

Middlesex University Research Repository

An open access repository of
Middlesex University research

<http://eprints.mdx.ac.uk>

Schabas, William A. ORCID: <https://orcid.org/0000-0002-7462-4284> (2018) Fragmentation or stabilisation? Recent case law on the crime of genocide in light of the 2007 judgement of the International Court of Justice. In: Nigerian yearbook of international law 2017. Eboe-Osuji, Chile and Emeseh, Engobo, eds. Nigerian Yearbook of International Law, 2017 . Springer, The Hague, pp. 213-238. ISBN 9783319714752. [Book Section]
(doi:10.1007/978-3-319-71476-9_10)

Final accepted version (with author's formatting)

This version is available at: <https://eprints.mdx.ac.uk/26022/>

Copyright:

Middlesex University Research Repository makes the University's research available electronically.

Copyright and moral rights to this work are retained by the author and/or other copyright owners unless otherwise stated. The work is supplied on the understanding that any use for commercial gain is strictly forbidden. A copy may be downloaded for personal, non-commercial, research or study without prior permission and without charge.

Works, including theses and research projects, may not be reproduced in any format or medium, or extensive quotations taken from them, or their content changed in any way, without first obtaining permission in writing from the copyright holder(s). They may not be sold or exploited commercially in any format or medium without the prior written permission of the copyright holder(s).

Full bibliographic details must be given when referring to, or quoting from full items including the author's name, the title of the work, publication details where relevant (place, publisher, date), pagination, and for theses or dissertations the awarding institution, the degree type awarded, and the date of the award.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Middlesex University via the following email address:

eprints@mdx.ac.uk

The item will be removed from the repository while any claim is being investigated.

See also repository copyright: re-use policy: <http://eprints.mdx.ac.uk/policies.html#copy>

Fragmentation or Stabilization? Recent Case Law on the Crime of Genocide in
light of the 2007 Judgment of the International Court of Justice

by William Schabas OC MRIA *

For publication in the *Nigerian Yearbook of International Law*

The Convention on the Prevention and Punishment of the Crime of Genocide was the first human rights treaty to be adopted by the General Assembly of the United Nations. By a unanimous resolution on 9 December 1948, the Assembly approved the text that had been negotiated over the previous two years, opening the Convention for signature. On the same day, it also adopted a companion resolution mandating the creation of an international criminal court, giving effect to the reference to such an institution in article 6 of the Convention itself. But within a few years, international criminal law had gone into virtual hibernation from which it was not to emerge for more than four decades.

The year 1998 witnessed the glorious achievement of the Rome Statute of the International Criminal Court. As for the Genocide Convention, its fiftieth anniversary that same year was barely noticed. Yet in the decade that followed, important judgments were issued by the *ad hoc* tribunals that applied and interpreted the provisions of the Convention. There was a virtual explosion of academic writing on this hitherto neglected instrument. This was all crowned by a seminal ruling of the International Court of Justice in February 2007, in the case of *Bosnia and Herzegovina v. Serbia*.¹

Since the 2007 judgment, other international courts and tribunals have reacted to its holdings. There have been important rulings of the *ad hoc* tribunals, notably the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, but also judgments of the International Criminal Court and the European Court of Human Rights dealing with the interpretation and application of provisions of the Convention. In February 2015, the International Court of Justice issued a second important judgment dealing with application of the Genocide Convention to the

* Professor of international law, Middlesex University, London; professor of international criminal law and human rights, Leiden University; *emeritus* professor of human rights law, National University of Ireland Galway.

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007.

Balkan wars of the 1990s, in the case of *Croatia v. Serbia*.² The international case law dealing with genocide that was issued over the eight years between the two judgments of the International Criminal Court is the subject matter of this essay.

The European Court of Human Rights

The European Court of Human Rights was the first international judicial body to consider the 2007 judgment of the International Court of Justice. The case, *Jorgić v. Germany*, involved the application of article 7 of the European Convention on Human Rights. Article 7 enshrines the principle of legality and is very similar to provisions in other international instruments, such as article 11(2) of the Universal Declaration of Human Rights and article 15 of the International Covenant on Civil and Political Rights. Jorgić had been prosecuted in Germany pursuant to German law for crimes perpetrated in Bosnia and Herzegovina during the 1992-1995 war, including genocide. He was convicted of acts of ‘ethnic cleansing’ pursuant to what the European Court described as a ‘wide interpretation of the “intent to destroy”’ as set out in article 2 of the Genocide Convention.³ Before the European Court Jorgić argued that the German courts did not respect the principle of legality.

In reviewing the relevant legal sources, something that is a typical feature of its judgments, the Court cited an excerpt from paragraph 190 of the judgment of the International Court of Justice, where the notion of ‘ethnic cleansing’ is discussed. According to the International Court of Justice: ‘This is not to say that acts described as “ethnic cleansing” may never constitute genocide, if they are such as to be characterized as, for example, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group...’⁴

The European Court of Human Rights noted that the case law of the International Criminal Tribunal for the former Yugoslavia supported a narrow interpretation whereby genocide ‘as defined in public international law, comprised

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015.

³ *Jorgić v. Germany*, no. 74613/01, § 112, ECHR 2007-III.

⁴ *Ibid.*, § 45.

only acts aimed at the physical or biological destruction of a protected group'.⁵ But it said that because the Tribunal's interpretation of the scope of genocide, as well as other decisions taken by national and international courts, 'in particular the International Court of Justice', had been delivered subsequent to the commission of his offences, 'the applicant could not rely on this interpretation being taken by the German courts in respect of German law at the material time, that is, when he committed his offences'.⁶ Thus, in the *Jorgić* case the European Court held that a conviction by German courts based upon a broader construction of the scope of genocide than that espoused by the International Criminal Tribunal for the former Yugoslavia as well as by the International Court of Justice in the February 2007 judgment did not violate the principle of legality.

There is also a lengthy reference to the 2007 judgment of the International Court of Justice in an admissibility decision of the European Court of Human Rights issued in July 2013. The application was submitted by an association of survivors of the Srebrenica massacre. It was directed against the Netherlands and concerned conduct attributed to the Dutch units of United Nations peacekeeping troops. A seven-judge Chamber of the European Court of Human Rights reviewed a range of legal materials concerning Srebrenica including relevant judgments of various courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the Human Rights Chamber of Bosnia and Herzegovina. The admissibility decision contains a five-paragraph overview of the February 2007 judgment of the International Court of Justice.⁷ The Court declared the case inadmissible based upon the immunities of the United Nations. Aside from a summary of the judgment of the International Court of Justice in the *Bosnia* case, presented as background, the European Court was strongly influenced by rulings of the International Court of Justice respecting immunities, notably the recent decision in the *Jurisdictional Immunities of the State* case.⁸

There are also some summary references to the 2007 judgment by a Chamber of the European Court in a case directed against Switzerland concerning genocide

⁵ *Ibid.*, § 112.

⁶ *Ibid.*, § 112.

⁷ *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, §§ 49-53, 11 June 2013.

⁸ Cited at *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, § 158, 11 June 2013.

denial legislation.⁹ The 2007 judgment of the International Court of Justice was also cited by the European Court of Human Rights with respect to its statements on State responsibility, attribution and the ‘direct control’ criterion.¹⁰ In addition, the 1996 interlocutory ruling in the same case was also cited by a judge of the European Court of Human Rights in a separate opinion as authority for the proposition that human rights obligations are not by nature reciprocal.¹¹

Two Grand Chamber decisions of the European Court of Human Rights dealing with genocide were delivered in October 2015, after the February 2015 decision of the International Court of Justice, and are therefore outside the scope of this study.¹²

International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda has issued many decisions concerning genocide, at both the trial and the appeals stage, but as a general rule these have contributed only modestly to the interpretation of articles 2 and 3 of the Genocide Convention. In several of the Appeals Chamber judgments decided since February 2007, the defence raised very broad and often unsubstantiated allegations that the Trial Chamber had misapplied the law on genocide.¹³ In others, issues relating to the definition of genocide have not arisen at all.¹⁴ Similarly, there is little of interest in terms of legal development in the Trial Chamber judgments issued in recent years.¹⁵ These decisions do not generally address any new issues concerning

⁹ *Perinçek v. Switzerland*, no. 27510/08, §§ 23, 83, 116, 17 December 2013.

