

The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts^{*}

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4.1 INTRODUCTION

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

The scholarly debate on this issue is divided. Whereas some scholars reject that genocide implies a collective act and focus on the intent of individual accused,⁵ others argue that genocide is best characterised as a type of system criminality – i.e. widespread

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- 1 Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), Article 2. The legal definition of genocide differs from the meaning of genocide in everyday speech and social science. D. Luban, 'Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report', 7 *Chicago Journal of International Law* (2006-2007) 303, 308; L. van den Herik, 'The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect' in R. Henham and P. Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Aldershot: Ashgate Publishing, 2007) 75, 75-76.
 - 2 Statute for the International Criminal Tribunal for Rwanda, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc. S/RES/955 (8 November 1994) (ICTR Statute), Article 2(2); Statute for the International Criminal Tribunal for the former Yugoslavia, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc. S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc. S/RES/1877 (7 July 2009) (ICTY Statute), Article 4(2); Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (ICC Statute), Article 6.
 - 3 E.g. *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-T, Trial Chamber I, 2 August 2001 (*Krstić* Trial Chamber judgment), para. 541; *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, Trial Chamber II, 21 May 1999 (*Kayishema and Ruzindana* Trial Chamber judgment), para. 88; *Prosecutor v. Jelišić*, Judgment, Case No. IT-95-10-T, Trial Chamber I, 14 December 1999 (*Jelišić* Trial Chamber judgment), para. 60.
 - 4 The question concerning genocide's contextual embedding is connected to the scholarly debate on the requisite level of intent. See W.A. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012) 146; W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2009) 242-243. While acknowledging this connection, this chapter focuses on genocide's contextual embedding.
 - 5 E.g. P. Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence', 3 *Journal of International Criminal Justice* (2005) 989, 996; G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford University Press, 2005) 211; K. Heller, 'International Decisions: *Prosecutor v. Karemera, Ngirumpaste and Nzirorera*', 101 *American Journal of International Law* (2007) 157, 159. Similarly see, O. Triffterer, 'Genocide, its Particular Intent to Destroy in Whole or in Part the Group as such', 14 *Leiden Journal of International Law* (2001) 399, 399-408, 402; R. Arnold, 'The *Mens Rea* of Genocide under the Statute of the International Criminal Court', 14 *Criminal Law Forum* (2003) 127, 150.

and organised (state) criminality – and accordingly attach value to the existence of an objective context of violence.⁶ A similar disagreement exists in the case law of the *ad hoc* Tribunals and the ICC. On the one hand, the Tribunals find that the existence of a collective act is not a necessary requirement of genocide.⁷ It is only a factor that is evidential of the accused's genocidal intent. On the other hand, the ICC's Elements of Crimes explicitly require that the accused operated 'in the context of a manifest pattern of similar conduct'.⁸ Before the ICC, the context of collective violence thus constitutes a distinct legal element, which potentially creates 'a separate "Rome regime" of crimes'.⁹

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

The chapter is structured as follows. Section 2 starts with an analysis of the scholarly debate on the contextual embedding of genocide. It distinguishes two schools of thought that are referred to as the goal-oriented model and the structure-based model. Sections 3 and 4 proceed to describe the case law of the *ad hoc* Tribunals and the ICC, respectively. I evaluate to what extent the theoretical distinction between the goal-oriented and the

6 E.g. W.A. Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', 18 *Leiden Journal of International Law* (2005) 871, 877; A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', 99 *Columbia Law Review* (1999) 2259, 2288; S. Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct', 42 *Creighton Law Review* (2009) 347, 352-355; C. Kress, 'The Darfur Report and Genocidal Intent', 3 *Journal of International Criminal Justice* (2005) 562, 572; T. Simon, 'Defining Genocide', 15 *Wisconsin International Law Journal* (1996) 243, 248; H. Vest, 'A Structure-Based Concept of Genocidal Intent', 5 *Journal of International Criminal Justice* (2007) 781, 784.

7 *Prosecutor v. Jelišić*, Judgment, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001 (*Jelišić* Appeals Chamber judgment), para. 48; *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004 (*Krstić* Appeals Chamber judgment), paras. 223-224; *Jelišić* Trial Chamber judgment, para. 100; *Kayishema and Ruzindana* Trial Chamber judgment, para. 94.

8 Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, 1st sess (ICC-ASP/1/3 and Corr.1) (3-10 September 2002) (Elements of Crimes), Articles 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7).

9 R. Cryer, 'The Definitions of International Crimes in the *Al-Bashir* Arrest Warrant Decision', 7 *Journal of International Criminal Justice* (2009) 283, 295-296.

structured-based model influences the courts' interpretation and application of genocide. Emphasis is thereby placed on the factual circumstances on the basis of which the courts assess and establish genocide in individual cases. Since the International Criminal Tribunal for Rwanda (ICTR) has the most experience with genocide cases, its case law forms the primary basis of analysis. The case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) is used to complement this analysis, as it has more extensively dealt with the challenges of establishing genocide outside a clear genocidal context. The ICC case law on genocide is still very limited. The *Al-Bashir* Pre-Trial Chamber has rendered a handful of decisions relating to the possible commission of genocide in Darfur, but a final judgment in this case is still to be delivered. The following analysis of ICC case law is therefore only preliminary. Section 5 interprets and values the results of the case law analyses in light of the open texture of genocide and the casuistic method of legal reasoning. In this way, I demonstrate that the contextual embedding of genocide in practice is characterised by a bounded flexibility. Section 6 concludes with some observations on the implications of this finding for scholars' future study and courts' future use of the genocide concept.

4.2 GOAL-ORIENTED VERSUS STRUCTURE-BASED MODEL

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

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

10 R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010) 204. See also Schabas 2012 (n. 4 above) 104.

11 E.g. L. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff Publishers, 2005) 108; Triffterer (n. 5 above) 402; Akhavan (n. 5 above) 996; Mettraux (n. 5 above) 211; Heller (n. 5 above) 159.

12 E.g. Arnold (n. 5 above) 133-134; Akhavan (n. 5 above) 997.

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

According to this assertion, genocide is above all determined by the goals of the individual perpetrator(s), rather than by the scale of the crimes committed. Genocide thus becomes a primarily *goal-oriented* crime. This allegedly ensures the (more) effective prevention of genocide. After all, criminal responsibility for genocide can be established in relation to conduct that took place before the occurrence of an actual massacre.¹⁴

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

The structure-based model has been implemented in two ways. The first way takes as its starting-point that intent is only legally relevant insofar as it is realistic and amounts to more than a vain hope. Kirsch in this respect finds that ‘a single individual cannot realistically believe that his or her individual genocidal conduct and desire will actually cause the total destruction of a protected group’.¹⁸ Therefore, ‘the individual’s desire to commit genocide must be related to the results of a collective activity to which he or she

13 Triffterer (n. 5 above) 402-403.

14 E.g. Arnold (n. 5 above) 133; Triffterer (n. 5 above) 401. On the distinction between the prevention and the criminal punishment of genocide, see Van den Herik (n. 1 above) 93-94.

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

16 E.g. Kress (n. 6 above) 572; Kirsch (n. 6 above) 354. Although, scholars generally agree that this campaign must be genocidal in character, the threshold they adopt in this respect differs. For example, whereas Vest requires a *practical certainty* that the implementation of a plan leads to the (partial) destruction of a protected group, for Kress it suffices that the campaign is of a nature *capable* to bring about the planned destruction. Vest (n. 6 above) 792-793; C. Kress, ‘The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al-Bashir* Case’, 7 *Journal of International Criminal Justice* (2009) 297, 306. In relation to the ICC, Cryer argues that the requisite policy may also be non-genocidal. Cryer (n. 9 above) 291-292.

17 Schabas (n. 6 above) 877. See also Greenawalt (n. 6 above) 2288; Kirsch (n. 6 above) 352-355; Kress (n. 6 above) 572; Simon (n. 6 above) 248; Vest (n. 6 above) 784.

18 Kirsch (n. 6 above) 354. See also Kress (n. 16 above) 304-305; Vest (n. 6 above) 789-790.

contributes'.¹⁹ The second view presents the collective act as an autonomous element of genocide. Schabas in this regard asserts that evidence of a plan or policy has been essential for all genocide convictions.²⁰ He therefore argues that the finding of such a plan or policy 'lies at the very heart of the debate' on genocide.²¹

The structure-based model adds a significant difficulty to genocide prosecutions: the construction of a link between the accused's misconduct and the collective genocidal campaign. It must be ascertained that the accused's actions did not only occur *against the background* of a collective campaign of violence, but genuinely *formed part* of it.²² This link is mostly construed in terms of the accused's *mens rea*. In particular, it is found that the accused must have *known* of the collective act and the destructive results thereof.²³ The assessment of this standard varies depending on the accused's position. Whereas knowledge on the part of political and military leaders can be established relatively easily (after all, they are responsible for the design of the collective act), it cannot be presumed in relation to low-ranking perpetrators.²⁴

4.3 THE *AD HOC* TRIBUNALS AND THE CONTEXTUAL EMBEDDING OF GENOCIDE

4.3.1 *General Interpretation*

The *ad hoc* Tribunals have addressed questions concerning the contextual embedding of genocide in relation to their findings on the accused's genocidal intent. The Tribunals emphasise that genocidal intent is a form of 'special' intent.²⁵ According to the *Akayesu*

19 Kirsch (n. 6 above) 354. See also Kress (n. 16 above) 304-305.

20 Schabas (n. 4 above) 131.

21 Schabas (n. 6 above) 877.

22 Kirsch (n. 6 above) 355.

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

24 Similarly, N. Jørgenson, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice', 1 *International Criminal Law Review* (2002) 285, 299; Van den Herik (n. 11 above) 122. See also *Report of the International Law Commission on the work of its forty-eighth session*, UN Doc A/51/10 (6 May-26 July 1996) 45, para. 10.

25 E.g. *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998 (*Akayesu* Trial Chamber judgment), para. 498; *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999 (*Rutaganda* Trial Chamber judgment), para. 58; *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13-A, Trial Chamber I, 27 January 2000 (*Musema* Trial Chamber judgment), para. 164; *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66-T, Trial Chamber I, 13 December 2006 (*Seromba* Trial Chamber judgment), para. 319; *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, Appeals Chamber, 7 July 2006 (*Gacumbitsi* Appeals Chamber judgment), para. 39; *Kayishema and Ruzindana* Trial Chamber judgment, para. 91.

