The Legal Qualification of Ethnic Cleansing

Submitted by Clotilde Pégrior to the University of Exeter as a thesis for the degree of Doctor of Philosophy, 17 December 2010.

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any University.
Abstract

Though commonly used in public international law, ethnic cleansing is a term which has not, as yet, been formally classified, either by international tribunals or conventions. Consequently, the notion has existed in a grey area since its coinage in the 1990s. With fresh instances of destruction and expulsion of civilian groups continually emerging, it is vital that efforts are made to redress this situation. With this in mind, the present thesis aims to formulate a classification of ethnic cleansing within the public international law order that reflects its specific characteristics and conditions.

Previously, attempts to address the issue of ethnic cleansing (in UN resolutions, scholarly work and jurisprudence) have aligned it against the standards of international humanitarian law, war crimes, genocide and crimes against humanity. A similar methodological principle shall be adopted here, beginning with a detailed assessment of the validity of Security Council resolutions qualifying the practice as a violation of international humanitarian law – a verdict which has not been re-affirmed by the International Criminal Tribunal for the Former Yugoslavia or any other tribunal, and thus lacks binding legal effect. Following this, a theoretical evaluation of all relevant case law will be used to examine ethnic cleansing against other international crimes – war crimes, genocide and crimes against humanity – focussing not only on the parallels but also the crucial disparities between them.

Via close analysis of conditions and limitations, it shall here be shown how the current qualification fails to provide an efficient instrument for identification. Having its own particular characteristics, ethnic cleansing ought to be classified as a specific independent crime: one whose mental element is similar to that of crimes against humanity, and which does not only target human groups, and can, in fact, be perpetrated against populations, both in the context of armed conflict and during peacetime.
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<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedom adopted by the Council of Europe in Rome on 4 November 1950 (also referred to as the European Convention on Human Rights)</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ESCOR</td>
<td>Economic and Social Office Records</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
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<td>ICTR</td>
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<td>ICTY</td>
<td>International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (also referred to as the International Criminal Tribunal for the Former Yugoslavia)</td>
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<tr>
<td>ICTY Statute</td>
<td>Statute of the International Criminal Tribunal for the Former Yugoslavia, in Security Council Resolution 827</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation, established under the North Atlantic Treaty, signed in Washington, 4 April 1949 (entry into force 24 August 1949)</td>
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<td>Nuremberg Judgment</td>
<td>Trial of the Major War Criminal before the International Military Tribunal (TMWC), 42 volumes, Nuremberg, 1947-1949</td>
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CHAPTER ONE

Introduction

The decade of the 1990s was a challenging period for international criminal justice with violent mass-murder being perpetrated in numerous locations across the globe. The nature and extent of the atrocities committed in the former Yugoslavia and Rwanda attracted particular attention from the international community. In response to events in these regions, the UN Security Council determined to create two ad hoc International Tribunals – the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) and the International Criminal Tribunal for Rwanda (hereafter ICTR) – charged with the jurisdictional mandate of prosecuting those responsible for serious violations of international law. In fulfilling their aim, the Tribunals qualified numerous acts under the established paradigms of genocide, crimes against humanity and war crimes as grave breaches of the Geneva Conventions of 1949 or as violations of Article 3 common to the Geneva Conventions and Additional Protocol II. Many of the crimes committed against the civilian population in the former Yugoslavia, however, were classified, by journalists, scholars and United Nations resolutions, under a new coinage which has

3 See articles 2 to 5 of the Statute of the ICTY. See also Articles 2 to 4 of the Statute of the ICTR.
subsequently entered the legal lexicon and become established in academic and popular discourse – as acts of “ethnic cleansing”.

The use of this term was somewhat peculiar insofar as never before had ethnic cleansing been discussed, let alone qualified, as an international crime. In fact, numerous commentators across various disciplines, from the very beginning, voiced objections to its use, uneasy with the resort to a new term which, on the one hand, was seen to derive from the vocabulary of modern journalism rather than legal sources, and, on the other, was considered imprecise and hazy, even as a dangerous euphemism for genocide. In Germany, for instance, the direct translation *ethnische Säuberung* was, in 1992, chosen by the Gesellschaft für deutsche Sprache (The Association for the German Language) as one of its “Unwörter des Jahres” – an “Unwort” being a word deemed not only infelicitous but also undesirable or unwelcome – on the very grounds that the metaphor of “cleansing” immorally connotes a positive sense of rendering free from impurity, and so masks the true reference to the violent removal, expulsion or even murder of a people on the basis of ethnic identities. Taking on this line of argument, Boston sociologist Andrew Bell-Fialkoff opens his wide-ranging study of the practice by stating:

The term ‘cleansing’ itself is ambiguous. In everyday use it has positive connotations of cleanliness and purification, evoking soap and water. But when applied to human populations it refers to refugees, deportation, and

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7 In contrast, the crime of genocide is condemned since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide unanimously adopted by the General Assembly on 9 December 1948. The term “crimes against humanity” has been legally used for the first time in the IMT Charter where it was defined in Article 6(c) of the Charter of the International Military Tribunal in Nuremberg. These crimes are now codified in Article 7(1) of the Rome Statute of the International Criminal Court adopted in Rome in 1998. War crimes are codified in Article 8 of the Rome Statute of the International Criminal Court adopted in Rome in 1998.

detention. It spells suffering. And that is why the term is widely used: it is a euphemism that hides the ugly truth.\(^9\)

The ambiguities and moral dilemmas that exist in the employment of “cleansing” in this latter sense can be traced through a pre-history that goes back some considerable way beyond its initial conjunction with “ethnic” in the specific context of the conflict in the former Yugoslavia.\(^10\) The term was, for instance – to take just a couple of notable examples from the twentieth-century – used, either directly or connotatively, across various linguistic cultures to describe the actions of the Nazis against the Jews in Poland, Russia and the Balkans from 1941 onwards: as Christopher Browning notes, the invasion of Russia, the victories in France and in Poland as well as the anticipation of a conquest of Lebensraum and an ideological (racial) crusade against “Judeo-Bolshevism” in the Soviet Union were considered at the time the necessary elements for rendering Europe judenrein – literally “free of jews” (“rein” and its cognate “Reinheit” both carry a quite specific sense of “purity”).\(^11\) Similarly, Stalin’s revolutionary attempt to remould Soviet society and eliminate a whole generation of Communist leadership – commonly referred to as the “Great Purge” in the English-speaking world – was defined by the word chistka, again literally meaning “cleansing”. The semantic equivalencies of the English verbs “to cleanse” and “to purge” warrant brief consideration here, and a comparison with the associated terminology in the German language yields relevant insights. There the term Säuberung has been established as a normative reference for acts of “cleansing” in this manner and serves as the common root for three expressions related thereto: ethnische Säuberung, politische Säuberung and Die grosse Säuberung. The English equivalents are, however, “ethnic cleansing”, “political purge” and “The Great Purge” (in the specific historical context of the Soviet Union) respectively – in other words, the commonality conveyed by the single expression Säuberung in German is, in English, seemingly split by the use of both “cleansing” and “purging”.\(^12\) A glance at the Oxford English Dictionary would perhaps suggest this to be of scant consequence – “to purge” is, for instance, initially defined as ‘[t]o remove by a cleansing or purifying operation (also fig.); to clear away, off, or out; to expel or exclude, to excise’, followed by the caveat: ‘in recent use: esp. to remove (a person regarded as undesirable) from an

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\(^10\) For a detailed survey of historical instances of “cleansing”, see id., pp. 3-49.


\(^12\) The situation is similar in French cultures, where three terms – purification ethnique, nettoyage ethnique and épuration ethnique – are all used interchangeably.
organization, political party, etc.” Yet despite such considerable overlap, “to purge” nonetheless carries a more violent connotation than the gentler “to cleanse”, and though both expressions doubtless convey something of the general sense of exclusion or expulsion that inheres in the nature of the acts in question, the duality implies a distinction, however minor, in terms of action – this in contrast to the German, which regulates this aspect under the one term – Säuberung – and differentiates on the basis of the targeted group(s) and intentionality of the act (i.e. ethnische (ethnic) or politische (political)). In both linguistic cultures, however – and this is the critical point – the euphemistic employment of the concept of “cleansing” or “purging” in this context serves to conceal rather than reveal the frequent horrors and violence involved in such situations.

Yet if the concept of Säuberung has, in recent times, become established in such fashion as a normative reference, it nonetheless remains the case that alternative expressions have at times been used in the German context to describe such actions, notably in the arena of late nineteenth- and early twentieth-century racial science and, particularly, during the Nazi era. Norman M. Naimark, for instance, in his ground-breaking survey of ethnic cleansing in the twentieth-century pulls out the example of völkische Flurbereinigung – a term which was, he tells us, one of Himmler’s favoured expressions for referring to the Aryanisation of German territories. Borrowed from the vocabulary of agriculture, a Flurbereinigung describes a “cleansing of the soil” (stemming from “rein” and “Reinheit”, “Bereinigung” likewise implies a sense of “purity”) which, in accordance with Nazi ideologies, is here co-opted to connote the removal of alien elements from the national soil. This latter aspect is of particular note, as by directly appending the idea of the Volk to the practice of removal, Nazi propaganda machinery provides an important historical placing and precursor for the emergence of the modern term “ethnic cleansing”. The concept of the Volk – and what may constitute a particularly völkisch action – is notoriously difficult to define: at root, it designates that which is unique to a particular people and so serves as a marker of national (and, in the Nazi context especially, ethnic and racial) identity. It is, however – and despite Nazi rhetoric – a largely artificial category, socially constructed so as to reinforce the identity of the collective self, and at the same time, inevitably, to define and extrude the “other” who falls outside the contours of the dominant group. As Naimark goes on to point out, such issues remain very much embedded within the

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contemporary discourse of ethnicity – he quotes R. G. Grillo’s definition of ethnicity as ‘aris[ing] in the interaction of groups’ and ‘exist[ing] in the boundaries constructed between them’. In this sense, ethnicity would appear to inhabit a border region between groups that is porous and unstable – based on subjective rather than “objective” categories, it is a construct which is susceptible to shifts and dangerously prone to violent conflagration. Inasmuch as the term “cleansing” is, in its various guises, clearly somewhat troubling in its usage to describe such contexts, so the “ethnic” component likewise brings certain of its own problems and dilemmas.

In saying all of this, the aim here is by no means to either make the case or prepare the ground for any kind of terminological revision. For all that it is difficult to argue with the viewpoint of the Gesellschaft für deutsche Sprache that there is something immoral about the use of “cleansing” in such contexts, it seems that the dye is, whether regrettably or not, cast in this regard – the term ethnic cleansing is established within the lexical frame of academic, political and legal discourse. What can and should be attempted, however, is to confront the problematic issues that continue to attend the employment of the term. Bell-Fialkoff and Naimark have, from the standpoint of the sociologist and historian respectively, made significant contributions along these lines, opening up a number of vitally important insights. Here, however, the intention is to add a further dimension to these discussions by providing an analysis on the subject from a specifically legal perspective.

As an initial point, we may in this regard consider the argument, voiced by several commentators in the early to mid-nineties, that the emergence of the term ethnic cleansing as a neologism made it inappropriate for post ad hoc application to earlier instances of mass violence. Against this it can be readily countered that new concepts and terminologies are, across all disciplines, constantly being invented or evolved to describe and classify both new phenomena and historical events – one need only think, in the legal context, of the precedent of Raphael Lemkin’s development of the notion of genocide. That in this case it may perhaps have been journalists rather than jurists who played a more active role in circulating the term need not, in itself, be considered a significant problem – provided, of course, that its adoption and use in the framework of international law is exact and closely determined. This, however, brings us to the altogether more problematic aspect of the precision of the term, or rather the lack of precision with which it has been, and continues to be, conceptualised and employed.

15 Id., p. 5.
Leaving aside the laxity that arises from popular usage, it is also the case that, despite first entering the vocabulary of public international law in 1992, the term ethnic cleansing has not, as yet, been officially defined by any relevant and binding legal instrument. As a result, the specific conditions of the act have not yet been established and the term remains unclassified, meaning that there is no judicial organ, either international or internal, which can legally prosecute and condemn crimes under this heading, or even precisely determine the exact acts to be qualified as such. The consequence of all this is that there remains a considerable amount of confusion and lack of clarity surrounding the use of the term, particularly with regard to its relation with international crimes. Testimony to this is provided by the following statement of the Commission of Experts sent to the former Yugoslavia with the mandate of providing the UN Secretary-General with its conclusions ‘on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia’: 17

Based on many reports describing the policy and practices conducted in the former Yugoslavia, “ethnic cleansing” has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population on ghetto area, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention. 18

The nexus of issues that attends this question of definition and classification provides the focal point for the present study. That there exists considerable overlap between the various categories of crimes – particularly genocide – and the notion of ethnic

cleansing, is very much a commonplace of legal discourse, and any attempt at a strict, closed definition will be prone to a certain amount of bleeding and slippage. That notwithstanding, the aim here is to examine and address the implications of the loophole within which ethnic cleansing has existed since its conception in connection with three key, interrelated questions:

(i) Does the use of the term ethnic cleansing – and its conceptual content – constitute a valuable contribution to legal understanding and praxis?
(ii) What are the exact conditions of the act and where does the distinction lie with the other categories of international crimes?
(iii) How should the concept of ethnic cleansing be classified within the public international law framework, and what effect might such a classification have for issues of recognition and prosecution?

In order to provide the framework for an answer to these questions, the study will begin with a historically-oriented analysis of the origins of the notion, its specific etymological associations and its judicial recognition. In the subsequent chapters, attention will then move to a series of comparative examinations of ethnic cleansing in relation to the specific principles of international humanitarian law, war crimes, genocide and crimes against humanity. The methodology employed in this central section shall, above all, focus on detailed legal analysis – characterisations provided by politicians, sociologists and historians will largely be placed in the background on the basis that they provide little exact guidance as to the legal determination of international crimes. That said, full consideration will be given wherever appropriate to detailed historical accounts of genocidal policies and international conflicts as an indispensable supplement for a deeper understanding of the circumstances and dynamics of their occurrence. Pulling these elements together with the findings of the inquiries, the study shall, in the final chapter, arrive at a conclusion that provides a new and much-needed insight into how the concept of ethnic cleansing ought to be classified within the public international law order so as to permit a more straightforward comprehension of the notion – one which may, in turn, not only facilitate a more accurate recognition of the crime (past, present and future), but also, crucially, sanction more effective prosecution.

19 See the subsequent chapters and in particular Chapter Four, pp. 87-92 analysing ethnic cleansing and war crimes, Chapter Five pp. 99-174 analysing ethnic cleansing and genocide and Chapter Six pp. 175-213 dealing with ethnic cleansing and the crimes against humanity.
CHAPTER TWO

Emergence of the notion of ethnic cleansing

2.1. Historical examples of ethnic cleansing: ‘a new name for an old crime’?

Though not coined until the early 1990s, the crime of ethnic cleansing is by no means a new one – much as Graven says of crimes against humanity, it is rather ‘a new name for an old crime’.¹ Bell-Fialkoff, in his historical analysis of its origins, suggests that the first probable example dates from 883-859 B.C. when the Assyrians displaced 4.5 million conquered individuals in order to gain new territories.² Further instances might also be drawn from Ancient History: the Neo-Babylonian Empire, Ancient Greece, and the Roman Empire were all, in Bell-Fialkoff’s view, responsible for acts of ethnic cleansing likewise motivated by economic gain through the acquisition of new territories.³ In the Middle Ages too, there were similar acts perpetrated, targeted, in the main, against religious minorities, whilst in early modern times the crime acquired a largely ethnic orientation.⁴ Clearly therefore, ethnic cleansing is a crime with a long historical tradition, the principal aim and target of which – political, religious, ethnic – has varied considerably over the centuries.

This aspect was acknowledged in the final report of the Commission of Experts, where it is stated that “‘Ethnic Cleansing’, as a practice, is not new to history’.⁵ Indeed, the Commission also indicated in the report several further historical examples of the crime:

Examples from antiquity include the policies of Assyrian ruler Tiglath-Pileser III (745-727 B.C.) who is said to have displaced one-half of the population of conquered territories. In medieval times, the Jews were

³ Id., pp. 7-10.
⁴ Id., p. 52.
expelled from England (1290), France (1306), Hungary (1349-1360), Austria (1421), Lithuania (1445), Spain (1402), and from other countries as well.\textsuperscript{6}

Instances of the crime are not, however, limited to the distant past. In the modern period since the First World War, there is also a catalogue of European examples generally considered to constitute acts of ethnic cleansing:

In the interwar period, 1.5 million Greeks cleansed from Turkey, 400,000 Turks cleansed from Greece, between 92,000 and 102,000 Bulgarians cleansed from Greece, 35,000 Greeks cleansed from Bulgaria, 67,000 Turks cleansed from Bulgaria; during World War II and its aftermath, 11,000 Romanians cleansed from Bulgaria, 62,000 Bulgarians cleansed from Romania, 1.2 Poles cleansed from areas incorporated by the German Reich, 700,000 Germans cleansed from Latvia, Lithuania, Estonia, Romania, Yugoslavia, and Italy and relocated into the Nazi incorporated Territories of Western Poland, 6 million Jews cleansed from Nazi-occupied Europe and eventually exterminated, 600,000 Soviet citizens belonging to politically suspect ethnic groups (e.g. Chechens, Tatars, Pontic Greeks) cleansed from their histories homelands on Stalin’s orders and relocated beyond the Urals, 14 million Germans cleansed from Poland, Czechoslovakia, Hungary, Yugoslavia, and Romania, 140,000 Italians cleansed from Yugoslavia, 31,000 Hungarians cleansed from Czechoslovakia, 33,000 Slovaks cleansed from Hungary; since 1948, 45,000 Turkish Cypriots cleansed from Greek Cyprus, 160,000 Greek Cypriots cleansed from Turkish Cyprus, and more than 300,000 ethnic Turks cleansed from Bulgaria, 2.5 million people displaced as a result of the conflict in the former Yugoslavia, many of whom were victims of ethnic cleansing. It should be emphasized that this list is not exhaustive.\textsuperscript{7}

Though commonly recognised as such, there is, however, no certitude that all the examples listed here can be defined as ethnic cleansing, as the crucial point, alluded to in the introduction, is that the specific characteristics of the crime have not yet been

\textsuperscript{6} Id., para. 111, p. 21, footnote 121.

determined. If the modern notion of the term as it emerged in the Yugoslavian context is to be used to classify earlier, subsequent (as it has been for Darfur, Burundi, and Rwanda)\(^8\) and future crimes, it follows that a first step ought to be to establish a set of particular conditions and prerequisites from which to proceed. With this in mind, it seems prudent to begin any analysis by looking in close detail at the specific exigencies of the situation under which the modern concept emerged.

2.2. The perpetration of ethnic cleansing in the former Yugoslavia

The term ethnic cleansing was, as stated earlier, first employed in a legal setting in the context of the conflict in the former Yugoslavia, used to ‘describe[,] a set of human rights and humanitarian law violations in both Bosnia and Herzegovina and Croatia’.\(^9\) In its interim report S/25274, the Commission of Experts made official reference to the act, noting that:

> Considered in the context of the conflicts in the former Yugoslavia, ―ethnic cleansing‖ means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. ―Ethnic cleansing‖ is contrary to international law.\(^10\)

Having thus acknowledged the existence of the term ethnic cleansing, the Commission subsequently indicated in its final Report that:

> “Ethnic Cleansing”, as a practice, is not new to history nor [...] is it entirely new to the Balkans. Ethnic conflict has been involved in efforts to establish nationhood and define national boundaries in the Balkans since the 19th century. This report, however, discusses «ethnic cleansing» as part of a

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broader policy, pursued by Serbian forces within BiH, Croatia, and the FRY, to create a “Greater Serbia”.¹¹

This report of the Commission definitively embedded the term ethnic cleansing into the sphere of public international law. It did not, however, provide any clear indication of the relationship between the act and international law – other than to state that it was wrongful – nor did it engage and explain the specific origins of the term.

2.2.1. THE ORIGIN OF ETHNIC CLEANSING: A MILITARY NOTION

The term ethnic cleansing constitutes a literal translation of the Serbo-Croatian expression etničko čišćenje. It is, however, difficult to determine the exact roots of the term and to establish who first employed it, why, and in which particular context of the conflict. It has been reported that:

Before Srebrenica, Serbian commanders used the military code-words: ‘etnicko ciscenj’ (‘cleansing of the region’) and ‘ciscenje prostor’ or ‘terena’ (‘cleaning the territory’) for leaving nobody alive.¹²

Similarly, as Petrovic points out:

as military officers of the former Yugoslav People’s Army had a preponderant role in these events, the conclusion could be drawn that the expression “ethnic cleansing” has its origin in military vocabulary.¹³

In view of this, it is perhaps peculiar that these military origins are frequently neglected. At the risk of stating the obvious, the etymological root of the term (“ethnic” and “cleansing”) denotes the cleansing of a particular ethnic group from a given territory. The Oxford English Dictionary of Law lists the expression ethnic cleansing but surprisingly fails to define it: it merely states that the definition must be sought under that provided for ethnic minority, which reads:

¹³ Drazen Petrovic, op. cit. note 9, p. 343.
a group numerically inferior to the rest of the population of a state whose members are nationals of that state and possess cultural, religious, or linguistic characteristics distinct from those of the total population and show, if only implicitly, a sense of solidarity, directed towards preserving their own social customs, religion, or language. The attempted extirpation of an ethnic minority by the forces of the majority within a state (known as *ethnic cleansing*) can be regarded as a crime against humanity justifying humanitarian intervention.\(^\text{14}\)

From the outset, it appears that the same notion might be used to cover two quite distinct realities. In the definition given above, ethnic cleansing means, straightforwardly, an attempt to displace an ethnic minority group from a particular territory. In the initial context, however, the term was understood specifically as a military tactic designed to secure the taking of a territory, it being easier to gain control over a designated area if its population has already been expelled. According to Petrovic, the “ethnic” component was appended solely on the basis that, in military vocabulary, enemies are often considered and projected as belonging to another ethnicity.\(^\text{15}\)

It is thus uncertain at present whether ethnic cleansing ought to be considered merely as a crime perpetrated against a particular minority group, or, more exactly, as a method of war. As a result, it is difficult to determine the principal aim of the crime, and, by extension, to provide an analysis of the acts covered by the term. Compounding this is the variability of reference, across languages, alluded to in the opening chapter – between “cleansing” and “purging” in English, and between “purification”, “nettoyage” and “épuration” in the French. At root, such confusions of approach and terminology stem from the fact that there is no internationally recognised definition of the concept.\(^\text{16}\)

This legal blind spot has a distinctly adverse effect on international law procedure, as it not only breeds a lack of clarity but also a considerable amount of slippage between the use of terms, particularly ethnic cleansing and genocide. An example of this can be seen from the recent situation in Darfur. Prior to the outbreak of conflict, the United States, in the Sudan Peace Act of 21 October 2002, described the acts being perpetrated in

\(^{14}\) Oxford Dictionary of Law. Emphasis in the original.
\(^{15}\) Drazen Petrovic, *op. cit.* note 9, p. 343.
\(^{16}\) See subsequent developments in this Chapter pp. 43-45.
Darfur as being of a genocidal nature. In the same bill, however, it was also decreed that Sudan was to be condemned for human rights violations and for its ‘policy of low-intensity ethnic cleansing’. In other words, in the same legal instrument, both genocide and ethnic cleansing were used to describe the same set of actions. Finally, in July 2004, the United States government adopted a resolution officially declaring that genocide was occurring in Darfur. As it stands, the US is the only country to make such a decree, although the British government has also considered that the crimes might constitute an act of genocide. That notwithstanding, this example highlights the fact that there is no adequate distinction between the notions of ethnic cleansing and genocide, and gives a sense of the confusion that prevails on the matter. This is moreover not limited to government and high office, but also remains a problem amongst legal scholars and journalists.

2.2.2. THE JUDICIAL RECOGNITION OF ETHNIC CLEANSING: A JURISPRUDENTIAL NOTION

The expression ethnic cleansing first appeared in public international law in resolutions of the Security Council of the United Nations, eight of which make reference to the term. None, however, provide an accepted definition or statement on whether the notion is to be granted with legal recognition. In its Resolution 47/80 ‘Ethnic

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18 Id., paragraph 4(1)(B) and 4(2).
24 Security Council Resolution 819 moves toward a classification of ethnic cleansing. The provision of the Resolution and its legal value will be analysed in Chapter Three pp. 47-53.
Cleansing and racial hatred’, the General Assembly likewise failed to establish a legal status for the crime, merely specifying that it:

Condemns unreservedly “ethnic cleansing” and acts of violence arising from racial hatred;

Strongly rejects policies and ideologies aimed at promoting racial hatred and “ethnic cleansing” in any form;

Reaffirms that “ethnic cleansing” and racial hatred are totally incompatible with universally recognized human rights and fundamental freedoms;

Reiterates its conviction that those who commit or order the commission of acts of “ethnic cleansing” are individually responsible and should be brought to justice;

Demands that all those who commit or order acts of “ethnic cleansing” put an end to them immediately;

Calls upon all States to cooperate in eliminating all forms of “ethnic cleansing” and racial hatred [...] 25

A significant move towards legal recognition came with the decision of the Security Council of the United Nations, in 1993, to create the ICTY. In its resolutions affirming the necessity to create the tribunal, the Security Council noted ‘its grave alarm at [...] the continuance of the practice of “ethnic cleansing”’. 26 Thus as noted by the Appeals Chamber of the ICTY:

The Security Council was therefore particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the Tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict. 27

The establishment of the ICTY by Security Council Resolution 827, 28 and the conferment of jurisdiction vested in it, leaves little doubt as to the judicial recognition of ethnic cleansing as a jurisprudential notion – albeit it one which remains unclassified.

Indeed, although the ad hoc International Criminal Tribunal for the former Yugoslavia did not include this practice as one of the counts for prosecution, it did acknowledge it in its judgments and indictments.

Since the resolutions of the Security Council were the first to recognise ethnic cleansing, and as the ICTY was established and requested by such instruments to judicially deal with such instances – even if ethnic cleansing was not included in its Statute – it is necessary to consider the legal value of the Security Council resolutions as an important initial step in working towards a viable classification. Particularly significant in this regard is Resolution 819, which is the most detailed and relevant with respect to a possible categorisation within the framework of public international law, and which shall, consequently, provide a major focal point for the following chapter. As a complement to this, an analysis of the judicial interpretation – if not law-making – of ethnic cleansing shall also be provided.

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29 See the ICTY Statute.
CHAPTER THREE

Ethnic cleansing as a legal notion in public international law

In the previous chapter it has been noted how several of the resolutions adopted by the Security Council and the General Assembly make explicit condemnatory reference to ethnic cleansing. Only one, however – Security Council Resolution 819 – moves toward a classification of the practice. In what follows, an analysis shall be provided both of how the Security Council qualified and understood the term, and of the legal value of its resolutions.

3.1. The definition of ethnic cleansing in United Nations resolutions

The first resolution to issue a condemnation of ethnic cleansing was Security Council Resolution 771, adopted on 13 August 1992. Paragraphs 2 and 3 of Recital 4 of the resolution read:

The Security Council […]:

2. Strongly condemns any violations of international humanitarian law, including those involved in the practice of “ethnic cleansing”;
3. Demands that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law including from actions such as those described above; […]

This qualification of ethnic cleansing as a violation of international humanitarian law was subsequently re-affirmed in similar terms by Security Council Resolutions 780, 787, 808, 819, 827, 836, and General Assembly Resolution 46/242.
787, and 808, and by Resolution 46/242 of the General Assembly. Yet in each case, the practice is only considered in the preamble and not in the legal provisions, perhaps as a result of the absence of an accepted definition. With the adoption of Resolution 819, however, there came a move in the direction of legal recognition, as the Security Council condemned ‘any taking or acquisition of territory by the threat or use of force, including through the practice of “ethnic cleansing”’ as ‘unlawful and unacceptable’, and attempted to authorise a more definite classification of the act.

3.1.1. SECURITY COUNCIL RESOLUTION 819

In much the same fashion as the other resolutions adopted in relation to the conflict in the former Yugoslavia by the Security Council and, to a lesser extent, by the General Assembly, Resolution 819 condemned the practice of ethnic cleansing in its preamble. In Article 7, however, it also provides that the Security Council:

Reaffirms its condemnation of all violations of international humanitarian law, in particular the practice of “ethnic cleansing” and reaffirms that those who commit or order the commission of such acts shall be held individually responsible in respect to such acts.

The particular significance of the article lies in the fact that, in enouncing foreseeable charges against perpetrators of such practices, the Security Council here recognises ethnic cleansing as a prosecutable manifestation of conduct. The question that presents at this point is whether this may also be adduced as normative recognition of the act as a specific crime. The text of the Resolution is, on this point, ambiguous: the structure of the sentence, and the fact that that the Security Council refers to the ‘practice of “ethnic cleansing”’ as constituting a violation of international humanitarian law may seem to speak against recognition as a distinct crime. That speech marks and the term “practice” are still employed may also attest this, though it might also be seen that the retention of

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these elements are more a reflection of the absence of established qualification and classification. It likewise remains unclear to which acts exactly the notion of responsibility attaches – to violations of international humanitarian law or to the practice of ethnic cleansing. The creation of the ICTY (and the ICTR and ICC) as an institution granted with jurisdiction over violations of international humanitarian law and international crimes,\(^8\) brings these two fields of international law into close proximity; even if the expression ‘who commit or order the commission of such acts shall be held individually responsible’ is not taken to refer directly to the specific act of ethnic cleansing and to violations of international humanitarian law, perpetrators of these acts can nonetheless be individually prosecuted in the same way as perpetrators of international crimes. The establishment of the ICTY can thus be viewed as pointing to a move towards specific criminal status for violations of international humanitarian law and for ethnic cleansing.\(^9\) The willingness of the Security Council to condemn ethnic cleansing in Article 7, and to set up the ICTY (along with the ICTR)\(^10\) – taken together with the ambiguities inscribed within the text of Resolution 819 – thus opens the way to a possible dual qualification of the act as both a violation of international humanitarian law and an international crime.

This tension is of crucial significance on the grounds that the international criminal law and international humanitarian law systems represent two distinct spheres within the public international law order. Put simply, a violation of international humanitarian law is not necessarily the same as an international crime. For this reason, it is vital to consider which of the two systems provides the more appropriately adapted framework for a classification of ethnic cleansing. Prior to this, however, it must first be established what legal status Security Council resolutions, especially Resolution 819, carry so as to determine whether the qualifications provided therein might provide the foundation for a classification under either paradigm.

\(^8\) See the ICTY, ICTR and the ICC Statutes.

\(^9\) See following developments pp. 60-62 and Chapter Two pp. 43-45.

In accordance with articles 24 and 25 of the United Nations Charter, the Security Council is legally entitled to adopt resolutions binding upon all UN members. Article 25 of the UN Charter holds that:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.\[^{11}\]

This competence is unique to the Security Council – resolutions adopted by the General Assembly, by way of contrast, do not have the same potentially binding force and are only recommendatory.\[^{12}\] The reason for this is that the Security Council acts on behalf of all member states in order to achieve the goals of the UN: the Council is, in this regard, the most important organ of the UN system, and the member states are pressed to comply with, and apply, its decisions.\[^{13}\] And yet it nonetheless remains that the Security Council functions more as a forum for discussion than an effective measure-taking organ, largely due to the possibility of veto accorded to its five permanent members.\[^{14}\] Doubtless the Council can make important and substantial contributions to maintaining international peace. The question of whether the resolutions created by the Council all carry binding effect upon the member states of the UN nonetheless remains complex, and needs to be assessed in relation to the specific terms of each individual instrument.

Of particular significance in this regard is how, in order to carry binding authority, the resolutions have to fulfil the primary task of the Council, namely the maintenance of international peace and security.\[^{15}\] In order to do so, it was determined by the ICJ that they have to include enforcement under Chapter VII of the UN Charter.\[^{16}\] However, it is not merely because a resolution is based on Chapter VII that it is legally binding. Indeed, to determine whether a SC resolution is binding under articles 24 and 25 of the

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\[^{11}\] Article 25 of the UN Charter, signed on 26 June 1945 at the San Francisco Conference.
\[^{13}\] Id., p. 1208.
\[^{14}\] Id., pp. 1208-1209.
\[^{15}\] Article I(1) of the United Nations Charter signed on 26 June 1945 at the San Francisco Conference.
UN Charter, the language used within the resolution has to be closely considered. This was affirmed by the ICJ in the *Namibia* case:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.\(^{17}\)

Even under Chapter VII, resolutions adopted by the Security Council could also contain provisions which are non-binding and rather recommendatory, indicating just how important it is to consider the language used in each case. It seems clear, for instance, whatever the resolution adopted, that the use of verbs such as “urges” or “invites” rather than “decides” suggests a lack of direct binding force. Some expressions are still further problematic in terms of ambiguity: paragraphs opening with how the Council “endorses” a particular measure, or “calls upon” the states to implement it, could be taken to mean that the provisions included therein are legally binding, or that they are purely recommendatory. It is in just such situations that the ICJ advisory opinion in the *Namibia* case is useful. Thus, if a resolution is adopted ‘in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25’, ‘[t]he decisions are consequently binding on all states members of the United Nations, which are thus under obligation to accept and carry them out’.\(^{18}\)

Working on this principle, it follows that, in order to determine whether Article 7 of Resolution 819 has a binding effect upon members of the UN, its language must too be closely analysed. The paragraph begins with the expression “reaffirms its condemnation”, which, in and of itself, does not seem to convey that the operative paragraph has legal values. And yet to interpret a resolution, ‘all circumstances that might assist in determining the legal consequences of the resolution of the Security Council should be carefully considered.


\(^{18}\) *Id.*, para. 115.
Council’ can and ought to be considered.\textsuperscript{19} Thus even if Article 7 may not be legally binding per se, Resolution 819 might still be according to the circumstances of its adoption. The language of Resolution 819 would, however, seem to indicate that the Security Council does not here have the intention of binding the states. Even if this were the case, it seems questionable to consider that Article 7 attempts to create binding effect beyond that Resolution. To conclude this to be the definite case, it would, indeed, be necessary for other Security Council resolutions to formulate the same qualification of the act as provided by Resolution 819 – a line of argument rendered doubtful by the apparent uncertainty and reticence embedded within the resolutions themselves.\textsuperscript{20} The paragraph is, moreover, not in itself binding as demonstrated above by the vocabulary used, reinforcing the argument that the qualification of ethnic cleansing provided does not carry binding authority. And yet, even if Article 7 may only be considered recommendatory, it can nevertheless present a degree of obligation. As Judge Lauterpacht suggests:

A resolution recommending [...] a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation [...]. The state in consideration, while not bound to accept the recommendation, is bound to give it due consideration in good faith.\textsuperscript{21}

This element of legal obligation, though, as Judge Lauterpacht notes, ‘rudimentary, elastic and imperfect’, delivers an indication that the interpretation of ethnic cleansing provided by Resolution 819 ought to be upheld, even if the resolution is not constituted of legally-binding provisions. Viewed from this standpoint, the practice of ethnic cleansing thus can, as prescribed by the resolution, be qualified as either a violation of international humanitarian law or as an international crime.\textsuperscript{22}

Two significant aspects warrant, however, further consideration and might be noted here, both with regard to the two possible classifications of ethnic cleansing

\textsuperscript{19} Id., para. 114.
\textsuperscript{22} Article 7 of Security Council Resolution 819, 16 April 1993, UN Doc. S/RES/819.
provided by Resolution 819. One is the fact that this resolution is the only document qualifying ethnic cleansing in one of its legal provisions, whereas the other resolutions merely make reference to the act in their preambles. The other, meanwhile, is that if the Council considered ethnic cleansing a clear and precise violation within the international humanitarian law framework, it would surely have subsequently reaffirmed the definition provided by Article 7 of Resolution 819, and avoided the potential complications of a dual qualification as an international crime. As it stands, by neither reaffirming the above, nor developing a specific classification as an international crime, the Security Council has upheld the apparent uncertainty embedded within the Resolution, creating some degree of practical confusion – as reflected in the measures taken by the Security Council in the process of creating the ICTY. The decision to establish the tribunal was motivated by the Council’s alarm at the commission of acts of ethnic cleansing, suggesting that the ICTY would have prosecutorial jurisdiction over the perpetration of such crimes. By the time Resolution 827, establishing the Statute of the tribunal, was adopted, the Council had already qualified the act of ethnic cleansing, in Resolution 819, as potentially being a violation of international humanitarian law and an international crime. Despite having jurisdiction over these two categories, the ICTY did not, however, invoke the qualification provided by Resolution 819 to prosecute acts of ethnic cleansing. It is thus arguable that the ongoing uncertainty and confusion surrounding classification, coupled to the limitations of the International Criminal Court (hereafter ICC) Statute, continued to inhibit the development of a clear and consistent jurisdictional standard.

This perspective is reinforced by the various and varied references made to ethnic cleansing during the trials brought before the ICTY, which provide further evidence of how the Trial Chambers were unsure of how best to deal with the act. At times, ethnic cleansing was qualified as genocide, at others as a crime against humanity, while, in

26 See the ICTY Statute.
28 See below, pp. 56-57.
Prosecutor v. Knorjelac, the Appeals Chamber also marked an implicit linkage to international humanitarian law, stating:

The Security Council was therefore particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the Tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict.  

