THE GENOCIDE DEFINITION IN THE JURISPRUDENCE OF THE *AD HOC* TRIBUNALS

GUGLIELMO VERDIRAME*

I. INTRODUCTION

THE permanence of the genocide definition[1] over more than five decades is remarkable considering how much criticism has been directed against it since the adoption of the Genocide Convention in 1948.[2] The existence of a stable internationally agreed definition of genocide presents indubitable advantages, particularly if compared with the lasting uncertainties in the definition of other international crimes, such as crimes against humanity. However, the genocide definition is also characterised by a number of problematic aspects and unresolved interpretative questions, some of which have been addressed in the decisions of the *ad hoc* Tribunals for the Former Yugoslavia and for Rwanda.[3] Divergent approaches to the *mens rea* requirement, to the definition of the four protected groups against whom genocide can be committed, or to the identification of acts that constitute genocide had been confined to an exclusively academic ambit until not long ago, but can now be determinative of an acquittal or conviction. With the exception of one decision by the ICTY,[4] all other judgments on genocide have come from the ICTR, in whose custody are some of the most prominent members of the interim

* University of Nottingham.

1. The definition was first contained in GA Res. 260 (III), which adopted the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 [hereinafter Genocide Convention]. It has been confirmed in other international law instruments since then, most notably the Statutes of the two *ad hoc* Tribunals, *infra* n.3, and the Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (*adopted* 17 Jul. 1998), *in* (1998) 37 I.L.M. 1999 [hereinafter ICC Statute]. The only exception is the 1954 Draft Code of Crimes Against Peace and Security of Mankind, adopted by the International Law Commission, which opted for a non-exhaustive enumeration of genocidal acts. The 1991 and the 1996 Draft Codes have reverted to the Convention definition.

2. For example, see Chalk, "Redefining Genocide", and Kuper, "Theoretical Issues Relating to Genocide: Uses and Abuses", in G. J. Andreopoulos (Ed), *Genocide: Conceptual and Historical Dimensions* (1997).

3. The crime of genocide is part of the subject matter jurisdiction of both the Rwandan and the Yugoslavia Tribunals. Art. 2, International Tribunal for Rwanda, SC Res. 827, 25 May 1993, (1993) 32 I.L.M. 1203 [hereinafter ICTR]; Art. 4, International Tribunal for the Former Yugoslavia, SC Res. 995, 8 Nov. 1994, (1994) 33 I.L.M. 1602 [hereinafter ICTY].

4. *Prosecutor* v. *Jelisic* (ICTY-I-95-10). The ICTY has, however, considered aspects of genocide law in a number of important decisions under Rule 61, and in decisions confirming indictments.

government and of the militias accused of having organised and carried out the 1994 Rwandan genocide.[5]

In examining the application of the genocide definition by the two Tribunals, this article focuses on the development of a purposeful approach to the definition. This tendency has been signalled, for example, by the recognition that rape and sexual violence can amount to genocide in the *Akayesu* case,[6] and by a more innovative approach to collective identities and membership of the four protected groups in the ICTR decisions *Ruzindanda and Kayishema* and *Rutaganda*, and in the *Jelisic* case decided by the ICTY.[7]

The first section of this article discusses the Convention definition and outlines some of the theoretical problems underlying it. In the following section, the mental element and its application by the two Tribunals is analysed. Thirdly, the article considers a thorny issue, which has perhaps received unduly scant attention to date: the determination of the membership of the four protected groups (national, ethnical,[8] racial or religious). It is argued that the approach based on the idea that membership of these collective groups is a "social fact" has progressively been superseded by a better approach, which recognises that membership of these groups is a "social construct" and that the perceptions of the victims and of the alleged perpetrators must be taken into account. The article concludes by examining the recognition of particular acts, such as ethnic cleansing and systematic rape, as amounting to genocide in the jurisprudence of the two Tribunals.

II. THE DEFINITION OF GENOCIDE

ART. II of the Genocide Convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

5. The Prime Minister at the time of the genocide, Jean Kambanda, and the Deputy Head of the interahamwe, Georges Rutaganda, have already been convicted of genocide by the ICTR. No less than 14 ministers and high-ranking civil servants, together with many military commanders and militia leaders, are still awaiting trial. Some trials of prominent "genocidaires" have taken place in Rwanda; at the time of writing, the trial of the former Minister of Justice, Agnes Ntamabyaliro, accused of being one of the organisers of the genocide, has commenced in Kigali. On the Rwandan genocide, see African Rights, *Death, Despair and Defiance* (1995, 2nd ed.), and Human Rights Watch/Fédération Internationale des Ligues des Droits de l'Homme, *Leave None to Tell the Story* (1999).

6. *Prosecutor* v. *Akayesu*, Case No. ICTR–96–4–T, *in part reported at* (1998) 37 I.L.M. 1399.

7. *Prosecutor* v. *Kayishema and Ruzindana*, Case No. ICTR–95–1–T, *available on the ICTR web-site* www.ictr.org.

8. The term "ethnical", instead of ethnic, is used in the Genocide Convention, probably the result of a solecism that has featured in the legal definition of genocide since then.

(a) Killing members of the group;
(b) Causing serious bodily harm 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 definition represented the minimum common denominator on which a very broad consensus was reached in the aftermath of World War II. It is noteworthy that, in spite of the numerous reservations made to other provisions in the Convention—in particular to Art. IX which establishes the jurisdiction of the ICJ—no reservations were made to Art. II. The United States is the only country to have attached an interpretative declaration to Art. II.[9] The most problematic aspect of the US declaration is the requirement that the impairment of mental faculties as a result of the infliction of serious mental harm (Art. II, b) be permanent, for it to amount to an act of genocide. Were a similar approach applied to torture, for example, the infliction of mental suffering could be considered to constitute torture only if it had led to the permanent impairment of the mental faculties of the victim. This approach appears inopportune, and has been correctly rejected by the ICTR.[10] Indeed, whether the impairment is permanent or not often depends on the victim's reaction and coping strategy. In addition, a criminal conduct should not be qualified simply on the basis of the victim's psycho-social reaction to the trauma engendered by it.[11] The United States tried to propound the view underlying this interpretative declaration in the preparatory commission for the ICC on the elements of crime, but the Working Group, whose conclusions will be endorsed by the members of the Assembly of State

9. It reads: "(1) ... the phrase 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in Article II.

(2) That the term 'mental harm' in Article II (b) means permanent impairment of mental faculties through drugs, torture or similar techniques".