¹⁰ *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, §§ 76, 96, 115, 19 October 2012.

¹¹ *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, 7 November 2013.

¹² *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015; *Vasiliauskas v. Lithuania*, [GC], no. 35343/05, 20 November 2015.

¹³ *Simba v. Prosecutor* (ICTR-01-76-A), Judgment, 27 November 2007, paras. 256-270; *Bagosora and Nsengiyumva v. Prosecutor* (ICTR-98-41-A), Judgment, 14 December 2011, paras. 382-386.

¹⁴ *Karera v. Prosecutor* (ICTR-01-74-A), Judgment, 2 February 2009; *Bikindi v. Prosecutor* (ICTR-01-72-A), Judgment, 18 March 2010; *Prosecutor v. Rukundo* (ICTR-2001-70-A), Judgment, 20 October 2010; *Zigiranyirazo v. Prosecutor* (ICTR-01-73-A), Judgment, 18 December 2010; *Muvunyi v. Prosecutor* (ICTR-2000-55A-A), Judgment, 1 April 2011; *Mugenzi and Mugiraneza v. Prosecutor* (ICTR-99-50-A), Judgment, 4 February 2013.

¹⁵ *Prosecutor v. François Karera* (ICTR-01-74-T), Judgment and Sentence, 7 December 2007, paras. 533-549; *Prosecutor v. Nchamihigo* (ICTR-01-63-T), Judgment and Sentence, 12 November 2008, paras. 329-336; *Prosecutor v. Bikindi* (ICTR-01-72-T), Judgment, 2 December 2008, paras. 404-426; *Prosecutor v. Théoneste Bagosora et al.* (ICTR-98-41-T), Judgment and Sentence, 18 December 2008, paras. 2084-2163; *Prosecutor v. Zigiranyirazo* (ICTR-01-73-T), Judgment, 18 December 2008, paras.

interpretation of the definition of genocide. Typically, they consist of relatively perfunctory recitals of the case law. For that reason, they do not deserve any particular attention here.

It may seem astonishing that this Tribunal, whose work has been devoted very largely to the implementation of the 1948 Genocide Convention, does not appear to have ever made reference to the 2007 judgment of the International Court of Justice. Indeed, it has virtually never referred to the case law of the Court at all.¹⁶ There is one obscure mention of the 1996 Preliminary Objections ruling in the *Bosnia* case, on the *erga omnes* nature of the obligations in the 1948 Convention, but that is only because one of the parties cited it, prompting the Court to acknowledge the reference in its summary of the positions taken by the parties.¹⁷

The fact that there is little of interest in the post-February 2007 decisions of the International Criminal Tribunal for Rwanda may only reflect the fact that its case law, at least as the definition of the crime of genocide is concerned, had already become quite developed and detailed, leaving little room for dispute or challenge. Many of the issues and controversies that were so important to the context of the former Yugoslavia, such as the demarcation between genocide and ethnic cleansing and the significance of forcible displacement, never seriously arose in the Rwandan

396-428; *Prosecutor v. Renzaho* (ICTR-97-31-T), Judgment and Sentence, 14 July 2009, paras. 760-780; *Prosecutor v. Nsengimana* (ICTR-01-69-T), Judgment, 17 November 2009, paras. 831-841; *Prosecutor v. Rukundo* (ICTR-2001-70-T), Judgment, 27 February 2009, paras. 555-576; *Prosecutor v. Nindiliyimana et al.* (ICTR-00-56-T), Judgment and Sentence, 17 May 2011, paras. 2044-2085; *Prosecutor v. Nyiramasuhuko et al.* (ICTR-98-42-T), Judgment and Sentence, 24 June 2011, paras. 5653-6038; *Prosecutor v. Bizimungu et al.* (ICTR-99-50-T), Judgment and Sentence, 30 September 2011, paras. 1954-1987; *Prosecutor v. Karemera et al.* (ICTR-98-44-T), Judgment and Sentence, 2 February 2012, paras. 1575-1672.

¹⁶ *Prosecutor v. Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007, para. 23, fn. 32, citing *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, I.C.J. Reports 1989, p. 177, para. 47; *Prosecutor v. Rwamakuba* (ICTR-98-44C-I), Decision on Appropriate Remedy, 31 January 2007, para. 48, fn. 71, citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, p. 73 and *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, p. 174; *Prosecutor v. Karemera et al.* (ICTR-98-44-T), Decision on Nzirorera's Preliminary Motion to Dismiss the Indictment for Lack of Jurisdiction: Chapter VII of the United Nations Charter, 29 March 2004, para. 10, fn. 4, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 16; *Prosecutor v. Karemera et al.* (ICTR-98-44-PT), Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004, para. 22, fn. 22, citing *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963*, I.C.J. Reports 1963, p. 15 and *Nuclear Tests (Australia v. France), Judgment*, I.C.J. Reports 1974, p. 253.

¹⁷ *Prosecutor v. Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007, para. 23, fn. 33.

context. The major contribution by the Rwanda Tribunal to the development of the law of the Genocide Convention addressed the crime of direct and public incitement,¹⁸ a matter that is not of any great relevance to the present proceedings.

One judgment of the Appeals Chamber of the International Criminal Tribunal for Rwanda, issued in March 2008, is of importance for its discussion of the *actus reus* of the second act of genocide, that is, causing serious bodily and mental harm to members of the group. The Chamber said that in its previous judgments it had not ‘squarely addressed the definition of such harm’.¹⁹ It said that ‘quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs’.²⁰ The Appeals Chamber said that serious mental harm includes ‘more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat’.²¹ Noting that nearly all convictions for genocide on the basis of causing serious bodily or mental harm had involved killing or rape, the Chamber said that ‘[t]o support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part’.²² In a footnote to this remark, the Chamber noted that in a decision concerning a charge of crimes against humanity a Trial Chamber has said it was ‘not satisfied that [the removal of a church roof depriving Tutsis of an effective hiding place] amount[ed] to an act of similar seriousness to other enumerated acts in the Article’.²³ The Appeals Chamber also cited the commentary on the Code of Crimes in the 1996 report of the International Law Commission.²⁴

The Appeals Chamber of the Rwanda Tribunal referred to statements in the trial judgment that the accused, who was a Catholic priest, had refused to allow Tutsi refugees to get food from a banana plantation, something that contributed to their physical weakening, and that ‘his order prohibiting refugees from getting food from

¹⁸ *Nahimana et al. v. Prosecutor* (ICTR-99-52-A), Judgment, 28 November 2007.

¹⁹ *Prosecutor v. Seromba* (ICTR-2001-66-A), Judgment, 12 March 2008, para. 46.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, fn. 117, citing *Prosecutor v. Ntakirutimana et al.* (ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 855.

²⁴ The reference in *Seromba* is to the Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May-26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 91, UN Doc. A/51/10 (1996). However the precise reference appears to be erroneous; the statement to which the Appeals Chamber seems to have been referring appears on p. 46.

the banana plantation, his refusal to celebrate mass in Nyange church, and his decision to expel employees and Tutsi refugees' had facilitated the victims 'living in a constant state of anxiety'.²⁵ The Appeals Chamber mentioned the 'parsimonious statements' of the Trial Chamber about the acts allegedly comprising the serious bodily and mental harm, concluding that it could not 'equate nebulous invocations of "weakening" and "anxiety" with the heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture'.²⁶ These words were endorsed in a July 2013 ruling of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.²⁷

In another decision, the issue of proof of genocidal intent prompted the Appeals Chamber of the International Criminal Tribunal for Rwanda to recall that in the absence of direct evidence, 'a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts'.²⁸ The Chamber noted that even facts and events that arose subsequent to the perpetration of the crime itself could be considered as part of the context for this purpose.²⁹

In *Prosecutor v. Gatete*, issued in October 2012, the Appeals Chamber confirmed that the rule against cumulative convictions is not breached when convictions for both genocide *per se* and conspiracy to commit genocide are entered. The Chamber reasoned that conspiracy does not involve commission of the crime as such. It held that the two crimes, genocide and conspiracy, were distinct, and that 'the crime of genocide has a materially distinct *actus reus* from the crime of conspiracy to commit genocide and both crimes are based on different underlying conduct'. According to the Appeals Chamber, '[t]he crime of genocide requires the commission of one of the enumerated acts in Article 2(2) of the Statute, while the crime of conspiracy to commit genocide requires the act of entering into an agreement to

²⁵ *Prosecutor v. Seromba* (ICTR-2001-66-A), Judgment, 12 March 2008, para. 47.

