Università
Ca'Foscari
Venezia

Corso di Laurea magistrale
(*ordinamento ex D.M. 270/2004*)
in Relazioni Internazionali Comparate

Tesi di Laurea

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Dorsoduro 3246
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Rwanda and Darfur: the International Debate on Prevention and Repression of the Crime of Genocide

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Anno Accademico
2012 / 2013

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Abstract

In Ruanda, nell'aprile del 1994, iniziava l'eccidio del popolo Tutsi, uno tra i più efferati episodi di razzismo del XX secolo. In soli 100 giorni, circa 800.000 persone furono barbaramente uccise a colpi di machete ed armi da fuoco.
Innumerevoli gli episodi di tortura e violenza sessuale, i quali non risparmiarono neppure donne e bambini. A guidare la strage, la feroce milizia *Interahamwe*, appoggiata dal governo ruandese. Ciò che rese tuttavia possibile la realizzazione di uno sterminio di tale portata in un così breve arco di tempo fu la straordinaria partecipazione di massa, che vide coinvolta nel massacro la quasi totalità della popolazione di etnia Hutu.
Ed ecco che meno di dieci anni dopo, nella vicina regione del Darfur, nell'ovest del Sudan, la storia si ripete. Una milizia araba nota come *Janjaweed*, anch'essa supportata dal governo sudanese, diede vita, a partire dal febbraio 2003, ad una vera e propria campagna di terrore nei villaggi abitati da popolazioni non arabe. Stime autorevoli parlano di almeno 300.000 morti e quasi tre milioni di persone costrette a subire violenze e ad abbandonare i propri villaggi per cercare rifugio nei campi profughi sparsi lungo il Sudan e nel vicino Ciad. A undici anni dall'inizio del conflitto, la situazione nella regione del Darfur rimane ancora molto delicata.
"Rwanda and Darfur: the International Debate on Prevention and Repression of the Crime of Genocide" vuole essere un' analisi delle risposte internazionali ai terribili crimini commessi nei due paesi africani.

Dopo la Seconda Guerra Mondiale e la scoperta delle barbarie dell'Olocausto, la comunità internazionale si impegna affinché atrocità simili non accadano più in futuro. Nel dicembre del 1948, a New York, l'Assemblea Generale delle Nazioni Unite adotta la Convenzione per la Prevenzione e la Repressione del Delitto di Genocidio. Gli stati membri, attualmente 144, riconoscono così il genocidio come crimine di diritto internazionale, che essi si impegnano a prevenire e punire. Secondo quanto afferma la Convenzione, un crimine può essere considerato

genocidio nell'ipotesi in cui vi sia un' "intenzione di distruggere, in tutto o in parte un gruppo nazionale, etnico, razziale o religioso, come tale".

Come precisato nell'Articolo II, per genocidio si intende ciascuno degli atti seguenti: uccisione di membri del gruppo; lesioni gravi all'integrità fisica o mentale di membri del gruppo; il fatto di sottoporre deliberatamente il gruppo a condizioni di vita intese a provocare la sua distruzione fisica, totale o parziale; misure miranti a impedire nascite all'interno del gruppo; ed infine il trasferimento forzato di fanciulli da un gruppo ad un altro.

Secondo quanto prescrive la Convenzione, non vi è punibilità solo per gli atti diretti di genocidio, ma anche per quelli ad esso connessi, quali l'intesa mirante a commettere genocidio, l'incitamento diretto e pubblico a commettere genocidio, il tentativo di genocidio e la complicità nel genocidio.

Quando però in Ruanda nel 1994 tutto lasciava intendere che lo spettro del crimine di genocidio potesse divenire realtà, le Nazioni Unite rifiutarono di intervenire per prevenire l'esplosione delle violenze. Nemmeno a massacro iniziato vennero prese iniziative tempestive ed efficaci. Al contrario, il Consiglio di Sicurezza dell'ONU decise di ridurre drasticamente il numero delle truppe stanziate nella Missione di assistenza delle Nazioni Unite per il Ruanda (UNAMIR), già presente nel territorio ruandese dal 1993 con l'obiettivo di monitorare le tensioni etniche. Troppo cara la posta in gioco per potenze mondiali quali la Francia, che continuava a rifornire di armi il governo ruandese, e gli Stati Uniti d'America, che non avevano alcun interesse nel piccolo e sperduto paese dell'Africa centrale. Per definire la drammatica situazione in Ruanda, termini quali conflitto interno e guerra civile furono preferiti alla più vincolante nozione di genocidio. "Abbiamo aspettato troppo tempo prima di chiamare quei crimini con il loro nome: genocidio", fu la tristemente nota considerazione del Presidente Americano Bill Clinton, il quale riconobbe solo a conflitto terminato il deplorevole fallimento della comunità internazionale.

Quanto successo più recentemente in Darfur appare di conseguenza ancora più grave, non tanto per il numero di vittime coinvolte, quanto soprattutto per gli errori nuovamente ripetuti dalla comunità internazionale a distanza di meno di dieci anni dalla fine dell'eccidio ruandese e dalle innumerevoli promesse fatte e ancora una volta non mantenute.

Paradossalmente, gli anni della grande crisi umanitaria in Darfur coincidevano con l'emergere della dottrina della "Responsabilità di Proteggere". Secondo quanto afferma tale dottrina, ogni singolo stato è responsabile della protezione dei suoi cittadini da ogni qualsiasi forma di crimine internazionale. Ogni qualvolta che uno stato si dimostra impotente o riluttante ad adempiere a tale compito, la responsabilità dev'essere allora assunta dalla più ampia comunità internazionale, la quale ha il dovere di intervenire, pacificamente o, in casi estremi, anche attraverso l'uso della forza, per assicurare alle popolazioni in pericolo un'adeguata protezione.

Ed ecco che, ciò nonostante, puntualmente la storia si ripete.

Un altro paese africano costretto a subire i più terribili crimini sotto lo sguardo indifferente di un'intera comunità internazionale. Ci si continua ad interrogare inutilmente a lungo sul nome da assegnare alle atrocità che stavano accadendo in Darfur, e non si fa niente per fermare il massacro di centinaia di migliaia di cittadini innocenti.

Cosa spinge dunque ancora una volta la comunità internazionale a ripetere gli stessi errori? Nuovamente purtroppo, interessi economici e geopolitici finiscono per prevalere sulla difesa di diritti umani riconosciuti come universali.

Potenze mondiali quali Cina e Russia, da sempre forti alleate del governo Sudanese, a lungo si opposero al dispiegamento di un contingente delle Nazioni Unite nella regione. La congiunta missione di pace delle Nazioni Unite e dell'Unione Africana, denominata UNAMID, fu autorizzata dal Consiglio di Sicurezza solo nel luglio 2007, a distanza di quattro anni dall'inizio del conflitto.

Neppure gli Stati Uniti d'America, pur essendo stati l'unica nazione ad aver pubblicamente definito come genocidio le atrocità in atto nella regione del Darfur, prontamente agirono per fermare il massacro. Al contrario, ritardarono ancora di più i tempi, influenzando il Consiglio di Sicurezza delle Nazioni Unite nella decisione di istituire una specifica Commissione di Inchiesta, la quale aveva, tra i vari compiti, anche quello di stabilire se la situazione in Darfur si potesse definire genocidio o meno. Dopo mesi di accurate indagini, il team di esperti delle Nazioni Unite concluse che, sebbene alcuni individui potessero aver agito con intento genocidiario, e che di conseguenza spettasse ad una corte internazionale il compito di giudicarli singolarmente, il governo sudanese non aveva perseguito una politica di genocidio. Pur negando l'ipotesi di genocidio, la Commissione precisò come i delitti internazionali commessi in Darfur dal governo centrale e dalle milizie ad esso riconducibili fossero comunque della massima gravità e andassero classificati come crimini internazionali contro l'umanità.

Dopo il lungo dibattito tra governi e istituzioni delle Nazioni Unite in merito ai crimini commessi nella regione africana, l'unica vera risposta internazionale fu il riferimento della situazione in Darfur alla Corte Penale Internazionale, istituita nel 2002 con lo scopo di giudicare i singoli individui macchiatisi di crimini di gravità internazionale, quali il genocidio, i crimini di guerra, e i crimini contro l'umanità.

Anche nel caso del genocidio ruandese, una delle poche iniziative efficaci intraprese dalle Nazioni Unite fu l'istituzione, nel novembre del 1994, del Tribunale Penale Internazionale per il Ruanda. Tale corte internazionale, creata con l'intento di giudicare i più alti responsabili dei crimini commessi sul territorio ruandese dal 1 gennaio al 31 dicembre 1994, non solo contribuì enormemente allo sviluppo del diritto penale internazionale, ma soprattutto diffuse l'idea che gli autori di crimini efferati quali il genocidio non potessero rimanere impuniti.

Nel corso della loro attività, entrambe le corti si trovarono a dover giudicare personalità di alto livello accusate di aver commesso i più spietati crimini internazioni, quali il Primo Ministro del governo ruandese durante il genocidio Jean Kambanda, e l'attuale Presidente del Sudan, Omar Hassan Al-Bashir.

Se per il Ruanda però, sulla base dei risultati concreti ottenuti in questi anni, anche e soprattutto grazie al contributo di efficienti sistemi giudiziari nazionali, è lecito e corretto parlare di una "giustizia post-genocidio" che vede puniti i principali responsabili di quanto successo nel 1994, lo stesso non si può dire per gli autori dei crimini internazionali commessi in Darfur, i quali rimangono tuttora a piede libero. Nonostante i due mandati di arresto per crimini di guerra, crimini contro l'umanità, e perfino crimini di genocidio, recentemente emessi dalla Corte Penale Internazionale, il Capo di Stato sudanese Al Bashir non è ancora stato catturato, al contrario, rimane libero di viaggiare e intrattenere relazioni economiche con stati come la Cina, i quali, senza timore di conseguenza alcuna, si rifiutano di arrestarlo.

Ancora una volta dunque, come denuncia apertamente l'attuale procuratore della Corte Penale Internazionale, il silenzio e l'immobilismo del Consiglio di Sicurezza delle Nazioni Unite rendono tollerabile nel mondo il perdurare di crimini di gravità internazionale. Senza una netta inversione di rotta, la situazione in Darfur non accennerà a cambiare. Per quanto tempo ancora rimarranno impuniti i responsabili dell'ennesimo massacro africano, definito comunemente come la crisi umanitaria più grande al mondo?

Introduction

Less than ten years after the terrible massacre that took place in Rwanda in 1994 and the subsequent UN commitment to ensure that similar atrocities would no longer occur in the future, the African region of Darfur is now living almost the same situation as Rwanda since 2003. Hundreds of thousands deaths and displaced people, frequent episodes of rape and torture against civilians, that is what happened in Rwanda twenty years ago and what has occurred again in the region of Darfur, in Western Sudan, in the last ten years.[1]

"Rwanda and Darfur: the International Debate on Prevention and Repression of the Crime of Genocide" aims at focusing on two contemporary examples of mass exterminations, which have occurred in the African continent.

In both cases, governments and UN institutions proved mostly unwilling to label those atrocities with their rightful name, genocide.[2]

Within the international community, a long debate took place on this subject matter. Nevertheless, as it will be analyzed, instead of discussing for so long on whether the crimes occurring in Rwanda and Darfur amounted to genocide or not, the international community should have done more to halt those slaughters of innocent civilians, yet failed to do so.

In order to better understand the legal meaning of the international crime of genocide and the obligations a similar definition imposes upon states, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, will be taken into consideration. Despite the unquestionable merits of such a text, the Convention, as it will be seen, is not

[1] T. PIIPARINEN, *Reconsidering the Silence over the Ultimate Crime: a Functional Shift in Crisis Management from the Rwandan Genocide to Darfur,* in *Journal of Genocide Research,* 2007, pp. 71-73.

[2] Ibid., p. 78.

immune to critics. Recent international case law has frequently attempted to fill some of the omissions and limitations concerning the text of 1948.[3]

Subsequent chapters will be dedicated to the analysis of the situations in Rwanda and Darfur.

After having examined the background and causes that led to the terrible massacres in both places, the attention will be focused on the international debate concerning the use of the word "genocide".

As it will be seen, despite the inadequacy of international responses, both in prevention and repression of those atrocities, of considerable importance was the institution of two international tribunals, the *Ad Hoc* International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), aiming at the prosecution of perpetrators of hideous crimes there committed. Although not flawless, those international courts have not only significantly contributed to the improvement of international criminal justice, they have also, the ICTR in particular, spread the idea that those responsible for serious international crimes could not remain unpunished.[4]

After having examined some among the most famous and important cases brought before the ICTR and the ICC, including the indictments against the Prime Minister of Rwanda at the time of the genocide and the current Sudanese President, an overlook to the nowadays situation in both places will be provided.

[3] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* second edition, 2009, UK, Cambridge University Press, p. 119.

[4] A. CASSESE, *Cassese's International Criminal Law*, third edition, 2013, Oxford University Press, UK, p. 20.

<u>Chapter I:</u> Genocide in international law

CONTENTS:

1. First steps towards the drafting of the Convention of 1948

In order to determine whether the crime of genocide actually took place in Rwanda and Darfur, it is necessary to analyze the text that best defined this particular crime in legal terms. The Convention on the Prevention and Punishment of the Crime of Genocide, one of the first United Nations Conventions concerning humanitarian issues, was adopted by the UN General Assembly on 9 December 1948 in response to the atrocities committed during World War II. The Convention became fully operational on 12 January 1951.[5]

Historically, episodes of genocide have always existed. Despite the gravity of such a crime however, they have gone unpunished. The reason for this is to be found in the principle of State Sovereignty. According to such an historical principle, "what went on within the borders of a sovereign State was a matter that concerned nobody but the State itself".[6] Great massacres occurring in a country were thus essentially a matter of national domestic jurisdiction.

