.

Furthermore, genocide is a crime that could be geographically limited. International custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone.<sup>143</sup> For example, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the *dolus specialis*. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.<sup>144</sup> On the other hand, a campaign resulting in the mass killings of members of the protected group, committed in different places spread over a broad geographical area might not qualify as genocide (despite the high total number of casualties), because it would not show the perpetrator's intent to target the very existence of the group as such.<sup>145</sup> As concluded before the ICTY, the number of victims "should be evaluated not only in absolute terms but also in relation to the overall size of the entire group."<sup>146</sup>

#### IV. CONCLUSION

Genocide is always an intentional, conscious, and deliberate crime aiming the destruction of a group of people who share some common characteristics that set them apart from other groups. This is not a crime that could be committed accidentally or unintentionally.

Looking at the activities that have to be performed under the requirement of *actus reus* – genocide seems to be similar to other core crimes of nowadays. For example, killings or causing serious harm are actions that can be recognized as the *actus reus* of some other core crimes as well, e.g. crimes against humanity. However, the object of genocide and the perpetrator's special intention are the elements that make genocide a crime of both – the specific focus and special intention.

The object of the crime is very specific: it is not an individual of no particular characteristics; it is a group of people that belongs to the one prescribed by the 1948 Genocide Convention: national, ethnic, racial, or religious. No other groups count for the establishment of genocide before the court. It has to be established that the victims share the same group identity. It is about who they are in the meaning of belonging to the particular group.

What is further required, as the constituted element of the crime, is the perpetrator's "higher" intention, his ultimate goal for the extermination. Not only that the perpetrator has the intention to commit some of the crimes enumerated as *actus reus* of genocide against the members of the protected group, but, moreover, his intention is lifted up on a higher mental level. He performs the crime with the intention to destroy in whole or in part the group of people as such. That particular special intention makes genocide a crime

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<sup>143</sup> Brđanin Trial Judgment, para. 703; Jelisić Trial Judgment, paras. 82-83; Krstić Trial Judgment, para. 589-590; Stakić Trial Judgment, para. 523.

<sup>144</sup> Krstić Trial Judgment, para. 560. See also Tolimir Appeal Judgment, para. 186.

<sup>145</sup> Krstić Trial Judgment, para. 590.

<sup>146</sup> Krstić Appeal Judgment, para. 12. One may say that this situation occurred before the ICJ in 2015. The Court concluded that 12500 Croat deaths "alleged by Croatia is small in relation to the size of the targeted part of the group." 2015 ICJ Judgment, para. 406; 437.

that is difficult to be proven before the court. However, the case law of international criminal *ad hoc* tribunals indicates that various elements can be used to suggest or presuppose the existence of genocidal intent, such as: massacres, high number of victims, violent shows of aggressiveness, destruction, systematic use of hate-filled speeches against members of the protected group, plans, declarations, or other written statements, etc.

Without *dolus specialis*, one cannot even speak of genocide. It is its essential element that distinguished it from other core crimes. However, at the same time, this is also an element that makes genocide the “crime of all crimes.” Having the higher intention of destroying a group of people only because they belong to a particular group, and with no other motive, shows the frightening deviance of the perpetrator’s criminal mind, which is even more accentuated by challenging its determination before the court.

One could say that *dolus specialis* in particular and the challenges of its determination before the court constitute the grounds for calling the Genocide Convention a “dead letter” since the most horrifying crimes may easily be left unpunished under the name of genocide, despite the intimidating scale of destruction and the significant number of victims. On the other hand, one could conclude that the “lower” type of intent may easily lead to a situation that the destruction of a group with no particular perpetrator’s intention to do so, is characterized as genocide. Some would say that there is no legal requirement for lowering the threshold of special intent because genocide is not the only crime, nor is the perpetrator going to be prosecuted or punished for the crimes he has committed. He will be punished if his responsibility is proven, but the crimes he has committed will simply be recognized under some other name. Having in mind similarities between genocide and crimes against humanity, one could conclude that – in the absence of *dolus specialis* and determination of group membership of victims, which are elements requested for genocide – the perpetrator would be prosecuted and punished for crimes against humanity.