

# THE CONTEXTUAL EMBEDDING OF GENOCIDE: A CASUISTIC ANALYSIS OF THE INTERPLAY BETWEEN LAW AND FACTS

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*This article discusses the contextual embedding of genocide in the case law of the ad hoc tribunals and the International Criminal Court. In particular, it seeks to clarify to what extent the courts require that an individual génocidaire acted in the context of a collective act. The article shows that the courts' approach towards the contextual embedding of genocide depends on the factual circumstances of the specific situation under consideration. It can therefore not be captured in one uniform standard, but differs per case. This flexibility and context-dependency can be explained in terms of the open texture of the genocide concept. This article emphasises that the openness of genocide must not lapse into illegitimate decision-making. It therefore advocates a casuistic methodology of judicial reasoning. This methodology balances the need for progressive development and judicial creativity on the one hand, against the requirements of legality and consistency on the other.*

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## I INTRODUCTION

The crime of genocide was first defined in art 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*') as the commission of one of the listed acts with the intent to destroy, in whole or a part, a national, ethnic, racial or religious group, as such.<sup>1</sup> This definition has been reproduced verbatim in the statutes of the ad hoc tribunals and the International Criminal Court ('ICC').<sup>2</sup> It has also been recognised as customary international law.<sup>3</sup> The definition of genocide is characterised by the accused's *intent to destroy*. It neither contains an explicit contextual element, nor alludes to a collective act. This raises the question of whether genocide requires some form of contextual embedding.<sup>4</sup> Can a single perpetrator acting with the intent to destroy commit genocide? Or does a perpetrator have to participate in a collective campaign of (destructive) violence to qualify as a *génocidaire*?

The scholarly debate on this issue is divided. Whereas some scholars reject that genocide implies a collective act and focus on the intent of individual accused,<sup>5</sup> others argue that genocide is best characterised as a type of system criminality — widespread and organised (state) criminality — and accordingly

<sup>1</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2 ('*Genocide Convention*'). The legal definition of genocide differs from the meaning of genocide in everyday speech and social science: David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 *Chicago Journal of International Law* 303, 308; Larissa van den Herik, 'The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate, 2007) 75, 75–6.

<sup>2</sup> SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994) annex ('*Statute of the International Tribunal for Rwanda*') art 2(2) ('*ICTR Statute*'); SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) art 4(2) ('*ICTY Statute*'); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 6 ('*Rome Statute*').

<sup>3</sup> See, eg, *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-33-T, 2 August 2001) [541] ('*Krstić Trial Chamber Judgement*'); *Prosecutor v Kayishema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [88] ('*Kayishema Trial Chamber Judgement*'); *Prosecutor v Jelisić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10-T, 14 December 1999) [60] ('*Jelisić Trial Chamber Judgement*').

<sup>4</sup> The question concerning genocide's contextual embedding is connected to the scholarly debate on the requisite level of intent. See William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012) 146; William A Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2<sup>nd</sup> ed, 2009) 242–3. While acknowledging this connection, this article focuses on genocide's contextual embedding.

<sup>5</sup> See, eg, Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence' (2005) 3 *Journal of International Criminal Justice* 989, 996; Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005) 211; Kevin Jon Heller, 'International Decisions: *Prosecutor v Karemera, Ntirumpaste, and Nzirorera*' (2007) 101 *American Journal of International Law* 157, 159. See also Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) 14 *Leiden Journal of International Law* 399, 402; Roberta Arnold, 'The Mens Rea of Genocide under the *Statute of the International Criminal Court*' (2003) 14 *Criminal Law Forum* 127, 150.

attach value to the existence of an objective context of violence.<sup>6</sup> A similar disagreement exists in the case law of the ad hoc tribunals and the ICC. On the one hand, the tribunals have found that the existence of a collective act is not a necessary requirement of genocide,<sup>7</sup> but only a factor that is evidential of the accused's genocidal intent. On the other hand, the ICC's *Elements of Crimes* explicitly require that the accused operated 'in the context of a manifest pattern of similar criminal conduct'.<sup>8</sup> Before the ICC, the context of collective violence thus constitutes a distinct legal element that potentially creates 'a separate "Rome regime" of crimes'.<sup>9</sup>

The disagreement on the contextual embedding of genocide creates undesirable uncertainties about the exact meaning of this crime. This article seeks to address these uncertainties and aims to clarify the issue of contextual embedding by supplementing the current theoretical discourse with factual analyses. These analyses assess the application of genocide in individual cases and describe how the ad hoc tribunals and the ICC have dealt with the issue of contextual embedding in practice. In this way, it is made clear that the genocide concept has an open texture and develops in interplay with the facts of individual cases. As a result, the contextual embedding of genocide differs per case and cannot be captured in one uniform standard. While acknowledging this flexibility and context-dependency, this article emphasises that courts cannot freely tweak the law to fit the facts. To prevent such abuses, courts are advised to justify their decisions pursuant to a casuistic methodology.

The article is structured as follows. Part II starts with an analysis of the scholarly debate on the contextual embedding of genocide. It distinguishes two schools of thought that are referred to as the 'goal-oriented model' and the 'structure-based model'. Parts III and IV proceed to describe the case law of the ad hoc tribunals and the ICC, respectively. I evaluate to what extent the theoretical distinction between the goal-oriented and the structure-based model influences the courts' interpretation and application of genocide. Emphasis is

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<sup>6</sup> See, eg, William A Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (2005) 18 *Leiden Journal of International Law* 871, 877; Alexander K A Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259, 2288; Stefan Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct' (2009) 42 *Creighton Law Review* 347, 352–5; Claus Kress, 'The Darfur Report and Genocidal Intent' (2005) 3 *Journal of International Criminal Justice* 562, 572; Thomas W Simon, 'Defining Genocide' (1996) 15 *Wisconsin International Law Journal* 243, 248; Hans Vest, 'A Structure-Based Concept of Genocidal Intent' (2007) 5 *Journal of International Criminal Justice* 781, 784.

<sup>7</sup> *Prosecutor v Jelisić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [48] ('*Jelisić Appeals Chamber Judgement*'); *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [223]–[224] ('*Krstić Appeals Chamber Judgement*'); *Jelisić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10-T, 14 December 1999) [100]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [94].

<sup>8</sup> International Criminal Court, *Elements of Crimes* (Doc No ICC-PIDS-LT-03-002/11, 11 June 2010) arts 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7).

<sup>9</sup> Robert Cryer, 'The Definitions of International Crimes in the *Al Bashir* Arrest Warrant Decision' (2009) 7 *Journal of International Criminal Justice* 283, 295–6.

placed on the factual circumstances based on which the courts assess and establish genocide in individual cases. Since the International Criminal Tribunal for Rwanda ('ICTR') has the most experience with genocide cases, its case law forms the primary basis of analysis. The case law of the International Criminal Tribunal for the former Yugoslavia ('ICTY') is used to complement this analysis as it has more extensively dealt with the challenges of establishing genocide outside a clear genocidal context. The ICC case law on genocide is still very limited. The Pre-Trial Chamber ('PTC') in *Prosecutor v Al Bashir* ('*Al Bashir*') has rendered a handful of decisions relating to the possible commission of genocide in Darfur, but a final judgment in this case is still to be delivered. The following analysis of ICC case law is therefore only preliminary. Part V interprets and values the results of the case law analyses in light of the open texture of genocide and the casuistic method of legal reasoning. In this way, I demonstrate that the contextual embedding of genocide in practice is characterised by a bounded flexibility. Part VI concludes with some observations on the implications of this finding for scholars' future study and courts' future use of the genocide concept.

## II THE GOAL-ORIENTED VERSUS THE STRUCTURE-BASED MODEL

The status of genocide as an international crime is uncontroversial, yet the interpretation of the legal elements of this crime continues.<sup>10</sup> One of these difficulties concerns the question of whether genocide requires some form of contextual embedding: can a single perpetrator acting with the intent to destroy commit genocide? Or does genocide require a collective campaign of (destructive) violence? In the scholarly debate, two views on this issue have emerged.

The first view holds that the accused's genocidal intentions do not have to result in the actual destruction of a protected group.<sup>11</sup> The scholars adopting this view recognise that genocide generally encompasses large-scale and organised violence.<sup>12</sup> At the same time, they emphasise that the legal elements of genocide are already satisfied when an individual intends to destroy (part of) a protected group and kills a single person for that end. Otto Triffterer, for example, asserts that

for the commission of genocide it is sufficient that the perpetrator merely intended 'to destroy, in whole or in part, a ... group, as such.' This means that the perpetrator must only intend to achieve this consequence or result. For the completion of the crime, therefore, it does not matter whether he was in this regard successful or not or perhaps will never be ...<sup>13</sup>

According to this assertion, genocide is above all determined by the goals of the individual perpetrator(s), rather than the scale of the crimes committed. Genocide

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<sup>10</sup> See Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2<sup>nd</sup> ed, 2010) 204. See also Schabas, *Unimaginable Atrocities*, above n 4, 104.

<sup>11</sup> See, eg, L J van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff, 2005) 108; Triffterer, above n 5, 402; Akhavan, 'The Crime of Genocide', above n 5, 996; Mettraux, above n 5, 211; Heller, above n 5, 159.

<sup>12</sup> See, eg, Arnold, above n 5, 133–4; Akhavan, 'The Crime of Genocide', above n 5, 997.

<sup>13</sup> Triffterer, above n 5, 401–2.

thus becomes a primarily *goal-oriented* crime. This allegedly ensures the (more) effective prevention of genocide. After all, criminal responsibility for genocide can be established in relation to conduct that took place before the occurrence of an actual massacre.<sup>14</sup>

The second view is referred to as the *structure-based* model.<sup>15</sup> This model is premised on the thought that genocide — like war crimes and crimes against humanity — is a type of system criminality. It accordingly perceives that the conduct of individual perpetrators (*Einzel-taten*) should be observed and valued in light of a collective act and its underlying organisational structures (*Gesamttat*).<sup>16</sup> From this perspective, the idea of a lone *génocidaire* seeking to commit genocide on his or her own initiative and by his or her own means becomes ‘a sophomoric *hypothèse d’école*’ — a useless academic construct — that forms ‘a distraction for international judicial institutions’.<sup>17</sup>

The structure-based model has been implemented in two ways. The first way takes as its starting point that intent is only legally relevant insofar as it is realistic and amounts to more than a vain hope. Stefan Kirsch in this respect finds that

a single individual cannot realistically believe that his or her individual genocidal conduct and desire will actually cause the total destruction of a protected group. Therefore, the individual’s desire to commit genocide must be related to the results of a collective activity to which he or she contributes.<sup>18</sup>

The second way presents the collective act as an autonomous element of genocide. William Schabas, for example, asserts that evidence of a plan or policy has been essential for all genocide convictions.<sup>19</sup> He therefore argues that the finding of such a plan or policy ‘lies at the very heart of the debate’ on genocide.<sup>20</sup>

The structure-based model adds a significant difficulty to genocide prosecutions: the construction of a link between the accused’s misconduct and the collective genocidal campaign. It must be ascertained that the accused’s

<sup>14</sup> See, eg, Arnold, above n 5, 133; Triffterer, above n 5, 401. On the distinction between the prevention and the criminal punishment of genocide, see van den Herik, ‘Schism’, above n 1, 93–4.