Yet the problem was that, most of the time, genocide and other mass atrocities were committed under the direction or at least with the complicity of the state where they took place. As an obvious consequence, prosecution of perpetrators of genocide was extremely rare.[7]

It is only at about the end of the First World War, with the development of international human rights law, that the international community began imposing obligations upon states and consolidating fundamental rights to individuals. In this way, international protection of human rights ends up prevailing over the principle of State Sovereignty. Individuals, being them State

[5] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 3.
[6] Ibid., p. 2.
[7] Ibid., pp. 1-2.

officials or common citizens, while breaching human rights obligations, could be punished under international law.[8]

As it will be seen hereafter, however, even when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the criminalization of perpetrators of genocide at the international level proved far from immediate. It is only in the early 1990s that, with the establishment of the two *Ad Hoc* International Criminal Tribunals by the UN Security Council, things changed. It was indeed the first time in history that international courts were created in order to try those responsible for genocide and other international crimes.[9] Until that time, however, perpetrators of the so-called "core-crimes" continued to be prosecuted by national criminal jurisdictions. Criminal laws of a state may be applied whenever the criminal behaviour has a specific link with the state in question. The most traditional jurisdictional links are that of territoriality and active nationality. According to the first criterion, a state may apply its laws whenever a criminal act is taking place in its territory. With regard to the criterion of active nationality instead, national criminal laws are applicable even extraterritoriality, when a national of the prosecuting state has committed an offence abroad. Yet, as already said before, being international crimes generally perpetrated with the complicity, or at least the acquiescence of the authorities of the state, domestic prosecution was extremely rare.[10]

Moving back to the years which preceded the adoption of the Convention on Genocide, it is in the early 1940s that a Polish-Jewish lawyer named Raphael Lemkin, being aware of the massacre of the Armenians by the Ottoman Empire first and of the extermination of the Jews and other minorities by the Nazis after, tried to find an appropriate term to define such horrible crimes[11], crimes that

[8] Ibid., p. 2.
[9] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 20.
[10] Ibid., p. 271.
[11] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 29.

according to the then Prime Minister of the United Kingdom Winston Churchill were still "without a name".[12]

Classifying an international crime against a specific group of people with the name "genocide" is in fact relatively recent. It is only in his 1944 work, *Axis Rule in Occupied Europe*, that Lemkin coined the term. He was at that time working hard to find out legal norms to punish the crime.

"Genocide" is a neologism made up of two words. The first one is *genos*, a greek term meaning race, nation or tribe; the second one is *caedere*, which means to kill in Latin.[13] The definition he gave of genocide was the following:

> "[A] co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group".[14]

Right from these few lines, some important concepts concerning the specificities of the crime of genocide emerge. Raphael Lemkin states that , for a genocide to occur, crimes have to be directed against a particular national group, not a group in general. Moreover, he introduces the concept of the intent, while committing the crime, to annihilate the group itself. As it will be seen hereafter, such a specific intent will turn out being one of the most distinguishing aspects of the

[12] L. KUPER, *Genocide, Its Political Use in the Twentieth Century,* New Haven: Yale University Press, 1981, p. 12. W. A. SCHABAS refers to it in *Genocide in International Law, op. cit.,* p. 17.
[13] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 29.
[14] R. LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress,* Washington: Canergie Endowment for World Peace, 1944, p.79. W. A. SCHABAS refers to it in *Genocide in International Law*, op. cit., p. 29.

notion of genocide as defined in the future Convention. Lastly, he does not classify genocide only as a physical crime. Acts aimed at destroying culture and livelihood of a national group as well are considered by Lemkin acts of genocide.[15]

In his work *Axis Rule in Occupied Europe*, a text containing laws and decrees of the Axis powers for the government of occupied areas, Lemkin introduces significant thoughts that would forerun future Resolutions of the UN General Assembly. Lemkin realizes that international legal instruments need to be revisited, in order to include the new notion of genocide. He urges also for the prohibition of future genocides in time of peace or war and for the criminal prosecution of perpetrators of such a crime.[16]

Thus the concept of genocide started to circulate within the public opinion and two years later, in November 1946, the three States of Cuba, India and Panama proposed to the UN General Assembly a draft Resolution, asking for genocide to be declared an international crime.

Resolution 96 (I), adopted on 11 December 1946 unanimity,[17] affirms that "genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices [...] are punishable."[18] How to correctly punish perpetrators of genocide is not yet specified and any reference to universal jurisdiction is omitted. Anyway, Resolution 96 (I) is quite exhaustive and it properly anticipates most of the norms of the future Convention.

First of all, while Lemkin talked about committing genocide over only a national group of people, Resolution 96 (I) includes more groups to the list. It asserts that "many instances of such crimes of genocide have occurred when racial, religious,

[15] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 30.
[16] Ibid., pp. 31-34.
[17] Ibid., p. 55.
[18] UN General Assembly Resolution 96(I), December 11, 1946.

political and other groups have been destroyed, entirely or in part".[19] Moreover, stating that genocide is a crime under international law, it specifies for the first time that there is no distinction between private citizens and government officials committing genocide. They have to be punished equally.[20]

In the text of Resolution 96(I) a direct call is made to member states. They are asked to "enact the necessary legislation for the prevention and punishment of the crime" and to co-operate internationally in order to reach this goal more effectively.[21]

At the end of the text stands another fundamental request, that is "drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly"[22].

2. The Convention on the Prevention and Punishment of the Crime of Genocide

2.1 The Convention and its unquestionable merits

Notwithstanding its importance, the text of 1946, being a Resolution of the General Assembly, is not a source of binding law. In this respect it urges for the provision of a proper convention on the subject.[23]

The drafting of the international treaty known as the Convention on the Prevention and Punishment of the Crime of Genocide thus began. The Convention was then adopted on 9 December 1948 and put into force in January 1951.[24] Lemkin himself actively took part to the preparatory work as a consultant to the Secretary-General as well.[25]

[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 56.
[24] Ibid., p. 3.
[25] Ibid., p. 29.

With the last ratification of the state of San Marino on November 8, 2013, 144 states, out of a total of 193,[26] are members of the Convention.[27]

The International Court of Justice (ICJ), the primary judicial branch of the United Nations, in its advisory opinion on reservations to the Genocide Convention stated that:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a 'crime under international law' [...].The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[28]

Although not having expressed it directly, with this statement the ICJ considered the prohibition of the crime of genocide as a customary international norm.[29] The recent case law tended to confirm such a consideration. As the *Ad Hoc* International Criminal Tribunal for Rwanda (ICTR), the international court established by the United Nations Security Council in 1994, affirmed in one of its judgments, "the Genocide Convention is undeniably considered part of customary international law".[30]

Furthermore, nowadays the prohibition of genocide is generally considered as a *jus cogens* norm as well, with this term meaning a principle of international law that is accepted by the whole international community of states as a peremptory norm, which prevails both over treaties and customs. Besides genocide, *jus*

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[26] See: http://www.un.org/en/members/growth.shtml#text (accessed in December 2013).
[27] See: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (accessed in December 2013).
[28] Reservations to the Convention on the Prevention and punishment of the Crime of Genocide (Advisory Opinion), May 28, 1951. ICJ Reports 16, p.23. W. A. SCHABAS refers to it in *Genocide in International Law,* op. cit., p. 3.
[29] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 4.
[30] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, para. 495. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (accessed in October 2013).

cogens generally include the prohibition of wars of aggression, torture, slavery, racial discrimination and *apartheid* as well.[31]

As the ICJ affirmed in 2006, "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[32] Such a consideration was subsequently reaffirmed by the Court the following year, when it stated that "the norm prohibiting genocide was assuredly a peremptory norm of international law *(jus cogens)*".[33]

Although not being immune to critics, as it will be seen in the following paragraph, the Convention of 1948 has several noteworthy merits, the one of having provided a careful legal definition of the crime of genocide amongst all.

In Article I stand two significant concepts. First of all, the treaty makes it clear for the first time that genocide could be committed both in time of war or in time of peace, diversifying it from other crimes.[34] Moreover, Article I reiterates a point already mentioned before, while focusing on Resolution 96 (I). Being genocide a crime under international law, contracting parties have the duty to prevent and punish such a crime.[35]

The following Article is very important as well, especially because of the characterization it made of the crime of genocide.

For an international crime to occur, both objective and subjective elements are needed. In criminal law, the prosecution must prove the existence of specific wrongful acts being committed (*actus reus* or objective element), as well as the

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[31] C. FOCARELLI, *Diritto internazionale I. Il sistema degli Stati e i valori comuni dell'umanità*, 2a ed., Padova, Cedam, 2012, p. 213

[32] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, International Court of Justice, February 3, 2006, Judgment, para. 64. See: http://www.icj-cij.org/docket/files/126/10435.pdf (accessed in January 2014).

[33] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, February 26, 2007, Judgment, para. 161. See: http://www.icj-cij.org/docket/files/91/13685.pdf (accessed in January 2014).

[34] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. I.

[35] Ibid., Art. I.

accused person's intentional wish to commit similar offences (*mens rea* or subjective element).[36]

Article II of the Convention on Genocide affirms that a crime could amount to genocide when the offences are one or more among the following: "killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group"[37].

Concerning the *mens rea*, in the specific of a crime of genocide, the notion of intent as defined in the Rome Statute of the International Criminal Court, does not suffice. According to the latter, "a person has intent where, in relation to conduct, that person means to engage in the conduct; in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events".[38]

For a genocide to occur, a specific intent, commonly defined as *dolus specialis*, is also required. As Article II of the Convention on Genocide specified, acts have to be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[39]

While defining the notion of the *dolus specialis*, the above-mentioned ICTR affirmed that such a specific intent "is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged".[40]

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[36] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 172.

[37] Convention on the Prevention and Punishment of the Crime of Genocide December 8, 1948, Art. II (a) (b) (c) (d) (e).

[38] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 30 (2).

[39] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. II.

[40] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, para. 518. See:

The International Commission of Inquiry in Darfur, established by the UN Security Council in 2004 to investigate the crimes which were occurring in the African region of Darfur at that time, confirmed such a statement, by affirming that genocidal intent "implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such."[41]

The International Law Commission described genocide's specific intent as "the distinguishing characteristic of this particular crime under international law".[42]

A clear wish to annihilate one of the four groups listed in the Convention is necessary for a genocide to occur, otherwise the crime would be of another type.[43]

According to the Italian jurist Antonio Cassese, such an "aggravated form of intent" does not necessarily require the material realization of the ultimate act. For a genocide to occur, "it is only necessary that the perpetrator harbor the specific intent to destroy the group while carrying out one of those acts, regardless of whether by accomplishing the act the intended ultimate objective is achieved".[44]

Being the specific intent a "mental factor which is difficult, even impossible, to determine",[45] as it will be better seen in the following paragraph, the ICTR

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http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (accessed in January 2014).

[41] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 491.

[42] Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May - 26 July 1996, p. 87. W. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., p. 261.

[43] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 260.

[44] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 119.

[45] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, para. 523. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (accessed in January 2014).

jurisprudence significantly contributed to clarify the way to identify the proof of the subjective element.

In Article III stand the punishable acts, that are not only genocide, but also other forms of participation such as conspiracy, direct and public incitement, attempt and complicity.[46] These so-called "inchoate offences" are of particular importance due to the fact that repressing them could prevent a genocide to occur.[47]

Article IV focuses instead on people who commit genocide and have to be punished, no matter if they are constitutionally responsible rulers, public officials or private individuals.[48] Here the Convention continues what previously affirmed Resolution 96 (I). A defense of official capacity is unobjectionable to a charge of genocide. Being genocide a crime most of the time committed by people who are in power or at least with complicity of them, Article IV is of major importance. Future *Ad Hoc* International Criminal Tribunals will add another revolutionary prohibition, the defence of superior orders.[49]

The following Article is about contracting parties obligations. They "undertake to enact […]the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III".[50] States are free to decide how to punish criminals. The Convention simply states that a penalty should be effective. It will be seen later that the "application or fulfillment of the present Convention […] shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[51]

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[46] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. III (a) (b) (c) (d) (e).
[47] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 308.
[48] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. IV.
[49] Statute of the International Criminal Tribunal for Rwanda, November 8, 1994. Art 6 (3).
[50] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. V.
[51] Ibid., Art. IX.

Article VI concerns jurisdiction. The Convention contemplates trials both before domestic and international courts. "Persons charged with genocide […] shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[52] As it will be seen in the following paragraph, such an article arose several critical approaches among jurists and commentators.

Article VII refers to the concept of extradition. Genocide and other acts list in Article III could not be compared to a political crime and, consequently, extradition could not be denied to a criminal. Thus states member to the Convention should grant extradition with reference to their domestic laws and treaties.[53]

Subsequently, the Convention expresses the chance for contracting parties to address to competent organs of the United Nations, while they consider it appropriates in order to prevent and suppress acts of genocide.[54] These organs are principally the General Assembly, the Security Council and the Economic and Social Council.

Article IX concentrates essentially on the role of another organ of the United Nations, that is the International Court of Justice. This organ has the power to evaluate controversies between contracting parties concerning interpretation, application or fulfillment of the Convention. The Court could intervene as well as far as State responsibility for genocide and the other acts is concerned.[55]
Fourteen states have called upon the ICJ, charging another state of having committed genocide.[56]

Following Articles are "protocolar clauses".[57] They apply to more technical issues, such as the authentic languages of the Convention;[58] aspects concerning

[52] Ibid., Art. VI.
[53] Ibid., Art. VII.
[54] Ibid., Art. VIII.
[55] Ibid., Art. IX.
[56] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 499.

signature, ratification and accession to the treaty;[59] application of the latter to "sovereign territories"[60] and so on.

At the time of the adoption of the Convention, two Resolutions were released as well, one asking for an international judicial organ to be created,[61] the other inviting states parties which administer dependent territories to extend the Convention to them as well.[62]

2.2 Critical and Debatable approaches towards the Convention

As already pointed out before, despite the fundamental contribution the Convention of 1948 gave to the legal definition of the crime, the text is not immune to critics.

First of all, acts of genocide have not always been completely prevented. There is no doubt that what happened in Rwanda in 1994 could have been avoided, or at least downsized.[63] As it will be seen, while analyzing the specific situation of the African country, an inclusion of hate propaganda in the punishable acts listed in Article III might have prove to be an effective instrument of prevention.

Secondly, perpetrators of genocide have not always been correctly punished. The first judgment for counts of genocide was delivered only in 1998, when the *Ad Hoc* International Criminal Tribunal for Rwanda (ICTR) condemned the Democratic Republican Movement politician Jean-Paul Akayesu.[64]

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[57] Ibid., p. 593.
[58] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. X.
[59] Ibid., Art. XI.
[60] Ibid., Art. XII.
[61] Study by the International Law Commission of the Question of an International Criminal Jurisdiction, UN General Assembly Resolution 260 B (III), December 9, 1948.
[62] Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly Resolution 260 C (III), December 9, 1948.
[63] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 652.
[64] See: http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml (accessed in October 2013).

