The Khmer Rouge and the Crime of Genocide
-
Issues of Genocidal Intent With Regard to the Khmer Rouge Mass Atrocities

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TABLE OF COMMON ABBREVIATIONS

ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
UN	United Nations

PRELIMINARY REMARKS

Currentness of Material

Jurisprudence, legal materials and other sources of information have been considered up until May 2011.

Note on Citations

In the footnotes, books and articles are referenced by author, year and page – eg Abrams (2001) 303. For authors of multiple works, the italicized abbreviation following the description in the bibliography further identifies the volume – eg Amann *Deconstruction* (2000) 369.

I. INTRODUCTION

The violence inflicted upon their victims by the Khmer Rouge goes beyond comprehension. In less than four years around 1.5 million people perished under their regime. Every description and classification of the events must remain woefully inadequate in the face of human suffering of such extent. Nothing but the label of the worst of crimes seems to give an idea of the horrors that unfolded in Cambodia. The sheer scale of the atrocities committed by the Khmer Rouge has led to them being 'publicly considered one of the most egregious cases of genocide'.[1]

Yet, the legal qualification of the crimes committed by the Khmer Rouge remains contested. In the more than thirty years that have passed since the Khmer Rouge were ousted from power, vivid debates have been led with regard to the question of whether the Cambodian case is actually one of genocide. This discourse on the crimes committed by the Khmer Rouge blended historical and legal lines of argumentation, in many instances directly comparing the acts of the Khmer Rouge to the Holocaust and other prominent cases of mass atrocities. With not much prospect of holding the Khmer Rouge leadership accountable in a judicial process, legal debates for a long time were led in an argumentative vacuum, often resulting in little more than ideologically-tinted conclusions.

The advent of the Extraordinary Chambers in the Courts of Cambodia (ECCC), a judicial body established to bring to justice the senior Khmer Rouge leadership, fundamentally changed discussions. The ECCC were and continue to be an important catalyst for a more thorough examination of the specific requirements of potential criminal charges against former leaders of the Khmer Rouge. They particularly put into focus the crime of genocide and its characteristics. What soon became clear was that the legal realities would potentially clash with expectations created by a narrative of genocide established in Cambodia and across the international community. Genocide – a fact of common knowledge from the perspective of the Cambodian public – is hard to prove in court. The crime of genocide as defined in international criminal law poses difficult and very specific challenges for a conviction. To get from a blanket label of genocide to the criminal responsibility of the leadership for specific crimes proves problematic.

The case of the Khmer Rouge makes apparent complex definitional issues inherent in the law of genocide.[2] It 'is a good vehicle for exploring some of the

1 Ciorciari *Auto-Genocide* (2004) 413.
2 See Ratner et al (2009) 319.

nuances of genocide law and some of the consequent challenges in proving the crime to a legal standard'.[3] This is what the present study sets out to do.

[3] Ciorciari *Auto-Genocide* (2004) 414.

A. Scope and Outline of the Study

The crime of genocide is a multifaceted offence, combining notions of collective commission with individual responsibility. Applying it to a case as complex as the events that unfolded under the regime of the Khmer Rouge raises a broad range of issues. This study will try to provide insight only into a small segment of them. The focus will lie on examining questions regarding the particular mental element of the crime of genocide. This involves a discussion of genocide's intent requirement and the issues of group definition, group conception and group targeting. The proof of genocidal intent is of particular difficulty. Questions of how the mental element of the crime of genocide can be proven to a legal standard will be addressed. They offer important insight into the dogmatic issues and relate them to the task of the crime's practical application.

Instances of mass atrocities inevitably provoke questions regarding the motives behind them. Why do people engage in mass killings? What can bring someone to order the death of thousands? How do policies of group destruction extermination come about? These intuitive questions and the emotional responses they evoke heavily influence and shape the discourse with regard to the crime of genocide. They have been particularly prominent in the debates surrounding the crimes of the Khmer Rouge. Such debates as to the political and historical merits of the case will not be entered into. Rather, their role in a legal assessment of mass atrocities will be discussed. In this way, looking into the legal significance of motivations will make up a further component of the study.

The case law with regard to the crime of genocide is still very much in its infancy. After being codified in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), adopted by the UN General Assembly in 1948[4], genocide remained a largely symbolic offence. It was the proceedings at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) that finally brought about genocide's application in international forums. The body of case law developed by the ICTY and the ICTR for the first time delved into basic issues of the crime of genocide, giving important indications towards its understanding in international criminal law. Nevertheless, many of the interpretations given are closely tied to the particular situations presented by the individual cases and the challenges faced by the pioneering institutions. Important questions regarding the structure and very nature of the crime of genocide remain. In this sense, the case of the Khmer Rouge offers important perspectives on issues that have not been thoroughly explored so far.

[4] (1951) 78 UN Treaty Series 277.

Criminal responsibility for mass atrocities can be assigned not only through the crime of genocide but also through other international crimes such as crimes against humanity and common offences such as murder or rape. The jurisdiction of the ECCC reflects this fact in that it combines a competence for both international and national crimes in order to fully capture the acts in question. The relationship between the different crimes and their varying scope of application present difficult questions in themselves and will be touched upon on a number of occasions. The focus, however, will lie on the crime of genocide since its particular stigma and symbolic importance are of controversy with regard to the crimes of the Khmer Rouge.

The first part of the study deals with the legal issues relevant to possible genocide charges against the Khmer Rouge from a dogmatic point of view. The study attempts to outline a legal framework needed to meaningfully address the issues presented by the Cambodian case. This consists in a detailed look at genocide's particular intent requirement and the discussion of the relevance of aims and motives. Further, the group as the target of genocidal intent is focused on. With its special structure, genocide raises the difficult questions of how human groups are defined and what it means intending to destroy them. Eventually, a more detailed look is taken at the issue of proving the mental element of genocide, offering further perspectives on the dogmatic issues raised.

The second part of the study examines the case of the Khmer Rouge mass atrocities based on the legal framework elaborated. Genocide implies the targeting of particular groups. In turn, the Khmer Rouge's targeting of ethnic minorities and other groups is looked at. Issues raised by the policies adopted by the Khmer Rouge are examined, drawing on the findings gained from the dogmatic discussion. This involves questions related to the Khmer Rouge's group conception such as the auto-genocide debate and the targeting of groups not protected under the Genocide Convention. Another emphasis lies on the distinction between discriminatory mass killings and genocidal intent which is challenging for the case of the Khmer Rouge. Ultimately, particular questions of proof for possible genocide charges against the Khmer Rouge are discussed.

Much controversy exists over the modes of liability involved in assigning individual criminal responsibility in international criminal law in general and for the crime of genocide in particular. The proceedings at the ECCC so far show that these modes of liability will play an important role in the case of the Khmer Rouge leadership, as well. As important as these issues are, they fall outside the scope of the present work. Questions mainly regarding individual criminal responsibility will not explicitly be dealt with. As former ECCC Co-

Investigating Judge Marcel Lemonde put it, the facts of the Cambodian case make it arguably the most complex investigation since Nuremberg.[5] Findings concerning the guilt of individuals require an examination of detailed evidence regarding precise events and the role of individual actors in them.[6] Proceedings at the ECCC will hopefully provide the forum for such inquiry.

5 See Bates *Report* (2010) 40.
6 Ratner et al (2009) 319.

B. Introductory Notes on the Crime of Genocide

Mass atrocities such as those committed by the Khmer Rouge present the question of whether criminal law has the means to comprehend and conceptualize them with enough clarity and precision.[7] More essentially, they put to the test the very logic of trying to deal with such monstrous events and their consequences on a legal level. There seems to be a fundamental mismatch between the law and the crime[8], an inappropriateness in trying to comprehend the unfathomable in narrow legal terminology.[9] Nevertheless, after World War II international criminal law has developed as one of the main ways of recognizing the harm caused by mass atrocities and trying to prevent their further commission.[10] In its developing interpretation, genocide as the most prominent of international crimes reflects these attempts at getting to terms with mass atrocities in a legal way and presents an example of the difficulties involved in the process.

1. *Basic Notions*

The crimes of the Nazis initiated early efforts to grapple with massive criminality through a new legal terminology. Coined by Polish lawyer Raphael Lemkin in his work 'Axis Rule in Occupied Europe' in 1944, the term genocide rapidly developed from an academic concept into a criminal offence.[11] A few years after the end of World War II, this development culminated in the Genocide Convention, a multilateral treaty addressing genocide as a separate international offence.[12] At that point, however, genocide's evolution on a legal level came to a halt. Without being applied in forums of international criminal justice for decades, genocide went on to be perceived more as a symbol of a unique historic phenomenon than a genuine legal norm.[13]

At the same time, the concept of genocide took on a life of its own in other spheres. It was widely used in political and historical discourse. The term genocide in a broader sense came to stand for mass atrocities in general, adopting notions that somewhat removed it from the concept of genocide as a criminal offence relating to individual criminal responsibility.[14] The use of the term genocide is not limited to the legal field but is applied by different disciplines and is hard to grasp in all its connotations today.[15] It is used in a range of different meanings and is stretched to apply to heterogeneous phenom-

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7 Osiel (2009) ix.
8 Luban *Arendt* (2011).
9 See Anders (1956) 267 ff.
10 See Haldemann (2007).
11 See Nersessian *Political Groups* (2010) 5.
12 See Nersessian *Political Groups* (2010) 11.
13 See Wald *Prosecuting* (2006) 86; Ratner *Evils* (2007) 589.
14 Kirsch (2009) 347.
15 See Straus (2001) for an overview.

ena.[16] Legal commentators have often expressed their fear of an over-extension of the concept of genocide and a weakening of its particular stigma and symbolic importance.[17] Lacking practical application, 'for decades the Genocide Convention has been asked to bear a burden for which it was never intended'.[18] By the time genocide was applied for the first time by international criminal tribunals, courts found themselves confronted not only by the weighty historic legacy that marked its inception but also by the range of emotional and political connotations it had been charged with since. The discussions regarding genocide and the crimes of the Khmer Rouge in many ways mirror these developments. For a long time, the term genocide has been used as a blanket label, a description of the totality of events that took place from 1975 to 1979. In trying to assess the criminal responsibility of individuals, the ECCC face the enormous challenge of emancipating themselves from thirty years of intense political and historical debate.

The differentiation of the crime of genocide as a criminal offence is ongoing. With the general development of international criminal law and its concepts, perceptions of genocide are changing as well. Genocide's interpretation is heavily influenced by more nuanced understandings of fundamental issues of international criminal law such as the different modes of liability. With their jurisprudence in the matter, the International Criminal Court (ICC), other international criminal tribunals and national courts all contribute to the sharpening of the contours of genocide as a legal concept. The case of the Khmer Rouge and the discussions surrounding it have the potential to importantly contribute to the growing understanding and further development of the crime.

In trying to capture the enormity of mass atrocities targeted at the destruction of groups, genocide as defined in the Genocide Convention goes beyond the traditional concepts of criminal law. It includes features that point to a collective context, both in terms of the perpetrators as well as in terms of the victims.[19] Perpetrators and victims are not only seen as autonomous individuals but also as parts of collectives.[20] To some degree, genocide can be understood as a crime committed *by* a collective *against* a collective. With these two features, ie the context of collective action for the perpetrator and the group as target of the crime, genocide falls outside the scope of traditional concepts of criminal law. These features raise fundamental questions with regard to criminal responsibility of individual perpetrators and with regard to the role of groups.

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16 See Straus (2001) 115; Ambos *Internationales Strafrecht* (2011) 221.
17 Wald *Prosecuting* (2006) with further references.
18 Schabas *Genocide* (2009) 11.
19 See Vest *Structure* (2007) 786.
20 See Fletcher (2002) 68 ff.

The contours of criminal responsibility for genocide are subject to much controversy. The way genocide is structured, it combines notions of individual criminal responsibility with features of a crime committed in a collective context. It has been said that 'On one hand it is shaped along the lines of a traditional crime committed by an individual, on the other hand its mental element refers to a context of collective action'.[21] This creates fundamental ambiguities. Essentially, criminal proceedings are 'designed to deal with individual people in the dock'.[22]

> Criminal law usually highlights the defendant's deeds, treating socio-political context as irrelevant. The accused's contribution to mass atrocity, however, is unintelligible in isolation from many others' actions, often distant in place and time. The law generally asks what harm the accused has caused. Yet here lines of causation are multiple and muddied, agency is dispersed, labour divided. Responsibility for mass atrocity is widely shared. But its far-reaching scope often lies beyond anyone's complete control or contemplation.[23]

How the resulting conceptual clutter with regard to the criminal responsibility for genocide is to be interpreted remains unclear.

Genocide reaching beyond the individual victim by primarily defining groups of people as the target of the crime raises issues of its own. The crime being defined by its commission against human groups equally departs from traditional legal concepts. Are groups more than the sum of their members' existence in the eyes of criminal law? Do they hold a value of their own? How are groups defined and what does it mean to destroy them? From the very outset of genocide's conception, these questions have been discussed controversially. Lemkin's reason for singling out genocide as a distinct crime was his conviction that groups are essential to humanity because they have a value over and above the individuals who make them up.[24] He focused on the particular contribution of different national groups to world culture.[25] This idea of a special value assigned to groups 'as such' was already rejected strongly by Hannah Arendt in her reflections on the Nazi crimes. She objected to the concept of national groups 'which holds a nation to be an eternal organic body, the product of inevitable natural growth of inherent qualities' and which 'explains peoples, not in terms of political organizations, but in terms of biological superhuman qualities'.[26] The fundamental issues regarding the definition, value and targeting of groups have remained contentious.[27] Seemingly theoretical in nature,

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21 Fletcher and Ohlin (2005) 545.
22 May (2010) 135.
23 Osiel (2009) xi.
24 Luban *Arendt* (2011) 15.
25 Luban *Arendt* (2011) 15.
26 Arendt 343, 366-367; see Luban *Arendt* (2011) 16.
27 See May (2010) 23 ff.

these questions have proven to pose difficult challenges in the practical application of genocide and are crucial in the assessment of the crimes of the Khmer Rouge.

2. *RELEVANCE OF GENOCIDE CHARGES*

There can be no question that the victims of the Khmer Rouge suffered greatly, that the atrocities committed were massive in scale, nor that those responsible deserve severe sanction.[28] Arguably, concentrating on what to call mass atrocities and what charges to bring to hold perpetrators accountable unduly diverts attention from the important tasks of dealing with the consequences of systematic violence and the prevention of its further occurrence.[29] Yet, those accused before courts, victims and the international community place great weight on findings of genocide or the failure of a case in which accusations of genocide are made.[30] Genocide as a legal label can be of great emotional importance to victims who wish to have their suffering recognized as what they see it.[31] In Cambodia, the term genocide has come to represent recognition for people who have suffered the most grievous of abuses.[32] Genocide with its unique stigma 'has become the rallying cry for victims who consider that the seriousness and the horror of the crimes committed against them and their families may only be reflected in law (and even then only imperfectly so) if they are labelled as genocide'.[33] This emotional and political importance forms the background for the legal discussions regarding the relevance of genocide charges.

The focus and the importance generally placed on charges of genocide as opposed to corresponding charges of crimes against humanity and other offences is subject to debate. With the developing interpretation of genocide and crimes against humanity, the two offences in their current conceptions overlap in many respects.[34] In turn, it has been argued that virtually any acts of genocide would today also qualify as crimes against humanity.[35] And given that crimes against humanity may carry the same sentence as genocide, deterrence and retribution would seem to be served equally well by convictions for either offence.[36] With crimes against humanity usually being easier to establish in court because of genocide's narrow definition and more specific requirements, genocide would thus have once again a mostly symbolic role in the future.[37] This line of argumentation is not broadly shared. In *Akayesu*, the

28 See Amann *Expressivism* (2002) 113
29 See Amann *Expressivism* (2002) 113 ff.
30 Wade (2009) 153.
31 Wade (2009) 153.
32 Ciorciari *Auto-Genocide* (2004) 429.
33 Mettraux (2006) 201 fn 36.
34 See eg Schabas *Whither* (2007) 188.
35 Greenawalt (1999) 2293.
36 Amann *Expressivism* (2002) 117.
37 Schabas *Darfur* (2005) 884.

ICTR noted that genocide and crimes against humanity 'have different elements, and, moreover, are intended to protect different interests'.[38] Genocide is seen as an offence apart from crimes against humanity, both in terms of its symbolic importance as well as with regard to its legal features.[39] While sharing historic origins with crimes against humanity, genocide has developed into a more specific legal norm. Genocide's main feature, the intended destruction of groups, places it as a unique criminal offence in respect to crimes against humanity.[40]

Pursuing charges of genocide in that sense does have added significance by drawing a clearer picture and addressing a specific wrong. As Amann puts it,

> Law operates as a means for articulation and nourishment of societal values. This expressive function has special force in international criminal law, only now entering an era in which ongoing international criminal tribunals reinforce pronouncements of norms, such as the proscription against genocide in the 1948 Convention.[41]

Intentional group destruction, untechnically spoken the intended 'wiping out of a whole group of people from the face of the earth', creates a gut feeling of the enormousness of the crimes in question that seeks expression in the way it is dealt with legally. Charges of genocide cannot simply be substituted by charges of crimes against humanity or mass murder without losing in specificity.[42] Because of genocide's symbolic importance, arguments as to difficulties in proving genocidal intent individual cases are likely to ring hollow to victims in cases where a criminal trial is the only means by which an official finding can be made.[43] On a more concrete level, jurisprudence regarding specific charges of genocide may contribute to some degree of closure for victims, putting events into a legal and criminal framework, away from political justifications.[44] Broken down to the pragmatic approach of prosecutors trying to ensure convictions in court, 'genocide can and is used as a bargaining chip because of its super-stigma; it can be negotiated down to crimes against humanity in exchange for a guilty plea and the accused's help in prosecuting others'.[45]

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38 *Akayesu (TC)* [1998] ICTR para 469.
39 See also the section 'Genocide as a Crime Against Humanity'.
40 For a detailed comparative analysis see Nersessian *Political Groups* (2010) 163 ff; see also Ratner et al (2009) 583.
41 Amann *Expressivism* (2002) 95.
42 Ratner *Evils* (2007) 588.
43 Wade (2009) 153.
44 Mettraux (2006) 201 fn 36.
45 Wald *Genocide* (2007) 627.

C. HISTORICAL BACKGROUND

In the following section, a brief overview of the Khmer Rouge rule and the events that led up to the establishment of the ECCC will be given. It will sketch but the broadest outlines of a regime that brought about one of the most infamous cases of mass atrocities in the twentieth century and the struggle for accountability that ensued.[46]

1. *THE RULE OF THE KHMER ROUGE*

17 April 1975 marks the day the Khmer Rouge swept into Phnom Penh and announced the liberation of Cambodia from the repressive regime of General Lon Nol. Their takeover of the capital city was the culmination of a five-year civil war that pitted various communist and royalist fractions against Lon Nol's right-wing republican regime which had seized power in 1970 by overthrowing Prince Norodom Sihanouk, the leader of Cambodia's preceding royalist regime.[47] The Khmer Rouge, initially labeled that way by Sihanouk to signify their Marxist/Leninist ideological roots[48], governed the whole of Cambodia between April 1975 and January 1979, renaming it for their purposes to Democratic Kampuchea. The Khmer Rouge, who would later identify themselves as the Communist Party of Kampuchea, set out to achieve a revolution which would establish a pure Maoist agrarian society, self-sustaining and immune to foreign influence.[49] At the center of the Communist Party of Kampuchea operated a small core of secretive leaders – including the infamous Pol Pot, Nuon Chea, Son Sen, Ieng Sary, Mok and Khieu Samphan – uncompromisingly bent on transforming Cambodian society by the most extreme measures.[50]

The envisaged transformation was initiated by the evacuation of more than two million people from Phnom Penh and other cities. The Khmer Rouge scattered city people throughout the countryside, sending them to rigidly controlled agricultural communes in an attempt to break down old structures and patterns of pre-revolutionary life.[51] City evacuees were classified as New People to set them apart from the Khmer Rouge's ideal of the simple Khmer peasants with 'blank hearts and minds' that would make the material for a

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46 The rise, rule and decline of the Khmer Rouge and the complex political, economical and social issues involved are the subject of an extensive body of literature. For historical accounts of the Khmer Rouge regime see eg Kiernan *Pol Pot Regime* (2008); Becker (1998); Etcheson (1984); Chanda (1986). For a discussion of the preconditions to the mass atrocities see eg Kiernan *Cambodian Genocide* (2004) 304; Harff (2003).

47 For a detailed account of the civil war between 1970 and 1975 see Deac (1997); see also Dyrchs (2008) 28 with further references.

48 Ball (1999) 98.

49 Ciorciari *Auto-Genocide* (2004) 416.

50 See Dyrchs (2008) 28; Ciorciari *Auto-Genocide* (2004) 416.

51 Chalk and Jonassohn (1990) 404; see also Hinton Agents (1996) 823.

true Maoist revolution.[52] People associated with the former regime were summarily executed by the thousands[53]; New People were singled out for harsh 're-education' in the communes. Persons from upper social strata, persons with foreign contacts and intellectuals were treated with special contempt. Perceived as a threat to a unified Khmer culture, ethnic minorities equally became the target of massive mistreatment.[54] Within its own ranks, the Khmer Rouge tried to root out perceived opponents of the revolution. A series of brutal and increasingly paranoid purges between late 1975 and 1979 led to the torture and execution of thousands of alleged traitors in the Khmer Rouge's extensive prison structures. In Democratic Kampuchea 'fear dominated life, and immediate death was constantly at hand'.[55]

The Khmer Rouge intentionally isolated Democratic Kampuchea from the rest of the world, expelling nearly all foreigners from the country by mid-1975 and refusing most foreign aid.[56] Other policies enforced by the Khmer Rouge included the building of large irrigation structures by manual labor, replacing modern medicine by what they saw as traditional Khmer medical care and the abolishment of money.[57] These measures led to massive economic crisis that resulted in mass starvation and untreated disease.[58]

The relationship of the Khmer Rouge with the communist regime of neighboring Vietnam which had initially provided some support to Democratic Kampuchea quickly turned sour.[59] The Khmer Rouge openly claimed the need to regain the Mekong delta and other territories in the south of Vietnam. A low-intensity border war ensued from 1975 which was escalated by Cambodian raids of Vietnamese border villages in 1977 in which hundreds of civilians were massacred.[60] Vietnam eventually responded by sending troops into Cambodia[61], launching a full-scale invasion in December 1978 leading to the fall of Phnom Penh and the ousting of the Khmer Rouge on 6 January 1979.[62]

In turn, the Vietnamese installed a government consisting mostly of former Khmer Rouge cadre who had defected to Vietnam. This government ruled Cambodia, now renamed the People's Republic of Kampuchea, for over a decade with the support of the Vietnamese army.[63] The Khmer Rouge retreated to

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52 Kiernan *Pol Pot Regime* (2008) 55; Ciorciari *Auto-Genocide* (2004) 416; Hinton *Agents* (1996) 824 ff.
53 Chalk and Jonassohn (1990) 404.
54 Ball (1999) 110; Ciorciari *Auto-Genocide* (2004) 416.
55 Kamm (1998) 128.
56 See Ponchaud *Year Zero* (1978) 52, 106.
57 See eg Ball (1999) 101; Abuza (1993) 1015.
58 Ciorciari *Khmer Krom* (2008) 417.
59 Ball (1999) 114.
60 See also the historical account in *Duch (TC)* [2010] ECCC para 60 ff and para 75 ff.
61 Ball (1999) 114.
62 Ratner et al (2009) 315.
63 Ball (1999) 114.

the Thai-Cambodian border from where they battled the Vietnamese in a guerilla war throughout the 1980s and onwards.[64]

2. *THE STRUGGLE FOR ACCOUNTABILITY*

It took almost thirty years for Cambodia to come to an internationally recognized mechanism that is to provide at least some measure of accountability for the mass atrocities committed under the Khmer Rouge regime from 1975 to 1979.[65] While the legal and evidentiary basis for prosecution would have been relatively solid early on[66], political support, internally and externally, was fragile and for most of the time lacking entirely.[67] After the fall of the Khmer Rouge regime, Cambodia continued to be a battlefield of the Cold War, involving the interests of international and regional powers[68], leaving little room for the pursuit of accountability. Cambodia has also been and still is in a process of far-reaching political and economic transformation. The Vietnamese-installed and internationally isolated regime of the 1980s was followed by one of the largest UN missions which entailed a transitional authority and peace plan[69], resulting in a new constitution and government in the early 1990s. Years of intensive and sometimes violent internal political conflict followed. Given this background, it came as a surprise to many that a judicial investigation into the events of 1975 to 1979 came together after all.

Pursuing justice for the acts of the Khmer Rouge did form part of political agendas domestically and internationally to different extents over time. As early as eight months after the fall of the Khmer Rouge regime, the new Vietnamese-controlled government in 1979 established the 'People's Revolutionary Tribunal' to try 'the Pol Pot-Ieng Sary Clique', in absence of the accused.[70] After a mere five days of trial, Pol Pot and Ieng Sary were found guilty of genocide and sentenced to death. The proceedings were rejected as 'sham trials' by most of the international community as they clearly did not meet fair trial standards from the outset.[71]

Beginning in the early 1980s, the mass atrocities in Cambodia under the Khmer Rouge became the subject of historical and legal analysis, particularly in Australia and the United States. Private initiatives started gathering material for a case against the Khmer Rouge and explored and advocated different

64 Ratner et al (2009) 315; see also Abuza (1993) 1011.
65 For a detailed account of this struggle for accountability see eg Fawthrop and Jarvis (2005); Marks (1994) and Lambourne (2009).
66 See Marks (1994) 19.
67 See Etcheson *Politics* (2004) for a detailed account. See also Phay-Vakalis (2008) 297 ff.
68 See eg Abuza (1993) 1011 with further references.
69 See Boyle *Cambodge* (2004) for a detailed account.
70 For more detailed accounts of the 1979 Trial see De Nike et al (2000); Fawthrop and Jarvis (2005) 40 ff; De Nike (2008).
71 Whitley (2006) 31 ff; see also Petit (2011) 191.

avenues of legal proceedings.[72] However, these efforts did not prompt noteworthy action on an official political level. International pressure to bring the Khmer Rouge to justice remained minimal.[73] Until the early 1990s, wicked arrangements of Cold War politics that reached far beyond the realm of Cambodia saw China and the United States supporting the remaining Khmer Rouge forces and effectively halt efforts of holding them accountable.[74] It was not until after the governance of the UN Transitional Authority in Cambodia that the Khmer Rouge organization was progressively marginalized politically. Political defections of Khmer Rouge cadre to the national Government continually weakened Khmer Rouge influence, leading up to the formal surrender in 1998 of the two remaining senior Khmer Rouge political leaders, Nuon Chea and Khieu Samphan, to Hun Sen, by then Prime Minister of Cambodia.[75]

In an international environment now favouring prosecution of past atrocities, the government of Cambodia skilfully voiced its commitment to hold Khmer Rouge perpetrators accountable when addressing the international community in the mid-1990s. This eventually led up to the official call of the Cambodian government to the UN requesting international assistance in bringing the Khmer Rouge to justice in 1997.[76] Actual commitment of the Cambodian government to holding the Khmer Rouge accountable has varied greatly and was openly absent at times.[77] Nevertheless, the neglect of Cambodia after 1979 by the international community has since been used as a bargaining chip of Cambodian foreign politics[78], with the Cambodian government cleverly adapting its statements to the audiences involved.

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72 An example of such efforts is the work of Stephen Heder and Brian Tittemore, see Heder and Tittemore (2001), as well as that of Hurst Hannum, see Hannum (1989); others include Stanton *World Court* (1986); Railsback (1989); Ratner et al (2009); Ramji (2000).

73 Whitley (2006) 34.

74 The intricate political situation of Cambodia after 1979 has become the subject of detailed political and historical analysis. See eg Etcheson *After The Killing Fields* (2005); Ball (1999) 114.

75 Etcheson *Trial* (2006) 7.

76 See Etcheson *Trial* (2006) 7 ff.

77 See Etcheson *Trial* (2006) 8; Prime Minister Hun Sen stated that Cambodia 'should dig a hole and bury the past', as reported by Fontaine C, 'Cambodia Premier Says No to Trial' *Associated Press* (1998).

78 See, for a recent example, Prime Minister Hun Sen's public statements of November 2009: 'L'histoire dont nous devons nous souvenir le plus est que nous avons survécu au massacre, mais [les Occidentaux] nous ont poussés plus loin encore avec leurs actes inhumains … Il est temps maintenant qu'ils expriment leurs regrets et, au moins, endossent une responsabilité morale. Sinon, il n'est pas nécessaire de juger les Khmers rouges', as reported in 'Le Cambodge demande à l'Occident des excuses pour son soutien aux Khmers rouges' <http://www.lemonde.fr/asie-pacifique/article/2009/11/24/le-cambodge-demande-a-l-occident-des-excuses-pour-son-soutien-aux-khmers-rouges_1271132_3216.html> accessed 11 June 2011.

3. *ESTABLISHMENT OF THE ECCC*

With a historical and political background as complex as indicated in the previous remarks[79], it is hardly surprising in retrospective that the process leading up to the establishment of the ECCC turned out to be tortuous itself.[80] It presents a labyrinthine tale of negotiations between the UN and the government of Cambodia, with imminent failure constantly looming.[81] The negotiations reaching an end with the successful establishment of a judicial body seemed astounding at the time. Opinions on whether the result constitutes an acceptable outcome remain divided.[82]

In June 1997, the Cambodian government officially asked the United Nations for assistance in setting up a tribunal to hold trials for the Khmer Rouge. In turn, the UN created a Group of Experts which visited Cambodia in 1998.[83] The Group of Experts then issued a report, making a number of recommendations on the establishment of a tribunal.[84] Negotiations between the UN Secretariat and the Cambodian government began in July 1999. The two sides reached consensus in March 2003 on an agreement to govern the new hybrid tribunal. The UN General Assembly approved the accord in May 2003 and Cambodia passed the law required to implement the agreement in October 2004, paving the way for the actual establishment of the ECCC.[85]

Once agreement had been reached on creating the ECCC, discussions over the funding of the court caused further delay.[86] It was not until July 2006 that the national and international judicial officials of the ECCC were sworn in. Reaching consensus on procedural rules again proved to be time consuming[87]; the Internal Rules of the court were adopted in June 2007. Co-Prosecutors filed the first Introductory Submission at the end of July 2007. Consequently, the Co-Investigating Judges made the first arrest on 31 July 2007 and within four months all five suspects named in the first Introductory Submission were under provisional detention at the ECCC.

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79 See the section 'The Struggle for Accountability'.

80 Skilbeck (2008) 424.

81 It has been told in detail by many. See eg Whitley (2006); Etcheson *Trial* (2006); Donovan (2003); Dyrchs (2008) 53 ff.

82 See eg Skilbeck (2008) 427; Whitley (2006) 51; for general remarks see eg Liebermann (2005); Capeloto (2008); Higonnet (2006); De Bertodano (2006).

83 For an inside account see Ratner *Experts* (1999).

84 Report of the Group of Experts for Cambodia, UN Doc. A/53/850/S/1999/231, 16 March 1999.

85 For concise accounts of the establishment of the ECCC see eg Shraga (2004) 16 ff; Ratner et al (2009) 349 ff; Skilbeck (2008) 424 ff.

86 Skilbeck (2008) 427 ff.

87 Skilbeck (2008) 428.

II. Genocide as a Criminal Offence – Relevant Dogmatic Issues

The case law of international criminal tribunals with regard to the crime of genocide only gives vague indications in respect to important questions raised by the crimes of the Khmer Rouge regime. This first part will try to provide a framework for a more precise understanding of the legal issues that the case of the Khmer Rouge raises and that will be discussed in the second part. Some of the most controversial of these questions directly and indirectly concern genocide's *mens rea*, its mental element. On one hand they include issues regarding genocide's particular intent as well as the relevance of motives and ulterior aims. On the other hand they importantly touch upon the questions of group definition and the group conceptions held by the perpetrators. Finally, the question of how to prove genocidal intent will be taken up.

A. General Notions of the Crime of Genocide

Most of the ambiguities encountered in trying to apply the crime of genocide to factual situations directly stem from its particular structure. In creating genocide as a legal norm, the drafters of the Genocide Convention transcended criminal law's pre-existing categories. Genocide's definition in its current form is an attempt at conceptualizing mass atrocities that are seen as crimes of a different order in comparison to common crimes such as murder or rape. Yet, the legal concepts employed in defining the offense are those developed in response to such ordinary crimes of comparatively smaller scale. The combination of collective and individual characteristics within the crime of genocide creates tensions that lie at the heart of the problems encountered in interpreting and applying it.

1. *Nature of the Crime of Genocide*

Genocide is without a doubt the most prominent of the crimes under international criminal law. Codified in the Genocide Convention after the traumatic events of World War II, it holds a place of unrivaled symbolic importance. Different forums of international criminal justice such as the ICTY and ICTR and most recently the ICC have laid a particular focus on the prosecution of genocide and continue to produce jurisprudence on the matter. The crime of genocide has equally been the subject of ICJ case law and a large body of scholarly debate. Apart from the attention paid to it in legal circles, genocide is ubiquitously referred to in the media coverage of international conflict and mass violence.[88]

[88] See in this respect the discussions in the section 'Introductory Notes on the Crime Genocide'.

And yet, basic questions about the very nature, core features and distinctive characteristics and the position of genocide in the system of international criminal law are unclear and continue to be discussed intensively. Having been placed in a somewhat awkward position at the intersection of collective and individual responsibility[89], the concept of genocide has become the playing field for a broad range of ideas. As one commentator put it, 'although the drafters of the [Genocide]Convention succeeded to some extent in clarifying the crime's definition, they nevertheless produced a text that remains susceptible to remarkably divergent interpretations, with far-reaching implications for the scope of the [Genocide] Convention's application'.[90] Controversy persists on many aspects of the definition of genocide, even and precisely on most fundamental issues.[91]

a) Genocide as a Crime Against Humanity

In applying the crime of genocide, it is important to understand how it relates to other international crimes. One of the controversially debated fundamental issues concerns the question of whether genocide is a crime against humanity and how the two concepts correspond.[92] The distinction between the crime against humanity of persecution and genocide has attracted particular debate, for example in relation to the occurrence of ethnic cleansing in the Balkans.[93] With regard to the question of whether genocide should be considered a crime against humanity it is useful to differentiate between different levels of meaning that the concepts carry. There are on one hand the conceptual connotations of crimes against humanity and genocide, questions of their origin and the broader context they are situated in. On the other hand, there are the aspects of the particular crimes against humanity and the crime of genocide as defined in the conventions and instruments relevant to international criminal law that need to be carefully differentiated in their application.

In the conceptual sense, genocide is seen as belonging to the category of crimes against humanity.[94] Historically, the development of genocide as a distinct crime can clearly be traced back to its origins within the crimes against humanity. At the International Military Tribunal in Nuremberg what would later be called genocide was charged as crimes against humanity.[95] Genocide was not yet perceived as a crime of international criminal law in its own right.[96] In the indictments it was mentioned only as a distinct manifestation of

89 Fletcher and Ohlin (2005) 545 ff.
90 Greenawalt (1999) 2264.
91 See Nersessian *Approaches* (2007) 222 with further references.
92 See also the discussions in the section 'Relevance of Genocide Charges'.
93 See eg Nersessian *Political Groups* (2010) 8 ff; Schabas *Problems* (2001) 293; Mettraux (2006) 246; Schabas *Genocide* (2009) 221 ff.
94 See eg *Kayishema & Ruzindana (TC)* [1999] ICTR para 89; see in this respect also Ambos *Reflections* (2003) 18.
95 Satzger (2009) 248.
96 See Van der Vyver *Prosecution* (1999) 286.

war crimes and crimes against humanity.[97] It was not until after World War II and the Nuremberg Trials that genocide was established as an independent crime in the Genocide Convention.[98] Still, the connections to the crimes against humanity, especially to the crime against humanity of persecution, remain obvious. In their scope, genocide and crimes against humanity are closely linked. Genocide is said to form a special type of crime against humanity rather than an entirely different crime.[99] It has been noted that genocide, while in essence being a crime against humanity, is an 'extreme and the most inhumane form of persecution'[100] and 'established as the most heinous of the heinous'.[101] Similarly, in the *Eichmann* case it was held that 'the "crime against the Jewish people", which constitutes the crime of "genocide", is nothing but the gravest type of "crime against humanity"'.[102]

However, with regard to the more specific sense of genocide and crimes against humanity as particular crimes laid out in the statutes of international criminal tribunals it is important to note that they constitute distinct crimes with distinct characteristics. In that sense, although genocide may be seen as a sub-category of and deriving from crimes against humanity, the concepts should not be muddled together in their actual application.[103] Genocide is, technically speaking, not simply *lex specialis* to crimes against humanity.[104] In its configuration it differs considerably in a whole range of aspects.[105] Genocide and crimes against humanity overlap only when certain fact-specific conditions exist.[106] This issue was addressed by the ICTY Appeals Chamber in the *Krstic* case. In this case, cumulative convictions for genocide and persecution were approved.[107] According to this precedent, depending on the factual background, an offender can properly be convicted of both crimes arising out of the same underlying criminal transaction.[108]

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97 See 'Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 - 1 October 1946' 27-92.

98 Ambos Internationales Strafrecht (2011) 221.

99 See Greenawalt (1999) 2293; Vest *Botschaft* (1999) 352; Nersessian *Approaches* (2007) 244 with further references.

100 *Kupresic (TC)* [2000] ICTY para 636

101 Clark (2001) 91; see also Vest *Herausforderung* (2001) 475.

102 *Eichmann (TC)* [1961] 36 ILR 5 (Isr Distr Ct) 41.

103 Aksar (2003) 213.

104 Werle *Völkerstrafrecht* (2007) 255 ff; see also Vest *Botschaft* (1999) 362.

105 See especially Nersessian *Approaches* (2007); see also Ratner *Evils* (2007) 583; Amann *Expressivism* (2002) 131.

106 Nersessian *Approaches* (2007) 250 ff.

107 *Krstic (AC)* [2004] ICTY para 217; see Nersessian *Approaches* (2007) 250 ff for comments on this decision; see Bogdan (2002) on the question of cumulative charges in international criminal law in general and the case law of the ICTY and ICTR in this respect; see also Bassiouni *Framework* (1998).

108 Nersessian *Approaches* (2007) 222; see also Nersessian *Political Groups* (2010) 161 ff; see Van den Herik (2005) 249 for a discussion of this issue with regard to the case law of the ICTR. See *Duch (TC)* [2010] ECCC para 559 for a discussion of the question of cumulative charges with regard to crimes against humanity and war crimes-

b) **Hierarchical Position**

Closely connected to the question of whether and in what way genocide is a crime against humanity, the issue then arises whether the two concepts stand in a particular hierarchy to each other. Genocide, as understood by a broader public, is generally seen as uniquely, supremely evil.[109] Not only are genocide and crimes against humanity perceived as distinct crimes, but it seems to be accepted that the former is worse than the latter.[110]

Both genocide and crimes against humanity are generally seen to apply to mass atrocities, for which, when moving away from theoretical considerations and looking at the horrendous facts, a comparison of evils can seem pointless and distasteful. In that sense, scholars of human rights law tend to share the opinion that genocide and crimes against humanity are equally bad and stress the equal gravity of findings of crimes against humanity.[111]

From the perspective of international criminal law, questions of hierarchy between core crimes are still being discussed. Different views on the relative gravity of the different crimes subject to international criminal justice have been advanced.[112] Nevertheless, it is a widely accepted position that genocide constitutes 'the crime of crimes'[113], certainly from a symbolic point of view but also because of the harm it addresses[114]. Corresponding to the public notion, the legal concept of genocide is seen as getting 'to the core of something fundamentally worse'.[115] It has been argued that this was the precise reason for separately codifying genocide in the Genocide Convention at the time. While crimes against humanity still required a nexus to armed conflict, genocide was seen as so serious in nature that it justified an international instrument to at least make this particularly heinous crime applicable during peacetime.[116]

Nevertheless, technically the hierarchical relationship between genocide and crimes against humanity is unclear. Neither the statute of the ICTY nor the statue of the ICTR expressly adopts a hierarchy of the crimes.[117] Similarly, the statute of the ICC, while symbolically and systematically putting genocide in a

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109 See eg Amann *Expressivism* (2002) 132.

110 Ratner *Evils* (2007) 583; see, with detailed references, Schabas *Genocide* (2009) 11; Amann *Expressivism* (2002) 124 ff.

111 Ratner *Evils* (2007) 584. See eg the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, UN Doc. S/2005/60 at para 506 which emphasizes the particular gravity of its findings of crimes against humanity. For comments on this issue see also Luban *Name* (2006) 306 ff.

112 See eg Lippman *Genocide* (2001); Bassiouni *Sources* (1999) 67-73; for a legal philosophy perspective see Ratner *Evils* (2007) with further references.

113 See Schabas *Genocide* (2009), a major work in the field of genocide law that carrys the phrase as its secondary title.

114 See eg Bassiouni *Sources* (1999) 97 ff; Behrens (2007) 125; May (2010) 61 ff; see also Nersessian *Approaches* (2007) 222, 262 with further references

115 Ratner *Evils* (2007) 586.

116 Schabas *Whither* 188.

117 Bogdan (2002) 8.

special position, does not formally establish a hierarchy between the crimes within its jurisdiction.[118] Equally, the case law of the international criminal tribunals in that respect does not give a clear picture. The ICTY has generally rejected the notion of ranking crimes in international law.[119] Nevertheless, a number of judges have noted that they hold opposing views on this issue.[120] And the ICTR jurisprudence generally suggests the existence of a hierarchy of genocide, crimes against humanity, and war crimes, in that order[121], again showing the lack of consistency in response to the question.

c) Status as Legal Norm in International Criminal Law

When referring to the crime of genocide, what is generally meant is the crime as defined in the Genocide Convention. The Genocide Convention has been widely accepted and ratified. As of 2010, 141 states have done so.[122] As early as 1951 the ICJ held that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[123] In this sense, genocide as defined in the Genocide Convention is seen as being a norm of customary international law.[124] Beyond that, genocide is also seen as being part of *ius cogens*, ie the peremptory norms of international law from which states may not derogate, even absent a conventional obligation.[125] This was equally affirmed by the ICJ in a more recent decision.[126]

Key elements of the Genocide Convention's definition of the crime have been retained in the statutes of the relevant institutions of international criminal

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118 Satzger (2009) 248.

119 Bogdan (2002) 8; *Furundzija (TC)* [1998] ICTY paras 240-243; *Krstic (TC)* [2001] ICTY para 700; *Kunarac (TC)* [2001] ICTY.

120 *Jelisic (AC)* [2001] ICTY, Partial Dissenting Opinion of Judge Wald para 13; *Jelisic (AC)* [2001] ICTY, Partial Dissenting Opinion of Judge Shahabuddeen para 26. For comments of these opinions see Amann *Expressivism* (2002) 130 and Bogdan (2002) 8.

121 Bogdan (2002) 8; however, in *Kayishema & Ruzindana (TC)* [1999] ICTR para 367 it was held that '… there is no hierarchy of crimes under the Statute…'.

122 See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en> accessed 11 June 2011; see also Nersessian *Political Groups* (2010) 1.

123 ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), ICJ Reports 16, p 23; see Schabas *Genocide* (2009) 3 ff for comments on the possible implications of that statement.

124 See ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 26; see on this issue Ambos *Internationales Strafrecht* (2011) 222; Zahar and Sluiter (2007) 156; Schabas *Genocide* (2009)3 ff; Starkman (1984) 13 ff; Fletcher and Ohlin (2005) present a critical view of the role of customary international law in a criminal context.

125 See eg Satzger (2009) 249; Schabas *Genocide* (2009) 4; Ambos *Internationales Strafrecht* (2011) 222; Cherkassky (2008) 114, each with further references.

126 ICJ *Case Concerning Armed Activites on the Territory of the Congo* (New Application 2002)(Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para 64; for detailed comments with regard to this issue see Wouters (2005).

justice. Article II of the Genocide Convention was exactly reproduced in the ICTY and ICTR Statutes.[127] The ICC Statute, which entered into force on 1 July 2002, equally includes the Genocide Convention's definition without modification.[128] On the whole, the relative uniformity of international criminal law with respect to crime of genocide extends to individual states' adoption of genocide provisions into national legislation.[129]

At the same time, genocide as defined in the Genocide Convention has attracted a lot of criticism as soon as it came into being.[130] Calls for the development of genocide as a legal norm and the need for a contemporary definition are regularly voiced.[131] Attempts in evolving the crime have been made in national adaptations of genocide.[132] Equally, it has been argued that the crime of genocide as covered by customary international law goes beyond what is defined in the Genocide Convention.[133] Nevertheless, the most important factor in the development of genocide as a legal norm has been the establishment of the ICC.[134] While retaining the Genocide Convention's definition, the Rome Statute adds to the debate regarding the definition of genocide in its Elements of Crimes[135]. The Elements of Crimes complement the ICC Statute and were adopted to assist the Court in the interpretation of articles 6, 7, and 8 of the ICC Statute which deal with genocide, crimes against humanity and war crimes. The Elements of Crimes favour interpretations of the norm of genocide that are controversial in parts. Their status and relationship to other legal sources is not entirely clear yet.[136] What is certain is that the ICC and its statute and accompanying materials act as an extremely important catalyst of discussions surrounding the crimes under its jurisdiction and international

127 Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993), annex, art 4; Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), annex, art 2.

128 Rome Statute of the International Criminal Court (2002), art 6.

129 See Schabas *Genocide* (2009) 5 ff and Nersessian *Political Groups* (2010) 112 ff for a detailed description of genocide provisions in national legislations.

130 See eg Nersessian *Approaches* (2007) 223 with detailed references.

131 Ratner *Evils* (2007) 589.

132 Most notably by France in its penal code; see Nersessian *Political Groups* (2010) 112 ff.

133 Van Schaack *Blind Spot* (2007) 2274; see on this issue also Wouters (2005) 403 ff; critical in this respect Fletcher and Ohlin (2005) 556 ff.

134 See Mettraux (2006) 202 ff.

135 ICC-ASP/1/3 (part II-B); The Elements of Crimes have been adopted according to art 9 (1) of the ICC Statute which provides that: 'Elements of Crimes shall assist the Court in the interpretation and application of articles 6,7, and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties'.

136 This issue was brought up in ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009; see Cryer (2009) 290 and Kress *Genocide* (2009) for a detailed discussion. For general discussions with regard to the Rome Statute's definition of genocide, genocide in the Elements of Crime and related issues see eg Kress *Elements* (2007); Van der Vyver *Mens Rea* (2004); Werle and Jessberger (2005); Ambos *Reflections* (2003); Arnold (2003); Mettraux (2006) 204.

criminal law in general that are of massive importance with regard to the perception of genocide as a crime.