10. *Prosecutor* v. *Rutaganda*, ICTR-96-3-T, at para.50: "The Chamber is of the opinion that 'serious harm' need not entail permanent or irremediable harm". See also *Prosecutor* v. *Musema*, ICTR-96-13-1, at para.156.

11. This is particularly so since rape and sexual violence can constitute genocide either as "killing of members of the group" (Art. II, a) in those cases where the woman is killed, or as a way of "causing serious bodily or mental harm to members of the group" (Art. II, b). While for all women rape and sexual violence are undoubtedly traumatising experiences, which can result in a "permanent impairment of mental faculties", under the US declaration, those women who have coped with the trauma of rape without developing a permanent mental impairment would never be considered victims of an act of genocide.

Parties once the Statute enters into force, has preliminarily decided not to include the US proposal in its first draft.[12]

One of the most contentious aspects of the genocide definition is the exclusion of political and social groups from the list of protected groups. In its first resolution on genocide, the General Assembly had initially opted for a broader definition based on the notion of "denial of the right of existence of entire human groups".[13] But GA Res. 260 (III), which adopted the current text of the Genocide Convention, took into account the concerns of States about the inclusion of political and social groups. As pointed out by Chalk, the exclusion of political and social groups from the protection of the Genocide Convention has important consequences, in particular it means

> ignoring the 15 to 20 million Soviet civilians liquidated as "class enemies" and "enemies of the people" between 1920 and 1939; (...) neglecting the roughly 300,000 mentally impaired and mentally ill Germans and others murdered by the Nazis as "life unworthy of life"; (...) overlooking the thousands of homosexuals killed by the Nazis because of their sexual orientation; (...) disregarding the million or more Khmer murdered by the state and the Communist party of Kampuchea in the years from 1975 and 1978.[14]

Although these massacres cannot be subsumed under the Genocide Convention, they remain acts prohibited under other international norms. Some authors have, in fact, questioned the importance normally attributed to the exclusion of political and social groups from the Genocide Convention, arguing that human rights and humanitarian law provide adequate ancillary protection.[15] For others, however, the failure to protect political and social groups constitutes the "Genocide Convention's blind spot", but one that is obviated by the emergence of a *jus cogens* prohibition of genocide "broader than the Convention's prohibition".[16] While this latter view may have some theoretical validity, the jurisdiction of the *ad hoc* Tribunals and of the International Criminal Court is limited to the Convention-based definition of genocide. As a result, the international machinery for preventing and for punishing

12. Art. 9 of the ICC Statute states that "elements of crime shall assist the Court in the interpretation and application of Articles 6, 7, and 8", which deal respectively with genocide, crimes against humanity and war crimes.

13. GA Res. 96 (I). This formulation was very close to the one theorised by the French jurist Lemkin in the 1930s and 1940s (*Axis Rule in Occupied Europe* (1944)).

14. Chalk, *supra* n.2 at 50. The list could continue with the extermination of hundreds of thousands of Communist militants in Indonesia, and the political massacres in Maoist China.

15. René Beres, "Genocide and Genocide-Like Crimes", in S. Bassiouni, *International Criminal Law*, Vol. I, *International Crimes*, at 271.

16. van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot", (1997) 106 *The Yale Law Journal* 2261–2262.

genocide currently in place cannot enforce the putatively broader *jus cogens* prohibition.

The effectiveness of the Convention regime for preventing and punishing genocide has been the object of critical analysis. Leo Kuper questioned the ability of the State-centred UN system to act against a crime that in almost all situations "is committed by governments or with governments' condonation or complicity".[17] Hurst Hannum condemned the failure of States to bring cases to the International Court of Justice (ICJ) "relating to the interpretation, application and fulfilment of the ... Convention, including those relating to the responsibility of a State for genocide" (Art. IX).[18] In this respect, Bosnia's application against Yugoslavia in 1993 has signalled the belated beginning of inter-State litigation under Art. IX.[19] To the Bosnia case one now needs to add the cases brought by the Federal Republic of Yugoslavia (FRY) against the ten NATO countries in the course of the Kosovo war, which were *inter alia* based on Art. IX of the Convention, and the case brought by Croatia against the Federal Republic of Yugoslavia.[20] In spite of these developments, Hannum's remarks still retain some validity: in the cases now pending before the ICJ, the applicant State is the State directly affected by the alleged commission of genocidal acts. There is to date no example of "altruistic" inter-State litigation brought under the Genocide Convention by a non-directly affected State, reflecting the *erga omnes* nature of the obligations in the Convention.[21]

While the importance of this litigation originating from the "discovery" of Art. IX should not be underestimated, doubts on the effectiveness of the dispute settlement mechanism under the Convention cannot be easily

17. Kuper, *supra* n.2 at 36.

18. In particular, Hannum remarked that in the case of the Cambodian genocide "the failure of any state thus far to institute proceedings before the Court is an indefensible abdication of international responsibility" ("International Law and Cambodian Genocide: The Sounds of Silence", (1989) 11 *Human Rights Quarterly* 82 at 84).

19. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia [Serbia and Montenegro])* (Merits) [1996] I.C.J. Rep. 595.

20. *Legality of the Use of Force (Federal Republic of Yugoslavia* v. *Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States)* (Request for Interim Measures) [1999] 38 I.L.M. 950; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Yugoslavia)* (Proceedings instituted on 2 July 1999) www.icj-cij.org.

21. The ICJ has emphasised that the obligations deriving from the Genocide Convention are non-contractual and that the Convention is not characterised by competing interests but by a common interest, i.e. "the accomplishment of those high purposes which are the raison d'etre of this Convention", based on moral and humanitarian principles (*Reservations to the Convention on Genocide* [1951] I.C.J. Rep. 15). See also the well-known *dictum* of the ICJ on the *erga omnes* nature of obligations outlawing genocide in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Co. Case (Belgium* v. *Spain)* (Merits) [1970] I.C.J. Rep. 3, at paras33–34).

dismissed. First, many States have made reservations to Art. IX excluding the jurisdiction of the ICJ. For example, had a State brought a case against Rwanda during the 1994 genocide, the ICJ would have had no basis for jurisdiction because of a Rwandan reservation to Art. IX.