The Convention fails to make a list of the measures to prevent such a crime and of the penalties to ascribe to perpetrators. Art. I affirms that "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish",[65] but it did not specify how.

Moreover, recent expansive interpretations of Article I of the Convention arose new critical debates. It is in its judgment delivered on 26 February 2007 in the Bosnia v. Serbia and Montenegro case that the International Court of Justice placed a broad interpretation on the explicit obligations concerning states to prevent and to punish the crime of genocide.[66] On the opinion of the Court, under Article I of the Convention, contracting states were also obliged to refrain from directly engaging in genocide.

> "Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide".[67]

With such a statement, the Court established a "duality or responsibility" for genocide enshrined in the text of the Convention. According to the ICJ, for a same punishable act, both individual criminal liability and state responsibility may coexist.[68]

A similar view has been largely criticized by commentators in the past years.

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[65] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. I.

[66] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 112.

[67] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, February 26, 2007, Judgment, para. 166. See: http://www.icj-cij.org/docket/files/91/13685.pdf (accessed in January 2014).

[68] Ibid., para. 163.

On the opinion of the Italian Professor Paola Gaeta, such a consideration goes against the historical foundations of the Convention. According to her,

> "under the Genocide Convention states are mandated to prevent the commission of genocide as an instance of individual criminality, regardless of whether these acts are committed by state officials belonging to any state. To contend, as the Court did, that the Genocide Convention also obliges states themselves not to commit genocide through their organs is at odds with the historical legacy of Nuremberg that inspired its drafters: what the Convention wanted to achieve was the enforcement, through the threat and imposition of national criminal sanctions, of fundamental values of international law regardless of whether they are violated by individuals acting on behalf of a state".[69]

According to most, in fact, the text of 1948 essentially provides for criminal liability of individuals.[70] As Professor Gaeta underlines, it is necessary to differentiate between criminal and state responsibility. According to her, "states are certainly bound not to commit genocide, but in terms not identical to those embodied in the Genocide Convention".[71] The obligation upon states not to commit genocide arises in fact from customary international law.[72]

How is it therefore possible to determine that a state is responsible for genocide? According to most convincing view, "since states are abstract entities and have a collective dimension, it is not unrealistic or absurd to maintain that they can commit genocide only when there is a policy or plan against a targeted group".[73]

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[69] P. GAETA, *On What Conditions Can a State Be Held Responsible for Genocide?*, in *European Journal of International Law*, 2007, p. 635

[70] A. CASSESE, *Cassese's International Criminal Law*, op. cit., pp. 112-113.

[71] P. GAETA, *On What Conditions Can a State Be Held Responsible for Genocide?*, in *European Journal of International Law*, op. cit., p. 643.

[72] Ibid., p. 642.

[73] Ibid., p. 643.

Whilst the requirement of a genocidal state plan or policy appears to be necessary while determining state responsibility for genocide, things are different with regard to criminal liability of individuals.

Article II of the Convention on Genocide does not expressly require the existence of such a genocidal state policy. Both *Ad Hoc* Tribunals did confirm this view. Although having recognized that the existence of such a plan is to be considered as a useful element while determining genocidal intent, along with others that will be hereafter analyzed, according to them such a characteristic is not strictly necessary.[74] Nevertheless, as the ICTR affirmed, "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation".[75]

On the opinion of the American Professor William Schabas and other distinguished commentators, a genocidal policy or at least some form of collective violence is necessary for a genocide to occur. According to them, it would be unrealistic for a single individual acting alone to "destroy a group as such".[76] In response to this, noteworthy is the observation Cassese made:

> "Even admitting that historically genocide has been perpetrated within a genocidal context, still it is theoretically possible that a lone perpetrator may realistically aim at the destruction of a targeted group in the absence of such context. An example is [...] that of the individual who possesses a weapon of mass destruction. Another example is the attack, by a single individual, against the leadership of the group, that may realistically endanger its existence, at least in part".[77]

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[74] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 123.

[75] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Case No. ICTR 95-1-T), Judgment, May 21, 1999, para. 94. See: http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/990521_judgement.pdf (accessed in January 2014).

[76] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 124.

[77] Ibid., p. 124.

Moving forward to Article II, here we find, on the opinion of the most, the principal deficiency of the Convention.[78] By stating that "in the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group […]"[79] and subsequently making a list of the acts to be considered as genocide, it puts a limit on the number of groups protected by the Convention. Contrary to Resolution 96(I), this Article does not end the list by referring to "analogous groups". A more precise and restrictive solution was preferred.

Frequent were the attempts to enlarge the Convention definition, yet subsequent critical responses stopped them. There were some who would like to embody political, cultural, social and economic groups to the list as well.

Especially concerning the inclusion of political groups, a long debate between states took place. There were those, such as the Soviet Union, who were against including such groups to the list because they believed that political crimes, having nothing to do with concepts of race or tribe derived from the term *genos*, were not be considered as genocide.[80] Moreover, they applied to the fact that, talking about genocide, the criterion for belonging to a group was objective, not subjective. As a consequence of this statement, others rightly replied that an analogue exclusion could be made for religious groups as well. But the Soviet Union steadily replicated that: "in all known cases of genocide perpetrated on grounds of religion, it had always been evident that nationality or race were concomitant reasons".[81] Rather, on the opinion of the most, the hostility to include political groups to the list was a matter of a Soviet stratagem.[82] During the Stalin era in fact, several political opponents where transferred to Soviet labor camps, better known as Gulag camps, and forced to live in extremely harsh

[78] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 117.
[79] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. II.
[80] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 156.
[81] UN Doc. A/C.6/SR.74 (Morozov, Soviet Union), October 17, 1948. W. A. SCHABAS refers to it in *Genocide in International Law,* op. cit., p. 157.
[82] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 160.

conditions.[83] The Soviet will not to include political groups to the list seems therefore clear.

Contrary to Soviet Union, other states such as Bolivia, The Netherlands, Ecuador and initially also the Us, were not of the same opinion. They believed that, by excluding these groups to the list, political opinions might be used by a state as a pretext to commit genocide over a racial or religious group.[84]

But in the end, an important argument in favor of the exclusion prevailed over the others. By quoting the words of the above-mentioned William Schabas, "the broader and more uncertain the definition, the less responsibility states will be prepared to assume."[85] Several countries in fact ended up agreeing that an extension of the definition might prevent states from acceding to it and inhibit ratification.[86]

However, the question remains whether the choice not to include political groups to the list is actually not a matter of great powers political convenience.

The subsequent case law sometimes preferred to widen the definition of protected groups. In the Akayesu case for instance, the ICTR Trial Chamber affirmed that acts of genocide could be committed against any "stable and permanent groups".[87] While describing their characteristics, the Trial Chamber affirmed that "membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and irremediable manner".[88] Yet a similar view, aiming at enlarging the definition enshrined in the Convention, appeared subsequently

[83] See: http://gulaghistory.org/nps/onlineexhibit/stalin/ (accessed in October 2013).
[84] UN Doc. A/C.6/SR.74 (Correa, Equador). W. A. SCHABAS refers to it in *Genocide in International Law,* op. cit., p. 158.
[85] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 10.
[86] UN Doc. A/C.6/SR.69 (Amado, Brazil); UN Doc. A/C.6/SR.69 (Raafat, Egypt); UN Doc. A/C.6/SR.69 (Maùrtua, Peru); UN Doc. A/C.6/SR.69 (Pérez-Perozo, Venezuela). October 7, 1948. W. A. SCHABAS refers to it in *Genocide in International Law,* op. cit., p. 156.
[87] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, para. 516. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (accessed in January 2014).
[88] Ibid., para. 511.

unconvincing.[89] As it will be better seen in the specific chapter concerning the situation in Rwanda, the ICTR eventually applied a subjective approach in order to determine whether a group of people did belong or not to one of the protected groups listed in the Convention.[90]

Another debatable issue concerns the difficulty in determining the *dolus specialis*. As already mentioned previously, in the Akayesu case the Trial Chamber affirmed that intent "is a mental factor which is difficult, even impossible to determine", adding that "in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact".[91] Among the factual circumstances that can be indicative of a genocidal intent, the Trial Chamber considered the nature and the scale of the atrocities, the deliberate and systematic attacks against specific victims of a group, the existence of a state plan or policy, as well as the repetition of discriminatory acts and speeches.[92]

Moreover, as it has been seen, Article II of the Convention focuses on a whole or partial destruction of a group. Yet, what it really means with the term "in part" is in the text of 1948 not specified. William Schabas found out four different ways to consider this aspect. First, the Convention could have meant a partial result in destroying the group. Secondly, it could have interpreted the term quantitatively, as a "substantial" part of a whole group. Thirdly, it could have thought about it qualitatively, meaning a "significant" part. Lastly it could have been seen as a geographical part. Being the Convention not explicitly clear on this point, up to now diverse and subjective have been the interpretations.[93]

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[89] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 120.
[90] Ibid., p. 121.
[91] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, para. 523. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (accessed in October 2013).
[92] Ibid., paras. 523-524.
[93] Ibid., pp. 277-286.

Both *Ad Hoc* Tribunals for instance, tend to prefer the quantitative solution of the "substantial" part to the others.[94]

Another long-debated and criticized aspect concerns the exclusion of cultural genocide from the acts to be punished in accordance with the text of 1948. Article III of the Convention on Genocide, as it has already been seen, enumerates five categories of genocidal acts. All of them involve some kind of physical or biological destruction.[95]

In his work, *Axis Rule in Occupied Europe*, Raphael Lemkin did provide the notion of cultural genocide. More precisely, he believed in "the existence of techniques of genocide in various fields, […] including political, social, cultural, economical, biological, physical, religious and moral genocide".[96]

The initial draft of the Convention, the so-called Secretariat Draft, maintained the notion of cultural genocide. According to it, criminal acts arose to genocide when, among other things, they aimed at the destruction of the specific characteristics of one of the protected groups.[97]

This could happened through:

"forcible transfer of children to another human group; forced and systematic exile of individuals representing the culture of a group; prohibition of the use of the national language even in private intercourse; systematic destruction of books printed in the national language or of religious works or prohibition of new publications;

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[94] *Prosecutor v. Semanza* (Case No. ICTR 97-20-T), Judgment and Sentence, May 15, 2003, para. 316; *Prosecutor v. Simba* (Case No. ICTR 2001-76-T), Judgment and Sentence, December 13, 2005, para. 405. W.A. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., p. 279.

[95] G. VERDIRAME, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals,* in *International and Comparative Law Quarterly,* 2000, p. 594.

[96] R. LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress,* Washington: Canergie Endowment for World Peace, 1944, pp. 89-90. L. ZAGATO refers to this in *Il Ritorno del 'Genocidio Culturale' nel Diritto Internazionale: Osservazioni Introduttive*, 2011, p. 2. See: http://www.unive.it/nqcontent.cfm?a_id=147894 (accessed in January 2014).

[97] Convention on the Prevention and Punishment of the Crime of Genocide, the Secretariat Draft, (UN Doc. E/447), May 1947, Art. I, 3. L. ZAGATO refers to this in *Il Ritorno del 'Genocidio Culturale' nel Diritto Internazionale: Osservazioni Introduttive*, op. cit., p. 3.

systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship".[98]

Despite initial support, more and more states gradually turned out believing that the inclusion of cultural genocide among the acts to be punished as genocide would have gone beyond the scope of the Convention. The final text of 1948 therefore excluded such a notion.[99]

The only trace left lays in Paragraph (e) of Article III, where the Convention states that "forcibly transferring children of the group to another group"[100] amounts to genocide. Although the International Law Commission treated such a paragraph as belonging to biological genocide,[101] on the opinion of the most it should be considered as an expression of cultural genocide. As Schabas affirmed, "presumably, when children are transferred from one group to another, their cultural identity may be lost. They will be raised within another group, speaking its language, participating in its culture, and practicing its religion".[102]

According to Article VI, "persons charged with genocide […] shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".[103]

With this statement the Convention failed to recognize universal jurisdiction. Furthermore, it makes a step back to the detriment of the achievements reached six years before, at the Nuremberg Trial. In that context, the International

[98] Ibid., Art. I, 3 (a) (b) (c) (d) (e).

[99] L. ZAGATO, *Il Ritorno del 'Genocidio Culturale' nel Diritto Internazionale: Osservazioni Introduttive*, op. cit., p. 5.

[100] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. III (e).

[101] Report of the Commission to the General Assembly on the Work of Its Forty-First session, UN Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), June 9 and 22, 1989, p. 102, para. 4. W. A. SCHABAS refers to this in *Genocide in International Law, The Crime of Crimes,* op. cit., p .201.

[102] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p .203.

[103] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. VI.

Military Tribunal made up of the victorious Allied governments after the end of the Second World War, could at last bring Nazi war criminals to trial, putting an end to the historical right of no intervention.[104] In Article VI of the Convention of 1948 instead, a reference to an international penal tribunal is truly made, but it comes only secondly to domestic prosecution. By stating that persons charged with genocide shall be tried by territorial courts, the Convention raised one of its main flaws. As it has already been seen, most of the time are territorial state authorities, or individuals supported by them, which commit acts of genocide. National prosecutors will indeed be inevitably reluctant to prosecute people charged with genocide. Moreover, at the time of the drafting of the Convention, no international criminal tribunal existed.[105]

The International Criminal Court (ICC), whose jurisdiction concerns all international crimes, was created exactly only 50 years after the adoption of the Convention, on 17 July 1998, when the Rome Statute was adopted.[106] The fact remains, however, that the court can intervene only when national tribunals do not want or are not able to condemn international crimes as genocide.[107]

Nevertheless, of great importance was the institution of other two international courts, classified as *Ad Hoc* Tribunals, because of their limited but precise sphere of action. They were created by a resolution of the UN Security Council, respectively in 1993 and 1994, in order to try those criminals responsible for the massacres that were happening in the territories of the former Yugoslavia and Rwanda.[108] We will have the opportunity to return to this point later, especially while concentrating on the Rwandan genocide and on the achievements reached by such a tribunal.

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[104] See: http://www.ushmm.org/wlc/en/article.php?ModuleId=10007069 (accessed in October 2013).
[105] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 113.
[106] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 107.
[107] Ibid., p. 400.
[108] Ibid., pp. 112-114.