²⁶ *Ibid.*, para. 48.

²⁷ *Prosecutor v. Karadžić* (IT-95-5/18-AR98bis.I), Judgment, 11 July 2013, para. 32, fn. 83.

²⁸ *Hategekimana v. Prosecutor* (ICTR-00-55B-A), Judgment, 8 May 2012, para. 133.

²⁹ *Ibid.*

commit genocide'.³⁰ It overturned the Trial Chamber's holding to convict the accused of genocide but not to enter a conviction for conspiracy because 'by convicting Gatete only of genocide while he was also found criminally responsible for conspiracy to commit genocide, the Trial Chamber failed to hold him responsible for the totality of his criminal conduct, which included entering into the unlawful agreement to commit genocide'.³¹

The Appeals Chamber also explained that by recognising conspiracy to commit genocide as an inchoate crime, the Genocide Convention 'aims to prevent the commission of genocide'. However, it said 'another reason for criminalising conspiracy to commit genocide is to punish the collaboration of a group of individuals resolved to commit genocide. The danger represented by such collaboration itself justifies the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide has been committed.'³²

One member of the Appeals Chamber, Judge Agius, dissented on this point. Judge Agius had been the presiding judge in the *Popović* trial before the International Criminal Tribunal for the former Yugoslavia, which is discussed below. In his dissenting opinion in *Gatete*, Judge Agius said that he did not disagree with the majority's statement of the legal principles concerning the distinct nature of the crime of conspiracy to commit genocide. However, he considered that entering a conviction for conspiracy in addition to one for genocide raised problems of fairness to the accused.³³ He said he disagreed with the majority's holding that the danger represented by the impugned collaboration itself justified the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide has been committed.³⁴ He repeated the reasoning he had advanced in *Popović* that once a person is convicted for genocide the rationale for adding a conviction for conspiracy becomes 'less compelling', especially when the criminal responsibility is based upon participation in a joint criminal enterprise.³⁵

³⁰ *Prosecutor v. Gatete* (ICTR-00-61-A), Judgment, 9 October 2012, para. 260.

³¹ *Ibid.*, para. 261.

³² *Ibid.*, para. 262 (reference omitted).

³³ *Prosecutor v. Gatete* (ICTR-00-61-A), Dissenting Opinion of Judge Agius, 9 October 2012, para. 3.

³⁴ *Ibid.*, para. 4.

³⁵ *Ibid.*, para. 5. For the discussion to which Judge Agius refers, see: *Prosecutor v. Popović et al.* (IT IT-05-88-T), Judgment, 10 June 2010, paras. 2111-2127.

International Criminal Court

At the International Criminal Court, there is a pending charge of genocide in the proceedings directed against the President of Sudan, Omar Al Bashir. Because the Court has been unable to obtain custody over the accused, there have been no developments with respect to interpretation of the crime of genocide since the issuance of the arrest warrant in 2010. Nevertheless, the decisions concerning issuance of the arrest warrant contain a very rich discussion of aspects of the law of genocide including significant references to the 2007 ruling of the International Court of Justice in the *Bosnia* case.

Pre-Trial Chamber I, to which the case was initially assigned, concurred with the Prosecutor's application with respect to war crimes and crimes against humanity but it declined to authorise a charge of genocide when it issued the arrest warrant in this case.³⁶ The decision was later overturned, the Appeals Chamber considering that the standard the Pre-Trial Chamber had set for determining the charges it would authorise was too demanding at this stage of proceedings.³⁷ The Pre-Trial Chamber subsequently added the genocide charge to the Al Bashir arrest warrant.³⁸ Much of the initial ruling on issuance of the arrest warrant consisted of a discussion of the definition of genocide. There was also a substantial dissenting opinion about the majority's exclusion of the crime of genocide from the warrant. The two subsequent decisions, of the Appeals Chamber and the Pre-Trial Chamber, do not really contribute anything of interest with respect to interpretation of the definition of genocide.

The Pre-Trial Chamber invoked the 2007 judgment of the International Court of Justice on more than twenty occasions. At no point did it suggest that it disagreed with any aspect of the decision of the Court.³⁹

³⁶ *Prosecutor v. Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009.

³⁷ *Prosecutor v. Bashir* (ICC-02/05-01/09), 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", 3 February 2010.

³⁸ *Prosecutor v. Bashir* (ICC-02/05-01/09), Second Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 12 July 2010.

³⁹ *Prosecutor v. Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 114, fn. 133, para. 135, fns. 148, 149 and 150, para. 137, fn. 152, para. 138, fn. 153, para. 139, fn. 154, para. 140, fn. 155, para. 142, fn. 156, para. 143, fn. 157, para. 144, fns. 158, 159 and 160, para. 146, fns. 161, 162 and 163, para. 167, fn. 188, para. 182, fns. 202, 203, 204, 205 and 206, para. 183, fns. 207 and 208, para. 194, fn. 221.

An important feature of the International Criminal Court's interpretation of the scope of the crime is its consideration of an additional source of law, the Elements of Crimes. This is a secondary instrument adopted by the Assembly of States Parties whose purpose, according to article 9(1) of the Rome Statute, is to 'assist the Court in the interpretation and application' of definitions of crimes contained in articles 6, 7, 8 and 8*bis*. They are required to be 'consistent' with the Rome Statute,⁴⁰ and are listed in article 2 as the sources of law to be applied 'in the first place',⁴¹ along with the Statute and the Rules of Procedure and Evidence.

The Elements largely echo the text of article 6 of the Statute, which is essentially identical to article 2 of the 1948 Genocide Convention. However, they also contain some language that is not part of that text. In the *Bashir* arrest warrant decision, the majority said that in this way the Elements of Crimes 'elaborate on the definition of genocide provided for in article 6 of the Statute'.⁴² First, they require that the victims belong to the targeted group. Second, they require that the punishable acts - killings, serious bodily or mental harm, imposition of conditions of life - take place 'in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'. Third, they specify that the perpetrator act with the intent to destroy in whole or in part the targeted group. The first and third of these elements do not raise any particular difficulties. They find much support in the case law of the *ad hoc* tribunals, the *travaux préparatoires* and the scholarly literature. The second element is more controversial.

It appears that the second of these elements, namely the requirement that genocidal acts 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', was not included in the original drafts of the Elements of Crimes debated by the Preparatory Commission of the International Criminal Court during its 1999 sessions.⁴³ This Element was added to the draft at the beginning of 2000,⁴⁴ apparently in reaction to the first judgment of the Yugoslavia Tribunal that dealt with the merits

⁴⁰ Rome Statute of the International Criminal Court, (2002) 187 UNTS 90, art. 9(3).

⁴¹ *Ibid.*, art. 21(1)(a).

⁴² *Prosecutor v. Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 113.

⁴³ See, e.g., PCNICC/1999/L.5/Rev.1/Add.2, pp. 5-7, issued 22 December 1999. The initial proposal for the Elements of Crimes, submitted by the United States, borrowed the 'widespread or systematic' language from the Rome Statute's definition of crimes against humanity: Proposal Submitted by the United States of America, Draft elements of crimes, PCNICC/1999/DP.4.

⁴⁴ PCNICC/2000/L.1/Rev.1/Add.2, pp. 6-8 (issued 7 April 2000).

of a genocide charge.⁴⁵ In that ruling, a Trial Chamber of the Tribunal held that genocide could be committed by an individual acting alone, even in the absence of evidence that this was part of some larger policy, plan, or campaign involving others, and without any requirement that the intentions of the individual perpetrator had any reasonable chance of being achieved. Those who drafted the Elements of Crimes appear to have added the requirements of a manifest pattern of similar conduct or conduct that could itself effect such destruction in order to prevent the International Criminal Court from adopting a similar interpretation of the scope of the crime of genocide.

