Rwanda Crisis and Genocide in Case
Law of Rwanda Tribunal

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### Abbreviations

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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>CDR</td>
<td>Coalition pour la Défense de la République</td>
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<td>ECOSOC</td>
<td>Economic and Social Council of the United Nations</td>
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<td>FAR</td>
<td>Forces Armées Rwandais</td>
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<td>GP</td>
<td>Garde Présidentielle</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>MRND(D)</td>
<td>Mouvement Révolutionnaire National pour le Développement (et la Démocratie)</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>PL</td>
<td>Parti Libéral</td>
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<td>PSD</td>
<td>Parti Social Démocrate</td>
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<td>RPF</td>
<td>Rwandese Patriotic Front</td>
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<td>RTLMC</td>
<td>Radio Télévision Libre des Mille Collines</td>
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<td>UNAMIR</td>
<td>United Nations Assistance Mission to Rwanda</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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1 Introduction

1.1 Rwanda Crisis

Rwanda is a small, hilly country in the Great Lakes region of Central Africa. Before the events of 1994, it was the most densely populated country of the African continent. Rwanda was and still is one of the poorest countries in the world. The majority of the population lives on agriculture. The population was traditionally divided into the groups of Hutu, Tutsi and Twa. The Hutu and the Tutsi make up the overwhelming majority.

The roots of the conflict between the Hutu and the Tutsi stretch back to colonial times, when the separation of the groups was cemented. The Tutsis were favoured by the colonisers, as they were considered more suitable to govern the country. The Tutsi dominance, however, changed, when Rwanda gained independence and the Hutus took power.

The tension between the major groups culminated in the deadly campaign of the ruling Hutu government. In 1994 approximately 800,000 people perished within 100 days. Even unborn children were not spared. The aim was to eradicate the Tutsi population of Rwanda, so that future generations would not know “what a Tutsi looked like”.

The international community failed to halt the genocide in Rwanda. It stood by idle, despite alarming reports pouring into the United Nations headquarters in New York and into the capitals of its member States. The governments of various States avoided calling the genocide by its real name. The genocide was not stopped; the international community failed to follow the infamous phrase “never again”, sworn after the Second World War.

Chapter 2 of the study examines the genocide in Rwanda as an historical incident. It elaborates on the main stages, parties to, and scale of the conflict. Furthermore, it looks into the role of the media in the genocide. The steps towards the establishment of the Rwanda Tribunal are also discussed briefly. The explanation of the main facts of the conflict enables the reader to understand the case law better, and, in addition, serves the purpose of memorialising the tragedy.
1.2 The ICTR Case Law

The United Nations established the International Criminal Tribunal for Rwanda (the ICTR or the Tribunal) to bring to justice persons responsible for the genocide, following the blueprint of its sister ad hoc tribunal for former Yugoslavia (the ICTY). The ICTR was empowered to prosecute persons committing genocide as defined in its Statute. This definition uses exactly the same wording as the Genocide Convention of 1948. The Security Council dusted the decades-old provision on genocide, which had remained more or less dead letter since its adoption, and blew life into it.

The Genocide Convention was adopted as a response to the horrors of the Holocaust in the aftermath of the Second World War. The definition in the Convention is on the one hand a description of the evil, which humanity is capable of, and on the other hand a criminalisation of genocide. The definition is rather sparse and the elements of the crime are not specified further in the Convention. Therefore, the provision has been under academic debate since its adoption and needed an authoritative interpretation by an international judicial institution. The ICTR was the first international judicial body to have the opportunity to interpret the definition. In 1998 it rendered its first judgement and a conviction of genocide 50 years after the adoption of the Genocide Convention.

The main interest of this study is the ICTR case law on the crime of genocide. The aim is to discover how the Tribunal interprets the definition of genocide as contained in its Statute. However, issues related to criminal participation of genocide are not dealt with.

The last part of the study starts with chapter 3 and explores the jurisdiction of the Tribunal and the law applicable to the situation. The chapter sets the overall framework for inquiry into the case law.

In chapter 4 the case law is examined in detail. The definition of genocide is divided into elements, which are contemplated separately. First, the groups protected by the provision are discussed (chapter 4.3). Second, the underlying offences (acts of genocide) are elaborated (chapter 4.4). Last, the peculiar mental element of genocide is examined in the light of the ICTR case law.
2 Rwanda Genocide and International Reaction

2.1 Historical Remarks

Rwanda has a lengthy colonial history. It was first the colony of Germany from the end of the nineteenth century. In 1897 the Germans instituted a policy of indirect rule by enlisting Tutsi chiefs to serve as their puppets and feudal lords to the Hutus. After the Germany’s defeat in the First World War the Belgians took control of Rwanda. In 1933 the new rulers introduced identity cards, which labelled every Rwandan as a Hutu, Tutsi, or Twa. The introduction of this identity card that classified the people into one of the three ethnic groups enabled the Belgians to administer an apartheid system in Rwanda, based on the precept of Tutsi superiority. Tribal membership became increasingly rigid as a result of this formal classification system.\(^1\) It may be said that the colonial powers planted the idea of racial supremacy in the minds of the Rwandan people. However, this factor alone is not enough to explain why the genocide unfolded. There were many factors that together made it possible for genocide to take place.\(^2\)

In 1959 Rwanda became independent from Belgium and the Hutus seized power from the Tutsis. Following next years over 100,000 Tutsis fled to neighbouring countries to escape the waves of mass killings. The exiled Tutsis established the Tutsi army, known as the Rwandan Patriotic Front (RPF). The troops of the RPF invaded Rwanda from their bases located in Uganda and repeatedly tried to overthrow the Rwandan government. They demanded an end to Hutu tyranny and Tutsi exclusion. These attacks provoked revenge attacks targeted on the Tutsis remaining in Rwanda.\(^3\)

The RPF was able to gain ground in the northeast part of the country. In 1992 the Rwandan government and the RPF began negotiating a series of agreements in Arusha, Tanzania. The

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\(^3\) Morris & Scharft, *supra* note 1, p. 50.
negotiations culminated in the signing of a comprehensive accord (Arusha Accord) in 1993. The Accord agreed on the integration of the armed forces, called for the ratification of international human rights conventions, and for the deletion of references to ethnicity in official documents. To monitor and implement the Accord the Security Council adopted Resolution 872 on 5 October 1993 establishing the United Nations Assistance Mission for Rwanda (UNAMIR). However, the Arusha Accord was not implemented due to a series of delays reportedly caused by President Habyarimana. This led to the deterioration of relations between the government and the RPF.

2.2 The 1994 Genocide in Rwanda

2.2.1 The Downing of the Aeroplane Carrying the Rwandan President

On 6 April 1994 the downing of the plane carrying President Juvénal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi led to a rapid escalation of violence. The plane was shot down by a surface-to-air missile killing everybody on board.

The Hutu extremists instantly accused the RPF of assassinating President Habyarimana. However, most probably the President was killed by members of his own inner circle ("akazu"), who had decided to gamble on their all-or-nothing assassination scheme. The Hutu extremists took this desperate act, because they began to fear that Habyarimana was finally going to comply with the Arusha Accord.

After the crash the Rwandan Presidential Guard immediately sealed off the area around Kigali Airport from which the missile had been fired, preventing the United Nations peacekeeping troops from investigating the cause of the plane crash.

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7 Morris & Scharft, supra note 1, p. 51.
8 Ibid., p. 53.
9 Prunier, supra note 2, p. 221.
10 Morris & Scharft, supra note 1, p. 53-54.
The killing of President Habyarimana on 6 April 1994 was the culmination of the long enmity between the Hutus and the Tutsis. It was the trigger for the genocide in Rwanda. The extremists made the fullest use of the crash in their propaganda to make the people believe that the extermination of the Tutsis was a solution to the problems that plagued the country.

The roadblocks on the streets of Kigali were erected very rapidly after President Habyarimana’s aeroplane was brought down at the Kigali airport. The plane was shot down at around 8.30 p.m.; by 9.15 p.m. there were already roadblocks throughout the city and houses were being searched.\textsuperscript{11} People’s identity cards were inspected and those who had a Tutsi identity card or Tutsi physical traits were summarily executed. In a few hours the streets of Kigali began to fill with corpses.\textsuperscript{12}

### 2.2.2 First Victims

The first victims were carefully selected. They were predominantly moderate Hutus. On 7 April 1994 members of the Presidential Guard went to the homes of the moderate opposition members and murdered them and their families. One of the first victims was Prime Minister Agathe Uwilingiyimana, who was attacked in her house by an angry crowd. She was supposed to be protected by ten Belgian UNAMIR soldiers, whom the Presidential Guard officers demanded lay down their weapons. They obeyed and were taken to a military camp and killed, whilst the Prime Minister was assassinated in her house. Her five children escaped death through the courage of their neighbours.\textsuperscript{13}

Among the first victims were also the President of the Constitutional Court, Joseph Kavaruganda; numerous priests at the Christus Centre; businessman and civil rights activist Charles Shamukiga; the leader of the democratic faction of the PL\textsuperscript{14}, Landwald Ndasingwa with his Canadian wife and two children; the leader of the PSD\textsuperscript{15}, Minister of Agriculture Frédéric Nzamurambaho, along with his assistant Théoneste Gafaranga and several other party members; journalist André Kamweya; former Foreign Minister Boniface Ngulinzira; and Information Minister Faustin Rocogoza. Furthermore, Prime Minister-designate Faustin

\textsuperscript{11} Prunier, \textit{supra} note 2, p. 223, Interview by Prunier with Carlos Rodriguez, UNHCR delegate in Kigali on 15 May 1994.

\textsuperscript{12} Morris & Scharft, \textit{supra} note 1, p. 54.

\textsuperscript{13} Prunier, \textit{supra} note 2, p. 230.

\textsuperscript{14} Parti Libéral, the third largest opposition party.

\textsuperscript{15} Parti Social Démocrate, the second largest opposition party.
Twagiramungu was to be killed, but the killers had the address slightly wrong - while they were searching he had time to escape.\textsuperscript{16}

Although the attacks were clearly focused on liberal politicians and other democrats, the victims in the beginning of the conflict were not only well known people. The death lists prepared were long, detailed and open to extension. Tutsis were killed simply because they were Tutsis; they were considered to be accomplices of the RPF. Also Hutus who were either members or simply sympathisers of democratic opposition parties were also killed. They were considered no better than Tutsis, because of their opposition to “the democratic majority”. People were also killed because of their high social status. Some well-dressed people, or people who spoke good French, or people that owned a car and were not known to the MRND(D)\textsuperscript{17} supporters were killed simply because these marks of social distinction made them natural suspects for holding liberal opinions.\textsuperscript{18}

\subsection*{2.2.3 Hate speeches on the Radio Télévision Libre des Mille Collines}

In the course of the conflict the radio was efficiently used by the Hutu extremists to excite the population and prepare and organise them for the killings. The masses were told to revenge the death of President Habyarimana on the Tutsis and kill the accomplices of the RPF. Hate speech against the Tutsis was the dominant state of affairs in Rwanda. People could do it without any threat of responsibility.

Radio Rwanda remained neutral and confined itself to information bulletins, but the Radio Télévision Libre des Mille Collines (RTLMC) started to broadcast direct incitements to murder Tutsis, “to avenge the death of our President”. Within the next few hours after the crash the calls turned into hysterical appeals for ever-greater quantities of blood. The RTLMC broadcasted such items as “You have missed some of the enemies in this or that place. Some are still alive. You must go back there and finish them off.” or “The graves are not yet quite full. Who is going to do the good work and help us fill them completely?”\textsuperscript{19}

\begin{flushleft}
\textsuperscript{16} Prunier, \textit{supra} note 2, pp. 230-231.
\textsuperscript{17} Mouvement Révolutionnaire National pour le Développement (et la Démocratie), Habyarimana’s single party, its leader were among the main organisers of the genocide.
\textsuperscript{18} Prunier, \textit{supra} note 2, p. 231.
\textsuperscript{19} \textit{Ibid.}, p. 224.
\end{flushleft}
The role of the RTLMC was of great importance in the course of events. Without its broadcasting of hate speech the killings would not have taken place so forcefully. It persuaded people to kill their neighbours, with whom they had lived in peace, destroy their houses and steal their cattle. Together with the orders and incitement from the leaders, it turned ordinary people into cold-blooded killers, making them “collectively guilty of genocide”.

2.2.4 Parties to the Conflict

2.2.4.1 Three Categories of Individuals Responsible for the Genocide

The responsibility for the 1994 genocide in Rwanda is shared in varying degrees by three categories of individuals: 1) the planners, 2) the “military” superiors and subordinates, and 3) the unwilling accomplices. In the first category there are the high-level government officials and other influential individuals, who planned the genocidal policies and ordered or otherwise instigated the implementation of these polices. This group includes government politicians in President Habyarimana’s MRND(D) party and the CDR\(^{20}\), as well as government administrators at different levels.\(^{21}\)

The second category of responsible individuals consists of those who supervised and executed the actual killings. Members of the militia, the FAR\(^{22}\) and the Presidential Guard belong to this group. Furthermore, the extent of the genocide would not have been possible without the cooperation of local officials who helped in distributing weapons to the population, allowed the curfew to be ignored by the killers, and rallied meetings in which they encouraged the Hutus to kill the Tutsis and to destroy their homes.\(^{23}\)

The third category of responsible individuals encompasses those who were forced to kill by an individual from one or other of the two categories. It has been estimated that nearly half of the Hutu population of Rwanda participated in the genocide.\(^{24}\)

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\(^{20}\) Coalition pour la Défense de la République, extremist party, one of the organisers of the genocide.

\(^{21}\) Morris & Scharft, supra note 1, p. 55.

\(^{22}\) Forces Armées Rwandais (Rwandan Armed Forces).

\(^{23}\) Morris & Scharft, supra note 1, p.57.