For a long time after its coming into force, the Genocide Convention was not applied in judicial proceedings.[137] It was not until 1998 that with the ICTR's judgement in *Akayesu* the first judicial decision on the crime was reached by an international tribunal.[138] Up to that point, most of the theoretical developments with regard to the crime of genocide took place in academic debate and in UN special committees.[139] Until the ICTY and ICTR were created in 1993 and 1994, respectively, no international body competent to render such decisions existed. At the same time, domestic courts of states party to the Genocide Convention were reluctant to prosecute people suspected of having committed genocide.[140]

In important first steps, the ICTY and ICTR created case law with regard to genocide that still dominates the current discussions. They have 'turned much of international law from paper into reality'.[141] Since the definition of the crime of genocide applied by the bodies of the ICTY and the ICTY follows that of the Genocide Convention, the interpretation of the tribunals' statutes is generally taken as persuasive evidence of a plausible interpretation of the Genocide Convention.[142] Those first steps into largely uncharted legal territory were taken by institutions which were themselves novel and which worked under considerable political pressure. The resulting jurisprudence, the bulk of it stemming from the ICTR, is of debateable quality and shows a range of weaknesses and inconsistencies.[143] A particular criticism often repeated has been that of judicial law-making beyond what the conventional texts provide for.[144] In this respect, applied genocide law very much remains in its 'infancy'.[145] This needs to be kept in mind when the case law is considered.

The ICTY and ICTR continue to produce jurisprudence which, to some extent, consolidates and reviews principles of genocide law set out in earlier decisions. At the same time, a small body of case law stemming from the ICJ has added facets to the discussions[146] and there have also been a growing number

137 See Starkman (1984), providing an example of the efforts made to make the prosecution of genocide a reality.
138 See *Akayesu (TC)* [1998] ICTR.
139 See Nersessian *Contours* (2002) 235 with further references.
140 Nersessian *Contours* (2002) 235.
141 Mettraux (2006) 199, with further commentary on this issue.
142 Nersessian *Contours* (2002) 242; Mysliwiec (2009) 393.
143 See Zahar and Sluiter (2007) 157 ff for a more detailed analysis. See also Greenawalt (1999) 2263.
144 See eg Mettraux (2006) 207.
145 Zahar and Sluiter (2007) 178; on the development of the legal concept of genocide in general see also Van den Herik (2005) 88 ff.
146 In particular the ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007.

of genocide prosecutions under national law.[147] Meanwhile, it is expected that the ICC and its case law will have the most important impact on future developments of genocide law and its interpretation.[148] It is hoped that the ICC's jurisprudence will help further untie genocide law from the very particular historical contexts that the present case law is linked to.

2. *Basic Structure and Characteristics of the Crime of Genocide*

The crime of genocide as defined in the Genocide Convention has a structure that, while borrowing from well-known concepts of criminal law, is not known in domestic criminal law otherwise.[149] As pointed out before, the definition of the crime places it at an intersection of collective and individual responsibility.[150] While on one hand it is shaped along the lines of a traditional crime committed by an individual, on the other hand its mental element refers to a context of collective action.[151] At the same time, genocide also includes another element of reference to a collective context by primarily aiming to protect groups of people. Again, this highlights genocide's position between the paradigms of individual responsibility under criminal law and collective responsibility under international law.[152]

Most of the problems in applying the crime of genocide stem from its particular structure which allows for a wide range of interpretations.[153] The inherent contradictions and inconsistencies resulting from forging together elements of individual and collective responsibility give rise to a number of specific characteristics and issues such as the questions regarding specific intent and those regarding the protected groups. In discussing these issues, it is important to keep in mind the underlying structural issues because most of the central questions can be traced back to genocide's particular structure. And because the structure of genocide is subject to a lot of controversy, discussions tend to not only focus on what the elements of genocide are but also on what they should be.

a) **Structure**

Within the crime of genocide, three specific elements can be distinguished.[154] These elements include the genocidal act, the corresponding *mens rea* and the intent to destroy a group. Generally, the two components of the subjective part

147 See Strippoli (2009); Schabas *National Courts* (2003) 39 ff.
148 Genocide already came into the spotlight in ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009.
149 See Vest *Structure* (2007) 784, 793.
150 Fletcher and Ohlin (2005) 545 ff.
151 Vest *Structure* (2007) 786.
152 See Fletcher and Ohlin (2005) 545.
153 See in this respect Greenawalt (1999) 2264.
154 Ambos Internationales Strafrecht (2011) 223.

of the crime, the *mens rea* corresponding to the genocidal act and the intent to destroy a group, are looked at separately.[155] Some commentators, however, insist that those should be looked at as both forming part of an overarching genocidal *mens rea.*[156] Either way, it is the intent to destroy a group, the element of crime which goes beyond the material side of the underlying act[157], which marks the particular structure of the crime of genocide. Inasmuch as genocide contains such an extra subjective criterion, it resembles domestic crimes in which the perpetrator seeks to produce a specific consequence through his act.[158] Common Law larceny, for example, requires the taking and carrying away of the property of another for which the defendant's mental state must be established, but in addition it must be shown that there was an 'intent to steal' the property.[159] However, genocide's extra subjective element goes beyond what is known in national criminal law because here the intent to destroy a group is not only referring to the result of the individual action but also to the conduct and result of a collective action.[160] The intent to destroy in that way carries the connection to the collective context that does not form part of the genocidal act.[161]

155 See eg Mettraux (2006) 208; Triffterer (2001) 399; Satzger (2009) 250; Ambos *Intent* (2009) 834.

156 See eg Mundorff (2009) 94; see Arnold (2003) 127 for further references with regard to this issue.

157 Vest *Structure* (2007) 783.

158 See Ambos *Internationales Strafrecht* (2011) 234; Ambos *Reflections* (2003) 18; Vest *Structure* (2007) 784 with further references.

159 LaFave (2003) 169 ff.

160 Vest *Structure* (2007) 784; see also Kress *Darfur* (2005) 572 ff who seems to follow this approach in essence; see further Jones (2003) 479 who seems to suggest that the intent to destroy a group *only* refers to the collective action. In this respect see also Ambos *Intent* (2009) 841.

161 Ambos *Internationales Strafrecht* (2011) 234; this idea was introduced by Hans Vest, see Vest *Botschaft* (1999) and Vest *Machtapparate* (2002), and later restated by eg Lüders (2004) 93 ff.

b) Intended Group Destruction

While discussions with regard to the structure of genocide remain[162], it is undisputed that the intent to destroy a group inherent to genocide is its central feature. This 'goal of group destruction is why genocide is at the apex of contemptible crimes'.[163] It is this feature which most clearly distinguishes genocide from crimes against humanity.[164] Just as genocide, the crime against humanity of persecution can require an extended mental element. However, where the crime against humanity of persecution requires intent to discriminate on prohibited grounds, genocide requires the further reaching intent to destroy a group.[165] In this way, the *mens rea* of genocide is more narrowly defined. Genocide has thus been described as an 'extreme and the most inhumane form of persecution'.[166] The crime of genocide does not stand merely for bias against a group but for the ambition to eliminate it.[167] As mentioned, that is the feature which makes genocide stand out.[168] It is what marks the fundamental point of differentiation.[169]

c) Object of Protection

Mirroring the fact that the intent to destroy a group is the distinguishing element of genocide is the fact that groups are the main object of protection of genocide as a criminal offence. The distinctive feature of genocide can in that way also be seen as lying in the group aspect of the victims.[170] The main objects of protection of genocide are groups.[171] That is, the main protected social interest is the sanctity of the group.[172] In respect to genocide, groups are not seen merely as an aggregation of individuals. Groups must be targeted as separate and distinct entities. It is not enough that individuals are targeted for their membership in a group.[173] 'Genocide is a crime directed at groups viewed as collective entities, with a moral dignity of their own.'[174] Again, mir-

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162 See eg Ambos *Internationales Strafrecht* (2011) 223 with regard to the number of structural elements genocide comprises.

163 Wald *Prosecuting* (2006) 87.

164 Aksar (2003) 213.

165 See Nersessian *Approaches* (2007) 258, 243 with further references. See on the issue also Schabas *Genocide* (2009) 261 ff with further references.

166 *Kupresic (TC)* [2000] ICTY para 636; see also Ambos *Reflections* (2003) 18 with further references.

167 Fletcher (2002) 68.

168 Haque (2005) 308.

169 Vest *Botschaft* (1999) 358.

170 See Simon *Genocide* (2007) 93.

171 Vest *Herausforderung* (2001) 476; see in this respect also Hopkins (2010) 33 ff.

172 Bassiouni *Framework* (1998) 212; Bogdan (2002) 7. Discussions exist with regard to the exact interests protected by the criminal provision, something which is of particular interest to lawyers of German speaking legal traditions that operate with this concept. See Demko (2009) 224 and Satzger (2009) 249 for a summary of the debate and further references.

173 Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996), 88.

174 Luban *Theory* (2004) 97; see in this respect also *Sikirica et al. (TC)* [2001] ICTY Judgment on Defense Motion to Acquit, 3 September 2001, 89.

roring the discussion regarding the intended destruction of a group, it is the group as targeted entity that drives the understanding that genocide is uniquely evil.[175] Individuals are protected only derivatively as group members since the destruction of groups requires the commission of crimes against its members.[176] With regard to the crime of genocide, the acts committed against individuals are not looked at *per se* but as acts against members of a group to which they belong.[177]

d) **Inchoate Offense**

Genocide is generally considered to be an inchoate offence. In contrast to result-oriented offences which require the prohibited conduct to achieve a specified injury, inchoate offences are defined as being committed with a particular mental state, regardless of whether the prohibited injury actually occurs.[178] For genocide, this follows out of the structure of the crime, comprising an extended mental element, an intent that goes beyond the commission of the underlying genocidal act. One of the aims behind the Genocide Convention is to criminalize genocidal intent as soon as it becomes manifest in an act, if possible at the first instance.[179] The criminal action is to be addressed before the perpetrators realize their intent and before the full harm, ie the destruction of a group, is done.[180] With the aim of the provision being the protection of groups this is clearly mandated. It is an expression of the purpose of prevention of the Genocide Convention.[181] For genocide, the possible incompleteness of the result lies in the destruction of the group, not in the harm resulting from a genocidal act against an individual member of the group. It has therefore been called an inchoate offence vis-à-vis the protected groups.[182] Hence, it is the success with regard to the intended group destruction which is irrelevant for the completion of the crime.[183]

3. *Structural Elements*

As mentioned above, the crime of genocide can be seen to be made up of three distinct elements. In the following section, these elements will summarily be discussed. Genocidal intent in its different facets will be given a closer look subsequently.

a) **Physical Element**

While mass killings are certainly what is most closely associated with the crime of genocide, the crime of genocide as defined in the Genocide Conven-

175 Amann *Expressivism* (2002) 132.
176 Nersessian *Approaches* (2007) 245; Gil Gil (2000) 396.
177 Robinson (1956) 58; for a more detailed enquiry into this question see May (2010) 61 ff.
178 See Ashworth *Harm* (1987) 7 ff.
179 Triffterer (2001) 401.
180 Triffterer (2001) 401.
181 Schabas *Genocide* (2009) 308.
182 Nersessian *Edge* (2003) 298; Nersessian *Approaches* (2007) 223.
183 Triffterer (2001) 402; see also Gil Gil (2000) 394 ff and Jessberger (2009) 107.

tion comprises a wider range of acts that are seen to lead to the destruction of groups. The *actus reus* or physical element of genocide is limited to certain underlying offences as defined in article II of the Genocide Convention:

> *(a) Killing members of the group;*
>
> *(b) Causing serious bodily or mental harm to members of the group;*
>
> *(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
>
> *(d) Imposing measures intended to prevent births within the group;*
>
> *(e) Forcibly transferring children of the group to another group.*

This list of acts is of exhaustive character.[184] Only the five listed acts can, together with the other elements required, form the crime of genocide.[185] This being said, letters (b), (c) and (d) are not so much descriptive of particular acts but can be seen as categories of acts or setting out a threshold of intensity and harm that conduct has to reach in order to qualify as a possible genocidal act. While not being discrete underlying offences, a broad range of actions can make up the underlying acts of genocide.[186] As the case law shows, rape[187], torture, acts of ethnic cleansing and the starvation of a civilian population can all form the basis of genocide.[188] Acts of genocide, though subsumed under one or more of the categories named in the Genocide Convention, may take considerably different shapes and occur in different patterns depending on the particular context.[189]

It forms part of the physical element of genocide that the victim of the genocidal act is a member of one of the protected groups. The conduct forming the *actus reus* must therefore be directed at members of the targeted group.[190] It is important to note, though, that with regard to the groups genocide is an inchoate offence.[191] While the crime of genocide invokes images of mass killings, for the completion of the physical element of the crime a certain extent of the

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184 See eg Schabas *Genocide* (2009) 174 ff with an overview of the origins of the listed acts; Mettraux (2006) 243 ff.

185 See for detailed commentary with extensive reference to the relevant case law eg Schabas *Genocide* (2009) 178 ff; Ambos *Internationales Strafrecht* (2011) 224; Nersessian *Contours* (2002) 257 ff; Mettraux (2006) 236 ff; Jessberger (2009) 94 ff.

186 Mettraux (2006) 244.

187 This has become the subject of intense debate; see for example Zahar and Sluiter (2007) 170 with further references. See on sexual violence as an act of genocide in detail Short (2002).

188 See, with further references, Van der Vyver *Prosecution* (1999) 299.

189 Questions with regard to so called 'cultural genocide' as opposed to physical or biological genocide are sometimes discussed in relation to genocidal acts. These questions, however, tend to be not so much an issue of the underlying genocidal acts but of the intended destruction. See in this respect the discussions in the section 'Intended Destruction'.

190 See eg Ambos *Internationales Strafrecht* (2011) 223f; Vest *Herausforderung* (2001) 479.

191 See the discussion in the section 'Inchoate Offence'.

genocidal acts or impact on the targeted group is not relevant. With regard to the underlying offence, however, three of the five acts listed in the Genocide Convention require proof of a result.[192] For the killing of members of the group under (a), the ICC Elements of Crimes in article 6(a) see one killing as sufficient while some commentators point out that a plain reading of the text of the Genocide Convention suggests a requirement of the killing of at least two members of the group.[193]

b) Mental Element Corresponding to the Actus Reus

As mentioned, there are two subjective elements, the mental state corresponding to the *actus reus* and the intent to destroy a group.[194] Though they can overlap, they have different points of reference[195]. The mental element, or *mens rea*, corresponding to the *actus reus* covers the objective elements of the crime. It answers the question of whether the perpetrator meant to engage in the conduct that makes up the genocidal act[196], the concrete actions that are at the base of the crime of genocide. In this respect, it has to cover both the conduct as well as the fact that the victim is attacked by the perpetrator in its capacity as a member of a targeted group.

The text of the Genocide Convention does not give clear indications towards the issue of how to construe the mental element that corresponds to the *actus reus*.[197] Some commentators have argued that reckless or negligent commission of the underlying acts would suffice.[198] Generally, though, the interpretative trend has been to require each genocidal act to involve an independent criminal wrongdoing[199]. This means that with regard to the underlying offence, the perpetrator must act with intent[200]. This was confirmed in *Krstic* where it was held that genocide 'requires proof of intent to commit the underlying act'.[201]

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192 Schabas *Genocide* (2009) 177.

193 See eg Ambos *Internationales Strafrecht* (2011) 226; Vest *Herausforderung* (2001) 477 with further references.

194 See the section 'Structural Elements'.

195 Triffterer (2001) 403; this issue has been touched upon in the jurisprudence of the ICC with regard to the relationship between art 6 and art 30 ICC Statute; see ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, para 139.

196 Mental element as described in article 30 of the ICC Statute.

197 Greenawalt (1999) 2270, 2279.

198 In particular Nersessian *Contours* (2002) 270 ff who argues that intent for the *actus reus* is not necessary. Along the same lines Triffterer (2001) 403 and Greenawalt (1999) 2292. Schabas *Genocide* (2009) 253 seems to see reckless commission of the genocidal act as sufficient.

199 Greenawalt (1999) 2291; see eg Mettraux (2006) 236; Arnold (2003) 143; Ambos *Internationales Strafrecht* (2011) 231.

200 Vest *Structure* (2007) 785.

201 *Krstic (AC)* [2004] ICTY para 20; in respect of the genocidal act of killing members of a group, this principle has been set out by the jurisprudence of the ICTR which made clear that the death must have been caused intentionally and that involuntary or negligent

c) Intent to Destroy a Group

As mentioned above, genocide is structurally somewhat unique because of the particular intent requirement.[202] The intent to destroy a group is an extra subjective element. It does not correspond directly to the *actus reus*.[203] In this respect, it corresponds well to certain offences under domestic criminal law.[204] However, not only does the intent to destroy a group refer to something which goes beyond the underlying offence, it is in itself referring to two different things. The intent to destroy a group is said to have a mixed individual-collective point of reference.[205] On one hand, it must be established that the perpetrator possessed genocidal intent in relation to the underlying offence for which he is charged, ie the perpetrator must have intended to destroy a group or further the destruction of a group through his act.[206] On the other hand, the intent to destroy a group goes beyond the consequences of the conduct of the individual perpetrator.[207] The acts of the perpetrator may and normally will not be sufficient to bring about the intended destruction.[208] The extended subjective element also refers to the overall context of the collective action.[209]

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homicide would not qualify as 'killing' for the purpose of genocide. See in this respect and with extensive reference to the case law Mettraux (2006) 236 ff.

202 See the section 'Structural Elements'.

203 Triffterer (2001) 401.

204 See the section 'Structural Elements'; with regard to this issue see also Schabas *Genocide* (2009) 260.

205 Vest *Structure* (2007) 781, 785.

206 Mettraux (2006) 236; Vest *Herausforderung* (2001) 481 ff.

207 Vest *Structure* (2007) 784; see in this respect also Ambos *Intent* (2009) 841.

208 Triffterer (2001) 403; see also Vest *Structure* (2007) 789 ff.

209 Vest *Structure* (2007) 784, 785; see the discussion in the section 'Reference to Collective Acts'.

B. A CLOSER LOOK AT INTENT

As seen, its particular intent element is of central importance to the crime of genocide. The interpretation of the exact requirements of genocidal intent raises a number of issues concerning the very essence of genocide as a criminal offence. Intent as a concept of criminal law is in itself subject to important ambiguities. These ambiguities manifest in the discussions regarding genocidal intent. The contours of the concept of intent under criminal law will therefore be looked at separately before getting into a more detailed analysis of its role and for the crime of genocide. The discussions with regard to genocidal intent offer an important first perspective on the question of the significance of motivations and ulterior aims that are particularly relevant for the case of the Khmer Rouge. The issue will further be explored subsequently in the remarks regarding the role of motive.

1. *THE CONCEPT OF INTENT*

The concept of intent and its corresponding notions have formed an integral part of criminal law doctrine of both civil and common law countries for a long time.[210] For many offences, the presence of intent is a condition of criminal responsibility. Nevertheless, the concept of intent has proven difficult to define and has been given different meanings in different contexts.[211] Its proper definition remains subject to debate and disagreement[212], even on the level of national criminal law. The concept of intent thus carries a multiplicity of meanings, further complicating discussions in international criminal law which draw on sources from varied backgrounds and diverse legal contexts.

a) **Paradigm and Connotations**

The paradigm commonly thought to underlie the different notions of intent is that of 'self-determined action'. Intent 'connotes a state of affairs which the party "intending" ... does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about'.[213] On a basic level it is said that 'one intends consequences that one chooses to produce'.[214]

However, intent carries an additional connotation of not only choosing to produce a result but also desiring the state that is to be brought about.[215] This extends the notion of intent substantially. The decision to bring about and the

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210 See eg Ashworth *Principles* (2009) 170 ff.

211 See Herring (2009) 64; see also Triffterer (2001) 404.

212 Ashworth *Principles* (2009) 171.

213 Lord Asquith in *Cunliffe v Goodman* [1950] 2 KB 237, 253 (CA), see in this respect Herring (2010) 142.

214 Ashworth *Principles* (2009) 172 with further detail on this aspect.

215 See LaFave (2003) 162; see also Vest *Structure* (2007) 787. Civil Law usually takes the combination of a volitional and cognitive element as a starting point. This approach has also found its way into the ICC Statute in Article 30 which uses the terms 'intent and knowledge'.

desire to bring about a certain consequence are two quite different things that need not necessarily coincide. In other words, it is possible to decide to bring about a consequence without desiring it.[216] Different consequences can be attached to the two connotations. On a basic level of determining criminal responsibility, where there is a decision to bring about a result, the question of whether the result is also desired is generally deemed irrelevant.

The concept of intent carrying notions of both cognitive and volitional nature has been at the core of a lot of the discussions regarding its adequate interpretation. In most cases, the normal, everyday understanding of the word intent which generally includes a notion of volition does not interfere with legal analysis. There, the decision and desire to bring about a result are both present and the need to distinguish between the two does not arise. But from a legal perspective there are more complex cases where someone decides to bring about a consequence without desiring that particular consequence, either because it is a mere means to a desired end or because it arises as a mere side effect of a desired result.[217] While falling under the basic paradigm of 'deciding to bring about', these cases stretch the normal understanding of intent to its limits.[218]

b) **Comparative Perspective**

The definition and delimitation of intent and associated concepts show a wide range of differences in national legal systems[219]. Two approaches to the term intent that have importantly shaped the discussions on genocide's particular mental element are the differentiation of intent and knowledge found in the Model Penal Code and the concept of *dolus directus* of the German doctrine. The Model Penal Code strictly differentiates between a volitional mens rea element, the 'purpose', and a cognitive mens rea element, the 'knowledge'.[220] The concept of *dolus directus,* in contrast, combines volitional and cognitive elements and differentiates among degrees of intentionality. What is referred to as *dolus directus of the first degree* covers the conscious goal of the perpetrator as well as necessary preconditions to that goal. *Dolus directus of the second degree* is seen to cover not only what is seen by the perpetrator to constitute necessary preconditions but also the invevitable consequences to his conscious goal.[221]

The comparison of the different concepts of intent among Civil Law and Common Law jurisdictions shows some important similarities with respect to the

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216 Herring (2010) 143.
217 See Herring (2009) 65; Herring (2010) 141.
218 See Herring (2010) 184.
219 Ambos *Internationales Strafrecht* (2011) 233f.
220 See eg Dressler (2006) 150 f.
221 See Ambos *Intent* (2009) 844, Vest *Structure* (2007) 788.

core notion of intent as well.[222] Generally, the meaning of intent is construed to lie within the paradigm of 'deciding to bring about', limiting the importance of a volitional component where a consequence is chosen to be produced. This is done by either defining intent in this way or by separately defining the mental states compounded in the normal understanding of intent.[223] There are three consequences that follow from this basic differentiation. Firstly, it is generally recognised that intent covers both the desired end as well as the means necessary to that end. Secondly, intent is also recognised to cover certain consequences or side-effects of a desired result. Thirdly, it is understood that the voluntative and cognitive components of intent need not be present cumulatively to satisfy the intent requirement. These three aspects will be discussed briefly in the following.

(1) *Intent Covers Ends and Means*

'Where the means are necessary to the desired end, and knowingly undertaken in that light, it is argued that the individual intends the means as well as the ends.'[224] Put more bluntly, intent is said to include the means and the end.[225] This flows directly out of the paradigm which holds that one is said to intend consequences one chooses to produce. It is, however, a departure from a concept of intent that is based on a volitional element in the form of a strict desire to produce a certain result. But for means-ends relationships the case for taking a broader view of intention is particularly strong where the desired result is inseparably bound to a foreseen though possibly undesired side-effect of that result.[226] With respect to intent it is thus assumed that whether a result is seen as the goal itself or the precondition to another goal is irrelevant.[227] Ultimate aim is regarded as motive or reason for acting and is, as such, seen as irrelevant to legal liability.[228] All levels of action on the way to the intended result are said to be covered by intent.[229]

(2) *Intent Includes 'Oblique Intent'*

There has been a great measure of discussions over whether a result which 'is not the actor's purpose, but which was foreseen by him, can be said to be intended by him'.[230] These situations have been labeled 'non-purpose intention',

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222 See for a detailed comparative analysis eg Roßkopf (2007) 16 ff; see also Ambos *Intent* (2009) 842 ff.

223 This is the approach taken in the US Model Penal Code, see in this respect LaFave (2003) 164.

224 Norrie (2002) 47-50.

225 Heaton (2006) 52

226 Williams *Oblique Intent* (1987) 424.

227 Vest *Herausforderung* (2001) 482 ff; see also Ambos *Internationales Strafrecht* (2011) 233 ff and Heaton (2006) 52.

228 Heaton (2006) 52.

229 See Vest *Herausforderung* (2001) 483. See also the discussions in the section 'Motive'.

230 Herring (2010) 184.

'indirect intention'[231] and, most prominently, 'oblique intention'.[232] Mirroring the fact that preconditions to a goal are seen to be covered by intent, consequences to an intended goal are also generally considered to be intentional[233]. 'Where the side-effect is known to be a certain by-product of achieving one's purpose it is argued that one intends the side effect in addition to the purpose'.[234] In a broad sense, both Common Law and Civil Law take foresight of certainty of a consequence as intent.[235] Under traditional Common Law doctrine 'criminal perpetrators intended the consequences of their actions if they knew to a practical certainty what the consequences of those actions would be, regardless of whether or not they deliberately sought to realize those consequences'.[236] A similar approach has also been chosen for the definition of intent in the general principles of criminal law in the ICC Statute. In article 30 paragraph 2 (b) of the ICC Statute it is determined that a person has intent if 'In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'.[237]

(3) *Volitional and Cognitive Elements Need Not Be Present Cumulatively*

As described above, intent is normally characterized by two elements, the desire to bring about a certain result and the foreseeing of the result of one's actions. However, it is important to note that those volitional and cognitive elements of intent need not be present cumulatively with regard to the result in question to be qualified as criminal intent.[238] Oblique intent describes the situation where a perpetrator only foresees the result of his actions without desiring it, ie where only the cognitive element is present. As seen, this is considered to be covered by intent. Equally, in a situation in which the perpetrator desires to achieve a certain purpose, the perceived likelihood of him achieving that purpose through his conduct is generally seen as irrelevant for establishing the intentionality of his acts.[239]

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231 Heaton (2006) 52; see for more detail on this issue and further sources Vest *Structure* (2007) 189 ff.

232 Williams *Oblique Intent* (1987).

233 It is interesting to note that means to and side-effects of an intended results are not always treated equally. See in this respect Kugler (2002) 37 ff who also offers a more in-depth analysis of oblique intent and its relevance.

234 Norrie (2002) 47-50.

235 See eg Vest *Structure* (2007) 789 ff; Greenawalt (1999) 2266; see also Park *Intent* (2010) 161 for further references.

236 Greenawalt (1999) 2266; for an overview of English case law on this question see Herring (2010) 143 ff.

237 See on the definition of intent in the ICC statute and its implications Van der Vyver *Mens Rea* (2004); Werle and Jessberger (2005); Ambos *Reflections* (2003); Arnold (2003).

238 See Roßkopf (2007) 66 with further references. See also Vest *Structure* (2007) 787.

239 See eg LaFave (2003) 162 ff and Heaton (2006) 51.

c) Delimitation and Differentiation of Intent

Intent is distinguished from other mental states that can make up the subjective side or *mens rea* of a crime such as recklessness and negligence.[240] It is also distinguished from subjective factors that are normally deemed not directly relevant for criminal responsibility such as motive.[241] Further, several degrees or sub-categories of intent are differentiated. The delimitations and differentiations used in the different national criminal law doctrines do not necessarily correspond.[242] There is a wide range of varying terminology stemming from national doctrine that is used in discussing problems of international criminal law which creates particular difficulties when approaching highly technical questions.[243] One such question which is often discussed and referred to with regard to the mental element of the crime of genocide is that of special or specific intent. Specific intent is seen as a particular notion of intent, but its distinct meaning remains somewhat unclear.[244] It will be discussed in the following remarks.

d) Specific Intent

The concept of specific or special intent is often used when discussing questions surrounding the crime of genocide. International Tribunals have relied on it to describe the law as they see it applicable.[245] Nevertheless, the use of terminology remains inconsistent and the exact meaning of specific or special intent in international criminal law is unclear.[246] This partially stems from the fact that it takes variable meanings even on the level of national criminal law. Both in Common Law jurisdictions[247] but also in Civil Law jurisdictions the concepts of specific or special intent in the sense of *dolus specialis* are partially disputed.[248] When operating with the terms 'special intent', 'specific intent' and *dolus specialis* it is therefore important to clarify what meaning is assigned to the term used.

Specific intent is sometimes used in Common Law to distinguish offences of general or basic intent.[249] One view is that 'offences of specific intent are those which have intention as their mens rea; whereas crimes of basic intent are

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240 See eg Herring (2010) 166; Lewy (2007). For a comparison of Civil Law and Common Law concepts see Vest *Herausforderung* (2001) 471. For a French perspective on on intent in international criminal law see Elliot (2000).

241 See for the discussion regarding the delimitation of intent and motive the section 'Motive'.

242 See eg the table in Arnold (2003) 130; see also Van der Vyver *Mens Rea* (2004) 63 who points out that *dolus eventualis* and negligence do not correspond exactly.

243 Nersessian *Contours* (2002) 263.

244 See Triffterer (2001) 404.

245 See eg *Akayesu (TC)* [1998] ICTR para 498.

246 Ambos *Intent* (2009) 836.

247 For American criminal law see LaFave (2003) 168 ff; for English criminal law see Heaton (2006) 63.

248 Triffterer (2001) 404; see on the usage of the term in Civil Law systems also Jørgensen *Definition* (2001) 48.

249 Schabas *Genocide* (2009) 260.

those which require recklessness'.[250] In this interpretation, criminal intent takes the general notion of mens rea while specific intent is limited to the one mental state of intent.[251] 'Special intent crimes' in this understanding would be those that require intent as opposed to recklessness or negligence.

Special or specific intent has also been used to describe crimes that have an extended mental element.[252] In that sense, specific intent crimes include an intent that goes beyond the conduct or result that constitutes the *actus reus* of the offence.[253] The terms 'special' or 'specific' in that case refer to the additional mental element of the offence which has no counterpart in the actus reus, without necessarily qualifying the degree of intent required.[254]

In a different usage yet, specific intent is used to distinguish particular notions of intent-based liability. In this view, specific intent crimes attach liability 'only to perpetrators whose actual aim or purpose is to realize certain forbidden consequences'.[255] Specific intent in that sense would require 'proof that the actor's conscious object, or purpose, is to cause the social harm set out in the definition of the offence'.[256] Specific intent offences in this sense are thus defined to require proof of an ulterior intent as part of the mens rea.[257]

2. *Concept of Intent for the Crime of Genocide*

'Sometimes the intent is the essence of the offence'.[258] This seems to hold particularly true for the crime of genocide for which the intent to destroy a group is the central feature by definition. As seen, the concept of intent can take different meanings in different contexts and encompasses a wide range of different notions. This equally applies to genocidal intent. On one hand, discussions of the concept of intent for the crime of genocide mirror the controversies surrounding intent in general. On the other hand, the unclear terminology of intent applied to the crime of genocide with its particular structure creates even more ambiguities. In the Genocide Convention itself, a precise definition of the mental elements was left unresolved. Investigations into the origins and drafting of the Genocide Convention do not provide answers either but further point to the vagueness of the treaty's provisions regarding the *mens rea*.[259]

On closer inspection, the *mens rea* element of the crime of genocide is much more complex than is normally realized.[260] It is not surprising, then, that the

250 Herring (2010) 169.
251 LaFave (2003) 169.
252 See the discussions in section 'Structural Elements'.
253 Dressler (2006) 147.
254 See LaFave (2003) 169 with examples.
255 Greenawalt (1999) 2266.
256 Dressler (2006) 1147.
257 Heaton (2006) 60.
258 Ashworth *Principles* (2009) 170.
259 Greenawalt (1999) 2270, 2279.
260 May (2010) 124.

concept of intent with regard to the crime of genocide has been subject to intense dogmatic debate. While some of the more technical questions seem to be of limited practical relevance, questions of genocidal intent and its particular requirements do touch on genocide's very foundation and symbolic importance. They also shape the approach to practically highly relevant questions such as necessary elements of proof.

There are two aspects to the issue of genocidal intent that will be focused on in the following discussion. The first is the more abstract question of the degree of intent required for the crime of genocide. The second is the question of how to reconcile the concept of intent with genocide's partially collective nature, ie questions regarding the individual and collective nature of intent and possible references to a collective context. Both of these aspects deal with the extended mental element of genocide and not the mental element which solely corresponds to the *actus reus*.[261] Further reaching questions regarding consistency of intent and standards of knowledge will be explored in the section on the proof of genocidal intent.[262]

a) Required Degree of Intent for 'Intent to Destroy'

One of the issues most hotly debated with regard to genocidal intent is that of the degree of intent required. This issue has received considerable attention in the case law of the international criminal tribunals but important aspects remain unclear.[263] Two aspects of this issue are, firstly, whether and in what sense genocide is a 'special intent crime' and secondly whether genocide can be committed recklessly. These questions and their possible practical implications will be dealt with in the following section.

There is a further issue regarding the standard of intent required for the crime of genocide that has received attention in the case law and scholarly work. As discussed before, genocide has characteristics of a collective crime and is normally being perpetrated in a context of systematic and organized actions. Nevertheless, genocide is not a crime that can only be committed by certain categories of persons. It may, in principle, be committed by any individual. Still, questions arise with regard to the *mens rea* requirements for genocide at different hierarchical levels and for different degrees of involvement. This includes questions relating to the standard of intent required for superiors in relation to the executors of genocidal acts[264] and the responsibility of military commanders and civil leaders under the concept of command responsibili-

261 See the section 'Mental Element Corresponding to the Actus Reus'.
262 See the section 'Proving Genocidal Intent'.
263 Ambos *Internationales* Strafrecht (2011) 235 f.
264 See in this respect Ambos *Intent* (2009) 846 who suggests that there should infact be different standards of intent for different hierarchical levels. See also Zahar (2001) 614; Greenawalt (1999) 2279; Arnold (2003) 144 ff; Nerlich *Responsibility* (2007) 672; Mettraux (2006) 244; Quigley *Genocide Convention* (2006) 130 ff.

ty.[265] They also include questions of genocidal intent in joint criminal enterprises[266] and the standard of intent required for aidors and abettors and accomplices.[267] These questions will not be dealt with in detail in the following remarks but will be addressed topically where relevant to the study.

(1) *Special Intent in the Sense of Purpose Required?*

Genocide is often described as a crime of specific or special intent.[268] As discussed, specific or special intent is a concept that is used in variable meanings.[269] Regarding genocide as a 'special intent crime' still poses the question of what meaning the term 'special intent' takes with regard to this particular offence. Put differently, it remains unclear what degree of intent is required to make up the genocidal *mens rea.* Academic discussions have focused on two main views, one being the so–called purpose-based approach and the other being the knowledge-based approach. The purpose-based approach sees genocidal intent as requiring a deliberate desire to achieve the destruction of a group.[270] The knowledge-based approach stresses that it is sufficient that the perpetrator accepts that 'his or her act ought to or most probably might have' the additional consequence of furthering the destruction of a group.[271] A third view, the so-called structure-based approach, focuses less on either the volitional or cognitive elements of genocidal *mens rea*, pointing out that for an analysis of genocidal intent it is important to recognize its particular structure of mixed reference.[272] In the following section, the main views and arguments regarding the particular meaning of genocidal intent will briefly be presented and practical implications discussed.

The question of whether intent necessarily requires a desire to achieve the result to be brought about is of particular relevance to the crime of genocide. A purely purpose-based *mens rea* requirement would exclude cases of oblique intent and would also raise questions regarding means-ends-relationships and ultimate aim that entail significant difficulties.[273] The notion of oblique intent is normally seen as a somewhat theoretical, 'rare and exceptional' case under national criminal law.[274] For the crime of genocide, however, it routinely becomes an issue. Genocide is more complex than regular crimes under national criminal law where act and intended result are normally closely connected.

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265 See with regard to this issue eg Nersessian *Whoops* (2006); Zahar (2001) 615; Van der Vyver *Mens Rea* (2004) 85.

266 See with regard to this issue eg Van Sliedregt (2007); Zahar and Sluiter (2007) 181 ff.

267 See with regard to this issue eg Mysliwiec (2009); Eboe-Osuji (2005). See also Vest *Business Leaders* 861 and Van Sliedregt (2007) 12; Werle *Responsibility* (2007) 960 ff.

268 See Schabas *Genocide* (2009) 260; Aptel (2002) 277.

269 See the section 'Specific Intent'; Vest *Structure* (2007) 782.

270 See eg Roßkopf (2007) 111.

271 Greenawalt (1999) 2288; on the knowledge-based approach in general see also Triffterer (2001).

272 See Vest *Structure* (2007).

273 See the section 'Motive',

274 Herring (2009) 65-

For such individual crimes it is possible to circumstantially infer a mental state of purpose or desire.[275] With genocide, however, the perpetrator's intent only partially refers to consequences of his own actions.[276] Act and intended result can be decoupled. Inferring a particular desire in those cases becomes somewhat random. The same difficulties are faced in trying to determine a perpetrator's ultimate aim in a context of collective crimes

(a) Prevailing View

Courts and legal scholars have, to a large majority, taken the view that genocide is a specific intent crime in the sense of the purpose-based approach. In the context of genocide, this has generally been taken to mean that there needs to be a deliberate goal to destroy a group.[277] In the debate surrounding genocidal intent, the understanding special intent in the sense of desiring a particular result is often not made explicit and the term is used without reference to the exact concept referred to. Nevertheless, there is a wide range of jurisprudence and scholarly work that takes a purpose-based concept of specific intent as a starting point, building on what the ICTR laid out in its early case law.[278]

The ICTR and the ICTY have repeatedly held that an individual perpetrating the crime of genocide must act with the aim, goal, purpose, or desire to destroy a part of a protected group.[279] In *Akayesu* an ICTR Trial Chamber noted that 'genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'.[280] In *Blagojevic & Jokic* an ICTY Trial Chamber held that it is 'not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group'.[281] There is a good number of further statements on this issue in the case law of the Ad-hoc Tribunals that confirms their goal-oriented approach to genocidal intent, rejecting a mere knowledge-based requirement.[282] The International Court of Justice, citing the ICTY jurisprudence, also refers to a 'special or specific intent' as an 'extreme form of willful and de-

275 See LaFave (2003) 172 with examples; see also Vest *Structure* (2007) 792.
276 Vest *Structure* (2007) 792.
277 See Greenawalt (1999) 2259, 2265.
278 Zahar and Sluiter (2007) 163.
279 Kirsch (2009) 351; for an overview of the Ad-hoc Tribunals' jurisprudence on this issue see eg Mettraux (2006) 199 ff; Tournaye (2003) 450; Behrens (2007) 126; Ambos *Intent* (2009) 836 ff; Van den Herik (2005).
280 *Akayesu (TC)* [1998] ICTY para 498.
281 *Blagojevic & Jokic(TC)* [2005] ICTY para 656.
282 See Ambos *Intent* (2009) 838 and Nersessian *Contours* (2002) 264 ff for further references.

liberate acts designed to destroy a group or part of a group'. [283] This suggests that the ICJ is following the approach of a purpose-based understanding of genocidal intent. This approach is supported by a majority of legal scholars. The genocidal intent to destroy is mostly seen to 'leave scope for dolus directus only'.[284] The view still dominating the current discussions 'assumes that genocide is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself'.[285]

The reasons for interpreting genocidal intent in this particular way are not always explicitly brought forward. It frequently seems to be taken as a matter of course. A main argument for this understanding mentioned both in case law[286] and scholarly work is that special intent in the meaning of clearly desiring the consequence of group destruction is the very core of the crime of genocide. It is seen as its central and constitutive characteristic.[287] 'It is often said that the distinguishing characteristic of genocide, as compared to all other crimes under international law, is its dolus specialis, or special intent.'[288] Special intent, in terms of a particularly high threshold or aggravated state of intent, is further seen as distinguishing genocide from other crimes under international criminal law, particularly crimes against humanity.[289]

(b) Closer Scrutiny

The emerging case law of the Ad-hoc Tribunals has provoked a more in-depth analysis of this conventional understanding of genocidal intent that had initially been taken for granted. It has since become subject to substantial criticism.[290] One main point of contention concerns the meaning of genocidal intent's specificity. It is generally agreed upon that genocide has a particular structure with the intent to destroy a group being specific to the crime of genocide. In that sense, Genocidal intent is particular in that it is geared towards the achievement of a consequence that goes beyond what constitutes the *actus reus* of the offence.[291] It has a further particularity of referring to individual

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283 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2009, para 188.

284 Van der Vyver *Mens Rea* (2004) 71; see also Roßkopf (2007) 111; Ambos *Internationales Strafrecht* (2011) 234.

285 See Greenawalt (1999) 2264 for an overview; see especially the well argued positon of Mettraux (2006) 210; see also Ambos *Internationales Strafrecht* (2011) 234; Van den Herik (2005) 109; Satzger (2009) 252.

286 See Behrens (2007) 126 for references in this regard.

287 Roßkopf (2007) 112.

288 Kirsch (2009) 351.

289 See eg Satzger (2009) 252; Greenawalt (1999) 2292 ff with further references; Kirsch (2009) 351 ff.

290 For example by Greenawalt (1999) and Triffterer (2001). See also Lewy (2007) for a social science approach to this question.

291 See the section 'Structural Element'.

acts as well as to a collective context.[292] What is contested is that under the conventional understanding, a particular threshold of genocidal intent is inferred from its structural particularities. In other words, 'It is not clear why genocide's intent is referred to as 'special', as opposed to merely specific or unique to the crime'.[293] Genocidal intent certainly is particular in its meaning as an extra subjective element but not, however, in the sense of *dolus specialis*, ie requiring a particular desire to achieve the group destruction.[294]

As Ambos puts it,

> While the 'intent to destroy' may be understood as an ulterior intent in the sense of the double intent structure of genocide … it is quite another matter to give this requirement a purpose-based meaning by reading into the offence definition the qualifier 'special' or 'specific'. Even if this qualifier were part of the offence definition, it does not necessarily refer to the degree or intensity of the intent; instead it may also be interpreted, as … clarify[ing] that the 'special' intent to destroy must be distinguished from the 'general' intent referring to the underlying acts.[295]

The positions mentioned above also, to some degree, counter the argument that the special intent is genocide's very essence and therefore cannot be understood but as requiring a particular degree of intent. It is clear that the intent to destroy a group is what characterizes the crime of genocide. However, this does not necessarily imply a specific intent requirement.

> The status of genocide as the 'crime of crimes', characterized by a special degree of wrongfulness, is not predicated on an either purpose- or knowledge-based reading of the 'intent to destroy' element but on its specificity in protecting certain groups from attacks and ultimately destruction.[296]

In this sense, genocidal intent is understood in a way that comes closer to the paradigm established for the concept of intent in general.[297] The focus shifts from solely looking at particular desires or motives to bring about group destruction to include the conscious decision to bring about the destruction of a group[298], emphasizing the fact that volitional and cognitive elements of intent complement each other.[299] Looking at the intent to destroy itself, little seems

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292 See the section Reference to Collective Acts'.
293 Zahar and Sluiter (2007) 163.
294 Triffterer (2001) 404.
295 Ambos *Intent* (2009) 844.
296 Ambos *Intent* (2009) 846; see also Greenawalt (1999) 2288.
297 See the section 'The Concept of Intent'; see also Vest *Structure* (2007) 788 and Quigley *Genocide Convention* (2006) 86 ff with further references.
298 See discussions later in the section 'Motive'; see also Vest *Herausforderung* (2001) 482 ff.
299 See the section 'The Concept of Intent'; see in this respect Vest *Herausforderung* (2001) 485.

to speak for an interpretation that requires a particular aim beyond the destruction of a group that is consciously decided upon.[300]

(2) *Reckless Genocide?*

There have been a number of scholars who suggest that even *dolus eventualis* should be sufficient to satisfy the intent requirements for the crime of genocide.[301] They argue that the concept of intent for genocide must be understood in a wider sense, encompassing the concept of conditional intent which would include notions of recklessness and negligence.[302] Manifesting internal inconsistencies, the ICTR in *Akayesu* suggested such an interpretation when it held that 'The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group'.[303] In this sense, it was then suggested that cases of 'wilful blindness', ie cases where an individual deliberately fails to inquire into the consequences of certain behaviour, should satisfy the genocidal intent requirement, as well.[304] The legal terminology with regard to notions of intent that go beyond its core understanding take a range of nuances between Civil Law and Common Law traditions and make it hard to compare the exact ideas referred to in the case law and scholarly opinions. The case law of the Ad-hoc Tribunals taken together, however, points to a required degree of intent for genocide that is not reached in cases of recklessness or negligence, a view shared by a majority of scholars.[305]

(3) *Practical Implications*

As referred to above, intense academic debates have been and continue to be led on the question of the exact nature and requirements of genocidal intent. While they remain important, touching on some of genocide's core characteristics, the immediate implications of taking a purpose- or knowledge-based approach may remain of limited importance in their practical application. As has become evident in the case law of the Ad-hoc Tribunals, the main problem with regard to genocidal intent is its proof.[306]

Genocidal intent must normally be proven by circumstantial evidence. All genocide prosecutions in international forums have relied to at least some degree on inferences of genocidal intent from the factual context in which the ac-

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300 For the discussion of whether 'as such' in the GC definition should be interpreted as requiring such motives see the sections 'Intent to Destroy As Such' and 'Motive'.

301 See in this respect Triffterer (2001) 403 ff; See also Roßkopf (2007) 111 for further references.

302 Gil Gil (2000) 395.

303 *Akayesu (TC)* [1998] ICTR para 520.

304 See Quigley *Genocide Convention* (2006) 93; Schabas *Genocide* (2009) 255. May (2010) 127 seems to concur.

305 See in this respect Mettraux (2006) 210; Ambos *Intent* (2009) 840; Vest *Structure* (2007) 789; Van der Vyver *Mens Rea* (2004) 63.

306 See eg Satzger (2009) 253; Vest *Structure* (2007) 781; Ambos *Internationales Strafrecht* (2011) 236.

cused acted.[307] Lacking direct evidence, a requirement of 'genocidal purpose' must equally be proven circumstantially, something which has generally been accepted by the Ad-hoc Tribunals. The fact that one takes action 'with full knowledge of the detrimental consequences it would have for the physical survival of [a particular] community' has been taken as highly probative on the question of whether an actor specifically intended to achieve this result.[308] Additionally, the ICTY held that the actual destruction of a group in whole or in part 'may constitute evidence of the specific intent'.[309]

If knowledge of the fact that one's actions further the destruction of a group is in fact taken as evidence for specific intent and a possible purpose is inferred from knowledge based-acts, then technical differentiations regarding the exact nature of genocidal intent become somewhat obsolete.[310] Irrespective of the approach taken to the exact nature of genocidal intent, practical problems then shift to the question of what standard of knowledge or certainty regarding a particular consequence of or precondition to ones actions needs to be established to satisfy the requirements of genocidal intent.[311] As will be discussed in the next section, the practical implications of adhering to a particular standard of genocidal intent might be further limited by genocide's particular nature and the interplay of individual and collective components of intent.

b) **Reference to Collective Acts**

As mentioned before, genocide comprises a distinct mixture of elements of a traditional individual crime and collective characteristics.[312] This structure *sui generis* generates room for widely divergent interpretations with regard to the application of the offence. The crime as conventionally defined does not expressly regulate the interplay between individual and collective components, leading to much debate.[313] The difference of opinions is particularly evident with regard to the required relationship between individual genocidal acts and a background of collective crimes. The question received a lot of attention with the ICC Elements of Crimes for the first time expressly stipulating a contextual element for the crime of genocide. The recognition of a contextual element was then controversially discussed in the case law of the ICTY[314] and the

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307 Park *Intent* (2010) 152.