Despite the clear statement that the practice of ethnic cleansing might be perpetrated in the context of internal and international conflicts, there is, however, no explicit mention of the fact that this constitutes a violation of international humanitarian law per se. It thus seems evident that the qualification provided by Resolution 819 has had a restricted effect, and failed to securely establish the practice as either a violation of international humanitarian law or an international crime. Clearly, the question of whether Security Council resolutions carry binding effect, and whether the Council can adopt general norms through legislative activity, is complex and controversial. That said, and even though Resolution 819 may not be legally binding in this regard, it nonetheless remains, as the preceding discussion has shown, that it can and ought to be given due consideration as an initial focus and departure point for qualifying ethnic cleansing. In view of the limited impact of the resolution and the lack of absolute clarity it brings to the definitional issue, however, international courts and tribunals, scholars and journalists all continue to interpret the term in various ways, which in turn opens up the – equally complex – possibility and question of judicial interpretation of the notion.

3.2. The judicial interpretation of ethnic cleansing

As a result of the limitations of Resolution 819, it becomes particularly important to consider more fully the processes that have contributed to the ICTY recognising ethnic cleansing as a new jurisprudential notion. Aside from the traditional models based on

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32 Analysis of the different definitions of ethnic cleansing will be conducted in latter chapters. Chapter Five pp. 99-103, 148, 158 and pp. 172-173, Chapter Six pp. 175-178 and Chapter Seven p. 232. Yet see also: Chapter Two pp. 41-43.
state practice and *opinio juris*, one must here take into account the function of the international judge who, in assessing normative considerations and evaluating the substance of international law, plays an important interpretative role in the construction of new customary norms. As the subsequent developments demonstrate, this question is in itself bound up with the difficult issue of whether the ICTY, as a judicial instance, carries the legitimacy to create new legal notions without violating the principle of legality. Only once this point has been established might we then turn to offer a detailed consideration of how it classified the act within the public international law order.

### 3.2.1. ETHNIC CLEANSING AND INTERNATIONAL CRIMINAL LAW

Ever since the Nuremberg and the Tokyo judgments, the principle of legality in international criminal law has exerted considerable influence over the whole system for the protection of Human Rights and over the role and influence of the international judge in relation to international crimes. Indeed, the origins of the principle date back to post-World War II when a set of compelling criminal Statutes were established and the drafters of the Nuremberg Statute affirmed the notion of individual criminal responsibility.

The principle of legality, also known as *nullum crimen nulla poena sine lege* (no crime or punishment without law) and more specifically as *nullum crimen sine lege*, requires criminal rules to clearly indicate the prohibited conduct. Judges do not have the freedom to create law aimed at correcting lacunae of international criminal law.³³ It is nevertheless accepted that this maxim does not prevent a court or tribunal from clarifying the elements of a particular crime. But:

> [...] under no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal.³⁴

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Interestingly, the principle of legality does not appear in the Statutes of the ICTY and the ICTR. This statutory silence may have prompted the ad hoc Tribunals to take an apparently progressive approach to international criminal law – what Schabas refers to as a ‘relatively relaxed approach’:

Although formally professing rigid adherence to the *nullum crimen* principle, in practice judges at the ad hoc tribunals have taken a relatively relaxed approach, much in the spirit of their predecessors at Nuremberg…

Although international judges are cautious not to create law, it nonetheless remains that they are at times interpreting crimes and principles of international law in a way that may lead to them being viewed as law-makers. It is noteworthy in this context that, in the Aleksovski case, the ICTY Appeals Chamber itself explained that the legality principle:

> does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the element of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.

This wide interpretation of the *nullum crimen sine lege* precept may potentially prove complex and problematic, particularly in connection with newly-emergent crimes such as ethnic cleansing. As Gallant notes, the principle of legality dictates that:

> The prohibition of the act and the maximum penalty must not only have been in existence at the time of the act. They must also have been applicable to the actor and the action at the time. An act cannot constitute an offense carrying a penalty except pursuant to some national or international law applicable to the actor and the act at the time committed.

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As ethnic cleansing as a practice is not explicitly mentioned in the ICTY Statute, this standard of non-retroactivity would appear to indicate that the tribunal could not consider it a punishable crime. In accordance with the principle of *nullum crimen sine lege*, the ICTY and ICTR could only prosecute crimes which were perpetrated prior to their establishment, and for which penalties were already foreseen and available. These conditions did not apply to the prohibition of ethnic cleansing: though the act was given previous mention in Security Council resolutions, and was classified by Resolution 819, this was not sufficient to denote its existence, at the time the ICTY was created, as a custom of international law.\(^{38}\) Had a custom been developed in the meantime, a definition of ethnic cleansing would surely have been included in the ICC Statute – a move which would have granted the Court jurisdiction to prosecute. Unfortunately, however, not only did a period of seven years have to elapse before any amendments could be made to the original Rome Statute, but state parties to the ICC were also made responsible for initiating emendations, meaning that objections from individual states could inhibit the inclusion and ratification of ethnic cleansing within the jurisdictional orbit of the ICC.\(^{39}\) As it stands in 2010, it can be noted that no changes have, in fact, been made despite the seven year period having elapsed, revealing something of the uncertainty that persists within the UN and amongst the state parties to the Rome Statute in respect of whether to grant the ICC jurisdiction over the act of ethnic cleansing.

The fact that the Rome Statute does not include ethnic cleansing does not, however, mean that the act was not considered by its drafters. In an overview on the establishment of the 1998 Rome Statute it is clearly stated that the omission of ethnic cleansing could be due to its apparent closeness to genocide:

\[38\text{Id.},\text{ p. 386.}\]
\[39\text{See Articles 121-123 of the Rome Statute.}\]
Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future.\footnote{Overview on the establishment of the Rome Statute, see http://untreaty.un.org/cod/icc/general/overview.htm. Emphasis added.}

Additionally, in making reference to war crimes and crimes against humanity, the drafters of the ICC Statute also determine that the role of this new International Criminal Court would be to punish future criminals, including those charged with committing acts of ethnic cleansing:

Effective deterrence is a primary objective of those working to establish the international criminal court. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment – to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits – it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers.\footnote{Ibid.}

For the drafters of the Rome Statute, ethnic cleansing is thus a variant of, or guise for, an act of genocide, a crime against humanity or a war crime. The lack of classification and specification might explain why it was not as such included within the ICC Statute. It is worth noting, moreover, that Article 22 of the Rome Statute specifically and expressly recalls the principle of legality – arguably making any judicial recognition of a new crime a practical impossibility.

In this sense, then, the position of the ICTY on ethnic cleansing would seem to strictly conform to the principle of legality: as the act had not previously entered customary international law, the tribunal did not, and could not, prosecute this particular act:

From the perspective of the nullum crimen sine lege principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the
rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.\footnote{Prosecutor v. Mitar Vasiljević (“Višegrad”), Case No IT-98-32-T, Judgment, Trial Chamber II, 29 November 2002, para. 193.}

Yet the issue is not quite as clear-cut as it may initially seem, and there has been, in the case law of both \textit{ad hoc} International Criminal Tribunals, a good deal of debate and controversy as to what exactly is covered by the Statutes – as Gallant states, the question of when a crime has previously been defined ‘remains a live and difficult issue’.\footnote{Kenneth S. Gallant, op. cit. note 37, p. 307.} Whilst adhering to the principle, the tribunals have nonetheless modernised how they interpret its terms of reference. Indeed, the ICTY has indicated that:

\begin{quote}
The scope of the Tribunal’s jurisdiction \textit{rationae materiae} [subject matter jurisdiction] may therefore be said to be determined both by the Statute […] and by customary law, insofar as the Tribunal’s power to convict an accused of any crime listed in the Statute depends upon its existence \textit{qua} custom at the time this crime was allegedly committed.\footnote{Prosecutor v. Milan Milutinović, Case No IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, para. 9, cited in Kenneth S. Gallant, \textit{op. cit.} note 37, p. 313. Brackets added.}
\end{quote}

As Gallant goes on to note:

\begin{quote}
The ICTY and the ICTR have continued the practice of treating case law as an element of the practice that goes into the formation and statement of customary international criminal law.\footnote{Kenneth S. Gallant, \textit{op. cit.} note 37, p. 348.}
\end{quote}

It is in this context that the role of the international judge as an interpretive instance becomes critical. The development of customary international law through judicial interpretation does not contravene the principle of legality, provided that any expansion or extension was ‘foreseeable to the person being charged and the relevant public at the
time that the crime was committed.\textsuperscript{46} It could here be argued that the ICTY qualification of ethnic cleansing as a criminal act constitutes one such foreseeable development, and would thus not violate the principle. Yet, such consideration inevitably opens the door to active judicial interpretation, if not law-making – a situation, which although not exclusive to the issue of ethnic cleansing, remains controversial and questionable.

Other areas of international criminal law have been affected by judicial interpretation and activism, arguably to the benefit of the evolution of the field. The\textit{Akayesu} decision, for example, enabling the prosecution of rape and sexual violence as genocidal acts, provides an instance of an important and progressive development of the law of genocide.\textsuperscript{47} Notwithstanding that the ICTR here probably forced an improbable interpretation of the definition of genocide, it remains that it was a welcome development from a legitimate judge. Furthermore any argument contradicting this decision on the basis of the principle of legality should be moderated insofar as, although the judge did not apply the Genocide Convention\textit{stricto sensu}, General Assembly Resolution 96(I), which provides for the first international legal definition of the crime, could have been invoked in order to justify the judicial interpretation.\textsuperscript{48}

As an expression of customary international law, Resolution 96(I) constitutes a primary source of normative principle, and might be seen to carry the same legal force as the definition included in the Genocide Convention. This was recognised by the ICJ in the case of \textit{Military and Paramilitary activities in Nicaragua}, when the Court concluded that:

the fact that […] principles […] have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regard countries that are parties to such conventions. Principles […] continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated […]\textsuperscript{49}

\textsuperscript{46} William A. Schabas, \textit{op. cit.} note 35, p. 63.
\textsuperscript{47} \textit{Prosecutor v. Jean-Paul Akayesu}, Case No ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, paras 731 and 733.
\textsuperscript{48} General Assembly, Resolution 96(I), 11 December 1946, GAOR, 1\textsuperscript{st} Session, 55\textsuperscript{th} plenary Meeting, U.N. Doc. A/64/Add. 1, (1947).
With respect to both ethnic cleansing and genocide, the role of the judge is thus an important consideration that cannot be left aside, as the principle of judicial interpretation presents, as noted above, the possibility for significant developments of international criminal law. In light of the foregoing discussion of the dual qualification of ethnic cleansing – as both an international crime and a violation of international humanitarian law – it follows, however, that it ought to be assessed whether the same concept might be applied within the international humanitarian law framework. The principle of legality is recognised and also applied to violations of international humanitarian law, as it appeared in the Third and the Fourth Geneva Conventions of 1949. The Additional Protocols I and II of 1977 likewise employ the same language – Additional Protocol I, for instance, clearly states that:

no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.  

Both Additional Protocols explicitly forbid retroactive increases of penalties and retroactive creation of crimes. The distinction between the two lies in the fact that Additional Protocol II applies to non-international conflicts. That Additional Protocol II was adopted by 160 states provides strong evidence to indicate the importance of the principle of legality to the international community, even in the field of international humanitarian law.

It thus seems that judges could develop rules of international humanitarian law in order to adapt it to present circumstances. On this count one might consider how, during the Tadić trial, the ICTY reconfigured contextual parameters by determining that grave

50 Article 99 of Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, and article 65 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. See also: Kenneth S. Gallant, op. cit. note 37, pp. 207-211.

51 Article 75(4)(c) of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. For a similar formulation see also article 6(2)(c) of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

52 Kenneth S. Gallant, op. cit. note 37, p. 208.
breaches of the Geneva Conventions of 12 August 1949 could be perpetrated during non-international, as well as international, armed conflicts: 53

On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to “grave breaches” of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute. […]

[…] This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely “grave breaches” of the Geneva Conventions or violations of the “Hague law.” Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed. 54

The case law of the ICTY and ICTR has thus enabled important developments and extensions in the definition of both international crimes and principles of international humanitarian law. Though the judgments of the *ad hoc* Tribunals do not carry binding


54 *Id.*, paras 71 and 92.
legal force on the ICC, the case law has nonetheless had a partial effect on determining the offences incorporated into the Court’s jurisdictional competence by way of influence exerted upon the provisions of the Rome Statute.\textsuperscript{55} The Akayesu precedent, for example, initiated discussions within the Preparatory Commission for the International Criminal Court on whether rape and sexual violence ought to be included within the Rome Statute,\textsuperscript{56} even if, in the final text, any reference to such acts in relation to genocide were excluded. More tellingly, the ICC Statute has codified the Trial Chamber interpretation of the international humanitarian law framework provided by the Tadić case,\textsuperscript{57} to the effect that criminal acts may now be perpetrated – and recognised as such – in the context of non-international armed conflicts. Pre-Trial Chamber I of the ICC has also taken into consideration the case law developed by the ICTY explaining that acts which take place in the aftermath of an armed conflict might still be prosecutable provided they can be linked to the conflict and that they occur within its extended context.\textsuperscript{58}

This discussion of the importance of the role played by the international judge might at this point be enlightened by a parallel drawn with the development and implementation of Human Rights Law. Here one has to consider that it is not only the UN and the International Criminal Tribunals but also the regional human rights courts which ‘participate in making rules of law concerning human rights in criminal proceedings’.\textsuperscript{59} Of the other regional legal systems established to protect human rights,\textsuperscript{60} the most developed is arguably the system of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights.\textsuperscript{61} Alongside the International Criminal Tribunals, the Human Rights Courts and, in particular, the European Court of Human Rights participate in significant

\textsuperscript{57} See Article 8 of the Rome Statute.
\textsuperscript{59} Kenneth S. Gallant, op. cit. note 37, p. 403.
\textsuperscript{61} The European Convention on Human Rights signed in Rome on 4 November 1950.
fashion in interpreting Human Rights treaties and in defining further the rights specified therein. Even if:

[The human rights courts] do not [...] appear to be as central to the formation of customary international human rights law as the international criminal tribunals are to the formation of customary international criminal law, at least partly because they each apply treaty texts.

They, nevertheless, beside state practice, participate in interpreting human rights treaties. Given that the role of the European judge for the protection of Human Rights has likewise been recognised as being that of a law-maker, for its evolutive interpretation of the European Convention on Human Rights, it is of significant interest to consider in closer detail how the European system for the protection of Human Rights works, how it coalesces with the international law framework, and whether the European judge might be able to provide a classification of ethnic cleansing.

3.2.2. ETHNIC CLEANSING AND THE EUROPEAN COURT OF HUMAN RIGHTS

The relationship between the European Convention on Human Rights and international law is marked by a good deal of overlap and interaction. As rightly stated by Wildhaber in a recent article:

The European Court’s case law [...] confirms that the Convention, despite its special character as a human rights treaty, is indeed part of public international law. [...] The Convention and international law find themselves in a kind of interactive mutual relationship, checking and building on each other.

He goes on to explain:

62 Kenneth S. Gallant, op. cit. note 37, 403.
63 Ibid.
64 Ibid.
66 Luzius Wildhaber, op. cit. note 65, p. 217.
In the case of the Convention, this is expressed through the rule established in the case law of the European Court of Human Rights to the effect that “the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part”. At the same time, however, the Court has frequently also emphasized “the Convention’s special character as a human rights treaty” and “as an instrument of European public order (ordre public) for the protection of individual human beings”, a function which confers on the Court the responsibility of ensuring the Convention’s effectiveness in its interpretation of it. [...]67

On account of there being such strong links and dependencies between the two systems, it is conceivable to think that the principles determined by the European Convention of Human Rights – and interpreted by the Strasbourg Court – could potentially be germane and admissible in other fields within the international law order. In view of this, it may be instructive to analyse whether and how the characteristics of the European Law of Human Rights might be applied to ethnic cleansing, with the aim of gleaning a better comprehension of the requirements of the act and, in turn, a clearer understanding of effective measures of prevention and prohibition. As a first point, it is worth reiterating how, as part of the international law framework, the European Convention of Human Rights is closely bound by its provisions:

[...] The Court has also pointed out that the Convention is well and truly part of international law and that it “has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties”, in particular the rule that “account is to be taken of “any relevant rules of international law applicable in the relations between the parties”.68

A significant aspect of the European Court of Human Rights, especially with regard to the present concern, is its insistence that the Convention be interpreted as a “living instrument”. This principle was reaffirmed by the Human Rights Committee, which stated that a treaty on human rights ‘should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day

67 Id., p. 220.
68 Id., pp. 220-221.
The “living instrument” doctrine is a fundamental principle of the European system for the protection of Human Rights, and signifies that ‘the Convention [...] is intended to guarantee rights that are not theoretical or illusory, but practical and effective’. The question prompted at this point is thus whether the principle of the Convention as a “living instrument” attuned to “present-day conditions” might be considered legally applicable to international crimes. Before engaging this issue in any detail, however, it is first necessary to address and examine the fundamental origins of the concept.

3.2.2.1. Origins of the principle of “living instrument”

In *Golder v. United Kingdom*, the European Court of Human Rights famously discussed the Vienna Convention on the Law of Treaties and its relevant rules of interpretation. Following this analysis, the idea that the Convention was a living instrument emerged in the Court’s decision, albeit only implicitly. It is only in *Tyrer v. United Kingdom* that the “living instrument” doctrine was fully admitted and explicitly enounced:

> the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of the present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.

“The living instrument” principle, or ‘evolutive or dynamic interpretation’ as Letsas also terms it, has, since the *Tyrer* case, been established as one of the fundamental principles of exegesis regarding the European Convention on Human Rights. Over time, the principle of interpretation has evolved and the Strasbourg Court now considers that

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70 Luzius Wildhaber, *op. cit*. note 65, p. 223.
74 *Id.* p. 1, para. 31.
75 George Letsas, *op. cit*. note 65, p. 65.
the initial intent of the drafters of the Convention need not have any restrictive bearing on present-day competencies and application. In the *Matthews* case, for instance, the Court stated:

That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court’s case-law (see, *inter alia*, the Loizidou v. Turkey judgment of 23 March 1995 (*preliminary objections*), Series A no. 310, pp. 26-27, § 71, with further reference). The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.  

Clearly, the European Court of Human Rights has adopted the perspective that the interpretation of the articles of the Convention ought not to be fixed to the limited horizons that attended its initial drafting in 1950, but should rather evolve dynamically in response to changing priorities, principles and exigencies. In theory, the “living instrument” doctrine is thus a principle that, in permitting an extension of interpretive parameters, encourages an active protection of human rights. In practice, however, the Court has in certain circumstances been cautious and reticent about applying it. This has been especially notable in cases relating to the Convention’s scope of applicability, particularly with regard to its extra-territoriality. In the *Banković* case, for example, the Court sitting as a Grand Chamber had to pass verdict on whether NATO’s bombing campaign in the former Yugoslavia fell within the jurisdiction of contracting states under Article 1 of the European Convention on Human Rights.  

Recalling the principle of interpretation, the Court concluded that:

It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court’s case-law. The Court has applied that approach not only to the Convention’s substantive provisions (for example, the Soering judgment cited above, at § 102; the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45; the X, Y and Z v. the United Kingdom judgment of

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77 George Letsas, *op. cit.* note 65, p. 67.
22 April 1997, Reports 1997-II; V. v. the United Kingdom [GC], no. 24888/94, § 72, ECHR 1999-IX; and Matthews v. the United Kingdom [GC], no. 24833/94, § 39, ECHR 1999-I) but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs (the above-cited Loizidou judgment (preliminary objections), at § 71). The Court concluded in the latter judgment that former Articles 25 and 46 of the Convention could not be interpreted solely in accordance with the intentions of their authors expressed more than forty years previously to the extent that, even if it had been established that the restrictions at issue were considered permissible under Articles 25 and 46 when the Convention was adopted by a minority of the then Contracting Parties, such evidence “could not be decisive”.

However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties’ positive obligations and, as such, of the scope and reach of the entire Convention system of human rights’ protection as opposed to the question, under discussion in the Loizidou case (preliminary objections), of the competence of the Convention organs to examine a case. In any event, the extracts from the travaux préparatoires detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise that it is not interpreting Article 1 “solely” in accordance with the travaux préparatoires or finding those travaux “decisive”; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969). [...].

This sense of caution within the European Court of Human Rights notwithstanding, it is nonetheless reasonable to consider whether the “living instrument” principle might be potentially applied to other fields of international law. From a theoretical viewpoint, there is no legal exclusion between the international and European legal orders, making it tenable to foresee the transposition of a legal principle rooted in the European Protection of Human Rights framework to the sphere of international criminal law, as a

measure to facilitate condemnation and prosecution of international crimes, including, perhaps, ethnic cleansing. An analogy along these lines was, moreover, provided by the German Federal Court in December 2000 when it characterised the Genocide Convention as encompassing the “living instrument” principle.\(^{79}\) By extending this perspective from genocide to the broader field of international criminal law, and applying it to the practice of ethnic cleansing, it might be possible to specify this new concept.

### 3.2.2.2. The application of the “living instrument” to ethnic cleansing

In the decision alluded to above, the German Federal Court determined to extend the scope of the genocidal intent in order to include practices other than just physical or biological acts of destruction. This arbitration might be considered as a first step towards a modernisation of the understanding of genocide and the Genocide Convention in line with the “living instrument” principle, as the Court considered that:

> the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group […] the intent to destroy the group […] extends beyond physical and biological extermination […]. The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of the members of the group.\(^{80}\)

The decision of the German Federal Court thus provides a precedent that suggests that the Strasbourg principle of “living instrument” might be rendered to international criminal law and applied to instances of genocide. In other words, modern practice – even if only domestic – indicates that, much as with the European Convention on Human Rights, the definition of genocide provided at the time of the drafting of the Genocide Convention in 1948\(^{81}\) ought to be granted a wider latitude of interpretation in accordance with present-day conditions and requirements – that it too should be evolutive and dynamic, and develop in a way compatible with the shifts in the

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\(^{80}\) *Ibid.*

international society. With this in mind, it might be asserted that the principle applied to genocide may be extended in relation to ethnic cleansing – a development that could ultimately, in view of the uncertainties of classification and definition within the public international law order, yield significant benefits in terms of permitting effective conceptualisation of the term. There is, however, a potential stumbling block here, namely that ethnic cleansing is a jurisprudential notion rather than an instrument to which the idea of the “living instrument” might be applied. Whereas, for example, the Genocide Convention may provide, similarly to the ECHR, the concept of “living instrument” with its direction and parameters, the notion of ethnic cleansing lacks any such contextual determinant. As a result, it may thus become less easy to secure an interpretation of the notion which is dynamic and appropriately adapted to modern exigencies, and not one which is merely loose and inexact. That reservation notwithstanding, it nonetheless merits consideration whether the doctrine of the “living instrument” could – with due caution – be applied via analogy to the notion of ethnic cleansing so as to permit the evolution of a dynamic, “living” concept.

To assess the feasibility and validity of such a “living conceptualisation”, it must first be determined whether or not the current understanding of ethnic cleansing is fixed to a particular time frame. In the case of both the European Convention on Human Rights and the Genocide Convention, modern approaches apply a dynamic interpretation of initial provisions – might the same practice be engaged with regards the references to ethnic cleansing supplied by UN resolutions and in the case law of the ad hoc Tribunals? At first sight, the Commission of Experts sent to the former Yugoslavia might appear to posit a view that indicates a determinative temporal and geographical context, not least on account of its specific focus on the horrors perpetrated during the Balkans conflict. The general explanation of the practice as a ‘means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area’\(^82\) has, however, a broad enough signification – in avoiding reference to specific victim groups – to suggest that it was conceived to be perpetrated and punishable at other times and under other circumstances. To this we might add the fact that international criminal law is partially developed through both judicial decisions and analogy,\(^83\) and it is the use of the latter


\(^83\) Kenneth S. Gallant, *op. cit.* note 37, pp. 360-362.
principle that might enable the application of the “living instrument” doctrine to the
interpretation of ethnic cleansing so as to provide a ‘dynamic and evolutive’ definition.

The importance of developing such a “living concept” is stated, by analogy, by
the Grand Chamber of the European Court of Human Rights, in the case Stafford v. United Kingdom, when it declared that:

…. A failure by the Court to maintain a dynamic and evolutive approach
would risk rendering it a bar to reform or improvement.
Similar considerations apply as regards the changing conditions and any
emerging consensus discernible within the domestic legal order of the
respondent Contracting State. Although there is no material distinction on
the facts between this and the Wynne case, having regard to the significant
developments in the domestic sphere, the Court proposes to re-assess 'in the
light of present-day conditions' what is now the appropriate interpretation
and application of the Convention (see the Tyrer v United Kingdom
judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-
law). 84

This analogy is legally workable as the field of international criminal law is
comprehended as a living field in constant evolution. Such a “living” interpretation of
international criminal law is admitted, as exemplified by the interpretative role of the
international criminal law judges. 85 The creation of a “living concept” by the
international criminal judge, based on the “living instrument” principle, would not be to
overstretch the scope of judicial construction. Standards and regulative norms
developed by the ECHR can be, and have been, interpreted by the International
Criminal Tribunals. In the Tadić case, for instance, the ICTY Appeal Chamber – whilst
not considering the “living instrument” theory but rather the principle of equality of
arms – recognised the importance of the Strasbourg principles and case law:

In deciding on the scope of application of the principle of equality of arms,
account must be taken first of the international case law. In Kaufman v.
Belgium, a civil case, the Eur. Commission H. R. found that equality of
arms means that each party must have a reasonable opportunity to defend its

1121, ECHR 2002-IV, paras. 68-69.
85 See above pp. 53-63.
interests “under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent”. In Dombo Beheer B.V. v. The Netherlands, another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that “as regards litigation involving opposing private interests, ‘equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”. The Court decided in a criminal proceeding, Delcourt v. Belgium, that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not “put the accused unfairly at a disadvantage.” It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.86

Drawing such statements together with the other elements discussed in this chapter, it seems that the recognition of the Strasbourg principle of the “living instrument” as a tool of, sometimes very active and far-reaching, interpretation of international crimes is neither unrealistic nor in contravention of the principle of legality. Having been applied to genocide by the German Federal Court, it follows that the concept might reasonably and theoretically be employed, by analogy, for acts of ethnic cleansing by an international criminal instance, allowing for the emergence of a “living concept” which, attuned to modern exigencies, offers the prospect of more effective prevention and prosecution.

Yet if the application of this principle may aid clarity on the question of classification, it cannot resolve the issue alone. Whilst the ICTY has granted ethnic cleansing with criminal status and made it a legal notion of public international law, the problem of the dual qualification within Resolution 819 – as both an international crime and a violation of international humanitarian law – nonetheless remains. As such, and in view of the provisions provided by Resolution 819, both frameworks must now be carefully analysed so as to ascertain which of the two is more adapted to providing an effective and accurate classification of the practice.

CHAPTER FOUR

Ethnic cleansing and international humanitarian law

The discussion in the previous sections has shown how, in Security Council Resolution 819, the practice of ethnic cleansing was qualified as a violation of international humanitarian law. As a first move towards a classification of the act, a detailed analysis of this framework shall now be conducted with the aim of determining whether the qualification provided by Resolution 819 could and should be adopted as a normative principle.

An important preliminary point to make in this regard is that violations of international humanitarian law are prosecutable in the same manner as crimes committed within the international criminal law framework: the ad hoc International Criminal Tribunals and the ICC have, in both cases, similar jurisdictional mandates. The ICTY Statute provides unequivocally that the Tribunal has ‘the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute’. The ICTR Statute adopts a similar position, stating that the Tribunal:

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

The ICC Statute also gives express recognition to similarities and crossovers in prosecutory measures for crimes within the two frameworks, as it considers violations of international humanitarian law to constitute war crimes – a category that pertains to the international criminal law system. In this regard, the ICC Statute would appear to subsume a part of the international humanitarian law framework within that of international criminal law. Indeed Article 8 of the Rome Statute specifies that:

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

2. For the purpose of this Statute, “war crimes” means:
   (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: […]
   (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […]
   (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: […]
   (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
   (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: […]
   (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.  

What this means is that, in principle, a classification of ethnic cleansing within the field of international humanitarian law would not reduce feasibilities of condemnation and prosecution. It thus makes sense, from a legal perspective, to conduct a closer analysis.

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\(^3\) Article 8 of the Rome Statute. Underline in the original.
of this framework to evaluate whether it provides a suitable basis for classification. An initial, crucial, consideration in this regard relates to the links between ethnic cleansing and armed conflicts, as violations of international humanitarian law are only punishable if perpetrated in the latter context. In order to determine whether ethnic cleansing might justifiably be classified within this field, this nexus must therefore be confronted and scrutinised.

4.1. Ethnic cleansing and the notion of armed conflicts

In the historical overview provided in the opening chapter, we have seen how the modern term ethnic cleansing was first coined during the conflict in the former Yugoslavia – a war that was characterised by the ICTY as an international armed conflict. There was, however, a series of engagements in the Balkan area, some of which were only qualified as internal rather than international. As a result of this, the ICTY case law looked to broaden the definition of armed conflict enshrined in Article 3 of its Statute and extend international criminal law to cover the treatment of internal acts. In a revolutionary fashion, the Tadić judgment provided that ‘International Humanitarian Law […] extends beyond the duration of hostilities until a general conclusion of peace is reached’. The same principle was reaffirmed in the Kunarac et al. case, where the Trial Chamber explained that, although the acts perpetrated were not part of an international armed conflict, they nonetheless remained linked to its context and were consequently not to be considered as purely internal:

Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are

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5 Prosecutor v. Duško Tadić ("Prijedor"), Case No IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.
committed in furtherance or take advantage of the situation created by the fighting.  

The terms of the nexus requirement developed by the ICTY were reaffirmed in the ICC Statute. Under the Rome Statute, grave breaches necessitate that ‘the conduct took place in the context of and was associated with an international armed conflict’. In its initial decisions, moreover, the ICC has willingly followed the ICTY jurisprudence on this matter. Yet ethnic cleansing has also been identified in the context of non-international conflicts: Schabas, for example, argues that ethnic cleansing was perpetrated in the early stages of the Rwandan conflict, prior to the genocide, whilst similar claims have also been made regarding the Darfur conflict – both of which were qualified as internal rather than international. In all of these cases (Yugoslavia, Rwanda, Darfur) the situation of armed conflict is the common characteristic, and from this we might deduce a primary condition of ethnic cleansing – it is a wartime act, perpetrable, as the examples demonstrate, in the context of both international and non-international conflicts. As crimes committed under these conditions are regulated by international humanitarian law, it would appear to follow that ethnic cleansing ought to be classified within the same framework.

4.1.1. BACKGROUNDS OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law was established in order to regulate the conduct of combatants during armed conflicts. Subsequently, it has evolved so as to also regulate the protection of “victims of wars”, chiefly prisoners of war, sick and wounded combatants, and civilian populations. In the main, then, this body of law is geared

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8 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 287, and The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 380.
towards protecting persons who are not, or are no longer, directly engaged in hostilities, though its goals embody something of a double perspective. This is because they emerged from different sources, including The Hague and Geneva Conventions.

The history of international humanitarian law is relatively short, as it was not until the mid-nineteenth century that nations came to the decision that international regulations were needed to avoid unnecessary suffering during wars. Following the adoption of the Lieber Code in 1861, other instruments aiming at reducing wartime affliction were subsequently taken up. At the 1874 Brussels Conference, a draft for an international declaration concerning the laws and customs of war was discussed, but a lack of willingness on the part of the 15 states present meant that a convention on the subject was not ratified. Although the Brussels Conference failed to achieve its goal, it nonetheless marked an important step towards the codification of the laws and customs of war and the adoption of The Hague Conventions.

The first Hague Conventions, officially termed the Final Act of the International Peace Conference, were adopted in The Hague on 29 July 1899, at the initiative of the Russian Tsar Nicholas II with the object of ‘seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments’. Their purpose and goal was to codify and revise the norms discussed in 1874 during the conference of Brussels. Thus, although the Peace Conference did not succeed in reaching an agreement on the primary object for which it was initially called, namely, the limitation or reduction of armaments, it did nonetheless lead to the adoption of three Conventions and three Declarations, including The Hague Convention II on Laws and Customs of War on

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12 Ibid.
13 The Declaration of St Petersburg introduced limitations on the use of weapons of war. It abolished not only the use of explosive bullets but also ‘any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances’. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November to 11 December 1868. See also: Jean Pictet, Development and Principles of International Humanitarian Law (Geneva: Henri Dunant Institute, 1985), p. 49.
14 Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874.
16 Convention (I) for the peaceful adjustment of international differences, The Hague, 29 July 1899, Convention (II) regarding the laws and customs of war on land, The Hague, 29 July 1899, Convention (III) for the adaptation to maritime warfare of the principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899, Declaration (I) to prohibit the launching of projectiles and explosives from balloons or by other similar new methods, The Hague, 29 July 1899, Declaration (II) to prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases, The
Additionally, it foresaw the organisation of a second conference, which led to the adoption of the extended second Hague Convention of 18 October 1907: where in 1899 only four conventions had been adopted, the second conference saw 11 different conventions and one declaration ratified.

Whilst The Hague Conventions were an important step in the process of advancing international recognition of the laws and customs of war, the real codification of the law of armed conflicts only began after the Second World War with the adoption of the four 1949 Geneva Conventions. In the two Additional Protocols to these Conventions, subsequently adopted in 1977, the rules embodied in The Hague Regulations were partly reaffirmed and developed. Though the initial Conventions had been aimed exclusively at regulating hostilities and were thus based on ‘military necessities and the preservation of the State’, their incorporation within the Law of Geneva has meant a good deal of blurring and overlap between the two. That said, two aspects still belong exclusively to The Hague regulations: the protection of cultural property and the prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects.

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17 Convention regarding the laws and customs of war on land, The Hague, 29 July 1899.
21 Jean Pictet, op. cit. note 13, p. 2.
4.1.2. The Modernisation of International Humanitarian Law with the Adoption of the Geneva Conventions of 12 August 1949

The Law of Geneva aims at protecting military personnel placed “hors de combat” – prisoners of war, medical and religious staff – and any other persons who do not take part in the hostilities, including the civilian population. This aspect of international humanitarian law is composed of the four Geneva Conventions adopted on 12 August 1949,24 and of the two Additional Protocols to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977.25 A third Additional Protocol was later adopted on 8 December 2005.26

The principal difference between the Law of The Hague and the Law of Geneva is that the Geneva Conventions were adopted in order to protect potential victims of armed conflicts. The protection offered by the Geneva Conventions is broader than that provided by the law of The Hague. Of particular interest to the present concern is that, with the adoption of Additional Protocol II, the protection offered by the Geneva Conventions became partly applicable to situations of non-international armed conflicts:27 where the original conventions were only relevant in the context of international wars, political developments in the post-war period made it necessary to develop new norms applicable to the ever more common occurrence of internal conflicts. Thus, Additional Protocol II opens its preamble by recalling that:

the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character.28


27 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

28 Preamble of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
As a result of the Geneva Conventions being adopted, laws are in place to regulate violence during armed conflicts and to ensure that persons “hors de combat” are not targeted: armed conflicts have, in theory at least, been “humanised” by the adoption of the laws of The Hague and Geneva. Unfortunately, the reality is, of course, very different and perpetrators of violence generally fail to respect these humanist codes. Yet, while contraventions of international humanitarian law are, in theory, obviously punishable, the practice is rendered somewhat less clear by the fact that such violations fall under three distinct categories: grave breaches of the Geneva Conventions of 12 August 1949, violations of the laws or customs of war, and violations of Article 3 common to the Geneva Conventions of 12 August 1949. In this respect, it is worth noting that, aside from its qualification as a violation of international humanitarian law in Resolution 819, it has never been determined in which of the above three categories of violations ethnic cleansing should be placed. With this in mind, it shall in the following be initially considered whether it ought to be classified as a grave breach of the Geneva Conventions – the category of violation which, on account of its entailing universal jurisdiction and obliging ratifying states to enact criminal legislations not only limited to their own nationals, constitutes the most significant norm of the international humanitarian law framework.

4.2. Ethnic cleansing as a grave breach of international humanitarian law

The exact scope and applicability of the category of grave breaches, determined by both the Geneva Conventions of 12 August 1949 and their Additional Protocol I, is broad and slightly complex. Article 50 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for example, states:

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29 Genocide and crimes against humanity are crimes which can also be perpetrated during armed conflicts. However both crimes are not considered as violations of international humanitarian law but as international crimes. See Articles 2 to 5 of the ICTY Statute, Articles 2 to 4 of the ICTR Statute and Articles 5 to 8 of the ICC Statute for a distinction between international crimes and violations of international humanitarian law.

30 For a distinction between the three categories of violations of international humanitarian law, see Articles 2 and 3 of the ICTY Statute, Article 4 of the ICTR Statute and Article 8 of the ICC Statute.


32 Id., p. 305.
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.\(^{33}\)

Article 130 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, meanwhile, modifies this definition to provide that:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.\(^{34}\)

Geneva Convention (IV) and Additional Protocol I offer further variations on the list of specific acts that constitute grave breaches of international humanitarian law.\(^{35}\) Clearly, the question of definition must be considered in order to assess whether ethnic cleansing might be included under the ambit of grave breaches. First, though, it is vital to establish the legal status of these violations.

4.2.1. The Legal Status of the Grave Breaches of the Geneva Conventions

Determining the legal status of grave breaches is not as easy as it may perhaps initially seem. Indeed, in the period following the Second World War and during the emergence

\(^{33}\) Article 50 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949. See also Article 51 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949.

