ACKNOWLEDGMENT

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Lastly, but not by any means least to my family, my father, Hamidu Mtulya, my mother, Asha Kambi, my brothers, Abdallah Mtulya and Sifa Zuberi, and my sister Rehema Mtulya. I will always remember them for moral and material support. They encouraged me all the time of my stay in Oslo. They comforted me to go through the first winter ever seen in my life. I should admit, without them my study would not have reached this stage.

While I take personal responsibility for any errors, omissions or shortcomings contained in this work, to those mentioned and others I have not mentioned, but who have, in one way or another contributed to this work, I humbly say thank you for your assistance.
DEDICATION

This work is dedicated to my brothers, Abdallah Mtulya and Sifa Zuberi, and my sister Rehema Mtulya. Their efforts to make me succeed from my childhood to date are incomparable.
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**ABBREVIATIONS**

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<tr>
<td>AG</td>
<td>Attorney General</td>
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<td>Doc.</td>
<td>Document</td>
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<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<td>et. al.</td>
<td>Et Cetera</td>
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<td>GA</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<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>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IMT</td>
<td>International Military Tribunal</td>
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<td>mtg.</td>
<td>Meeting</td>
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<td>Trial Chamber</td>
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<td>res.</td>
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<td>SC</td>
<td>Security Council</td>
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<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>UN</td>
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<td>VRS</td>
<td>Army Republika Srpska</td>
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CHAPTER I
INTRODUCTION

1.1 General Perception and background to the Problem
The adoption by the General Assembly of the Universal Declaration of Human Rights (UDHR) on the 10 December 1948, constituted a major step forward in the advancement of civilization at the international and national levels.\(^1\) The Declaration comprises in one consolidated text nearly the entire range of what today are recognized as human rights and fundamental freedoms.\(^2\) In an historical context, it should be remembered that the UDHR was adopted by the General Assembly the day after the Convention on the Prevention and Punishment of the Crime of Genocide (The Convention).\(^3\)

There is thus a temporal link and, perhaps, an understanding that the two documents may be read together.\(^4\) Indeed, when adopting the International Covenant on Civil and Political Rights (ICCPR),\(^5\) the international community made explicit the primacy of the prohibition on Genocide.\(^6\) At the level of State responsibility it is now widely recognized that customary rules on genocide impose \textit{erga omnes}\(^7\) obligation, and those rules now form part of \textit{Jus Cogens}.\(^8\) Therefore, genocide is given higher status with other norms which are considered as \textit{jus cogens}.\(^9\) This may be attributed from the fact that genocide

\(^{1}\) Resolution 217(III) of 10 December 1948.
\(^{3}\) Resolution 260 A (III) of 9 December 1948.
\(^{5}\) Resolution 2200 A (XXI) of 16 December 1966.
\(^{6}\) Article 6(3) of the ICCPR.
\(^{7}\) Rules of \textit{erga Omnes} obligation lay down obligations towards all other member States of international community, and at the same time confer any State right to require that acts of genocide be discontinued: Cassese, A., \textit{International Criminal Law} (2003) p. 98.
\(^{9}\) \textit{Jus Cogens} is the norm that is considered to have higher status and rank than ordinary rule deriving from treaties and customs. The body of peremptory norms that may not be derogated from by international agreement and national legislation as well. Consequently, treaties must not
constitutes the crime of crimes. The word genocide is a modern term for an ancient crime. The term was created in the aftermath of the Jewish Holocaust of the Second World War. Indeed the genocide Convention has been characterized as the product of an international bad conscience over the failure to take action to frustrate the genocidal projects of the Nazi government, and of a determination to support some of the somewhat shaky foundations of the law of the International Military Tribunal at Nuremberg and to expand the scope of that law to cover peace-time crimes against humanity.

Genocide therefore was first conceived of as a category of crimes against humanity. Neither Article 6(c) of the Charter of the International Military Tribunal at Nuremberg (the Nuremberg Charter) nor Article III (1) (c) of Control Council Law No. 10 explicitly envisaged genocide as a separate category of crimes against humanity. The Nuremberg Charter condemned practices of extermination not genocide. Although genocide was discussed in length in some cases, surprisingly, judgments of the Tribunal do not mention the reality of genocide. Despite this weakness, the importance of the Nuremberg Tribunal cannot be ignored. The Tribunals established several precedents for the future prosecution of crimes against humanity.

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15 Law Reports of Trials of War Criminals, vii and xiii at page 25 and 17 respectively.
17 For instance, the Tribunals established that a single inhumane act may be prosecuted as a war crime, and held that a crime against humanity requires evidence of systematic or widespread abuse; Francis Pilch, Legal Response to Sexual Violence www.ciaonet.org (Accessed 20-09-2004).
1.2 Hypothesis/ Statement of the Issue

The first essential element of the crime of genocide is the intent to destroy in a whole or in part, a national, ethnical, racial, or religious group, as such. Some scholars have argued that the key word here is *intent*, because it is the standard of intent requirement that distinguish the crime of genocide with other crime. Giving the importance of the intent, Daniel Nsereko in his work *Genocide: A Crime Against Mankind* put it in this way ‘A person who kills member of a group, numerous though they may be and in however barbaric of atrocious a manner may do it, it is not guilty of genocide unless he kills with the *specific intent – dolis specialis* to destroy a group as such’\(^{18}\) Nsereko adds up that ‘similarly, when a person kills another because that other person belongs to a protected group, he is not guilty of genocide unless he kills with the *intent* to destroy the victim’s group as such’\(^{19}\) It is because of this, that Bill Frelick put it in this way ‘the *intent* of the perpetrator of genocide is often as difficult to establish as is the act itself’.\(^{20}\) Kurt Jonassohn, while dealing with three criteria of determining genocide, concluded that ‘of the three criteria, the first one, which requires that there be evidence of *intent*, is clearly the most difficult to deal with.’\(^{21}\)

These statements are corroborated with the trial chamber of ICTR in Akayesu judgment. In that the Tribunal held that ‘intent is a mental factor which is difficult, even impossible to determine’.\(^{22}\) With this difficult in determining intent, this research stretches to endeavor on the subject. Therefore the central intention of the research is to focus on intent to destroy, in whole or in part, as such in the crime of genocide under international criminal law. The issues that will be looked include the definition of genocide within the Convention, and how to determine intent in genocide cases. The aim of this research


\(^{19}\) Nsereko (2000) p. 124.


therefore, is to discuss the genocidal intent with particular focus on the contribution given by the International Criminal Tribunal for the former Yugoslavia (ICTY)\(^{23}\) and the International Criminal Tribunal for Rwanda (ICTR)\(^{24}\) to the clarification on this rather ambiguous element.\(^{25}\) In order to evaluate and assess the contribution by the ICTY and ICTR a brief presentation of the status of international law prior to the established of the ICTY and ICTR is needed and will be looked upon. The research will extend to the intent and its accompanied elements viz; to destroy in whole or in part as such, with reference to the practices of the ICTY and ICTR, and show how the two tribunals have determined \textit{in whole or in part} concepts and the meaning of \textit{as such}. All this will be looked in relation to \textit{genocidal intent}. Threshold of genocidal intent is given particular importance in each case when the discussion is underway.


\(^{24}\) Res. SC/RES/955 (1994).

\(^{25}\) The Choice with ICTY and ICTR stem from the fact that the Convention has not been widely invoked to prosecute those culpable of genocide. In fact, Akayesu judgment marked the first time that an individual was brought to trial committing genocide and was convicted for the crime. The delay in its invocation has invited a lot of debates. Schabas thinks it due to ‘rigorous of the definition and its clear focus of the mentioned groups’. Jongso says that ‘it is because of the difficulties of producing evidence of specific genocidal intent. Cassese says ‘the most blatant ones are the definition of genocide and the four classes’. Kadre differs and says that ‘the paucity of actions under the convention can be attributed not to any inherent defects within the convention itself, but because of a lack of the political will by the governments necessary to take actions’; Akayesu 2 September 1998; Mitchell, D., \textit{Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimna v. Thomson}, 2000, Melbourne University Law Review 15; Schabas, W., \textit{Genocide in International Law} (2000) p.9; Oh, J., \textit{The Prosecutor’s Dilemma: Strength and Flaws of the Genocide Convention}, (http://www.murdoch.edu.au/elaw/text.html, Accessed 14 February 2005); Cassese (2003) p. 96-97; Kader, D., \textit{Progress and Limitation in Basic genocide Law: A Critical Bibliographical Review}, 1991, p. 142.
Additionally, the research will stretch to intent definition under the International Criminal Court Statute (ICC).\textsuperscript{26} This being one of the grey areas, this research will endeavor and trace some differences and similarities with the two tribunals and see whether further clarification is needed. Finally, the research would give some concluding remarks on whether there is a need to change the genocidal concept or the contents of concepts.

\textbf{1.3 Objective and approach of the Research}

The word intent in genocide cases has invited a lot of problems. Professor Clark writing of his experience in preparation of Rome Statute regarding \textit{mens rea},\textsuperscript{27} admitted this ‘many of us in the process were speaking by this point of mental elements of offence… perhaps with uneasy feeling that not everybody else understood the words mental element in the same way’.\textsuperscript{28} He concluded ‘such fundamental questions came back to haunt us much later’.\textsuperscript{29} This is a general outlook of \textit{mens rea} and not specific intent as is required in genocide cases. Therefore, one could think of the difficulties involved in tracing specific genocidal intent in genocide. Cecile Aptel\textsuperscript{30} a practitioner in international tribunals offers her experience with the two tribunals in this way ‘the question whether the intent to destroy should be construed as general intent or as a \textit{dolus specialis} has yet to be resolved’.\textsuperscript{31} This shows that the area regarding intent requirement can be considered grey and can still invites more studies. To make it clear Roberta Arnold\textsuperscript{32} put it in terms of a question, ‘one of the major debates is whether the adjective \textit{special} simply indicates

\textsuperscript{26} The ICC Statute was adapted by 166 States and opened for signature 17 July 1998 in accordance to Article 125, and came into force on the 1 July 2002. To moment, June 2005, 139 States have signed and 99 have ratified the Statute: http://untreaty.un.org/english Accessed 6 June 2005.


\textsuperscript{28} Clark (2001) p. 298 -299.

\textsuperscript{29} Clark R (2001) p. 299.

\textsuperscript{30} Cecile Aptel is the Coordinator in the Office of the Prosecutor of the ICTY formerly Legal Officer, ICTR.


