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Standing the Test of Time: The Dynamic Interpretation of the Genocide Convention

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1. INTRODUCTION

The 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[1] 'was the first *human rights treaty* adopted by the General Assembly of the United Nations. … Its adoption marked a crucial step towards the development of international human rights and international criminal law as we know it today.'[2]

The definition of the crime of genocide contained in this human rights treaty permeated international criminal law, where it is reproduced verbatim.[3] All the relevant international instruments thus define genocide as a series of specific acts, perpetrated against specific groups with the specific intent to bring about the destruction of the given group in whole or in part:

> [genocide] means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[4]

[1] Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 1948. Approved and proposed for signature, ratification or accession by the General Assembly of the United Nations, Resolution 260 A (III) of 9 December 1948 (entered into force 12 January 1951).

[2] United Nations, Office on Genocide Prevention and the Responsibility to Protect, 'The Genocide Convention', www.un.org/en/genocideprevention/genocide-convention.shtml, accessed 31 July 2021. Emphasis added.

[3] See Art 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); Art 2 of the Statute of the International Criminal Tribunal for Rwanda (ICTR); Art 6 of the Statute of the International Criminal Court (ICC).

[4] Art 4 ICTY Statute; Art 2 ICTR Statute; Art 6 ICC Statute.

Noticeably, the Genocide Convention – just like subsequent international criminal law instruments[5] – fails to define the terms it employs, thus generating legal uncertainty and arguably paving the way for judicial activism. Faced with the silence of the conventional text, the ad hoc international criminal tribunals were left with no other choice than to resort to judicial interpretation, a role that remains typically within the confines of their mandates and thus beyond criticism. Yet, because these judicial constructions are based on hardly any textual indication, besides of course when they resort to the *travaux préparatoires*, the creativity of the international criminal tribunals has sometimes dangerously grazed legislative action. As the following contribution proposes to explore, the lack of conventional precision has indeed prompted the ICTY and the ICTR to elaborate on the terms used in the definition of the crime of genocide, notably with respect to the acts proscribed, the groups protected and the intent of the genocider to destroy the group in whole or in part.

In interpreting the Genocide Convention, it appears that, rather than freeze the meaning of the crime of genocide to when it was defined back in 1948, the ad hoc international criminal tribunals have implicitly made use of dynamic methods of interpretation, possibly borrowed from the European Court of Human Rights (ECtHR)[6] – a claim that finds some credential in the origins of the Convention as a human rights instrument. Two particular constructions here seem to stand out: the 'living instrument' doctrine – as applied to the genocidal *actus reus*; and the teleological doctrine – as adapted to the groups protected. This dynamism notwithstanding, the ad hoc tribunals have generally refrained from overstretching the concept of genocide and, when it comes to their understanding of the genocidal *mens rea*, conservatism seems to have been their overarching principle.

2. A MODERN UNDERSTANDING OF THE GENOCIDAL *ACTUS REUS* 'IN THE LIGHT OF PRESENT-DAY CONDITIONS'

The 'living instrument' doctrine was first elaborated and explicited by the ECtHR in the 1978 *Tyrer* case: 'The [European Convention on Human Rights (ECHR)] is a living instrument which … must be interpreted in the light of present-day conditions.'[7] Put differently, rather early on, the ECtHR opted for an interpretation of the ECHR that is made not in the light of past events or of the circumstances at the time of the drafting but rather in the light of contemporary conditions.

[5] Note, however, that the ICC 'Elements of Crimes' do offer some clarification. See Art 6, Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, First Session, New York, 3–10 September 2002 (UN publication, Sales No E.03.V.2 and corrigendum) part II.B.

[6] Note that the Tribunals were not bound by human rights law. Art 21(3) ICC Statute, by expressly providing that '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights', constitutes an innovation in the text of international criminal law.

[7] ECtHR, *Tyrer v The United Kingdom*, Appl No 5856/72, Judgment, 25 April 1978, para 31.

The Genocide Convention proceeds to an exhaustive list of prohibited acts. In so doing, it limits itself to a strict catalogue of proscribed acts, without, however, defining them. It is precisely this interplay between the restrictive list and the lack of definition of the proscribed acts that prompted the ad hoc international criminal tribunals to define these acts and to ultimately include within the original enumeration acts that had not been initially contemplated, thus going beyond the intention of the drafters, admittedly to the detriment of the principle of legal certainty but in favour of a contemporary reading of the text. To this end, the tribunals seem to have – implicitly – resorted to the established human rights law 'living instrument' doctrine. As it will be discussed, they embarked on an interpretation of genocidal acts that mirrors present-day conditions rather than the conditions at the time of the drafting of the Convention.