\(^{34}\) Article 130 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

\(^{35}\) Article 147 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, and Article 11(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
of a new international law order, war crimes and grave breaches were considered as two separate offences. In Article 6 of the Nuremberg Charter\textsuperscript{36} the term grave breaches was not used – it was first coined in the Geneva Conventions of 1949.\textsuperscript{37} The Convention did not, however, provide for any international criminal liability regarding these violations:\textsuperscript{38}

War crimes were certain acts and omissions carried out in times of war and criminalized in international law. Grave breaches were a limited set of particularly serious violations of the Geneva Conventions of 1949 that gave rise to special obligations of the States Parties for the enactment and enforcement of domestic criminal law.\textsuperscript{39}

Although the Geneva Conventions did not provide for international criminal liability, they nonetheless provided for universal jurisdiction as mentioned above.

With the adoption of the first Additional Protocol to the Geneva Conventions, the concepts of “war crimes” and of “grave breaches” came into overlap as all grave breaches were now to be considered under the rubric of war crimes. Article 85(5) of Additional Protocol I of 1977 expressly states that ‘[…] grave breaches […] shall be regarded as war crimes’.\textsuperscript{40} As Öberg notes, moreover:

By deciding that grave breaches constituted war crimes, the drafters gave the former a new additional meaning, providing them with criminal consequences in international law.\textsuperscript{41}

With the adoption of the above provisions, grave breaches acquired the status of war crimes – a status confirmed and reinforced by the Statutes of the \textit{ad hoc} International

\textsuperscript{36} Article 6(c) of the Charter of the International Military Tribunal in Nuremberg, 8 August 1945 annexed to the London Agreement.


\textsuperscript{39} \textit{Ibid}.

\textsuperscript{40} Article 85(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

\textsuperscript{41} Marko Divac Öberg, \textit{op. cit.} note 38, p. 167.
Criminal Tribunals and of the ICC. They are thus prosecutable violations. The practices they encompass, including ‘torture or inhuman treatment’, ‘wilful killing’, and ‘wilfully causing great suffering’, have, moreover, ever since their legal creation been regarded as the most serious violations of international humanitarian law. For this reason, an exhaustive analysis of grave breaches seems vital in terms of establishing the suitability of the paradigm as a tool for aiding the classification of ethnic cleansing. What makes this doubly important is that despite the serious nature of the acts, and despite the fact that grave breaches are specifically named in the Geneva Conventions and in Additional Protocol I, their status nonetheless remains blurred. The distinction between grave breaches and war crimes came at the forefront of the judicial debate, notably in the Tadić case, where the ICTY Appeals Chamber set to determine whether grave breaches could be perpetrated in the context of a non-international armed conflict, as is now the case with other war crimes and, as we have seen, with the practice of ethnic cleansing.

4.2.2. INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS: A BLURRED DISTINCTION SINCE THE TADIĆ CASE

The conflicting interpretations that continue to attend the concept of grave breaches do not facilitate the classification of ethnic cleansing. If it is to be categorised under this ambit, it must be strictly established whether grave breaches can be perpetrated in non-international armed conflicts: then and only then, might there be any guarantee of condemnation and prosecution.

From a theoretical perspective, it can be argued that, since grave breaches are only mentioned within the provisions of the Geneva Conventions dealing with international armed conflicts, they cannot, in fact, be perpetrated in non-international situations. One of the principal grounds for Tadić’s appeal was that, because of the internal nature of the conflict in the former Yugoslavia, Article 2 (on grave breaches of the Geneva Conventions of 12 August 1949), Article 3 (on violations of the laws and customs of

42 See: Article 1 of the ICTY Statute, Article 1 of the ICTR Statute, and Article 8 of the Rome Statute.
43 See the Geneva Conventions of 12 August 1949 and the Additional Protocol I of 8 June 1977.
44 Ibid.
war) and Article 5 (on crimes against humanity) of the ICTY Statute were not applicable. Leaving aside the arguments regarding Articles 3 and 5, and concentrating solely on the issue of grave breaches, it has to be acknowledged that, by strict definition, a grave breach of the Geneva Convention can only be perpetrated in the context of an international armed conflict. Reaffirming this principle, the Appeals Chamber unequivocally declared that grave breaches were not applicable in situations covered by Article 3 common to the Geneva Conventions, as this disposition deals exclusively with violations perpetrated in the context of non-international conflicts. Refuting the position of the Trial Chamber, the Appeals Chamber thus concluded:

The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of “grave breaches.” However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: “persons or property protected under the provisions of the relevant Geneva Conventions.” (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as “protected” by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of “protected persons or property” must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict.

By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.\textsuperscript{47}

Yet, despite reaffirming that grave breaches can only be perpetrated in the context of an international armed conflict, the Appeals Chamber nevertheless acknowledged a new \textit{opinio juris} of the states. In the “Ćelebići Camp” case, the Trial Chamber, applying the decision of the Appeals Chamber in \textit{Tadić}, considered it possible that international customary law has developed the scope of grave breaches, extending them to internal armed conflicts.\textsuperscript{48} In the \textit{Tadić} case, the Appeals Chamber had recognised that such a process might be occurring, indicating that:

[...] we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the \textit{amicus curiae} brief submitted by the Government of the United States, where it is contended that:

“the ‘grave breaches’ provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character.” (U.S. \textit{Amicus Curiae} Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in \textit{opinio juris} of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the “grave breaches” system might gradually materialize. [...] Attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva

\textsuperscript{47} Id., para. 81.

Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (see above, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the “grave breaches” provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the “grave breaches” system may operate regardless of whether the armed conflict is international or internal.49

Despite admitting the existence of a new customary rule, the Appeals Chamber nonetheless concluded that ‘in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts’.50 This verdict appears to be at odds with both the Chamber’s own findings and national courts’ decisions.51 It also runs contrary to the “Ćelebići Camp” judgment and judges’ opinions52 which have given the indication that grave breaches might be perpetrated in the context of both international and non-international armed conflicts.

50 Id., para. 84.
51 For the position of national courts see: Id., para. 83.
52 See for example Prosecutor v. Duško Tadić (“Prijedor”), Case No IT-94-1, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, p. 5.
This line was, moreover, considered to have been suggested by the Security Council itself when it enacted the ICTY Statute:

the Security Council’s object in enacting the Statute – to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects – suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.\(^{53}\)

Since *Tadić*, a new customary law interpretation of grave breaches as perpetrable in both situations of conflicts seems to have evolved, rendering them compatible with the practice of ethnic cleansing. Yet, the ambivalence of the Appeals Chamber’s conclusion brings to light the fact that this interpretation is by no means unanimously accepted. Reflecting the current state of the law, the ICC Statute does not consider that grave breaches might be perpetrated during internal hostilities\(^{54}\) – prosecution in these circumstances is only feasible if the current violence can be linked to the context of an international conflict. Under current conditions, then, a classification of ethnic cleansing as a grave breach would severely reduce its scope of applicability, meaning it could not, for example, be invoked in the Rwanda and Darfur contexts. Thus, although there is, strictly speaking, little preventing a classification in these terms, there is likewise little commending it, and to place the practice of ethnic cleansing within this framework would, in fact, be to impose an unnecessarily inhibiting limitation.

An alternative approach might be to consider ethnic cleansing as a violation of the laws and customs of war\(^{55}\) or as a violation of Common Article 3 to the Geneva Conventions of 12 August 1949,\(^{56}\) both of which might be perpetrated in the context of an international or of a non international armed conflict.\(^{57}\) Any classification within the framework of international humanitarian law remains, however, problematic due to the fact that none of the major legal instruments have reaffirmed the qualification. Despite

\(^{53}\) *Prosecutor v. Duško Tadić ("Prijedor"),* Case N° IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 78.

\(^{54}\) Article 8 of the ICC Statute.

\(^{55}\) *Prosecutor v. Duško Tadić ("Prijedor"),* *op. cit.* note 53, para. 137.


\(^{57}\) Common Article 3 to the Geneva Conventions of 12 August 1949, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 covered situations of non-international armed conflicts.
having – admittedly – ample opportunity to do so, the drafters of the ICTY, ICTR and ICC Statutes refrained from such a categorization. With this in mind, attention might be turned again at this point to how Resolution 819 qualified the act not only as a violation of international humanitarian law, but also as a prosecutable legal norm and an international crime – one which might thus also be considered within the international criminal law framework.

4.3. Beyond the international humanitarian law framework: ethnic cleansing as a war crime

4.3.1. A CLASSIFICATION OF ETHNIC CLEANSING AS A WAR CRIME

In shifting focus to the international criminal law system, it seems prudent to begin with that notion which is perhaps – in terms of the nexus of conflict – most closely linked to violations of international humanitarian law: war crimes. The first clear condemnation and prosecution of war crimes emerged during the Nuremberg Trials.\(^{58}\) Article 6 of the Nuremberg Charter listed three categories of offences: crimes against peace, crimes against humanity and war crimes. The latter were considered as:

namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.\(^{59}\)

The Charter of the Tribunal for the Far East likewise identified war crimes as one of the punishable offences, only there the definition was limited to ‘conventional war crimes’ and only included ‘violations of the laws and customs of war’.\(^{60}\)

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\(^{58}\) The notion of war crimes emerged for the first time after the First World War. Articles 227-229 of the Treaty of Versailles provide for the first time provisions on individual criminal responsibility for violations of the law of war. See for further information Gary D. Solis, *op. cit.* note 31, p. 74.

\(^{59}\) Article 6(c) of the Charter of the International Military Tribunal in Nuremberg, 8 August 1945 annexed to the London Agreement.

\(^{60}\) Article 5(b) of the Charter of the International Military Tribunal for the Far East, 19 January 1946.
As a consequence of the two military tribunals, the international community was made aware that certain actions, even if perpetrated in the context of armed conflict, were not justifiable as conducts of war. Since then, and even more so following the adoption of the Geneva Conventions of 1949, these war crimes have been subjected to prohibition and prosecution. More recently, the International Criminal Tribunals have followed this path and have accordingly punished perpetrators of such acts. The ICTY Statute indicates in its Article 3 that the Tribunal ‘shall have the power to prosecute persons violating the laws or customs of war’. The same article also specifies that:

such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

While the ICTR Statute also includes a provision on war crimes, it differs from that of the ICTY Statute on account of the fact that the conflict in Rwanda, unlike that in the former Yugoslavia, was not international. Article 4 of the ICTR Statute thus only addresses ‘violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II’. This difference being jurisdictional rather than substantive, it seems safe to assert that, according to both Statutes of the ad hoc Tribunals, war crimes can be perpetrated in the context of both international and non-international conflicts. This assertion is further reinforced by the fact that this approach was unequivocally reaffirmed in the Rome Statute.

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61 Article 3 of the ICTY Statute.
62 Ibid.
63 Theodor Meron, op. cit. note 10.
64 Article 4 of the ICTR Statute.
65 Article 8 of the Rome Statute.
While it cannot be disputed that war crimes constitute a generic category of offence, developing a clear and specific definition nonetheless remains an arduous task, notably due to both the nature of the crimes and the fact that they are determined in numerous international instruments. As Bassiouni sums up:

The category of war crimes contains 71 relevant instruments dating from 1854 to 1998. There are also 35 other applicable instruments from 1868 to 1998 that have been classified, in accordance with the methodology employed, under other categories of crimes.

As a result of their being included and defined across so many instruments, it is difficult to clearly grasp the nature and the definitional scope of war crimes. This can, in turn, create complications and limitations in terms of securing effective prosecution. The flip-side to this, however, is that the broad nexus of violations of international humanitarian law detailed in the various instruments might be taken to signify that this is an evolving category of crimes. Viewed in this perspective, and bearing in mind the apparent closeness to grave breaches, it might thus be considered whether ethnic cleansing can be classified under the category of war crimes.

In light of Bell-Fialkoff’s historical analysis, and in view of the etymological origins discussed in Chapter Two, ethnic cleansing seems to closely correspond to the concept of transfer of population. In the Rome Statute, this practice is expressly recognised as one of the existing categories of war crimes. With respect to international armed conflicts, Article 8 of the Statute indeed includes reference to ‘unlawful deportation or transfer or unlawful confinement’ and ‘transfer, directly or indirectly, by the Occupying Power of parts of its own population into the territories it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside its territory’.

With respect to non-international armed conflicts, Article 8 of the Rome Statute also criminalises acts that involve ‘destroying or seizing the property of an adversary

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69 See Chapter Two, pp. 41-43.
70 Article 8(2)(a)(vii) of the Rome Statute.
71 Article 8(2)(b)(viii) of the Rome Statute.
unless such destruction or seizure be imperatively demanded by the necessities of the conflict\textsuperscript{72} and:

ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.\textsuperscript{73}

Article 8 of the Rome Statute thus lists practices which clearly constitute acts of ethnic cleansing, which could, as a consequence, be prosecuted as a war crime if it were to be included in one of the already recognised sub-categories of this crime. The crime of displacement of population is well-established, codified in the Rome Statute as a crime against humanity\textsuperscript{74} and as a war crime.\textsuperscript{75} To determine whether ethnic cleansing could fall within the ambit of the war crime of population transfer, it is vital to both understand the specific conditions of the crime, and to refer to the principle of “living concept” outlined in the previous chapter.

The existence of a proximity between unlawful transfer of population and ethnic cleansing has been noted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in Resolution 1997/29, which recognised that:

Practices of forcible exile, mass expulsion and deportation, population transfer, forcible population exchange, unlawful evacuation, eviction and forcible relocation, “ethnic cleansing” and other forms of forcible displacement of populations within a country or across borders not only deprive the affected populations of their rights to freedom of movement but also threaten the peace and security of States.\textsuperscript{76}

It went even further, indicating that it:

\begin{itemize}
  \item Article 8(2)(e)(xii) of the Rome Statute.
  \item Article 8(2)(e)(viii) of the Rome Statute.
  \item Article 7(1)(d) of the Rome Statute.
  \item Article 8(2)(a)(vii), Article 8(2)(b)(viii) and Article 8(2)(e)(viii) of the Rome Statute.
  \item Sub-Commission on Prevention of Discrimination and protection of minorities, Resolution 1997/29 ‘Freedom of Movement and population Transfer’, 36\textsuperscript{th} meeting, 28 August 1997.
\end{itemize}
Urges Government and other entities involved to do everything possible to stop and prevent all practices of forced displacement, population transfer and “ethnic cleansing” in violation of international law.\textsuperscript{77}

Although, by making these statements, the Sub-Commission apparently considered ethnic cleansing as a crime in the same vein as forcible population transfers or expulsion, it did not directly assimilate them. For good reason, for though ethnic cleansing and population transfers are both violations of international law, they do not constitute the same crime. Defining ethnic cleansing as a war crime of forcible and inhumane transfer of population thus seems legally inadequate.

The fact that ethnic cleansing and the specific war crime of transfers of populations cannot be considered to constitute the same act, does not, however, in and of itself, mean that ethnic cleansing cannot be qualified as a war crime. In order to draw any definitive conclusion that ethnic cleansing is not a war crime, it is necessary to consider the qualitative elements which may make such a qualification inapt and which characterise ethnic cleansing as an entirely different crime. Only then might it be said with any degree of certitude that the practice of ethnic cleansing cannot be considered to constitute a new and specific war crime.

One central aspect worthy of note here is the view that war crimes are seen as an evolving category of crime. The \textit{Kunarac} Appeals Chamber, for instance, stated that:

\begin{quote}
The determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed. As was once noted, the laws of war “are not static, but by continual adaptation follow the needs of a changing world”.\textsuperscript{78}
\end{quote}

Taking this into account, together with the normative characteristics of war crimes, it could be concluded that ethnic cleansing might be qualified as a war crime which could be perpetrated in both international and non international armed conflicts. The ongoing lack of clarity regarding the specification of the requirements of ethnic cleansing makes this assessment extremely difficult, however. Adopting such a classification of ethnic cleansing would, in theory, be possible. Yet the fact that the ICC Statute does not

\begin{flushright}
77 \textit{Ibid.}.

\end{flushright}
consider ethnic cleansing as a war crime, presents a hindrance to such a classification. In an overview on the establishment of the 1998 Rome Statute, the ICC indicates that it has considered the term ethnic cleansing, but expressly not as being a war crime:

[…] Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide – in the guise of “ethnic cleansing” – once again commanded international attention.79

The fact that ethnic cleansing does not seem to be a specific new war crime could be problematic, especially since, at present, it has, as we have seen, only been enounced in situations of armed conflicts. However, this could, arguably, be a mere reflection of the specific political exigencies of the various instances in the former Yugoslavia, Rwanda and Darfur respectively and need not necessarily preclude the possibility of recognising ethnic cleansing during peacetime. An analogy might be drawn here with the situation regarding crimes against humanity after the Second World War – a category of crime established in a specific context of conflict but extended in line with subsequent realities. In the following section, it shall thus be considered whether ethnic cleansing might, by analogy, be likewise developed so as to be regarded as a peacetime notion.

4.3.2. ETHNIC CLEANSING: A WARTIME AND A PEACETIME CRIME

The Nuremberg Charter and Trials propelled the concept of crimes against humanity into the centre of legal discussion and debate – as Van Schaak notes, this has proven to be the ‘real legacy’ of Nuremberg, albeit with what she terms ‘chronic definitional confusion’.80 The concept was not confined to the Nuremberg Charter, but was also subsequently included in the Tokyo Charter of the International Military Tribunal for the Far East.81 From a modern perspective, the definitions provided in the two Charters would certainly have to be considered unsatisfactory on account of the prescribed links with other international crimes, for both insist that an act must be perpetrated ‘in execution or in connection with’82 war crimes or crimes against peace in order to constitute a crime against humanity.

81 The Charter of the International Military Tribunal for the Far East was adopted on 19 January 1946.
82 Article 6(c) of the Charter of the International Military Tribunal in Nuremberg.
It must be borne in mind, however, that the definition of crimes against humanity proffered by the London agreement was adapted to the particular historical circumstances of the post-war period. The Nuremberg Tribunal had the specific aim of prosecuting and convicting Nazi leaders for crimes against humanity – and any crimes within its statute – perpetrated during the Second World War; it was not established with the intention of creating a broader definition of crimes which might be applied more universally:

To constitute crimes against humanity, the acts relied on before the outbreak of the war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939, War crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity. 83

Moreover, though the IMT expressly limited its jurisdictional powers to the crimes committed between 1939 and 1945, this does not signal a denial, trivialisation or exculpation of earlier atrocities. As Woetzel states:

The fact that the court only considered crimes committed in the period from 1939 to 1945 does not mean that only acts occurring during wartime can be considered as crimes against humanity. It must be concluded that the court merely felt itself generally limited in its jurisdiction to cases occurring in connection with or during the war. It did not mean to qualify the nature of acts, however, by stating this proviso. 84

The section of the Nuremberg Judgment excerpted above demonstrates how the war nexus was the essential element required to justify international prosecutions for crimes against humanity. Without this requirement, the acts perpetrated would have fallen under the national jurisdictional sphere of Germany, preventing international intervention. It is interesting to observe, however, that this connection with armed conflict was immediately criticised by contemporaneous scholars: Egon Schwelb, for example, writing in 1946, argued notably that the concept of crimes against humanity as defined in the Nuremberg Charter failed to provide ‘the cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of inhabitants of all countries’.  

This situation appeared to shift slightly with the adoption of Control Council Law No. 10, designed to facilitate Nazi prosecutions by the Allies in their respective zones of occupation. Article II of the Law did not prescribe limitations to wartime, encouraging the sense that crimes against humanity might also be committed during times of peace. In its preamble, however, Control Council No. 10 categorically held that its aim was ‘to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto’; and in Article I, it proceeded to declare that both the Moscow Declaration and the London Agreement were ‘integral parts of this Law’. Thus, although Control Council Law No. 10 did not expressly reaffirm that crimes against humanity were limited to wartime, the statements in the preamble and in Article I confirmed this impression, preventing a broadening of applicability to peacetime. In addition, the Allied powers addressed and reaffirmed the war nexus in several of their proceedings: in the *Flick* case, for example, the defendant was acquitted of crimes against humanity for his acquisition of Jewish properties before the war because the Court found itself without jurisdictional power.

Nonetheless, there were, as van Schaak notes, tribunals which ‘interpreted the terms of the Law literally and announced that crimes against humanity could be perpetrated and prosecuted independent of a state of war’. The *Einsatzgruppen* case,

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86 Law No. 10 of the Control Council of Germany adopted on 20 December 1945.
87 Preamble of the Law No. 10 of the Control Council of Germany of 20 December 1945.
88 Article I of the Law No. 10 of the Control Council of Germany of 20 December 1945.
89 *United States v. Flick et al.*, the ‘*Flick* case’, Case No. 5, Military Tribunal IV, 6 *Nuremberg Subsequent Proceedings*, 1213. See also *United States v. Von Weizsaecker et al.*, the ‘*Ministries case*’, Case No. 11, Military Tribunal IV, 12-14 *Nuremberg Subsequent Proceedings*, 1-1096.
90 Beth Van Schaack, *op. cit.* note 80, p. 809.
for instance, brought against commanders of the killing squads that were responsible for the execution of considerable number of Jews and other individuals they considered “undesirable”, foresaw that:

[The] Allied Control Council, in its Law No. 10, removed this limitation [the war nexus] so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.\(^91\)

The case proceeded to conclude that the law prohibiting crimes against humanity was not restricted to events of war, but rather envisioned ‘the protection of humanity at all times’.\(^92\) A similar decision was reached in the *Justice* case.\(^93\)

It is here that the war nexus comes into particularly sharp relief as a focal point for debate and definition. The insistence on this nexus during the Nuremberg Trials must be explicated in relation to the particular conditions of the conflict: the concept of crimes against humanity was invoked and applied during the trials in order to reflect the specific nature of Nazi crimes – no existing category of crime could sufficiently reflect the scale and extremity of the atrocities committed by the National Socialist regime. As these crimes were inextricably connected with the context of an armed conflict, the war nexus emerged as a definitional element of the crime, and a requirement to justify the exercise of international penal jurisdiction.\(^94\) The aim of Control Council Law No. 10, on the other hand, was to provide a universal definition of crimes against humanity to render possible the punishment of crimes similar to those perpetrated during the Second World War. Indeed, this law was adopted in order to facilitate the uniform prosecution of war criminals in the different zones of occupation, and was also applied by German Courts across the various zones. Contrary to the Charter of the International Military Tribunal for the Major War Criminals, Control Council Law No. 10 was not an international agreement but rather a hybrid between international and national laws. Yet, its impact was restricted due to the internal tensions that existed between the broader implications of Article II and the statements in the Preamble and Article I reaffirming the war nexus.

\(^91\) *United States v. Ohlendorf et al.*, the ‘*Einsatzgruppen* case’, Case No. 9, Military Tribunal II, 4 *Nuremberg Subsequent Proceedings*, p. 499.

\(^92\) *Id.*, p. 497.


\(^94\) Cited in Beth Van Schaack, *op. cit.* note 80, pp. 814-815.
Had crimes against humanity remained defined by the connection with the specific conditions of the Second World War, the concept would, in essence, have become obsolete almost immediately – the definitions provided by the London Charter and Control Council Law No. 10, formulated as responses to the particular dilemmas presented by Nazi crimes, would have been seen as historically specific and would not have permitted the prosecution of similar crimes committed during other conflicts. Fortunately, the course of international law since then has emancipated crimes against humanity from this linkage with the particularities of the Second World War and from armed conflict in general: the ICTR, 95 for example, remained silent on the requirement of a war nexus, 96 whilst the jurisprudence of the ICTY 97 concluded that ‘an armed conflict is not a condition for a crime against humanity but is for its punishment by the Tribunal’. 98 Indeed, although the ICTY Statute incorporates that crimes against humanity have to be ‘committed in armed conflict, whether international or internal in character’, 99 this specification:

was not intended to reflect a general definition of crimes against humanity or alter the fact that such crimes may be committed in time or war or in time of peace. Rather, it was intended to make the crime specific to the Yugoslav context: an armed conflict which could, at different times, be characterised as being international, internal, or a combination of the two. 100

Furthermore, the fact that the ICTY requires a war nexus but does not distinguish between the forms of conflict dictates that this element is merely jurisdictional and not definitional.

96 See Caroline Fournet, op. cit. note 4, p. 45.
99 Article 5 of the ICTY Statute.
4.4. Conclusion

The judicial developments achieved by the *ad hoc* Tribunals with respect to the war nexus, coupled with the absence of such requirement in the definition of crimes against humanity in the Statute of the International Criminal Court,\(^\text{101}\) have led to the conclusion that connection to war, or to other international crimes, is no longer a legal ingredient of crimes against humanity, which are now universally acknowledged as independent acts. Indeed, as conclusively stated by the Report of the Preparatory Committee on the Establishment of an international criminal court:

> The armed conflict nexus that appeared in the Nuremberg Charter was no longer required under existing law, with attention being drawn to Article I of the Genocide Convention, CCL No.10, the Convention on the non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the ICTR Statute, the ICTY Appeals Chamber decision in the Tadic, and the 1996 Draft Code. The view was also expressed that although “crimes against humanity” often occur in situation involving armed conflict, these crimes could also occur in time of peace or in situations that were ambiguous.\(^\text{102}\)

The question that presents at this point, then, is whether this evolving definition of crimes against humanity, particularly in terms of the shedding of the necessary war nexus, provides a model that might be applied to the legal framework of ethnic cleansing – one that legitimates the use of the “living concept” principle as an interpretive tool. A broadening of the notion of ethnic cleansing to encompass acts committed in both war- and peacetime would certainly facilitate (provided such a mandate is one-day codified) a wider latitude of prosecution. Thus even if ethnic cleansing is not considered as a war crime *per se*, being both a peacetime and a wartime notion, such an interpretation would be in line with the current trend in international criminal law, as demonstrated by the interpretation of crimes against humanity.\(^\text{103}\)

\(^{101}\) Article 7 of the Rome Statute.


\(^{103}\) See above pp. 92-96.
That said, it would be imprudent to assume the possibility of such an analogy without first examining more closely the conditions under which the act of ethnic cleansing might conceivably be committed outside the context of war. Having considered the possibility and limitations of a classification as a violation of international humanitarian law, and the restrictions that would attend a qualification under the ambit of war crimes, the following two chapters shall thus look in finer detail at the question of war- and peacetime exigencies. They shall accordingly focus on the parallels and disparities between ethnic cleansing and the two remaining categories of international crime which exist regardless of the existence of an armed conflict: genocide and crimes against humanity.
CHAPTER FIVE

Ethnic cleansing and the law of genocide

From the very beginning of the conflict in the former Yugoslavia, scholars have recurrently and freely used the terms genocide and ethnic cleansing in interchangeable fashion to describe the consequences that this conflict would have for the civilian population. Procida, for instance, provides a neat exemplification, holding that:

Genocide, termed “ethnic cleansing”, quickly became a facet of the war. First occurring in the Spring of 1992 by Serbian forces, ethnic cleansing rapidly became a widespread military tactic designed to cleanse the territory of both Muslims and Croats. The practice of ethnic cleansing was not limited to the Serbs, however, as both Croats and Muslims occasionally committed such acts, although primarily of a retaliatory nature. Consequently, ethnic cleansing soon became the direct cause of most of human rights violations in Bosnia.¹

If, as has been established previously, ² the practice of ethnic cleansing is defined by an act of removal or expulsion, Procida’s statement opens up a crucially important issue by blending the aim of “cleansing” with that of destruction or annihilation, which is the ultimate intent of genocide.³ Other scholars have, in similar fashion, qualified ethnic cleansing as an act of destruction, and so set up an equation with genocide, focusing on the extent to which the practice encompasses the characteristic elements associated with the genocidal act, but failing to address the question of any specific or independent requirements. Salzman, for instance, concludes that:

² See Chapter Two pp. 41-43.
³ See following developments pp. 118-126.
In essence, genocide and ethnic cleansing coincided, the goal being the establishment of a greater Serbia – that is, a Serb-inhabited region purged of all non-Serbs throughout Serbia, Bosnia-Herzegovina, and Croatia.\textsuperscript{4} Kresock similarly indicates that ‘a growing body of evidence suggests that Serbs, and other responsible for practicing ethnic cleansing, have undertaken genocide’.\textsuperscript{5} The Commission on Human Rights, in a Resolution concerning the events in Bosnia, also provides that the states involved in the conflict were all parties to the Genocide Convention,\textsuperscript{6} and thus had to respect their obligations resulting from the Convention.\textsuperscript{7} Schabas recognises that ‘the view that the two terms are equivalent or that they overlap is widely held within the diplomatic and academic communities’,\textsuperscript{8} whilst Roux declared that ethnic cleansing:

\begin{quote}
\hspace{1cm}is the policy of forced national homogenisation of a territory by the expulsion (and secondary by the massacre) of elements judged undesirable.\textsuperscript{9}
\end{quote}

This understanding of ethnic cleansing – explicitly linked to destruction and massacre – seems legally erroneous, as the Convention for the Prevention and Punishment of the Crime of Genocide adopted in 1948 does not refer to this crime. Interestingly however, this conventional silence may contribute to explaining the judicial attitude towards both crimes, as it did, notably, allow the ICTY to consider ethnic cleansing in its possible relation to genocide. The \textit{Krstić} Trial Chamber, for example, found that:

\begin{quote}
\hspace{1cm}[…\] as of 13 July, the plan to ethnically cleanse the area of Srebrenica escalated to a far more insidious level that included killing all of the military-aged Bosnian Muslim men of Srebrenica. […] this campaign to kill
\end{quote}

\textsuperscript{5} David M. Kresock, \textit{op. cit.} note 1.
\textsuperscript{6} The Convention for the prevention and punishment of the crime of genocide, the so-called Genocide Convention, as submitted by the Sixth Committee, was unanimously adopted by the General Assembly Resolution 260A(III) by 55 to 0, on 9 December 1948. It was signed on 11 December 1948 by 20 states.
\textsuperscript{8} William A. Schabas, \textit{op. cit.} note 1.
all the military aged men was conducted to guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica and therefore constituted genocide.\textsuperscript{10}

Similarly, the Nikolić Trial Chamber explained that:

In this instance, this policy of “ethnic cleansing” took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character. For instance, the Chamber notes the statements by some witnesses which point, among other crimes, to mass murders being committed in the region. More specifically, the constitutive intent of the crime of genocide may be inferred from the very gravity of those discriminatory acts. [...] The Chamber considers that the Tribunal may possibly have jurisdiction in this case under Article 4 of the Statute. It would therefore invite the Prosecutor to pursue his investigations, if feasible and advisable, with a view to indicting Dragan Nikolić for complicity in genocide or acts of genocide.\textsuperscript{11}

In contrast to the scholarly opinions reproduced earlier, the ICTY judges have not in these cases equated ethnic cleansing with genocide. They rather consider how policies of ethnic cleansing may potentially lead to the perpetration of genocide. This perspective was reaffirmed by the General Assembly in two different resolutions. In Resolution 47/121(1992), it explained that:

Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres,


in pursuit of the abhorrent policy of “ethnic cleansing”, which is a form of genocide, [...]  

In Resolution 49/205, *Rape and Abuse of Women in the Areas of Armed Conflicts in the former Yugoslavia*, it reiterated the same principle, again linking rather than directly equating, ethnic cleansing with genocide.

In spite of this, it nonetheless remains that current massacres are still qualified as constituting both genocide and ethnic cleansing, with little clear-cut distinction between the two acts. A particularly striking illustration of such ongoing confusion regarding the application of the two terms can be found in the modern media, as journalists continue to label massacres as acts of ethnic cleansing. NGO documents also show a similar assimilation as the term ethnic cleansing is often used therein to qualify the Darfur situation. In a report dated May 2004, for instance, Human Rights Watch called the conflict in Darfur a situation of ‘ethnic cleansing by government and militia forces in Western Sudan’. In another report, however, it stated that:

> Many of the abuses against these groups amount to crimes against humanity and war crimes, as the attacks are deliberately and systematically directed against civilians on account of their ethnicity. Some abuses stand out for the extraordinary level of brutality shown by the perpetrators, suggesting an intention to destroy the civilian group targeted in a given locality. All these incidents should be investigated in depth, and prosecuted as exceptionally serious international crimes, including potentially the crime of genocide.

Although it was widely discussed whether the crimes committed in Darfur were genocide or acts of ethnic cleansing, Pre-Trial Chamber I of the ICC actually issued an arrest warrant against the president Al-Bashir, in the first instance, for crimes against

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humanity following the conclusion drawn by the International Commission of Inquiry on Darfur.\(^{18}\) On the 12 July 2010, however, the Pre-Trial Chamber issued a second arrest warrant adding this time charges of genocide.\(^{19}\)

In light of these various examples, it can be readily seen how the development of a classification of ethnic cleansing within the scope of genocide would allow for adjustments in the understandings of these crimes as provided by both scholars and judicial instances. Within this context, the critical question is whether ethnic cleansing might be considered synonymous with the umbrella term genocide, whether it might be localised as a specific form or manifestation of the latter, or whether the two practices refer to different realities and dynamics. Resolving this issue and providing a qualification of the act is of vital importance, not only with regard to bringing clarity to the classification of crimes, but also in relation to future prosecutions. Ethnic cleansing ought either to be recognised as genocide and consequently prosecuted as such, or it has to be defined and provided with its own corresponding conditions of prosecution. In order to assess this question in further detail, we can begin by considering the specific *actus reus* and *mens rea* of genocide.

5.1. Ethnic cleansing as a genocidal act

In his initial definition of the term “genocide” from his 1944 book *Axis Rule in Occupied Europe*, Raphael Lemkin famously announced that the act was constituted by the annihilation of certain populations from within given territories – a view which was subsequently upheld by the jurisprudence of the Nuremberg Tribunal.\(^{20}\) As the list of practices encompassed in Article II of the Genocide Convention illustrates, however, genocide can be committed by subsidiary means other than outright annihilation, and may include:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

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\(^{18}\) See *The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”),* No. ICC-02/05-01/09, Warrant of Arrest, Pre-Trial Chamber I, 4 Mars 2009.

\(^{19}\) *The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”),* No. ICC-02/05-01/09, Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.\(^{21}\)

Viewed under this aspect, it seems prudent to inquire whether, despite not being explicitly included in the above list of actions, ethnic cleansing might in fact be considered as an element constituent towards the policy of genocide, and so classified as a genocidal act.

5.1.1. ETHNIC CLEANSING AND THE GENOCIDAL ACTUS REUS

In light of the reigning confusion over the specific conditions and requirements of ethnic cleansing, it is little surprise that there is no exhaustive list detailing the acts covered by the concept. What is clear, is that it is – much like genocide – a practice embodying multiple actions, which may range across a broad spectrum, from relatively peaceful deportations and transfers, on the one hand, to rape, murder and extermination on the other (as demonstrated in the \( \text{Vasiljević} \) case).\(^{22}\) In this respect, the Ambassador of New Zealand has tellingly and accurately declared, before the United Nations General Assembly, that ethnic cleansing ‘covered a multitude of gross violations of human rights such as systematic expulsion, forcible relocation, destruction of dwellings, degrading treatment of human being, rape and killings’.\(^{23}\)

Interestingly for the purposes of the present analysis, it is worth recalling here that during the drafting of the Genocide Convention and the debates in the Sixth Committee, Syria suggested an additional category of genocidal act, namely, ‘imposing measures intended to obligate members of a group to abandon their homes in order to escape the threat of subsequent ill treatment’\(^{24}\) – a category which, when considered in light of the origins and etymologic characteristics of the term,\(^{25}\) would appear to directly encompass the practice of ethnic cleansing. Perhaps regrettably, this proposal was ultimately turned down by committee members on the grounds of being at a too distant remove from the

\(^{21}\) Article II(2) of the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly Resolution 260 (III).
\(^{22}\) Prosecutor v. Mitar \( \text{Vasiljević} \) (‘Višegrad’), Case No IT-98-32-T, Judgment, Trial Chamber II, 29 November 2002, para. 58.
\(^{23}\) UN Doc. A/C.3/48/SR.6, para. 29.
\(^{25}\) See Chapter Two pp. 41-43.
core concept of genocide. While for the United Kingdom, ‘the problem raised by the Syrian amendment was a serious one but did not fall within the definition of genocide’, 26 the United States were concerned that this additional act ‘might be extended to embrace forced transfers of minority groups such as have already been carried out by members of the United Nations’. 27 Even if the Syrian amendment had some support, notably from the Soviet Union for whom ‘measures compelling members of a group to abandon their homes, in the case of acts committed under the Hitler regime, were rather a consequence of genocide’, 28 it was finally defeated by twenty-nine votes to five. As a result, ethnic cleansing was not included amongst the genocidal acts listed in the conventional text.

Though this list of actions is, indisputably, extensive, however, it nonetheless remains that the Convention fails to provide for a comprehensive definition of specific forms. Unsurprisingly, therefore, it has fallen on the ad hoc Tribunals to fill in the gaps, so to speak, and attempt to define such genocidal acts.

For the purposes of the present analysis, the judicial definition of the genocidal act as ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction’ is particularly interesting insofar as, from the outset, it seems to convey implicit similarities to the concept of ethnic cleansing. In this respect, it is worth noting that, in the Akayesu case, the ICTR Trial Chamber considered that:

> For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement. 29

Thus, for the Trial Chamber, acts of systematic expulsions from home fall within the ambit of the genocidal act of ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part’. 30

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26 UN GAOR, UN Doc A/C.6/SR/82 (1948), (Fitzmaurice, United Kingdom).
27 William A. Schabas, *op. cit.*, note 1, p. 296.
28 UN GAOR, UN Doc A/C.6/SR/82 (1948), (Morozov, Soviet Union).
This qualification of expulsions from home as a genocidal act by the Akayesu Trial Chamber does not, however, signify that ethnic cleansing was also recognised as such. Indeed, while ethnic cleansing generally involves forcible expulsion, the two concepts are not inherently identical: while expulsions from home may be considered as a form of ethnic cleansing, the latter notion would appear to cover a wider array of different practices. What is of particular interest here is the fact that, although the list of genocidal acts is fixed, the existing categories can, in principle, be expanded through judicial specification and input. In fact, as a consequence of the Akayesu decision, expulsion from home is now considered in international criminal law as a genocidal act included in the category of ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part’. The ad hoc Tribunals have, moreover, and in similar vein, specified non-lethal acts of genocide and have admitted that genocide also encompasses acts of so-called “slow death genocide”. The ICTY and the ICTR have explained that the notion of “slow death genocide” or “non-killing genocide” is constituted when the conditions of life inflicted on a group may not lead to its immediate physical destruction, but do have an important impact on the survival of the group. This concept was recognised by the ICTR in the Kayishema case:

It is the view of the Trial Chamber that “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” includes methods of destruction which do not immediately lead to the death of members of the group. The Chamber adopts the above interpretation. Therefore the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.