\(^{24}\) Ibid., p. 58.
2.2.4.2 Victims

The great majority of victims of the conflict were people that belonged to the Tutsi social group. All Tutsis were under threat of being slaughtered. No women, old people, children nor even babies were spared. The hunting was called “bush clearing”, because of its absolute thoroughness.\(^{25}\)

The pattern of killing in the countryside differed from that of the towns, and even more in the capital Kigali. In the countryside where people knew each other well, identifying the Tutsi was easy and they therefore had absolutely no chance of escaping. The Hutu and the Tutsi lived side by side in similar huts and, because of the demographic ratio, each Tutsi household was usually surrounded by several Hutu families, making concealment almost impossible.\(^{26}\)

In towns and cities the situation was different, since people did not know each other. That made the identification of the Tutsis harder. For that purpose roadblocks were erected where people were asked for their identity cards. To be identified on one’s card as a Tutsi or to pretend to have lost one’s papers meant unavoidable death. Even though a person carried a Hutu card, he could be killed if he was suspected of being a supporter of the opposition parties or was accused of having a false identification card due to having a Tutsi-like appearance.\(^{27}\)

2.2.4.3 Bystanders to the Conflict

The bystanders to the conflict were mostly the churches. Apart from some courageous acts of ordinary Christians, the church hierarchies were at best useless and at worst accomplices in the genocide. The aforementioned is especially true of the Catholic Church; however Protestant Churches did not fare much better.\(^{28}\)

During the conflict Fathers Vleugels and Theunis of the White Fathers sent frequent faxes to their head office to inform their Order of the developments in Rwanda. The general tone is

\(^ {25} \) Prunier, supra note 2, p. 248-249.
\(^ {26} \) Ibid., p. 249.
\(^ {27} \) Ibid., p. 249.
\(^ {28} \) Ibid., p. 250.
very revealing. In the faxes there were precise lists of priests killed but nothing about the mass killings of their parishioners. The violence is reported to be occurring but the perpetrators are never identified. This ambiguous attitude of the Catholic Church towards the conflict can be explained by the result of many years of close association between the republic of Rwanda dominated by the Hutus and the Catholic Church. 29

2.2.5 How Many Were Killed? – The Problem of Figures

The population of Rwanda is composed of three main groups. Two of the biggest groups are Hutu and Tutsi. The smallest group is called Twa. The distinct groups share the same language and culture. Therefore anthropologists have disagreed over whether the Hutu and the Tutsi actually constitute different ethnicities. 30

It quite impossible to measure with absolute precision how many were killed in the conflict that started on 6 April and ended on 18 July 1994, i.e. from when the Hutu-dominated Rwandan Government fled the country until the RPF established a new government of national unity. The estimates of people who were slaughtered during the approximately 100 days of conflict range from half a million to one million civilians. That equates to fully seventy-five per cent of Rwanda’s entire pre-genocide Tutsi population. Throughout this period, the loss of life in Rwanda is estimated to have occurred at nearly three times the rate of the loss of Jewish lives during the Holocaust. 31

The estimates of the death toll fluctuated depending on the body giving them, but finally the figures were settled roughly between half a million and one million. In the Final Report of the Commission of Experts of 9 December 1994 32, the Commission adopted the estimate that 500,000 civilians were murdered in Rwanda. According to a later report of the Independent Inquiry 33 the estimate is put at 800,000 dead.

29 Ibid., pp. 250-251.
31 Morris & Scharft, supra note 1, p. 47.
Prunier makes an illustrative calculation to assess the losses due to the conflict. He starts the calculation from the August 1991 Rwandan census. Then he adds the yearly growth, about 3.2 per cent a year, of the population until 1994. He acknowledges that the Hutu dominated government likely underestimated the Tutsi population in order to keep its schools and employment quotas low. He takes cognizance of Tutsi population that survived the genocide in foreign refugee camps and inside Rwanda. Prunier’s calculation results in a casualty figure of 800,000 Tutsi killed in three months, to which must be added the deaths of opposition Hutus – an unknown number but approximately between ten and thirty thousand. He concludes with a total figure of between 800,000 and 850,000 casualties in the conflict. That would mean a loss about 11 per cent of the pre-genocide population, one of the highest casualty rates of any population in history from non-natural causes.  

2.3 Investigation of Human Rights Violations – First Steps towards the Tribunal

2.3.1 High Commissioner for Human Rights

On 4 May 1994, the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, called attention to the worsening human rights situation in Rwanda. He called for the convening of an emergency session of the Commission on Human Rights. The Commissioner visited Rwanda on 11 and 12 May, and in a subsequent report called for immediate action to stop the slaughter and urged the international community to condemn, in the strongest terms, the “wanton killing” which had occurred. He also called the parties to the conflict to respect all relevant human rights instruments, including the Genocide Convention of 1948, to which Rwanda was a party. He also suggested that the Commission on Human Rights appoint a Special Rapporteur for Rwanda.

The Commission on Human Rights subsequently convened the third special session in its history in Geneva on 24 and 25 May 1994. The Commission condemned all breaches of

34 Prunier, supra note 2, p. 265.
international law and all violations and abuses of human rights in Rwanda. It endorsed the High Commissioner’s recommendations concerning the appointment of a Special Rapporteur assisted by a team of human rights officers.

2.3.2 Special Rapporteur for Rwanda

The Special Rapporteur of the Commission on Human Rights René Degni Segui travelled to Rwanda and neighbouring States between 9 and 20 June and again between 29 and 31 June. He described the killings as having been “planned, systematic and atrocious”, concluding that a campaign of incitement to ethnic hatred and violence had been orchestrated by the public authorities and the media belonging to the former government.

The Special Rapporteur determined that the vast majority of the massacres had been carried out in areas held by the former government. Most of these massacres were conducted by militia aligned to MRND, the *interahamwe*, or “those who attack together”; and militia affiliated with CDR, *impuzamugambi*, or “those who have a single aim”. In the media Tutsis were referred to as the main enemy, the *inyenzi*, or “cockroach”, which had to be “crushed”.

Following his visits to the area, the Special Rapporteur determined that the conditions specified by the Genocide Convention of 1948 had been found to exist and that the term “genocide” was applicable to the killings of Tutsis. He called upon the United Nations to establish an international tribunal to hear the evidence and bring the guilty parties to trial.

2.3.3 Commission of Experts

The international community had difficulty labelling what was happening in Rwanda correctly. Especially, the members of the Security Council avoided using the term “genocide” in its resolutions, perhaps fearing the consequences it would bring, i.e., responsibility to prevent genocide in accordance with article VIII of the Genocide Convention. Finally, the Security Council requested the Secretary-General to establish, as a matter of urgency, an

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impartial Commission of Experts in Resolution 935 of 1 July 1994. The Commission was mandated to review the evidence of grave violations of international law committed in Rwanda, including possible acts of genocide.

The Commission of Experts visited Rwanda and neighbouring countries between 29 August and 17 September 1994. The Commission then prepared a preliminary report of its findings. It met with Government officials, interviewed refugees in Goma and Dar es Salaam. The Commission was aided in its work by the information provided first of all by the Special Rapporteur and secondly by the Office of the United Nations High Commissioner for Refugees. The Special Rapporteur produced a list containing 55 persons he considered chiefly responsible for the massacres. They were individuals against whom there was sufficient evidence regarding massive human rights violations. Also the Organization of African Unity, non-governmental organisations and private individuals transmitted information containing evidence relating to systematic killings and persecution.

In its final report of the Commission of Experts concluded that individuals from both sides of the armed conflict had perpetrated serious breaches of international humanitarian law and crimes against humanity. It concurred with the Special Rapporteur that there existed “overwhelming evidence” indicating that the extermination of Tutsis by Hutu elements had been planned months in advance of its actual execution. It had been carried out “in a concerted, planned, systematic and methodical way” and had been motivated by ethnic hatred. Furthermore, the Commission agreed with the Special Rapporteur that these mass exterminations were clearly in violation of the Genocide Convention.

The Commission strongly urged the Security Council to ensure that the individuals responsible for human rights violations were brought to justice before an independent international criminal tribunal. The Commission recommended that the Security Council amend the Statute of the International Criminal Tribunal for the Former Yugoslavia to extend its jurisdiction over crimes under international law to those committed during the armed conflict in Rwanda, which had begun on 6 April 1994.

3 Jurisdiction of the Tribunal and Applicable Law

3.1 Resolution 955 of 1994

The Security Council went ahead with its preparations for establishing an international institution to investigate and prosecute individuals responsible for grave violations of international humanitarian law and acts of genocide. It did not, however, fully follow the recommendations made by the Commission of Experts. The Commission had recommended that the jurisdiction of the International Criminal Tribunal for the former Yugoslavia should be expanded to cover international crimes committed in Rwanda rather than to create a separate ad hoc international criminal tribunal.

On 8 November 1994 the Security Council adopted the Resolution 955 establishing the International Criminal Tribunal for Rwanda.41 The Resolution was adopted under chapter VII of the Charter of the United Nations and it is binding on all member states of the United Nations pursuant to article 25 of the Charter.

The Statute of the Rwanda Tribunal (the ICTR Statute)42 is annexed to the Resolution 955. When the Statute of the Rwanda Tribunal was under preparation, the Statute of the International Criminal Tribunal for the former Yugoslavia (the ICTY Statute)43 provided an

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43 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to
acceptable blueprint. Therefore, the foregoing statutes are alike in many respects: articles on genocide are, nevertheless, identical. The Tribunals share a common Appeals Chamber to guarantee uniform application of law. They also had a common Prosecutor until the ICTR Statute was amended in that respect. The Security Council appointed Mr. Hassan Bubacar Jallow of The Gambia as the prosecutor of the Rwanda Tribunal, succeeding Mrs. Carla Del Ponte of Switzerland. The amendment took effect on 15 September 2003.

3.1.1 Jurisdiction of the Tribunal

3.1.1.1 Limited Jurisdiction

The competence of the Rwanda Tribunal is limited in many respects. In general it is restricted to the historical events that took place in Rwanda in 1994. It also has limited competence in the purpose for which it was established. The Tribunal was established by the Security Council “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”. Article 1 of the ICTR Statute confers upon the Tribunal the power to prosecute persons responsible for such crimes in accordance with the provisions of the Statute. It defines the jurisdiction in general terms in accordance with this limited purpose and further indicates that this jurisdiction must be exercised in accordance with its constituent instrument.

The jurisdiction is further elaborated in later provisions of the ICTR Statute. Here are mentioned only a few aspects of the jurisdiction. The emphasis is put on the subject matter jurisdiction of the Tribunal, especially the crime of genocide that is discussed in the following chapter.

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*Article 2 in the Statute of the Rwanda Tribunal and article 4 in the Statute of the Yugoslavia Tribunal.*

*Article 13(4) of the Statute of the Rwanda Tribunal.*


*Resolution 955, para. 1.*
The Tribunal has personal jurisdiction over natural persons only.\textsuperscript{49} This jurisdiction does not extend to legal or juridical persons. That means that corporations, organisations with necessary legal personality and states may not be prosecuted in front of the Tribunal.

The territorial jurisdiction of the Tribunal is limited to the territory of Rwanda as well as to the territory of neighbouring states. However, only Rwandan citizens can be prosecuted for serious violations of international humanitarian law committed in neighbouring states. The temporal jurisdiction, on the other hand, only covers the period beginning on 1 January 1994 and ending 31 December 1994.\textsuperscript{50} From this follows that crimes committed before or after that period cannot be prosecuted in the Tribunal.

The Tribunal has concurrent jurisdiction with national courts to prosecute persons for serious violations of international humanitarian law. This is to do with the peculiar characteristics of crimes under international law. In principle, all states have competence to prosecute and punish the perpetrators of such crimes. The Tribunal has, however, primacy over national courts and therefore may at any stage of the procedure formally request a national court to defer to its competence.\textsuperscript{51}

\subsection{3.1.1.2 Subject Matter Jurisdiction}

The subject matter jurisdiction of the Rwanda Tribunal covers offences that are stated in articles 2, 3 and 4 of the ICTR Statute. It has jurisdiction \textit{ratione materiae} over genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions and of Additional Protocol II to the preceding Convention. In this study the crimes against humanity and violations of article 3 common to the Geneva Convention and of Additional Protocol II are not discussed further.

\textsuperscript{49} Article 7 of the ICTR Statute.
\textsuperscript{50} Article 7 of the ICTR Statute.
\textsuperscript{51} Article 8 of the ICTR Statute.
Article 2 of the Statute of the Rwanda Tribunal is as follows:

**Article 2: Genocide**

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
   
   (a) Killing members of the group;
   
   (b) Causing serious bodily or mental harm to members of the group;
   
   (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   
   (d) Imposing measures intended to prevent births within the group;
   
   (e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

   (a) Genocide;
   
   (b) Conspiracy to commit genocide;
   
   (c) Direct and public incitement to commit genocide;
   
   (d) Attempt to commit genocide;
   
   (e) Complicity in genocide.

In the Statute genocide is the first category of crimes over which the Rwanda Tribunal has subject matter jurisdiction. The provision is based on relevant articles of the Genocide Convention of 1948\(^\text{52}\) and is identical to the formulation in the ICTY Statute.

Article 2(1) of the ICTR Statute empowers the Tribunal to prosecute persons responsible for the crime of genocide. Article 2(2) of the Statute is the most important part of the provision on genocide, because it contains the material description of genocide. It enumerates groups that are protected by the article and lists the acts by which genocide can be committed. Further, it sets a requirement that acts must be committed with the intent to destroy a group.

3.2 International Criminal Law

International criminal law is a branch of public international law and therefore the rules making up this body originate from sources of international law. It is, however, relatively new branch of law compared to traditional public international law.

One of the characteristics of international criminal law is that it simultaneously derives its origin, additionally, from human rights law and from national criminal law, more than any other segment of international law. It is an essentially hybrid branch of law. It can be described as being public international law impregnated with notions, principles, and legal constructs derived from national criminal and human rights law. However, the recent establishment of international criminal tribunals, and in particular of the International Criminal Court (the ICC), has given impulse to the evolution of a corpus of international criminal rules proper. This development seems to have opened the path to formation of a fully-fledged body of law in this area.53

The most authoritative provision on the sources of international law can be found in article 38 of the Statute of the International Court of Justice. It stipulates that primary sources are treaties and international customary law, as well as, general principles of law. The subsidiary sources are judicial decisions and the teachings of the most highly qualified publicists.