<sup>15</sup> Kai Ambos, ‘What Does “Intent to Destroy” in Genocide Mean?’ (2009) 91 *International Review of the Red Cross* 833, 841; Vest, above n 6, 782.

<sup>16</sup> See, eg, Kress, ‘The Darfur Report’, above n 6, 572; Kirsch, above n 6, 354. Although scholars generally agree that this campaign must be genocidal in character, the threshold they adopt in this respect differs. For example, whereas Vest requires a practical certainty that the implementation of a plan leads to the (partial) destruction of a protected group, for Kress it suffices that the campaign is of a nature capable to bring about the planned destruction: Vest, above n 6, 792–3; Claus Kress, ‘The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al Bashir* Case’ (2009) 7 *Journal of International Criminal Justice* 297, 306. In relation to the ICC, Robert Cryer argues that the requisite policy may also be non-genocidal: Cryer, ‘The Definitions of International Crimes’, above n 9, 291–2.

<sup>17</sup> See Schabas, ‘Darfur and the “Odious Scourge”’, above n 6, 877. See also Greenawalt, above n 6, 2288; Kirsch, above n 6, 352–5; Kress, ‘The Darfur Report’, above n 6, 572; Simon, above n 6, 248; Vest, above n 6, 784.

<sup>18</sup> Kirsch, above n 6, 354. For related discussion: see Kress, ‘The Crime of Genocide and Contextual Elements’, above n 16, 304–5; Vest, above n 6, 789–90.

<sup>19</sup> Schabas, *Unimaginable Atrocities*, above n 4, 131.

<sup>20</sup> Schabas, ‘Darfur and the “Odious Scourge”’, above n 6, 877.

actions did not only occur *against the background* of a collective campaign, but genuinely *formed part* of it.<sup>21</sup> This link is mostly construed in terms of the accused's *mens rea*. In particular, it is found that the accused must have *known* of the collective act and the destructive results thereof.<sup>22</sup> The assessment of this standard arguably varies, depending on the accused's position. Whereas knowledge on the part of political and military leaders can be established relatively easily — after all, they are responsible for the design of the collective act — it cannot be presumed in relation to low-ranking perpetrators.<sup>23</sup>

### III THE AD HOC TRIBUNALS AND THE CONTEXTUAL EMBEDDING OF GENOCIDE

#### A *General Interpretation*

The ad hoc tribunals have addressed questions concerning the contextual embedding of genocide in relation to their findings on the accused's genocidal intent. The tribunals emphasise that genocidal intent is a form of 'special' intent.<sup>24</sup> According to the Trial Chamber in *Prosecutor v Akayesu* ('*Akayesu*'), this means that

[t]he perpetration of the act charged ... extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element.<sup>25</sup>

By reasoning in this way, the Chamber sets a high threshold: the tribunals need to establish that the perpetrator aimed for the (partial) destruction of a

<sup>21</sup> Kirsch, above n 6, 355.

<sup>22</sup> See, eg, William Schabas, 'The *Jelisić* Case and the Mens Rea of the Crime of Genocide' (2001) 14 *Leiden Journal of International Law* 125, 137; Greenawalt, above n 6, 2288; Kirsch, above n 6, 357; Kress, 'The Darfur Report', above n 6, 577; Vest, above n 6, 792. Contrary to these authors, Ambos argues that 'the knowledge need not concern the ultimate destruction of the group in the future — indeed, this is only a future expectation which as such cannot be known but only hoped or desired — but only the overall genocidal context': Ambos, above n 15, 848.

<sup>23</sup> See, eg, Nina H B Jørgenson, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice' (2001) 1 *International Criminal Law Review* 285, 299; van den Herik, *The Contribution of the Rwanda Tribunal*, above n 11, 122. See also International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, UN GAOR, 51<sup>st</sup> sess, Agenda Item 146, Supp No 10, UN Doc A/51/10(SUPP) (26 July 1996) [10].

<sup>24</sup> See, eg, *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [498] ('*Akayesu Trial Chamber Judgement*'); *Prosecutor v Rutaganda (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [58] ('*Rutaganda Trial Chamber Judgement*'); *Prosecutor v Musema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [164] ('*Musema Trial Chamber Judgement*'); *Prosecutor v Seromba (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-2001-66-I, 13 December 2006) [319] ('*Seromba Trial Chamber Judgement*'); *Gacumbitsi v Prosecutor (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006) [39] ('*Gacumbitsi Appeals Chamber Judgement*'); *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [91].

<sup>25</sup> *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [522].

protected group.<sup>26</sup> Legal practice illustrates that this threshold is difficult to meet, since it is hard to find direct evidence showing that the accused pursued a destructive purpose. The tribunals therefore accept that genocidal intent is inferred from the acts, utterances and position of the accused and from the ‘pattern of purposeful action’.<sup>27</sup> The latter category includes circumstances such as: the general policy underlying the acts; the methodical way of planning; the systematic manner of killing; the number of victims; the scale of atrocities; and the use of derogatory language towards members of the targeted group.<sup>28</sup> This list of circumstances clarifies that the accused’s intent can be deduced from the organised context of collective violence in which he or she participated. The Appeals Chamber in *Prosecutor v Jelisić* (‘*Jelisić*’) has confirmed the relevance of such an organised setting by emphasising that

in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.<sup>29</sup>

It is not required that this plan or policy consists (exclusively) of destructive acts, or that it has a destructive effect. However, ‘the extent of the actual destruction, if it does take place, will more often than not be a factor from which the inference may be drawn that the underlying acts were committed with [genocidal intent]’.<sup>30</sup>

It follows from this account that the ad hoc tribunals assume a close *evidentiary* relationship between the accused’s genocidal intent and the existence

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<sup>26</sup> *Prosecutor v Milošević (Decision on Motion for Judgment of Acquittal)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-54-T, 16 June 2004) [125]–[126] (‘*Milošević Rule 98 bis decision*’); *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [497].

<sup>27</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [93]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [61]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [167]. Factors that are relevant in relation to the accused’s position include the accused’s education, his experience as an officer, his general capabilities especially with respect to his duties and responsibilities stemming from his specific professional position: *Prosecutor v Tolimir (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) (‘*Tolimir Trial Chamber Judgement*’) [1161].

<sup>28</sup> See, eg, *Prosecutor v Bagilishema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) [62] (‘*Bagilishema Trial Chamber Judgement*’); *Prosecutor v Semanza (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [313] (‘*Semanza Trial Chamber Judgement*’); *Prosecutor v Kajelijeli (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-98-44A-T, 1 December 2003) [804], [806]; *Prosecutor v Blagojević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007) [123] (‘*Blagojević Appeals Chamber Judgement*’).

<sup>29</sup> *Jelisić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [48].

<sup>30</sup> *Milošević Rule 98 bis decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-54-T, 16 June 2004) [129]. See also *Prosecutor v Brđanin (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [697] (‘*Brđanin Trial Chamber Judgement*’).

of a collective act. This does not, however, imply that the finding of a genocidal campaign<sup>31</sup> or plan also forms a *legal* element of genocide.<sup>32</sup> According to the Trial Chamber in *Jelisić*, the drafters of the *Genocide Convention* ‘did not discount the possibility of a lone individual seeking to destroy a group as such’.<sup>33</sup> Thus, it is ‘theoretically possible’ that the crimes committed by a single perpetrator

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.<sup>34</sup>

In this light, the tribunals maintain that genocidal intent has to be established above all on the basis of the accused’s own conduct.<sup>35</sup>

### B *Genocidal Intent Applied*

As the previous Part has shown, the ad hoc tribunals’ interpretation of genocidal intent entails a delicate balance between the accused’s individual goals and his or her participation in a collective context. How has this balance been implemented in practice? Based on which facts have the tribunals determined that an accused acted with genocidal intent? Case law analysis reveals that the ICTR and the ICTY assess genocidal intent in light of circumstances concerning: (i) the campaign of collective violence; (ii) the indicted crimes; and (iii) the acts and utterances of the accused.

In relation to the first category, the tribunals inter alia refer to: the political background;<sup>36</sup> the implication of (state) organisations in the commission of crimes;<sup>37</sup> the implementation of discriminatory measures;<sup>38</sup> the implementation

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<sup>31</sup> *Krstić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [223]–[224].

<sup>32</sup> *Prosecutor v Popović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [829]–[830] (*‘Popović Trial Chamber Judgement’*); *Jelisić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [48]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [94].

<sup>33</sup> *Jelisić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10-T, 14 December 1999) [100].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Bagilishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) [63].

<sup>36</sup> See, eg, *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [548] (*‘Stakić Trial Chamber Judgement’*); *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [78]–[109]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [277]–[282]; *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [978], [981].

<sup>37</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [109]–[110], [128]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [277]–[282], [283]–[286]; *Stakić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [548]–[549].

of a military program;<sup>39</sup> the use of derogatory language;<sup>40</sup> the discriminatory, yet indiscriminate, and cruel character of the crimes committed;<sup>41</sup> the planned, systemic and coordinated character of the crimes committed;<sup>42</sup> the geographically widespread commission of crimes;<sup>43</sup> and the number of victims.<sup>44</sup> The Trial Chamber in *Akayesu* has, for example, established that the massacres in Rwanda were aimed at exterminating the Tutsi group given ‘their undeniable

<sup>38</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [107], [123]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [287]–[288]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [928].

<sup>39</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [283]–[286]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [837].

<sup>40</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [118], [120]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [932].

<sup>41</sup> See, eg, *Prosecutor v Bizimungu (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) [2080] (*‘Bizimungu Trial Chamber Judgement’*); *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [116], [121], [123]–[124], [128]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [290]–[291]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [399]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [928]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [423].

<sup>42</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [118]–[119], [126]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [278]–[289]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [399]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [423]; *Bizimungu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) [2080]–[2082]; *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [983].

<sup>43</sup> See, eg, *Prosecutor v Bagosora (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2156] (*‘Bagosora Trial Chamber Judgement’*); *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [114]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [289]–[290]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [399]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [928]; *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [983].

<sup>44</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [111], [114]–[115]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [531]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [423].

scale, their systematic nature and their atrociousness'.<sup>45</sup> It has substantiated this finding with reference to the expert witness statement of Alison Desforges, who testified:

on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that — as they said on certain occasions — their children, later on, would not know what a Tutsi looked like, unless they referred to history books.<sup>46</sup>

The second category of relevant factual circumstances is largely analogous to the first one. Also in this respect, reference is made to: the implication of (state) organisations in the commission of crimes;<sup>47</sup> the implementation of discriminatory measures;<sup>48</sup> the use of derogatory language;<sup>49</sup> the discriminatory, yet indiscriminate, and cruel character of the crimes;<sup>50</sup> the widespread, planned

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<sup>45</sup> *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [118].

<sup>46</sup> *Ibid.*

<sup>47</sup> See, eg, *Prosecutor v Simba (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [416] ('*Simba Trial Chamber Judgement*'); *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [312]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [858]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [770].

<sup>48</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [307].

