

## 27

# The ICC's First Encounter with the Crime of Genocide

## The Case against Al Bashir

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### 27.1 Introduction

On 31 March 2005 the UNSC, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593 referring the situation in Darfur, Sudan, since 1 July 2002, to the prosecutor of the ICC.<sup>1</sup> After having informed Pre-Trial Chamber I on 1 June 2005 of its decision to initiate an investigation into the Darfur situation, pursuant to Article 53 of the ICC Statute, the prosecution, on 14 July 2008, filed an application under Article 58 of the ICC Statute requesting the issuance of a warrant of arrest against Omar Hassan Ahmad Al Bashir (2008 Application), who, at that time, was (and, at the time of writing, continues to be) the Head of the State of Sudan.<sup>2</sup>

It is hard to overstate the importance of the situation in Darfur, in general, and that of the case against Al Bashir, in particular, for the ICC.<sup>3</sup> The first UNSC referral of a situation in accordance with Article 13(b) of the ICC Statute confronted the Court, which before had largely been dealing with *rebel* leaders at the request of the respective governments, with its core mission being to examine whether *state* leaders had crossed the ultimate red line drawn by international criminal law. And the Court was requested to fulfil its core mission while the underlying conflict was ongoing and the most likely suspects were still in office. Unsurprisingly, the Sudan precedent has brought to light a host of legal and policy issues, which go to the heart of the ICC's work, including, for example, the tension between the new international criminal justice system and the traditional international law immunities, the timing of the issuance of arrest warrants during ongoing conflicts, the (non-)cooperation of states with the Court in high-profile cases, and the proper role of the UNSC subsequent to a referral under Article 13(b) of the ICC Statute, including the (non-)use of its power under Article 16 of the ICC Statute. More generally, it has also revealed the

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<sup>1</sup> UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, op. para. 1.

<sup>2</sup> Public Redacted Version of the Prosecutor's Application under Article 58, ICC-02/05-157-AnxA, *Situation in Darfur*, OTP, ICC, 12 September 2008.

<sup>3</sup> For a brief summary of the history of the conflict, see M Kelly, 'The Debate over Genocide in Darfur, Sudan' (2011) 18 *University of California Davis Journal of International Law* 205, 206 *et seq.*

possible tension between the burning need, on the one hand, to alleviate human suffering and put an end to a bloody non-international armed conflict and, on the other hand, the global interest in the validation of fundamentally important international law rules through the new international criminal justice system. Fascinating as all these issues are, none of them will be addressed in this chapter.<sup>4</sup> Instead, the latter's modest ambition is to shed some light on the ICC's first substantial encounter with the crime of genocide.

This encounter was triggered by the prosecution's submission, in the 2008 Application, that Al Bashir bears criminal responsibility for the crime of genocide as a result of the killing of and the causing of serious bodily or mental harm to members of the Fur, Masalit, and Zaghawa ethnic groups, as well as the deliberate infliction on those groups of conditions of life calculated to bring about the groups' physical destruction.<sup>5</sup> In its 4 March 2009 Decision (2009 Decision), Pre-Trial Chamber I found that the material provided by the prosecution had failed to give reasonable grounds to believe that Al Bashir had committed the crime of genocide.<sup>6</sup> This finding was reversed by the Appeals Chamber<sup>7</sup> in its Judgment of 3 February 2010<sup>8</sup> (2010 Judgment) on the ground that the Pre-Trial Chamber had applied an erroneous standard of proof. In its 12 July 2010 Decision (2010 Decision), Pre-Trial Chamber I,<sup>9</sup> on the basis of the legal determinations made by the Appeals Chamber, decided to issue a warrant of arrest for genocide as applied for by the prosecution.<sup>10</sup> At the time of writing, Al Bashir remains at large.

## 27.2 The ICC's *Al Bashir* Case-Law on the Crime of Genocide

To date, the 2009 Decision constitutes the most important engagement of an ICC Chamber with the definition of the crime of genocide. The analysis of this decision, therefore, is at the heart of the present chapter while references to the 2010 Judgment and to the 2010 Decision may be kept comparatively short.

<sup>4</sup> The literature on these issues is vast; for a few studies, see C Krefß, 'The International Criminal Court and Immunities under International Law for States not Party to the Court's Statute' in M Bergsmo and L Yan (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher 2012) 223; S Nouwen, *Complementarity in the Line of Fire. The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press 2013) 244.

<sup>5</sup> Public Redacted Version of the Prosecutor's Application under Article 58 (n 2) paras 76–209.

<sup>6</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-3, PTC I, ICC, 4 March 2009, para. 206.

<sup>7</sup> The Chamber was composed of Judges Erkki Kourula, Sang-Hyun Song, Ekaterina Trendafilova, Daniel David Ntanda Nsereko, and Joyce Aluoch.

<sup>8</sup> Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-73 OA, AC, ICC, 3 February 2010, para. 41.

<sup>9</sup> The Chamber was composed of Judges Sylvia Steiner, Sanji Mmasenono Monageng, and Cuno Tarfusser.

<sup>10</sup> Second Decision on the Prosecution's Application for a Warrant of Arrest, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-01/09-94, PTC I, ICC, 12 July 2010, p. 28.

### 27.2.1 The teleology behind the law against genocide

The 2009 Decision finds that ‘the definition of the crime of genocide aims at protecting the existence of a specific group or people’. It accordingly determines that the fact that three different groups have been targeted must be reflected through the articulation of three distinct counts of genocide.<sup>11</sup> While this is not a particularly elaborate statement, it is in line with a consolidated judicial approach starting with the seminal 1998 judgment of the ICTR in the *Akayesu* case.<sup>12</sup>

By endorsing this approach, the 2009 Decision implicitly rejects the more recent suggestion made by Larry May that the prohibition of genocide *exclusively* protects the interests of the *individual* members of the protected group concerned. These individuals, so the argument runs, hold the interest in defining their (social) identity also through the belonging to their group, and the crime of genocide therefore threatens the individual members of the group with the significant harm of losing their group identity.<sup>13</sup>

It constitutes an intriguing question *de lege ferenda* whether the law against genocide should be purely ‘individualistic’ along the lines suggested by May. The *existing* law, however, cannot be convincingly explained in that way. The protective scope of the current legal definition of genocide is confined to four specific categories of groups, and it is hard to explain this limitation if the prohibition of genocide is seen through the lens of the interest of individual human beings to form a group identity. This interest has also not been at the historical roots of the recognition of genocide as a distinct crime under international law. Raphael Lemkin’s seminal book *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*<sup>14</sup> was inspired by Johann Gottfried Herder’s belief that humanity was enriched by the existence of a plurality of national cultures,<sup>15</sup> and it is precisely this idea that the UNGA ceremonially endorsed when it stated in its historic resolution of 11 December 1946 that genocide ‘results in great losses to humanity in the form of cultural and other contributions represented by these human groups’.<sup>16</sup> The *travaux préparatoires* therefore suggest that the law against genocide protects the world’s interest in ‘national cosmopolitanism’.

While this collective interest has rightly been recognized in the 2009 Decision, there is no compelling reason to deny that, *in addition* thereto, the current law against genocide protects those *individual rights* of the targeted group members. The fact that

<sup>11</sup> Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 115.

<sup>12</sup> Judgment, *Akayesu*, ICTR-96-4-T, TC I, ICTR, 2 September 1998, para. 469.

<sup>13</sup> L May, *Genocide. A Normative Account* (Cambridge: Cambridge University Press 2010) 88 *et seq.*

<sup>14</sup> R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace 1944).

<sup>15</sup> For a brilliant analysis of Lemkin’s ‘groupism’ and the significance of thinkers other than Herder for Lemkin’s writings, see A Dirk Moses, ‘Raphael Lemkin, Culture, and the Concept of Genocide’ in D Bloxham and A Dirk Moses (eds), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press 2010) 22 *et seq.*

<sup>16</sup> UNGA Res 96(I) (11 December 1946) UN Doc A/RES/96(I); reprinted in H Abtahi and P Webb (eds), *The Genocide Convention. The Travaux Préparatoires* vol. I (Leiden: Martinus Nijhoff Publishers 2008) 34; as Dirk Moses (n 15) 37, aptly observes: ‘This is pure Lemkin’.

those individuals may not ‘count’ as individuals *for the genocidaires* is utterly irrelevant. It is *the law’s perspective* that matters, and here the individual rights of the targeted group members count a great deal.<sup>17</sup> The 2009 Decision does not touch upon this aspect.

The decision does also not offer reflections about the question whether, and if yes, in what specific sense, genocide is a crime *against international peace and security* as the ILC’s *Draft Code of Crimes against Peace and Security of Mankind*<sup>18</sup> (through its very title) and the Preamble of the ICC Statute (through its third consideration) suggest. While it would have been fascinating to learn the Chamber’s view on this, it is understandable that it has refrained from digging that deep. At this moment in time international legal scholarship continues to struggle with the conceptualization of the UNSC’s more recent practice to apply the concept of ‘threat to *international peace and security*’<sup>19</sup> to serious forms of *internal violence*, and, accordingly, international criminal law scholarship continues to struggle with the conceptualization of the ‘second generation of crimes under international law’,<sup>20</sup> including genocide, crimes against humanity, and war crimes committed in a non-international armed conflict, in cases without direct trans-border repercussions.

## 27.2.2 The basic structure of the crime of genocide

### 27.2.2.1 The texts

Pursuant to Article 7 of the ICC Statute and customary international law, crimes against humanity require the existence (or at least the emergence) of a widespread or systematic attack directed against any civilian population.<sup>21</sup> It is thus clearly established that crimes against humanity will, except perhaps in the most exceptional circumstances, have a *systemic* character. The customary definition of genocide, as contained in Article II of the 1948 Genocide Convention<sup>22</sup> and as reprinted in Article 6 of the ICC Statute, reads conspicuously differently. It neither contains an explicit objective contextual element, nor does its intent requirement explicitly allude to a collective genocidal activity. As a consequence hereof, the crime of genocide, other than crimes against humanity, appears to be drafted from the perspective of the ‘lone individual seeking to destroy the group as such’.<sup>23</sup> Yet, the ICC Elements of Crimes<sup>24</sup> on

<sup>17</sup> For a more detailed argument, see C Kreß, ‘§ 6 VStGB’ in W Joecks and K Miebach (eds), *Münchener Kommentar zum Strafgesetzbuch* vol. 8, 2nd edn (München: Verlag C.H.Beck 2013) 1088 (marginal note 2).

<sup>18</sup> 1996 *Yearbook of the International Law Commission* vol. II, part 2, 44.

<sup>19</sup> See e.g. E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing 2004) 138 *et seq.*

<sup>20</sup> For the distinction between a first and a second generation of substantive international criminal law, see C Kreß, ‘The International Criminal Court as a Turning Point in the History of International Criminal Justice’ in A Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009) 146 *et seq.*

<sup>21</sup> This part of the chapter builds on and updates C Kreß, ‘The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al Bashir* Case’ (2009) 7 *Journal of International Criminal Justice* 297.

<sup>22</sup> Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

<sup>23</sup> Judgment, *Jelisić*, IT-95-10-T, TC I, ICTY, 14 December 1999, para. 100 (‘*Jelisić* Trial Judgment’).

<sup>24</sup> Elements of Crimes, ICC/ASP/1/3, 9 September 2002 (First Session of the ASP).

the crime of genocide significantly qualify this first impression conveyed by a first reading of the crime's definition. They stipulate a common Element which reads as follows:

The conduct (killing, causing serious bodily or mental harm etc.) took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

This is complemented by the following explanations in the Introduction of the Elements of Crimes on genocide.

With respect to the last element listed for each crime:

- The term 'in the context of' would include the initial acts in an emerging pattern;
- The term 'manifest' is an objective qualification;
- Notwithstanding the normal requirement for a mental element provided for in article 30 and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

#### 27.2.2.2 The 2009 Decision

In its 2008 Application, the prosecution takes the requirement of a genocidal context for granted and applies the first alternative of the common Element as follows:

The Prosecution must show that, as to each genocidal *actus reus*, the conduct took place in the context of a manifest pattern of similar conduct directed against each target group. The magnitude, consistency and planned nature of the crimes detailed in this Application unequivocally demonstrate that the alleged acts of genocide took place in the context of a manifest pattern of similar conduct, in furtherance of Al Bashir's plan to destroy in substantial part each of the targeted groups.<sup>25</sup>

The 2009 Decision takes a more scrupulous approach to the matter. It recognizes a possible departure of the common Element from the crime's definition and notes that 'there is certain controversy as to whether this contextual element should be recognised'.<sup>26</sup> In the end, however, the Chamber does not find the contextual Element in 'irreconcilable contradiction' to the definition. The Chamber interprets the Element as follows:

In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide—as an *ultima ratio* mechanism

<sup>25</sup> Public Redacted Version of the Prosecutor's Application under Article 58 (n 2) para. 209; cf. also para. 76 of the same document.