Secondly, in terms of the effectiveness of prevention, notwithstanding the Court's ever bolder use of interim measures,[22] it is hardly conceivable that a government that is committing or condoning a genocide would comply with the interim measures of the ICJ. Ultimately, the question of an effective prevention of genocide cannot be separated from that of the legality of humanitarian intervention, and/or of the availability in these situations of the system of collective peace-enforcement under Chapter VII. Indeed, in the course of a genocide, the use of force—either by an individual State or group of States, or by the Security Council using its Chapter VII powers—is often the only method that can effectively stop or limit the commission of genocidal acts.

Finally, with regard to the effectiveness of the dispute settlement system of the Convention for punishing—rather than preventing—genocide, it must be observed that the determination of the responsibility of States by the Court would not only be belated in most cases, but also inappropriate if the government responsible for the genocide has been replaced by a new one. For example, in the case of the two most horrific genocides of the last two decades, Cambodia and Rwanda, the "genocidal" authorities remained in power respectively for three years and for four months—less than a judgment of the ICJ on the merits would have presumably taken. The case of the Federal Republic of Yugoslavia appears different, as the authorities accused by Bosnia-Herzegovina and by Croatia of committing acts of genocide are still in power. Furthermore, in this case the genocide was allegedly perpetrated in the territory of another State. The determination of the responsibility of the FRY may thus have legal consequences on the plane of State responsibility, regardless of the political vicissitudes in this country.

The issues covered by the ICJ judgments on the merits of these cases may to some extent overlap with issues already addressed by the *ad hoc* Tribunals. But, as far as individual criminal responsibility is concerned, the case-law of the *ad hoc* Tribunals is destined to remain unique at least until the International Criminal Court becomes operative. On questions on which the *res judicata* of the ICJ and of the *ad hoc* Tribunals in part coincides, the risk of legal or factual findings that are in contradiction with each other cannot be completely ruled out; it is a risk typical of an era

22. See, for example, *Case Concerning the Vienna Convention on Consular Relations (Germany* v. *USA)* (Order of 3 Mar. 1999), in which the Court adopted interim measures *inaudita altera parte.*

characterised by the proliferation of international judicial and semi-judicial bodies.

III. THE MENTAL ELEMENT

In all likelihood, the decisions on the merits in the ICJ cases brought under the Genocide Convention will involve some consideration of intent, albeit not for the purposes of determining individual criminal responsibility, but in order to ascertain whether a State has breached its obligations under the Convention. In its order of 2 June 1999 on the FRY's request for interim measures, the ICJ gave an indication of how it may proceed on the merits in these cases. The Court made a kind of *prima facie* factual finding, noting that it did not appear that the NATO "bombings entail an element of intent, towards a group as such".[23] From the point of view of criminal law, it probably makes little sense to determine whether a certain conduct has been characterised by a particular intent without considering *whose* intent is to be determined. In fact, intent being the subjective element of crime,[24] it can only in principle be determined in relation to the *mens rea* of an individual. However, having to establish, for example, whether genocide was committed in Bosnia by the FRY, the ICJ need to ascertain whether the actions of certain groups were characterised by an intent to destroy, in whole or in part, a particular group, and whether such actions are imputable to the FRY.[25]

The *ad hoc* Tribunals have clarified some of the issues pertaining to intent, in particular the quantum and the proof of intent. In *Akayesu*, the Trial Chamber of the ICTR pointed out that "intent is a mental factor which is difficult, even impossible, to determine", adding that, failing a confession of the accused, intent can only be "inferred from a certain

23. See, for example, *Legality of the Use of Force (FRY* v. *UK)*, *supra* n.20, at para. 35, and *Legality of the Use of Force (FRY* v. *France)*, *supra* n.20, at para.27. However, in its order in the *Bosnia Genocide Application* case, the ICJ had not reached a *prima facie* factual determination in the same terms with respect to the question whether the acts of Yugoslavia (Serbia and Montenegro) in Bosnia were characterised by intent to destroy a particular group. But, the Court acknowledged the existence of a grave risk that acts of genocide had been committed and emphasised that "Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia [Serbia and Montenegro])* (Order) [1993] I.C.J. Rep. 3, para.45).

24. In the words of the ICTY in the *Jelisic* case, intent is the "élément moral de l'infraction" (*Prosecutor* v. *Jelisic*, *supra* n.4, para.62).

25. In the *Legality of the Use of Force* cases, since it is the actions not of paramilitary groups but of States that are at stake, the ICJ will mainly have to determine whether the NATO bombings constituted a genocidal act. A problem of imputability could arise only with regard to those NATO countries that did not directly participate in the military campaign, but limited themselves to lending political support to it as members of the alliance.

number of presumptions of fact".[26] In part relying on the Rule 61 decisions of the ICTY on Karadjic and Mladic,[27] the Trial Chamber in *Akayesu* considered as circumstances that can be indicative of a genocidal intent: the scale and the general nature of the atrocities; the fact of deliberately or systematically targeting victims of a group, while excluding the members of other groups; the general political doctrine of the perpetrators of the crime; the repetition of discriminatory and destructive acts; speeches or projects preparing the ground for the massacres.[28] Applying these considerations to the facts of the case, the Trial Chamber found that it was possible to infer Akayesu's genocidal intention "*inter alia*, from all acts and utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators".[29]

The context in which the alleged genocidal conduct is said to have taken place is of great significance. In *Akayesu*, the Chamber had already determined "in absolute terms"—that is not in respect of the criminal responsibility of any individual—that "genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group",[30] as the massacres aimed to destroy this particular group. As far as Akayesu's own intent, to be determined separately from the "collective intent" to destroy the Tutsi group that unequivocally characterised the massacres in Rwanda, the Chamber found that Akayesu had made speeches "calling, more or less explicitly, for the commission of genocide",[31] and that the systematic rape of women in Taba commune, over which he had presided, had targeted Tutsi women, in most cases resulting in the killing of the victims.[32]

In *Kayishema and Ruzindana*, the ICTR specified that "the *mens rea* must be formed prior to the commission of genocidal acts", although this does not mean that "the individual acts themselves (...) require premeditation".[33] To the factors indicative of intent identified in *Akayesu*, the Trial Chamber in *Kayishema and Ruzindana* added the number of victims from the group, the use of derogatory language towards members of the targeted group, the weapons employed and the extent of the bodily injury that had been inflicted, the methodical way of planning, and the