Trial Chamber, this means that ‘the perpetration of the act charged (...) extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an *ulterior motive*, which is to destroy, in whole or in part, the group of which the individual is just one element’.²⁶

By reasoning in this way, the Chamber sets a high threshold: the tribunals need to establish that the perpetrator aimed for the (partial) destruction of a protected group.²⁷ Legal practice illustrates that this threshold is difficult to meet, since it is hard to find direct evidence showing that the accused pursued a destructive purpose. The Tribunals therefore accept that genocidal intent can be inferred from the acts, utterances and position of the accused and from the pattern of purposeful action.²⁸ The latter category includes circumstances such as the general policy underlying the acts; the methodical way of planning; the systematic manner of killing; the number of victims; the scale of atrocities; and the use of derogatory language towards members of the targeted group.²⁹ This list of circumstances clarifies that the accused’s intent can be deduced from the organised context of collective violence in which he participated. The *Jelisić* Appeals Chamber has explicitly confirmed the relevance of such an organised setting by emphasising that ‘in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime’.³⁰ It is not required that this plan or policy consists (exclusively) of destructive acts or that it has a destructive effect. However, ‘the extent of the actual destruction, if it does take place, will more often than not be a factor from which the inference may be drawn that the underlying acts were committed with [genocidal intent]’.³¹

26 *Akayesu* Trial Chamber judgment, para. 522 (emphasis added).

27 *Prosecutor v. Milošević*, Decision on motion for judgment of acquittal, Case No. IT-02-54-T, Trial Chamber I, 16 June 2004 (*Milošević* Rule 98bis decision), paras. 125-126; *Akayesu* Trial Chamber judgment, para. 497.

28 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, para. 93; *Rutaganda* Trial Chamber judgment, para. 61; *Musema* Trial Chamber judgment, para. 167. Factors that are relevant in relation to the accused’s position include the accused’s education, his experience as an officer, his general capabilities especially with respect to his duties and responsibilities stemming from his specific professional position. *Prosecutor v. Tolimir*, Judgment, Case No. IT-05-88/2-T, Trial Chamber II, 12 December 2012 (*Tolimir* Trial Chamber judgment), para. 1161.

29 E.g. *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-T, Trial Chamber I, 7 June 2001 (*Bagilishema* Trial Chamber judgment), para. 62; *Prosecutor v. Semanza*, Judgment, Case No. ICTR-97-20-T, Trial Chamber I, 15 May 2003 (*Semanza* Trial Chamber judgment), para. 313; *Prosecutor v. Kajelijeli*, Judgment, Case No. ICTR-98-44A-T, Trial Chamber II, 1 December 2003 (*Kajelijeli* Trial Chamber judgment), paras. 804, 806; *Prosecutor v. Blagojević and Jokić*, Judgment, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007 (*Blagojević and Jokić* Appeals Chamber judgment), para. 123.

30 *Jelisić* Appeals Chamber judgment, para. 48.

31 *Milošević* Rule 98bis decision, para. 125. See also *Prosecutor v. Brđanin*, Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004 (*Brđanin* Trial Chamber judgment), para. 697.

It follows from this account that the *ad hoc* Tribunals assume a close *evidential* connection between the accused's genocidal intent and the existence of a collective act. This does, however, not imply that the finding of a genocidal campaign³² or plan also forms a *legal* element of genocide.³³ According to the *Jelisić* Trial Chamber, the drafters of the Genocide Convention 'did not discount the possibility of a lone individual seeking to destroy a group as such'.³⁴ Thus, it is 'theoretically possible' that the crimes committed by a single perpetrator 'are sufficient to establish the material element of the crime of genocide and it is *a priori* possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organization in which other individuals participated'.³⁵ In this light, the Tribunals maintain that genocidal intent has to be established above all on the basis of the accused's own conduct.³⁶

4.3.2 *Genocidal Intent Applied*

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

In relation to the first category, the Tribunals *inter alia* refer to the political background;³⁷ the implication of (state) organisations in the commission of crimes;³⁸ the implementation of discriminatory measures;³⁹ the implementation of a military

32 *Krstić* Appeals Chamber judgment, paras. 223-224.

33 *Prosecutor v. Popović et al.*, Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010 (*Popović et al.* Trial Chamber judgment), paras. 829-830; *Jelisić* Appeals Chamber judgment, para. 48; *Kayishema and Ruzindana* Trial Chamber judgment, para. 94.

34 *Jelisić* Trial Chamber judgment, para. 100.

35 *Jelisić* Trial Chamber judgment, para. 100.

36 *Bagilishema* Trial Chamber judgment, para. 63.

37 E.g. *Prosecutor v. Stakić*, Judgment, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003 (*Stakić* Trial Chamber judgment), para. 548; *Akayesu* Trial Chamber judgment, paras. 78-109; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 277-282; *Brđanin* Trial Chamber judgment, paras. 978, 981.

38 E.g. *Akayesu* Trial Chamber judgment, paras. 109-110, 128; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 277-286; *Stakić* Trial Chamber judgment, paras. 548-549.

39 E.g. *Akayesu* Trial Chamber judgment, paras. 107, 123; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 287-288; *Musema* Trial Chamber judgment, para. 928.

program;⁴⁰ the use of derogatory language;⁴¹ the discriminatory, yet indiscriminate, and cruel character of the crimes;⁴² the planned, systemic and coordinated character of the crimes;⁴³ the geographically widespread commission of crimes;⁴⁴ and the number of victims.⁴⁵ The *Akayesu* Trial Chamber has, for example, established that the massacres in Rwanda were aimed at exterminating the Tutsi group ‘considering their undeniable scale, their systematic nature and their atrociousness’.⁴⁶ It has substantiated this finding with reference to the expert witness statement of Alison Desforges, who testified:

on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that – as they said on certain occasions – their children, later on, would not know what a Tutsi looked like, unless they referred to history books.⁴⁷

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

40 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, paras. 283-286; *Popović et al.* Trial Chamber judgment, para. 837.

41 E.g. *Akayesu* Trial Chamber judgment, paras. 118, 120; *Musema* Trial Chamber judgment, para. 932.

42 E.g. *Prosecutor v. Bizimungu et al.*, Judgment, Case No. ICTR-00-56-T, Trial Chamber II, 17 May 2011 (*Bizimungu et al.* Trial Chamber judgment), para. 2080; *Akayesu* Trial Chamber judgment, paras. 116, 121, 123-124, 128; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 290-291; *Rutaganda* Trial Chamber judgment, para. 399; *Musema* Trial Chamber judgment, para. 928; *Semanza* Trial Chamber judgment, para. 423.

43 E.g. *Akayesu* Trial Chamber judgment, paras. 118-119, 126; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 278-289; *Rutaganda* Trial Chamber judgment, para. 399; *Semanza* Trial Chamber judgment, para. 423; *Brđanin* Trial Chamber judgment, para. 98; *Bizimungu et al.* Trial Chamber judgment, para. 2080-2082.

44 E.g. *Prosecutor v. Bagosora et al.*, Judgment, Case No. ICTR-98-41-T, Trial Chamber I, 18 December 2008 (*Bagosora et al.* Trial Chamber judgment), para. 2156; *Akayesu* Trial Chamber judgment, para. 114; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 289-290; *Rutaganda* Trial Chamber judgment, para. 399; *Musema* Trial Chamber judgment, para. 928; *Brđanin* Trial Chamber judgment, para. 983.

45 E.g. *Akayesu* Trial Chamber judgment, paras. 111, 114-115; *Kayishema and Ruzindana* Trial Chamber judgment, para. 531; *Semanza* Trial Chamber judgment, para. 423.

46 *Akayesu* Trial Chamber judgment, para. 118.

47 *Akayesu* Trial Chamber judgment, para. 118.

48 E.g. *Prosecutor v. Simba*, Judgment, Case No. ICTR-01-76-T, Trial Chamber I, 13 December 2005 (*Simba* Trial Chamber judgment), para. 416; *Kayishema and Ruzindana* Trial Chamber judgment, para. 312; *Popović et al.* Trial Chamber judgment, para. 858; *Tolimir* Trial Chamber judgment, para. 770.

49 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, para. 307.

50 E.g. *Tolimir* Trial Chamber judgment, para. 773.

crimes;⁵¹ the widespread, planned and systematic character of the crimes;⁵² and the number of victims.⁵³ Even so, this category should be clearly distinguished from the previous category, since it does not concern the *overall* context of violence, but specifically relates to the *indicted* crimes. Note, for example, the following reasoning of the *Kayishema and Ruzindana* Trial Chamber of the ICTR:

[t]he number of Tutsis killed in the massacres, *for which Kayishema is responsible*, either individually or as a superior, provides evidence of Kayishema's intent. The Trial Chamber finds that enormous number[s] of Tutsis were killed in each of the four crime sites. (...) Not only were Tutsis killed in tremendous numbers, but they were also killed regardless of gender or age. Men and women, old and young, were killed without mercy. Children were massacred before their parents' eyes, women raped in front of their families. No Tutsi was spared, neither the weak nor the pregnant.⁵⁴

The third category of relevant factual circumstances relates to the accused's participation in the indicted crimes. It includes the acts of the accused, such as his ordering; instigation; encouragement; leading and directing of, or personal participation in, the planning

51 E.g. *Prosecutor v. Stakić*, Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006 (*Stakić* Appeals Chamber judgment), para. 35; *Kayishema and Ruzindana* Trial Chamber judgment, para. 532; *Rutaganda* Trial Chamber judgment, para. 398; *Musema* Trial Chamber judgment, paras. 929-930, 932-933; *Semanza* Trial Chamber judgment, para. 424; *Bagosora et al.* Trial Chamber judgment, paras. 2125, 2141, 2147, 2151; *Bizimungu et al.* Trial Chamber judgment, paras. 2078, 2080; *Stakić* Trial Chamber judgment, paras. 544-545; *Popović et al.* Trial Chamber judgment, paras. 856, 859-860, 1180, 1318; *Jelisić* Trial Chamber judgment, paras. 89-94, 106; *Krstić* Trial Chamber judgment, paras. 546-547, 594; *Tolimir* Trial Chamber judgment, para. 769.