<sup>49</sup> See, eg, *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [773].

<sup>50</sup> See, eg, *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [35] ('*Stakić Appeals Chamber Judgement*'); *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [532]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [398]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [929]–[930], [932]–[933]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [424]; *Bagosora Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2125], [2141], [2147], [2151]; *Bizimungu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) [2078], [2080]; *Stakić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [544]–[545]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [856], [859]–[860], [1180], [1318]; *Jelisić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10-T, 14 December 1999) [89]–[94], [106]; *Krstić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-33-T, 2 August 2001) [546]–[547], [594]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [769].

and systematic character of the crimes;<sup>51</sup> and the number of victims.<sup>52</sup> Even so, this category should be clearly distinguished from the previous category, since it does not concern the *overall* context of violence, but specifically relates to the *indicted* crimes. Note, for example, the following reasoning of the ICTR in the *Kayishema Trial Chamber Judgement*:

The number of Tutsis killed in the massacres, for which *Kayishema* is responsible, either individually or as a superior, provides evidence of *Kayishema's* intent. The Trial Chamber finds that enormous number [sic] of Tutsis were killed in each of the four crime sites. ... Not only were Tutsis killed in tremendous numbers, but they were also killed regardless of gender or age. Men and women, old and young, were killed without mercy. Children were

<sup>51</sup> See, eg, *Prosecutor v Krajišnik (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [868] ('*Krajišnik Trial Chamber Judgement*'); *Prosecutor v Blagojević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-60-T, 17 January 2005) [674]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [309]–[311]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [398]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [424]; *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [416]; *Bagosora Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2125], [2142]; *Bizimungu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) [2081]–[2082]; *Jelisić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10-T, 14 December 1999) [88]–[93]; *Jelisić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [71]; *Krstić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-33-T, 2 August 2001) [546]; *Krstić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [35]; *Stakić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [544]–[545]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [837], [856], [858]–[861], [1180]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [770], [773].

<sup>52</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [531]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [929]; *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [416]; *Bagosora Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2147], [2151]; *Bizimungu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) [2078], [2081]; *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [974]–[977]; *Krstić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-33-T, 2 August 2001) [594]; *Krstić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [35]; *Krajišnik Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [868]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [856]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [770].

massacred before their parents' eyes, women raped in front of their families. No Tutsi was spared, neither the weak nor the pregnant.<sup>53</sup>

The third category of relevant factual circumstances relates to the accused's participation in the indicted crimes. It includes the acts of the accused, such as his or her ordering, instigation, encouragement, leading and directing of, or personal participation in, the planning and execution of crimes.<sup>54</sup> This category also takes account of the accused's (organisational) position. Even though genocide is not a leadership crime,<sup>55</sup> the tribunals regularly infer the accused's genocidal intent from his or her position of authority;<sup>56</sup> instrumental contribution to the implementation of the genocidal plan;<sup>57</sup> leadership role in the execution of

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<sup>53</sup> *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [531]–[532] (emphasis added).

<sup>54</sup> See, eg, *Prosecutor v Niyitegeka (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-14-T, 16 May 2003) [411]–[417], [427] (*'Niyitegeka Trial Chamber Judgement'*); *Prosecutor v Nahimana (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-99-52-T, 3 December 2003) [966]–[968] (*'Nahimana Trial Chamber Judgement'*); *Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-2001-64-T, 17 June 2004) [259] (*'Gacumbitsi Trial Chamber Judgement'*); *Prosecutor v Seromba (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-66-A, 12 March 2008) [177]–[180] (*'Seromba Appeals Chamber Judgement'*); *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [535]–[536], [543]–[544]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [398]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [932]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [426]–[427], [429], [431], [435]; *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [418]; *Bagosora Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2126], [2148], [2152]; *Jelisić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10-T, 14 December 1999) [74]–[75]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1179]–[1180], [1318], [1408]–[1410]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1163], [1172].

<sup>55</sup> *Prosecutor v Kayishema (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1-A, 1 June 2001) [170] (*'Kayishema Appeals Chamber Judgement'*).

<sup>56</sup> See, eg, *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [398]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [932]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1313], [1412]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1165], [1172].

<sup>57</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [535]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1179], [1314], [1318], [1409].

the crimes;<sup>58</sup> and association with officials and prominent figures (at the *loci delicti*).<sup>59</sup> Finally, value is attached to the accused's utterances insofar as they concern: abusive or dehumanising characterisations of the victims (for example, 'filth', 'dirt', 'dogs', 'cockroaches');<sup>60</sup> inciting speeches calling upon others to, for example, 'take up their arms' or 'go back to work';<sup>61</sup> or specific calls to

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<sup>58</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [543]; *Niyitegeka Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-14-T, 16 May 2003) [419]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1318]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1163].

<sup>59</sup> See, eg, *Niyitegeka Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-14-T, 16 May 2003) [419]; *Krstić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [84], [102], [111], [113], [117]; *Stakić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [548]–[549]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1165].

<sup>60</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [538], [542]; *Nahimana Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-99-52-T, 3 December 2003) [959], [961]; *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [418]; *Seromba Appeals Chamber Judgement* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-66-A, 12 March 2008) [180]; *Jelisić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [66]–[68]; *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [986]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1167]–[1169], [1172].

<sup>61</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [539], [542]; *Gacumbitsi Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-2001-64-T, 17 June 2004) [259]; *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [986], [988]; *Jelisić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [66]–[68]; *Krajišnik Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [869], [1092]–[1093]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1179]–[1180], [1315].

destroy the victims' group (for example, 'eliminate the enemy', 'do not spare babies' and 'let's exterminate them').<sup>62</sup>

It follows from this outline that the finding of genocidal intent depends on a balanced evaluation of contextual circumstances concerning the collective campaign of violence and individual circumstances relating to the accused's conduct. Both categories of circumstances include objective (*actus reus*) elements that focus on the actions of the alleged perpetrators (for example, the general commission of widespread crimes and the accused's planning of crimes) and subjective (*mens rea*) elements emphasising their criminal intentions (for example, the general use of derogatory language and the accused's calls for destruction). In combination, these facts give expression to a comprehensive and varied practice in which the ad hoc tribunals assess whether: (i) the indicted crimes formed part of a *collective act*; (ii) that was *aimed* at the (partial) destruction of a protected group;<sup>63</sup> (iii) in which the accused *participated*; (iv) with genocidal *intent*. Based on this assessment, the tribunals can exclude isolated acts of violence committed by a lone *génocidaire* from the notion of genocide and at the same time ensure that the accused's criminal responsibility for genocide does not lapse into guilt by association, but is based on his or her own conduct.

### C Interpreting Practice

Taking a closer look at the tribunals' assessment of genocidal intent, it appears that the relations between the various relevant circumstances, and the way in which each of these circumstances is applied, differ per case. Whereas in some cases objective contextual circumstances are emphasised, in other cases the

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<sup>62</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [361]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [539]; *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [418]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [932]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [429]; *Niyitegeka Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-14-T, 16 May 2003) [419]; *Nahimana Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-99-52-T, 3 December 2003) [967]–[968]; *Bagosora Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2156]; *Jelisić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [66]–[67]; *Krajišnik Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [869], [1092]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1170].

<sup>63</sup> In response to questions concerning the applicability of Joint Crime Enterprise III to the crime of genocide, the ICTY clarified that the common plan (the violent campaign) need not be inherently genocidal, but that genocide should at least have been a reasonably foreseeable consequence: see *Prosecutor v Brđanin (Decision on Interlocutory Appeal)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 19 March 2004) [5]–[10]. However, in practice the tribunals only established genocide when the principal perpetrators aimed to destroy a protected group. Now that this article focuses on the application of genocide in legal practice, it will depart from the assumption that the campaign of collective violence is aimed at the (partial) destruction of a protected group.

focus is placed on circumstances relating to the subjective intentions of the individual accused. The resultant variations in the case law are most apparent insofar as they concern: (i) the distinction between genocide and other forms of mass violence; (ii) the link between the indicted crimes and the overall genocidal campaign; and (iii) the link between the accused's actions and the collective context of violence. These issues therefore require further attention.

### 1 *Distinguishing Genocide from Other Forms of Mass Violence*

Genocide concerns the intended *physical or biological* — as opposed to the social and cultural — destruction of (a part of) a protected group.<sup>64</sup> This unique feature distinguishes genocide from other forms of mass violence, most significantly, ethnic cleansing.<sup>65</sup> The tribunals have accordingly sought to ascertain that the campaign in which the accused participated was specifically aimed at the physical or biological destruction of a group of persons. They have thereby been confronted with distinct legal tasks, leading to different types and levels of contextual embedding. On the one hand, the destructive purpose underlying the Rwandan atrocities is generally recognised.<sup>66</sup> There is clear evidence showing that the crimes committed were targeted at the physical extermination of an entire group, rather than at the elimination of specific individuals.<sup>67</sup> The ICTR has therefore had few problems with establishing that

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<sup>64</sup> Cryer et al, *An Introduction to International Criminal Law and Procedure*, above n 10, 220.

<sup>65</sup> Ethnic cleansing is making a territory ethnically homogenous by means of forced displacement. It falls under the definition of deportation and forced transfer as crimes against humanity.

<sup>66</sup> van den Herik, 'Schism', above n 1, 77. The International Criminal Tribunal for Rwanda even qualified the Rwandan genocide as a fact of common knowledge: see *Prosecutor v Karemera (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-AR73(C), 16 June 2006) [33]–[38]. This was not the first time a court has taken judicial notice of genocide. In 1981, the Hon Johnson of the Superior Court of the State of California for the County of Los Angeles declared that '[t]his court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944 ... It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact', quoted in *Mel Mermelstein v Institute for Historical Review* (Superior Court of the State of California for the County of Los Angeles, Case No C 356 542, 5 August 1985) (Judge Wenke). I thank Professor Caroline Fournet for bringing this case to my attention.

<sup>67</sup> Additionally, acts of mercy do not necessarily negate genocidal intent: see, eg, *Rutaganda v Prosecutor (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-3-A, 26 May 2003) [537] ('*Rutaganda Appeals Chamber Judgement*'); *Prosecutor v Nahimana (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-52-A, 28 November 2007) [571]–[572] ('*Nahimana Appeals Chamber Judgement*'); *Kayishema Appeals Chamber Judgement* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1-A, 1 June 2001) [148]–[149]; *Jelisić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [71].

the perpetrators acted pursuant to a destructive policy based on the widespread, organised and discriminatory nature of the crimes.<sup>68</sup>

On the other hand, qualifying the crimes committed during the Balkan war as genocide is less obvious from a legal point of view.<sup>69</sup> As some scholars have argued, it seems that ‘the objective of the conflict in the former Yugoslavia was not to exterminate an ethnic group, but to rather expel it in order to create ethnically pure territories’.<sup>70</sup> In this light, the ICTY has preferred to characterise the *nationwide* campaigns pursued by the Balkan states as ethnic cleansing.<sup>71</sup> Genocide charges have only been successful insofar as they were limited to specific *regions or municipalities*. The ICTY’s appraisal of the evidence adduced to prove these charges includes critical elements that are less evident in the ICTR case law. For example, the ICTY has found that the ‘mere’ widespread, organised and discriminatory commission of crimes is insufficient to qualify a violent campaign as genocidal.<sup>72</sup> Moreover, it has refused to unequivocally accept evidence of derogatory statements as proof of genocidal intent, instead

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<sup>68</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [111], [114]–[115], [118]–[119], [126]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [278]–[290], [531], [309]–[311], [531]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [398]–[399]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [423]–[424]; *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [983]; *Bagosora Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2125], [2142], [2151], [2156]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [928]–[929]; *Bizimungu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) [2078], [2080], [2082].