<sup>26</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 125.

to preserve the highest values of the international community—is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.<sup>27</sup>

In the Chamber's view this is not an amendment to the crime's definition but rather the articulation of an implicit element of the latter:

[T]he Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or part thereof, is (i) not *per se* contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22(2) of the Statute that the definition of the crimes 'shall be strictly construed and shall not be extended by analogy' and 'in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the 'crime of crimes'.<sup>28</sup>

In her Separate and Partly Dissenting Opinion, Judge Ušacka explicitly refrains from deciding on the issue and questions the Majority's reasoning to the extent that it is based on Article 22 of the ICC Statute.<sup>29</sup> More specifically, Judge Ušacka disagrees with the majority's view that a 'concrete threat' is required to satisfy the contextual elements.<sup>30</sup>

### 27.2.2.3 Analysis

This commentator shares the Chamber's view that the formulation of the last (common) Element does not purport to amend the crime's definition but provides for a welcome clarification of the latter (section 27.2.2.3.1). It is respectfully submitted, though, that the contextual Element should not be seen as an addition to the crime's *actus reus* but as an *objective point of reference* of a *realistic genocidal intent* (section 27.2.2.3.2).<sup>31</sup> Finally, it is thought that the requirement of a 'concrete threat' is unfortunately worded because it suggests an unduly stringent threshold (section 27.2.2.3.3).

#### 27.2.2.3.1 The definition of the crime and the common Element of Crimes on genocide

It should be noted at the outset that the Elements of Crimes do not exclude the scenario of the lone *génocidaire* altogether. The second alternative of the common Element explicitly provides for this possibility. It requires, however, that such a lone *génocidaire* must be in possession of the means to effect the destruction of the targeted group in whole or in part.<sup>32</sup> Obviously, this latter qualification is of great practical importance.

<sup>27</sup> Ibid., para. 124.      <sup>28</sup> Ibid., para. 133.

<sup>29</sup> Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 16 and 20.

<sup>30</sup> Ibid., para. 19, fn. 26.

<sup>31</sup> See already C Kreß, 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 461, 471 *et seq.*

<sup>32</sup> R Cryer et al., *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 218; W Rückert and G Witschel, 'Genocide and Crimes

As it is extremely difficult to conceive of a single perpetrator who is in a position to destroy a (substantial part of a) protected group on his own, the first alternative of the common Element will be applicable in practice (as in the *Al Bashir* case), except for the most exceptional circumstances, which William A Schabas aptly described as 'little more than a sophomoric *hypothèse d'école* and a distraction for judicial institutions'.<sup>33</sup> Yet, it is important to fully appreciate what the common Element of the crime of genocide essentially suggests: that this crime presupposes a real danger for the targeted group and that this, for all practical purposes, entails the need for a planned genocidal campaign.

(i) *The significance of the principle of strict construction*

Judge Ušacka is correct that it would be too easy to simply rely on Article 22(2) of the ICC Statute to resolve our question because the application of this statutory rule of interpretation requires the existence of an ambiguity. At the same time, however, Article 22(2) of the ICC Statute carries its full weight if a reasonably strong case—based on other considerations—can be made in support of the narrow construction of the crime's definition. As it will now be shown, such considerations can be formulated.

(ii) *History and travaux préparatoires*

The idea of a genocidal campaign is not a recent arrival. Quite to the contrary, it lies at the heart of the original concept of the crime. In his groundbreaking study on the subject, *Raphael Lemkin* had the following to say:

[Genocide] is intended... to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.<sup>34</sup>

As is well known, Lemkin's otherwise rather broad concept of genocide, including several forms of cultural genocide,<sup>35</sup> was significantly narrowed as a result of the deliberations in the UNGA's Sixth Committee. This, in itself, makes it rather unlikely that states, at the same time, decided to fundamentally broaden the crime's scope of application to cases where no real danger for (part of) a group exists. This is confirmed by a reading of the debates within the Sixth Committee. It must of course be conceded that the drafters did not wish to categorically exclude the scenario of the lone *génocidaire* and rejected suggestions that would have had that effect.<sup>36</sup> On the other hand, and crucially, at no place do the *travaux préparatoires* reveal that the drafters seriously contemplated the definition encompassing conduct not posing a real danger to the

against Humanity in the Elements of Crime', in H Fischer et al. (eds), *International and National Prosecution of Crimes Under International Law* (Berlin: Berlin Verlag Arno Spitz 2001) 66.

<sup>33</sup> W Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (2005) 18 *Leiden Journal of International Law* 871, 877.

<sup>34</sup> Lemkin (n 14) 79.

<sup>35</sup> W Schabas, *Genocide in International Law. The Crime of Crimes* 2nd edn (Cambridge: Cambridge University Press 2009) 59 *et seq.*, 82.

<sup>36</sup> For such suggestions, see A/C.6/211, 1 October 1948 (France); A/C.6/217, 5 October 1948 (Belgium).

group or a part hereof.<sup>37</sup> Historical background and genesis thus both point to a narrow construction of the crime's definition.

(iii) *Systematic considerations*

While the crime of genocide received a proper definition before crimes against humanity did, the former has grown out of the latter.<sup>38</sup> This historic fact cautions against a disconnection of the common roots of both crimes under international law. As was highlighted earlier, there can be no doubt that crimes against humanity imply a real danger for the targeted civilian population because of the requirement of a (emerging) widespread or systematic attack. In light of the historic development, it would be rather odd if the crime of genocide had been given a fundamentally broader scope of application. It was therefore right for the 2009 Decision to emphasize that it would be hard to reconcile such a broad construction with the widely accepted consideration of the crime of genocide as the 'crime of crimes'.<sup>39</sup>

Construing the crime of genocide without the requirement of a real danger for the targeted group would also place this crime in a peculiar position relative to other crimes under international law. For not only crimes against humanity, but also war crimes and the crime of aggression require a real danger to the internationally protected value. In the case of war crimes, this danger stems from the fact that an armed conflict must exist. Consequently, the commission of any war crime entails the real risk of escalating already existing violence and of posing an obstacle to the conclusion of a genuine peace. Correspondingly, a crime of aggression under customary international law presupposes an actual state use of force in contravention of the international prohibition on the use of force. This is even more than a real threat to international peace and security. All this demonstrates the need to pass a high threshold to reach the realm of the international community's *jus puniendi*. Indeed, the Chamber formulates a useful word of caution against tendencies to trivialize international criminal law *stricto sensu* when it stresses that this body of law constitutes the '*ultima ratio* mechanism to preserve the highest values of the international community'. From a standpoint of systematic coherency within the existing body of international criminal law *stricto sensu*, it would hardly be convincing to construe the crime of genocide in a manner that would legitimize international intervention through criminal law without the need to pass a similarly high threshold.

(iv) *The Elements of Crimes as evidence of the opinio juris of states*

According to Article 9 of the ICC Statute, the Elements of Crimes shall assist in the interpretation of Article 6 of the ICC Statute and they shall be consistent with it. While these legal requirements cannot exclude the possibility of an irreconcilable conflict

<sup>37</sup> For the same view, see Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 244 *et seq.*

<sup>38</sup> Cryer *et al.* (n 32) 205–6.

<sup>39</sup> The problematic consequences of this broad construction of the crime are usefully spelled out in P Mysliwicz, 'Accomplice to Genocide Liability: The Case for a Purpose *Mens Rea* Standard' (2009) 10 *Chicago Journal of International Law* 389, 402 *et seq.* Mysliwicz suggests a stringent standard specifically for 'accomplice liability' for genocide to avoid part of these consequences; this, however, does not strike at the root of the problem.

between an Element and the statutory definition, they nonetheless caution against too hasty an assumption that such a contradiction exists. The Elements of Crimes should first be evaluated as what they are, i.e. the expression of a 'consensus by the international community'<sup>40</sup> that a certain crime should be interpreted in a certain way. This must also apply in the case of the last common Element on the crime of genocide. There is no compelling indication that the drafters of the last common Element intended to hereby amend the well-entrenched definition of the crime of genocide. While there were differences as to the precise language and the best analytical way to capture the underlying idea, there was no fundamental disagreement on the substance. As one observer has rightly noted:

Because genocide is universally recognized as an extremely serious crime, it was generally agreed that the context of the crime requires that there be a certain scale or other real threat to a group.<sup>41</sup>

The Elements of Crimes thus support the systematic considerations by way of subsequent practice.

(v) *The prior case-law*

The formulation of the common Element is not without support within the case law of the ICTY. In fact, it is identical to a statement made by the Trial Chamber of the ICTY in *Krstić*.<sup>42</sup> The ICTY Appeals Chamber, however, was hostile to the Trial Chamber's view:

The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements of genocide. While a perpetrator's knowing participation in an organized and extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw the inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against a civilian population. In reasoning otherwise, the Trial Chamber relied on the definition of genocide in the Elements of Crimes adopted by the ICC. This definition, stated the Trial Chamber,

<sup>40</sup> Cryer et al. (n 32) 219 *et seq.*; see also S Malliaris, 'Assessing the ICTY Jurisprudence in Defining the Elements of the Crime of Genocide: The Need for a "Plan"' (2009) 5 *Review of International Law and Politics* 105, 116: 'Given that the Elements have been adopted by the Assembly of States, it should be inferred that the ICC approach is genuinely representing the existing customary norm'.

<sup>41</sup> V Oosterveld, 'The Context of Genocide' in R Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational Publishers 2001) 45; for a similar observation, see Rückert and Witschel (n 32) 66.

<sup>42</sup> Judgment, *Krstić*, IT-98-33-T, TC, ICTY, 2 August 2001, para. 682 (*Krstić* Trial Judgment); cf. also the following wise statement of the ICTY prosecution: '[I]n the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation. Indeed, it should be reserved only for acts of exceptional gravity and magnitude which shock the conscience of humankind and which, therefore, justify the appellation of genocide as the "ultimate crime"' (Transcript of hearing before the Trial Chamber of 27 June 1996, *Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, TC, ICTY, 27 June 1996, 15 *et seq.*).

‘indicates clearly that genocide requires that the conduct took place in the context of a manifest pattern of similar conduct’. The Trial Chamber’s reliance on the definition of genocide given in the ICC’s Elements of Crimes is inapposite. As already explained, the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention and was not mandated by customary international law. Because the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time Krstić committed his crimes, it cannot be used to support the Trial Chamber’s conclusion.<sup>43</sup>

This is a rather strong judicial pronouncement on an important point of law. Deplorably, the pronouncement is not supported by equally strong reasoning.<sup>44</sup> The only argument contained in the cited passage is that the Genocide Convention does not contain an explicit contextual element. The further statement that the Elements of Crimes ‘did not reflect customary international law’ remains a mere assertion. Upon a closer look, it would appear that the drafters of the Elements of Crimes captured the prior case-law more accurately than the ICTY Appeals Chamber. This is confirmed by the excellent summary of the prior practice in the leading monograph on the subject by William A Schabas:

Although there have been convictions for crimes against humanity in the absence of a plan or policy, there is nothing similar in the case law concerning genocide. In practice, although the jurisprudence often says that it is inquiring into whether ‘the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part of the group as such’, judges invariably discuss the existence of the organized plan or policy, and conclude as to the existence of the ‘intent’ of the accused based on knowledge of the circumstances.<sup>45</sup>

It should also be noted that even the ICTY Appeals Chamber in *Jelisić* has made an important concession to the more narrow construction of the crime because it has held that, ‘in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases’.<sup>46</sup> It was thus correct for the 2009 Decision to attribute more weight to the *opinio juris* that states expressed through the

<sup>43</sup> Judgment, *Krstić*, IT-98-33-A, AC, ICTY, 19 April 2004, para. 223 *et seq.* (*Krstić Appeals Judgment*).

<sup>44</sup> For the same view, see Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 245; the same author is also correct in criticizing the Appeals Chamber of the ICTY for a similarly poor reasoning with respect to the plan or policy requirement of crimes against humanity; the ICC Statute’s retention of the policy requirement in Art. 7(2)(a) is evidence for the fact that the judicial pronouncements of the ICTY advocated for a legal development too far ahead of what states were prepared to accept; see Krefß, ‘The International Criminal Court as a Turning Point in the History of International Criminal Justice’ (n 20) 148.

<sup>45</sup> Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 246 *et seq.*; Schabas’ assessment is in line with the earlier analysis of the ICTR practice by J Jones, ‘“Whose Intent is it Anyway?” Genocide and the Intent to Destroy a Group’ in L Vohrah et al. (eds), *Man’s Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International 2003) 467, 474 *et seq.*

<sup>46</sup> Judgment, *Jelisić*, IT-95-10-A, AC, ICTY, 5 July 2001, para. 48; in the same case, the Trial Chamber went even further and stated that ‘it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or system’; *Jelisić Trial Judgment* (n 23) para. 101.