308 *Krstic (AC)* [2004] ICTY para 29. See in this respect Park *Intent* (2010) 161 and Ratner et al (2009) 39.

309 *Brdjanin* (TC) [2004] ICTY para 697.

310 The jurisprudence of the Ad-hoc Tribunals has been heavily criticized in this regard. See eg Mettraux (2006) 236; Ambos *Internationales Strafrecht* (2011) 236; Van den Herik (2005) 121 ff.

311 See, in particular, Vest *Structure* (2007) 795 ff and Vest *Herausforderung* (2001) 485; See in this respect the more detailed discussion in the section 'Proving Genocidal Intent'.

312 See the section 'Structural Elements'.

313 See Kirsch (2009) 354 and Nerlich *Core Crimes* (2010) 11.

314 An ICTY Appeals Chamber observed that the definition of genocide adopted in the Elements of Crimes 'did not reflect customary law as it existed at the time Krstic committed

ICC.[315] In the following, the issue will be dealt with from the perspective of genocidal intent's particular structure. It is argued that while there is no express reference to a collective context, genocidal intent typically incorporates a reference to collective acts. The question is then addressed of how this collective context has to be construed. Finally, a view on the more tangible relationship between individual intent and collective acts will be presented.

(1) *Relevant Perspective on Genocidal Intent*

As mentioned, genocide carries connotations of a collective crime. Nevertheless, in determining criminal responsibility, the problem of genocidal intent has to be approached from an individual perspective.[316] As a judgment of the International Military Tribunal already prominently held 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[317] While the context of collective action is eminently important with regard to genocide, the inquiry is initiated at the level of the actor committing the crimes. This inquiry uses evidence of coordination, planning and a broader context of crimes committed to determine whether the actor's intent can be inferred.[318] As has been laid out in the case law of the ICTY[319] and confirmed by the ICJ in its *Genocide* decision, the focus initially lies on individual genocidal intent.[320] A 'collective genocidal intent', however construed, in this way is not seen as an independent element of the crime of genocide but something which is relevant to assess the mental element necessary for individual criminal responsibility.[321] This view is based on the understanding that the collective element of the *actus reus* which, for example, characterizes crimes against humanity that require a widespread or systematic attack, is transposed to the mental element in genocide.[322] Unlike war crimes and crimes against humanity, the definition of genocide does not expressly call for a contextual element.[323] The reference to a collective context is subjectivised.[324] The contextual element is not seen as an addition to the crime's actus

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his crimes', see *Krstic (AC)* [2004] ICTY para 224; This view has been repeated in *Popovich et al.* (TC) [2010] ICTY paras 828 ff.

315 For an overview see eg Kress *Genocide* (2009) with further references.

316 For a fundamentally different persepective see Jones (2003) 468 who is of the opinion that 'intent specific to genocide should be considered an attribute of the plan and not regarded as a mens rea requirement that must be proved in relation to an individual accused.'

317 *France et al. V. Goering et al.*, 22 IMT 411, 466 (Intl. Mil. Trib. 1946).

318 Loewenstein (2007) 6.

319 *Jelisic (AC)* [2001] ICTY para 48.

320 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, paras 373 ff; see Loewenstein (2007) 6 ff for more detailed comments.

321 See Cryer (2009) 289.

322 Vest *Botschaft* (1999) 354.

323 Nerlich *Core Crimes* (2010) 11; see also Ambos *Intent* (2009) 845; Mettraux (2006) 210 ff; Nersessian *Approaches* (2007) 252.

324 See Roßkopf (2007)113.

reus but as an 'objective' point of reference for the determination of individual genocidal intent.[325]

In contradiction to this approach, the ICC Elements of Crimes expressly stipulate a contextual element for the crime of genocide.[326] This seeming inconsistency is not necessarily a fundamental one. As Kress elaborates:

> … this intent must be realistic and must thus be understood to require more than the vain hope of a single perpetrator of hate crimes to destroy (a part of) the hated group. On the basis of such a realistic concept of intent, which is fully compatible with the wording of the legal term, a coherent explanation of the last common Element is possible: The individual perpetrator will act with the realistic intent to destroy (a part of) the targeted group if his conduct is in itself capable to effect this destruction. In almost all cases, however, this will not be the case. Therefore, for all practical purposes, a perpetrator's realistic intent requires that his conduct takes place 'in the context of a manifest pattern of similar conduct directed against that group'. Under this approach, the last common Element constitutes the objective point of reference of genocidal intent.[327]

Consequently, this view holds that while it is not an element of its actus reus, the collective context is, unsurprisingly, essential to the crime of genocide.[328] As the ICC Elements of Crimes equally suggest, the possibility of a 'lone genocidaire', a 'genocidal maniac' with sufficient means, is not excluded but theoretically provided for.[329]

So while the present position might still be that 'a plan or policy, even on a small scale, is not a legal ingredient of genocide'[330], it holds true that 'intent to commit will be difficult to prove against an individual acting alone'.[331] Whether a background of collective action is seen as an element of the actus reus or as a point of reference for the individual intent, its presence is crucial. In practice, while keeping the focus on individual criminal responsibility, a shift towards the context takes place. To establish individual intent, a pattern of col-

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325 Kress *Genocide* (2009) 3.

326 ICC Elements of Crimes, element 4 corresponding to art 6 of the ICC Statute: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.' See also the references of Kress *Genocide* (2009) 3.

327 Kress *Genocide* (2009) 8; see on the issue of a 'realistic' genocidal intent further Kress *Elements* (2007) 622; Kirsch (2009) 353; Vest *Structure* (2007) 789; May (2010) 118; See also the ICTR Trial Chamber in *Kayishema & Ruzindana* which stated: '[A]lthough a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization.' See *Kayishema & Ruzindana (TC)* [1999] ICTR para 94.

328 See in this regard in much detail Schabas *State Policy* (2008) 966 ff.

329 See eg Vest *Structure* (2007) 785, Kress *Genocide* (2009) 4, Schabas *Darfur* (2005) 877 f; interesting in this regard Chalk (1989) 153 who presents possible scenarios of 'individual genocides'. See on this issue also Schabas *Strangelove* (2010) 847 ff.

330 *Jelisic (AC)* [2001] ICTY para 48; *Sikirica et al. (TC)* [2001] ICTY para 62.

331 Zahar and Sluiter (2007) 175; see also Mettraux (2006) 210.

lective action of which the individual had knowledge and acted in furtherance of has to be shown. This entails the questions of how the collective action referred to needs to be interpreted and how the relationship between an individual's acts and intent and the point of reference needs to be construed.

(2) *Collective Context*

The first issue to be addressed is how a 'context of collective action', whether as a point of reference or as an element of the crime, should be understood. The jurisprudence of the Ad-hoc Tribunals gave first indications towards such an understanding. Prior to assessing the question of a defendant's individual liability, they generally tried to establish that *the* situations in question generally constituted genocide.[332] In other words, the courts did not inquire whether the factual circumstances point to any particular individual. They were looking for a diffusely defined 'situation of genocide', a broader atmosphere that would suggest that someone acted with genocidal intent.[333] While this suggests a particular approach to determining genocidal intent, it does not answer the question of what properties such a situation of genocide would have. The ICTY Appeals Chamber in *Krstic* went further stating that 'the inference that a particular atrocity was motivated by genocidal intent may be drawn, even where the individuals to whom the intern is attributable are not precisely identified'.[334] This points to an understanding which presupposes a collective genocidal intent of some sort, something which had already been stated by the Trial Chamber in the same case that had emphasized the 'need to distinguish between individual intent of the accused and the intent involved in the conception and commission of the crime'.[335] The ICJ in its *Genocide* judgment equally recognized the possibility of a collective genocidal intent.[336] It analyzed specific intent in terms of the existence of a plan.[337] This is probably the most common construction. On a level of collective action, a plan or policy is seen as the mental element.[338]

The ICC Elements of Crimes which refer to genocide seem to suggest a slightly different understanding. They require a 'context of a manifest pattern of simi-

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332 *Kayishema & Ruzindana (TC)* [1999] ICTR para 273; *Jelisic (AC)* [2001] ICTY paras 61-64.
333 Park *Intent* (2010) 154.
334 *Krstic (AC)* [2004] ICTY para 34.
335 *Krstic (TC)* [2001] ICTY para 549.
336 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para. 371; for comments on the issue of collective intent with regard to this judgement see Kress *Elements* (2007) 622 .
337 Schabas *State Policy* (2008) 969.
338 Schabas *Whither* (2007) 190; see Schabas *Genocide* (2009) with further references. This is also the conclusion Jones (2003) seems to come to. See May (2010) 119 for a more detailed discussion. Partiallly pointing towards this understanding is ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009 in paras 150 ff where reference is made to'the Government of Sudan's genocidal intent'.

lar conduct'.[339] This element is, of course, in itself open to different interpretations. Cryer notes that it points to the fact that there is no requirement of a plan or policy: 'By its terms, it requires that the relevant conduct must occur against the background of a 'manifest pattern of similar conduct', which is not the same thing. The term conduct does not refer to the mental element of the offence at all. Hence this part of the Element under consideration can be fulfilled by a non-genocidal campaign of 'similar conduct' (ie killings, and/or the other physical elements of genocide) against the civilian population'.[340] The ICJ, however, seems to require a consistent pattern of conduct that points to the existence of a plan or policy, taking the pattern of conduct as a mere indication of a campaign.[341]

In its decision in the *Al Bashir* Case, the ICC Pre-Trial Chamber added a new facet to these discussions.[342] In interpreting the last ICC Element of Crime corresponding to genocide, it stated that the crime of genocide is only completed when 'the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical'[343], thus further qualifying the requirement of a 'manifest pattern'. This was met by a dissenting opinion and harsh academic criticism, opposing such a result-based construction of the collective context.[344]

A further qualification to the contextual element that has been commented upon in discussions is that of an 'international dimension' that the crime of genocide is supposed to require. In practice, mass atrocities relevant to international prosecution will inherently encompass an 'international dimension', however defined.[345] Nevertheless, it would be problematic to see it as an element of the crime.[346] Either way, the understanding of what a genocidal plan or policy would require and how a collective goal should be construed is subject to ongoing debate and evolving jurisprudence.[347]

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339 ICC Elements of Crimes, element 4 corresponding to article 6 of the ICC Statute.

340 Cryer (2009) 291.

341 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 376

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

343 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 125.

344 ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), 4 March 2009, Separate and Partly Dissenting Opinion of Judge Anita Usacka paras 16, 20; see the comments of Kress *Genocide* (2009) 10 and Cryer (2009) 291.

345 See, with further references, Lüders (2004) 93 and Ambos *Internationales Strafrecht* (2011) 230 f.

346 Kress *Genocide* (2009) 621.

347 See the sections 'Proving Genocidal Intent' and 'Motive'. The policy element has been widely discussed for Crimes Against Humanity. A contested point there was whether the

(3) *Relationship Between Individual Acts and Collective Context*

As seen, the issue of a required collective context is of central importance to the crime of genocide. For an individual act to become relevant in the scope of genocide it has to occur against a background of collective action. The presence of an individual act and a genocidal context is not enough, though. There has to be a particular relationship between the two to satisfy the requirements of the crime of genocide as conventionally defined. In this sense,

> Recognizing a collective level of genocidal activity within the legal concept of genocide should not weaken the fundamental truth that genocide, as a criminal offense, requires a finding of individual misconduct and responsibility. Therefore, the major difficulty in prosecuting genocide is the ability to identify individual misconduct that is part of a joint plan or collective attack on a protected group rather than individual misconduct that merely occurs in the background of such an attack.[348]

Structurally, this is described as the mixed individual-collective point of reference of genocidal intent.[349] Individual intent to destroy has to be present both for the consequences of the individual act as for the consequences that lie beyond the realm of the individual perpetrator. This is generally expressed by requiring the perpetrator to have acted 'with knowledge' and 'in furtherance of' a genocidal campaign or policy. The knowledge of a policy or campaign links the individual perpetrator's acts to the collective context on a basic level.[350] It has been called the key to genocidal criminality.[351] Beyond that, it must be established that the perpetrator possessed a genocidal intent in relation to the individual acts he is accused of.[352] It is required that the individual perpetrator acted not only with knowledge but also in furtherance of a genocidal policy, ie that he decided to bring about consequence he knew would advance the policy.[353]

The question of the collective context and the relationship between individual acts and that context is certainly one of the most controversial issues with regard to the crime of genocide. While it has been discussed in the case law of the international criminal tribunals, intensively reviewed within academic debate and, most importantly, expressly dealt with in the ICC Elements of

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mere tolerance of a policy or pattern of conduct by a state would meet the required standard. See Ambos *Internationales Strafrecht* (2011) 253 for further references.

348 Kirsch (2009) 355; in this sense also May (2010) 99.

349 Vest *Structure* (2007) 785; see also Demko (2009) 228.

350 See for detailed references Schabas *Genocide* (2009) 243 ff; See also Jones (2003) and May (2010) 125.

351 Schabas *State Policy* (2008) 971; May (2010) 100. The requirement of knowledge of a collective context entails a number of questions regarding its nature and the standards applied to it. In this regard, see Ambos *Intent* (2009) 841; Vest *Structure* (2007) 792; Kirsch (2009) 354 and the discussions later in the section 'Proving Genocidal Intent.

352 Mettraux (2006) 236.

353 Vest *Herausforderung* (2001) 481 ff.

Crimes, its precise contours remain ill-defined. Ultimately, the issue becomes central in proving the crime of genocide in its actual application.[354] With regard to questions of proof, pragmatic approaches are favoured. In this sense the Trial Chamber observed in *Jelisic* 'that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system'.[355] This point can be taken further. It is to be expected that a prosecution would only take up a case if it was able to preliminarily find that a pattern of conduct or a genocidal plan existed and that this was being implemented with the individual accused's knowledge and involvement.[356] And since international criminal tribunals tend to focus their attention on leaders and those most responsible for mass atrocities, genocide cases will generally involve identifying a collective plan or policy and then prosecuting those most responsible for its implementation.[357]

354 See the section ‚Proving Genocidal Intent'.
355 *Jelisic (AC)* [2001] ICTY para 101.
356 Zahar and Sluiter (2007) 174.
357 Schabas *State Policy* (2008) 981.

C. OBJECT AND SUBSTANCE OF ADDITIONAL INTENT

Genocidal intent by definition is targeted at certain groups. The inclusion of the 'group' as the object of genocidal intent has far-reaching implications. It raises the questions of how and by whom groups are defined and what it means wanting to destroy them. These issues are of specific relevance to the Cambodian case since the targeting of groups by the Khmer Rouge is subject to intense controversy.

1. *THE GROUP AS TARGET OF THE INTENT TO DESTROY*

To understand the nature of the crime of genocide, it seems essential to know what it means for victims to belong to a group and more precisely what it means for victims of genocide to be members of a certain group type.[358] Equally, establishing the genocidal intent of an alleged perpetrator can only take place in conjunction with the identification of the group at which his conduct is aimed.[359] Hence, the crime of genocide as defined in the Genocide Convention seems to presuppose a differentiation of groups. At first glance, the presupposition of the existence of human groups and their differentiation seem unproblematic, being concepts that are widely operated with and that are even seen as anthropological fundamentals.[360] However, the inclusion of groups as the very focus of a crime raises definitional issues that reveal the complexity of this seemingly simple assumption.[361] Closer scrutiny renders a 'nearly intractable problem set'.[362] It leaves open a number of questions that are highly relevant in the assessment of criminal responsibility and that the international tribunals continue to be faced with.

The issues raised by groups as the object of genocidal intent in some aspects tie in with the structural difficulties discussed with regard to the nature of the intent. This mainly concerns the partially collective nature of the crime of genocide. While genocide on one hand poses the question of how a crime can be committed *by* a collective of persons and how individual responsibility is attached in such a situation, it also ensues the question of how a crime is committed *against* a collective of persons and how that collective should be understood. The objects of protection of the crime of genocide are particular groups, yet the victims of genocidal acts are individuals.[363] Again, the questions of what makes an individual person a member of a group in the sense of the criminal provision and how that is assessed lead to complex issues that belie seemingly obvious conclusions.[364]

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358 Simon Genocide (2007) 94.
359 Martin (2009) 113.
360 Diamond (1993) 298 ff; see also Nersessian *Political Groups* (2010) 47.
361 See May (2010) 7.
362 May (2010) 58.
363 See Quigley *Genocide Convention* (2006) 107; Luban *Name* (2006) 311.
364 See May (2010) 7 ff.

Two main problems can be identified in the discussions surrounding genocide's protected groups in the jurisprudence of the international criminal tribunals.[365] The first one concerns the identification of the groups in the law of genocide. Article II of the Genocide Convention limits genocide to acts intended to affect only certain group types, namely national, ethnical, racial or religious groups. It therefore seems of particular and primary importance to define what is meant by the four enumerated terms and to find out whether and how this enumeration is exclusive of or, by way of example, inclusive of further group types. The second main issue of contention is that of the relevant perception of the victim group. It has been controversially discussed by whom a group and group membership should be defined for the purposes of the crime of genocide. This has generally been seen as an issue of choosing either an objective approach, emphasizing an objective and neutral determination of whether a certain group exists and whether victims belong to such a group, or choosing a subjective approach which relies on the perpetrators' or victims' view of group definition and affiliation. A third, so called mixed objective-subjective approach has tried to combine elements of the two other points of view.[366]

In the following remarks, these two main issues are to be looked at individually at first, beginning with the issue of how the groups enumerated in the Genocide Convention are to be interpreted. Attention is then turned to the question of the relevant perspective on group definition, taking up points discussed in the interpretation of the enumerated groups. In this way the study follows the development of the jurisprudence in this matter that initially saw the group matter as an issue of finding appropriate definitions to the terms mentioned in the Genocide Convention before realizing the complexities involved, turning to the question of the relevant perspectives in defining protected groups.[367] In a further step, it will be attempted to give a more synthetical view of the issue of protected groups that takes into account the fundamental connection between the groups enumerated and the relevant perspective in defining such groups and group membership of individuals.

a) **Interpretation of the Enumerated Groups**

As has been noted before, 'By limiting genocide to acts intended to affect only certain types of groups, the drafters of the Genocide Convention created more complexity than they realized'.[368] Even the terms used in the Genocide Convention by themselves in their vagueness create room for a wide spectrum of interpretation. The notions referred to in the Genocide Convention are not further defined in the convention itself or related instruments and the *travaux*

365 Hopkins (2010) 34.
366 For a an overview see eg Ambos *Internationales Strafrecht* (2011) 224 f.
367 Quigley *Genocide Convention* (2006) 153.
368 Quigley *Genocide Convention* (2006) 139.

preparatoires of the Genocide Convention themselves are of little assistance in gauging the exact aims of the drafters.[369] Taken together, this enhances the interpretative dilemmas inherent to the broad terms used in the definition of the crime. What is clear, however, is that the factual existence of certain victim groups was seen as a given by the drafters of the Genocide Convention. Discussions leading up to the establishment of the Genocide Convention show that the question at stake was not so much whether and in whose perception certain groups exist but which of the groups to include and how to precisely define them.[370] The drafters gave no indication that they anticipated any problems in determining the existence of a group.[371] The approach that the text of the Genocide Convention suggests and that the drafters seem to have had in mind is a straight-forward one. A limited number of groups is set out to be the possible target of genocidal acts and intent. The exact nature of these groups was left constructively ambiguous but nevertheless defined. In the application of the Genocide Convention to a particular case, in a first step it can be assessed whether a group has factually been harmed. In a second step it can be seen whether the group found to have been harmed can be subsumed under one of the group types as defined.[372] The issue is in that way seen within the context of the objective elements of the crime, ie as an objectively answerable question of whether victims of genocidal acts belong to one of the enumerated groups. It is following this logic and consequently trying to find the right standard for groups that form the object of genocide that a lot of the controversies with regard to the protected groups are led.

(1) *Definition of Enumerated Groups*

It was the ICTR that was first faced with the task of finding more precise contours to the four groups enumerated in the Genocide Convention in an actual application of the law.[373] In *Akayesu,* the very first conviction for genocide, the ICTR Trial Chamber gave its working definitions for each of the terms. National groups were taken as consisting of 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[374] The ethnic group was defined as 'a group whose members share a common language or culture'.[375] Racial groups were said to be based upon 'the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious fac-

369 See Aksar (2003) 216; Martin (2009) 114; Nersessian *Political Groups* (2010) 21.
370 Martin (2009) 116; see also Mundorff (2009) 88.
371 See Quigley *Genocide Convention* (2006) 146.
372 See also Nersessian *Political Groups* (2010) 27.
373 See Nersessian *Political Groups* (2010) 21 ff and Van den Herik (2005) 127 ff for a more detailed account. See Schabas *Genocide* (2009) 124 for references to prior academic attempts at definitions. Group identification has been discussed in other areas of international law, for example by the ICJ in *Nottebohm* (Liechtenstein v. Guatemala), Merits, ICJ Reports (1955) 4, para 23. See in this respect Young (2010) 8 ff.
374 *Akayesu (TC)* [1998] ICTR para 512; see also *Krstic (TC)* [2001] ICTY para 558-559.
375 *Akayesu (TC)* [1998] ICTR para 513.

tors'.[376] And religious groups were defined as those 'whose members share the same religion, denomination or mode of worship'.[377] As became clear quickly, these definitions are themselves vague and problematic in different ways. They drew a great amount of criticism, being termed too unspecific, questionable from a sociological and scientific point of view and circular in argumentation.[378] In addition, they were found not to be adapted to the factual realities of the situation in Rwanda. It seemed that in the end the court had to circumvent its own definitions to come to the conclusion that Hutus and Tutsis are different ethnic groups in the sense of the crime of genocide.[379]

The problems encountered by the ICTR Trial Chamber in *Akayesu* in separately defining each of the groups mentioned in the Genocide Convention led to different approaches in dealing with the issue. In several cases, the international criminal tribunals tried to pragmatically side-step it as a whole. Victims were found to belong to a protected group without specifying the particular group within which they fell.[380] A more reasoned approach was proposed by Schabas who advanced the idea that the four terms should be seen 'operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection'.[381] An ICTY Trial Chamber took up this concept and stated that 'setting out such a list [of protected groups], was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as 'national minorities', rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention'.[382] While this interpretation, also called the 'ensemble approach'[383], equally allowed the courts to avoid directly dealing with definitional issues with regard to the groups protected, it too seems not fully satisfactory in relation to the clear enumeration in the text of the Genocide Convention.[384] As will be seen in the next section, the four enumerated groups are still seen to carry their own distinct meaning.

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376 *Akayesu (TC)* [1998] ICTR para 514; see also *Kayishema & Ruzindana (TC)* [1999] ICTR para 98.

377 *Akayesu (TC)* [1998] ICTR para 515.

378 See eg Mettraux (2006) 227 ff; Nersessian *Edge* (2003) 299 ff.

379 See eg Zahar and Sluiter (2007) 159 ff; Schabas *Genocide* (2009) 125; Verdirame (2000) 592.

380 *Krstic (TC)* [2001] ICTY paras 559-560; *Stakic (TC)[*2002] ICTY para 512; see in this respect Mettraux (2006) 229 with further references.

381 Schabas *Genocide* (2009) 129 ff.

382 *Krstic (TC)* [2001] ICTY para 556; see also *Brdjanin (TC)* [2004] ICTY paras 682-683; *Blagojevic & Jokic (TC)* [2005] ICTY para 666.

383 See Amann *Expressivism* (2002) 109 ff; Hopkins (2010) 39 ff; Nersessian *Political Groups* (2010) 70 ff.

384 This has been the subject of intense academic debate. See eg Amann *Expressivism* (2002) 879; Hopkins (2010) 34 ff; disagreeing in this respect Quigley *Genocide Convention* (2006) 149; Martin (2009) 120 ff; Van den Herik (2005) 133.

(2) *Exclusiveness or Overall-Conception of Enumerated Groups?*

The list of enumerated groups is generally interpreted as being exhaustive. Implicitly, this speaks for an interpretation of the enumerated groups on an individual basis. Other groups than the ones mentioned in the Genocide Convention are said not be included as possible objects of the crime of genocide.[385] The *travaux preparatoires* of the Genocide Convention give a fairly clear picture in this respect in that certain groups were purposefully not included into the text of the convention.[386] This goes in particular for political, economical and social groups.[387] The exclusion of certain groups as possible objects of genocide has been the focus of a lot of the criticism that has been brought forward against the definition of the crime in the Genocide Convention. Since its coming into force, there have been constant calls for reform of the definition to include more groups or even make it applicable to all human groups, most recently with the inclusion of the crime of genocide in the ICC Statute.[388] However, apart from differing national definitions of the crime of genocide, the enumeration of protected groups in the Genocide Convention's definition of the crime relevant for international criminal law still stands.

In an effort of trying to establish a more inclusive definition of the crime of genocide it has been suggested that genocide as a norm of customary international law has evolved to include political and other groups as possible objects of the crime.[389] The legal basis for such a claim seems very thin, though, with clear evidence of both *opinio juris* and state practice lacking.[390] Faced with the problems of having to define the groups enumerated and at the same time having to delimit groups that cannot form the object of the crime of genocide, the international criminal tribunals considered other concepts that would have moved away from the restrictive approach to the groups enumerated in the Genocide Convention. The ICTR in its *Akayesu* judgement looked at the *travaux preparatoires* and considered that genocide

> ... was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be nor-

385 See eg Ambos *Internationales Strafrecht* (2011) 224 and Lüders (2004) 65 with further references; see also Mettraux (2006) 230.

386 See Vest *Herausforderung* (2001) 478; see, in particular, Schabas *Genocide* (2009) 117 ff for detailed analysis.

387 See Schabas *Genocide* (2009) 153 ff; Ratner et al (2009) 36 ff; Mundorff (2009) 89.

388 See eg Paul (2008) 118 ff; Van Schaack *Blind Spot* (2007) 2272 ff; Hübner (2004) 118.

389 This idea was brought forward in particular by Beth Van Schaack, see Van Schaack *Blind Spot* (2007).

390 See for an extensive analysis Nersessian *Political Groups* (2010) 91 ff. See also the comments in Schabas *Genocide* (2009) 171 and the general objections to a customary law-based argumentations in international criminal law by Fletcher and Ohlin (2005) 559.

> mally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[391]

In looking for a common core of the different groups named in the Genocide Convention, this somewhat resembles the ensemble approach to interpreting the four enumerated terms.[392] The ICTR's interpretation to see 'stable and permanent groups' as the core object of protection was not taken up in later jurisprudence of international criminal tribunals. It was brought up again, though, by the Darfur Inquiry Commission in 2005 which, somewhat surprisingly, saw it as by that point having become 'part and parcel of international customary law'.[393] This is probably not the case, the interpretation never having been confirmed, running counter to the general view that the list of enumerated groups is exhaustive and in addition having drawn considerable criticism.[394]

Another such concept, brought up first before the ICTY, was the question of whether negatively defined groups could form the object of genocide, as well. A negative construction of the concept of the 'protected group' considers as a protected group all individuals rejected by the perpetrators of the atrocities (ie group definitions such as 'non-Serbs').[395] In this case the rejected individuals are seen to form a distinct group by virtue of their exclusion.[396] This was first accepted by an ICTY Trial Chamber in *Jelisic*[397] but clearly rejected in later decisions of the ICTY.[398] The position that there must be positive group identification has been confirmed by the ICJ[399] and recent case law of one of the ICC's Pre-Trial Chambers.[400]

b) **Relevant Perception of Victim Groups**

As seen, the application of genocide law reveals problems in appropriately defining and delimiting protected groups following the approach suggested by the text of the Genocide Convention. The solutions initially proposed of either

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391 *Akayesu (TC)* [1998] ICTR para 511.

392 See discussions above in the section 'Definition of Enumerated Groups'.

393 International Commission of Inquiry on Darfur, Report to the Secretary-General, UN Doc. S/2005/60, para 51.

394 Most prominently by Schabas *Genocide* (2009) 153; for an in-depth analysis see Nersessian *Political Groups* (2010) 52 ff. See also Quigley *Genocide Convention* (2006) 146 ff; Martin (2009) with further references. Partially agreeing with the notion of 'stable and permanent groups' Ratner *Evils* (2007) and Ambos *Internationales Strafrecht* (2011) 224.

395 Kress *Elements* (2007) 623; Cryer (2009) 292; Nersessian *Edge* (2003) 309.

396 See Nersessian *Edge* (2003) 309.

397 *Jelisic (TC)* [1999] ICTY para 71.

398 *Stakic (AC)* [2006] ICTY para 20; a Trial Chamber had already rejected the negative approach in *Brdjanin (TC)* [2004] ICTY paras 685-686.

399 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, paras 193-196; the Dissenting Opinion of Judge Mahiou disagreeing in this point, see para 75.

400 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 135.

working with a fuzzy definition of the protected group according to a common core of the four group types mentioned or to avoid the issue altogether seem unconvincing. The problems thus encountered gave rise to further reaching reflections regarding the protected groups. These reflections go beyond definitional issues of single groups to consider structural implications of the crime of genocide as defined in the Genocide Convention, offering new views as to the conceptualization and factual determination of protected groups.[401] The questions regarding the constitution of protected groups which have long been seen as an issue of the objective elements of the offense reveal a greater deal of complexity and show structural inconsistencies of the offense as such. While the concept of protected groups implied by the drafters suggests their existence as an objective element, it remains tightly linked to the genocidal intent of the perpetrator. The range of questions evoked by these structural inconsistencies goes beyond correctly defining groups and involves inquiries into the very nature of the concept of human groups. The simplistic use of the term in legal terminology is starkly contrasted by the adaptation of ideas well established in the social sciences which view groups not as biological entities or scientifically determinable constants but as products of social processes and perceptions.

(1) *Impossibility of Finding an Objective Definition*

As early as 1999 the same ICTR Trial Chamber that had rendered judgement in *Akayesu* noted that 'the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof'.[402] There is a good chance that definitions of that kind will never be found. While both jurisprudence and academia have gone to considerable length in coming up with appropriate concepts, these efforts have proven to be artificial, suffering from serious analytical flaws and practical drawbacks.[403] The question of how groups are to be defined objectively quickly lands in the thicket of historical and political disputes.[404] The closer one looks in trying to delimit particular groups, the blurrier the lines appear. This goes particularly for seemingly clear-cut cases such as groups one is born into[405] or, for example, the question of whether the Hutus in Rwanda constitute a race.[406] The discussions regarding the definition of particular groups tend to get extensive and lose focus, exactly because objective definitions, ie definitions that are independent of valuations of those who establish or apply them, do not exist in this context. Even when definitions rely on seemingly objective criteria, the choice of these

401 See Demko (2009) 28.
402 *Rutaganda (TC)* [1999] ICTR para 56; see also *Kamuhanda (TC)* [2004] ICTR para 630.
403 Nersessian *Edge* (2003) 313.
404 Simon *Genocide* (2007) 95.
405 Vest *Botschaft* (1999) 357.
406 See eg Verdirame (2000) 588; Van der Vyver *Prosecution* (1999) 304.

criteria in defining a group remains a subjective one that is open to discussion.[407]

(2) *Groups as Social Constructs*

Citing the work of Verdirame, the Darfur Inquiry Commission in its report to the Secretary General of the UN recently stated that 'collective identities, and in particular ethnicity, are by their very nature social constructs, "imagined" identities entirely dependent on variable and contingent perceptions, and not social facts, which are verifiable in the same manner as natural phenomena or physical facts'.[408] With this, the Darfur Inquiry Commission made explicit a fundamental precondition of meaningfully interpreting and applying the crime of genocide beyond the framework of particular cases. It is an understanding which has gradually entered the considerations of the Ad-hoc Tribunals in what has been called a 'quiet shift' in interpreting the concept of protected groups.[409] Drawing the conclusion that group identity is a social construct, the jurisprudence and the ensuing academic discussions[410] retrace fundamental insights into social processes that have been a mainstay of 20th-century thought.[411] Following the ideas of social constructionism, groups are understood as social phenomena that do not exist as facts of nature, independently of social interactions. Groups are, in whole, seen as a product of social processes. They are seen as contingent on processes of attribution of certain characteristics based on criteria that are not 'inevitable' or 'determined by nature' but chosen by those who attribute.[412] The fact that groups are seen as social constructs does not necessarily mean that their existence remains abstract or fleeting. Social interactions reinforce certain understandings and perceptions. Human typefications can come to be understood as part of an objective reality, engender deep and long-lasting sentiments and eventually become institutionalized and structurally engraved.[413] The terms 'race' and 'racial group' give a vivid example of the above said. What is meant by the term 'race', what meanings are attached to it, differs enormously according to the social context. 'Race' in its general meaning as a scientific categorization of human beings has been largely delegitimized over the last century. What was seen as an objec-

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407 Quite apart from the fact that the 'scientific' evidence which is sometimes seen as an objective factor in defining groups is itself subjective in varying degrees. See in this respect Nersessian *Edge* (2003) 310; Chaumont (2002) 211; Straus (2001) 365.

408 International Commission of Inquiry on Darfur Report to the Secretary-General, UN Doc. S/2005/60, para 499; see Verdirame (2000) 592.

409 Verdirame (2000) 592.

410 See eg Demko (2009); Young (2010); Paul (2008) 163; Simon *Genocide* (2007) 243 ff.

411 Perhaps most prominently represented in the works of Peter Berger and Thomas Luckmann, see Berger and Luckmann (1967). See Powell (2007) 530 ff for an overview of the developments. For the the application of the concept by legal scholars see eg Amann *Deconstruction* (2000) and Schabas *Genocide* (2009) 129. Schabas notes that the terms enumerated in the Genocide Convention 'are social constructs, not scientific expressions, and were meant as such by the drafters'.

412 Demko (2009) 232 ff.

413 See Mann (2005) 21; Moshman (2011) 918.

tive, scientific delimitation of human groups and a fact of nature sixty years ago can clearly be identified as a fluid social construct today, unsupported by scientific evidence.[414] Anthropologists agree that race should be analyzed as a cultural construct, largely independent of biological and genetic variation. Nevertheless, in different cultural contexts varied conceptions of the term 'race' are operated with.[415] As Powell puts it, 'Human groups identified on the basis of race do exist, but only as a result of social processes of racialization.'[416] These conceptions of 'race' are in many cases deeply engraved and relevant in social interactions, carrying specific understandings that are by and large shared by members of the societies concerned.

(3) *Differing Approaches*

In trying to get to terms with the problems raised by the concept of protected groups, two main approaches have been identified by the jurisprudence of the international tribunals and the academic discussion.[417] On one hand there is the objective approach, emphasizing an objective and neutral determination of whether a certain group exists and whether victims belong to such a group. On the other hand there is the subjective approach which relies on the perpetrators' or victims' view of group definition and affiliation. A third, so called mixed objective-subjective approach combines elements of the two other points of view. The terminology used in the context of these approaches is far from clear, though.[418] The objective approach is sometimes understood as finding a stand-alone concept of the group that is to be determined as opposed to linking the legal standard exclusively to the minds of the victims or perpetrators of genocide.[419] On the other hand, an objective definition of the protected groups is seen as involving evidence of group-delimitation that is perceptible to a neutral observer. In the same way, what is called a subjective approach differs substantially in its application by the courts and in the academic discussions. What is often implied is that the objective approach somehow relies on tangible criteria while the subjective approach is based on mostly virtual delimitations. In this respect, the terminology commonly used is not helpful in gaining a meaningful understanding of the concept of protected groups for the crime of genocide.

In discussing these approaches, it is instead useful to consider the basic insight that groups are products of social processes and do not exist apart from social interactions. To acknowledge the basic subjectivity of group identities

414 The work of Nell Irving Painter gives thought-provoking insights into this question, see Painter (2010).
415 See eg Nersessian *Political Groups* (2010) 64.
416 Powell (2007) 539.
417 These discussions go back to the *Kayishema & Ruzindana* decision of the ICTR which for the first time differentiated between a general group definition and the 'self-identification' of victim groups, see *Kayishema & Ruzindana (TC)* [1999] ICTR para 98.
418 May (2010) 40.
419 Nersessian *Edge* (2003) 308.

and the criteria applied to determine them does not present a radical new method of the identification of victim groups but merely represents a more accurate labelling.[420] The Ad-hoc Tribunals have implicitly recognised that group membership is socially constructed and changes with social context and therefore requires an understanding of the time and place at issue.[421] 'Objective' criteria in the strict sense of the word of 'being external to all minds' do not exist for the purpose of dealing with the crime of genocide.[422] Any criterion relevant in the legal assessment is the result of subjective social processes of attribution. Criteria termed 'objective' relied upon by international criminal tribunals, such as identity cards that specify the 'race' of the bearer, are themselves the product of social processes, informed by subjective beliefs which have been transferred to a broader context and possibly crystallized in institutions that reflect those beliefs.[423] As the ICTR stated in *Gacumbitsi*, '... in a given situation, the perpetrator, just like the victim, may believe that there is an objective criterion for determining membership of an ethnic group on the basis of an administrative mechanism for the identification of an individual's ethnic group'.[424] The criteria of delimiting group affiliation, whether 'imagined', scientifically based or 'objectivized' in legislation, form part of the process of creating group identity. Even the fact that criteria chosen to delimit a group can be based on scientifically verifiable differences such as genetic variance does not change the constitutively subjective character of that process.[425] In the same way, referring to a group as being subjectively defined does not necessarily denote that the group exits only virtually, but simply accepts that group identity is a result of complex interactions of subjective views in the social context in question.[426]

(4) *Tangible Group Identity*

As seen, the terminological distinction between subjective and objective means of identifying groups can be misleading, implying understandings of objectivity that do not apply in the context of criminal law. It has been proposed by May that the better distinction to make is that between subjective

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420 Young (2010) 17.

421 Amann *Expressivism* (2002) 135; See *Rutaganda (TC)[*1999] ICTR para 56.

422 May (2010) 47.

423 Young (2010) 15; see also the Darfur Inquiry Report: '... it would be erroneous to underestimate one crucial factor: the process of formation of a perception and self-perception of another group as distinct ... While on historical and social grounds this may begin as a subjective view, as a way of regarding the others as making up a different and opposed group, it gradually hardens and crystallizes into areal and factual opposition. It thus leads to an objective contrast. The conflict thus from subjective becomes objective. It ultirnately brings about the formation of two conflicting groups, one of them intent on destroying the other', see the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, UN Doc. S/2005/6 para 500.

424 *Gacumbitsi (TC)* [2004] ICTR para 254.

425 Demko (2009) 232 ff.

426 Young (2010) 22.

and intersubjective group identification.[427] Intersubjective in that sense would stand for group identifications that are not based merely on the mental state of a particular person or group of people but on a concept that has manifested itself in intersubjective relations on a broader scale. In other words, intersubjective group identification is one that is perceptible by observers and not merely private or arbitrary.[428] There obviously is a strong argument that relevant group identification needs to be perceptible to third parties if an outside assessment such as the one in criminal law is going to have a chance of succeeding meaningfully.[429] Such a tangibility of the criteria relied upon in their assessment of a situation is what the jurisprudence of the Ad-hoc Tribunals and the ICJ highlighted in its discussion of the different approaches to determining group identity with regard to the crime of genocide. The ICJ noted that it was essentially agreed that international jurisprudence accepts a subjective-objective approach and implicitly rejected a purely subjective definition of the protected group.[430] In *Rutaganda*, an ICTR Trial Chamber stated that 'membership of a group is, in essence, a subjective rather than an objective concept. ... nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups'. It went on to note that identification of a group must take 'into account both the relevant evidence proffered and the political, social and cultural context'.[431] Indeed, the tangibility seems to be one of the goals that are aimed for by combining the 'objective' and 'subjective' approach.[432] As Nersessian puts it:

> The fundamental disconnect created by the absence of any kind of tangible indicia of group membership supporting the perpetrator's understanding is fatal to adopting a purely subjective approach. This is particularly true in the context of one of the world's most serious crimes. At a minimum, then, there must be some colourable evidence that the victim group has some recognized racial, national, ethnic or religious existence outside of the mind of the perpetrator.[433]

While it is generally recognized that the group identity needs to be perceptible, ie that tangible indicia of a group identity exist, it is less clear what can actually constitute elements of the legal assessment involved. The perceptibility of group identities relevant for the crime of genocide could take a variety of shapes. Most commonly, institutionalized differentiations, represented, for ex-

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427 See May (2010) 51.

428 May (2010)47; see in this respect also Mettraux (2006) 223.

429 May (2010) 51.

430 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 191.

431 *Rutaganda (TC)* [1999] ICTR paras 56-57, 373; See also *Kamuhanda (TC*) [2004] ICTR para 630.

432 See Aptel (2002) 285. The mixed subjective-objective approach is argued for in different forms by a majority of scholars, see eg Ambos *Internationales Strafrecht* (2011) 244 f; Kolb (2008) 76; Ratner et al (2009) 1090.

433 Nersessian *Edge* (2003) 312; see also Nersessian *Political Groups* (2010) 30 ff.

ample, in identity cards which stipulate a certain group membership of the bearer, would satisfy the criteria. This goes in general for views about group identities held in a society that are expressed and perceptible in a variety of ways and that the perpetrators might adopt. While all distinctions for purposes of genocide are in the end arbitrary, the pre-existing social structures provide a context that allows those arbitrary characteristics to be agreed upon by perpetrators and subsequently imposed upon the group.[434] Additionally, perpetrators have often used markers to clearly establish membership in a victim group for their purposes, the most notorious example being the clothing labels used by the Nazis.[435]

However, perceptible indicia of relevant group identities can also be drawn from the group concept that members of a targeted group adhere to and that the perpetrators use as a criterion of differentiation. Equally, a concept of a victim group held by perpetrators, previously not perceptible, can become evident in the perpetrator's targeting pattern. Perceptibility needs not necessarily rest on the continual existence of a group identity either. Individuals may not acknowledge that they are seen as belonging to a group before they experience discrimination as a members of the group as perceived by perpetrators.[436]

The Ad-hoc Tribunals have identified victim groups of genocide based on the whole spectrum of such tangible indicia.[437]

ered themselves as being Jewish.[453] Where this question was directly addressed, the Ad-hoc Tribunals have consistently held that it is indeed the perpetrators' view and not the targeted group's perspective that is relevant. In *Bagilishema* the ICTR stated that a victim should be considered as belonging to a protected group if he was perceived by the perpetrators as such, even in cases where this would not fully correspond to the perception of the group itself or other elements of society.[454] This was confirmed in a most demonstrative way in the judgement of *Ndindabahizi*. In this case, one of the victims had a German father and a Rwandan mother. On the basis of official criteria this victim would not have qualified as belonging to any Rwandan ethnic group since the ethnic identity of a Rwandan was generally determined by the ethnic identity of the father. Yet, the killing of this victim was qualified as an act of genocide since the victim was considered a Tutsi by the perpetrators.[455]

Nevertheless, the victims' view on group affiliation can be of indirect relevance in establishing the relevant view of the perpetrator. It will frequently be the case that the perpetrators' and victims' view correspond to a large degree since genocide is often committed against groups of people in close connection to the perpetrators. The process of stigmatization and delimitation of group identity is a dynamic one where the concepts of the agent of stigmatization and that of the stigmatized interact[456]. As Lang puts it from a psychological point of view:

> Social identity is formed through the eradication of perceived differences between members of the in-group and the exacerbation of differences between members of the in-group and those of the out-group. The process of psychological homogenization of the in-group begins with the self categorization of the individual in terms of shared group membership. Self categorization soon motivates the stereotyping of oneself and others in terms of characteristics seen to be salient group features. Stereotyping serves to enhance the perceptual identity between the self and one's own in-group, and at the same time sharpens the perceived contrasts between one's own group and members of the out-group.[457]

In this way, the victim's view of group affiliation can be heavily influenced by the views and consequent actions of perpetrators[458] and can itself become tes-

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453 See Jäckel (1985) 10 where it is also noted that '*ganz genau müssten als Opfer diejenigen bezeichnet werden, die von den Tätern zu Juden erklärt worden waren*'. See in this respect also Verdirame (2000) 588. He points out that rules on the membership of groups are nearly always disputed. See also Young (2010) 2 and Margolin *Particularités* (1999) 209.

454 *Bagilishema (TC)* [2001] ICTR paras 61, 65. See also *Ndindabahizi (TC)* [2004] ICTR paras 466-469; *Kajelijeli (TC)* [2003] ICTR para 813. See in this respect Van den Herik (2005) 131; Zahar and Sluiter (2007) 162.

455 See *Ndindabahizi (TC)* [2004] ICTR paras 466-469; see in this regard Van den Herik (2005) 131 ff.

456 See Powell (2007) 541 ff.

457 Lang (2010) 238.

458 See in this respect also Jäckel (1985) 10.

timony to the relevant group conception. Equally, a view of group membership held by a community or in a particular society at large can become relevant in shaping the perpetrators' conceptions.

c) An Important Shift

Adopting the perspective that groups are social constructs and have to be understood as such is a change in understanding more than a change of the tangible criteria looked at in assessing the relevant perceptions of group identity.[459] Nevertheless, this shift of perspective is an important one. It helps to focus on the structural inconsistencies of the crime of genocide and exposes as largely negligible questions of exact group definition and the inclusion and exclusion of certain groups that make up a large part of the discussions regarding the protected groups. The discussion of these questions is not helpful in more than one way. First of all, it suggests that an exclusive definition of the protected group exists; and secondly, it suggests that the definition of groups and the question of whether targeted people belong to such a group are central to the establishment of responsibility for the crime of genocide. Trying to expand the definition of certain groups, trying to include new groups, trying to include groups supposedly included under customary law and trying to interpretatively find general characteristics of protected groups stays within the flawed logic of 'objectively' defining the 'protected' groups and then trying to find out whether the perpetrators targeted their victims as members of such a group. It is flawed and in a way irrelevant methodically because it is not an external definition of whatever kind that counts in the assessment of genocide but the perpetrators' perception of their target group. While the crime's definition makes it tempting to take them as a starting point, as Nersessian puts it:

> It would not be logically necessary to postulate the existence of objective and clear-cut distinctions among groups of people to prove that a particular group was stigmatized and targeted. In this sense, the perception of differences is more important than the differences themselves [...] The Genocide Convention can be implemented effectively only if courts recognize that the prosecution should not be expected to prove the improvable. What matters is the targeting of the group in question, the intention to destroy the group in whole or in part and actual measures to carry this intention out.[460]

Nevertheless, the enumeration of four groups makes it necessary that the perpetrators' conception of the victim group bears at least some relation to one or more of the four group types defined in the Genocide Convention.[461] It has to be shown that the perpetrators' group conception somehow fits into the four categories, bringing with it all the fundamental problems mentioned. How to reconcile the structural importance of the perpetrators' conception of group

459 Young (2010) 3.
460 Nersessian *Edge* (2003) 313.
461 Nersessian *Edge* (2003) 312; see also Nersessian *Political Groups* (2010) 31, 73; Young (2010) 13.

identity with the enumeration of particular protected groups remains one of the central issues with regard to the crime of genocide.