2.1. A 'No-Nonsense' Approach

Even before they had to face definitional issues, the international criminal tribunals had to overcome obstacles generated by a slightly incoherent choice of vocabulary on the part of the drafters of the Genocide Convention. As noted by Quigley, the genocidal act of 'killing members of the group' 'reads oddly in this context. "Killing" is not a term ordinarily used to define crime in English-speaking countries, since it implies no culpability. A killing can be accidental, or in self-defense.'[8] In light of the fact that this oddity is further enhanced by the reference in the French version of the text to 'meurtre' – a penal qualification that requires intent and implies culpability – the ICTR had to resolve this linguistic discrepancy and, in all sovereignty, decided to concur with the French version of the conventional text:

> The Trial Chamber is of the opinion that the term 'killing' used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term '*meurtre*', used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda which stipulates in its Article 311 that 'Homicide committed with intent to cause death shall be treated as murder'.[9]

Elaborating on its decision, Trial Chamber I defined the act of 'killing' in the following terms:

> In order to be held criminally liable for genocide by killing members of a group, in addition to showing that an accused possessed an intent to destroy the group as such, in whole or

[8] John Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot, Ashgate, 2007) 94.

[9] *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, para 500. See also *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras 101–04; *Prosecutor v Rutaganda*, Judgement and Sentence 6 December 1999, ICTR-96-3, para 50; *Prosecutor v Musema*, ICTR-96-13-A, Trial Chamber I, Judgment and Sentence, 27 January 2000, para 155; *Prosecutor v Bagilishema*, ICTR-95-1A-T, Judgment, Trial Chamber I, 7 June 2001, paras 57–58.

> in part, the Prosecutor must show the following elements: (1) the perpetrator intentionally killed one or more members of the group, without the necessity of premeditation; and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.[10]

Subsequent definitional efforts shine by their brevity, 'killing' being merely defined as 'homicide committed with intent to cause death';[11] a brevity judicially justified by the fact that '"Killing" in sub-paragraph (a) needs no further explanation. As regards the underlying acts, the word "killing" is understood to refer to intentional but not necessarily premeditated acts.'[12] This 'no-nonsense' approach was also accompanied with a common-sense approach that reflected, within the law of genocide, general trends in international criminal law and notably the explicit recognition of acts of sexual violence as international crimes.

2.2. The Interpretation of Genocidal Acts in the Light of the Criminalisation of Sexual Violence

Although regrettably late, the law of war crimes and the law of crimes against humanity have been amended to include crimes of sexual violence.[13] This evolution, however, had no impact on the textual definition of the crime of genocide, which has remained untouched since 1948. Yet, in a progressist fashion, the ad hoc international criminal tribunals – perhaps inspired by the more general and contemporary trend to criminalise sexual violence – have interpreted genocidal acts so as to include within their scope sexual crimes.

In interpreting the act of 'causing serious bodily or mental harm to members of the group', the ICTR specified that 'to a large extent, "causing serious bodily harm" is self-explanatory. This phrase could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.'[14] This judicial contentment as to the clarity of the notion notwithstanding, the ICTR was nonetheless prompt in finding that 'serious bodily or mental harm' is to be 'determined on a case-by-case basis, *using a common sense approach*',[15] a finding which, if it could be seen as contravening the principle of legal

[10] *Bagilishema* (n 9) para 58 (footnotes omitted). See also *Prosecutor v Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para 319. See also *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Trial Chamber II, 1 December 2003, Judgment and Sentence, para 813.

[11] *Musema* (n 9) para 155. See also *Prosecutor v Seromba*, ICTR-2001-66-I, Judgment, Trial Chamber, 13 December 2006, para 317.

[12] See *Prosecutor v Stakić*, IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, para 515. See also *Prosecutor v Kamuhanda*, ICTR-95-54A-T, Trial Chamber II, Judgment, 22 January 2004, para 632; *Prosecutor v Ntagerura, Bagambiki, Imanishimwe*, ICTR-99-46-T, Judgment and Sentence, Trial Chamber III, 25 February 2004, para 664.

[13] For war crimes, see Art 4(e) ICTR Statute; Art 8(2)(b)(xxii) and Art 8(2)(e)(vi) ICC Statute. For crimes against humanity, see Art 3(g) ICTR Statute; Art 5(g) ICTY Statute; Art 7(1)(g) ICC Statute.

[14] *Kayishema and Ruzindana* (n 9) para 109. See also *Prosecutor v Krstić*, IT-98-33, Judgment, Trial Chamber I, 2 August 2001, para 483; *Semanza* (n 10) para 320 and 322; *Stakić* (n 12) para 516; *Ntagerura, Bagambiki, Imanishimwe* (n 12) para 664; *Seromba* (n 11) para 317.

[15] *Kayishema and Ruzindana* (n 9) para 108. Emphasis added. For the case-by-case assessment of mental harm, see ibid paras 110 and 113.

certainty and predictability, is admittedly reasonable. In a similar vein, Trial Chamber I of the ICTY stated that:

> 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.[16]

The international criminal tribunals used the textual uncertainty to expressly include within the realm of 'causing serious bodily or mental harm' acts which are not conventionally mentioned, while simultaneously refraining from proceeding to an exhaustive enumeration, thus leaving the door open for further acts to be included within the – initially strictly limitative – list of genocidal acts. It has thus been judicially found that 'serious bodily and mental harm does not necessarily mean harm that is permanent or irremediable'[17] and notably encompasses '*acts of sexual violence*, *rape*,[18] mutilations and interrogations combined with beatings, and/or threats of death',[19] acts of bodily or mental torture, inhumane or degrading treatment, persecution,[20] 'cruel treatment, torture, *rape* and deportation'.[21] In *Seromba*, the ICTR Appeals Chamber referred to 'torture, *rape*, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs'[22] as '*quintessential examples* of serious bodily harm'. This express inclusion of acts of sexual violence within the ambit of genocide notwithstanding, the *Akayesu* Trial Chamber adopted an ever more straightforward approach by emancipating crimes of a sexual nature from the pre-existing categories of genocidal acts:

> [T]he Chamber wishes to underscore the fact that in its opinion, [rape and sexual violence] *constitute genocide in the same way as any other act* as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, *one of the worst ways of inflicting 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

[16] *Krstić* (n 14) para 486. Footnote omitted.