Elements of Crimes than to the view expressed by the Appeals Chamber of the ICTY in *Krstić* on the state of customary international law.

(vi) *Summary*

Taken together, the foregoing considerations support the view espoused in the 2009 Decision that the common Element of the crime of genocide correctly suggests that this crime presupposes the existence of a real danger for the targeted group and that this, for all practical purposes, entails the need for the existence of a planned genocidal campaign.<sup>47</sup>

27.2.2.3.2 The genocidal campaign and a realistic genocidal intent

Yet, the literal argument remains that the wording of the *objective* elements (the *actus reus*) of the crime in its statutory definition does not provide for a basis to introduce a contextual element.<sup>48</sup> While this argument is hard to refute, it does not affect the alternative approach to reflect the typical interplay between individual and collective conduct in the crime's definition. The key to reconcile the approach taken in the Elements of Crimes with the definition of the crime lies in the interpretation of the concept of genocidal *intent*. All the considerations listed in section 27.2.2.3.1 support the view that this intent must be realistic and must thus be understood to require more than the vain hope of a single perpetrator of hate crimes to destroy (a part of) the hated group. On the basis of such a realistic concept of intent, which is fully compatible with the wording of the legal term, a coherent explanation of the common Element is possible: the individual perpetrator will act with the realistic intent to destroy (a part of) the targeted group if his conduct is in itself capable to effect this destruction. In almost

<sup>47</sup> This position remains controversial; for statements, which would appear to be (at least broadly) in agreement with it, see K Ambos, 'What Does "Intent to Destroy" in Genocide Mean?', (2009) 91 *International Review of the Red Cross* 833, 846; P Behrens, 'The *Mens Rea* of Genocide' in P Behrens and R Henham (eds), *Elements of Genocide* (New York: Routledge 2013) 70, 74–5; L Berster, 'Article II' in C Tams et al. (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Oxford: C H Beck/Hart/Nomos 2014) 141 (marginal note 114); Cryer et al. (n 32) 219; K Goldsmith, 'The Issue of Intent in the Genocide Convention and its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5 *Genocide Studies and Prevention* 238, 245 *et seq.*; S Kirsch, 'The Social and the Legal Concept of Genocide' in P Behrens and R Henham (eds), *Elements of Genocide* (New York: Routledge 2013) 7, 12 *et seq.*; Malliaris (n 40) 105 *et seq.*; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 246 *et seq.*; for the contrary view, see D Alonzo-Maizlish, 'In Whole or in Part: Group Rights, the Intent Element of Genocide, and the "Quantitative Criterion"' (2002) 77 *New York University Law Review* 1369, 1380–1; S Clearwater, 'Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ's 2007 Decision in *Bosnia v Serbia*' (2009) 15 *Auckland University Law Review* 1, 34 *et seq.*; N Maitra, 'A Perpetual Possibility? The International Criminal Tribunal for Rwanda's Recognition of the Genocide of 1994' (2005) 5 *International Criminal Law Review* 573; Mysliwiec (n 39) 402; C Safferling, 'The Special Intent Requirement in the Crime of Genocide' in C Safferling and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (The Hague: TMC Asser Press 2010) 163, 172; G Werle, *Principles of International Criminal Law* 2nd edn (The Hague: TMC Asser Press 2009) 271–2 (paras 743–6); for the—unconvincing—suggestion to distinguish between the different genocidal acts, see A Cassese, 'Is Genocidal Policy a Requirement for the Crime of Genocide?' in P Gaeta (ed.), *The UN Genocide Convention* (Oxford: Oxford University Press 2009) 128, 134–5.

<sup>48</sup> Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) para. 6 in conjunction with paras 13–17, the Pre-Trial Chamber explicitly treats the 'contextual element' as a 'material element'.

all cases, however, this will not be the case. Therefore, for all practical purposes, a perpetrator's realistic intent requires that his conduct take place 'in the context of a manifest pattern of similar conduct directed against that group'. Under this approach, the common Element constitutes the objective point of reference of genocidal intent. There is only a fine analytical nuance between this construction of genocidal intent and the widespread judicial practice to regard the genocidal campaign as 'only the evidentiary basis from which the fact-finder may draw the inference'<sup>49</sup> that a genocidal intent exists.

While it is true that the common Element of Crimes is worded in the form of an objective circumstantial element, it is submitted that the concept of realistic intent constitutes the preferable way to capture the substance of what the drafter's of the Elements had in mind.<sup>50</sup> First, this concept conforms to the wording of the Genocide Convention. Second, it has the advantage of avoiding the debate about an additional mental requirement. The drafters of the Elements were aware of this problem but were unable to solve it within the short negotiation time given to them. This is readily apparent from the evasive passage in the Introduction to the Elements of Crimes on genocide.<sup>51</sup> If, however, a genocidal campaign is seen as the objective point of reference for a realistic genocidal intent, it is clear that the individual perpetrator must be aware of this campaign to form such an intent.

Very interestingly, when dealing with the intent requirement in its 2009 Decision, the Chamber chose an approach that comes very close to the concept of realistic intent, as outlined earlier. The Chamber draws the following distinction between what it calls the genocidal intent of the Government of Sudan, and Al Bashir's genocidal intent:

The Prosecution highlights that it relies exclusively on proof by inference to substantiate its allegations concerning Omar Al Bashir's alleged responsibility for genocide. In particular, the Prosecution relies on inferences to prove the existence of Omar Al Bashir's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.

In this regard, the Majority observes that, according to the Prosecution, Omar Al Bashir was in full control of the 'apparatus' of the State of Sudan. . . .

As a result, the Majority considers that if the materials provided by the Prosecution support the Prosecution's allegations in this regard, the existence of reasonable grounds to believe that Omar Al Bashir had a genocidal intent would automatically lead to the conclusion that there are reasonable grounds to believe that a genocidal campaign against the Fur, Masalit and Zaghawa groups was a core component of the [Government of Sudan (GoS)] counter-insurgency campaign.

However, the situation would be different if the materials provided by the Prosecution show reasonable grounds to believe that Omar Al Bashir shared the control over the 'apparatus' of the State of Sudan with other high-ranking Sudanese political and military leaders. In this situation, the Majority is of the view that the

<sup>49</sup> *Krstić* Appeals Judgment (n 43) para. 223.

<sup>50</sup> For the same view, see *Ambos* (n 47) 845 *et seq.*; *Berster* (n 47) 138 *et seq.* (marginal note 107 *et seq.*); *Jones* (n 45) 478 *et seq.*; *Kirsch* (n 47) 7; *May* (n 13) 120 *et seq.*

<sup>51</sup> For the citation, see section 27.2.2.1; see the formulation in the third indent.

existence of reasonable grounds to believe that one of the core components of the GoS counter-insurgency campaign was a genocidal campaign against the Fur, Masalit and Zaghawa groups would be dependent upon the showing of reasonable grounds to believe that those who shared the control of the 'apparatus' of the State of Sudan with Omar Al Bashir agreed that the GoS counter-insurgency campaign would, *inter alia*, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.

It is for this reason that the Majority refers throughout the rest of the present decision to 'the GoS's genocidal intent' as opposed to 'Omar Al Bashir's genocidal intent'.<sup>52</sup>

While the meaning of these considerations is not entirely clear, one very plausible explanation would be that the Majority holds the view that there is a connection between the required 'individual' genocidal intent of Al Bashir and a 'collective' genocidal intent. If 'governmental intent' is translated into a 'plan to carry out a genocidal campaign', it becomes apparent that the Chamber is of the view that the overall genocidal plan amounts to an objective point of reference for Al Bashir's individual intent which, by virtue of this point of reference, becomes a *realistic* one.<sup>53</sup> On the basis of such a concept of genocidal intent, a separate mental requirement concerning an objective contextual element is as superfluous as this objective requirement itself. The 2009 Decision has thus come halfway in adopting the concept of realistic intent as outlined in this contribution and it is suggested that the ICC should fully endorse this idea when the next opportunity arises.

#### 27.2.2.4 *No requirement of a concrete threat*

In the 2009 Decision, the last common Element is understood to mean that the crime of genocide is only completed when 'the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical'.<sup>54</sup> The Chamber's precise understanding of 'concrete threat' is not entirely clear, but the term risks being understood as posing too significant a hurdle to pass. As Judge Ušacka rightly observes in her dissent,<sup>55</sup> the precondition of a 'concrete threat' comes close to a 'result-based requirement', i.e. the requirement of a situation where the genocidal campaign has advanced to a point where actual destruction may soon result. None of these considerations call for the introduction of so stringent a threshold and the same is true for the prior practice. Contrary to what the Chamber appears to hold, the common Element does not require the occurrence of

<sup>52</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 147–51.

<sup>53</sup> It is worth emphasizing that the concept of realistic intent is not prejudicial to the decision in the debate between a 'purpose-based' and a 'knowledge-based' approach to the individual intent to which we shall turn our attention in section 27.2.4.3. Analytically, these are two distinct legal issues.

<sup>54</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 124.

<sup>55</sup> Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 19, fn. 26.

such an advanced threat either.<sup>56</sup> Under this Element's second alternative, it is sufficient that the conduct in question *can effect* the destructive result. Accordingly, it must suffice for the first alternative, too, that the genocidal campaign is of a nature *capable of bringing about* the planned destruction.<sup>57</sup> This interpretation is confirmed by the fact that the Introduction to the Elements of Crimes on Genocide underlines that the 'term "in the context of" would include the initial acts in an emerging pattern'. This means that the crime of genocide is completed with the initial act of a genocidal campaign. It follows that, for the typical case of genocide, no more should be required as the objective point of reference for the perpetrator's intent than the existence of a realistic collective goal to destroy the target group in whole or in part. Interestingly, the 2010 Decision does not contain any reference to the requirement of 'concrete threat'.<sup>58</sup> It would be good if the point were fully clarified on the next occasion.

### 27.2.3 The material elements

The following analysis does not offer a comprehensive commentary on the material elements, and is by and large confined to those legal questions addressed by the 2009 Decision.<sup>59</sup>

#### 27.2.3.1 *On the concept of 'protected group' in general and that of 'ethnic group' in particular*

It was only at an advanced stage of the negotiations that, following a suggestion made by Sweden,<sup>60</sup> the *ethnic* group was included in the list of protected groups. In light of this, it may be considered as somewhat of a historical irony that the concept of ethnic group has quickly gained particular prominence. The ICC's early case-law confirms this point. The 2009 Decision sheds further light on this concept and also on the more general one of 'protected group'. The pertinent passage reads as follows:

[T]he Majority is of the view that the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof... The Majority considers that there are no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups—the Fur, the Masalit and the Zaghawa—that, according to the Prosecution, have been targeted....

<sup>56</sup> For the same view, Berster (n 47) 138 (marginal note 107 together with fn. 453); R Cryer, 'The Definitions of International Crimes in the *Al Bashir* Arrest Warrant Decision' (2009) 7 *Journal of International Criminal Justice* 283, 290–1; Cryer et al. (n 32) 219, footnote 93; Werle (n 47) 272–3 (marginal note 746).

<sup>57</sup> For the same view, see Berster (n 47) 141 (marginal note 114).

<sup>58</sup> For the relevant passages, see Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) para. 6 in conjunction with paras 13–17.

<sup>59</sup> For the attempt of a comprehensive commentary, see Krefß, '§ 6 VStGB' (n 17) 1099–111 (marginal notes 30–69).

<sup>60</sup> UNGAOR, 3rd Session, 6th Committee, 115.

As a result, the question arises as to whether any of the three groups is a distinct ethnic group. In this regard, the Majority finds that there are reasonable grounds to believe that this question must be answered in the affirmative as there are reasonable grounds to believe that each of the groups... has its own language, its own tribal customs and its own traditional links to its lands.<sup>61</sup>

These paragraphs contain four elements which partly consolidate and otherwise usefully complement the prior international case-law in point. First of all, the Chamber considers the list of protected groups to be *exhaustive*. Hereby, it implicitly rejects the idea of recognizing *other* protected groups than those explicitly listed, provided such groups are comparably *stable*. This idea had been considered by the ICTR in its *Akayesu* judgment,<sup>62</sup> but without any positive echo in the subsequent case-law. The implicit rejection in the 2009 Decision of the suggestion made in *Akayesu* is all the more important, as both Chambers faced a not altogether dissimilar difficulty to bring the targeted human group(s) in question within the confines of the genocide definition. In light of the text of the definition and of its history, the position adopted in the 2009 Decision is correct<sup>63</sup> and, with this judicial pronouncement, the international case-law on the point in question appears to be settled.