2. *INTENDED DESTRUCTION*

Closely related to the issues regarding the object of genocidal are questions regarding the exact nature of the destruction intended for the targeted groups. What it means wanting to destroy a group directly depends on the conception one holds of a group's definition and existence. Interpreting the meaning of the intent to destroy a group 'in whole or in part' as defined in the Genocide Convention touches on aspects of the same set of issues. The Genocide Convention further qualifies genocidal intent as having to target groups 'as such'. The phrase gives important indications towards the collective nature of the target of genocidal intent. These issues regarding the intended destruction will be discussed in the following sections.

a) **Nature of the Intended Destruction**

It is important to keep in mind that the destruction of the group is part of the *mens rea* only. The destruction of a group needs not succeed; it only needs to be intended by the perpetrator.[462] The number and nature of the victims of attacks can only serve as an indication of the possibly genocidal intent. What is controversial with regard to the intended destruction of a group is its very nature. Having concluded that group identity and existence are social concepts rather than biologically defined entities, the issue of how the destruction of a group is to be understood becomes more complex, as well. Views on what kind of destruction the perpetrators need to intend in order for crimes to qualify as genocide have been divergent. The jurisprudence of the international tribunals seems to have settled on the requirement of an intended 'physical or biological' destruction. In its *Genocide* decision the ICJ approvingly cited the ICTY's *Krstic* decision which stated that 'even in customary law, despite recent developments ... genocide is limited to those seeking the physical or biological destruction of a group'.[463] While it is fairly clear what the physical destruction of an individual human being implies, it is less clear what that is to mean for a group. An ICTY Trial Chamber voiced its doubts as follows: 'It is not accurate to speak of "the group" as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as such aspects of the group as its members' cul-

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462 See Jessberger (2009) 107 with further references; see the discussions in the section 'Inchoate Offence'.

463 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 334; See *Krstic (TC)* [2001] ICTY para 580; confirmed in *Krstic* (AC) [2004] ICTY para 46. This position was also endorsed by the Darfur Inquiry Commission, see the report at paras 515, 517, 518, 520. For the jurisprudence of the ICTR which has not gone to detail with regard to this question see eg *Semanza (TC)* [2003] ICTR para 315; *Kajelijeli (TC)* [2003] ICTR para 808.

ture and beliefs, are neither physical nor biological'.[464] The requirement established in the jurisprudence seems to extend the concept of physical destruction of an individual human being to human groups. Physical destruction of a group in that way is seen as the physical destruction of each of the group's members.

Generally, the destructive goal is seen as having to be the result of a generalized commission of one or more of the five acts listed in Article II of the Genocide Convention, making up the *actus reus* of the crime of genocide.[465] Looking at the listed acts can, however, also lead to different conclusions regarding the interpretation of the intended destruction. A range of commentators have pointed to the fact that article II of the Genocide Convention includes acts which do not require the killing of or infliction of physical harm on group members.[466] The forced transfer of children and the measures to prevent births envisage the elimination taking place over a longer period of time.[467] In concession to the collective nature of groups, 'biological destruction' of groups is therefore also included, understood as denying a group the means of physical self-perpetuation.[468]

This conventional concept of the required intended destruction for the crime of genocide has drawn substantial criticism and was deviated from in national decisions dealing with that question.[469] Most prominently, Judge Shahabuddeen voiced his views in his dissenting opinion in the ICTY Appeal Chamber's decision in *Krstic*:

> A group is constituted by characteristics – often intangible - binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.[470]

The issue raised is that the survival of a group as a social entity is not solely dependent on the survival of individual members of the group.[471] Most com-

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464 *Krajisnik (TC)* [2006] ICTY para 854 fn 1702.
465 Kress *Elements* (2007) 626.
466 See eg Mundorff (2009) 75 ff and Jessberger (2009) 107.
467 Storey (1998) 228.
468 See Storey (1998) 228 ff.
469 *Jorgic* [1997] 2 StE 8/96 German District Court, see 45 Strafsachen 81; upheld by the German Federal Constitutional Court, see Neue Juristische Wochenschrift (2001) 1850. See also the decision of the ECHR in this case, *Jorgic v Germany* [2007] ECHR para 112. See Ambos *Internationales Strafrecht* (2011) 239 and Paul (2008) 292 ff with extensive references to the national jurisprudence and academic opinions.
470 *Krstic (AC)* [2004] ICTY Partial Dissenting Opinion of Judge Shahabuddeen para 50; see also *Blagojevic & Jokic (TC)* [2005] ICTY para 659.
471 See May (2010) 35 ff for a more detailed analysis. See also Quigley *Genocide Convention* (2006) 103 ff.

mentators agree that the intended destruction has to be brought about by means of the acts listed in article II of the Genocide Convention which for the most part involve the infliction of direct physical harm to individual group members.[472] It is, however, argued that the destruction sought by such means can be to render impossible the survival of a group as a social entity instead of the physical destruction of each of the group's members.[473]

What is not covered by the crime of genocide as defined in the Genocide Convention is what has been called a purely 'cultural' genocide.[474] Cultural genocide, seen as the destruction of a group through cultural means only, such as the suppression of languages and destruction of cultural institutions, does not fall directly within the scope of the Genocide Convention.[475] It is an intended cultural and social dissolution of a group that does not target the physical integrity of the group's members or the group's capacity to biological self-perpetuation at all. It can also be described as the eradication of a group's culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.[476]

The categorizations into 'physical or biological' and 'cultural' genocide could give the impression that abuse targeted against groups actually occurs in such distinct forms. The differentiation is, however, a purely terminological one: Where groups are targeted, acts against the physical integrity of its members regularly go hand in hand with measures against the group's social and cultural institutions.[477] The manner and intensity in which groups are targeted for destruction exist on a continuum. Because attacks against the members of a group and a group's cultural and social institutions tend to happen simultaneously and vary in their intensity over time, it is not easy to pin-point the exact nature of the intended destruction at any given time, but especially before physical abuse has taken place.

Even those commentators who accept that the destruction to be brought about by means of the acts listed in the Genocide Convention does not have to be an immediately physical or biological one concede that not all types of destruction, especially the ones mainly targeted at the social fabric of a group, fall within the scope of genocide.[478] The intended destruction has to be of particular intensity. Borderline cases exist where an intended destruction of the

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472 See Ambos *Internationales Strafrecht* (2011) 238 f for more detail.

473 See eg Zahar and Sluiter (2007) 179; Quigley *Genocide Convention* (2006) 103 ff; Demko (2009) 244.

474 See eg Mettraux (2006) 246; Nersessian *Contours* (2002) 255; Ratner et al (2009) 32 ff; Schabas *Genocide* (2009) 207 ff. See also the differing opinions of Demko (2009) 244 ff and May (2010) 41 ff.

475 Bunyanunda (2000) 1603.

476 Mettraux (2006) 246; see also Demko (2009) 244.

477 Bunyanunda (2000) 1603; see also the section 'Accompanying Acts'.

478 See eg Ambos and Wirth (2001) 295.

social fabric of a group involves the killing of members pertaining to certain segments of the group seen as important to the group's social identity and continuity.[479]

The issue of the destruction intended by the perpetrators has received particular attention with regard to the euphemistically termed practice of 'ethnic cleansing' on the territory of former Yugoslavia.[480] Ethnic cleansing describes the policies that were aimed at rendering certain areas ethnically homogenous by driving off unwanted groups. Such practices, while being punishable as crimes against humanity or war crimes, do not necessarily constitute genocide since they can be executed without intent to physically or even socially destroy the group that is to be driven off.[481] As the ICJ clearly stated in its *Genocide* decision:

> Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of the group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.[482]

b) **Intending to Destroy 'In Whole or In Part'**

Closely related to the question regarding the nature of the intended destruction is the issue of interpreting what it means for a perpetrator to intend to destroy a group 'in part'. Just as with the nature of the intended destruction, the Genocide Convention and its *travaux preparatoires* do not give a clear picture of how the phrase 'in whole or in part' is meant to be interpreted as a whole.[483] What is undisputed, however, is that the question of intending to destroy a group in part is one of the intended result and not of the factual result.[484] Even though early commentators suggested that while the result can be an only partial destruction the intent must be to destroy the entire group, it has become clear that the interpretation has to be based on the intended re-

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479 See *Krstic (AC)* [2004] ICTY paras 15-16; *Krstic (TC)* [2001] ICTY paras 594-99; ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, paras 198-200, 296; see also the discussion in the next section 'Intending to Destroy in Whole or in Part'.

480 Jessberger (2009) 103; see also *Jorgic v Germany* [2007] ECHR paras 47 and 111.

481 See eg Schabas *Genocide* (2009) 228 ff; Jessberger (2009) 104 ff; Kress *Elements* (2007) 625.

482 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 190. This was confirmed in the ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, paras 143 ff.

483 See eg Kress *Genocide* (2006) 489 ff.

484 See Van den Herik (2005) 117; Nersessian *Edge* (2003) 296, 324; Kress *Genocide* (2006) 489 ff; Zahar and Sluiter (2007) 175. See also *Krstic (TC)* [2001] ICTY para 74.

sult.[485] However, the actual extent of a group's destruction can be an important indicator regarding the intent held by the perpetrators.[486]

Taken to the extreme, intending to destroy a group 'in part' could mean intending to destroy a single member of the group, the member forming what could be considered the smallest possible part of a human group.[487] The jurisprudence of the international criminal tribunals and commentators agree in this respect that this interpretation would clearly fall outside the scope of the crime as defined in the Genocide Convention. Equally, it is accepted that the intention needs not go towards a complete annihilation of a group from every corner of the globe.[488] In between those two extremes, however, a wide range of possible interpretations has been suggested and so far a convincing test or threshold for the required intent to partially destroy has not been established.

One approach sees the part of a group as a geographically limited section of a group.[489] It is an intuitive starting point in addressing the issue. However, it leaves the question of how narrowly a group can be defined in terms of geographical extent and therefore does not give a definitive answer to the definition of a relevant part.[490] The other major starting point in interpreting the intent to destroy a group in part is a quantitative criterion.[491] The jurisprudence of the international criminal tribunals has come to the shared conclusion that the intent to destroy in part requires the intended destruction of a considerable number of individuals.[492] The ICTY has argued for a minimum quantitative threshold by requiring that genocide must involve the intent to destroy a 'substantial part'.[493] While giving a general indication of a minimal number of intended victims, the terms 'considerable number' and 'substantial part' remain themselves subject to further interpretation. The quantitative criterion has mostly been understood as applying in relation to the size of the targeted group.[494] In *Sikirica* the ICTY referred to a 'reasonably substantial number *relative* to' the targeted group as a whole.[495]

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485 See Schabas *Transition* (2008) 179 with further references. See also Kress *Genocide* (2006) 489 ff.
486 See Ratner et al (2009) 41; see also the section 'Proving Genocdial Intent'.
487 See Van den Herik (2005) 117 with further references.
488 Kress *Genocide* (2006) 489.
489 See Petit et al (2007) 174; Kress *Genocide* (2006) 490.
490 See Mettraux (2006) 217.
491 See for a detailed analysis Nersessian *Political Groups* (2010) 41 ff.
492 Kayishema & Ruzindana (TC) [1999] ICTR para 97. See also Bagilishema (TC) [2001] ICTR para 64; Krstic (TC) [2001] ICTY para 586; ICJ Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 198.
493 *Jelisic (TC*) [1999] ICTY para 82.
494 See Jessberger (2009) 108.
495 *Sikirica et al. (TC)* [2001] ICTY para 65.

While a quantitative criterion certainly remains 'critical' in gauging the intent to destroy[496], applied on its own it fails to give a meaningful threshold.[497] In assessing the intent to destroy in part, the courts have continuously referred to qualitative criteria, as well.[498] In this respect, a 'significance' of the targeted part was equally seen as relevant.[499] As the ICJ put it, '... since the object and purpose of the Convention as a whole is to prevent the intentional destruction of a group, the part targeted must be significant enough to have an impact on the group as a whole'.[500] The significance can be seen as qualifying the quantitative aspect of group destruction but it has also been interpreted to qualify the essentiality of a targeted part of a group for the survival of the group. Such essential parts could be the leadership of a group or segments crucial to its biological self-reproduction capabilities.[501] In this respect, the discussions return to the issues normally raised within the frame of the nature of the intended destruction.[502] Focussing on a part's significance for a group's survival entails the question of what is meant by a group's survival or destruction. As has been observed in the jurisprudence of the international criminal tribunals, the destruction of certain parts of a group can lead to the threat of a group's continued existence. This implies an understanding of a group's survival that goes beyond the mere survival of its individual members. Interstingly enough, the same chambers that, with regard to the intended destruction, endorsed a concept of strictly 'physical or biological' destruction[503] seem to suggest that a group's survival is seen at least partially with respect to its continued existence as a social entity when it comes to assessing the relevance of group's part.[504] Some commentators have pointed to the fact that taking the significance of a group's part as a criterion can lead to the 'introduction of a social group concept through the backdoor'. They suggest that the relevance of a part's destruction has to be judged by its impact on the physical or biological survival of the group.[505]

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496 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 201.

497 *Stakic (TC)* [2002] ICTY para 29.

498 See in detail Nersessian *Political Groups* (2010) 44 ff.

499 See Schabas *Transition* (2008) 182 ff.

500 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 198.

501 See Mundorff (2009) 87 ff; Ambos *Internationales Strafrecht* (2011) 241 ff.

502 See the discussion in the section 'Nature of the Intended Destruction'.

503 See the section 'Nature of the Intended Destruction'.

504 *Krstic (TC)* [2001] ICTY para 634; *Krstic (AC)* [2004] ICTY para 12: 'If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.'

505 Kress *Genocide* (2006) 492; see also Southwick (2005) 206 ff; Nersessian *Political Groups* (2010) 45.

In addressing the issue of the intended partial group destruction it is helpful to consider the approach taken by the ICTY in *Sikirica*.[506] It held that the intent to destroy a group, even in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individual within.[507] It is argued that while the perpetrators need not seek to destroy the entire group, they must view the part of the group they wish to destroy as a distinct entity.[508] This is clearly warranted since it allows to take into account the importance of the perpetrators perspective, something which is easily neglected when looking at quantitative and qualitative criteria only. The qualitative analysis has to start from the perpetrators' subjective conception of the victim group and the segments particularly important to its survival.[509]

It remains that so far no general criteria or threshold have been found that allow to assess perpetrators' intent to destroy a group 'in part'. Consensus exists on the view that the targeted part of a group needs to be of a certain level of relevance, however understood.[510] Neither quantitative nor qualitative criteria can stand alone[511] and the perpetrators' concept of the targeted part is of essential importance in this question, as well. After having considered the different criteria advanced in the jurisprudence and discussions so far, the ICJ in its *Genocide* decision concludes with what seems to be the open-ended result of the current discussions: 'Much will depend on the Court's assessment of those and all other relevant factors in any particular case'.[512]

c) Intent to Destroy a Group 'As Such'

'As such' is a further element qualifying the intent to destroy a group. It has a turbulent legislative history and the *travaux preparatoires* show that its exact meaning was unclear to the drafters of the Genocide Convention.[513] As with the rest of the *mens rea* components, its specific meaning was left unresolved.[514] Arguing with the fact that the phrase 'as such' replaced an explicit reference to a motive requirement for the crime of genocide in initial drafts of

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506 *Sikirica et al. (TC)* [2001] ICTY; see Schabas *Transition* (2008) 182.

507 *Sikirica et al. (TC)* [2001] ICTY para 89.

508 See Schabas *Transition* (2008) 182; see also Petit et al (2007) 174. Critical in this respect Southwick (2005) 209; Kress *Genocide* (2006) 492; Zahar and Sluiter (2007) 178. Kress *Elements* (2007) 627 suggests that the ICJ has explicitly rejected this approach.

509 Nersessian *Political Groups* (2010) 45.

510 See Ambos *Internationales Strafrecht* (2011) 240 ff; Mettraux (2006) 223.

511 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 200.

512 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 201. Much in the same way the ICTY Appeals Chamber in *Krstic* noted that 'these considerations ... are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.', *Krstic (AC)* [2004] ICTY para 12-14.

513 See eg Lippman *Drafting* (1985) 22 ff; Schabas *Genocide* (2009) 297 ff.

514 Greenawalt (1999) 2278.

the Genocide Convention, it has sometimes been said that 'as such' fulfills the same function of a motive requirement in the Genocide Convention as ratified, albeit implicitly.[515] There is, however, a broad consensus in the jurisprudence of the international criminal tribunals as well as within the academic discussion that this is not the case.[516] Rather, the element 'as such' is seen as distinguishing the point of reference of the genocidal intent to destroy.[517] As the International Law Commission stated in its commentary to the Draft Code of Crimes Against the Peace and Security of Mankind, 'the intention must be to destroy the group 'as such', meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group'.[518] The crime must be directed against the collectivity, ie at the individuals in their collective capacity.[519] Through the victimization of the individual the perpetrator must intend to inflict damage upon the group.[520] Thus, mass killings resulting in the deaths of a large portion of a group would not constitute genocide if they were part of a random campaign of violence not directed against any particular target.[521] In the same way, the phrase 'as such' would point to the requirement that members of a group need to be targeted not merely for particular reasons such as their individual political affiliations but, at least partially, because of their affiliation to a targeted group.[522] As the ICTY put it in *Krstic*, 'the intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victim's membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such'.[523]

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515 See Ambos *Internationales Strafrecht* (2011) 240 and Schabas *Genocide* (2009) 299 ff each with further references.

516 See Tournaye (2003) 451 ff; Zahar and Sluiter (2007) 179 ff; Mundorff (2009) 85 ff; Jessberger (2009) 109; Mettraux (2006) 230 ff each with further references.

517 Vest *Botschaft* (1999) 356 ff. See also Paul (2008) 282; Tournaye (2003) 451; Greenawalt (1999) 2288; see further May (2010) 130 who is of the opinion that 'as such' should be disregarded all together.

518 Report of the International Law Commission on the Work of Its Forty-Eighth Session, [1996] 2 Y.B. Int'l L. Comm'n 17, 45, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), at 45. It directly paraphrases Lemkin who wrote that 'Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group', see Lemkin (1944) 79.

519 Mettraux (2006) 230.

520 *Sikirica et al. (TC)* [2001] ICTY para 89.

521 Ratner et al (2009) 40. See also the discussion in the section 'Intending to Destroy in Whole or in Part' and the comments of Kress *Genocide* (2006) 491 fn 154 who disagrees with this view.

522 Vest *Botschaft* (1999) 356 ff; see ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka paras 70-72.

523 *Krstic (TC)* [2001] ICTY para 561.

D. MOTIVE

Questions regarding the motive for committing genocide play an important role in the public discourse on mass atrocities. Why people take part in mass killings and what are the root causes for genocidal policies are questions that are difficult to fathom and controversially discussed across disciplines.[524] As could be expected, mass killings are complex phenomena that evade simple explanations. In terms of the legal assessment of mass atrocities, an important issue concerns the question of the significance of such motives for the attribution of criminal responsibility. The discussions regarding genocide's particular intent requirement have already touched upon questions of motive by addressing the relevance of specific ulterior aims. This section will try to give another perspective on this issue by considering the distinction between intent and motive in criminal law and by looking at the role of motive in its individual and collective form for the crime of genocide.

1. *THE DISTINCTION BETWEEN MOTIVE AND INTENT AND THE IRRELEVANCE OF MOTIVE*

In criminal law and for the crime of genocide, in particular, the distinction between the concepts of intent and motive is generally seen as an important one.[525] The importance of the distinction stems from the fact that intent is commonly seen as an essential factor in determining criminal responsibility while motive is often seen as irrelevant in this context.[526] The distinction of the two concepts and the relevance attached to it will be briefly discussed.

The terms 'motive' and 'intent' are used almost interchangeably in everyday language.[527] When they are given distinct meanings and operated with in a legal context they are distinguished as technical terms of art.[528] It has even be said that 'the distinction between motive and intent and the irrelevance of motive maxim are rhetorical constructs: formulations rendered meaningful by their role within a particular historically and institutionally situated discursive practice'.[529] In this way, both concepts, even as technical terms, have taken a range of varied connotations according to the different contexts they are used in. The distinction of motive and intent for the purpose of interpreting the crime of genocide is made more complicated thereby. Often, the concepts are used in an overlapping fashion, making a clear differentiation impossible.

A common approach to distinguish motive and intent in a general fashion is to see intent as the aim while motive is seen as the reason for forming that

524 See eg Diamond (1993) 277 ff; Hinton *Why* (2005); Mann (2005) 30 ff.
525 *Jelisic (AC)* [2001] ICTY para 49 emphasises 'the necessity to distinguish specific intent from motive'.
526 See eg Heaton (2006) 58; Binder (2003) 34 ff; Kaufman (2003) 318.
527 See Binder (2003) 4 and Hitchler (1931) 106.
528 Binder (2003) 4.
529 Binder (2003) 2.

aim.[530] Intent or intentions in that way are likened to cognitive states of mind while motives are seen to belong to desiderative mental states, being essentially affective rather than intentional.[531] A second strand of differentiation divides desiderative states into immediate and remote goals.[532] Intent in this sense covers only the most immediate intention and motive in this way is seen as an ulterior intention, ie the intention with which an intention is done.[533] A pragmatic extension to this view is the distinction of intent being those goals that are elements of the criminal offence concerned as opposed to motives that are defined as more remote goals, not relevant to the offence[534]. These differentiations are problematic or unsatisfying if the goal is to distinguish between mental states relevant with regard to criminal responsibility.[535] If motives are defined as irrelevant intents for a particular offence, then the statement that motives are irrelevant in assigning criminal responsibility becomes true by definition, a circular argument of no value.[536] If, however, motive and intent are defined as more or less remote goals; they become virtually indistinguishable in an abstract sense.[537] Any intent might in that way be considered a motive when compared to some more immediate intent.[538]

The problem in distinguishing between intent and motive in a general fashion partially depends on the fact that often the specific concepts referred to are not made explicit. If intent is understood in a broad sense of incorporating desiderative connotations, ie including the desire to bring about a consequence, it becomes difficult to delineate it from motive completely since motive is broadly defined as the desire to bring about certain consequences as an end.[539] The distinction becomes meaningful and feasible where intent is reduced to the decision to bring about a certain consequence, irrespective of the desires or aims attached to it.[540] In that way the irrelevance of motive for assigning criminal responsibility is more than a tautology. Particular aims and desires that accompany the decision to bring about a certain consequence are in fact in most offences seen as being of no direct relevance to establish criminal responsibility. This is mirrored by the discussions surrounding the con-

530 May (2010) 139.
531 See Binder (2003) 4; Kaufman (2003) 322.
532 Binder (2003) 4.
533 Kaufman (2003) 323.
534 Binder (2003) 4.
535 LaFave (2003) 173.
536 See in detail Binder (2003) 47 with further references.
537 Herring (2010) 209; Ratner et al (2009) 45.
538 Binder (2003) 46; LaFave (2003) 173.
539 LaFave (2003) 173 with further references.
540 See the discussions in the section 'Concept of Intent for the Crime of Genocide'; see also Greenawalt (1999) 2274.

cept of intent where means-ends considerations are generally seen as irrelevant and where the focus lies on the decision to bring about a consequence.[541]

Apart from the exact delimitation of motive and intent and the general irrelevance of desiderative elements, it is clear that in a number of criminal provisions particular aims of the perpetrator do play a role. They are defined in a way to include a mental state which is concerned with something beyond the defendant's decision to perform the prescribed acts or to cause the consequences.[542] For inchoate offences, an act only becomes criminal if committed with the aim of causing a particular harm.[543] Further, there are crimes defined such as to involve the intention to commit another crime.[544] In essence, when looking at a particular offence, it is not enough to state that motives are irrelevant to criminal liability.[545] On one hand this depends on the understanding of the underlying concepts. On the other hand, motive understood as a desiderative mental state can be relevant depending on the offence concerned. In addition, what is broadly referred to as motive can play an important role in sentencing considerations, for possible defences and in proving the mental elements of a crime.[546]

2. *The Role of Motive for Genocide*

The mass atrocities associated with the crime of genocide regularly provoke lively discussions about the causes and motivations behind those horrid deeds of enormous scale. The search for what motivates perpetrators of genocide is a central point in the reflection on past atrocities as well as in attempts of trying to prevent future ones.[547] As Cambodia shows exemplarily, it is also a question that survivors of mass atrocities are struggling with. It is not surprising, then, that genocidal motive takes a prominent place in legal discussions, as well, and has sparked considerable controversy. From a legal point of view, the role of a motive element for the crime of genocide is being discussed under a number of different headings, creating a complex picture.

On one extreme, there are voices that insist on the applicability of the doctrine of irrelevance of motive to the crime of genocide, rejecting the idea that the criminal responsibility for genocide should in any way depend on the grounds for its perpetration. On the other extreme, there are those who hold the view that particular motivations are what define the core of the crime of genocide. Making matters more complicated, the concepts relied upon in the discussion

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541 See discussions in section 'The Concept of Intent'; see also Ashworth *Principles* (2009) 172.
542 LaFave (2003) 173; see also Heaton (2006) 60.
543 Binder (2003) 48.
544 Williams *Criminal Law* (1961) 48; see LaFave (2003) 169 who gives the example of Common Law larceny.
545 See for an extensive analysis Binder (2003) 45 ff.
546 Herring (2010) 143, 208 and Binder (2003) 48 with further references.
547 See eg Hinton *Why* (2005); Diamond (1993) 288 ff.

surrounding genocidal motive are, for the most part, only broadly defined and used in a spectrum of different meanings depending on the context. As Judge Wald stated with respect to the jurisprudence of the international criminal tribunals, motive and its differentiation from intent have 'plagued and confused courts'.[548]

With regard to the text of the Genocide Convention, the issue of motive is commonly seen as being a question of the interpretation of the phrase 'as such' which qualifies the intent to destroy a group.[549] However, the element of motive is equally relevant in distinguishing genocide's particularly defined intent element itself, contrasting notions of special intent regularly associated with the crime.[550] Additionally, genocide's particular structure and its partially collective nature make it necessary to address the issue of genocidal motive both on an individual and collective level.

a) Where Motive Comes Into Play

The question of where motive comes into play for the crime of genocide does not have a clear-cut answer. The concepts of motive and intent were not clearly distinguished by the drafters of the Genocide Convention and the *travaux preparatoires* hence give an unclear picture of the interpretation of the genocidal *mens rea* as a whole.[551] A direct reference to a motive element that was provided in drafts of the Genocide Convention was later abandoned and replaced with the phrase 'as such'.[552] While some commentators insist that 'as such' still carries the notion of a motive requirement[553], in whole the jurisprudence of the international criminal tribunals and a majority of academic opinion do not see the phrase 'as such' as requiring a particular motive for genocide.[554] However, considerations of a motive requirement are also made under different headings, even if they are not commonly identified as such. The blurry definition of the concept of intent and its derivatives has led to discussions of genocide's particular intent that, in substance, treat the question of a motive requirement.

As discussed, the dominant view on the question of what degree of intent is required for the crime of genocide is that a 'specific' or 'special' intent has to be shown. 'Specific' or 'special' intent in that context is generally understood as requiring a deliberate desire to achieve the destruction of a group.[555] By definition, the presence of specific intent in that sense relies on an assessment of individual means-ends considerations of the perpetrator. Vest notes that 'A

548 Wald *Prosecuting* (2006) 88; see also Van Schaack *Blind Spot* (2007) 128.
549 See the section 'Intent to Destroy a Group As Such'.
550 See the section 'Concept of Intent for the Crime of Genocide'.
551 See eg Van den Herik (2005) 106 ff and Schabas *Genocide* (2009) 295 ff,
552 See the section 'Intent to Destroy a Group As Such'.
553 See Schabas *Genocide* (2009) 305.
554 See the section 'Intent to Destroy a Group As Such'.
555 See the section 'Concept of Intent for the Crime of Genocide'.

purpose-based approach will rely mainly on the personal ends a perpetrator tries to reach with his criminal conduct'.[556] In this way, the jurisprudence of the international criminal tribunals has simultaneously put forward contradictory notions.[557] On one hand, the distinction between motive and intent[558] and the irrelevance of motive in criminal law and for the crime of genocide in particular has been stressed.[559] On the other hand, the jurisprudence has repeatedly required the presence of 'specific intent', amounting to a requirement of proof of particular personal ends.[560] Requiring 'specific intent' in that sense leads in to the grey area between motive and intent where means-ends considerations come into play.[561]

b) Individual and Collective Motive

The inconsistencies in the jurisprudence of the international criminal tribunals and within academic opinion with regard to the relevance of motive for genocide show that merely pointing to the general irrelevance of motive in criminal law does not do the issue justice. For the crime of genocide, the issue comes up under different headings and requires a differentiated examination that goes beyond the simplifying maxim of the irrelevance of motive and takes account of genocide's particular structural characteristics. As has been noted, offences can be defined so as to require proof of an ulterior intent as part of the *mens rea*.[562] The pertinent questions are thus whether and, if so, in what way this is the case for the crime of genocide. An answer to these questions has to take into consideration both the individual genocidal intent in all its facets as well as the collective context to which it partially refers. For this collective context, the question of required ulterior intents can be asked separately. In the following remarks, the issue will be looked at first on the individual and consequently on the collective level.

As discussed, intent for the crime of genocide is structurally complex and somewhat unique.[563] On one hand there is the *mens rea* corresponding to the *actus reus*, answering the question of whether the perpetrator meant to engage in the conduct that makes up the genocidal act. On the other hand there is the intent to destroy a group which does not directly correspond to the *actus reus*. It is itself referring to two different points. First, it must be established that the perpetrator intended to destroy a group or further the destruction of a group through his act. Further, there needs to be an intentional connection

556 Vest *Structure* (2007) 794.
557 See *Behrens* (2007) 130.
558 *Kayishema & Ruzindana (AC)* [2001] ICTR para 161.
559 See *Jelisic (AC)* [2001] ICTY para 49; *Tadic (AC*) [1999] ICTY paras 268-269.
560 See the references in section 'Prevailing View'.
561 Greenawalt (1999) 2286 ff.
562 See the section 'Specific Intent'.
563 See the section 'Concept of Intent for the Crime of Genocide'.

to a collective context going beyond the consequences of the conduct of the individual perpetrator.[564]

There is broad consensus on the view that individual motives in the sense of personal goals and desires are irrelevant to both the intent corresponding to the *actus reus* as well as to the intent to destroy as a whole.[565] As an ICTY Trial Chamber put it in *Stakic*, 'In genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt'.[566] However, the intent to destroy a group is in itself an extended mental element. It does not correspond directly to the *actus reus.* In this sense, genocide is an inchoate offence vis-à-vis the protected group.[567] It is an offence that is defined as being committed with a particular mental state, namely that of intending group destruction. In this sense, it clearly refers to an ulterior intention going beyond the mere decision to perform a prohibited act. This is expressed by requiring knowledge of the collective context and the acting in furtherance of it. Thus, personal ends of a perpetrator are in fact of no direct relevance in establishing criminal responsibility. But genocide is defined so as to require one particular aim that has to be present even if it is clear that it is not the sole or even the primary force behind the decision to act against a victim.[568]

As discussed, the individual perpetrator's intent has to refer both to the performance and the consequences of his acts as well as to a context of collective action. How this context of collective action is to be construed is subject to debate. It has been described as a manifest pattern of similar conduct, a plan or a policy geared at the destruction of a group.[569] The question arises whether this collective action, however understood, requires particular motives beyond the aim of group destruction to fall within the scope of genocide.[570]

In his influential work, Schabas prominently stressed that a particular collective motive is in fact required for the commission of the crime of genocide. He noted that '... it should be necessary for the prosecution to establish that genocide, taken in its collective dimension, was committed "on the grounds of nationality, race, ethnicity, or religion". The crime must, in other words, be motivated by hatred of the group'[571] and that 'Evidence of hateful motive will constitute an integral part of the proof of existence of a genocidal policy, and

564 See on the whole issue the discussion in the section 'Structural Elements'.
565 *Stakic (TC)* [2002] ICTY para 45; *Jelisic (AC)* [2001] ICTY para 49. See also Jones (2003) 468; May (2010) 147 ff; Van der Vyver *Prosecution* (1999) 309; Schabas *Genocide* (2009) 306; see also Luchterhand (1998) 361 with further references.
566 *Stakic (TC)* [2002] ICTY para 45.
567 See the section 'Inchoate Offence'.
568 See Mettraux (2006) 210.
569 See the section 'Reference to Collective Acts'.
570 See in this respect Jones (2003) 468 ff who suggests that the question of genocidal intent is relevant on the collective level only.
571 Schabas *Genocide* (2009) 306.

therefore of a genocidal intent'.[572] A similar position was taken by Simon who equally put forward the importance of a collective motive of hatred. He stated that '... the motive element of genocide consists of institutionalized forms of hatred. ... A peculiar form of hate directs perpetrators toward fulfilling their goals of annihilation. In instances of genocide, individuals become objects of hate because of their group status. Genocide involves killings because of group hatred'.[573] How such a collective motivation would have to be construed is unclear.[574] It has been noted that collective intention is better understood as a shared individual intention rather than seeing the collectivity taking an intention of its own.[575] In this sense, collective motive has been likened to the motives of the organizers and planners of the genocidal policy.[576] In a different view, collective motive for the crime of genocide has been seen as a collective judgement on the moral worth of a group.[577]

On the whole, the position stressing the legal importance of a motive of hatred is not convincing. A motive of hatred, though intuitively associated with genocide, is not a legal requirement of the crime as defined in the Genocide Convention, whether in individual or collective form.[578] As Mundorff points out, equating the intent to destroy one of the listed groups as such with a requirement of hatred rests on 'extremely shaky grounds'.[579] The targeting of a group as an entity can be based on the full range and any combination of motivations inducing human behaviour. Hatred, economic incentives, social utopias and even benevolent motives of acting in the supposedly best interest of a targeted group can play a role.[580] Besides, nothing in the Genocide Convention points to a restriction of a requirement of hatred as a motive.[581] On a fundamental level it can matter little what the intended destruction of a group is motivated by if it is the Genocide Convention's goal to impede group destruction.

In a more practical sense, it is hard to imagine how a particular 'collective motive' would be established at all in a legal context.[582] Institutionalized or collective hatred are concepts that so far elude clear-cut definitions. On a collective level it is particularly difficult to unravel alleged means-ends relationships.[583]

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572 Schabas *Genocide* (2009) 305.
573 Simon *Genocide* (2007) 84; see also Van Haren (2006) 37 ff who seems to agree with the requirement of a hate motive.
574 See in this respect the observations of Fletcher and Ohlin (2005) 545 with regard to the findings of the Darfur Inquiry Commission.
575 See May (2010) 128, 350 ff.
576 Schabas *Genocide* (2009) 305.
577 Simon *Genocide* (2007) 85.
578 See also Wald *Prosecuting* (2006) 88.
579 Mundorff (2009) 109.
580 See Mundorff (2009) 109 ff with further references. See also Storey (1998) 228 and Ahrens (1976) with regard to the killing of the Aché in Paraguay.
581 Mundorff (2009) 109.
582 See the discussion later in section 'The Motive Debate'.
583 See Vest *Structure* (2007) 793 ff.

Even trying to fathom individual motives for participating in genocidal acts has proven to be a dip into a bottomless pit.[584] Relying on the motives of individual organizers or planners of a genocidal policy in that way only seemingly presents a solution. Quite apart from the fact that trying to pin-point particular individual motives in a legal context is a doubtful affair in itself, even just two planners coming together to plot group destruction might have completely different personal motives for doing so.

On a philosophical level, every intent to destroy a group, however motivated in detail, can be seen to carry a notion of hatred or disdain. And for the prototypical cases of genocide, hatred has often been seen to be one of the driving forces.[585] Nevertheless, making hatred or any other particular motive part of the legal requirements of the crime of genocide is neither indicated nor helpful. More pragmatically, what is in fact required both on the individual level as well as for a collective plan or policy, however understood, is the aim of the, at least partial, destruction of the targeted group as an entity as opposed to the killing or mistreatment of some individuals because of their membership in a particular group.[586] In this sense, one particular aim has been made part of the definition of the crime.[587] On the collective level, the 'destruction of a group' is the immediate harm that is to be brought about by the collective action. For the collective action it is, figuratively speaking, not an extended mental element. No further aim or particular underlying motive is required. And an ulterior motive for targeting a group does not negate genocidal intent.[588]

584 See the section 'Introductory Notes on the Crime of Genocide'.
585 Schabas *Genocide* (2009) 306.
586 See the section 'Intent to Destroy a Group As Such'.
587 Tournaye (2003) 452 ff.
588 See in this respect *Ndindabahizi (TC)* [2004] ICTR para 469.

E. PROVING GENOCIDAL INTENT

The conceptual difficulties that genocidal intent poses inevitably and most markedly appear in the actual application of the law of genocide, ie at the processual stage when genocidal intent needs to be proven. Because the structural particularities of genocidal intent remain somewhat ambiguous, spelling out the requirements for proving intent has been difficult for the institutions first faced with the task. Proving genocidal intent has therefore been identified as the main legal problem with regard to the crime of genocide as a whole.[589] Unsurprisingly, the law in this respect is far from settled.[590] Indeed, the approaches to proving intent taken by the international criminal tribunals are still very much tied to the few and particular factual contexts these bodies had to deal with so far.

Having to prove genocide in specific cases brings the structural particularities of the crime and its mental element to the forefront. At the same time, a necessarily pragmatic approach of these questions puts in perspective the theoretical discussions that have been led with regard to the crime's characteristics.[591] What is more, the real problems confronted in proving genocidal intent in the actual application of the law have importantly informed and influenced the theoretical understanding of the crime of genocide.[592] What has been highlighted in the attempts to establish genocidal intent in the international criminal courts so far are the different components the mental element for the crime of genocide comprises and the complex interaction of an individual perpetrator's mental state with a background of collective action. In this way, it has become apparent that the proof of genocidal intent requires establishing both an individual and collective component as well as showing that the two components are connected in a particular fashion.

1. *PROVING INTENT BY INFERENCE*

In the way the crime of genocide is defined in the Genocide Convention, establishing genocidal intent will almost always require the proof of intent for the individual act and the proof of a collective context of action geared towards group destruction as well as showing that the individual act and mental state was linked to the collective context. The intent with its complicated structure is clearly the most difficult element of genocide to prove. It presents challenging evidentiary issues in almost every determination of criminal responsibility for the crime of genocide.[593] Only under exceptional circumstances will there be direct evidence such as statements of the perpetrator and policy docu-

589 Ambos *Internationales Strafrecht* (2011) 236; see also Satzger (2009) 253.
590 Park *Intent* (2010) 133.
591 See the discussions before in the section 'Proving Genocidal Intent'.
592 Most prominently, this has been the case with the understanding of the definition of protected groups; see the section 'Impossibility of Finding and Objective Definition'.
593 Ratner et al (2009) 37.

ments that will unambiguously establish the different components of genocidal intent. More often, only indirect or circumstantial evidence will be available.[594] On a more fundamental level, intent in general is often seen as a 'private fact' that, by its very nature, can only be inferred from outward manifestations. In that sense, even the existence of seemingly direct evidence can only lead to an approximation of the actual intent at the time of the commission of the crime.[595] There have been cases where statements of the perpetrators strongly suggested the presence of genocidal intent.[596] At the ICTY, *Jelisic* made reference to statements of the defendant that he hated Muslims and wanted to kill them all.[597] Even then, the apparent alignment of evidence and supposed intent can prove more complicated. Contradictory factors and inconsistencies can coincide with evidence for genocidal intent.[598] In addition, individual genocidal intent has to refer to a collective context of action in a distinct way to become relevant for the crime of genocide.

The Preparatory Commission for the International Criminal Court in its Elements of Crimes as well as the jurisprudence of the Ad-Hoc Tribunals have made clear that genocidal intent needs not be clearly expressed but can be inferred from relevant facts and circumstances.[599] In essence this restates a position that is well known in domestic criminal law: 'Intent is a logical deduction that flows from evidence of the material acts. Criminal law presumes that an individual intends the consequences of his or her acts, in effect deducing the existence of the mens rea from proof of the physical act itself'.[600] Genocidal intent poses particular difficulties in this respect. For individual crimes the act and consequences are normally closely connected and the inference from act to intent is generally unproblematic. For possibly genocidal acts the same is not true. The individual genocidal act may be far removed from the intended consequences on a collective level.[601] Because of genocide's particular structure, act and consequences can be partially decoupled. It therefore becomes likely that 'the prohibited act may not provide enough information for the

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594 Ratner et al (2009) 37; an example in this respect is provided by the Prosecution's case in relation to Omar al Bashir's alleged responsibility for the crime of genocide. See in this respect ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), 4 March 2009, para 111: '... the Prosecution acknowledges that (i) it does not have any direct evidence in relation to Omar Al Bashir's alleged responsibility for the crime of genocide; and that therefore (ii) its allegations concerning genocide are solely based on certain inferences that, according to the Prosecution, can be drawn from the facts of the case'.

595 See eg Mettraux (2006) 233 and Behrens (2007) 127.

596 See on the whole issue Behrens (2007) 128.

597 *Jelisic (TC)* [1999] ICTY para 102. See also *Ntakirutimana (TC)* [2003] ICTR para 828.

598 Behrens (2007) 128.

599 See ICC Elements of Crimes, General Introduction, para 3; Rutaganda (AC) [2003] ICTR para 525; Gacumbitsi (TC) [2004] ICTR para 40 ; see also ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka, para 27.

600 Schabas *Genocide* (2009) 264.

601 See Schabas *Genocide* (2009) 265.

prosecution to prove that it was committed with the intent to destroy, in whole or in part, a protected group'.[602] In addition, the individual act may give no indication towards the collective context of action and the connection between the two. Because intent is not capable of direct proof and cannot or only theoretically be inferred from the individual act alone, the question of other suitable elements of evidence has become of great importance in the adjucation of the crime of genocide.[603] Circumstantial evidence from which intent or its point of reference is inferred has proven crucial.

Courts have repeatedly stated that 'genocidal intent is inferred on a case-by-case basis from evidence at trial'.[604] In doing so, they have come up with a long list of factors which may be relevant in establishing genocidal intent[605]. In this way, the elements of evidence considered have strongly depended on the factual context that the institutions concerned were dealing with. In many cases it was not distinguished whether the elements contemplated were indicative of the individual or collective component of genocidal intent. This drew a considerable amount of criticism which disapproved of the inference of individual intent solely from general circumstances or a background of collective action.[606] In the following remarks, it will be examined what elements of evidence have been regarded as pertinent with regard to establishing genocidal intent. A distinction will be made between the elements of proof relevant for each of the components of genocidal intent as well as for their interplay.

2. *Establishing the Collective Context*

As mentioned before, genocidal intent is structurally unique in that it has a mixed individual-collective point of reference.[607] On one hand, it must be established that the perpetrator possessed genocidal intent in relation to the underlying offence for which he is charged, ie the perpetrator must have intended to destroy a group or further the destruction of a group through his act.[608] On the other hand, the intent to destroy a group goes beyond the consequences of the conduct of the individual perpetrator.[609] The acts of the perpetrator may and normally will not be sufficient to bring about the intended destruction.[610] A realistic genocidal intent will have to refer to a context of collective action geared towards group destruction. In this way, a plan or policy on a collective level to destroy a group is not seen as a legal element of the crime

602 Van Haren (2006) 221 ff.
603 Behrens (2007) 127.
604 *Musema (TC)* [2000] ICTR para 167; *Rutaganda (TC)* [1999] ICTR para 63.
605 For an overview see Mettraux (2006) 233 ff and Van den Herik (2005) 110 ff.
606 See eg Kirsch (2009) 357 ff.
607 See the section 'Concept of Intent for the Crime of Genocide'.
608 Mettraux (2006) 236; Vest *Herausforderung* (2001) 481 ff.
609 Vest *Structure* (2007) 784; see in this respect also Ambos *Intent* (2009) 841.
610 Triffterer (2001) 403; with regard to this aspect see also Vest *Structure* (2007) 789 ff.

but it becomes essential as a basis of proof that an individual perpetrator possessed genocidal intent.[611]

While not giving indications as to the theoretical foundations of the assertion, the Ad-hoc Tribunals have repeatedly stressed the importance of establishing a background of collective action to the individual perpetrator's case. As the ICTR put it in *Karemera,* 'Although not itself sufficient to support a genocide conviction' the background against which an individual acts is 'relevant to the context in which individual crimes are charged'.[612] The existence of a nationwide campaign of crimes was seen to provide the framework for understanding the individuals' actions.[613] In *Kayishema*, the ICTR held that 'although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation'.[614] In a similar way, an ICTY Trial Chamber observed in *Jelisic* 'that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system'.[615] As was repeated in *Krstic*, while 'the existence of a plan [is] not a legal ingredient of the crime of genocide', it can 'be of evidential assistance to prove the intent of the authors of the criminal act[s]'.[616] At the ICC, the Pre-Trial Chamber I confirmed that a contextual element as laid out in the Elements of Crimes is in fact required.[617] Prior to assessing an individual defendant's criminal responsibility, the international criminal tribunals have thus looked at the backdrop to an individual's acts and intent.[618]

One approach to establishing the background of individual genocidal intent has been trying to show that genocide occurred in a particular historical context, independently of determining individual criminal responsibility. In doing so, the courts understood the term 'genocide' in an abstract sense as comprising the totality of all crimes during a certain conflict or period of time.[619] Most prominently, it was the ICTR which went on to hold that the situation in Rwanda at the time of the commission of the atrocities generally constituted

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611 See the discussions in section 'Reference to Collective Acts'; see also Mettraux (2006) 210; Nersessian *Contours* (2002) 267; Aptel (2002) 289.

612 *Karemera et al. (AC)* [2006] ICTR, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, para 36.

613 See also Jørgensen *Fact* (2007) 892.

614 Kayishema & Ruzindana (TC) [1999] ICTR para 94.

615 *Jelisic (TC)* [1999] ICTY para 101.

616 *Krstic (TC)* [2001] ICTY para 572 (citing *Jelisic (AC)* [2001] ICTY para 48).

617 ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), 4 March 2009, para 121. See in this regard also the Dissenting Opinion of Judge Usacka, paras 16-20.

618 See Park *Intent* (2010) 153 ff.

619 See Milanovic (2006) 593 ff who also points out this argumentation in the pleadings of Bosnia in the ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007.

genocide. It held that the question of 'whether genocide took place in Rwanda in 1994 ... is so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue'.[620] The ICTR went so far as to take judicial notice of the fact that 'genocide' had occurred in Rwanda. The Appeals Chamber in *Karemera* ruled that the 'fact of the Rwandan genocide is part of world history … a classic instance of a 'fact of common knowledge'.[621] The term 'genocide' in that respect was used to relate to a historical or sociological concept rather than referring to the legal requirements for individual criminal responsibility as laid out in the definition of the crime in the Genocide Convention.[622] Blending the establishment of the factual background with a blurry legal characterization in that way is clearly problematic. In particular, since proving genocidal intent relies heavily on inferences, the danger that a legal characterization of the general background in broad terms could end up forming the sole basis for an individual's conviction for the crime of genocide became apparent.[623] Rather, what needs to be established with respect to the proof of genocidal intent is that a factual situation existed to which the individual perpetrator's intent referred. It needs to be shown that there was a plan, a policy or at least a pattern of acts geared towards group destruction.[624] An abstract legal or historical characterization of the collective context is of no further help.