\textsuperscript{32} Roberto Arnold (PhD Student), Legal Adviser to Swiss Ministry of Defence.
that, in additional to the general intent to kill or to harm someone, the accused must have possessed a special genocidal intent, or whether it refers to the degree of the genocidal intent itself.\(^{33}\) She thinks that ‘the ICC Statute has failed to make up the uncleanness of the mens rea requirement’.\(^{34}\)

From this it can be learn that the requirement of intent to destroy, in whole or in part, as such in genocide studies still have an opportunity. Though it is not virtually a new area in international law, and particularly in international criminal law,\(^{35}\) it is not sufficiently been researched upon to give key answers to many asked questions. Therefore this work is intended to explore some of the plain areas of genocidal intent and probably to motivate researchers to take keen interest on the subject.

The research is also intended to make readers aware of the intent requirement in genocide cases with particular reference to the international criminal law, and its application in international criminal tribunals/ courts.

It is also the intention of the research to draw attention to the effects of bringing the case to international criminal tribunal/ court without a critical look at intent requirement in genocide cases. In all, the research intended to provide difficulties involving in the determination of intent requirement and in that context try to provide some minimum conditions that must be addressed when dealing with genocide issues.

### 1.4 The degree of Genocidal Intent – the threshold in different jurisdiction

As a rule, an intention is a necessary prerequisite in any criminal conduct. However, there are several degrees of intent and its definition differs.\(^{36}\) In some United States (US) state

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\(^{34}\) Arnold (2003) p. 127.

\(^{35}\) The history starts in 1944 when Raphael Lemkin coined the term, and it was adopted in 1948 in the Convention.

legislatures define intention as ‘willful, deliberate killing’. In most countries, the lowest degree is that of dolus eventualis, which requires knowledge of grave risk of death and acceptance of that risk. In continental European terminology, intent or purpose is a kind of dolus, but the exact requirements are subject to complicated discussion. In common law legal tradition, for instance, intent to destroy a group is mainly considered to have the precise meaning of specific intent. At minimum, intention entails causing serious bodily injury and committing an act clearly dangerous to human life that causes the death of an individual. When it comes to genocide, legally speaking, genocide is the most serious crime. It is considered an aggravated crime against humanity, for important reason. The Genocide Convention requires the proven intent of the perpetrator to destroy a human community- ‘the intent to destroy, in a whole or part, a national, ethnical, racial or

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37 Courts (2000) 175, at p. 177; Arnold (2003) p. 137 – 144, where she offers three different degree of mens rea under criminal law, namely, dolus directus, dolus indirectus and dolus eventualis.

38 Canadian Penal Code also have almost similar provision, See: Section 231 (3).

39 Arnold (2003) p. 137 – 144; David L Neressian offers explanation of the three degree of mens rea. He says ‘dolus directus is direct intent, where the wrongful consequences of the criminal act were both foreseen and desired by the perpetrator. Dolus Indirectus refers indirect to indirect intent, where the wrongful consequences of the criminal act were foreseen, but not necessary desired, by the perpetrator. Dolus eventualis covers the situation where the perpetrator foresees certain consequences as a significant possibility but nevertheless proceeds with the wrongful conduct: Neressian, D., The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals, 37 Texas, International Law Journal 231 (2002) 270, at p. 263.


41 Heine, G., & Vest, H., (2000) p. 177; Section 19.02 (b) (2) of the Texas Penal Code.

religious group, as such’. Other crimes against humanity and war crimes do not require proof of such intent, merely of the criminal action itself, such as mass murder.\textsuperscript{42}

The definition of \textit{mens rea} in the ICC Statute states that a person has intent where, in relation to conduct, that person means to engage in the conduct; in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.\textsuperscript{43} But words \textit{with intent} that appear in the \textit{chapeau} of article II of the Genocide Convention do more than simply reiterate that genocide is a crime of intent. Article II of the Convention introduces a precise description of the intent, namely to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The reference to \textit{intent} in the text indicates that the prosecution must go beyond establishing at the offender meant to engage in the conduct, or meant to cause consequences.\textsuperscript{44} The offender must also be proven to have a specific intent or \textit{dolus specialis}. Where the specified intent is not established, the act remains punishable but not as genocide.\textsuperscript{45} It may be classified as a crime against humanity or it may be simply a crime under ordinary criminal law.\textsuperscript{46} Examples here may be drawn from a situation where a person drops a bomb to a river and causes flooding, and aware that the flooding may cause death to the conventional group. Here he will be acting with purpose to cause flooding but not necessary to destroy a protected group. The question that arises is whether the destruction of the group must be the aim of the bombing or whether it is sufficient that it is a certain or likely consequence of the bombing. This will be discussed in detail in the threshold of intent in chapter II and III of this research.

\textsuperscript{43} Article 30 of the ICC Statute
\textsuperscript{44} Schabas (2000) p. 214; The preparatory Committee of the ICC discussed this issue and let it to the court to decide depending on the circumstances of each case; Roberta Arnold (2003).
\textsuperscript{46} Bassiouni, C., \textit{United States Involvement in Vietnam} (1979) 9 California Western International Law Journal – In the discussion Bassouni concluded that genocide was not committed by the United States against aboriginal population, or in the case of war, because of an absence of proof of \textit{specific intent}. 
With all this in mind, that is why in 1996 the International Law Commission (ILC) qualified genocide’s specific intent in these words: ‘the prohibited acts enumerated in subparagraphs (a) to (c) 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 combine with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is 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 overall consequences of the prohibited acts’.\textsuperscript{47} In any case, genocide is provided in the Statutes of ICTY and ICTR, as well as ICC and there is some jurisprudence to learn. The first two tribunal have had the opportunity to try quite a few persons accused of genocide, and have delivered important judgments on the matter.

CHAPTER II
AN OVERVIEW AND HISTORICAL DEVELOPMENT OF THE GENOCIDAL INTENT UNDER THE GENOCIDE CONVENTION OF 1948

2.1 Situation before the Genocide Convention of 1948
Genocide was first conceived of as a category of crimes against humanity. Neither Article 6(c) of the Charter of the International Military Tribunal at Nuremberg (the Nuremberg Charter) nor Article III (1) (c) of Control Council Law No. 10 explicitly envisaged genocide as a separate category of crimes against humanity.\(^{48}\) The Nuremberg Charter condemned practices of extermination not genocide.\(^{49}\) Although genocide was discussed in length in some cases,\(^{50}\) surprisingly, judgments of the Tribunal do not mention the reality of genocide.\(^{51}\) For instance in France et al. v. Goering et al.,\(^{52}\) the indictment of the International Military Tribunal charged the defendant with deliberate and systematic genocide, viz., the extermination of racial and national groups, against civilian population of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles and Gypsies, but there was no mention of genocide in the judgment.\(^{53}\)

Having this problem in mind, the international community felt compelled to draft a Convention specifically to deal with the crime of genocide perpetrated both in time of peace and war.\(^{54}\) But the law regarding crimes against humanity has evolved substantially that it may be committed in time of peace and in time of war.\(^{55}\) To know better the normative content of the Convention, this thesis will now turn to the content and development to the adoption of the Convention.

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\(^{50}\) Law Reports of Trials of War Criminals, See: footnote 15 to this Research.
\(^{52}\) France et al. v. Goering et al., (1946) 22IMT 203, p. 45 -46.
\(^{53}\) Chapter I, Section 1.1, footnote 16 to this Research.
\(^{54}\) Article I of the Convention.
\(^{55}\) Article 7 of the ICC Statute and Tadic Case.
2.2 Early discussions within the United Nations

When the first session of the United Nations General Assembly was taking place in London, some countries asked that the question of genocide be put on the agenda.\textsuperscript{56} The matter was discussed briefly, and then referred to the Sixth Committee where the same States proposed a draft resolution on genocide. They argued that although the General Assembly was not a legislative body, and its recommendations could not be considered as laws, any measure it took was vested with incontestable authority.\textsuperscript{57} In the course of the debate, the notion that the resolution be completed with a full-blown convention soon began to circulate. Many countries took initiative on the preparation of the text, and after several amendments the draft resolution was presented.\textsuperscript{58} Although there were some discussion about who should assume responsibility of the task, but finally due to the sake of unanimity the duty was assigned to the Economic and Social Council (ECOSOC).\textsuperscript{59} The draft resolution was then adopted by the General Assembly on 11 of December 1946 unanimously and without much debate.\textsuperscript{60} The resolution, in part, stated that ‘genocide is a denial of the right of existence of entire human groups; such denial of the right of existence shocks the conscience of mankind; the punishment of the crime of genocide is a matter of international concern; request the Economic and Social Council to undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide’.\textsuperscript{61}

\begin{footnotes}
\item[56] These countries are Cuba, India and Panama: UN Doc. A/BUR.50.
\item[57] UN Doc. A/C.6/SR.22.
\item[58] UN Doc. A/C.6/83.
\item[59] UN Doc. A/C.6/SR.32.
\item[60] Res. 96(I).
\item[61] Res. 96 (I). Although resolutions are said to be not binding but in the case of the \textit{Legality of the Threat or Use of Nuclear Weapons}, the International Court of Justice (ICJ) said that ‘the Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence of important for establishing the existence of a rule or the emergence of an \textit{opinion juris}: ICJ Reports 226, 1996, para. 70.
\end{footnotes}
Just few months after the resolution, the Secretary General conveyed it to ECOSOC, and suggested that the ECOSOC might assign the task to the Commission on Human Rights or to a special committee of the Council.\(^\text{62}\) Being with heavy programmes, ECOSOC asked the Secretary General to undertake with assistance of experts in the field of international and criminal law, the necessary studies with the view to drawing up a draft convention in accordance with the resolution 96(I).\(^\text{63}\) The Secretary General turned to the Secretariat’s Human Rights Division for preparation of an initial draft.\(^\text{64}\) The Division consulted three experts, namely Raphael Lemkin,\(^\text{65}\) Henri Donnedieu de Vabres\(^\text{66}\) and Vespasian Pella.\(^\text{67}\) The Secretary General concern was that genocide should be defined so as not to encroach on ‘other notions, which logically are and should be distinct’.\(^\text{68}\) This was an oblique reference to crimes against humanity, already defined in the Charter of the Nuremberg Tribunal and its judgment of 30 September – October 1946, as well as to the question of minority rights, then under consideration by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and the Commission on Human Rights within the context of the drafting of the Universal Declaration of Human Rights.\(^\text{69}\) The consideration was to the effect that the draft should embrace all points likely to be adopted, leaving it to the competent organs of the United Nations to eliminate what they did not wish to include.\(^\text{70}\)

The drafting exercise by the experts started as quick as possible. The experts went through article by article to create the whole Convention. Of interest to this research are preamble and the discussion on article I and II which contain necessary elements within the limits of this research. The drafters started with preamble defining genocide as the

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\(^\text{62}\) UN Doc. E/330.

\(^\text{63}\) ESC Res. 47 (IV).

\(^\text{64}\) UN Doc. E/447.

\(^\text{65}\) Author of the *Axis Rule in Occupied Europe* and inventor of the word *genocide*.