Second, the 2009 Decision makes the attempt to *distinguish* between the *four* groups listed in the definition of the crime. This contrasts with the 'holistic' approach as developed by William A Schabas<sup>64</sup> and occasionally accepted by the ICTY.<sup>65</sup> Although the approach chosen in the 2009 Decision is more cumbersome, it must be commended because it is loyal to the text of the definition.<sup>66</sup> It would seem premature, though, to treat the international case-law on this point as consolidated.

Third, the 2009 Decision explicitly rejects the idea that a protected group in general and an ethnical group in particular could be defined 'by negation'. Such an approach had been favourably considered by the ICTY Trial Chamber in *Jelisić*,<sup>67</sup> but was then rejected by this Tribunal's Appeals Chamber in *Stakić*.<sup>68</sup> In its 2007 Judgment in the 'Genocide Case', the ICJ<sup>69</sup> had endorsed the ICTY Appeals Chamber's view, and the 2009 Decision joins this line of international case-law in the following words:

[I]t is important to highlight that the drafters of the 1948 Genocide Convention gave 'close attention to the positive identification of groups with specific distinguishing

<sup>61</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 135–7.

<sup>62</sup> *Akayesu* (n 12) para. 701.

<sup>63</sup> A very broad majority of writers concurs; see, for example, F Martin, 'The Notion of "Protected Group" in the Genocide Convention and its Application' in P Gaeta (ed.), *The UN Genocide Convention* (Oxford: Oxford University Press 2009) 112, 119 *et seq.*; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 152.

<sup>64</sup> Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 129 *et seq.*

<sup>65</sup> The most important judgment in point is *Krstić* Trial Judgment (n 42) para. 556.

<sup>66</sup> Concurring Berster (n 47) 102–3 (marginal note 36); Martin (n 63) 112, 122.

<sup>67</sup> *Jelisić* Trial Judgment (n 23) para. 71.

<sup>68</sup> Judgment, *Stakić*, IT-97-24-A, AC, ICTY, 2 March 2006, paras 20–1.

<sup>69</sup> Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 26 February 2007, ICJ Reports 2007, 43 (paras 193–6).

well established, some said immutable, characteristics'. It is, therefore, a matter of who the targeted people are, not who they are not. (footnotes omitted)<sup>70</sup>

This is correct and may now also be considered as settled international case-law.

Fourth, and most importantly, the cited passage from the 2009 Decision, by highlighting each of the groups' 'own language', 'own tribal customs', and 'own traditional links to its lands', encapsulates an essentially *objective* starting point to the definition of the concepts 'protected group' and 'ethnic group'.<sup>71</sup> This contrasts with a number of statements in the prior international case-law<sup>72</sup> and in the literature<sup>73</sup> which indicate a preference to define the concept of ethnic group *subjectively* and more specifically from the *perpetrator's* perspective. Yet, as Rebecca Young has usefully demonstrated,<sup>74</sup> the international case-law prior to the 2009 Decision had never articulated an absolute departure from an objective approach and a good part of the international criminal law scholarship had, in varying nuances, moved towards a mixed 'subjective-objective' approach,<sup>75</sup> which seems broadly in line with the test favoured by the ICJ in its 2007 'Genocide Judgment'.<sup>76</sup>

While the *International Commission of Inquiry on Darfur* (Darfur Commission) went so far as to opine that some form of a subjective-objective approach had 'become part and parcel of international customary law'<sup>77</sup>, it must be welcomed that the 2009 Decision insists on the *objective* starting point to the definition of the concepts of 'protected group' and 'ethnic group'. This is so even though the subjective approach has 'a strong initial appeal, since it is ultimately the *genocidaire's* view of the group's features which decides on whether an individual will be victimized as a group-member',<sup>78</sup> a fact famously alluded to in Jean-Paul Sartre's

<sup>70</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 135.

<sup>71</sup> This is true albeit that the Chamber states in passing that it does not wish to express a view on the matter, *ibid.*, para. 137 (fn. 152).

<sup>72</sup> Judgment, *Kayishema and Ruzindana*, ICTR-95-1-T, TC II, ICTR, 21 May 1999, para. 98; *Jelisić* Trial Judgment (n 23) para. 70; *Krstić* Trial Judgment (n 42) para. 557; on this tendency towards a *subjective* definition, see G Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 *International & Comparative Law Quarterly* 578, 589.

<sup>73</sup> For a particularly clear pronouncement to that effect, see R Maison, 'Le crime de génocide dans les premiers jugements du tribunal pénal international pour le Rwanda' (1999) 103 *Révue Générale de Droit International Public* 129, 137; for a more recent statement pointing in the same direction, see R Young, 'How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purposes of Genocide' (2010) 10 *International Criminal Law Review* 1, 21.

<sup>74</sup> Young (n 73) 10 *et seq.*

<sup>75</sup> For a few examples, see D Demko, 'Die von der Genozidkonvention geschützten "Gruppen" als Regelungsgegenstand des "Specific Intent"' (2009) *Schweizerische Zeitschrift für internationales und europäisches Recht* 223, 232 *et seq.*; Martin (n 63) 112, 126; D Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press 2010) 31; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 128; Werle (n 47) 260 (marginal note 715).

<sup>76</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 69) para. 191; for a comment, see C Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18 *European Journal of International Law* 619, 623–4.

<sup>77</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc S/2005/60 (1 February 2005) para. 501.

<sup>78</sup> Berster (n 47) 104 (marginal note 40).

aphorism: ‘...c'est l'antisémite, qui fait le juif’<sup>79</sup>. On a closer inspection, though, a number of—ultimately prevailing—considerations in support of an *objective* starting point come to light. The three most important considerations are as follows.<sup>80</sup> First, the teleology behind the law against genocide (section 27.2.1), i.e. to prevent conduct that ‘results in great losses to humanity in the form of cultural and other contributions represented by these human groups’,<sup>81</sup> precludes the possibility that the existence of a protected group might result from a construction in the *perpetrator's* mind. Allowing for such a possibility would, second, also be incompatible with the drafters' decision for an *exhaustive* list of protected groups. Third, only an objective starting point guards against the transformation of the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive which could be distinguished from *persecution* as a crime against humanity only through the more limited list of *individual* rights at stake.<sup>82</sup> It should be stressed that an objective starting point to the definition of the concepts ‘protected group’ and ‘ethnic group’, as chosen in the 2009 Decision, leaves due room for considering (collective) perceptions in at least two respects. Elements such as a common culture, history, or language may give rise to a (collective) sense of group identity and this (collective) perception of *the members of the group concerned* is, of course, a relevant factor in establishing the existence of an ethnic group within the meaning of the genocide definition. Furthermore, the (collective) perception of *the perpetrators* may play a limited role when it comes to the delineation of the protected group's outer fringes.<sup>83</sup>

Despite these considerations and the fact that a number of commentators have recently expressed weighty words of caution against an essentially subjective approach under the *lex lata*,<sup>84</sup> the controversy is likely to receive further attention at the ICC. Judge Ušacka has challenged the 2009 Decision's objective starting point in her Separate and Partly Dissenting Opinion,<sup>85</sup> and the Majority itself has not really argued the point and has reserved its final view on the matter.<sup>86</sup>

<sup>79</sup> J-P Sartre, *Réflexions sur la question juive* (Paris: Paul Morihien 1946) 89.

<sup>80</sup> For a number of additional arguments to the same effect, see Berster (n 47) 105 *et seq.* (marginal notes 41–5).

<sup>81</sup> UNGA Res 96(I) (n 16).

<sup>82</sup> The arguments set out in the text here are submitted on the basis of the *lex lata*; whether or not such a transformation is desirable *de lege ferenda* is a different matter, which cannot be explored in this chapter (for an argument in favour of a subjective approach *de lege ferenda*, see A Paul, *Kritische Analyse und Reformvorschlag zu Art. II Genozidkonvention* (Berlin: Springer 2008) 160 *et seq.*

<sup>83</sup> For such a case, see Judgment and Sentence, *Ndindabahizi*, ICTR-07-71, TC I, ICTR, 15 July 2004, para. 68.

<sup>84</sup> P Akhavan, *Reducing Genocide to Law* (Cambridge: Cambridge University Press 2012) 150; Berster (n 47) 103–7 (paras 37–7); see also D Luban, ‘Calling Genocide by its Rightful Name: Lemkin's Word, Darfur and the UN Report’ (2006) 7 *Chicago Journal of International Law* 303, 318, who acknowledges that the subjective approach ‘abandons a central idea behind Lemkin's definition of genocide’ (for Luban's reform proposal, see *ibid.* 319).

<sup>85</sup> Decision on the Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 25–6.

<sup>86</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 137 (fn. 152).

### 27.2.3.2 *The genocidal acts*

In light of its rejection of reasonable grounds to believe that Al Bashir had acted with genocidal intent, the 2009 Decision does not deal with any of the five categories of genocidal acts. The 2010 Decision cannot avoid the matter, however, after having reached a different conclusion regarding the question of genocidal intent. This decision deals with those first three genocidal acts listed in the definition which have also played a dominant role in the prior international case-law.<sup>87</sup>

#### 27.2.3.2.1 Killing

The 2010 Decision holds as follows:

According to the Elements of Crimes, the specific material element of the crime of genocide by killing is that the perpetrator killed one or more persons. It is worth noting that the element is common to both the crime of genocide by killing under article 6(a) and the crime against humanity of murder under article 7(1)(a) of the Statute with the exception that the former provides that the acts of killings must be directed against members of a national, ethnical, racial or religious group, while the latter requires that the acts be directed against a civilian population.<sup>88</sup>

This statement confirms, in particular, that despite the plural ‘members’ in the text of the genocide definition, it suffices for the perpetrator to cause the death of *one member* of a protected group. Although this interpretation does not yet go entirely unchallenged in international criminal law scholarship,<sup>89</sup> it now appears too firmly accepted in practice to be reversed in the future. The same applies, *mutatis mutandis*, to the second, fourth, and fifth genocidal acts listed in the definition.

#### 27.2.3.2.2 Causing serious bodily or mental harm

The 2010 Decision holds as follows:

According to the Elements of Crime the specific material element of this count of genocide is that the perpetrator caused serious bodily or mental harm to one or more persons, which may include acts of torture, rape, sexual violence, or inhuman or degrading treatment... The underlying acts of genocide by inflicting bodily or mental harm... are identical to the underlying acts of the crimes against humanity included in the Prosecution’s Application as Counts 6, 7 and 8 (forcible transfer of population, torture civilians, and rape of civilians).<sup>90</sup>

This is a surprisingly sweeping statement. While the footnote to the relevant Element of Crimes is worded carefully enough to say that acts of torture, rape, sexual violence, or inhuman or degrading treatment *may* amount to the causing of serious

<sup>87</sup> For a reference to the potential relevance of the fourth genocidal act to explain the genocidal nature of the *Srebrenica* campaign, see Judgment, *Popović et al.*, IT-05-88-T, TC II, ICTY, 10 June 2010, para. 866.

<sup>88</sup> Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) para. 20.

<sup>89</sup> For a recent argument suggesting that the perpetrator must cause the death of at least two persons, see Berster (n 47) 116 (marginal note 61); the clearly predominant scholarly view is the one espoused in the 2010 Decision; see e.g. Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 179.

<sup>90</sup> Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) paras 26–7.

bodily or mental harm, the cited passage appears to suggest that such acts *invariably* cause such harm. The latter is not the case. The prior international case-law has convincingly established that the genocidal act in question requires the causing of 'a grave and long-term disadvantage to a person's ability to lead a normal and constructive life'.<sup>91</sup> Whether or not, say, the inhuman or degrading treatment of another person has led to such a result can only be decided *in concreto*.

The sweeping approach chosen in the 2010 Decision is most astonishing with respect to the 'forcible transfer of population', which is *not* referred to in the relevant footnote to the Element of Crime. Here again it is *possible* that forcibly transferred members of the targeted group *may* suffer the required 'grave and long-term-disadvantage', but the 2010 Decision, contrary to the much more careful approach in the 2008 Application,<sup>92</sup> appears to take such a result for granted. It is to be doubted whether the Pre-Trial Chamber has given full consideration to the consequences of its sweeping statement. If the forcible transfer of a person amounted to causing serious bodily or mental harm to that person, a campaign of so-called ethnic cleansing would, contrary to the prior international case-law, invariably fulfil the *actus reus* of the crime of genocide.