The contextual element set out in the Elements of Crimes was invoked by Pre-Trial Chamber I in its decision on the *Bashir* arrest warrant. The Chamber recognised that the definition in the Genocide Convention itself ‘does not expressly require any contextual element’.⁴⁶ It then considered the case law of the *ad hoc* tribunals, which have not insisted upon a plan or policy as an element of the crime of genocide.⁴⁷ It must be said that all of the judgments of the *ad hoc* tribunals are rather hypothetical when it comes to this question. To use the common law expression, they represent *obiter dicta*. At the Rwanda Tribunal, there has never really been any doubt that the killings of several hundred thousand Tutsi in 1994 were the product of a plan or policy. The judgments of the Yugoslavia Tribunal are even more abstract given the fact that the only convictions for genocide concern the Srebrenica massacre, where the existence of a plan or policy is not seriously questioned and it is not suggested that this was the act of a single individual.

In the *Jelisić case*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia dismissed a charge of aiding and abetting genocide because of insufficient evidence the crime was being perpetrated by persons other than the accused. It then went on to rule that a conviction for genocide was in any event ‘theoretically possible’ because an individual, acting alone, could perpetrate the crime.⁴⁸ The Trial Chamber concluded that Jelisić was such a mentally unstable

⁴⁵ *Prosecutor v. Jelisić* (IT-95-10-T), Judgment, 14 December 1999.

⁴⁶ *Prosecutor v. Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 117.

⁴⁷ *Ibid.*, para. 119, citing: *Prosecutor v. Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 400 (an error; the correct reference is to para. 100); *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, paras. 520, 523.

⁴⁸ *Prosecutor v. Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 100; affirmed: *Prosecutor v. Jelisić* (IT-95-10-A), Judgment, 5 July 2001.

individual that he was not capable of forming a genocidal intent and he was acquitted of the charge. But the conclusion in *Jelisić* that genocide could be committed by an individual perpetrator, acting alone, and in the absence of a broader plan or policy, remains the law of the Yugoslavia Tribunal.

In *Bashir*, Pre-Trial Chamber I compared the Elements of Crimes and the case law of the *ad hoc* tribunals, observing that:

the crime of genocide is completed by, inter alia, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs. As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.⁴⁹

Pre-Trial Chamber I said that following this interpretative approach, the crime of genocide depends upon proof that the accused had the intent to destroy the protected group, and that ‘[a]s soon as this intent exists and materializes in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group’.⁵⁰

Noting ‘a certain controversy’ as to whether the contextual element in the Elements of Crimes should be applied,⁵¹ Pre-Trial Chamber I quite clearly distanced itself from the case law of the *ad hoc* tribunals. It highlighted the importance of the contextual element set out expressly in the Elements of Crimes.

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 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.⁵²

Dissenting, Judge Ušacka insisted that the role of the Elements of Crimes was only to ‘assist’ the Court, and hinted at the view that in the *Bashir* case they were inconsistent

⁴⁹ *Prosecutor v. Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 119 (references omitted). *Contra: Bashir* (ICC-02/05-01/09), Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 19, fn. 26.

⁵⁰ *Ibid.*, para. 120.

⁵¹ *Ibid.*, para. 125.

⁵² *Ibid.*, para. 124.

with article 6 of the Statute, a point she said did not need to be determined in the case at bar.⁵³

The Pre-Trial Chamber might well have justified the difference in its approach and that of the *ad hoc* tribunals by relying exclusively on the requirements imposed by the Elements of Crimes, thereby avoiding any implication of disapproval of the interpretation of the Yugoslavia Tribunal in *Jelisić*. However, it went on to state that it did not see any ‘irreconcilable contradiction’ between the definition of genocide in article 6 of the Rome Statute and the criterion of a contextual element set out in the Elements.⁵⁴

Quite the contrary, the 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 a 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 ‘[i]n 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 the crimes’.⁵⁵

The decision represents therefore an important development in the jurisprudence of the International Criminal Court. It departs from established case law of the *ad hoc* tribunals on a significant substantive legal issue. The debate is about whether the contextual element contained in the Elements of Crimes represents a clarification of the scope of the definition of genocide taken from article 2 of the Convention or whether it is a limitation or restriction imposed by States in the particular context of the adoption of a supplementary instrument to the Rome Statute. Those who see it as a narrowing of the Convention definition argue that the Elements of Crimes are ‘jurisdictional’ in nature. Their contention, which is often driven by a visceral resistance to anything that appears to narrow or limit definitions of crimes at the international level, is essentially based upon a literal reading of the text of the Convention. They assert that because the contextual element is not set out explicitly in the definition of the crime taken from article 2 of the Genocide Convention, that it therefore represents a change or alteration.

The

⁵³ *Prosecutor v. Bashir* (ICC-02/05-01/09), Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 20.

⁵⁴ *Prosecutor v. Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 132.

⁵⁵ *Ibid.*, para. 133.

The position that the Elements of Crimes merely clarify the content of article 2 of the Convention finds support in general rules of treaty law. The Elements may be considered as ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ or ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’, well-known concepts set out in article 31(3) of the Vienna Convention on the Law of Treaties. There cannot be much doubt that the drafters of the Rome Statute, at the 1998 diplomatic conference and before, treated article 2 of the 1948 Convention as somewhat of a sacred text that was not to be modified at all. It is striking that article 6 of the Rome Statute faithfully respects the text of article 2 of the 1948 Convention, whereas the definitions of the other categories of crime that were adopted at the Rome Conference vary significantly from earlier models. In effect, they dramatically develop the codifications of both crimes against humanity and war crimes. However, when the Rome Conference turned to the crime of genocide, there was resistance to any change whatsoever in the 1948 text. There was only one hint that it might be changed, a casual proposal by Cuba for inclusion of political and social groups that was never even submitted as a formal amendment.⁵⁶ Many States took the floor to insist upon fidelity to the 1948 version.⁵⁷

It seems implausible therefore that in June and July 1998, at the Rome Conference, States more or less unanimously expressed their allegiance to the 1948 definition of genocide but that two years later, when the Preparatory Commission was drafting the Elements of Crimes, they intended to depart from that definition with a so-called ‘jurisdictional’ limitation on the scope of genocide. Pursuant to the Final Act of the Rome Conference, the Preparatory Commission had the same composition as the Rome Conference, so it cannot be argued that it was not as representative or that its membership differed. Nevertheless, the fact that the intent of the Preparatory Commission was to elucidate the scope of the 1948 definition does not necessarily lead to the conclusion that it did not, as a matter of law, effect what amounts to an amendment rather than an interpretative clarification.

In the *Bashir* arrest warrant decision, the Pre-Trial Chamber recognised the development by scholars of what has been identified as a ‘knowledge-based’

⁵⁶ UN Doc. A/CONF.183/C.1/SR.3, para. 100.

⁵⁷ See particularly the debates at UN Doc. A/CONF.183/C.1/SR.3, paras. 20-179.

approach to genocide.⁵⁸ The Pre-Trial Chamber described the approach as facilitating the criminal responsibility of ‘direct perpetrators and mid-level commanders ... even if they act without the *dolus specialis*/specific intent to destroy in whole or in part the targeted group’. It said that according to the knowledge-based approach, ‘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 Pre-Trial Chamber insisted that the so-called ‘knowledge-based approach’ is not different from the traditional approach in relation to those senior political and military leaders who plan and set into motion a genocidal campaign, who must act with the genocidal intent described in article 2 of the Convention. Given that in the *Bashir case*, the issue was not the involvement of a mid-level commander or direct perpetrator but rather an individual at the highest leadership level, the Pre-Trial Chamber said the knowledge-based approach was irrelevant to its determination.