\(^\text{66}\) Professor at the Faculty of Law of the University of Paris, and former judge of the IMT.

\(^\text{67}\) Professor in Romania and President of the International Association for Penal Law.

\(^\text{68}\) UN Doc. E/447, p. 15.


\(^\text{70}\) UN Doc. E/447, p. 16.
intentional destruction of a group of human beings and the crime against the law of the nations. The commentary stressed that the importance of a narrow definition, so as not to confuse genocide with other crimes, and to ensure the success of the convention by facilitating ratification by large number of States.\footnote{UN Doc. E/447, p. 17; Schabas (2000) p. 53.} Article I offered the aim of the convention that to prevent the destruction of racial, national, linguistic, religious or political groups of human beings. This enumeration was different from resolution 96 (I) which had provided for protection of racial, religious, political, and other groups, by eliminating the reference to other groups.\footnote{UN Doc. E/447, p. 17.} Lemkin preferred to omit political groups.\footnote{His argument was that political groups lacked the required permanency. However, his three acts of genocide in his book were taken. These are physical, biological, and cultural.} Donnedieu de Vabres and Vespasian Pella were against inclusion of cultural genocide.\footnote{Their argument was that cultural genocide represents an undue extension of the notion of genocide and amounted to reconstituting the former protection of minorities under cover of the term genocide.} When questioned on cultural genocide, the Secretary General decided to include it in the draft, subject to change by ECOSOC or the General Assembly.\footnote{UN Doc. E/447, p. 27.} The Secretariat draft, accompanied by a summary of the comments of the three experts, was sent to the Committee on the Progressive Development of International Law and Its Codification, on 13 June 1947.\footnote{UN Doc. A/ACC.10/41; UN Doc. A/AC.10/42Add.1; UN Doc. A/AC.10/15.} The Secretariat draft was presented to the ECOSOC at its fifth session in July-August 1947. The Secretary General had fulfilled part of the mandate given at ECOSOC’s previous session. On 6 August 1947, the ECOSOC instructed the Secretary General to collate the comments of member States on the draft, and to transmit to General Assembly together with the draft convention. It informed the General Assembly that it proposed to proceed as rapidly as possible, subject to further instructions from the General Assembly.\footnote{ESC Res. 77 (V).}
2.3 *Travaux Preparatoires* of the intent to destroy in whole or in part as such

Article II and III of the Convention are the heart of the Convention. They define the crime, as well as modalities of its commission. In the Sixth Committee the debate returned to issues that had been bruited since the first days of drafting: definitional of intentional element; inclusion of political groups among the victims of genocide; and treatment of cultural genocide.\(^{78}\) Since this research concentrates on some of the elements within article II, its focus therefore will be *travaux preparatoires* of article II. Article II consist of an enumeration of acts of genocide, but actually begins by delimiting the intentional element of the crime by providing that genocide means any of the acts committed with *intent to destroy, in whole or in part*, a national ethnical, racial or religious group, *as such*. The Sixth Committee of the General Assembly made four changes of the Ad Hoc Committee draft: it eliminated the word deliberate before acts; it incorporated the qualification that genocide need not involve the total destruction of the group, but can also occur where destruction is only partial; it redefined the notion of protected groups, adding ethnical and removing political, and it replaces the suggestion that genocide was committed on grounds of the national or racial origin, religious belief, or political opinion of its members with the enigmatic word *as such*.\(^{79}\) Some writers have related the word *as such* with motive. William Schabas has this to offer ‘there is no explicit reference to motive in article II of the Genocide Convention, and casual reader will be excused for failing to guess that the words *as such* are meant to express the concept’. He added that ‘here, the *travaux preparatoires* prove indispensable.’\(^{80}\)

2.3.1 Genocidal intent – the threshold

It is commonplace to state that genocide is a crime requiring proof of intent but the provision of genocide requires do more than simply reiterate that genocide is a crime of intent.\(^{81}\) The intent within article II is to destroy, in whole or in part, the mentioned groups, as such. The drafting history may shed some lights on the threshold of the

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\(^{79}\) UN Doc. A/C.6/SR.83.

\(^{80}\) Schabas (2000) p. 245.

\(^{81}\) Schabas (2000) p. 213.
genocidal intent. The history shows that the preamble of the Secretariat draft described genocide as the intentional destruction of a group of human beings. The word intent did not appear in the substantive portions of the draft, although the definition proposed in article I and II labelled genocide an act committed with the purpose of destroying the groups in whole or in part. In fact it was described it as the deliberate destruction of human group.\(^82\) This definition excludes certain acts which may result in the total or partial destruction of a group of human beings.\(^83\) For instance destruction of a group in civil war may not be considered, but if accompanied with intent to destroy a group in whole or in part, it might be taken into consideration. When the Secretariat was asked of the times of political or religious turmoil where there is loss of life, it confirmed that such acts are outside the notion of genocide so long as the intention physically to destroy a group of human being is absent.\(^84\)

Despite all these good explanation from the Secretariat, member states still felt of the need to include the term intent in the genocide definition,\(^85\) and excluding the term deliberate.\(^86\) The word intent was finally included, and this represented the compromise aimed at generating consensus between states with somewhat different conceptions of the purposes of the Convention. Commenting on the word intent, William Schabas says, ‘the first paragraph or chapeau of article II of the Convention defines the specific intent to destroy in whole or in part a national, racial, ethnical or religious group as such’.\(^87\) He adds up that ‘the degree of intent require by article II of the Convention can be described

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83 For instance destruction of a group in international or civil war, isolated acts of violence not aimed at destruction of a group of human beings, mass displacement of Population.
86 The word deliberate was removed from the Convention because the drafters did not intend to extend the concept of premeditation to the crime of genocide. Schabas (2000) p. 225-226.
as specific intent or special intent”. This intent therefore amounts to *dolus specialis*, that is, to an aggravated criminal intention, required in additional to the criminal intent accompanying the underlying offence. It logically follows that other categories of mental element are excluded: recklessness, and gross negligence. In any case drafters of the convention appear to have regarded genocide as requiring specific intent.

### 2.3.2 Genocidal intent ‘to destroy’

Article II of the Convention specifies that the offender must intend to destroy a protected group. One of the members of Expert group consulted by Secretary General to prepare a draft convention thought of the broad inclusion of the term genocide. According to him genocide involved the destruction of political institutions, economic life, language and culture, and that its ultimate stage was only physical destruction. The drafters of the Convention clearly chose to limit the scope, in terms of the acts of genocide set out in the five paragraphs of article II to physical and biological. But the big issue was whether the term destruction is part of the intent in first part of article II must correspond to the physical or biological destruction defined in the second part of article II. *Travaux Précéparatoires* shows that these issues were not specifically debated during the drafting of the article, but the spirit of the discussions resist extending the concept of destruction beyond physical and biological acts. This problem, however, was considered by the International Law Commission (ILC) in the draft Code of Crimes when it stressed that

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88 According to him *specific intent* and *special intent* appear to be synonymous expression. Specific intent is used to in common law 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: Schabas (200) p. 217-218.


90 UN Doc. A/AC 6/SR 72, page 72 states that ‘genocide was characterized by the factor of particular intent to destroy a group. In absence of that factor, whatever the degree of atrocity of an act and whatever similar it might be to the acts described in the Convention, that act still could . It is important to retain the concept of *dolus specialis*’.


‘destruction in question is the material destruction of a group either by physical or biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group’.\(^\text{93}\) However this is not to exclude these groups in entirety. That is why ICL added that ‘the national or religious element and the racial or ethnic element are to be taken into consideration in the definitional of the word *destruction*, which must be taken only in its material sense, its physical or biological sense’.\(^\text{94}\) It has been argued that a broader interpretation may be employed in the term destruction. A liberal court may rely on the objectives of the Convention, the need for dynamic interpretation of legal instruments that protect human rights, and the principle established in the Vienna Convention on the Law of Treaties which authorises resort to a convention’s preparatory work only when the ordinary meaning of the provisions, taken in its context and in the light of its object and purpose, leaves a provision ambiguous or obscure.\(^\text{95}\) In any case, however, considering the nature of genocide as a criminal act, it is left to the court to decide depending on the circumstances of each particular case.

### 2.3.3 The concept of ‘in whole or in part’ in genocide

The words in whole or in part appeared for the first time in the preamble in resolution 96 (I) under the wording *entirely or in part*.\(^\text{96}\) The Secretariat draft defined genocide as a criminal act directed against any one of the aforesaid groups with the purpose of destroying it in whole or in part.\(^\text{97}\) The Secretariat commented to the *Ad Hoc* Committee that the victim of the crime of genocide is a human group. It added ‘it is not a greater number or a smaller number of individual who are affected for a particular reason but a group as such’.\(^\text{98}\) The *Ad Hoc* Committee agreed with reference to in whole or in part to

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\(^\text{94}\) ILC Report, 1989, p.102, para. 4.


\(^\text{96}\) UN Doc. A7BUR/50.

\(^\text{97}\) UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, articles I and II.

\(^\text{98}\) Note by the Secretariat, Chapter I, no. 1.
appear in the text of the definition. In the Sixth Committee, Norway agreed on the inclusion, but focused the debate by inserting the term in whole or in part after the words ‘with the intent to destroy’.\textsuperscript{99} Finally, while all states accepted the inclusion of the word in whole or in part, but this provided little guidance as to what meant by the term \textit{in part}.\textsuperscript{100} A little guidance can be gathered from the United Nations General Assembly resolution 37 of 1982 which provided that the massacre of few hundred victims in the Palestinian refugee camps in Sabra and Shatila to be an act of genocide.\textsuperscript{101} A General Assembly resolution could be, in theory, of considerable assistance in construing the scope of the words as a form of authentic interpretation or merely an indication of opinion \textit{juris} of States.\textsuperscript{102} However, the circumstances surrounding the adoption of the Sabra and Shatila resolution, and the lack of unanimity, argue against drawing any meaningful conclusion.\textsuperscript{103}

The International Law Commission considered that ‘it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. Nonetheless the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group’.\textsuperscript{104} It adds that ‘it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed’. When asked what enough to convict a person, it declared ‘it is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of the protected group as such’.\textsuperscript{105} The final draft of the Preparatory Committee of the ICC Statute also echoed this analysis when construed in whole or in part to refer to the specific intention to destroy more than a small

\begin{itemize}
\item \textsuperscript{99} UN Doc. A/C.6/SR. 228.
\item \textsuperscript{100} Schabas (2000) p. 233.
\item \textsuperscript{101} GA Res. 37/123 D.
\item \textsuperscript{102} Schabas (2000) p. 235.
\item \textsuperscript{103} Cassese, A., \textit{Violence and Law in Modern Age} (1988) p. 82.
\item \textsuperscript{104} Report of the ILC on the Work of Its Fort-Eighth Session, 6 May-26 July 1996, UN Doc.A/51/10, p. 125.
\item \textsuperscript{105} ILC Report, 1996, p.126, and ILC Report, 1989, p.102, para. 6.
\end{itemize}
number of individuals who are members of a group.\textsuperscript{106} While there seems generally acceptable definition of substantial number of victims, some scholars warn that the intent requirement that the destruction contemplate the group in whole or in part should not be confused with the scale of the participation by an individual offender.\textsuperscript{107}

\textbf{2.3.4 The concept of ‘as such’ in genocide}

The words \textit{as such} as they appear at the end of paragraph of article II of the Convention were added during the four changes in the article by the Sixth Committee. It is a Venezuelan Representative in the Committee who inserted the word in substitution for ‘on grounds of the national or racial origin, religious belief or political opinion of its group members’ in the \textit{Ad Hoc} Committee’s Draft.\textsuperscript{108} A difference of opinion ensued in the Sixth Committee on the precise effect of the substitution. In view of this, a statement was included in the report of the Sixth Committee that the Committee, in taking a decision on any proposal, did not necessarily adopt the interpretation of its author.