#### 27.2.3.2.3 Deliberately inflicting conditions of life calculated to bring about physical destruction

According to its description in the definition of the crime, the third genocidal act requires the infliction of certain conditions of life 'on the group'. In light of the fact that the genocidal conduct in question must be calculated to bring about the group's physical destruction 'in whole or *in part*', the words 'on the group' should be read so as to include the case in which the relevant conditions have been inflicted '*on a part of the group*'.<sup>93</sup> The wording of the definition, however, excludes the idea that the infliction of certain conditions of life upon *one member* of the group suffices.<sup>94</sup> For most practical purposes, the material genocidal act in question, therefore, and contrary to the four other cases, already implies action *within a genocidal context*. The first Element of Crime on 'Genocide by Deliberately Inflicting Conditions of Life Calculated to Bring About Physical Destruction' ignores this fact and instead redefines this genocidal act in structural conformity with the other four categories. The *Element of the Crime* 'translates' the 'infliction of certain conditions of life *on (part of) the group*', as required in the crime's *definition*, into the 'infliction of certain conditions of life *upon one or more persons*'. In doing so the Element of Crimes oversteps the confines of interpretation. The 2010 Decision does not address this question directly and instead—somewhat opaquely—holds as follows:

Unlike for the previous counts of genocide—and similar to what is required for some of the acts underlying the crime against humanity of extermination—the Elements of

<sup>91</sup> See e.g. *Krstić Trial Judgment* (n 42) paras 510 and 513; concurring F Jessberger, 'The Definition and the Elements of the Crime of Genocide' in P Gaeta (ed.), *The UN Genocide Convention* (Oxford: Oxford University Press 2009) 87, 99.

<sup>92</sup> Public Redacted Version of the Prosecutor's Application under Article 58 (n 2) paras 119–71.

<sup>93</sup> Berster (n 47) 121–2 (marginal note 74); Jessberger (n 91) 101.

<sup>94</sup> Concurring Jessberger, *ibid.*, 100 (footnote 81).

Crimes include an additional element for this particular offense and require that the infliction of certain conditions of life upon one or more persons ‘should be calculated to bring about the physical destruction of that group, in whole or in part’.<sup>95</sup>

Because of the definition’s explicit reference to the *physical* destruction and the drafter’s decision to exclude most forms of *cultural* genocide,<sup>96</sup> it is not sufficient for the genocidal act in question to be calculated ‘merely’ to bring about the *dissolution* of the group. Instead, the infliction of the conditions of life must be capable of (slowly) causing either the death of or serious bodily or mental harm to a number of members of the group sufficient to form a significant part thereof.<sup>97</sup> In line with this interpretation, the international case-law prior to the 2010 Decision had settled with the position that the forcible displacement of (a part of) a(n) ethnic) group—the often so-called ethnic cleansing of a territory—cannot *as such* be considered to be ‘calculated to bring about the physical destruction of the targeted group in whole or in part’.<sup>98</sup>

In accordance with this case-law, the prosecution, in its 2008 Application, refrained from relying on the ill-conceived reference to the ‘systematic expulsion from homes’ in the footnote to the fourth Element of Crime on ‘Genocide by Deliberately Inflicting Conditions of Life Calculated to Bring about Physical Destruction’ and instead recalled that ‘[d]eliberations preceding adoption of the Genocide Convention concluded that “[m]ass displacements of populations from one region to another [...] do not constitute genocide [...] unless the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population”’.<sup>99</sup> Therefore, the 2008 Application is careful not to rest its genocide case on the forcible displacement of members of the three protected groups as such, but on the ‘systematic displacement from their home *into inhospitable terrain where some died as a result of thirst*,

<sup>95</sup> Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) para. 33.

<sup>96</sup> It is possible to regard the fifth genocidal act as an instance of cultural genocide; Krefß, ‘§ 6 VStGB’ (n 17) 1110 (marginal note 65).

<sup>97</sup> This is now widely accepted in international criminal law scholarship; see e.g. Jessberger (n 91) 100; Werle (n 47) 267 (marginal note 730); contrary to what is suggested in the text, these three authors appear to confine ‘physical destruction’ to ‘slow *death* measures’; this is also the starting point adopted by Berster (n 47) 124 (marginal note 78); this commentator then (*ibid.*, marginal note 79) distinguishes between two scenarios; in the first case, so many members of the group are at risk of dying that ‘the total number of remaining group members falls below the required minimum to make up a group as such’; in the second case, ‘the physical elimination of members may so damage the social bonds between the remaining persons that the minimum social or cultural requirements of national, ethnic, racial or religious groups can no longer be fulfilled’; the need for this distinction is not apparent, though, as in both cases ‘slow death measures’ are being inflicted on (a substantial) part of a group.

<sup>98</sup> For the first determination to that effect, see Judgment, *Stakić*, IT-97-24-T, TC II, ICTY, 31 July 2003, para. 519 (‘*Stakić* Trial Judgment’); this was confirmed by the ICTY Appeals Chamber in the *Krstić* Appeals Judgment (n 43) para. 33, and by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 69) para. 190; concurring, for example, Jessberger (n 91) 101; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 221 *et seq.*

<sup>99</sup> Public Redacted Version of the Prosecutor’s Application under Article 58 (n 2) para. 173; the passage quoted in this paragraph is UN Doc E/447, 24; on the ill-fated Syrian proposal to list the imposition of ‘measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ (UN Doc A/C.6/234), see Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 228.

starvation and disease (emphasis added)' and the 'denial and hindrance of medical and other humanitarian assistance needed to sustain life in IDP camps'.<sup>100</sup>

In the quoted passage, the 2010 Decision does not question the prosecution's interpretation and 'notes that acts similar to those referred to in the paragraph above are listed in the prosecution's Application under Count 5 (crimes against humanity of extermination)'.<sup>101</sup> The 2010 Decision goes on as follows:

The Chamber is of the view that the acts of contamination of the wells and water pumps and the forcible transfer of hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups coupled with the resettlement in those villages and lands they had left by members of other tribes allied with the GoS shall be analysed against the backdrop of the Chamber's previous findings that (i) thousands of civilians primarily to the Fur, Masalit and Zaghawa groups were subjected, throughout the Darfur region, to acts of murder by GoS forces, and over a thousand civilians, belonging primarily to the Fur, Masalit and Zaghawa groups were killed in connection with the attack on the town of Kailek on or around 9 March 2004 by GoS forces, and (ii) civilians belonging to the aforementioned groups were subjected to acts of torture by the GoS forces. For these reasons, even though the assessment of the Majority in the First Decision in relation to the conditions within the IDF Camps in Darfur differs in part from what was described by the Prosecution and alleged under Count 3, the Chamber considers that one of the reasonable conclusions that can be drawn is that the acts of contamination of water pumps and forcible transfer coupled with resettlement by members of other tribes, were committed in furtherance of a genocidal policy, and that the conditions inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.<sup>102</sup>

An important question mark must be placed behind the persuasiveness of the attempt, which is apparent from this passage, to play down the difference between the 2009 Decision and the 2008 Application in the assessment of the conditions within the IDP camps in Darfur. In the 2009 Decision these factual issues are being addressed within the different legal context of Al Bashir's possible *genocidal intent*. The Majority, after observing that 'the Prosecution relies heavily on what the Prosecution considers to be a key component of an alleged GoS genocidal campaign: the subjection of a substantial part of the Fur, Masalit and Zaghawa civilian population (up to 2.700.000 individuals) to unbearable conditions of life within IDF Camps',<sup>103</sup> remained unconvinced by the materials submitted in the 2008 Application in support of that allegation.<sup>104</sup> If the subjection of a substantial part of the Fur, Masalit, and Zaghawa civilian population to unbearable conditions of life within IDF Camps is indeed a key component of

<sup>100</sup> Public Redacted Version of the Prosecutor's Application under Article 58 (n 2) para. 172.

<sup>101</sup> Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) para. 35.

<sup>102</sup> Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) paras 37–8.

<sup>103</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 178.

<sup>104</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) paras 179–89.

the alleged campaign against the Fur, Masalit, and Zaghawa groups, the establishment of the infliction of conditions of life calculated to bring about the physical destruction of a substantial part of these groups *depends on this* conduct. Contrary to what is being suggested in the 2010 Decision, it will not be possible instead to ‘analyse’ the forcible transfer ‘against the backdrop’ of the killings and the acts of torture of other members of the protected groups.

#### 27.2.4 The genocidal intent

As Larry May has aptly observed ‘[t]he *mens rea* element of the crime of genocide is the key to this crime. No other international crime involves such a complex intent element.’<sup>105</sup> The 2009 Decision approaches this key issue from the following, generally shared starting point, that the crime of genocide is comprised of two subjective elements:

- i. a general subjective element that must cover any genocidal act provided for in article 6(a) to (e) of the Statute, and which consists of article 30 intent and knowledge requirement; and
- ii. an additional subjective element, normally referred to as ‘*dolus specialis*’ or specific intent, according to which any genocidal acts must be carried out with the ‘intent to destroy in whole or in part’ the targeted group. (footnote omitted)<sup>106</sup>

This chapter will only address the crucial second element and will deal with its three *sub*-elements in turn.

##### 27.2.4.1 The intent to destroy, in whole or in part, a protected group as such

While the narrow interpretation of ‘physical destruction’ within the context of the third genocidal act listed in the definition appears to be widely accepted,<sup>107</sup> the correct interpretation of the word ‘destroy’ within the context of genocidal intent remains a matter of scholarly debate. According to one view, the term includes the destruction of the group as a *social entity*.<sup>108</sup> The international case-law prior to the 2009 Decision, however, had favoured the more limited concept of *physical-biological* destruction. This position goes back to the 2001 ICTY’s Trial Chamber’s determination in *Prosecutor v Krstić*,

that...customary international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group.<sup>109</sup>

<sup>105</sup> May (n 13) 130.

<sup>106</sup> Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 139.

<sup>107</sup> Cf. section 27.2.3.2.3.

<sup>108</sup> A Ahmed and I Tralmaka, ‘Prosecuting Genocide at the Khmer Rouge Tribunal’ (2009) 1 *City University of Hong Kong Law Review* 105, 111; Berster (n 47) 81 *et seq.* (marginal note 2, 3); Safferling (n 47) 175–6; M Sirkin, ‘Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations’ (2010) 33 *Seattle University Law Review* 489, 512, 525–6; Werle (n 47) 278–9 (marginal note 760).

<sup>109</sup> *Krstić* Trial Judgment (n 42) para. 580; concurring *Krstić* Appeals Judgment (n 43) para. 26; Judgment, *Seromba*, ICTR-2001-66-I, TC, ICTY, 13 December 2006, para. 319; Report of the

This position enjoys strong support in international criminal law scholarship.<sup>110</sup> The predominant view is essentially correct.<sup>111</sup> The starting point of the more liberal construction of the word 'destroy' is, however, readily understandable. If it is—as we have seen<sup>112</sup>—the primary goal of the law against genocide to protect the existence of certain groups in light of their contributions to world civilization, a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal. The social concept of the term 'destroy' is thus more in line with the most basic object of the rule against genocide. It may also be wondered whether the social concept of group destruction may be supported by an argument *e contrario* based on the explicit use of the word '*physical*' as an attribute of destruction *only* within the *actus reus* context of *one* of the prohibited acts. Finally, the words 'as such' could be read so as to support the social concept.<sup>113</sup>

However, the *social* concept of destruction conflicts with the deliberate decision made by the drafters of the Genocide Convention (for better or worse) *not* to protect the existence of the specified groups *comprehensively* but *only against an exhaustive list of prohibited acts*. Importantly, most forms of *cultural* genocide were deliberately not included in the definition. But if a person kills one member of a protected group or causes serious bodily or mental harm to him or her, thereby furthering an *overall* campaign which, as our perpetrator knows, is directed to the dissolution of the group as such 'merely' through the systematic destruction of the cultural heritage, the perpetrator would have to be convicted of genocide on the basis of the social concept of destruction. This would be contrary to the more modest aspiration which lies at the origin of the international rule against genocide and which has not been superseded by subsequent developments.<sup>114</sup>

However, the predominant view needs to be clarified in one respect. The meaning of the word 'destroy' cannot be reduced to the physical elimination of the members of the group as they exist at the time of the overall genocidal campaign, but it must extend to all forms of damage to the group which may result from an *overall* campaign which takes the form of a *pattern* of one or more of the prohibited genocidal

International Commission of Inquiry on Darfur to the Secretary-General (n 77) paras 515, 517, 518, and 520; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 69) para. 190.

<sup>110</sup> 1996 *Yearbook of the International Law Commission* (n 18) 46 (para. 12); Behrens (n 47) 70, 82 *et seq.*; Jessberger (n 91) 107–8; Kreß, 'The Crime of Genocide under International Law' (n 31) 486 *et seq.*; Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 221 *et seq.*, 234.

<sup>111</sup> The following considerations update Kreß, 'The Crime of Genocide under International Law' (n 31) 486 *et seq.*

<sup>112</sup> Section 27.2.3.1.

<sup>113</sup> All these arguments are eloquently set out in Berster (n 47) 81–2 (marginal notes 2 and 3).