3. Genocide compared to other international crimes

The Statute of the Nuremberg Tribunal has the merit of having formulated a classification of the international crimes. Two main aspects characterize such a notion. The first noteworthy feature is that they could be undertaken both by private individuals or state officials. Secondly, they normally possess a double dimension. They constitute criminal acts both in domestic legal system and in international customary rules and treaties, in that they undermine universally recognized human rights values.[109]

Up to now, they have been divided into war crimes, crimes against humanity and crimes against peace.[110] Concerning genocide, there are those who believe that such a crime occupies a special place by itself, and other who consider it as a subset of crimes against humanity.[111]

First of all, it has become a common view to differentiate genocide from war crimes. In the latter in fact, a nexus with an armed conflict is necessary.[112] On the contrary, according to the Convention of 1948, a genocide could occur both in time of peace and of war.

While genocide is an international human rights law concern, war crimes are subject to international humanitarian law.[113] The four Geneva Conventions are the most important treaties concerning rules of warfare. The aim of these instruments is principally to protect civilians during an armed conflict.[114]

Examples of war crimes are acts such as torture, sexual assaults, pillage and devastation not justified by military necessity.[115]

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[109] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 37.
[110] C. FOCARELLI, *Diritto internazionale I. Il sistema degli Stati e i valori comuni dell'umanità*, op. cit., pp. 364-365.
[111] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 12-15.
[112] Ibid., p. 7.
[113] Ibid., p. 7.
[114] See: http://www.un.org/en/holocaustremembrance/EWG_Holocaust_and_Other_Genocides.pdf (accessed in October 2013).
[115] Ibid.

The second subset of international crimes concern crimes against peace, also known as crimes of aggression.[116] The Charter of the International Military Nuremberg Tribunal described them as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy".[117]
It is correct to say, therefore, that crimes against peace, when not prevented in time, anticipate war crimes. Crimes against peace differ from genocide because the aim of the latter is not necessarily to trigger a war.

Problems come, as already said at the beginning of the page, when focusing on crimes against humanity.
Before the drafting of the Convention on Genocide of 1948, crimes against Jews were considered as crimes against humanity. The problem was that the Statute of the Nuremberg Tribunal stated that crimes against humanity could only be committed in time of war. Hence the necessity to formulate a specific Convention only for crimes of genocide, which could occur both in time of peace and in time of war, arose.[118] Nowadays however, customary international law recognizes that a nexus with an armed conflict is not needed anymore for crimes against humanity to occur. Both in the Statutes of the *Ad Hoc* Tribunals and of the ICC such a connection is indeed not required.[119]
According to the most recent definition, Article 7 of the Rome Statute defines crimes against humanity as acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[120] Among the acts to be considered as crimes against humanity, the

[116] C. FOCARELLI, *Diritto internazionale I. Il sistema degli Stati e i valori comuni dell'umanità*, op. cit., p. 381.
[117] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, August 8, 1945. Charter, Art. 6 (a).
[118] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 12.
[119] C. FOCARELLI, *Diritto internazionale I. Il sistema degli Stati e i valori comuni dell'umanità*, op. cit., p. 371.
[120] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 7.

Statute lists murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, and so on.[121]

This solution clearly stands as an "expanded" definition of genocide.[122]

True, both categories actually share at least three features. Firstly, both of them embody very serious offences aiming at attacking the most fundamental aspects of human dignity. Secondly, both genocide and crimes against humanity posses a systematic character and they do not constitute isolated events. Lastly, both of them are commonly carried out by state officials, or at least with some kind of involvement of the authorities.[123]

Yet, what differentiate one from the other, according to those who believe in the specificity of genocide?

The notion of the specific intent is of fundamental importance. For a genocide to occur, acts have to be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[124] This aspect helps to better understand a crime often confused with genocide, that is ethnic cleansing.

Such a term is relatively new, it consists in "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area".[125] Considered in the context of the conflicts in the former Yugoslavia, "ethnic cleansing has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults […]. Those practices constitute crimes against humanity".[126]

Whether it is true that both crimes could have the aim to eliminate a target group from a given area, the intent to destroy the group is the aspect that will

[121] Ibid., Art. 7. (a) (b) (c) (d) (e) (f) (g).
[122] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 12.
[123] A. CASSESE, *Cassese's International Criminal Law*, op. cit., pp. 127-128.
[124] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. II.
[125] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, May 27, 1994, para. 129 (55).
[126] Ibid., para. 129 (56).

differentiate genocide from ethnic cleansing. While the latter would in fact tolerate the existence of the group elsewhere, genocide would not.[127]

Moreover, the specificity of genocide is to be found also in the choice of the groups against which the crime is directed. Differently from crimes against humanity that could occur against "any civilian population",[128] for a genocide to occur a "national, ethnical, racial or religious group" needs to be targeted.[129]

Because of its specificity, genocide is commonly defined as the "crime of crimes". Such a term was first used by the Rwandan representative to the Security Council in 1994[130] and later quoted in one of the first judgments of the ICTR, the one against the Prime Minister Jean Kambanda.[131]

Despite this classification, according to Schabas:

> "since 1948, the law concerning crimes against humanity has evolved substantially. […] The obligations upon states found in the Genocide Convention now apply *mutatis mutandis*, on a customary bases, in the case of crimes against humanity. Therefore, the alleged gap between crimes against humanity and genocide has narrowed considerably".[132]

Nevertheless, on the opinion of the most, the fact of categorizing atrocities as crimes against humanity rather than as genocide, means to decrease the gravity

[127] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 234.
[128] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art.7(1).
[129] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. II.
[130] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 652.
[131] *Prosecutor v. Jean Kambanda* (Case No. ICTR 97-23-S), Judgment, September 4, 1998, para. 16. See: http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf (accessed in November 2013).
[132] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 14.

of the crime.[133] On Schabas' opinion, "the argument is not about the state of the law: it is one of symbolism and semantics".[134]

There will be the opportunity to discuss the matter further, while focusing on the situation in Darfur and the debatable choice the International Commission of Inquiry made in 2005, when it defined atrocities occurring in Darfur as crimes against humanity rather than genocide.[135]

[133] Ibid., p.653.
[134] Ibid., p. 15
[135] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, pp. 3-4 (Executive Summary).

Chapter II: Rwanda

CONTENTS:

1. Background and causes of the genocide

The staggering combination of speed and popular involvement is what makes the 1994 Rwandan genocide unique in history. In just one hundred days, up to one million people were murdered. Not only ordinary people killed strangers, but also friends, relatives and neighbors. It even happened that Hutu parents killed their own son because his wife was Tutsi, or that children of Hutu fathers killed their Tutsi mothers.[136] In order to better understand the origins and causes of such cruelty, we need to move back to Rwandan history prior to 1994.

Being Rwanda among the poorest countries in the world, with few natural resources and consequently no strategic importance, little is what we know about the history of this territory, suddenly become unfortunately famous because of the terrible genocide.[137]

Historians wrote that Rwandan society has always been characterized by a rigid caste system. Hutu represented the majority of the population, followed by Tutsi and Twa.[138] The latter, a pigmy people representing just 1% of Rwandan inhabitants, have always been subservient to the other two groups. They are rarely mentioned by historians.[139]

Concerning Hutu and Tutsi, more is what we know. Around 1000 AD Hutu farmers , probably from the east, arrived in the country and soon became the dominant population. It is between the eleventh and fifteenth centuries that Tutsi herders came and conquered much of Rwanda territory. The latter, although representing only 10-14% of the population, were better organized and soon able to rule both Hutu and Twa militarily, politically and economically.

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[136] C. MIRONKO, *Igitero: Means and Motive in the Rwandan Genocide,* in *Journal of Genocide Research,* 2004, pp. 47-48.

[137] T. LONGMAN, *Placing genocide in context: research priorities for the Rwandan genocide,* in *Journal of Genocide Research,* 2004, p. 29.

[138] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* 2005, pp. 802-803.

[139] J. MUKIMBIRI, *The Seven Stages of the Rwandan Genocide,* in *Journal of International Criminal Justice,* 2005, p. 825.

Because of Tutsi superiority, a sort of antagonism between the two major groups has always existed.[140] But it will be seen hereunder how hatred increased, once Europeans from the late XIX century colonized the country.

Before colonialism, categories of Hutu and Tutsi were considered a socio-economic status rather than a concept of race. [141] Both groups shared the same language, religion and culture.[142] They acknowledged the same forefather: Kanyarwanda. Mobility between castes, although rare, was not impossible.[143]
Yet, concerning physical appearance, the two groups were quite different one from another. Tutsi were commonly tall and thin, with a fine nose, whereas Hutu people were shorter, with a flatter nose.[144] Anyway, being at that time mixed marriage and concubinage not unusual, these features were not always noticeable due to genetic mixing.[145]

Yet in 1894, with the arrival of German colonists, things changed. The latter controlled Rwanda indirectly through the existing Tutsi leaders, in that way increasing the opposition between the two groups. Furthermore, they gave birth to the 'Hamitic Myth', which considered Tutsi people as descendants of the ancient Egyptians. They thus recognized Tutsi as superior people, having nothing in common with Hutu, considered to be of Sub-Saharan African Bantu origins.[146]

From 1924 to 1962 the Belgians replaced the Germans. With the arrival of the new colonizers, the situation that Rwanda had to face got even worse. In order to make the ethnic distinction between the two groups more evident, the Belgians introduced a system of identity cards. The strange and objectionable

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[140] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., pp. 802-803.
[141] J. MUKIMBIRI, *The Seven Stages of the Rwandan Genocide,* in *Journal of International Criminal Justice,* op. cit., p. 826.
[142] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 125.
[143] J. MUKIMBIRI, *The Seven Stages of the Rwandan Genocide,* in *Journal of International Criminal Justice,* op. cit., pp. 825-826.
[144] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 125.
[145] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., p. 804.
[146] J. MUKIMBIRI, *The Seven Stages of the Rwandan Genocide,* in *Journal of International Criminal Justice,* op. cit., p. 825.

way to classify someone as Hutu or Tutsi was determined by the number of cows such a person held. Historians affirm that those with ten or more cows at the time of the 1933-34 census were Tutsi, whereas those with fewer were Hutu. The vast majority of the population turned out to be Hutu, followed by a 14% of Tutsi and just 1% of Twa. Concerning future generations, ethnicity of fathers would have prevailed over ethnicity of mothers. All that was achieved with this rigid division into fixed categories, which would have meant just a worsening of the situation in terms of Hutus and Tutsis' relations.

Tutsi, described as a superior race, rich and powerful, were initially favored by Belgians over Hutu. They were given the most important social tasks, to the detriment of the majority of the population, which was forced to live in conditions of inferiority and subordination.[147]

As the years passed, the Belgians changed their policy favoring Hutu people. In the late 1950s the latter were in fact able to reorganize themselves and increase their power. In 1957 a Hutu Manifesto was published by some Hutu intellectuals.[148] Tutsi were designated as foreign invaders, whose government was illegitimate. Hutu on the contrary were the native inhabitants of Rwanda, the only ones entitled to be in power.[149] Supported by Belgian colonizers, who started replacing Tutsi chiefs with Hutu, they triggered the terrible revolt of 1959 against Tutsi rivals. Thousands of Tutsi, to escape death, had to flee to neighboring countries.

Elections took place in 1960 and Gregoire Kayibanda became Rwanda's Hutu president. The independence of the country came on 1 July 1962.[150] Tutsi refugees demonstrated their opposition by launching attacks against Hutu in Rwanda. These invasions resulted unsuccessful. They rather increased Hutu

[147] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., pp. 806-808.
[148] Ibid., p. 809.
[149] Ibid., p. 820.
[150] Ibid., p. 809.

hatred. From 1959 to 1967 about 20,000 Tutsi were killed and another 200,000 forced to leave the country.[151]

In 1973 Juvénal Habyarimana became the new president. At least initially he seemed to accommodate to Tutsis' requests to end prosecution. But once these requests became more pressing and the role of the Tutsi-led Rwandan Patriotic Front (RPF) rebels in 1990s increased in military force, he changed his mind, strongly opposing everything that could undermine his position[152].

Rwanda with Habyarimana became a Hutu dictatorship. No social rights were ensured to Tutsi people. Moreover, they were expelled from public functions and public life.[153] What had happened to Hutu for so many years in the past, was now happening to Tutsi.

Initially, neighbors' countries such as Uganda, welcomed Tutsis' refugees who were fleeing from an hostile Rwanda. But their increasing presence over the years generated humanitarian, economic and political difficulties. It is in Uganda in 1987 that the above mentioned RPF was created by a group of refugees, whose aim was to return to their country. In 1990-1992 numerous attacks were launched by the RPF's army (the RPA). Hutu ultra-nationalists promptly replied by force.[154]

Faced with an unsustainable situation, Habyarimana signed the Arusha Accords with the RPF on 3 August 1993. Hutu nationalists strongly opposed the implementation of these agreements concerning a declaration of ceasefire, a creation of a multi-party government, and a return for Tutsi refugees back into the country and their subsequent integration into the Rwandan Hutu army.

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[151] A. J. KUPERMAN, *Provoking genocide: a revised history of the Rwandan Patriotic Front,* in *Journal of Genocide Research,* 2004, p. 63.
[152] Ibid., pp. 61-68.
[153] J. MUKIMBIRI, *The Seven Stages of the Rwandan Genocide,* in *Journal of International Criminal Justice,* op. cit., p. 831.
[154] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., pp. 811-812.

Events in neighboring Burundi further increased the resentment toward Tutsi. In October 1993 Hutu President of Burundi, Ndaday, was assassinated by a Tutsi-led militia.

Worried about the situation of profound instability of Rwanda, Habyarimana kept on implementing the accords. On 6 April 1994, however, his private plane was shot down, causing the death of everyone on board. Assassins are still not known. While Hutu immediately accused the RPA, historians now almost agree on the fact that the President was killed by some Hutu extremists.[155]

Although this assassination commonly marks the beginning of the massacres occurred in Rwanda, deeper causes lay behind the terrible genocide of 1994.

2. Rwandan genocide of 1994

As already mentioned above, individuals killed not only strangers, but also neighbors, friends and familiars.[156] A huge and various portion of the population participated in that state-organized extermination campaign. Alongside the armed militias stood any other category of individuals, from farmers to businessmen, involving ecclesiastics and NGO workers as well.[157]

Several historians have tried to find out reasons for such an hateful and broad mass participation. They commonly agree on the fact that the terrible genocide became possible because of the convictions, most often unfounded, that Hutu leaders imparted to the population.