Some Scholars have related the word \textit{as such} with motive. William Schabas is one of them. He says ‘there is no explicit reference to motive in article II of the Genocide Convention, and casual reader will be excused for failing to guess that the words \textit{as such} are meant to express the concept’. He added that ‘here, the \textit{travaux preparatoires} prove indispensable.’\textsuperscript{109} Pieter Drost on the other hand thinks that ‘in the absence of any words to the contrary, the text offers no pretext to presume the presence of an unwritten, additional element in the definition of the crime. Whatever the ultimate purpose of the deed, whatever the reasons for the perpetration of the crime, whatever the open or secret motives for the acts or measures directed against the life of the protected group, wherever

\begin{itemize}
\item \textsuperscript{107} Schabas (2000) p. 239, he says that the accused may only be involved in one or a few killings or other punishable acts. No single accused, as a principal perpetrator of the physical acts, could plausibly be responsible for destroying a group in whole or in part.
\item \textsuperscript{108} UN Doc. A/C.6/SR.83.
\item \textsuperscript{109} Schabas (2000) p. 245.
\end{itemize}
the destruction of human life of members of the group as such takes place, the crime of genocide is fully committed.\textsuperscript{110} Patrick Thornberry thinks that the crime of genocide exists when there is intent to destroy the group \textit{as such}.\textsuperscript{111}

Therefore from the history of the Convention it is safe to say that the words \textit{as such} were aimed at avoiding the possibility of the perpetrators claiming that the crime had not been committed out of hatred towards the group itself, but for other reasons, such as destruction during war, robbery, profiteering, or the like.\textsuperscript{112} In this case, the Convention does not require proof of further reasons or ‘motives’ for genocidal actions. Despite this thought from the Preparatory Committee, some scholars have insisted that the words resolve nothing, and leave the provision ambiguous as to whether or not motive is an essential element of the offence.\textsuperscript{113}

On the 9\textsuperscript{th} of December 1948 the General Assembly accepted the Sixth Committee’s draft Convention, without further amendment, unanimously adopting Resolution 260 (A) (III) creating the Convention,\textsuperscript{114} and by 12\textsuperscript{th} of January 1951, the Convention had entered into force. The final draft of the Convention regarding the definition provides that ‘in the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another


\textsuperscript{112} For instance see explanation by Henri Giraud from the Secretariat to the \textit{Ad Hoc} Committee when he said it is unnecessary to prove motive. The minute the intention arose to destroy a human group, genocide was committed. UN Doc. E/AC.25/SR.11, p. 3; UN Doc. E/AC.25/SR/3.


\textsuperscript{114} 1948 UN.Y.B 3 UN GAOR, 179\textsuperscript{th} mtg., 851, 1948, Res. adopted by vote of fifty-six to zero.
group’. This provision was adopted *mutatis mutandis* by the Security Council when establishing the ICTY and ICTR, and hereunder we are going to discussion their jurisprudence.

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115 Article II of the Convention.

116 Res. 827 (1993); Article 4 of the ICTY Statute; Res. 955 (1994); Article 2 of the ICTR Statute.
3.1 Genocide under the Statute of the two Tribunals

It is important to note that the wording in the two Statutes of the tribunals mimics the exactly language of the Genocide Convention. The definition of genocide found within article 4 of the ICTY Statute and article 2 of the ICTR Statute provides that ‘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’.\footnote{Although the ICTR Statute complements rather than replicates that of ICTY, the genocide provision is \textit{mutatis mutandis}.}

The interpretation of this article in the ICTY jurisprudence came in two re-known judgments in Jelisic\footnote{\textit{Jelisic}, 14 December 1999. Jelisic was accused of 31 counts in his indictment, including crimes against humanity, violations of the laws or custom of war and genocide. His trial only covered the charges of genocide, since he had already pled guilty to the 30 other charges. According to his indictment in 1992 Jelisic participated in the illegal confinement, illegal treatment and killings of Muslims and Croats in a makeshift facility located in Northern Bosnia. He was found guilty to fifteen counts of crimes against humanity and sixteen counts of violations of the laws or customs of war relating to murders, beatings, and the plunder of private property in the municipality of \textit{Brcko} in the north-eastern part of Bosnia and Herzegovina in May 1992. The Trial Chamber acquitted Jelisic of one count of genocide to which he had pled not guilty. The Appeals Chamber acquitted Jelisic of one count of genocide to which he had pled not guilty. The Appeals Chamber held that although the Trial Chamber’s erroneous application of the standard under Rule 98 \textit{bis} led to an incorrect assessment of the evidence on the count of genocide, it was not appropriate to reverse the acquittal and remit the case for further proceedings. As such, the Appeals Chamber affirmed the Trial Chamber’s sentence of forty years imprisonment. See: \textit{Jelisic}, 5 July 2001.} and Krstic.\footnote{\textit{Krstic}, 14 December 2001. Krstic was accused of 26 counts in his indictment, including crimes against humanity, violations of the laws or custom of war and genocide. His trial only covered the charges of the crimes against humanity, since he had already pled guilty to the other 20 counts. According to his indictment in 1992 Krstic participated in the illegal confinement, illegal treatment and killings of Muslims and Croats in a makeshift facility located in Northern Bosnia. He was found guilty of fifteen counts of crimes against humanity and sixteen counts of violations of the laws or customs of war relating to murders, beatings, and the plunder of private property in the municipality of \textit{Brcko} in the north-eastern part of Bosnia and Herzegovina in May 1992. The Trial Chamber acquitted Krstic of the count of genocide to which he had pled not guilty. The Appeals Chamber upheld the Trial Chamber’s acquittal and remitted the case for further proceedings. As such, the Appeals Chamber affirmed the Trial Chamber’s sentence of forty years imprisonment. See: \textit{Krstic}, 5 July 2001.} In Jelisic case the Tribunal defined genocide in this...
way, ‘genocide is characterised by two legal ingredients according to the terms of Article 4 of the Statute: [1] the material element of the offence, constituted by one or several acts enumerated in paragraph 2 of Article 4; [2] the mens rea of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. 

In Krstic the Trial chamber defined that ‘genocide refers to any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means. Those are two elements of the special intent requirement of genocide: (1) the act or acts must target a national, ethnical, racial or religious group; (2) the act or acts must seek to destroy all or part of that group’. It added ‘customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group’. ICTR on the other hand interpreted the provision to mean that ‘firstly, one of the acts listed under Article 2(2) of the Statute was committed and, secondly, that this act was committed against a specifically targeted national, ethnical, racial or religious group, with the specific intent to destroy, in whole or in part, that group’. According to Trial Chamber, therefore, genocide invites analysis under two headings: the prohibited underlying acts and the specific genocidal intent or dolus specialis.

### 3.2 The interpretation of intent to destroy in whole or in part as such

#### 3.2.1 Genocidal intent – the threshold

As regard to the level of genocidal intent within article 4 of the ICTY Statute, the Appeals Chamber in Jelisic judgment had this to offer, ‘the Statute itself defines the

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119 *Krstic*, 2 August 2001. Krstic was Chief of Staff of the Drina Corps of the Army of Republika Srpska (VRS) and then its Commander during the time of the Bosnian Serb take-over of the United Nations “safe haven” of Srebrenica in July 1995. He was convicted of genocide, violations of the laws or customs of war, and crimes against humanity, and sentenced to forty-six years imprisonment.


123 *Bagilishema*, 7 June 2001, para. 55.
intent required: the intent to accomplish certain specified types of destruction. This intent has been referred to as, for example, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent*. But this was long been said in Trial Chamber in the same case when it said ‘the Trial Chamber will have to verify that there was both an intentional attack against a group and an intentional upon a part of the accused to participate in or to carry out this attack’. The Trial Chamber insisted that for an individual to be guilty of genocide he must have the specific intent to destroy in whole or in part a specific delineated group. The tribunal reasoned that there must be evidence of clear knowledge that the accused was participating in the destruction of a given group. It held ‘by killing an individual member of the targeted group, the perpetrator does not thereby only manifest his hatred of the group to which his victim belongs but also knowingly commits this act as part of a wider-ranging intention to destroy the national, ethnical, racial or religious group of which the victim is a member’.

In so far as Jelisic’s intentions were concerned, the Trial Chamber held that the prosecution had not met its burden beyond a reasonable doubt of proving that Jelisic had the specific intent to commit genocide. Thus, Jelisic was acquitted of the charge of genocide. Upon appeal by prosecution, the Appeal Chamber had this to confirm ‘The Chamber considers that a question of interpretation of the Trial Chamber’s Judgement is involved. Read in context, the question with which the Judgement was concerned in referring to *dolus specialis* was whether destruction of a group was intended. The Chamber finds that the Trial Chamber only used the Latin phrase to express specific intent’. It concluded ‘accordingly, the Chamber holds that the prosecution’s challenge

125  *Jelisic*, 14 December 1999, para. 78.
126  *Jelisic*, 14 December 1999, para. 73 and 98.
128  *Jelisic*, 14 December 1999, para. 73.
129  *Jelisic*, 14 December, 1999, para. 79.
130  *Jelisic*, 14 December 1999, para. 98.
to the Trial Chamber’s finding on this issue is not well founded, being based on a misunderstanding of the Judgement’. This holding confirms that genocide is crime requiring specific intent to destroy the protected group under the Convention. This is what the drafters of the Convention had in mind and in doing so the Tribunal preserve status quo of the provisions.