<sup>114</sup> Berster (n 47) 81 *et seq.* (marginal notes 2 and 3) recognizes this consideration as a 'stronger argument', but nevertheless opines as follows: '(T)he penalization of the perpetrator in this scenario appears well justified if viewed in the context of Article III lit. (c)—direct and public incitement to commit genocide, and Article III lit. (d)—attempt to commit genocide. These modes of liability especially highlight the Convention's effort to prevent genocide at a timely stage by averting potential trigger incidents. It stands to reason that, in light of a large scale campaign of "cultural genocide" and collateral hate propaganda, the first physical attacks on members of the group, if they go unpunished, would likely open the floodgates to random atrocities.' This, however, is unconvincing because it broadens the scope of the crime's definition by reference to broad considerations of prevention.

acts. This idea is expressed by the Trial Chamber in *Krstić* by referring to *physical or biological* destruction and the latter term must then be construed so as to also include the *forcible transfer of children* on a mass scale. This careful broadening of the concept of ‘destroy’ beyond physical destruction also allows us to attribute a different meaning to the word ‘destroy’ within the context of genocidal *intent* in comparison with the meaning of ‘physical destruction’ within the context of the third genocidal act. Hence the argument *e contrario* in support of the social concept of the word ‘destroy’ can also be refuted.

The 2009 Decision, without explicitly using the terms ‘physical or biological destruction’, follows the prior international case-law and applies it to a campaign of forcible displacement. It endorses, in particular, the statement made by an ICTY Trial Chamber and confirmed by the ICJ that ‘a clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide’.<sup>115</sup> The 2010 Decision does not challenge this legal standard.<sup>116</sup>

While the early practice of the Pre-Trial Chamber has therefore made a contribution to the consolidation of the prevailing position, it would seem premature to consider the latter as fully settled. Following a statement made by Judge Shahabuddeen in *Prosecutor v Krstić*,<sup>117</sup> the ICTY Trial Chamber in *Prosecutor v Blagojević* challenged the predominant approach.<sup>118</sup> Judge Ušacka adopted this Chamber’s ‘more expansive approach in order to preserve the choice for a later (ICC) Trial Chamber’.<sup>119</sup> It is therefore to be expected that the interpretation of the word ‘destroy’ within the context of genocidal intent will be fully debated at the ICC on an appropriate future occasion.

#### 27.2.4.2 *The intent to destroy, in whole or in part, a protected group as such*

The 2009 Decision does not deal at great length with the meaning of ‘part of a group’. Instead, it refers with approval to the relevant paragraph in the ICJ’s judgment in the Genocide case<sup>120</sup> in which an attempt is made to summarize the ICTY and ICTR case-law in point. The Pre-Trial Chamber hereby lends its support to the by now generally accepted requirement that the relevant part must be *substantive* and joins its voice to the understanding that such ‘substantiality’ may be determined in a *quantitative or qualitative* way.<sup>121</sup>

<sup>115</sup> Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 144.

<sup>116</sup> Cf. Second Decision on the Prosecution’s Application for a Warrant of Arrest (n 10) para. 4.

<sup>117</sup> Partial Dissenting Opinion of Judge Shahabuddeen, *Krstić* Appeals Judgment (n 43) para. 48 in conjunction with 55.

<sup>118</sup> Judgment *Blagojević and Jokić*, IT-02-60-T, TC I, ICTY, 17 January 2005, para. 666; for a critical commentary, see Kreß, ‘The Crime of Genocide under International Law’ (n 31) 488–9.

<sup>119</sup> Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 62.

<sup>120</sup> Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 146.

<sup>121</sup> For a detailed explanation, see Kreß, ‘§ 6 VStGB’ (n 17) 1111–16 (marginal notes 73–7).

The 2009 Decision's reference to the ICJ judgment includes the passage in which that Court observed that the ICTY Trial Chamber in *Prosecutor v Stakić* indicated the need for caution not to distort the definition of genocide by too generously accepting *geographically* defined parts of the protected group in accordance with the *opportunity available to the alleged perpetrator*.<sup>122</sup> While this call for caution is to be commended,<sup>123</sup> it is suggested to go one step further and to completely abandon the criterion of the *individual* perpetrator's *destructive opportunities*. This criterion lends itself to a dilution of genocide if applied to lower-level perpetrators and it is at odds with that crime's typical form of participation in *collective* action.

It is interesting to note that neither the 2009 Decision nor the 2010 Decision considers the 'at least 35,000 civilians' allegedly (directly) killed by 'Al Bashir's forces and agents'<sup>124</sup> as constituting per se substantial parts of the three protected groups in question. Instead, both decisions appear to (implicitly) accept the approach chosen in the 2008 Application to recognize only those individuals as forming substantial parts of the groups concerned 'upon whom conditions of life calculated to bring about their physical destruction' were allegedly imposed in the wake of their forcible displacement.<sup>125</sup> David Luban has drawn an enlightening comparison between the corresponding approach followed in the 2005 Darfur Commission Report, on the one hand, and the ICTY case-law starting with *Prosecutor v Krstić* to consider the approximately 40,000 Bosnian Muslims in Srebrenica to constitute a substantial part of the group of the Bosnian Muslims. Luban questions the possibility to convincingly explain the different treatment and suggests that the more restrictive application of the concept of 'part of the protected group' in the Darfur case is 'more faithful to Lemkin's uncompromised conception of genocide'.<sup>126</sup> While the latter suggestion is certainly correct, it is possible to defend the seemingly more liberal approach in the case of Srebrenica in light of the strategic importance of this safe area under the circumstances prevailing at the relevant time.<sup>127</sup>

#### 27.2.4.3 *The intent to destroy, in whole or in part, a protected group as such*

The proper interpretation of the word 'intent' is often seen as the most important legal question regarding the definition of the crime of genocide. In light of the far-reaching practical consequences of the meaning given to the words 'destroy' and 'part', as discussed, this is a questionable assessment. Yet, the fact remains that the concept of genocidal 'intent' continues to be surrounded by an important controversy, and it is to this controversy that we shall now turn our attention.

<sup>122</sup> *Stakić* Trial Judgment (n 98) para. 523.

<sup>123</sup> Concurring Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (n 33) 874.

<sup>124</sup> Public Redacted Version of the Prosecutor's Application under Article 58 (n 2) para. 36.

<sup>125</sup> Public Redacted Version of the Prosecutor's Application under Article 58 (n 2) para. 46.

<sup>126</sup> Luban (n 84) 312 *et seq.*, 316. <sup>127</sup> *Krstić* Appeals Judgment (n 43) para. 23.

### 27.2.4.3.1 The predominant view: the *purpose*-based approach

As early as in its seminal judgment in *Prosecutor v Akayesu*, the ICTR decided to interpret the concept of genocidal *intent* in line with what has come to be referred to as the *purpose*-based approach. According to this approach, the *individual* perpetrator of the crime must act with the *goal* or *desire* to contribute to the (partial) destruction of the targeted group. The pertinent passage reads as follows:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator *clearly seeks* to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part’, a national, ethnical, racial or religious group, as such.<sup>128</sup>

The Chamber adduces one single consideration in support of this interpretation:

‘Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.’<sup>129</sup>

When the ICTY addressed the matter for the first time in *Prosecutor v Krstić*, it embraced the *purpose*-based approach, but with a different reasoning and with a brief reference to the possibility of a different construction of the term:

The preparatory work of the Genocide Convention clearly shows that the drafters envisaged genocide as an enterprise whose goal, or objective, was to destroy a human group, in whole or in part.... Some legal commentators further contend that genocide embraces those acts whose foreseeable or probable consequence is the total destruction or partial destruction of the group without any necessity of showing that the destruction was the goal of the act. Whether this interpretation can be viewed as reflecting the status of customary international law at the time of the acts involved is not clear. For the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompasses only acts committed with the *goal* of destroying all or part of the group. (footnote omitted)<sup>130</sup>

To the best of this writer’s knowledge, at no time in the subsequent case-law has the *purpose*-based approach received closer attention or been debated in full consideration of the arguments advanced against it. Nevertheless, at least *in the abstract*<sup>131</sup> the

<sup>128</sup> *Akayesu* (n 12) para. 498; cf., however, the different formulation in para. 520 of the same judgment.

<sup>129</sup> *Akayesu* (n 12) para. 518. <sup>130</sup> *Krstić* Trial Judgment (n 42) para. 571.

<sup>131</sup> Whether the latter standard has been *consistently applied to the facts* is far less clear, however; A Greenawalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’ (1999) 99 *Columbia Law Review* 2259, 2281; Greenawalt had soon identified the judicial temptation to ‘squeeze ambiguous fact patterns into the specific intent paradigm’.

international case-law has ever since adhered to this legal standard. The latter is also shared by many commentators.<sup>132</sup>

The *purpose*-based approach has also been followed in the 2005 Darfur Commission Report, but with a noteworthy addition:

...the intent to destroy, in whole or in part, the group as such. This... element is an aggravated criminal intent, or *dolus specialis*; it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, *and knew that his acts would destroy, in whole or in part, the group as such* (emphasis added).<sup>133</sup>

The highlighted last part of this passage adds an element of *foresight* to the *purpose*-requirement which, as we shall see, paves the way to the recognition of a concept of *realistic* intent as suggested in this chapter. This addition has been welcomed in recent international criminal law scholarship.<sup>134</sup>

#### 27.2.4.3.2 The *knowledge*-based approach

Only one year after the ICTR's judgment in the *Akayesu* case, the predominant position was challenged in Alexander K A Greenawalt's voluminous and thorough article 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation'.<sup>135</sup> Greenawalt summarized his approach as follows:

In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.<sup>136</sup>

In the same year, the Spanish author Alicia Gil Gil came up with a very similar solution<sup>137</sup> which made it clear that the controversy between the purpose- and knowledge-based approach is not a 'legal family affair'. In the years thereafter quite a considerable number of commentators endorsed the knowledge-based approach,<sup>138</sup> and since William A Schabas' adoption of this interpretation in the second edition

<sup>132</sup> Akhavan (n 84) 44; D Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2 *International Criminal Law Review* 93, 132; Cryer et al. (n 32) 227–8; Jessberger (n 91) 106; B Lüders, *Die Strafbarkeit von Völkermord nach dem Römischen Statut für den Internationalen Strafgerichtshof* (Berlin: Berliner Wissenschaftsverlag 2004) 125; Mysliwiec (n 39) 401–2; D Nersession, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 *Texas International Law Journal* 231, 265; Safferling (n 47) 172; Werle (n 47) 274–6 (marginal notes 754–5).

<sup>133</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General (n 77) para. 491.

<sup>134</sup> Berster (n 47) 137 *et seq.* (marginal notes 106 *et seq.*).

<sup>135</sup> Greenawalt (n 131).

<sup>136</sup> Greenawalt (n 131) 2288.

<sup>137</sup> A Gil Gil, *Derecho Penal Internacional: Especial Consideración del delito de genocidio* (Editorial Tecnos 1999) 259 *et seq.*

<sup>138</sup> Ambos (n 47) 842 *et seq.*; C Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia* (Ardsley: Transnational Publishers 1996) 527; Goldsmith (n 47) 245 *et seq.*; Jones (n 45) 478 *et seq.*; H van der Wilt, 'Genocide, Complicity in Genocide and *International v. Domestic Jurisdiction*' (2006) 4 *Journal of International Criminal Justice* 239, 241 *et seq.*; H Vest, *Genozid durch organisatorische Machtapparate* (Baden-Baden: Nomos Verlagsgesellschaft 2002) 107 *et seq.*; in a similar direction May (n 13) 115 *et seq.*

of his leading monograph<sup>139</sup> it has become doubtful to characterize this position as a *minority* position in international criminal law *scholarship*.

The scholarly articulations of the knowledge-based approach differ in three respects. In its original version, as formulated by Greenawalt, there need not even be a destructive goal at the *collective* level, but just the knowledge of a campaign whose *manifest effect* is the (partial) destruction of the group.<sup>140</sup> Most adherents of the knowledge-based approach, however, require the existence of a *collective* destructive goal. Among the latter group some argue that those *at the leadership level* must *individually share* this collective goal,<sup>141</sup> while others are of the view that it is sufficient that a *collective goal effectively exists*.<sup>142</sup> Finally, some commentators require *dolus eventualis*<sup>143</sup> or *foresight as a practical certainty*<sup>144</sup> in respect of the occurrence of the (partial) destruction, while others<sup>145</sup> hold that no such additional requirement is needed if the point of reference of the perpetrator's knowledge is a *realistic* collective genocidal goal.