[17] *Kayishema and Ruzindana* (n 9) para 108. Footnotes omitted. See also *Akayesu* (n 9) para 502. *Rutaganda* (n 9) para 51. *Musema* (n 9) para 156; *Semanza* (n 10) paras 320–21.

[18] See eg *Akayesu* (n 9) paras 706–07. Emphasis added; *Kayishema and Ruzindana* (n 9) para 110; *Rutaganda* (n 9) para 51. *Musema* (n 9) para 156; *Semanza* (n 10) paras 320–21.

[19] *Kayishema and Ruzindana* (n 9) para 108. Footnotes omitted. See also *Akayesu* (n 9) para 502; *Rutaganda* (n 9) para 51; *Musema* (n 9) para 156; *Semanza* (n 10) paras 320–21.

[20] *Akayesu* (n 9) para 504; *Rutaganda* (n 9) para 51.

[21] *Krstić* (n 14) paras 482–86. Footnotes omitted. Emphasis added. It is also interesting to note that the Preparatory Commission for the ICC indicated that serious bodily and mental harm 'may include, *but is not necessarily restricted to*, acts of torture, rape, sexual violence or inhuman or degrading treatment'. Cited in ibid (emphasis added).

[22] *Prosecutor v Seromba*, ICTR-2001-66-A, Judgment, Appeals Chamber, 12 March 2008, para 46.

> were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. *Sexual violence was an integral part of the process of destruction*, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[23]

Although rape and sexual violence have not explicitly been included in the Rome Statute's definition of the crime of genocide, the Preparatory Commission for the ICC still confirmed the Tribunals' earlier case law and indicated that serious bodily and mental harm 'may include, but is not necessarily restricted to, acts of torture, *rape, sexual violence* or inhuman or degrading treatment'.[24] Although it may be regretted that crimes of sexual violence have not made it into the text of the law, their judicial inclusion is to be welcomed. There is no doubt such crimes constitute 'serious bodily [and] mental harm', and that – if perpetrated with the intent to destroy one of the protected groups – they constitute genocide. Had the international criminal tribunals perpetuated the conventional omission of sexual violence from the ambit of the crime of genocide, they would have problematically frozen the prohibition of genocide in time and completely overlooked the fact that sexual violence is, more often than not, part of the genocidal process.[25]

This evolutive judicial approach to genocidal acts is thus necessary to allow for the adjudication of acts that are essentially genocidal and cause 'serious bodily or mental harm'. The same conclusion could be reached with respect to the genocidal act constituted by 'imposing measures intended to prevent births within the group'. As per the *Akayesu* Trial Chamber:

> [T]he measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. … Furthermore, 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.[26]

This judicial interpretation, by expressly including acts of sexual violence within the realm of measures imposed to prevent births within the group, here also mirrors the evolution of international criminal law, which – although slowly – has gradually and increasingly recognised sexual crimes as international core crimes.

[23] *Akayesu* (n 9) para 731. Emphasis added.
[24] See Elements of Crimes (n 5), Art 6(b)(1), fn 3. Emphasis added.
[25] See eg *Akayesu* (n 9).
[26] *Akayesu* (n 9) paras 507–08. See also *Kayishema and Ruzindana* (n 9) para 117; *Rutaganda* (n 9) para 53; *Musema* (n 9) para 158.

2.3. A 'Common-Sense' Approach

A similar evolutive approach was adopted with respect to the scope of the genocidal act of 'serious mental harm', which has been found to 'be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim'[27] and to 'mean more than minor or temporary impairment of mental faculties'.[28] According to Bryant, mental harm includes 'anything from racial or ethnic slurs by individuals directed at members of a group, to an overt pattern of governmental discrimination or harassment of a group, to deliberate debilitation and demoralization of a group through the use of addictive narcotic drugs'.[29] This rather wide understanding of the notion of 'mental harm' seems a far cry from the original intention of the drafters of the Genocide Convention for whom it was 'absolutely clear that "mental harm", within the meaning of the Convention, can be caused *only* by the use of narcotics'.[30] Here also, the approach of the international criminal tribunals has brought the evasive notion of 'serious mental harm' into the twenty-first century – undoubtedly departing from its original meaning to transform it into a more modern concept, fit to be adjudicated before contemporary international criminal courts and tribunals.