26. *Akayesu, supra* n.6, at para.523.
27. *Radovan Karadjic* (Rule 61 Decision), IT-95-5-R61; *Ratko Mladic* (Rule 61 Decision), IT-95-18-R61.
28. *Akayesu., supra* n.6, at paras523-524.
29. *Ibid.*, at para.728.
30. *Ibid.*, at. para.126.
31. *Ibid.*, at para.729. On the basis of this, Akayesu was also convicted of direct and public incitement to commit genocide (*Ibid.*, at paras672-675).
32. See *infra* Section V Ethnic Cleansing and Sexual Violence as Acts of Genocide.
33. *Kayishema and Ruzindana, supra* n.7, at para.91.

systematic manner of killing.[34] However, it is not necessary for the individual to know the full details of the genocidal plan or policy.[35]

As far as Clément Kayishema was concerned, two facts were considered particularly indicative of his intent. First, he was a *préfet* during the genocide, a circumstance of great importance since the "national plan to commit genocide was implemented at *prefecture* level".[36] The Chamber was also persuaded that Mr Kayishema had executed this plan in the *prefecture* of Kibuye with efficiency and zeal. Secondly, the sheer numbers of "Tutsis killed in the massacres, for which Kayishema is responsible, either individually or as a superior" revealed, in the view of the Court, his genocidal intent.[37] Combined with a series of utterances[38] and a persistent pattern of conduct, the two elements above persuaded the Chamber beyond any reasonable doubt that Kayishema had intended to destroy the Tutsi as a group.

The other accused in *Kayishema and Ruzindana*, Obed Ruzindana, was a businessman, who, in the view of the Tribunal, "displayed his intent to rid the area of Tutsis by his words and deeds and through his persistent pattern of conduct".[39] Ruzindana's actions were particularly ruthless. The Chamber found that, after transporting Hutu extremists to sites where Tutsis had been gathered, Ruzindana "offered payment in exchange for the severed heads of well known Tutsis or identification cards of massacred Tutsis".[40]

In the *Jelisic* case, the ICTY considered for the first time the criminal responsibility of an individual accused *inter alia* of genocide in the context

34. *Ibid.*, para.93.
35. *Ibid.*, para.94.
36. *Ibid.*, para.528.
37. *Ibid.*, para.531. The Trial Chamber found that around 8,000 people were killed in an area in Kibuye town known as the Complex (the Catholic Church and Home St. Jean Complex); between 8,000 and 27,000 were killed in the Stadium; and 4 to 5,500 were massacred in Mubuga Church. In addition, in the area of Bisesero, in the same *prefecture* of Kibuye, other massacres took place and "evidence suggests that the number of those who perished was well into the tens of thousands" (*Ibid.*, para.531).
38. There were numerous testimonies that reported hearing Kayishema refer to Tutsis as "filth or dirt". In the Complex, the Chamber found out that he used a megaphone in the Complex to read out a message from Kigali encouraging the extermination of the Tutsis (*Ibid.*, para.539).
39. *Ibid.*, para.541.
40. *Ibid.*, para.544. Obed Ruzindana was sentenced to 25 years of imprisonment, a lenient penalty according to the Rwandan government that vehemently protested against it. The reasoning of the Chamber on the sentencing does, indeed, give rise to some doubts, particularly in the light of the horrific acts of which Ruzindana was found guilty. The Chamber found that Kayishema deserved more punishment than Ruzindana (*Ibid.*, para.26), since the former had been found guilty of four counts of genocide while Ruzindana had been convicted of "only" one count. The Chamber stressed Ruzindanda's "relative young age and the goal of rehabilitation in his case" (he was 32 in 1994!). In a sense, having been tried together with Kayishema may have helped Ruzindana's case by making his actions look "less horrific" in comparison with those of Kayishema.

of the events in the former Yugoslavia. Jelisic was acquitted of the charge of genocide on the grounds that the Prosecutor had failed to prove Jelisic's genocidal intent beyond any reasonable doubt. Goran Jelisic had pleaded guilty to all counts, except genocide.[41] The Trial Chamber found that Jelisic was "not only perfectly aware of the discriminatory nature of the operation [against the civilian population in Brcko], but that he adhered to it fully".[42] Before considering whether Jelisic's intention actually surpassed a discriminatory intent and amounted to a genocidal one, the Chamber specified that "genocidal intent can take two forms": on the one hand, the intent to exterminate a very large number of members of the group, and, on the other, the intent to pursue a more selective destruction targeting only certain members of the group "because of the impact their disappearance would have on the survival of the group as such".[43]

The Chamber's conclusion that the existence of a plan to destroy the Muslim group in Brcko had not been proven by the Prosecutor beyond any reasonable doubt complicated the proof of Jelisic's intent a great deal. Although in principle an individual may be found guilty of genocide even if no genocidal plan existed, this is an extremely unlikely scenario. As stated by the Chamber, "it will be very difficult in practice to prove genocidal intent of an individual if his actions do not have a massive character and if the alleged criminal conduct was not supported by an organisation or system".[44] Numerous testimonies relayed accounts of Jelisic's brutalities when, in May 1992, he commanded the camp of Luka.[45] However, the Chamber did not find that these testimonies unequivocally pointed to his genocidal intent. The picture emerging from the testimonies revealed—in the view of the three Trial judges—"an essentially disturbed personality". In addition, Jelisic chose his victims on the basis of a "casual selection", and, on a couple of occasions, rather inexplicably, Jelisic even conceded a laissez-passer to detainees, including, once, a prominent Muslim leader. The Chamber thus concluded that "Jelisic's actions did not reveal a firm will to pursue the partial or total destruction of a group as such".[46]

41. The other charged offences were violations of the laws and customs of war (Art. 3, Statute of the ICTY) and crimes against humanity (Art. 5, Statute of the ICTY). Throughout May 1992 Goran Jelisic acted as commander of Luka camp, where Serb forces confined large numbers of Croats and Muslims who had been for the most part expelled from their homes in the town of Brcko.

42. *Jesilic*, *supra* n.4, at para.75 (original text of the judgment is in French).

43. *Ibid.*, at para.82.

44. *Ibid.*, at para.101 (and 99–100).

45. In particular, he referred to himself as "Serb Adolf", and reportedly said that he could not drink his coffee in the morning unless he had executed between 20 and 30 detainees. He informed detainees in Luka that the vast majority of them (70% according to one testimony, 90% according to another) would be killed. (*Ibid.*, paras.102–108).