In only three months about 800,000 Tutsi and between 10,000 and 30,000 moderate Hutu who refused to take part in the massacres, were killed. 11% of

[155] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., pp. 813-815.
[156] C. MIRONKO, *Igitero: Means and Motive in the Rwandan Genocide,* in *Journal of Genocide Research,* op. cit., p. 48.
[157] D. LI, *Echoes of violence: considerations on radio and genocide in Rwanda,* in *Journal of genocide Research,* 2004, p.10.

the Rwandan population died during those 100 days. Episodes of rape against women and torture were extremely frequent as well.[158]

Historical researches, principally based on interviews with Hutu prisoners, showed that genocide leaders proved perfectly capable of being obeyed by the population. They were able to spread among the country false reports concerning upcoming Tutsi attacks on Hutu. As during the revolution of 1959, enemies were defined as a minority of foreign invaders, who had nothing in common with the local majority, the only people entitled to rule the country.

A couple of events occurred prior to the genocide, President of Burundi's murder first and Habyarimana's assassination later, both contributed to spread the conviction of a possible Tutsi plan to recapture the country.

In a similar context, Hutu leaders were quickly able to escalate the events and make the population believe in an upcoming Tutsi-led extermination campaign against Hutu. Episodes of the past were thus brought into the present.

By so doing, Hutu leaders tried to get the message that killing, consisting in a form of self-defense rather than a criminal act, was not only conceivable but also legitimate.[159]

Rwanda was at that time the most densely populated state in Africa and one among the poorest countries in the world.[160] All this inevitably contributed to economic problems, such as land and food scarcity, with a subsequent increasing competition between Hutu farmers and Tutsi herders. Economic issues were frequently used by Hutu leaders to incite civilians to kill Tutsi rivals. Land of victims was promised to those who were able to kill Tutsi owners.[161] The promise

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[158] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., p. 816.

[159] L. A. FUJI, *Transforming the moral landscape: the diffusion of a genocidal norm in Rwanda,* in *Journal of genocide Research,* 2004, pp. 108-112.

[160] T. LONGMAN, *Placing genocide in context: research priorities for the Rwandan genocide,* in *Journal of Genocide Research*, op. cit., p. 37.

[161] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., pp. 817-818.

of a reward instead of a penalty for anyone who would have taken part in the mass slaughter, helped to further inspire and provoke the population.

Moreover, it is important to remember that very often people were driven to perpetrate killings under influence of alcohol and drugs.[162]

As already mentioned above, moderates Hutu who refused to take part in the massacres of Tutsi enemies were killed as well.[163]

Even the Hutu Prime Minister Agathe Uwilingiyamana was assassinated by Rwandan government's soldiers, only because of her refusal to support the mass slaughter of civilians. Ten Belgian peacekeepers who were giving her protection, were murdered as well.[164]

Rwandan Hutu citizens thus experienced a double fear: the threat of the possible Tutsi attacks and the threat of punishment for opposition to Hutu extremists. As a consequence of all this, killing other human beings gradually became tolerable and justifiable in such a context.[165]

Hutu leaders spread their genocidal message through radio and newspapers. By so doing they were able to reach the whole population.

Concerning incitements to take part in the massacres of Tutsi minority, enormous was the contribution of a semi-private radio station, known as Radio-Télévision Libre des Mille Collines (RTLM).

In July 1993 a group of Hutu extremists gave birth to their own popular station.[166] RTLM soon became the primary source of information for Rwandan population.[167] As it will be seen in more detail in the paragraph concerning

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[162] C. MIRONKO, *Igitero: Means and Motive in the Rwandan Genocide,* in *Journal of Genocide Research,* op. cit., p. 59.

[163] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., p. 801.

[164] See: http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml (accessed in November 2013).

[165] L. A. FUJI, *Transforming the moral landscape: the diffusion of a genocidal norm in Rwanda,* in *Journal of genocide Research,* op. cit., p. 100.

[166] Ibid., p. 104.

[167] D. LI, *Echoes of violence: considerations on radio and genocide in Rwanda,* in *Journal of genocide Research,* op. cit., p. 9.

judgments, Ferdinand Nahimana, one of the founders and directors of RTLM, was convicted by the ICTR for genocide on the basis of superior responsibility.[168] The Tribunal condemned him with a thirty-year sentence even if he did not take part in the killings and not even personally incited people to kill through his statements. Nevertheless, being Nahimana one among the leaders of the station, relevant was his engagement in the anti-Tutsi radio campaign.[169] This unavoidable involvement, together with the failure to prevent racist incitements of his subordinates, explains a similar, yet debatable thirty-year sentence.[170]

One of RTLM's strengths consisted in the ability to spread its racist and hateful message through the language of the people who lived in rural areas. Kinyarwarda rather than French was more and more used and thus able to reach the vast majority of the population.[171]

Most of the time RTLM entertainers used to incite people to kill by using a disguised linguistic code. Every morning they asked listeners: "Hello, good day, have you started to work yet?"[172] By using the term "work" instead of "killing", they were easily understood the same, but the reference was less direct.[173] "Work" was a term already used by Hutu, during the 1959-62 revolution.[174]

Another word already used previously, this time during RPF attacks after the independence of the country, was "cockroaches". With this term Hutu used to refer to Tutsi, dehumanizing and comparing them to mere insects.[175]

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[168] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Judgment, December 3, 2003, para. 5. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Summary-Media.pdf (accessed in November 2013).

[169] Ibid., para. V. Sentencing.

[170] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 365-366.

[171] L. A. FUJI, *Transforming the moral landscape: the diffusion of a genocidal norm in Rwanda,* in *Journal of genocide Research,* op. cit., p. 105.

[172] D. LI, *Echoes of violence: considerations on radio and genocide in Rwanda,* in *Journal of genocide Research,* op. cit., p. 15.

[173] Ibid., p. 12.

[174] L. A. FUJI, *Transforming the moral landscape: the diffusion of a genocidal norm in Rwanda,* in *Journal of genocide Research,* op. cit., p. 105.

[175] D. LI, *Echoes of violence: considerations on radio and genocide in Rwanda,* in *Journal of genocide Research,* op. cit., p. 12.

In Hotel Rwanda, a 2004 American drama film telling the real story of the hotelier Paul Rusesabagina who gave shelter to a great number of Tutsi citizens, it happens to listen to RTLM voices. In addition to the frequent use of the term "cockroaches", entertainers speak about "cutting down high trees". Here Tutsi are compared to high trees, due to their tall and slim physical appearance.[176]

Nevertheless, messages spread throughout the population were not always so veiled. Continuous were the references to the events of the past, with the aim of prompting action. Kantano Habimana, RTLM's most popular announcer, once incited listeners by saying: " Masses, be vigilant… Your property is being taken away. What you fought for in '59 is being taken away" (RTLM, January 21, 1994).[177] Other times requests were even more direct and ruthless. It happened to listen to similar sentences: "The graves are only half empty; who will help to fill them?", with an unequivocal call to commit genocide.[178]

Moreover, RTLM frequently broadcasted racist songs against Tutsi. They were played several times a day, inevitably entering into the mind of listeners, who sang them naturally. By so doing, the station kept on making genocide a familiar and daily concept.[179]

As it is stated in the Trial Chamber sentence dated 3 December 2003 against Ferdinand Nahimana:

> "the nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active. The power of the human voice […] adds a quality and dimension beyond language to the message conveyed".[180]

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[176] *Hotel Rwanda*, directed by TERRY GEORGE, 2004.

[177] D. LI, *Echoes of violence: considerations on radio and genocide in Rwanda,* in *Journal of genocide Research,* op. cit., p. 13.

[178] Ibid., p. 9.

[179] L. A. FUJI, *Transforming the moral landscape: the diffusion of a genocidal norm in Rwanda,* in *Journal of genocide Research,* op. cit., p. 104.

[180] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Judgment, December 3, 2003, para. 5. See:

The continuous exhortations on the radio, together with the threats and promises of the government, brought to an unprecedented mass participation to the massacres, which made the Rwandan genocide unique and different from other contemporary atrocities.[181] Those who took part in the killings were not only the so-called *interahamwe*, the notorious militia group, but also a huge number of local villagers, armed with machete, who actively joined the army. As distinct survivor testimonies indicate, "the market was surrounded by villagers that had turned *interahamwe*".[182]

But it is now time to consider the role of the RPF during those 100 days. At the beginning of the killings higher priority was given by Tutsi rebels to the conquer of the country rather than to the protection of civilians. They promptly rejected initial government cease-fire offers. Only on April 23, faced with an unprecedented escalation of violence, the RPF offered to compromise its requests for political power. The problem was that Hutu leaders extremists, and not only them, were no more willing to stop the genocidal campaign they had started. The slaughter continued until the RPF, under Paul Kagame's command and with the help of a French-led military operation known as the Operation Turquoise, conquered most of the country. When that happened, in July 1994, nearly 80% of the Tutsi population, had been killed.[183]

The new government was formed on 18 July 1994 and consisted in a coalition of ministers from the RPF and other political parties. The aim was to built a multi-party democracy, which eventually would have put an end to the previous ethnic classification system. The new president was a Hutu, Pasteur Bizimungu, while

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http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Summary-Media.pdf (accessed in November 2013). para. 99.

[181] D. LI, *Echoes of violence: considerations on radio and genocide in Rwanda,* in *Journal of genocide Research,* op. cit., p. 10.

[182] L. FLETCHER, *Turning interahamwe: individual and community choices in the Rwandan genocide,* in *Journal of Genocide Research,* 2007, pp. 39-40.

[183] A. J. KUPERMAN, *Provoking genocide: a revised history of the Rwandan Patriotic Front,* in *Journal of Genocide Research,* 2004, pp. 78-79.

the vice-president and minister of defence was a Tutsi, the above mentioned Paul Kagame.[184]

3. Discussions surrounding the notion of genocide and subsequent inadequacy of international responses

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide clearly defines the nature of such an awful international crime. After specifying that genocide has to be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such",[185] it makes a list of the acts to be considered as genocide. These acts are the following:

> "killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group".[186]

After everything that has been said up to now, it is possible to state that what happened in Rwanda from April to July 1994 was certainly genocide.

Concerning the intent to destroy a group of people, the peculiar characteristic of this particular crime, there is no doubt that people in Rwanda killed for this specific purpose. Hutu expected to annihilate Tutsi "foreign invaders", based on the principle that they were the only ones legitimate to rule the country.

At the time of the mass slaughter, Hutu criminals certainly considered their enemies as belonging to a different ethnic group. As already pointed out before,

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[184] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., pp. 816-817.
[185] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. II.
[186] Ibid., Art. II. (a) (b) (c) (d) (e).

it is with the arrival of European colonizers that this difference began to become more and more detectable. In the years following their arrival in 1924, the Belgian introduced a system of identity cards, which contributed to classify Rwandan citizens into fixed and definite ethnic categories.

Even if both groups kept on sharing the same language and culture, the fact that the offender perceived the enemy as different from itself on ethnical basis proved to be sufficient to the ICTR Trial Chambers to consider the Tutsi, as well as the Hutu and the Twa, as different ethnic groups once the genocide occurred.[187]

With regard to the acts to be considered as genocide, here as well there is no doubt that most of them took place in Rwanda at that time. Actual data speak of more than 800,000 Tutsi who were killed in only little more than three months.[188] The second act listed in Article II of the Convention refers to the fact of causing bodily or mental harm to members of the group. Researches reveal that Tutsi victims were often forced to endure violence and torture inflicted by Hutu enemies.[189]

Whether there is no evidence about other two acts on the list, that are respectively inflicting on the group conditions of life which bring to physical destruction and forcibly transferring children from one group to another, the one of imposing measures intended to prevent births within group actually occurred in Rwanda in 1994. As historians ascertain, it even happened that extremists killed pregnant Hutu women of Tutsi men in order to prevent the Tutsi fetus' survival.[190]

Despite all this evidence, calling a similar massacre with its own name was far from immediate.

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[187] *Prosecutor v. Kajelijeli* (Case No. ICTR-98-44A-T). W. A. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., p. 125.

[188] P. J. MAGNARELLA, *How Could it Happen? The Background and Causes of the Genocide in Rwanda,* in *Journal of International Criminal Justice,* op. cit., p. 816

[189] Ibid., p. 816.

[190] Ibid., p. 816.

Four years after the terrible Rwandan genocide, US President William Clinton publicly acknowledged the grave failure of the international community once faced with such an awful humanitarian massacre. "We did not immediately call these crimes by their rightful name: genocide" was his bitter recognition.[191]

But let us make a few steps back in order to better analyze how things went on.

Even before the first killings occurred in April 1994, prevention of the forthcoming massacre was something attainable.

The Arusha Peace Accord, signed on 4 August 1993 between the Rwandan Government and the RPF, was made possible thanks to the coordinating role of the United Nations as well.[192] On 5 October the UN Assistance Mission for Rwanda (UNAMIR), a peacekeeping force of 2,548 military personnel,[193] was established in the country.[194] The aim of the mission was to supervise the transition period that Rwanda had to face during those years, from previous dictatorship to newborn multi-party democracy. Anyway, due to lack of resources and weakness of the mandate, UNAMIR proved to be a failure right from the beginning.[195]

Canadian Brigadier General Romeo A. Dallaire was appointed as Force Commander of the mission. He once received information concerning Hutu awful plan to assassinate the whole Tutsi population. The informant was an *interahamwe* instructor who had been charged to register all Tutsi in Kigali, the capital of Rwanda. The man promised to show UNAMIR the position of a weapons hidden supply if his family was given protection.[196] Immediately after such a shocking revelation, on 11 January 1994, General Dallaire sent a telegram to the Department of Peacekeeping Operations (DPKO) of the Secretariat in New

[191] 'Clinton's Painful Words of Sorrow and Chagrin', *New York Times,* March 26, 1998, p. A-10, in W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 529.
[192] I. CARLSSON, *The UN Inadequacies,* in *Journal of International Criminal Justice,* 2005, p. 838.
[193] Ibid., p. 838.
[194] UN Doc. S/RES/872, October 5, 1993, para. 2.
[195] L. MELVERN, *The Security Council in the Face of Genocide,* in *Journal of International Criminal Justice,* 2005, pp. 847-848.
[196] I. CARLSSON, *The UN Inadequacies,* in *Journal of International Criminal Justice,* op. cit., p. 839.