This may have been underselling the principles of the ‘knowledge-based approach’, bearing in mind that it has been developed by scholars who do not entirely agree amongst themselves. One feature of the approach is its emphasis not on the specific intent of individual perpetrators but rather on the plan or policy behind the genocidal campaign itself. It is consistent with the controversial Element in the Elements of Crimes because it tends to dismiss the thesis of the lone perpetrator, requiring that the destruction of the group be a feasible outcome of the ensemble of acts of genocide. For all practical purposes, the knowledge-based approach excludes the possibility that genocide is the work of isolated individuals. Genocide results from a plan or policy that is the creation of a State or State-like entity. A focus on the *mens rea* of individuals should only then arise with respect to the knowledge of such individuals of the plan or policy. If they know of the plan or policy and contribute to its implementation, then they have the requisite *mens rea*. In other words, the starting point for the analysis should be the existence of a plan or policy of a body with the

⁵⁸ *Prosecutor v. Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 139, fn. 154, referring to: Claus Kreß, ‘The Darfur Report and Genocidal Intent’, (2005) 3 *Journal of International Criminal Justice* 562, at pp. 565-572; William Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge: Cambridge University Press, 2009, pp. 241-264.

capacity to destroy a protected group in whole or in part. To the extent that individual criminal responsibility is at issue, the analysis then proceeds to consider the knowledge of the plan by the individual and whether or not he or she could avail of an excuse or justification that might counteract the apparent mental element.

The focus on individual intent that features in international criminal law cannot be automatically transposed to the debate about State responsibility for international crime. In practice, as the International Court of Justice recognised in the 2007 judgment in the *Bosnia* case, the word ‘intent’ and even ‘specific intent’ is used in the context of an analysis of policy. Whether or not one of the individual perpetrators in the Srebrenica massacre manifested the specific intent to commit genocide is really quite secondary to whether the events were the product of a coordinated plan perpetrated by an entity rather than the perverse product of a single mind.

International Criminal Tribunal for the former Yugoslavia

Only a relatively small number of cases at the International Criminal Tribunal for the former Yugoslavia have dealt with charges of genocide. It is therefore not unusual that it was only in mid-2010 that the Tribunal considered the judgment of the International Court of Justice. The *Popović et al.* case concerned seven accused, four of whom were charged with genocide or, in the alternative, aiding and abetting genocide as participants in the Srebrenica massacre. Two of the accused, Vujadin Popović and Ljubiša Beara, were convicted of genocide, while a third, Drago Nikolić, was convicted of aiding and abetting genocide. Ludomir Borovčanin was acquitted of the genocide charge but convicted of aiding and abetting the crime against humanity of extermination. The Prosecutor did not appeal the acquittal of Borovčanin for genocide.

The *Popović* Trial Chamber considered the legal elements of the crime of genocide in some detail, reviewing the case law on the subject. It cited the *Bosnia* decision of the International Court of Justice on several occasions.⁵⁹ In almost all of these references, the Trial Chamber also referred to rulings of the *ad hoc* institutions,

⁵⁹ *Prosecutor v. Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 807, fns. 2910 and 2911, para. 808, fn. 2913, para. 809, fn. 2916, para. 812, fn. 2925, para. 813, fn. 2926, para. 814, fn. 2929, para. 817, fn. 2934, para. 819, fn. 2937, para. 821, fn. 2940, para. 822, fns. 2943 and 2944, para. 827, fn. 2958, para. 831, fn. 2968.

confirming the consistency of the international case law and the agreement of the International Court of Justice with the legal findings of the *ad hoc* tribunals. Of particular interest was its consideration of the punishable acts, especially that of causing serious bodily or mental harm. The Trial Chamber approved of the statement by the Appeals Chamber of the International Criminal Tribunal for Rwanda in *Seromba* that '[t]o support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part'.⁶⁰ It provided as examples of the act 'torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group',⁶¹ citing in support paragraph 319 of the judgment of the International Court of Justice in the *Bosnia* case. The Trial Chamber also noted the holding of the Appeals Chamber that forcible transfer 'does not constitute in and of itself a genocidal act'.⁶² The footnote to this statement said: 'The International Court of Justice has held that neither the intent to render an area ethnically homogenous nor operations to implement the policy "can *as such* be designated as genocide: the intent that characterizes genocide is to 'destroy, in whole or in part,' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group".'⁶³

Referring to the punishable acts of genocide that are listed in the five paragraphs of article 2 of the Genocide Convention, the Trial Chamber said that the methods of destruction covered in the third act – 'Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' – are 'those seeking a group's physical or biological destruction'.⁶⁴ Here it referred in support to paragraph 344 of the International Court's 2007 judgment, citing the statement that 'the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group'. The Trial Chamber also considered

⁶⁰ *Ibid.*, para. 811.

⁶¹ *Ibid.*, para. 812.

⁶² *Ibid.*, para. 813.

⁶³ *Ibid.*, para. 813, fn. 2926, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 190 (emphasis in the original).

⁶⁴ *Ibid.*, para. 814.

briefly the fourth act of genocide – ‘Imposing measures intended to prevent births within the group’ – in concluding that ‘[t]o amount to a genocidal act, the evidence must establish that the acts were carried out with intent to prevent births within the group and ultimately to destroy the group as such, in whole or in part’.⁶⁵ It provided as authority two paragraphs from the International Court’s 2007 judgment.⁶⁶

The Trial Chamber also devoted significant attention to the contention by one of the defendants that the crime of genocide comprised an element of State policy. The Trial Chamber rejected this argument, stating that jurisprudence of the *ad hoc* tribunals had ‘made it clear that a plan or policy is not a statutory element of the crime of genocide’.⁶⁷ The Trial Chamber referred to the Elements of Crimes of the International Criminal Court, holding that article 6 of the Rome Statute, which consists of the definition of genocide drawn from the 1948 Convention, ‘does not prescribe the requirement of “manifest pattern” introduced in the ICC Elements of Crimes’.⁶⁸ The Trial Chamber said that ‘the language of the ICC Elements of Crimes, in requiring that acts of genocide must be committed in the context of a manifest pattern of similar conduct, implicitly excludes random or isolated acts of genocide’.⁶⁹ It said that the Appeals Chamber of the Yugoslavia Tribunal in the *Krstić case* had already said ‘reliance on the definition of genocide given in the ICC’s Elements of Crimes is inapposite’.⁷⁰ Although the passage was not cited by the Trial Chamber in *Popović*, the Appeals Chamber in *Krstić* had gone on to say that 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’.⁷¹ The *Popović* Trial Chamber concluded ‘that a plan or policy is not a legal ingredient of the crime of genocide... However, the Trial Chamber considers the existence of a plan or policy can be an important factor in inferring genocidal intent.’⁷² The *Popović* Trial Chamber did not mention or otherwise consider the ruling of the Pre-Trial Chamber of the International Criminal

⁶⁵ *Ibid.*, para. 819.

⁶⁶ *Ibid.*, para. 819, fn. 2937, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 355.

⁶⁷ *Ibid.*, para. 829.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Prosecutor v. Krstić* (IT-98-33-A), Judgment, 19 April 2004, para. 224.

⁷² *Prosecutor v. Popović et al.* (IT IT-05-88-T), Judgment, 10 June 2010, para. 830.

Court issued fifteen months earlier on the *Bashir* arrest warrant. Here then there is a very significant contrast in the interpretation of article 2 of the Convention by chambers of the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia.

The Appeals Chamber delivered its judgment in *Popović et al.* only three days before the judgment of the International Court of Justice in *Croatia v. Serbia*. There were only two rather perfunctory references to the 2007 judgment of the Court in the *Bosnia and Herzegovina v. Serbia* case. One of the defendants had invoked the decision in support of the contention that there is an implicit requirement in the definition of genocide that it be perpetrated pursuant to a plan or policy. The Appeals Chamber did not find that the International Court of Justice provided support for this argument.⁷³

The trial of Radovan Karadžić, who was the senior civilian official of the Bosnian Serbs for the period from 1992 to 1995, began in October 2009. The Prosecutor has alleged that Karadžić, as the highest civilian and military authority in the Republika Srpska, participated in an ‘overarching joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in BiH’.⁷⁴ This objective ‘was primarily achieved through a campaign of persecutions as alleged in this indictment. In some municipalities, between 31 March 1992 and 31 December 1992 this campaign of persecutions included or escalated to include conduct that manifested an intent to destroy in part the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such. In such municipalities, a significant section of the Bosnian Muslim and/or Bosnian Croat groups, namely their leaderships, as well as a substantial number of members of these groups were targeted for destruction.’⁷⁵ The genocidal acts that are alleged correspond to the first three paragraphs of article 2 of the Genocide Convention, namely, killing, causing serious bodily or mental harm, and deliberately inflicting upon detainees conditions of life calculated to bring about their physical destruction.