46. *Ibid.*, para.107.

This distinction between different types of "hostile" intents against a group is of great importance. The intent to discriminate against, or even to persecute a group cannot be considered identical to the intentional pursuit of its physical annihilation. In addition, a method for the judicial application of the *dolus specialis* in genocide has been crystallised by the *ad hoc* Tribunals. First, contextual elements are assessed. In particular, the existence of a genocidal plan and the commission of a genocide in a given situation are considered. Secondly, the Tribunals examine the genocidal intent of the individual, which is distinct but yet connected to the "collective" genocidal intent underlying the plan.

IV. DETERMINING THE MEMBERSHIP OF "NATIONAL, ETHNICAL, RACIAL OR RELIGIOUS GROUPS"

The identity of the victims is a fundamental element of the crime of genocide. As mentioned earlier, the systematic extermination of even tens of thousands on political grounds does not amount to genocide under the Genocide Convention,[47] while the extermination of fewer can amount to genocide if the perpetrators' intent to destroy one of the four groups is proven. In essence, there are two ways of determining who is a member of a group. First, objective criteria can be applied. Second, membership of a group can be decided on the basis of subjective identification, either by the victims themselves or by the perpetrators of the crime. This distinction is far from having only theoretical importance. For example, in the case of the Holocaust, if objective criteria of membership and identity were applied, it would be concluded that a genocide was perpetrated only to the extent that the victims were "really" Jewish. In other words, persons who were killed because they were perceived to be Jewish by the Nazis—and were considered Jewish under the Nuremberg laws—would not be considered victims of a genocide, but, presumably, of a crime against humanity and/or of a war crime.

One problem with objective criteria is that rules on the membership of groups are nearly always disputed. For example, the question of who is a Jew is notoriously controversial. The *halachic* rules on matrilineal descent and on conversions have been contested at least since the 18th century by various streams of Conservative, Reformed or Progressive Judaism. The *halacha* itself accommodates diverse positions. In the view of at least one author, Maimonides, a person killed because of his or her imputed Jewish identity should be entitled to a Jewish burial, and thus become a member of the group, although posthumously, on the basis of the identification by his/her murderer. Ethnicity in Rwanda presents at least a similar degree

47. The argument has been made that the definition of genocide under customary international law is actually broader than the one based on the Genocide Convention. See *supra* n.16. It is an argument that has not been echoed in the jurisprudence of the *ad hoc* Tribunals.

of complexity, although western observers have often failed to perceive such complexity, or have made the too common mistake of forcing an European reading of identities in the Rwandan context.[48]

The groundbreaking case-law of the Rwanda and Yugoslav Tribunal on these questions shows a progressive shift from the objective position to one which is predominantly based on subjective criteria of membership, i.e. identification by others or self-identification. Initially, the Rwanda Tribunal was reluctant to adhere to the subjective positions, not least because of the existence of precedents[49] in which both the Permanent Court of International Justice and the International Court of Justice had opted for objective criteria. In addition, reluctance to determine membership of a group on the basis of subjective criteria can also derive from criminal law. In fact, mistakes of fact can often be determinative of the qualification of the crime. For example, in most legal systems, Oedipus' killing of his father, Laios, would be qualified as murder, and not as parricide, since Oedipus did not know that the "old man in the chariot", which had pushed him out of the paved way at a cross-roads, was actually his father.[50] In the context of the Rwandan genocide, the rape and killing of a woman believed to be a Tutsi on the basis of her physical appearance—while she was in "reality" of mixed origin with a Hutu father and a Tutsi mother[51]—would be considered a crime against humanity and not a genocidal act, if this approach is taken.

The *Minorities in Upper Silesia* case illustrates the approach based on objective criteria. Germany sought a declaration from the Permanent Court establishing "the unfettered liberty of an individual to declare according to his own conscience and on his own personal responsibility that he himself does or does not belong to a racial, linguistic or religious

48. The colonial period was a time when Hutu, Tutsi and Twa identities went through a radical process of transformation, visions of Tutsi superiority were instilled and perceptions were racialised (G. Prunier, *The Rwanda Crisis: History of a Genocide 1959–1994* 23–41 (1995)).

49. *Rights of Minorities in Upper Silesia (Germany* v. *Poland)*, P.C.I.J. Rep. Series A, No. 12; *Nottebohm (Liechtenstein* v. *Guatemala)* (Merits) [1955] I.C.J. Rep. 4.

50. Sophocles, *Oedipus Rex* at lines 800–809. Oedipus may have acted in self-defence because Laios apparently attacked him after he had hit the driver of the chariot.

51. Patrilineal descent normally determines identity in Rwanda. But "transitions" from one group to the other were common in pre-colonial Rwanda, especially from the Hutu group to the Tutsi one through the contract of *ubuhake*. Under this contract "a Tutsi patron gave a cow to his Hutu client. Since the Hutu were in theory not allowed to have cattle (...), it was not only an 'economic' gift, but also a form of upward social mobility. For the cow could reproduce, and the future calves would be shared (...). This could be the beginning of an upward social climb where, once endowed with cattle, the Hutu lineage would become 'tutsified'" (Prunier, *supra* n.48 at 13–14). See also Verdirame, "Ethnicity, Conflict and Constitutional Change in Rwanda and Burundi", in Gardner and others (Eds), *Creation and Amendment of Constitutional Norms* (forthcoming in 2000).