Likewise resorting to a realistic, case-by-case approach to define the act of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', the ICTR justified it by the fact that

> it is impossible to enumerate in advance the 'conditions of life' that would come within the prohibition of Article II; … Instances of genocide that could come under subparagraph (c) are such as placing a group of people on a subsistence diet, reducing medical services below a minimum, withholding sufficient living accommodations, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part.[31]

This 'impossibility' explains why judicial findings have remained rather elusive and merely gave illustrations of which acts could potentially constitute a deliberate infliction on the group of conditions of life calculated to bring about its physical destruction:

> [T]he expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction. [They] 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.[32]

[27] *Prosecutor v Gacumbitsi*, ICTR-2001-64-T, Trial Chamber III, Judgment, 17 June 2004, para 291. Footnote omitted.

[28] *Semanza* (n 10) para. 321. Footnote omitted. See also *Kajelijeli* (n 10) para 815; *Kamuhanda* (n 12) para 634; *Ntagerura, Bagambiki, Imanishimwe* (n 12) para 664; *Seromba* (n 11) para 317.

[29] Bunyan Bryant, 'Substantive Scope of the Convention' (1975) 16 *Harvard International Law Journal* 686–96, 693.

[30] Nehemiah Robinson, *The Genocide Convention – A Commentary* (New York, Institute of Jewish Affairs, 1960) ix. Emphasis added.

[31] ibid 64.

[32] *Akayesu* (n 9) paras 505–06.

Providing what is admittedly a common-sense and reasonable definition of the 'conditions of life calculated to bring about its physical destruction in whole or in part', the ad hoc international criminal tribunals have also included therein the concept of 'slow death genocide', that is, 'circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion'.[33] They specified that

> 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.[34]

A comparable dynamic reading was also applied to the act of 'forcibly transferring children of the group to another group':

> With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[35]

This act, which undoubtedly puts at risk the cultural identity of the group, is generally considered as the last remain of 'cultural genocide' within the conventional ambit. The initial draft of the Genocide Convention included cultural genocide among acts of genocide and defined it as the destruction of the specific characteristics of the persecuted groups by various means, such as forced exile, prohibition of the use of the national language, destruction of books, and similar acts.[36] If cultural genocide was subsequently abandoned in the final version of the Convention, a look at the case law reveals that the international criminal tribunals have not been reluctant to take into account the cultural aspects of the crime. Although recalling the legality principle, the ICTY still found that the proof of attacks directed against cultural institutions and monuments, committed in association with killing, may prove important in establishing the existence of a genocidal intent:

> The Trial Chamber is aware that it must interpret the Convention with due regard for the principle *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. … The Trial Chamber

[33] *Kayishema and Ruzindana* (n 9) para 115. Footnote omitted. See also *Rutaganda* (n 9) para 52; *Musema* (n 9) para 157; *Stakić* (n 12) para 517.

[34] *Kayishema and Ruzindana* (n 9) para 116.

[35] *Akayesu* (n 9) para 509. See also *Kayishema and Ruzindana* (n 9) para 118; *Rutaganda* (n 9) para 54; *Musema* (n 9) para 159.

[36] UN Doc A/AC.10/41 and UN Doc A/362 (Appendix II). See also Lemkin's definition of 'genocide in the cultural field' which consisted of 'the prohibition or the destruction of cultural institutions and cultural activities, of the substitution of education in the liberal arts for vocational education, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking': Raphaël Lemkin, *Axis Rule in Occupied Europe – Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC, Carnegie Endowment for International Peace, Division of International Law, 1944) xi–xii.

> *however* points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[37]

While it maintained that 'an enterprise attacking only the cultural or sociological characteristics of a human group … would not fall under the definition of genocide',[38] the Trial Chamber implicitly applied the 'living instrument' doctrine when it recognised the existence of 'recent developments' towards the recognition of the crime of cultural genocide. One such development may be found in the case law of the Federal Constitutional Court of Germany:

> [T]he statutory definition of genocide defends a supra-individual object of legal protection, ie, 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.[39]

Reflecting on the attitude of the international criminal judge, Schabas pointed to the role of 'a contemporary interpreter of the definition of genocide', noting that

> it can be argued that a contemporary interpreter of the definition of genocide should not be bound by the intent of the drafters back in 1948. The words 'to destroy' can readily bear the concept of cultural as well as physical and biological genocide, and bold judges might be tempted to adopt such progressive construction.[40]

This 'contemporary interpretation' did not solely involve an implicit resort to the 'living instrument' doctrine developed in human rights law, and notably by the ECtHR. The judicial interpretation of the groups protected by the Genocide Convention also appears to have turned to another Strasbourg-elaborated construction, that of safeguarding rights that are both 'practical and effective'.

3. A TELEOLOGICAL APPROACH TO THE GROUPS PROTECTED: SAFEGUARDING RIGHTS THAT ARE 'PRACTICAL AND EFFECTIVE'

Aside from the 'living instrument' doctrine, the Strasbourg Court has also developed a teleological interpretation, asserting that the ECHR is 'intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[41] When looking at their judicial construction of the groups protected under the

[37] *Krstić* (n 14) para 580. Emphasis added.
[38] ibid.
[39] Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000, para (III)(4)(a)(aa). Emphasis added. Cited in *Krstić* (n 14) para 579.
[40] William A. Schabas, *An Introduction to the International Criminal Court*, 3rd edn (Cambridge, Cambridge University Press, 2007) 94.
[41] ECtHR, *Airey v Ireland*, Appl No 6289/73, Judgment, 9 October 1979, para 24.

definition of genocide, the international criminal tribunals seem to have adopted a similar purposeful approach, interpreting the definition so as to guarantee its effective use and application in practice.