A broad range of categories of evidence have been found pertinent to different degrees by the international criminal courts in circumstantially establishing genocidal intent. For the most part, the courts did not differentiate between elements of evidence particularly relevant for the different components of intent. Nevertheless, the elements of evidence presented in the following sections are those that have so far been used to establish the general context that an individual perpetrator's intent refers to.

In assessing evidence pointing towards a plan or policy, elements of evidence such as policy documents or overt statements directly establishing that the commission of acts on a larger scale was planned have been taken to inexorably support an inference of genocidal intent on the part of the individual perpetrators, given that the individual elements are present.[625] However, in most

620 *Kayishema & Ruzindana (TC)* [1999] ICTR para 273.
621 *Karemera et al. (AC)* [2006] ICTR, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, para 14.
622 See Jørgensen *Fact* (2007) 895 and Milanovic (2006) 593 ff.
623 Jørgensen *Fact* (2007) 895; see on the issue also Kirsch (2009) 358 ff.
624 See also ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 115,
625 See Park *Intent* (2010) 156; see also ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007 para 373.

cases direct evidence of a plan or policy is rare.[626] A collectively organized pattern of action has then to be shown by way of inference from circumstantial evidence. Propaganda, political doctrine and statements made in connection to the commission of mass atrocities have been extensively used to infer the existence of a background of collective action. In the same way, patterns of conduct and evidence of systematic targeting as well as the characteristics of the genocidal acts themselves have been looked at in the effort to characterize the collective context. Additionally, abusive acts accompanying mass atrocities have also played an important role. Finally, evidence showing the existence of particular aims on a collective level, such as particular economic or military advantages sought, have also been taken into consideration.

Making inferences as to the collective background of genocidal intent and genocidal intent itself from the evidence presented in court is far from being a mechanical inquiry. The jurisprudence of the Ad-hoc Tribunals has made clear that with regard to pertinent elements of evidence a case-by-case approach has to be taken. Neither of the particular elements presented in the following remarks can be identified as necessary or sufficient to prove genocidal intent and its collective background.[627] The courts conduct a holistic inquiry into whether the overall factual context constitutes 'the physical expression of an affirmed resolve to destroy ... a group as such'.[628] As stated by the prosecution of the ICC and affirmed by the Pre-Trial Chamber I, an inference of a genocidal policy 'may properly be drawn from all evidence together, even where each factor on its own may not warrant such an inference'.[629]

a) **Articulations of a Collective Course of Action**

When looking to prove individual intent, an intuitive starting point are statements of the perpetrator. Figuratively, the same goes for trying to establish a collective plan or policy. Unlike for an individual perpetrator, articulations of a collective plan or policy geared towards group destruction can manifest themselves through different actors and through distinct channels. Clearly, documents or declarations directly spelling out such a plan or policy are of the greatest evidentiary value. Yet, such declaration will rarely exist or be available to the prosecution. Instead, what often will have to be relied on are more indirect articulations of a collective course of action. One such type of articulation that was found indicative of a collective context geared towards group destruction is that of a particular political doctrine. As the ICTY put it in *Karadzic & Mladic*, 'The intent which is peculiar to the crime of genocide need not be

626 The Prosecution's case in ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, provides a good example in this respect, see para 111.

627 Park *Intent* (2010) 152.

628 *Jelisic (TC)* [1999] ICTY para 108; see in this regard Park *Intent* (2010) 153.

629 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009 paras 153, 156.

clearly expressed ... intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 ... '.[630] In *Al Bashir*, the Prosecutor of the ICC relied on a number of documents indicating a particular political stance.[631] Following from political doctrine and further illustrating its contents can be the presence of propaganda. Rwanda before and during the mass atrocities provides many examples of the widespread dissemination of messages through the different media that indicate the existence of a particular policy.[632] In this way, the ICTR in *Akayesu* took note of 'a propaganda campaign conducted before and during the tragedy ... overtly call[ing] for the killing of Tutsi'.[633] Equally, a collective course of action can articulate itself in the statements of political leaders or other figures of authority.[634] In order to understand the collective context, the ICTR made several references to public statements made by Leon Mesera, a professor and known propagandist[635] who had urged his audience 'to cut the legs ... [off] babies who were still sucking ... so that they would not be able to walk' and claimed that 'we will not make the ... mistake where we let the younger [Tutsis] escape'.[636] In the same way, the ICTR referred to letters of a military colonel that were widely distributed and identified the enemy to be targeted by collective action.[637] More recently, in the case of *Al Bashir* the prosecutor of the ICC also placed particular reliance on statements of members of the Sudanese Government.[638] Further, statements of people directly involved in the commission of genocidal acts have played an important role in establishing the existence of a broader policy or plan. A chilling example in this respect is the reference made by the ICTR in *Ntakirutimana* to armed attackers who chased Tutsi refugees while singing 'Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests'.[639] However, isolated statements of individual perpetrators can be of limited significance for the inference a collective policy, rather pointing to the individual mental state. Generally, the further away the statements are made from the center of policy making and the exercise of power on the collective level, the

630 *Karadzic & Mladic (TC)* [1996] ICTY, Review of Indictment Pursuant to Rule 61, para 94; see also Van Haren (2006) 221 and Quigley *Genocide Convention* (2006) 116 ff.

631 ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, para 166; see also the Dissenting Opinion of Judge Usacka, para 42, 47.

632 See Park *Intent* (2010) 163.

633 *Akayesu (TC)* [1998] ICTR para 123.

634 See also ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 164.

635 Park *Intent* (2010) 155.

636 *Kayishema & Ruzindana (TC)* [1999] ICTR para 280; see also *Akayesu (TC)* [1998] ICTR para 100.

637 See Park *Intent* (2010) 163.

638 See ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, paras 170-174.

639 *Ntakirutimana (TC)* [2003] ICTR para 828. A similar example is found in *Niyitegeka (TC)* [2003] ICTR paras 413, 419.

less pertinent they will prove in establishing a collective course of action, rather attesting to the individual perpetrator's state of mind.[640]

b) **Nature and Extent of Violent Acts**

Apart from more or less direct articulations of a policy geared towards group destruction through people connected to the commission of the atrocities, the way in which genocidal acts are committed can allow important inferences. Evidence of systematic targeting, the particular scale and intensity and the specific characteristics of the acts of violence have been seen as indicative of the existence and genocidal nature of a collective course of action.

(1) *Systematic Targeting*

One main aspect that indicates a collectively organized course of action is evidence of the systematic targeting of victims.[641] It can also help to determine whether a particular attack was ultimately directed at a group rather than at the individual victims concerned.[642] As the ICTR put it in general terms in *Kayishema*, the 'consistent and methodical pattern of killing is further evidence of the specific intent'.[643] In *Al Bashir*, the Prosecutor of the ICC acknowledged that his allegations concerning the existence of reasonable grounds to believe in the genocidal intent of the Sudanese Government were essentially based on the inference drawn from the alleged clear pattern of mass atrocities[644], 'a consistent modus operandi'.[645] More specifically, the jurisprudence of the Ad-hoc Tribunals has identified means through which systematic targeting occurs. Importantly attesting to systematic targeting are processes of victim selection. In *Ntagerura* et al the ICTR made reference to massacres on a football field where soldiers had come to the field beforehand asking the refugees whether they were all Tutsis.[646] Other evidentiary examples of the process of victim selection in Rwanda include execution lists identifying categories of victims and the setting up of roadblocks at which 'soldiers, troops of the Presidential Guard and/or militiamen ... systematic[ally] check[ed] identity cards indicating the ethnic group of their holders'. Persons listed as a Tutsi were

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640 See in this respect the ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, para 175; see also para 152: '... the mental state of mid level superiors and low level physical perpetrators is irrelevant for the purpose of determining whether the materials provided by the Prosecution show reasonable grounds to believe that the crime of genocide against the Fur, Masalit and Zaghawa groups was part of the GoS counter-insurgency campaign ...'.

641 See also Ratner et al (2009) 38; Jones (2003) 410 cautions against inferring genocidal intent solely from systematic targeting.

642 See Nersessian *Political Groups* (2010) 39.

643 Kayishema & Ruzindana (TC) [1999] ICTR para 535.

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

645 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka at para 48, 65.

646 *Ntagerura et al.* (TC) [2004] para 690; see in this respect also Behrens (2007) 136.

then 'immediately apprehended and killed, sometimes on the spot'.[647] The ICTY found evidence for the systematic nature of the killings in Srebrenica in 'the number of [military] forces involved' and 'the standardised coded language used by the units in communicating information about the killings.'[648] Further, the repetition of particular acts throughout a multitude of individual crimes has been taken to be a factor supporting the inference of a genocidal policy.[649] The ICTR found the repetitive manner of acts committed against the Tutsi to be compelling evidence of planning.[650] The blanket targeting of all segments of a group, particularly the targeting of children and people of old age, has equally acted as a strong indicator. In *Kayishema*, the ICTR observed that '... they were also killed regardless of gender or age. Men and women, old and young, were killed without mercy. ... No Tutsi was spared, neither the weak nor the pregnant'.[651] This was taken to provide substantial evidence of genocidal intent.[652] Conversely, in *Brdjanin* an ICTY Trial Chamber agreed that the fact that perpetrators had directed their acts solely against members of the group of military age partially militated against a finding of genocidal intent.[653]

(2) *Scale*

The significance of evidence of the breadth and scale of attacks has been repeatedly emphasized in the jurisprudence of the Ad-hoc Tribunals and has also been noted in recent jurisprudence of the ICC Pre-Trial Chamber I.[654] In *Kayishema*, the ICTR specifically stressed the number of group members targeted by the perpetrator as a means of establishing genocidal intent.[655] The scale was seen relevant both in terms of the absolute number of victims from a group affected as well as in relation to the size of the potential victim group.[656] As Park notes:

> Inferring genocidal intent from the scale of atrocities appears to derive from the legal presumption – present in many domestic jurisdictions – that people intend the foreseeable consequences of their deliberate acts. In other words, the fact that one takes action (e.g., killing large amounts of people) "with full knowledge of the detrimental consequences it would have for the

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647 *Akayesu (TC)* [1998] ICTR para 123.
648 *Krstic (TC)* [2001] ICTY para 572.
649 *Jelisic (AC)* [2001] ICTY para 48. See also Behrens (2007) 138; Moreillon (2009) 257; Van Haren (2006) 222.
650 *Kayishema & Ruzindana (TC)* [1999] ICTR paras 534-35. See in this regard Park *Intent* (2010) 171.
651 *Kayishema & Ruzindana (TC)* [1999] ICTR paras 531-532.
652 See Zahar and Sluiter (2007) 173.
653 *Brdjanin (TC)* [2004] ICTY para 979; see also Behrens (2007) 132.
654 See ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka at para 51; see also Behrens (2007) 136.
655 Kayishema & Ruzindana (TC) [1999] ICTR para 93.
656 See Park *Intent* (2010) 160 f.

> physical survival of [a particular] community" is highly probative on the question of whether the actor specifically intended to achieve this result.[657]

It is normally the scale of atrocities that triggers international attention leading up to allegations of genocide in the first place. And it is the scale of atrocities, also, that will generally work as the most manifest proof of genocidal intent. The importance of evidence of the extent of the attacks concerned can thus hardly be underestimated in building a case. Nevertheless, it has to be pointed out that the mere scale of attacks alone will normally not be sufficient proof of a genocidal policy. Mass-scale attacks are also a feature of crimes against humanity.[658] The inference of an intended group destruction crucial to the crime of genocide rests on a weak evidential basis if proven by numbers only. Equally, a particular scale of the violent acts is not a necessary element of proof. Genocide not being a result crime with regard to the group destruction, it is the *intended* group destruction that needs to be established, not the group destruction as such.[659] Further, relying on a particular scale of the violent acts ensues the question of what extent the attacks must be in order to be relevant to establish genocidal intent, leading back to the issue of the necessary intended destruction for the crime of genocide.[660]

(3) *Characteristics of Acts*

In addition to the mere scale, the intensity of attacks can play a role in inferring a genocidal policy. In *Nikolic*, the ICTY regarded the extreme gravity of discriminatory acts as indicative of genocidal intent.[661] In this way, a particularly brutal attack targeting a limited number of victims can also indicate the existence of a genocidal policy.[662] The manner in which killings and other genocidal acts were executed has been extensively looked at in the jurisprudence of the Ad-hoc Tribunals.[663] The type of weapons used in the conduct of attacks has equally been seen potentially relevant in establishing the existence

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657 Park *Intent* (2010) 160, referring to *Krstic (AC)* [2004] ICTY para 29.
658 See the discussion in section 'Concept of Intent for the Crime of Genocide'.
659 See the discussion in section 'Inchoate Offence'.
660 See the discussion in section 'Nature of the Intended Destruction'.
661 *Nikolic (TC)* [1995] ICTY, Review of Indictment, para 34.
662 See ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka at para 51.
663 See Behrens (2007) 138.

of a genocidal policy.[664] Additionally, the time and place at which the relevant acts were committed have been considered.[665]

c) Accompanying Acts

In trying to establish the collective context, the acts looked at need not necessarily be in furtherance of the actus reus of genocide to be fairly interpreted as manifesting genocidal intent.[666] The Ad-hoc Tribunals have held that it is proper to consider the wider context of the crimes in evaluating intent.[667] As held by the ICTY in *Karadzic & Mladic*, genocidal intent can be inferred 'from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group – acts which are not in themselves covered by the list in article 4(2) but which are committed as part of the same conduct'.[668] In *Krstic*, the ICTY went on to observe that: 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group'.[669] This view was later confirmed by the ICJ in its Genocide decision.[670] In this way, forcible transfer can be indicative of the existence of a genocidal policy.[671] Even though forcible transfer does not by itself constitute a genocidal act, the ICTY relied on it as evidence of the intentions of high-ranking members of the Army of the Serb Republic.[672] Further examples of acts accompanying mass-atrocities that were interpreted as manifesting genocidal intent include the destruction of property and attacks against cultural institutions of the targeted group.[673] In *Al Bashir*, the Prosecution of the ICC additionally relied on alleged instances of pillage and the hindrance of

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664 See Moreillon (2009) 257; Nersessian *Contours* (2002) 267. In this respect the ICJ noted that despite their destructive power, the use of nuclear weapons would not per se establish genocidal intent, see ICJ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 227, 240; see also ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka at para 49, pointing to the fact the the Prosecution considered the use of consistent types of weaponry relevant.

665 See Van Haren (2006) 222.

666 See Park *Intent* (2010) 164.

667 *Jelisic (AC)* [2001] ICTY para 47; see Mundorff (2009) 102 ff with further references.

668 *Karadzic & Mladic (TC)* [1996] ICTY para 84.

669 *Krstic (TC)* [2001] ICTY 580.

670 ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 334.

671 See in this respect Scheffer (2006) 241 ff.

672 *Krstic (AC)* [2004] ICTY paras 33-34.

673 See Van den Herik (2005) 110 ff; Mundorff (2009) 102 and Van Haren (2006) 222 with further references. For a more detailed analysis of this issue see Vrdoljak (2007) 17.

medical and other humanitarian assistance to prove the existence of a genocidal policy.[674]

3. *PROVING THE INDIVIDUAL COMPONENTS*

Proving the individual components of the *mens rea* for the crime of genocide in the first place involves establishing the intentional commission of the *actus reus*.[675] To do so should be unproblematic in most cases, especially for direct perpetrators of genocidal acts, where, absent extraordinary circumstances, proof of the acts itself will provide sufficient basis of proof for the mental element. For indirect, high-level perpetrators, the problem in this respect will revolve around linking them to the commission of the individual crimes.

It is the component of individual genocidal intent which goes beyond the *actus reus* that raises a number of issues with regard to its proof. As noted before, the existence of a particular collective context is crucial to proving genocidal intent. However, what needs to be established in addition is a specific connection of the individual acts and mental state to that broader background.[676] It is not enough to show that an individual acted at the same time that others were acting.[677] In a first step, it needs to be shown that the individual perpetrator was aware that his acts fitted into a reasonable plan to destroy a group.[678] Mere knowledge of the collective context, however, is not sufficient, either. In a second step, it needs to be shown that the perpetrator possessed the individual intent of group destruction. The prosecution must identify contextual elements, particular acts and conduct of the individual that point to him being part of the genocidal campaign.[679]

(1) *Proving Knowledge of the Collective Context*

In order to be able to establish that a perpetrator had genocidal intent, the prosecution has to show that he had knowledge of the collective course of action. If such a genocidal policy exists, it should be relatively straightforward to show that the perpetrator did in fact have knowledge of it, especially if the perpetrator concerned held a position of authority at the time of the commission of the crimes.[680] Knowledge of the policy needs not be precise.[681] As Morris and Scharf are cited in *Kayishema*, 'it is unnecessary for an individual to

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674 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka at para 181, 192.

675 See the section 'Mental Element Corresponding to the Actus Reus'; see in this respect *Krstic (AC)* [2004] ICTY para 20.

676 See Mettraux (2006) 233 ff with further references.

677 Quigley *Genocide Convention* (2006) 116.

678 See Kirsch (2009) 357.

679 See Kirsch (2009) 359.

680 See ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 373.

681 See Van der Vyver *Mens Rea* (2004) 266.

have knowledge of all details of the genocidal plan or policy'.[682] The International Law Commission in its draft Code of Crimes Against the Peace and Security of Mankind already noted that 'The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide'.[683] The degree of knowledge will vary depending on the position of the perpetrator within the organization that carries the genocidal policy into execution.[684]

(2) *Proving Individual Intent*

As noted, the collective context in the first place serves as a point of reference for individual intent. Beyond that, the characteristics of the collective genocidal policy can also be indicative for further distinguishing the individual intent.[685] Knowledge of a particular collective context in itself can help paint the picture of the personal genocidal *mens rea*. However, evidence of the collective context and the perpetrator's knowledge thereof cannot sufficiently establish his intent alone.[686] Collective and individual components of proof must both be present to allow the proper inference of genocidal intent.[687] In *Bagilishema*, the Trial Chamber of the ICTR noted that '... the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action'.[688]

(a) Characteristics of Individual Acts

The case law of the Ad-hoc Tribunals, that of the ICTR in particular, shows that the acts of the perpetrators themselves allow an important inference of genocidal intent at the time of the commission of the crimes.[689] The intent can become apparent in the perpetrator's conduct and the genocidal acts he is directly responsible for.[690] Exemplarily, in the opinion of an ICTR Trial Chamber the accused Obed Ruzindana 'displayed his intent to rid the area of Tutsis by his words and deeds and through his persistent pattern of conduct'.[691] It is un-

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682 Morris (1997) 167; see *Kayishema & Ruzindana (TC)* [1999] ICTR para 94.

683 International Law Commission, Report of the International Law Commission to the General Assembly on the Work of its Forty-Third Session, para 45, U.N. Doc. A/46/10 (July 19, 1991). See also Schabas *State Policy* (2008) 966 ff. This issue also ensues the question of how probable the group destruction must have seemed. See in this respect Vest *Structure* (2007) 793 ff.

684 Schabas *State Policy* (2008) 967.

685 Aptel (2002) 287 ff.

686 See Kirsch (2009) 359; Ratner et al (2009) 39.

687 See Behrens (2007) 136.

688 *Bagilishema (TC)* [2001] ICTR para 63; see in this respect Quigley *Genocide Convention* (2006) 117 and Aptel (2002) 289.

689 Behrens (2007) 136.

690 See Zahar and Sluiter (2007) 173.

691 Kayishema & Ruzindana (TC) [1999] ICTR para 541.

challenged that the acts of the perpetrator and their characteristics are of foremost relevance in establishing the existence of genocidal intent.[692] Nevertheless, it has to be kept in mind that with regard to the individual act, genocidal intent is an extra subjective element. The individual act and the intended consequence of group destruction can and normally will be decoupled.[693] It is thus important to note that the inference of genocidal intent from individual acts cannot be drawn in a straightforward manner and, on its own, may not provide sufficient evidence. The ICTR drew the inference of genocidal intent from individual acts and their characteristics in several cases. With regard to Mr Kayishema, the inference of his genocidal intent was drawn from the efficiency and zeal with which he had overseen the killings in his prefecture and the sheer number of killings he was directly responsible for.[694] For Mr Ruzindana, the court found evidence of genocidal intent in the particular ruthlessness that he had displayed in his actions.[695] With regard to determining Mr Akayesu's intent, the Trial Chamber found relevant that Tutsi women in the commune over which he presided had been systematically raped.[696]

(b) Individual Statements

Apart from his acts, a perpetrator's statements are the other main element of evidence to establish his intent. As the ICTR Trial Chamber put it in *Akayesu*, 'it is possible to infer the genocidal intention that presides over the commission of a particular act, inter alia ... from the utterances of the accused ...' [697] In this way, throughout the case law of the international criminal tribunals statements of potential perpetrators were closely examined in determining whether an individual possessed the requisite genocidal intent.[698] Because perpetrators of genocide act within a collective context in which the intent to destroy a group is often legitimized and even made part of a publicly endorsed policy, there is no shortage of perpetrators who betray their intent through public or private statements.[699] Statements directly voicing intent of group destruction obviously carry the greatest evidential value. In addition, pejorative

692 See Van der Vyver *Mens Rea* (2004) 266.
693 See the discussion in 'Proving Genocidal Intent'.
694 *Kayishema & Ruzindana (TC)* [1999] ICTR para 531. See in this respect Verdirame (2000) 586 and Van den Herik (2005) 113 with further references.
695 Kayishema & Ruzindana (TC) [1999] ICTR para 544.
696 See Verdirame (2000) 584 with further references.
697 *Akayesu (TC)* [1998] ICTR para 728.
698 See Park *Intent* (2010) 156 ff.
699 Schabas *Genocide* (2009) 265. For examples in the case law of the international criminal tribunals see *Akayesu (TC)* [1998] ICTR para 729; *Rutaganda (TC)* [1999] ICTR para 198; ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka at paras 37 ff.

language towards the victims and the targeted group has been taken into account when assessing and individual perpetrator's genocidal intent.[700]

4. *EVIDENCE SPEAKING AGAINST THE PRESENCE OF GENOCIDAL INTENT*

In assessing genocidal intent, it is equally as important to know factors which, in their presence or absence, speak against the existence of such intent, either on the level of the collective policy or for the perpetrator's individual mental state. The issue has for the most part not been approached systematically in the jurisprudence of the international criminal tribunals. Nevertheless, the case law shows that certain elements have repeatedly been considered in this regard.

a) **Counterindicators at the Collective Level**

Proof of acts or conduct that explicitly counterindicates the existence of a genocidal policy has mainly been found in instances where large sections of the groups allegedly targeted were allowed to flee or even actively brought to security.[701] For example, the Darfur Inquiry Commission partially based its findings that there was insufficient indication of a state policy to commit genocide in Sudan on evidence that a part of the members of the communities otherwise victimized were allowed to flee or collected in camps for the internally displaced.[702] Similar conclusions were drawn by the ICC Pre-Trial Chamber I regarding the same situation.[703]

When looking for other factors speaking against the presence of genocidal intent, the focus tends to shift to negative evidence, ie evidence of the lack or omission of certain acts and their characteristics that are normally seen as manifesting the intent to destroy a group. On a basic level, since there are no particular elements of proof that necessarily need to be present in proving genocidal intent, the absence of a particular element never as such speaks against the presence of that intent. The presence and absence of each element has to be seen in the case-specific context.[704] Basing the inference of an absence of intent on the absence of certain acts can be problematic. The Darfur Inquiry Commission's findings again provide an example. The Commission noted that the perpetrators had refrained from attacking villages where both target and non-target groups lived and concluded that this showed a lack of intent to destroy the target group as such.[705] While this is one of the conclusions

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700 See Quigley *Genocide Convention* (2006) 116; Van der Vyver *Mens Rea* (2004) 266; Van Haren (2006) 222.

701 See the examples given at Van Schaak *Darfur* (2005) 1129 ff; Southwick (2005) 196 ff.

702 See Van Schaak *Darfur* (2005)

703 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 196.

704 See Behrens (2007) 137.

705 Report of the International Commission of Inquiy on Darfur to the United Nations Secretary General (2005), UN Doc. S/2005/60, para 516. This example is taken from Luban *Name* (2006) 315.

that can be drawn, the facts could point to the exact opposite inference, ie that the attackers were hostile only to the targeted group and did not want to risk harm to other groups.[706] In the same context, in order to support its finding of a lack of genocidal policy, the ICC Pre-Trial Chamber I noted that no long-lasting detention camps where inmates were systematically tortured and executed had been established in Darfur.[707] As Judge Usacka put it in her dissenting opinion to this decision, 'While the existence of such camps would certainly be relevant to support an inference of genocidal intent, proof of such camps is not a required element of any of the counts of genocide alleged'.[708] The absence of detention camps as such does not indicate the absence of a genocidal policy.

The question of whether the lack of a particular action can be taken as evidence for a lack of genocidal intent becomes particularly significant in cases where the perpetrators had the specific opportunity to act.[709] In this way, an ICTY Trial Chamber in *Brdjanin* pointed to the fact that the Serbian forces in the situation concerned had the resources to displace a large number of Bosnian Muslims and Bosnian Croats, 'resources which, had such been the intent, could have been employed in the destruction of all Bosnian Muslims and Bosninan Croats'.[710] In the same logic, the ICC Pre-Trial Chamber I in *Al Bashir* pointed to the fact that even where attackers had encircled a targeted village, the large majority of inhabitants were neither killed nor injured.[711] But even in such cases, inferences drawn from the omission of acts can be problematic. As Behrens puts it, 'Context is again of great importance if the accurate value of the omission of a fact is to be ascertained. The omission of the destruction of a group when the perpetrator had the means at his proposal to proceed, may serve as a prima facie negation of genocidal intent. However, the consideration of contextual factors may change the picture'.[712] For example, the ICTY Appeals Chamber in *Krstic* noted that 'the decision not to kill the women or children may be explained by the Bosnian Serbs' sensitivity to public opinion'.[713]

Both conduct such as actively saving people by evacuating them and the omission of acts can seem to be inconsistent with a genocidal policy and therefore

706 Luban *Name* (2006) 315.
707 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 197.
708 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka, para 79.
709 Behrens (2007) 137.
710 *Brdjanin (TC)* [2004] ICTY para 978; see Behrens (2007) 137.
711 ICC *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), 4 March 2009, para 196; see in this respect also the Dissenting Opinion of Judge Usacka, para 78.
712 Behrens (2007) 137.
713 *Krstic (AC)* [2004] ICTY para 31.

be seen to speak against the presence of a collective course of action geared towards the destruction of a group. As noted before, such inconsistencies need to be seen in context. Mettraux notes that 'In almost every case of mass atrocities, and genocidal conduct in particular, there is an element of randomness or incoherence on the part of the killers, be it in the form of unexpected mercy on the part of an otherwise ruthless murderer or by reason of pure opportunism'.[714] Genocidal policies are implemented by individuals who may retain considerable discretion in doing so.[715] Therefore, individual acts or omissions considered in isolation might suggest a particular intent but gain an entirely different meaning when events are looked at as a whole.[716] On a more fundamental level, the context of genocidal acts in which perpetrators momentarily exercise absolute power over their victims is in itself conducive to acts which would appear inconsistent with a genocidal policy. As Sofsky puts it, 'implicit in absolute power is the liberty to refrain from atrocities at will'.[717] And because genocide is targeted not at the individual, as such, but at a group, the fate of a particular victim could seem irrelevant to perpetrators who aim for group destruction on a large scale.[718]

Finally, an important issue in assessing factors that could point to the absence of a genocidal policy consists of the question whether evidence of certain objectives of a collective course of action other than group destruction speaks against the presence of genocidal intent. It concerns the possibility and impossibility of the coexistence of certain aims on the collective level.[719] This goes for the coexistence of genocidal intent with political and economic aims but, in particular, it concerns the issue of the potential coexistence of military or security considerations with the intended group destruction. As has been noted,

> Evidence of genocidal intent can be obscured where alternative intents or purposes can be identified, hypothesized, or claimed. For example, where violence is occurring within the context of a civil war or a counter-insurgency movement with ethnic dimensions, attacks on a particular group can be framed as part of an armed conflict reflecting political or other discord in an effort to deflect attention from a genocidal policy.[720]

In the words of Judge Usacka, 'throughout history, groups who were subjected to genocide were targeted on the basis of an allegation that they posed a

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714 Mettraux (2006) 232.

715 See Van Schaak *Darfur* (2005) 1131; see the example of the Janjaweed in Darfur at Luban *Name* (2006) 315; see also Heder *Reassessing* (2005) 390 and the discussion in section 'Official Policy, Local Practice'.

716 Van Schaak *Darfur* (2005) 1131.

717 Sofsky (1997) 230; see in this regard Lang (2010) 238.

718 See also Kiernan *Targeting* (1991) 224.

719 For the coexistence of motives on the individual level see the section 'Motive' and the discussion in the following section 'Counterindicators at the Individual Level'.

720 Van Schaack *Blind Spot* (2007) 128.

threat to the perpetrating group'.[721] The case-law of the Ad-hoc Tribunals confirms this pattern. Confronted with charges of genocide, defendants have frequently responded that any targeting of a protected group was driven by military considerations rather than the desire for group destruction.[722] While the threat posed by the targeted group can be mere pretence, the relationship between the perception of military advantages and the intent to destroy a protected group can also be a very close one.[723] An ulterior reason for a genocidal policy of destroying a group in whole or in part may well be to gain a tactical military advantage.[724] In this sense, 'the ICTR has recognized that mass murder and military conflict follow no necessary causal orientation: genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan'.[725] The presence of armed conflict as such neither indicates nor counterindicates genocidal intent.[726] More generally, evidence suggesting certain ulterior motives of the perpetrators such as economic, political or military advantages do not as such speak against the presence of a genocidal policy since they may well coexist.[727]

b) **Counterindicators at the Individual Level**

What has been noted on elements of evidence speaking against the presence of a genocidal policy on the collective level in a transferred sense also goes for possible counterindicators of genocidal intent at the individual level. The context and the other elements of evidence relevant for establishing genocidal intent available are extremely important in assessing individual acts or omissions that could indicate the absence of genocidal intent. In the case of *Bagilishema* who was acquitted of the charges of genocide[728], what was relied on in finding that Mr Bagilishema had lacked genocidal intent were his conduct before and during the genocidal events, the use of the security resources at his disposal to protect victims and the fact that he had hidden Tutsi in his own house.[729] Singular instances in which perpetrators acted in a manner that could be considered inconsistent with genocidal intent, however, were repeatedly not seen to negate individual *mens rea*. In several cases the ICTR re-

721 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion of Judge Usacka, para 65.

722 Park *Intent* (2010) 168; see eg *Krstic (AC)* [2004] ICTY para 26.

723 Behrens (2007) 132.

724 Park *Intent* (2010) 167.

725 Park *Intent* (2010) 167 with further references. See eg *Akayesu (TC)* [1998] ICTR para 127.

726 The ICJ held that the exercise of military force is not sufficient in itself to establish genocidal intent. See ICJ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 227, para 35. See Nersessian *Political Groups* (2010) 213 ff for a more detailed analysis.

727 See the discussion in section 'Individual and Collective Motive'.

728 Bagilishema (TC) [2001] ICTR, Bagilishema (AC) [2002] ICTR.

729 *Bagilishema (TC)* [2001] ICTR, Separate Opinion of Judge Gunawardana paras 13-131. See Van den Herik (2005) 113 ff for further references.

jected that saving individual victims could as such be sufficient proof of the absence of genocidal intent.[730]

As noted before, it has been made clear in the jurisprudence of the Ad-hoc Tribunals that evidence of the existence of a personal motive such as personal economic benefits or political advantage does not exclude the perpetrator's genocidal intent.[731] Equally, a lack of statements that would indicate genocidal intent seems not to have been seen as particularly significant in determining individual genocidal intent.[732] However, as Behrens puts it, 'A contextual view may again yield different results - in situations, in which a statement had been expected of, but was denied by, the defendant (such as the refusal to take an oath on a genocidal leader), the omission of utterances might allow an insight into the mind of the perpetrator and may cast doubt on the existence of genocidal intent'.[733]

5. *STANDARD OF PROOF*

A trier of fact needs to be convinced that the evidence at hand establishes the necessary mens rea at the time of the commission of the crime 'beyond a reasonable doubt'. This is the standard broadly accepted to apply at the trial stage of criminal proceedings at the international level.[734] In adjucating a case of state responsibility, the ICJ used a slightly different wording, holding that 'claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive … The Court requires that it be fully convinced that the allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established'. [735]

Circumstantial evidence often plays an important role in findings of genocidal intent. As has been confirmed by the ICC Pre-Trial Chamber I, genocidal intent 'may properly be drawn from all evidence taken together, even where each factor on its own may not warrant such an inference'.[736] Nevertheless, tribu-

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730 *Kayishema & Ruzindana (AC)* [2001] ICTR paras 147-149; *Barayagwiza et al (TC)* [2003] ICTR, paras 838-850, 968-969; *Muhimana (AC)* [2007] ICTR para 32.

731 *Jelisic (AC)* [2001] ICTY para 52, citing *Tadic (AC)* [1999] ICTY para 269. See also Ambos *Intent* (2009) 837; Mettraux (2006) 211; Behrens (2007) 131.

732 *Krstic (AC)* [2004] ICTY para 34.

733 Behrens (2007) 138.

734 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 155; see also Kordic & Cerkez (AC) [2004] ICTY para 833; Brdjanin (TC) [2004] ICTY para 353; for the ECCC see ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 1323. See in this respect also Armoury Combs (2010) 364 who presents a more detailed view of the issue.

735 See ICJ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 209; See in this respect Milanovic (2006) 593 ff.

736 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, para 153, 156.

nals are expected to give detailed reasons why the evidence at hand permits to conclude that an accused possessed the required intent.[737] In this sense, the jurisprudence of the Ad-hoc Tribunals has been criticized for relying too much on evidence of a collective background of mass atrocities to make findings of individual genocidal intent.[738] The quantity, quality and combination of elements of evidence needs to be such that it could only point to the existence of genocidal intent.[739] As held by an ICTR Appeals Chamber in *Karera*:

> It is well established that a conclusion of guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available from the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, it must reach such a conclusion beyond a reasonable doubt. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the nonexistence of that fact, the conclusion of guilt beyond a reasonable doubt cannot be drawn.[740]

737 See Mettraux (2006) 234.

738 See discussions in the section 'Reference to Collective Acts'.

739 ICJ Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para 373; ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, paras 154, 156.

740 Karera (AC) [2009] ICTR para 34; see ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009, Dissenting Opinion Judge Usacka, para 31.

III. Questions Raised by the Khmer Rouge Mass Atrocities

The case of the Khmer Rouge can serve as an example which allows to explore some of the most controversial issues raised in the interpretation of the crime of genocide.[741] Assessing the mass atrocities committed under the Khmer Rouge makes apparent the intricate definitional issues inherent in the law.[742] Drawing on the perspectives gained in the discussion of relevant dogmatic issues, this second part looks at the specific questions raised in the attribution of criminal responsibility for the crime of genocide in the case of the Khmer Rouge. A brief overview of the mass atrocities committed and groups targeted by the Khmer Rouge is given before questions of the legal characterization of the acts in question are addressed.

A. Mass Atrocities Committed Under the Khmer Rouge

The scale and intensity of violent acts committed under the Khmer Rouge regime is hard to exaggerate. An overwhelming body of personal accounts, documents and physical remnants of the victims give ample testimony of the darkest chapter of Cambodian history. After more than thirty years, the grave results of the Khmer Rouge policies are still sorely present in all aspects of Cambodian society.

The following section will provide a general overview of the mass atrocities committed by the Khmer Rouge. In view of the complexity and scale of the case, it is necessarily fragmentary, touching only on the broadest outlines of the events that unfolded from 1975 to 1979. The overview merely serves as a starting point for the discussion of the legal issues raised. The focus will come to lie on the targeting of specific groups by the Khmer Rouge since this is of particular importance with regard to the crime of genocide.

1. *Overview*

The work that is currently done at the ECCC will hopefully help to establish a comprehensive picture of the Khmer Rouge regime. Questions of command structure and the distribution of power at different hierarchical levels will play an important part in assessing individual criminal responsibility. Again, the brief overview of the perpetrators, acts and victims presented here will only serve to provide a general background for the subsequent discussions regarding the application of the crime of genocide.

a) **Perpetrators**

The atrocities committed during the existence of the Khmer Rouge's Democratic Kampuchea were not isolated acts and decisions of individuals in

741 Abrams (2001) 303.
742 Ratner et al (2009) 319.

power[743]. They involved people at all hierarchical levels throughout the country. Supervising the intended revolution was the Communist Party of Kampuchea, which called itself 'Angkar', or 'revolutionary organization'. The Khmer Rouge did not see themselves as a political party or government but as a social movement which was to bring about the restructuring of society.[744] In turn, the Khmer Rouge did not clearly distinguish between party and government functions.[745] It was not until April 1976 that the establishment of Democratic Kampuchea was officially proclaimed[746] and it took until 28 September 1977 that the existence of the Communist Party of Kampuchea and its control of the government was publicly revealed.[747] While the constitution of Democratic Kampuchea promulgated in 1976 delegated executive power to a state presidium and legislative power to a national assembly, there is no evidence that the state presidium ever convened and nominal governmental posts were subject to control of the Communist Party of Kampuchea centre.[748]

According to the party statutes, the Communist Party of Kampuchea's Central Committee with Pol Pot as its secretary and Nuon Chea as its deputy secretary was formally the 'highest leading body' of the Khmer Rouge regime. Its duties included the 'implementation of the Party's lines … throughout the country'.[749] The smaller Standing Committee of the Central Committee, informally established, then formed the *de facto* uppermost leadership body.[750] Accounts of its membership differ for certain persons. However, it is clear that Pol Pot, Nuon Chea, Son Sen and Ieng Sary formed part of it.[751] Within the Standing Committee, Pol Pot and Nuon Chea dominated the agenda and handed down decisions without consultation. It has been widely confirmed that they were the leading officials of the regime.[752]

To exercise control, the Khmer Rouge established an interwoven civilian and military chain of command.[753] The country was divided into zones, sectors, districts and cooperatives with party cadre at every level of the hierarchy con-

743 Ratner et al (2009) 306.
744 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 1353.
745 Bunyanunda (2000) 1588 with further references.
746 Ratner et al (2009) 306.
747 See on this matter Chandler *Party* (1983); Chalk and Jonassohn (1990) 403.
748 See *Duch (TC)* [2010] ECCC para 92 ff; Ciorciari and Chhang (2005) 251.
749 Heder and Tittemore (2001) 42.
750 Heder and Tittemore (2001) 43; see also Leang and Smith (2010) 153 and ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 35 ff and paras 119 ff.
751 Heder and Tittemore (2001) 43.
752 Ciorciari and Chhang (2005) 252 with further references. See for an overview also Bunyanunda (2000) 1587 ff.
753 For a detailed account of the Khmer Rouge command structure see Heder and Tittemore (2001) 42 ff; see also ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 33 ff.

trolling life down to the individual village.[754] Policies were decided upon by the party centre in Phnom Penh and subsequently implemented through the hierarchical chain of command at different levels.[755]

While there was a clear chain of command with regard to decisions and policies coming from the central authority[756], at the local level a looser and more diffuse hierarchical structure of delegated and discretionary authority existed.[757] Local cadre, made up mostly of former military personnel of whom some were children of less than fifteen years of age that had joined the Khmer Rouge only shortly before, exercised a large degree of discretion in their authority to kill and punish.[758]

b) **Policies and Acts**

The scale of atrocities committed under the Khmer Rouge regime makes it necessary to give an overview on certain categories of acts that occurred. Commentators have mostly distinguished between killings that were directly inflicted under the central command of the Khmer Rouge leadership and deaths provoked by the implementation of Khmer Rouge policies in general.[759]

Direct executions were performed under orders of the Khmer Rouge leadership against specified targets.[760] These executions included purges against former officials of the Lon Nol Government, purges of party cadre, killings of people seen as enemies of the revolution and certain members of ethnic and religious groups.[761] The term 'purge' was understood to mean the political purification by means of sanctions ranging from re-education to execution.[762] In addition, the centrally directed broad policies on searching out enemies of the revolution and the implementation of economic reform gave local cadre authority over life and death of the local populations under their power.[763] The abuse of the broadly delegated authority was rampant and lead to a great amount of mistreatment[764] and killings at a local level.[765]

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754 Ratner et al (2009) 308.

755 Ratner et al (2009) 308; Heder and Tittemore (2001) 49; *Duch (TC)* [2010] ECCC paras 102 ff

756 Leang and Smith (2010) 153.

757 Heder *Reassessing* (2005) 382 ff; Hinton *Agents* (1996) 824; see also *Duch (TC)* [2010] ECCC paras 84 ff for a detailed account of CPK structure and paras 102 ff on issues of delegation of authority and dissemination of directives.

758 Heder *Reassessing* (2005) 382; Margolin *Particularités* (1999) 191 ff; Becker (1998) 266; see also Ea and Sim (2001) for an account of children's roles in the Khmer Rouge hierarchy.

759 eg Margolin *Particularités* (1999) 198 ff; Ratner et al (2009) 313 ff; Hannum (1989) 88 ff.

760 Ratner et al (2009) 313.

761 As discussed later in the section 'Purges'. See Margolin *Kambodscha* (1998) 198 ff for a detailed analysis of the deaths brought about by the Khmer Rouge.

762 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para192.

763 Becker (1998) 257.

764 Sexual violence was abundant. See Anderson *Reconciliation* (2005) 789 ff for more detail.

Besides those direct executions and discretionary killings at the local level, the Khmer Rouge regime put in place a series of policies that led to the death of a large number of those who perished from 1975 to 1979.[766] It has been estimated that more people died as a result of the conditions to which they were subjected than from execution and massacre.[767] One of the first measures taken by the Khmer Rouge when they achieved control over the whole country was to forcibly evacuate cities and towns. Within a week, two to three million people were forced out of their homes and marched to the countryside. Thousands of city-dwellers died of exhaustion, lack of food, water and medical assistance.[768]

As part of the intended reform of economic structures in Cambodia, the Khmer Rouge leadership implemented a national system of forced labor and cooperative living. In this system, the population was fully dependent on the food provided by the government. Food rations were inadequate, especially given the extremely harsh working conditions imposed, resulting in the starvation of several hundred thousand people.[769] A complete lack of adequate medical care further led to a massive number of deaths through disease.[770]

c) **Victims**

There has been intense academic debate on the subject of how many people died under the Khmer Rouge, with the total number of deaths in Cambodia during the period of 1975 to 1979 remaining in dispute.[771] The differing estimates of total deaths range from 750'000 to over three million.[772] Several studies point to a total mortality of around 20 percent of the population at the beginning of 1975 of about 7.5 million people, ie around 1.5 million people.[773]

Equally, the breakdown of mortality to certain causes of death and the death toll for minorities and specific groups remain disputed. In this way, for example, the number of deaths suffered by the Cham communities and the number

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765 Ratner et al (2009) 313; Willmott *Errors* (1981) 226 ff; see Heder *Reassessing* (2005) for a more detailed assessment of abuse of power at the local level; see also Hinton *Agents* (1996) 824.

766 Ratner et al (2009) 313.

767 Hannum (1989) 93; DeWalque (2005) 351, however, suggests that the fact that adult males were most likely to die under the Khmer Rouge suggests that violent deaths represent a large share of excess mortality. See in this regard also Neupert (2005) 225.

768 Ratner et al (2009) 308 ff; Ponchaud *Briève Histoire* (2007) 78 ff.

769 See DeFalco (2010) and Bashi (2010) for a closer look at starvation and famine under the Khmer Rouge; see also Abuza (1993) 1015.

770 Margolin *Particularités* (1999) 203.

771 See also the discussion in the section 'Result Trap'.

772 Ciorciari *Auto-Genocide* (2004) 387. For an overview of the various inquiries regarding the death toll see eg. Etcheson *After The Killing Fields* (2005) 107-129 and Heuveline (1998).

773 See DeWalque (2005) 352 and Neupert (2005) 219 for an overview of the latest estimates. See also Ratner et al (2009) 314 with further references.

of monks killed have become the subject of intense debate.[774] Indicatively, the mortality rate for the urban and rural population considered by the Khmer Rouge as New People[775] has been estimated at 25 percent while the mortality rate for the rural population considered as Base People has been estimated at 15 percent.[776] Recent studies confirm the thesis that people from an urban or educated backgrounds were more likely to die and also confirm that members of the Muslim minority were less likely to survive than members of other religious groups.[777]

The disputed death tolls reflect the heated debates that have been led regarding the historical analysis of Khmer Rouge regime. They also indicate the difficulties involved in obtaining accurate information about this period of Cambodian history.[778] Nevertheless, it is important to note that none of the different estimates on death tolls and their interpretation take away from the inherent scale and horrific quality of the atrocities committed by the Khmer Rouge.[779] Besides the number of people who suffered death under the Khmer Rouge regime, many more became victims of rape, torture, malnourishment and a broad range of other mistreatments.

2. *VICTIM GROUPS*

The description of groups targeted by the Khmer Rouge already touches upon some of the main legal question involved in the assessment of the Cambodian case with regard to genocide. Whether and how the Khmer Rouge perceived particular group identities is subject to intense debate. The following description of victim groups is based on common classifications of groups along the lines of political, ethnical and religious characteristics. It does not provide a complete picture of all groups targeted and does not go into the details of the Khmer Rouge ideology and the differences in treatment of specific groups. Rather, it focuses on select groups and provides a general background in respect to the legal discussions regarding the application of the crime of genocide.

a) **Purges**

The euphemistically termed 'purges', the mass killings of persons considered undesirable by the regime, are emblematic for the Khmer Rouge. They stand for a broader policy of trying to radically bring about social change but also include campaigns against specific segments of society, not in the least against 'unreliable elements' within the ranks of the Khmer Rouge hierarchy.

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774 See Osman *Oukoubah* (2002) 2 for the discussions surrounding the number of Cham killed and Harris *Buddhism* (2007) 222 ff for the discussions regarding the number of Buddhist monks who died.