There were also cases of Tutsis who became Hutus. Two notable examples are Froudald Karamira and Robert Kajuga, who became leading Hutu extremists, the latter heading the *interahamwe*.

minority".[52] Under the terms of the German–Polish Convention on Upper Silesia, the protection of minorities in the region had to be secured *inter alia* through the establishment of schools providing instruction in the language of the group. In 1926, the Polish Government decided to investigate the authenticity of the applications for admissions to these schools and declared the admission of over 7,000 children to these schools to be null and void.[53] Before the Court, Germany argued, in part relying on a provision of its treaty with Poland, that "the question whether a person does or does not belong to such a minority (...) must be left to the subjective expression of the intention of the persons concerned", while according to Poland this was "a question of fact and not one of intention".[54]

The Court thus held that membership of one of the protected minorities was primarily a question of fact. To a large extent this case hinged on the interpretation of the terms of the German-Polish Convention and should not be regarded as conclusive evidence of the existence of a norm of general international law favouring objective criteria for establishing membership of groups. However, the fact that one provision in the German-Polish Convention supported the German thesis confirms the predilection for objective criteria in international law.[55] In regard to subjective criteria, the Permanent Court stated that subjective elements could still be taken into account, particularly since "what is to be understood as a person's tongue is not always clear and beyond doubt".[56] Judge Nyholm, dissenting, appeared aware of the intrinsic difficulties in adopting deceptively objective criteria for what are ultimately social constructs dependent on changing individual and societal perceptions. He warned that there was "very little object in giving a rigid and objective definition of the idea of 'minority' since the linguistic, religious and ethnical divisions cannot be disentangled". Judge Nyholm also observed that "a definition of minorities *solely based on the subjective principle* must, for example, allow of an individual counting himself as one of a minority from a religious point of view; on the other hand, it should not be

52. *Minorities in Upper Silesia*, *supra* n.49 at 5.

53. *Ibid.*, at 10.

54. *Ibid.*, at 32.

55. Indeed, Art. 74 stated that "the question whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities". The Court interpreted this provision, almost against its literal meaning, as aimed solely at "the avoidance of the disadvantages ... which would arise from a verification or dispute", and not as requiring "the substitution of a new principle for that which *in the nature of things* and according to the provisions of the Minorities Treaty determines membership" (*Ibid.*, at 34) [emphasis added]. According to the Court, such provisions as those formulating the declaration of the person as "Which is the language of the pupil or child?" ("Quelle est la langue d'un élève ou enfant?") revealed that the Convention viewed membership of the minority as a question of fact.

56. *Ibid.*, at 40–41.

impossible for the same individual to consider himself as belonging to the minority as regards schools but to the majority in other spheres ...".[57]

The ICJ considered similar issues in the *Nottebohm* case. Although this dealt with the question of nationality rather than ethnic, religious or racial identities, its conclusions may be valid for determining individual membership of other groups too. In *Nottebohm*, the ICJ stated that

> nationality is a legal bond having as its basis a *social fact* of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State [emphasis added].[58]

National identity is thus considered a "social fact", of which the law is a mere expression. The ICJ disregarded two elements that would appear to be of greatest significance as far as national identity is concerned: the self-perception of the individual, and the view of the concerned State. The reason for disregarding these elements was essentially the belief that there is something more "objective" than them: the existence of an authentic and objectively verifiable link between the person and the country of his or her nationality.

It is therefore not surprising that in *Akayesu* the Trial Chamber of the ICTR referred to *Nottebohm* when grappling for the first time with the definition of national group.[59] In the end, the Chamber settled for that

57. Judge Nyholm's dissenting opinion took careful account of the socio-cultural context. In particular, he observed that in Upper Silesia "the working class ordinarily and in domestic life exclusively speaks" neither German nor Polish but a dialect, which is often "the sole means of expression, to the exclusion of German and Polish, for children up to the time when the latter begin their school studies". Judge Nyholm added that "a request for the entry of a child for a minority school cannot be, generally speaking, considered as having as its aim the denationalisation of a child in reality of Polish nationality. The aim may be different, for example, that the parent, realising that the child will automatically learn Polish, wishes for practical reasons to have him instructed in the German language ..." (*Ibid.*, at 63–64 [diss. op. of Judge M. Nyholm]).

58. *Nottebohm*, *supra* n.49.

59. The question of belonging has arisen also in the context of cases on minority rights. For example, in a communication to the Human Rights Committee, Sandra Lovelace, born and registered as a Maliseet Indian, complained that the Canadian legislation that deprived her of her status as a Maliseet Indian for "marrying out" violated her rights under the International Covenant on Civil and Political Rights, in particular Arts. 2 and 26 (non-discrimination) and Art. 27 (rights of individuals belonging to minorities). The Committee found that a violation of Art. 27 had occurred, and did not deem it necessary to examine the issues that had been raised under other provisions in the Covenant. The reasoning of the Committee combined subjective and objective criteria. The Committee noted that "persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant" (Communication No. 24/1977, *Sandra Lovelace* v. *Canada*, at paras. 14 and 17).

definition "as a collection of people who are perceived to share legal bonds based on a common citizenship, coupled with reciprocity of rights and duties".[60] On the ethnic group the Chamber pointed out that the essential aspect was that its "members share a common language or culture".[61] *Akayesu* also confirmed the objective approach to membership for the two remaining protected groups. A racial group was thus found to be "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors",[62] while a religious group was defined as one "whose members share the same religion, denomination or mode of worship".[63] In no case was any reference made to subjective identification either in the form of self-identification or identification by others.

However, it was clear to the Trial Chamber in *Akayesu* that Tutsis did not closely match any of the four definitions. Indeed, although commonly described as an ethnic group, Tutsis do not share a different language or, arguably, a different culture: Kinyarwanda, a tonal Bantu language, is spoken by both Hutus and Tutsis, and there is no difference in the customary practices of the two groups. In order to classify the massacres of 1994 and Akayesu's actions as genocidal, the Chamber thus resorted to an improbable interpretation of the Genocide Convention. It argued that "it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux preparatoires* was patently to ensure the protection of any stable and permanent group".[64] Constrained by its own restrictive definitions of the four protected groups, the Chamber had no other alternative but to force an interpretation of the Convention that seems remote from the text of Art. II and from the intention of the drafters. In addition, the ideas of permanence and stability may still be ill-suited to the Rwandan context, also characterised by *some* social mobility.[65]

Although the *Akayesu* approach has not been openly disowned in subsequent cases, a "quiet" shift towards the subjective approach has taken place. The Tribunals are, in other words, beginning to acknowledge that collective identities, and in particular ethnicity, are by their very nature social constructs, "imagined" identities[66] entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts.

60. *Akayesu*, *supra* n.6, at para.511.
61. *Ibid.*, at para.513.
62. *Ibid.*, at para.514.
63. *Ibid.*, at para.515.
64. *Ibid.*, at para.516.
65. See *supra* n.51.
66. B. Anderson, *Imagined Communities* (1983).