Just like it fails to define the acts it proscribes, the Genocide Convention also falls short of precisely clarifying the groups it aims at protecting – leaving here again the door open for judicial interpretation. Article II merely refers to 'national, ethnical, racial [and] religious' groups, without providing for any form of indication as to what these categories of groups cover in reality. The confusing aspect of this group classification had already emerged during the drafting of the conventional text, when it had been argued that 'ethnic' was equivalent to both 'racial' and 'national'[42] and when the distinction between religious groups and national groups proved controversial.[43] Notwithstanding the fact that the reference to 'racial' groups is highly problematic, if not altogether literally racist, it also appears that, from its very inception, the categorisation drawn by the conventional text, by ignoring the interweaving of the different groups, proved artificial and hardly a workable tool. In the words of Drost:

> [A] convention on genocide cannot effectively contribute to the protection of certain described minorities when it is limited to particular defined groups … it serves no purpose to restrict international legal protection to some groups; firstly, because the protected members always belong at the same time to other unprotected groups.[44]

In this context, it is unsurprising that the ad hoc international criminal tribunals had to define the groups protected, sometimes forcing an improbable interpretation of the conventional text but – here also – using common sense and filling the gaps of a defective text. The limits of the conventional group characterisation became particularly clear when, so as to qualify the acts perpetrated in Rwanda as genocide, the *Akayesu* Trial Chamber was left with little other choice than to interpret in an extensive fashion the conventional scope of protection. As Tutsi did not fit in any of the conventionally listed groups,[45] the Trial Chamber proactively decided to turn to the *travaux préparatoires* and recalled that the conventional text was meant to

[42] See 3 UN GAOR C.6 (75th meeting) 115–16, UN Doc A/633 (1948). Cited in Lawrence J LeBlanc, 'The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?' (1988) 13 *Yale Journal of International Law* 271.

[43] See Report of the Ad Hoc Committee on Genocide, 3 UN ESCOR Supp 6, UN Doc E/794 (1948) 6.

[44] Pieter N Drost, *The Crime of State – Penal Protection for Fundamental Freedoms of Persons and Peoples, Book II: Genocide* (UN Legislation on International Criminal Law, Leyden, AW Sythoff, 1959) 122–23.

[45] The Tutsi did not fit in any of the groups described as they were not really a different ethnic group compared to the Hutu: they shared the same language, and probably the same culture: 'The Hutu and the Tutsi cannot even correctly be described as ethnic groups for they both speak the same language and respect the same traditions and taboos. It would be extremely difficult to find any kind of cultural or folkloric custom that was specifically Hutu or Tutsi. … [There] were certainly distinguishable *social categories* in existence before the arrival of the colonisers, but the differences between them were not based on ethnic or racial divisions. [The colonisers reinforced the antagonism between Hutus and Tutsis which] has since become absorbed by the people themselves': Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (London, Pluto Press, 1995) 36. Emphasis added.

cover 'permanent and stable' groups,[46] an argument that thankfully allowed for the recognition that Tutsi were victims of genocide but whose grounds can be debated.[47]

More specifically, the *Akayesu* Trial Chamber also individually defined the different groups conventionally protected, holding that 'a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties';[48] 'an ethnic group is generally defined as a group whose members share a common language or culture';[49] a 'racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors';[50] and a 'religious group is one whose members share the same religion, denomination or mode of worship'.[51] In subsequent case law, the ICTR further defined the groups as protected by the Genocide Convention. In the *Kayishema and Ruzindana* case, Trial Chamber II gave a rather wide definition of 'ethnic group' as a group 'whose members share a common language and culture; or, a group which distinguishes itself as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)'.[52]

This definitional effort notwithstanding, the artificiality of the distinction between the different groups was subsequently acknowledged by the international criminal tribunals, and notably by the ICTY when the *Krstić* Trial Chamber found that:

> To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention. … A group's cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits. As in the *Nikolic* and *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.[53]

Put differently, the Trial Chamber here decided to proceed to both an objective and a subjective understanding of the notion of group – an arguably reasonable decision that allows for the concept of genocide to be meaningful and applicable in practice.

[46] *Akayesu* (n 9) paras 511–16, 701.

[47] Only one day after the adoption of the Genocide Convention, the General Assembly adopted the Universal Declaration of Human Rights (UDHR) whose Arts 15(2) and 18 expressly recognise the rights to change nationality as well as religion respectively. Art 15(2) provides that 'No one shall be … denied the right to change his nationality' and Art 18 that 'Everyone has the right to … freedom to change his religion.' In the words of the UK representative, the Genocide Convention 'should also provide protection to groups the members of which were as free to leave them as they were to join them. National or religious groups were obvious instances of that kind.' UN GAOR, 6th Committee, 3rd session, 69th Meeting (1948) para 60.