In Krstic judgment, ICTY made a considerable contribution in various aspects to the definition of intention in genocide. The judgment has been more innovative probably in order to overcome the fact that no prior determination has been made to whether genocide was committed in Bosnia and Herzegovina, and that the Tribunal did not have the possibility, in view of limited scope of the case, to examine the fate of all the Bosnian Muslims during the conflict in Bosnia. The Tribunal reintroduced the geographic criterion that it had deliberately set aside while designating the group. In that case, the Prosecution accused the defendant of genocide having for having planned and participated in the massacre in a limited locality, the area of Srebrenica, of between 7,000 and 8,000 Bosnian Muslims, all of them men of military age.

The question before the Tribunal was whether there was intent to destroy in part all men of military age living in geographical zone. The Tribunal answered in affirmative. It held that ‘the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality could be characterised as genocide’. When the Tribunal asked of the ratio decidendi of its holding, it had this to offer ‘by the time they decided to kill all men of military age, the forces could not have failed to know that this selective destruction of the group would have a lasting impact upon the entire group…the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society.

133 Jelisic, 5 July 2001, para. 52.
135 Krstic, 2 August 2001, para. 569.
136 Krstic, 2 August 2001, para. 595.
It is also worth to mention the *obiter dictum* in Kupresiskic Trial Judgment when it comes to intention in genocide cases. In that case, the Trial Chamber, by the way, held that ‘both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the *intent* to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics.’\(^{137}\) It is therefore the intention of the perpetrator which distinguishes the crime of genocide and other crime, and this shows the importance of intention in the genocide cases, and of course, ICTY case law shows the need of specific intent for perpetrator to be held responsible for genocide.

When it comes to the ICTR, the tribunal needed there years to enter the first verdict. The accused was Jean-Paul Akayesu who found guilty of genocide and sentenced to life imprisonment.\(^ {138}\) The Appeals Chamber affirmed the verdict of guilty entered against Akayesu on all counts.\(^ {139}\)

The importance of this case is the fact that judges faced a critical question of what constitutes a specific intent in genocide cases, especially when there is no hard evidence of intent, such as a confession or written plan delineating an aggressor’s intentions. Of course, judges concluded that intent could be inferred through a number of presumed facts.\(^ {140}\) But the interest here is to look on the specific intent not the factors that may be inferred in these cases. So, when the tribunal asked of what exactly constitutes specific intent the tribunal held that ‘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.’\(^ {141}\)

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\(^{137}\) *Kupreskic*, 14 January 2000, para. 636.

\(^{138}\) *Akayesu*, 2 September 1998, para. 3; he was a *bourgmestre* of Taba *Commune* in 1994 and indicted, apart from other offence, genocide.

\(^{139}\) *Akayesu*, 1 June 2001.

\(^{140}\) *Akayesu*, 2 September, 1998, paras. 523-524.

The Chamber found that the offender is culpable only when he has committed one of the offences charged under Article 2(2) with the clear intent to destroy, in whole or in part, a particular group. When Trial Chamber asked why so! It says, ‘because he knew or should have known that the act committed would destroy, in whole or in part, a group’.\(^{142}\)

From this wording of ‘knew or should have known’, the practices of ICTR appear to suggest that standard for intent is knowledge of genocide plus prohibited acts. In other words if an individual does not confess to having the intent to destroy in whole or in part, as long as he or she killed at least one of the person in a protected group and had a knowledge of or participated in the plan to exterminate the protected group, then its specific intent could be inferred from overwhelming evidence of the planned extermination.\(^{143}\) In contrast, the negotiating records of the Genocide Convention states that an individual’s own intent must be proven such that the person had the purpose to destroy the group in whole or in part, since the actor’s mental state is an element of the crime. Merely inferring that the accused had intent to destroy in whole or in part because it is obvious from the general context that the victim were killed because they were members of a particular group will likely fail to meet the drafter’s intent, since it is the individual’s state of mind that is sought, not what happened collectively.\(^{144}\) On the other hand, ICTY seems to offers a third standard which can be said lies between the ICTR and the Genocide Convention. In Jelisic case\(^{145}\) the tribunal held that the accused must have clear knowledge of his or her participation in the genocide. And intent could only be proven through planning,\(^{146}\) inciting or ordering of the genocide, where the accused acts

\(^{142}\) Akayesu, 2 September 1998, para. 520; Musema, 27 January 2000, para. 164.


\(^{144}\) When drafters of Genocide Convention agreed to insert the Norwegian amendment which included the phrase ’in whole or in part’, the drafters also agreed that the aggressor’s acts would constitute genocide if the aggressor’s purpose was destruction of a group: U.N GAOR (73\(^{rd}\) mtg.) 1948, at 97.


\(^{146}\) Nothing in the definition of genocide in the text explicitly identifies a plan or policy as an element of the crime of genocide, but ICTR has held that ‘the existence of a plan would be strong evidence
with the intent to destroy the targeted group, irrespective of the overall nature of the atrocities which took place.

Therefore, ICTY seems to be more in line with the Genocide Convention, whereas the ICTR has lowered the intent standards from purposely committing one of the prohibited acts enumerated in article II of the Convention to the knowingly participating in the extermination of the individual because they are a member of targeted group. By lowering the standards to knowledge ICTR appears to have stretched too far from the original intent of the Genocide Convention. The drafters intended that genocide is such a grievous crime that it was made punishable by the international community. It is a crime that shocks the conscience of human beings.

But all this should not imply that the tribunals cannot expand the legal requirement of intent in certain circumstances, because a person can be held liable for criminal activity through various modes of liability. For instance a person can be responsible as a direct perpetrator,\(^{147}\) as a commander,\(^{148}\) as an abettor,\(^{149}\) or as a participant in a joint criminal enterprise, among others. When it comes to joint criminal enterprise, the Tadic case\(^{150}\) offers three categories namely, co-perpetration,\(^{151}\) active and knowing participation in a system organized to commit a crime,\(^{152}\) and sharing the common purpose of a joint criminal enterprise.\(^{153}\) The Trial Chamber of ICTY decided to employ the third category of the specific intent requirement for the crime of genocide’. When asked why! It says ‘it would appear that it is not easy to carry out genocide without a plan’; Kayishema, 21 May 1999, para. 94 and 276.

\(^{147}\) The one who is directly involved in the killing.

\(^{148}\) The one who orders his subordinates to violate the law or fails to prevent or punish their crimes

\(^{149}\) The one who is abetting or aiding or facilitating the crime.

\(^{150}\) Tadic, 15 July 1999, para. 185-229, 202, and 204.

\(^{151}\) This happens where all participants in a common design possess the same criminal intent to commit crime, and the crime is committed.

\(^{152}\) This happens where the crime is committed.

\(^{153}\) This happens where crimes not part of that enterprise are foreseeable, and in those crimes occur.
of this type in finding the specific intent in genocide cases. In Brdjanin case, the Trial Chamber held ‘the third category of joint criminal enterprise liability refers to criminal liability of an accused for crimes which fall outside of an agreed upon criminal enterprises, but which crime nonetheless natural and foreseeable consequences of that agreed upon enterprise’. It added, ‘where the different crime is a crime of genocide, the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in article 4 (2) would be committed and that it would be committed with genocidal intent’. This is to say that a person can be found of genocide even though that person does not have specific intent to destroy a protected group in whole or in part. All that is required is that the person enters into a joint criminal enterprise of which genocide is a reasonably foreseeable consequences and it occurs. But the same Trial Chamber recently put a kind of qualification on it when it held that ‘for both first and third categories of joint criminal enterprises the Prosecution must, inter alia, prove the existence of a common plan that amounts to, or involves an understanding or an agreement to commit a crime provided in the Statute. This is to suggest that, in absence of an understanding or an agreement is very difficult to convict a person of genocide. That is why the Trial Chamber did not convict Brdjanin of genocide. But again, the better position, when it comes to special intent in joint criminal enterprises, might be said that of the Kvocka case. In that the Trial Chamber of the Tribunal said, ‘where the crime requires special intent, the accused must also satisfy the additional requirement imposed by the crime, if he is a co-perpetrator’. And this is exactly what has been said by the Trial Chamber of ICTR in Musema case, when talking of conspiracy to commit genocide, where it held ‘the mens rea of the crime of conspiracy to commit genocide rests on the concerted intent to commit genocide. It is the intent required for the

154  *Brdjanin*, Decision on Motion for Acquittal Pursuant to Rule 98 Bis, 28 November 2003.
156  *Brdjanin*, 1 September 2004, para. 341.
157  In that the Trial Chamber held ‘there is no direct evidence to establish such an understanding or an agreement between the Accused and the relevant physical perpetrators’. *Brdjanin*, 1 September 2004, para. 353.
crime of genocide that is the *dolus specilis* of genocide*. Therefore, while tribunals seem to be clear on the threshold of genocidal intent for the direct perpetrators of the genocide, there is no clear cut threshold for the other perpetrators of the crime.

### 3.2.1.1 How to determine Genocidal Intent

In practice, proof of intent is rarely a formal part of the prosecution’s case. The prosecution does not generally call psychiatrists as expert witness 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 mens rea from the proof of physical act itself.

The Trial Chamber in Akayesu judgment gives a solution on how to determine. It says ‘in absence of a confession from accused, intent may be inferred from the following factors: 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 repetitions of destructive and discriminatory acts; and the perpetration of act 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’.

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162 Schabas (2000) for a detailed discussion.

3.2.1.2 When Genocidal Intent required to be formed by the perpetrator

The Trial Chamber of ICTR in Kayishema judgment held that the *mens rea* must be formed prior to the commission of the genocidal acts. It said ‘the individual acts themselves, however, do not require premeditation; the only consideration is that the acts should be done in furtherance of genocidal intent’.\(^{164}\) It added, ‘it is specific intent that distinguishes the crime of genocide from the ordinary crime of murder. The Trial Chamber opines that for the crimes of genocide to occur, the mens rea must be formed prior to the commission of the genocidal acts’.\(^{165}\) This is echoed by ICTY in different style. In Krstic judgment the tribunal while considering time span for premeditation it held that ‘article 4 of the Statute does not require that the genocidal acts be premeditated over a long period’.\(^{166}\) This shows that the ICTR determination is similar to that of ICTY, but has different style of approach.

3.2.1.3 Specific Plan for genocide

There is no specific reference to specific plan in article II of the Genocide Convention, and plain reading to the provision shows that specific plan is not an element to the crime of genocide. However, it would appear that it is not easy to carry out genocide without such a plan, or at least an organization. The question then would be what the status of specific plan in genocides cases. Trial Chamber in Kayishema judgment had this to offer ‘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’. It added, ‘it is unnecessary for n individual to have knowledge of all details of genocidal plan or policy’. Then the Trial Chamber gives the status of the specific plan, ‘the existence of such genocidal plan would be strong evidence of the specific intent requirement for the crime of genocide’.\(^{167}\) This analysis can also be read from the ICTY judgments. In Jelisic, the tribunal accepted the same position. It held ‘existence of a plan or policy is not a legal ingredient of the crime’ and it adds ‘however, in the context of proving specific

\(^{164}\) *Kayishema* 21 May 1999, para 91.