775 See for more detail the section 'New People'.

776 Kiernan *Cambodian Genocide* (1994) 193.

777 See on the whole issue DeWalque (2005) 351 ff.

778 Ciorciari *Auto-Genocide* (2004) 418.

779 See the discussions regarding death tolls in the section 'Result Trap'.

(1) *Purges of People Affiliated with the Khmer Republic*

Immediately following the overthrow of the Lon Nol government and in the course of the evacuation of the major cities and towns, the Khmer Rouge started a campaign targeted at people affiliated with the former Lon Nol regime. Instructions from the Khmer Rouge leadership commanded that the evacuation was to be combined with the killing of specific persons associated to the former regime.[780] First, those targeted for execution were to include only high-ranking officers and civil servants but executions soon extended to most military and police officers and civil service officials and eventually included military personnel down to the rank of private.[781] Wives and children of officials and military personnel equally became the target of killings. In this respect, a Khmer Rouge slogan stated that 'Their line must be annihilated down to the last survivor'.[782] Purges of people supposedly affiliated with the former regime were repeated in 1977 and 1978, leading to the death of people at levels of society with even weaker connections to the old regime.[783]

(2) *Intra-Party Purges*

The Khmer Rouge carried out purges that were at first aimed at identifying and expelling individuals within the ranks of the Communist Party of Kampuchea who were unreliable because of their class background or who were accused of ideological weakness.[784] The internal purges became more aggressive and extensive over time and led to the arrest and systematic execution of a large number of party cadre[785]. The increasingly paranoid Khmer Rouge leadership was ever more on the look-out for traitorous element within its own ranks, especially for agents of foreign powers such as CIA, KGB and Vietnamese spies. In prisons all over the country, usually referred to as security centers, detainees were tortured and killed, and in the course of interrogations compelled to implicate themselves and other supposed traitors, fueling a dynamic of more arrests and killings.[786]

(3) *Purges of the General Population*

A Central Committee decision of 1976 granted Khmer Rouge cadre at different levels the general authority to execute persons who were allegedly guilty of serious crimes against the revolution[787]. Officials at every level were in-

780 Heder *Reassessing* (2005) 384; Heder and Tittemore (2001) 31.

781 Hannum (1989) 89; Quinn (1989) 190; Heder *Reassessing* (2005) 384; see in this respect also ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 208 and 209.

782 See Ponchaud *Year Zero* (1978) 70; Chalk and Jonassohn (1990) 404.

783 Quinn (1989) 194; Ratner et al (2009) 310.

784 Heder and Tittemore (2001) 35.

785 Heder and Tittemore (2001) 35.

786 Abrams (2001)305; Ball (1999) 112 ff; see Heder and Tittemore (2001) 35 ff for a detailed account of the dynamics of the intra-party purges. See also *Duch (TC)* [2010] ECCC paras 109 ff for a detailed account of the Khmer Rouge security structure.

787 Heder and Tittemore (2001) 33; See *Duch (TC)* [2010] ECCC para 102.

structed to filter out anyone they deemed politically impure and be vigilant against spies and 'traitorous links'.[788] Informal policy was that it was 'better to kill an innocent person than to leave an enemy alive' and that there was 'nothing to be gained by keeping [them alive], nothing to be lost by removing them'.[789] As Heder points out, broad authorization by the Khmer Rouge leadership left local authorities with an enormous margin of personal discretion that led to a dynamic of extensive executions at the local level.[790]

b) New People

The Khmer Rouge used the label New People in a fairly loose fashion to delineate people who lived in the mostly urban areas that were not under Khmer Rouge control prior to 17 April 1975.[791] Being loosely defined, the New People consisted of a large variety of different segments of urban society including civil servants, soldiers and police of the Lon Nol regime, business people, doctors and nurses as well as teachers, students, factory workers and clergy. The label New People was assigned to contrast the people referred to from the so called Base People who were living in rural regions already under control by the Khmer Rouge starting from 1970.[792]

Inhabitants of urban areas were the target of forced transfer of the urban population to the countryside right after the 17 April 1975. The forced evacuations directly resulted in the death of thousands of persons.[793] As New People, the survivors were deposited amongst base people in agricultural cooperatives which had been set up by the Khmer Rouge earlier.[794] New People were to be ideologically re-educated and were in many cases discriminated against in the cooperatives which were run by Base People.[795]

In the countryside, New People were forced to work in farming, the digging of vast irrigation projects and the clearing of agricultural land. In many cases, new people were short-rationed with food and sometimes denied food altogether.[796] Discretionary killings of ordinary New People were common in places of famine all over the country.[797] New People who failed to achieve production quotas or who were too weak or exhausted by labor were vulnerable for execution.[798] New People were also likely to be killed for not following rules and instructions by local cadre and many executions followed signs of

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788 Ball (1999) 112 ff; Heder *Reassessing* (2005) 387; Simon *Genocide* (2007) 119.
789 Heder *Reassessing* (2005) 395.
790 See Heder *Reassessing* (2005) for a detailed analysis of this issue.
791 Heder *Reassessing* (2005) 385.
792 Jackson (1989) 166; see on the whole issue also Hinton *Agents* (1996) 824 ff.
793 Quinn (1989) 183.
794 Heder *Reassessing* (2005) 385.
795 Ball (1999) 103; Heder *Reassessing* (2005) 386.
796 Heder *Reassessing* (2005) 392.
797 Becker (1998) 269; Heder *Reassessing* (2005) 392.
798 Heder *Reassessing* (2005) 393.

organized opposition among New People.[799] In addition, persons trying to flee to Thailand or Vietnam were killed when caught trying to do so.[800] Analysis of excess mortality under the Khmer Rouge suggests that persons from an urban or educated background were significantly more likely to die than average members of the population.[801]

c) Buddhist Monkhood

Buddhism has been and continues to be an integral part of traditional Cambodian society.[802] The Buddhist monastery took a central part in the life of nearly every village and was the center of its activities. Monasteries fulfilled a broad range of social functions and the Buddhist monastic order played an important and complex role in Cambodian politics.[803] By the end of the 1960s, there existed more than 3'300 monasteries and around 65'000 monks in the country.[804]

Early on, the Khmer Rouge adopted a well documented policy of eliminating Buddhist practice in Cambodia.[805] Buddhism was prohibited and high-level directives were issued that called to 'wipe out religion'.[806] Immediately after coming to power, the Khmer Rouge targeted the most senior members of the clergy for immediate execution.[807] Other, lower ranking monks were equally killed at the outset of Khmer Rouge rule.[808] In the initial stages, monks were ordered to defrock and the majority of the country's pagodas were emptied. By the end of 1975, almost all the monasteries still active in Cambodia were closed. Pagodas were either demolished or reused for various functions including serving as prisons, storehouses and arm depots.[809] While there seems to have been little violent resistance to these measures, the refusal to defrock was cause for immediate execution.[810]

In addition, other measures of assimilation were enforced. The Khmer Rouge put monks to work that conflicted with their religious obligations. In Theravada Buddhism, fully ordained monks are not to take up many types of activities

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799 Becker (1998) 257; Ball (1999) 104; Heder *Reassessing* (2005) 393.
800 Heder *Reassessing* (2005) 393.
801 DeWalque (2005) 358 ff.
802 See Harris *Buddhism* (2007) for a detailed account of Buddhism in Cambodia before, during and after the Khmer Rouge. See also Anderson *Reconciliation* (2005) 815.
803 Boua (1991) 228; Harris *Buddhism* (2007) 21 ff.
804 Boua (1991)228; Harris *Buddhism* (2007) 24.
805 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 740 ff.
806 Ciorciari *Auto-Genocide* (2004) 425; Simon *Genocide* (2007) 104; Ratner et al (2009) 320.
807 Heder *Reassessing* (2005) 396; see ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 210.
808 See Ciorciari and Chhang (2005) 264 ff with further references; Harris *Buddhism* (2007) 131 ff.
809 Harris *Buddhism* (2007) 151 ff; see also Bunyanunda (2000) 1605.
810 Harris *Buddhism* (2007) 134 ff; Boua (1991) 234; See on this issue ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 210.

such as digging the ground.[811] Monks were usually tasked with farming and agricultural work clearly going against their convictions.[812] Further measures to assimilate the monks and eradicate Buddhist practice included forced marriages of monks and the enlisting of monks for military service.[813] Unwillingness to conform to these measures and any other sign of religious practice was met with execution.[814]

There is some debate over the number of monks killed and the extent of destruction of religious structures during the Khmer Rouge regime.[815] Studies indicate that members of the Buddhist clergy were more likely to die than members of the average population.[816] In terms of absolute numbers of monks killed, the situation is less clear. Boua concluded that not more than 2'000 out of the initial 65'000 monks survived the regime[817] while other studies suggest a death rate of about 60 percent.[818] Leaving aside the exact death toll, it is clear that a substantial number of monks perished in the period from 1975 to 1979. As early as September 1975 a Khmer Rouge policy document stated that 'The monks have disappeared…90 to 95 per cent [killed]'.[819] In 1978, the Khmer Rouge Minister of Culture and Education declared that Buddhism was incompatible with the revolution and had become 'a relic of the past, forgotten and surpassed' and that 'the ground has been cleared for the foundations of a new revolutionary culture'.[820]

d) **Cham Muslims**

The Cham Muslims, sometimes also referred to as Khmer Islam, are a minority group whose roots can be traced back to the hinduised Champa-Kingdom.[821] Originating in today's Vietnam, the Cham settled in different parts of Cambodia, bringing with them Muslim faith and a unique cultural heritage. The Cham are culturally distinct from the Khmer majority in that they usually live apart

811 Harris *Buddhism* (2007) 114.
812 Ponchaud *Year Zero* (1978) 147 ff; Harris *Buddhism* (2007) 114 ff.
813 Harris *Buddhism* (2007) 127, 129; for the practice of forced marriages under the Khmer Rouge in general see Heuveline and Poch (2006) 99 ff and Jain (2008) 1022 ff. See in this respect also ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 216 ff and paras 842 ff.
814 Heder *Reassessing* (2005) 397; Abrams (2001) 306.
815 Harris *Buddhism* (2007) 222 ff.
816 DeWalque (2005) 358.
817 Boua (1991) 239.
818 Harris *Buddhism* (2007) 226.
819 As quoted in Kiernan *Cambodian Genocide* (2004) 340.
820 As quoted in Ciorciari *Auto-Genocide* (2004) 425; see also Harris *Buddhism* (2007) 179; for an account of the re-emergence of Buddhism after the Khmer Rouge see Harris *Buddhism* (2007) 177 ff.
821 For a background of their historical origins see Ponchaud *Brièvе Histoire* (2007) 23. For detailed descriptions and harrowing personal accounts of the experiences of the Cham under the Khmer Rouge see Osman *Rebellion* (2006).

from the Khmer population in close-knit villages, are of Muslim faith and have their own language and distinctive dress.[822]

Having suffered discriminatory policies under the pre-revolutionary government, Cham Muslims initially supported the resistance movement against the Lon Nol regime. Some Cham joined the resistance and took military positions.[823] The Cham hoped a new regime would mitigate discrimination against their communities.[824] However, it quickly became clear that aspects of Cham culture directly conflicted with Khmer Rouge policies. Beginning as early as 1973, the Khmer Rouge instituted a program of so called 'Khmerisation' on the population in areas of Cambodia under their control, which they would later extend to the entire country.[825] It entailed a plan to eliminate all ethnic diversity by banning cultural practices and forcing minorities to assimilate to Khmer culture as the Khmer Rouge envisaged it.[826] They began setting up cooperative villages, enforcing rigid standards of conformity in ideology and culture[827].

With regard to the Cham, a Central Committee directive ordered that 'The Cham nation no longer exists on Kampuchean soil belonging to the Khmer. Accordingly the Cham nationality, language, customs and religious belief must be immediately abolished. Those who fail to obey this order will suffer all the consequences for their acts of opposition to Angkar'.[828] In turn, the Cham communities experienced a broad range of drastic measures aimed at cultural uniformity. Forced displacement of Cham communities began in 1973 and escalated after 1975.[829] Practice of Islam was banned completely; mosques and Islamic schools were closed.[830] The use of the Cham language was prohibited. Cham names were abolished and people were forced to adopt Khmer names.[831] To eradicate Muslim practices, Cham were forced to consume pork. Copies of the Quran were confiscated and destroyed.[832] Traditional Cham dress was equally forbidden and women were required to cut their hair.[833] In some cases, Cham children were taken away from their parents and raised in Khmer communities.[834] These measures were imposed on pain of execution.[835]

822 Hannum (1989) 86.
823 Osman *Rebellion* (2006) 2; Duong (2007) 13.
824 Becker (1998) 251; see Osman *Rebellion* (2006) 2 ff for a more detailed account of Cham involvement in the resistance movement and early experiences with the Khmer Rouge.
825 Hannum (1989) 86, See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 207, 211.
826 Becker (1998) 253; Duong (2007) 13.
827 Do (2009) 39 ff.
828 Stanton *Blue Scarves* (1987) 2.
829 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 211 and paras 748 ff.
830 Osman *Oukoubah* (2002) 4.
831 Osman *Oukoubah* (2002) 4.
832 Osman *Rebellion* (2006) 113.
833 Osman *Rebellion* (2006) 114; Duong (2007) 13.
834 Stanton *Blue Scarves* (1987) 2.

Any sign of religious difference made the Cham Muslims targets for arrest and execution.[836]

The policy of uniformity imposed by the Khmer Rouge caused several independent resistance actions on the part of individual Cham communities in 1975.[837] Whole villages refused to abandon religious practice and insisted on observing ritual obligations during fasting periods. The Khmer Rouge put down these rebellions with utmost force and brutality, on instances using artillery to shell villages, killing men, women and children indiscriminately.[838]

Soon after the rebellions in 1975, the Khmer Rouge broke up Cham communities across the country.[839] The Khmer Rouge adopted a formalized policy of dispersal of the Cham.[840] Cham were to be dispersed into ethnic Khmer communities to enforce uniformity and eradicate Cham identity.[841] Equally, Cham leaders and religious teachers began to be specifically targeted and killed from 1974 onwards. Party documents called for identification and extermination of Cham community leaders.[842]

There are indications that starting in 1977 there was a change of policy of the Khmer Rouge with regard to the Cham, it having been concluded that the Cham were beyond re-education and therefore had to be totally exterminated as a whole.[843] So far, no definitive documentary evidence supporting this claim has surfaced.[844] It is clear, however, that in 1978 new waves of executions of Cham people took place with entire Cham communities being taken away to be killed.[845] Witness evidence strongly suggests a policy geared at the destruction of the Cham communities in their entirety.[846] It has been estimated that the Cham population fell from around 250'000 in 1975 to about 173'000 by the end of the Khmer Rouge regime.[847] Clear indications exist that Muslims were more likely to have died under the Khmer Rouge than members of the

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835 Heder *Reassessing* (2005) 401.
836 Osman *Rebellion* (2006) 115.
837 Osman *Rebellion* (2006) 53,77; Chalk and Jonassohn (1990) 406.
838 Osman *Rebellion* (2006) 56; Duong (2007) 15.
839 Kiernan *Cambodian Genocide* (2004) 302; Osman *Rebellion* (2006) 113.
840 Heder *Reassessing* (2005) 401; see ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 211.
841 Duong (2007) 16.
842 Kiernan *Targeting* (1991) 222; Heder *Reassessing* (2005) 398; see ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 211.
843 Heder *Reassessing* (2005) 405; Ciorciari and Chhang (2005) 266; Becker (1998) 260 ff; Osman *Rebellion* (2006) 116; Ciorciari *Auto-Genocide* (2004) 426; See also ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 763 ff.
844 Ciorciari and Chhang (2005) 266.
845 See Ciorciari and Chhang (2005) 265; Osman *Rebellion* (2006) 116; see in this respect ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 212.
846 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 764 ff.
847 Osman *Oukoubah* (2002) 2; Ciorciari and Chhang (2005) 265; see also Kissi (2006) 116.

Buddhist majority.[848] The demographic study commissioned by the Co-Investigating Judges concludes that 36 percent of the Cham population in Cambodia perished during the Khmer Rouge regime, compared to a death rate of 18.7 percent for Khmers.[849]

e) Ethnic Vietnamese

Cambodia and Vietnam share a tightly intertwined history with territorial disputes dating back to the early Cambodian and Vietnamese empires and extending to the present.[850] Long before the Khmer Rouge regime, the ethnic Vietnamese minority had become the target of state-sponsored discrimination. The escalating Vietnam War had forced Vietnamese communist forces to seek refuge in Cambodia in the 1960s, further promoting anti-Vietnamese sentiments among Cambodians. After Field Marshall Lon Nol overthrew Prince Norodom Sihanouk's government in 1970, his regime openly targeted ethnic Vietnamese for persecution.[851] The brutal measures of the Lon Nol government forced approximately 250'000 ethnic Vietnamese to flee to the Republic of Vietnam, thousands of those who remained were massacred.[852]

Having assumed power in 1975, the Khmer Rouge continued Lon Nol's policy of persecution and expelled over 150'000 ethnic Vietnamese in a mass purge.[853] Following the purge, only a small population of around 20'000 to 30'000 ethnic Vietnamese remained.[854] In 1976, the Khmer Rouge policy towards the ethnic Vietnamese changed.[855] The regime no longer allowed them to leave the country.[856] Apart from a general mistrust and aversion against the ethnic Vietnamese, the border tensions and eventual war between the Khmer Rouge and Vietnam exacerbated ethnic division and led to even more drastic measures.[857] In 1977, a formal directive was issued that instructed Khmer Rouge officials at all levels to arrest and detain all ethnic Vietnamese and anyone remotely associated with them, including all people who spoke Vietnamese.[858] All the arrested were consequently executed.[859] The April 1977 issue of the 'Revolutionary Flag', a Khmer Rouge periodical that served as an impor-

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848 DeWalque (2005) 359.
849 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 747.
850 See Berman (1996) 823 ff for a detailed description of the Vietnamese-Cambodian relationship.
851 Amer (2006) 389; Ponchaud *Briève Histoire* (2007) 70 ff.
852 Berman (1996) 830.
853 See *Duch (TC)* [2010] ECCC para 68, 69; Chanda (1986) 16, See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 213 and paras 794 ff.
854 See Closing Order 002, para 792.
855 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 214.
856 Duong (2007) 8.
857 Do (2009) 47 ff.
858 Ciorciari and Chhang (2005) 263 with further references; Kiernan *Pol Pot Regime* (2008) 297; Hinton *Why* (2005) 219; Duong (2007) 9.
859 Ciorciari and Chhang (2005) 263; See Park *Intent* (2010) with further references.

tant means of political communication[860], contained a direct call to kill all members of the Vietnamese community remaining in Cambodia.[861] By the end of 1978, almost all of the remaining ethnic Vietnamese had indeed been killed.[862]

f) Khmer Krom

The Khmer Krom (literally 'the Khmer from below') have traditionally inhabited the lowlands around the Mekong Delta. They once made up the southeastern part of the Khmer empire and have retained linguistic and cultural links to Cambodia.[863] Vietnamese influence in the Mekong Delta region rose over time, culminating in the territory being attributed entirely to Southern Vietnam by the French in 1949. By that point, Vietnamese made up the majority of the population in the region and the roughly one million ethnic Khmer living in the area had become a relatively small minority.[864] Khmer Krom on both sides of the newly established border between Cambodia and Vietnam continued to refer to the region as Kampuchea Krom and retained a distinct cultural identity.

The Khmer Rouge viewed the Khmer Krom community with distrust, some Khmer Krom having been trained by the US government to fight against the Viet Cong and later having served under the Lon Nol regime.[865] While Kampuchea Krom, ie the Mekong Delta region, and its annexation featured centrally in Khmer Rouge ideology as a historical humiliation Cambodians had suffered by the Vietnamese, the Khmer Krom as a minority were seen as potential agents for Vietnamese interference because of their ambiguous identity.[866]

Research into acts by the Khmer Rouge targeted specifically at Khmer Krom has been of limited extent so far. However, various events of Khmer Krom being targeted for imprisonment, torture and subsequent killing have been described.[867] Khmer Krom were frequently accused of espionage and other counterrevolutionary activities and many were sent to prison facilities.[868] Different scholars have argued that by 1978 there existed a general policy to separate and kill the Khmer Krom population along with the ethnic Vietnamese.[869] It

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860 See in this regard *Duch (TC)* [2010] ECCC para 105.
861 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 214 and paras 814 ff.
862 Ciorciari *Auto-Genocide* (2004) 424; Ciorciari and Chhang (2005) 263 with further references. See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 792, 793.
863 Ciorciari *Khmer Krom* (2008) 1.
864 Ciorciari *Khmer Krom* (2008) 1.
865 Ciorciari *Khmer Krom* (2008)1; see also Roberts (2010).
866 Ciorciari *Khmer Krom* (2008) 2.
867 Kiernan *Pol Pot Regime* (2008) 423-425.
868 Ciorciari *Khmer Krom* (2008)2.
869 Ciorciari *Khmer Krom* (2008) 4; Ciorciari and Chhang (2005) 263 with further references; Kiernan *Pol Pot Regime* (2008) 297; Hinton *Why* (2005) 219; Duong (2007) 9.

has been estimated that around 125'000 Khmer Krom died under the Khmer Rouge regime.[870]

g) Ethnic Chinese

The majority of people of Chinese ethnicity in Cambodia were traditionally living in cities and towns, controlling large parts of Cambodia's commercial life.[871] By 1975, the concentration of ethnic Chinese in Phnom Penh and other towns had grown further because many of those originally from rural parts of the country had fled to the cities during the war preceding the Khmer Rouge regime.[872]

Living mainly in urban areas, most of the ethnic Chinese were forcibly transferred to the countryside during the evacuations of the major towns by the Khmer Rouge. During these evacuations, wealthy Chinese were singled out for execution.[873] Even after the evacuation of the cities, the Khmer Rouge further dispersed the ethnic Chinese to live amongst ethnic Khmer.[874] Like other ethnic minorities, the Chinese were subject to the 'Khmerisation' policies of the Khmer Rouge. Ethnic Chinese were prohibited from using their native language and practicing their religion.[875] In turn, there were cases of ethnic Chinese being executed for speaking Chinese.[876] In some cases, ethnic Chinese children were segregated from their parents.[877] It has been estimated that during the Khmer Rouge regime almost half of the ethnic Chinese population in Cambodia perished.[878]

h) East Zone Massacres

In 1978 massive massacres in the East Zone, the Khmer Rouge administrative region on the boarder to Vietnam, occurred which have been called the most violent event of the entire Khmer Rouge period.[879] In what started as a regional purge at the end of 1977[880], an estimated 100'000 people were executed in a six-month period.[881] Prior to the massacres, the Khmer Rouge were facing intense attacks by Vietnamese forces on the Eastern border. The losing battle against the Vietnamese eventually led the Khmer Rouge to accuse their own

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870 Kiernan *Pol Pot Regime* (2008) 300.
871 Willmott *Chinese* (1967) 94; Chalk and Jonassohn (1990) 399.
872 Heder *Reassessing* (2005) 402.
873 Heder *Reassessing* (2005) 402.
874 Duong (2007) 25.
875 Duong (2007) 25.
876 Heder *Reassessing* (2005) 402; Duong (2007) 26.
877 See Chan (2003).
878 Kiernan *Chinese* (1986) 18.
879 Kiernan *Targeting* (1991) 211.
880 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 200.
881 Hannum (1989) 90; Kiernan *Cambodian Genocide* (1994) 201; Vickery *Cambodia* (1984) 136.

military cadre in the East Zone of collaborating with the Vietnamese[882] and therefore having committed the most heinous of treasons, that in favor of arch-enemy Vietnam.[883] While some of those executed during the purges belonged to a recognizable political group judged disloyal by the Khmer Rouge, large numbers of people were killed by mere association, having lived under the leadership of those presumed disloyal. A large part of the victims were simple peasants or urban evacuees without any political affiliation[884]. Khmer Rouge documents described the entire population of the Zone as having 'Khmer bodies with Vietnamese minds'[885] or they were spoken of as having been contaminated 'by a pro-Vietnamese virus'.[886] Through the Khmer Rouge publication 'Revolutionary Flag', the East Zone purges were justified and encouragements were issued to search and kill further enemies.[887] In some cases the Khmer Rouge specifically marked the Eastern Zone population for extermination by handing out particular pieces of clothing.[888] A part of the population of the Eastern Zone was forcibly transferred to other provinces where they died of starvation or disease or were murdered[889], others were executed right away. Arrests of cadre originally from the East Zone in different parts of the country continued through to the end of the Khmer Rouge regime.[890] The purge of the East Zone has been described as the most violent event under the Khmer Rouge regime, differing qualitatively even against the backdrop of the other systematic violence.[891]

882 Vickery *Cambodia* (1984) 136.
883 Vickery *Cambodia* (1984) 138.
884 Hannum (1989) 90.
885 Kane (2007) 145; Kiernan *Targeting* (1991) 212.
886 Hinton *Agents* (1996) 825.
887 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 202
888 Stanton *Blue Scarves* (1987) 3; Kiernan *Targeting* (1991) 212 ff.
889 Ratner et al (2009) 312.
890 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 201
891 Vickery *Cambodia* (1984) 137.

B. Assessing the Targeting of the Khmer Rouge

Even the roughest outline of the crimes committed under the Khmer Rouge as presented above can leave no doubt as to their shocking magnitude. It is obvious and well documented that mass atrocities falling within the responsibility of the Khmer Rouge regime occurred during the period of 1975 to 1979. The issues raised by the case of the crimes committed by the Khmer Rouge in a legal context are thus only related to their particular characterization. For different reasons that are to be explored in the following section, the dogmatic issues previously discussed become apparent and pertinent in the application of the law of genocide to the case of the Khmer Rouge. The case can in this respect act 'as a window through which to consider key issues concerning the codification of genocide'.[892]

This study will take an approach to these questions that will go beyond the scope of what the trials against the former Khmer Rouge leaders at the ECCC most likely will focus on. In dealing with the cases against the individuals charged, the ECCC will deal with the contentious issues linked to the crime of genocide only to a limited degree. As a reaction to the enormity of the crimes committed by the Khmer Rouge, the Co-Prosecutors and consequently the Co-Investigating Judges focused their investigations on specific crimes in specific regions early on in the investigative stage.[893] This means that possible genocide charges in connection to targeted minorities outside the scope of the focused investigation became impossible.[894] What is more, the very fact that the law in respect to the crime of genocide is in parts ambiguous and controversial made the Co-Investigating Judges cautious in approaching possible genocide charges. Because of the particular symbolic importance of genocide, potentially unsuccessful genocide charges leading to an acquittal of the defendants in this respect were seen as a great risk. Therefore, genocide was only charged with regard to the crimes committed against the Cham and ethnic Vietnamese minorities which present the least difficulties both in terms of evidentiary material available and the doctrinal issues raised. In this regard, the present study will take a broader look at the issues involved in characterizing the crimes committed against different minorities and sections of the majority population. It will try to take up contended issues and bring up some of the ambiguities resulting of genocide's particular structure.

The focus of the following remarks will lie on issues of genocidal intent, hence questions of group conception and intended destruction. This presents a crucial but fairly small segment of the broad range of issues involved in applying the law of genocide to the case of the Khmer Rouge. At the trials of the surviving former Khmer Rouge leaders in the ECCC, it is likely that a focus will lie on

892 Abrams (2001) 303.
893 See Van Schaack *Closing Order* (2010).
894 See the section 'Genocide Charges at the ECCC'.

linking individuals to the crimes committed. To convict the political leaders for direct responsibility of the crimes requires tracing orders, plans and other means by which they planned, ordered or aided the immediate commission of the crimes by their subordinates.[895] These questions of individual responsibility, decisive at the trial stage, will not be further elaborated here. While raising dogmatic issues of their own, their resolution relies to a large part on the specific evidence presented at trial.[896]

The following deliberations will first deal with general issues flowing out of the legal nature of the crime of genocide and its particular intent element that are of significance when approaching a general characterization of the crimes of the Khmer Rouge. They mainly revolve around the importance of distinguishing between a historical and legal assessment of the case. Next, the more specific issues of the conception and intended destruction of groups by the perpetrators will be looked at. This involves the discussion of the Khmer Rouge's targeting of groups within the Cambodian society. Finally, issues of genocidal intent relevant to the case of the Khmer Rouge will be discussed in respect to the challenges involved in proving them, offering a more pragmatic perspective on the dogmatic questions involved.

1. *Fundamental Issues*

This section will deal with basic issues arising out of the legal nature of the crime of genocide that frame the discussions surrounding the Khmer Rouge case. For the most part, in the past these discussions have been led not from a purely legal point of view but were informed by historical analysis. In trying to reach conclusions with regard to the legal characterization of the events, it is important to highlight that the crime of genocide under international criminal law is a highly specific concept that does not fully correspond to the notion of genocide as used in the social sciences context. Implications stemming from this distinction form the subject of the following section.

a) **Basic Implications of the Particular Legal Nature of the Crime of Genocide**

The crime of genocide as defined in the Genocide Convention is structured in a particular way that emphasizes the importance of the perpetrators' intent rather than a particular outcome of their actions. It also emphasizes the group nature of the victims of the crime. These two characteristics have important implications for the characterization of mass atrocities which become pertinent for the assessment of the crimes committed by the Khmer Rouge.

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895 Ciorciari and Chhang (2005).

896 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, 214 ff with regard to the roles of the charged persons.

(1) *One Genocide, Multiple Genocides*

The basic question often posed with regard to crimes of the Khmer Rouge is a variation of 'Was it genocide?' or 'Did the Khmer Rouge commit genocide?'. What is expected as an answer is a globalized assessment of all the events that took place under the Khmer Rouge regime. This type of question geared at an overall reply is not answerable in a strictly legal sense. Rather, it operates with a concept of genocide that is used in a historical or socio-political context and therefore requires recourse to the terminology of these disciplines. A legal assessment will therefore fail to give a satisfying response. The crime of genocide as defined in the Genocide Convention has to be clearly distinguished from the historical phenomenon referred to as 'genocide' or 'a genocide'.[897]

Even though the crime of genocide is seen as possessing characteristics of a collective crime, criminal responsibility for it can only be attributed to individuals.[898] The crime of genocide is further defined as being committed against particular groups. Unspecific large-scale killings and mistreatments do not automatically constitute genocide in the legal sense. Otherwise, there would hardly be a discussion about the assessment of the Cambodian case at all. The question of 'Was it genocide?', when approached from a legal point of view, necessarily needs to be distinguished both in terms of the perpetrators and the victims involved. An overall historical characterization of events, as such, does not form part of the legal analysis. As Mettraux puts it, a judicial mandate

> … is limited, as far as genocide is concerned, to establishing whether or not the elements of this crime, as charged against an accused and as defined under customary international law, have been proved by the Prosecution beyond reasonable doubt. The events surrounding the actions of the accused, ie the context in which his acts may have been committed, are relevant only to the extent that they may shed light on and are evidentially relevant to one or several of the elements which must be established by the Prosecution to prove its case.[899]

Analyzing mass atrocities in segments and according to a technical terminology can run counter to the broader public's understanding of genocide, seemingly shifting the focus away from the sum of events in their enormousness to detailed questions of limited importance. In a non-legal sense, genocide is generally understood as the 'crime of crimes', the most outrageous of offences. In that sense, it raises the expectation that a characterization of genocidal events should be self-evident, standing out against crimes of a lesser order. Cambodia provides a fitting example in this respect. The term 'genocide' has

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897 Mettraux (2006) 248.

898 With regard to state responsibility for genocide and the differentiation between between genocide as an international wrongful act of state and genocide as a crime involving individual criminal liability see eg Gaeta (2007) 631 ff; Milanovic (2006); Loewenstein (2007) 3.

899 Mettraux (2006) 248; see in this regard also Wilson et al (2010).

been extensively used to describe the collectivity of the acts of the Khmer Rouge ever since the fall of their regime in 1979. To the Cambodian public, the characterization of the events as genocide is thus a matter of course.

A legal assessment of the events that took place under the Khmer Rouge according to the crime of genocide as defined in the Genocide Convention has thus the potential to severely disappoint such settled views. Nevertheless, this is the function of a criminal tribunal such as the ECCC. International tribunals who tried to compromise in this respect and ventured into historical analysis came up with evaluations that were not satisfying from either a legal or a historical perspective. The declaration by the ICTR that the events in Rwanda as a whole had constituted genocide was clearly problematic.[900] For Cambodia a similar assessment by the ECCC would be even more out of depth given the partial lack of obvious delimitations of victim groups.

(2) *Result Trap*

Discussions about potential cases of genocide tend to revolve around the number of killings perpetrated in the events in question. It is generally the presence of mass killings that attracts wider attention to a situation in the first place, triggering interest in the legal assessment and possible criminal responsibility. Extensive research goes into the calculation and comparison of victim numbers of different mass atrocities and debates are led with regard to the exact death tolls of different regimes.[901] For the case of the Khmer Rouge regime, descriptions of the events will almost invariably start with an indication of the massive number of people who died in the period of 1975 to 1979. In turn, the precise number of deaths attributable to the Khmer Rouge has been the subject of intense debate.[902]

At the base, these discussions are of a socio-historical nature. Establishing the record of mass atrocities in terms of their numerical dimension presents a fundamental interest when approaching the subject, an interest inherent to the very concept of atrocities defined by their large scale. Because of that fundamental nature, the death tolls and the discussions surrounding them also strongly influence legal debate with regard to mass atrocities. Clearly, they mark the starting point for a legal assessment of a situation as it will usually be prompted by the presence of mass killings. Recognizing the importance of the death toll, it is, however, important to note that the number of killings can only serve as a starting point and does not in itself allow conclusions as to the legal characterization of the acts that brought it about. This is particularly important for an application of the crime of genocide. Genocide is not defined as a result crime. Rather, its definition places emphasis on the particular intent to

900 See Jørgensen *Fact* (2007) 895; Kirsch (2009) 358 ff; Mettraux (2006) 248 ff.
901 See eg Rummel (1994).
902 See the section 'Victims'.

bring about a result. In that way, the application of the crime of genocide cannot be reduced to the question of how many people were killed in a given situation. Results, for example the destruction of a certain percentage of a particular group, will serve as an important indicator for establishing genocidal intent. But they need to be seen in the context of the perpetrators' intent. Even a limited number of killings of members of a certain group can constitute genocide if accompanied by genocidal intent.[903]

A different aspect of narrowly result-based discussions with regard to the crime of genocide is the focus on violent deaths. One argument that is often brought forward in discussions regarding the crimes of the Khmer Rouge is the assertion that of the large number of people who died during the Khmer Rouge regime, only a fraction were executed and that most of those who died succumbed to disease or starvation. This is seen to somehow imply the absence of genocide or genocidal intent. While the assertion is questionable in itself[904], it is also not pertinent in the legal characterization of the events. It is important to keep in mind that the infliction of serious bodily or mental harm and the deliberate infliction of conditions of life calculated to bring about physical destruction can just as well form the basis of the crime of genocide.

b) **Leadership Responsibility**

The question of the overall responsibility of the Khmer Rouge leadership for the events that unfolded under their regime is hotly debated among historians.[905] The complex political, economical and social background of the Khmer Rouge rule make it difficult to specifically pinpoint the degree of control the central leadership had at different points in time over local cadre. In the same way, there are differing views on whether the large number of deaths by starvation and disease were the result of misguided policies or consciously brought about by the people in charge. These questions, in a general fashion touching upon the individual responsibility of the former political leaders, will have to be explored at trial at the ECCC. It is a matter of factual determination, the evaluation of which will be based on the evidence presented in court. In this sense, questions of attribution of individual responsibility lie outside the scope of the present study. The legal issues of direct responsibility and command responsibility connected to the question of overall control by the leadership will therefore not be entered into. Nevertheless, responsibility of the senior leadership in a broad sense is important contextually when dealing with the crime of genocide. This section will briefly present some of the main

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903 See eg Wald Prosecuting (2006) 90 who takes up the case of the Srebrenica massacres. See the discussion in the section 'Inchoate Offence'.

904 See DeWalque (2005) 355 ff and Neupert (2005) 226; see also the discussion in the section 'Errors in Policy?'.

905 See Heder *Reassessing* (2005) 378 ff with further references.

issues raised with respect to the leadership of the Khmer Rouge in an overview.

Attribution of individual criminal responsibility relies on showing that the individual held responsible had a particular degree of control over the events in question. The presence or absence of this control is relatively easily ascertainable for individual crimes and becomes harder to pinpoint when different actors collaborate. For large-scale crimes such as genocide that are generally based on complex organizational structures and will involve the acts of a large number of people in different functions, determining individual control and contribution constitutes an intricate challenge. Attributing individual criminal responsibility for collective crimes is one of the thorniest issues that international criminal law is faced with. Breaking down the responsibility for a collective action to the level of individual accountability necessarily involves making simplifying assumptions about the complex structures and interwoven dynamics that bring about mass atrocities. They do not or only to a limited degree take into account the evolution of policies and structures, the potentially chaotic decision making processes and the varied roles of the middle and lower echelon in the commission of crimes[906]. Legal as well as historical approaches to analyzing collective responsibility will often be based on a strong top-down paradigm, ie the assumption that mass atrocities are the premeditated result of central planning, enforced through a rigid hierarchy.[907] For Cambodia the respective thesis would be that the senior leadership around Pol Pot harboured clear intentions derived from a consistent and coherent ideology which it implemented through an all-powerful totalitarian dictatorship.[908] Since this approach clearly oversimplifies the complex phenomenon at closer examination, it begs questions with regard to its main notions. The major questions with regard to the Khmer Rouge leadership in this respect are whether the deaths that occurred during the regime were, in a broad sense, intended and to what extent the central leadership was in control of the events that occurred at the local level.

(1) *Errors in Policy?*

Only a part of the staggering total number of around 1.5 million deaths under the Khmer Rouge was brought about by the execution of the victims. Apart from the direct killings, a large number of people perished as a result of starvation and diseases.[909] With regard to these deaths which were not provoked by direct violence, the question has been raised of whether and to which extent they were intended by the Khmer Rouge leadership.[910] It has been as-

906 See in this respect the recent work of Christian Gerlach, Gerlach (2010).
907 Heder *Reassessing* (2005) 378.
908 Heder *Reassessing* (2005) 408.
909 See the section 'Victims'; see in this respect the detailed analysis of DeWalque (2005).
910 See Ciorciari *Auto-Genocide* (2004) 419.

serted that a part of these deaths is attributable either to random acts of mistreatment or to errors and faulty implementation of economical policies of the Khmer Rouge.[911]

The most prominent of the policies of the Khmer Rouge called for a 'phenomenally great leap forward'[912], following the example of the economic and social campaign of the Chinese Communist Party of the early 1960s, aiming for the rapid transformation of the country into a modern, agriculture-based communist society. Under the Khmer Rouge, Cambodia was to reach Communism 'more quickly, fully and successfully than the Soviet, Vietnamese, Chinese or other Communists had been able to do'.[913] Agricultural development was seen as essential to the revolution.[914] In turn, rice-production, the mainstay of Cambodian agriculture, was focused on. The re-structuring of the rice production aimed for by the Khmer Rouge provides a good example in which decisions and implementation of economic policy led to starvation. In order to provide means for the revolution, the rice production was to be drastically raised. In practice, the means to do so were in most parts lacking.[915] Productivity quotas set for the communes were completely unrealistic which fuelled a devastating dynamic. Leaders of the communes, responsible to the merciless central command, understood that failure to meet the production quotas was tantamount to treason and hence reported better yields to their supervisors than they had actually achieved.[916] The communes then were taxed on the amounts reportedly produced and in turn rice needed for the sustenance at the local level was sent to the central command. Consequently, while people in large parts of the country were malnourished, rice was exported abroad.[917]

In this sense, part of the harsh conditions of life is understandable as an effect of policies of the Khmer Rouge leadership that was not intended or approved. There are, however, clear indications that deaths caused by starvation and disease to a large extent were not inadvertent side results of poor policy making and implementation. For one, the central command was informed about the starvation in large parts of the country.[918] Further, there are well-documented accounts that describe the deliberateness with which starvation and the withholding of appropriate medical care was used.[919] Forced labourers, famished by extreme workloads and insufficient nutrition, were forbidden to forage for food without permission under pain of death.[920] Foreign aid with

911 See, for example Ratner et al (2009) 324 with further references.
912 Heder and Tittemore (2001) 36.
913 Heder and Tittemore (2001) 36 ff.
914 Bashi (2010) 14.
915 Bashi (2010) 14 ff.
916 See Bashi (2010) 14.
917 See Bashi (2010)15 with further references.
918 Bashi (2010) 34.
919 See on this issue the report of DeFalco (2010).
920 See Bashi (2010) 12.

respect to food and medicine was consequently refused.[921] Generally, as Hannum has put it,

> It cannot be contended that the government of Democratic Kampuchea intended every death that resulted from its draconian social and economic policies. However, the consistency between internal memoranda and public pronouncements of the regime and what actually occurred throughout the country - the deterioration of social conditions and increased violence and death as the government consolidated its control over the provinces, the operation of extermination facilities under the direct command of the highest state authorities, and the pervasive government control over work and agricultural policies - indicates the deliberate character of decisions taken at the highest levels of government.[922]

(2) *Official Policy, Local Practice*

The general responsibility of the Khmer Rouge leadership can also be scrutinized under the aspect of effective control over the commission of crimes committed at a local level. There is convincing historical analysis which shows that the top-down paradigm, emphasising a large degree of central authority and control, takes an overly broad view of the relationship between the Khmer Rouge leadership, the local cadre and the commission of crimes at the base.[923] As Heder puts it, the terror which ensued in Cambodia was 'in part a haphazard result of collective processes in the upper reaches of the power structure and in part the result of the preferences of local authorities acting on their own initiative'.[924] There are indications which support the conclusion that a part of the crimes committed at the local level were aberrations from the central policy or not covered by central orders.[925] For one, there were important regional and local differences in the treatment of the population, potentially implying a substantial degree of autonomous authority by regional and local commands.[926] Partially, these regional differences are also comprehensible as a result of the broad orders by the central command to root-out enemies at all levels without specific criteria of how to do so.[927] These orders were interpreted at the local level to strongly differing standards.

However, to recognize the limits and simplifying nature of the top-down approach is not to swing to the opposite extreme.[928] Evidence of local differences and partially autonomous action at the local level does not as such exonerate

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921 See Chalk and Jonassohn (1990) 403 with further references.
922 Hannum (1989) 111.
923 See on the whole issue the detailed analysis by Heder *Reassessing* (2005); see also Margolin *Particularités* (1999) 185 ff; see also the section 'Perpetrators'.
924 Heder *Reassessing* (2005) 407.
925 See Vickery *Kampuchea* (1983) 99.
926 See eg Vickery *Cambodia* (1984) 139; see also Heder *Reassessing* (2005) 382 ff; Margolin *Particularités* (1999) 186 ff.
927 Hinton *Agents* (1996) 824.
928 See Heder *Reassessing* (2005) 381.

the Khmer Rouge leadership.[929] An important number of killings was centrally premeditated and directly ordered by the central command with specific instructions, executed by regional or local authorities.[930] Other killings were committed by local cadre not acting as a part of a tight chain of command but as an expression of looser and more diffuse hierarchy of delegated and discretionary authority.[931] This does not imply an absence of control by the central command. The Khmer Rouge leadership's control over their cadre during most of the regime is well documented.[932] It is important to keep in mind that the delegation of killing powers was consciously and expressly performed by the Khmer Rouge command.[933] A directive by the Central Committee of 30 March 1976 specifically entitled regional command to decide over the killing of enemies independently.[934] While being decided at the local level, discretionary killings were thus for the most part sanctioned by the leadership.

c) **The Motive Debate**

Based on the understanding that most of the killings were in fact ordered or sanctioned and that deaths caused by starvation and disease were to a large degree deliberately provoked, an intuitive first step in the qualification of the events lies in asking for the reasons for such policies. The enormity of the atrocities committed instinctively triggers the 'Why?' question. Generally speaking, this is what the historical debate regarding the crimes of the Khmer Rouge has focused on. The legal debate regarding the application of the crime of genocide to the events that unfolded under the Khmer Rouge regime has by and large followed suit. A large part of the discussions has tended to gravitate towards the question of ulterior motives behind the Khmer Rouge's actions. Yet, as will be discussed in the following section, from a purely legal perspective the specific incentives and underlying driving forces that provoked the mass atrocities are of limited importance. It is, in fact, crucial to appreciate the limitations of a legal inquiry into supposed collective aims and motivations.

(1) *The Role of Historical Analysis*

As emerges from the theoretical discussion earlier in this study, in the legal qualification the specific motive behind genocidal acts and policies is of no direct relevance. If the aim of group destruction can be proven, motivations behind that aim and other aims accompanying the intended group destruction are of no further importance, both on an individual as well as on a collective level.[935] Nevertheless, legal debates regarding the characterization of the

929 Heder *Reassessing* (2005) 381.
930 Heder *Reassessing* (2005) 382.
931 Heder *Reassessing* (2005) 382.
932 See eg Bashi (2010) 32. See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, 16 ff.
933 See also Chalk and Jonassohn (1990) 405.
934 See *Duch (TC)* [2010] ECCC para 102.
935 See the discussions in the section 'The Role of Motive for Genocide'.

crimes of the Khmer Rouge have to a large extent revolved around the questions of how to consider the role of the Khmer Rouge's ideology, thereby blending historical analysis and legal assessment.

With more than thirty years having passed since the events in question, an important body of historical analysis has accumulated on the subject of the Khmer Rouge regime. The regime has been looked at from a variety of viewpoints, taking account of the complex political, economical and social background that gave rise to it. Scholars with diverse academic backgrounds have developed theories to explain the nature of the mass atrocities committed by the Khmer Rouge.[936] Trying to fathom the particular nature of Khmer Rouge ideology in this context has led to large number of sometimes conflicting answers. More specifically, a broad spectrum of opinions exists as to the reasons behind the extremely violent nature of the regime.

What is commonly agreed on is the very basic 'theory of the case', namely that the Khmer Rouge ruthlessly implemented a revolutionary project.[937] Leading scholars agree that the Khmer Rouge regime committed mass atrocities in this context, but the abuses are interpreted differently.[938] What the revolutionary project consisted in is subject to heated debates.[939] Different aspects of the totalitarian regime are focused on.

The endeavour of the Khmer Rouge is often characterized as an extreme type of Marxist-Leninist revolution.[940] Following this approach, historians claim that the Khmer Rouge mainly targeted their victims for political reasons and that enemies of the regime were defined in terms of class strata in the Marxist sense.[941] In this way, Chandler argues that it were communist and nationalist goals that motivated the regime and ultimately led to the extreme levels of violence.[942] Other historians have argued that ethnic hatred and racial persecution and not communist ideas were at the heart of the Khmer Rouge ideology.[943] The most prominent scholar proposing this view is Kiernan who argues that 'Khmer Rouge conceptions of race overshadowed those of class'.[944] He emphasizes that the leadership sought to create a homogenous society not simply by purging political enemies but by destroying minority groups as part

936 In respect to Rwanda see Van den Herik (2005) 115.
937 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 1353.
938 See Kiernan *Cambodian Genocide* (2004) 310 ff; Ciorciari *Auto-Genocide* (2004) 418.
939 For a more extensive overview of the debates, see Barth (2006); Ciorciari *Auto-Genocide* (2004) 418 ff; Simon *Genocide* (2007) 119 ff; Heder *Reassessing* (2005) 378.
940 Ciorciari *Auto-Genocide* (2004) 418. See eg Chandler *Brother Number One* (1999) 4.
941 Simon *Genocide* (2007) 119.
942 Chandler *Brother Number One* (1999) 4, 147.
943 See Simon *Genocide* (2007) 119 and Ciorciari *Auto-Genocide* (2004) 418 with further references.
944 Kiernan *Pol Pot Regime* (2008) 26.

of an overriding racialist ideology and lust for power.[945] Yet another strain of interpretation focuses on the peasant-based nature of the intended revolution, supposedly differing substantially from orthodox Marxist-Leninist goals.[946] Further, the violence of the Khmer Rouge regime has also been described as largely devoid of substantial political or racial ideology, instead driven by incoherent efforts to stabilize the government in a highly volatile and unpredictable political environment.[947]

For the most part, historians agree that the Khmer Rouge do not neatly fit under one particular stereotype of totalitarian regimes.[948] As has to be expected, the Khmer Rouge ideology is a complex amalgam that has drawn on a multitude of sources.[949] Like other instances of large-scale violence, the mass atrocities committed by the Khmer Rouge are a phenomenon that resists simplifying attempts at deriving its motivation from a single driving force.[950] Instead, it is possible to take into account economic, political, military and ideological motivations for the actions of the regime.[951] Different underlying factors, such as ethnic and social differences, fuel each other and overlap.[952] Further, ideologies and motivations will change over time and differ in substance depending on the hierarchical level. In this sense, historical analysis can give a complex picture of driving forces and their dynamics but not a plain answer as to the aims and motivation behind the events that unfolded under the Khmer Rouge.