The sources may be utilised in the order described in the following. One should first of all look for treaty rules or for rules laid down in such international instruments as binding resolutions of the Security Council of the United Nations, when these treaty rules or resolutions contain provisions conferring jurisdiction on the court or tribunal and setting out the procedure. Where such rules are lacking or contain gaps, one should resort to customary law or to treaties implicitly or explicitly referred to in the aforementioned rules. When even this set of general or treaty rules is of no avail, one should apply general principles of international criminal law or, as a fallback, general principles of law. If one still does not find the applicable rule, one may finally have to resort to general principles of criminal law

common to the nations of the world. Nowadays the order described above is by and large codified in article 21 of the Statute of the International Criminal Court.\(^{54}\)

The ICTR Statute lacks a general article on applicable law. As an international judicial body the Rwanda Tribunal must apply in the first instance, international law: its Statute and the Genocide Convention. In the second, it may resort to other sources of law, if international instruments are of no avail when discussing a specific issue. For interpreting the ICTR Statute one may rely upon the rules of interpretation laid down in the Vienna Convention on the Law of Treaties.\(^ {55}\) Indeed, in many respects the resolution and the annexed Statute may be equated with international treaties. However, one must also stay mindful of the general principles of criminal law, such as, the principle of legality of crimes (\textit{nullum crimen sine lege}), and the principle of legality of penalties (\textit{nulla poena sine lege}).

### 3.3 Genocide in International Law

#### 3.3.1 Concept of Genocide

The concept of the crime of genocide is relatively new and developed primarily in the aftermath of the Nazi atrocities committed during the Second World War. It was first envisaged merely as a sub-category of crimes against humanity during the Nuremberg Trials.\(^ {56}\) Neither article 6(c) of the Charter of the International Military Tribunal (IMT) nor article II(1)(c) of Control Council Law no. 10 explicitly envisaged genocide as a separate category of these crimes. However, the wording of the relevant provisions clearly shows that those crimes encompassed genocide.\(^ {57}\)


\(^{56}\) The article 6(c) of the Charter of International Military Tribunal stipulates: “CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.”, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), signed 8 August 1945, (1951) 82 UNTS 279. Original signatories: the United States of America, France, the United Kingdom of Great Britain and Northern Ireland and the Soviet Union.

\(^{57}\) Cassese, \textit{supra} note 53, p. 96.
The term of genocide has its origins in the work of Polish attorney and scholar Raphael Lemkin. He was a primary proponent of an international convention on the subject. In his 1944 study survey into Nazi occupation policies, Axis Rule in Occupied Europe\(^\text{58}\), he proposed that the term genocide should be employed to describe “the destruction of a nation or of an ethnic group”. The neologism of genocide combined the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus paralleling such words as tyrannicide, homicide and infanticide.

Genocide acquired autonomous significance as a specific crime in 1948, when the General Assembly of the United Nations adopted the Genocide Convention. Nowadays 133 states are parties to the Convention.\(^\text{59}\)

### 3.3.2 Definition of Genocide

The definition of genocide contained in article 2 of the ICTR Statute\(^\text{60}\) is based on articles II and III of the Genocide Convention of 1948. In the *Reservations to the Genocide Convention case*\(^\text{61}\), the International Court of Justice stated that: “The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation.” The Court thus recognised the definition as customary international law. This position was recalled by the United Nation’s Secretary-General in his Report on the establishment of the International Criminal Tribunal for the Former Yugoslavia.\(^\text{62}\)

The crime of genocide is comprised of three main elements: 1) the commission of at least one of the acts listed in Article 2(2) (a) through (e); 2) the act must be directed against one of the enumerated types of groups; and 3) the act must be carried out with the intent to destroy the group, in whole or in part.\(^\text{63}\) The first element is the objective element or *actus reus* of the

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\(^{60}\) See the citation of article 2 above.


crime. The second and the third element are part the subjective element or mens rea of the crime. In this study the protected groups are examined separately in chapter 4.3 below, for analytical reasons.

4 The Crime of Genocide in the Case Law of the Tribunal

4.1 Introduction

The trials before the Rwanda Tribunal are composed of pre-trial proceedings, trial proceedings and post-trial proceedings. Virtually all cases go through all the phases mentioned, and therefore the processes take several years to be concluded. Before a trial begins the Office of the Prosecutor performs the investigation of an alleged crime and prepares an indictment to be reviewed and confirmed by a Judge of the Trial Chamber. The presence of an accused is secured by an order to arrest and transfer of the accused, which the States are obliged to obey.

The pre-trial proceedings include, e.g., the initial appearance of an accused and appointment or assignment of defence counsel. The Trial Chamber may issue such pre-trial orders as may be required for the conduct of a trial. Both parties may file various motions requesting any ruling or other relief that may be appropriate before the actual commencement of a trial or file restrictedly interlocutory appeals with the Chamber.

The trial proceedings are public trials where the case is presented, evidence produced and witness testimonies given. A third party may participate as amicus curiae by submitting its views in writing or by appearing before the Trial Chamber. A State, an organisation or an individual may participate upon request or by invitation if the Trial Chamber considers that this would to a proper determination of the case.

At the post-trial stage the Trial Chamber judgements can be appealed to or reviewed by the Appeals Chamber in accordance with articles 24 and 25 respectively. Article 24 requires that an appeal must pertain to an error of law which invalidates the decision or an error of fact which has occasioned a miscarriage of justice. Article 25, on the other hand, stipulates that a new fact must have been discovered which was not known at the time of proceedings before
the Trial Chamber or the Appeals Chamber, and which could have been a decisive factor in reaching the decision.\textsuperscript{64}

Thus far the trials of 26 accused persons have been completed since the establishment of the Rwanda Tribunal in 1994.\textsuperscript{65} All the indictments have contained charges of genocide, or of other modalities of genocide, e.g., complicity in genocide. In the trials the Tribunal has found 23 of those accused guilty and acquitted three persons; the indictment was withdrawn in two cases. Altogether the Tribunal has rendered 20 trial judgements.

The Appeals Chamber has handed down 12 judgements concerning 14 accused persons. It has affirmed the verdicts and sentences with minor changes. In addition, it has entered two war crimes convictions for the first time in the history of the Rwanda Tribunal.\textsuperscript{66} Only two convictions have not been appealed against.\textsuperscript{67} Furthermore, today there are eight appeals pending before the Appeals Chamber, 28 detainees on trial and 15 awaiting trial before the Tribunal.

In this study thorough attention is paid to the cases in which the Appeals Chamber has delivered its final judgement. However, some remarks are made to other cases of the Rwanda Tribunal as well and to cases before the Yugoslavia Tribunal and other relevant bodies, when appropriate.

In the next chapter, before entering the case law, the leading case on genocide of the ICTR is presented. This case provides an example of the process in the Tribunal and is elaborated due to its significance as the first international judgement on genocide after the adoption of the Genocide Convention.

\textsuperscript{64} For more information on the proceedings see Morris & Scharft, \textit{supra} note 1, chapters XI, XII and XIII.  
\textsuperscript{65} The information on the trials and judgements is mainly obtained from the ICTR web site at \url{http://www.ictr.org/}, last visited 5 April 2006.  
\textsuperscript{66} Prosecutor v. Rutaganda, Appeals Chamber Judgement, Case No. ICTR-96-3, 26 May 2003.  
\textsuperscript{67} Prosecutor v. Ruggiu, Trial Judgement and Sentence, Case No. ICTR-97-32-I, 1 June 2000, a Belgian national got a sentence of 12 years in prison and Prosecutor v. Rutaganira, Trial Judgement and Sentence, Case No. ICTR-951C-I, 14 March 2005.
4.2 Akayesu Trial

On 2 September 1998 the Rwanda Tribunal delivered its first judgement dealing with the crime of genocide in the case *Prosecutor v. Akayesu*.68 The ICTR was the first international court to endeavour to interpret the definition of genocide and finding an individual responsible for acts of genocide. The judgement was rendered exactly fifty years after the adoption of the Genocide Convention. This leading judgement’s “primordial achievement”69 is its conclusion that genocide, as defined in Article 2 of the ICTR Statute and Articles II and III of the Genocide Convention, in fact occurred during the months of April, May, and June 1994. The Trial Chamber I composed of Laïty Kama, presiding, and Judges Lennart Aspegren and Navanethem Pillay rendered the lengthy decision70 that exhaustively analyses the facts in the case, and presents a discussion of many of the legal issues, including the definition of genocide, the nature of command responsibility and the threshold for non-international armed conflict.

The accused Jean-Paul Akayesu, born in 1953, served as the “bourgmestre” (mayor) of Taba commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, he was a teacher and school inspector in Taba.71 He was arrested in Zambia on 10 October 1995. On 22 November 1995, the Prosecutor requested the Zambian authorities keep him in detention for a period of 90 days, while awaiting the completion of the investigation.72

The Prosecutor Richard Goldstone submitted the initial indictment on 13 February 1996, which was amended on 17 June 1997 during the trial with leave from the Chamber. The Amended Indictment contains a total of 15 counts covering genocide, crimes against humanity and violations of article 3 Common to the 1949 Geneva Conventions and Additional Protocol II of 1977 thereto. More specifically on counts of genocide, Akayesu was

70 The Judgement has 744 paragraphs and almost 100,000 words.
71 *Prosecutor v. Akayesu*, Amended Indictment, Case No. ICTR-96-4-I, para. 3.
72 Akayesu Judgement, para. 9.
individually charged with genocide, complicity in genocide and direct and public incitement to commit genocide.\textsuperscript{73}

The Indictment was confirmed and an arrest warrant was issued by Judge William H. Sekule on 16 February 1996. Akayesu was transferred from Zambia to the Detention Facilities of the Tribunal in Arusha, Tanzania, on 25 May 1996. The initial appearance of the accused before the Court took place on 30 May 1996, where he pleaded not guilty to all the counts against him.\textsuperscript{74} The trial on the merits opened on 9 January 1997.\textsuperscript{75} In the course of the trial the prosecutor called 28 witnesses and the defence 13 witnesses to the stand, including the accused. A total of 155 exhibits were submitted to the Tribunal.\textsuperscript{76} On 26 March 1998 the case was adjourned for deliberation on the judgement after 60 days of hearings.\textsuperscript{77}

The Trial Chamber I unanimously found Akayesu guilty of, \textit{inter alia}, genocide and direct and public incitement to commit genocide, but not guilty of complicity in genocide\textsuperscript{78} and sentenced him a month later in a separate decision to life imprisonment.\textsuperscript{79} The Chamber found that Akayesu, from 18 April 1994 onwards, had participated actively and enthusiastically in the massacres, tolerating, ordering, and, in some cases, personally engaging in killings, beatings and rapes.

Both the prosecutor and the defence appealed the verdict to the Appeals Chamber. The Appeals Chamber unanimously dismissed each of the grounds of appeal raised by Akayesu and affirmed the verdict of guilty and the sentence of life imprisonment on 1 June 2001. The grounds of appeal raised by the Prosecution addressed alleged errors of law by the Trial Chamber, which fell outside the scope of article 24 of the ICTR Statute. The Prosecution acknowledged that its grounds of appeal would have no bearing on the Trial Chamber's judgement, but argued that they were nonetheless "important matters of general significance to the Tribunal's jurisprudence."\textsuperscript{80} The Appeals Chamber agreed with the Prosecutor and

\begin{footnotes}
\item[73] \textit{Ibid.}, para. 10.
\item[74] \textit{Ibid.}, paras. 11 and 12.
\item[75] \textit{Ibid.}, para. 17.
\item[76] \textit{Ibid.}, para. 24.
\item[77] \textit{Ibid.}, para. 28.
\item[78] \textit{Ibid.}, chapter 8, Verdict.
\item[79] Prosecutor v. Akayesu, Sentence, Case No. ICTR-96-4-T, 2 October 1998.
\item[80] Prosecutor v. Akayesu, Appeals Chamber Judgement, Case No. ICTR-96-4-A, 1 June 2001, para. 14.
\end{footnotes}
continued ruling on the grounds raised by the Prosecutor, however, with Judge Nieto-Navia dissenting.  

This first case was a massive task and challenge for the Tribunal facing many serious operational deficiencies in the management of the Tribunal. According to the Report of the Office of Internal Oversight Services, in the Tribunal's Registry not a single administrative area functioned effectively, the Office of the Prosecutor in Kigali had administrative, leadership and operational problems and the relationship between the Registry and the Office of the Prosecutor was often characterised by tension rather than cooperation. Nonetheless, despite being still in the phase of formation when the initial appearance of Akayesu took place in May 1996, the Trial Chamber managed to steer the case to a conclusion that took more than two and half years to be made.

### 4.3 Protected Groups

The protected groups enumerated in article 2 of the ICTR Statute, based on article II of the Genocide Convention, are national, ethnical, racial or religious groups. This part of the formulation of the definition of genocide has been one of the most controversial besides the intent requirement for genocide. It has been described as far too restrictive to allow the Convention to function appropriately, for example by excluding political, linguistic, ideological, and economic groups from protection. For several decades the Genocide Convention was the only international legal instrument enjoying widespread ratification that imposed meaningful obligations upon states in cases of mass atrocities. People in despair turned to the Convention in the hopes for relief. This situation made many academics and human rights activists to call for its amendment, to make it more readily applicable and to suggest rather more expansive interpretations of its terms. The tendency was to focus on what are widely perceived as the shortcomings of the Convention.

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81 Ibid., paras. 27 and 28.
As an example that “illustrates the critical shortfall of the Genocide Convention”\textsuperscript{83} is frequently mentioned the killing in Cambodia during the Khmer Rouge era in 1975–78. Under the repressive rule it is estimated that almost a fifth of the population was executed or killed by being worked or starved to death.

Beth Van Schaack strongly argues that political groups are indeed protected by the broader \textit{jus cogens} prohibition of genocide. The Genocide Convention is not the sole authority on the crime of genocide, but rather a higher law exists. The scholar proposes that the prohibition of genocide represents the paradigmatic \textit{jus cogens} norm, a customary and peremptory norm of international law from which no derogation is permitted. This prohibition is broader than the Convention’s prohibition and the attempts of the drafters of the Convention to exclude political groups from article II of the Convention is without legal force to the extent that it is inconsistent with the \textit{jus cogens} prohibition of genocide. The scholar goes on suggesting that in the event of mass killings evidencing the intent to eradicate political groups in whole or in part, domestic and international judicatory bodies should apply the \textit{jus cogens} prohibition of genocide.\textsuperscript{84} This position has not, however, received wholehearted support from other researchers.