\(^{165}\) *Kayishema* 21 May 1999, para 91.

\(^{166}\) *Krstic*, 2 August 2001, para. 572.

\(^{167}\) *Kayishema*, 21 May 1999, paras. 94 and 276.
intent, the existence of a plan or policy may become an important factor in most cases’. It offers the importance of taking into consideration ‘the evidence may be consistent with the existence of a plan or policy, or may even show such existence and the existence of a plan or policy may facilitate proof of the crime’. It can therefore said that for genocide no policy or plan is required, but may be important factor.

3.2.2 Genocidal intent ‘to destroy’
Destruction concerns the type of destruction covered by the Genocide Convention. The key question here is whether the destruction covers only physical and biological or broader to encompass a sociological or cultural. The ICTY judgments have consistently found that the destruction referred to under the Convention only covers a physical or biological destruction and does not include cultural. The ICTY thereby clearly refused to automatically label ethnic cleansing as genocide. However, one must recognize that to include the notion of cultural destruction would not necessarily be contrary to the principle of effectiveness. Case law from the same Tribunal does make it possible to take into consideration attacks on the group’s symbols such as the cultural or religious buildings as further evidence of the intent to target the group as a distinct entity. Some writers also have argued that United Nations General Assembly, when initially deploying the phrase ethnic cleansing in 1991 in context of Balkan conflicts, made clear that the phrase referred to a form of genocide. This position seems to be echoed by Samantha Power who thinks that ethnic cleansing might well be considered under the convention. William Schabas also seems to suggest this when he says ‘a liberal court may rely on the objectives of the Convention, the need for dynamic interpretation of legal

168 Jelisic, 5 July 2001, para. 41.
instruments that protect human rights’. Although the issue was not specifically debated in the *travaux preparatoires*, the statement from the International Law Commission worth merit here. It provides that ‘destruction in question is the material destruction of a group either by physical or biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group’. However this is not to exclude these groups in entirety. That is why ICL added that ‘the national or religious element and the racial or ethnic element are to be taken into consideration in the definitional of the word *destruction*, which must be taken only in its material sense, its physical or biological sense’.

It is from these views the Trial Chamber in Krstic concluded that ‘despite recent development of customary international law to limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group, the Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of targeted group as well, the attacks which may legitimately be considered as evidence of an intent to physically destroy the group’. In the same case the Chamber asked itself the question whether a perpetrator can be responsible if the destruction was not the original goal. In this case Trial Chamber answered in the affirmative that ‘it is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation’.

When looking at the ICTR jurisprudence, it seems that there is no much discussion for the term destruction, but the judgment in Semanza is worth to mention. In this judgment the Trial Chamber held that ‘the drafters of the Genocide Convention unequivocally

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175 ILC Report, 1989, p.102, para. 4.
177 *Krstic*, 2 August 2001, para. 572.
chose to restrict the meaning of ‘destroy’ to encompass only acts that amount to physical or biological genocide’. It is also unnecessary to establish actual termination of the whole group. Rutaganda judgment gives an insight when it provides that ‘genocide does not imply the actual extermination of a 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 judgment concludes that ‘in a case other than that of Rwanda, a person could be found guilty of genocide without necessarily having to establish that genocide had taken place throughout the country concerned’. In the same judgment the Tribunal held that acts of sexual violence can form an integral part of the process of destruction of a group when stated that ‘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’. Therefore, the ICTR practice seems to agree to both the drafters’ intention and the ICTY that genocide should be restricted to physical and biological destruction, but interestingly ICTR managed to connect rape to amount to physical destruction that can lead to genocide.

The position that destruction should be strict to physical and biologically is probably wise. This is in conformity with customary international law and courts or tribunals are bound to follow. The interpretation also gets support from the principle of legality. This also required by the general principle of criminal law in *dubio pro reo*. That is why in Tadic case the tribunal did not hesitate to hold that ‘in applying these criteria, any doubt should be resolved in favour of defence in accordance with principle in *dubio pro reo*’.  

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181  Akayesu, 2 September 1998, para.731, See also Kayishema, 21 May 1999, para. 95.
182  *Tadic*, 15 October 1998, para. 73.
3.2.3 The concept of ‘in whole or in part’ in genocide

The expression in whole or in part appeared for the first time in the preamble in resolution 96 (I) under the wording ‘entirely or in part’, and finally it was agreed to include ‘in whole or in part’.\(^\text{183}\) Drafting history reveals that even substantial part of the group is enough.\(^\text{184}\) In Krstic judgment the Tribunal held that ‘any act committed with intent to destroy a part of a group, as such, constitutes an act of genocide within the meaning of the Convention’.\(^\text{185}\) The Tribunal added that ‘the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individual within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such’.\(^\text{186}\)

While there is generally accepted agreement that in whole or in part within the definition, but there is little consensus with regard to what is in part. Practice from the Tribunal seems to suggest that in part means substantial part of the group. In Jelisic judgment the Tribunal held that ‘it is widely acknowledged that the intention to destroy must target at least a substantial part of the group’.\(^\text{187}\) In Krstic it was added that ‘intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively’.\(^\text{188}\) These judgments reflect commonly accepted principle of customary law that the destruction must be substantial. But still this invites other questions like what is substantial part of the group? How should this be understood? And what is the criterion of determining and evaluating the substantial part of the group? ICTY has used several mechanisms trying to answer these questions. The Tribunal, in Sikirica, looks on the number of victims. To its opinion the part which one seeks to

\(^{183}\) UN Doc. A7BUR/50
\(^{184}\) UN Doc. A7BUR/50; UN Doc. A/AC. 10; UN Doc. A/362, Appendix, article I and II; UN Doc. AC/C.6/SR. 228; UN Doc. A/C6/SR. 73; UN GAOR C. 6, 92-97.
\(^{185}\) Krstic, 2 August 2001, para. 584.
\(^{186}\) Krstic, 2 August 2001, para. 590.
\(^{187}\) Jelisic, 14 December 1999, para. 82.
\(^{188}\) Krstic, 2 August 2001, para. 634.
destroy must represent a large number relative to the size of the whole group. In that it held ‘this part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group’. 189 This holding is consistent with the solution retained in the Statute for the International Criminal Court where intent to destroy in whole or in part was understood to refer to the specific intention to destroy more than a small number of individuals who are member of group. 190

Destruction in part would also be considered substantial when the perpetrator targets a qualitatively important part of the group with intent to systematically eliminate the elite of the group. In Sikirica the Tribunal held ‘the intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership. The requisite intent may be inferred from the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. The importance element here is the targeting of the selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimization within terms of article 4 (2) (a), (b) and (c) would impact upon the survival of the group as such’. 191

When it comes to the forms upon which genocide may be committed in whole or in part, Jelisic judgment is of importance. It provides that ‘genocidal intent may be manifested in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also be consist of the desired destruction of more limited number of persons selected for the impact that their disappearance would have upon the

189 Sikirica, 3 September 2001, para. 65.
191 Sikirica, 3 September 2001, para. 76-77.
survival of the group as such. This would then constitute an intention to destroy the group selectively.\textsuperscript{192}

The Tribunal in Krstic judgment has made a lot of innovations with regards to in whole or in part concept. In that the Tribunal reintroduced the geographic criterion, and held that ‘the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality could be characterised as genocide’.\textsuperscript{193} It added that ‘intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individual within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such’.\textsuperscript{194}

The tribunal in this judgment faced a key question that ‘whether the killing of Bosnian Muslim men in Srebrenica was carried out with intent to destroy a substantial part of the Bosnian Muslim group’.\textsuperscript{195} The Prosecution argued that ‘causing at least 7,475 deaths of mainly Bosnian Muslim men in Srebrenica, the destruction of this part of the group, which numbered in total approximately 38,000 to 42,000 prior to the fall constitutes a substantial part of the group not only because it targeted a numerically high number of victims, but also because the victims represented a significant part of the group. The Prosecution concluded that ‘the defendant’s crimes have not only resulted in the death of thousands men and boys, but have destroyed the Srebrenica Muslim community.’\textsuperscript{196} The Defence argued that ‘although the desire to condemn the acts of the Bosnian Serb Army at Srebrenica in the most pejorative terms is understandably strong these acts do not fall under the legal definition of genocide because it was not proven that they were committed with the intent to destroy the group as an entity. The killing up to 7,500

\begin{thebibliography}{99}
\bibitem{Jelisic} Jelisic, 14 December 1999, para. 82.
\bibitem{Krstic} Krstic, 2 August 2001, para. 569.
\bibitem{Krstic2} Krstic, 2 August 2001, para. 590.
\bibitem{Krstic3} Krstic, 2 August 2001, para 591.
\bibitem{Krstic4} Krstic, 2 August 2001, para 592.
\end{thebibliography}
members of a group that numbers 1.4 million people does not evidence to destroy a substantial part of the group’.\textsuperscript{197} Defence continued that ‘the 7,500 dead are not even substantial when compared to the 40,000 Bosnian Muslims in Srebrenica’. The tribunal concluded that ‘the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as genocide’.\textsuperscript{198}

When the Tribunal asked of the ratio decidendi of its holding, the tribunal held that ‘by the time they decided to kill all men of military age, the forces could not have failed to know that this selective destruction of the group would have a lasting impact upon the entire group…the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society’.\textsuperscript{199} Therefore the Tribunal used some kind of sub-group notion within a given group. The group being Bosnian Muslims, and the sub-group being Bosnian Muslims of Srebrenica\textsuperscript{200} perceived by perpetrators of the crime as referring to an entity to be eliminated as such.\textsuperscript{201} In this case it can be said that the Tribunal considered the substantial part both in qualitative and quantitative. Quantitative in the sense it was between 7,000 and 8,000 persons out of 30,000 to 40,000 Bosnian Muslims living in Srebrenica were killed, and qualitatively in the sense they were military-aged men within the group.\textsuperscript{202}

Practice from the ICTR suggests being in line with the Drafters of the Convention and ICTY. The Tribunal has dealt with the concept ‘in whole or in part’ in a number of judgments. Some of them are set a very good precedent and are mentioned here. In Kayishema the Tribunal held that ‘in part requires the intention to destroy a considerable

\textsuperscript{197} Krstic, 2 August 2001, para. 593.
\textsuperscript{198} Krstic, 2 August 2001, para 598.
\textsuperscript{199} Krstic, 2 August 2001, para. 595.
\textsuperscript{200} Krstic, 2 August 2001, para. 560.
\textsuperscript{201} See also earlier discussion in Jelisic, 14 December 1999, para. 83 states ‘it is accepted that genocide may be perpetrated in a limited geographical zone. The geographical one in which an attempt to eliminate the group is made may be limited to the size of the region or a municipality’.
\textsuperscript{202} Krstic, 2 August 2001, para. 594-595.
number of individuals who are part of the group.\footnote{203} This was made clear in the case of Bagilishema. In that the Tribunal clarified that ‘the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in particular group.’ Although the destruction sought need not be directed at every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group.\footnote{204} This confirms that the Tribunal is within the ambits and views not only of the drafters of the Convention but also its counterpart, ICTY.