52 E.g. *Prosecutor v. Krajišnik*, Judgment, Case No. IT-00-39-T, Trial Chamber I, 27 September 2006 (*Krajišnik* Trial Chamber judgment), para. 868; *Prosecutor v. Blagojević and Jokić*, Judgment, Case No. IT-02-60-T, Trial Chamber I, 27 January 2005 (*Blagojević and Jokić* Trial Chamber judgment), para. 674; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 309-311; *Rutaganda* Trial Chamber judgment, para. 398; *Semanza* Trial Chamber judgment, para. 424; *Simba* Trial Chamber judgment, para. 416; *Bagosora et al.* Trial Chamber judgment, paras. 2125, 2142; *Bizimungu et al.* Trial Chamber judgment, paras. 2081-2082; *Jelisić* Trial Chamber judgment, paras. 88-93; *Jelisić* Appeals Chamber judgment, para. 71; *Krstić* Trial Chamber judgment, para. 546; *Krstić* Appeals Chamber judgment, para. 35; *Stakić* Trial Chamber judgment, paras. 544-545; *Popović et al.* Trial Chamber judgment, paras. 837, 856, 858-861, 1180; *Tolimir* Trial Chamber judgment, paras. 770, 773.

53 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, para. 531; *Musema* Trial Chamber judgment, para. 929; *Simba* Trial Chamber judgment, para. 416; *Bagosora et al.* Trial Chamber judgment, paras. 2147, 2151; *Bizimungu et al.* Trial Chamber judgment, paras. 2078, 2081; *Brđanin* Trial Chamber judgment, paras. 974-977; *Krstić* Trial Chamber judgment, para. 594; *Krstić* Appeals Chamber judgment, para. 35; *Krajišnik* Trial Chamber judgment, para. 868; *Popović et al.* Trial Chamber judgment, para. 856; *Tolimir* Trial Chamber judgment, para. 770.

54 *Kayishema and Ruzindana* Trial Chamber judgment, paras. 531-532 (emphasis added).

and execution of crimes.⁵⁵ This category also takes account of the accused's (organisational) position. Even though genocide is not a 'leadership-crime',⁵⁶ the Tribunals regularly infer the accused's genocidal intent from his position of authority;⁵⁷ instrumental contribution to the implementation of the genocidal plan;⁵⁸ leadership role in the execution of the crimes;⁵⁹ and association with officials and prominent figures (at the *loci delicti*).⁶⁰ Finally, value is attached to the accused's utterances insofar as they concern abusive or dehumanising characterisations of the victims (e.g. 'filth', 'dirt', 'dogs', 'cockroaches');⁶¹ inciting speeches calling upon others to, for example, 'take up their arms' or 'go back to work';⁶² or specific calls to destroy the victims' group (e.g. 'eliminate the enemy', 'do not spare babies', and 'let's exterminate them').⁶³

It follows from this outline that the finding of genocidal intent depends on a balanced evaluation of contextual circumstances concerning the collective campaign of violence

55 E.g. *Prosecutor v. Niyitegeka*, Judgment, Case No. ICTR-96-14-T, Trial Chamber I, 16 May 2003 (*Niyitegeka* Trial Chamber judgment), paras. 411-417, 427; *Prosecutor v. Nahimana et al.*, Judgment, Case No. ICTR-96-11-T, Trial Chamber I, 3 December 2003 (*Nahimana et al.* Trial Chamber judgment), paras. 966-968; *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-T, Trial Chamber III, 17 June 2004 (*Gacumbitsi* Trial Chamber judgment), para. 259; *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66-A, Appeals Chamber, 12 March 2008 (*Seromba* Appeals Chamber judgment), paras. 177-180; *Kayishema and Ruzindana* Trial Chamber judgment, paras. 535-536, 543-544; *Rutaganda* Trial Chamber judgment, para. 398; *Musema* Trial Chamber judgment, para. 932; *Semanza* Trial Chamber judgment, paras. 426-427, 429, 431, 435; *Simba* Trial Chamber judgment, para. 418; *Bagosora et al.* Trial Chamber judgment, paras. 2126, 2148, 2152; *Jelisić* Trial Chamber judgment, paras. 74-75; *Popović et al.* Trial Chamber judgment, paras. 1179-1180, 1318, 1408-1410; *Tolimir* Trial Chamber judgment, paras. 1163, 1172.

56 *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001 (*Kayishema and Ruzindana* Appeals Chamber judgment), para. 170.

57 E.g. *Rutaganda* Trial Chamber judgment, para. 398; *Musema* Trial Chamber judgment, para. 932; *Popović et al.* Trial Chamber judgment, paras. 1313, 1412; *Tolimir* Trial Chamber judgment, paras. 1165, 1172.

58 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, para. 535; *Popović et al.* Trial Chamber judgment, paras. 1179, 1314, 1318, 1409.

59 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, para. 543; *Niyitegeka* Trial Chamber judgment, para. 419; *Popović et al.* Trial Chamber judgment, para. 1318; *Tolimir* Trial Chamber judgment, para. 1163.

60 E.g. *Niyitegeka* Trial Chamber judgment, para. 419; *Krstić* Appeals Chamber judgment, paras. 84, 102, 111, 113, 117; *Stakić* Trial Chamber judgment, paras. 548-549; *Tolimir* Trial Chamber judgment, para. 1165.

61 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, paras. 538, 542; *Nahimana et al.* Trial Chamber judgment, paras. 959, 961; *Simba* Trial Chamber judgment, para. 418; *Seromba* Appeals Chamber judgment, para. 180; *Jelisić* Appeals Chamber judgment, paras. 66-68; *Brđanin* Trial Chamber judgment, para. 986; *Tolimir* Trial Chamber judgment, paras. 1167-1169, 1172.

62 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, paras. 539, 542; *Gacumbitsi* Trial Chamber judgment, para. 259; *Brđanin* Trial Chamber judgment, paras. 986, 988; *Jelisić* Appeals Chamber judgment, paras. 66-68; *Krajišnik* Trial Chamber judgment, para. 1092-1093; *Popović et al.* Trial Chamber judgment, paras. 1179-1180, 1315.

63 E.g. *Akayesu* Trial Chamber judgment, para. 361; *Kayishema and Ruzindana* Trial Chamber judgment, para. 539; *Simba* Trial Chamber judgment, para. 418; *Musema* Trial Chamber judgment, para. 932; *Semanza* Trial Chamber judgment, para. 429; *Niyitegeka* Trial Chamber judgment, para. 419; *Nahimana et al.* Trial Chamber judgment, paras. 967-968; *Bagosora et al.* Trial Chamber judgment, para. 2156; *Jelisić* Appeals Chamber judgment, paras. 66-67; *Krajišnik* Trial Chamber judgment, paras. 869, 1092; *Tolimir* Trial Chamber judgment, para. 1170.

and individual circumstances relating to the accused's conduct. Both categories of circumstances include objective (*actus reus*) elements that focus on the actions of the alleged perpetrators (e.g. the general commission of widespread crimes and the accused's planning of crimes) and subjective (*mens rea*) elements emphasising their criminal intentions (e.g. the general use of derogatory language and the accused's calls for destruction). In combination, these facts give expression to a comprehensive and varied practice in which the *ad hoc* Tribunals assess whether (i) the indicted crimes formed part of a *collective act*; (ii) that was *aimed* at the (partial) destruction of a protected group;⁶⁴ (iii) in which the accused *participated*; (iv) with genocidal *intent*. Based on this assessment, the Tribunals can exclude isolated acts of violence committed by lone *génocidaires* from the notion of genocide and at the same time ensure that the accused's criminal responsibility for genocide does not lapse into guilt by association, but is based on his own conduct.

4.3.3 *Interpreting Practice*

When we take a closer look at the Tribunals' assessment of genocidal intent, it appears that the relations between the various relevant circumstances and the way in which each of these circumstances is applied, differ per case. Whereas in some cases objective contextual circumstances are emphasised, in other cases focus is placed on circumstances relating to the subjective intentions of the individual accused. The resultant variations in the case law are most apparent insofar as they concern (i) the distinction between genocide and other forms of mass violence; (ii) the link between the indicted crimes and the overall genocidal campaign; and (iii) the link between the accused's conduct and the collective context of violence. These issues therefore require further attention.

4.3.3.1 **Distinguishing Genocide from Other Forms of Mass Violence**

Genocide concerns the intended *physical or biological* – as opposed to the social or cultural – destruction of (part of) a protected group. This unique feature distinguishes genocide from other forms of mass violence, most significantly ethnic cleansing.⁶⁵ The

64 In response to questions concerning the applicability of JCE III to the crime of genocide, the ICTY has clarified that the common plan (the violent campaign) need not be inherently genocidal, but that genocide should at least have been a reasonably foreseen consequence. See *Prosecutor v. Brđanin*, Decision on interlocutory appeal, Case No. IT-99-36-R77, Appeals Chamber, 19 March 2004 (*Brđanin* Rule 98bis decision), para. 5-10. However, in practice the Tribunals only established genocide when the principal perpetrators aimed to destroy a protected group. Now that this chapter focuses on the application of genocide in legal practice, it will assume that the campaign of collective violence should in principle be aimed at the (partial) destruction of a protected group.