On 28 June 2012, after the Prosecutor had concluded the presentation of the case against the accused, the Trial Chamber granted in part the motion to acquit

⁷³ *Prosecutor v. Popović et al.* (IT-05-88-A^[SEP]), Judgment, 30 January 2015, paras. 438-439.

⁷⁴ *Prosecutor v. Karadžić* (IT-95-5/18), Prosecution’s Marked-Up Indictment, 19 October 2009, para.

8.

⁷⁵ *Ibid.*, para. 38.

presented pursuant to Rule 98*bis* of the Rules of Procedure and Evidence and removed the charge of genocide with respect to activities of Bosnian Serb forces in the municipalities. It retained the charge of genocide concerning Srebrenica.⁷⁶ The Trial Chamber issued its ruling orally, as has been the practice at the Yugoslavia Tribunal for more than a decade.

With respect to the charge of genocide perpetrated in the municipalities over the course of the war as a whole, the Trial Chamber began by stating that it was not bound either by earlier findings during trials before the Tribunal or by the judgment of the International Court of Justice of February 2007.⁷⁷ The Chamber said that the evidence submitted to the Tribunal by the Prosecutor indicated ‘that a large number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the municipalities during and after their alleged take-over and while in detention’.⁷⁸ It said this evidence was ‘capable of supporting a conclusion that Bosnian Muslims and/or Bosnian Croats were killed on a large scale with the intent to kill with persecutory intent’.⁷⁹ Furthermore,

the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold. However, the evidence the Chamber received in relation to the municipalities, even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such.⁸⁰

Turning to the punishable acts of genocide that are enumerated in the five paragraphs of article 2 of the Genocide Convention, the Trial Chamber said that ‘serious bodily harm must go beyond temporary unhappiness, embarrassment or humiliation, and result in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life, but it need not be permanent and irremediable’.⁸¹ But it added that ‘in order to support a conviction for genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in

⁷⁶ *Prosecutor v. Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28751, lines 23-25, p. 28752, line 1, p. 28757, line 25, p. 28758, lines 1-10.

⁷⁷ *Ibid.*, p. 28763, lines 20-24.

⁷⁸ *Ibid.*, p. 28764, lines 22-25.

⁷⁹ *Ibid.*, p. 28765, lines 1-4.

⁸⁰ *Ibid.*, p. 28765, lines 4-13.

⁸¹ *Ibid.*, p. 28765, lines 19-22.

whole or in part'.⁸² Referring to the jurisprudence of the Tribunal, and specifically the Appeals Chamber ruling in *Prosecutor v. Krstić* and the Trial Chamber judgment in *Prosecutor v. Popović et al.*, the Trial Chamber said this established 'that forcible transfer does not constitute in and of itself a genocidal act, but where attended by such circumstances as to lead to the death of the whole or part of the displaced population, it may be considered an underlying offence that causes serious bodily or mental harm'.⁸³ It said the Chamber had not 'heard evidence which rises to the level which could sustain a conclusion that the serious bodily or mental harm suffered by those forcibly transferred in the municipalities was attended by such circumstances as to lead to the death of the whole or part of the displaced population for the purposes of the actus reus for genocide'.⁸⁴

With respect to the third punishable act listed in article 2 of the Convention, the Trial Chamber said that in assessing 'whether conditions of life imposed on the targeted group were calculated to bring about its physical destruction, the Chamber has to focus on the objective probability of these conditions leading to the physical destruction of the group in part and must assess factors like the nature of the conditions imposed, the length of time that members of the group were subjected to that, and characteristics of the targeted group such as vulnerability'.⁸⁵ It said that proof that the result was actually achieved was not required in order to sustain a conviction.⁸⁶

Speaking of the issue of genocidal intent, the Trial Chamber said:

[I]n the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence.⁸⁷

The Trial Chamber concluded that 'there is no evidence that these actions reached a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy in whole or in part the Bosnian Muslims and/or

⁸² *Ibid.*, p. 28766, lines 3-6.

⁸³ *Ibid.*, p. 28766, lines 12-18.

⁸⁴ *Ibid.*, p. 28766, lines 23-25, p. 28767, lines 1-3.

⁸⁵ *Ibid.*, p. 28767, lines 11-17.

⁸⁶ *Ibid.*, p. 28767, line 22.

⁸⁷ *Ibid.*, p. 28768, lines 5-15.

Bosnian Croats as such'.⁸⁸ It noted in this respect evidence produced by the Prosecution of statements and speeches by the accused and others that allegedly contained 'rhetorical warning of the disappearance, elimination, annihilation or extinction of Bosnian Muslims in the event that war broke out'.⁸⁹ It did not consider that such evidence could change its assessment in any respect.

The Prosecutor appealed the acquittal on the charge of genocide and, on 11 July 2013, the Appeals Chamber ordered that it be reinstated.⁹⁰ In other words, the defence had a case to answer on the point. The Appeals Chamber considered the Trial Chamber decision by first examining the findings with respect to evidence of the three punishable acts of genocide that were at issue. Like the Trial Chamber, it insisted it was not bound by the factual findings and evidentiary assessments in earlier decisions of the Tribunal or by the ruling of the ICJ.⁹¹ The Appeals Chamber noted that the Trial Chamber had concluded there was evidence that the *actus reus* of the genocidal act of killing had been perpetrated.⁹² Turning to the punishable act of causing serious bodily and mental harm, it referred to evidence of beatings and other forms of physical abuse as well as rapes.⁹³ The Appeals Chamber said that '[w]hile the commission of individual paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, including evidence of sexual violence and of beatings causing serious physical injuries, could have concluded that it was insufficient to establish the *actus reus* of genocide in the context of Rule 98 *bis* of the Rules'.⁹⁴ The Appeals Chamber reached a similar conclusion with respect to the third act of genocide, citing evidence of deprivation of food and other harsh conditions of detention.⁹⁵

⁸⁸ *Ibid.*, p. 28769, lines 3-6.

⁸⁹ *Ibid.*, p. 28769, lines 10-12.

⁹⁰ *Prosecutor v. Karadžić* (IT-95-5/18-AR98bis.I), Judgment, 11 July 2013.

⁹¹ *Ibid.*, para. 94.

⁹² *Ibid.*, para. 25. This is probably a misreading of the Trial Chamber's position. Like the Appeals Chamber, the Trial Chamber methodically examined the relevance of each of the three punishable acts of genocide. Before turning to causing serious bodily and mental harm (beginning at p. 28765, line 14), it discussed killing in the previous paragraph (beginning at p. 28764, line 19). There it concluded, in language similar to what it used for the other two acts of genocide further on in the ruling, that 'even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such' (p. 28764, lines 8-13).

⁹³ *Ibid.*, paras. 34-36.

⁹⁴ *Ibid.*, para. 37 (reference omitted).

⁹⁵ *Ibid.*, paras. 47-48.