According to Raphael Lemkin, the developer of the term of genocide, “by genocide we mean the destruction of a nation or of an ethnic group”. He called for the development of “provisions protecting minority groups from oppression because of their nationhood, religion, or race”. Lemkin’s writings indicate he conceived of the repression of genocide within the context of the protection of what were then called “national minorities”. The terms such as “ethnic”, “racial” or “religious” were merely used to flesh out the idea, without at all changing its essential content.\textsuperscript{85}

In practice there are essentially two ways of determining who is a member of a group. First, objective criteria can be applied. Second, membership of a group can be decided on the basis of subjective identification, either by the victims themselves or by the perpetrator of the

\textsuperscript{84} Ibid., pp. 2261-2262.

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Taking an objective approach involves defining the group and then assessing whether the victims belong to it. A subjective standpoint, on the other hand, is unconcerned with whether the group really exists in an objective sense. Its analysis involves assessing the views and intentions of the perpetrator or of the group member.

In *Akayesu* the Trial Chamber I largely followed the precedents \(^{87}\) of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), which had both opted for objective criteria. The Trial Chamber’s reluctance to determine membership of a group on subjective criteria can also derive from criminal law, because mistakes of fact can often be determinative of the qualification of the crime. As a starting point it perceived that the Genocide Convention affords protection to “stable” groups, i.e., groups constituted in a permanent fashion and membership of which is determined by birth rather than to “mobile” groups, i.e., groups which one joins through individual voluntary commitment, such as political and economic groups. The Chamber stated that the four groups protected by the convention share a “common criterion,” namely, “that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.” \(^{88}\)

In *Kayishema & Ruzindana* a trial chamber sitting in a different composition \(^{89}\) adopted a more subjective approach, noting that an ethnic group could be “a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)” \(^{90}\). It concluded in legal findings that the Tutsis were an ethnic group based on the existence of government-issued official identity cards describing them as such. \(^{91}\) The ICTY has taken the same approach in *Jelisic* in its first judgement on a genocide indictment. However, the Trial Chamber also conceded that the


\(^{88}\) *Akayesu* Judgement, para. 511.

\(^{89}\) Judge William H. Sekule, presiding, Judges Yakov A. Ostrovsky and Tafazzal Hossain Khan.

\(^{90}\) Prosecutor v. Kayishema and Ruzindana, Trial Judgement, Case No. ICTR-95-1-T, 21 May 1999 (Kayishema and Ruzindana Judgement), para. 98.

intent of the drafters of the Genocide Convention was to assess groups on an objective rather than a subjective basis.\(^\text{92}\)

In \textit{Rutaganda}\(^\text{93}\) and \textit{Musema}\(^\text{94}\) the Trial Chamber I sitting in the same composition as in the \textit{Akayesu} trial seems to move away from its original, rather strict, objective approach, acknowledging that the concepts of national, ethnical, racial and religious groups have been researched extensively and, at present, there are no generally and internationally accepted precise definitions thereof. According to the Chamber the concepts must be assessed in the light of a particular political, social and cultural context. It went on to state that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction (identification by others). In some instances, the victim may perceive himself or herself as a member of said group (self identification). This seems to be quite different from the approach to defining group membership taken a few years earlier.

The objective and subjective approaches should not be seen as rivals to each other. The pure subjective approach is appealing up to a point, especially because the perpetrator’s intent is a decisive element in the crime of genocide. Its flaw is in allowing, at least in theory, genocide to be committed against a group that does not have any real objective existence. Although helpful to an extent, the subjective approach flounders, because law cannot permit the crime to be defined by the offender alone. It is necessary, therefore, to determine some objective existence of the four groups.\(^\text{95}\) In \textit{Bagilishema} the Trial Chamber I sitting in a renewed composition appears to attempt to reconcile both the objective and the subjective approach, stating that:

\begin{quote}
The Chamber notes that the concepts of national, ethnical, racial, and religious groups enjoy no generally or internationally accepted definition.\(^\text{[62]}\) Each of these concepts must be assessed in the light of a particular political, social, historical, and cultural context. Although membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension.\(^\text{[63]}\) A group may not have precisely
\end{quote}

\(^{92}\) Prosecutor v. Jelisic, Trial Judgement, Case No. IT-95-10-T, 14 December 1999 (Jelisic Judgement), paras. 69-72.

\(^{93}\) Prosecutor v. Rutaganda, Trial Judgement and Sentence, Case No. ICTR-96-3-T, 6 December 1999 (Rutaganda Judgement), paras. 55-57.


\(^{95}\) Schabas, \textit{supra} note 85, p. 110.
defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.96

The application of the four groups to the Rwandan situation was not without difficulties. Historically, it is believed that the Rwandan Tutsis are descendants of Nilotic herders, whereas the Rwandan Hutus are considered to be of Bantu origin from south and central Africa. Their economies were different, the Tutsis raising cattle while the Hutus tilled the soil. There are genomic differences, a typical Tutsi being tall and slender, with a fine, pointed nose, a typical Hutu being shorter with a flatter nose. These differences are visible in some, but not in many others. Tutsis, although commonly described as an ethnic group, do not share a language, religion or a culture distinct that of the Hutus. Both speak Kinyarwanda, a Bantu language, and there is no difference in the customary practices of the two groups. Mixed marriages are common.97

The division of the Hutu and the Tutsi was enforced by the colonial rulers. First, under German rule between 1888 and 1916, and then from 1919 onwards under Belgian rule.98 Both the German and Belgian authorities relied on an elite essentially composed of people who referred to themselves as Tutsi, a choice which according to the testimony of Dr. Alison Desforges was born of racial or even racist considerations. The colonisers thought that the Tutsi looked more like them, because of their height and colour, and were therefore more intelligent and better equipped to govern.99

Eventually, the division between the groups of Hutu, Tutsi and Twa was cemented by the Belgian authorities, which introduced a permanent distinction by dividing the population into three groups termed ethnic groups. In line with this division, it became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity. The reference to ethnic

96 Prosecutor v. Bagilishema, Trial Judgement, Case No. ICTR-95-1A-T, 7 June 2001 (Bagilishema Judgement), para. 65. Composition of the Chamber: Judge Erik Møse, Presiding, Judges Asoka de Zoysa Gunawardana and Mehmet Güney.
97 Schabas, supra note 85, p. 109.
98 WSOY Pikkujättiläinen, Werner Söderström Osakeyhtiö, 2004 (Finnish encyclopaedia on the Internet).
99 Akayesu Judgement, para. 82.
background on identity cards was maintained even after Rwanda’s independence and was finally abolished only after the genocide.100

The four terms of ‘national’, ‘ethnical’, ‘racial’ and ‘religious’ groups are analysed separately below. Especially, the leading Akayesu judgement, which first attempted to define the boundaries of the four groups, is examined. The judgement’s dictum is, however, rather short and uses simple words.

4.3.1 National Group

In international law the word ‘national’ has had two implications. It has been understood to mean ‘national’ in the sociological sense and in the political sense, or respectively the sociological ‘nation’ and ‘national’ as citizen. Both positions have been defended in the literature and in the practice of States. C.A. Macartney argues that the word national should be understood to mean “the feeling of appurtenance to a nation, [which] is fundamentally different from nationality in the sense of membership of a state”.101 The opposite opinions have been expressed by G. Gilbert, N. Lerner, and G. Pentassuglia who interpret the word to mean citizen, the position endorsed by several UN Rapporteurs who were appointed to study the question of minorities.102

The question of nationality raised an exchange of thoughts during the 1950s when the draft provisions of the Covenant on Civil and Political Rights103 were debated. The Soviet Union began rallying States behind its draft resolution obliging states to “ensure to national minorities the right to possess their national schools, libraries, museums…”.104 At that time, it was heatedly opposed to the idea of promoting the rights of persons who belonged to ethnic, linguistic or religious minorities, because “a group could be called an ethnic or linguistic group long before it had reached the stage of becoming a national minority”.105 When the

100 Ibid., para. 83.
102 Ibid.
104 Cited in Gayim, supra note 101, p. 75.
105 Ibid.
Soviet Union was asked to clarify its conception of national minority it responded by pointing out that this expression was derived from the concept of the sociological nation, i.e.:

an historically formed community of people characterized by a common language, a common territory, a common economic life and a common psychological structure manifesting itself a common culture. Consequently, a ‘national minority’ meant a group with the same characteristics.\(^{106}\)

That is to say, when the socialists used the word ‘national’ what they had in mind was not necessary ‘citizens’ . The Soviet draft was, however, rejected for various reasons and, eventually, the provision\(^ {107}\) that was adopted provided protection for the rights of persons belonging to ethnic, linguistic or religious minorities.

On the other hand, the conviction of most of the European States is strongly that ‘national’ means ‘having citizenship’. Even the pertinent provisions of many of the European regional instruments\(^ {108}\) dealing with minority rights use the expression ‘national minorities’, and the term is widely understood to apply to persons ‘having citizenship’.

The ICTR, when for the first time dealing with the question of nationality in Akayesu, resorted to the Nottebohm case of the ICJ. In the case the ICJ stated that:

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.\(^ {109}\)

The ICJ considered nationality to be a “social fact”, of which the law is a mere expression. It disregarded the two significant components as far as national identity is concerned: the self-perception of the individual, and the view of the concerned State. The reason for this is the belief that there is something more “objective” than these. It considers that there exists an

\(^{106}\) Ibid., pp. 75-76.
\(^{107}\) Article 27 of the CCPR.
\(^{109}\) Nottebohm case, italics added.
authentic and objectively verifiable link between the person and the country of his or her nationality.\textsuperscript{110}

In \textit{Akayesu} the Chamber holds that a national group is defined as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”.\textsuperscript{111} The finding has been criticised, because the Chamber seems to link the concept of ‘national group’ with that of the population of a nation state only, thereby excluding most national minorities.\textsuperscript{112} This holding is also troublesome to reconcile with Lemkin’s original idea of the protection of what were then called “national minorities” in a continuation of the treaty regime established after the First World War.\textsuperscript{113} The Chamber has been accused for incomplete reading of \textit{Nottebohm}, because the case was about establishing ‘nationality’, not membership in a ‘national group’; it does not address the situation of national minorities, who while sharing cultural and other bonds to a given State, may actually hold the nationality of another State, or who may even be stateless.\textsuperscript{114}

It seems that the Chamber proposed a too-restrictive definition of the national group in \textit{Akayesu} and, therefore, unnecessarily limited the scope of a protected group. It would be preferable if the term of national would be understood as covering both ‘national’ as sociological nation and ‘national’ as citizen.

4.3.2 Ethnical/Ethnic Group

The question of ethnicity is, at least, as controversial as nationality. During the drafting process of the Genocide Convention the term of ethnical was first introduced, then deleted, and then reintroduced again. Sweden, which reintroduced the term, felt that use of the term ‘national’ might be confused with ‘political’. The Swedish delegate also noted that the constituent factor of a minority might be its language. On the other hand, several States said that they saw no difference between ethnical and racial groups. Remarking on confusion

\textsuperscript{110} Verdirame, \textit{supra} note 86, p.591.
\textsuperscript{111} \textit{Akayesu} Judgement, para. 512.
\textsuperscript{112} Schabas commentary, \textit{supra} note 69, p. 541.
\textsuperscript{113} \textit{Ibid}.
\textsuperscript{114} Schabas, \textit{supra} note 85, p. 115.
between the terms, Haiti observed that ‘ethnic’ might well apply where ‘racial’ was problematic.\textsuperscript{115}

The present practices of States are no less bewildering. For instance, Jews are treated in Hungary as an ethnic minority, in Iran as a religious minority and in France neither. Governments of Trinidad and Tobago, India, Malta, Benin, France and the Republic of Korea have maintained that the phrase ‘ethnic minorities’ has no practical meaning or applicability in their countries. The picture becomes even more blurred when including the States that admit possessing a large number of ethnic minorities, e.g., Vietnam’s fifty and Mexico’s fifty-six. In Finland, the Roma and the Sami are acknowledged as ethnic minorities, the latter also as an indigenous people.\textsuperscript{116}

In 1996, the International Law Commission (the ILC) in its Draft Code of Crimes against the Peace and Security of Mankind changed the word ‘ethnical’ in the definition of genocide to ‘ethnic’ in article 17 to reflect modern English usage without affecting the substance of the provision.\textsuperscript{117} It even considered whether it was necessary to retain both the terms ‘ethnical’ and ‘racial’ in the Draft Code. Special Rapporteur Doudou Thiam considered it “normal to retain these two terms, which give the text on genocide a broader scope covering both physical genocide and cultural genocide”. He observed that:

\begin{quote}

it seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common physical traits.\textsuperscript{118}
\end{quote}

The term that comes closest describing the Tutsi, at least \textit{prima facie}, is ‘ethnic’. It was, however, somewhat premature for the Tribunal to concede already in the chapter “Genocide in Rwanda in 1994?” that “it was indeed a particular group, the Tutsi \textit{ethnic} group, which was

\begin{flushright}
\textsuperscript{115} \textit{Ibid.}, p. 124.
\textsuperscript{116} Gayim, \textit{supra} note 101, pp. 40-41. See also the footnotes 152-154.
\end{flushright}
targeted”\textsuperscript{119}, while considering whether the massacres in Rwanda constituted genocide on general level before any elaboration on the law of genocide.

The Tribunal finds in \textit{Akayesu} that “An ethnic group is generally defined as a group whose members share a common language or culture.”\textsuperscript{120} But Tutsis and Hutus speak the same language, Kinyarwanda, share the same culture, and have no differences in their customary practices, as the Tribunal observed. However the Tribunal observes that there are a number of objective indicators of Tutsis as a group with a distinct identity. These indicators were listed to be that every Rwandan citizen was required before 1994 to carry an identity card including an entry for ethnic group, and that the Rwandan Constitution and laws identified Rwandans by reference to their ethnic group (e.g., article 57 of the Civil Code of 1988 provided that a person would be identified by ethnic group and article 118 of the same Code provided that birth certificates would include a reference for ethnicity). In addition, the Tribunal noted that customary rules existed in Rwanda governing the determination of an ethnic group, which followed patrilineal lines of hereditary. The identification of persons as belonging to the groups of Hutu, Tutsi or Twa had thus become embedded in Rwandan culture. Furthermore, the Rwandan witnesses testifying before the Tribunal identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbours belonged.\textsuperscript{121}

The Tribunal was evidently troubled with its own definition of ethnic group and with classifying the Tutsi as one of the protected groups. Therefore, it went on suggesting that the actual intent of the drafters of the Genocide Convention was to afford protection to any “stable and permanent group”. This proposition is discussed in this study later.