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

Tribunals have accordingly sought to ascertain that the campaign in which the accused participated was specifically aimed at the physical or biological destruction a group of persons. They have thereby been confronted with distinct legal tasks, leading to different types and levels of contextual embedding. On the one hand, the destructive purpose of the Rwandan atrocities is generally recognised.⁶⁶ There is clear evidence showing that the crimes committed, were targeted at the physical extermination of an entire group, rather than at the elimination of specific individuals.⁶⁷ The Rwanda Tribunal has therefore had few problems with establishing that the perpetrators acted pursuant to a destructive policy based on the widespread, organised and discriminatory nature of crimes.⁶⁸

On the other hand, qualifying the crimes committed during the Balkan war as genocide is less obvious from a legal point of view.⁶⁹ As some scholars have argued, it seems that ‘the objective of the conflict in the former Yugoslavia was not to exterminate an ethnic group, but rather to expel it in order to create ethnically pure territories’.⁷⁰ In this light, the ICTY has preferred to characterise the *nation-wide* campaigns pursued by the Balkan states as ethnic cleansing. Genocide charges have only been successful insofar

66 Van den Herik (n. 1 above) 77. The ICTR even qualified the Rwandan genocide as a fact of common knowledge. See *Prosecutor v. Karemera et al.*, Decision on Prosecutor’s interlocutory appeal of decision on judicial notice, Case No. ICTR-98-44-AR73(C), Appeals Chamber, 16 June 2006 (*Karemera et al.* judicial notice decision), paras. 33-38. This was not the first time, a court took judicial notice of genocide. In 1981, Judge Thomas T. Johnson of the Superior Court of the State of California for the County of Los Angeles declared that: ‘this court does take judicial notice of the fact that Jews were gassed to death at Auschwitz Concentration Camp in Poland during the summer of 1944. (...) It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact.’ *Mel Mermelstein v. The Institute for Historical Review*, Superior Court of the State of California for the County of Los Angeles, Case No. C 356 542, 1985). I thank Professor Caroline Fournet for bringing this case to my attention.

67 Still, acts of mercy do not necessarily negate genocidal intent. See e.g. *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3-A, Appeals Chamber, 26 May 2003 (*Rutaganda Appeals Chamber judgment*), para. 537; *Prosecutor v. Nahimana et al.*, Judgment, Case No. ICTR-99-52-A, Appeals Chamber, 28 November 2007 (*Nahimana et al. Appeals Chamber judgment*), paras. 571-572; *Kayishema and Ruzindana Appeals Chamber judgment*, paras. 148-149; *Jelisić Appeals Chamber judgment*, para. 71; *Akayesu Trial Chamber judgment*, paras. 114, 118-119, 126; *Kayishema and Ruzindana Trial Chamber judgment*, paras. 278-290, 309-311, 531; *Rutaganda Trial Chamber judgment*, paras. 398-399; *Semanza Trial Chamber judgment*, paras. 423-424; *Brdanin Trial Chamber judgment*, para. 983; *Bagosora et al. Trial Chamber judgment*, paras. 2125, 2142, 2151, 2156; *Musema Trial Chamber judgment*, paras. 928-929; *Bizimungu et al. Trial Chamber judgment*, paras. 2078, 2080.

68 E.g. *Akayesu Trial Chamber judgment*, paras. 111, 114-115; *Kayishema and Ruzindana Trial Chamber judgment*, para. 531; *Semanza Trial Chamber judgment*, para. 423.

69 C. Tournaye, ‘Genocidal Intent before the ICTY’, 52 *International and Comparative Law Quarterly* (2003) 447, 447. Similarly, see E. van Sliedregt, ‘Commentary to the Judgement of the ICTY Trial Chamber in the *Krstić Case*’ in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases VII* (Antwerp: Intersentia, 2005) 767, 767; W.A. Schabas, ‘Was Genocide Committed in Bosnia and Herzegovina? The First Judgments of the International Criminal Tribunal for the former Yugoslavia’, 25 *Fordham International Law Journal* (2001) 23, 24-30; Van den Herik (n. 1 above) 81.

70 Tournaye (n. 69 above) 447-448. See also Van den Herik (n. 1 above) 81; Van Sliedregt (n. 69 above) 767; Schabas (n. 69 above) 24-30.

as they were limited to specific *regions or municipalities*. The ICTY's appraisal of the evidence adduced to prove these charges includes critical elements that are less evident in ICTR case law. For example, the Yugoslav Tribunal has found that the 'mere' widespread, organised and discriminatory commission of crimes is insufficient to qualify a violent campaign as genocidal.⁷¹ Moreover, it has refused to unequivocally accept evidence of derogatory statements as proof of genocidal intent, but has emphasised that such statements must be understood in their proper context.⁷² When this context is not genocidal (but, for example, persecutorial) in nature, ethnic insults cannot automatically be perceived as implicit calls for destruction. Consider, for example, the following finding of the *Brđanin* Trial Chamber:

[i]n his utterances, the Accused openly derided and denigrated Bosnian Muslims and Bosnian Croats. He also stated publicly that only a small percentage of them could remain in the territory of the ARK. Some of the Accused's utterances are openly nasty, hateful, intolerable, repulsive and disgraceful. On one occasion, speaking in public of mixed marriages, he remarked that children of such marriages could be thrown in the Vrbas River, and those who would swim out would be Serbian children. On another occasion, he publicly suggested a campaign of retaliatory ethnicity based murder, declaring that two Muslims would be killed in Banja Luka for every Serbian killed in Sarajevo. Whilst these utterances strongly suggest the Accused's discriminatory intent, however, they do not allow for the conclusion that the Accused harboured the intent to destroy the Bosnian Muslims and Bosnian Croats of the ARK.⁷³

In contrast to these critical considerations, the ICTY adopts a lenient approach insofar as it concerns the use of non-destructive acts – such as forcible transfer, illegitimate detention, or rape – for proving genocidal intent. The Yugoslav Tribunal takes as a

71 According to the *Brđanin* Trial Chamber, 'while the general and widespread nature of the atrocities committed is evidence of a campaign of persecutions (...) in the circumstances of this case, it is not possible to conclude from it that the specific intent required for the crime of genocide is satisfied'. *Brđanin* Trial Chamber judgment, paras. 983-984. See also e.g. *Krajišnik* Trial Chamber judgment, paras. 868, 1093; *Popović et al.* Trial Chamber judgment, para. 1312.

72 The *Stakić* Appeals Chamber held that 'evidence demonstrating ethnic bias, however reprehensible, does not necessarily prove genocidal intent. [Although such, MC] utterances might constitute evidence of genocidal intent even if they fall short of express calls for a group's physical destruction'. *Stakić* Appeals Chamber judgment, para. 52. See also e.g. *Brđanin* Trial Chamber judgment, paras. 985-988; *Krstić* Appeals Chamber judgment, para. 130; *Krajišnik* Trial Chamber judgment, para. 1092; *Stakić* Trial Chamber judgment, para. 554; *Stakić* Appeals Chamber judgment, para. 52; *Popović et al.* Trial Chamber judgment, paras. 1177, 1312, 1399, 2086.

73 *Brđanin* Trial Chamber judgment, paras. 986-987.

starting-point that non-destructive acts cannot independently constitute genocide, but only form circumstantial evidence that should be analysed in connection with the commission of (other) genocidal acts.⁷⁴ This starting-point has, however, been implemented with a certain flexibility. In particular the qualification of the Srebrenica massacre as genocide is largely based on the commission of non-destructive acts. The *Tolimir* Trial Chamber has, for example, inferred the existence of a genocidal campaign in the Srebrenica region from the killing of almost 6000 Bosnian Muslims in combination with *inter alia*

the persistent capture of the Bosnian Muslim men from the column; the almost simultaneous implementation of the operations to kill the men from Srebrenica and the forcible transfer of the Bosnian Muslim women, children and elderly out of Potočari (...); the forcible transfer of the Bosnian Muslim population from Žepa and the murder of three of its most prominent leaders (...); and the deliberate destruction of the mosques of Srebrenica and Žepa and the homes of Bosnian Muslims (...), following the fall of the respective enclaves.⁷⁵

The ICTY's findings on this issue have been criticised by scholars, who claim that the Yugoslav Tribunal thus waters down the distinction between genocide and other forms of mass violence and devalues the unique character of 'the crime of crimes'.⁷⁶ The *Karadžić* Trial Chamber has sought to address this criticism in its Rule 98*bis* decision. The Trial Chamber has initially dismissed the genocide charges relating to the crimes committed in detention facilities in Bosnia and Herzegovina, because 'there is no evidence that these actions reached a *level* from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy'.⁷⁷ After all, the crimes did not contribute to, or bring about, the physical destruction of the group to which the victims belonged.⁷⁸ By reasoning in this way, the Chamber (implicitly)

⁷⁴ E.g. *Blagojević and Jokić* Appeals Chamber judgment, para. 123; *Tolimir* Trial Chamber judgment, para. 748; *Krstić* Appeals Chamber judgment, paras. 33-35. An important exception to this practice is the *Milošević* Rule 98*bis* decision. This Chamber did not distinguish between acts of genocide leading to the destruction of a protected group and other acts such as forcible transfer. It consequently found that genocide could have been committed outside the scope of Srebrenica. *Milošević* Rule 98*bis* decision, para. 246.

⁷⁵ *Tolimir* Trial Chamber judgment, para. 773.

⁷⁶ See also Van den Herik (n. 1 above) 82; Van den Herik (n. 11 above) 120-121; Schabas (n. 6 above) 881; Schabas (n. 69 above) 45-47; Van Sliedregt (n. 69 above) 767-772.

⁷⁷ *Prosecutor v. Karadžić*, Judgment, Case No. IT-95-5/18-T, Trial Chamber III, 28 June 2012 (*Karadžić* Trial Chamber Rule 98*bis* judgment), p. 28769 (emphasis added).

⁷⁸ *Karadžić* Trial Chamber Rule 98*bis* judgment, p. 28766-28768.

ascertains that genocidal intent cannot be based on evidence of crimes that cannot objectively lead to a group's physical or biological destruction. The *Karadžić* Appeals Chamber has promptly reversed this finding.⁷⁹ According to the Appeals Chamber, the evidence of *Karadžić*'s statements 'assessed in conjunction with evidence regarding the scale and nature of the alleged genocidal and other culpable acts is sufficiently compelling' for holding that he acted with genocidal intent.⁸⁰ Whereas the Appeals Chamber does thus not explicitly reject the *legal* standard defined by the Trial Chamber, its findings on the *evidential* value of non-destructive acts seem to express the revival of a more generous approach towards the use of such acts for establishing genocidal intent.