Having concluded that there was evidence of the three physical acts of genocide charged in the indictment, the Appeals Chamber then turned to the issue of evidence of genocidal intent. Citing an earlier ruling of the Appeals Chamber, in which it had upheld the dismissal of a genocide charge with respect to the municipalities⁹⁶ the Appeals Chamber noted the Prosecutor's criticism of the Trial Chamber ruling for having 'compartmentalised' the analysis, but dismissed this ground after considering the reasoning of the Trial Chamber.⁹⁷ The Appeals Chamber said that 'in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry'.⁹⁸ It said that instead of 'considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state'.⁹⁹

Under the heading 'The substantiality of the Groups', the Appeals Chamber considered the pronouncement by the Trial Chamber that the evidence, taken at its highest, '[did] not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such'.¹⁰⁰ The Appeals Chamber dismissed the objection to this statement made by the Prosecutor.¹⁰¹ It also considered issues relating to the relationship of the accused to the alleged joint criminal enterprise. There is no need here to develop its reasoning because this concerns the matter of individual liability strictly, and does not bear on State responsibility at all. In any case, the Tribunal did not find that there was reviewable error by the Trial Chamber in this respect.¹⁰²

The Appeals Chamber also considered the discussion of public statements attributed to the accused and others as evidence of genocidal intent. It found the consideration of this matter by the Trial Chamber to be satisfactory.¹⁰³ Nevertheless, it found 'convincing' the Prosecutor's argument that genocidal intent might be shown

⁹⁶ *Prosecutor v. Stakić* (IT-97-24-A), Judgment, 22 March 2006, para. 55.

⁹⁷ *Prosecutor v. Karadžić* (IT-95-5/18-AR98bis.I), Judgment, 11 July 2013, paras. 59-60.

⁹⁸ *Ibid.*, para. 56.

⁹⁹ *Ibid.*, para. 56.

¹⁰⁰ *Ibid.*, para. 61, citing *Prosecutor v. Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28765, lines 9-13 (emphasis added by the Appeals Chamber).

¹⁰¹ *Ibid.*, para. 68.

¹⁰² *Ibid.*, paras. 79-83.

¹⁰³ *Ibid.*, paras. 84, 95.

by evidence of meetings with the accused.¹⁰⁴ The Appeals Chamber said that specific intent could be inferred from ‘a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts’.¹⁰⁵

The Appeals Chamber concluded that ‘the evidence on the record, taken at its highest, could indicate that Karadžić possessed genocidal intent. Other evidence on the record indicates that other alleged members of the [joint criminal enterprise] also possessed such intent’.¹⁰⁶ The Appeals Chamber granted the appeal of the Prosecutor on the genocide charge relating to the municipalities.

The significance of this decision could easily be exaggerated and it was certainly misunderstood by many observers of the proceedings. The test that is to be applied for such motions formulated during the trial and before the defence has presented its case and evidence is ‘whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question and not whether an accused's guilt has been established beyond reasonable doubt’.¹⁰⁷

In December 2012, a Trial Chamber of the Yugoslavia Tribunal convicted Zdravko Tolimir of genocide with respect to crimes perpetrated in Srebrenica in mid-July 1995. It referred to the February 2007 judgment of the International Court of Justice as authority for the proposition that ‘[a] perpetrator’s specific intent to destroy can be distinguished from the intent required for persecutions as a crime against humanity on the basis that a perpetrator who possesses genocidal intent has formed more than an intent to harm a group by virtue of his discriminatory acts; he actually intends to *destroy* the group itself’.¹⁰⁸ To an extent the Trial Chamber departed from

¹⁰⁴ *Ibid.*, para. 97.

¹⁰⁵ *Ibid.*, para. 99, citing *Prosecutor v. Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para. 47; *Prosecutor v. Krstić* (IT-98-33-A), Judgment, 19 April 2004, para. 34; *Hategekimana v. Prosecutor* (ICTR-00-55B-A), Judgment, 8 May 2012, para. 133; *Gacumbitsi v. Prosecutor* (ICTR-2001-64-A), Judgment, 7 July 2006, paras 40-41.

¹⁰⁶ *Ibid.*, para. 100.

¹⁰⁷ *Prosecutor v. Delalić et al.* (IT-96-21-A), Judgment, 20 February 2001, para. 434 (emphasis in original). See also: *Prosecutor v. Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para. 37.

¹⁰⁸ *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 746 (emphasis in the original), citing *Application of the Convention on the Prevention and Punishment^[17] of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, *I.C.J. Reports 2007*, p. 43, para. 187.

earlier precedent by taking the view that ‘forcible transfer’ could be ‘an additional means by which to ensure the physical destruction of a group’.¹⁰⁹ It endorsed the words of an earlier Trial Chamber decision in *Blagojević and Jokić* where it was held ‘that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members’.¹¹⁰ The *Tolimir* Trial Chamber said it was ‘particularly guided’ by this finding of the Trial Chamber in *Blagojević and Jokić*.¹¹¹ What it does not say is that this aspect of the *Blagojević and Jokić* Trial Judgment was reversed on appeal. The *Tolimir* Trial Chamber only states that it is ‘cognizant’ of the holding by the Appeals Chamber that displacement of a people is not equivalent to destruction and that forcible transfer in and of itself is not a genocidal act.¹¹² One of the five members of the Appeals Chamber in the *Blagojević and Jokić* ruling was in dissent. Judge Shahabuddeen would have upheld a conviction of complicity in genocide, following a broader approach to the definition of the crime than his four colleagues.¹¹³ As is often the case with a dissenting opinion, it sharpens the debate and clarifies any possible ambiguity about the intent of the majority judgment. Just as there can be no question that the Appeals Chamber in *Blagojević and Jokić* did not confirm the broad and liberal approach to genocide that had been adopted by the Trial Chamber, there can also be little doubt that the Trial Chamber in *Tolimir* was promoting a similar broad and liberal approach to genocide, thereby inviting the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia to reconsider its position. It is also striking that the Trial Chamber in *Tolimir* did not refer to the pronouncement of the International Court of Justice on this subject, which was of course completely inconsistent with its holding.

The majority of the Trial Chamber in *Tolimir* held that the only ‘reasonable inference to draw from the evidence’ was that ‘the conditions resulting from the acts

¹⁰⁹ *Ibid.*, para. 765.

¹¹⁰ *Ibid.*, para. 764, citing *Prosecutor v. Blagojević and Jokić* (IT-02-60-T), Judgment, 17 January 2005.

¹¹¹ *Ibid.*, para. 764.

¹¹² *Prosecutor v. Blagojević and Jokić* (IT-02-60-A), Judgment, 9 May 2007, para. 123. Note that this judgment was issued several weeks after the February 2007 judgment of the International Court of Justice. The judgment is listed as an authority at the end of the Appeals Chamber’s judgment but it is not in fact cited anywhere in the reasons of the Appeals Chamber.

¹¹³ *Prosecutor v. Blagojević and Jokić* (IT-02-60-A), Partly Dissenting Opinion of Judge Shahabuddeen, 9 May 2007.

of Bosnian Serb Forces, as part of the combined effect of the forcible transfer and killing operations were deliberately inflicted, and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern BiH'.¹¹⁴ With respect to the *mens rea*, the Trial Chamber said that it 'ha[d] no doubt that the Bosnian Serb Forces who committed the underlying acts set out in Article 4(2)(a)-(c) [of the Statute of the ICTY] intended the physical destruction of the Bosnian Muslim population of Eastern BiH'.¹¹⁵

The *Tolimir* case concerned not only Srebrenica but also the attacks in Žepa, which followed in late July 1995. It seems that mass killings, like those in Srebrenica, did not occur in Žepa. Nevertheless, three community leaders were murdered by Bosnian Serb forces. Holding that there was genocidal intent associated with the attacks on Žepa, the majority of the Trial Chamber said that 'to ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient - in the case of Žepa - to remove its civilian population, destroy their homes and their mosque, and murder its most prominent leaders'.¹¹⁶ In this respect, it endorsed an interpretative approach whereby the words 'in whole or in part' in article 2 of the Convention refer not only to a 'substantial part' but also a 'significant part'. It concluded: 'The Majority has no doubt that the murder of Hajrić, Palić and Imamović was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such. On the basis of the above, the Majority, Judge Nyambe dissenting, is satisfied beyond reasonable doubt that Bosnian Serb Forces killed the three leaders named in the Indictment with the specific genocidal intent of destroying part of the Bosnian Muslim population as such.'¹¹⁷ The legal finding by the Trial Chamber on this point is both innovative and questionable. The inference that the murder of three community leaders constitutes both the *mens rea* and the *actus reus* of genocide because of the alleged impact this may have on the survival of the group is a rather large interpretative step that broadens enormously the scope of the crime.