Similarly, the Rutaganda Trial Chamber has affirmed that:

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31 See above p. 104.
32 See for instance Article 6(c)(4) of the Finalized draft text of the Elements of Crimes, UN Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2000/1/Add. 2 (2000).
the deliberate infliction on the group of conditions of life calculated to bring about its destruction in whole or in part, [...] are to be construed as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group, but which are, ultimately, aimed at their physical destruction.\textsuperscript{34}

In light of these judicial findings, it does seem that ethnic cleansing could theoretically be included within the list of genocidal acts. Since the ICTY and ICTR have both, as shall be discussed presently, already legally considered that new acts, beyond those listed in Article II of the Genocide Convention may constitute genocide – notably hate speeches and sexual violence, for instance – it seems persuasive to think that the same principle of modernisation might be extended to the practice of ethnic cleansing too.

5.1.1.1. Modernisation of genocidal acts: the recognition of hate speeches

The question of hate speech and its association with genocide has been widely debated and engaged ever since the drafting of the Genocide Convention in 1948, emerging with particular salience during, and in the wake of, the Akayesu decision. Trial Chamber I of the ICTR was the first international instance to have found that: ‘[...], through his speeches, Akayesu committed the crime of direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute’.\textsuperscript{35}

The judgment delivered by the Akayesu Trial Chamber is of fundamental significance not only because it was the first judgment convicting an accused of direct and public incitement to commit genocide, but also because Akayesu was found guilty on the grounds of his speeches and his words. This decision may not, at first glance, seem all that original or startling: the potential impact of speech and rhetoric as a means of inciting violence has long-since been a commonplace of cultural understanding. What is of crucial importance, however, is the fact that hate speech does not figure in the listings of Article II of the Convention, and there is, indeed, no indication that it may be considered as a genocidal element – Schabas has, with good reason, spotlighted this

\textsuperscript{34} Prosecutor v. George Rutaganda, Case N° ICTR-96-3-T, Judgment, Trial Chamber I, 6 December 1999, para. 52.

\textsuperscript{35} Prosecutor v. Jean-Paul Akayesu, Case N° ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, para. 672.
omission as the Convention’s blind spot.\textsuperscript{36} This is made all the more surprising by the fact that the Secretariat draft had included a specific article on hate speech:

All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.\textsuperscript{37}

The adoption of Article III in the Secretariat draft illustrated the importance of such an offence. Additionally,

In the accompanying commentary, the Secretariat noted that this was not the same as direct and public incitement, which had been provided for as an act of genocide in Article II of the draft. In cases provided for by article III, “the author of the propaganda would not recommend the commission of genocide, but would carry on such general propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light”. According to the Secretariat’s commentary, “Such propaganda is even more dangerous that direct incitement to commit genocide. Genocide cannot take place unless a certain state of mind has previously been created”.\textsuperscript{38}

For the UN Secretariat, hate speech was thus a fundamental act characterising genocide, even more clearly than direct and public incitement to commit genocide. Unfortunately, however, any such reference was excised from the provisions of the final text.

When the ICTR addressed the issue of hate speech in the Akayesu case, it is perhaps unsurprising, therefore, that, whilst recognising a link between hate speech and genocide, it did not condemn the defendant on this count for genocide. For his speeches, Akayesu was convicted of direct and public incitement to commit genocide.\textsuperscript{39} Thus contrary to the Secretariat’s commentary, the Trial Chamber considered that hate speech could only be an act of direct and public incitement to commit genocide and not an act of genocide itself.

\textsuperscript{37} Article III of the first draft of the Genocide Convention prepared by the UN Secretariat in 1947, UN ESCOR, UN Doc. E/447 (1947).
\textsuperscript{38} William A. Schabas, \textit{op. cit.} note 36, p. 163. Footnote omitted.
\textsuperscript{39} See Prosecutor \textit{v. Jean-Paul Akayesu}, Case N° ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, para. 672.
The open interpretation of the ICTR on the issue of hate speech nonetheless remains significant on account of its allowing for prosecution in the context of genocide. With this decision, the Trial Chamber issued a challenge to the established provisions of the Genocide Convention, seemingly employing the “living instrument” principle.\footnote{See Chapter Three on the principle of “living instrument” pp. 63-71.} Until then, the acts constituting genocide were fixed into the Genocide Convention and had not evolved since 1948: this decision of the ICTR marked an important first step in the evolution of the Genocide Convention into an instrument adapted to contemporary exigencies.\footnote{It has to be noted that this evolution was not reaffirmed by the Rome Statute. See subsequent development p. 111.}

That hate speech was judicially included within the category of direct and public incitement to commit genocide may be due to the fact that it is not specifically deemed punishable as an international crime. As the law currently stands, hate speech is only a human rights violation, as illustrated by the case law of the European Court of Human Rights,\footnote{See for example: Sürek v. Turkey (No.1) (Applicant 26682/95) and Sürek v. Turkey (No.3) (Applicant 24735/94), Judgment of 8 July 1999, ECHR 1999-IV.} and it is not recognised as an international crime beyond the regional context. Direct and public incitement to commit genocide, in contrast, is a punishable offence under international law ‘irrespective and regardless of whether it is proscribed under domestic law’.\footnote{Commentary Caroline Fournet in André, Klip and Sluiter Göran (eds.), Annotated Leading Cases of International Criminal Tribunals Volume 17: The International Criminal Tribunal for Rwanda 2003-2004 (Antwerp – Oxford – Portland: Intersentia, 2008), p. 523.} Considering hate speech as direct and public incitement to commit genocide thus serves as a means of ensuring legal justification for punishment in international criminal law. Nevertheless:

Hate speech and direct and public incitement to commit genocide do not correspond to the same criminal conduct. To put it simply, as the law stands today, hate speech is not direct and public incitement to commit genocide. The Law of the Genocide Convention, which is the authoritative text on the matter, is clear and straightforward: direct and public incitement to commit genocide must go beyond the promotion of hatred, it must incite and encourage the perpetration of genocide.\footnote{Ibid.}
Although the Akayesu judgment opened the door to a modern interpretation of genocide, and although hate speech and direct and public incitement to genocide must not be assimilated, a real change nonetheless occurred with the Nahimana et al. judgment.\footnote{Prosecutor v. Ferdinand Nahimana et al., Case No ICTR-99-52-T, Judgment, Trial Chamber I, 3 December 2003.} In this judgment, the Trial Chamber convicted Ferdinand Nahimana for genocide on account of his speeches and – crucially – considered hate speech as an act of genocide \textit{per se} rather than merely as an incitement to commit genocide:

The Chamber notes Nahimana’s particular role as the founder and principal ideologist of R TLM. R TLM was a creation that sprang from Nahimana’s vision more than anyone else. It was his initiative and his design, which grew out of his experience as Director of ORINFOR and his understanding of the power of the media. The evidence indicates that Nahimana was satisfied with his work. In a broadcast on Radio Rwanda on 25 April 1994, he said, “I am very happy because I have understood that RTLM is instrumental in awakening the majority people.” His communications with Dahinden in June 1994 do not indicate that he and Barayagwiza felt otherwise. Although Nahimana disclaimed responsibility for RTLM broadcasting after 6 April, the Chamber considers this disclaimer too facile. Nahimana’s interview on Radio Rwanda took place while the genocide was underway; the massacre of the Tutsi population was ongoing. Nahimana was less actively involved in the daily affairs of RTLM after 6 April 1994, but RTLM did not deviate from the course he had set for it before 6 April 1994. As found in paragraph 486, the broadcasts intensified after 6 April and called explicitly for the extermination of the Tutsi population. The programming of RTLM after 6 April built on the foundations created for it before 6 April. RTLM did what Nahimana wanted it to do. It was “instrumental in awakening the majority population” and in mobilizing the population to stand up against the Tutsi enemy. RTLM was Nahimana’s weapon of choice, which he used to instigate the killing of Tutsi civilians. For this reason the Chamber finds Nahimana guilty of genocide pursuant to Article 6(1) of its statute.\footnote{Id., para. 974.}
By condemning the accused for genocide, the ICTR proceeded to an extensive interpretation of the Genocide Convention, which – as previously mentioned – fails to prohibit hate speech. While this decision can undoubtedly be considered as an ‘improbable interpretation of the Genocide Convention’, it is nonetheless to be welcomed as it does facilitate the recognition of other genocidal acts than those conventionally proscribed. This development seems however to have been ignored by the drafters of the ICC Statute, where hate speech remains absent from the list of genocidal acts. Yet, the literal reproduction of the terms of the Genocide Convention in the ICC Statute did not prevent the ad hoc Tribunals from further extending the enumeration of genocidal acts to include, in particular, rape and other forms of sexual violence.

5.1.1.2. Modernisation of genocidal acts: the recognition of sexual violence

Perhaps one of the most striking developments with regards to the genocidal actus reus is the judicial recognition of rape as an act of genocide, in spite of the conventional silence on the matter:

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and

47 Commentary Caroline Fournet op. cit. note 43.
their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. ⁴⁹

Although rape and other acts of sexual violence were commonly used against the Bosnian population, ⁵⁰ they were first recognised as acts of genocide in the Rwandan context. Preceding even further than in its interpretation of hate speech, the ICTR here considered rape and sexual violence as acts of genocide falling within the ambit of the conventionally qualified act of ‘causing serious bodily or mental harm to members of the group’: ⁵¹

In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process. ⁵²

Where both sexual violence and rape were hereby recognised as genocidal acts causing bodily or mental harm, the Akayesu Trial Chamber went a step further in its consideration that rape could also be seen to constitute an act of genocide in itself, in the same vein as ‘imposing measures intended to prevent births within the group’. ⁵³

[…] the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate. ⁵⁴

These examples relating to rape and sexual violence provide an apt illustration of the quasi-legislative role of the judge in international criminal law. Indeed, although such

⁴⁹ Ibid.
⁵⁰ See for example: Todd A., Salzman, op. cit. note 4, pp. 348-378.
⁵¹ Article II(2)(b) of the Genocide Convention.
⁵³ Id., para. 508.
⁵⁴ Ibid.
acts are not conventionally regarded as genocidal acts, they have nonetheless been qualified as such by the *ad hoc* Tribunals – several decisions having confirmed the *Akayesu* precedent,\(^{55}\) including, for example, that taken by the ICTY in the *Krstić* case:

[...]

serious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgement, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life. In subscribing to the above case law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.\(^{56}\)

The various examples of case law cited over the previous pages clearly illustrate that the Genocide Convention can be interpreted as encompassing acts other than those expressly listed in Article II. The judicial recognition of rape and sexual violence as genocide, although already qualified as crimes against humanity and war crimes,\(^{57}\) arguably acquires particular significance in view of the fact that such evolutions have failed to be incorporated in the Rome Statute. In this context, it could be tendered that the case law will – hopefully – serve as a useful safety net for the future qualification of these acts.

To develop this point further, we may also consider how all other international instances, besides the ICC, legally recognise genocide to include within its scope rape and sexual violence. The International Court of Justice, for instance, in its 2007 judgment concerning *Application of the Convention on the Prevention and Prosecution of Crimes against the Peace*...
of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) clearly indicated that:

There is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group.\(^{58}\)

Viewed from this perspective, it becomes clear how rape and sexual violence are widely recognised – judicially, formally and legally – as acts of genocide. In light of the manner in which the case law of the ICTY and the ICTR has broadly interpreted the framework of genocidal acts to include hate speech, rape and sexual violence, it seems fair to consider that similar possibilities may exist for ethnic cleansing, too – particularly given how the ICTY expressly, and importantly, recognises how the act may amount to genocide.

5.1.1.3. Modernisation of genocidal acts: the recognition of ethnic cleansing

The Nikolić Trial Chamber recognised that in the Yugoslav context ‘the policy of ethnic cleansing took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character’.\(^{59}\) The recognition of ethnic cleansing as a “slow death” genocidal act was, unfortunately, only affirmed by the ICTY. The District Court of Jerusalem, for example, whilst recognising that acts of ethnic cleansing were connected with the commission of genocide, nonetheless concluded that they did not comprise genocidal acts:

The implementation of the “final solution”, in the sense of total extermination, is to a certain extent connected with the cessation of emigration of Jews from territories under German influence.\(^{60}\)

In such a way, the District Court of Jerusalem merely noticed the evolutionary dynamic of Nazi policy, beginning with the plans of resettlement and finishing with the Final


\(^{60}\) Attorney-General of Israel v. Eichmann (District Court of Jerusalem), International Law Reports, 36 (1968), p. 5, para. 80.
Solution – it did not, however, provide a framework for extending the list of genocidal acts so as to explicitly include ethnic cleansing within its orbit.

In fact, whilst not inconceivable, the prospect of an extension of the provisions embodied in Article II along these lines seems somewhat unlikely. Since its adoption, the Genocide Convention has never been modified in order to encompass further acts. The definition of genocide under the ICC Statute is a mere reproduction of Article II of the Convention on the prevention and punishment of the crime of genocide. All of this would appear to point towards the political difficulties involved in any attempt to modernise the Convention. Like hate speech, ethnic cleansing is unlikely to be recognised and appended as a genocidal act per se. Rather than creating a new category of act, however, it is thus more viable to consider whether ethnic cleansing could be encompassed within the existing genocidal actus reus – much as rape and sexual violence have been. Indeed, as affirmed by the Commission of Experts sent to the former Yugoslavia:

“ethnic cleansing” has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. […] Such acts could also fall within the meaning of the Genocide Convention.61

Moreover, in the 1993 Case Concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia Herzegovina and Others v. Yugoslavia), it was considered that acts of genocide included in Article II of the Convention were not limited to:

murder; summary executions; torture; rape; mayhem; so-called ‘ethnic cleansing’; the wanton devastation of villages, towns, districts and cities; the siege of villages, towns, districts and cities; the starvation of the civilian population; the interruption of, interference with, or harassment of humanitarian relief supplies to the civilian population by the international

community; the bombardment of civilian population centres; and the
detention of civilians in concentration camps or otherwise;\textsuperscript{62}

Traced out from this perspective, it seems reasonable to consider ethnic cleansing as potentially coming within the meaning of the Genocide Convention. This being so, it remains to determine which specific category of genocidal act it may be classified as falling under.

Given that it is, at root, perpetrated in order to displace an ethnic group from a given territory, ethnic cleansing could, much like expulsion from home, be qualified as a measure adopted to inflict on the group conditions of life bringing about its physical destruction.\textsuperscript{63} Indeed, by displacing an ethnic group, the powerful collective seeks to destroy traces of the existence of the group on the territory. This idea is reinforced by the fact that the displacement of the ethnic group, whatever the means used for such a result, would always have a physical impact on the survival of the group.

Yet ethnic cleansing is not merely a crime ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, but could also be considered to ‘caus[e] serious bodily or mental harm to members of the group’.\textsuperscript{64} In the \textit{Plavsić} and \textit{Krajišnik} cases, for instance, it was recognised by the ICTY Trial Chamber that:

\begin{quote}
the Bosnian Serb leadership, [...], initiated and implemented a course of conduct which included the creation of impossible conditions of life, involving persecution and terror tactics, that would have the effect of encouraging non-Serbs to leave those areas; the deportation of those who were reluctant to leave; and the liquidation of others. By 31 December 1992, this course of conduct resulted in the death or forced departure of a
\end{quote}

\textsuperscript{63} Article II(c) of the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly Resolution 260 (III).
\textsuperscript{64} Article II(2)(b) of the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly Resolution 260 (III).
significant portion of the Bosnian Muslim, Bosnian Croat and other non-Serb groups from these municipalities.\textsuperscript{65}

Thus ethnic cleansing committed through acts of forced departure from home can cause serious mental or bodily harm, in similar vein to rape and sexual violence.

The fact that ethnic cleansing could viably be included under these two different categories of genocidal acts provides a telling indication of how it might readily be placed within the existing parameters provided by the Convention. Like the \textit{ad hoc} International Tribunal, the International Court of Justice also explained that “ethnic cleansing” could amount to genocide – if classified as a genocidal act:

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 (\textit{dolus specialis}), that is to say with a view to the destruction of the group, as distinct from its removal from the region. [...] In other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. [...]\textsuperscript{66}

Yet, as previously stated, the Rome Statute did not take into consideration the jurisprudential extension of the genocidal acts provided by the \textit{ad hoc} International Tribunals and only reaffirmed the acts considered by the Genocide Convention. It thus seems doubtful that the statutory definition of the genocidal acts would be modified in order to include ethnic cleansing (or rape, sexual violence or hate speech). This state of affairs is regrettable, as a modernisation of the Convention could provide for clearer recognition of such acts and, with regard the specific object of inquiry here, even move


towards a classification of ethnic cleansing. This notwithstanding, it ought to be noted that domestic courts and even international instances including ad hoc Tribunals could still enhance the definition of genocide by adopting a definition of the crime encompassing the genocidal acts determined by the ICTY and the ICTR.

Should one, in light of the analysis presented here, therefore leave aside the ICC’s definition of genocide, it seems that there are very reasonable, even convincing, grounds for arguing that ethnic cleansing can be classified as a genocidal act. That said, it must still be determined whether or not the act also shares the genocidal mens rea. Only by way of a detailed analysis of the genocidal intent is it thus possible to establish whether or not this specific mental element is adapted for a consideration of ethnic cleansing.

5.1.2. ETHNIC CLEANSING AND THE MENTAL ELEMENT OF GENOCIDE

The central importance of the genocidal intent was firmly established by the Krstić case:

As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.67

The mental element of the genocidal acts, or mens rea, revolves primarily around the notion of intent, although it is actually composed of the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’,68 and can only be formed by the union of these elements.69 In order to analyse this mental aspect, the notion of intent

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68 Article II(1) of the Genocide Convention.
shall, in what follows, first be considered independently, then linked to a fuller examination of its supplementary components – the aim being to assess whether the genocidal mens rea might be adapted to the act of ethnic cleansing.

Judgments by the ICTY have illustrated that ethnic cleansing and genocide were, in fact, two crimes requiring intent as a mental element. The Karadžić and Mladić expressed that:

[...] certain methods used for implementing the project “ethnic cleansing” appear to reveal an aggravated intent as, [...] the specific nature of some of the means used to achieve the objective of “ethnic cleansing” tends to underscore that the perpetration of the acts is designed to reach the very foundations of the group or what is considered as such. The systematic rape of women, to which material submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child. In other cases, humiliation and terror serve to dismember the group. The destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of various national components of the population. This intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, form the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.70

Similarly in Rwanda, the Akayesu Trial Chamber considered that:

Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer,

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beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes.\textsuperscript{71}

The intent of the perpetrator is thus largely deduced from the context. Acts of ethnic cleansing could, therefore, be presented as evidentiary elements allowing for the establishment of the genocidal \textit{mens rea}. Before the ICJ, in the \textit{Case concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia Herzegovina and Others \textit{v}. Yugoslavia)}, for example, Bosnia explained that the genocidal intent to destroy a group as such was characterised by the policy of ethnic cleansing.\textsuperscript{72} A similar principle was enounced by the ICJ in its 2007 judgment:

That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (\textit{dolus specialis}) inspiring those acts.\textsuperscript{73}

The genocidal intent can thus to some considerable extent be demonstrated by the occurrence of acts of ethnic cleansing, indicating how this crime could potentially require intent as a mental element. In order to definitively recognise ethnic cleansing as a genocidal act, the specificity of the genocidal \textit{mens rea} and the requirements contributing to its characterisation, have to be analysed. To this end, a detailed excursus will be made here to focus on these specific issues, before then returning to the fuller question of their significance for a classification of ethnic cleansing.

5.1.2.1. The specificity of the genocidal intent

Intent is of cardinal importance in regard to genocide, providing the crime with its acute specificity. As Schabas notes, for instance:

\textsuperscript{71} \textit{Prosecutor \textit{v}. Jean-Paul Akayesu, Case N° ICTR-96-4-T}, Judgment, Trial Chamber I, 2 September 1998, para. 730.


Where the specified intent is not established, the acts remains punishable, but not as genocide. It may be classified as crimes against humanity or it may be simply a crime under ordinary criminal law.\textsuperscript{74}

Dadrian presents along similar lines the view that:

Genocide is the successful attempt by a dominant group, vested with formal authority and/or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision for genocide.\textsuperscript{75}

Intent is thus the core element of the definition of genocide. Without it, genocide cannot be seen to be perpetrated. It is, moreover, considered a unique intent, on account of its expressing the particularities of the crime:

a distinguishing aspect of the crime of genocide is the specific intent (\textit{dolus specialis}) to destroy a group in whole or in part. The \textit{dolus specialis} applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’ It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.\textsuperscript{76}

It seems that this intent is a synonym of \textit{dolus specialis}. For the Sirikira Trial Chamber, however, the concept of \textit{dolus specialis} ought not to be applied, standing, as it does, in contradiction with the object and purpose of the Genocide Convention:

In its Pre-trial Brief, the Prosecution maintains that proof of any of the following three alternative forms of intent satisfies the requirement of

\textsuperscript{74}William A. Schabas, \textit{op. cit.} note 69, p. 214.
\textsuperscript{76}Prosecutor v. Clément Kayishema and Obed Ruzindana, Case N° ICTR-95-1-T, Judgment and Sentence, Trial Chamber II, 21 May 1999, para. 91.
Article 4: (a) the accused consciously desired the acts to result in the destruction, in whole or in part, of the group, as such; or (b) the accused knew his acts were destroying, in whole or in part, the group, as such; or (c) the accused knew that the likely consequence of his acts would be to destroy, in whole or in part, the group, as such.

The Prosecution disagrees with the finding of the Jelisic Trial Chamber that in order to establish the accused’s requisite intent for the crime of genocide, it must be proved beyond reasonable doubt that he “was motivated by the dolus specialis of the crime of genocide”, that is, option (a). The Prosecution maintains that: 1) the dolus specialis requirement reduces the scope of application of the genocide prohibition in a way that undermines the object and purpose of the Statute; 2) the dolus specialis requirement contradicts the Akayesu Trial Judgement; and 3) Article 30 of the ICC Statute, on the mental element of the crimes enumerated therein, supports the Prosecutor’s interpretation of Article 4.77

Having to demonstrate that the genocidal intent is a dolus specialis would reduce the scope of the Convention and thus limit prosecutions for genocide. In order to avoid complication, the Jelisić Appeals Chamber therefore decided to understand it as meaning special intent:

Read in context, the question with which the Judgement was concerned in referring to dolus specialis was whether destruction of a group was intended. The Appeals Chamber finds that the Trial Chamber only used the Latin phrase to express specific intent as defined above.78

No other Trial Chambers have attempted to differentiate special intent from dolus specialis, and both terms are now understood as meaning the same.79 The genocidal

77 Prosecutor v. Duško Sirikira et al. (“Keraterm Camp”), Case N° IT-95-8, Judgement on Defence Motions to Acquit, Trial Chamber III, 3 September 2001, para. 27.
intent is, in other words, a special intent, which can thus be understood as a *dolus specialis*.

It has to be noted at this point that when intent is present, an actual destruction of one of the protected groups by the Genocide Convention need not necessarily occur. Demonstrable intent to destroy is sufficient in order to prosecute the perpetration of acts of genocide, and can even permit the avoidance of mass violence when proofs of the genocidal intent are reunited before the beginning of the physical destruction:

In view of the particular intent requirement, which is the essence of the crime of genocide, the relative proportionate scale of the actual or attempted physical destruction of a group, or a significant section thereof, should be considered in relation to the factual opportunity of the accused to destroy a group in a specific geographical area within the sphere of his control, and not in relation to the entire population of the group in a wider geographical sense.  

During the *travaux préparatoires* for the adoption of the Genocide Convention, discussions arose concerning the possibility of a negligent or premeditated intent. Premeditation implies, clearly, a degree of planning or preparation on the commission of a crime. The drafters of the Convention did not have the objective to extend intent to premeditation. The ICTR recognised, however, that:

[...] the Trial Chamber opines that for the crime of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent.  

“Intent” thus has to be present as a precursor to the commission of genocidal acts. The perpetrator, however, does not need to have necessarily planned his or her actions. The difference between premeditation and intent beforehand seems to be limited, but the presence of intent before an actual destruction permits to consider some facts to be


evidence of the genocidal intent. With regard to a negligent intent, such a concept is impossible in the case of genocide, as the crime is expressly aimed at the destruction of groups. This understanding illustrates that if the genocidal intent could also become the requirement of ethnic cleansing, the latter cannot be committed negligently or recklessly.

The genocidal intent is thus interpreted as a particular characteristic because ‘a specific intent offence requires performance of the actus reus but in association with an intent or purpose that goes beyond the mere performance of the act’. The ICTR has summarised this specific element:

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”.

This special intent has also been detailed by the International Law Commission:

The prohibited acts […] are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.

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Yet though so clearly the case that genocide cannot be constituted without this special intent, the task of demonstrating the mental element is complicated and complex. The ICTR, for example, has explicitly admitted the difficulties involved:

on the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia also stated that the specific intent of the crime of genocide:
“may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct”.

Thus, in the matter brought before the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber, in its findings, found that:
“this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group”.

The relevance of this decision lies in its understanding of the intractable aspect of the notion of intent, and in the information it gives concerning what can help to secure an effective demonstration. Evidence of intent can be constituted by different factors which have a destructive effect: if a perpetrator shows by his or her actions destructive sentiments against members of a special group, intent can then be said to be proven.

The specific intent behind the commission of genocide thus resides in the clear objective to destroy a human group. If ethnic cleansing is to be classified as a genocidal act, it must then be seen to encompass not only the *mens rea* but also this specific intent of destruction.

5.1.2.1.1. Ethnic cleansing and the genocidal motives

The commission of ethnic cleansing appears to require discriminatory motives, as has been explained by several commentators. Bell-Fialkoff, for example, has affirmed that the perpetration of the act is driven by ‘religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these’. 86 A similar definition has been provided by Petrovic, who considers ethnic cleansing as being committed ‘on the basis of religious, ethnic or national origin’, 87 while Mazowiecki asserts that it is grounded on ‘ethnic criteria’ only. 88 The demonstration that a population or human group was targeted on account of such characteristics or common identities thus seems to be a necessary requisite to characterise an act as ethnic cleansing. This assertion finds some credence in the case law, which specified that ‘the implementation of that discriminatory policy’ has to be known as ethnic cleansing. 89 It nevertheless remains, however, to ascertain whether the discriminatory motives of ethnic cleansing are compatible with those of genocide.

The *Krstić* Trial Chamber noted the relationship between genocide and ethnic cleansing within the specific context of this requirement of discriminatory motives:

As the ILC noted:

[...] the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The [...] act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group.

As a result, there are obvious similarities between a genocidal policy and the policy commonly known as “ethnic cleansing”.

The determination of intent is thus not as strict under the Genocide Convention as it initially appears, and can, in fact, be demonstrated via the revelation of discriminatory grounds. Much like ethnic cleansing, genocide too requires certain discriminatory motives as part of its intent – providing another marker of the apparent closeness between the two acts.

The recognition of genocidal motives was not unanimously admitted during the drafting of the Genocide Convention. Delegates argued that ‘it was the fact of destruction which was vital, whereas motives were difficult to determine’. The United Kingdom, meanwhile, actively sort to have reference to motives deleted. According to its representative:

the concept of intent had already been expressed at the beginning of the article. Once the intent to destroy a group existed, that was genocide, whatever reasons the perpetrator of the crimes might allege. The phrase was not merely useless; it was dangerous for its limitative nature would enable those who committed a crime of genocide to claim that they had not committed that crime ‘on grounds of’ one of the motives listed in the article.

Panama, by way of contrast, considered that ‘it was a grave mistake to omit statement of motives, as the nature of the crime which it was intended to prevent and to punish would thus be obscured’. In an attempt to provide a satisfactory compromise,

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92 UN Doc. A/C.6/SR.75 (Fitzmaurice, United Kingdom).
93 UN Doc. A/C.6/SR.75 (Aleman, Panama).
Venezuela introduced an amendment for the use of the expression “as such” to summarise all the motives of the crime of genocide. It explained that such a proposal:

omitted the enumeration … but re-introduced the motives for the crime without, however, doing so in a limitative form which admitted of no motives other than those which were listed. The aim of the amendment was to give wider powers of discretion to the judges who would be called upon to deal with cases of genocide. The General Assembly had manifested its intention to suppress genocide as fully as possible. The adoption of the Venezuelan amendment would enable the judges to take into account other motives than those listed in the Ad Hoc Committee’s draft.94

Mr. Perez Perozo further affirmed that:

the enumeration of motives would be a powerful weapon in the hands of guilty parties and would help them to avoid being charged with genocide. […] Defendants would maintain that the crime has been committed for other reasons than those listed in Article II. […] It was sufficient to indicate that intent was a constituent factor of the crime.95

This amendment was actively debated in the Sixth Committee. Jean Spiropoulos, for instance, stated that:

the adoption of the Venezuelan […] amendment would mean, therefore, that it was decided to include the motives in the definition but not to enumerate them.96

The use of the expression “as such” was ultimately adopted after the fashion of the Venezuelan proposal, and has subsequently become a fundamental element of the genocidal intent – as demonstrated by scholars and the ad hoc International Criminal Tribunals alike. Schabas, for example, admits that:

94 UN Doc. A/C.6/SR.77 (Pérez-Perozo, Venezuela).
95 UN GAOR C.6, 76th meeting (1948), pp. 124-125 (Perez Perozo, Venezuela).
96 UN Doc. A/C.6/SR.76 (Spiropoulos, Greece).
There is no explicit reference to motive in article II of the Genocide Convention and the casual reader will be excused for failing to guess that the words ‘as such’ are meant to express the concept.  

Similarly, Tournaye explained that without a reference to motive, ‘the term as such would otherwise have no meaning’. The jurisprudence of the ICTY followed this interpretation, the Krstić Trial Chamber providing a good illustration with its explanation that ‘where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime’. The Jelisić Appeals Chamber also clearly stated that:

As to proof of specific intent, it may, in the absence of direct explicit evidence, 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.

This interpretation of the genocidal intent relying on motives was also recognised by the ICTR:

The Appeals Chambers of the International Tribunal and the ICTY also confirmed that in the absence of explicit, direct evidence, specific intent may be inferred from other facts, such as the general context and the perpetration of other acts systematically directed against a given group. Such an approach does not imply that the guilt of an accused may be inferred only from his affiliation with “a guilty organisation.”

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97 William A. Schabas, op. cit. note 69, p. 245.
It is clearly recognised by the jurisprudence of both *ad hoc* Tribunals that when the genocidal intent cannot be directly demonstrated, it can be determined by the motives leading to the destruction of the entire group or of some of its members. Indeed, for the recognition of genocide, the motivation behind the actions is more important than the physical outcome, which does not constitute a proof of the genocidal intent. Acts perpetrated with intent to destroy a group, even if they do not necessarily involve actual killings, would be qualified as genocide, whereas murders without intent would not. Extrapolating this principle, acts of ethnic cleansing perpetrated with genocidal intent could therefore be qualified as genocide.

The office of the prosecutor of the ICTY and the ICTR has defined the genocidal intent as being composed of three different alternatives. First of all, intent is demonstrated when the perpetrator consciously desires the result of the destruction, in whole or in part, of the group as such. Secondly, the intent can also be determined by the fact that the perpetrator knew that his or her acts were destroying, in whole or in part, the group as such. Finally, the genocidal intent is also present when the perpetrator knew that the acts were going to result in the destruction, in whole or in part, of the group as such. Thus the demonstration of the genocidal intent is not fixed, and depends of different factors, *i.e.* on discriminatory motives, similarly to ethnic cleansing.

The fact that both crimes require discriminatory motives does not, however, signal that they share the same mental element. During the Milošević trial concerning the atrocities committed in Kosovo, Louise Arbour, prosecutor of the International Criminal Tribunal for the former Yugoslavia, indicted Milošević and other political leaders for acts of ethnic cleansing but did not qualify them as genocide:

> During their offensives, forces of the FRY and Serbia acting in concert have engaged in a well-planned and co-ordinated campaign of destruction of property owned by Kosovo Albanian civilians. Towns and villages have been shelled, homes, farms, and businesses burned, and personal property destroyed. As a result of these orchestrated actions, towns, villages, and entire regions have been made uninhabitable for Kosovo Albanians. Additionally, forces of the FRY and Serbia have harassed, humiliated, and degraded Kosovo Albanian civilians through physical and verbal abuse. The Kosovo Albanians have also been persistently subjected to insults, racial

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102 *Prosecutor v. Goran Jelisić (“Brčko”),* Case No IT-95-10-PT, Pre-Trial Brief, Trial Chamber, 19 November 1998, para. 3.1, pp.7-8.
slurs, degrading acts based on ethnicity and religion, beatings, and other forms of physical mistreatment.

The unlawful deportation and forcible transfer of thousands of Kosovo Albanians from their homes in Kosovo involved well-planned and co-ordinated efforts by the leaders of the FRY and Serbia, and forces of the FRY and Serbia, all acting in concert. Actions similar in nature took place during the wars in Croatia and Bosnia and Herzegovina between 1991 and 1995. During those wars, Serbian military, paramilitary and police forces forcibly expelled and deported non-Serbs in Croatia and Bosnia and Herzegovina from areas under Serbian control utilising the same method of operations as have been used in Kosovo in 1999: heavy shelling and armed attacks on villages; widespread killings; destruction of non-Serb residential areas and cultural and religious sites; and forced transfer and deportation of non-Serbian populations.

This position illustrates how difficult it is for international instances to have a legal understanding of ethnic cleansing. Schabas likewise accepts that genocide and ethnic cleansing are distinct acts specifically because they do not share the same mens rea. He considered that the intent behind acts of ethnic cleansing is the forced displacement from a territory and not the intent to destroy the group. He went further holding that although both crimes could possibly have the same consequences – the group displaced would cease to exist because it has lost all its religious, cultural, economic and political benchmarks – they do not share the same mental element. In order to determine whether intent or knowledge is more adapted to ethnic cleansing as mental element, the relationship between both must first be considered.

5.1.2.1.2. Requirement of a plan

Both Lemkin in 1944 and the ad hoc International Tribunals in subsequent decades have recognised that genocide could not have been committed without knowledge of a

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103 Prosecutor v. Slobodan Milošević and others (“Kosovo, Croatia and Bosnia”), Case No. IT-99-37, Initial Indictment, Trial Chamber, 22 May 1999, paras 34-35.
104 William A. Schabas, op. cit. note 1, p. 295.
105 Ibid.
If, besides intent, knowledge of a plan also has to be demonstrated this will not simplify the burden of proof of ethnic cleansing – if classified as a genocidal act. As Schabas notes, this plan requirement was necessary:

because of the scope of genocide, it can hardly be committed by an individual, acting alone. Indeed, while exceptions cannot be ruled out, it is virtually impossible to imagine genocide that is not planned or organised either by the State itself or by some clique associated with it.\textsuperscript{107}

Yet the ICTR rightly specified that a full knowledge of the plan was not required:

it is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation. Morris and Scharf noted that “it is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime.” They suggested that “it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy.” The Chamber concurs with this view.\textsuperscript{108}

It thus seems clear that although individual perpetrators do not need to participate in conceiving the genocidal plan, they remain liable if they commit genocidal acts in knowledge of this plan. Yet the requirement of knowledge of a plan should not become a condition of genocide. As it stands, it is already difficult to demonstrate intent – if knowledge of a plan were also to become a requisite, prosecution for genocide would be rendered even more difficult and complicated, with convictions limited on the grounds that perpetrators who partook of genocidal acts without being aware of any overarching plan could not be prosecuted.

Inasmuch as this applies to genocide, it also extends to ethnic cleansing. Working on the same principles, it would be true to say that perpetrators of acts of ethnic cleansing would remain unpunished if it were not demonstrated that they knew that their


\textsuperscript{107} William A. Schabas, \textit{op. cit.} note 69, p. 207.

\textsuperscript{108} \textit{Prosecutor v. Clément Kayishema and Obed Rugandana}, Case N° ICTR-95-1-T, Judgment and Sentence Trial Chamber II, 21 Mai 1999, para. 94.
such a case is theoretically possible. The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the ad hoc committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.  

It is therefore possible – and recognised by the ad hoc Tribunals as such – that an individual can commit genocide by himself without any support. Working on this basis, the same would be true for perpetrators of ethnic cleansing who, acting individually and without knowledge of a plan, would still be liable for prosecution.

The distinction between the mental element of genocide and the mental requirement of crimes against humanity was, however, complicated by the Akayesu Trial Chamber:

With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.  