In *Kayishema and Ruzindana* the ICTR opened up the definition of at least one of the four protected groups—the ethnic one—to a subjective construction, signalling a departure from the line of international law precedents that goes back to the *Minorities in Upper Silesia* case. An ethnic group was thus defined not only as "one whose members share a common language or culture", but also as "a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)".[67] However, in this case the Trial Chamber did not yet derive the necessary consequences from this statement. Kayishema and Ruzindanda were convicted of genocide, but acquitted of crimes against humanity because the latter were, in the view of the Chamber, subsumed under the counts of genocide.[68] Since it had been established that not all the victims of Kayishema and Ruzindanda were Tutsis and that Hutus were also killed,[69] the acquittal of Dr Clement Kayishema and Mr Obed Ruzindanda of crimes against humanity leaves two options: either, the killing of Hutus was implicitly considered to amount to genocide; or, the crimes committed against Hutus were left unpunished.[70] In *Akayesu,* the approach had been different: Akayesu had been convicted of genocide and of crimes against humanity, depending *inter alia* on the ethnicity of the victims, since, as has been seen, the genocidal plan in Rwanda was normally considered to have targeted only Tutsis as a group.[71]

In its only judgment on genocide so far, the ICTY, endorsing a departure from the objective approach in the case of all protected groups but the religious one, held that:

> Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using

67. *Kayishema and Ruzindana*, *supra* n.7, para.98. See also para.291: "There is ample evidence to find that the overwhelming majority of the victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were 'members of a group', in this case an ethnic group".

68. *Kayishema and Ruzindanda, supra* n.7, at para.578: "Considering the above and based on the facts the Trial Chamber finds that it will be improper to convict the accused persons for genocide as well as for crimes against humanity based on murder and extermination because the later two offences are subsumed fully by the counts of genocide as discussed in the Part of the Judgment entitled Cumulative Charges". This decision on cumulative charges runs contrary to precedents both of the ICTR (*Akayesu*) and of the ICTY (*Tadic* and *Delalic* cases, referred to in the dissenting opinion of Judge Khan in *Kayishema and Ruzindanda*, at paras13 and 15).

69. For example at para.347 in regard to those killed at the Complex (*supra* n.37): "... the Trial Chamber finds that they were unarmed and predominantly Tutsi".

70. Mr Ruzindanda has been sentenced to 25 years of imprisonment. If the second reading of the decision of the Chamber is correct, he could be subjected to another trial for murder of Hutus without violating the double jeopardy principle.

71. This was the case in *Akayesu*, and in *Prosecutor* v. *Kambanda*, ICTR 97-23-S, *in part reported at* (1998) 37 I.L.M. 1413.

> objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single out that group from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.[72]

The ICTR reinforced its timid *dictum* in *Kayishema and Ruzindanda* in *Rutaganda* stating 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. Each of these concepts must be assessed in the light of a particular, political, social and cultural context... for the purposes of applying the Genocide convention, membership of a group is, in essence, a subjective rather than an objective concept.[73]

From an initial rigid and objective approach to collective identities, the two *ad hoc* Tribunals have thus progressively moved towards a subjective position, quietly setting aside some important precedents. It is a welcome shift that takes into account the mutable and contingent nature of social perceptions, and does not reinforce perilous claims to authenticity in the field of ethnic and racial identities. The perception of the perpetrator of the crime is after all more important for establishing individual criminal responsibility than the putative "authentic" ethnicity of the victim.

V. ETHNIC CLEANSING AND SEXUAL VIOLENCE AS ACTS OF GENOCIDE

The Convention definition enumerates five categories of genocidal acts. "Cultural genocide" does not expressly feature under this definition, as each of the five acts involves some type of physical destruction.[74] It is only if one of the four protected groups is denied its right to exist in the future

72. *Jelisic, supra* n.4, at para.70.

73. *Prosecutor* v. *Rutaganda, supra* n.10, at para.55. In *Prosecutor* v. *Musema, supra* n.10, Trial Chamber I of the ICTR reiterated that "membership of a group is, in essence, a subjective rather than an objective concept", but added that "a subjective definition alone is not sufficient to determine victim groups" and that the *travaux preparatoires* of the Convention suggest that "certain groups, such as political and economic groups, have been excluded from the protected groups because they are considered to be 'non stable' or 'mobile' groups which one joins through individual, voluntary commitment" (paras.161–162). The Chamber thus recommended the adoption of a case-by-case approach.

74. There was some support for the inclusion of "cultural genocide" before the adoption of the Convention (see Shaw, "Genocide and International Law", in Y. Dinstein, *International Law at a Time of Perplexity* (1989) at 809).

by means of the forcible transfer of children to another group[75] that some protection is accorded to the cultural identity of the group and to its right to continued cultural existence, under the system of the Genocide Convention.

The hitherto most interesting aspect of the jurisprudence of the *ad hoc* Tribunals on genocidal acts is the recognition that ethnic cleansing and sexual violence can amount to genocide. The Security Council had already emphasised that investigating ethnic cleansing ought to be an important part of the Tribunal's work in its resolution establishing the Tribunal.[76] The Trial Chamber specified that in the Yugoslav context "the policy of ethnic cleansing took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character".[77] The same Trial Chamber also noted, in the cases of Radovan Karadzic and Ratko Mladic, that "the uniform methods used in committing the said crimes, their pattern, their pervasiveness throughout all of Bosnian Serb-held territory, the movement of prisoners between various camps, and the tenor of some of the accused's statements are strong indications" of the possible genocidal nature of these crimes.[78]

The above statements on ethnic cleansing feature only in decisions of the ICTY taken under Rule 61 proceedings.[79] As has been seen, in the only genocide case so far decided by the ICTY, the accused has been acquitted of genocide on grounds of lack of sufficient intent and the Chamber did not need to consider the qualification of the imputed acts as genocidal. In future judgments, it will be interesting to see how the Tribunal will pronounce on the relationship between ethnic cleansing and genocide.

A landmark aspect of the *Akayesu* decision is the recognition that sexual violence and rape can amount to genocide in some circumstances. The Chamber emphasised that rape and sexual violence "constitute genocide in the same way as any other act as long as they were committed with the specific intent" that characterises the crime of genocide.[80] The genocide definition already encompasses the infliction of serious bodily or mental harm on the victims and the Chamber applied this to the reality of systematic sexual violence, which "resulted in the physical and

75. Art. II, (e), Genocide Convention.

76. SC Res. 827 (1993).

77. *Prosecutor* v. *Nikolic* (Rule 61), Case IT-94-2-R61.