### 27.2.4.3.3 The 2009 Decision

This was the rather complex picture of the debate when the Pre-Trial Chamber had its first encounter with the crime of genocide. The 2009 Decision's attempt to reflect the state of the discussion reads as follows:

A number of authors have put forward in the recent years an innovative approach to the subjective elements of the crime, known as the 'knowledge-based approach'. See also Kress, C., *The Darfur Report and Genocidal Intent*, J Int Criminal Justice, pp. 562–578, Oxford University Press, March 2005, see in particular pp. 562–572. See also Schabas, W.A., *Genocide in International Law The Crime of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, pp. 241–264. According to this approach, direct perpetrators and mid-level commanders can be held responsible as principals to the crime of genocide even if they act without the *dolus specialis*/specific intent to destroy in whole or in part the targeted group. According to these authors, as long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite *dolus specialis*/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy in whole or in part the targeted group. The 'knowledge-based approach' does not differ from the traditional approach in relation to those senior political/military leaders who planned and set into motion a genocidal campaign: they must act with the intent to destroy in whole or in part the targeted group because, otherwise, it would be possible to qualify a campaign of violence against the members of a given group as a genocidal campaign. Moreover, when, as in the present case, those who allegedly planned and

<sup>139</sup> Schabas, *Genocide in International Law. The Crime of Crimes* (n 35) 242–3.

<sup>140</sup> Greenawalt (n 131) 2288. <sup>141</sup> Ambos (n 47) 848–9; Van der Wilt (n 138) 243–4.

<sup>142</sup> H Vest, 'Humanitätsverbrechen—Herausforderung für das Individualstrafrecht?' (2001) 113 *Zeitschrift für die gesamte Strafrechtswissenschaft* 457, 486.

<sup>143</sup> Gil Gil (n 137) 259 *et seq.*

<sup>144</sup> Vest, *Genozid durch organisatorische Machtapparate* (n 138) 107 *et seq.*

<sup>145</sup> Jones (n 45) 479.

set into motion a genocidal campaign are prosecuted pursuant to article 25(3)(a) of the Statute as indirect (co) perpetrators, the mental element of the direct perpetrators becomes irrelevant. As explained in the Decision on the Confirmation of the Charges in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, the reason being that, according to article 25(3)(a) of the Statute, such senior political and military leaders can be held liable as principals of the crime of genocide regardless of whether the persons through which the genocidal campaign is carried out are criminally liable (ICC-01/04-01/07-717, paras. 571–572, 573–576, 579–580). As a result, the ‘knowledge-based approach’ would only differ from the traditional approach to the subjective elements of the crime of genocide in those cases in which mid-level superiors and low-level perpetrators are subject to prosecution before this Court. In this regard, the literal interpretation of the definition of the crime of genocide in article 6 of the Statute and in the Elements of Crimes makes it clear that only those who act with the requisite genocidal intent can be principals to such a crime pursuant to article 25(3)(a) of the Statute. Those others, who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can only be held liable as accessories pursuant to articles 25(3)(b) and (d) and 28 of the Statute.<sup>146</sup>

This is a problematic judicial pronouncement in two respects. First (and of lesser importance), the passage falls short of an accurate and comprehensive presentation of the ‘knowledge-based approach’. Only one articulation of this approach is set out,<sup>147</sup> and it is slightly misleading to portray an approach, which, as we have seen, has existed almost as long as the *Akayesu* judgment, as ‘innovative’ in comparison with a ‘traditional’ approach, as espoused by the international case-law. Second (and of crucial importance), the knowledge-based approach, which has been explained in the form of detailed legal arguments since Greenawalt’s groundbreaking 1999 study,<sup>148</sup> which, over the past 15 years has been gaining a steadily growing number of adherents and which has never been fully debated in the international case-law, is discarded in one single sentence and by way of an unexplained reference to ‘the literal interpretation’.

#### 27.2.4.3.4 The argument in support of a *knowledge-based approach* embodying the concept of *realistic genocidal intent*

The approach chosen in the 2009 Decision is regrettable and it is to be hoped that Trial Chambers and, most importantly, the Appeals Chamber will not treat the Pre-Trial Chamber’s superficial footnote as the ICC’s last word on the difficult controversy between the *purpose-* and *knowledge-*based approaches. The following argument is made in support of a knowledge-based approach which embodies the concept of *realistic genocidal intent*.<sup>149</sup> It is respectfully submitted with a view to help in preparing

<sup>146</sup> Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 6) para. 139 (fn. 154).

<sup>147</sup> It follows from the information given in section 27.2.4.3.2 that other authors than the two cited in the 2009 Decision should have been mentioned as representatives of this articulation.

<sup>148</sup> Greenawalt (n 131).

<sup>149</sup> The argument builds on and updates C Kreß, ‘The Darfur Report and Genocidal Intent’ (2005) 3 *Journal of International Criminal Justice* 562, 565–77; and Kreß, ‘The Crime of Genocide under International Law’ (n 31) 492–8; for a somewhat more detailed exposition of the same argument, see Kreß, ‘§ 6 VStGB’ (n 17) 1116–120 (marginal notes 78–88).

a fully informed judicial consideration of the proper construction of the concept of genocidal intent on an appropriate future occasion.

The argument is exclusively concerned with the genocide scenario that matters for all practical purposes, i.e. the commission of the crime *as part of collective action*. It is argued that, in such a context, a perpetrator—whatever his or her hierarchical level—acts with genocidal *intent* if he or she is *aware* that his or her conduct forms part of a *realistic collective campaign directed* towards the destruction of a protected group, in whole or in part. This complex legal standard requires some commentary.

As was explained earlier<sup>150</sup> in some detail, the existence of a *realistic* collective campaign as the necessary *point of reference* for the *individual* genocidal *intent* incorporates the ‘genocidal context’ and avoids the need to introduce an unwritten contextual element as part of the crime’s *actus reus*. As was also seen earlier, the 2009 Decision makes an implicit step towards the recognition of such a requirement by acknowledging the need to determine the intent of ‘the Government of Sudan’ in case the latter was not, at the material time, simply identical to the individual intent of Al Bashir.

It is not sufficient for the collective campaign to have the (partial) destruction of the protected group as its *manifest effect*. The campaign must rather *target* the members of the group *as such*, i.e. because of this membership, and it must pursue the *goal* to (partially) destroy the group concerned. This collective goal does *not* have to take the form of a *highly sophisticated plan*, but a genocidal campaign may also receive its *collective direction from an effective public incitement* to that effect.<sup>151</sup>

With the *awareness* of such a genocidal campaign, the perpetrator knows of the *real possibility that the (partial) destruction of the protected group may occur* as a result of the collective action to which he or she chooses to contribute. This is sufficient. A *probability* standard would be impracticable, and to require that the perpetrator *foresee* the (partial) destruction of the group *as a practical certainty* would render the definition of the crime virtually inapplicable in practice.<sup>152</sup>

In the following, the considerations in support of this construction will be set out. Along the way, special regard will be given to the recent commentary by Lars Berster because this study presents the rare example of a sophisticated argument in support of the *purpose-based* approach.

(i) *The ‘ordinary’ meaning of the term ‘intent’*

Contrary to what the *Akayesu* judgment and the 2009 Decision suggest, the ‘literal interpretation’ does not yield an unambiguous result. The genocidal intent to destroy complements the general intent and goes beyond the material elements of the crime. While often referred to as a *specific* intent requirement, it is more helpful to speak of an *ulterior* intent.<sup>153</sup> A study of comparative criminal law, as it has been conducted most thoroughly by *Kai Ambos*, reveals that the words ‘intent’, ‘intention’, and ‘intención’, particularly if used to denote an ‘ulterior intent’, are not invariably understood

<sup>150</sup> Cf. section 27.2.2.3.2.

<sup>151</sup> May (n 13) 121 *et seq.*; 209 *et seq.*

<sup>152</sup> For the same ‘cognitive standard’ (though according to him on top of a purpose-requirement) Berster (n 47) 140–1 (marginal notes 113–14).

<sup>153</sup> Ambos (n 47) 835.

exclusively to mean 'purposely', but may take a more cognitive meaning according to their specific legal context.<sup>154</sup> As far as the French concept of '*dol spécial*' is concerned, to which the *Akayesu* judgment referred, it does also not unambiguously refer to the *intensity*, but rather to the *object* of the intent.<sup>155</sup> Recently, Lars Berster has introduced a new element to the debate by suggesting that the Russian and the Chinese versions of the definition support the exclusive interpretation as 'purpose'. But also Berster accepts that this 'discovery' does not lead to a *conclusive* result of the literal interpretation in light of the discrepancies between the different language versions.<sup>156</sup> It has accordingly been acknowledged also by adherents of the *purpose*-based approach that the latter is not required as a matter of *literal* interpretation.<sup>157</sup>

It must be conceded, though, that if one reads the word 'intent' in the definition of genocide together with the words 'as such', which imply the need for a *targeting of group members because of their membership*,<sup>158</sup> more points in the direction of the requirement of a *goal or purpose* to destroy. Yet, the scope of possible meanings of the word 'intent' allows for an interpretation that locates such *goal or purpose* at the *collective* level and *connects* the *individual* perpetrator's mental state with this goal through his or her *knowledge* of the latter's existence. Such an interpretation recognizes the fact that the definition must, for all practical purposes, capture *individual conduct within a context of collective action*.

(ii) *The travaux préparatoires and the customary law argument*

Lars Berster suggests that the *travaux* clearly support the interpretation of the word 'intent' as 'purpose'. He points out that the 1947 Secretariat Draft used the words 'with the *purpose* of destroying' (emphasis added)<sup>159</sup> and that the subsequent replacement of these words by 'intent to destroy' was not accompanied by a wish to alter the meaning, as numerous statements of delegates both in the Ad Hoc Committee and in the Sixth Committee confirm.<sup>160</sup>

While Berster's analysis is a careful one, his firm conclusion is to be doubted for three reasons. First, Greenawalt's similarly thorough perusal of the same materials 15 years ago led this author to draw the opposite conclusion that 'an investigation of the origins and drafting of the Genocide Convention only reinforces the ambiguity of the treaty's intent provision'.<sup>161</sup> This contradictory reading of the same materials by two learned observers in itself suggests applying a degree of caution with a view to the interpretation of the statements made by delegates in the course of the historic deliberations.

<sup>154</sup> Ambos (n 47) 842–5; the same is true for the concept of '*dol special*', see Krefß, 'The Darfur Report and Genocidal Intent' (n 149) 567–8.

<sup>155</sup> Krefß, 'The Darfur Report and Genocidal Intent' (n 149) 567–8 (with reference to French scholarship in fns 24–5).

<sup>156</sup> Berster (n 47) 142–143 (marginal notes 119–121). <sup>157</sup> Jessberger (n 91) 106.

<sup>158</sup> Krefß, '§ 6 VStGB' (n 17) 1120–21 (marginal notes 89–90).

<sup>159</sup> Secretariat Draft. First Draft of the Genocide Convention, Prepared by the UN Secretariat (May 1947) UN Doc E/447, 26.6; reprinted in Abtahi and Webb (n 16) 209, 214.

<sup>160</sup> Berster (n 47) 93–6 (marginal notes 20–3).

<sup>161</sup> Greenawalt (n 131) 2270; it is difficult, for example, to disagree with Greenawalt that the statements, which he cites *ibid.* 2277, are ambiguous at best; see also Goldsmith (n 47) 249–50.

This impression is re-enforced by the fact that the debate about the intent-requirement was at times confusingly entangled with that about a motive-requirement.

Second, Lemkin had already proposed to cover not only those persons as *génocidaires* who order genocide practices, but also those who execute such orders.<sup>162</sup> Those belonging to the latter category, however, will often not be imbued with the personal desire that the group be (partially) destroyed. The *travaux préparatoires* do not reveal a clear drafter's decision to depart from Lemkin's idea. To the contrary, the debate in the Sixth Committee on how to treat those persons who act upon superior orders must be considered as inconclusive.<sup>163</sup>

This uncertainty confirms, third, the important general observation made by John R W D Jones, that

[u]nlike the circumstances surrounding the adoption of the Rome Statute for an International Criminal Court, where criminal lawyers of all shades were at hand to draft precise definitions of the offences, accompanied subsequently by even more detailed 'Elements of the offences', the Genocide Convention was adopted in many ways as a political manifesto against a certain form of massive criminality and was not intended as a criminal code.<sup>164</sup>

While this may be a slight exaggeration in both directions, a close reading of the historic deliberations gives the reader a clear sense of the fact that the delegates in the Sixth Committee did not fully appreciate the complexity of translating a macro-criminal phenomenon with its interplay between individual and collective action into easily applicable criminal law terms. It is therefore perfectly possible—and perhaps even likely—that many of the drafters ultimately had the collective level in mind when they used words such as 'aim', 'goal', or 'purpose'. Therefore, even if the ICTY Trial Chamber's assessment in *Prosecutor v Krstić* is taken for granted, that '[t]he preparatory work of the Genocide Convention clearly shows that the drafters envisaged genocide as an *enterprise* whose goal, or objective, was to destroy a human group, in whole or in part' (emphasis added),<sup>165</sup> this would not be conclusive with respect to the requisite mental state of the *individual* perpetrator, as the genocidal 'enterprise' might have always been understood as the collective genocidal campaign.<sup>166</sup>

This analysis of the *travaux préparatoires* casts a heavy shadow of doubt about the customary law argument advanced by the ICTY Trial Chamber in *Prosecutor v Krstić*<sup>167</sup> and it should be recalled that this argument was formulated in a strikingly tentative manner. There are also serious methodological problems with this argument. It is impossible to pinpoint a consistent state practice, beginning with the Genocide Convention's entry into force, reflecting a corresponding *opinio iuris* in support of the

<sup>162</sup> Lemkin (n 14) 93; this is rightly recalled by Goldsmith (n 47) 250–1.