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This statement clearly explicates that the mere knowledge of the destruction of a group in whole or in part is enough to constitute genocide. This forges a link between genocide and crimes against humanity, as intent is no longer required where knowledge can be demonstrated. Such a decision is troublesome, and largely inappropriate, in that it confuses genocide and crimes against humanity, which ought to be distinguished on the ground that, in theory, they do not prohibit the same offences and because they do not share the same requirements of commission.\footnote{See Chapter Six pp. 175-213 for an analysis of crimes against humanity.}

A similar interpretation was likewise adopted by the ICC:

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.\footnote{Draft Elements of Crimes, Preparatory Commission of the International Criminal Court, June 2001, Article 6(3).}

On a case-by-case basis the International Criminal Court is set on deciding which level of mental element is required. On occasion, knowledge will be an adequate proof as demonstrated by the Akayesu Trial Chamber.\footnote{Prosecutor v. Jean-Paul Akayesu, Case N° ICTR-96-4-T, Judgment and Sentence, Trial Chamber I, 2 September 1998, para. 520.} This new consideration of the mental element of genocide could complicate the determination of the corresponding aspect of ethnic cleansing, posing the question: does ethnic cleansing require only intent, or both intent and knowledge? Whatever the interpretation of the genocidal intent, this mental element will remain applicable to ethnic cleansing as both intent and knowledge are compatible therewith.\footnote{See Chapter Six pp. 195-199 for an analysis of knowledge.}

The International Criminal Court has closely studied the question of the relationship between intent and knowledge. Its Article 30(1) explained, perhaps surprisingly, that:
unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.115

For the ICC, intent and knowledge are elements constituting the genocidal mens rea. In the Genocide Convention, however, which includes the definition of genocide applied by the Rome Statute, knowledge is not considered. It is therefore difficult to comprehend the reasoning behind the statement of the ICC that both knowledge and intent are compulsory, contravening the conventional definition of genocide.

If, as has been established, genocidal intent is the most important requirement of genocide, it ought nonetheless to be born in mind that this does not constitute the entire mental element of the crime. It is rather provided that the act must embody the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.116 When such actions, however odious, are committed without the intent to destroy a particular human group, genocide cannot be considered as perpetrated, even if all the other conditions of the crime are reunited. What this means in effect is that the killing of thousands of people without the demonstrable intent to destroy would be qualified as homicide or as a crime against humanity. Similarly, or rather vice versa, the killing of one single individual could constitute an act of genocide, if the presence of the genocidal intent were to be proven. This intent must, however, be directed against the group. The individual has to be targeted because of his membership to the group and not for any other reason. Thus the demonstration of intent is not enough in order to be qualified as genocidal intent. The determination that the person was targeted because of his belonging to the specified group – that the intent was directed against the group or a part of it – is also compulsory. The Karadžić and Mladić Trial Chamber affirmed this specificity of the genocidal intent:

Genocide requires that acts be perpetrated against a group with an aggravated criminal intent, namely, that of destroying the grouping whole or in part. The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts

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115 Article 30(1) of the Rome Statute.
116 Article II (1) of the Genocide Convention.
enumerated in the definition was perpetrated with a specific intent suffices.\textsuperscript{117}

Yet the Trial Chamber also specified that:

The intent which is peculiar to the crime of genocide need not be clearly expressed. […] The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group – acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.\textsuperscript{118}

The interpretation of genocide provided by the ICTY in the Krstić case could also be seen as extending the genocidal intent,\textsuperscript{119} although this maybe pushing the interpretative parameters a little far. In Srebrenica, certainly, it was not the entire population that was destroyed; only the males of military age were killed, whilst the women, elderly, and children were expelled from the territory:

The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.\textsuperscript{120}

The Krstić Trial Chamber considered that the perpetrators knew that acts of killings and forcible transfer would lead to a destruction of the group, but that the acts were not committed with this specific intent.

Knowledge and intent ought not to be confused as they constitute two different \textit{mens rea}. Intent is specific to genocide and knowledge is specific to crimes against

\textsuperscript{118} id., para. 94.
\textsuperscript{119} See Prosecutor v. Radislav Krstić (“Srebrenica-Drina Corps”), Case No IT-98-33-T, Judgment, Trial Chamber I, 2 August 2001, para. 595.
\textsuperscript{120} Ibid.
humanity. By affirming that the Serbian forces knew that the acts would lead to a destruction of the group, rather than recognising that they had the intent to destroy, the Trial Chamber demonstrated its lack of conviction that genocide was perpetrated. The use of the word “knew” illustrates that the crimes committed in Srebrenica fell short of the necessary intent to be qualified as genocide. This argument was presented by the defence, who explained that the massacres in Srebrenica were not genocide, and this formed the most significant point of disagreement in this case between the defence and the Chamber. Indeed, the defence argued that:

had the VRS actually intended to destroy the Bosnian Muslim community of Srebrenica, it would have killed all the women and children, who were powerless and already under its control, rather than undertaking the time and manpower consuming task of searching out and eliminating the men of the column.122

It went further, explaining that:

the VRS would have killed the Bosnian Muslims in Zepa, a neighbouring enclave, as well, if its intent was to kill the Bosnian Muslims as a group. Furthermore, the Defence claims that none of the military expert witnesses “could attribute the killings to any overall plan to destroy the Bosnian Muslims as a group”. To the Defence, a true genocide is almost invariably preceded by propaganda that calls for killings of the targeted group and nothing similar occurred in the present case. Inflammatory public statements made by one group against another – short of calling for killings - are common practice in any war and cannot be taken as evidence of genocidal intent. […] The Defence argues that, despite the unprecedented access to confidential material obtained by the Prosecution, none of the documents submitted, not even the intercepted conversations of VRS Army officers involved in the Srebrenica campaign, show an intent to destroy the Bosnian Muslims as a group. The Defence contends that the facts instead prove that the VRS forces intended to kill solely all potential fighters in order to

121 This interpretation is independent from the position of the International Criminal Court. See above pp. 134-135.
eliminate any future military threat. The wounded men were spared. More significantly, 3,000 members of the column were let through after a general truce was concluded between the warring parties. The Defence concludes that the killings were committed by a small group of individuals within a short period of time as a retaliation for failure to meet General Mladic’s demand of surrender to the VRS of the BiH Army units in the Srebrenica area.123

In order to defend its position, the Trial Chamber reaffirmed that ‘the Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4’.124 However, this affirmation does not indicate whether or not the destruction of some members of the group was perpetrated with intent. Thus in an attempt to definitively conclude that genocide was committed rather than crimes against humanity, the Trial Chamber asserted that:

Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potocari and the principal mosque in Srebrenica soon after the attack.125

In order to foresee the application of the genocidal intent for acts of ethnic cleansing, the German Constitutional Court, meanwhile, stated in a decision of December 2000 that:

The statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group […] the intent to destroy the group […] extends beyond physical and biological extermination […]. The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of the members of the group.126

123 Ibid.
124 Id., para. 560.
125 Id., para. 595.
The German Constitutional Court interpreted genocide with an extensive scope in order to permit the recognition of ethnic cleansing. Indeed, it considered that the intent to destroy the group has to be extended beyond physical and biological destruction.

The specificity of the genocidal intent is thus marked by its goal – its objective to destroy. For ethnic cleansing to be classified as a genocidal act, it must therefore also embody this intent, and it is to this aspect that attention shall now be turned.

5.1.2.1.3. To destroy

Lemkin considered that genocidal destruction could take place in the political field, social field, cultural field, economic field, biological field, field of physical existence, religious field and the field of morality.\(^1\) The drafters of the Genocide Convention,\(^2\) by way of contrast, apparently closed off such broad possibilities and consciously limited its application to the pressing issues of physical and biological elements. The ratification of the convention by as many states as possible was, indeed, considered of primary importance, and limiting the different types of genocide was seen as a way of helping to secure this:

The drafters [of the Convention] were diplomats who represented states, and these states had different interests so far as specific provisions of the convention were concerned. At the same time, as diplomats, the drafters had to find ways to produce an instrument that would be acceptable to a large number of states. In fact, the question of what would be acceptable to states was at all times a matter of great concern to the drafters. Achieving that goal meant that compromises of various sorts had to be reached, and these compromises did not always reflect the best possible choice among competing principles and ideas, but rather the most acceptable choice.\(^3\)

Genocidal acts have to be perpetrated in order to physically or biologically destroy a human group. “Destroy”, as defined by the Oxford English Dictionary, is composed of different possible interpretations. The most appropriate – certainly for our concern – are ‘to put out of existence (living beings); to deprive of life; to slay, kill’ and ‘to bring to

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\(^1\) Raphael Lemkin, *op. cit.* note 20, pp. xi-xii.


nought, put an end to; to do away with, annihilate (any institution, condition, state, quality, or thing immaterial)’. \(^{130}\)

The first understanding of destroy associates the notion with the verb “to kill”. The Genocide Convention itself illustrates this interpretation in that the first listed genocidal act is that of killing. \(^{131}\) Destruction can, however, be achieved by various other means, including torture, enslavement or rape. \(^{132}\) Nor is it the case that destruction is only perpetrated in the sense of a deprivation of life. For example, the systematic and repeated rape of Tutsi women could lead to the slow destruction of the ethnic group on account of an inability to conceive purely Tutsi babies anymore. The first definition of “destroy” thus does not cover all possibilities of the genocidal acts.

The second definition of destroy – ‘to bring to nought, put an end to; to do away with, annihilate (any institution, condition, state, quality, or thing immaterial)’ \(^{133}\) – in referring largely to institutions or states, seems, at first sight, to perhaps have limited application at the level of the individual. The term “annihilate”, however, referred to in this definition, is often used as a synonym of “destroy”, specifically ‘to destroy all trace of’. \(^{134}\) In this sense, the latter definition may appear the more appropriate, as it does not indicate that “destroy” be merely interpreted as “to kill”, but rather conveys something of its broader orbit. By the same token, however, one might make the case that “to remove” be regarded an apt synonym for destroy. Such considerations may have significant implications for an understanding of this aspect of ethnic cleansing.

Taken in the fundamental sense of a removal of a population from a territory, \(^{135}\) ethnic cleansing does not necessarily carry a sense of destruction. The motive for the removal could be economic – the territory welcoming the ethnic group is no longer viable in order to satisfy the needs of the group – or administrative – the group has to be displaced in order to secure a better adequacy between a political boundaries and its ethnicity – or even political. Thus states ‘can physically eliminate national minorities either by removing peoples to fit existing nation-state boundaries or by adjusting

\(^{130}\) Oxford English Dictionary.

\(^{131}\) Article II(2)(a) of the Convention for the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly Resolution 260 A(III) on the 9th December 1948.


\(^{133}\) Oxford English Dictionary.

\(^{134}\) Thesaurus reference.

\(^{135}\) See Chapter Two pp. 41-43.
international boundaries to fit existing demographics’. In such cases the groups are not removed in order to be eliminated.

Yet with the implication of destruction, “to remove” does not solely signify that the creation of a territory free of a particular ethnicity was foreseen. “To remove” encompasses as its ultimate goal the forcible eradication of the ‘other’ ethnic group – saying that ethnic cleansing only seeks displacement of people is misleading, as “to remove” is a synonym of “to destroy”.

The connotation of destruction as a requirement of ethnic cleansing draws the act close to genocide. Whilst in theory a neat distinction can be cited between ethnic cleansing as a policy geared towards displacement, and genocide as a policy of extermination, the reality is more complex, and the lines between “removal” and “destruction” frequently become blurred. In the Srebrenica case, for example, the Trial Chamber, in concluding that genocide had occurred, ‘viewed the destruction of the Srebrenica Muslims in a figurative sense, apparently contradicting its affirmation of the literal meaning of “destroy”’. The Trial Chamber itself held that:

the elimination of virtually all the men has made it almost impossible for the Bosnian Muslim women who survived the take-over of Srebrenica to successfully re-establish their lives. Often, as in the case of Witness DD, the women have been forced to live in collective and makeshift accommodations for many years, with a dramatically reduced standard of living. The pain and fear associated with having so many loved ones torn away makes it very difficult for those who survived to think of returning home (even if that were possible in practical terms) or even to exist as a cohesive family unit. In Witness DD’s words: …sometimes I also think it would be better if none of us had survived. I would prefer it. This aptly illustrates how ethnic cleansing could have the same consequences as genocide, ultimately leading to the destruction of the group. From this point of view it is thus quite conceivable to legally consider ethnic cleansing as a genocidal act.

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Before drawing any hasty conclusions, however, it ought to be born in mind that ethnic cleansing could be a crime related to genocide and sharing its mental elements, without necessarily being a genocidal act in and of itself. In this case, the demonstration of intent for both crimes would be different. The intent behind genocide would remain the destruction of the group, whereas the intent of ethnic cleansing would be the total removal of the population from a territory through whatever means necessary. Where the distinction becomes porous is when, in order to remove the population from a territory, the dominant group resorts to physical annihilation. Though culminating in genocidal effect, such crimes could, in this case, still be classified as ethnic cleansing if the goal behind the destruction was not the extermination of the group but rather their forcible removal from the given territory. Under such circumstances, ethnic cleansing and genocide come close to bleeding together: it nonetheless remains, however, that ethnic cleansing cannot be classified as genocide if the intent behind the removal of the population is not total destruction. Such a conclusion was drawn by the International Court of Justice in its 2007 judgment concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro):

Neither the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: 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, nor is such destruction an automatic consequence of the displacement. […] As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’” (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet “[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.” (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) […] In fact, in the context of the
Convention, the term “ethnic cleansing” has no legal significance of its own.\[140\]

Ethnic cleansing could, however, also encompass the genocidal intent without being categorised as a genocidal act. During the Second World War, for instance, the Nazi regime could have been seen to be moving towards the annihilation of the Jews via their earlier plans for mass resettlement. Such a verdict, drawn along the lines of the “intentionalist” paradigm, is founded on the view that the Nazis intended, from the very off, to exterminate the Jews – that this was a fundamental and irresolute conviction.\[141\] According to this view, although the annihilation of the Jews could be seen as a way of creating German Lebensraum, the aim behind such actions was genocidal – considered responsible for the signature of the Treaty of Versailles and as “enemies of the German state”, the Jews had, in line with Hitler’s ideology, to be completely exterminated, and the intent behind the initial resettlement plans was already physical destruction.

This analysis demonstrates that ethnic cleansing can be perpetrated in order to fulfil the genocidal intent, \textit{i.e.} the intent to destroy. However, it does not mean that ethnic cleansing is always committed in order to fulfil it. In the former Yugoslavia, acts of ethnic cleansing were conducted in order to achieve the creation of a “Greater Serbia” – Milošević did not use ethnic cleansing to exterminate a particular ethnic group, contrary to Hitler. It was rather the case that all human groups, which were not wanted on the Serbian territory, were targeted.

Genocide is always perpetrated in order to destroy the groups. Ethnic cleansing is perpetrated in order to remove a population or a group from a given territory, even if in some occasion it can be used in order to achieve the genocidal goal \textit{i.e.} the destruction of the group. Thus ethnic cleansing cannot be included within the genocidal acts when it does not share the genocidal intent. In order to affirm the genocidal intent as the mental element of acts of ethnic cleansing, the prosecutor will have to clearly demonstrate that behind the objective of removing the ethnic population from the territory, the real intent of the perpetrator was the annihilation of this population. Without the intent to annihilate a human group, leading to its complete destruction as well as to the complete

destruction of all proof of its existence, genocide is not perpetrated and so, by extension, ethnic cleansing cannot, if classified as an act of genocide, be committed either.

From all this it follows that despite considerable overlaps, ethnic cleansing does not strictly fulfil the genocidal intent requirement, indicating that it ought not be strictly classified as genocide. That said, the act could still be defined by other requirements of the genocidal *mens rea*, which would explain why this crime was often only defined as encompassing the genocidal characteristics. It thus seems advisable, in the next step, whether, like genocide, ethnic cleansing also targets whole or partial human groups.

5.1.2.2. The genocidal *mens rea*

5.1.2.2.1. In whole or in part

The expression “in whole or in part” implies that the group does not have to be totally destroyed to become a victim of genocidal acts. Its partial destruction is enough in order to evidence such acts. The interpretation of part of the group could be transposable to ethnic cleansing, although in order to specifically apprehend this expression, it must first be analysed a little more closely.

“In whole or in part” has been widely discussed during the drafting of the Genocide Convention, and by the *ad hoc* Tribunals. The proposition that genocide may be perpetrated against an entire group or simply against a part of a group was suggested by Resolution 96(I) of the General Assembly, when it affirmed that: ‘many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part’. The Genocide Convention reaffirmed the notion of partial genocide. The expression “in part” thus signifies that genocide need not necessarily encompass large-scale mass destruction, but that the destruction of a substantial part of the group can be considered sufficient to see an act qualified as genocide:

the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial; the

Convention is intended to deal with action large number, not individuals even if they happen to possess the same group characteristics. It will be up to the courts to decide in each case whether the number was sufficiently large.143

This definition, although applied to genocide, could also have been enounced for ethnic cleansing. The displacement of some members of a particular ethnic group may, similarly, be considered enough to be qualified as an act of ethnic cleansing. Thus it is not solely the number of victims that has to be taken into account in order to establish whether or not ethnic cleansing was perpetrated: the destruction of a single individual, or a selectively targeted part of the group can be deemed sufficient evidence.

The notion “in part” is difficult to grasp as it cannot be reduced to a quantitative determination. It would, of course, be terribly inhumane to impose any kind of normative benchmark figure to qualify the “in part” element of the act. To avoid a quantitative determination of a partial destruction, both the ad hoc International Tribunals and scholars have used three different interpretations of this notion: substantial, sub group and significant part of the group.

Such determinations are similarly difficult to ascertain as, again, they cannot be determined purely by number but rather involve more complex factors. The ICTY shared this view when it has declared that a substantial part did not necessarily involve a “very important part”:

From that point of view, the Trial Chamber considered it not necessary for the accused to have had the intention to perpetrate crimes over a very broad geographic area, or that he had the intention to eliminate a very substantial – of course, it must be substantial – part of that population.144

With this declaration, the Trial Chamber expressed that genocide could be committed against a group on a limited geographical region. Indeed, in all its judgements, the ICTY considered municipalities or regions but never considered the former Yugoslavia.


as a whole. When the intent of the alleged perpetrator to destroy members of the group is demonstrated by different criteria and data, and even if he or she did actually only physically suppress one member of the targeted group, this could potentially constitute genocide.

For Tournaye, the ICTY not only created the notion “substantial destruction” but also the concept of “sub group”. With the notion of “sub group”, the Krstić Trial Chamber relied on the intent of the perpetrator. If the perpetrator considered its victims as part of a “group as such”, a crime of genocide was constituted. For example, the Trial Chamber used the term “sub group” to characterise ‘the Bosnian Muslims in Srebrenica, perceived by the perpetrators of the crime as referring to an entity to be eliminated as such’. Both understandings of partial destruction could be adopted for ethnic cleansing as it is the intent of the perpetrators and not the actual number of victims which is determinative. A further variant of the concept of partial genocide was developed in the Jelisić case – that of significant genocide or selective part of the group:

Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.

If a significant part of the group is destroyed, genocide can be constituted. Significant is different from substantial in that it is a qualitative rather than quantitative category. Significant part means that if influential members of the group, or their political and religious leaders, are targeted, genocide can be perpetrated, irrespective of their number. During the Second World War, for example, the interdiction imposed on Jews to exercise high rank professions like bankers, teachers and judges could have been qualified as ethnic cleansing because of the influence of these individuals on the

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146 Cécile Tournaye, op. cit. note 98, p. 460.
147 Ibid.
survival of the group. The prosecutor in such a case merely has to demonstrate the importance of this destruction for the life of the group. The Commission of experts established by the Security Council concluded along similar lines:

If essentially the total leadership of a group is targeted, it could also be amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others – the totality per se may be a strong indication of genocide regardless of the actual number killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group.

During the debates for the establishment of an International Criminal Court, genocide was interpreted as being a crime seeking the destruction of ‘more than a small number of individuals who are members of a group’. This interpretation seems misconceived because it understands intent as meaning the destruction of numerous people, whereas, as demonstrated, the destruction of a small group of persons can constitute genocide. A large destruction of members of the group is not a required condition under the Genocide Convention. With this interpretation, the International Criminal Court is applying a narrow-minded interpretation of genocide which could be reducing its effectiveness. Fortunately, Article 6(a)(1) to Article 6(e)(1) of the Elements of Crimes of the International Criminal Court provide that the acts of genocide can be committed against ‘one or more persons’.

This aspect of the interpretation of genocide provided by the Rome Statute can serve as a useful starting point in order to interpret ethnic cleansing. Recognising that ethnic cleansing can be perpetrated via the targeting of a single individual would help facilitate swifter recognition, action and prosecution, hopefully staving off the threat of subsequent escalations. Yet in order to conclude that ethnic cleansing is a genocidal act, its group requirement must also match that of genocide – a factor which initially seems somewhat dubious in light of its apparent limitation to protecting ethnic groups:

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151 UN Doc. A/AC.249/1998/CRP.8, p. 82.
152 See Article II of the Genocide Convention.
153 Article 6(a)(1) to Article 6(e)(1) of the Elements of crimes under the International Criminal Court.
“ethnic cleansing is a practice which means that you act in such a way that, in a given territory, the members of a given ethnic group are eliminated, aiming that a given territory be “ethnically pure”, in other words that that territory would contain only members of the ethnic groups that took the initiative of cleaning the territory” [...].\textsuperscript{154}

5.1.2.2.2. The group protected by the notion ethnic cleansing

It is internationally recognised that ethnic cleansing mainly effects, as one may expect, ethnic groups, even if the targeting of other groups and even populations has been acknowledged.\textsuperscript{155} In view of its etymology, the cleansing of the territory ought at root to be along ethnic lines. This characteristic was recognised by the Special Rapporteur of the Commission for Human Rights, Mr Tadeusz Mazowiecki, who explained that:

As a practice, ethnic cleansing could mean a set of different actions, directly or indirectly related to military operations, committed by one group against members of other ethnic groups living in the same territory.\textsuperscript{156}

In view of this apparent limitation to ethnic collectivities, the victim groups of ethnic cleansing ought thus to be analysed in the context of genocide to determine more closely whether or not the two crimes may, in fact, be seen to target the same groups.

5.2.2.2.2.1. The protection of ethnic groups under the Genocide Convention

The notion of ethnic groups under the Genocide Convention is problematic, reflected by the fact that it was not initially admitted as a genocidal group during the drafting of the Convention:

the General Assembly, therefore, affirms that genocide is a crime under international law which the civil world condemns [...] whether the crime is committed on religious, racial, political or any other grounds [...].\textsuperscript{157}


\textsuperscript{155} See infra pp. 158-161, and see Chapter Six pp.194-195 on the notion of population.

\textsuperscript{156} Drazen Petrovic, op. cit. note 87, p. 344.
Similarly, the Secretariat draft and the ad hoc Committee draft made no mention of ethnic groups. The term ethnical group was introduced by the Sixth Committee on a proposal by the Swedish representative, who was afraid that the term national would be confused with political and so voiced favour for ethnical as an alternative. The Soviets supported the Swedish proposal, stating that ‘an ethnical group was a sub-group of a national group; it was a smaller collectivity than the nation, but one whose existence could nevertheless be of benefit for humanity’. Other states, however, did not see the difference between ethnical and national; and when the term ethnic was eventually adopted it was as a supplement to, rather than as an alternative for, national.

Scholars are also divided with regard to the independent nature of “ethnic group”. Glasner considered that “ethnic”, as employed in Article II of the Genocide Convention, was larger than “racial” and designated a community of people bound together by the same customs, the same language and the same race. According to Malcolm Shaw, however:

> it is also rather difficult to distinguish between “ethnical” and “racial” groups [...]. It is probably preferable to take the two concepts together to cover relevant cases rather than attempting to distinguish between these so that unfortunate gaps appear.

Finally, on his work on the draft Code of Crimes Against the Peace and Security of Mankind, Doudou Thiam interrogated whether it was necessary to retain both racial and ethnical groups because of their similarities. The conclusion reached was that it is ‘normal to retain these both terms, which give the text on genocide a broader scope covering both physical genocide and cultural genocide.’ Indeed:

158 Article I of the first draft of the Genocide Convention prepared by the UN Secretariat in 1947, and Article II of the second draft of the Genocide Convention prepared by the Ad Hoc Committee of the Economic and Social Council between the 5th April 1948 and the 10th May 1948.
159 UN Doc. A/C.6/SR 74 (Morozov, Soviet Union).
it seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common physical traits.\(^\text{162}\)

Thus the ICTR has concluded that ‘an ethnic group is generally defined as a group whose members share a common language or culture’.\(^\text{163}\)

This definition of ethnic group permits a distinction with the category of race. It also enables indirect protection of other groups like cultural groups – as ethnic groups are largely defined by their common culture, protection extends in this direction. The Krstić Trial Chamber noted this characteristic, explaining that:

The physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.\(^\text{164}\)

During the drafting of the Genocide Convention, the representative of Sweden furthermore stated that they can encompass linguistic groups:

the constituent factor of a minority might be its language, and if linguistic groups were not connected with an existing state, then they would be protected as an ethnical group rather than a national group.\(^\text{165}\)

The recognition that linguistic groups are indirectly protected under the Genocide Convention indicated that the Convention could offer protection to groups related to those explicitly protected. One can, therefore, conclude that the groups protected are non-exhaustive. Following this interpretation, the definition of “ethnic group” under ethnic cleansing could also be extended and not limited to purely ethnic group, as this


\(^{163}\)Prosecutor v. Jean-Paul Akayesu, Case N° ICTR-96-4-T, Judgement, Trial Chamber I, 2 September 1998, para. 513.


\(^{165}\)UN Doc.A/C.6/SR.75 (Petren, Sweden).
term is characterised by its similarity with national, racial and cultural group, and cannot as such be objectively defined.

The definition of what is qualified under the expression ethnic group is not an easy task, and the difficulty in defining this expression was noted in relation to genocide by the ICTR. Interestingly, the Akayesu Trial Chamber indicated that a definition of ethnic groups was not objective, but was rather provided by the perpetrator itself. Indeed, it explained that ‘the Tutsi were conceived of as an ethnic group by those who targeted them for killing’. The prosecution’s expert, Dr. Alison Desforges, has also summarised that it is sufficient, in order to satisfy the conditions of the Genocide Convention that the concept of ethnicity exists in the eyes of both victims and perpetrators:

The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time. [...] But, if you fix any given moment in time, [...] you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandan currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition reality is an interplay between the actual conditions and peoples’ subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene. [...] The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued [...] to such an extent that this division into three ethnic groups became an absolute reality.167

To charge Akayesu with genocide, the ICTR thus had to decide whether Hutu and Tutsi constitute different ethnic groups or not, and whether they saw each other as two different groups according to the subjective definition of “ethnic group”. Without such a distinction between Hutu and Tutsi, Akayesu could not be prosecuted for genocide.

166 Prosecutor v. Jean-Paul Akayesu, Case N° ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, para. 171.
According to one observer, the distinctions between the two groups are essentially meaningless and:

have been widely exaggerated as it is rarely possible to tell whether an individual is a Twa, Hutu, or Tutsi from his or her height. Speaking the same language, sharing the same culture and religion, living in the same places, they are in no sense tribes, nor even distinct “ethnic groups”. 168

The three groups are not objectively distinguishable. For a long time, the only means to differentiate between the groups was based on an individual’s wealth, ‘those with ten or more cows were classified as Tutsi, those with less as Hutu’, as van Schaak blithely puts it. 169 Finally, it was decided that the only way to differentiate between Hutu and Tutsi was by the use of the identity card, which specified each individual as belonging to a particular group, or by individual self-determination. Analysing all these elements, the ICTR has concluded that ‘the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population’, and has explained that:

The term ethnic group is, in general, used to refer to a group whose members speak the same language and/or have the same culture. Therefore one can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture. 170

Nevertheless it was considered by the Trial Chamber that Hutu and Tutsi have to be identified as two distinct ethnic groups, even though the conditions of ethnicity are not reunited. As an objective determination of ethnic groups was not available, a subjective approach was developed. Indeed, in order to interpret human groups objectively each particular collective has to be specifically defined. A definition of the genocidal groups was attempted by the ICTR, but the task proved impossible, yielding categories which were too narrow to permit a practical application of the four groups. For example, in the Akayesu case, the ICTR defined each group individually but finally considered that genocide can be committed against any stable and permanent group similar to the four protected groups, without using its earlier definitions:

170 Prosecutor v. Jean-Paul Akayesu, Case No ICTR-96-4-T, Judgment and Sentence, Trial Chamber I, 2 September 1998, footnote n° 56.
Hence the question to be addressed is against which group the genocide was allegedly committed. [...] Article 2(2) of the Statute, like the Genocide Convention, provides that genocide may be committed against a national, ethnical, racial or religious group. In its findings on the law applicable to the crime of genocide *supra*, the Chamber considered whether the protected groups should be limited to only the four groups specifically mentioned or whether any group, similar to the four groups in terms of its stability and permanence, should also be included. The Chamber found that it was necessary, above all, to respect the intent of the drafters of the Genocide Convention which, according to the *travaux préparatoires*, was clearly to protect any stable and permanent group.

In the light of the facts brought to its attention during the trial, the Chamber is of the opinion that, in Rwanda in 1994, the Tutsi constituted a group referred to as “ethnic” in official classifications.\(^1\)

If the groups were precisely defined, it would have been impossible for the ICTR, and for the ICTY, to permit an application of the Genocide Convention to the Rwandan and Bosnian conflicts respectively. An accurate definition would limit the application of the Convention more than it is already, and will prevent an effective and timeless prohibition of genocide. Similarly, an objective determination of ethnic groups would also certainly limit the qualification of crimes as ethnic cleansing. The term ethnic group has thus to be interpreted extensively. Furthermore, different ethnic groups could be defined within a single state or even within a single territory. The multiplicity of individuals encompassed within the term ethnic was already determined during the Second World War. The aim of Adolf Hitler as *Führer* of Nazi Germany was the creation of a “volksdeutsche” state, meaning one which is free of any individuals who were not purely German or Aryan German. The first step in the creation of this new German state was the deportation of all Jews from German territories via massive resettlement plans.\(^2\) Such plans were also to be applied to Poland and France. Yet Nazi officials could not decide how to manage such plans and were not sure whether to deport all Jews to the same location, or whether to separate eastern Jews from western

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This distinction between eastern and western Jews illustrated that even under the Third Reich, Jews were not all considered members of a single ethnic group. The Jewish population was, and still remains, composed of different ethnicities, for example eastern and western groups. This historical example shows that under the expression “ethnic group” different sub-categories of “ethnic groups” could be identified. Therefore the ethnic groups targeted by ethnic cleansing have not to be strictly defined in order to promote a large prevention and prohibition of this crime.

In an attempt to enlarge the groups protected under the Genocide Convention that he considered too restrictive, Lippman held that the Genocide Convention has to be applied to ‘any coherent collectivity which is subject to persecution’ or should protect political groups and possible women, homosexuals, and economic and professional classes’. The Rwanda Tribunal also tried to extend the protection offered by the Genocide Convention, and explained that:

the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment, such as political and economic groups.

The same subjective determination of what constituted a human group within the Genocide Convention was applied by the ICTY for all groups and not only for ethnic collectives.

During the conflict in the former Yugoslavia it was also analysed and determined that the individuals targeted in Srebrenica were part of a national group. National minorities seemed therefore to have been targeted. With the former Yugoslavia being such a multi-ethnic territory, especially Srebrenica, it was harder to define a national, ethnic, religious or racial group. The Jelisić Trial Chamber has recognised the difficulties in linking the victims of the crimes perpetrated in Srebrenica with the objective determination of the protected groups. It has thus decided that a group has to be evaluated from the point of view of the perpetrators, using positive and negative criteria:

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173 Id., pp. 82-83.
a group may be stigmatised in this manner by way of positive or negative
criteria. A “positive approach” would consist of the perpetrators of the
crime distinguishing a group by the characteristics which they deem to be
particular to a national, ethnical, racial or religious group. A “negative
approach” would consist of identifying individuals as not being part of the
group to which the perpetrators of the crime consider that they themselves
belong and which to them displays specific national, ethnical, racial or
religious characteristics. Thereby, all individuals thus rejected would, by
exclusion, make up a distinct group. The Trial Chamber concurs here with
the opinion already expressed by the Commission of Experts and deems that
it is consonant with the object and the purpose of the Convention to consider
that its provisions also protect groups defined by exclusion where they have
been stigmatised by the perpetrators of the act in this way.  

Going further, the Trial Chamber also concluded that a group has to be defined
subjectively and no longer objectively:

although the objective determination of a religious group still remains
possible, to attempt to define a national, ethnical or racial group today using
objective and scientifically irreproachable criteria would be a perilous
exercise whose result would not necessarily correspond to the perception of
the persons concerned by such categorisation. Therefore, it is more
appropriate to evaluate the status of a national, ethnical or racial group from
the point of view of those persons who wish to single that group out from
the rest of the community. The Trial Chamber consequently elects to
evaluate membership in a national, ethnical or racial group using a
subjective criterion. It is the stigmatisation of a group as a distinct national,
ethnical or racial unit by the community which allows it to be determined
whether a targeted population constitutes a national, ethnical or racial group
in the eyes of the alleged perpetrators. This position corresponds to that

176 Prosecutor v. Goran Jelisić (“Brčko”), Case N° IT-95-10-T, Judgment, Trial Chamber I, 14
December 1999, para. 71.
adopted by the Trial Chamber in its Review of the Indictment Pursuant to Article 61 filed in the Nikolic case.\textsuperscript{177}

Similarly, the \textit{Krstić} Trial Chamber concluded that:

A group’s cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits. As in the \textit{Nikolic} and \textit{Jelisic} cases, the Chamber identifies the relevant group by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.\textsuperscript{178}

The approach taken by the ICTY in these two cases is of particular interest. With no objective biological, cultural or linguistic distinction between the groups, defining their contours was fraught with difficulties. The identity of the groups existed only as constructs of the victims and/or perpetrators respectively. Under these conditions, prosecuting and convicting for genocide would likewise have been extremely difficult. Even though all the other requirements of the Genocide Convention were reunited, the lack of differences between the perpetrators and the targeted group would have rendered the application of the Convention almost impossible, leaving a utopian and largely useless instrument. To counteract this and ensure applicability in the Yugoslavian conflict, the \textit{Krstić} Trial Chamber decided to create the “national minorities” approach. As none of the groups enounced in the Genocide Convention correspond to the reality of the Srebrenica setting (as the jurisprudence of the \textit{ad hoc} Tribunals and scholars all agree that the groups are undefined), the traditional approach would not permit for the prosecution of \textit{Krstić} for genocide:

the preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what were recognised, before the second world war, as “national minorities”, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of

\begin{itemize}
\item \textsuperscript{177} Id., para. 70.
\item \textsuperscript{178} Prosecutor v. Radislav \textit{Krstić} (“Srebrenica-Drina Corps”), Case N° IT-98-33-T, Judgment, Trial Chamber I, 2 August 2001, para. 557.
\end{itemize}
scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.179

The population targeted in Srebrenica were Bosnian Muslims of East Bosnia. They did not constitute a religious group, because they had the same religion as the majority of the population. They were not a racial group because they were part of the Bosnian population. Nor were they an ethnic group as they shared the culture and language of the rest of the Muslim population, and they did not constitute a national group because of the multi-ethnicity of the territory.180 A determination of the group thus could not have been achieved with objective criteria. The use of subjective criteria was also impossible, as the perpetrators and the victims did not consider themselves as being two different groups:

Most of the Bosnian Muslims residing in Srebrenica at the time of the attack were not originally from Srebrenica but from all around the central Podrinje region. Evidence shows that they rather viewed themselves as members of the Bosnian Muslim group.181

The innovative interpretations of the ICTY have allowed for a modernisation of the definition of genocide. These may, in turn, be employed to help assess which groups could be protected against ethnic cleansing. For much as is the case with genocide, ethnic cleansing must also be considered as a crime not only targeting objectively defined ethnic groups. As the groups are subjectively defined by the perpetrators, this will allow for a better prohibition of the crime and will not require the objective demonstration that the group targeted was anthropologically defined as ethnic. That said, there may also be a third option open that warrants consideration here – that of no reference to groups.

The determination of the groups targeted for ethnic cleansing, if based on subjective criteria or on the “no group” criteria, must also, like genocide, comprise some objective factors. Indeed, objective criteria are needed in order to avoid too much variability between cases. The objective criteria of genocide are composed of its other definitional characteristics, mainly intent. Applied to ethnic cleansing, that means that

179 Id., para. 556.
when the mental element of ethnic cleansing is determined, then the other characteristics of the crime could be subjectively defined. It would be a failure of the law if perpetrators could only be prosecuted when the elements characterising the mental element of ethnic cleansing would be objectively determined. For this reason, this mixed approach is more efficient than a purely objective one.

Before analysing the remaining elements of the genocidal mens rea, it has to be determined whether the interpretation provided by Petrovic and the commission of experts sent to the former Yugoslavia concerning an extension of the groups which can be victims of acts of ethnic cleansing can be legally justified. Both considered, for instance, that ethnic cleansing could be perpetrated against religious groups. Furthermore, Petrovic also considered that ethnic cleansing could be perpetrated against national groups. Generally:

Existing historical records indicate that cleansing has been practiced for nearly 3,000 years, most likely even longer. Although it has significantly changed over time, cleansing has always been directed at groups that were considered dangerous, groups that had to be eliminated.

5.1.2.2.2.2. Can ethnic cleansing protect other groups than ethnic groups?

Ethnic cleansing, like genocide, is, as we have seen, committed against a group of persons and not against individuals per se:

the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim […] is the group itself and not only the individual.

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183 Drazen Petrovic, *op. cit.* note 87.