[48] *Akayesu* (n 9) para 512.

[49] ibid para 513.

[50] ibid para 514.

[51] ibid para 515. See also *Kayishema and Ruzindana* (n 9) para 98.

[52] ibid.

[53] *Krstić* (n 14) paras 556–57. Footnotes omitted.

With the Genocide Convention, 'determining the meaning of the groups protected by the Convention seems to dictate a degree of subjectivity. It is the offender who defines the individual victim's status as a member of a group protected by the Convention.'[54] The judicial acknowledgement of the importance of subjective elements in determining the perpetration of genocide is thus to be welcomed insofar as it reflects the specificity of the crime of genocide. As explained by the *Bagilishema* Trial Chamber, 'the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society'.[55] Although expressing the view that 'a subjective definition alone is not enough to determine victim groups',[56] the same Trial Chamber simultaneously noted that 'for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction.'[57] The necessity to adopt a semi-subjective approach also justifies judicial recourse to a case-by-case assessment of the facts:

> The determination of whether a group comes within the sphere of protection created by Article 2 of the Statute ought to be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators.[58]

Adopting a similar view, Trial Chamber I of the ICTY found that the qualification of the group could be achieved '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'[59] and further held that 'the correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria'.[60] This 'correct determination' constitutes a means of guaranteeing the effectiveness of the group protection as envisaged in the Genocide Convention. Short of this semi-subjective approach it is conceivable that the concept of groups would have remained too rigid to be effectively used in court.

The teleological approach was admittedly further used – albeit implicitly – to solve interpretational discrepancies, such as the one that arose at the ICTY with respect to the determination of genocidal intent in an instance where only military-aged men had been targeted. Turning to the judicially created concept of the group 'as a distinct entity',[61] Trial Chamber I in the *Krstić* case qualified the crimes as genocide and found that:

> 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

[54] William A Schabas, *Genocide in International Law – The Crimes of Crimes* (Cambridge, Cambridge University Press, 2000) 109.

[55] *Bagilishema* (n 9) para 65.

[56] *Rutaganda* (n 9) para 57. See also *Musema* (n 9) para 162.

[57] *Rutaganda* (n 9) para 56. See also *Musema* (n 9) para 161; *Kajelijeli* (n 10) para 811; *Gacumbitsi* (n 27) para 254.

[58] *Semanza* (n 10) para 317. Emphasis in original. See also *Musema* (n 9) para 163; *Kajelijeli* (n 10) para 811; *Seromba* (n 11) para 318.

[59] *Krstić* (n 14) para 557.

[60] *Prosecutor v Blagojević and Jokić*, IT-02-60-T, Judgment, Trial Chamber I, 17 January 2005, para 667.

[61] ibid para 590. Emphasis added.

> entire group. … By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory.[62]

Yet, only one month after the *Krstić* judgment, Trial Chamber III of the ICTY reached an opposite conclusion in the *Sikirica* case,[63] and, while this divergence was ultimately settled by the Appeals Chamber when it concurred with the *Krstić* Trial Chamber,[64] it still remains that the judicial uncertainty caused by the conventional vagueness could seriously endanger the applicability of the law of genocide.

The dynamic interpretation of the international criminal tribunals, which do point to a certain degree of flexibility,[65] did not, however, dilute or trivialise the concept of genocide. Nor did it contravene the initial understanding of the drafters of the Convention. For instance, when the *Jelisić* Trial Chamber added a 'negative approach' to the subjective understanding of the victim group,[66] it was rapidly contradicted by the *Stakić* Trial Chamber which argued that in 'cases where more than one group is targeted, it is not appropriate to define the group in general terms, as, for example, "non-Serbs"'.[67] The Appeals Chamber subsequently concurred with the *Stakić* Trial Chamber,[68] recalling that 'genocide was *originally conceived* of as the destruction of a race, tribe, nation, or other group with a particular positive identity – not as the destruction of various people lacking a distinct identity'.[69] Thus, 'a group, for the purpose of the law of genocide, can only be defined *positively*, ie, as encompassing individuals who share certain characteristic features relevant to the law of genocide'.[70] Ultimately, '[u]nder the law of genocide, subjective considerations can have evidential relevance, but a protected group must have an *objective* existence'[71] – an interpretation that is both dynamic and respectful of the object and purpose of the original definition of the crime.

Where this 'flexibility' could be seen as more problematic is in the fact that the lack of detailed definitions in the conventional provisions left states parties with significant discretion as to the groups which are to be protected. As 'defining the groups more precisely was presumably left to the implementing legislation which parties to the Convention are to adopt in accordance with Article V', 'different states have varying definitions of protected groups and problems could arise in interpreting and applying the Convention'.[72] It is, for instance, striking that, while the Convention famously excludes political and social groups from its protective ambit,

[62] ibid paras 595–97.

[63] See *Prosecutor v Sikirica*, IT-95-8-T, Judgment on Defence Motions to Acquit, Trial Chamber III, 3 September 2001, paras 55–97.