York, asking for a reinforcement of military personnel, in order to take action in a short space of time. He firmly believed that with a force of 5,000 soldiers he could have prevented and stopped the killings.[197] But the answer of the Secretariat was far from reassuring. It stated that a similar military operation clearly exceeded UNAMIR's mandate. The risk was too high to be taken.[198]
Furthermore, the Secretariat communicated those information neither to the Security Council nor to the Secretary-General.[199]

As the days passed, the situation got even worse. Increasingly violent demonstrations took place and more and more frequent hate propaganda messages were spread throughout the country. Some knowledge of what was happening gradually began the circulate in the Western world as well.
The Belgian embassy in Kigali for instance promptly informed its government. Concerning France, information was even greater. The French were indeed the major Hutu weapons suppliers. More generally, thanks to the role played by intelligence services, all permanent states of the Council were well informed about the situation occurring in Rwanda. This information was, however, not shared with non-permanent members.
Major powers were even more informed than UN peacekeepers on the ground, who felt completely abandoned, not aware of the developments of the situation. Thus General Dallaire explained the subsequent and unexpected deaths of 10 of his Belgian personnel by Rwandan soldiers on 7 April, only three days after the beginning of the genocide, triggered by the assassination of Hutu President Habyarimana.[200]

As the killings began, UN Council members tried to find out possible solutions to solve the situation. At that moment, UNAMIR, with its few resources and

[197] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 571-572.
[198] I. CARLSSON, *The UN Inadequacies,* in *Journal of International Criminal Justice,* op. cit., p. 839.
[199] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research,* op. cit., p. 77.
[200] L. MELVERN, *The Security Council in the Face of Genocide,* in *Journal of International Criminal Justice*, op. cit., pp. 849-851.

weak mandate, was truly not prepared to face such a terrible situation.[201] Emblematic is what General Dallaire said to Paul Rusesabagina, the hotelier who sheltered lots of Tutsi citizens, in the movie Hotel Rwanda. When the latter kept on asking for help to UN military personnel, General Dallaire admitted: "We are peacekeepers, not peacemakers".[202] They were there simply to mediate and supervise. They cannot use force without a former authorization given by the Security Council. They did not have the capacities neither to put an end to hostilities nor stop human rights abuses.[203]

Members of the Council thus discuss whether to reinforce UNAMIR, to reduce its force or to withdraw it completely. What they agreed on at the end was something unbelievable. On April 21 the majority of the permanent members with veto powers decided for everyone. The Council thus released Resolution 912,[204] which consisted in UNAMIR reduction to only 270 troops.[205] Major powers firmly believed that only a strong and powerful military operation could have stopped the slaughter in Rwanda. Yet something of that magnitude was unconceivable, because of major powers' lack of political will to intervene in such a country. Concerning the other two options, reducing UNAMIR force or withdrawing it completely, the first was preferred to the second. To evacuate all peacekeepers could have meant transmitting a negative message to public opinion.[206]

The situation that followed was something devastating for the Rwandan population. The removal of most UN military personnel left the field open to Hutu killers who could now more easily carry out their extermination campaign.

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[201] Ibid., p. 848.
[202] *Hotel Rwanda*, directed by TERRY GEORGE, 2004.
[203] L. MELVERN, *The Security Council in the Face of Genocide,* in *Journal of International Criminal Justice*, op. cit., pp. 848.
[204] UN Doc. S/RES/912, April 21, 1994, para. 8.
[205] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research,* op. cit., pp. 74-75.
[206] L. MELVERN, *The Security Council in the Face of Genocide,* in *Journal of International Criminal Justice*, op. cit., p. 854.

Civilians, instead of being protected by the UN troops, felt completely abandoned to their fate. Furthermore, the UNAMIR reduction was inevitably problematic for the remaining peacekeepers as well. They were left alone, without supplies nor political direction to follow.[207]

After two weeks of full-blown mass slaughter, the UN Secretary General, Boutros-Ghali, focused on a civil war instead of a genocide occurring in Rwanda. According to him, to intervene militarily in an internal conflict would have meant to repeat the disaster happened in Somalia only a year before.[208] There, the population was suffering from famine and civil war. In 1993, the UN tried to bring peace in the African country by sending a UN force, known as UNOSOM II. Yet the latter had a too much ambitious mandate, consisting not only in protecting civilians, but also in disarming warring factions and assisting in the reconstruction of the Somali state. UNOSOM II, in a similar context of war and anarchy, turned out to be a complete failure, with a great number of human and economic losses. No desired results were achieved. Yet concerning Rwanda, the situation was different. No civil war was taken place there. It has been frequently argued that a modest force of 5000 people could have stopped the genocide and given protection to those innocent civilians who were seeking refuge by the UN personnel.[209]

Concerning the Security Council, there as well there were those who denied the evidence. On 29 of April Colin Keating, the Ambassador of New Zealand who was holding the presidency of the UN Council at that moment, eventually stated that genocide was occurring in Rwanda. Four of the other non-permanent members supported his statement. Yet those who were not of the same opinion

[207] Ibid., p. 853.
[208] Ibid., p. 855.
[209] J. BAYLIS – J. J. WIRTZ – C. S. GRAY, Strategy in the contemporary world, 2010, Oxford University Press, New York, pp. 314-317.

were permanent members with right of veto.[210] The term genocide was consequently not used. The compromise the Council finally agreed upon added more hypocrisy to an already absurd and critical situation. The presidential statement affirmed what follows: ' The Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable by international law'[211]. Such an assertion, although perfectly reflecting what states the Convention on Genocide, did not include the word 'genocide'.

To correctly understand what actually lays behind this refusal, it is necessary to consider the interests for such an avoidance of two major powers, namely France and the United states. Both of them, being permanent members in the Council, had the power to decide and consequently prevent any actions to be taken.

With regard to France, it is possible to say that it was the state most well-informed about the extermination campaign going on in Rwanda. It was even aware of the intentions to commit such terrible atrocities before they actually occurred. The reason for its silence is to be explained with regard to the kind of economic relations it had with Hutu government. France provided Rwanda with arms both before and during the genocide. Furthermore, it even trained Hutu militias. All this clarifies its interests in avoiding to denounce the mass slaughter. Yet, what it clarifies as well is the role France played in the Rwandan genocide, specifically as a supporter of the Hutu government genocidal campaign. However, the French parliamentary commission charged to investigate France's involvement in the genocide, ended up absolving France responsibility.

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[210] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research,* op. cit., p. 75.

[211] Statement by the President of the Security Council Condemning the Slaughter of Civilians in Kigali and Other Parts of Rwanda, UN Doc. S/PRST/994/21, April 30, 1994. W. A. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., p. 548.

The subsequent French-led humanitarian operation, known as Operation Turquoise, seemed to the most to have acted as a screen to previous French inadequacies.[212] The human right activist Alison Des Forges spoke of the "indifference to the genocide" of French policy-makers, but at the same time acknowledged that French soldiers proved able to save many civilians lives.[213]

Concerning the United States, different were the reasons not to intervene in the Rwandan genocide. Although being perfectly aware of the extermination campaign against Tutsi innocent civilians, they willingly failed to take any preventive measures to stop the killings. They made the irreparable mistake to compare the situation in Rwanda to the events previously happened in Somalia. The United States government did not want to risk the loss of other American soldiers. Yet, as already said before, the Rwandan genocide had nothing to do with the civil war that had occurred in Somalia in 1993. Rwandan civilians could have been protected by UN forces with very limited risk to be taken by the latter. At any case, the shadow of Somalia was not the only reason not to act. The lack of American interests in Rwanda is what mostly determined the United States inaction. Economic issues sadly prevailed over universal values.[214]

Not until 17 May 1994 did the Security Council eventually adopt Resolution 918 authorizing a new UN operation of 5.500 troops, known as UNAMIR II.[215] Offers of military personnel came only from African countries. Even if they constituted a sufficient number, they required additional military equipment. Western countries delayed in providing such material.[216] United States among all others took a month before providing African troops with the Armoured

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[212] R. DALLAIRE – K. MANOCHA – N. DEGNARAIN, *The Major Powers on Trial,* in *Journal of International Criminal Justice*, 2005, pp. 861-867.
[213] A. DES FORGES, *Leave None to Tell,* p. 689. W. A. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 550-551.
[214] R. DALLAIRE – K. MANOCHA – N. DEGNARAIN, *The Major Powers on Trial,* in *Journal of International Criminal Justice*, 2005, pp. 867-873.
[215] UN Doc. S/RES/918, May 17, 1994, para. 5.
[216] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research,* op. cit., p. 76.

Personnel Carriers (APCs) they had requested. When these resources eventually arrived, in July, the Rwandan genocide had already brought to an end.[217]
In a report to the Security Council dated 31 May , the Secretary General recognized:

"The delay in reaction by the international community to the genocide in Rwanda has demonstrated graphically its extreme inadequacy to respond urgently with prompt and decisive action to humanitarian crises entwined with armed conflict […]. We must all realize that, in this respect, we have failed in our response to the agony of Rwanda, and thus have acquiesced in the continued loss of human lives".[218]

The Secretary General thus eventually affirmed that the crime of genocide was actually taking place in Rwanda. Subsequently, on 8 June, the appalling 'g-word' appeared in a resolution of the Council as well, which noted "with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recall[ed] in this context that genocide constitutes a crime punishable under international law".[219]
Little more than a month later, on 18 July 1994, the genocide ended. The RPF conquered Rwanda and declared a unilateral ceasefire.[220]

4. Tribunals repressing the crime of genocide

4.1 ICTR, the *Ad Hoc* International Criminal Tribunal for Rwanda

Article VI of the Convention of 1948 states that:

[217] R. DALLAIRE – K. MANOCHA – N. DEGNARAIN, *The Major Powers on Trial,* in *Journal of International Criminal Justice*, op. cit., p. 872.
[218] Report of the Secretary General on the situation in Rwanda, UN Doc. S/1994/640, May 31, 1994, para. 43.
[219] UN DOC. S/RES/925, JUNE 8, 1994, preamble.
[220] I. CARLSSON, *The UN Inadequacies,* in *Journal of International Criminal Justice,* op. cit., p. 841.

"persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".[221]

Rwanda experienced both possibilities. Among perpetrators of the 1994 genocide, there were those who were tried by domestic courts and others by the International Tribunal for Rwanda settled in Arusha, Tanzania. While the latter had jurisprudence mainly over persons in position of authority, most of the time planners and instigators of genocide, National Tribunals and the so-called *Gacaca* courts, both better explain later, tried respectively most serious perpetrators who remained in the country and other inferior offenders.[222]

Eventually convinced by overwhelming evidence that genocide had actually occurred, on 8 November 1994 the Security Council created the so-called *Ad Hoc* International Criminal Tribunal for Rwanda (ICTR).[223] The year previously, in May 1993, another *Ad Hoc* International Criminal Tribunal was established, the one for the former Yugoslavia.[224] Both of them are classified as *ad hoc* tribunals because of their specific mandate in both time and space. While the ICTY has jurisprudence over international crimes committed in the territory of the former Yugoslavia since 1991, the ICTR was created in order to prosecute those responsible for genocide and other serious violations of international humanitarian law occurred in Rwanda from 1 January 1994 to 31 December 1994.[225]

In its Resolution 827, dated 25 May 1993, the UN Security Council affirmed that the situation in the former Yugoslavia, and in particular in the territories of

[221] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. VI.
[222] K. P. APUULI, Procedural due process and the prosecution of genocide suspects in Rwanda, in *Journal of Genocide Research,* 2009, pp. 11-12.
[223] UN Doc. S/RES/955, November 6, 1994, para. 1.
[224] UN Doc. S/RES/827, May 25, 1993, para. 1.
[225] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 443-444.

Bosnia and Herzegovina, constituted "a threat to international peace and security".[226] According to the UN Security Council, "the establishment of an international tribunal […] [would] contribute to ensuring that such violations are halted and effectively redressed".[227]

The setting up of the ICTY, however, gave rise to some criticism. One of the main objections was that, with the establishment of such a tribunal, the Security Council went beyond its powers under the UN Charter. According to those who criticized such a decision indeed, the act of establishing an international criminal court did not fall within the remit of the Security Council.[228]

Furthermore, being both *Ad Hoc* International Tribunals imposed by the Security Council, and thus not treaty-based, there were those who argued that states have not properly 'accepted' their jurisdiction.[229] With regard to this last point, the International Court of Justice once affirmed what follows:

"When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to 'those Contracting Parties which shall have accepted [the] jurisdiction' of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of 'international penal tribunal' restrictively in order to exclude from it a court which, as in the case of the [International Criminal Tribunal for the former Yugodlavia], was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them".[230]

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[226] UN Doc. S/RES/827, May 25, 1993, p. 1.
[227] Ibid., p.1.
[228] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 260.
[229] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 455.
[230] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, 26 February 2007, para. 445. W. A. SCHABAS refers to it in, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 454-455.

The third and last international criminal tribunal created in 1998 with subject matter jurisdiction over the crime of genocide, the International Criminal Court (ICC), differs from the others, being a treaty-based organization with an independent and permanent mandate.[231] We will have the opportunity to focus more on this institution while analyzing the situation in Darfur.