<sup>69</sup> Cécile Tournaye, ‘Genocidal Intent before the ICTY’ (2003) 52 *International and Comparative Law Quarterly* 447, 447. See also Elies van Sliedregt, ‘Commentary to the Judgement of the ICTY Trial Chamber in the Krstić Case’ in Andre Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals* (Intersentia, 2005) vol 7, 767; William A Schabas, ‘Was Genocide Committed in Bosnia and Herzegovina? The First Judgments of the International Criminal Tribunal for the Former Yugoslavia’ (2001) 25 *Fordham International Law Journal* 23, 24–30; van den Herik, ‘Schism’, above n 1, 81.

<sup>70</sup> Tournaye, above n 69, 447. See also van den Herik, ‘Schism’, above n 1, 81; van Sliedregt, ‘Commentary’, above n 69, 767; Schabas, ‘Was Genocide Committed in Bosnia and Herzegovina?’, above n 69, 24–30.

<sup>71</sup> See Tournaye, above n 69, 447–8.

<sup>72</sup> According to the Trial Chamber in *Brđanin*, ‘[w]hile the general and widespread nature of the atrocities committed is evidence of a campaign of persecutions ... in the circumstances of this case, it is not possible to conclude from it that the specific intent required for the crime of genocide is satisfied’: *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [984]. See also *Krajišnik Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [868], [1093]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1312].

asserting that such statements must be understood in their proper context.<sup>73</sup> When this context is not genocidal — but, for example, persecutorial — in nature, ethnic insults cannot automatically be perceived as implicit calls for destruction. Consider, for example, the following finding of the Trial Chamber in *Prosecutor v Brđanin*:

In his utterances, the Accused openly derided and denigrated Bosnian Muslims and Bosnian Croats. He also stated publicly that only a small percentage of them could remain in the territory of the [Autonomous Region of Krajina]. Some of the Accused's utterances are openly nasty, hateful, intolerable, repulsive and disgraceful. On one occasion, speaking in public of mixed marriages, he remarked that children of such marriages could be thrown in the Vrbas River, and those who would swim out would be Serbian children. On another occasion, he publicly suggested a campaign of retaliatory ethnicity-based murder, declaring that two Muslims would be killed in Banja Luka for every Serbian killed in Sarajevo. Whilst these utterances strongly suggest the Accused's discriminatory intent, however, they do not allow for the conclusion that the Accused harboured the intent to destroy the Bosnian Muslims and Bosnian Croats of the [Autonomous Region of Krajina].<sup>74</sup>

In contrast to these critical considerations, the ICTY adopts a lenient approach insofar as it concerns the use of non-destructive acts — such as forcible transfer, illegitimate detention or rape — for proving genocidal intent. The ICTY takes as a starting point that non-destructive acts cannot independently constitute genocide, but only form circumstantial evidence that needs to be analysed in connection to the commission of (other) genocidal acts.<sup>75</sup> This starting point has, however, been implemented with a certain flexibility. In particular, the

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<sup>73</sup> The Appeals Chamber in *Prosecutor v Stakić* held that '[e]vidence demonstrating ethnic bias, however reprehensible, does not necessarily prove genocidal intent ... [Although such] utterances might constitute evidence of genocidal intent even if they fall short of express calls for a group's physical destruction': *Stakić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [52]. See also *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [985]–[988]; *Krstić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [130]; *Krajišnik Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [1092]; *Stakić Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [554]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1177], [1312], [1399], [2086].

<sup>74</sup> *Brđanin Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [986]–[987] (citations omitted).

<sup>75</sup> See, eg, *Prosecutor v Blagojević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007) [123]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [748]; *Krstić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [33]–[35]. An important exception to this practice is the *Milošević Rule 98 bis decision*. The Trial Chamber did not distinguish between acts of genocide leading to the destruction of a protected group and other acts such as forcible transfer. The Chamber consequently found that genocide could have been committed outside the scope of Srebrenica: *Milošević Rule 98 bis decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-54-T, 16 June 2004) [246].

qualification of the Srebrenica massacre as genocide is largely based on the commission of non-destructive acts. The Trial Chamber in *Prosecutor v Tolimir* has, for example, inferred the existence of a genocidal campaign in the Srebrenica region from the killing of almost 6000 Bosnian Muslims in combination with

the persistent capture of the Bosnian Muslim men from the column; the almost simultaneous implementation of the operations to kill the men from Srebrenica and the forcible transfer of the Bosnian Muslim women, children and elderly out of Potočari ...; the forcible transfer of the Bosnian Muslim population from Žepa and the murder of three of its most prominent leaders ...; and the deliberate destruction of the mosques of Srebrenica and Žepa and the homes of Bosnian Muslims ... , following the fall of the respective enclaves.<sup>76</sup>

The ICTY's findings on this issue have been criticised by scholars, who claim that the Tribunal thus waters down the distinction between genocide and other forms of mass violence and devalues the unique character of 'the crime of crimes'.<sup>77</sup> The Trial Chamber in *Prosecutor v Karadžić* ('*Karadžić*') has sought to address this criticism in its Rule 98 *bis* decision. The Trial Chamber has initially dismissed the genocide charges relating to the crimes committed in detention facilities in Bosnia and Herzegovina because 'there is no evidence that these actions reached a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy'.<sup>78</sup> After all, the crimes did not contribute to, or bring about, the physical destruction of the group to which the victims belonged.<sup>79</sup> By reasoning in this way, the Chamber (implicitly) ascertains that genocidal intent cannot be based on evidence of crimes that cannot objectively lead to a group's physical or biological destruction. The Appeals Chamber in *Karadžić* promptly reversed this finding.<sup>80</sup> According to the Appeals Chamber, the evidence of Karadžić's statements 'assessed in conjunction with evidence regarding the scale and nature of the alleged genocidal and other culpable acts is sufficiently compelling' for holding that he acted with genocidal intent.<sup>81</sup> Whereas the Appeals Chamber does thus not explicitly reject the *legal* standard defined by the Trial Chamber, its findings on the *evidentiary* value of non-destructive acts seem to express the revival of a more generous approach towards the use of such acts for establishing genocidal intent.

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<sup>76</sup> *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [773].

<sup>77</sup> Schabas, 'Darfur and the "Odious Scourge"', above n 6, 881; Schabas, 'Was Genocide Committed in Bosnia and Herzegovina?', above n 69, 30. See also at 45–7. See also van den Herik, 'Schism', above n 1, 82; van den Herik, *The Contribution of the Rwanda Tribunal*, above n 11, 120–1; van Sliedregt, 'Commentary', above n 69, 767–72.

<sup>78</sup> Transcript of Proceedings, *Prosecutor v Karadžić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-T, Judge Kwon, 28 June 2012) 28769 ('*Karadžić Trial Chamber Rule 98 bis Judgement*') (emphasis added).

<sup>79</sup> *Ibid* 28766–8.

<sup>80</sup> *Prosecutor v Karadžić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-5/18-AR98bis.1, 11 July 2013) ('*Karadžić Appeals Chamber Rule 98 bis Judgement*').

<sup>81</sup> *Ibid* [100] (citations omitted).

## 2 *Placing the Indicted Crimes in Context*

Once the existence of a collective campaign has been established, the tribunals proceed to determine whether and how the indicted crimes are linked to this campaign. To this end, they connect the circumstances concerning the collective act to the circumstances relating to the indicted crimes. The establishment of such a connection has been particularly important in the first judgments of the ICTR. In these judgments, the ICTR has inferred the accused's genocidal intent from contextual circumstances concerning the *national* genocidal campaign, even when the charges were restricted to crimes committed in one municipality or during one attack.<sup>82</sup> The ICTR has construed the linkages between the indicted crimes and the national campaign in terms of, inter alia: their temporal and/or geographical equivalence; the similar methods and objects of attack; and the participation of similar perpetrators in the attacks.<sup>83</sup> The validity of these factual similarities is debatable. In particular, it is doubtful whether the fact that the indicted crimes were committed at the same time and place as the genocidal campaign justifies the conclusion that they were part of this campaign.

Having established early on that genocide occurred in Rwanda, the ICTR's later judgments have increasingly focused on the crimes that were allegedly committed in the specific localities or regions included in the charges.<sup>84</sup> The ICTR has thus moved away from genocide's embedding in a nationwide campaign towards a more localised embedding. As a result, its practice has come to resemble the ICTY's approach on this point, which — in the absence of a national genocidal campaign — has consistently focused on the commission of genocide in specific regions and municipalities. Under this approach, the

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<sup>82</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [730]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [928]–[931]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [528]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [399].

<sup>83</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [730]; *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [312]; *Karemura Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1655]–[1656]; *Rutaganda Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [399]; *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [424]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [928]–[931].

<sup>84</sup> See, eg, *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [427]; *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [416]. For a scholarly evaluation: see van de Herik, *The Contribution of the Rwanda Tribunal*, above n 11, 105.

genocidal campaign and the indicted crimes effectively merge together. As a consequence, it becomes less important to construct a link between them.<sup>85</sup>

### 3 *Linking the Accused to the Collective Act*

To make sure that criminal responsibility for genocide does not lapse into collective culpability, the ad hoc tribunals have to complement their evaluations of the collective genocidal campaign with an assessment of whether the accused participated in this campaign with the intent to destroy. To this end, the tribunals analyse the circumstances relating to the accused's acts and utterances. In particular the ICTR has ascribed an increasingly central position to these circumstances.<sup>86</sup> In this way, the ICTR meets the scholarly criticism that its first judgments were so focused on the general genocidal context that they did not ascertain the accused's genocidal intent sufficiently.<sup>87</sup> At the same time, the ad hoc tribunals recognise that establishing genocidal intent based on individual circumstances has its own limitations and challenges. Most importantly, because an individual is generally unable to effectuate the intent to destroy by himself or herself, his or her acts do not (have to) result in the destruction of a protected group.<sup>88</sup> Individually, these acts can thus not articulate the destructive nature of genocide.<sup>89</sup> The tribunals therefore assess the accused's acts and utterances in light of the collective act.<sup>90</sup> In this respect, they rely upon three main 'linking factors'.

The first factor establishes an objective relation between the accused and the genocidal context. It looks into the accused's *actus reus* and the effect of his or

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<sup>85</sup> In fact, the finding of such a link is largely limited to all-encompassing genocide prosecutions of senior leaders: see *Milošević Rule 98 bis decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-54-T, 16 June 2004) [232]–[245]; *Karadžić Trial Chamber Rule 98 bis Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-T, 28 June 2012) 28752.