78. *Prosecutor* v. *Karadjic* (Rule 61), Case IT-95-5-R61; *Prosecutor* v. *Mladic* (Rule 61), Case IT 95-18-R61.

79. When an arrest warrant is not executed within a "reasonable time", the judge who confirmed the original indictment invites the Prosecutor to report on any progress made, or lack thereof. Then, if the confirming judge finds that all necessary steps have been taken, s/he will order the Prosecutor to submit the case to a Trial Chamber where a rule 61 hearing will take place. This hearing is not a trial, and does not result in a verdict.

80. *Prosecutor* v. *Akayesu, supra* n.6, at para.731.

psychological destruction of Tutsi women, their families and their communities".[81] The ICTR observed that "the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to the other group being excluded".[82] This element, together with the factual finding that a genocide was perpetrated in Rwanda as well as around Taba commune where Akayesu was *bourgmestre*, proved, in the view of the Chamber, that these rapes were characterised by the specific intent to destroy, in whole or in part, the Tutsi group. While rape and sexual violence expressly featured in the Statute of the ICTR as a crime against humanity (Art. 3, g) or a violation of Common Art. 3 and Protocol II of the Geneva Convention (Art. 4, e, "rape, enforced prostitution and other forms of indecent assault"), in *Akayesu*, the ICTR established that certain rapes are genocidal in their nature, the determining factor being the presence of the *dolus specialis* that characterises the crime of genocide.

It is noteworthy that rape had not been included in the original indictment against Akayesu. In June 1997, largely because of the interest of Judge Pillay, the only woman serving as a judge in the Trial Chambers of the ICTR, the indictment was amended to include three counts of sexual violence. The testimony of witness J, whose six year old daughter had been raped, had paved the way to the amendment of the indictment, and to a series of shocking factual findings on the sexual violence perpetrated in the municipal offices of Taba.[83] The criminal responsibility of Akayesu was not excluded, in the view of the Court, by the fact that he had not been the material author of the rapes. Indeed, first, as mayor of Taba, Akayesu could have prevented the rapes that were systematically perpetrated in the *bureau communal*. Secondly, Akayesu actively abetted, aided, ordered and encouraged their commission.[84]

81. *Ibid.*, at 731

82. *Ibid.*, at 730. See also para.731: "The Chamber is satisfied that the acts of rape and sexual violence described above were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."

83. *Ibid.*, at paras401–448.

84. The ICTR has amended the indictment of the Rwandan Minister for Women and Family Affairs at the time of the genocide, Pauline Nyiaramasuhuko, to include six additional charges, "one of which accuses her of being responsible for rape 'as part of a widespread and systematic attack against a civilian population on political, ethnic and racial grounds' in Butare, central Rwanda" (Press Release of the ICTR, ICTR/INFO 9-2-196, 11 Aug. 1999). Pauline Nyiaramasuhuko was not the material author of the sexual violence, but, according to the accusations, she planned and ordered the systematic sexual violence of Tutsi women, together with her son, Chalome Ntahobali, himself in the custody of the Tribunal.

In *Akayesu*, the Trial Chamber took a sensible approach to the definition of rape. Drawing a parallel with the torture definition, the Chamber opined that

> The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[85]

These legal findings will probably remain as a lasting contribution of the *Akayesu* judgment to the development of international law on sexual violence. The Chamber wisely considered that the brutality of the rapist, not unlike that of the torturer, can find an almost infinite variety of physical acts through which to manifest itself. It thus refused to engage in futile lengthy discussions on the particular physical acts—such as the hackneyed question of whether penetration is an essential requirement of rape or not—and opted for a definition of rape along the lines of the torture definition.

In *Rutaganda*, the Trial Chamber has attempted to systematise some of the findings on genocidal acts contained in the previous case-law of the ICTR. While reiterating that the term "killing" under Art. II, a includes both intentional and unintentional killing, the Chamber stated that "the words 'serious bodily or mental harm' [Art. II, b] include acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution". As for the deliberate infliction on the group of conditions of life calculated to bring about its destruction in whole or in part (Art. II, c), the Chamber opined that they "are to be construed 'as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group', but which are, ultimately, aimed at their physical destruction"; as examples of this practice, the subjection of a group to a subsistence diet, the systematic

85. *Prosecutor* v. *Akayesu*, *supra* n.6, at paras687–688.

expulsion from their homes and the deprivation of essential medical supplies below a minimum vital standard were given. "Sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages" are, on the other hand, examples of measures "intended to prevent births within the group" (Art. II, d). Finally, Art. II, e of the Convention on the forcible transfer of children from one group to another is meant to sanction "not only any direct act of forcible physical transfer, but also any acts of threats or trauma which would lead to the forcible transfer of children from one group to another group".[86]

VI. CONCLUSION

The contribution of the *ad hoc* Tribunals to the development of genocide law is remarkable, and, in some respects, groundbreaking. The adoption of a subjective approach to the definition of the four protected groups, far from undermining the Convention, breathes new life into it and ensures a healthy interplay between the norms and the socio-cultural context in which they are applied. *Akayesu* aside, the Tribunals have resisted the tendency to resolve such a complex and crucial issue by obstinately referring to nothing but the intention of the drafters. The more innovative approach that has been chosen was demanded by the very subject matter, and is consistent with the rules on the interpretation of treaties.[87] As far as the other aspects of the genocide definition (intent, genocidal acts) is concerned, important clarifications have been made on the quantum and on the proof of intent, while the five genocidal acts enumerated at Art. 2 have been fleshed out, most notably through the recognition of the genocidal nature of sexual violence in some circumstances. On other indirectly related issues, which have been only touched upon in this article, most importantly the question of cumulative charges, conflicting indications have sometimes emerged, although it would appear that the *Kayishema and Ruzindana* ruling on this point seems destined to remain isolated in the jurisprudence both of the ICTR and of the ICTY.

86. *Prosecutor* v. *Rutaganda*, *supra* n.10, at paras49–53.

87. Art. 31, 3, Vienna Convention on the Law of Treaties 1969, on the basis of which subsequent practice and subsequent agreements between the parties have to be taken into account. In addition, most of the State parties to the Genocide Convention did not participate in the drafting process (see *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ Rep. Series A, No. 23, in which the Permanent Court of International Justice did not consider the *travaux preparatoires* for interpreting a treaty to which some of the State parties had only acceded). Finally, the Tribunals are technically applying a provision in a resolution of the Security Council and not the Convention directly.