Concerning the ICTR, the tribunal was established by the UN with the primary aim of promoting reconciliation in a territory characterized by hatred, tensions and instability. In the years following the genocide both survivor-victims and perpetrators of awful crimes had to live side by side. In such a particular context, the importance of an effective justice system became unavoidable.[232]

By prosecuting the main leaders of the Rwandan genocide, such as ministers, prefects, and burgomasters, the ICTR proved itself able to condemn similar atrocities, no matter who had committed them. Rwandan society, being deprived of the "architects" of the genocide, would be more inclined to march into a future reconciliation.[233]

The tribunal is governed by its proper statute and it is settled in Arusha, in the United Republic of Tanzania. The choice of the place was made by the Security Council because of the belief that trial proceedings should be held in a neutral country, in order to increase fairness and impartiality.[234]

Concerning the ICTR structure, the tribunal is made up of three organs: the three Trial Chambers and the Appeals Chamber, composed of 16 judges from different nationalities elected by the UN General Assembly with a term of four years; the Office of the Prosecutor, responsible for investigations and

[231] See: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (accessed in November 2013).
[232] K. P. APUULI, Procedural due process and the prosecution of genocide suspects in Rwanda, in *Journal of Genocide Research*, op. cit., p. 21.
[233] F. X. NSANZUWERA, *The ICTR Contribution to National Reconciliation,* in *Journal of International Criminal Justice,* 2005, p. 948.
[234] E. MØSE, *Main Achievements of the ICTR,* in *Journal of International Criminal Justice,* 2005, p. 921.

prosecutions; and the Registry, which provides judicial and legal support to the Chambers and the Prosecutor.[235]

The first ICTR trial, the one against the burgomaster Jean Paul Akayesu, dated back on 9 January 1997. In August 2003 the Security Council decided that all investigations should have been completed by 2004, all trials by 2008 and all appeals by 2010.[236] Due to a number of factors, the tribunal is still operative. In a letter dated 23 May 2013, the President of the tribunal, judge Vagn Joensen reported to the President of the Security Council the status of cases. He stated that:

> "As at 10 May 2013 the tribunal has completed its work at the trial level with respect to all of the 93 accused. [..] All but one of the remaining appeals will be completed in 2014. Owing to delays in translation and other factors as described herein, the final appeal (in the *Butare* case) is now projected to be completed by July 2015".[237]

Reasons for this delay have to be found mainly in the fact that international criminal proceedings are more complex than national ones. More documents are required, they have to be translated into at last one official language of the tribunal. International trials often have a huge number of witnesses, whose testimonies have to be translated into three languages. Furthermore, the personnel involved in international cases do not come from a single nation, on the contrary, there are people with different cultures and traditions. Moreover, people who come to an international tribunal to testify need continuous assistance and protection.[238]

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[235] See: http://www.unictr.org/tabid/103/Default.aspx (accessed in November 2013).
[236] E. MØSE, *Main Achievements of the ICTR,* in *Journal of International Criminal Justice,* 2005, p. 926.
[237] Report on the completion strategy of the International Criminal Tribunal for Rwanda (as at 10 May 2013), UN Doc. S/2013/310, May 23, 2013, para. 3.
[238] E. MØSE, *Main Achievements of the ICTR,* in *Journal of International Criminal Justice,* op. cit., pp. 927-928.

To reduce the time spent in a courtroom, several improvements has been reached by the tribunal throughout these years.

The initial number of judges provided by the ICTR statute had soon proved insufficient. Six judges in two Trial Chambers were not enough to face the huge number of accused. Thus the Security Council created another Chamber with additional staff inside it. Moreover, 18 *ad litem* judges were introduced as well. The latter would intervene when needed.

In 2003 another important solution was taken by the Security Council. Until then, the ICTR and its sister court, the ICTY, both shared the same Prosecutor. To reduce time, two independent figures were established.

As the years passed, well-trained simultaneous interpreters were more and more able to translate from and into Kinyarwanda language.[239]

All these measures have increasingly enabled good results to be achieved.

Article 2 (2) of the ICTR statute perfectly correspond to Article 2 of the Convention on Genocide.[240] Besides prosecuting alleged perpetrators of the crime of genocide, the Tribunal of Rwanda has the power to prosecute persons responsible for crimes against humanity[241] and serious violations of Article 3 common to the Geneva Conventions of 1949 for the Protection of War Victims and of Additional Protocol II of 1977. Examples of these violations includes acts as collective punishments, taking of hostages, acts of terrorism, pillage.[242]

In relation to sentencing, all these international crimes are punished equally. As the ICTR Appeals Chamber remarked in Kayishema:

> "[…] there is no hierarchy of crimes under the Statute and all of the crimes specified therein are serious violations of international humanitarian law capable of attracting the same sentence.[…] The Appeals Chamber finds that the Trial Chamber's

[239] Ibid., pp. 928-932.
[240] Statute of the International Criminal Tribunal for Rwanda, November 8, 1994. Art 2 (2).
[241] Ibid., Art. 3.
[242] Ibid., Art. 4.

description of genocide as the 'crime of crimes' was at the level of general appreciation and did not impact on the sentence it imposed".[243]

Concerning penalties, Article 23 (1) of the ICTR statute affirms that life imprisonment, not capital punishment, is the most severe sentence the tribunal can impose.[244] It will be interesting to notice in the paragraph concerning domestic jurisdictions, that in many African countries, including even Rwanda until 2007, the death penalty is still in force.

With regard to the terms of imprisonment, the ICTR Statute points out that "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda".[245]

Article 23 (2) specifies that in imposing the sentence, factors such as the gravity of the offence and the individual circumstances of the convicted person, the latter including any eventual aggravating or mitigating circumstances, should be taken into consideration.[246]

Contrary to the ICTY, the ICTR is essentially a genocide tribunal. Although its temporal jurisdiction officially goes from 1 January 1994 to 31 December 1994, it has tended to focus entirely on the genocide that occurred from April to June 1994.[247] The fact of having recognized to the crime of genocide its own specificity is of considerable importance. The then UN Secretary-General Kofi Annan recognized the first judgment on the crime of genocide as:

"a landmark decision in the history of international criminal law. It brings to life, for the first time, the ideals of the Convention on the Prevention and Punishment of the Crime of genocide, adopted 50 years ago. This judgment is a testament to our collective

[243] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Case No. ICTR 95-1-A), Judgment, June 1, 2001, para. 367. P. AKHAVAN refers to it in *The Crime of Genocide in the ICTR Jurisprudence,* in *Journal of International Criminal Justice,* 2005, UK, p. 997.
[244] Statute of the International Criminal Tribunal for Rwanda, November 8, 1994. Art 23 (1).
[245] Ibid.
[246] Statute of the International Criminal Tribunal for Rwanda, November 8, 1994. Art 23 (2).
[247] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 455.

determination to confront the heinous crime of genocide in a way we never have before. It is a defining example of the ability of United Nations to establish an effective international legal order and the rule of law. Let us never again be accused of standing by while genocide and crimes against humanity are being committed. I am sure that I speak for the entire international community when I express the hope that this judgment will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law." [248]

On the other hand, the ICTR has been criticized by some for having focused its attention exclusively on the genocide occurred from April to July 1994.
Concerning the prosecution of officials of the RPF for instance, who are strongly believed to have committed violations of international humanitarian law once they reached the power on July 1994 and thereafter, the ICTR jurisprudence has remained silent. A similar policy, characterized as one-sided as it focuses only on Hutu who killed Tutsi during genocide, stands in clear contrast with the main purpose of the ICTR, which is national reconciliation.[249]

Another obstacle to this latter goal is to be found in the choice of the settlement of the tribunal. The ICTR, as it has been mentioned before, is located outside Rwanda, in the city of Arusha, Tanzania. Distance and subsequent difficulty to understand by Rwandan population what achievements actually the tribunal was reaching, were soon perceived as an impediment to reconciliation between Hutu and Tutsi.[250] That is why, in 1998, the ICTR began to establish its Outreach Programme, whose aim was the promotion of a more widespread acknowledgement of the tribunal's work. This program was used to bring close

[248] Statement by U.N. Secretary-General Kofi Annan on the Occasion of the Announcement of the First Judgment in a Case of genocide by the International Criminal Tribunal For Rwanda, September 2, 1998. See: http://www.unictr.org/tabid/155/Default.aspx?ID=955 (accessed in November 2013).
[249] L. REYDAMS, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?,* in *Journal of International Criminal Justice,* 2005, pp. 977-978.
[250] V. PESKIN, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,* in *Journal of International Criminal Justice,* 2005, pp. 950-951.

and to inform Rwandan people about the state of the trial processes.[251] Explanatory brochures with translations into Kinyarwanda were distributed throughout the population. Moreover, The ICTR Outreach Programme went beyond simply informing Rwandan citizenry. It promoted direct experiences of interaction, such as seminars and conferences, with tribunal's experts as well.[252]

Although the efforts made by the ICTR, most Rwandans still know little about the tribunal's work.

Translations into "the language of the people" were truly made. Yet they were not understood by the majority of citizens because of their complex and articulated system of writing. ICTR's website was continuously updated. However, only wealthy people possessed an Internet access. In September 2000 a public information centre was opened in Kigali, the capital city of Rwanda. There, people could browse the web and look at several juridical volumes. Nevertheless, only a little minority of urban citizens could reach the centre and make use of it.[253]

Although the institution of the ICTR may be perceived by some, if not by the most, as a "remedy" for the UN previous inadequacies in preventing the genocide, the contribution it gave to the improvement of international criminal justice is without any question. In the following paragraph four of the most famous and noteworthy ICTR judgments will be analyzed.

4.1.1 The case against Jean Paul Akayesu

Jean Paul Akayesu, the burgomaster of the Rwandan commune of Taba, was the first person to be tried by the ICTR. Its trial started on 9 January 1997.[254] Considerable is the importance of such a case, not only because it was the first

[251] Ibid., pp. 952-953.
[252] Ibid., p. 954.
[253] Ibid., pp. 955-957.
[254] E. MØSE, *Main Achievements of the ICTR,* in *Journal of International Criminal Justice,* op. cit., p. 935.

conviction for genocide ever.[255] The case against Akayesu has significantly contributed to clarifying the subjective element of genocide as well.
As the Trial Chamber affirmed,

"special intent […] is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the Perpetrator".[256]

As already mentioned in the first chapter, the existence of such a specific intent has to be inferred from factual circumstances. As Cassese underlines, it is extremely rare to find documents or statements explicitly declaring the intent to destroy a group a people.[257]
According to the ICTR Trial Chamber indeed,

"the intent underlying an act can be inferred from a number of facts. The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, inter alia, from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators".[258]

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[255] See: http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml (accessed in November 2013).
[256] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, para. 518. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (accessed in November 2013).
[257] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 125.
[258] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, para. 728. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (accessed in November 2013).

As far as Akayesu's own intent, the Chamber found that he had made speeches "calling, more or less explicitly, for the commission of genocide".[259] Furthermore, special intent was also deduced from the huge number of systematic and widespread attacks committed against Tutsi people[260] and the numerous acts of rape and sexual violence against Tutsi women.[261]

Especially with regard to this last point, another noteworthy aspect in the Akayesu decision is the recognition that, in some circumstances, rape and sexual violence, while possessing the specific intent to destroy a protected group of people, can amount to genocide. Offences of this kind indeed "constitute genocide in the same way as any other act as long as they were committed with the specific intent".[262]

Akayesu, married and father of five children, was elected burgomaster of Taba in 1993.[263] In rendering judgment, on 2 September 1998, the Trial Chamber found him responsible for several hideous offences. Akayesu was accused of having killed and caused serious bodily or mental harm to various Tutsi people. He aided and abetted sexual violence to occur, not only by allowing these acts to take place, but also by encouraging people to commit them. Moreover, he directly and publicly incited Hutu to fight against Tutsi. In addition to all this, several innocent people were tortured by him.[264]

As already mentioned before, besides the gravity of the offences, aggravating circumstances concerning the status of the individual person committing the crimes as well should be taken into consideration by the ICTR. In the specific of the Akayesu case, the Prosecutor found out that the accused, because of its position of authority and responsibility, had the duty to ensure protection and

[259] Ibid., para. 729.
[260] Ibid., para. 730.
[261] Ibid., paras. 731-733.
[262] Ibid., para. 731.
[263] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, p. 8. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/ak81002e.pdf (accessed in November 2013).
[264] ibid., pp. 5-6.

security to the population. What is more, he abused his powers, both by personally committing atrocious crimes and by giving orders to its municipal police to struggle against Tutsi members. Moreover, Akayesu acted with intent and premeditation. Its criminal behavior became increasingly more intensive as the time passed.[265]

On the other hand, Akayesu never pleaded guilty. He continued to declare his innocence, by trying to find out any mitigating factors he could.

He firmly affirmed his opposition to the killings and violence occurred in Taba at the time he was burgomaster of the commune. He asserted having even risked his life in order to protect its population. Because of the limited number of communal policemen he disposed at that moment, the situation could in no way be solved. He made reference to General Dallaire as well, stating that even the latter, although being a Commander of a UN peacekeeping force, could do nothing faced with the Rwanda slaughter of innocent civilians. Moreover, Akayesu admitted having always cooperated with the tribunal, since the beginning of its trial in September 1997.[266]

With regard to these mitigating factors, the Chamber recognized that Akayesu, at least in the initial phase, actually made efforts to prevent atrocities to occur.[267] In Luke Fletcher's article, focusing on citizens turning *interahamwe,* the author quoted Akayesu's words. The latter, while explaining his relationship with Kubwimana, a powerful member of the Hutu militia, used the term "boss" in relation to him and explained to the judge:

"Well I used the expression "boss" to show what he was doing because indeed on that same morning he told me very ironically: "You continue resisting the interahamwe and very soon you are going to see, you are going to see what would

[265] ibid., p. 6.
[266] Ibid., p. 7.
[267] Ibid., p. 8.

happen." You see, he was making verbal threats. He was threatening me verbally. He arrests and imprisons people. It is what I mean when I say he was my boss.[…]".[268]

It has been established by the Trial Chamber that, up to 18 April 1994, the burgomaster personally opposed and tried to avoid massacres to take place in his commune.[269]Furthermore, Akayesu had not previously been convicted for any criminal indictments.[270]

Nonetheless, the Chamber affirmed that aggravating factors prevailed over mitigating circumstances, especially because of Akayesu's choice to personally participate in the genocide.[271]

In any case however, as the Chamber specified, whether there are any mitigating conditions, they shall be applied to the assessment of the sentence, not to the gravity of the crime.[272]

On 2 October 1998, the Trial Chamber condemned Jean Paul Akayesu for different counts. The accused was sentenced to life imprisonment for crime of genocide, for crimes against humanity, with regard to extermination, and for direct and public incitement to commit genocide. Moreover, the Chamber sentenced him to 15 years of imprisonment for crimes against humanity, in the specific of murder and rape, and to 10 years for other crimes against humanity, this time concerning torture and similar inhumane acts.[273]

Being the above sentences to be served contemporaneously, the Chamber sentenced Akayesu to a single sentence of life imprisonment.[274]

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[268] L. FLETCHER, *Turning interahamwe: individual and community choices in the Rwandan genocide,* in *Journal of Genocide Research,* op. cit., pp. 25-26.
[269] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, September 2, 1998, p. 8. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/ak81002e.pdf (accessed in November 2013).
[270] Ibid., p. 8.
[271] Ibid., p. 8.
[272] Ibid., p. 8.
[273] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR 96-4-T), Sentence, 2 October 1998, pp. 9-10. See: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/ak81002e.pdf (accessed in November 2013).
[274] Ibid., p. 10.