<sup>86</sup> See, eg, *Bagilishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) [63]; *Niyitegeka Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-14-T, 16 May 2003) [411]–[419]; *Nahimana Appeals Chamber Judgement* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-52-A, 28 November 2007) [527]–[539]; *Gacumbitsi Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-2001-64-T, 17 June 2004) [259].

<sup>87</sup> Critique came from, for example: John Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate, 2006) 118; Heller, above n 5, 159; Greenawalt, above n 6, 2282.

<sup>88</sup> See, eg, Triffterer, above n 5, 402; Akhavan, 'The Crime of Genocide', above n 5, 996; Mettraux, above n 5, 211; Heller, above n 5, 159; van den Herik, *The Contribution of the Rwanda Tribunal*, above n 11, 108.

<sup>89</sup> See Paul Behrens, 'A Moment of Kindness? Consistency and Genocidal Intent' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate, 2007) 125, 136.

<sup>90</sup> *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [427]. However, there is some authority from the Tribunals that disputes that this is necessary: see, eg, *Rutaganda Appeals Chamber Judgement* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-3-A, 26 May 2003) [530].

her conduct on the destructive campaign.<sup>91</sup> The Trial Chamber in *Prosecutor v Nahimana* has accordingly considered that

Ferdinand Nahimana, in a Radio Rwanda broadcast on 25 April 1994, said he was happy that [Radio Télévision Libre des Mille Collines ('RTLM')] had been instrumental in awakening the majority people, meaning the Hutu population, and that the population had stood up with a view to halting the enemy. At this point in time, mass killing — in which RTLM broadcasts were playing a significant part — had been ongoing for almost three weeks. ... As the mastermind of RTLM, Nahimana set in motion the communications weaponry that fought the 'war of media, words, newspapers and radio stations' he described in his Radio Rwanda broadcast of 25 April as a complement to bullets. Nahimana also expressed his intent through RTLM, where the words broadcast were intended to kill on the basis of ethnicity, and that is what they did.<sup>92</sup>

The second factor focuses on the accused's mens rea. In this respect, the tribunals take account of the accused's knowledge of the collective act, in particular his or her awareness of the destructive nature and consequences of the crimes committed.<sup>93</sup> For example, the Trial Chamber in *Prosecutor v Popović* has held indicative of Beara's genocidal intent,

the inferences which can be drawn from his detailed knowledge of the killing operation itself ... As the most senior officer of the Security Branch — the entity

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<sup>91</sup> See, eg, *Akayesu Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [729]; *Gacumbitsi Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-2001-64-T, 17 June 2004) [259]; *Nahimana Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-99-52-T, 3 December 2003) [957]–[969], [1022]–[1028]; *Krajišnik Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [1092]; *Karadžić Trial Chamber Rule 98 bis decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-T, 28 June 2012) 28769.

<sup>92</sup> *Nahimana Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-99-52-T, 3 December 2003) [966].

<sup>93</sup> Reference has been made to the accused's knowledge of the genocidal intent of the physical perpetrators: see *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [428]; *Bagosora Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2144]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [2088]. Subsequently, reference has been made to the accused's knowledge that the principal perpetrators were committing genocide: see *Semanza Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [427]; *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [418]. Further reference is made to the accused's knowledge of the destructive consequences of the actions given the accused's position: see *Simba Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-76-T, 13 December 2005) [418]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1166], [1172]. Lastly, reference is made to the accused's knowledge of the genocidal nature or consequences of the operation: see *Krstić Appeals Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [35]; *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1178]–[1180], [1313], [1401]–[1408], [1588]; *Tolimir Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [1166].

charged with a central directing role — he had perhaps the clearest overall picture of the massive scale and scope of the killing operation. Further, from his walk through Bratunac on the night of 13 July, his personal visits to the various execution sights and the extensive logistical challenges he faced throughout, he had a very personal view of the staggering number of victims destined for execution.<sup>94</sup>

Third, the tribunals assess the accused's (organisational) position.<sup>95</sup> The Trial Chamber in *Prosecutor v Niyitegeka* has, for example, attached value to the fact that the accused 'was one of the *leaders* of two large-scale attacks by more than 6,000 armed attackers, comprising soldiers, policemen and Interahamwe, against Tutsi refugees at Muyira Hill'.<sup>96</sup>

It follows from this outline that each factor — *actus reus*, *mens rea* and position of the accused — has a distinctive character and emphasises a different aspect of the relation between the accused and the genocidal context. As such, the link between the accused and the collective action differs depending on each factor. The validity or relevance of the individual factors can, however, be questioned.<sup>97</sup> In particular, linking the accused to the genocidal context on the mere basis of his or her position raises serious concerns in relation to the principle of individual criminal responsibility. This problem can be partly addressed by applying the linking factors in combination with each other.

#### D Interim Conclusion

The previous case law analysis shows that the *ad hoc* tribunals' interpretation of the genocidal intent element takes account of the accused's individual goals and the existence of a collective context. The tribunals' application of this element in practice confirms that genocidal intent is subject to *individual* circumstances relating to the accused's subjective goals and objective conduct and *contextual* circumstances concerning the purpose and scope of the collective campaign of violence. The evaluation of these circumstances varies depending on the facts and challenges of the case under consideration. As a result, the contextual embedding of genocide differs per case and cannot be captured in a uniform standard. It therefore seems inappropriate to characterise the tribunals' practice in terms of either the goal-oriented or the structure-based model.

<sup>94</sup> *Popović Trial Chamber Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [1313] (citations omitted).

<sup>95</sup> See, eg, *Kayishema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [528]–[529], [543]–[544]; *Musema Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [932]; *Niyitegeka Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-14-T, 16 May 2003) [412]–[419].

<sup>96</sup> *Niyitegeka Trial Chamber Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-14-T, 16 May 2003) [412] (emphasis added).

<sup>97</sup> See John R W D Jones, "Whose Intent is It Anyway?" *Genocide and the Intent to Destroy a Group* in Lal Chand Vohrah et al (eds), *Man's Inhumanity to Man* (Kluwer, 2003) 467, 475; Michael Freeman, 'The Theory and Prevention of Genocide' (1991) 6 *Holocaust and Genocide Studies* 185, 191–2; van den Herik, *The Contribution of the Rwanda Tribunal*, above n 11, 122 citing Rafaëlle Maison, 'Le Crime de Génocide dans les Premiers Jugements du Tribunal Pénal International pour le Rwanda [The Crime of Genocide in the First Judgments of the International Criminal Tribunal for Rwanda]' (1999) 103 *Revue Générale de Droit International Public* 129, 143–5; Jørgenson, above n 23, 299.

## IV THE ICC AND THE CONTEXTUAL EMBEDDING OF GENOCIDE

## A General Interpretation

The ICC characterises genocide in terms of the accused's intent to destroy. It finds that genocidal intent forms an 'additional subjective element, normally referred to as "*dolus specialis*" or specific intent'.<sup>98</sup> The PTC in *Al Bashir* has emphasised that genocidal intent is discriminatory in nature. This implies that a *génocidaire* selects his victims on account of their national, ethnic, racial or religious characteristics.<sup>99</sup> Moreover, genocidal intent is aimed at the physical or biological *destruction* of a protected group.<sup>100</sup> In this sense, it fundamentally differs from the intent of persecution as a crime against humanity. Although the persecutory intent is discriminatory, it does not entail a destructive purpose.<sup>101</sup> According to the ICC, genocidal intent can be inferred from all relevant facts of a case taken together. The Court has not yet explained which facts it considers relevant in this respect, but has merely emphasised the holistic nature of its inference exercise. This means that genocidal intent may be established even if each fact on its own does not allow such an inference to be made.<sup>102</sup>

In addition to the elements of genocide laid down in the *Genocide Convention*, the ICC's *Elements of Crimes* — drawn up to assist the Court in the interpretation and application of the statutory definitions of international crimes<sup>103</sup> — provide for a so-called 'contextual element'. This element stipulates that the actions of the accused must fall within 'the context of a manifest pattern of similar conduct directed against [a protected] group or was conduct that could itself effect such destruction'.<sup>104</sup> The *Elements of Crimes* do not establish a corresponding mental requirement. They do not, for example, explicitly require that the accused knew that he acted within a pattern of criminal conduct. The Preparatory Commission drafting the contextual element, however, agreed that such knowledge is generally subsumed in the accused's genocidal intent.<sup>105</sup> If not, then the Court has to determine the applicable mental requirement on a case-by-case basis.

<sup>98</sup> *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [139] ('*Al Bashir First Warrant of Arrest Decision*').

<sup>99</sup> *Ibid* [114].

<sup>100</sup> *Ibid* [139].

<sup>101</sup> *Ibid* [140]–[145]. In her separate and partly dissenting opinion, Judge Ušacka appears to take a different approach. She attaches more relevance to the crime of forced displacement for the finding of genocidal intent: *Al Bashir First Warrant of Arrest Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [57]–[61] (Separate and Partly Dissenting Opinion of Judge Anita Ušacka).

<sup>102</sup> *Al Bashir First Warrant of Arrest Decision*, (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [153].

<sup>103</sup> *Rome Statute* art 9.

<sup>104</sup> *Elements of Crimes* art 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7). Articles 6(a) and (b) of the *Elements of Crimes* clarify that the term 'in the context of' signifies that the campaign includes the initial acts in an emerging pattern, while the term 'manifest' should be understood as an objective manifestation.

<sup>105</sup> Valerie Oosterveld, 'The Context of Genocide' in Roy S Lee et al (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 44, 48–9.

The Preparatory Commission has also explained that the ‘pattern of similar conduct’ does not have to be committed with genocidal intent or pursuant to a genocidal plan.<sup>106</sup> The contextual element is already satisfied when an individual — acting with the intent to destroy a protected group — commits, for example, a murder in the course of a collective campaign involving the widespread commission of murders. The fact that the other murders do not constitute genocide, but rather qualify as crimes against humanity, is irrelevant in this respect.<sup>107</sup> The Commission has thus merely sought to ensure that genocide encompasses a collective campaign of violence, without qualifying this campaign in terms of its underlying purpose. This limited aim seems to be at odds with the PTC’s interpretation of the contextual element in *Al Bashir*. The PTC in this case considered that the contextual element ensures that ‘the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical’.<sup>108</sup> According to Claus Kress, this finding essentially implies that the accused should have acted in the context of a *genocidal* campaign of collective violence.<sup>109</sup> If Kress’ argument is correct, it signifies that the Court’s interpretation of the contextual element goes beyond the intentions of the drafters.

## B Genocide Applied

### 1 Genocidal Intent

So far, the ICC has only applied the crime of genocide in relation to the conflict in Darfur. The question of whether genocide has been committed in Darfur is controversial. The UN International Commission of Inquiry on Darfur and several legal scholars have argued that the Darfur crimes constitute crimes against humanity instead of genocide.<sup>110</sup> Non-governmental organisations (‘NGOs’) and human rights activists, however, continue to characterise them as genocidal.<sup>111</sup> Also, the ICC Prosecutor has insisted upon the issuance of an arrest

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<sup>106</sup> Ibid 48–9.

<sup>107</sup> Ibid 47–8.

<sup>108</sup> *Al Bashir First Warrant of Arrest Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [124].