4.3.3.2 Placing the Indicted Crimes in Context

Once the existence of a collective campaign is established, the Tribunals proceed to determine whether and how the indicted crimes are linked to this campaign. To this end, they connect the circumstances concerning the collective act to the circumstances relating to the indicted crimes. The establishment of such a connection has been particularly important in the first judgments of the ICTR. In these judgments, the Rwanda Tribunal has inferred the accused's genocidal intent from contextual circumstances concerning the *national* genocidal campaign, even when the charges were restricted to crimes committed in one municipality or during one attack.⁸¹ The ICTR has construed the linkages between the indicted crimes and the national campaign in terms of *inter alia* their temporal and/or geographical equivalence; the similar methods and objects of attack; and the participation of similar perpetrators in the attacks.⁸² The validity of these factual similarities is debatable. In particular, it is doubtful whether the fact that the indicted crimes were committed at the same time and place as the genocidal campaign justifies the conclusion that they were part of this campaign.

Having established early on that genocide occurred in Rwanda, the ICTR's later judgments have increasingly focused on the crimes that were allegedly committed in the specific localities or regions included in the charges.⁸³ The Rwanda Tribunal has thus

⁷⁹ *Prosecutor v. Karadžić*, Judgment, Case No. IT-95-5/18-AR98bis.1, Appeals Chamber, 11 July 2013 (*Karadžić* Appeals Chamber Rule 98bis judgment).

⁸⁰ *Karadžić* Appeals Chamber Rule 98bis judgment, para. 100.

⁸¹ E.g. *Akayesu* Trial Chamber judgment, para. 730; *Musema* Trial Chamber judgment, paras. 928-931; *Kayishema and Ruzindana* Trial Chamber judgment, para. 528; *Rutaganda* Trial Chamber judgment, para. 399.

⁸² E.g. *Prosecutor v. Karemera et al.*, Judgment, Case No. ICTR-98-44-T, Trial Chamber III, 2 February 2012 (*Karemera et al.* Trial Chamber judgment), paras. 1655-1656; *Akayesu* Trial Chamber judgment, para. 730; *Kayishema and Ruzindana* Trial Chamber judgment, para. 312; *Rutaganda* Trial Chamber judgment, para. 399; *Semanza* Trial Chamber judgment, para. 424; *Musema* Trial Chamber judgment, paras. 928-931.

⁸³ E.g. *Semanza* Trial Chamber judgment, para. 427; *Simba* Trial Chamber judgment, para. 416. For a scholarly evaluation, see Van den Herik (n. 11 above) 105.

moved away from genocide's embedding in a nation-wide campaign towards a more localised embedding. As a result, its practice on this point has become to resemble the ICTY's approach, which – in the absence of a national genocidal campaign – has consistently focused on the commission of genocide in specific regions and municipalities. Under this approach, the genocidal campaign and the indicted crimes effectively merge together, making it less important to construct a link between them.⁸⁴

4.3.3.3 Linking the Accused to the Collective Act

To make sure that criminal responsibility for genocide does not lapse into collective culpability, the *ad hoc* Tribunals have to complement their evaluations of the collective genocidal campaign with an assessment of whether the accused participated in this campaign with the intent to destroy. To this end, the Tribunals analyse the circumstances relating to the accused's acts and utterances. In particular the ICTR has ascribed an increasingly central position to these circumstances.⁸⁵ In this way, the Rwanda Tribunal meets the scholarly criticism that its first judgments were so focused on the general genocidal context that they did not ascertain the accused's genocidal intent sufficiently.⁸⁶ At the same time, the *ad hoc* Tribunals recognise that establishing genocidal intent based on individual circumstances has its own limitations and challenges. Most importantly, because an individual is generally unable to effectuate the intent to destroy by himself, his acts do not (have to) result in the destruction of a protected group.⁸⁷ Individually, these acts can thus not articulate the destructive nature of genocide.⁸⁸ The Tribunals therefore assess the accused's acts and utterances in light of the collective act.⁸⁹ In this respect, they rely upon three main 'linking factors'.

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

84 In fact, the finding of such a link is largely limited to all-encompassing genocide prosecutions of senior leaders. See e.g. *Milošević* Rule 98bis decision, paras. 232-245 and *Karadžić* Trial Chamber Rule 98bis judgment, p. 28752.

85 E.g. *Bagilishema* Trial Chamber judgment, para. 63; *Niyitegeka* Trial Chamber judgment, paras. 411-419; *Nahimana* et al. Appeals Chamber judgment, paras. 527-539; *Gacumbitsi* Trial Chamber judgment, para. 259.

86 Critique came from e.g. J. Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot: Ashgate Publishing, 2006) 118; Heller (n. 5 above) 159; Greenawalt (n. 6 above) 2282.

87 E.g. Triffterer (n. 5 above) 402; Akhavan (n. 5 above) 996; Mettraux (n. 5 above) 211; Heller (n. 5 above) 159; Van den Herik (n. 11 above) 108.

88 Similarly, P. Behrens, 'A Moment of Kindness? Consistency and Genocidal Intent' in R. Henham and P. Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Aldershot: Ashgate Publishing, 2007) 125, 136.

89 *Semanza* Trial Chamber judgment, para. 427. Conversely, e.g. *Rutaganda* Appeals Chamber judgment, para. 530.

destructive campaign.⁹⁰ The *Nahimana* et al. Trial Chamber has accordingly considered that

Ferdinand Nahimana, in a Radio Rwanda broadcast on 25 April 1994, said he was happy that RTLM had been instrumental in awakening the majority people, meaning the Hutu population, and that the population had stood up with a view to halting the enemy. At this point in time, mass killing – in which RTLM broadcasts were playing a significant part – had been ongoing for almost three weeks. (...) As the mastermind of RTLM, Nahimana set in motion the communications weaponry that fought the “war of media, words, newspapers and radio stations” he described in his Radio Rwanda broadcast of 25 April as a complement to bullets. Nahimana also expressed his intent through RTLM, where the words broadcast were intended to kill on the basis of ethnicity, and that is what they did.⁹¹

The second factor focuses on the accused’s *mens rea*. In this respect, the Tribunals take account of the accused’s knowledge of the collective act, in particular his awareness of the destructive nature and consequences of the crimes committed.⁹² For example, the *Popović* et al. Trial Chamber of the ICTY has held indicative of Beara’s genocidal intent,

the inferences which can be drawn from his detailed knowledge of the killing operation itself (...). As the most senior officer of the Security Branch – the entity charged with a central directing role – he had perhaps the clearest overall picture of the massive scale and scope of the killing operation. Further, from his walk through Bratunac on the night of 13 July, his personal visits to the various execution sights and the extensive logistical challenges he

90 E.g. *Akayesu* Trial Chamber judgment, para. 729; *Gacumbitsi* Trial Chamber judgment, para. 259; *Nahimana* et al. Trial Chamber judgment, paras. 957-969, 1022-1028; *Krajišnik* Trial Chamber judgment, para. 1092; *Karadžić* Trial Chamber Rule 98bis judgment, p. 28769.

91 *Nahimana* et al. Trial Chamber judgment, para. 966.

92 Reference has been made to the accused’s knowledge of the genocidal intent of the physical perpetrators (e.g. *Semanza* Trial Chamber judgment, para. 428; *Bagosora* et al. Trial Chamber judgment, para. 2144; *Popović* et al. Trial Chamber judgment, para. 2088), his knowledge that the principal perpetrators were committing genocide (e.g. *Semanza* Trial Chamber judgment, para. 427; *Simba* Trial Chamber judgment, para. 418); the accused’s knowledge of the destructive consequences of his own actions given his position (e.g. *Simba* Trial Chamber judgment, para. 418; *Tolimir* Trial Chamber judgment, paras. 1166, 1172); and his knowledge of the genocidal nature or consequences of the operation (e.g. *Krstić* Appeals Chamber judgment, para. 35; *Popović* et al. Trial Chamber judgment, paras. 1178-1180, 1313, 1401-1408, 1588; *Tolimir* Trial Chamber judgment, para. 1166).

faced throughout, he had a very personal view of the staggering number of victims destined for execution.⁹³

Third, the Tribunals assess the accused's (organisational) position.⁹⁴ The *Niyitegeka* Trial Chamber has, for example, attached value to the fact that the accused 'was one of the *leaders* of two large-scale attacks by more than 6,000 armed attackers, comprising soldiers, policemen and Interahamwe, against Tutsi refugees at Muyira Hill'.⁹⁵

It follows from this outline that each factor – *actus reus*, *mens rea* and position – has a distinctive character and emphasises a different aspect of the relation between the accused and the genocidal context. As such, the link between the accused and the collective action differs per factor. The validity or relevance of each of the individual factors, however, seems somewhat doubtful.⁹⁶ In particular, linking the accused to the genocidal context on the mere basis of his position raises serious concerns in relation to the principle of individual criminal responsibility. This problem can be partly addressed by applying the linking factors in combination with each other.

4.3.4 *Interim Conclusion*

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

93 *Popović* et al. Trial Chamber judgment, para. 1313.

94 E.g. *Kayishema and Ruzindana* Trial Chamber judgment, paras. 528-529, 543-544; *Musema* Trial Chamber judgment, para. 932; *Niyitegeka* Trial Chamber judgment, paras. 412-419.

95 *Niyitegeka* Trial Chamber judgment, para. 412 (emphasis added).

96 See also J. Jones, "'Whose Intent Is it Anyway?'" Genocide and the Intent to Destroy a Group' in L. Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) 467, 475; M. Freeman, 'The Theory and Prevention of Genocide', 6 *Holocaust and Genocide Studies* (1991) 185, 191-192; Van den Herik (n. 11 above) 122 citing R. Maison, 'Le Crime de Genocide dans les Premiers Jugements du Tribunal Penal International pour le Rwanda', 103 *Revue Général de Droit International Public* (1999) 129, 143-145; Jørgenson (n. 24 above) 299.