\textbf{4.3.3 Racial Group}

The terms of ‘race’ seems to have worn out most of the four qualifiers of the groups since the adoption of the Genocide Convention in 1948. Some present-day specialists have disputed the term altogether, stating that ‘the term “race” is a socially constructed artefact – that there is no such thing in reality as “race;” that the very word is racist; that the idea of “race,” implying the existence of significant biologically determined mental differences rendering some

\textsuperscript{119} Akayesu Judgement, para. 124, italics added.
\textsuperscript{120} Akayesu Judgement, para. 513. Throughout the judgement is used the modern version of the word, instead of “ethnical” used in the Statute.
\textsuperscript{121} Akayesu Judgement, paras. 170-171.
populations inferior to others, is wholly false. If taking a purely scientific view the term race appears to have lost its justification, but it still has its significance, especially in popular usage, social science and international law.

During the drafting process of the Genocide Convention the term ‘racial groups’ seemed to pose the least problem for the drafters, although it may well be the most problematic today. The travaux préparatoires reveal no significant discussion of the term. According to Schabas, this suggests that it is very close to the core of what the drafters intended the Convention to protect. As a term, ‘racial groups’ was present throughout the whole drafting process, in General Assembly Resolution 96(I), the Secretariat Draft, and the Drafts submitted by the United States, France and China.

The subsequent instrument International Convention on the Elimination of All Forms of Racial Discrimination of 1965 defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”. The Convention seems to juxtapose the terms racial, national and ethnic to some degree.

The Rwanda Tribunal in Akayesu adopted a more restrictive interpretation of the term racial group stating that “the conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”, without giving any source for its “conventional definition”. In the Kayishema & Ruzindana case the Tribunal followed the same formulation. On the other hand, it is noted that at the time of the formulation of the Genocide Convention the meaning of “racial groups” was much broader than it is today. It was to a large extent synonymous with national, ethnic and religious groups. According to Schabas the 1948 meaning of “racial group” should be favoured over some more contemporary and more restrictive interpretations.

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123 Schabas, *supra* note 85, p. 120.
125 Akayesu Judgement, para. 514.
126 Kayishema and Ruzindana Judgement, para. 98.
4.3.4 Religious Group

Religious groups were accepted to the list of protected groups right from the beginning of the drafting process of the Genocide Convention. The term existed already, in the General Assembly Resolution 96(I)\textsuperscript{128} requesting the United Nations Economic and Social Council (ECOSOC) to undertake the necessary steps to draw up a convention on the crime of genocide, and in the early drafts of the convention.

The position of religious groups was, however, questioned by some delegates. The United Kingdom impugned the inclusion of religious groups arguing that people were free to join and to leave them.\textsuperscript{129} The Soviet Union also opposed the inclusion for ideological reasons. It urged the term to be added in brackets after the reference to national groups.\textsuperscript{130} The abolition or amendments were, however, rejected by the majority of the delegates.

Having a religious group as a protected group brings along the question of identifying a religion. The Human Rights Committee has stated that “religion” should not be limited to “traditional religions or to religions and beliefs with institutional characteristics analogous to those of traditional religions”.\textsuperscript{131}

The ICTR in Akayesu holds that a religious group is one “whose members share the same religion, denomination or mode of worship”\textsuperscript{132} and in Kayishema & Ruzиндana followed suit, writing that “A religious group includes denomination or mode of worship or a group sharing common beliefs.”\textsuperscript{133} According to Schabas these attempts at definitions are, once again, more restrictive than both the drafters’ intent and the common meaning of the term in 1948.\textsuperscript{134}

\textsuperscript{128} UN Doc. A/BUR/50.
\textsuperscript{129} UN Doc. A/C.6/SR.69.
\textsuperscript{130} UN Doc. A/C.6/223.
\textsuperscript{131} UN Doc. CCPR/C/21/Rev.1/Add.4, para. 2 (1993).
\textsuperscript{132} Akayesu Judgement, para. 515.
\textsuperscript{133} Kayishema and Ruzinda Judgement, para. 98.
\textsuperscript{134} Schabas, supra note 85, p. 128.
4.3.5 “Permanent and Stable Groups”

In the course of history there have been several suggestions that other groups than those mentioned in the Genocide Convention should be afforded protection.\textsuperscript{135} For example, different drafts of the Convention mentioned political, economic, social and linguistic groups. However, these suggestions did not gain enough support and were deleted from the final version of the text. Nowadays it is widely held that the list of protected groups is exhaustive.\textsuperscript{136}

There are references in national legislation, case law and academic writings to groups not contemplated by the Convention. It has been suggested that, e.g., political, economic, social, and linguistic groups and even gender as a group should be afforded protection under the rubric of genocide. The ICTR was the first international tribunal to deliberate the matter.

In the \textit{Akayesu} case the Trial Chamber of the ICTR attempted to define the protected groups autonomously from each other. It ended up with rather rigid interpretations as can be seen from the text above in this study. For the Tribunal the word ethnic came closest describing the Tutsi, but this viewpoint was also problematic due to the definition of ethnic group adopted in the judgement. The Tutsi could not be meaningfully distinguished from the majority Hutu population in terms of language and culture.\textsuperscript{137} The Trial Chamber was clearly troubled with its own legal findings on the law and facts and circumstances in Rwanda in 1994. It was virtually impossible for the Chamber to conclude that genocide was not actually committed, because the Tutsi cannot be subsumed into any of the protected groups, even though it would seem so by a strict reading of the Trial Chamber’s interpretation of the law. As a solution to this the Trial Chamber introduced the novel concept of “stable and permanent groups”.

The \textit{Akayesu} judgement declared:

On reading through the \textit{travaux préparatoires} of the Genocide Convention [Footnote 96. Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official

\textsuperscript{135} See chapter 4.5 above.
\textsuperscript{136} Schabas, \textit{supra} note 85, p. 130.
\textsuperscript{137} Nevertheless, ethnic classification was applied when the Tribunal found \textit{Akayesu} guilty of “a widespread or systematic attack on the civilian population on ethnic grounds”, \textit{Akayesu} Judgement, para. 653.
Records of the General Assembly], it appears that the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.\(^{138}\)

The Trial Chamber went on:

Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.\(^{139}\)

While deliberating the law of genocide, the Trial Chamber itself questioned whether the Genocide Convention also protects other groups than those explicitly mentioned. It resorted to historical interpretation and relied upon the travaux préparatoires of the Convention. Based on this material it made a daring proposal, that actually the intention of the drafters of the Genocide Convention was to afford protection to “any stable and permanent group”. This proposal is problematic in many ways.

First, the Trial Chamber’s opinion on the permanence of group membership does not correspond with reality of world. When the four groups are examined more closely, they reveal in practice only racial groups, when defined genetically, may claim some relatively prolonged stability and permanence. National, ethnic and religious groups seem neither stable nor permanent. Nationality may be changed, sometimes for large groups of individuals where, for example, two countries have joined or secession has occurred. Religious groups may appear and disappear within a lifetime. Individual members of ethnic groups may come and

\(^{138}\) Akayesu Judgement, para. 515.  
\(^{139}\) Akayesu Judgement, para. 516.
go, although there may be legal rules on determining ethnicity as a result of marriage or in the case of children whose parents belong to different ethnic groups.\textsuperscript{140}

Second, the Trial Chamber makes general reference to the \textit{travaux préparatoires} in justification of its interpretation. The preparatory work of the treaty and the circumstances of its conclusion may be used as a supplementary means of interpretation according to the Vienna Convention.\textsuperscript{141} It may be used to clarify ambiguous and obscure terms or those that are manifestly absurd or unreasonable. However, the preparatory work may not be used to add elements that are not in the treaty already. The Tribunal could have made use of different documents that were produced during the drafting process to explicate the actual meaning of the four terms, but not read into the Genocide Convention something that is not there. This kind of expansive interpretation is also objectionable when the treaty defines a criminal offence, which should be subject to the principle of \textit{nullum crimen sine lege}.

The subsequent judgements of the ICTR have departed somewhat from the \textit{Akayesu} judgement. The \textit{Kayishema & Ruzindana} judgement of 21 May 1999 adopted a more subjective approach towards the protected groups and wholly omitted mentioning the novel concept of stable and permanent groups introduced less than a year earlier. The \textit{Rutaganda} and \textit{Musema} judgements of 6 December 1999 and 27 January 2000 respectively, nonetheless, adhere to the stable and permanent conception. In \textit{Bagilishema} judgement of 7 June 2001 the conception is omitted again. When examining the judgements a little closer one can see that the appearance of the concept has to do with the composition of the Trial Chamber. It seems that the concept has not gained general support among the judges of the ICTR.

\textbf{4.3.6 Conclusion}

In the case law of the ICTR on determining the membership of national, ethnic, racial or religious groups can be seen the gradual shift from the objective to subjective position. In \textit{Akayesu} membership was determined wholly in objective terms, but already in \textit{Kayishema & Ruzindana} a more subjective approach was chosen emphasising group's self-identification and identification by other, including the perpetrators of the crimes. This track has been followed with minor modifications in \textit{Rutaganda} and \textit{Musema}, noting that concepts must be assessed

\textsuperscript{140} Schabas, \textit{supra} note 85, p. 133.
\textsuperscript{141} Vienna Convention on the Law of Treaties, art. 32.
within the light of a particular context of the society and identification by the perpetrator, and in some instances the self-identification of the victim should be accepted.

It can be seen that membership of a group is essentially a subjective rather than an objective concept. However, if a totally subjective approach is chosen, it may lead to unsatisfactory results allowing, at least in theory, genocide be committed against a group without any objective existence in the society. Therefore, it is necessary to determine some objective existence of a group. The approach that tries to reconcile objective and subjective dimensions of the group membership was adopted in the Bagilishema case. The Trial Chamber noted that membership of the group must be an objective feature of the society in question, but there is also a subjective dimension. Sometimes it may be difficult to determine whether or not a victim was a member of a protected group. Moreover, occasionally the targeted group may be characterised in ways that differ from conceptions of the group shared generally, or by other segments of society. In such cases the Chamber resorted to the formulation of identification by perpetrator. If a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered as a member of the protected group, for the purposes of genocide.

The approach to the protected groups adopted in the ICTR case law can be described as seriatim. First, the respective chambers defined each adjective separately and then applied that definition to the situation at hand, or to put it differently, they first endeavoured to attach meaning to each term, and then to place the victim group within that meaning. The seriatim approach was challenged in the Krstic case of the ICTY. The ICTY Trial Chamber adopted an ensemble approach, by which the four terms were to be interpreted as components of the concept of a national minority. First, the Trial Chamber noted that the Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnical, racial and religious groups. The Chamber, however, acknowledged that protected groups are not clearly defined in the Convention or elsewhere. Quite in contrast, the

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142 Diane Marie Amann, Group Mentality, Expressivism, and Genocide, *International Criminal Law Review*, Vol. 2, No. 2 (2002), p.103, Amann speaks in the article about seriatim and ensemble approaches and finally suggests that a combination of the both should be favoured calling that synthetic contextual inquiry.

concepts partially overlap and are on occasion synonymous. It went on to state that "To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the [Genocide] Convention." Consequently, the Trial Chamber rejected attempts to distinguish the four terms by any means. It declined to put any label on victims in terms of four qualifiers, but simply called "the Bosnian Muslims" a "protected group".

The issue of interpreting groups protected against genocide is not settled in international criminal law. The same questions will arise in possible future trials. The International Criminal Court, especially, will have to take a stand on the matter.

4.4 Underlying Offences

The last two material chapters of this study examine the underlying of offences (acts) of genocide and the mental element of genocide. Before entering the acts of genocide, it is, however, important to make a few remarks on the elements of crime in general. The notions below are especially familiar to criminal lawyers.

In criminal law it is a general principle that a person may not be convicted of a crime unless proved beyond reasonable doubt both (a) that he caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. The event or state of affairs is called the actus reus, and the state of mind the mens rea of the crime.

In the case of genocide it must be proved that one of the acts listed in article 2(2)(a) to (e) of the Statute has been committed (actus reus), and that that act was committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (mens rea). The mens rea required separately for different underlying offences of genocide is discussed.

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144 Ibid., paras. 554-555.
145 Ibid., para. 556.
146 Ibid., para. 560.
under each title in this chapter, when necessary. The genocidal intent is studied in the next chapter. For questions related to protected groups see chapter 4.3 above.

The exhaustive list of acts of genocide in article 2(2)(a) to (e) of the Statute is as follows:

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

Since the *actus reus* includes all the elements in the definition of the crime except the accused's mental element, if follows that the *actus reus* is not merely an act. It may consist of a state of affairs, not including an act at all. The *actus reus* requires proof of an act or an omission (conduct). An offence may be either an act of commission or an act of omission. This principle also applies to all of the acts of genocide, including killing. Genocide can be committed by omission, if the accused had a duty to act. This question was addressed in the *Kambanda* judgement.

Usually, it must be proved that the conduct had a particular result, e.g., killing requires that the accused's conduct caused the death of a victim. Some offences do not require evidence of any result. In the context of genocide, three of the five acts require proof of a result: (a) killing members of the group, (b) causing serious bodily or mental harm to members of the group or (e) forcibly transferring children of the group to another group. Two of the acts do not demand such proof, but require a further specific intent: (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part or (d) imposing measures intended to prevent births within the group. Proof of a result of a crime also requires evidence that the act itself is a cause of the outcome. However, in many cases this is not a contentious issue because the matter is not disputed.

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148 Ibid., p. 31.
149 Schabas, supra note 85, p. 156.
150 Prosecutor v. Kambanda, Trial Judgement and Sentence, Case No. ICTR-97-23-S, 4 September 1998, para. 39(ix), "Jean Kambanda acknowledges that on 3 May 1994, he was personally asked to take steps to protect children who had survived the massacre at a hospital and he did not respond. On the same day, after the meeting, the children were killed. He acknowledges that he failed in his duty to ensure the safety of the children and the population of Rwanda."
151 Schabas, supra note 85, p. 155-156.
4.4.1 Killing Members of the Group

Killing is the first act of genocide listed in article 2(2)(a) of the Statute. Killing is the most definitive way of committing genocide. It is a means of committing physical genocide to wipe a human group out of existence.