The historical debate and analysis is of vital interest to a legal assessment of the events. In terms of gaining a solid understanding of the factual situation, ie command structures, actors and victims and the broader context, historical research provides the very basis for legal assessment and procedures thirty years after the Khmer Rouge regime was in power. The 'theory of the case', shaped by historical debate, importantly informs the legal inquiries.[953] However, the importance attached in historical research to questions of underlying causes of mass atrocities does not simply transfer to the legal approach. To take the question of motivations as a focus of the legal inquiries is to blur historical and legal debates in a problematic way. Ulterior aims and underlying

945 Ciorciari *Auto-Genocide* (2004) 418; See also Kiernan *Pol Pot Regime* (2008) 465.
946 See Ciorciari *Auto-Genocide* (2004) 419.
947 See Ciorciari *Auto-Genocide* (2004) 419 with further references.
948 See Ciorciari *Auto-Genocide* (2004) 420.
949 See Harris *Onslaught* (2005) 70 ff with further references.
950 Even for the mass atrocities in Rwanda where the motivation for genocidal policies was seemingly obvious, closer examination reveals the whole spectrum of possible driving forces behind the massacres. See in this respect Van den Herik (2005) 115. For compelling examples pictured from a historical point of view see Gerlach (2010).
951 For another aspect see also the recent work of Tyner (2008) who focuses on territorial factors.
952 See Mann (2005) 5.
953 See Heder *Reassessing* (2005) 378.

motives of policies aimed at mass destruction are, as such, of no importance in the application of the crime of genocide[954].

The scope of legal inquiry is fundamentally different to that of other disciplines.[955] In trying to establish individual criminal responsibility for the crime of genocide, only events which set the acts of the accused into a relevant political, economical or military context may be the subject of legal inquiry to the extent that they may be relevant to the charges.[956] In that sense, lawyers are ill-equipped and out of depth when asked to assess historical or socio-political cause and effect. As Mettraux puts it,

> The illusion that the law can somehow embody historical truths ignores the different texture of the 'truth' as pursued by the law on the one hand and that sought by history on the other. The judge may try to get as close as permits to the illusory pretence of historical truth, but he or she will never achieve such endeavour simply because his tools - the law - will not allow it.[957]

This has not stopped courts from involving themselves into the search for social and political roots of mass atrocities. Equally, prosecutions and defence parties are prone to offer them as proof of guilt or justification.[958] This is neither helpful nor effective. As Wald wrote: 'Unless the history has some direct relationship to the intent or knowledge of the accused in the context in which he or she committed the alleged crime or to an element of the crime itself ... the court should forget the history or merits of the conflict, and concentrate on the specific act of genocide that is charged'.[959]

(2) *Motives for Group Targeting*

Just as the legal inquiry is not suited for making generalized statements about the historical context, it is also not proficient at ascertaining the roots of policies at a more detailed level. This goes particularly for determining the motivations behind the targeting for destruction of groups in assessing genocide charges. The case of the Khmer Rouge is paradigmatic in this respect.

The targeting of groups by the Khmer Rouge bore highly irrational features that make a straight-forward identification of motives behind it impossible. Based on the acts of the perpetrators and the distinctions they made it is possible to distinguish targeted groups and their assigned characteristics.[960] Beyond that, a range of motivations exists which, to different degrees, might

954 See in this respect the section 'The Role of Motive for Genocide'.
955 See Mettraux (2006) 250.
956 Mettraux (2006) 250.
957 Mettraux (2006) 250.
958 Wald *Prosecuting* (2006) 86.
959 Wald *Prosecuting* (2006) 86; see also the discussion in the section 'Establishing the Collective Context'.
960 See discussions in the section 'Group Conceptions'.

have provoked such targeting. The Khmer Rouge themselves cultivated an image of arbitrariness in the exercise of their power. An infamous saying at the time stated that 'Angkar kills but does not explain'.[961] Historians have noted that with regard to the targeting of groups, there was a degree of artificiality in the definition of the groups by the Khmer Rouge and the reasons given for the persecution.[962] Attribution of group affiliation was done in ways that sometimes went counter to the conception of group identities held by a broader public. Accordingly, possible reasons for such targeting become harder to fathom. In this respect, historians have pointed out that it is difficult to ascertain whether the motivation behind the discriminatory targeting was even attached to group identity. As Heder notes, 'Victims were labelled and killed not for who they were but for ... what they did or did not do'.[963] Taking this thought further, it has been pointed out that victims were often not eliminated because they belonged to a certain group but they were labelled group members because they were going to be eliminated.[964]

In debates on the legal qualification of the persecution of particular groups by the Khmer Rouge, the question of motive behind the targeting of groups is frequently addressed. An argument often brought up is that the crime of genocide does not apply to the targeting of groups by the Khmer Rouge because the groups were supposedly targeted for political reasons.[965] This is problematic in different ways. First, motives behind the targeting of groups are a complex matter, not easily reducible to a single driving force. More importantly, in the legal assessment the motives behind an intended group destruction do not matter. If the intent to destroy a group exists on a policy level, a characterisation of events as genocide does not depend on whether the intended destruction was driven by a political agenda, military considerations, racial hatred or a combination of conceivable motives.[966] An ulterior motive for targeting a group does not negate genocidal intent.[967]

The question of motive has to be distinguished from the perpetrators' group conception which can play a role in the legal characterization of the events because of the enumeration of protected groups under the Genocide Convention.[968] It is important to differentiate between the characteristics based on which groups are targeted and the reasons for the perpetrators' choice of such characteristics. To intend to destroy a group defined by supposed racial char-

961 See Margolin *Particularités* (1999) 199.
962 See Heder *Reassessing* (2005) 382; Margolin *Particularités* (1999) 194 ff; Simon *Genocide* (2007) 119 ff; see also Phay-Vakalis (2008).
963 Heder *Reassessing* (2005) 390.
964 See Hannum (1989) 89 with further references.
965 See eg Roberts (2010).
966 See the discussion in the section 'Motive'.
967 Roberts (2010) 13.
968 See discussions in the section 'Group Conceptions'.

acteristics, for example, does not necessarily mean that race or racial hatred is the driving force behind the intended destruction.

The persecution of the ethnic Vietnamese minority by the Khmer Rouge provides a good example with regard to the distinction between the characteristics relevant for the targeting and the reasons for the targeting. The ethnic Vietnamese were delimited by the Khmer Rouge according to a set of pseudo-racial characteristics.[969] Along with relying on cultural traits, most importantly the Vietnamese language, the discrimination was thus race-based in the eyes of the Khmer Rouge. All the same, it is generally assumed that racial hatred was not the main driving force that prompted the targeting of the ethnic Vietnamese in Cambodia.[970] A statement by Duch, the accused in Case File 001, directly attests to this. Referring to Cambodians married to ethnic Vietnamese and mixed blood children of such couples he stated

> It should be understood that the regime was particularly attentive to this population category, in which they had no trust. This was more for political than "racial" reasons. In fact, there was agreement between the higher and lower echelons that these people should be unable to take action.[971]

In this case it can be argued that the racial targeting was based on political and security considerations rather than racial hatred.

The differentiation between the targeting and the motivation has to be made for other groups, as well, who were targeted by the Khmer Rouge based on ethnical or cultural characteristics. The Khmer Krom were targeted based on traits associated with their ethnicity.[972] The reasons behind their persecution, however, are generally seen not to be linked to their ethnicity as such. Rather, the Khmer Rouge saw them as a security risk because of their connections to Vietnam and their military involvement in the civil war that preceded the Khmer Rouge regime.[973] Equally, the Cham minority was clearly singled out according to its ethnic and religious identity. The reasons behind its targeting are less clear. Considerations with regard to the stability of the regime and political aims indubitably played a role.[974] The Buddhist monkhood is another group where the grounds for their persecution and the characteristics on which the persecution was based diverge. Evidently, the Buddhist monks were identified based on their religious attributes. While the Khmer Rouge did follow a policy of abolishing religion, the targeting of the monkhood reveals a broad spectrum of underlying motivations at closer examination. The reasons behind acting against the monkhood, not the Buddhist population in general,

969 See the section 'Ethnic Vietnamese'.
970 See Do (2009) 54 ff with further references.
971 ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 811.
972 See the section 'Khmer Krom'.
973 Roberts (2010) 13.
974 See Duong (2007) 22.

are deep rooted and complex.[975] The Buddhist elite had played an important role politically and economically and was therefore a likely target for the Khmer Rouge.

As described, the motives on which the targeting of particular groups is based are hard to fathom and harder still to pinpoint. They are of no direct relevance to the application of the crime of genocide. Motives for the targeting of a group such as a supposed military threat and political or economical considerations do not exclude genocidal intent. The group conception by the perpetrators can play an important role with regard to the protection under the Genocide Convention. It does not, however, enter at the stage of assessing the perpetrators' ulterior aims and motives.

2. *GROUP CONCEPTIONS*

The crime of genocide is defined as acts being committed with the intent to destroy a particular group. As seen, determining the targeted groups in this respect is not as straightforward as the definition of the crime in the Genocide Convention suggests. A realistic and appropriate identification of the victim groups has to be based on the perceptions of the perpetrators.[976] However, the crime of genocide as defined in the Genocide Convention is limited to the intended destruction of four particular group types, ie national, ethnical, racial or religious groups. This enumeration of protected groups makes it necessary that the perpetrators' conception of the victim group bears at least some relation to one or more of the four group types defined in the Genocide Convention. For the case of the Khmer Rouge, questions related to this issues play an important role because the targeting of groups did not always follow the lines of the group types mentioned in the Genocide Convention. Questions primarily arise with regard to the targeting of groups within the Khmer majority population and will be discussed in the following section.

Just as with determining motives for the targeting of groups, discerning the perpetrators' group conceptions can lead to complex answers, especially in the case of the Khmer Rouge. From a historical point of view it has been held that it was emblematic for the Khmer Rouge to have victimized groups in a way that was partially devoid of common rationality, for example by labeling whole villages as KGB spies.[977] The victimization was based on criteria that in some instances referred to established group identities such as ethnic minorities. In other instances the criteria referred to group identities that had no real bearing in Cambodian society, were based solely on abstract definitions of the

975 See in this respect the comprehensive study by Harris *Buddhism* (2007). See in particular pages 63 ff.

976 See discussions in the section 'Relevant Perception of Victim Group'.

977 Margolin *Particularités* (1999) 1486.

'enemy' and the behaviour of potential victims and made the identification of 'group members' a matter of individual discretion.[978]

A particular problem in identifying groups that were perceived and targeted as such by the Khmer Rouge lies in the all-encompassing system of terror and abuse the regime installed in the country. Conditions of living were dire to the point of being lethal for a substantial part of the population. A large number of deaths occurred that are not directly attributable to group-based persecutions. Against such a background of general violence and elevated mortality, differences in treatment of particular groups become less pronounced and harder to distinguish.[979] Nevertheless, indications of the targeting of particular groups by the Khmer Rouge exist.[980] Even just based on the diverging mortality rates, differences in treatment along the lines of group identities become visible.[981] Equally, the Khmer Rouge communicated policies of group discrimination, both in regard to ethnic minorities as well as with respect to groups they identified within the Khmer majority.

In the following sections the targeting of groups will be focused on. First, the targeting of groups within the ethnic Khmer majority population will be looked at. This involves examining the issue of auto-genocide which is often associated with the crimes of the Khmer Rouge. Then, the targeting of minority groups will be discussed.

a) Targeted Groups within the Khmer Majority

For the legal assessment of the acts committed against groups within the Khmer majority population, the perpetrators' group conception is of central importance. The designation of groups targeted is not readily apparent. Unlike for the targeting of ethnic or religious minorities, the perpetrators' group definition does not consistently follow the outlines of well-established group identities as understood by Cambodian society. In turn, the question of how to determine the groups for the application of the crime of genocide has caused a great deal of confusion with regard to the atrocities committed by the Khmer Rouge. The targeting of groups within the Khmer majority remains one of the most controversial issues with regard to the Cambodian case.

It was expected that it would also be one of the main questions the ECCC would have to address.[982] The UN Group of Experts for Cambodia in its report from 1999 stated that 'whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretative

978 See Heder *Reassessing* (2005) 382; Simon *Genocide* (2007) 119 ff.
979 See also the discussions in the section 'Proving Genocidal Intent'.
980 Heder and Tittemore (2001) 33.
981 See in this respect the study of DeWalque (2005) 362.
982 See Schabas *Genocide* (2009) 139; Quigley *Genocide Convention* (2006) 126; Nersessian *Political Groups* (2010) 54 ff.

issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims'.[983] The Group of Experts explicitly declined to take a position on these issues but noted that the matter should be addressed by the ECCC.

With the charges brought against the accused in Case File 002, it has become clear that chances of the ECCC actually addressing the issues are slim. It seems that the Co-Investigative Judges and the Co-Prosecutors deliberately passed on bringing them up. In fact, it can be assumed that charges involving these issues have not been brought in order to avoid such controversial questions largely unexplored in the jurisprudence of other international criminal tribunals. Addressing these issues would have meant running a high risk of not succeeding with part of the genocide charges, something which the political context of the ECCC made difficult. For the prosecution to refrain from charges of genocide regarding groups within the Khmer majority can also be justified by reasons of manageable scope and specificity of charges. Venturing into questions that would have potentially ensued an overly broad discussion of the historic dimensions of the case was something to be avoided. On a different level, the fact that charges in respect of the acts against groups within the Khmer majority were not brought also points to the limits of criminal proceedings in cases of mass atrocities in general. It shows that criminal proceedings are not well suited to adjudicate the collective aspects of mass atrocities because they have to focus on individual criminal responsibility for a particular set of events.

The question of how to assess the acts committed by the Khmer Rouge against the majority population and groups within it nevertheless remains an important part of the public debate. In the following section, this study will take up the problems involved and try to offer a legal perspective on them. First, the issue of so called auto-genocide will be looked at. Then, cases of potential stigmatizations within the majority population and their relevance for the crime of genocide will be examined.

(1) *Auto-Genocide?*

The killings and mistreatments under the Khmer Rouge have often been called auto-genocide. The term auto-genocide is generally used to describe the fact that a lot of the victims of the Khmer Rouge belonged to the ethnic Khmer majority and were Cambodian nationals[984]. It is widely applied in historical, legal and general public debate. As has been noted by Kiernan, in Cambodia one can hear people say: 'Pol Pot was worse than Hitler. Nazis killed Jews but not Ger-

983 Report of the Group of Experts for Cambodia, UN Doc. A/53/850/S/1999/231, 16 March 1999, annex, para 65.

984 See eg Ciorciari and Chhang (2005) 263.

mans. Pol Pot massacred his own Khmer people'.[985] In a broad sense, the term auto-genocide refers to the entire range of killings under the Khmer Rouge, ie what has been described as Cambodians killing Cambodians.[986]

Auto-Genocide is not a concept specifically outlined in the Genocide Convention or other sources of international criminal law. Apparently, one of its first uses was that by the Chairman of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, Abdelwahab Bouhdiba, who, referring to the case of the Khmer Rouge, concluded that the destruction of the Cambodian society by the government of Democratic Kampuchea amounted to 'nothing less than auto-genocide'.[987]

This description of events took on a remarkable dynamic. It soon featured in and dominated the legal discourse on the events that unfolded under the Khmer Rouge regime. Auto-Genocide was taken from a merely descriptive term to being reformulated into a legal notion, taking up the concept of the protected groups under the Genocide Convention definition.[988] In that respect it was now understood as characterizing cases were protected groups turned on themselves. Equally, from this point of view it was concluded that the Khmer Rouge's terror provided exactly such a case of the unusual situation of a group turning on itself.[989]

In the following section the questions raised by such a qualification will be taken up. While it is out of question that a large part of the victims of the Khmer Rouge were of Cambodian nationality and can be considered having belonged to the ethnic Khmer majority, the legal conclusions often drawn from this situation are controversial. The group conceptions of the perpetrators have an important part to play in that assessment and have often been neglected. It will be discussed whether and in what way the concept of auto-genocide falls within the scope of the Genocide Convention and in what ways it is relevant and pertinent for the case of the Khmer Rouge.

(a) Auto-Genocide and the Genocide Convention

The Genocide Convention does not explicitly mention or address the situation in which perpetrators target their own group or parts of it.[990] As mentioned, auto-genocide in this sense is merely a descriptive term. The *travaux prepara-*

985 Kiernan *Targeting* (1991) 207.
986 Simon *Genocide* (2007) 109.
987 UN Doc. E/CN 4/SR.1510 (1979) at 7; See in this respect Isaksson (2010) 229; Hannum (1989) 112; Schabas *Genocide* (2009) 138 ff; Quigley *Genocide Convention* (2006) 129.
988 Paul (2008) 287 ff; Jessberger (2009) 109 ff.
989 Simon *Genocide* (2007) 109.
990 See Ratner et al (2009) 322 and Ciorciari *Auto-Genocide* (2004) 428.

toires of article II of the Genocide Convention are not instructive on this issue, either.[991] The matter was not considered and debated as such.[992]

Starting with the description as auto-genocide in the Bouhdiba Report[993], it was the case of the Khmer Rouge which first drew considerable attention to the issue.[994] Some commentators contended that what was generally described as auto-genocide is not covered by the Genocide Convention. They argued that to treat mass killings of the perpetrators' own group as genocide would run counter to the purpose of the Genocide Convention of protecting national minorities from hate based crimes.[995] On the whole, this view is not shared by the majority of scholars in the field of international criminal law.[996] In his UN study of genocide, Whitaker noted that article II of the Genocide Convention imposes no requirement of the victims having to be of a different group from that of the perpetrators.[997] 'The definition does not exclude cases where the victims are part of the violator's own group'.[998] Nothing in the further text of the Genocide Convention points to an exclusion of such cases, either.[999] In particular, the intended partial destruction of a group is explicitly mentioned. Cases of victims belonging to the perpetrators' group would therefore not require a quasi-suicidal tendency on the part of the perpetrators.[1000] Provided that the requirements are met, it can thus be assumed that the scenario generally described as auto-genocide would fall under the Genocide Convention.[1001]

(b) Targeting of Non-Minority Victims as Auto-Genocide

The complex structure of the crime of genocide easily leads to wrong conclusions with regard to auto-genocide and the case of the Khmer Rouge. Such conclusions, namely that the crimes committed by the Democratic Kampuchea regime present a prototypical case of auto-genocide, have often been drawn.[1002] In examining from a legal perspective whether the label auto-genocide applies to the atrocities committed by the Khmer Rouge, problems and inconsistencies become readily apparent. Closer scrutiny reveals that qualifying the crimes of the Khmer Rouge as auto-genocide is largely based on

991 Quigley *Genocide Convention* (2006) 129.
992 Quigley *Genocide Convention* (2006) 129.
993 See above section 'Auto-Genocide?'; see in this respect in particular Isaksson (2010) 229.
994 For a further example of perpetrators supposedly targeting members of their own group see Quigley *Genocide Convention* (2006) 128.
995 See Paul (2008) 287 with further references.
996 See eg Quigley *Genocide Convention* (2006) 129; Schabas *Jurisprudence* (2001) 464; Nersessian *Edge* (2003) 310.
997 Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Whitaker B, 2 July 1985,Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1985/6, 16
998 Ibid.
999 Paul (2008)288; Hannum (1989) 82.
1000 See Paul (2008) 287.
1001 See Jessberger (2009) 109 ff.
1002 See the references at 'Auto-Genocide?'.

mistaken interpretations of the crime of genocide. The supposed exceptionality of the Khmer Rouge killing fellow Cambodians which is seen to distinguish it from other instances of genocide becomes less unusual when looking at the perpetrators' group perception.

As discussed before, for the purposes of the crime of genocide, the significant characteristics for membership in a targeted group are those selected by the perpetrators of the genocidal acts.[1003] It is the process of stigmatization by the perpetrator that forms the group identity relevant to the determination of the group whose destruction is intended. The perception of the perpetrators is the one that matters, not group definitions based on a scientific, legal or other 'objective' basis.

With regard to assessing the targeting of non-minority victims of the Khmer Rouge, this is of crucial importance. What qualifications as auto-genocide are generally based on are 'objective' group definitions, ie group conceptions defined from an outside perspective. When it is said that perpetrators and victims belonged to the same group, the group meant is either that of the Cambodian nationals as defined by their nationality or the ethnic Khmer majority as defined according to a current definition of ethnicity. It may be useful to make such birds-eye view determination for historical or sociological analysis. And the fact that both perpetrators and victims were of Cambodian nationality and partially of Khmer ethnicity according to the definitions chosen is without doubt. For the assessment of the intended group destruction, however, such an outside view is of no direct relevance. From a legal point of view it is flawed because it constructs the supposedly 'protected' group after the fact instead of examining whether the perpetrators actually targeted persons based on particular characteristics in the first place.[1004]

If one steps away from 'objectively' defining the perpetrators and victims as belonging to the same group based on broad categorizations, then the Cambodian case looks less like auto-genocide and much more like a regular instance of genocide where one group seeks to destroy other groups.[1005] Stigmatization in the case of the non-minority victims of the Khmer Rouge was generally based on something other than nationality, ethnicity or race.[1006] The Cambodian nationals and the ethnic Khmer majority, respectively, can seem to be a homogenous mass from an outside perspective. But in the eyes of the political leadership of the Khmer Rouge, this mass was not seen as such. It was divided along several lines such as class-features and suspected subversive poten-

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1003 Nersessian *Political Groups* (2010) 54; see the section 'Importance of the Perpetrators' View of Group Affiliation'.
1004 Nersessian *Political Groups* (2010) 58.
1005 See May (2010) 49.
1006 See Quigley *Genocide Convention* (2006) 127 and Nersessian *Political Groups* (2010) 54 ff.

tial.[1007] Unlike victims belonging to the targeted minorities who came under attack by reason of their perceived affiliation to the minority, victims within the Khmer majority were not targeted based on belonging to the Khmer ethnicity. For the purpose of targeting people for destruction, the Khmer Rouge did not perceive them as belonging to their own group.

The importance of the perpetrators' perspective on targeted groups is of overall importance. If one adopts broad, 'objective' group definitions that are not based on the perpetrators' group conception and intent, most instances of the collective crimes commonly called genocides would qualify as 'auto-genocides'.[1008] The most prominent examples of genocide in the 20th century were not targeted at groups far-removed from the perpetrators but at groups that shared close bonds with the *genocidaires* in a spatial, social and cultural sense.[1009] The Cambodian case is not as unique in this sense as commonly implied. Victims of mass atrocities very often were of the same nationality and ethnicity as the perpetrators, if 'objectively' assessed. In *Kayishema and Ruzindana* the Trial Chamber of the ICTR accepted the testimony of a French professor of sociology who stated that 'all Rwandans share the same national territory, speak the same language, believe in the same myths and share the same cultural traditions'.[1010] Based on current definitions of nationality and ethnicity, the targeting of Tutsis by Hutus was an intended destruction of Rwandans by Rwandans. Looking at the criterion of nationality, the same assessment could be made for part of the killings of Jews by the Nazis.[1011] German Jews shared the nationality of their perpetrators just as 'class enemies' shared that of the Khmer Rouge. This goes to show that the label of auto-genocide should not be applied to the Cambodian case without due consideration. Because victimization within the ethnic Khmer majority did not follow established group identities, an assessment of group conceptions has to be all the more specific.

(2) *Targeting of a National Group*

Just as in the assessment of the qualification as auto-genocide, the perpetrators' group conception is also of central importance when examining a supposed genocide against a national group by the Khmer Rouge. It has been argued that the Khmer Rouge committed genocide against the Khmer national group, intending to destroy it in whole or in part.[1012] To substantiate this claim, it would have to be shown that members of such a group were targeted on the basis of their membership to that group.

1007 Hinton *Agents* (1996) 824 ff; Margolin *Particularités* (1999) 210.
1008 See Margolin *Particularités* (1999) 210.
1009 See Simon *Genocide* (2007) 99 and Margolin *Particularités* (1999) 210.
1010 *Kayishema & Ruzindana (TC)* [1999] ICTR para 34; See with regard to this issue Zahar and Sluiter (2007) 161 ff.
1011 This is not to say that the same could not be done based on a current definition of ethnicity.
1012 See Ratner et al (2009) 321; Quigley *Genocide Convention* (2006) 128 and Dyrchs (2008) 151, each with further references.

Even advocates of the argument of a genocide committed against the Khmer national group do not contend that the Khmer Rouge intended to destroy the Khmer national group in whole.[1013] Nothing points to an intended destruction of the Khmer people in its entirety. It would be absurd to assume an intended suicide on the collective level, something which then could be appropriately termed auto-genocide.[1014] The Khmer Rouge saw the complete demise of old Cambodia and the ascension of a new Democratic Kampuchea only in a metaphorical sense, at least with regard to the larger part of its people.[1015]

Rather, what has been argued is that the Khmer Rouge intended to destroy parts of the Khmer national group.[1016] This view seems well substantiated if looking at the large number of victims amongst the national population and the ethnic Khmer majority in particular. It is problematic, however, if taking into account the perpetrators' group conception and intended destruction. Most of the sources suggest that victims amongst the national population were not targeted as members of a national group.[1017] There is little evidence to suggest that Cambodian nationals were targeted as such.[1018] It would appear that the Khmer Rouge targeted their victims within the Khmer majority based on group conceptions that involved political, social and economical criteria.[1019]

Clearly, the perpetrators knew about their victims' Cambodian nationality. But the nationality of the victims was of no direct relevance in the targeting. Whereas members of minorities were targeted for destruction based on their perceived membership to the minority, Cambodian nationality or belonging to the ethnic Khmer majority did not lead to immediate targeting.[1020] As has been pointed out, any large group of people will belong to one or more national groups if their nationality is looked at from an outside perspective.[1021] But what matters in respect to the crime of genocide is whether they were targeted based on that characteristic.

There are indications of mindsets of the Khmer Rouge that saw a certain percentage of the Cambodian population as not fit for their envisaged society and hence bound for destruction.[1022] Around five percent of the population were considered problematic with regard to the goals of the revolution.[1023] A wit-

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1013 See Hannum (1989) 111 ff.
1014 See Margolin *Particularités* (1999) 180; Nersessian *Edge* (2003) 310; Hannum (1989) 111.
1015 See Tyner (2008) 49.
1016 See Hannum (1989) 111 ff; Hawk (1988) 139 ff; Stanton *Genocide* (2001) 31.
1017 Ciorciari *Auto-Genocide* (2004) 428.
1018 Ratner et al (2009) 322.
1019 Abrams (2001) 304; see also the section 'Targeting of Groups Based on Political, Economic and Social Criteria'.
1020 See in this respect Vest *Machtapparate* (2002) 122 ff.
1021 Schabas *Genocide* (2009) 290 ff; see in this respect also Nersessian *Political Groups* (2010) 56 ff.
1022 See Hannum (1989) 88 ff.
1023 Heder *Reassessing* (2005) 387; see also Ciorciari and Chhang (2005) 263.

ness in the trial against Duch verified that Duch had stated during the DK regime that only four million out of the estimated population of seven million would be allowed to live.[1024] Such conceptions give evidence of the perverted nature of the Khmer Rouge ideology. But they do not indicate a specific targeting of a part of the national group as such. At most, the diffuse victimization could be seen to add up to a negative stigmatization of a part of the national group which would not suffice with regard to the requirements of the crime of genocide.[1025]

(3) *Targeting of Groups Based on Political, Economic and Social Criteria*

It is relatively straightforward to conclude that the Khmer Rouge did not target their non-minority victims based on their nationality or ethnicity. To positively identify characteristics based on which the Khmer Rouge discriminated is a more challenging problem. For an important part of their policies that included the killing or death resulting from mistreatments of numerous victims, there seems to have been no clear attribution of the victims to specific target groups.[1026] In this respect, victimization was based on diffuse categorisations and supposed traits of the victims that did not delimit tangible group identities. Criteria for victimization for a large number of the victims, for example in the intra-party purges, were unstable and varied greatly depending on the location and the level of hierarchy of the perpetrators. Group affiliation of the subsequent victims was fabricated on the spot. Fictitious enemy definitions served the lower-level perpetrators as an excuse for the exercise of their absolute power over life and death.[1027]

There are, however, also categories of people within the majority population which the Khmer Rouge clearly identified as distinct factions. These categories were relatively stable and based on tangible criteria. The most prominent such targeting of a distinct faction of the majority population is that of the Buddhist monkhood, a group distinguishable by the perpetrators according to a well-established group identity. Other factions were delimited by the Khmer Rouge based on their political affiliation or provenance.

The crime of genocide as defined in the Genocide Convention is based on the intended destruction of particular groups. Mass atrocities committed without the targeting of specific groups by the perpetrators therefore do not fall within

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1024 Transcript from Trial Proceedings, July 20, 2009 (Case 001) Him Huy. On July 20, 2009 Him Huy was asked about an interview he gave in 1990 in which he stated: 'In office S-21, I heard Duch exchange conversation that we shall kill everyone except the 4 million people so it means we kill all people.' Him Huy responded: 'First, Duch stated—he said everyone had to be killed and leaving only 4 million people and then later on he said everyone shall be smashed to bits to all and the statement I still remember ever since.'

1025 See Nersessian *Political Groups* (2010) 54 ff.

1026 See eg Simon *Genocide* (2007) 119 ff; Heder *Reassessing* (2005) 382.

1027 See Margolin *Particularités* (1999) 194; Heder *Reassessing* (2005) 382.

its scope. Where particular group conceptions of the perpetrators are identifiable, it has to be assessed whether these group conceptions correspond to the group types covered by the Genocide Convention. The exhaustive list of possible target groups in article II of the Genocide Convention entails that the intended destruction of groups defined by criteria other than nationality, race, ethnicity and religion does not constitute genocide in the narrow legal sense. This issue becomes particularly pertinent in the case of the Khmer Rouge. In the following section, the targeting of groups within the majority population that were delimited according to political, social and economic criteria and its legal implications with regard to the crime of genocide will be looked at. The focus will lie on the perception of distinct groups by the perpetrators. Questions of whether the Khmer Rouge also had the intent to destroy such groups will form the subject of the subsequent section.

(a) Distinguishing the 'New People'

As described before the Khmer Rouge created the label New People to loosely distinguish people from mostly urban areas that had not been under their control prior to 17 April 1975 from Base People who were living in rural regions already under control by the Khmer Rouge starting from 1970.[1028] Being defined in such broad terms, the New People were comprised of a broad spectrum of the population with widely differing social and economic backgrounds. They included persons with high levels of education such as teachers and doctors as well as labourers, civil servants and merchants.[1029] The New People were thus a group identity originally created and defined by the Khmer Rouge. The concepts of Base People and New People had not existed in Cambodian society before the Khmer Rouge started distinguishing persons according to their urban or rural background. Nevertheless, the provenance provided a tangible criterion for distinction and group identity and ensued massive discrimination and abuse.

The definition of the New People was an official one. The distinction between New People and Base People played an important part in the formulation of the Khmer Rouge economic policies. New People were to be 're-fashioned', transformed to dependable and useful members of society as envisaged by the Khmer Rouge.[1030] With the New People comprising the full range of different strata of urban Cambodian society, some of the persons concerned were bound to become specifically targeted by the Khmer Rouge. Within the New People, the Khmer Rouge identified five percent of persons whom they judged untrustworthy and irreformable.[1031] 'Feudalists, capitalists and bourgeois' along with former officials of the Khmer Republic were described as oppo-

1028 See the section 'New People'.
1029 See Heder *Reassessing* (2005) 385.
1030 Heder *Reassessing* (2005) 385.
1031 Heder *Reassessing* (2005) 385 ff.

nents of the revolution and therefore became the target of intense purges.[1032] While the New People as a whole were clearly distinguished from the rural population, they were officially considered 'part of the people of Cambodia and not all enemies.'[1033] The cooperatives they were sent to in the course of the evacuations of cities were 'to prepare food, water, and lodging for the evacuees, to slaughter animals, to feed them, and give them cooperative rice...'.[1034] The realities of the treatment of the New People in the cooperatives were dramatically different from the official policies. The distinction between New People and Base People became a license to discriminate against New People at the local level.[1035] There is abundant evidence of the mistreatment, starvation and killings of New People after their expulsion from the urban areas. Overall, New People were significantly more likely to die than persons considered part of the Base People.[1036]

(b) Targeting of People Affiliated with the Khmer Republic

People affiliated with the former Khmer Republic regime of Lon Nol give one of the clearest examples of a specific group targeted within the ethnic Khmer majority population.[1037] As opposed to the sometimes erratic victimization of other strata of the population, the group of former Khmer Republic officers and officials was clearly defined according to tangible criteria and uncompromisingly targeted as such. The killing of former Khmer Republic officers and officials was ordered by the Khmer Rouge leadership from the outset.[1038] During the evacuation of the cities, people associated with the Khmer Republic were to be identified and killed.[1039] The killing of 'officers, starting from the generals and working down through to the lieutenants, as well as ... policemen, military police personnel, and reactionary civil servants ...' was seen as a necessary part of 'attacking the old social regime'.[1040] The searching-out of former Khmer Republic officials continued after the evacuations. The Khmer Rouge initiated a formal policy of arresting and executing members of the prior regime.[1041] The Khmer Rouge had a clear and stated conception of former Khmer Republic officials as an 'enemy group'.[1042] Based on affiliations with the former regime, members of that group were positively identified and targeted.[1043]

1032 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 207; see also the section 'Purges'.
1033 See Heder *Reassessing* (2005) 386 with further reference.
1034 Heder *Reassessing* (2005) 386 with further reference.
1035 Heder *Reassessing* (2005) 392.
1036 See DeWalque (2005) 351; Do (2009) 45 ff; Vickery *Cambodia* (1984) 144.
1037 Heder and Tittemore (2001) 33.
1038 See Heder *Reassessing* (2005) 384.
1039 See Heder and Tittemore (2001) 31.
1040 Heder *Reassessing* (2005) 388 with references to interviews with Kae Pok.
1041 Heder and Tittemore (2001) 31.
1042 See Simon *Genocide* (2007) 119 ff.
1043 Heder *Reassessing* (2005) 389.

(c) Targeting of the East Zone Population

The targeting of the East Zone population in 1978 presents another instance in which the Khmer Rouge identified a distinct group within the majority population. With an estimated 100'000 victims in a six-month period, the East Zone massacres of 1978 stand as one of the most violent and intensive group persecutions of the Khmer Rouge regime. Because the military and political leadership of the East Zone was judged disloyal, the entire East Zone population became a target for destruction.[1044] Accusations of treason against the local cadre made the whole population politically suspect in the eyes of the Khmer Rouge.[1045] The inhabitants of the East Zone were not members of any political group in the common sense of the word.[1046] The conception of the East Zone population as a distinct group was entirely based on the Khmer Rouge's views. As with the New People, the setting apart of that part of the population had no bearing in previous group conceptions held in Cambodian society. Before the East Zone population was defined as a specific target, it was 'a vast peasant mass previously distinguishable only for their geographical origin'.[1047] Other than their origin there were no further tangible characteristics that distinguished persons from the East Zone from the rest of the population. In order to be able to execute the persecution of persons from the East Zone, the Khmer Rouge had to set them apart by handing out particular scarves.[1048] 'Otherwise the Khmer Rouge would not know who was who'.[1049]

There are indications that the stigmatization of the East Zone population also had a racial component. The Khmer Rouge leadership described the entire population of the East Zone as having 'Khmer bodies with Vietnamese minds'.[1050] The killings were sometimes justified by stating that East Zone people were suspected of having been infected or contaminated by a pro-Vietnamese virus.[1051] However, it seems fairly evident that racial notions were not at the base of the Khmer Rouge's group conception. Supposed racial traits were not relevant for the initial definition of the target group. The racial stigmatization was a thinly veiled justification for the brutal persecution on grounds of suspected disloyalty. As Kiernan notes, the population of the East Zone was '*targeted not for an accident of genetics but of geography*'.[1052]

1044 See the section 'East Zone Massacres'.
1045 See Kiernan *Cambodian Genocide* (2004) 303; Kiernan *Targeting* (1991) 224; Vickery *Cambodia* (1984) 136.
1046 Hannum (1989) 90.
1047 Kiernan T*argeting* (1991) 207.
1048 See in particular Stanton *Blue Scarves* (1987); see also Kiernan *Targeting* (1991) 212 ff.
1049 Kiernan *Targeting* (1991) 214.
1050 See Kiernan *Targeting* (1991) 212 with further references. See also Kane (2007) 145.
1051 See Hinton *Agents* (1996) 825.
1052 Kiernan *Targeting* (1991) 217.

(d) Group Conceptions Unprovided For by the Genocide Convention

As seen, apart from a wide range of indiscriminate abuse and killings of persons of the general population, the Khmer Rouge also targeted specific groups within the majority population according to their own definitions. On a fundamental level, these group definitions were not based on nationality, race, ethnicity or religion. Rather, it was political affiliation that defined the group of targeted persons associated with the Khmer Republic. For the New People, the distinction was based on provenance and the social and economical background in a larger sense. And for the population of the East Zone that fell prey to the ferocious massacres it was their geographic origin and political affiliation in the widest sense that made them a target group in the eyes of the Khmer Rouge. Based on the group conceptions by the Khmer Rouge in these cases, the consequential next step in determining the applicability of the crime of genocide would be to see whether there was sufficient intent to destroy the groups as perceived. Because of the particular nature of the definition of the crime of genocide which limits its applicability to certain groups, however, first it has to be ascertained whether the groups as perceived and targeted fall within the scope of the crime of genocide.

The current definition of the crime of genocide in international criminal law as set out in the Genocide Convention and the ICC Statute, applicable to the ECCC as laid out in the ECCC Law[1053], only mentions four groups that can form the target of genocidal intent. The list of the enumerated national, ethnical, racial or religious groups is generally interpreted as being exhaustive.[1054] As noted before, defining the meaning of the mentioned groups is a tricky issue since the perpetrators' group conception shapes the structure of the crime of genocide.[1055] Nevertheless, the enumeration of those particular groups requires that the perpetrators' group conception is characterized by notions of nationality, ethnicity, race or religion. This represents the current state of the offence. The inclusion of group conceptions based on political, social or other grounds either by way of an extensive interpretation of the Genocide Convention or by way of recourse to a supposed wider definition of the crime under customary international law is unconvincing.[1056]

The Khmer Rouge's group conceptions in respect to the East Zone population, the New People and the people associated with the Khmer Republic were not characterized by notions of nationality, ethnicity, race or religion. The groups within the majority population as perceived and targeted by the Khmer Rouge do not fall within the categories mentioned in the Genocide Convention. Acts committed against these groups with the intent of group destruction therefore

1053 ECCC Agreement article 9.
1054 See the section 'Exclusiveness of Enumerated Groups'.
1055 See the section 'Relevant Perception of Victim Groups'
1056 See eg Nersessian *Political Groups* (2010) 91 ff.

do not qualify as genocide. In view of the extent and scope of the Khmer Rouge's targeting of groups defined by political and social characteristics, the outright inapplicability of the crime of genocide can seem inappropriate. The case of the targeting of groups within the non-minority population by the Khmer Rouge shows that the enumeration of 'protected' groups in the Genocide Convention is problematic. Nationality, race, ethnicity and religion just as well as notions of class, ideology and political affiliation are not absolute categories but concepts which the perpetrators define with respect to their victims. Basing the applicability of the crime of genocide on particular labels of group identification is fraught with problems given that the perpetrators' group conception is central to the criminal offence.[1057]

b) Targeting of Minorities

The group conceptions of the Khmer Rouge with regard to the targeting of minorities are less problematic than those of groups targeted within the majority population. With regard to the minorities in Cambodia, the Khmer Rouge's group conceptions correspond in large parts to the self-perception and external perception of those groups in Cambodian society. The minorities were clearly distinguishable according to cultural and religious characteristic from the majority population. And because the group identities as perceived by the Khmer Rouge were based on such notions, the groups fall within the scope of the 'protected' groups enumerated for the crime of genocide.

In fact, with regard to these minority groups, it was the clearly perceptible cultural differences that played an important part in leading to their targeting by the Khmer Rouge in the first place. Although Cambodia was a mostly homogenous society after more than one century of French colonial rule, there were substantial ethnic minority populations living among the ethnic Khmer majority.[1058] As has been noted in the Closing Order Case File 002, an objective of the revolution as envisaged by the Khmer Rouge 'was to establish an atheistic and homogenous society without class division, abolishing all ethnic, national, religious, racial, class and cultural differences'.[1059] A decree issued by Pol Pot in 1976 stated that 'There is one Kampuchean revolution. In Kampuchea there is one nation, and one language, the Khmer language. From now on the various nationalities do not exist any longer in Kampuchea'.[1060] Beginning as early as 1973, the Khmer Rouge instituted a program of so called 'Khmerisation' on the population in areas of Cambodia under their control, which they would later extend to the entire country.[1061] It entailed a plan to eliminate all ethnic diversity by banning cultural practices and forcing minorities to assimilate to

1057 See the 'Concluding Remarks'.
1058 Ball (1999) 110; see also the descriptions in the section 'Victim Groups'.
1059 ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 207.
1060 Ball (1999) 111; see also Heder *Reassessing* (2005) 398.
1061 Hannum (1989) 86; see ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 207 and 211.

Khmer culture as the Khmer Rouge envisaged it.[1062] Ethnic minorities thus were an explicit part of Khmer Rouge policies. They were considered to be part of a 'separate special class type' that needed particular attention.[1063]

Ethnic minorities were thus targeted along the lines of features commonly seen to set them apart from the ethnic Khmer majority. These features included the language, dialects, dress and other cultural features as well as religion in the case of the Cham.[1064] With regard to the ethnic Vietnamese, the Khmer Rouge established particular rules of distinguishing members of the group as they perceived it. The conflict with Vietnam and prejudices predating the Khmer Rouge regime had made the ethnic Vietnamese in Cambodia a primary target. A continued presence of ethnic Vietnamese was strictly ruled out by the Khmer Rouge leadership. As early as May 1975 Nuon Chea stated at a party congress that 'we cannot allow any Vietnamese minority' to live in Cambodia.[1065] The Khmer Rouge seem to have based their policy of targeting ethnic Vietnamese in Cambodia on a theory of matrilineal descent.[1066] 'If a Vietnamese man was married to a Cambodian woman, only the man would be killed and the woman and any children would be spared. However, if a Vietnamese woman was married to a Cambodian man, the woman and any children of the marriage would be killed, while the man would be spared'.[1067] Witnesses stated that they were told that the children of Vietnamese mothers were killed because 'the umbilical cord or the blood comes from the mother and not from the father" or because the policy consisted of "killing the Vietnamese genes or the Vietnamese blood line'.[1068]

3. *GENOCIDAL INTENT*

The perception of certain group identities by the perpetrators is one precondition for the crime of genocide. Apart from establishing whether such groups fall within the scope of the enumerated groups for genocide, the important next step in the qualification of the mass atrocities consists of assessing whether there was the required intent to destroy the targeted groups. For groups like the ethnic Vietnamese minority and the people affiliated with the Khmer Republic, the Khmer Rouge's decision for physical destruction is easily distinguishable. For other groups such as the Buddhist monkhood, however, the issue of the intended destruction raises a number of more specific questions. The possible presence and nature of the destruction intended by the

1062 Becker (1998) 253; Duong (2007) 13.
1063 ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 207.
1064 See the section 'Victim Groups'.
1065 Ciorciari and Chhang (2005) 265.
1066 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 215.
1067 ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 215.
1068 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 215.

Khmer Rouge for these groups is less clear. In this respect, the difficult delimitation of cultural and physical destruction becomes relevant.

In the following section, first a brief overview will be given on groups for which the intended destruction by the Khmer Rouge is either easily traceable or absent according to the current indications. Then, a closer look will be taken at issues that fall within the grey area of the intent required for the crime of genocide such as measures aimed at the cultural disappearance of a group and the intended destruction of small but important segments of a targeted group.

a) Presence and Absence of Intent to Destroy

Historical research and the documents and accounts available to the public suggest a reasonably clear picture with regard to the intended destruction of some of the groups targeted by the Khmer Rouge. On one hand, there is little to indicate that the Khmer Rouge targeted the category of New People for physical destruction as a whole or in specific parts. Being defined in a vague manner and encompassing a broad spectrum of the Cambodian population, the Khmer Rouge's policy towards them was geared at a transformation in the economical and political sense rather than towards elimination in general.[1069] On the other hand, in the case of the ethnic Vietnamese, the people affiliated with the Khmer Republic, the population of the East Zone as well as the Cham in the late stages of the regime, the material currently available strongly suggests such an intended physical destruction.

The clearest policy of an intended physical destruction was adopted against the ethnic Vietnamese minority. Being questioned on the Khmer Rouge's attitude towards the Vietnamese in Cambodia, Duch testified that at the time, all those who remained in Cambodia were to be eliminated.[1070] He stated: 'I remember seeing S-21 lists carrying the names of Vietnamese who were still living in Cambodia. Civilians and the military were treated the same way: they were interrogated and sent to execution'.[1071] Evidence of the policy geared towards physical destruction is abundant.[1072] Khmer Rouge propaganda explicitly stated the goal to destroy all Vietnamese and particularly the Vietnamese people in Cambodia.[1073]

Similarly, for people affiliated with Lon Nol's Khmer Republic, a policy of physical destruction of all the members of that group as perceived by the Khmer Rouge is easily distinguishable. Orders for the mass killing of members

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1069 See the section 'New People'; see Abrams (2001) 306 and Heder *Reassessing* (2005) 385 ff.
1070 ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 811.
1071 ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 811.
1072 See Ciorciari *Auto-Genocide* (2004) 423 ff and Heder and Tittemore (2001) 33.
1073 See Roberts (2010) 15; ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, paras 819 ff.

of the Lon Nol administration and army came directly from the party centre and were executed on a large scale.[1074] In much the same way, the Khmer Rouge adopted a clear policy of destruction towards large parts of the East Zone population in 1978.[1075] In the case of the Cham Muslims, the Khmer Rouge's policy of physical destruction seems to have developed over time. The Cham first fell victim to the Khmerisation policy which involved forced assimilation and a violent suppression of Cham cultural practice.[1076] Apart from the killing of leaders of the Cham communities, there is little evidence to suggest that the Cham were targeted as a group for outright physical destruction in the early stages of the Khmer Rouge regime. However, this approach seems to have changed in the last two years of Khmer Rouge rule. There are indications of a policy that envisaged the physical destruction of the entire Cham population in 1978 and 1979.[1077] Increased waves of mass killings of Cham in 1978 support the assumption that such a policy existed.[1078]

b) **Ambiguous Intent**

For other groups the question regarding the presence or absence of an intent for group destruction is not as easily answerable. On one hand, for some groups it is doubtful whether an intent for group destruction is discernible against the backdrop of the Khmer Rouge's violence against the whole population. On the other hand, some of the acts of the Khmer Rouge show a clear intention targeted towards particular groups but it is unclear whether the nature of the consequences intended falls within the scope of the crime of genocide. The issue of ambiguous intent in these two aspects will be the subject of the following remarks.