For Lemkin, it was only minority groups that had to be protected against genocide.\footnote{Raphael Lemkin, \textit{op. cit.} note 20, p. 93.} This interpretation is no longer valid, as during current massacres, it is not only minorities who are targeted for mass murder. The Genocide Convention ought, therefore, not only protect national, racial, religious or ethnic minorities. The term “group” remains, however, undefined in the Convention.

Nehemiah Robinson stated that in the Convention ‘groups consist of individuals’.\footnote{Nehemiah Robinson, \textit{op. cit.} note 143, p. 58.} As different definitions of groups are possible and because of the silence of the Genocide Convention, it seems that genocide is not expressly limited to minority groups. A majority group can also be the victim of genocide. For example, Article II(e) of the Genocide Convention, dealing with ‘forcibly transferring children of the group to another group’, states that such actions can be perpetrated against a minority or a majority group. The term group is thus a flexible notion which is not directly linked with minority. Applying this reasoning by analogy to ethnic cleansing, it would be too restrictive to consider ethnic cleansing as only ever being committed against ethnic groups.

Due to the difficulties in defining the term “group”, the International Law Commission, during the drafting of a Draft Code of Crime Against the Peace and the Security of Mankind, has argued in favour of a non-exhaustive list of protected groups under the Genocide Convention, explaining that:

\begin{quote}

The non exhaustive nature of the list of groups is totally justified: genocide is a concept intended to cover a variety of situations which do not necessarily coincide with the few examples documented by history. Thus, in the case of the acts of genocide perpetrated in Cambodia, the target group did not have any of the characteristics included in the definition of genocide set out in article II of the Convention on 9 December 1948… Consequently, the definition of genocide should be reviewed. There are two possible solutions: either adopting a non-exhaustive list of groups, or supplementing the exhaustive list with other notions such as those of political groups and socio-economic groups.\footnote{Comments and Observations of Governments on the Draft Code of Crimes Against the Peace and the Security of Mankind Adopted on the First Reading by the International Law Commission at its Forty-Third Session’, UN Doc.A/CN.4/448, pp. 35-36.}
\end{quote}
This interpretation of genocide is unfortunately unlikely as the Genocide Convention, together with the ICC, includes a strict list of protected groups. It could, however, be extrapolated to ethnic cleansing. Despite its etymology, it would be wrong to think that only ethnic groups could be the victims of ethnic cleansing – witness, for example, events in the former Yugoslavia.\textsuperscript{189} The subjective method of determining the targeted groups permits the inclusion of groups other than purely objective “ethnic groups” under the umbrella ethnic cleansing. The crime ought not, therefore, be categorised as only being committed against this particular group. Neither should it be defined as protecting merely ethnic or religious group.\textsuperscript{190} As Bell-Fialkoff rightly affirms:

Ethnic cleansing can be understood as the expulsion of an “undesirable” population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these.\textsuperscript{191}

This definition does not limit ethnic cleansing to ethnic and religious groups. In this definition, it can be committed for different reasons with various motives. Although one can argue that the terms “group”, “discrimination” and “considerations” do not have the same scope, this definition nonetheless widens the parameters of ethnic cleansing. An ethnic group can be targeted for political or economical reasons, or both – the group determination and the reasons for the targeting – are different. As the definition considers that ethnic cleansing is committed for particular reasons and not against particular groups, different groups and not solely ethnic or religious ones can be victims of ethnic cleansing when targeted for political, economical, religious, ethnic and any other reasons. A non-exhaustive list of groups protected against ethnic cleansing could thus be determined and would help ensure that the crime would remain punishable at each turn in history and the instrument not become obsolete.

Yet, although it seems legally justifiable to enhance the scope of the victim groups of ethnic cleansing, especially since some scholars, as well as the commission of experts sent to the former Yugoslavia, have enlarged the groups targeted by ethnic cleansing, such an extension has not been internationally recognised. Although an ethnic group can

\textsuperscript{189} See above p. 157.
\textsuperscript{191} Andrew Bell-Fialkoff, \textit{op. cit.} note 86.
be subjectively and extensively defined, it cannot be interpreted in such fashion to facilitate a classification of ethnic cleansing as a genocidal act. In accordance with current legal provisions, the groups protected under the Genocide Convention do not match with those targeted by acts of ethnic cleansing (not named “religious, national, ethnic and racial cleansing”).

Thus although ethnic cleansing and genocide could be perpetrated through acts of destruction against groups – on account of massacre being viewed as the most effective method of removing a population from any given territory – the two crimes should be neither confused nor equated: the element of destruction refers only to the genocidal intent. That said, we can, by the same token, see how the two crimes can be closely related: ethnic cleansing can, as history has shown, readily escalate into genocide. This evolution was illustrated by the radicalisation of Hitler’s ideology during the Second World War, the founding stone of the “functionalist” interpretation of Nazi policy. According to this view, the annihilation of the Jews during the Second World War went beyond the parameters of ethnic cleansing. Kershaw, for example, concludes his study along these lines, qualifying the killings of the Jews during the Second World War as genocide:

[...] Hitler’s authorization [for the Final Solution] opened the door widely to a whole range of new initiatives from numerous local and regional Nazi leaders who seized on the opportunity now to rid themselves of their own ‘Jewish problem’, to start killing Jews in their own areas. There was a perceptible quickening of the genocidal tempo over the next few weeks. But there was as yet no coordinated, comprehensive programme of total genocide. This would still take some months to emerge.

In order to reach a final verdict on the possible analogy created between genocide and ethnic cleansing, it will now be considered, through an analysis of the judicial and scholarly definitions of ethnic cleansing, whether this qualification is correct and viable.

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192 Christopher R. Browning, op. cit. note 141. See also Ian Kershaw, op. cit. note 141. See also Chapter Seven pp. 218-221.
193 Ian Kershaw, op. cit. note 141, p. 685.
5.2 Ethnic cleansing and genocide: two identical crimes?

As has been shown previously, ethnic cleansing is commonly qualified as genocide by scholars, UN resolutions and ICTY jurisprudence. However, it is not legally efficient to define a term by merely stating that it is identical to, or a synonym for, another concept. Each legal term ought to have its own specificity, and currently none of the recognised international crimes have synonyms.

It seems doubtful that ethnic cleansing should only to be comprehended as a pure euphemism for genocide as firstly this crime was not a count for prosecution for the ICTY, and secondly some scholars and international instances have tried to define it specifically and without only referring to genocide. Indeed, if genocide and ethnic cleansing were legally to be understood as two identical crimes, Trial Chambers of the ICTY would surely have made use of the opportunity to indicate in all their cases that the crime committed was genocide, despite being termed ethnic cleansing. Thus they could and presumably would have definitively stated that both crimes are identical and have to be comprehended as such. As rightly demonstrated by Schabas, however:

In its 1997 judgment on the merits in the Tadic case, the Trial Chamber conducted an historical review of the former Yugoslavia, noting that the Serbs themselves had been victims of “ethnic cleansing” at the hands of Bulgarian and Hungarian occupying troops during the Second World War. Observing then, that it was “no new concept”, the Trial Chamber expressed the view that Serb forces had adopted the “practice of ethnic cleansing” in order to achieve “the redistribution of populations, by force if necessary, in

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194 See Rony Blum, Gregory H. Stanton, Shira Sagi, and Elihu D. Richter, op. cit. note 1, William A. Schabas, op. cit. note 1, David M. Kresock, op. cit. note 1, Nicole M. Procida, op. cit. note 1, and Todd A. Salzman, op. cit. note 4, pp. 354-357.
the course of achieving a Greater Serbia”. But it stopped shy of using the word genocide. 198

In the Sikirika et al. case, the ICTY even specified that acts of ethnic cleansing have been classified as crimes against humanity and not as genocide:

The Chamber concludes that the evidence has not established that Dusko Sikirica possessed the very specific intent required by Article 4(2) to destroy in part the Bosnian Muslims or Bosnian Croats as a group, even though it may establish the mistreatment of the members of that group on political, racial or religious grounds, in which event the relevant crime is persecution, not genocide. 199

This example illustrated that for some Trial Chambers of the ICTY, the link between ethnic cleansing and genocide was not always constituted. If ethnic cleansing was identical to genocide, the similarities between both crimes would have been readily – by all Trial Chambers of the ICTY – demonstrated. This was not the case, however. One can, therefore, wonder whether the public opinion – supported by United Nations resolutions, scholarly works, and ICTY jurisprudence200 – considering ethnic cleansing and genocide as two identical crimes could become a legal principle of international law.

The characterisation of ethnic cleansing as another name for genocide was not the only approach providing an association between both crimes. Journalists, scholars in social science as well as in political sciences or in history have created the amalgam expression “genocidal ethnic cleansing”,201 or “nettoyage éthnique génocidaire”202 in French.

199 Prosecutor v. Duško Sikirica et al. (“Keraterm Camp”), Case N° IT-95-8, Judgment on Defence Motions to Acquit, Trial Chamber III, 3 September 2001, para. 90.
200 See above footnotes 194-196.
This expression does not seem to analyse ethnic cleansing and genocide as two similar crimes. Because of its formulation – ethnic cleansing being a noun and genocide being understood as an adjective – this expression leads to the conclusion that genocide is characterising ethnic cleansing. Thus ethnic cleansing and genocide are neither seen as identical nor as sharing the same goal. Nevertheless, it remains that ethnic cleansing can be committed through acts of genocide.

Ethnic cleansing and genocide are not considered as qualifying the same crime, and this is confirmed by their aims. Although the following analysis might lack legal rigour, as “aims” are not legal components of international crimes, it will nevertheless reaffirm the specificity of the genocidal intent which cannot be applied to ethnic cleansing, and the consequent necessity to classify the latter crime.

5.2.1. THE GENOCIDAL AIM: THE GOAL TO BE ACHIEVED BY PERPETRATORS OF ETHNIC CLEANSING?

The goal of ethnic cleansing was determined as being the creation of a homogeneous territory. Genocide on the contrary has for its overarching goal the destruction of a human group, as its definition clearly indicates. Their respective goals thus seem variable, even incompatible. This was affirmed by the Stakić Trial Chamber:

It does not suffice to deport a group or a part of a group. 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. As Kreß has stated, “(t)his is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation. This is because the dissolution of the group is not to be equated with physical destruction”. In this context the Chamber recalls that a proposal by Syria in the Sixth Committee to include “[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment” as a

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203 See Chapter Two pp. 41-43.
separate sub-paragraph of Article II of the Convention against Genocide was rejected by twenty-nine votes to five, with eight abstentions. Judge Lauterpacht, however, declared that he was prepared to order, pursuant to the Genocide Convention, a prohibition of:

“ethnic cleansing” or conduct contributing thereto such as attacks and firing upon, sniping at and killing of non-combatants, and bombardment and blockade of areas of civilian occupation and other conduct having as its effect the terrorization of civilians in such manner as to lead their to abandon their home.

The International Court of Justice did not share his opinion, however, and by taking this decision has affirmed that ethnic cleansing could not be considered as identical to genocide.

It could, similarly, be argued that if the Genocide Convention was to encompass ethnic cleansing, the drafters of the Convention would have included it as one of the genocidal acts. It would have thus been possible during the drafting of the Genocide Convention to encompass ethnic cleansing, as the citation of Judge Lauterpacht emphasised. Comments accompanying the Secretariat draft of the Genocide Convention, however, explained that the suggested definition of genocide, excluded ‘certain acts which may result in the total or partial destruction of a group of human beings […], namely […] mass displacements of population’. It went further, stating that:

Mass displacement of populations from one region to another also does not constitute genocide. It would, however, become genocide if the occupation were attended by such circumstances as to lead to the death of the whole or part of the displaced population (if, for example, people were driven from

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their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemics). 209

In line with this view, ethnic cleansing is thus not, in and of itself, genocide, but can foreseeably escalate to it. This interpretation by the Secretariat-General was, however, not reaffirmed by the Sixth Committee of the General Assembly during the debates for the adoption of a convention on genocide. 210 Thus in the Genocide Convention no mention is made of ethnic cleansing.

Trial Chamber I of the ICTY considered that ethnic cleansing was the goal that follows and drives the perpetration of genocide. 211 One can thus question whether it is legally accurate to accept that, behind genocide, the goal of the perpetrators is the commission of ethnic cleansing. To illustrate this point, one could take a closer look at the Rwandan conflict. This conflict was defined as an ethnic conflict between Hutus and Tutsis, although Hutu and Tutsis are not, as we have seen, definable per se as two different ethnic groups. 212 The goal behind the massacres of thousands of Tutsis was not the mere expulsion of the Tutsis from the Rwandan territory, but their actual annihilation. Genocide and not ethnic cleansing was perpetrated in Rwanda: this case study serves to exemplify the difference in ultimate goal. The latter concerns the disappearance of one group from a territory, whilst the former concerns the destruction of the group perpetrated with genocidal intent.

The fact that ethnic cleansing has, at various junctures, been defined as being identical to genocide could be a method aimed at preventing the use of the word genocide. Indeed, politicians are, perhaps understandably, wary of the word genocide because of the grave consequences associated therewith:

The efforts of transnational advocacy networks to name crimes are often resisted by policymakers who understand the pressure this places upon them to respond. During the crisis in Rwanda, policymakers labored intensely to prevent the application of the word “genocide” to Rwanda. Similarly, during

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209 Ibid.
210 The Convention for the prevention and punishment of the crime of genocide, the so-called Genocide Convention, as submitted by the Sixth Committee, was unanimously adopted by the General Assembly by 55 to 0 on 9 December 1948. It was signed on 11 December 1948 by 20 states.
212 For a discussion on the qualification of Hutus and Tutsis as two ethnic groups, see: Prosecutor v. Jean-Paul Akayesu, Case N° ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998.
the war in Bosnia, the British government opposed a U.N. resolution that equated ethnic cleansing with genocide.\textsuperscript{213}

Ethnic cleansing cannot impose duties upon states, on account of it being unclassified. The use of the expression, instead of genocide, thus enables states to politically condemn the crimes perpetrated, without having any legal duty to prevent or prosecute them. The costs of the use of genocide are too high for the states as it forces them to make efforts to prevent and prohibit its occurrence according to the Genocide Convention.\textsuperscript{214} It is worth noting, moreover, that, even if the state is somehow involved in the perpetration of an international crime, whether it be a war crime, a crime against humanity or genocide, it is not prosecuted on account of the principle of state criminal responsibility not being recognised.\textsuperscript{215} It is the state officials who are individually prosecuted:

The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.\textsuperscript{216}

That being said, any state in which genocide is perpetrated is nevertheless swiftly stigmatised as a “black sheep” of the international community, and prosecutions for genocide often illustrate that officials of the state were directly implicated in the genocidal policy.\textsuperscript{217} With ethnic cleansing the situation is, however, different. Speaking of ethnic cleansing is thus legally less demanding and does not have the same connotation of mass murder that attends the practice of genocide. This reluctance on the part of states to name the crimes committed in Bosnia as genocide was clearly illustrated by the position of the U.S. Department of State.\textsuperscript{218} Similarly in Rwanda

\textsuperscript{214} Article I of the Genocide Convention.
\textsuperscript{216} Article 7(2) of the ICTY Statute, Article 6(2) of the ICTR Statute and Article 27 of the ICC Statute.
\textsuperscript{217} For example the conflict in the former Yugoslavia: the Bosnian Serb Army commander General Ratko Mladić was accused of genocide and complicity of genocide by the ICTY. Unfortunately this accused is still at large. The former Yugoslav leader Slobodan Milošević was accused of complicity in genocide. Generally, see Jan Willem Honing, ‘Srebrenica’ in Samuel, Totten, and Paul R. Bartrop (eds), the Genocide Studies Reader (London, New York: Routledge, 2009), 192-194, p. 193.
\textsuperscript{218} Michael Scharf, Lecture at the conference on Accounting for Atrocities, Bard College (Annandale-on-Hudson, New York: 1998).
‘during the genocide, policymakers resisted attempts to call the conflict genocide for fear that such a label would increase pressure on them to take significant actions.’

Doubts concerning the recognition of ethnic cleansing as genocide were also expressed by the Krstić Trial Chamber:

Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potocari and the principal mosque in Srebrenica soon after the attack.

With this statement, the Krstić Trial Chamber indicated that the selective destruction of the group – via the killing of all military-aged men – was a means geared towards reconquering the territory upon which the group was living. Additionally, such selective destruction will have an impact on the survival of the group and would insure that the group cannot return. Through the selective killing of a part of a human group, both ethnic cleansing – elimination of a group from a territory – and genocide – destruction of the group – could be pursued. For the Krstić Trial Chamber, two distinct goals were thus followed in Srebrenica: ethnic cleansing and genocide.

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219 Michelle Sieff and Leslie Vinjamuri Wright, *op. cit.* note 213, p. 775.
The Trial Chamber also specified, as alluded to earlier, that ethnic cleansing in Srebrenica escalated into genocide:

The Trial Chamber has made findings that, as of 13 July, the plan to ethnically cleanse the area of Srebrenica escalated to a far more insidious level that included killing all of the military-aged Bosnian Muslim men of Srebrenica. A transfer of the men after screening for war criminals – the purported reason for their separation from the women, children and elderly at Potocari – to Bosnian Muslim held territory or to prisons to await a prisoner exchange was at some point considered an inadequate mode for assuring the ethnic cleansing of Srebrenica. Killing the men, in addition to forcibly transferring the women, children and elderly, became the object of the newly elevated joint criminal enterprise of General Mladic and VRS Main Staff personnel. The Trial Chamber concluded that this campaign to kill all the military aged men was conducted to guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica and therefore constituted genocide.221

From this statement it seems to follow that ethnic cleansing and genocide cannot co-exist. When a policy of ethnic cleansing radicalises to reunite the definitional elements of genocide, as is frequently the case, it becomes genocide itself. However, the Krstić decision can be interpreted in a fashion other than merely stating that ethnic cleansing has to escalate to genocide in order to be prosecuted. If the intent behind the acts committed in Srebrenica was the annihilation of the group, one might well question why the women and the children were transferred and not massacred. The transfer of part of the population was an act of ethnic cleansing. If the aim of the Serbs was the sole destruction of the group, they would have killed the women and the children rather than sparring them. Only the killings of all military-aged men constituted acts of genocide. In this view of things, ethnic cleansing and genocide could thus be seen as two distinct crimes which can be committed simultaneously, not with the one necessarily preceding the other.

Such an interpretation would, however, perhaps extend the comprehension of genocide too far, especially since Krstić was acquitted by the Appeals Chamber of participation in a joint criminal enterprise to commit genocide. Indeed, the Appeals

221 Id., para. 619.
Chamber explained that General Mladić was only going to take atrocious actions against the civilians if the military men did not surrender:

General Mladić said that the population had to choose whether to stay or whether to go, and he demanded that all ABiH troops in the area surrender their weapons, and emphasised that the survival of the civilian population in the enclave was linked to the surrender of the ABiH troops. At the third meeting, he again made it clear that the survival of the civilian population in the area was conditional upon the capitulation of the ABiH forces. He said “you can either survive or disappear … For your survival, I request: that all your armed men who attacked and committed crimes – and many did – against our people, hand over their weapons to the Army of the Republika Srpska … on handing over weapons you may … choose to stay in the territory … or, if it suits you, go where you want. The wish of every individual will be observed, no matter how many of you there are.” To secure the surrender of the ABiH forces General Mladić was willing to threaten severe repercussions for the civilian population that chose to remain in the area but was also willing to facilitate their removal.222

The fact that the decision of the Krstić Trial Chamber cannot be legally interpreted in two different ways demonstrates how ethnic cleansing and genocide cannot co-exist. Nevertheless, ethnic cleansing can escalate to genocide, or be perpetrated genocidally, as suggested by the expression “genocidal ethnic cleansing”. Both crimes are thus different, and ought to be recognised and classified as such. The consideration that acts of ethnic cleansing can radicalise into genocide, or can be committed in a “genocidal” fashion does unable the prosecution of such acts, only, however – and unfortunately – under the ambit of genocide. Nevertheless, perpetrators of ethnic cleansing would finally become prosecutable. This would, however, also mean that ethnic cleansing would never be prosecuted as a crime per se, but only if it does evolve into genocide. A similar conclusion was drawn by the Stakić Trial Chamber, which considered that:

It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a

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group. The expulsion of a group or part of a group does not in itself suffice for genocide. As Kreß has stated, “(t)his is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation. This is because the dissolution of the group is not to be equated with physical destruction”.\textsuperscript{223} 

Thus more than simply affirming that ethnic cleansing is punishable alongside genocide, the Trial Chamber recognised that ethnic cleansing cannot be prosecuted \textit{per se}. It would have been a real progress in defining and classifying ethnic cleansing if the Trial Chamber had taken the opportunity to prosecute ethnic cleansing as an independent crime. Indeed, the fact that genocide cannot replace ethnic cleansing, and \textit{vice versa}, means that both crimes are unique and should be characterised as independent, on account of their different intents and aims. Thus it seems:

\[\ldots\] ironic that the UN itself adopted a euphemism [ethnic cleansing] invented by Milosevic, an accused perpetrator of genocide, despite its never having been formally defined or recognized as a term with specific legal status and mandated obligations, as genocide has been since the 1948 Genocide Convention.\textsuperscript{224}

5.2.2. CONCLUSION

The lengthy analysis provided in the previous section has, ultimately, evinced the view that ethnic cleansing and genocide are not identical notions, but rather independent crimes with quite different respective thresholds. Were this not the case, all genocidal instances that have occurred since 1992 could have been labelled as examples ethnic cleansing. The distinction between the two acts dwells, as we have seen, in the specific intentionality of the genocidal act.

As the concept of “to destroy” is a compulsory requirement of genocide, it seems presumptuous to classify ethnic cleansing within the genocidal acts, as it does not share this common intent. Yet genocide is not only specific in this sense, but also quite unique in its attendant connotations of attempted dehumanisation. As Fournet rightly notes,


\textsuperscript{224} Rony Blum, Gregory H. Stanton, Shira Sagi, and Elihu D. Richter, \textit{op. cit. note} 1.
Nazi Jewish policy not only fulfils the specific intention of the genocidal act, but also carries this further distinct element:

The Nazis created a whole industrialised system of death: the concentration and extermination camps. These camps were not only death sites; they were also dehumanization centres created to annihilate all human features of the victims before actually murdering them. It should be stressed here that this does not in any way imply that the Nazis succeeded in dehumanizing their victims, but it means that this was their intention.225

Here again, we find relevant evidence that determines that genocide and ethnic cleansing should not be amalgamated, and which further spotlights how regrettable it is – for the sake of clarity and efficacy – that the two crimes are so regularly cited as being identical.

In spite of this, and the fact that genocide is the only international crime perpetrated in order to destroy a group, the special rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia nonetheless levelled this distinction and defined ethnic cleansing as requiring the same characteristics. Indeed, in its third report I, Tadeusz Mazowiecki defined ethnic cleansing as referring to: ‘the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups’.226 This definition appears inappropriate, in that it considers ethnic cleansing as an act of elimination. Accordingly, ethnic cleansing would have the exact same scope of application as genocide. It ought to be kept in mind, however, that the Commission of Experts sent to the former Yugoslavia clearly stated that ‘an important factor in identifying the categories of crime in specific cases to be investigated in depth would be patterns of behaviour sufficiently consistent to reveal a policy or system in such violations as genocide, ethnic cleansing, or large scale sexual assault’.227 This sentence is of particular significance in that it considers genocide and ethnic cleansing as two separate crimes. If ethnic cleansing were simply to be interpreted as a synonym of genocide, it would not have been listed in such

open fashion by the Commission of Experts, who clearly explained that genocide, ethnic cleansing and other crimes were perpetrated on the territory of the former Yugoslavia. This line of analysis may also go some way to explaining why, in its Sixth Report II, the special rapporteur modified its definition of ethnic cleansing and considered that:

Ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, with the view to forcing it to abandon the territories where it lives’.  

This second definition seems to be more appropriate to contemporary offences than the first, on the grounds that it does not consider ethnic cleansing as comprising the intent to destroy a particular ethnic group.

If scholars cannot provide a strict definition of ethnic cleansing, limiting it to particular instances where an ethnicity is cleansed from a particular territory and not destroyed, it becomes legally impossible to distinguish between this crime and genocide. This situation would create a legal loophole whereby in some destructive situations the crime would be named genocide and in others it would be termed ethnic cleansing. Already it is difficult to demonstrate the commission of genocide: if, however, prosecution officers or scholars are also compelled to justify why a particular form or instance of destruction constitutes genocide and why another ethnic cleansing, the situation will become so involved and complex as to prevent clear determination and create delays in prosecution.

A possible solution to this dilemma would be to consider that, when the mental elements of genocide, being ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’ are reunited, the resultant crime is genocide. If they are not reunited, the crime committed can be qualified as ethnic cleansing. This argumentation does not, however, take into consideration the fact that the conditions of ethnic cleansing, especially its mental requirements, are not known and that another category of crimes could be applicable when the conditions of genocide are not fulfilled. Affirming that ethnic cleansing is perpetrated when the genocidal intent cannot be identified could feasibly become irrelevant in terms of providing an independent

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determination, as when the conditions of genocide are not fulfilled, the crime perpetrated often fulfils the conditions of crimes against humanity. These crimes are too tightly linked to genocide, but unlike ethnic cleansing, have been defined. The report of the Commission of Inquiry in Darfur rightly demonstrated the scope of crimes against humanity and their closeness to genocide:

there was insufficient evidence to conclude that there was a state policy of genocide, but [...] “International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.”

Whilst classifying ethnic cleansing as a euphemism for genocide or as a genocidal act may, in theory, provide a possible solution to the problem of developing a legal classification of the crime within the framework of public international law, the preceding analysis has outlined the difficulties that prevent render this approach inadequate. Though undeniably close to genocide, and at times coming into direct contact, ethnic cleansing remains crucially distinct in terms of intentionality. Before confirming from this that the crime requires its own independent classification, however, it ought first to be considered in similarly detailed fashion whether it might be drawn under the ambit of another category of international crimes, namely that of crimes against humanity.

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Ethnic cleansing and the law of crimes against humanity

Following the discussion in the previous section, this chapter will examine whether or not it might be legally possible to qualify ethnic cleansing as a crime against humanity. The interpretive nexus engaged here – namely that of the applicability of the notion of crimes against humanity as a matrix for understanding and defining other categories of crime – has been frequently noted and discussed. Clark, for example, recognises how:

[T]he establishment of the doctrine of crimes against humanity [...] paved the way for subsequent development of other offences of international concern. It led directly to the definitions of genocide and the crime of apartheid and less directly to the development of a whole package of international crimes.  

To determine whether this principle may be extended to the subject at issue here, the following developments shall offer a closely-focused analysis of the specific requirements of crimes against humanity and their applicability to the act of ethnic cleansing. Links between the two crimes have already been variously identified by both the ICTY and legal scholars. The Nikolić Trial Chamber, for instance, indicated that:

The implementation of that discriminatory policy, commonly referred to as “ethnic cleansing”, over the region of Vlasenica alone seems to have been so wide-spread as to fall within the Tribunal’s jurisdiction under Article 5.

Trial Chamber II in the Vasiljević case reaffirmed a similar relationship:

The Trial Chamber is satisfied upon the evidence before it that there was a widespread and systematic attack against the non-Serb civilian population of


the municipality of Višegrad at the time relevant to the Indictment. The attack took many forms, starting with the Serb take-over of the town and the systematic and large-scale criminal campaign of murders, rapes and mistreatment of the non-Serb population of this municipality, particularly the Muslims, which eventually culminated in one of the most comprehensive and ruthless campaigns of ethnic cleansing in the Bosnian conflict. Within a few weeks, the municipality of Višegrad was almost completely cleansed of its non-Serb citizens, and the municipality was eventually integrated into what is now Republika Srpska.\(^3\)

The view that ethnic cleansing might be classified as a crime against humanity was also noted in the Karadžić and Mladić cases, albeit far less clearly. Trial Chamber I, for example, considered in the review of the indictment pursuant to Rule 61 that ethnic cleansing was the object behind the perpetration of both crimes against humanity and genocide:

> They appear to have a common objective: permitting the establishment of “ethnically pure” territories and thus creating a new state. The acts constitute the means to implement “the policy of ethnic cleansing”, devised by the SDS in Bosnia and Herzegovina in complicity or co-ordination with others, and applied by its official bodies in Bosnia and Herzegovina.\(^4\)

In the same indictment, however, the Trial Chamber also stated that:

> It does appear, […] relative to the events subject to its review, that a deliberate and systematic line of conduct called “ethnic cleansing” has been substantiated […].\(^5\)

These few examples provide evidence to show how there is an accepted and recognised judicial link between ethnic cleansing and crimes against humanity. The ICTY has, however, not been the only instance to observe these connections; scholars too, have

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\(^5\) Id., p. 954 para. 22.
identified certain significant similarities between the crimes. Bell-Fialkoff, for example, considers that:

Ethnic cleansing can be understood as the expulsion of an “undesirable” population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these.\(^6\)

The key term here is ‘discrimination’, which indicates the possible link to the concept of crimes against humanity. Discrimination signifies that the motives for the targeting of a particular people are based on specific grounds – in the above definition, ethnic cleansing has to be motivated by religious, ethnic, political, strategic and/or ideological factors. Such considerations are not, however, specific to ethnic cleansing. In particular, the crime against humanity of persecution is likewise based on discriminatory motives and defined under the Rome Statute as a crime perpetrated:

[...] against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.\(^7\)

The specific elements detailed in the Statute’s definition of persecution reveal a close association with the recognised conditions of ethnic cleansing. By the same token, the definition of the latter provided by Petrovic refers back to crimes against humanity and their definitional requirement of systematicity, as he considers the aim of the act to be to ‘systematically eliminate another group’:

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\(^7\) Article 7(1)(h) of the Rome Statute defined persecution as a crime perpetrated ‘on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law. Article 5(h) of the ICTY Statute and Article 3(h) of the ICTR Statute defined persecution as a crime committed ‘on political, racial and religious grounds’. 

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Ethnic cleansing is a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin.  

The link cited here between ethnic cleansing and “elimination” might open up a broader context for further exploring the nexus with crimes against humanity, as it may indicate that the practice not only encompasses certain characteristics of persecution, but also of the crime of extermination as well. Additionally, the use of the word “systematically” generally reinforces the closeness between ethnic cleansing and crimes against humanity, as the term is one of the principal elements of the actus reus of the latter, defined as:

any of the following acts [...] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

A similar definition to that provided by Petrovic was likewise adopted by Mr Tadeusz Mazowiecki, the special rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia. He too considered the “systematic” element a requirement of ethnic cleansing:

Ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, with the view to forcing it to abandon the territories where it lives.

These references to systematicity provide a notable example of how a characteristic of crimes against humanity has been extended to apply to ethnic cleansing. Coupled with the further parallels identified to the crimes of persecution and extermination, it thus seems both justifiable and, indeed, vitally important, to scrutinise more closely whether the established paradigm of crimes against humanity might provide a viable category for the classification of the practice of ethnic cleansing.

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9 Extermination, like persecution, will be analysed subsequently pp. 199-211.
6.1. Ethnic cleansing and the material elements of crimes against humanity

The obvious starting and base-point for an inquiry along these lines is provided by the established *actus reus* of crimes against humanity. As noted above, the “systematic” character of such crimes has been taken up and engaged by scholars, practical instances and judicial instruments as a condition of ethnic cleansing. It might be further considered, however, that Trial Chamber I of the ICTY also recognised a second key element – that of the “widespread” nature of the act – as a further characteristic of ethnic cleansing:

The implementation of [...] ethnic cleansing, over the region of Vlasenica seems to have been so widespread as to fall within the Tribunal’s jurisdiction [...]12

These two elements will thus provide something of a focal point for the discussion that follows – to what extent must an act of ethnic cleansing be “systematic”? To what extent “widespread”? In order to fully probe these issues, attention will also be extended towards the other definitional characteristics of crimes against humanity – namely, whether the act must constitute an “attack”, be perpetrated “against a civilian population” and “with knowledge”. By carefully analysing these questions, it shall become possible to gain a clearer insight to both the parallels and the differences between the two categories of crime, which will, in turn, help further clarify the overmastering issue of the possibilities for classifying ethnic cleansing.

6.1.1. DETERMINATION OF THE WIDESPREAD OR SYSTEMATIC ATTACK CHARACTERISTICS

The “widespread or systematic” characteristic of crimes against humanity has, as we have seen, been frequently convoked as an important consideration in qualifying ethnic cleansing. To fully grasp the meaning of the two terms, however, and to assess their applicability in the case of ethnic cleansing, it is first important to consider the notion of “attack” to which they are attached in the Rome Statute definition.13

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13 See above footnote 10.
6.1.1.1. Attack

Although the definition of attack was formulated in the context of crimes against humanity, it seems reasonable to consider that it might also be applied as a definitional element of ethnic cleansing. The term was defined by the Kunarac Appeals Chamber as constituting mistreatment of any civilian population, during either peace or war:

The concepts of “attack” and “armed conflict” are not identical. As the Appeals Chamber has already noted when comparing the content of customary international law to the Tribunal’s Statute, “the two – the ‘attack on the civilian population’ and the ‘armed conflict’ – must be separate notions, although of course under Article 5 of the Statute the attack on ‘any civilian population’ may be part of an ‘armed conflict’”. Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it. Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population. […]\(^\text{14}\)

part of this attack could, all other conditions being met, amount to crimes against humanity.\(^\text{15}\)

Any act perpetrated against a civilian population as part of a main attack, and with knowledge thereof, could thus amount to crimes against humanity. In other words, it would seem that the “attack” requirement is considered fulfilled when all the other conditions constituent to the definition are reunited. This does not, however, mean that all such acts must have been perpetrated during the same attack: acts committed either before or after the main assault could still be prosecuted if considered sufficiently interconnected. Nor does it necessarily demand that the attack be perpetrated through force and violence. As a result of this relatively broad latitude of definition, an act of ethnic cleansing could thus be seen to be perpetrable within the context of an attack. As specified by the Kunarac Appeals Chamber,\(^\text{16}\) however, the other conditions applicable to crimes against humanity must also be demonstrated in order to establish that the incident in question escalated to this level of crime – although the attempt to remove a civilian population from a given area, for example, may appear to constitute an attack in these terms (insofar as the expression may be applied to ethnic cleansing),\(^\text{17}\) the other characteristics of crimes against humanity must also be shown to be applicable to the practice of ethnic cleansing in order to permit a qualification under this ambit. Should these other requirements be met, the demonstration of the attack would itself be considered fulfilled and thus become auxiliary.

6.1.1.2. The widespread or systematic elements

Having discussed the applicability of the “attack” requirement, attention might now be turned back again to look in finer detail at the notion of the “widespread or systematic” nature of the act. Certainly there can be no doubting that ethnic cleansing can be committed on a large-scale, where swathes of territory in a given country are purged in an attempt to eliminate certain human groups or even an entire population – one might cite as examples the situation in Bosnia during the Yugoslavian conflict,\(^\text{18}\) or the


\(^{16}\) Ibid.

\(^{17}\) See subsequent developments on “civilian population” pp. 190-195.

\(^{18}\) See Chapter Two pp. 40-43.
expulsion of the Jews and opponents to the Nazi regime before the establishment of the Final Solution during the Second World War. Of this latter context, Zayas states:

Persons who appeared recalcitrant to Nazification, or even those who seemed of little use to Nazi enterprises, became victims of large-scale expulsions, driven from their homes in a few short hours with their most scanty baggage, and spoiled of their property.

This forced expulsion is, of course, widely recognised as one of the major horrors of the twentieth century, and offers forthright evidence of the scale on which ethnic cleansing might be committed. At the same time, the keenly-pursued and openly-stated aim of the Nazi leadership to remove all full-Jews from German territories also reveals a model of the systematic nature of the crime – the chilling example of Nazi Judenpolitik thus provides a paradigmatic model of how the act of ethnic cleansing appears to be both widespread and systematic simultaneously.

The point at issue here is that widespread and systematic are quantitative and qualitative factors employed to define the scale and the nature of the attack element of crimes against humanity. The adoption of such factors as definitional elements of ethnic cleansing seems equally necessary if we wish to distinguish this crime from a war crime, from a crime within a national legislation, or from an isolated crime. Within the context of crimes against humanity, widespread and systematic are presented as alternatives – to constitute a crime against humanity, the attack must be either widespread or systematic:

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19 A more detailed analysis of ethnic cleansing within the context of the Nazi regime, see: Chapter Five p. 161, and Chapter Seven pp. 218-225.
21 See M. de Menthon, cited in Alfred M. de Zayas, id., p. 216.
22 See Chapter Four on war crimes pp. 87-92.
It is the occurrence of the act within the context of a widespread or systematic attack on a civilian population that makes the act a crime against humanity as opposed to simply a war crime or a crime against national penal legislation, thus adding an additional element, and therefore in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs.\(^{25}\)

The fact that the two adjectives are linked by “or” rather than “and” permits a broader scope of application and prosecution. There is, however, no legal instrument providing explicit and specific instruction on exactly how “widespread and systematic” have to be defined. Trial Chamber I of the ICTY addressed this oversight and concluded that the “widespread or systematic” requirement should be decided on a case-by-case basis:

> The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.\(^{26}\)

In effect, the verdicts of the different Trial Chambers indicate that where all other requirements of crimes against humanity are fulfilled, the “widespread or systematic” requirement should likewise be considered constituted. This finding is to be welcomed in the sense that it provides a measure of clarity to notions which would otherwise have remained ambiguous. The application of the characteristic elements of crimes against humanity to ethnic cleansing would, moreover, also facilitate the demonstration of the attack requirement, which would, in turn, enable its classification as a crime against humanity.