The word "killing" aroused the question of interpretation in comparison with the counterpart "meurtre" in the French version of the Statute. In Akayesu the Trial Chamber was of the opinion that the term "killing" is too general, because "it could very well include both intentional and unintentional homicides..." The French term "meurtre" was considered more precise. Taking into consideration the presumption of innocence of the accused and the general principles of criminal law, the Chamber held that the more favourable term "meurtre" should be upheld and article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which "meurtre" (killing) is homicide committed with the intent to cause death.152

The issue was raised again in Kayishema & Ruzindana. The Trial Chamber agreed that if doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused. Therefore, the relevant act under article 2(2)(a) is "meurtre," that is, unlawful and intentional killing. The Trial Chamber noted, however, that all the enumerated acts must be committed with intent to destroy a group in whole or in part. Referring to the Commentary on the ILC Draft Code of Crimes Against the Peace and Security of Mankind of 1996153, the enumerated acts “are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. They are not the type of acts that would normally occur by accident or even as a result of mere negligence . . . the definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act." Hence, there is virtually no difference between the two, as the term “killing” is linked to the intent to destroy in whole or in part.154 Killing/meurtre should therefore be considered along with the specific intent of genocide, that is, the intent to destroy in whole or in part, a national, ethnical, racial or religious group as

152 Akayesu Judgement, paras. 500-501.
153 Draft Code of Crimes and Commentary, supra note 118.
154 Kayishema and Ruzindana Judgement, para. 103.
such. The Trial Chamber's finding was later confirmed by the Appeals Chamber, but it, however, emphasised that 'if the word “virtually” is interpreted in a manner that suggests a difference, though minimal, between the two terms, it would construe them both as referring to intentional but not necessarily premeditated murder, this being, in its view, the meaning to be assigned to the word “meurtre”'.\textsuperscript{155}

The reference to "members of the group" as victims of the genocidal act, may suggest that the act itself must involve the killing at least two members of the group. From a grammatical standpoint the phrase can just as easily apply to a single act of killing. In \textit{Akayesu}, when elaborating the intent required, the Trial Chamber stated that "the act must have been committed against one or several individuals..."\textsuperscript{156} The ICC Elements of Crimes sets out that killing one person is enough, if other requirements are fulfilled.\textsuperscript{157} However, the Elements are not binding on the Court. They "shall assist the Court in the interpretation and application" of the material articles of the ICC Statute, and they "shall be consistent" with the ICC Statute".\textsuperscript{158}

In \textit{Akayesu} the Trial Chamber asked itself whether an assault on an individual who was not a member of the protected group, but who was attacked within the context of genocide, could be considered an act of genocide under the Statute. The Tribunal was convinced of Akayesu's presence and participation when victim V, a Hutu man, was beaten with a stick and the butt of a rifle by a communal policeman called Mugenzi and by a member of the \textit{interahamwe} militia. The acts attributed to the accused constitute serious bodily and mental harm inflicted on the victim. However, because the acts were perpetrated against a Hutu, they cannot, therefore, constitute a crime of genocide against the Tutsi group.\textsuperscript{159}

As a synthesis, the \textit{Semanza} judgement set out criteria, which have to be met in order to be held criminally liable for genocide by killing members of a group. In addition to showing that an accused possessed an intent to destroy the group as such, in whole or in part, the prosecutor must show that (1) the perpetrator intentionally killed one or more members of the

\textsuperscript{155} Prosecutor v. Kayishema and Ruzindana, Appeals Chamber Judgement, Case No. ICTR-95-1-A, 1 June 2001, para. 151.

\textsuperscript{156} Akayesu Judgement, italics added, para. 521.


\textsuperscript{159} Akayesu Judgement, para. 711-712.
group, without the necessity of premeditation; and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.\footnote{Prosecutor v. Semanza, Trial Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 319 (Semanza Judgement).}

The causation was under deliberation in the \textit{Nahimana et al.} case, so-called "media case".\footnote{Prosecutor v. Nahimana, Barayagwiza and Ngeze, Trial Judgement and Sentence, Case No. ICTR-99-52-T, 3 December 2003 (Nahimana et al. Judgement).} \textit{Nahimana}, founder and ideologist of the Radio Tél\'évision Libre des Mille Collines (RTLMC), \textit{Barayagwiza}, high ranking board member of the \textit{Comité d’initiative} of the RTLMC and founding member of the Coalition for the Defence of Republic (CDR), and \textit{Ngeze}, chief editor of Kangura newspaper, were convicted for genocide, incitement to genocide, conspiracy to commit genocide and crimes against humanity of extermination and persecution. \textit{Nahimana} and \textit{Ngeze} were sentenced to life imprisonment and \textit{Barayagwiza} was sentenced to 35 years imprisonment.\footnote{Press Release of the ICTR, ICTR/INFO-9-2-372.EN, Arusha, 3 December 2003, available at http://www.ictr.org/, last visited 5 April 2006.}

The Trial Chamber observed that "The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself." According to the Chamber this does not diminish, however, the causation to be attributed to the media, or the criminal accountability of those responsible for the communication. The Chamber described the death of President \textit{Habyarimana} by the downing of the President’s plane as "the trigger" for the killing of the Tutsi and the hate speech through media as "the bullets in the gun". The trigger had such a deadly impact because the gun was loaded. Therefore, the Chamber considered that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through the RTLMC, Kangura and CDR, before and after 6 April 1994."\footnote{Nahimana et al. Judgement, para. 952-953.}

\textbf{4.4.2 Causing Serious Bodily or Mental Harm to Members of the Group}

The second act of genocide covers situations of physical violence that fall short of actually killing of the victim. This as well as killing are considered modes of physical genocide. The
act may be committed through causing serious bodily or mental harm to members of the group.

The notion of acts that cause bodily harm is well known in domestic legal systems. It differs from assault, requiring proof that actual harm has resulted. Domestic laws often recognise degrees of assault causing bodily harm, distinguishing between harm in a general sense and harm of a serious or permanent nature. The Statute does not specify that the harm caused be permanent, but uses the adjective "serious" as a qualifier.\(^{164}\)

In the *Eichmann* case of 1961 the District Court of Jerusalem stated that serious bodily and mental harm of members of a group could be caused "by the enslavement, starvation, deportation and persecution ... and by their [Jews] detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture".\(^{165}\) In *Akayesu* the Trial Chamber ruled the phrase "serious bodily and mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution".\(^{166}\) In the *Kayishema & Ruzindana* judgement the phrase was stated to mean "harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses".\(^{167}\)

The mental element of the act of genocide requires that the perpetrator must have the intent to cause serious bodily or mental harm to a member of the group. In *Kayishema & Ruzindana* it was formulated "that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental harm in pursuit of the specific intention to destroy a group in whole or in part".\(^{168}\) This seems to put the intent threshold somewhat higher than in the case of genocide by the act of killing.

The USA, when ratifying the Genocide Convention, formulated an understanding saying that '[T]he United States Government understands and construes the word "mental harm" ... to

\(^{164}\) Schabas, *supra* note 85, p. 160.
\(^{166}\) *Akayesu* Judgement, para. 504.
\(^{167}\) *Kayishema and Ruzindana* Judgement, para. 109.
\(^{168}\) *Ibid.*, para. 112.
mean permanent impairment of mental faculties. Bryant is of the opinion that 'the ordinary meaning of the phrase "mental harm" in the context of the Genocide Convention does not necessarily imply "permanent" injury and construing the term as understanding [ ] does may be erroneous in view of the object and purpose of the Convention'. In Akayesu the Trial Chamber cast aside the requirement of permanence of mental harm, stating that, "bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable". However, according to the Semanza judgement serious mental harm is understood "to mean more than minor or temporary impairment of mental faculties".

4.4.3 Inflicting on the Group Conditions of Life

This act of genocide takes another step further off actual physical destruction of the group, or to put it differently, the criminalisation of the act provides an outer circle of protection to the existence of the group. Article 2(2)(c) stipulates that genocide may be committed by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The Trial Chamber in Akayesu interpreted the provision holding "that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction." Means of deliberately inflicting on the group conditions of life include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement. The infliction on the group conditions of life was interpreted in the Kayishema & Ruzindana judgement "to include circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion." The methods include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable

170 Ibid., p. 695.
172 Semanza Judgement, para. 321.
173 Akayesu Judgement, para. 505-506.
period, provided that the above would lead to the destruction of the group in whole or in part.\textsuperscript{174}

Contrary to the acts of genocide examined above, killing and causing serious bodily or mental harm, the offence of deliberately inflicting on the group conditions of life calculated to bring about group's destruction does not require proof of result. The conditions of life must be calculated to bring about the destruction, but whether the result is achieved or not is irrelevant. The distinction was made already in the \textit{Eichmann} case of 1961. The accused was charged with imposing living conditions upon Jews calculated to bring about their physical extermination. In accordance to the District Court of Jerusalem, such a charge was only applicable to the persecution of Jews who had survived the Holocaust. The Court ruled:

We do not think that conviction on the second Count [imposing living conditions calculated to bring about the destruction] should also include those Jews who were not saved, as if in their case there were two separate acts - first, subjection to living conditions calculated to bring about their physical destruction, and later the physical destruction itself.\textsuperscript{175}

Theoretically speaking all five acts of genocide can be committed by omission, but the question of positive duty to act rises especially in relation subparagraph (c). Because of the overall genocidal intent requirement, not to mention the requirement in the subparagraph that the conditions be calculated, the omission cannot be one of simple negligence.\textsuperscript{176}

Article 6(3) of the ICTR Statute provides some lead to the assessment of superior responsibility. It provides that "The fact that any of the acts ... was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Article 28 of the ICC Statute elaborates the superior responsibility in more detail. It imposes on military and civilian superiors a positive duty to act to prevent genocide.

\textsuperscript{174} Kayishema and Ruzindana Judgement, para. 115-116.
\textsuperscript{175} Eichmann case, para. 196.
\textsuperscript{176} Schabas, \textit{supra} note 85, p. 170.
It may be difficult to establish the extent of requirements for a State, or for an individual, in terms of assuring adequate nutrition, medical care and housing. International human rights law may provide helpful guidance on the matter.\textsuperscript{177}

\subsection*{4.4.4 Preventing Births within the Group}

The second last act of genocide in article 2(2)(d) of the Statute contains the provision on biological genocide. Genocide can be committed by imposing measures intended to prevent births within the protected group.

In the \textit{Akayesu} judgement the Trial Chamber was of the opinion "that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages". In the Rwandan context it pointed out that "In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group." In addition, "that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate".\textsuperscript{178} The \textit{Musema} judgement followed suit, except it omitted mentioning rape as a measure intended to prevent births.\textsuperscript{179}

Such views on rape may seem exaggerated, because it is unrealistic and perhaps absurd to believe that a group can be destroyed in whole or part by rape and similar crimes. One should read the subparagraph (d) carefully in comparison to subparagraph (c). Paragraph (d) does not require that the measures to restrict births be "calculated" to bring about the destruction of the group in whole or part, only that they be intended to prevent births within the group. Such measures can be merely auxiliary to a genocidal plan or programme.\textsuperscript{180}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid.}, p. 171.
\item \textit{Akayesu} Judgement, para. 507-508.
\item \textit{Musema} Judgement, para. 158.
\item Schabas, \textit{supra} note 85, p. 174.
\end{enumerate}
\end{footnotesize}
Article 2(2)(d) of the does not require a result as a material element of the offence. The *actus reus* consists of the imposition of the measures. Whether a result follows is irrelevant.

### 4.4.5 Forcibly Transferring Children

The last act of genocide is provided in article 2(2)(e): forcibly transferring children of the group to another group. The subparagraph had a somewhat peculiar preparation, or lack of it, after it came into being. It was added to the Genocide Convention almost as an afterthought, with little substantive debate or consideration. The provision is enigmatic, because the drafters clearly rejected the concept of cultural genocide.\(^\text{181}\) The International Law Commission treated paragraph (e) of the Convention as "biological genocide".\(^\text{182}\)

The Statute or the Genocide Convention does not specify what is meant by "children". The Convention on the Rights of the Child gives an authoritative precedent, defining a child as every human being below the age of 18 years.\(^\text{183}\) The ICC Elements of Crimes also define a child as a person under the age of 18 years.\(^\text{184}\) However, the genocidal act of transferring children only makes sense with relatively young children. Older children are more unlikely to lose their cultural identity by such a transfer.

Article 2(2)(e) stipulates that the transfer of children must be done forcibly. In *Akayesu* the Chamber opined that, "the objective 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".\(^\text{185}\) The ICC Element of Crimes states that "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.

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\(^\text{184}\) The ICC Elements of Crimes, *supra* note 158.

\(^\text{185}\) *Akayesu* Judgement, para. 509.
4.4.6 Rape as an Act of Genocide

Rape of Tutsi women during the havoc was systematic and large scale. It was used as a way to cause serious harm to the women and to deteriorate the Tutsi group as a whole. Rapes were usually carried out under extreme circumstances, e.g., the victims were either threatened to be killed or actually killed after the act.

Rape was defined in the Akayesu judgement as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is defined as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. As an example of sexual violence the Trial Chamber provided an incident where the accused ordered a student to undress and forced her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd. According to the judgement, sexual violence falls within the scope of "other inhumane acts", set forth article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in article 4(e) of the Statute, and "serious bodily or mental harm," set forth in article 2(2)(b) of the Statute.\(^{186}\)

On rape and sexual violence against Tutsi women the Tribunal went on saying:

...the Chamber wishes to underscore the fact that in its opinion, they [rape and sexual violence] constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

\(^{186}\) Akayesu Judgement, para. 688.
The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises “in order to display the thighs of Tutsi women”. The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, “let us now see what the vagina of a Tutsi woman takes like”. As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: “don’t ever ask again what a Tutsi woman tastes like”. This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group - destruction of the spirit, of the will to live, and of life itself.