[64] *Prosecutor v Krstić*, IT-98-33-A, Judgment, Appeals Chamber, 19 April 2004, para 23.

[65] The term is borrowed from Schabas who wrote: 'the label "group" is flexible'. William A Schabas, *Genocide in International Law: The Crimes of Crimes*, 2nd edn (Cambridge, Cambridge University Press, 2009) 123.

[66] *Prosecutor v Jelisić*, IT-95-10-T, Judgment, Trial Chamber I, 14 December 1999, para 71.

[67] *Stakić* (n 12) para 512.

[68] *Prosecutor v Stakić*, IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para 28.

[69] ibid para 21. Emphasis added.

[70] Guénaël Mettraux, *International Crimes: Law and Practice*, vol II: *Crimes Against Humanity* (Oxford, Oxford University Press, 2020) 580. Footnote omitted.

[71] ibid.

[72] LeBlanc (n 42) 271–72.

some domestic provisions chose to depart from the conventional sphere, thereby raising questions as to possible interpretations of the Convention in the future.[73]

4. THE JUDICIAL UNDERSTANDING OF THE GENOCIDAL *MENS REA*: AN OVERLY CONSERVATIVE APPROACH?

The definition of the crime of genocide requires an extremely high standard of proof regarding the mental element in the sense that a very specific 'intent to destroy in whole or in part, a national, ethnical, racial, or religious groups, as such'[74] must exist in order to qualify the act as genocide. While this requirement of a specific intent, construed as the distinctive element of the crime,[75] is a key safeguard against any abuse and trivialisation of the crime of genocide, it nonetheless remains that this extremely strict understanding of the *mens rea* requirement holds the risk of turning genocide into an unprovable crime and of thus resulting in acquittals for the charge of genocide in cases of actual genocide.[76] Far from being purely theoretical, this is arguably the scenario that unfolded at the ICTY as the Tribunal has limited its finding of genocide to Srebrenica and has consistently refuted the qualification of genocide for crimes perpetrated in other municipalities, even if it recognised that the perpetrators had genocidal intent.

Elaborating on the conventionally undefined notion of genocide 'in part', the ICTY read in a new requirement: substantiality. In other words, the genociders needed to have the intent to destroy a group not 'in part' but in 'substantial part'. Relying on previous ICTY case law,[77] the *Mladić* Trial Chamber recalled

> that in determining the *substantiality* of the group, the numerical size of the targeted part of the protected group in absolute terms is one factor among many. Other factors

[73] See notably Art 281 of the Ethiopian Penal Code (1957); Art 373 of the Costa Rican Penal Code and Art 127 of the Costa Rican Penal Code Project (1998), which offer an extremely wide protection as the definition of genocide covers gender, age, political, sexual, social, economic and civil groups; Art 319 of the Peruvian Penal Code (1998); Art 211-1 of the French New Penal Code; Art 356 of the Romanian Socialist Republic Penal Code (1976). It may be recalled here that, in its Resolution 96 (I) on the crime of genocide, the UN General Assembly expressly included political groups within the definitional scope of the crime of genocide. See GA Resolution 96 (I), UN Doc A/231 (11 December 1946). It is also noteworthy that, in his Report, Special Rapporteur Whitaker proposed to include genocide against social and political groups in an additional optional protocol to the Genocide Convention. See *Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr B Whitaker, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, Thirty-eighth session, E/CN.4/Sub.2/1985/6, 2 July 1985 (herein after referred to as the Whitaker Report) 19, para 37.

[74] Art II of the Genocide Convention. Emphasis added.

[75] 3 UN GAOR, Sixth Committee, 89–97 (1948). Cited in Bryant (n 29) 692.

[76] In this respect, see the concerns raised by the French and Soviet delegates during the drafting of the conventional text. UN Doc A/C.6/SR.73 (Chaumont, France; Morozov, Soviet Union).

[77] See *Jelisić* (n 66) para 82. Emphasis added. A 'targeted part of a group would be classed as *substantial* either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community'. See also *Sikirica* (n 63) paras 76–77: the 'important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimisation within the terms of Article 4(2)(a), (b) and (c) would impact upon the survival of the group, as such.' See *Krstić* (Appeal) (n 64) para 8.

> include: numerical size of the part in relation to the overall size of the group; the prominence of the part of the group within the larger whole and whether it is emblematic of the overall group or essential to its survival; the area of the perpetrators' activity and control; and the perpetrators' potential reach.[78]

This added requirement of substantiality is not new. In his early commentary of the Genocide Convention, Robinson explained that the characterisation of genocide requires a substantial number of victims, even if it is left to the courts to decide in each case whether 'the number was *sufficiently large*'.[79] Likewise, in his report on the Genocide Convention, Whitaker had pointed out that the term 'in part' implied 'a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership'.[80] On the judicial front, the ICTR had found that there must be a '*considerable number*' of victims for the crime to qualify as genocide,[81] while the ICTY referred to a '*substantial*' part, although not necessarily a '*very important part*'.[82] By contrast, the 'Elements of Crimes' adopted by the Preparatory Commission for the ICC specify that '*one or more* persons' may be the victim of the crime of genocide,[83] a specification that finds some support in academic writings. As Drost had explained,