The view of the Trial Chambers that the interpretation of the “widespread or systematic” conditions ought to be realised on a case-by-case basis ought likewise to be applied to considered acts of ethnic cleansing. It is this that accounts for why, in the various definitions cited above, the terms “widespread” and “systematic” were both used. It has already been judicially admitted that acts of ethnic cleansing could be


prosecuted for their systematicity or their large scale. For example, in the Karadžić and Mladić cases, Trial Chamber I explained that: ‘a deliberate and systematic line of conduct called “ethnic cleansing” has been substantiated’. The specific widespread nature of ethnic cleansing was, by the same token, explicitly recognised by the Nikolić Trial Chamber.

Yet it ought to be borne in mind that a crime of this type could fulfil both the quantitative and qualitative condition – the act might be committed both systematically and on a large scale. For instance, when a state or any other organisational policy is involved in the commission of massacres against a civilian population, the attack is qualified as systematic; when these massacres are perpetrated on a whole territory or destroy numerous individuals, they must also be characterised as widespread. The qualification of crimes as both widespread and systematic has already found precedent with regard to ethnic cleansing in the Vasiljević case:

[...] The attack took many forms, starting with the Serb take-over of the town and the systematic and large-scale criminal campaign of murders, rapes and mistreatment of the non-Serb population of this municipality, particularly the Muslims, which eventually culminated in one of the most comprehensive and ruthless campaigns of ethnic cleansing in the Bosnian conflict. [...].

In this regard, then, ethnic cleansing could be considered as both ‘systematic and large-scale’.

Having established that the “widespread or systematic attack” requirement could become a determinative element of ethnic cleansing, it remains to consider whether the same is true of the other characteristics of crimes against humanity. Prior to pursuing this, however, it seems important at this point to reverse the perspective, so to speak, and to first look at whether one of the specific elements which has been seen as one of the characteristic elements of ethnic cleansing is compatible with crimes against humanity. In the situations where this term has been used, officials of the state appear to

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30 Ibid.
have been involved. During the conflict in Yugoslavia, for example, officials of the state such as Milošević and Karadžić were responsible for instigating ethnic cleansing, whilst the Darfur, Burundi and, most recently, Georgia cases, all of which were – with varying degrees of veracity and exactitude – described as examples of ethnic cleansing, were similarly prompted by state officials. From this, ethnic cleansing does seem to require a specific state policy element. If ethnic cleansing is to be classified under the concept of crimes against humanity, it thus appears vital to consider whether this aspect of the act might fit within the definitional ambit of the category.

6.1.1.3. The question of the state policy element

Although state participation appears to be a specific requirement of ethnic cleansing, its connection with the notion of systematicity also has a long-standing tradition in the case law on crimes against humanity. Indeed, in the wake of the Nuremberg precedent, several national Courts have confirmed the requirement of a state policy – the French Cour de cassation in the Barbie case, for example, held that the perpetrator of a crime against humanity should act ‘in the name of a state practicing a policy of ideological supremacy’. These precedents were reaffirmed in both the ICTY and the ICTR Statutes. As McAuliffe deGuzman points out, however, the policy element for both ad hoc Tribunals was specifically:

a reaction to the atrocities perpetrated in the Former Yugoslavia and Rwanda, where armed groups, not recognised as governments, committed massive and systematic violations of human rights.


Thus the ICTY and the ICTR did not hold that state participation was compulsory, but only stated that in the case of an armed conflict, *de facto* governments, like *de jure* governments, could be convicted for committing a crime against humanity. Nevertheless, the *Tadić* Trial Chamber introduced a further element of doubt by affirming that:

such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.\(^{36}\)

Trial Chamber II of the ICTY demonstrated, meanwhile, that although widespread and systematic prospered on their own, these requirements were also linked with the existence of a state’s policy. The demonstration of state policy was considered necessary in order to fulfil the widespread or systematic requirement. Yet the Trial Chamber also clearly needed to specify that it only drew this conclusion because ‘the evidence in this case clearly establishes the existence of a policy’.\(^{37}\) By its implications, this sentence is particularly significant: it indeed suggests a lack of certainty on the part of the Trial Chamber itself, which does not appear to be wholly convinced by its own argument or verdict, especially since:

this is not expressed in so many words in the above definition [Article 6(c) of the Nürnberg Charter] […] that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.\(^{38}\)

Similarly, the *Kunarac* Appeals Chamber affirmed that:

Contrary to the Appellants’ submissions, neither the attack nor the acts of the accused needs to be supported by any form of “policy” or “plan”. There was nothing in the Statute or in customary international law at the time of

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\(^{38}\) *Ibid.*
the alleged acts which required proof of the existence of a plan or policy to commit these crimes.\footnote{39}

The outlook developed by the ICTY was not, however, followed by the ICTR. In the \textit{Akayesu} case, for example, the ICTR adopted the view of the fixed jurisprudence based on the Draft Code of Offences Against the Peace and Security of Mankind\footnote{40} and on the Draft Code of Crimes Against the Peace and Security of Mankind.\footnote{41} However, contrary to both Codes, which considered that crimes against humanity have to be systematic, widespread, and ‘instigated or directed by a Government or by any organization or group’,\footnote{42} the Trial Chamber only considered the state requirement as part of the systematic element:

the concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state.\footnote{43}

The \textit{Akayesu} Trial Chamber thus affirmed that the notion of state policy was inscribed in the definition of crimes against humanity as an elaboration of the meaning of systematic and was not therefore a separate, further requirement. This affirmation did not, however, by any means resolve all debate and unease concerning the concept of state participation. Indeed, during the drafting of the Statute of the International Criminal Court, it was decided that for a crime against humanity to be recognised, it has to be determined as part of a state or organisational policy. The Preparatory Commission explained that:

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It is understood that “policy to commit such attack” requires the State or organization actively promote or encourage such an attack against a civilian population.\textsuperscript{44}

This provision was accompanied by a footnote concluding that:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack […]\textsuperscript{45}

From this it is clear that it is not only an active state policy that could constitute an element of crimes against humanity, but also the failure to protect a population against an attack, or the failure to suppress any such attack. The Rome Statute’s definition of crimes against humanity precisely states that the attack against a civilian population has not only to be widespread or systematic, but also has to be committed ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’.\textsuperscript{46} Rather than merely reaffirming the conventional notion of the “widespread or systematic attack”, this new policy requirement, by stipulating an additional requisite condition, effectively puts an end to it. Therefore, according to the Rome Statute, the attack perpetrated against any civilian population has to be committed as part of a state’s action, and so the widespread or systematic distinction – that is, the differentiation between a state’s participation and a large-scale attack – is no longer applicable. This conclusion was also drawn by Schabas, who stated: ‘it seems […] that the term attack has both widespread and systematic aspects’.\textsuperscript{47} The International Criminal Court Statute thus seemingly reduces the scope of crimes against humanity by rendering the distinction between widespread and systematic obsolete and demanding that a state’s action always has to be demonstrated.

This analysis of the case law on crimes against humanity regarding a state policy element indicates that a widespread or systematic attack does not necessarily require

\textsuperscript{45} Id., p. 9, footnote No. 6.
\textsuperscript{46} Article 7(2)(a) of the Rome Statute of the International Criminal Court adopted in Rome in 1998.
\textsuperscript{47} William A. Schabas, \textit{An Introduction to the International Criminal Court} (Cambridge: Cambridge University Press, 2001), p. 36.
such policy to be recognised as such – the exception being the text of the Rome Statute. Yet the historical examples recognised as ethnic cleansing have, as detailed above, always been committed as part of a state policy. The policies pursued by the Nazis to expel the Jews from the German territories were, for all the recent debate between “Intentionalists” and “Structuralists”,\textsuperscript{48} decided by central government. As Friedländer notes:

Nazis persecution and exterminations were perpetrated by ordinary people who lived and acted within a modern society not unlike our own, a society that had produced them as well as the methods and instruments for the implementation of their actions; the goals of these actions, however, were formulated by a regime, an ideology, and a political culture that were anything but commonplace.\textsuperscript{49}

In the former Yugoslavia the situation was similar, with the acts of ethnic cleansing being recognised as states policies by the United Nations itself. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, for example, expressly explained that it condemned the policies of so-called ethnic cleansing.\textsuperscript{50} The use of the term policies in this context signifies how the state was considered to be involved in the acts of ethnic cleansing perpetrated. Drawing these lines together, it seems clear that the element of state policy is a formal condition of the crime, and not just a possibility as it is for crimes against humanity: ethnic cleansing appears to only be constituted when a state policy is present.

Having made this brief excursus to examine and demonstrate how ethnic cleansing does not completely align with the interpretation of “widespread” and “systematic” as applied to crimes against humanity – other than in the definition provided by the ICC Statute – attention can now turn back to consider whether or not the act can be perpetrated against “any civilian population”.

\textsuperscript{48} For an analysis of this debate, see Chapter Seven pp. 218-221.
6.1.2. Any Civilian Population

The formulation of ethnic cleansing with the mention of the term “ethnic” seems to indicate that only ethnic minorities are the targets of this crime. It was, however, also considered as a method of war seeking for the displacement of a population.51 Despite its etymology, it thus has to be determined whether ethnic cleansing can be perpetrated against any civilian population, similarly to crimes against humanity, and not only against an ethnic group.

6.1.2.1 Any civilian

It is important to mention that the notion “any” means that the nationality of the targeted population is irrelevant when determining whether or not a crime against humanity was committed. This interpretation was adopted by the ICTY and followed the International Law Commission approach in its formulation of the Nuremberg Principles of 1950.52 Indeed, it was reaffirmed by the Tadić Trial Chamber that:

The inclusion of the word “any” makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality.53

Depending on whether ethnic cleansing is understood as a military notion or as an act solely against a minority group,54 the term “any” could be interpreted as standing in opposition to ethnic cleansing. If ethnic cleansing is defined as a military notion, as it was originally, the term “any” could be applicable to it. If, however, it is considered as only targeting ethnic minorities, the term “any” fails to be applicable: ethnic cleansing would not be perpetrated against “any” civilian population but only against a specific one.

This consideration aside, the compatibility of ethnic cleansing with the term “any” further depends on whether or not the act could potentially fulfil the civilian population element. For some scholars, the expression “civilian population” includes two key

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51 See Chapter Two pp. 41-43.
54 Chapter Two pp. 41-43.
elements: firstly, the act has to be directed against non-combatants, and secondly, a large number of victims has to be targeted.\textsuperscript{55}

The fact that the expression “civilian population” includes all non-combatants is hardly surprising. This understanding accords with the Geneva Conventions of 1949 and their Additional Protocols of 1977 – the only international conventions which define the term civilian in this context. Geneva Convention IV relative to the Protection of Civilian Persons in Time of War thus defines civilians as:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.\textsuperscript{56}

Unfortunately, this definition was only applicable in wartime because the Geneva Conventions of 1949 were adopted in order to specify the law of armed conflicts. As crimes against humanity as well as acts of ethnic cleansing can be perpetrated during peacetime, the protection offered to civilians under the Geneva Conventions is different from the protection that international criminal law has to offer to victims of such crimes. And yet, as recognised by the \textit{Tadić} Trial Chamber, there is no convention defining civilian population in peacetime:

The Statute does not provide any guidance regarding the definition of “civilian” nor, for that matter, does the \textit{Report of the Secretary-General}. The Prosecution in its Pre-Trial brief argues that the term “civilian” covers “all non-combatants within the meaning of common Article 3 to the [Geneva] Conventions” because of the finding that the language of Common Article 3 reflects “elementary considerations of humanity” which are “applicable under customary international law to any armed conflict”. The Defence agrees that “civilians” under Article 5 covers all non-combatants, arguing however that the concept of “non-combatants” is not always clear in application. The Defence notes that particularly in situations  

\textsuperscript{55} Egon Schwelb, ‘Crimes against Humanity’, (1946) 23 \textit{British Yearbook of International Law} 178-226, pp. 190-191.

\textsuperscript{56} Article 3(1) of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War adopted the 12 August 1949.
such as that in Bosnia and Herzegovina, “where groups are mobilising without necessarily being under the direct control of the central government,” there is a “grey area” between combatants and non-combatants. Thus the Defence concludes that the notion of non-combatants may not be sufficiently defined to determine in all cases whether the victims were civilians.\(^{57}\)

Without a specific definition of the term “civilian” in peacetime, it seems safe to assert that the integration of ethnic cleansing within the ambit of crimes against humanity will be made easier as this requirement will not have to be strictly demonstrated as a necessary characteristic. It is the case law of the tribunals which will decide what constitutes a civilian population.

The case-by-case approach is also highly relevant in defining the term “civilian” in the scenario where a single individual commits an armed action. The difficulty here stems from the fact that a single perpetrator has potentially to be defined as an illegal combatant, because he was a combatant rather than a civilian, but without being part of a regular army. Yet, the ICTY explained that the determination of the status of an individual remains to be judicially established on an individual case basis:

In case of doubt as to whether a person is a civilian, that person shall be considered to be civilian. The Prosecution must show that the perpetrator could not reasonably have believed that the victim was a member of the armed forces.\(^{58}\)

The affirmation of a broad and inclusive definition of “civilian” was also accepted and determined by the ICTR. In the \textit{Akayesu} case, the ICTR Trial Chamber held that:

[...] an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed \textit{hors de combat} by sickness, wounds, detention or any other cause.


Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.\textsuperscript{59}

This extensive, case-by-case understanding of “civilian” enables its application to current instances of ethnic cleansing. If “civilian” were more precisely defined, its scope of application would inevitably finds itself restricted. Indeed, as long as doubts persist concerning the status of a person, he or she has to be considered as a civilian – this seems the most reasonable approach. In explaining the importance and the neutrality of the term “civilian”, the ICTY concluded that:

As a group, the civilian population shall never be attacked as such. Additionally, customary international law obliges parties to the conflict to distinguish at all times between the civilian population and combatants, and obliges them not to attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage anticipated.\textsuperscript{60}

The victim of an act of ethnic cleansing – if ethnic cleansing were to be classified as a crime against humanity – does not need to demonstrate that he or she was linked with either side to the conflict. As a civilian, he or she must never be targeted. The perpetration of ethnic cleansing against civilians was also recognised by Judge Lauterpacht when, in his separate opinion concerning the Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia Herzegovina and Others v. Yugoslavia), he defined ethnic cleansing as ‘the forced migration of civilians’.\textsuperscript{61} Similarly, Sir David Hannay explained to the Security Council that ethnic cleansing has to be comprehended as ‘the forcible removal of civilian populations’.\textsuperscript{62} Thus the act, like any other crime against humanity, clearly targets civilians. It remains

\begin{itemize}
\item \textsuperscript{59} Prosecutor v. Jean-Paul Akayesu, Case N° ICTR-96-4-T, Judgement, Trial Chamber I, 2 September 1998, para. 582.
\item \textsuperscript{60} Prosecutor v. Dragoljub Kunarac et al. (“Foća”), Cases N° IT-96-23-T and N° IT-96-23/1-T, Judgment, Trial Chamber II, 22 February 2001, para. 435.
\item \textsuperscript{62} Security Council, UN Doc S/PV.3106, p. 36.
\end{itemize}
to be determined, however, whether or not “population”, as affirmed by Hannay, could become a condition of ethnic cleansing.

6.1.2.2. Population

Insofar as ethnic cleansing has been conceived as a crime perpetrated against an “undesirable” civilian population,\(^ {63}\) it seems that the targeting of a “population” is indeed one of the definitional requirements of ethnic cleansing. Yet, ethnic cleansing has also been defined as an act perpetrated against groups rather than populations:

Ethnic cleansing is a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory [...].\(^ {64}\)

The distinction between the concepts of “group” and “population” nonetheless seems rather artificial and, in any event, purely theoretical. In practice, and as affirmed by the Kunarac Trial Chamber, ‘as a group, the civilian population shall never be attacked as such’\(^ {65}\). With this finding, the Trial Chamber here brought a welcomed harmonisation between the two notions, and it now seems relatively established that a civilian population is considered as being itself a group. Applied to ethnic cleansing, this means that, whatever the definition of ethnic cleansing adopted, as an act against a population or against a group, the population requirement of crimes against humanity would be fulfilled. It also needs to be assessed, however, what exactly the notion of “population” can be seen to cover.

In this regard it is interesting to note how the Tadić Trial Chamber recognised that:

the term “population” in Article 5 contemplates that by his actions the accused participated in a widespread or systematic attack against a relatively large victim group, as distinct from isolated or random acts against individuals. The Defence, while generally in agreement, argues that in order


\(^{64}\) Drazen Petrovic, *op. cit.* note 8.

to constitute a crime against humanity the violations must be both widespread and systematic.\textsuperscript{66}

The term “population” seems to indicate that the crime has to be widespread or systematic, and committed against large groups of civilians. In line with this interpretation, ethnic cleansing cannot be perpetrated against single individuals, unless they form part of the targeted population, and unless the isolated acts are part of a widespread or systematic attack.\textsuperscript{67} The \textit{Kunarac} Appeals Chamber offered the same interpretation:

As was correctly stated by the Trial Chamber, the use of the word “population” does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.\textsuperscript{68}

“Population” can thus signify that a particular group within the civilian population was targeted. However, according to the case law, such a specific targeting has to be large enough in order to satisfy the “population” requirement. There are no particular, “objective” conditions determining such issues. Each Trial Chamber must, therefore, appreciate that individuals targeted during a “widespread or systematic attack” could be defined as a civilian population.

This interpretation of the “civilian population” requirement does not present many problems for ethnic cleansing: this crime was already defined as fulfilling such a requirement and the definitions of both terms are wide enough to be applied to it.

\subsection*{6.2. Ethnic cleansing and the mental element of crimes against humanity}

To be considered an international crime, ethnic cleansing has to be perpetrated with a mental element – due to their particular nature, all such crimes must be committed with

\begin{itemize}
  \item \textit{Id.}, paras 644 and 649.
\end{itemize}
a specific, and largely variable, degree of moral criminality. The ICTY, for example, has explicitly enounced this element in relation to crimes against humanity:

The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.69

The requirement of a mental element is, in fact, so significant that the question of intent will, in large part, determine the classification of the crime. With regard to crimes against humanity, both the law and case law unequivocally assert that the mens rea of the act is knowledge-based. In this respect, the Blaškić Trial Chamber specified that:

The person who has “knowledge” of the plan, policy or organisation as part of which the crimes take place is not only the one who fully supports it but also the one who, through the political or military functions which he willingly performed and which resulted in his periodic collaboration with the authors of the plan, policy or organisation and in his participation in its execution, implicitly accepted the context in which his functions, collaboration and participation must most probably have fit.70

In accordance with this, knowledge is demonstrated when the perpetrator ‘knowingly took the risk of participating in the implementation of the ideology, plan or policy’.71 The perpetrator thus does not necessarily need to support the policy or plan behind the acts committed: he or she need only be responsible for actual implementation, and be

71 Id., para. 257.
aware of the his or her involvement in a scheme that will cause great suffering to the targeted individuals.

In the same vein, the Tadić Trial Chamber ruled that the perpetrator should have ‘knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis’.\footnote{Prosecutor v. Duško Tadić (“Prijedor”), Case No IT-94-1-T, Judgment, Trial Chamber II, 7 May 1997, para. 659.} It also held that the perpetrators should not commit crimes against humanity for merely personal reasons.\footnote{Ibid.} The latter statement explicitly excludes personal discrimination as a requirement for the recognition of crimes against humanity and thereby distinguishes them from other crimes which could be committed solely for personal reasons. Applying this to the case before it, Trial Chamber II was thus able to consider that Tadić was:

an “earnest SDS member and an enthusiastic supporter of the idea of creating Republika Srpska”, both of which embrace the notion of an ethnically pure Serbian territory. Additionally, in his role as SDS President in Kozarac, he must have had knowledge of the SDS programme, which included the vision of a Greater Serbia.\footnote{Id., para. 459.}

For the purposes of the present analysis, it is striking to note that, while knowledge was judicially interpreted as being the mental element of ethnic cleansing, it was also originally defined as the intentional element for crimes against humanity. This consideration greatly reinforces the similarities between both crimes.

Under international customary law, the mental element of crimes against humanity consists of a knowledge-based requirement. Indeed, following the Nuremberg Charter,\footnote{Article 6(c) of the Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, 82 United Nations Treaty Series, 279.} the concept of crimes against humanity did not immediately become the subject of any comprehensive convention. As Van Schaak notes, with no broadly-accepted consensus definition, ‘international tribunals, international law drafters and commentators […] were left to follow the Nuremberg precedent in their treatment of the prohibition against crimes against humanity’.\footnote{Beth Van Schaack, ‘The Definition of Crimes Against Humanity: Resolving the Incoherence’, (1998-1999) 37 Columbia Journal of Transnational Law 787-850, p. 792.} The codification of crimes against humanity in a legal instrument did not occur before the Rome Statute of the ICC in
1998, which integrated most aspects of the customary definition of crimes against humanity, including the knowledge-based mental element. The Rome Statute, indeed, holds that the perpetrator has to have knowledge of the attack against any civilian population.\textsuperscript{77} Such knowledge does not need to be precise or particular: the perpetrator only needs to have a general knowledge of the attack in order to be prosecuted for crimes against humanity. In the courtroom, this means that the burden of proof for the prosecution is somewhat lighter. The prosecution does not need to prove a particular mental element and can simply demonstrate that, at some level, the perpetrator knew that a link existed between his or her act and a widespread or systematic attack.

Although ethnic cleansing requires some form of state or organisational policy,\textsuperscript{78} perpetrators of ethnic cleansing on the ground could be anyone contributing to the removal of a targeted population from a given territory. With knowledge as a mental element, the burden of proof would be facilitated in order to demonstrate that ethnic cleansing was perpetrated, even if the detailed plan behind this policy was not widely known, as perpetrators are considered to possess enough common sense to recognise the consequences of their actions. It ought to be here kept in mind, moreover, that ethnic cleansing can, as has been established previously,\textsuperscript{79} be achieved through various means, from the implementation of resettlement plans and sustained threats and propaganda, to systematic rape of female victims or even physical annihilation. The spectrum of acts is thus potentially broad, and relatively peaceful acts can be effectively employed to such ends just as readily as mass murder.

As a final point, it can be noted that knowledge may also mean that the persons committing criminal acts can be identified as foot soldiers, for although they did not know the full details of the plan behind the acts they perpetrated – they might, for example, be unaware of the fact that with rape or killing they participated in a large-scale crime against humanity – they were nonetheless conscious that their actions fell within the definitional scope of a punishable crime. Likewise, in the case of ethnic cleansing, although a foot soldier does not necessarily have full knowledge of a plan in all its details, he or she could still be prosecuted if deemed to possess knowledge of the willingness to cleanse a territory from a population.

In this respect, ethnic cleansing seems to carry, in essence, the same mental element as crimes against humanity. This assertion must, however, be immediately

\textsuperscript{77} Article 7(1) of the Rome Statute of the International Criminal Court adopted in Rome in 1998.
\textsuperscript{78} See supra pp. 185-189.
moderated insofar as the mental element can vary between the different crimes against humanity. Since their conception in the Nuremberg Charter, crimes against humanity have been divided into two distinct groups: murder-type crimes on one hand and persecutions on the other. The Nuremberg Charter, indeed, defined them as:

Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.  

Far from being purely theoretical, this definitional distinction has an impact in practice, notably with regards the mental element required. Applied to the case of ethnic cleansing, this means that its mental element will depend upon its classification as either a murder-type crime against humanity or as a crime of persecution. It is thus not enough to assert that ethnic cleansing is a crime against humanity, it must also be determined to which category it belongs – if at all. The following developments will thus extensively focus on murder-type crimes against humanity, using the crimes of extermination and persecution as a paradigm, and analysing in close detail their respective knowledge requirements so as to assess to which category ethnic cleansing seems to pertain most closely.

6.2.1. ETHNIC CLEANSING AND EXTERMINATION

Due to certain shared characteristics, the classification of ethnic cleansing as a crime against humanity alongside rape, enslavement, deportation and the other murder-type crimes would not necessarily be a legal oddity. It is from the outset rather striking to note the common features between ethnic cleansing and the crime of extermination. While it must be admitted that, unlike extermination, ethnic cleansing does not automatically encompass mass murder, it could nonetheless still aim at killing the

80 Article 6(c) of the Charter of the International Military Tribunal in Nuremberg. Emphasis added.
individuals belonging to a certain population. Put differently, while extermination is not necessarily the goal behind acts of ethnic cleansing, it could still potentially characterise acts of ethnic cleansing. Yet, except for the fact that extermination is the crime characterising mass murders, it is not specifically defined, and this textual deficiency could have greatly limited the comprehension of the possible relationship between ethnic cleansing and extermination if it were not for the judicial input of the ad hoc International Criminal Tribunals.

6.2.1.1. Ethnic cleansing and the actus reus of extermination

Thanks to the case law of the ICTY and the ICTR, a more definite understanding of extermination has been made possible, and several judgments have addressed in detail the crime of extermination, thereby filling the gap left in the text of the law. The Vasiljević Trial Chamber, for example, notably explained that the elements constituting extermination were as follows:

1. The material element of extermination consists of any one act or combination of acts which contributes to the killing of a large number of individuals (actus reus).
2. The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (mens rea).\(^2\)

In a similar vein, Trial Chamber I of the ICTR held that:

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The Chamber recalls that in Akayesu the Tribunal distinguished the crime of extermination from the crime of murder by saying, “Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder.” In Bagilishema, the Tribunal affirmed this distinction, holding that extermination is “unlawful killing on a large scale” and that “large scale” does not suggest a numerical minimum. In Ntarkirutimana, the Chamber cited Vasiljevic which held that extermination would be found where the Accused were responsible for the deaths of a large number of individuals, even if their part therein was remote or indirect, and that extermination “supposes the taking of a large number of lives”. The Chamber in Niyitegeka adopted the same approach, citing Akayesu and Vasiljevic with approval. In Semanza, the Chamber held that the “material element of extermination is the mass killing of a substantial number of civilian”. The Chamber agrees that in order to be guilty of the crime of extermination, the Accused must have been involved in killings of civilians on a large scale but considers that the distinction is not entirely related to numbers. The distinction between extermination and murder is a conceptual one that relates to the victims of the crime and the manner in which they were targeted.83

Based on these judicial findings, ethnic cleansing would appear to fit well within the category of extermination. Indeed, not only does the crime of extermination cover a rather wide array of different acts, it can also be constituted by the killings of a vast number of individuals rather than of a whole population – a characteristic which would allow ethnic cleansing to be recognised as such even where only parts of a civilian population are targeted. In his analysis of the crime of extermination, Schabas meanwhile goes even further in considering that extermination does not necessarily involve acts of killing, explaining that:

> evidence must exist that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated

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The use of the word “destruction” to designate the goal behind extermination is admittedly rather confusing as it seems to echo the language usually employed in the law of genocide – a crime precisely characterised by the intent to destroy.\footnote{See Chapter Five pp. 139-144.} Yet, leaving this aside for the moment, the destructive goal behind extermination appears to be the differentiating factor between this crime and ethnic cleansing, which does not necessarily aim at destroying the targeted population – unless, of course, one considers that the elimination of a group from a territory amounts to its destruction, in which case both crimes would share the same \textit{mens rea}.

\section*{6.2.1.2. Ethnic cleansing and the \textit{mens rea} of extermination}

To reiterate from earlier, the \textit{mens rea} for crimes against humanity is knowledge-based, meaning, in accordance with constant case law, that the perpetrator of such an act merely has to be aware of the general context in which his or her acts occurred, and of the existence of a nexus between these acts and a broader policy. A number of Trial Chambers, of both the ICTY and the ICTR, have, however, on occasion, challenged this definition of knowledge regarding crimes against humanity, and have sometimes required an additional discriminatory motive or even discriminatory intent.

In \textit{Akayesu},\footnote{Prosecutor \textit{v. Jean-Paul Akayesu}, Case N° ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, paras 591-592.} the Trial Chamber provided one of the first definitions of the crime of extermination and simultaneously recognised the possibility of a discriminatory requirement as a component of knowledge. Preceding even further, the \textit{Tadić} Trial Chamber did not simply refer to a discriminatory motive, but also to a discriminatory intent:

Another related issue is whether the widespread or systematic acts must be taken on, for example, racial, religious, ethnic or political grounds, thus requiring a discriminatory intent for all crimes against humanity and not only persecution. The law in this area is quite mixed. Many commentators and national courts have found that some form of discriminatory intent is
inherent in the notion of crimes against humanity, and thus required for the “inhumane acts” group, as well as persecution, because the acts are taken against the individual as a result of his membership in a group that is for some reason targeted by the perpetrator. […]

[...] Because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the Report of the Secretary-General, and since several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis, the Trial Chamber adopts the requirement of discriminatory intent for all crimes against humanity under Article 5.87

For the Tadić Trial Chamber, it was thus not sufficient for the prosecution to demonstrate that the perpetrator had knowledge of the attack, it also had to demonstrate the presence of intent and to determine that this intent was based on discriminatory, though not personal, grounds. This interpretation of knowledge as discriminatory intent presents a real challenge, and was not subsequently reaffirmed by other Trial Chambers of the ICTY or the ICTR. On the contrary, in fact, subsequent judgments largely undermined this position, finding that discriminatory motives – let alone intent – were not elements of extermination:

the crime of extermination must, by its very nature, be directed against a group of individuals, that it requires an element of mass destruction and that it embraces situations where a large number of people who do not share any common characteristic are killed. No discriminatory element is required.88

Such developments are to be welcomed in the sense that the requirement of discriminatory grounds for the recognition of crimes against humanity as such is both misleading and legally incorrect: crimes against humanity – including extermination – are crimes perpetrated against “any civilian population” and do not require demonstration of the reasons for which the population was targeted.

Turning to ethnic cleansing, this interpretation seems to be in line with the understanding of this particular act, which would require knowledge of the act – as affirmed by the Tadić Trial Chamber – as well as discriminatory motives. This is precisely where the difference between ethnic cleansing and extermination might thus be: in the requirement of discriminatory motives for the qualification of the former. What might be more persuasive therefore is a comparative analysis between ethnic cleansing and the other type of crimes against humanity, namely persecution.

6.2.2. ETHNIC CLEANSING AND PERSECUTION

Insofar as ethnic cleansing appears to require discriminatory motives – a condition absent from the definition of murder-type crimes against humanity – it could only be considered as a crime against humanity if it was to be equated, or at least linked with, the crime of persecution, which does require a unique mental element. As previously noted, several judicial decisions have acknowledged the inclusion of ethnic cleansing within the ambit of crimes against humanity. In the Nikolić case, however, an implicit reference to persecution was made through the use of the expression ‘discriminatory policy’. More tellingly, the Kupreškić Trial Chamber clearly found that ethnic cleansing was a crime encompassing the particularities of a specific crime against humanity namely, persecution. In the “Lašva Valley” case, Trial Chamber III affirmed that:

It should be added that if persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a lacuna would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent “to destroy, in whole or in part, a national, ethnical, racial, or religious group”. An example of such a crime

90 Prosecutor v. Jean-Paul Akayesu, Case No ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, paras 591-592. See also the analysis on ethnic cleansing and the genocidal discriminatory motives provided in Chapter Five pp. 126-131.
against humanity would be the so-called “ethnic cleansing”, a notion which, although it is not a term of art, is particularly germane to the work of this Tribunal. 92

Similarly, the Appeals Chamber of the ICTY in the Knorjelac case also clearly stated that ethnic cleansing was a crime against humanity, and more specifically one of persecution:

For these acts to be considered acts constituting the crime of persecution, they must have been committed, separately or cumulatively, with discriminatory intent and must constitute a crime of persecution the gravity of which is equal to the other crimes listed in Article 5 of the Statute. On several occasions, the Tribunal’s Trial Chambers have found that the forced displacement of the population within a state or across its borders constituted persecution. The Secretary-General’s report, which was approved by the Security Council, states that “[c]rimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.” It further states that “[c]rimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape” and that “[i]n the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called ‘ethnic cleansing’ and widespread and systematic rape.” The Security Council was therefore particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the Tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict. Forcible displacements, taken separately or cumulatively, can constitute a crime of persecution of equal gravity to other crimes listed in Article 5 of the Statute. This analysis is also supported by recent state practice, as reflected in the Rome Statute, which provides that displacements both within a state and across national borders can constitute a crime against humanity and a war crime.93

For the purposes of the present thesis, these statements by the ICTY Appeals Chamber are crucial insofar as they expressly qualify ethnic cleansing as a crime of persecution. Yet, so as to fully assess the legality and legitimacy of this qualification, an analysis of the specific requirements of the crime of persecution must be undertaken to definitively decide whether ethnic cleansing can be classified in such a fashion.

6.2.2.1. Ethnic cleansing and the actus reus of persecution

To be recognised as such, acts of persecution must, in accordance with the Rome Statute, be perpetrated on ‘political, racial, national, ethnic, cultural, religious, gender, or other grounds’. The discriminatory feature of both the actus reus and the mens rea of persecution determines the specific nature of this crime, and one might question whether or not ethnic cleansing shares its particularities. Indeed, except for the recognition of these unique characteristics in the ICC Statute, persecution was never specifically defined. This definitional lacuna has not gone unnoticed:

Neither international treaty law nor the case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world’s major criminal justice systems.

The undefined nature of persecution does not facilitate the recognition of differences and similarities between this crime and ethnic cleansing. Fortunately, the jurisprudence developed by the ad hoc Tribunals, together with the adoption of the Rome Statute, allows for an informed comparison between both crimes.

Persecution could be constituted by different acts and omissions, whether defined in the ICTY Statute or not, as long as they ‘seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is

repeatedly or constantly denied. As mentioned above, however, no exact list of the acts covered by the crime of persecution exists. The Tadić Trial Chamber for instance, acknowledged that:

the crime of persecution encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature.

This was later confirmed by the Kupreškić Trial Chamber, which found:

It is clear that persecution may take diverse forms, and does not necessarily require a physical element.

Perhaps more specifically, the ICTR in the *Ruggiu* case held that a four-part test had to be used in order to determine whether or not an act of persecution was perpetrated:

[...] the elements that comprise the crime of persecution [can be summarised] as follows: “a) those elements required for all crimes against humanity under the Statute, b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, c) discriminatory grounds”.

This decision by Trial Chamber I, reaffirming the ICTY jurisprudence, held that persecution is constituted by a gross or blatant denial (i), of a fundamental right ‘laid

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97 *Id.*, para. 710.
down in international customary or treaty law” (ii), reaching the same level of gravity as the other acts prohibited under the ICTY or ICTR Statutes (iii), and based on discriminatory grounds (iv). Without these four conditions, persecution cannot be prosecuted.

If ethnic cleansing is to be classified as a crime against humanity similar to persecution, it seems logical to assert that the same four-part test – as the only one available to distinguish persecution from other crimes – has to be applied to assess whether an act qualifies as ethnic cleansing. Using this test as the definitional framework, it appears that ethnic cleansing would fulfil all the requirements: it is indeed constituted by the gross or blatant denial of the fundamental right of a human group to live peacefully on a given territory. Such denial can reach the same level of gravity as other international crimes and is based on discriminatory grounds insofar as the group is targeted due to its ethnical belonging.

Moreover, in addition to these conditions, the Kordić and Ćerkez Trial Chamber specified that the unique nature of persecution was its cumulative effect:

acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed ‘inhumane’”. In this connection, the Trial Chamber notes the Defence contention that all the means of persecution alleged by the Prosecution in paragraph 37 of the Indictment must be proved in order for a widespread or systematic campaign of persecution to be proved. However, while the notion of persecution is generally used to describe a series of acts, the Trial Chamber agrees with the Kupreskic finding that “a single act may constitute persecution”, provided there is “clear evidence of the discriminatory intent.”

Thus acts, although not inhumane, can be seen as persecutory if their cumulative effect and overall consequences “offend humanity”. Considered as the forced removal of a


population from a given territory because of its ethnicity,\textsuperscript{103} it seems rather safe to assert that the \textit{actus reus} ethnic cleansing would fit in this definition.

It now remains to be seen whether ethnic cleansing can be considered as persecution in terms of \textit{mens rea}.

6.2.2.2. Ethnic cleansing and the \textit{mens rea} of persecution

As persecution shares the same discriminatory requirements as ethnic cleansing, a link between both crimes seems rather obvious. Indeed, ethnic cleansing can be conceived as an act targeting a population because of its ethnicity and members of ethnic groups because of their belonging to these groups.\textsuperscript{104} As such it seems reasonable to consider that ethnic cleansing is committed on ethnic grounds. In a similar fashion, the crime of persecution also requires discriminatory grounds, although the range of grounds for commission covered is undoubtedly wider. Yet, insofar as ethnic grounds are included within persecutory grounds, it could be submitted that, when perpetrated on ethnic grounds, persecution is nothing else than ethnic cleansing.