... in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say ”tomorrow they will be killed” and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

...the Chamber finds firstly that the acts described supra are indeed acts as enumerated in Article 2 (2) of the Statute, which constitute the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The Chamber is further satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such.187

The treatment of rape and sexual violence in the ICTR case law, especially in the Akayesu judgement, constitutes a major contribution to the development of the law of genocide. The initial indictment did not include gender-based crimes, but the indictment was amended in this respect after pressure from non-governmental organisations. Apparently the Akayesu case law had an effect on the ICC then under development. Nowadays, The ICC Elements of Crimes provide that the ”conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment”.188

187 Ibid., paras. 731-734.
188 The ICC Elements of Crimes, italics added, supra note 158, footnote 3.
4.4.7 Conclusion

In relation to killing, it seemed at first that the Tribunal found some difference between the words killing and *meurtre*, but the issue was settled later on in the Appeals Chamber judgement affirming that there is virtually no difference between the two terms in the context of genocide. Both should be construed as referring to intentional but not necessarily premeditated murder.

Before the *Akayesu* judgement there was some confusion about the nature of mental harm caused by the perpetrator. The judgement, however, discarded the requirement of permanence ruling, i.e. that mental harm does not necessarily mean that the harm is permanent and irremediable.

Perhaps the treatment of sexual violence by the Tribunal has the most long-lasting impact on international criminal law. The Tribunal found that rape and sexual violence falls within the scope of serious bodily or mental harm. They constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy. The Tribunal made a seminal ruling in this respect.

So far the Tribunal has found several convictions of genocide by killing and causing serious bodily or mental harm to members of the group\(^{189}\); some convictions of direct and public incitement to commit genocide [2(3)(c) of the Statute]\(^{190}\); and few of conspiracy to commit genocide [2(3)(b)]\(^{191}\) and complicity in genocide [2(3)(e)]\(^{192}\).

4.5 Mental Element or Mens Rea of Genocide

In criminal law it is required that the accused had a defined state of mind, *mens rea*, when committing a crime. Generally, for ordinary crimes recklessness or negligence may suffice for

\(^{189}\) E.g., Akayesu Judgement, Kayishema and Ruzindana Judgement, Rutaganda Judgement, Musema Judgement and Niyitegeka Judgement.

\(^{190}\) E.g., Akayesu Judgement and Nahimana *et al.* Judgement.

\(^{191}\) E.g., Niyitegeka Judgement and Nahimana *et al.* Judgement.

\(^{192}\) E.g., Semanza Judgement.
the *mens rea* requirement, while a conviction of genocide necessitates that the offender acted with intent. The mental element of genocide has two layers. The perpetrator must have the required *mens rea* of each underlying offence, e.g., killing, and, furthermore, the genocidal intent that separates genocide from ordinary crime of murder, for example. Article 2(2) of the Statute requires that the accused acted with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Consequently, the perpetrator must have the intention to destroy a protected group. This chapter focuses on the genocidal intent of the crime.

### 4.5.1 Knowledge

In national criminal law it is commonly stated that the *mens rea* of a crime has two components that are knowledge and intent. Also article 30 of the ICC Statute provides that "a person shall be criminally responsible...only if the material elements are committed with intent and knowledge."\(^{193}\)

According to the ICC Statute, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.\(^{194}\) Thus the perpetrator must have knowledge of the circumstances of the crime. Because of the scope of genocide, it can hardly be committed by an individual acting alone. While exceptions cannot be ruled out, it is virtually impossible to imagine genocide that is not planned and organised either by the State itself or by some clique associated with it. For genocide to take place there must be a plan, even though there is nothing in the Genocide Convention that requires this.\(^{195}\) In *Kayishema & Ruzindana*, the ICTR wrote that "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without such a plan, or organisation".\(^{196}\) In addition it clarified that "the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide".\(^{197}\)

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\(^{193}\) The ICC Statute, *supra* note 159, art. 30.
\(^{194}\) *Ibid.*, art. 30(3).
\(^{195}\) Schabas, *supra* note 85, p. 207.
\(^{196}\) Kayishema and Ruzindana Judgement, para. 94.
The plan or circumstances of genocide must be known to the offender. An individual who is not aware of the circumstances cannot be found guilty of the crime of genocide, but maybe of some lesser offence.

The International Law Commission considered the issue of the extent of knowledge in the commentary on the Draft Code of Crimes Against the Peace and Security of Mankind:

The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy.198

The accused must also have knowledge of the consequences of his or her act in the ordinary course of events. Knowledge of the consequences will vary depending on the act with which the accused is charged. In some cases, the genocidal act does not require proof of consequences. As an example of this can be the direct and public incitement to genocide provided in article 2(3)(c) of the ICTR Statute. In the Akayesu case the Tribunal stated in passing on the threshold of knowledge of consequences. "The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group."199 The "should have known" standard is generally in criminal law used to describe crimes of negligence and is inappropriate in the case of genocide charges.

199 Akayesu Judgement, italics added, para. 520.
4.5.2 Intent

Genocide is a crime that requires intent. Even without the term "with intent" in the definition of genocide, it is inconceivable that an infraction of such magnitude could be committed unintentionally.200

Article 30 of the ICC Statute provides that a person has intent where, in relation to conduct, that person means to engage in the conduct; or in relation to a consequence, that person means to cause the consequence or is aware that it will occur in the ordinary course of events. It can be seen that the words "with intent" that appear in the chapeau of article II of the Genocide Convention (article 2 of the ICTR Statute) do more than simply reiterate that genocide is a crime of intent. According to Schabas, article II of the Genocide Convention introduces a precise description of the intent. The reference to intent in the text indicates that the prosecution must go beyond establishing that the offender meant to engage in the conduct, or meant to cause the consequence. It must be proven that the offender had a "specific intent" or dolus specialis.201

The abovementioned description of genocidal intent as "specific intent" is nowadays the predominant position. It can be seen, e.g., from the case law represented in this study below. However, some scholars note that the two layers of the mental element are not differentiated enough in legal literature and praxis. Otto Triffterer argues in his article that the two subjective mental elements of genocide, first, intent as mens rea with regard to the actus reus and, second, "intent to destroy", have different points of reference, and that they have to be established separately and their scope be considered independent of each other. He goes on to say that quite often jurisprudence and literature do not sufficiently distinguish between this mens rea and the additional "intent to destroy". In relation to "intent to destroy", Triffterer furthermore suggests that, "Looking at the definitions of genocide in international instruments, they always correspondingly demand 'intent to destroy [...]'. Nowhere is mentioned an additional adjective such as specific, special, particular, or general intent. The word intent, characterizing this genocidal intent in the narrow sense, therefore needs to be

200 Schabas, supra note 85, p. 213-214.
201 Ibid., p. 214.
interpreted.\textsuperscript{202} Triffterer is quite right in saying that the texts of instruments do not require specific or special intent. However, genocidal intent defined as – intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such – may naturally be called specific as distinct from the \textit{mens rea} of each underlying offence. Here the word “specific” is understood to mean additional or ulterior intent, intent to destroy a group. The offender seeks an ulterior consequence that cannot usually result from his or her acts alone. An individual is hardly ever in a position to be able to destroy a population in whole or part acting alone.

\textbf{4.5.2.1 Specific Intent or \textit{Dolus Specialis}}

As already stated above it is clear that the acts of genocide must be committed with intent to destroy a group. This intent is usually called "specific" intent, "special" intent or in Latin \textit{dolus specialis}. "Specific" intent is used in the common law system to distinguish offences of "general" intent, which are crimes for which no particular level of intent is actually set out in the text of the infraction. A specific intent offence requires performance of the \textit{actus reus} but in association with an intent or purpose that goes beyond mere performance of the act.\textsuperscript{203}

The Rwanda Tribunal described genocidal intent in \textit{Akayesu} in the following way:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or \textit{dolus specialis}. 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. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group.\textsuperscript{204}

The Tribunal went on:

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the


\textsuperscript{203} Schabas, \textit{supra} note 85, pp. 217-218.

\textsuperscript{204} Akayesu Judgement, paras. 498-499.
offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.\textsuperscript{205}

The special nature of genocide compared to other crimes in the Statute was underlined in the \textit{Kambanda} case. The Trial Chamber was of the opinion that "the crime of genocide is unique because of its element of dolus specialis... hence the Chamber is of the opinion that genocide constitutes the crime of crimes".\textsuperscript{206} The placing of the crime of genocide on the apex of international crimes is not accepted by all scholars, noting that there is no hierarchy among the crimes. From the practical viewpoint, crimes against humanity and war crimes may well be equally destructive as genocide in some situations.

In the commentary on the ILC Code of Crimes against the Peace and Security of Mankind, the ILC defines genocide's specific intent as "which is the distinguishing characteristic of this particular crime under international law".\textsuperscript{207} It continued:

The prohibited acts enumerated in subparagraphs (a) to (e) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general \textit{awareness} of the probable \textit{consequences} of such an act with respect to the immediate victim or victims is \textit{not} sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the \textit{overall consequences} of the prohibited act.... an individual incurs responsibility for the crime of genocide only when one of the prohibited acts is "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such".\textsuperscript{208}

The quotations of the ICTR case law and the ILC commentary above emphasise the volitive side of the \textit{mens rea} requirement of genocide. In the context of Rwanda it may be partly due to the quite clear-cut nature of the genocide that took place. When the question is about the state of mind of the principal offender of genocide, the stress on volition may not present difficulties, but when a person is charged with criminal participation in genocide, e.g., complicity in genocide, this position may lead to controversy.

\begin{itemize}
\item \textsuperscript{205} \textit{Ibid.}, para. 518.
\item \textsuperscript{206} \textit{Kambanda} Judgement, para. 16.
\item \textsuperscript{207} Draft Code of Crimes and Commentary, \textit{supra} note 118, p. 87.
\item \textsuperscript{208} \textit{Ibid.}, italics added, p. 87.
\end{itemize}
Alexander K.A. Greenawalt offers an alternative understanding of genocidal intent in his article of 1999. He challenges the prevailing interpretation of genocidal intent, namely that genocide is a crime of specific 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. He proposes instead that, "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." He justifies his position by claiming that this approach emphasises the destructive result of genocide instead of the specific reasons that move particular individuals to perform such acts. Furthermore, it addresses the related problems of subordinate actors and ambiguous goals by unhinging the question of genocidal liability from that of the perpetrator's particular motive or desires with regard to the group as a whole.

4.5.2.2 Proof of Intent

All the elements of a crime, including the mental element, have to be substantiated. In practice, proof of intent is rarely a formal part of the prosecution's case. The prosecution does not generally call psychiatrists as expert witnesses to establish what the accused really intended. Rather, the intent is a logical deduction that flows from evidence of the material acts. Criminal law presumes that an individual intends the consequences of his or her acts, in effect deducing the existence of the mens rea from proof of the physical act itself.

The Trial Chamber in the Akayesu case considered that “intent is a mental factor which is difficult, even impossible, to determine”, but found that “in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact”. Partly citing the Yugoslavia Tribunal, the Trial Chamber found that intent may be inferred from the following factors:

210 Schabas, supra note 85, p. 222.
211 Akayesu Judgement, para. 523.
• the general context of the perpetration of other culpable acts systematically directed against that same
group, whether . . . committed by the same offender or by others;
• the scale of atrocities committed;
• the general nature of the atrocities committed in a region or a country;
• the fact of deliberately and systematically targeting victims on account of their membership of a
particular group, while excluding the members of other groups;
• the general political doctrine which gave rise to the acts;
• the repetition of destructive and discriminatory acts; or
• the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very
foundation of the group- acts which are not in themselves covered by the list . . . but which are
committed as part of the same pattern of conduct.  

The Trial Chamber conceived that the context of the perpetration of other culpable acts, even
by others, political doctrine and the perpetration of acts, e.g., attacks against cultural
institutions and monuments, which are not themselves enlisted in article 3(2) of the Statute,
are suitable material for inference of the accused’s intent. This calls for caution, because the
question at stake is the determination of individualised intent. Therefore, in Bagilishema the
Trial Chamber notes that, “the use of context to determine the intent of an accused must be
counterbalanced with the actual conduct of the Accused”. 213 The context may help in
determination, but the accused’s intent should be determined above all from his words and
deeds, and should be evident from patterns of purposeful action.

As already pointed out above, 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. Although a plan of genocide is not an element of the crime, the existence of
such a plan may be used as evidence of the specific intent of genocide.

4.5.3 Components of Specific Intent

The specific intent of genocide has three components. The offender must intend 1) to destroy
the group, the offender must intend that the group be destroyed 2) in whole or in part, and the
offender must intend to destroy a group that is defined by 3) nationality, ethnicity, race or
religion. Questions related to the groups are examined in detail in chapter 4.3 above and,
therefore, comments on them are not repeated here. Under the last subtitle the question of
two is examined.

4.5.3.1 “To Destroy”

Article II of the Genocide Convention provides that the offender must intend “to destroy” a
protected group. The question that arises here is what type of destruction is covered. Raphael
Lemkin took a wide view of this concept, observing that genocide involved the destruction of
political institutions, economic life, language and culture. Physical destruction was only the
ultimate or final stage in genocide. Nevertheless, the drafters of the Convention clearly
chose to limit its scope to physical and biological genocide.

During the consideration of the Draft Code of Crimes, the International Law Commission
addressed the question of destruction:

As clearly shown by the preparatory work for the Convention, the destruction in question is the material
destruction of a group either by physical or by biological means, not the destruction of the national, linguistic,
religious, cultural or other identity of a particular group. The national or religious element and the racial or
ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken
only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by
the Secretary-General and the 1948 draft prepared by the Ad Hoc Committee on Genocide contained provisions
on "cultural genocide" covering 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 intercourse 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. However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General
Assembly, did not include the concept of "cultural genocide" contained in the two drafts and simply listed acts
which come within the category of "physical" or "biological" genocide. The first three subparagraphs of the
present article list acts of "physical genocide", while the last two list acts of "biological genocide".

The ICTR aligned itself with the abovementioned position in the Semanza judgement, stating
that, ‘The drafters of the Genocide Convention, from which the Tribunal’s Statute borrows the

\(^{216}\) Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth
definition of genocide verbatim, unequivocally chose to restrict the meaning of “destroy” to encompass only acts that amount to physical or biological genocide.  

4.5.3.2  “In Whole or in Part”

The definition of genocide provides that the offender must intend to destroy a group “in whole or in part”. It declares that it is not necessary to seek the eradication of the whole group. It is enough, if the offender had the intention to destroy that group partially. But the question remains, what is the extent of the intended partial destruction. The mere letter of the Genocide Convention [article 2(2) of the Statute] seems to allow any intention to partially destroy a group to fall within the definition of genocide. The Genocide Convention has not, however, been interpreted only relying on the literal reading of the definition of genocide.