<sup>109</sup> Kress, ‘The Crime of Genocide and Contextual Elements’, above n 16, 300. This interpretation has been criticised by Cryer: Cryer, ‘The Definitions of International Crimes’, above n 9, 290–1.

<sup>110</sup> See *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, UN Doc S/2005/60 (1 February 2005) 3–4 (‘*UN Commission of Inquiry Report*’). For a scholarly view on this issue, see also George P Fletcher and Jens David Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *Journal of International Criminal Justice* 539, 545–6; Andrew T Cayley, ‘The Prosecutor’s Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide’ (2008) 6 *Journal of International Criminal Justice* 829; Schabas, ‘Darfur and the “Odious Scourge”’, above n 6, 871–4; Kress, ‘The Darfur Report’, above n 6, 563–5; Cryer, ‘The Definitions of International Crimes’, above n 9, 289–95.

<sup>111</sup> See, eg, United Human Rights Council, *Genocide in Darfur* (2014) <<http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm>>; *Darfur: The Crisis Continues* (2014) Save Darfur <<http://www.savedarfur.org/>>. See also Don Cheadle and John Prendergast, *Not on Our Watch: The Mission to End Genocide in Darfur and Beyond* (Hyperion, 2007); M W Daly, *Darfur’s Sorrow: A History of Destruction and Genocide* (Cambridge University Press, 2007) 294–5.

warrant against Omar Al Bashir — the President of Sudan — on charges of genocide.<sup>112</sup>

In evaluating the Prosecutor's application for such an arrest warrant, the PTC has linked its assessment of Al Bashir's genocidal intent to the campaign pursued by the Sudanese government. This link is subject to the accused's control over Sudan's state apparatus (including the Sudanese armed forces and the Janjaweed militia) and to his use of this apparatus for carrying out the alleged genocidal campaign.<sup>113</sup> If it is established that Al Bashir exercised full control over the state apparatus, his individual genocidal intent implies the existence of a genocidal campaign.<sup>114</sup> By contrast, if he shared control with other political and military leaders, the finding of a genocidal campaign

would be dependant upon the showing of reasonable grounds to believe that those who shared the control of the 'apparatus' of the State of Sudan with Omar Al Bashir agreed that the ... counter-insurgency campaign [of the government of Sudan] would, inter alia, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.<sup>115</sup>

Considering the importance of the accused's control over (the persons responsible for) the governmental campaign for establishing his genocidal intent, it is unfortunate that the PTC has neither defined the notion of control, nor determined to what extent and in which way Al Bashir exercised such control.<sup>116</sup> This makes it difficult to fully appreciate the ICC's understanding of the genocidal intent element. For now, the findings of the Court only seem to justify the general observation that the existence of a collective act can be relevant for establishing the accused's genocidal intent.<sup>117</sup>

This finding is confirmed by the fact that the PTC's evaluation of the genocidal intent element in *Al Bashir* focuses on whether the commission of genocide formed a core component of the campaign pursued by the Sudanese government.<sup>118</sup> In particular, the PTC has assessed the accused's genocidal intent in light of evidence concerning the discriminating policy of the government;<sup>119</sup>

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<sup>112</sup> See, eg, *Prosecutor v Al Bashir (Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir')* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 10 March 2009); *Prosecutor v Al Bashir (Prosecution Response to Observations of Amicus Curiae in respect of the Prosecution's Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir')* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09 OA, 2 October 2009).

<sup>113</sup> *Al Bashir First Warrant of Arrest Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [148].

<sup>114</sup> *Ibid* [149].

<sup>115</sup> *Ibid* [150].

<sup>116</sup> For example, the Pre-Trial Chamber ('PTC') did not determine whether the accused had total control over the government or whether he shared such control with other political and military leaders. This may be explained by the early stage of the proceedings and by the rudimentary character of the evidence to be considered: see *ibid* [223].

<sup>117</sup> *Ibid* [172], [205].

<sup>118</sup> *Ibid* [149]–[152]. In contrast to the UN Commission of Inquiry on Darfur, the ICC thus finds that the fact that there was no governmental policy to commit genocide does not negate the possibility that particular individuals were acting with genocidal intent: see *UN Commission of Inquiry Report*, UN Doc S/2005/60, [520].

<sup>119</sup> *Al Bashir First Warrant of Arrest Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [167].

the official statements issued by the accused and other members at the highest level of the government;<sup>120</sup> and the clear pattern of mass atrocities.<sup>121</sup> On this basis, the PTC has found that Al Bashir's statements 'do not provide, by themselves, any *indicia* of ... genocidal intent'.<sup>122</sup> It, however, recognised that a different conclusion may be warranted in light of other evidence concerning the commission of collective violence.<sup>123</sup>

In assessing the available evidence of collective violence, the PTC has taken particular effort to distinguish the existence of a genocidal campaign directed at the destruction of a group from other forms of mass violence. In this respect, it has clarified that the mere commission of war crimes and crimes against humanity — such as rape and forcible transfer — does not necessarily mean that the accused acted with genocidal intent.<sup>124</sup> Such a conclusion requires additional evidence concerning, for example, the indiscriminate commission of a high number of discriminatory crimes<sup>125</sup> and the introduction of measures that prevented the members of a protected group from fleeing to other areas.<sup>126</sup> Furthermore, genocidal intent can be inferred from the commission of patterned and systematic attacks.<sup>127</sup> However, when during such attacks the large majority of the population was neither killed nor injured, this forms a counter-indication for establishing genocide.<sup>128</sup>

In the absence of sufficient evidence of a specifically genocidal campaign, the PTC has initially decided that it could not establish Al Bashir's genocidal intent and thus rejected to issue an arrest warrant on genocide charges against him.<sup>129</sup> After the prosecutor had successfully appealed this decision,<sup>130</sup> the PTC has in the second instance concluded that the existence of a policy to commit genocide is at least one of the possible explanations for the crimes committed.<sup>131</sup> It is not completely clear to what extent this conclusion invalidates the PTC's initial fact-driven interpretation of the genocidal intent element. After all, the findings

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<sup>120</sup> Ibid [170]–[176].

<sup>121</sup> Ibid [177]–[178].

<sup>122</sup> Ibid [172] (emphasis in original).

<sup>123</sup> Ibid [172], [201].

<sup>124</sup> Ibid [182]–[183], [193]–[194]. Interestingly, Judge Ušacka in her separate and partly dissenting opinion did not limit the genocidal intent to the physical or biological destruction of a protected group. Instead, she adopted a view that has previously been expressed by Judge Shahabuddeen, namely that

while the terms of the *Genocide Convention* and the *ICTY Statute* specify that the 'listed act' — or *actus reus* — of the crime of genocide must consist of an act of physical or biological destruction, it is sufficient to demonstrate that the intent with which that act was perpetrated encompassed the destruction of the group, regardless of whether such intended destruction was to be physical, biological, social or cultural: at [60] (Judge Ušacka).

<sup>125</sup> Ibid [196].

<sup>126</sup> Ibid [198].

<sup>127</sup> Ibid [189].

<sup>128</sup> Ibid [196].

<sup>129</sup> Ibid [205]–[206].

<sup>130</sup> *Prosecutor v Al Bashir (Judgement on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir')* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09-OA, 3 February 2010) [33], [39].

<sup>131</sup> *Prosecutor v Al Bashir (Second Decision on the Prosecution's Application for a Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 July 2010) [4] ('*Al Bashir Second Warrant of Arrest Decision*').

of the PTC in second instance resulted from the application of a different standard of proof, not from a different evaluation of the evidence.<sup>132</sup> It can therefore be argued that the ICC is allowed to uphold its original assessment of facts when and if the case enters the trial phase. In this view, the following analysis continues to adhere to the evidentiary findings of the first PTC decision.

## 2 Contextual Element

The assessment of the contextual element by the PTC in *Al Bashir* is rather brief. The PTC has ascertained that crimes were committed on a large scale, both in geographical and in numerical terms. Moreover, the commission of crimes was systematic and followed a regular pattern.<sup>133</sup> According to the PTC, these facts justify the finding that there are at least ‘reasonable grounds to believe that the acts took place in the context of a manifest pattern of similar conduct directed against the targeted group’.<sup>134</sup>

The PTC’s findings give expression to a broad legal standard that does not constrain the criminal pattern in terms of its destructive purpose or results. This conforms to the drafters’ intention to only exclude isolated acts of violence from the scope of genocide, without requiring that the crimes are committed with genocidal intent or pursuant to a genocidal plan.<sup>135</sup> At the same time, it seems that the Court’s practice can create a complex internal contradiction. Assuming that the ‘real and concrete threat’ criterion (as adopted by the PTC in *Al Bashir*) implies that the crimes must have a destructive effect (as has been argued in the scholarly debate), there is an inconsistency between the Court’s abstract interpretation and its practical application of the contextual element.

Another concern regarding the ICC’s application of the contextual element relates to its failure to connect the pattern of criminal conduct to the crimes with which the accused is charged.<sup>136</sup> In this way, the Court can establish the context element without ascertaining a material link between the accused’s conduct and the collective act. This seemingly goes against the text of the *Elements of Crimes*, which stipulates that the accused should have acted *in the context of* a pattern of similar conduct.

More generally, the ICC’s application of the contextual element also raises questions concerning its added value. In particular, it seems that the Court’s findings on the large scale and organised nature of violence add little to its evaluation of the accused’s genocidal intent.<sup>137</sup> After all, this evaluation already takes account of the pattern of crimes committed. In fact, the Court in this respect even takes pains to determine whether the accused acted *in the context of* a specifically *genocidal* campaign.

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<sup>132</sup> Ibid [2].

<sup>133</sup> Ibid [15]–[16].

<sup>134</sup> Ibid [16].

<sup>135</sup> Cryer et al, *An Introduction to International Criminal Law and Procedure*, above n 10, 218; Oosterveld, above n 105, 47–8.

<sup>136</sup> *Al Bashir Second Warrant of Arrest Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 July 2010) [15]–[16].

<sup>137</sup> The PTC refers to, inter alia, the systematic character of the hindrance of medical and humanitarian assistance in the refugee camps in Darfur; the systematic acts of pillage; and the large number of unlawful attacks, acts of murder, forcible transfer and torture: ibid [189], [192].

### C *Interim Conclusion*

The previous analysis of ICC case law shows that the genocidal intent and contextual element ensure that the accused's acts and intentions are embedded in a collective act. Although we cannot yet determine the specifics of the Court's practice, it can be expected that the contextual embedding of genocide will vary depending on the factual circumstances of the case under consideration. The accused's position of authority and control will likely play a particularly important role in this respect. After all, in cases against high-level accused with complete control over the forces engaging in violent actions, the accused's individual intent will coincide with the establishment of a genocidal campaign. This allows for ascertaining the contextual embedding of genocide through the genocidal intent element. The ICC can thereby focus on the acts and utterances of the accused and the policies that he pursued. By contrast, in cases against low-ranking accused, the Court will probably look beyond such individual circumstances. In these cases, the contextual element can play a more prominent function by requiring that the Court takes account of circumstantial evidence and links the accused's actions to a campaign of collective violence. It seems difficult to capture this varied scheme exclusively in terms of either the goal-oriented or the structure-based model.