4.4 THE ICC AND THE CONTEXTUAL EMBEDDING OF GENOCIDE

4.4.1 *General Interpretation*

The ICC characterises genocide in terms of the accused's intent to destroy. It finds that genocidal intent forms an 'additional subjective element, normally referred to as *dolus specialis* or specific intent'.⁹⁷ The *Al-Bashir* Pre-Trial Chamber (PTC) has emphasised that genocidal intent is discriminatory in nature. This means that a *génocidaire* selects his victims on account of their national, ethnic, racial or religious characteristics.⁹⁸ Moreover, genocidal intent is aimed at the physical or biological *destruction* of a protected group.⁹⁹ In this sense, it fundamentally differs from the intent of persecution as a crime against humanity. Although persecutory intent is discriminatory, it does not entail a destructive purpose.¹⁰⁰ According to the ICC, genocidal intent can be inferred from all the relevant facts of a case taken together. The Court has not yet explained which facts it considers relevant in this respect, but has merely emphasised the holistic nature of its inference exercise. This means that genocidal intent may be established even if each fact on its own does not allow such an inference to be made.¹⁰¹

In addition to the elements of genocide that are laid down in the Genocide Convention, the ICC's Elements of Crimes (hereinafter 'the Elements') – drawn up to assist the Court in the interpretation and application of the statutory definitions of international crimes¹⁰² – provide for a so-called 'contextual element'. This element stipulates that the actions of the accused must fall within 'the context of a manifest pattern of similar conduct directed against [a protected, MC] group or was conduct that could itself effect such destruction'.¹⁰³ The Elements do not establish a corresponding mental requirement. They do not, for example, explicitly require that the accused knew that he acted within in a pattern of criminal conduct. The Preparatory Commission that drafted the contextual

97 *Prosecutor v. Al-Bashir*, Decision on the Prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, 4 March 2009 (*Al-Bashir* first warrant of arrest decision), para. 139.

98 *Al-Bashir* first warrant of arrest decision, para. 114.

99 *Al-Bashir* first warrant of arrest decision, para. 139.

100 *Al-Bashir* first warrant of arrest decision, paras. 140-145. In her separate and partly dissenting opinion, Judge Ušacka appears to take a different approach. She attaches more relevance to the crime of forced displacement for the finding of genocidal intent. *Prosecutor v. Al-Bashir*, Separate and partly dissenting opinion Judge Anita Ušacka, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, 4 March 2009 (Separate and partly dissenting opinion Judge Ušacka), paras. 57-61.

101 *Al-Bashir* first warrant of arrest decision, para. 153.

102 Article 9 ICC Statute.

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

element, however, agreed that such knowledge is generally subsumed in the accused's genocidal intent.¹⁰⁴ If not, then the Court has to determine the applicable mental requirement on a case-by-case basis.

The Preparatory Commission has also explained that the 'pattern of similar conduct' does not have to be committed with genocidal intent or pursuant to a genocidal plan.¹⁰⁵ The contextual element is already satisfied when an individual – acting with the intent to destroy a protected group – commits, for example, a murder in the course of a collective campaign involving the widespread commission of murders. The fact that the other murders do not constitute genocide but qualify as crimes against humanity, is irrelevant in this respect.¹⁰⁶ The Commission has thus merely sought to ensure that genocide encompasses a collective campaign of violence, without qualifying this campaign in terms of its underlying purpose. This limited aim seems to be at odds with the *Al-Bashir* PTC's interpretation of the contextual element. The PTC in this case considered that the contextual element ensures that 'the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical'.¹⁰⁷ According to Kress, this finding essentially implies that the accused should have acted in the context of a *genocidal* campaign of collective violence.¹⁰⁸ If Kress' argument is correct, it signifies that the Court's interpretation of the contextual element goes beyond the intentions of the drafters of the Rome Statute.

4.4.2 *Genocide Applied*

4.4.2.1 **Genocidal Intent**

So far, the ICC has only applied the crime of genocide in relation to the conflict in Darfur. The question of whether genocide has been committed in Darfur is controversial. The UN International Commission of Inquiry on Darfur and several legal scholars have explicitly argued that the Darfur crimes constitute crimes against humanity, instead of genocide.¹⁰⁹ NGOs and human rights activists, however, continue to characterise them

104 V. Oosterveld, 'The Context of Genocide' in R. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001) 44, 47.

105 Oosterveld (n. 104 above) 49.

106 Oosterveld (n. 104 above) 47-48.

107 *Al-Bashir* first warrant of arrest decision, para. 124.

108 Kress (n. 16 above) 300. This interpretation has been criticised by Cryer (n. 9 above) 290-291.

109 See, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, UN Doc. S/2005/60 (1 February 2005) 3-4 (UN Commission of Inquiry Report). For a scholarly view on this issue, see G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *Journal of International Criminal Justice* (2005) 539, 545-546; A. Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al-Bashir on Charges of Genocide', 6 *Journal of International*

as genocidal.¹¹⁰ Also the ICC Prosecutor has insisted upon the issuance of an arrest warrant against Omar Al-Bashir – the President of Sudan – on charges of genocide.¹¹¹

In evaluating the Prosecutor’s application for such an arrest warrant, the PTC has linked its assessment of Al-Bashir’s genocidal intent to the campaign pursued by the Sudanese government. This link is subject to the accused’s control over Sudan’s state apparatus (including the Sudanese armed forces and the Janjaweed militia) and to his use of this apparatus for carrying out the alleged genocidal campaign.¹¹² If it is established that Al-Bashir exercised full control over the state apparatus, his individual genocidal intent implies the existence of a genocidal campaign.¹¹³ By contrast, if he shared control with other political and military leaders, the finding of a genocidal campaign

would be dependant upon the showing of reasonable grounds to believe that those who shared the control of the apparatus’ of the State of Sudan with Omar Al Bashir agreed that the (...) counter-insurgency campaign [of the government of Sudan] would, *inter alia*, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.¹¹⁴

Considering the importance of the accused’s control over (the persons responsible for) the governmental campaign for establishing his genocidal intent, it is unfortunate that the PTC has neither defined the notion of control, nor determined to what extent and in which way Al-Bashir exercised such control.¹¹⁵ This makes it difficult to fully appreciate the ICC’s understanding of the genocidal intent-element. For now, the findings of the

Criminal Justice (2008) 829, 829-840; Schabas (n. 6 above); Kress (n. 6 above) 563-565; Cryer (n. 9 above) 289-295.

110 E.g. United Human Rights Council, *Genocide in Darfur*, available at <www.unitedhumanrights.org/genocide/genocide-in-sudan.htm>; *Save Darfur*, available at <www.savedarfur.org/>. See also D. Cheadle and J. Prendergast, *Not on Our Watch: The Mission to End Genocide in Darfur and Beyond* (New York: Hyperion, 2007); M. Daly, *Darfur’s Sorrow: A History of Destruction and Genocide* (Cambridge: Cambridge University Press, 2007).

111 E.g. *Prosecutor v. Al-Bashir*, Prosecution’s application for leave to appeal the “Decision on the Prosecution’s application for a warrant of arrest against Omar Hassan Ahmed Al-Bashir”, Case No. ICC-02/05-01/09, Office of the Prosecutor, 13 March 2009; *Prosecutor v. Al-Bashir*, Prosecution response to observations of Amicus Curiae in respect of the Prosecution’s appeal against the “Decision on the Prosecution’s application for a warrant of arrest against Omar Hassan Ahmad Al-Bashir”, Case No. ICC-02/05-01/09, Office of the Prosecutor, 6 July 2009.

112 *Al-Bashir* first warrant of arrest decision, para. 148.

113 *Al-Bashir* first warrant of arrest decision, para. 149.

114 *Al-Bashir* first warrant of arrest decision, para. 150.

115 For example, the PTC did not determine whether the accused had total control over the government or whether he shared such control with other political and military leaders. This can possibly be explained by the early stage of the proceedings and by the rudimentary character of the evidence to be considered. See, *Al-Bashir* first warrant of arrest decision, para. 223.

Court only seem to justify the general observation that the existence of a collective act can be relevant for establishing the accused's genocidal intent.¹¹⁶

This finding is confirmed by the fact that the *Al-Bashir* PTC's evaluation of the genocidal intent-element focuses on whether the commission of genocide formed a core component of the campaign pursued by the Sudanese government.¹¹⁷ In particular, the PTC has assessed the accused's genocidal intent in light of evidence concerning the discriminating policy of the government;¹¹⁸ the official statements issued by the accused and other members at the highest level of the government;¹¹⁹ and the clear pattern of mass atrocities.¹²⁰ On this basis, the PTC has found that Al-Bashir's statements 'do not provide, by themselves, any *indicia* of (...) genocidal intent'.¹²¹ It, however, recognised that a different conclusion may be warranted in light of other evidence concerning the commission of collective violence.¹²²

In assessing the available evidence of collective violence, the PTC has taken particular effort to distinguish the existence of a genocidal campaign directed at the destruction of a group from other forms of mass violence. In this respect, it has clarified that the mere commission of war crimes and crimes against humanity – such as rape and forcible transfer – does not necessarily mean that the accused acted with genocidal intent.¹²³ Such a conclusion requires additional evidence concerning, for example, the indiscriminate commission of a high number of discriminatory crimes¹²⁴ and the introduction of measures that prevented the members of a protected group from fleeing to other areas.¹²⁵ Furthermore, genocidal intent can be inferred from the commission of patterned and systematic attacks.¹²⁶ However, when during these attacks the large majority of the

116 *Al-Bashir* first warrant of arrest decision, paras. 172, 205.

117 *Al-Bashir* first warrant of arrest decision, paras. 149-152. In contrast to the UN Commission of Inquiry, the ICC thus finds that the fact that there was no governmental policy to commit genocide, does not negate the possibility that particular individuals were acting with genocidal intent. See, UN Commission of inquiry report, 520.

118 *Al-Bashir* first warrant of arrest decision, para. 167.

119 *Al-Bashir* first warrant of arrest decision, paras. 170-176.

120 *Al-Bashir* first warrant of arrest decision, paras. 177-178.

121 *Al-Bashir* first warrant of arrest decision, para. 172.

122 *Al-Bashir* first warrant of arrest decision, paras. 172, 201.

123 *Al-Bashir* first warrant of arrest decision, paras. 182-183, 193-194. Interestingly, Judge Ušacka in her separate and partly dissenting opinion did not limit genocidal intent to the physical or biological destruction of a protected group. Instead, she adopted a view that has previously been expressed by Judge Shahabuddeen, namely that 'while the terms of the Genocide Convention and the ICTY Statute specify that the "listed act" – or *actus reus* – of the crime of genocide must consist of an act of physical or biological destruction, it is sufficient to demonstrate that the intent with which that act was perpetrated encompassed the destruction of the group, regardless of whether such intended destruction was to be physical, biological, social or cultural.' Separate and partly dissenting opinion Judge Ušacka, para. 60.