<sup>163</sup> Cf. the statements by the delegates of the Soviet Union, France, Greece, and the USA in UNGAOR, 3rd session, 6th Committee, 96, 97, 306, 307, and 310.

<sup>164</sup> Jones (n 45) 478. <sup>165</sup> *Krstić* Trial Judgment (n 42) para. 571.

<sup>166</sup> Interestingly, the pertinent paragraph in the commentary of the ILC (1996 *Yearbook of the International Law Commission* (n 18) 45, para. 10) clearly points in that direction so that it is incorrect to list the ILC among the adherents of the purpose-based approach (as was done in the *Krstić* Trial Judgment (n 42) para. 571); for a more accurate reading of the ILC's position, see Goldsmith (n 47) 251–2.

<sup>167</sup> *Krstić* Trial Judgment (n 42) para. 571.

*purpose*-based approach. This is unsurprising given that the controversy between this and the *knowledge*-based approach concerns a rather *fine* point of the crime's construction which primarily concerns the *internal* delineation between *primary* and *secondary* individual criminal responsibility, rather than the *external* delineation of the international criminal responsibility for genocide as such.

(iii) *The particular seriousness of genocide*

Robert Cryer, Håkan Friman, Darryl Robinson, and Elisabeth Wilmshurst argue that the *purpose*-based approach 'may be seen as correctly reflecting the need to reserve genocide convictions only for those who have the highest degree of criminal intent'.<sup>168</sup> This is an important consideration, but it is to be questioned whether it is indeed the *desire, goal, or purpose* of the *individual* perpetrator that characterizes the particular seriousness of the crime of genocide. In the typical genocide case, it is the formation of the *realistic collective goal* to (partially) destroy a protected group which poses the *danger* to the latter's survival. A person who *knowingly* contributes to the realization of such a destructive goal makes himself or herself a part of this dangerous enterprise, the occurrence of which the law against genocide is intended to prevent. Against this background, it is of secondary importance at best whether or not the person concerned *desires* the group's (partial) destruction.

The historic *Eichmann* case is a paradigm example used to illustrate this point. Eichmann's conduct was so seriously dangerous because he knowingly contributed to the realization of the Nazis' horrible destructive goal. Therefore, the answer to the question asked by the District Court of Jerusalem whether Eichmann 'was personally imbued with this (collective) intention' does not affect the seriousness of Eichmann's<sup>169</sup> conduct at its core. Here lies the reason for the temptation that is almost inherent in the *purpose*-based approach to apply the *knowledge*-based approach through the 'evidentiary backdoor', by inferring the individual perpetrator's purpose from the 'fact patterns' surrounding his conduct. To conclude, Cryer's, Friman's, Robinson's, and Wilmshurst's concern not to see the definition of the crime of genocide becoming diluted is more safely and convincingly served by the requirement of a *realistic* genocidal campaign and by an appropriately narrow interpretation of the words 'destroy' and 'in part'.

(iv) *Genocide and crimes against humanity*

The interpretation of genocidal intent as suggested in this text brings the crime of genocide in structural conformity with crimes against humanity. This congruity makes sense historically, as genocide is rooted in the older concept of crimes against humanity,<sup>170</sup> and systematically, as both crimes capture the individual participation in collective action.<sup>171</sup> At the same time, the specificity of the crime of genocide vis-à-vis crimes

<sup>168</sup> Cryer et al. (n 32) 227.

<sup>169</sup> Judgment of 12 December 1961, *Attorney-General of the Government of Israel v Eichmann* (1968) 36 *International Law Reports* 18, 134 (para. 194).

<sup>170</sup> Krefß, '§ 6 VStGB' (n 17) 1096 (marginal note 22).

<sup>171</sup> For the same view, see Jones (n 45) 479.

against humanity remains completely safeguarded. The latter does not lie in a requirement that the individual perpetrator must act purposely, but in the nature of the campaign in which this individual takes part. While an attack against any civilian population, which may take different forms of violent action, suffices in the case of crimes against humanity, the genocidal campaign must be directed towards the destruction of a specifically protected group.

(v) *Questions of consistency*

As in the case of crimes against humanity, the *actus reus* of the crime of genocide is formulated from the perspective of the subordinate actor rather than from the leadership level.<sup>172</sup> The purpose-based approach combines this *actus reus* with what typically is a leadership *mens rea* standard. This in itself is not a very plausible construction; in addition, it gives rise to technical problems in a number of cases. Imagine that perpetrator A physically exterminates a pre-selected member of the targeted group with knowledge of thereby contributing to a genocidal campaign, but without any desire to help bring about the targeted group's (partial) destruction. Under the purpose-based approach, A has not committed the crime of genocide as a perpetrator for lack of genocidal intent. It is also difficult to see how A could have *otherwise* participated in the crime of genocide through his conduct. While A has certainly *aided and abetted* the *collective genocidal campaign*, this campaign *as such* does not constitute the crime's *actus reus*.<sup>173</sup> Lars Berster, who is to be commended for having turned his mind to this and similar problems<sup>174</sup> as a supporter of the purpose-based approach, opines that 'such *lacunae* should not be feared' as 'on-site executors' such as A 'would still be punishable for crimes against humanity'.<sup>175</sup> Quite apart from the fact that domestic criminal codes do not invariably include crimes against humanity, the resort to crimes against humanity cannot dispel the strong feeling that a convincingly construed definition of the crime should allow to hold somebody like A responsible for participation in the crime of *genocide* in one form or the other. The solution put forward in this text offers such a construction.

27.2.4.4 *The destiny of the genocide charge in the case against Al Bashir*

Whatever decision the ICC will eventually make as regards the controversy between the purpose- and knowledge-based approaches, the prospects for success of the genocide charge against Al Bashir at the trial stage must be considered as fragile at best if the Court maintains the 2009 Decision's strict line to the interpretation of the other two sub-elements of genocidal intent, 'destroy' and 'in part'. It is of course true that the 2010 Decision has found reasonable grounds to believe that Al Bashir acted with genocidal intent. However, it has not adduced any reasoning which would make it appear

<sup>172</sup> For the same point, see Goldsmith (n 47) 252.

<sup>173</sup> With the exception of the third genocidal act, on the latter's particular structure see section 27.2.3.2.3.

<sup>174</sup> See Krefß, 'The Darfur Report and Genocidal Intent' (n 149) 574–5.

<sup>175</sup> Berster (n 47) 146 (marginal note 127).

likely that, despite the doubts voiced in the 2009 Decision, it could be proven beyond reasonable doubt that the Government of Sudan (be it through Al Bashir's will alone or in the form of concerted decision-making) had formed the goal not only to forcibly displace substantial parts of the three targeted groups, but to ultimately eliminate the human beings concerned or at least to cause them serious bodily or mental harm. The two brief passages in the 2010 Decision, which directly deal with Al Bashir's possible genocidal intent, are completely devoid of substance,<sup>176</sup> and, as we have seen,<sup>177</sup> the related considerations on the third genocidal act are not particularly impressive in their effort to play down the difference between the 2009 Decision and the 2008 Application in the assessment of the conditions within the IDP camps in Darfur.

### 27.3 An Acquittal *in re* Genocide—A Failure? On the Rhetorics of Genocide

If Al Bashir eventually stands trial, the genocide charge against him is rather unlikely to succeed. Would that mean that the case against Al Bashir has failed? Unhesitatingly, the answer must be negative.<sup>178</sup>

At this point in the development of international law, the characterization of conduct as *genocidal* retains considerable practical importance at the inter-*state* level, as the case of *Bosnia and Herzegovina v Serbia and Montenegro* has brought to light.<sup>179</sup> Within the realm of international *criminal* law, however, the crime of genocide has lost much of its earlier importance because of the consolidation of crimes against humanity as a distinct crime under international law in times of armed conflict and peace. As the early years of the ICC make abundantly clear, crimes against humanity and not genocide dominate the practice of international criminal justice.<sup>180</sup>

The firm establishment of the law against crimes against humanity has led Alexander R J Murray to argue that 'the crime of genocide is now a redundant crime'.<sup>181</sup> This is not the position of states, which have until now treated the historical definition of genocide almost as a sacred text and have, to the best of this writer's knowledge, never seriously considered not to include the crime of genocide in a list of crimes under international law as the basis for international criminal jurisdiction. As of yet,

<sup>176</sup> Cf. Second Decision on the Prosecution's Application for a Warrant of Arrest (n 10) paras 4 and 5.

<sup>177</sup> Section 27.2.3.2.3.

<sup>178</sup> For a similar statement with respect to the case of 'Cambodia and the Khmer Rouge', see R Park, 'Proving Genocidal Intent: International Precedent and ECCC Case 002' (2010) 63 *Rutgers Law Review* 129, 187–8.

<sup>179</sup> J Quigley, 'International Court of Justice as a Forum for Genocide Cases' (2007) 40 *Case Western Reserve Journal of International Law* 243, 257; fortunately, however, the characterization of a campaign as *genocidal* is not decisive for the application of Chapter VII of the UN Charter or for the Responsibility to Protect; see, in particular, 2005 World Summit Outcome (15 September 2005) UN Doc A/60/L.1, paras 138–9; and W Schabas, 'Genocide in International Law and International Relations Prior to 1948' in C Safferling and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (The Hague: TMC Asser Press 2010) 19, 33–4.

<sup>180</sup> L Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334.

<sup>181</sup> A Murray, 'Does International Criminal Law Still Require a "Crime of Crimes"? A Comparative Review of Genocide and Crimes against Humanity' (2011) 3 *Göttingen Journal of International Law* 590.

there appears to be the widespread belief within the international community that, where the conditions of that crime's definition are met, it may be useful to single out a campaign and the individual participation therein as *genocidal*. Whether this belief is justified, despite the powerful criticisms that have recently been formulated against the teleology behind the existing definition of genocide<sup>182</sup> and the latter's internal coherency,<sup>183</sup> is not a matter to be discussed in this contribution.

In any event, the significance of a genocide charge must never be exaggerated in a manner that entails an inappropriate downgrading of any concurrent charge of crimes against humanity. This is precisely what happened when the 2005 Darfur Commission Report's conclusion that 'the Government of Sudan has not pursued a policy of genocide'<sup>184</sup> absorbed virtually all of the world public's attention.<sup>185</sup> Perhaps the ICTR and the ICTY have inadvertently contributed to the perception that a conviction for genocide greatly outweighs all other possible convictions by calling genocide the 'crime of crimes'<sup>186</sup> and by emphasizing the special stigma attached to a conviction for genocide in the pathetic terms that, 'among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium'.<sup>187</sup> Should judgment be rendered one day against Al Bashir, the ICC should avail itself of the opportunity to 'demystify' the crime of genocide and to hereby clear the way for according crimes against humanity their proper place in contemporary international criminal law.

<sup>182</sup> Cf. May (n 13) 23–94 and section 27.2.1.

<sup>183</sup> The most enlightening recent critical contribution is that by Luban (n 84); in essence, there are three problems with the definition *in light of its teleology to preserve 'national cosmopolitanism'*: first, it is not without difficulties to justify the present list of protected groups; second, the restriction of genocidal acts to 'physical' and 'biological' assaults on group members (together with the borderline case of the transfer of children) is hard to explain; and third, through the inclusion of the words 'in part', the definition loses 'its mooring in the group-pluralist theory of value' (Luban (n 84) 313).

<sup>184</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General (n 77) para. 518.

<sup>185</sup> Kelly (n 3) 212: 'That finding—removing the label "genocide"—seriously undermined efforts to marshal international action to stop the atrocities in Darfur'; P Bechky, 'Lemkin's Situation. Toward a Rhetorical Understanding of Genocide' (2012) 77 *Brooklyn Law Review* 551, 553.

<sup>186</sup> Judgment and Sentence, *Kambanda*, ICTR-97-23-S, TC, ICTR, 4 September 1998, para. 16.

<sup>187</sup> *Krstić Appeals Judgment* (n 43) para. 36.