During the drafting process of the Genocide Convention the formulation of partial destruction already appeared in the preamble of General Assembly Resolution 96(I). Some states, however, opposed any “partial” formulation, because that might result in an excessively low quantitative threshold. Finally, the words “in whole or in part” were inserted in the final draft according to the Norwegian proposal. The debates, however, provide little guidance as to what the drafters meant by “in part”.

Here should be pointed out that during the drafting of the Convention there was some confusion made between the material element and the mental element of the crime. The matter in question is the intent as opposed to the actual destruction. It is not to establish whether all or part of a group was actually destroyed, but to ascertain whether the perpetrator intended to destroy the group in whole or in part. Even a small number of actual victims is enough to establish the material element.

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217 Semanza Judgement, para. 315.
218 General Assembly Resolution 96(I), UN Doc. A/BUR/50.
219 For more information on the drafting process see Schabas, supra note 85, pp. 230-233.
220 “Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy “in whole or in part” a national, ethnical, racial or religious group.”, Akayesu Judgement, para. 497.
The USA struggled for decades with the ratification of the Genocide Convention.\footnote{The USA is the original signatory State to the Genocide Convention, but the Convention was ratified only just 25 November 1988.} During the process there was intense disagreement in the U.S. Senate over how to interpret the two parts of the phrase in which the word “intent” appears – “intent to destroy, in whole or in part”. This led the Foreign Relations Committee to propose an understanding on the matter stating:

That the U.S. Government understands and construes the words “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such,” appearing in article II to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such manner as to affect a substantial part of the group concerned.\footnote{The text of the understanding is reproduced in Lawrence J. LeBlanc, The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding, \textit{American Journal of International Law}, Vol. 78 (1984), p. 370.}

The understanding has been criticised because it does not seem to clarify the problem but instead raises additional problems, one being the determination of what constitutes a “substantial part” of the group concerned. It is not even clear if “substantial part” refers to an absolute or relative number of victims. The understanding proposed, and later on made upon ratification, does not resolve the problem it purports to address, but merely reformulates it.\footnote{Bryant and Jones, The United States and the 1948 Genocide Convention, pp. 692-693. See also David Alonzo-Maizlish, In Whole or in Part: Group Rights, the Intent Element of Genocide, and the “Quantitative Criterion”, \textit{New York University Law Review}, Vol. 77, No. 5 (November 2002). Alonzo-Maizlish strongly criticises the “quantitative criterion” brought up, especially in the ICTY case law, stating that ‘As a threshold requirement, the “quantitative criterion” is incompatible with the group-held right to exist on which the concept of genocide is premised. Although the tribunals may look to the quantity of victims when inferring genocidal intent, the emerging doctrine of the ICTY risks undermining the object and purpose of the Genocide Convention on which the former’s statute is based.’, p. 1374-1375.}

In the ICTR praxis on the “in whole or in part” requirement is not thoroughly examined due to the nature of the conflict in Rwanda. There is little room for ambiguity as to whether the requirement is satisfied, because of the overwhelming scale of the anti-Tutsi extermination campaign in Rwanda. The ICTR Trial Chambers broadly followed the guidance provided in the ILC Draft Code of Crimes stating that “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe”, but “the crime of genocide by its very nature requires the intention to destroy a substantial part of a particular group”.\footnote{Draft Code of Crimes and Commentary, \textit{supra} note 118, para. 8.} In the \textit{Kayishema & Ruzindana} case the Trial Chamber opined that “in part” requires the
intention to destroy a considerable number of individuals who are part of the group’. The Trial Chambers in the Bagilishema and Semanza cases interpreted “in part” to mean “a substantial part” of the group.

The ICTY Appeals Chamber had the opportunity to address the issue of defining the part of the group in the Krstic case. It confirmed that the intent requirement of genocide is “satisfied where…the alleged perpetrator intended to destroy at least a substantial part of the protected group.” It found a number of considerations that may be used while making the determination of when the targeted part is substantial enough to meet this requirement:

The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial...

It seems established that the intent to destroy a protected group “in part”, the part must be a substantial part of that group. There still remains the question of what is the population group, the “whole”, from which a “substantial part” may be defined. In the context of Rwanda, should the accused have intended to destroy the total Tutsi population of neighbourhood, village, town, Rwanda or beyond? In general terms, the relevance of this consideration increases in proportion to the perpetrator’s position in hierarchy of authority: the more limited his or her sphere of control, the more limited the geographical area or total population group that may be included in determining the appropriate threshold of scale. The issue was addressed in Krstic, providing a useful reference to Rwanda in terms of a geographical definition of the group targeted for destruction:

The historical examples of genocide also suggest that the area of the perpetrators’ activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of

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225 Kayishema and Ruzindana Judgement, para. 97.
226 Bagilishema Judgement, par. 64, Semanza Judgement, para. 316.
227 Prosecutor v. Krstic, Appeals Chamber Judgement, Case No. IT-98-33-A, 19 April 2004 (Krstic Appeals Chamber Judgement), para. 12.
that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country’s borders.\textsuperscript{23} The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.\textsuperscript{229}

The ICTY Appeals Chamber acknowledged that the considerations it put forward are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case. In other words, a court may make use of a wide margin of judicial appreciation and determine whether the requirement is met or not on a case-by-case basis.

4.5.4 “As Such” – Question of Motive

In the last Chapter of this study the phrase “as such” is examined. The phrase has been under intense debate since its adoption. During the drafting of the Genocide Convention some delegates proposed that motive should be included in the definition of genocide. Others were strongly opposed, fearing it to be dangerous and that it would enable those committing genocide to claim that they had not committed the crime on grounds of motives listed. As a compromise Venezuela, which favoured the United Kingdom proposal to delete the reference to motive, proposed that the word “as such” should be introduced.\textsuperscript{230} Due to the ambiguity in the drafting process, the question whether the words “as such” imply motive as a constituent element of genocide cannot be answered by looking at the drafting history of Article II.\textsuperscript{231}

There are divergent views on the meaning of “as such” in academic writings. On the one hand it is rejected that motives had any relevance in criminal law. On the other hand the words “as such” are seen as an expression of motive requirement in the definition, at least implicitly.

The position in most national criminal law systems is quite clear. In general motive is not an element of an offence, but as evidence motive is always relevant as well as when the question

\textsuperscript{229} Krstic Appeals Chamber Judgement, para. 13.
\textsuperscript{230} For more information on the drafting process see Schabas, \textit{supra} note 85, pp. 245-251.
of punishment is in issue. Some scholars argue that the crime of genocide is a special case and therefore acts against individuals should be motivated on grounds of hatred toward one of the listed groups. According to Schabas, it seems unreasonable to dismiss entirely any role for motive in the elements of the crime of genocide. He makes a distinction between the collective motive and the individual motive. Genocide is, by nature, a collective crime, committed with the cooperation of many participants: “The organizers and planners must necessarily have a racist or discriminatory motive, that is, a genocidal motive, taken as a whole. Where this is lacking, crime cannot be genocide.”

When the Genocide Convention was adopted, political groups were left out of the enumeration of the protected groups in the Convention. According to Jones, although political groups were not included in the ambit of the Convention, if acts were aimed at a protected group, but for political motives, they still may be characterised as acts of genocide as long as the perpetrator’s intention was to destroy the protected group. Why the perpetrator intended to do so is irrelevant to his guilt. Jones is of the opinion that the motives do not form part of the elements of the crime of genocide. They may be taken into consideration by the tribunal as a factual element in determining whether he had the intention to destroy the group, or in sentencing.

In the ICTR case law the phrase “as such” has been seen to reinforce the fact that the individuals are chosen to be victimised due to their membership of a group. In Akayesu the Trial Chamber held that, “the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group”. The same interpretation was adopted by different Trial Chambers of the ICTR in subsequent cases.

In the Jelisic case the ICTY Appeal Chamber stressed the difference between specific intent of genocide and motive stating that “The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or

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232 Smith and Hogan, supra note 147, pp. 81-83.
233 Schabas, supra note 85, p. 254-255.
235 Akayesu Judgement, para. 521.
236 See Nahimana et al., para. 948, Semanza Judgement, para. 312, Bagilishema Judgement, para. 61, Rutaganda Judgement, para. 60 and Musema Judgement, paras. 153-154, 165.
some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”\textsuperscript{237}

In the \textit{Niyitegeka} case the Trial Chamber, concurring with \textit{Akayesu}, interpreted “as such” to mean that “the act must be committed against an individual because the individual was a member of a specific group and specifically because he belonged to this group, so that the victim is the group itself, not merely the individual”.\textsuperscript{238} This interpretation was challenged in an appeal against the judgement. The appellant contended that the Trial Chamber had erred in law by failing to interpret the words “as such” as meaning “solely”. The Trial Chamber’s interpretation fails to give the words their full and true meaning and effect. In the appellant’s view, the words “as such” should be interpreted as referring to a situation “where the specific intent was to commit the specified acts against the group \textit{solely because they were members of such a group}.”\textsuperscript{239}

The Appeals Chamber acknowledged that the words “as such” constitute an important element of the crime and was deliberately included in the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. It went on to state that:

The term “as such” has the \textit{effet utile} of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion.\textsuperscript{239} In other words, the term “as such” clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context.\textsuperscript{240}

The Appeals Chamber upheld the Trial Chamber’s interpretation that acts have to be committed against the victims because of their membership in the protected group, but this need not to be the sole factor motivating the perpetrator. The perpetrator may also have other motivations, namely personal motives, but they are considered legally irrelevant. In other words, these personal motives do not preclude a conviction for genocide, if the perpetrator had the specific intent to commit genocide.

\textsuperscript{237} Prosecutor v. Jelisic, Appeals Chamber Judgement, Case No. IT-95-10-A, 5 July 2001 (Jelisic Appeals Chamber Judgement), para. 49.

\textsuperscript{238} Prosecutor v. Niyitegeka, Trial Judgement and Sentence, Case No. ICTR-96-14-T, 16 May 2003 (Niyitegeka Judgement), para. 410.

\textsuperscript{239} Prosecutor v. Niyitegeka, Appeals Chamber Judgement, Case No. ICTR-96-14-A, 9 July 2004 (Niyitegeka Appeals Chamber Judgement), emphasis in Appellant’s Brief, para. 47.

\textsuperscript{240} \textit{Ibid.}, para. 53.
The ICTR case law does not explicitly state whether or not the motives are part of the elements of the crime of genocide, but it does reveal that victims have to be selected because they are members of a protected group. The words “as such” have the function of clarifying the specific intent requirement. The Appeals Chamber interpreted that the term gains its *effet utile* through drawing a distinction between mass murder and crimes in which victims are targeted with discriminatory intent. However, it should be noticed here that the discriminatory intent, which is an element of the crime against humanity of persecution, is not enough for a conviction of genocide. The perpetrator has to seek to destroy the community as such. The phrase “as such” helps distinguish genocide from the crime against humanity of persecution.²⁴¹ Both crimes are “perpetrated against persons that belong to a particular group and who are targeted because of such belonging”. But, in addition the discriminatory intent required for persecution, genocide “must be accompanied by the intention to destroy…the group to which the victims of the genocide belong”.²⁴²

### 4.5.5 Conclusion

Genocide is a crime that requires intent as a constitutive element of the crime. This intention is called, *inter alia*, specific, special intent or *dolus specialis* in academic writing and the ICTR case law. This element gives the crime of genocide its particular character among other international crimes and separates it from the ordinary crime of murder, for example. The gravity of the crime and its destructiveness attaches deep moral condemnation to it, and therefore it has been labelled as “the crime of crimes”.

The ultimate victim of the crime of genocide is the targeted group, not merely the individual who is victimised because of his or her membership of that group. The perpetrator seeks to destroy the protected group. The definition of genocide is restricted to encompass acts that amount to physical or biological genocide.

The phrase “in whole or in part” is interpreted to include quantitative criterion in the definition, “in part” to mean at least “a substantial part” of the group. However, the ICTR case

²⁴¹ Akhavan, *supra* note 228, p. 1003.
law on the matter is not thorough, probably due to the nature of the conflict in Rwanda. In this regard, the ICTY case law provides a more useful reference.

The position on the issue of motives and their relevance among the definition of genocide is not settled. The perpetrator’s individual motives are, however, irrelevant, as long as he or she had the specific intent to commit genocide. The phrase “as such” reinforces the fact that the individuals must be singled out because of their membership of a group. It clarifies the specific intent requirement for genocide and helps in distinguishing genocide from the crime against humanity of persecution.

The problem in interpreting the definition of genocide, especially its mental element, at least partly lies in the fact that the States negotiating the definition and the judges within the ad hoc Tribunals understood the concepts of both “intent” and “motive” differently.\(^\text{243}\) A court interpreting the mental requirement has to balance between being faithful to the Genocide Convention, but on, the other hand, and trying to find a workable intent standard suitable for international prosecution of genocide. In this regard, there still remains work to be done by subsequent international courts.

5 Concluding Remarks

The 1994 Genocide in Rwanda is a dark period in humanity, but unfortunately not an exceptional event in the history of mankind. The genocide was implemented in such a way that it had an immense impact on the population of Rwanda and left the country virtually in ruins. The human suffering was measureless and continues to be a heavy burden on the survivors.

Although no trial can bring to life those who died in the conflict, prosecution of perpetrators may help in the gradual process of national reconciliation and maintenance of peace in the region. The international community, even though it failed to prevent the genocide, was determined to bring to justice those responsible for it. The creation of the ac hoc Tribunals

\(^\text{243}\) Boot, supra note 231, p. 416.
was another step in the path to end the culture of impunity that had earlier been the common state of affairs.

The ICTR had, without dispute, a troubled start facing logistical and organisational problems, but even so it became a fully operational and efficient court capable of conducting fair trials and creating important jurisprudence. It has delivered a wealth of judgements elucidating the legal ingredients of genocide and other international crimes alike. Even though one cannot yet make a definitive assessment of the work of the ICTR, it may be said that the ICTR has made a significant contribution to the law of genocide and international criminal justice in general.

For international lawyers it has become a commonplace to refer to the case law of the *ad hoc* Tribunals. The *corpus* of procedural and substantive law developed by the ICTR and the ICTY constitutes a basis for subsequent trials in international and hybrid tribunals. In addition, national jurisdictions might consider the jurisprudence on substantive law useful while prosecuting international crimes.