124 *Al-Bashir* first warrant of arrest decision, para. 196.

125 *Al-Bashir* first warrant of arrest decision, para. 198.

126 *Al-Bashir* first warrant of arrest decision, para. 189.

population was neither killed nor injured, this forms a counter-indication for establishing genocide.¹²⁷

In the absence of sufficient evidence of a specifically genocidal campaign, the PTC has initially decided that it could not establish Al-Bashir's genocidal intent and thus rejected to issue an arrest warrant on genocide charges against him.¹²⁸ After the prosecutor had successfully appealed this decision,¹²⁹ the PTC has in second instance concluded that the existence of a policy to commit genocide is at least one of the possible explanations for the crimes committed.¹³⁰ It is not completely clear to what extent this conclusion invalidates the PTC's initial fact-driven interpretation of the genocidal intent-element. After all, the findings of the PTC in second instance resulted from the application of a different standard of proof, not from a different evaluation of evidence.¹³¹ It can therefore be argued that the ICC is allowed to uphold its original assessment of facts when and if the case enters the trial phase. In this view, the following analysis continues to adhere to the evidential findings of the first PTC decision.

4.4.2.2 Contextual Element

The assessment of the contextual element by the *Al-Bashir* PTC is rather brief. The PTC ascertains that crimes were committed on a large scale, both in geographical and in numerical terms. Moreover, the commission of crimes was systematic and followed a regular pattern.¹³² According to the PTC, these facts justify the finding that there are at least 'reasonable grounds to believe that the acts took place in the context of a manifest pattern of similar conduct directed against the targeted group'.¹³³

The PTC's findings give expression to a broad legal standard that does not constrain the criminal pattern in terms of its destructive purpose or results. This conforms to the drafters' intention to only exclude isolated acts of violence from the scope of genocide, without requiring that the crimes are committed with genocidal intent or pursuant to a genocidal plan.¹³⁴ At the same time, it seems that the Court's practice can create a complex internal contradiction. Assuming that the 'real and concrete threat' criterion (as adopted by the *Al-Bashir* PTC) implies that the crimes must have a destructive effect

127 *Al-Bashir* first warrant of arrest decision, para. 196.

128 *Al-Bashir* first warrant of arrest decision, para. 205-206.

129 *Prosecutor v. Al-Bashir*, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al-Bashir', Case No. ICC-02/05-01/09-OA, Appeals Chamber, 3 February 2010, paras. 33, 39.

130 *Prosecutor v. Al-Bashir*, Second decision on the Prosecution's application for a warrant of arrest, Case No. ICC-02/05-01/09-94, Pre-Trial Chamber I, 12 July 2010 (*Al-Bashir* second warrant of arrest decision), para. 4.

131 *Al-Bashir* second warrant of arrest decision, para. 2.

132 *Al-Bashir* second warrant of arrest decision, paras. 15-16.

133 *Al-Bashir* second warrant of arrest decision, para. 16.

134 Cryer (n. 10 above) 218; Oosterveld (n. 104 above) 47-48.

(as has been argued in the scholarly debate), there is an inconsistency between the Court's abstract interpretation and its practical application of the contextual element.

Another concern regarding the ICC's application of the contextual element relates to its failure to connect the pattern of criminal conduct to the crimes with which the accused is charged.¹³⁵ In this way, the Court can establish the contextual element without ascertaining a material link between the accused's conduct and the collective act. This seemingly goes against the text of the Elements of Crimes, which stipulates that the accused should have acted *in the context of* a pattern of similar conduct.

More generally, the ICC's application of the contextual element also raises questions concerning its added value. In particular, it seems that the Court's findings on the large-scale and organised nature of violence in relation to this element add little to its evaluation of the accused's genocidal intent.¹³⁶ After all, the latter evaluation already takes account of the pattern of crimes committed. In fact, the Court in this respect even takes pains to determine whether the accused acted *in the context of* a specifically *genocidal* campaign.

4.4.3 *Interim Conclusion*

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

¹³⁵ *Al-Bashir* second warrant of arrest decision, paras. 15-16.

¹³⁶ In relation to the genocidal intent element, the PTC already refers to *inter alia* the systematic character of the hindrance of medical and humanitarian assistance in the refugee camps in Darfur; the systematic acts of pillage; the large number of unlawful attacks, acts of murder, forcible transfer and torture. *Al-Bashir* first warrant of arrest decision, paras. 189, 192.

4.5 GENOCIDE: A CASUISTIC CONCEPT

4.5.1 *Sliding Scale of Contextual Embedding*

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

In light of this finding, the current scholarly debate – which characterises genocide in terms of either the structure-based or the goal-oriented model – seems too stringent. Rather than presenting these models as alternatives that exclude each other, they can better be perceived as two poles of a continuum along which the case law of the courts can be positioned. Also the differences between the legal frameworks of the *ad hoc* Tribunals and the ICC need to be nuanced. On the one hand, the case law analyses show that the Tribunals' finding that genocide can be committed by a lone *génocidaire* does not mean that the ICTY and ICTR do not attach any value to the existence of a genocidal campaign. On the other hand, the inclusion of an autonomous contextual element in the Elements of Crimes does not automatically imply that the ICC will pay more extensive attention to the contextual embedding of genocide. Whether this is so depends on the Court's application of the contextual element in individual cases and on the way in which this element is shaped in practice.

Of course, it can be argued that the ICC's recognition of a contextual element has important restrictive value. By stipulating the contextual element as an autonomous legal element, the Court is required to evaluate the context of crimes in all cases that come before it. It cannot completely refrain from engaging in a contextual analysis and may not focus exclusively on the goals pursued by individual accused. This does, however, not detract from the finding that the meaning of genocide and the nature and scope of its

contextual embedding are not exclusively determined by the incorporation of a contextual element in the abstract legal framework. They are also shaped by the application of genocide in individual cases and by the way in which courts customise this crime to the factual situation to which it applies.

4.5.2 *Casuistry and Factors*

To understand and appraise the flexibility of (the contextual embedding of) genocide, we need to explore the character and process of judicial reasoning in international criminal law. International criminal courts are required to justify their decisions on the basis of (statutory or customary) rules. These rules are context-independent, i.e. applicable to a variety of unknown future situations. They are therefore necessarily formulated in relatively abstract terms. For example, the rules on genocide only stipulate that genocide concerns the commission of crimes with the intent to destroy. They do not determine the level of intent or the facts based on which this intent can be established. Thus, rules have – what Hart calls – an ‘open texture’.¹³⁷ Because of this open texture, concrete cases will bring up questions concerning the rules’ meaning and scope. For example, can a person who aimed for the destruction of a protected group without the support of an organised apparatus be qualified as a *génocidaire*?

Considering the uncertainties that legal rules can generate, their central position as all decisive standards must be nuanced. Rules do not settle the discussion on the meaning and scope of the law, but stimulate an argumentative process.¹³⁸ International criminal courts have an autonomous position in this process. They exercise a certain discretion to answer case-specific questions and to adjust the law accordingly. By thus advancing and modifying the law in interplay with the facts of the case before them, courts develop the law in a casuistic way.¹³⁹ In international criminal law, this casuistic

137 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) 127-128. On this issue see also J. Brennan, *The Open Texture of Moral Concepts* (Michigan: Macmillan Press, 1977).

138 K. Rozemond, ‘De Casuïstische Grenzen van het Materiële Strafrecht’, 37 *Delikt en Delinkwent* (2007) 465, 479-481; F.V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991) 227; L.M. Soriano, ‘The Use of Precedents as Arguments of Authority, Arguments *ab Exemplo* and Arguments of Reason in Civil Law Systems’, 11 *Ratio Juris* (1998) 90, 94-95; J. Klabbers, ‘The Meaning of Rules’, 20 *International Relations* (2006) 295, 298-300; M.J. Borgers, ‘De Communicatieve Strafrechter’ in *Controverses rondom Legaliteit en Legitimatie, Handelingen Nederlandse Juristen-Vereniging 2011-1* (Deventer: Kluwer, 2011) 103, 117; H. van der Wilt, ‘Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court’, 8 *International Criminal Law Review* (2008) 229, 263-264; E. van Sliedregt, ‘System Criminality at the ICTY’ in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 183, 199-200.

139 Similarly, Van der Wilt (n. 138 above) 264-266.

process has resulted in the formulation of judicial criteria. The *ad hoc* Tribunals and the ICC have, for example, clarified that genocidal intent is a form of special intent, akin to individual purpose. Moreover, they have indicated the factual circumstances from which genocidal intent can be inferred. These circumstances play an essential role in the process of judicial reasoning. They help to define the nature and scope of genocide and provide further guidance on its assessment in individual cases.

Legal theory clarifies that – in contrast to the elements of crime – factual circumstances are not laid down as necessary conditions of criminal responsibility that need to be established in every case. Instead, they function as factors. Factors are open-ended illustrations of legally relevant patterns of facts that courts can use to substantiate their decision. Each factor favours a certain outcome and provides reasons that move the decision-maker in a specific direction.¹⁴⁰ This implies, on the one hand, that the mere existence of a factor does not determine the decision. In other words, the finding of a factor in itself does not compel or automatically result in a particular outcome. On the other hand, not all relevant factors have to be established in each case for the accused to be held criminally responsible. The establishment of criminal responsibility rather depends on a balancing exercise: the relative strength of the factors favouring and disfavouring a decision have to be weighted against each other.¹⁴¹

The casuistic development of the law through the flexible use of factors entails a certain risk of abuse. In particular, there is a danger that judges will freely tweak the law to fit the facts. This is problematic in light of the principle of legality. This principle – explicitly laid down in Article 22 of the Rome Statute and recognised in the case law of the *ad hoc* Tribunals – protects accused from an arbitrary use of power by binding judges to existing law.¹⁴² It accordingly requires that courts justify their decisions with valid argumentation. This does not only mean that courts have to interpret the law on the basis of the sources of law and methods of interpretation stipulated in the Rome Statute, the Statute of the International Court of Justice (ICJ) and the Vienna Convention on the Law of Treaties (VCLT). They should also carefully justify the formulation and use of relevant factors. In this respect, the casuistic methodology of judicial reasoning provides for at least two important restrictions.