3.2.4 The concept of ‘as such’ in genocide

_Travaux Preparatoires_ reveals that the word _as such_ was inserted in substitution for ‘on grounds of the national or racial origin, religious belief or political opinion of its group members’ in the _Ad Hoc_ Committee’s Draft by the Sixth Committee.\footnote{205} The whole idea was that it is the group that is targeted and not a specific individual. While some scholars have related it with motive,\footnote{206} the ICTY trend seems to consider the reason of their group membership. In Krstic judgment the Tribunal reasoned that ‘the victim must be targeted by reason of their membership in a group. The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victims’ membership in a distinct group on the part of the perpetrators is not sufficient to establish intention to destroy the as such.’\footnote{207} This position was also considered in Jelisic Judgement where the Tribunal held that ‘the special intent which characterises genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy. Where the goal of the perpetrator or perpetrators of the crime is to destroy all or part of a group, it is the membership of the individual in a particular

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\footnote{203} Kayishema, 21 May 1999, para. 96-97.  
\footnote{204} Bagilishema, 7 June 2001, para. 64.  
\footnote{205} UN Doc. A/C.6/SR.83.  
\footnote{206} Schabas (2000) p. 245.  
\footnote{207} Krstic, 2 August 2001, para. 561.
group rather than the identity that is the decisive criterion in determining the immediate victims of the crime of genocide’.\textsuperscript{208}

Giving the importance of the word \textit{as such}, the Tribunal in Sikirica declared that ‘the evidence must establish that it is the group that has been targeted, and not merely specific individuals within the group. That is the \textit{significance} of the phrase \textit{as such} in the chapeau’. The Tribunal went on to give the reasons ‘this is what differentiates genocide from the crime against humanity of persecution’.\textsuperscript{209} The Tribunal having this in mind can be said to be concurrently with the intention of the drafters who thought of the protection of the group as such, and not specific individual within the group.

On the other hand the term has such has been interpreted by the ICTR 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{210} In Nahimana judgment the Tribunal just put it ‘the individual is the personification of the group’.\textsuperscript{211} This was in a way echoed in the Rutaganda judgment where the Tribunal emphasized that ‘the act must have been committed against one or more persons because of their membership in a specific group rather than by reason of individual identity. The victim of the act is a member of a given group which means the victim of the crime of genocide is the group itself and not the individual alone’.\textsuperscript{212} This position also seems to correspond with the interpretation of ICTY, and of course the intention of the drafters of the Convention.

\textsuperscript{208} \textit{Jelisic}, 14 December 1999, para. 67.
\textsuperscript{209} \textit{Sikirica}, 3 September 2001, para. 89; Krstic, 2 August 2001, para. 551.
\textsuperscript{210} \textit{Niyitegeka}, 16 May 2003, para. 410.
\textsuperscript{211} \textit{Nahimana}, 3 December 2003, para. 948.
CHAPTER IV

PRESENT AND FUTURE CHALLENGES: INTENT TO DESTROY IN WHOLE OR IN PART AS SUCH IN GENOCIDE UNDER THE INTERNATIONAL CRIMINAL COURT

4.1 Genocide under the ICC Statute

Article 6 of the ICC Statute reproduces word to word Article II of the Genocide Convention and the corresponding customary rule.\(^{213}\) The adapted version of genocide confirms the well accepted recognition of genocide as a universal crime, but still this shows that no improvements have been made in the past fifty years.\(^{214}\) The small contrast appears is that article 6 of the ICC Statute to the effect that it did not take up responsibility for other forms of participation in the crime other than perpetration.\(^{215}\) This may be either the notion has not been accepted by the Rome Diplomatic Conference\(^{216}\) or the relevant notion is laid down in general terms in other provisions of the ICC Statute.\(^{217}\) To this Cassese concluded that ‘at least one respect there is an inconsistency between customary international law and the Rome Statute. The former prohibits and makes punishable conspiracy to commit genocide, whereas article 6 does not contain a similar prohibition’.\(^{218}\) In any case, the travaux préparatoires of the Convention are the principal source of interpretation of the definition.\(^{219}\) The ICJ has indicated that the definition reflects customary law, but to date has had little to contribute to the understanding of article II itself.\(^{220}\)


\(^{215}\) Article 6 left on conspiracy to genocide, incitement to genocide, attempt to genocide, and complicity to genocide. See: Article III of the Convention and article 6 of the ICC Statute.

\(^{216}\) It is said that the concept did not find support of all Civil Law countries present at Rome.

\(^{217}\) This applies to incitement, attempt, and complicity provided under article 25.


4.2 A look into the ‘intent to destroy in whole or in part’ in genocide
When it comes to interpretation of article 6 it seems appropriate to consider the interpretation applicable not only to article II of the 1948 Convention, which it resembles, but also the context of adoption of article II, namely Convention as a whole.\textsuperscript{221} In this context, consideration is also taken for jurisprudence from ICTY and ICTR by looking at the ambiguities and lacunas not only to those not yet solved but also those already been confirm by article 6 of the ICC Statute.

To understand intent to destroy in whole or in part as such under the ICC Statutes, one has to relate it with general \textit{mens rea}, and the framing of the \textit{mens rea} is a more complicated exercise.\textsuperscript{222} To determine specific intent, it may be, therefore, helpful to first analyse the general mens rea requirement set forth by article 30 of the ICC Statute. This article provides general \textit{mens rea}. This was among the difficult part to negotiate at Rome, and the problem may have been that not every body understood the word in the same way.\textsuperscript{223} A consensus seemed to have been reached that negligence would not, as a general matter, be regarding as a sufficient basis for liability under the ICC Statute. The end result in article 30 was that intent\textsuperscript{224} and knowledge\textsuperscript{225} are said to be required and these two concepts are defined, albeit in such a way that they overlap in their meaning. The concepts of general and specific intent, often invoked in the debates, did not find their way into the ultimate version of article 30.\textsuperscript{226} The relation between article 30 and 6 is to the effect that genocide requires \textit{special intent}. Article 30 does not allow special intent, but article 6 is a special provision and therefore can not be subjected to article

\textsuperscript{222} Arnold (2003) p.129.
\textsuperscript{223} Clark (2001) p. 291.
\textsuperscript{224} Article 30 (2) (a) and (b).
\textsuperscript{225} Article 30 (3).
\textsuperscript{226} It was seemed to be a consensus that their meaning was sufficiently disputed that the use of these terms would not prove helpful: Clark (2001) p. 301 -302.
Roger Clark, while talking of the definition of genocide, concludes that ‘while there may be some room for the debate about what this means, intent and as such were widely viewed as entailing some kind of special intent, some thing more than the default rule of article 30’.\footnote{Arnold (2003) p. 132. The wording ‘unless otherwise provided’ under article 30 gives room for that interpretation.}

The very high intent requirement would seem to rule out the possibility that genocide can be committed with a lower level of \textit{mens rea}, although the Rome Statute appears to allow just that, in that it contemplates liability of commanders for genocide committed by their subordinates even if they have no real knowledge of the crime.\footnote{Clark (2001) p. 316.} This is qualified by the fact that it could be true only with regard to the case where the superior knows that genocide is about to be perpetrated, or is being committed, and deliberately refrains from forestalling the crime or stopping it.\footnote{Schabas, in Triffterer (ed.) (1999) p. 109.}

As has been indicated in chapter I and II above, intent go with destruction of the protected group. It is therefore safe to say that the crime of genocide requires intent to destroy. Article 6 of the ICC Statute specifies that the offender must intend to destroy a protected group. The drafters of the Convention clearly chose to limit the scope, in terms of the acts of genocide set out in the five paragraphs of article II to physical and biological.\footnote{Cassese (2003) p. 108.} The International Law Commission in the draft Code of Crimes confirmed this position when it stressed that ‘destruction in question is the material destruction of a group either by physical or biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. But it noted that ‘the national or religious element and the racial or ethnic element are to be taken into consideration in the definitional of the word \textit{destruction}, which must be taken only in its material sense, its physical or biological sense’.\footnote{Schabas (2000) p.229.} When ICTY faced with this problem\footnote{UN Doc. A/CN.4/SER.A/1989/Add.1, part II, p. 102, para. 4.}
concluded that destruction referred to under the Convention only covers a physical or biological destruction and does not include cultural.\textsuperscript{233} The same position was repeated by the ICTR when it held that ‘the drafters of the Genocide Convention unequivocally chose to restrict the meaning of ‘destroy’ to encompass only acts that amount to physical or biological genocide.’\textsuperscript{234} Therefore, this suggests that even ICC will follow the same restrictive trend so that it can be within the spirit of the drafters of the Convention.

When it comes to the concept of ‘in whole or in part’, the drafters of the Convention were very clear and sought to avoid two consequences. First, it was not intended that the crime of genocide extend to isolated acts of racially-motivated violence. Thus, there is some quantitative threshold.\textsuperscript{235} Second, the expression ‘in whole or in part’ indicates that the offender need not intend to destroy the entire group but only a substantial portion of it. Although some delegations to the Preparatory Committee requested clarification of the term ‘in part’, none was ever provided.\textsuperscript{236} It should be noted that in the process of drafting article 6, it was suggested that ‘the reference to intent to destroy in whole or in part a group as such was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group’.\textsuperscript{237} It would seem that that the customary international rule, as codified in article 6, does not require that the victims of genocide be numerous. Antonio Cassese thinks that ‘the only thing that can be clearly inferred from the rule is that genocide cannot be held to occur when there is only one victim’.\textsuperscript{238} But he qualifies his statement that ‘however, as long as the other requisite
elements are present, the killing or commission of the other enumerated offences against more than one person may amount to genocide’. 239 Schabas adds that ‘the expression in whole or in part goes even further, in that it requires the intent to destroy, at least, a substantial portion of a group’. 240 This position seems to be the right, and receives support from the International Law Commission when it declared that the nature of the offence of genocide requires the intention to destroy at least a substantial portion of a group. 241 It is therefore hoped that ICC will adopt this spirit, and preserve the same position when it is right or reasonable to do so.