## V GENOCIDE: A CASUISTIC CONCEPT

### A *Sliding Scale of Contextual Embedding*

The previous case law analyses show that the ad hoc tribunals and the ICC establish genocide on the basis of various individual, contextual, subjective and objective circumstances. The courts' assessment of these circumstances depends on the facts of the specific case under consideration and on the challenges that these facts present. For example, in some cases the acts and utterances of the individual accused are emphasised, whereas in other cases the focus is on the course and purpose of the collective act in which the accused operated. As a result, significant variations emerge insofar as it concerns the nature and scope of the collective violence (for example, relevance of non-destructive acts) and the linkages between this violence, on the one hand, and the indicted crimes and the individual accused, on the other (for example, knowledge or position). Given this interplay between law and facts, the type and level of genocide's contextual embedding differ per case. Genocide can therefore not be seen as a predetermined and fixed legal concept. Instead, the meaning of genocide is context-dependent and remains susceptible to a gradual case-by-case development. This makes it difficult to capture the courts' contextual embedding of genocide in one uniform standard and to denote in general terms whether emphasis is placed on the accused's purpose or the context of violence in which he participated.

In view of this finding, the current scholarly debate — characterising genocide in terms of either the structure-based or the goal-oriented model — seems too stringent. Rather than presenting these models as alternatives that exclude each other, they can better be perceived as two poles of a continuum along which the case law of the courts can be positioned. Also the differences between the legal frameworks of the ad hoc tribunals and the ICC

need to be nuanced. On the one hand, the case law analyses show that the Tribunals' holding that genocide can be committed by a lone *génocidaire* does not mean that the ICTY and ICTR do not attach any value to the finding of a genocidal campaign. On the other hand, the inclusion of an autonomous contextual element in the *Elements of Crimes* does not automatically imply that the ICC will pay more extensive attention to the contextual embedding of genocide. Whether this is so depends on the Court's application of the element in individual cases and on the way in which it is shaped in practice.

Of course, it can be argued that the ICC's recognition of a contextual element has important restrictive value. By stipulating the contextual element as an autonomous legal element, the Court is required to evaluate the context of crimes in all cases that come before it. It cannot completely refrain from engaging in a contextual analysis and may not focus exclusively on the goals pursued by individual accused. This does not, however, detract from the finding that the meaning of genocide, and the nature and scope of its contextual embedding, are not exclusively determined by the incorporation of a contextual element in the abstract legal framework. They are also shaped by the application of genocide in individual cases and by the way in which courts customise this crime to the factual situation to which it applies.

### B *Casuietry and Factors*

To understand and assess the flexibility of (the contextual embedding of) genocide, we should explore the character and process of judicial reasoning in international criminal law. International criminal courts are required to justify their decisions on the basis of (statutory or customary) rules. These rules are context-independent — that is, applicable to a variety of unknown future situations. They are therefore necessarily formulated in relatively abstract terms. For example, the rules on genocide only stipulate that genocide is the commission of a crime with the intent to destroy. They do not determine the level of intent or the facts based on which this intent can be established. Thus, rules have — what Hart calls — an 'open texture'.<sup>138</sup>

Because of this open texture, concrete cases will bring up questions concerning the rules' meaning and scope. For example, does a person who aimed for the destruction of a protected group without the support of an organised apparatus qualify as a *génocidaire*? Considering the uncertainties that legal rules can generate, their central position as all-decisive standards must be nuanced. Rules do not settle the discussion on the meaning and scope of the law, but

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<sup>138</sup> H L A Hart, *The Concept of Law* (Oxford University Press, 2<sup>nd</sup> ed, 1994) 127–8. Also on this issue, see J M Brennan, *The Open-Texture of Moral Concepts* (Macmillan, 1977).

stimulate an argumentative process.<sup>139</sup> International criminal courts have an autonomous position in this process. They exercise certain discretion to answer case-specific questions and to adjust the law accordingly. By thus advancing and modifying the law in interplay with the facts of the case before them, courts develop the law in a casuistic way.<sup>140</sup> In international criminal law, this casuistic process has resulted in the formulation of judicial criteria. The ad hoc tribunals and the ICC have, for example, clarified that genocidal intent is a form of special intent, akin to individual purpose. Moreover, they have indicated the factual circumstances from which genocidal intent can be inferred. These circumstances play an essential role in the process of judicial reasoning. They help to define the nature and scope of genocide and provide further guidance on its assessment in individual cases.

Legal theory clarifies that — in contrast to the elements of crime — factual circumstances are not laid down as necessary conditions of criminal responsibility that need to be established in every case. Instead, they function as factors. Factors are open-ended illustrations of legally relevant patterns of facts that courts can use to substantiate their decision. Each factor favours a certain outcome and provides reasons that move the decision-maker in a specific direction.<sup>141</sup> This implies, on the one hand, that the mere existence of a factor does not determine the decision. In other words, the establishment of a factor in itself does not compel or automatically result in a particular outcome. On the other hand, not all relevant factors have to be established in each case for the accused to be held criminally responsible. The establishment of criminal responsibility rather depends on a balancing exercise: the relative strength of the factors favouring and those disfavouring a decision have to be weighed against each other.<sup>142</sup>

The casuistic development of the law through the flexible use of factors entails a certain risk of abuse. In particular, there is a danger that judges will freely tweak the law to fit the facts. This is problematic in light of the principle of legality. This principle — explicitly laid down in art 22 of the *Rome Statute* and recognised in the case law of the ad hoc tribunals — protects the accused

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<sup>139</sup> K Rozemond, 'De casuïstische grenzen van het materiële strafrecht [The Casuistic Boundaries of Substantive Criminal Law]' (2007) 37 *Delikt en Delinkwent* 465, 479–81; Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1991) 227; Leonor Moral Soriano, 'The Use of Precedents as Arguments of Authority, Arguments *ab exemplo*, and Arguments of Reason in Civil Law Systems' (1998) 11 *Ratio Juris* 90, 94–5; Jan Klabbers, 'The Meaning of Rules' (2006) 20 *International Relations* 295, 298–300; M J Borgers, 'De Communicatieve Strafrechter [The Communicative Judge in Criminal Law]' in W J M Voermans, M J Borgers and C H Sieburgh, *Controverses Rondom Legaliteit en Legitimatie [Controversies Surrounding Legality and Legitimacy]* (Kluwer, 2011) 103, 117; Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229, 263–4; Elies van Sliedregt, 'System Criminality at the ICTY' in Harmen van der Wilt and André Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 183, 199–200.

<sup>140</sup> See also van der Wilt, 'Equal Standards?', above n 139, 264–6.

<sup>141</sup> Giovanni Sartor, *Legal Reasoning: A Cognitive Approach to the Law* (Springer, 2007) 177.

<sup>142</sup> Giovanni Sartor, 'Reasoning with Factors' (2005) 19 *Argumentation* 417, 423; K van Willigenburg, 'Casuïstiek en scherpe normen in het materiële strafrecht [Casuistry and Clear Standards in Substantive Criminal Law]' (2011) 27 *Delikt en Delinkwent* 365, 371–2.

from an arbitrary use of power by binding judges to existing law.<sup>143</sup> It accordingly requires that courts justify their decisions through valid argumentation. This does not only mean that courts have to interpret the law on the basis of the sources of law and methods of interpretation stipulated in the *Rome Statute*, the *Statute of the International Court of Justice* and the *Vienna Convention on the Law of Treaties*.<sup>144</sup> They should also carefully justify the formulation and use of relevant factors. In this respect, the casuistic methodology of judicial reasoning provides for at least two important restrictions.

First, casuistry recognises that the determination of relevant factors involves a particularly complicated process of interpretation. It restrains this process by requiring ‘teleological links’ between factors and goals. This implies that factors must originate from the desire to achieve the object of the applicable legal rule and reflect the belief that acting and deciding in a specific way promotes that object.<sup>145</sup> Giovanni Sartor illustrates this as follows:

my having the *goal* that the children are in good health, plus my belief that keeping the children at home when they are sick *contributes* to their good health, allows me to infer that the children being sick is a *factor* that favours keeping them at home.<sup>146</sup>

In relation to international criminal law, this reasoning scheme clarifies that having the *goal* to limit the criminal responsibility for genocide to crimes that are part of a context of collective violence — and *believing* that establishing genocide in case of the widespread commission of crimes promotes this goal — is a reason for perceiving such commission of crimes as a *factor* for holding an accused responsible for genocide. By thus connecting factors to goals, casuistic reasoning refines and operationalises the process of teleological reasoning.<sup>147</sup>

Secondly, the methodology of casuistry structures and restricts the weighing and balancing of (competing) factors by means of analogous reasoning from precedent. It takes as a starting point that like cases should be decided similarly, whereas unlike cases must be decided differently.<sup>148</sup> From this perspective, it assumes that the fact that precedent X had outcome Y in the presence of factors Z, justifies that the combination of factors Z produces outcome Y in future cases

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<sup>143</sup> Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullem Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002) 246–51, 365–96; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009) 303–8, 331–3.

<sup>144</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>145</sup> van der Wilt, ‘Equal Standards’, above n 139, 271–2; Sartor, *Legal Reasoning*, above n 141, 178–9; Sartor, ‘Reasoning with Factors’, above n 142, 417–18. Contrary to these authors, Roth argues that ‘it depends on a choice which case features are relevant in comparing cases, and that this choice is to some extent contingent’: Abraham Cornelis Roth, *Case-Based Reasoning in the Law: A Formal Theory of Reasoning by Case Comparison* (PhD Thesis, Maastricht University, 2003) 27. See also at 46.

<sup>146</sup> Sartor, *Legal Reasoning*, above n 141, 179 (emphasis added).

<sup>147</sup> Marjolein Cupido, ‘The Policy Underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate’ (2011) 22 *Criminal Law Forum* 275, 304.

<sup>148</sup> Trevor Bench-Capon and Giovanni Sartor, ‘Using Values and Theories to Resolve Disagreement in Law’ in Joost Breuker, Ronald Leenes and Radboud Winkels (eds), *Legal Knowledge and Information Systems — Jurix 2000: The Thirteenth Annual Conference* (IOS Press, 2000) 73, 74; Sartor, *Legal Reasoning*, above n 141, 738.

as well.<sup>149</sup> Courts should thus connect their assessment of a set of relevant factors to the analogous use of these factors in previous cases. Prototype cases have a special position and role in this respect. They bring together all factors that favour a qualification in *optima forma*.<sup>150</sup> Sartor provides the following example:

Assume ... that the qualification of a worker as an employee would be favoured to the extent that the worker is dedicating a larger proportion of his working time to one work-giver, is following the directions of the work-giver, is working within the premises of the work-giver or using the work-giver's tools.<sup>151</sup>

Looking at these factors, the prototypical employee is 'a person who is working full time for a single employer, under detailed directions, within the employer's premises and using the employers' tools'.<sup>152</sup> However, this does not imply that persons who differ from the prototype by expressing a less optimal combination of factors (for example, persons who work only 50 per cent of their time for a single employer without detailed directions) are excluded from the status of employee. The prototype case can entail factors that are absent in a new situation, whereas this new situation may also incorporate additional factors that hinder the prototypical features from playing their known function. As long as the similarities between the cases outweigh the differences, they can still be governed by the same legal principle. In relation to the crime of genocide, the Holocaust is generally seen as a prototype. The crime 'emerged from the factual matrix' of the crimes committed against the Jews during World War II, making the Holocaust the standard case of genocide.<sup>153</sup> Insights from casuistry clarify that this does not mean that only situations that are identical to the Holocaust can be qualified as genocide.<sup>154</sup> Genocide has an open texture that gives judges certain discretion to modernise and adapt this crime to the challenges presented by new fact situations.<sup>155</sup> Genocide can thus also be applied to more marginal situations that differ from the Holocaust in scope, style and technique. The discretion that courts have in this respect is, however, limited. They need to ascertain that the similarities between the Holocaust and the new situation outweigh the differences.<sup>156</sup>

<sup>149</sup> Soriano, above n 139, 99; Sartor, *Legal Reasoning*, above n 141, 738.