This assertion must however be handled with care. And indeed, both the ICTY and the ICTR Statutes specify that persecution can only be characterised as such if perpetrated ‘on political, racial and religious grounds’.\textsuperscript{105} Not only do they thus exclude ethnic grounds from the definition of persecution, they also insist on cumulative motives. When addressing this question, the \textit{Tadić} Trial Chamber opted for a rather loose interpretation of this disposition and concluded that:

\[ \ldots \text{it is highly unlikely that the Statute’s drafters intended the word “and” to require all three grounds to be present. The Statute should therefore be read in accordance with custom whereby each of the three grounds in and of itself is a sufficient basis for persecution.} \textsuperscript{106} \]

It thus appears that the definition of persecution provided by the ICTY and the ICTR Statutes has to be read and interpreted in light of the international customary law

\begin{itemize}
\item \textsuperscript{103} Chapter Two pp. 41-43.
\item \textsuperscript{104} Andrew Bell-Fialkoff, \textit{op. cit.} note 6. See also Chapter Two pp. 41-43.
\item \textsuperscript{106} \textit{Prosecutor v. Duško Tadić (“Prijedor”), Case N° IT-94-1-T, Judgment, Trial Chamber II, 7 May 1997, para. 713.}
\end{itemize}
definition, which does not require cumulative grounds. Specifying what is actually meant by ‘discriminatory grounds’, the Naletilić Trial Chamber held that the group has to be targeted for its particularities:

A discriminatory basis exists where a person is targeted on the basis of religious, political or racial considerations, i.e. for his or her membership in a certain victim group that is targeted by the perpetrator group. The Chamber concurs with the view expressed in the Kvocka Trial Judgement that the targeted group does not only comprise persons who personally carry the (religious, racial or political) criteria of the group. The targeted group must be interpreted broadly, and may, in particular, include such persons who are defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group. The Chamber finds this interpretation consistent with the underlying ratio of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. The Chamber finds that in such cases, a factual discrimination is given as the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator.\footnote{Prosecutor v. Mladen Naletilić and Vinko Martinović (“Tuta and Štela”), Case N° IT-98-34-T, Judgment, Trial Chamber I, 31 March 2003, para. 636.}

For the Trial Chamber, the state of mind of the perpetrator here satisfied the discriminatory requirement of persecution and, when the perpetrator considers the victim as being part of a different human group, the prosecution does not have to demonstrate a discriminatory act.

In contrast however, the Blaškić Trial Chamber went further and explained that the crime of persecution required not only knowledge but also a specific intent as mental element.\footnote{Prosecutor v. Tihomir Blaškić (“Lašva Valley”), Case N° IT-95-14-T, Judgment, Trial Chamber I, 3 March 2000, paras 244 and 260.} This was subsequently reaffirmed by numerous Trial Chambers, including in the Tadić case:

[...] The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with
regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.109

Interestingly for the purposes of the present analysis, it would appear that such discriminatory intent is also shared by ethnic cleansing. In what has remained an isolated instance, the Kupreškić Trial Chamber concluded that ethnic cleansing, like persecution, required intent rather than mere knowledge:

it should be added that if persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a lacuna would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent “to destroy, in whole or in part, a national, ethnical, racial, or religious group”. An example of such a crime against humanity would be the so-called “ethnic cleansing”, a notion which, although it is not a term of art, is particularly germane to the work of this Tribunal.110

None of the other Trial Chambers of the ICTR or of the ICTR have, however, confirmed this position.111 Nor have any of the scholarly definitions of ethnic cleansing expressed the view that the mental element of the act, classified as a crime against humanity, was “intent”.112 The finding in Kupreškić would thus appear, in the current state of law, to be an unjustifiable extrapolation with hardly any credential. In this respect, ethnic cleansing thus differs from persecution as it remains – at least for the time being – a knowledge-based crime rather than one founded on intent.

112 See previous developments in this chapter pp. 175-178.
6.3. Conclusion

Although ethnic cleansing seems to encompass some of the elements defining crimes against humanity – widespread or systematic attack against a civilian population with knowledge of this attack – the above analysis has shown that it cannot legally be classified as any of them. The knowledge requirement for the murder-type crimes against humanity as interpreted by the International Tribunals as well as the judicial determination of the mental element of persecution does not seem to correspond to the mental characteristics of ethnic cleansing. Indeed, unlike murder-type crimes against humanity, ethnic cleansing requires a discriminatory motive while, unlike persecution, it does not require a particular intent. In this context, the only possibility would be to consider ethnic cleansing as another category of crimes against humanity to place alongside murder-type ones and persecution.

Admitting that ethnic cleansing has to be characterised as a crime against humanity would render this category of international crimes an umbrella category, since nothing would prevent only ethnic cleansing being included as such. Yet it ought to be born in mind that this is already the case to some considerable degree, with crimes against humanity viewed as an overarching category of crime. Their scope was, indeed, already extended following the Nuremberg trial, and further developed with the adoption of both the ad hoc International Criminal Tribunals and the Rome Statute.

Except for various draft codes, however, no convention on crimes against humanity was ever adopted, and the International Law Commission proved to be relatively inefficient in dealing with the drafting of such a convention. As a result of too many conflicting political influences, it was impossible for the International Law Commission to adopt a definition of crimes against humanity satisfactory for all members of the United Nations. Consequently, crimes against humanity remained conventionally undefined until the adoption of the Rome Statute in 1998. Yet with the adoption of the Rome Statute it might be more difficult to alter the content of crimes against humanity in order to include ethnic cleansing.

113 See Article 6(c) of the Charter of the International Military Tribunal annexed to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, United Nations Treaty Series, 279.
114 See Article 5 of the ICTY Statute and Article 3 of the ICTR Statute.
If, following the lines of inquiry developed in the previous two chapters, ethnic cleansing can thus be classified neither as a violation of international humanitarian law nor within the framework of the international criminal law order, the overriding question thus remains: how could and should it be qualified?
Conclusion: Ethnic cleansing as an independent international crime

The foregoing analysis has been directed at addressing the confusion in international law about how to understand and classify the act of ethnic cleansing, and at attempting to delineate the precise characteristics and exigencies of the practice. That uncertainty continues to abound on this subject can be seen from the response proffered by the Prosecutor in the Karadžić and Mladić cases when requested by Trial Chamber II to provide a definition of the term:

Well, ethnic cleansing is a practice which means that you act in such a way that in a given territory the members of a given ethnic group are eliminated. It means a practice that aims at such a territory be, as they meant, ethnically pure. So, in other words, that that territory would no longer contain only members of the ethnic group that took the initiative of cleansing the territory. So, in other words, the members of the other groups are eliminated by different ways, by different methods. You have massacres. Everybody is not massacred, but I mean in terms of numbers, you have massacres in order to scare these populations. Sometimes these massacres are selective, and they aim at eliminating the elite of a given population, but they are massacres. I mean, that is the point. So whenever you have massacres, naturally the other people are driven away. They are afraid. They try to run away and you find yourself with a high number of a given people that have been massacred, persecuted and, of course, in the end these people simply want to leave. They also submitted to such pressures that they go away. They are driven away either on their own initiative or they are deported. But the basic point is for them to be out of that territory and some of them are sometimes locked up in camps. Some women are raped and, furthermore, often times what you have is the destruction of the monuments which marked the presence of a given population in a given territory, for
instance, religious places. Catholic churches or mosques are destroyed. So, basically, this is how ethnic cleansing is practised in the course of war.¹

Two specific, closely-related issues would appear to crystallise out of this makeshift, and somewhat awkward, attempt at definition. One is the question of overarching intent and objective – according to the view put forward by the Prosecutor, the endpoint of ethnic cleansing is, clearly, that ‘in a given territory the members of a given ethnic group are eliminated’. Bell-Fialkoff reaches a similar conclusion from his extensive survey, summarising that ‘[a]lthough it has significantly changed over time, cleansing has always been directed at groups that were considered dangerous, groups that had to be eliminated’.² What initially strikes from both definitions is the absence of a particular subject, which leaves unaddressed the question of who or what the agency responsible for carrying out this elimination may be. Of greater significance to the central point under discussion in this study, however, is the openness of the semantic (and conceptual) field connoted by the term “elimination”, which could be taken to mean removal, dislocation, destruction, or extermination or even genocide.

The implications involved here link intrinsically to, and are illuminated by, the second key issue to emerge out of the Prosecutor’s definition – namely that of the range of actions which may be employed in the implementation of ethnic cleansing policy. Petrovic, the first jurist to make a sustained case for an understanding of ethnic cleansing as an independent practice, tenders, for example, that ‘ethnic cleansing could mean a set of different actions […] committed by one group against members of ethnic groups living in the same territory’,³ and this view was clearly upheld by the Prosecutor in his cataloguing of a variety of procedures which may constitute, or contribute towards, acts of ethnic cleansing. Administrative measures, for instance, can readily be seen as an effective means of helping to facilitate such policies – indeed, Pajic has made explicit reference to this as the ‘bureaucratic dimension of ethnic cleansing’.⁴ Such measures may include – but are by no means limited to – the imposition of discriminatory and repressive legislations, or, as Petrovic notes, the refusal of hospital

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treatment and aid. In order to cast this issue into particularly sharp relief, Pajic quotes a decision taken by the municipal authorities of the Serbian Republic of Bosnia-Herzegovina:

It starts by listing 34 people by name in this decree, 33 of them Muslim and one Croat, to judge by their names, and banning them or explicitly saying that those citizens listed in Article 1 are not allowed to move around the town between 4pm and 6am, not allowed to stay in the street, in restaurants or other public places, not allowed to swim in two local rivers, or to fish or hunt, not allowed to travel to other towns without appropriate authorisation, not allowed to possess any firearms, not allowed to use or drive motor vehicles, not allowed to be in groups of more than three people, not allowed to communicate without authorisation with relatives who are not citizens of a particular municipality, and so it goes on. There is a very peculiar provision or paragraph at the end of this decree, saying that citizens listed in previous articles are not allowed to establish any contact with their neighbours or to walk outside between 00.00 and 24.00 hours, unless called up for work. So the previously mentioned provisions were gradually extended in the same document to a 24-hour ban, or 24-hour arrest for those people.

The effect of such measures are largely psychological, contributing to the creation of an atmosphere of terror which, in turn, polarises identities and engenders tensions between ethnic groups – the aim being, as the Prosecutor in the Karadžić and Mladić case suggests, to exert such pressures on the targeted population that they feel compelled to leave the given territory. Further gradations along this scale may include robbery, intimidation, destruction of religious and cultural elements, and physical attacks, perpetrated either by the military or armed civilians. Rape is a prominent example of the latter action, committed with the added intent to enforce pregnancy and so limit the number of births from the targeted ethnic group. More systematic military measures

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5 Cf. Drazen Petrovic, op. cit. note 3.
6 Zoran Pajic, op. cit. note 4.
may also be implemented, from enforced deportations to torture and execution – often targeting the most influential members of the persecuted group (religious, intellectual and political leaders) or those who play a prominent role in society (policemen, for instance, or business leaders). Thus as the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities has succinctly summarised, the practice of ethnic cleansing can clearly cover a wide and varied range of actions and procedures:

People may simply be rounded up, detained and deported; or, their movement may be the result of other, more indirect measures, including some or all of the following: the removal of elected authorities, the prohibition of ethnic associations and minority language use; forced homogenisation or assimilation; work restrictions; restricted access to education, housing, medicine, food or humanitarian aid; forced labour, confiscation of property; political violence in the form of pogroms and purges; or terror campaigns inflicting beatings, rape, castration, and even death.⁸

From this it follows that the act of ethnic cleansing may be considered to comprise a spectrum or continuum of violence, albeit one marked by gradations which cannot always be separated out, and which may rather coexist, be connected, even causal of one another, or represent different stages of a particular state policy. At one end, we may place legal or semi-legal measures designed to facilitate the displacement or deportation of the targeted group. As we move towards the opposite extreme, however, through the various measures detailed above, we can trace an escalation of violence that may ultimately culminate in mass-murder – at this point, ethnic cleansing comes into close contact with genocide, as deliberate, large-scale killings may be adopted as an effective means of purging the territory in question of the targeted ethnic group.

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7.1. Between ethnic cleansing and genocide: “intentionalists” versus “functionalists”

An instructive insight as to the exigencies that may be involved in such processes can be provided by a brief consideration of Nazi racial policy, particularly as focalised via the lens of the Historikerstreit between “intentionalists” and “functionalists” (or “structuralists”) that dominated the historiography of the period throughout the 1970s and 1980s. Since first being coined by Tim Mason in an article from 1981, these indicators have come to stand for two opposing viewpoints on the dynamics of Nazi policy making, especially with regard developments as they took shape after 1941. Christopher Browning concisely summarises the terms of the debate thus:

[The “intentionalists”] concentrate for the most part on political and diplomatic history and have focused their interpretation of the Nazi period on the central role of Hitler and the continuity of his ideological goals from their crystallization in the 1920s through their realization in the early 1940s.10

On the other hand, he goes on:

[The “functionalists”] have emphasised the polycratic nature of the Nazi regime and have sought to explain the course of events during this period in terms of the improvisation and cumulative radicalization produced by the contradictory nature and chaotic decision-making process of the regime rather than by the dominant role of Hitler and the calculated pursuit of his ideological goals.11

In recent years, the idea of such a strict division into two camps has been largely overcome, perhaps most notably by Ian Kershaw’s development of the concept of ‘working towards the Führer’, which brings together elements from both sides of the

11 Ibid., p. 3.
argument. Either way, the object here is not to critically engage the exact terms of the discussion, but rather to illustrate how an understanding of the two paradigms might help to shed new light on a particular aspect of ethnic cleansing which, as has been suggested in earlier chapters, points to its distinctiveness – the specific mental element. For the “intentionalists” (including Karl Dietrich Bracher, Eberhard Jäckel, Lucy S. Dawidowicz and Klaus Hildebrand), the “Endlösung” or “Final Solution” adopted at the Wannsee Conference in 1941 represented the final, long-planned, stage of Hitler’s racial ideology – the quest for extended German Lebensraum in the East was, according to this view, from the very beginning tied to Hitler’s stated intention, traceable back to Mein Kampf (1923), to exterminate the Jewish race. For the “functionalists”, by way of contrast (most notably Martin Broszat and Hans Mommsen), the arrival at the “Final Solution” was not the product of coherent planning and top-down policy-making, but rather a bureaucratic and largely ad hoc solution to what the Germans perceived to be the “Jewish problem” that emerged as a consequence of the peculiar dynamics of the Nazi political machinery. What is of particular significance for our concern here is the contrast in views that emerges with regard to the stages of development of Nazi policy, particularly in relation to the question of overall aim and intentionality. According to the “intentionalist” perspective, the pogroms, persecutions and forced deportations that preceded the step up to destruction were calculated as intentional precursors, and as such were from the start planned components of a systematic policy of genocide. From the point of view of the “functionalist” argument, however, the decisive move taken in 1941 becomes a largely improvised measure born of what Mommsen terms the “cumulative radicalisation” of policy, emerging, as Browning notes, as a ‘way out of the

14 On the specific links between these two aspects of Hitler’s racial ideology, see also Andreas Hillgruber, ‘Die “Endlösung” und das deutsche Ostimperium als Kernstück des rassenideologischen Programms des Nationalsozialismus’, (1972) 20 Vierteljahrshefte für Zeitgeschichte 133-153 reprinted with updated footnoted in Manfred Funke (ed.), Hitler, Deutschland and die Mächte (Düsseldorf: Droste Verlag, 1978).
15 Cf. Martin Broszat, ‘Hitler und die Genesis der “Endlösung”. An Anlaß der Thesen von David Irving’, (1977) 25/4 Vierteljahrshefte für Zeitgeschichte 739-775, and Hans Mommsen, ‘Die Realisierung des Utopischen: “Die Endlösung der Judenfrage” im “Dritten Reich”’, (Autumn 1983) IX/3 Geschichte und Gesellschaft 381-420. A variation on this argument is provided by Uwe Dietrich Adam, who suggests that Hitler, rather than his bureaucrats, may have planned the Final Solution, but that he only did so in the autumn of 1941 (cf. Uwe Dietrich Adam, Judenpolitik im Dritten Reich (Düsseldorf: Droste Verlag, 1972), pp. 303-16).
cul-de-sac into which the Nazis had manoeuvred themselves’. Whether one sides exclusively with this view or not, and that is not the point at issue here, this conceptualisation of the “Final Solution” as an _ad hoc_ provision opens the way for a more differentiated understanding of earlier Nazi racial policies as acts of ethnic cleansing: if the original aim was not to exterminate the Jewish race, then the measures implemented prior to 1941 can be qualified as acts geared towards the violent, often intimidatory, removal of the Jewish population from German-controlled territories. This applies not only to the organised terror of the pogroms and the brutal persecutions of everyday life that prompted so many to flee, but also to the more systematic programmes of deportation and resettlement that were planned (notably to Lublin and Madagascar) and implemented – Kershaw, for example, points out how in 1939 ‘some 3,000 Jews were deported […] from Alsace into the unoccupied zone of France’, and how later in the same year, ‘following a further meeting with two Gauleiter, a total of 6,504 Jews were sent to France in nine trainloads, without any prior consultation with the French authorities’. Such actions were, according to the “functionalist” paradigm, conceived and undertaken in their own right, as part of a plan to render German territories _Judenrein_ (“free of Jews”). In this regard, Nazi racial policy can be seen to introduce the vocabulary of “cleansing” into its political rhetoric – the concept of _Säuberung_, linked with the modern science of eugenics, recurred time and again as a euphemism in Nazi propaganda. And though the precise reference to a specifically ethnic-based policy of cleansing was, as we have seen, first coined in the context of the war in the former Yugoslavia in the early 1990s, the metaphor of a _völkische Flurbereinigung_ was widely adopted in Hitler’s Germany, betokening not only a “cleansing of the soil”, but also one which is, specifically, _völkisch_, connoting both particular national and ethnic characteristics.

In making these points, the intention is not, of course, to suggest that Nazi racial policy may, in any way whatsoever, be “downgraded” from genocide to ethnic cleansing, or to submit that a complete separation of pre- and post-1941 policy is possible. Viewed from the historical standpoint of post-Wannsee events and the stated terms of the “Final Solution”, it is without doubt the case that the entire range of persecutory measures adopted from 1933 onwards comprises the full scope – and the full horror – of the Nazi genocidal programme. What a “functionalist” understanding of Hitler’s Germany does allow, however, is a clearer appreciation of the connections and

16 Christopher R. Browning, _op. cit._ note 10, p. 5.
17 Ian Kershaw, _op. cit._ note 12, p. 183.
interconnections between ethnic cleansing and genocide, as a desire to render a given territory ethnically homogenous and excise “alien” elements may escalate into mass-murder as a means of expunging the targeted group – a dynamic which, in turn, also helps to spotlight a crucial, initial distinction between the mental element of the two acts.

7.2. The mental element of ethnic cleansing: nation-building and population transfers

The example of Nazi policy, viewed from this “functionalist” angle, serves to sharply exemplify how the practice of ethnic cleansing appears to be directly linked with a politics of identity that manifests itself in the processes of state-formation and nation-building. Indeed, it seems that the modern itinerary of the act (together with that of genocide) has largely followed the trace of developing nationalism and emerging (twentieth-century) conceptions of national unity, independence and identity. The doctrine of nationalism has at its core – and this is particularly evident when convoked (as is often the case) during periods of conflict and struggle – an apparent homogenising tendency, directed towards the construction of a single common identity based on national characteristics, whether ethnic, cultural, ideological or linguistic. The flipside to this positively-conceived ideal of unity, as history shows, is darker and more sinister, encouraging not only forced assimilation, but also violent extrusions of any “other” who stands outside, and is seen to pose a threat to, the collective identity of the group, via transfers, deportations and even (mass) killings.

These processes can be observed throughout the modern history of nationalism and nationhood. If, for example, as many do, one takes the French Revolution as having marked the birth of the modern idea of nationalism, then it is already possible to recognise certain of these mechanisms in nascent form, as the ideal of the nation une et indivisible transforms – or is perhaps rather deformed – into Robespierre’s terror-driven “Republic of Virtue”. This is not, of course, to make any claim that the Jacobin terror may be reconceived as a policy of ethnic cleansing – revolutionary nationalism was, to quote a distinction frequently cited in the specialist literature on the subject, very much “civic” rather than “ethnic”, as shall be discussed in greater detail presently. That said, the terror did nonetheless represent a policy that knew no political pluralism, that demanded absolute allegiance to – and identity with – the nation and Republic, and which sought to violently extrude any subversive political ‘other’. Interestingly, one
also finds in the context of revolutionary rhetoric and propaganda early anticipations of the modern metaphoric vocabulary of cleansing and purging of national body and blood – to cite just one example, we may consider Camille Desmoulins’s famous justification for violent excisions from 1793:

Vice was in the blood. Purging the poison, and driving it out, through the emigration of Dumouriez and his lieutenants, has already saved more than half of the body politic: and the amputations of the Revolutionary Tribunal – not those of the head of a servant who had to be sent to the hospital, but those of the generals and ministers, the vomiting up of the Brissotins from within the Convention – will complete the process of giving it a healthy constitution.18

Where nationalism and nation-building acquire particular importance to the specific object of study here, however, is, as suggested above, with regard to its ethnic dimensions and implications. The classic distinction between “civic” and “ethnic” forms of nationalism has, for a long time, been the dominant typology employed by historians of the subject, whereby the former refers to nations which derive their legitimacy and internal unity from the citizens’ voluntary subscription to a set of political principles and institutions, and the latter to nations which are founded upon a sense of self-identity principally determined by language and ascriptive ethnicity. Ethnic varieties of nationalism are often, not without reason, traced to the German response, in the late eighteenth- and early nineteenth century, to Napoleonic occupation, as a number of philosophers, theorists and activists looked to ignite a sense of pan-Germanic identity, founded on shared language and the mobilisation of the völkisch, national past, so as to provide the resources for a violent, popular war of liberation against the French – a view which has lent to the often misleading teleologies of the Sonderweg or “special path” view of German history. Inasmuch as historians have, in recent times, come to reject the specific terms of this argument in the German context, it nonetheless remains that varieties of ethnic nationalism do, in their very essence, invoke a particularly strident exclusivist sentiment that finds legitimacy in reference to “natural” factors (language,

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ethnicity, race), and is frequently turned, especially at times of war and conflict, to target enemies, deviants and outsiders, both internal and external. In the modern era, there is doubtless a particularly strong correlation between surges in such ethnically-defined nationalisms and extreme instances of mass violence and horror – as exemplified not only in Nazi Germany, but also the Ottoman Empire, for instance, and in the former Yugoslavia.

In each of these three cases, the respective policies of state-sponsored violence can be seen to be linked to a concept of nation-building and cultural assimilation that entailed efforts to either absorb or expunge minority elements. The Armenian genocide, for example, was a product of the Young Turks integralist nationalist ideology – indeed, one historian has even be moved to remark that it ‘was a – perhaps the – archetypal example of nationalist genocide’.19 In its most modest, localised form – leaving aside the global scope of Hitler’s millenarian racialism – Nazi racial policy was likewise, in the first instance, motivated by a desire to create an ethnically-homogenous nation state, free, as they saw it, of any Jewish taint or contamination. In the former Yugoslavia, meanwhile, it was a rise of Serbian nationalism, unscrupulously manipulated by Milošević towards the political end of a ―Great Serbia‖, that was the principal cause for the murderous ethnic conflict that erupted, as the targeted Bosnian Muslim group was subjected to deportations, displacement and, ultimately, an attempt at destruction. By mapping such patterns, it thus becomes apparent just how far, in each instance, a spirit of ethnically-defined nationalism provides both the ideological matrix and emotional underpinning for the programmes of cleansing implemented, oftentimes reinforced by a scapegoating mechanism that not only brands the supposedly “alien” elements a menace and threat to national identity, but also projects onto the group responsibility for existing political, social and economic problems. On account of these connections between (ethnic) nationalism and policies of ethnic cleansing, Jennifer Jackson-Pereece has thus justly made the case that the processes of nation-building and national-identity formation constitute an essential characteristic of the practice, stating: ‘a given area is eventually cleansed of a particular group of people defined in ethnic terms and the dominant ethnic group comes closer to achieving a homogenous nation-state – that is ethnic cleansing’.20

In making this link to nationalist thinking explicit, Jackson-Preece’s definition moves us a step closer to a more exact understanding of the act of ethnic cleansing as an independent practice. At the same time, however, it also leaves us with the question alluded to at the opening of this chapter, namely that of the specific implications of how an area is to be “cleansed” or, following both Bell-Fialkoff and the Prosecutor in the Karadžić and Mladić case, how a particular group is to be “eliminated”. In view of the distinction worked through in the above between the mental elements of ethnic cleansing and genocide, it would seem that the former may be understood as being, in essence, a policy of population transfer – a programme directed towards the physical removal of a people from a given territory (rather than, as in the case of genocide into which it can evolve, its complete destruction). Such an argument requires suitable caution and qualification, not least on the grounds that the transfer of population groups must not, in and of itself, always be viewed in an entirely negative light, but has in fact been cited in various spheres, aside from those associated with the horrors of mass killing, as a valid possibility for state formation and ethnic conflict resolution. In addressing post-war policy towards Germans in Britain, for example, Churchill remarked in the House of Commons in 1944 that:

Expulsion is the method which, so far as we have been able to see, will be the most satisfactory and lasting. There will be no mixture of populations to cause endless trouble. […] A clean sweep will be made. I am not alarmed by these large transferences, which are more possible in modern conditions than they ever were before.\(^{21}\)

In saying as much, the British premier echoed the sentiments expressed by Czechoslovakian President Edvard Beneš three years earlier:

I accept the principle of the transfer of populations […]. If the problem is carefully considered and wide measures are adopted in good time, the transfer can be made amicably under decent human conditions, under international control and with international support.\(^{22}\)


This recuperative viewpoint has, more recently, been taken on and extended by Bell-Fialkoff who concludes his study by stating that, although population transfers and resettlement are “no panacea” to the problem of ethnic conflict:

to deny the great advantages of such an ethnic divorce in situations in which it has every chance of success and is the only viable solution is not unlike denying marital divorce to a couple. Bosnian refugees, for example, are often asked, ‘Do you think you can live together?’ as if cleansing and massacre have not provided a sufficiently clear answer. No, they cannot. Even if the conflict is patched up now, the possibility of future conflicts, with concomitant death and destruction, is too high. It is the children and grandchildren of today’s refugees who will pay the price. The gradual easing of religious tensions in France and Germany, achieved through the separation of religious denominations by means of population transfers, points the way to solving ethnic conflicts where all else fails. To deny this option is to condemn millions of people and their children to unnecessary suffering in the generations to come.23

According to this opinion, then, population transfers may be undertaken as an effective means of altering the demographic balance so as to ease, even eradicate, tension and conflict between ethnic groups. For all that this may carry considerable substance, however, such an argument nonetheless raises the problem of the extent to which the displaced group are to move of their own volition or are to be forcibly relocated – a dilemma which, though implicit in the various caveats attached both by Bell-Fialkoff and Beneš in their respective statements, ought to be confronted head on in terms of its fuller implications, not least in view of the fact that forced transfers are, under the aegis of United Nations legislation, qualified as both violations of human rights and international crimes.

7.3. First attempts at prohibition: recognising the specific intent of ethnic cleansing as justification for its legal creation as crime

Addressing this issue of the existing positive law on, and legal status of, population transfers may, in view of the close links between the mental elements of the acts, aid the

23 Bell-Fialkoff, op. cit. note 2, p. 286.
development of a clearer framework for conceptualising a precise qualification of ethnic cleansing. A first attempt to internationally condemn forced transfers of population was made in 1986 with the adoption of the Declaration of the Principles of International Law on Mass Expulsions by the International Law Association,²⁴ which defined expulsion as:

an act or a failure to act … with the intended effect of forcing the departure of persons against their will… for reason of race, nationality, membership of a particular social group or political opinion’.²⁵

The efficacy of this declaration was restricted by the fact that it was only an instrument of soft law – one which, moreover, did not distinguish between transfers of population exercised in a humane way as an avatar of humanitarian relief, and those undertaken inhumanely via violent coercion. Subsequent developments have tended, in implication if not necessarily explicit statement, to principally address examples of the latter situation, deeming them to be unlawful. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities, for example, affirmed in Resolution 1997/29:²⁶

the right of everyone lawfully within the territory of a State to liberty of movement and freedom to choose his or her residence and the prohibition of arbitrary deprivation of the right to enter one’s own country as set out in article 12 of the International Covenant on Civil and Political Rights and article 13 of the Universal Declaration of Human Rights.²⁷

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The International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights have also declared such actions to be illegal. In Article 3 of the Draft Declaration on Population Transfer and the Implantation of Settlers, meanwhile, unlawful population transfers are defined as being constituted by:

[...] a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into or out of an occupied territory, without the free and informed consent of the transferred population and any receiving population.

Article 1 of the same declaration even goes some way to indicating the scope of applicability of the definition provided, holding that:

This Declaration sets standards which are applicable in all situations, including peacetime, disturbances and tensions, internal violence, internal armed conflict, mixed internal-international armed conflict, international armed conflict and public emergency situations. The norms contained in this Declaration must be respected under all circumstances.

For all that these various instruments and declarations would thus appear to establish a clear position on the unlawfulness of forced transfers, it bears considering that such practices may in fact, even from a legal perspective, be considered permissible under certain restricted and exceptional circumstances. This can be illustrated by the Potsdam Protocol of 1945 which provided authorisation for forcible transfers by ratifying the Protocol, the Allies sanctioned the transfer of Germans from east of the Oder-Neisse line, and from Poland, Czechoslovakia, and Hungary. The distinction between lawful and unlawful transfers thus appears to be but an abstract understanding that the former be undertaken in an orderly and, more importantly, humane fashion. In the case of

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28 See Article 12 of the International Covenant on Civil and Political Rights and Article 13 of the Universal Declaration of Human Rights.
German relocations in the immediate post-war years, however, one sees how the reality can often stand in stark contrast to the justificatory discourse – as Jackson-Preece notes, ‘more than 14 million Germans were expelled under conditions of starvation and terror’,\(^{33}\) whilst the *New York Times* carried the following report from Germany in February 1946:

> It was also agreed at Potsdam that the forced migration should be carried out “in a humane and orderly manner”. Actually, as everyone knows who has seen the awful sights at the reception centers in Berlin and Munich, the exodus takes place under nightmarish conditions, without any international supervision or any pretense of humane treatment. We share responsibility for horrors only comparable to Nazi cruelties …\(^{34}\)

The example provided by the Potsdam Protocol serves to underline the potentially problematic relationship between theory and practice, between abstract humanitarianism and frequently violent reality. Running alongside this is a second crucial element relating to the context of armed conflict within which forced transfers may be undertaken. Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, for example, provides that, in the course of international armed conflicts, a temporary evacuation of the population is permissible, but only if such a measure is deemed strictly necessary for the security of the population.\(^{35}\) It bears noting, however, that prior to making this indication, Article 49 of Geneva Convention IV effectively reaffirmed a general prohibition of such actions:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory.

\(^{33}\) *Id*. p. 829.


\(^{35}\) Article 49 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.36

A similar principle governing situations of non-international armed conflicts is foreseen by Article 17 of Additional Protocol II, which states that:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.37

Geneva Convention IV, as well as Additional Protocol II, both indicate that transfers of population or expulsions, when authorised, are subjected to strict conditions in order to guarantee their humane nature. Such statements also suggest, however, that, except in situations of armed conflicts – whether international or non-international – transfers of population or expulsions are unlawful and prohibited. Being unlawful, such actions

36 Ibid.
could be taken to constitute either a delict or a crime which ought, therefore, to be prosecuted. The definitions of a delict and an international crime were provided by the International Law Commission.\textsuperscript{38} The former was considered as:

Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.\textsuperscript{39}

An international crime, on the other hand, was defined as:

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole constitutes an international crime:

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.\textsuperscript{40}

In its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ explained why genocide was a crime, considering that it has to involve:


\textsuperscript{39} Ibid.

\textsuperscript{40} Draft Article 19(2) of the Draft Articles on State Responsibility.
a denial of the right of existence of entire human groups, a denial which
shocks the conscience of mankind and results in great losses to humanity,
and which is contrary to moral law and to the spirit and aims of the United
Nations [...].\textsuperscript{41}

By recognising the criminal unlawfulness of such acts, there is legal ground for
recognising that transfers or expulsions of population could be criminal acts justifying
the creation of ethnic cleansing as a new legal term.

Yet the criminal condemnation of deportations or forced transfers of population is
a relatively recent development, only becoming effective with the creation of the \textit{ad hoc}
International Criminal Tribunals and the adoption of the Rome Statute. Under the ICTY
and the ICTR Statutes, deportations of populations and groups were prosecuted as
crimes against humanity.\textsuperscript{42} With the adoption of the Rome Statute ‘deportations or
forcible transfer of population’ are criminalised as either crimes against humanity\textsuperscript{43} or
war crimes.\textsuperscript{44} Interestingly, the Genocide Convention also recognises as a specific
genocidal act the forcible transfer of children from one group to another.\textsuperscript{45}

All of this leads to the view that a classification of ethnic cleansing that blends
with that of forcible transfers is inapt. The latter acts are already prohibited under
international criminal law, and condemned as either crimes against humanity, genocide
or war crimes.\textsuperscript{46} Despite some inevitable overlap, and despite the determination offered
in the above of the specific intentionality of ethnic cleansing as being directed towards
the creation of a nation-state, the analyses provided in the previous chapters have shown
how any such direct assimilation is misguided. Whilst in theory, there may be no
specific element that expressly rules against the classification of ethnic cleansing as a
war crime, the fact that this has never been reaffirmed by the ICC doubtless speaks
against it and provides an important signal of its inappropriateness and inadequacy. The
same can be said of any attempt to qualify ethnic cleansing as a synonym for genocide:
again, in spite of obvious closeness, the question of specific intent provides a crucial
distinction between the two. From all this it follows that the act of ethnic cleansing,

\begin{footnotesize}
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\item[\textsuperscript{41}] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ,
\item[\textsuperscript{42}] Article 5(d) of the ICTY Statute, Article 3(d) of the ICTR Statute.
\item[\textsuperscript{43}] Article 7(1)(d) of the Rome Statute.
\item[\textsuperscript{44}] Article 8(2)(a)(vii), Article 8(2)(b)(viii) and Article 8(2)(e)(viii) of the Rome Statute.
\item[\textsuperscript{45}] Article II(2)(e) of the Genocide Convention.
\item[\textsuperscript{46}] Article 20 of the Rome Statute, and for a distinction of ethnic cleansing and the war crime of transfers
of populations, see Chapter Four pp. 87-90.
\end{itemize}
\end{footnotesize}
having been granted criminal status, should be prosecutable as an independent crime with a specific actus reus and mens rea. Admittedly, this latter aspect is, as we have seen, difficult to determine, as both knowledge and intent may be seen to apply\textsuperscript{47} – to secure effective prosecution and punishment, the knowledge requirement may be considered the more favourable option: there is little doubt that this degree of mens rea would render prosecutions of the crime more accessible and prevent uncertainties and overlap with the genocidal intent. Modelled along similar lines to the requisites of crimes against humanity, ethnic cleansing would thus require knowledge on the part of the perpetrator that his or her actions were committed in the fuller context of a policy of removal to be effectively qualified as such.

Drawing these various elements together with the provisions of Resolution 819 and the notion of the “living concept”, it is thus possible to evince a potential definition of ethnic cleansing as an independent crime: one committed either in peace- or wartime, aimed at the disappearance of human populations from a given territory, and perpetrated with knowledge of this intention. It is in this context, to return to the overriding question posed in the opening chapter, that the notion of ethnic cleansing might offer a valuable, indeed vitally important, contribution to understanding and praxis in the field of international law. In a practical sense, the recognition of the act as an independent crime would render necessary the inclusion of its definition in a separate article within the Rome Statute. Such amendments are foreseen by Article 123 of the Statute, which states:

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference. […]\textsuperscript{48}

\textsuperscript{47} For an analysis of knowledge, see Chapter Six pp. 195-199. For an analysis of the genocidal intent, see Chapter Five pp. 118-144.
\textsuperscript{48} Article 123(1) and (2) of the Rome Statute.
The practicalities of passing such an amendment might follow in one of two ways. Either the proposed text should be submitted by a state party to the Secretary-General of the UN, who then circulates the proposal for consideration at the next Assembly of State Parties; or else the state parties can decide to co-ordinate a Review Conference at which to discuss the issue. Should no absolute consensus be reached, the proposed amendment can be adopted by a two-third majority vote in either of the two forums.\textsuperscript{49} Even then, state parties would, in the case of such a fundamental amendment, have to submit individual instruments of ratification or accession. That said, it is generally foreseen by Article 121(4) that:

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\text{[…] an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.}\textsuperscript{50}
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In accordance with the various provisions of Article 121, an amendment to the Rome Statute to include a definition of ethnic cleansing as an independent crime could thus readily be implemented without too great a delay. While the principle of \textit{nullum crimen nulla poena sine lege}, according to which an individual cannot be criminally prosecuted if his or her conduct does not constitute ‘at the time it takes place, a crime within the jurisdiction of the Court’,\textsuperscript{51} prevents legal action being taken retrospectively, such an inclusion would provide a vitally important instrument for confronting future instances. Further benefits are also foreseeable: by providing and codifying a clear and precise definition – one that elides much of the confusion and instability that currently attends the term – the Statute would help to secure effective accountability for such acts.\textsuperscript{52} An amendment along these lines would, moreover, serve the end of peace negotiations and transitional justice, by enabling the victims of such violence to put a name on the violence to which they have been subjected, and helping to ensure international recognition for their suffering and trauma. Granting the act of ethnic cleansing with specific criminal penalties would also, in a broader context, help to challenge discourses of denial and impunity, ensuring that the perpetrators of such acts cannot hide behind the perceived “softer” vocabulary of cleansing and will be forced to face justice. In all

\textsuperscript{49} See Article 121(3) of the Rome Statute.
\textsuperscript{50} Article 121(4) of the Rome Statute.
\textsuperscript{51} Article 22(1) of the Rome Statute.
\textsuperscript{52} The definition of ethnic cleansing proposed here remains silent as to sentencing, thereby mirroring the other definitions of international crimes as contained in the ICC Statute. It is submitted here that it will be for the ICC judges to rule on sentencing and penalties.
these various ways, then, a classification of ethnic cleansing as a new independent crime would help to pave the way for more effective recognition, prevention and prosecution of violent atrocities.
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