> both as a question of theory and as a matter of principle nothing in the present [Genocide] Convention prohibits its provisions to be interpreted and applied to *individual cases* of murder by reason of the national, racial, ethnical or religious qualities of the *single victim* if the murderous attack was done with the intent to commit similar acts in the future and in connection with the first crime.[84]

If the above citations seem to refer to the actual result of the crime of genocide, that is, the number of victims, it is arguable that substantiality has in fact been envisaged as directly linked to genocidal intent as an intent to destroy a protected group not 'in part' but in *substantial* part.[85] This is exactly what the *Mladić* Trial Chamber found when it concluded – Judge Orie dissenting – that 'the physical perpetrators of the prohibited acts in Sanski Most, Vlasenica, and Foča Municipalities, and certain named perpetrators in Kotor Varoš and Prijedor Municipalities, *intended to destroy the Bosnian Muslims in those Count 1 Municipalities* as a part of the protected group',[86] but that, in these municipalities, the perpetrators had not perpetrated their

[78] *Prosecutor v Mladić*, IT-09-92-T, Judgment, Trial Chamber I, 22 November 2017, para 3528. Emphasis added. See also ibid para 3437.

[79] Robinson (n 30) 58. Emphasis added.

[80] Whitaker Report (n 73) 16, para 29.

[81] *Kayishema and Ruzindana* (n 9) para 97. Emphasis added.

[82] *Jelisić* (n 66) para 82. Emphasis added.

[83] See Art 6(a)(1), Elements of Crimes (n 5). Emphasis added.

[84] Drost (n 44) 85.

[85] This is in line with most academic opinions and case law. See eg Robinson (n 30) 58; Whitaker Report (n 73) 16, para 29. Contra, Drost (n 44) 85. For case law, see eg *Kayishema and Ruzindana* (n 9) para 97; *Bagilishema* (n 9) para 64; *Jelisić* (n 66) paras 81–82. At the domestic level, it seems only the US legislation requires that the acts be committed 'with the specific intent to destroy, in whole or in *substantial* part' a protected group. See T Hoffmann, 'The Crime of Genocide in Its (Nearly) Infinite Domestic Variety' in M Odello and P Łubiński (eds), *The Concept of Genocide in International Criminal Law: Developments after Lemkin* (Abingdon, Routledge, 2020) 67–97, 74. Emphasis added.

[86] *Prosecutor v Mladić* (n 78) para 3526. Emphasis added.

acts with the intent to destroy the Bosnian Muslims and Bosnian Croats as a '*substantial* part' of the protected groups in Bosnia-Herzegovina.[87] The crimes were thus not qualified as genocide but as crimes against humanity. Following the *Mladić* appeals judgment,[88] which confirmed the trial judgment, this reading of genocidal intent is admittedly one of the – regrettable – legacies of the ICTY.[89] It impedes the qualification of genocide to cases of genocide.

5. CONCLUDING REMARKS

The definition of the crime of genocide, as encapsulated in the Genocide Convention, that is, in a text adopted in 1948, has remained untouched in spite of the fact that it admittedly lacks precision. As the first international criminal tribunal to apply it fifty years later in the *Akayesu* case, the ICTR thus had no other choice than to embark on an interpretation exercise to specify the contours of this definition and the scope of the crime. The ICTY quickly followed suit and, as has been discussed, the international tribunals took their definitional role seriously and conscientiously, but not without a pinch of creativity and activism. In doing so, they seem to have borrowed certain methods of interpretation elaborated by the ECtHR, resorting to the 'living instrument' doctrine to elucidate the genocidal *actus reus* and to a teleological construction to specify the groups protected. If these dynamic approaches have at times gone beyond the notion of genocide as originally conceived by the drafters of the Genocide Convention, they have undoubtedly allowed the definition of the crime to conform to contemporary international criminal law and to be practical and effective. Departing from the text of the law can, however, be a two-way street and, at other times, the interpretation of the tribunals – notably with respect to the concept of destruction 'in part' – has questionably shown more conservatism, reading in requirements and arguably misreading the text of the law.[90] This mixed legacy notwithstanding, one thing seems certain: in applying the Genocide Convention, the ad hoc international criminal tribunals have enabled the 1948 definition of the crime to stand the test of time.

[87] ibid para 3536. Emphasis added.

[88] See *Prosecutor v Mladić*, MICT-13-56-A, Judgment, Appeals Chamber, 8 June 2021.

[89] See Caroline Fournet, 'The (Expected) Guilty Verdict against Ratko Mladić', *International Law Under Construction, Blog of the Groningen Journal of International Law* (2017) https://grojil.org/2017/12/27/the-expected-guilty-verdict-against-ratko-mladic/, accessed 31 July 2021. See also Caroline Fournet, '"Face to Face with Horror": The Tomašica Mass Grave and the Trial of Ratko Mladić' (2020) 6(2) *Human Remains and Violence* 23–41, www.manchesteropenhive.com/view/journals/hrv/6/2/article-p23.xml, accessed 31 July 2021.

[90] Fournet (ibid, 2017) and Fournet (ibid, 2020).