The last words in the end of article 6 of the ICC Statute are ‘as such’. These words were added during the drafting of the Convention in order to resolve an impasse between those delegations that felt there should be an explicit motive requirement and those viewed this as unnecessary and counterproductive. 242 The reference to intent to destroy in whole or in part as such was understood by the Preparatory Committee to refer to the specific intention to destroy more than a small number of individuals who are member of a group. 243 This can simply be said that the victims of genocide must be targeted because they belong to a particular group, and not as an individual. They should be chosen by reason of their membership in a group that perpetrators seek to destroy.

William Schabas relates the words as such with motive. He says ‘there is no explicit reference to motive in article II of the Genocide Convention, and casual reader will be excused for failing to guess that the words as such are meant to express the concept’. He added that ‘here, the travaux preparatoires prove indispensable.’ 244 Pieter Drost thinks that ‘in the absence of any words to the contrary, the text offers no pretext to presume the presence of an unwritten, additional element in the definition of the crime. Whatever the

242 UN Doc. A/C.6/SR.75-76.
244 Schabas (2000) p. 245.
ultimate purpose of the deed, whatever the reasons for the perpetration of the crime, whatever the open or secret motives for the acts or measures directed against the life of the protected group, wherever the destruction of human life of members of the group as such takes place, the crime of genocide is fully committed.²⁴⁵

Therefore from the history of the Convention it is safe to say that the words as such were aimed at avoiding the possibility of the perpetrators claiming that the crime had not been committed out of hatred towards the group itself, but for other reasons.²⁴⁶ In this case, the Convention does not require proof of further reasons or ‘motives’ for genocidal actions. Despite this thought from the Preparatory Committee, some scholars have insisted that the words resolve nothing, and leave the provision ambiguous as to whether or not motive is an essential element of the offence.²⁴⁷ In any case, article 6 of the ICC Statute merits the same spirit that the drafters of the Convention had in mind, and that the ICC is confirming and hoped to preserve that position.

²⁴⁵ Drost (1950) p. 53.
²⁴⁶ UN Doc. E/AC.25/SR.11, p. 3. See also UN Doc. E/AC.25/SR/3.
CHAPTER V

FINAL OBSERVATIONS AND CONCLUSION

The intention of this study was to examine genocidal intent to destroy, the protected group, in whole or in part as such, with particular reference to the practice of the ICTY and ICTY. The real concern was to focus on how the two tribunals have determined in whole or in part concepts and the meaning of as such. All these concepts were discussed in relation to genocidal intent. Threshold of genocidal intent was given particular importance in each case of the discussion. Additionally, the study stretched further to genocidal intent definition under the International Criminal Court Statute. This is one of the grey areas and the study endeavoured into some differences and similarities with the two tribunals. Having seen the discussion, this study turns to the concluding remarks and observations.

In the examination regarding ‘genocidal intent’ the study reveals that intent of the perpetrator of genocide is a mental factor which is often difficult to establish than the act itself. The crime of genocide requires element of special intent and it is because of this it is called a unique crime. The difficult of establishing special intent may stem from the fact that perpetrators do not document their guilty and evidence can be hard to find or prove. Despite this fact, the practice from the two tribunals shows that some perpetrators were convicted of genocide. The tribunals used a number of factors to determine genocidal intent, but still admitted that intent is difficult, even impossible to determine. It is from this difficulty that the determination standards of genocidal intent between the tribunal differ. For the ICTR it is enough to have knowledge of genocide plus prohibited acts, and the question of specific intent could only be referred from overwhelming evidence of the planned extermination.

In contrast, the negotiating records of the Genocide Convention states that an individual’s own intent must be proven such that the person had the purpose to destroy the group in whole or in part, since the actor’s mental state is an element of the crime. Merely inferring that the accused had intent to destroy in whole or in part because it is obvious from the general context that the victim were killed because they were members of a
particular group will likely fail to meet the drafter’s intent, since it is the individual’s state of mind that is sought, not what happened collectively. On the other hand, ICTY seems to offer a third standard which can be said lies between the ICTR and the Genocide Convention. In Jelisic case the tribunal held that the accused must have clear knowledge of his or her participation in the genocide. And intent could only be proven through planning, inciting or ordering of the genocide, where the accused acts with the intent to destroy the targeted group, irrespective of the overall nature of the atrocities which took place.

Therefore, ICTY seems to be more in line with the Genocide Convention, whereas the ICTR has lowered the intent standards from purposely committing one of the prohibited acts enumerated in article II of the Convention to the knowingly participating in the extermination of the individual because they are a member of targeted group. By lowering the standards to knowledge ICTR appears to have stretched too far from the original intent of the Genocide Convention. For the drafters, genocide was such a grievous crime that it was made punishable by the international community. It is a crime that shocks the conscience of human beings. This is confirmed by the adoption of the ICC Statute that maintains the same level of high level of intent, though some scholars think that requirement does not rule out that genocide can be committed with a lower level of mens rea.

The study also revealed that the concept of intent to ‘destroy’ means the destruction covered by the Convention that is physical and biological destruction. The drafters of the Convention clearly chose to limit the scope, and the tribunal seems to echo that. The ICTY on its part clearly refuse to automatically label ethnic cleansing as genocide. However, the tribunal does make it possible to take into consideration attacks on the group’s symbols such as the cultural or religious buildings as further evidence of the intent to target the group as a distinct entity. On the other part ICTR judgment are in the same line with its counter part. In its judgments emphasis that the drafters of the Genocide Convention unequivocally chose to restrict the meaning of destroy to encompass only acts that amount to physical or biological genocide. This position seems
to be the same within the ICC statute, and is supported by the International Law Commission when quoted to have said that the destruction of group is either physical or biological means, but noted that the national or religious element and racial or ethnic element are to be taken into consideration. In this way, both the two tribunals and the ICC are on the same footing.

This study also has shown that there is a big debate in the concept of ‘in whole or in part’. History from the drafters of the Convention reveals that all states accepted the inclusion of the word in whole or in part, but provided little guidance as to what meant by the term in part, but discussions within it suggest that even substantial part of the group is enough. Practice from both the ICTY and ICTR confirms this. With regard to ICC, the final draft of the Preparatory Committee of the ICC Statute echoed the same interpretation from history of the preparation of the Convention and holdings within the two tribunals when construed ‘in whole or in part’ to refer to the specific intention to destroy more than a small number of individuals who are members of a group. This suggests that there is generally acceptable definition of substantial number of victims, still some scholars warn that the intent requirement that the destruction contemplate the group in whole or in part should not be confused with the scale of the participation by an individual offender.

The concept of ‘as such’ is also not spared in debates. Some scholars have related it with motive, while others thinks that in absence of any words to the contrary, the text offers no pretext to presume the presence of additional element in the definition. In any case, from the history of the Convention it is safe to say that the words as such were aimed at avoiding the possibility of the perpetrators claiming that the crime had not been committed out of hatred towards the group itself, but for other reasons, such as destruction during war, robbery, profiteering, or the like. The ICTY trend seems to consider the reason of their group membership, and reasoned that the victim must be targeted by reason of their membership in a group. This was echoed by ICTR when it held 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. The trend remained the same in the ICC statute as the Preparatory Committee referred it to be specific intention to destroy individuals who are member of a group. Despite this thought from the Preparatory Committee, some scholars have insisted that the words resolve nothing, and leave the provision ambiguous as to whether or not motive is an essential element of the offence.

In view of the foregoing discussion and problems detailed out in chapter three, the following observation can be made, which can contribute to the protection of the interests of the victims of genocide, and the international community as a whole. There is no need to change the concept of genocidal intent, or even the contents of the concepts. The issue now should be the usefulness of the concepts derived from the jurisprudence of ICTY and ICTR, and preserving the intention of the drafters of the Convention.
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ANNEXES

1 THE LONDON AGREEMENT

8 August 1945

Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German Officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities.
Article 2

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4

Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5

Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Article 7

This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.
2 CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (Excerpt)

8 August 1945

Article 1

In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereafter called "the Tribunal") for the just and prompt trial and punishment of major war criminals of the European Axis.

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;
(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
20 December 1945

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.
(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any persons found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death; (b) Imprisonment for life or a term of years, with or without hard labour; (c) Fine, and imprisonment with or without hard labour, in lieu thereof; (d) Forfeiture of property; (e) Restitution of property wrongfully acquired; (f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.
4 THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST
CHARTER CONSTITUTION OF TRIBUNAL (Excerpt)

Article 1
Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo

II JURISDICTION AND GENERAL PROVISIONS

Article 5

Jurisdiction Over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) Conventional War Crimes: Namely, violations of the laws or customs of war;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.
5 STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Excerpt)


Statute of the International Criminal Tribunal for the Former Yugoslavia

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1 Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2 Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

**Article 3 Violations of the laws or customs of war**

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

**Article 4 Genocide**

1. The International Tribunal 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.

**Article 5 Crimes against humanity**

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

**Article 21 Rights of the accused**

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

**Article 29 Co-operation and judicial assistance**

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   (a) the identification and location of persons;

   (b) the taking of testimony and the production of evidence;

   (c) the service of documents;

   (d) the arrest or detention of persons;

   (e) the surrender or the transfer of the accused to the International Tribunal
6 STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA (Excerpt)

As amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of 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 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1 Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

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.

**Article 3 Crimes against Humanity**

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

**Article 4 Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II**

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

**Article 20 Rights of the Accused**

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.

3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

   (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

   (c) To be tried without undue delay;
(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

**Article 28 Cooperation and Judicial Assistance**

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda
7 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Excerpt)

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,
Have agreed as follows:

**PART 1 ESTABLISHMENT OF THE COURT**

**Article 1 The Court**

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

**Article 2 Relationship of the Court with the United Nations**

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

**Article 3 Seat of the Court**

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

**Article 4 Legal status and powers of the Court**

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.
PART 2 JURISDICTION, ADMISSION AND APPLICABLE LAW

Article 5 Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6 Genocide

For the purpose of this Statute, "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.
**Article 7 Crimes against humanity**

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.
Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

   (i) Wilful killing;

   (ii) Torture or inhuman treatment, including biological experiments;

   (iii) Wilfully causing great suffering, or serious injury to body or health;

   (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

   (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

   (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

   (vii) Unlawful deportation or transfer or unlawful confinement;

   (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

   (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

   (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

   (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United
Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.
Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 12 Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

   (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13 Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

   (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

   (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

   (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.
Article 17 Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

   (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

   (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 30 Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

PART 9 INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86 General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87 Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.
4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

   (b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

**Article 90 Competing requests**

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

   (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

   (a) The respective dates of the requests;
   
   (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
   
   (c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

   (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
   
   (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.
8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

**Article 98: Cooperation with respect to waiver of immunity and consent to surrender**

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

**PART 13 FINAL CLAUSES**

**Article 119 Settlement of disputes**

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

**Article 120 Reservations**

No reservations may be made to this Statute.