(1) *Threshold Between Discriminatory Mass Killings and Genocidal Intent*

One of the reasons why the case of the Khmer Rouge is of particular interest with regard to legal questions in connection to the crime of genocide is that the Khmer Rouge's all-encompassing acts of violence make it hard to delimit a genocidal intent in respect to particular groups. Mistreatments and abuse having reached virtually all strata of Cambodian society, an intent directed against individual groups is more difficult to determine. Yet, it is such intent which is of crucial importance in establishing the crime of genocide. It is the goal of group destruction which differentiates genocide from other crimes involving mass killings.[1079] As noted before, the crime of genocide must ultimately be directed against collectivities as such and target individuals in their collective

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1074 See the sections 'Purges' and 'Targeting of People Affiliated with the Khmer Republic'; see in particular Heder and Tittemore (2001) 33.
1075 See the section 'East Zone Massacres'; see Kiernan *Targeting* (1991) 212.
1076 See the section 'Cham Muslims' and 'Targeting of Minorites'.
1077 See in particular Ciorciari and Chhang (2005) 267 with further references.
1078 See the section 'Cham Muslims'.
1079 See the section 'Intended Group Destruction'.

capacity of belonging to the group targeted for destruction.[1080] Genocide presupposes that victims were chosen by reason of their membership in a group whose destruction was sought.[1081] Killings and abuse based on discriminatory selection of the victims alone would not suffice. This threshold between discriminatory killings and genocide is easily apprehensible in theory. However, to differentiate between the mass targeting of individuals on discriminatory grounds and the further-reaching mass targeting with an intent to destroy a collectivity can be difficult in practice.

In some cases, the crimes of the Khmer Rouge fall exactly within this grey area where the discriminatory mass killings reach a level of intensity which can suggest an intent for group destruction. This goes in particular for the treatment of the ethnic Chinese and the Khmer Krom minorities. For these groups, it is especially difficult to distinguish whether the intense discrimination of their members resulting in high mortality rates adds up to an intended group destruction.

The ethnic Chinese were perceived as a distinct minority and were hence subjected to the Khmer Rouge's desire to create national homogeneity. This involved various measures of forced assimilation such as the segregation of children from their parents and the prohibition to speak Chinese under pain of death.[1082] Nevertheless, the ethnic Chinese were not enemies by official definition.[1083] There are a number of indications that suggest that unlike the ethnic Vietnamese, the ethnic Chinese were not categorically targeted for destruction.[1084] However, in the eyes of the Khmer Rouge the ethnic Chinese possessed a number of characteristics which made them the target of particular discrimination. They were seen as originating mostly from an urban background, being ethnically distinct and belonging to a particular class stratum, all of which made them more likely to be targeted for discrimination and execution.[1085] The combination of characteristics ascribed to them and the ensuing discrimination and abuse almost made the ethnic Chinese 'enemies as such'.[1086]

In a similar way, the killing and mistreatment of members of the Khmer Krom minority falls within the grey area between mass discriminatory killings and genocidal intent. The Khmer Krom were perceived as a distinct group in terms of their cultural characteristics and their geographical origin. As for the case of the ethnic Chinese, an outright targeting of the Khmer Krom for destruction

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1080 See the section 'Intent to Destroy a Group As Such'.
1081 See *Krstic (TC)* [2001] ICTY para 561.
1082 See Duong (2007) 24 ff; see also the section 'Ethnic Chinese'.
1083 See Heder *Reassessing* (2005) 402.
1084 See eg Simon *Genocide* (2007) 114; Kiernan *Cambodian Genocide* (2004) 302; see also ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 802.
1085 See Heder *Reassessing* (2005) 402 ff.
1086 Heder *Reassessing* (2005) 402.

seems not to have been part of Khmer Rouge policy. But members of the Khmer Krom were frequently singled out for execution. The main reason for the criminal abuse suffered by members of the Khmer Krom were their perceived links to Vietnam. Mass executions of Khmer Krom on accusations of treason frequently took place.[1087] Evidence from the records of security centres suggests that Khmer Krom were often suspects of espionage and other counterrevolutionary activities[1088]. Local Khmer Rouge cadre went as far as proclaiming that the 'Khmer Krom had all become Vietnamese' and that they were considered contaminated by centuries of Vietnamese contact[1089].

In technical terms, mass killings falling within the grey area between mass discriminatory killings and genocidal intent raise the questions of specific intent and the perpetrators' knowledge of potentially genocidal consequences to their actions.[1090] For several of their victim groups including the ethnic Chinese and the Khmer Krom, the Khmer Rouge seem to have had no particular aim besides their general policies of radical economic and social transformation. Indeed, infamous Khmer Rouge proverbs give testimony to the indifference to the survival of people affected by their policies: 'Your life is no gain, your death no loss' and 'Better to kill an innocent person than to leave an enemy alive'.[1091] As laid out before, genocidal intent should be construed to include intended group destruction both as an end as well as a means. Whether perpetrators desire the group destruction itself or see it as a necessary precondition to ulterior goals is of no direct importance in assessing the crime of genocide. The same applies if the group destruction is not desired as such but seen as a certain consequence of actions undertaken in the pursuit of ulterior aims.[1092] While the Khmer Rouge's ulterior aim might have been to create a homogenous society, necessary preconditions to and consequences of that aim are also covered by intent. If it can be shown that mass discriminatory killings, while not targeted at group destruction as such, were seen to lead to certain group destruction, the threshold to genocidal intent is reached.

(2) *Intended Destruction*

The legal assessment of the Khmer Rouge's targeting of minorities and the Buddhist monkhood highlights the problems inherent to classifying the destruction intended by perpetrators of mass atrocities. Genocide is generally seen to only encompass the intended physical or biological destruction of groups. A mere cultural obliteration of a group is not seen to suffice. In the

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1087 See in this respect Roberts (2010) 4 ff with further references and Ciorciari *Khmer Krom* (2008) 3.
1088 See Ciorciari *Khmer Krom* (2008) 3.
1089 See Roberts (2010) 4 with further references.
1090 See the section 'Concept of Intent for the Crime of Genocide'.
1091 See Margolin *Particularités* (1999) 208 and Heder *Reassessing* (2005) 395; see in this respect the description of this phenomenon at Mann (2005) 16.
1092 See the section 'Concept of Intent for the Crime of Genocide'.

same way, where the intended destruction relates only to a part of a group, that part must be significant both quantitatively as well as qualitatively to be relevant for the crime of genocide.[1093] These requirements have so far been defined only vaguely in the jurisprudence of the international criminal tribunals. The case of the Khmer Rouge shows some fundamental problems in their application to the persecution of groups covered by the Genocide Convention based on religious or cultural traits ascribed to them by perpetrators. The assessment of the forced assimilation of minorities and the Buddhist monkhood as well as the outright execution of community leaders of these groups involves difficult questions regarding the essential properties of groups and what it means to destroy them.

(a) Forced Assimilation

One of the main controversial issues with regard to the destruction of groups intended by the Khmer Rouge touches upon the question of whether the forced assimilation of groups reached the level of group destruction relevant for the crime of genocide. Forced assimilation of groups can take varying degrees of severity. It can involve a range of different means to achieve the loss of particular group identities and the adoption of new ones. Milder forms involve, for example, the prohibition of languages and cultural practices and the thinning out of a group on a territory by bringing in settlers from a different group.[1094] More severe measures can consist in the forced displacement of people and the segregation of children from their families. It is clear that policies of forced assimilation involving such measures do not automatically fall within the scope of the crime of genocide. Rather, genocide does not cover situations in which the aim at cultural conformity is brought about solely by acts not listed in the Genocide Convention.[1095]

Extreme policies of forced assimilation give the radical choice between conversion and death. Members of targeted groups are given the option of either abandoning their former identities completely or face execution. There are various examples of such 'convert or die' policies from instances of mass atrocities targeted at particular groups. In pogroms, Jews were often given the choice to convert to Christianity or be killed.[1096] During and after World War I, Turkish forces massacring Armenians spared part of those who converted to Islam.[1097] Later, the Croat Ustasha forces targeting Serbs during World War II generally spared those who gave up Orthodoxy for Catholicism.[1098] For such

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1093 See the section 'Intended Destruction'.

1094 For examples in this regard see, Petit et al (2007) 168 ff and Storey (1998) 229 ff.

1095 See May (2010) 41 for a discussion of this position. See also the discussions regarding ethnic cleansing, eg Nersessian *Political Groups* (2010) 8 ff; Mettraux (2006) 246 and Schabas *Genocide* (2009) 221 ff.

1096 Mann (2005) 16; see also Nersessian *Political Groups* (2010) 81 with further references.

1097 Sautman (2003) 209.

1098 See Sautman (2003) 209; Mann (2005) 16.

extreme instances of forced assimilation, it can be argued that they reach a level of intensity with regard to the intended destruction which becomes relevant for charges of genocide. As Nersessian puts it,

> The ability to save oneself from genocide by denouncing group status (foregoing exercise of the right) does not mitigate the existence of the crime. The Convention represents a judgment that, even if an overt opportunity to exit the group is theoretically possible (unlikely for race) and actually made available, no one should be forced to choose between physical/biological destruction and his religious, national, ethnic or racial identity.[1099]

The policy of assimilation of religious groups and ethnic minorities pursued by the Khmer Rouge involved a range of measures aimed at the establishment of an atheistic and homogenous society.[1100] It included the banning of religious and cultural practice, forced displacement and dispersal of minority communities and the transfer of children.[1101] Ultimately, the Khmer Rouge also practiced a 'convert or die' policy on a broad basis. Widespread killings of monks refusing to defrock are well documented.[1102] Equally, the killing of Cham refusing to give up the practice of Islam was the usual course of action. Local cadre told Cham that if they did not do 'anything ... different from other people' they would not be killed.[1103] In the same way, members of the ethnic Chinese minority were killed for speaking Chinese or otherwise displaying ethnic attributes.[1104]

In assessing such a policy with regard to the crime of genocide, the destruction intended becomes the central issue. Applying the strictest interpretation of the intended destruction required for genocide[1105], such policies could not be considered as implying genocidal intent. The physical destruction of the group, which in that kind of interpretation has to mean the physical destruction of the individual members of the group, is not absolutely sought. In the perception of the perpetrators, group destruction sufficient to their aims can be realized by other means than the killing of persons initially identified as group members.

As noted before, such a strict interpretation of the intended physical destruction required has drawn substantial criticism. One of the arguments advanced in that discussion is that where acts of physical harm and destruction as listed in the Genocide Convention are used to bring about the destruction of a group,

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1099 See Nersessian *Political Groups* (2010) 81 with further references.
1100 See the section 'Targeting of Minorities'.
1101 See the section 'Victim Groups'.
1102 See the section 'Buddhist Monkhood'.
1103 Heder *Reassessing* (2005) 398.
1104 See Kiernan *Cambodian Genocide* (2004) 302; Becker (1998) 250.
1105 See the section 'Intended Destruction'.

the exact nature of the intended destruction is not of central importance.[1106] Further, the acts included in the Genocide Convention extend beyond simply killing the protected group. The inclusion of 'forced transfer of children' and 'imposing measures intended to prevent births within the group' points to a wider scope of group destruction for the crime of genocide.[1107] While these points are considerable in themselves, they do not explicitly point to the main problem involved in the strict interpretation which lies in trying to differentiate between the intended physical or biological destruction and the cultural destruction of groups enumerated in the Genocide Convention. Seeing the group types enumerated in the Genocide Convention as amenable to physical destruction in the same way that individuals can be killed is an oversimplification which does not hold in practical application[1108]. It is based on the flawed premise of groups being physical entities perpetuated by biological means. It neglects the social construction of group identities and, most importantly, the perpetrators' conception of group existence and perpetuation.

The targeting and treatment of the Buddhist monkhood by the Khmer Rouge provides a good example in this regard. In aiming at the abolition of religious practice in Cambodia, the Khmer Rouge 'drove Buddhist priests and monks from their religious practice ... killing those who resisted'.[1109] With Buddhism being an integral part of Cambodian society, completely interwoven into the social fabric[1110], the target group of the Khmer Rouge for specific action regarding Buddhist religious practice was the monkhood which represented the tangible institutions of the religion. As would be expected, the Buddhist monkhood was clearly perceived by the Khmer Rouge as being defined by its religious affiliation and practice. In that group perception, the Khmer Rouge followed the traditional Cambodian conception of monkhood. While the monastic order was seen as a distinct segment of society, membership in it was not necessarily static but could also be of temporary nature. For low-level monks, monkhood was not necessarily a choice for life. Rather, young men could spend a period of time as monks before returning to their former lifestyle outside the pagoda. Such 'temporary' monks could return to monkhood later in life either for another short period or to enter the monkhood permanently. This mobility between intense religious practice and more secular lifestyles was taken into account by the Khmer Rouge in their aim of eliminating the Buddhist monkhood. Senior figures of the monastic order were specifically targeted for immediate execution. Lower-level monks were forced to give up

1106 See Quigley *Genocide Convention* (2006) 103 ff and May (2010) 35 ff for an overview of the discussion.
1107 See Storey (1998) 228.
1108 Mundorf (2009) 63.
1109 Abrams (2001) 306.
1110 See Simon *Genocide* (2007) 105 and Harris *Buddhism* (2007) 23 ff.

religious practice under pain of death.[1111] The group being defined and discernible by cultural practice, its destruction in the eyes of the perpetrators consequently involved the elimination of persons unchangeably associated with the group and the forcing away from religious practice of persons that were seen to be able to completely assimilate. In as far as physical embodiments of the religious group existed, they were targeted for elimination. According to their conception of the Buddhist monkhood, the Khmer Rouge intended their complete destruction and took all measures they saw necessary to bring it about.

The group being defined based on elements of religious practice and institutionalized manifestations of Buddhism, the measures taken for its destruction were chosen accordingly. The demolition and reuse of pagodas[1112] went hand in hand with the killing of senior monks and the defrocking of lower-level monks. Looking for an exclusively physical destruction of the group in this case would be inappropriate since the perpetrators themselves saw the targeted group's identity as an amalgamate of the physical existence of its institutions and religious practice. As would be the case for most groups seen to be defined by religious characteristics, the Khmer Rouge did not perceive the Buddhist monkhood as biologically defined in pseudo-racial terms. Accordingly, the continued existence of the group was not seen as exclusively dependent on the survival of the members of the group at the time. To require a strictly interpreted physical destruction or denial of the means of biological perpetuation of the group in this case would fall short of appreciating the more complex realities of group existence[1113].

Instead, a more adequate assessment of the intended destruction of particular groups would support itself on a comprehensive view of the level of intensity of the destruction sought, ie on whether the immediate destruction of the group was aimed for, taking into account the means chosen to implement such a policy. What this means for the individual case depends on the group conception of perpetrators and cannot be selectively categorized into physical and cultural aspects. Such a categorization into physical and cultural destruction fails where the perpetrators' conception is not exclusively based on physical traits.

Extreme forms of forced assimilation such as 'convert or die' polices that are seen by the perpetrators to advance the immediate destruction of the group targeted can form part of an intend group destruction that falls within the scope of genocide. In combination with direct killings and large scale mistreatments of the targeted groups, the 'convert or die' policies adopted by the

1111 Heder *Reassessing* (2005) 396; Ratner et al (2009) 310. See also Harris *Buddhism* (2007) 80 ff.
1112 See Harris *Buddhism* (2007) 151 ff.
1113 See Powell (2007) 535.

Khmer Rouge towards the Buddhist monkhood and the Cham give a picture of an intended destruction which is relevant in terms of the crime of genocide. The discussion of the killing of the leadership of groups by the Khmer Rouge in the next section will give another perspective on this issue.

(b) Killing of Leadership

Just as with forced assimilation policies, the targeting of specific groups can go along with policies that aim at the immediate destruction of the targeted group's leadership. In the case of the Khmer Rouge, the killing of the leadership of targeted groups most prominently took place with regard to community leaders of the Cham and the highest-ranking monks of the Buddhist monastic order. The following remarks will focus on the questions raised by the treatment of the Buddhist monkhood's leadership since it exemplarily raises the issues involved in the legal assessment of such policies. These issues are closely related to those discussed in respect to the forced assimilation policies. They involve questions with regard to the definition of the targeted group and lead back to the question of what it means to destroy groups defined by religious and cultural characteristics.

In assessing the killing of the leadership of the Buddhist monkhood, initially questions regarding the perpetrators' group conception have to be addressed. The killing of the leadership can be looked at from different perspectives. On one extreme, the leadership of the Buddhist monkhood could be seen as the target group itself. On the other extreme, the highest-ranking monks could be seen as a subset of the Buddhist monkhood, itself a subset of Cambodian Buddhists.[1114] More suitably, however, the Khmer Rouge's group targeting is taken into account when considering the killing of the Buddhist monks' leadership. While the Khmer Rouge's aim was to eradicate the practice of Buddhist religion in Cambodia, the group of people targeted in the pursuit of this goal was neither the entire Buddhist population as a whole nor the highest-level monks only but the Buddhist monkhood.[1115] The Buddhist monks were seen as forming a special class within Cambodian society.[1116] Of the monks it was said that they had 'eaten their fill, done nothing with their hands, and moved only their mouths', poisoning the people with their sermons.[1117] The entire monkhood was characterized in dehumanizing terms as 'parasitic maggots, tapeworms and leeches' and said to be lazy exploiters and bearers of feudalistic habits.[1118] Accordingly, it is probably most adequate to see the leadership of the monkhood neither as a group in itself nor as a subset of a subset of Buddhists in

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1114 See Park *Intent* (2010) 179.
1115 See also Simon *Genocide* (2007) 104 ff.
1116 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 207.
1117 Heder *Reassessing* (2005) 398.
1118 Heder *Reassessing* (2005) 398.

general but as a distinct part of the Buddhist monkhood which was targeted as a whole.

Adopting the perspective that the leadership of the monkhood was seen as part of the targeted group, the issue is raised whether the killing of the leadership can be considered as a genocidal destruction of a group 'in part' as provided in article II of the Genocide Convention. As discussed before, for the intended destruction of a group's part to be relevant for the crime of genocide, the part needs to be 'substantial' and 'significant'.[1119] The assessment of the relevance of a group's part involves a combined view of its quantitative dimension as well as of the significance of the part to the group's survival. With regard to the leadership of a group, it is clearly its prominence and its importance to the overall group that would make its intended destruction fall within the scope of the crime of genocide.[1120]

Assessing the significance a group's part in relation to its importance with regard to the group's survival necessarily leads back to the issue of what it means for a group to survive. As seen before, the survival of a group can be seen as a combination of the physical survival of its members as well as the continuation of its membership on the level of group identity. The jurisprudence of the ICTY in this regard points to an understanding of group survival not limited to the mere survival of group members.[1121] With regard to the events at Srebrenica, the destruction of the Bosnian Muslim community was seen at least partially encompassing aspects of its social existence.[1122] For the Buddhist monkhood, whose survival was seen by the Khmer Rouge not entirely in physical terms but in terms of its social perpetuation, a view of its continued existence has to go beyond the physical survival of its members as well. Most importantly, it has to include the perpetrators' perspective on the group's survival as mentioned. It has to be seen whether the part of the group targeted for immediate destruction was important to the group's survival in the eyes of the perpetrators.[1123] The attack on the leadership has to be assessed not as an isolated act but in relation to the fate of the entire group targeted.[1124]

In this respect, the killing of the leadership is not only relevant as possibly genocidal in itself but also gives an important indication for a genocidal intent towards the whole group. The Commission of Experts established by the UN

1119 See the section 'Intending to Destroy in Whole or in Part'.

1120 See Petit et al (2007) 175; Ambos *Internationales Strafrecht* (2011) 241 f with further references.

1121 See in this respect Southwick (2005) 206 ff.

1122 *Krstic (TC)* [2001] ICTY paras 90-91, 597.

1123 In this sense Ambos *Internationales Strafrecht* (2011) 243.

1124 See Ambos *Internationales Strafrecht* (2011) 243, see the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN SCOR, U.N. Doc. S/1994/674 (1994), para. 94.

Security Council in 1992 to investigate violations of international humanitarian law in the former Yugoslavia stated:

> If essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others--the totality per se may be a strong indication of genocide regardless of the actual numbers killed. The character of the attack on the leadership must be viewed in the context of what happened to the rest of the group. If a group has its leadership exterminated and, at the same time or in the wake of that, has a relatively large number of the group members killed or subjected to other heinous acts (for example, deported on a large scale or forced to flee) the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.[1125]

In the case of the Khmer Rouge, the killing of the leadership of targeted groups puts into perspective the 'convert or die' polices adopted in forcefully assimilating religious groups and ethnic minorities. As the Trial Chamber in *Jelisic* stated, genocidal intent may manifest itself in 'the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such'.[1126] Looking at the killing of the leadership in the context of the wider range of actions taken against the targeted groups strengthens the case for an intended destruction of the groups falling within the scope of the crime of genocide.

c) Issues of Proof

Trying to prove genocidal intent for the targeting of groups by the Khmer Rouge means facing a range of challenges, only a small part of which relate to purely legal questions. As the investigations at the ECCC show, the actual gathering and assessing of evidentiary material for a case of this magnitude is fraught with problems of institutional and political nature.[1127] On a fundamental level, the case against the Khmer Rouge with respect to charges of genocide has to deal with huge expectations of the Cambodian and international public that have built up through the more than thirty years the struggle for accountability took. For a legal investigation as limited in scope and resources as the ECCC's to live up to these expectations is highly unlikely. Thirty years of dealing with the direct and long-term effects of the mass atrocities committed by the Khmer Rouge on a local and international level have established narratives reaching far beyond what a legal assessment could arrive at.[1128] Judicial investigations asking for hard, legally satisfactory evidence to attribute individual

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1125 Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN SCOR, U.N. Doc. S/1994/674 (1994), para 94.
1126 *Jelisic (TC)* [1999] ICTY para 82. See in this regard Southwick (2005) 207.
1127 See the section 'Evidence'.
1128 Bates *Report* (2010) 84.

criminal responsibility can become at odds with the generally accepted description of events. In terms of trying to prove genocidal intent, this means that there may be a substantial gap between anecdotal evidence and the kind of evidence necessary to convict in a court of law.[1129]

Most of the issues so far discussed with regard to the case of the Khmer Rouge ultimately also concern the proof of genocidal intent and will not be taken up again. In this section, the focus will lie on the particular difficulties involved in establishing genocidal intent for the targeting of groups by the Khmer Rouge. Specific elements of proof of a possible case against the Khmer Rouge will not be discussed. The Closing Order of the Investigating Judges in Case File 002 gives some indications towards the evidentiary material the Prosecution might rely on in court. Eventually, the trials regarding Case File 002 will have to shed more light more light into that aspect.

(1) *Consistency*

Proving genocidal intent to attribute criminal responsibility normally involves establishing that the individual perpetrator was acting within a broader context. It is necessary to show a collective policy or plan geared at group destruction. Ideally, such a policy could be imagined to be decided upon at a given point in time by the leadership and then be executed consistently through a strict hierarchy throughout a given territory. Unsurprisingly, the real-world dynamics of mass atrocities hardly ever provide this type of sharply defined collective course of action.[1130] Instead, policies geared at group destruction are not necessarily decided upon but may arise more diffusely, evolve over time and vary in their manifestation. Even for the Holocaust, the most iconic case of a genocidal course of action, the Nazi's policy of group destruction was not explicitly decided upon and present in its ultimate form in the beginning of their rise to power. Instead, improvised decisions over time turned into the infamous system of industrialized extermination.[1131] Trying to pin-point genocidal policies in a case of the magnitude of the Khmer Rouge's atrocities necessarily involves simplifications of the complex dynamics leading to such events. With regard to the group destructions intended by the Khmer Rouge, ambiguities with regard to the formation of policies and deviations thereof substantially complicate the proof of genocidal intent.

For all of the targeted groups there are important changes in the treatment by the Khmer Rouge over time in terms of central policy as well as the murderous actions taken at the local level. Discriminatory policies and actions intensified towards the end of the regime. As Heder puts it: 'ever-accelerating waves of killings of previously victimized categories were telescoped into almost con-

1129 See Bunyanunda (2000) 1610; see also the section 'Evidence'.
1130 See eg Osiel (2009) 16 ff.
1131 See in this respect Browning (2007).

tinuous massacre'.[1132] With regard to the targeting of the Cham, there is some evidence that the increased mass killings were the result of an explicit change in central policy.[1133] For other groups, the change in policy can only be inferred from the resulting treatment on a local level. The policy geared towards the elimination of the ethnic Vietnamese from Cambodian soil in the beginning seems to have consisted in forcefully expelling the minority from the country. Later, ethnic Vietnamese were purposefully kept in the country and targeted for execution.[1134] The other important dimension of variation in the policies pursued by the Khmer Rouge concerns their local implementation. There are considerable differences in respect to the treatment of groups throughout the different regions. Additionally, differences in the perception and treatment of targeted groups can be shown for different hierarchical levels.[1135]

Proving the crime of genocide for the Khmer Rouge with regard to the targeted groups will involve dealing with the full range of such indications that could potentially speak against the presence of the collective element of genocidal intent.[1136] It is important to keep in mind that genocidal intent does not have to be proven for *all* events of the time span looked at. It is sufficient to establish that there *were* acts conducted within the framework of a collective course of action geared towards group destruction.[1137] In evaluating the evidentiary material, clear-cut policies regarding the individual groups and their consistent execution cannot be expected. Rather, the complex nature of mass atrocities and the processes involved needs to be taken into account.

(2) *Exclusivity of Targeting*

The scale and all-encompassing nature of the violence inflicted upon Cambodian society by the Khmer Rouge makes for particular difficulties in proving genocidal intent for the targeting of individual groups. The mass killings and mistreatment of members of particular groups can be seen as part of an overarching policy that targeted whole sections of the society and renders the differentiation of group-related policies more intricate. On the level of evaluating elements of proof, acts not exclusively targeted at particular groups might prove less probative of genocidal intent:

> Broad targeting of many sectors of society suggests that the Khmer Rouge may not have been singling out specific groups protected by the Genocide Convention for destruction. While observers have argued that ethnic Vietnamese and Cham Muslims were disproportionately targeted by the Khmer Rouge, the strength of any inference drawn from their disproportionate targeting is necessarily far weaker than that involved in situations like Rwanda,

1132 Heder *Reassessing* (2005) 404.
1133 See Ciorciari and Chhang (2005) 267 ff and Heder *Reassessing* (2005) 405.
1134 See the section 'Ethnic Vietnamese'.
1135 See the section 'Official Policy, Local Practice'.
1136 See the section 'Evidence Speaking Against the Presence of Genocidal Intent'.
1137 See in this respect Behrens (2007) 140.

> Darfur, and Srebrenica, where the protected group in question was the near exclusive target of persecution.[1138]

In so far as international criminal tribunals have pronounced on the issue, no requirement of exclusivity in the targeting of a particular group has been established. In Rwanda, the primary targeting of the Tutsi was accompanied by the killing of other social and ethnic groups such as Hutus judged sympathetic to the Tutsi.[1139] While this was taken notice of, no particular attention was paid by the ICTR to the non-exclusivity of the violent acts concerned.[1140] At the ICC, the Prosecution took into account that acts of violence in Darfur had not been limited to members of the tribes allegedly targeted. In its application regarding the Arrest Warrant for Al-Bashir, the allegations of genocidal targeting were qualified by noting that only 'most' of the persons targeted were members of a protected group.[1141] While the non-exclusivity in targeting particular groups can make the proof of genocidal intent more difficult, there is no reason why policies involving the targeting of large sections of a society should, as such, speak against an inference of genocidal intent. As noted before, genocidal intent does not have to be motivated by hatred or disdain for the targeted group. The group destruction can simply be seen as necessary precondition to an ulterior aim. Such ulterior aims can consist in military objectives or larger ideological goals that might well include measures targeted at groups as well as against a broad range of persons not necessarily belonging to particular groups.

While not establishing a requirement of exclusive targeting of a group, the ICTR Trial Chamber in Akayesu noted that the probative weight of targeting is increased if the perpetrators exclude the members of other groups.[1142] Evidence of the selective killing of members of a targeted group and of processes of victim selection can be indicative of genocidal intent and could play an important role in the case of the Khmer Rouge. The selection of members of the ethnic Vietnamese minority provides an example of such specific targeting. The Khmer Rouge had detailed guidelines regarding membership to the group and used lists and registrations to ensure the ethnic Vietnamese identity of their victims.[1143] The singling out of victims is also prominently apparent in the classification and stigmatization of members of the East Zone population.[1144] The timing and scale of large-scale attacks gives additional indications towards an orchestration of group destruction. In the case of the Cham, simul-

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1138 Park *Intent* (2010) 178.
1139 *Kayishema & Ruzindana (TC)* [1999] ICTR para 302. See Park *Intent* (2010) 167.
1140 See Park *Intent* (2010) 165.
1141 ICC Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), 4 March 2009. See Park Intent (2010) 165.
1142 *Akayesu (TC)* [1998] ICTR para 523
1143 See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 1344; See the section 'Ethnic Vietnamese'.
1144 See the section 'East Zone Massacres'.

taneous targeting of communities in different parts of the country indicates direction of the acts by the central command within a broader framework of group elimination.[1145]

In respect to specific targeting, the widespread violence accompanying the targeting of individual groups might not only pose a hindrance but become instrumental to the proof of genocidal intent. Given the extremely harsh conditions of survival for the general population, the fact that it still can be shown that members of certain groups were significantly less likely to survive allows a weighty inference towards establishing genocidal intent.[1146]

[1145] See ECCC Co-Investigating Judges, Closing Order Case File 002, 15 September 2010, para 1341.

[1146] See DeWalque (2005) 351.

IV. Concluding Remarks

'Great cases, like hard cases, make bad law'.[1147] This often cited observation of influential US Supreme Court Judge Holmes partially rings true for genocide, as well. By its very nature, the law of genocide is shaped by emblematic cases. In this way, it carries notions that do not easily translate to different sets of events. Genocide still importantly stands for singular phenomena like the Holocaust and the Rwandan massacres. Assessing possible cases of genocide inevitably invites comparisons with these few but immensely influential points of reference that recent history provides. In many ways, genocide is still in a state of limbo between being a symbol for unique historic events and being a genuine criminal offence. However, the rapid development of international criminal law, its institutions and the resulting jurisprudence have initiated a more conscious approach to international crimes in general and genocide, in particular. A growing awareness for issues such as individual criminal responsibility for collective crimes or the problems involved in prosecuting state-organized crime importantly influence the understanding of genocide. New case law offers different perspectives on questions once strongly tied to the events that gave rise to the formulation of the offence. The Cambodian case can offer such insights that transcend the particular set of horrendous mass atrocities. With its specific characteristics, it provokes questions regarding aspects of the crime that have not yet been subject to thorough debate. The case can form an element of a larger, more comprehensive picture of genocide as a criminal offence.

A. Perspectives Gained

As the case of the Khmer Rouge exemplarily shows, genocide's scope and complex structure make it necessary to take into account the background of collective action against which perpetrators' criminal actions take place. The crime of genocide involves a complex interplay of factors at the individual and collective level. Assessing each of the particular elements of the crime separately involves consideration of the partially collective nature of genocide. This particularly concerns questions of intent. Approaching genocidal intent with the traditional legal concepts drawn from individual crimes alone does not lead to satisfying conclusions.

Genocidal intent is particular in that it refers to individual acts as well as to a collective context. It does not, however, imply a particular desire to achieve group destruction nor does it require particular motives behind an intended group destruction. Such requirements make particularly little sense in the collective context where causal links are complex and the distinction of potential collective intentions is exceedingly problematic. Trying to pinpoint whether

[1147] N. Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

the destruction of a group was seen as a goal itself or merely as a precondition to or consequence of an ulterior aim is a pointless exercise even where an intent for group destruction can be established. The case of the Khmer Rouge shows the limitations of a legal inquiry into aims and motivations at the collective level. As a complex phenomenon that engulfed the entire Cambodian society, the mass atrocities committed under the Khmer Rouge regime evade simplifying explanations. For the legal assessment, neither a collective desire, however defined, nor underlying motivations or ulterior aims are of direct relevance. What genocide requires is the decision to bring about group destruction. It is what lies at the heart of what the criminal offence tries to capture.

On a more fundamental level, the Cambodian case and its legal assessment put into question the current definition of genocide with its conclusively enumerated groups as possible objects of the offence. Applying the crime to the mass atrocities committed by the Khmer Rouge shows that the group concept central to the definition of genocide can lead to grave contradictions in terms of the evaluation of different group destructions. As is the case with part of the groups targeted by the Khmer Rouge, a range of groups identifiable and targeted as such by perpetrators fall outside the scope of the offence. The Cambodian case shows that the destruction intended for such groups not covered by the current definition does not necessarily differ in its quantitative or qualitative dimension in comparison to the destruction intended for groups that fall within the enumerated group types. In terms of the damage intended and caused there is little to differentiate between the treatment of groups that fall within or outside the definition of the crime.[1148] Yet, the legal qualification strongly differs. The basis for this difference in appraisal rests on weak grounds. In the Cambodian context, this varying appraisal appears particularly arbitrary since the group destructions intended by the perpetrators had an identical ideological point of origin and formed part of the same campaign of radical transformation of society.[1149]

The problems caused by the enumeration of particular group types for the offence are highlighted. The current definition of the crime is based on the assumption that there are naturally defined groups that deserve protection. Yet, trying to define these groups according to purely objective criteria proves impossible. In this sense, legal debate has had to retrace basic insights of social science regarding the social construction of groups and their identities. Rather than being biologically defined, groups are in that way seen as the product of social processes. They cannot be objectively defined according to inherent qualities but instead gain their identity through the attribution of characteristics in social interaction. For the crime of genocide, then, it is the perpetrators' perception of group identity that is of central importance. It is the perpetra-

[1148] See in this respect Vest *Botschaft* (1999) 359.
[1149] See Luchterhand (1998) 356 ff.

tors' perception, shaped by the social context in which they operate, that lets them identify their victims. In trying to punish and potentially prevent perpetrators' actions, it is *their* group perception and consequent identification of victims that must be looked at.

The label under which perpetrators choose to identify and characterize the groups they target for destruction in that sense becomes of secondary importance. Perpetrators basing discrimination and intended group destruction on concepts of race, ethnicity, religious affiliation and nationality have shaped the emblematic cases of mass atrocities of the last century. Yet, discrimination and destruction of groups can be imagined based on any type of perceived group identity. Such group identities can be the result of racial, religious, political or any other ideological conceptions.[1150] Labels such as race, ethnicity, religion or nationality do not contain a scientifically objective core that could be applied to identify groups disregarding the context in which they are used. As such, the labels give no indication with regard to the groups targeted or the destruction intended since that depends entirely on what the perpetrators mean by a certain label. This is why basing the applicability of genocide on particular group types or labels is fundamentally flawed and can lead to untenable differences in the qualification of mass atrocities.

It is the 'denial of the right of existence of entire human groups' that is at the core of what genocide criminalizes.[1151] As Wald put it, the 'goal of group destruction is why genocide is at the apex of contemptible crimes'.[1152] What particular ideological concepts perpetrators adhere to should be of no direct relevance in this respect.

As outlined, the conclusive enumeration of groups as in the current definition of genocide is not fully suitable. This has been noted by a range of commentators over the years and has led to adaptations of the offence in several national legislations. Departing from the wording of the Genocide Convention, some national definitions add more group types or abstractly extend the scope of the offence to the targeting of groups defined by whatever criteria chosen by perpetrators[1153]. Such modifications of the offence certainly present an important step in getting to a more comprehensive understanding of genocide. However, they raise questions of their own. It is widely feared that extending the range of 'protected groups' risks diluting genocide as a highly specific offence, trivializing what the crime stands for.[1154] Indeed, a differentiation of the

1150 See eg Simon *Genocide* (2007) 100.
1151 See UN General Assembly Resolution 96(I), U.N. Doc. A/63/Add.1 (1946).
1152 Wald *Prosecuting* (2006) 84.
1153 See for a detailed view Nersessian *Political Groups* (2010); see also Martin (2009) 113; Spiga (2011) 11, fn 33. Article 264 of the Swiss Penal Code presents an example in this respect.
1154 See eg Young (2010) 4 ff with further references.

offence is necessary to limit the scope of genocide to cases of intended group destruction of exceptional gravity. As seen, this differentiation cannot sensibly be made based on the type of label or conceptions used by perpetrators to identify their targets. The group types enumerated in the Genocide Convention can nevertheless serve as examples of group conceptions that can be at the basis of genocide in a qualitative and quantitative dimension.[1155] Nationality, ethnicity, race and religion exemplarily stand for the amplitude of the destruction that previous perpetrators of genocide intended.

Factoring in the social nature of group identity and the importance of the perpetrators' group conceptions represents a major shift in the way the crime of genocide is understood. The consequences of that paradigmatic shift with regard to the 'protected groups' have yet to be drawn and fully understood. Recognizing groups as social phenomena rather than biologically defined entities not only touches upon the scope of the crime with regard to the enumerated groups but also affects the question of what it means intending to destroy them. The interpretation of the intended destruction of groups is inextricably tied to the understanding of what groups are and how they are seen to continuously exist. As the targeting of the Buddhist monks by the Khmer Rouge shows, what should be understood as a relevant destruction of a group is not as straightforward as the definition of genocide implies. On one hand, strictly requiring the physical destruction of groups remains within the atavistic conception of groups as quasi-biological entities. On the other hand, it is clear that not all actions targeted at the destruction of the social fabric of a group are covered by genocide which implies an intended destruction of a different degree of severity. Borderline cases such as extreme forms of forced assimilation policies fall into a grey area for which the distinction between 'physical' and 'cultural' genocide fails. A more differentiated view of groups and their destruction with regard to international criminal law remains to be further developed.

[1155] See May (2010) 56; see in this respect also Powell (2007) 541, 543.

B. LOOKING FORWARD

If genocide is to function as a criminal offence and not just as a general category for mass atrocities, an in-depth analysis of the structural problems of the crime as currently defined in international criminal law has to take place. The inconsistencies in the structure of genocide need to be understood in the light of the events and the political context that gave rise to the formulation of the norm. Applying the crime without considering its inherent tensions can lead to differences in the evaluation of criminal responsibility that are hard to justify and can question the very legitimacy of genocide as a criminal offence.

The need for a contemporary definition of genocide has repeatedly been diagnosed.[1156] Many proposals for reform have been made and on a national level have led to a number of alternative definitions of the crime that address some of the difficulties raised.[1157] Nevertheless, on the international level, genocide has remained in its original structure as defined in the Genocide Convention. Most importantly, genocide has been incorporated in this way into the ICC Statute which, in its particular significance, sets the standard in terms of the formulation of current international criminal law. In this way, there is little or no prospect of a reform of genocide with regard to its conventional and statutory definition. The challenge thus remains to sensibly interpret the crime as defined in the Genocide Convention, taking into account the structural flaws and resulting problems without failing to capture the essential quality of the events that it stands for.

The problems faced in the application of genocide to some degree mirror the fundamental issues that international criminal law raises as a whole. Dealing with the collective dimension of international crimes brings up questions to which answers have to be found that transcend the frame of traditional concepts of criminal law. One of the main challenges in this respect is the issue of assigning individual criminal responsibility for taking part in collective actions, the commission of crimes in collective structures. This clearly shows in the multitude of recent efforts to come to terms with the question.[1158]

Genocide additionally poses the question of what it means to commit crimes *against* human collectives. Fundamentally, genocide in its current definition works as a metaphor, outlining a collective phenomenon in terms of an individual crime[1159]. The 'killing of a group' presents a very telling picture that is easily understood and seems to capture a particular quality that defines the most outrageous mass atrocities. Yet, translating the metaphor back into legal terms used to assign individual criminal responsibility leaves open structural

1156 See eg Ratner *Evils* (2007) 589.
1157 See Nersessian *Political Groups* (2010) 272 ff for a survey of the solutions in domestic legislation.
1158 See eg Osiel (2009) and Vest *Machtapparate* (2002).
1159 See in this respect Powell (2007) 533 ff.

questions that have yet to be fully understood. A consistent interpretation of genocide must take into account the complexities of collective phenomena and see beyond the powerful and simplifying imagery operated with. The developing legal grasp has to consider the organizational patterns and social processes by which mass atrocities occur.[1160]

It is highly unlikely that the proceedings at the ECCC will see elaborate discussions of the fundamental issues the case of the Khmer Rouge raises with respect to the crime of genocide. In fact, the future for the ECCC and its ongoing and expected proceedings looks rather bleak.[1161] Major funding shortages threaten the conduct and completion of the trials against Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith. There is discussion of the UN handing over Cases 003 and 004 to a purely national, residual ECCC.[1162] Taking into account the explicit dismissal of Cases 003 and 004 by the Cambodian government, the probability of proceedings living up to international standards in these cases is very small, with or without the involvement of the UN.

Against this background, it is reasonable to assume that the only judicial assessment of genocide charges will be those raised in Case File 002 regarding the treatment of the Cham and the ethnic Vietnamese. This means that many of the important questions with regard to the criminal liability for genocide in respect to the totality of the crimes committed under the Khmer Rouge will not be dealt with. The challenges faced by the ECCC in dealing with a case of vast complexity and important political implications have led to a pragmatic approach. For the Prosecution it has meant trying to achieve convictions of symbolic relevance while avoiding the thornier legal and political issues.

The ECCC's proceedings and their results are sure to disappoint most of the high expectations held in Cambodia and by the international public. The ECCC are confronted with steady and often justified criticism of their operations. The manifold shortcomings of the institution can hardly be denied. Importantly, the question of whether the meager outcomes justify the substantial financial efforts that continue to go into the operation of the court is often raised. It has become clear that the ECCC are likely to be one of the most expensive experiments of transnational justice with particularly high costs per accused.[1163] In contrast, the limited jurisdiction of the ECCC and the lack of complementary mechanisms of transitional justice leave a large impunity gap in respect to important figures of the Khmer Rouge hierarchy as well as perpetrators at the local level.

1160 See Osiel (2009) ix; Powell (2007) 537 f. For a historical perspective on the complexity of the dynamics of mass atrocities see eg Gerlach (2010).

1161 Petit (2011) 198.

1162 Petit (2011) 199.

1163 Bates *Report* (2010) 3.

Ideally, one would have wished for a more efficient, accessible and comprehensive institution to provide some degree of justice and reconciliation to the victims of the Khmer Rouge and to shed light on important legal issues. Nevertheless, given the massive difficulties faced, it is important to appreciate the establishment of the court and the significant efforts that continue to go into taking the small and arduous steps in trying to 'move forward through justice' as the ECCC set out to do:

> It is a sterile debate to consider whether Cambodia needed a different type of court to the government-majority dominated hybrid that was eventually agreed upon. No tribunal could have functioned without the cooperation and consent of the Cambodian government – in assisting the suspects' arrests, in giving access to the evidence and the crime scenes, and in ensuring the participation of witnesses. In terms of what was achievable, the ECCC was probably the best that the international community could have got. The uncomfortable truth is that the trade-off for any form of internationally supported criminal accountability mechanism was a tribunal that was always likely to be compromised by the considerable flaws of the domestic polity.[1164]

While it is too early to fully appreciate the impact of the ECCC as a whole, their influence on the public debate about the crimes of the Khmer Rouge is considerable. The trial of Duch seems to have been useful in stimulating an intergenerational dialogue in Cambodia and has initiated a resurgence in interest and education about the country's history.[1165] Victims of the mass atrocities have been given the opportunity to speak out. The proceedings also provide a measure of broader recognition for the suffering of a people whose destiny has often been neglected in international forums. In many ways, the ECCC have provided a chance for the Cambodian people to come to grips with the consequences of the Khmer Rouge regime and other aspects of the recent past that so importantly shape Cambodia's present. It is hoped that explicitly dealing with the mass atrocities of the past helps to positively influence the way current problems in Cambodia are faced.

On the international level, the judicial assessment of the Khmer Rouge mass atrocities presents an important signal in terms of the enforcement of international criminal law. The 'getting away'[1166] of the Khmer Rouge with one of the most shocking cases of mass atrocities after World War II stood out as a major failing of the international community. Forming part of global efforts to fight impunity for mass atrocities, the proceedings against the former leadership of the Khmer Rouge thus carry particular significance. As the present study shows, the Cambodian case can also provide important impulses in developing

1164 Bates *Report* (2010) 83.
1165 Bates *Report* (2010) 88.
1166 See Fawthrop and Jarvis (2005).

a more profound understanding of the norms of international criminal law. The case law of the ECCC can be instrumental in shaping the interpretation of criminal offences that try to capture phenomena of mass criminality. It can act as a starting point for further inquiries into the issues raised by the specific set of events.

Beyond the symbolic and legal importance, the ECCC offers a range of lessons for future endeavors of transitional justice. The cooperation of the Cambodian government and the UN in setting-up and running the ECCC have highlighted the grave problems faced by hybrid institutions in trying to address past mass atrocities. The ECCC and their functioning in assessing the crimes of the Khmer Rouge provide another example of the limitations of political and didactic aims of international criminal trials within the larger project of post-conflict peacemaking.[1167]

> In relation to genocide, broader expectations currently resting too firmly on criminal tribunals must be separated out and provided for in a wider context; criminal trials present an important and potentially powerful tool with which to respond to genocide but they do so exclusively when their limits are realistically estimated and provision made for justice beyond them.[1168]

Overall, the discussions surrounding the ECCC and the application of genocide to the crimes of the Khmer Rouge point to these limitations of dealing with mass atrocities on a legal level. Trying to attribute criminal responsibility for mass atrocities to particular individuals is an elusive and perilous enterprise.[1169] 'Genocide is a collective crime. Any prosecution is inevitably incomplete, selective, unsatisfactory and symbolic'.[1170] The prosecution of individual perpetrators according to the current standards of international criminal law inevitably fails to capture the enormity of the crimes.[1171] Expectations of victims who demand justice for the unimaginable harm they suffered clash with the realities of what international criminal justice can provide.[1172] International criminal justice has a narrow focus on attributing individual criminal responsibility and is in no way a comprehensive answer to the commission of mass atrocities, let alone a sufficient mechanism of prevention. On a fundamental level, the need for a legal characterization of past mass atrocities always comprises the concession of a failure to act.[1173] No effort of trying to provide justice to victims and of holding perpetrators criminally responsible can replace resolute action in preventing the commission of mass atrocities.

1167 See in this respect Luban *Arendt* (2011) 6 ff.
1168 Wade (2009) 167.
1169 Osiel (2009) vii.
1170 Lippman *Genocide* (2001) 526.
1171 Lippman *Genocide* (2001) 530.
1172 Wade (2009) 150.
1173 For further perspectives on the issue see Scheffer (2006).

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