First, casuistry recognises that the determination of relevant factors involves a particularly complicated process of interpretation. It restrains this process by requiring

140 G. Sartor, *Legal Reasoning: A Cognitive Approach to the Law* (Dordrecht: Springer, 2005) 177.

141 G. Sartor, 'Reasoning with Factors', 19 *Argumentation* (2005) 417, 423; K. van Willigenburg, 'Casuïstiek en Scherpe Normen in het Materiële Strafrecht', 27 *Delikt en Delinkwent* (2011) 365, 371-372.

142 M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia, 2002) 246-251, 365-396; K. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009) 303-308, 331-333.

‘teleological links’ between factors and goals. This means that factors must originate from the desire to achieve the object of the applicable legal rule and reflect the belief that acting and deciding in a specific way promotes that object.¹⁴³ Sartor illustrates this as follows: ‘my having the *goal* that the children are in good health, plus my belief that keeping the children at home when they are sick *contributes* to their good health, allows me to infer that the children being sick is a *factor* that favours keeping them at home’.¹⁴⁴ In relation to international criminal law, this reasoning scheme clarifies that having the *goal* to limit criminal responsibility for genocide to crimes that are part of a context of collective violence; and *believing* that establishing genocide in case of the widespread commission of crimes promotes this goal; is a reason for perceiving such widespread commission of crimes as a *factor* for holding an accused responsible for genocide. By thus connecting factors to goals, casuistic reasoning refines and operationalises the process of teleological reasoning.¹⁴⁵

Second, the methodology of casuistry structures and restricts the weighing and balancing of (competing) factors by means of analogous reasoning from precedent. It takes as a starting-point that like cases should be decided similarly, whereas unlike case should be decided differently.¹⁴⁶ From this perspective, it holds that the fact that precedent (X) had outcome (Y) in the presence on factors (Z), justifies that the combination of factors (Z) produces outcome (Y) in future cases as well.¹⁴⁷ Courts should thus connect their assessment of a set of factors to the analogous use of these factors in previous cases. Prototype cases have a special position and role in this respect. They bring together all factors that favour a qualification in *optima forma*.¹⁴⁸ Sartor provides the following example:

[a]ssume (...) that the qualification of a worker as an employee would be favoured to the extent that the worker is dedicating a larger proportion of his working time to one work-giver; is following the directions of the work-giver;

143 Van der Wilt (n. 138 above) 271-272; Sartor (n. 140 above) 178-179; Sartor (n. 141 above) 417-418. Contrary, Roth argues that ‘it depends on a choice which case features are relevant in comparing cases, and that this choice is to some extent contingent’. B. Roth, *Case-Based Reasoning in the Law: A Formal Theory of Reasoning by Case Comparison*, 26 November 2003, PhD Thesis, 27, 46.

144 Sartor (n. 140 above) 179 (emphasis added).

145 M. Cupido, ‘The Policy underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate’, 22 *Criminal Law Forum* (2011) 275, 304 and chapter 2 of this study.

146 T. Bench-Capon and G. Sartor, ‘Using Values and Theories to Resolve Disagreement in Law’ in J. Breuker et al. (eds.), *Legal Knowledge and Information Systems: Jurix 2000 the Thirteenth Annual Conference* (Amsterdam: IOS Press, 2000) 73, 74; Sartor (n. 140 above) 738.

147 Soriano (n. 138 above) 99; Sartor (n. 140 above) 738.

148 Sartor (n. 140 above) 192. Sartor’s description of prototypes corresponds with Hart’s ‘standard case’ – i.e. a case in which no doubts are felt about its application. H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, 71 *Harvard Law Review* (1958) 593, 607-608.

is working within the premises of the work-giver; or using the work-giver's tools.¹⁴⁹

Looking at these factors, 'the prototypical employee is a person who is working full time for a single employer, under detailed directions, within the employer's premises and using the employers' tools'.¹⁵⁰ However, this does not imply that persons who differ from the prototype by expressing a less optimal combination of factors (e.g. persons who work only 50 percent of their time for a single employer without detailed directions) are excluded from the status of employee. The prototype case can entail factors that are absent in a new situation, whereas this new situation may also incorporate additional factors that hinder the prototypical features from playing their known function. As long as the similarities between the cases outweigh the differences, they can still be governed by the same legal principle.

In relation to the crime of genocide, the Holocaust is generally seen as a prototype. The crime 'emerged from the factual matrix' of the crimes committed against the Jews during World War II, which makes the Holocaust the standard case of genocide.¹⁵¹ Insights from casuistry clarify that this does not mean that only situations that are identical to the Holocaust can be qualified as genocide.¹⁵² Genocide has an open texture that gives judges a certain discretion to modernise and adapt this crime to the challenges presented by new fact situations.¹⁵³ Genocide can thus also be applied to more marginal situations that differ from the Holocaust in scope, style and technique. The discretion that courts have in this respect is, however, limited. They need to ascertain that the similarities between the Holocaust and the new situation outweigh the differences.¹⁵⁴

It must be recognised that casuistic reasoning from (prototypical) precedents is not a pre-determined, strict, and all-decisive process. It cannot be defined beforehand and *in abstracto* to what extent two cases need to cohere. As a result, courts retain a certain discretion to determine, for example, whether the Srebrenica massacre shows sufficient similarities with the Holocaust to justify the qualification of this situation as genocide.

149 G. Sartor, *Factors and Dimensions in Legal Reasoning*, available online at <<http://complexite.free.fr/Berder/doc/Sartor3.pdf>>.

150 Sartor (n. 149 above).

151 P. Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012) 120. See also L. Douglas, 'Perpetrator Proceedings and Didactic Trials' in A. Duff et al. (eds.), *The Trial on Trial: Volume 2. Judgment and Calling to Account* (Portland: Hart Publishing, 2006) 191, 197-198; Schabas 2012 (n. 4 above) 104.

152 Social scientists have extensively debated the uniqueness of the Holocaust. E.g. A.S. Rosenbaum, *Is the Holocaust Unique? Perspectives on Comparative Genocide* (Boulder, CO: Westview Press, 1995); Freeman (n. 96 above) 187-188.

153 Douglas (n. 151 above) 197-199.

154 Similarly, M. Lippman, 'Genocide the Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium', 23 *Houston Journal of International Law* (2001) 467, 527; Freeman (n. 96 above) 187.

Even so, the process of analogical reasoning still offers a useful context of deliberation that guides judges through the complexities of each case.¹⁵⁵ In particular, it requires that judges assess and substantiate precisely whether there is a sufficient connection between the precedent and the present case. In other words, they must explain their decisions with reference to the similarities and differences between the case at hand and relevant precedents.¹⁵⁶ For example, which parallels can be drawn between the Srebrenica massacre and the Holocaust that justify their classification under the same legal principle? In this way, the methodology of casuistry enables judges to progressively refine the meaning of original paradigms within the confinements of a meticulous argumentative process. It thus establishes a neat balance between the need for flexibility and legal development, on the one hand, and the requirements of legality and legal certainty, on the other. Judicial reasoning that disturbs this balance by neglecting the restrictions of the casuistic methodology runs the risk of lapsing into a boundless ‘everything goes’ type of decision-making. This way of reasoning is logically and legally unsound and should therefore be rejected as ‘bad casuistry’.

4.5.3 Valuing the Casuistry of Genocide

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

155 A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988) 135; Borgers (n. 138 above) 133.

156 Jonsen and Toulmin (n. 155 above) 31, 35, 252-252.

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

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

Implementing the methodology of casuistry in judicial practice is essential, since a failure to do so can result in an abuse of the law's context-dependency. It is therefore unfortunate to see that the previous case law analyses bring forward several methodological irregularities. For one, the courts' use of non-destructive acts as factors for ascertaining the contextual embedding of genocide seems invalid. Recall that the formulation of factors is restricted by 'teleological links' that connect factors to the goals of

the legal rule for which they are used. Considering that the rules on genocide seek to criminalise conduct that is aimed at the *physical or biological destruction* of a protected group, it is inconceivable how crimes *not pursuing this objective to destroy* can still be used to prove the commission of genocide. The judicial practice to partially infer genocidal intent from the commission of non-genocidal acts should therefore be looked upon critically. It seems to illegitimately detach the genocidal intent-element from the destructive purpose of genocide.

Another matter in need of further consideration is the courts' weighing of relevant factual circumstances against each other. It seems that this weighing process has not been carried out consistently and does not always conform to the restrictions of analogical reasoning. Note, for example, that the ICTY has at least partially based its finding of genocide in Srebrenica on the forcible transfer of part of the population to other areas.¹⁵⁷ By contrast, the *Al-Bashir* PTC has found that the fact that people were not precluded from fleeing the area and safely reached refugee camps contradicts the claim that genocide occurred. Before the ICC, the forcible transfer of the population is thus a counter-indication of genocide.¹⁵⁸ While recognising that the *ad hoc* Tribunals and the ICC operate in a unique legal context and are not bound by each other's case law, it seems that their statutory frameworks are not so distinctive that they can explain and justify this different evaluation of evidence. Of course, this does not mean that there are no valid reasons for the differences and that the courts have engaged in an illegitimate process of judicial reasoning. It does, however, signify that the justificatory reasons underlying the courts' distinctive appraisals are not immediately evident, but remain somewhat uncertain.

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

157 See sub-section 4.3.3.1.

158 See sub-section 4.4.2.1.

reasoning from precedent. This will have a positive effect on the consistency of the law and the legality of judicial decisions.

4.6 CONCLUSIONS

The analyses of the case law of the *ad hoc* Tribunals and the ICC show that the judicial assessment of genocide is subject to the facts of the situation under consideration and to the challenges that this situation presents to the court. In particular, genocide's contextual embedding is shaped by the decisions in individual cases and customised to the present legal, historical and political realities. As a result, the type and level of contextual embedding differ per case. This requires a nuanced approach to the strict division between the structure-based and the goal-oriented model. Rather than seeing these models as alternatives that exclude each other, they should be perceived as two poles of a continuum along which the case law of the courts can be positioned.

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

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