<sup>150</sup> Giovanni Sartor, 'Factors and Dimensions in Legal Reasoning' (Paper, September 2005) <<http://complexite.free.fr/Berder/doc/Sartor3.pdf>>.

<sup>151</sup> Sartor, *Legal Reasoning*, above n 141, 192. Sartor's description of prototypes corresponds with Hart's 'standard case' — a case in which no doubts are felt about its application: H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 607.

<sup>152</sup> Sartor, *Legal Reasoning*, above n 141, 193.

<sup>153</sup> Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press, 2012) 120. See also Lawrence Douglas, 'Perpetrator Proceedings and Didactic Trials' in Antony Duff et al (eds), *The Trial on Trial: Volume 2 — Judgment and Calling to Account* (Hart, 2006) 191, 197–8; Schabas, *Unimaginable Atrocities*, above n 4, 104.

<sup>154</sup> Social scientists have extensively debated the uniqueness of the Holocaust: see, eg, Alan S Rosenbaum (ed), *Is the Holocaust Unique? Perspectives on Comparative Genocide* (Westview, 1996); Freeman, above n 97, 187–8.

<sup>155</sup> Douglas, above n 153, 197–9.

<sup>156</sup> See Matthew Lippman, 'Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium' (2001) 23 *Houston Journal of International Law* 467, 527; Freeman, above n 97, 187.

It must be recognised that casuistic reasoning from (prototypical) precedents is not a predetermined, strict and all-decisive process. It cannot be defined beforehand and *in abstracto* to what extent two cases need to cohere. As a result, courts retain certain discretion to determine, for example, whether the Srebrenica massacre shows sufficient similarities with the Holocaust to justify its qualification as genocide. Even so, the process of analogical reasoning still offers a useful context of deliberation that guides judges through the complexities of each case.<sup>157</sup> In particular, it requires that judges assess and substantiate precisely whether there is a sufficient connection between the precedent and the present case. In other words, they must explain their decisions with reference to the similarities and differences between the current case and relevant precedents.<sup>158</sup> For example, which parallels can be drawn between the Srebrenica massacre and the Holocaust that justify the classification of these situations under the same legal principle? In this way, the methodology of casuistry enables judges to progressively refine the meaning of original paradigms within the confinements of a meticulous argumentative process. Thus, it establishes a neat balance between the need for flexibility and legal development, on the one hand, and the requirements of legality and legal certainty, on the other. Judicial reasoning that disturbs this balance by neglecting the restrictions of the casuistic methodology runs the risk of lapsing into a boundless ‘everything goes’ type of decision-making. This way of reasoning is logically and legally unsound and should therefore be rejected as ‘bad casuistry’.

### C *Valuing the Casuistry of Genocide*

How should the flexible approach of the ad hoc tribunals and the ICC towards the contextual embedding of genocide be valued from the perspective of casuistry? What do the insights from casuistry teach us about the courts’ contextual embedding of genocide in practice? Answering these questions is challenging, especially because the ad hoc tribunals and the ICC do not engage in an explicit process of analogical reasoning in which the factual similarities and differences between cases are identified. As a result, the interplay between law and facts remains somewhat implicit, making it difficult to determine exactly which considerations have influenced the judicial assessment and development of genocide in recent cases. The previous case law analyses, however, seem to suggest that legal practice is at least somewhat affected by the specific historical and political context in which international courts function. This neither implies that genocide trials are show trials, nor that judges are susceptible to political pressures. It merely means that genocide cases present judges with controversial fact situations and difficult questions. In dealing with these situations and answering these questions, judges have relied upon the open texture of genocide to respond to the sensitivities of the case under consideration and to anticipate the consequences of their decisions.

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<sup>157</sup> Albert R Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (University of California Press, 1988) 135; Borgers, ‘De Communicatieve Strafrechter [The Communicative Judge in Criminal Law]’, above n 139, 133.

<sup>158</sup> Jonsen and Toulmin, above n 157, 31, 35, 251–2.

As a result of genocide's context-dependency, the case law of the Tribunals and the ICC cannot be captured in a uniform standard, but shows variation. From a casuistic standpoint, this variation is not necessarily problematic. One of the fundamental thoughts underlying casuistry is that the law develops in interplay with facts. It is modified with each new case coming before the courts and thus transforms continuously. It is therefore only logical that the type and scope of genocide's contextual embedding differ depending on the circumstances of individual cases. For example, it can be expected that in situations concerning large-scale destructive violence, the courts will largely establish the commission of genocide on the basis of contextual circumstances. As long as there is some additional evidence showing that the accused participated in this context, they can determine his or her genocidal intent without many problems. By contrast, when there is only little contextual evidence concerning the existence of a collective genocidal campaign, it is likely that more value is attached to evidence relating to the accused's *mens rea*. In this case, there will have to be strong indications that the accused aimed to destroy part of a protected group in order to classify him as a *génocidaire*.

Having said that, the fact that casuistry perceives genocide as a flexible, context-dependent concept does not mean that it accepts all forms of differentiation. Casuistry entails a specific methodology that places nuanced restrictions on the judicial development of genocide by requiring that courts justify their decisions following a process of analogical reasoning from (prototypical) precedents. As discussed above, the Holocaust is the prototype of genocide that forms the natural yardstick in the analogical reasoning process. Whereas this does not imply that only situations that are identical to the Holocaust can be qualified as genocide, it does mean that courts cannot apply the genocide concept to cases that substantially and fundamentally differ from this prototype. In this view, it can, for example, be argued that the commission of crimes by a lone *génocidaire* diverges to such an extent from the prototypical genocide that it will be difficult to classify these situations under the same legal rule. At first sight, the differences between them outweigh the similarities. In order to reach a different conclusion on this matter, courts have to engage in a precise and comprehensive process of analogical reasoning in which they show that the two situations *do* share sufficient relevant similarities to be treated analogously.

Implementing the methodology of casuistry in judicial practice is essential, since a failure to do so can result in an abuse of the law's context-dependency. It is therefore unfortunate to see that the previous case law analyses bring forward several methodological irregularities. For one, the courts' use of non-destructive acts as factors for ascertaining the contextual embedding of genocide seems invalid. Recall that the formulation of factors is restricted by 'teleological links' that connect factors to the goals of the legal rule for which they are used. Considering that the rules covering genocide seek to criminalise conduct that is aimed at the *physical or biological destruction* of a protected group, it is inconceivable how crimes *not pursuing this objective to destroy* can still be used to prove the commission of genocide. The judicial practice to partially infer genocidal intent from the commission of non-genocidal acts

should therefore be looked upon critically. It seems to illegitimately detach the genocidal intent element from the destructive purpose of genocide.

Another matter in need of further consideration is the courts' weighing of relevant factual circumstances against each other. It seems that this weighing process has not been carried out consistently and does not always conform to the restrictions of analogical reasoning. Note, for example, that the ICTY has at least partially based its finding of genocide in Srebrenica on the forcible transfer of part of the population to other areas.<sup>159</sup> By contrast, the PTC in *Al Bashir* has found that the fact that people were not precluded from fleeing the area and safely reached refugee camps contradicts the claim that genocide occurred. Before the ICC, the forcible transfer of part of the population thus forms a counter-indication of genocide.<sup>160</sup> While recognising that the ad hoc tribunals and the ICC operate in a unique legal context and are not bound by each other's case law, it seems that their statutory frameworks are not so distinctive that they can explain and justify this different evaluation of evidence. Of course, this does not mean that there are no valid reasons for these differences and that the courts have engaged in an illegitimate process of judicial reasoning. It does, however, signify that the justificatory reasons underlying the courts' distinctive appraisals are not immediately evident, but remain somewhat uncertain.

To prevent similar irregularities and uncertainties in the future, it is advisable that international criminal courts implement the methodology of casuistry more explicitly. This means that they cannot confine their reasoning process to the interpretation of legal rules in terms of judicial criteria. The courts should also explicitly substantiate their presentation, construction and assessment of fact(or)s and connect these fact(or)s to the relevant legal elements and precedents. In other words, they need to clarify which factual circumstances underlie their classification of an accused as *génocidaire* and explain why these facts are relevant for establishing genocide. Moreover, the courts should connect their decisions to previous judicial findings on factually similar situations. In this way, they can make the interplay between law and fact transparent and illustrate how their conclusions have been confined by the requirements of analogical reasoning from precedent. This will have a positive effect on the consistency of the law and the legitimacy of judicial decisions.

## VI CONCLUDING OBSERVATIONS

The analyses of the case law of the ad hoc tribunals and the ICC show that the judicial assessment of genocide is subject to the facts of the situation under consideration and to the challenges that this situation presents to the court. In particular, genocide's contextual embedding is shaped by its application in individual cases and customised to the present legal, historical and political realities. As a result, the type and level of contextual embedding differ per case. This requires a nuanced approach to the strict division between the structure-based and the goal-oriented model. Rather than seeing these models as

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<sup>159</sup> See above Part III(C)(1).

<sup>160</sup> See above Part IV(B)(1). This also applies to the ICTY's evaluation of the crimes committed in Bosnia and Herzegovina.

alternatives that exclude each other, they should be perceived as two poles of a continuum along which the case law of the courts can be positioned.

To explain and evaluate the flexibility and context-dependency of genocide, this article has discussed the open texture of the law and the casuistic nature of its development. It has demonstrated that the openness of the law does not give courts unlimited discretion to fit the law to the facts. The principle of legality prohibits that the judicial sensitivity for political and historical realities lapses into an illegitimate use of such realities. The courts have therefore been advised to implement the methodology of casuistry more explicitly. Without imposing a uniform and onerous legal framework, this methodology warrants that the interplay between facts and law is made transparent. In this way, it aptly balances the need for flexibility and judicial creativity on the one hand, against the need for restraint and consistency on the other.

This article has formulated some broad guidelines on how courts can use the methodology of casuistry to clarify and restrain the contextual embedding of genocide. However, further research is required. Rather than focusing exclusively on the question whether a case falls within the goal-oriented or the structure-based model, this research should look beyond abstract labels. In particular, it should seek to explicate the interplay between law and facts that governs the contextual embedding of genocide and try to position cases on a continuum between the goal-oriented and the structure-based model. In this way, the study of genocide can start to transcend the oversimplified theoretical distinctions that dominate the current scholarly debate.