In *Tolimir*, there were also allegations concerning prevention of births within the group. The Prosecutor had argued that this act of genocide resulted from 'the lack of similarly-aged men, the loss of a husband's pension upon remarriage, the social

¹¹⁴ *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 766.

¹¹⁵ *Ibid.*, para. 773.

¹¹⁶ *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 781.

¹¹⁷ *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 782.

stigma of remarriage and feelings of guilt'. The Trial Chamber did not consider that 'this consequence of the forcible transfer operation qualifies as a "measure" imposed by the Bosnian Serb Forces "intended to prevent births within the group"'.¹¹⁸ There is also discussion of the act of 'conspiracy to commit genocide' in *Tolimir*.¹¹⁹

The *Tolimir* conviction was upheld on appeal, in a judgment issued on 8 April 2015. The Appeals Chamber reversed several but not all of the genocide counts but did not alter the sentence of life imprisonment. It did not endorse the innovative developments of the majority of the Trial Chamber. A detailed discussion of that judgment is beyond the scope of this essay. There were several references to the February 2015 judgment in *Croatia v. Serbia*. The Chamber described the International Court of Justice as 'the principal organ of the United Nations and the competent organ to resolve disputes relating to the interpretation of the Genocide Convention'.¹²⁰

Concluding observations

In the 2007 judgment in the *Bosnia and Herzegovina v. Serbia* case, the International Court of Justice built upon the case law of the *ad hoc* tribunals, especially the International Criminal Tribunal for the former Yugoslavia. One of the very commendable features of the 2007 ruling was its effort at reconciling the interpretation of international legal provisions by international tribunals, thereby addressing the problem of fragmentation and encouraging the development of a holistic system despite the absence of structural unity in the hierarchical sense of domestic legal systems. This attitude towards the case law of specialised international tribunals was made more explicit a few years later in the *Diallo* case. There, the International Court of Justice held that while it was 'in no way obliged, in the exercise of its judicial functions, to model its own interpretation' of the International Covenant on Civil and Political Rights on that of the United Nations Human Rights Committee, it said it 'should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'. The

¹¹⁸ *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 766.

¹¹⁹ *Ibid.*, paras. 787-791.

¹²⁰ *Prosecutor v. Tolimir* (IT-05-88/2-A), Judgment, 8 April 2015, para. 226. For other references to the *Croatia v. Serbia* judgment, see: paras. 203 (fn. 580), 230, 231, 233 (fns. 670, 671, 673, 675), 234 (fn. 678), 246 (fn. 724), 247 (fn. 729), 754 (fn. 751).

Court said this would help ‘to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled’.¹²¹

There is a slight difference in this respect between the International Covenant on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. The former establishes a ‘treaty body’ in provisions that indicate the scope of its singular role. The latter contemplates not one but two tribunals with authority for its interpretation without indicating a preference as to the one that is more authoritative: an ‘international penal tribunal’, in article 6, and the International Court of Justice, in article 9.

In the *Bosnia* case, the International Court of Justice held that the Yugoslavia Tribunal was an ‘international penal tribunal’ contemplated by article 6 of the Genocide Convention. Although it did not speak directly to the point in that judgment, it is obvious that the International Criminal Court is also a tribunal within the meaning of article 6 of the Genocide Convention. In other words, the situation is slightly more complicated than it was in the *Diallo* case because of the multiplicity of international tribunals with responsibility for the interpretation of the Convention or of provisions derived from it. Moreover, although the drafters of the Convention clearly envisaged the distinct role of two different international tribunals, they do not seem to have imagined that there would actually be more than one ‘international penal tribunal’ capable of meeting the description in article 6. There seem to be four international tribunals that are covered by that definition: the two *ad hoc* tribunals, the Mechanism that succeeds them, and the International Criminal Court. What is to be done when there are conflicts in the interpretations proposed by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, as is the case with the ‘lone *génocidaire*’ and the ‘manifest pattern’ issue. Nor can the issues be neatly parcelled out, letting the international criminal tribunals deal with matters of individual criminal liability while reserving State responsibility for the International Court of Justice. The issue of the mental element of the crime of genocide may look somewhat different depending upon whether it is approached from the angle of individual intent, as has been the tendency at the *ad hoc* tribunals, or State policy, as

¹²¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 30 November 2010, para. 66.

may be the correct vision when examined from the perspective of State responsibility. The 'knowledge-based' approach is of some assistance in solving the problem, thereby promoting the unification of international law, an objective that the International Court of Justice endorsed in the *Diallo* case.

The judgment of the International Court of Justice in the *Bosnia* case met with considerable disappointment in some circles where a broad and expansive definition of genocide had been advocated. For decades, basically from the time of the adoption of the Convention in 1948, frustration with the narrow terms of article 2 had frequently been expressed. Yet it is a fact that the Genocide Convention was only intended to cover a narrow range of violations. It was a pioneering document, imposing new and unprecedented obligations upon States. At the time, it was impossible to achieve any broader consensus within the United Nations General Assembly on the punishment of international atrocity crimes. Anxiety about an extensive reach of international criminal justice had prompted the four powers at the London Conference, in 1945, to limit the scope of crimes against humanity to those with a nexus to armed conflict. The Genocide Convention represented huge progress over the Charter of the International Military Tribunal because it addressed the crime 'whether committed in time of peace or in time of war'. But there was a price to pay for this progressive development. The General Assembly defined genocide narrowly, limiting it to certain groups and requiring an intent to destroy, and it attempted to exclude such corollaries as the exercise of universal jurisdiction.

In the decades that followed, dismay with such restrictions manifested itself in calls for the definition of genocide to be interpreted very broadly or, alternatively, to be amended. There was little in the way of similar initiatives concerning crimes against humanity because their repression was not yet governed by a prospective treaty of general application. When international criminal justice revived, in the 1990s, the impetus for expanding the scope of international atrocity crimes manifested itself in the enlargement of the definition of crimes against humanity and the extension of war crimes to situations of non-international armed conflict. The Rome Statute of 1998 confirmed this very dramatic legal evolution. Perhaps revolution is a more accurate term. The impunity gap left by the initial codification of the 1940s was filled in the 1990s, but by a dramatic enlargement of the scope of crimes against humanity and war crimes rather than that of genocide. One consequence was to

relieve pressure to expand the definition of genocide, either through amendment or by interpretation.

When the Rome Statute was concluded in 1998, fifty years after the adoption of the Genocide Convention, there had been very little judicial interpretation of the crime of genocide by international courts and tribunals. The International Court of Justice had discussed the substance of the crime but only in the most general terms in the 1951 Advisory Opinion.¹²² There was also some limited consideration in the preliminary rulings in the *Bosnia* case. The *ad hoc* tribunals had yet to complete a trial where genocide was charged. However, since 1998, there has been a huge body of legal interpretation. This essay has only dealt with the most recent highlights, confining itself to decisions and judgments since the February 2007 ruling.

The judgment of the International Court of Justice in the *Bosnia* case of February 2007 had the effect of consolidating a process of stabilisation of the definition of genocide that had been underway for several years at the *ad hoc* tribunals. When the *ad hoc* tribunals began issuing judgments on the interpretation of the definition of genocide, there was initially no clarity about the direction this would take. For decades, there had been controversy resulting from the narrow scope of the definition in article 2 of the 1948 Convention. For proponents of a broad construction of the crime, there may have been some hope that this would be achieved through the work of the *ad hoc* tribunals. But this did not prove to be the case. The leading decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in *Krstić* in April 2004, left no question about the direction that was being taken. A rear-guard effort by one Trial Chamber, in *Blagojević and Jokić*, to reverse the trend towards a relatively narrow and strict interpretation, was quickly corrected by the Appeals Chamber. Although debates remain about some issues, the broad principles set out in the February 2007 judgment of the International Court of Justice made a great contribution to the consolidation of a body of law that is now relatively clear and, above all, foreseeable and predictable in its application and consequences. There were, to be sure, no surprises in the February 2015 ruling in *Croatia v. Serbia*. It confirmed and further enhanced the process of consolidation and stabilization in the judicial interpretation and application of the crime of genocide.

¹²² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.