4.1.2 The case against Jean Kambanda

The case against Jean Kambanda is of considerable importance due to a number of reasons. Firstly, because of the authoritative role the accused person covered at the time of the genocide. Jean Kambanda was indeed the Prime Minister of the Interim Government of Rwanda in 1994.[275] As it will be seen, this did not impinge in any way neither upon the gravity of the crimes committed by him nor upon the assessment of the penalty. According to Article 6 (2) of the ICTR Statute, "the official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

Secondly, Jean Kambanda was one among the nine persons, out of a total of 75 completed cases, who had pleaded guilty by the ICTR.[276] Such an admission is to be considered as a mitigating factor.[277]

Thirdly, it is in the ICTR decision against Jean Kambanda, dated 4 September 1998, that the Chamber labeled genocide as "the crime of crimes".[278]

Following the assassination of the Hutu moderate Prime Minister Agathe Uwilingiyamana by Hutu extremists, on 8 April 1994 Jean Kambanda became the new Prime Minister of the Interim Government of Rwanda. He remained in power until 17 July 1994, when the genocide ended and the RPF rebels declared a unilateral ceasefire.[279]

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[275] *Prosecutor v. Jean Kambanda* (Case No. ICTR 97-23-S), Judgment, September 4, 1998, para. 39 (ii). See: http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf (accessed in November 2013).

[276] See: http://www.unictr.org/Cases/tabid/204/Default.aspx (accessed in November 2013).

[277] *Prosecutor v. Jean Kambanda* (Case No. ICTR 97-23-S), Judgment, September 4, 1998, para. 46. See: http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf (accessed in November 2013).

[278] Ibid, para. 16.

[279] P. J. MAGNARELLA, *The U.N. criminal tribunal for Rwanda concludes its first case: a monumental step towards truth,* See: http://www.africa.ufl.edu/asq/v2/v2i3a5.htm (accessed in November 2013).

Kambanda was arrested on 9 July 1997 and a week later he was transferred to the ICTR Detention Facility.[280] On 1 May 1998 the accused pleaded guilty by the Trial Chamber.[281]

Several were the admissions he made. The ones that follow are among the most shocking and shameful.

Firstly, he recognized the importance of his political role at the time of the genocide. As Prime Minister, he had power and authority over members of the government, national policy and armed forces.[282] Besides being perfectly aware of the slaughter occurring in his country, he admitted not having taken any measures neither to prevent the massacre nor to stop or punish the perpetrators.[283] He confessed that, on the contrary, he had encouraged and reinforced the *Interahamwe* to commit killings of civilians.[284] Rwandan government of Jean Kambanda distributed weapons to those militia groups.[285] He acknowledged having openly supported racist broadcastings of RTLM radio station.[286] Moreover, he was once personally asked to give protection to a number of children who had survived a massacre in a hospital. Yet he failed in his duty and did nothing to prevent the killings of all those children.[287] As Schabas specifies, the latter is an example of an act of omission, which at the same level of acts of commission, is to be considered constituting the *actus reus* of an offence. Such a principle applies to all of the acts of genocide enumerated in Article II of the Convention on Genocide.[288]

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[280] *Prosecutor v. Jean Kambanda* (Case No. ICTR 97-23-S), Judgment, September 4, 1998, para. 1. See: http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf (accessed in November 2013).
[281] Ibid., para. 3.
[282] Ibid., para. 39 (ii).
[283] Ibid., para. 39 (iii).
[284] Ibid., para. 39 (v).
[285] Ibid., para. 39 (vi).
[286] Ibid., para. 39 (vii).
[287] Ibid., para. 39 (ix).
[288] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 177.

After having heard Jean Kambanda's admissions, the Trial Chamber took into consideration aggravating circumstances. Because of the leading role he played in Rwandan political life, the Prime Minister had the duty to protect his population. On the contrary, he abused of his position of authority and failed to prevent the slaughter of innocent civilians.[289]

Besides aggravating factors, any mitigating conditions needed to be considered by the Chamber as well. Three considerations were proffered by the Defence Counsel, that are the plea of guilty of the accused, his remorse for the acts committed and the co-operation he entertained with the Office of the Prosecutor.[290] Concerning this last point, the Prosecutor confirmed that considerable was the collaboration shown by Jean Kambanda in providing decisive and reliable information.[291]

Despite the existence of those mitigating factors, the trial Chamber affirmed that they had no bearing on the gravity of the crimes committed. The latter could mitigate the penalty applied, not the degree of the crime.[292]

Although Kambanda did not directly kill anyone, the character of the crimes he carried out, both by omission and commission, was of the gravest kind. He was responsible for the killing of and the causing of serious bodily and mental harm to Tutsi members.[293] He did conspire with others, including Ministers of his Government, to achieve his goal.[294] He directly and publicly incite anyone to take part in the massacre.[295] He was complicit in the mass slaughter of innocent Tutsi people.[296] Lastly, he was found responsible for the murder and extermination of

[289] *Prosecutor v. Jean Kambanda* (Case No. ICTR 97-23-S), Judgment, September 4, 1998, para. 44. See: http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf (accessed in November 2013).
[290] Ibid., para. 46.
[291] Ibid., para. 47.
[292] Ibid., para. 56.
[293] Ibid., para. 40 (1).
[294] Ibid., para. 40 (2).
[295] Ibid., para. 40 (3).
[296] Ibid., para. 40 (4).

civilians, as part of a widespread or systematic attack against a civilian population.[297]

On 4 September 1998, having considered all these arguments, the Chamber sentenced Jean Kambanda to the major ICTR penalty, which is life imprisonment, for the following crimes: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity, in the specific of murder and extermination.[298]

Following the Trial Chamber decision, a notice of appeal was filed by Kambanda. All the grounds of appeal he presented were dismissed by the Appeals Chamber. The sixth one was particularly emblematic, due to the fact it showed Kambanda's superfluous attempt to invalidate the sentence. The Appellant affirmed that "the Trial Chamber erred in law in failing to pronounce and impose a separate sentence for each count in the indictment each count being a separate charge of an offence."[299] As it has been seen in the case against Akayesu, each crime committed by the latter was followed by a different and separate assessment of penalty. On the contrary, with regard to Jean Kambanda the Trial Chamber sentenced the accused to a single sentence of life imprisonment. Nevertheless, the Appeals Chamber replied the Appellant's request by affirming that the Statute does not expressly state anywhere that for each count a separate sentence is needed.[300]

[297] Ibid., para. 40 (5)(6).
[298] *Prosecutor v. Jean Kambanda* (Case No. ICTR 97-23-S), Sentence, September 4, 1998, para. IV. Verdict. See: http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf (accessed in November 2013).
[299] *Kambanda v. Prosecutor* (Case No. ICTR 97-23-A), Judgment, October 19, 2000, para. 100 See: http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/191000.pdf (accessed in November 2013).
[300] Ibid., para. 102.

4.1.3 The "Media case" against Ferdinand Nahimana

The third case taken into consideration is the one against Ferdinand Nahimana, one of the founders and directors of the radio station RTLM.[301] Nahimana, together with other two accused persons, namely Jean-Bosco Barayagwiza and Hassan Ngeze, is part of the so-called "Media case".

The latter is to be considered as the first contemporary judgment investigating the role played by the media during international crimes. The boundary between freedom of expression and incitement to commit genocide or other hideous mass slaughter is there examined.[302]

Furthermore, the difference between hate speech and direct and public incitement to commit genocide is in the "Media case" highlighted as well. According to the ICTR, hate speech is considered as the crime against humanity of persecution. As the Trial Chamber affirmed, "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, […] constitutes persecution under Article 3 (h) of the Statute".[303] Such a term is indeed commonly utilized to connate speeches that incite people to racial discrimination and hatred, even when they do not entail incitement to violence.[304] On the contrary, for a crime of direct and public incitement to commit genocide to occur, a person must have "directly and publicly incited the commission of genocide (the material element or *actus reus*) or had the intent

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[301] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Judgment, December 3, 2003, para. 2. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Summary-Media.pdf (accessed in November 2013).

[302] E. MØSE, *Main Achievements of the ICTR,* in *Journal of International Criminal Justice,* op. cit., p. 935.

[303] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Judgment, December 3, 2003, para. 1072. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Judg&sent.pdf (accessed in November 2013).

[304] D. F. ORENTLICHER, *Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana*, *et al*., p.1. See: http://www.wcl.american.edu/hrbrief/13/hate_speech.pdf (accessed in November 2013).

directly and publicly to incite others to commit genocide (the intentional element or *mens rea*). Such intent in itself presupposes a genocidal intent".[305]

As Cassese specifies, being an inchoate crime, incitement to commit genocide is punishable whether or not genocide is actually carried out after the incitement. In order to be punishable, however, it must be both direct and public. Incitement must, first of all, induce people to engage in genocide. Moreover, this direct call to violence must be performed in a public place or, alternatively, through the mass media.[306]

During the drafting of the Convention on Genocide frequent were the attempts, especially on behalf of the Soviet delegation, to criminalize not only direct and public incitement to commit genocide, but also hate speech.[307] The Secretariat draft did contain a provision addressed to hate speech. "All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as necessary, legitimate or excusable act shall be punished".[308] Nonetheless, such a provision, capable of preventing acts of genocide to occur, did not feature in the final text of 1948.

Moving back to the analysis of the "Media case", all the three accused persons did cover important social roles at the time of the Rwandan genocide. Ferdinand Nahimana was Professor of history and Headmaster of the Faculty of Letters at the National University of Rwanda. He took part in the establishment of RTLM and soon became one of its directors.[309] Jean-Bosco Barayagwiza was a

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[305] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Appeals Judgment, November 28, 2007, para. 677. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgment.pdf (accessed in November 2013).

[306] A. CASSESE, *Cassese's International Criminal Law*, op. cit., p. 203.

[307] D. F. ORENTLICHER, *Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.*, op. cit., p. 2.

[308] Convention on the Prevention and Punishment of the Crime of Genocide, the Secretariat Draft, (UN Doc. E/447), May 1947, Art. III.

[309] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Judgment, December 3, 2003, para. 2. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Summary-Media.pdf (accessed in November 2013).

founder and a member of RTLM Steering Committee as well.[310] Concerning Hassan Ngeze, he worked as a journalist and, in 1990, he founded a newspaper entitled *Kangura,* soon becoming its Editor-in-Chief.[311]

Although the three accused were charged in separate indictments, because of the similarity of their cases they were tried together.[312]

Hereunder, the case against Nahimana is to be taken as an example of the three.

Although the accused neither directly took part in the mass slaughter of Tutsi civilians nor he personally made any statements constituting incitement through RTLM broadcastings[313], the Trial Chamber charged the accused Nahimana for: genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity, namely persecution and execution.[314]

Similar charges could be explained only in relation with Article 6 (3) of the ICTR statute. It affirms what follows:

"The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".

[310] Ibid., para. 3.
[311] Ibid., para. 4.
[312] Ibid., para. 5.
[313] *Nahimana et al. v. Prosecutor* (Case No. ICTR-99-52-A), Partly Dissenting Opinion of Judge Meron, November 28, 2007, para. 22. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf (accessed in November 2013).
[314] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Judgment, December 3, 2003, para. 5. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Summary-Media.pdf (accessed in November 2013).

RTLM, as already seen, transmitted a message of ethnic hatred and thus instigated acts of genocide against the Tutsi population to occur.[315] Because of the key role Nahimana played in RTLM control and direction, he was found criminally responsible for the racist ideology his radio station transmitted. He had the power and authority to prevent the broadcastings of his subordinates but failed to do that.[316]

Noteworthy is the declaration the Chamber addressed to the accused person before sentencing him. "Without a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians."[317]

On 3 December 2003 Ferdinand Nahimana, together with Jean-Bosco Barayagwiza and Hassan Ngeze, was sentenced to life imprisonment.[318]

The "Media case" is of considerable importance also because of the grounds of appeal filed by the three accused following the Trial Chamber sentence.

Concerning Nahimana, the Appellant declared that the sentence imposed was excessive for a number of reasons.

First, he had neither committed not ordered any of the crimes listed in the Statute. Being a common citizen, he did not have the power to oppose similar crimes to occur. Moreover, since his arrest, he had always collaborated with judicial authorities. Although admitting to have a part of indirect criminal responsibility, a similar degree of guiltiness had never been punished by life imprisonment. The Appellant reminded the Chamber that, at the time of the genocide, any modest initiative in opposition to the mass slaughter exposed that person to subsequent revenge. Lastly Nahimana stated that the Trial Chamber

[315] Ibid., para. 63.
[316] Ibid., paras. 79-81.
[317] Ibid., para. V. Sentencing.
[318] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Sentence, December 3, 2003, para. V. Sentencing. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/judgment/Summary-Media.pdf (accessed in November 2013).

had never taken into consideration any representations testified by Defence witnesses in his favor.[319]

Thus the Appeal Chamber took into account also the reasons the Trial Chamber had given to justify a similar sentence.

Crimes committed by the Appellant were of the gravest kind. Ferdinand Nahimana took part in the planning and organization of those criminal acts. Being in a position of authority, he abused his power. Lastly, there were no evidence of any representations on his favor at trial.[320]

Having considered all this, the Appeals Chamber uphold the convictions of the Appellant under Article 6 (3) of the ICTR Statute for direct and public incitement to commit genocide and for persecution as a crime against humanity, thus setting aside the convictions for conspiracy to commit genocide, genocide and extermination as a crime against humanity.[321]

The Appeals Chamber thus sentenced Nahimana to a 30 years' of imprisonment sentence.[322]

Despite this significant reduction, among the judges being part of the Appeals Chamber there was Judge Theodor Meron who openly dissented from the Chamber decision and considered even this last sentence too harsh. He argued that "Nahimana did not personally kill anyone and did not personally make statements that constituted incitement".[323]

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[319] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Appeals Judgment, November 28, 2007, para. 1044. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgment.pdf (accessed in November 2013).

[320] Ibid., para. 1045.

[321] Ibid., paras. 1051-1052.

[322] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* (Case No. ICTR 99-52-T), Appeals Sentence, November 28, 2007, para. 1044. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgment.pdf (accessed in November 2013).

[323] *Nahimana et al. v. Prosecutor* (Case No. ICTR-99-52-A), Partly Dissenting Opinion of Judge Meron, November 28, 2007, para. 22. See: http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgment.pdf (accessed in November 2013).

4.1.4 The "Butare case" against Pauline Nyiramasuhuko

The forth and last case taken into consideration is the one against Pauline Nyiramasuhuko. Pauline Nyiramasuhuko was the former Minister of Family and Women's Development in Kambanda's Interim Government.[324]

Noteworthy is the importance of such a case, being Pauline Nyiramasuhuko the first woman ever convicted by the ICTR. Furthermore, she was also the only woman tried and convicted by an international criminal court for genocide and rape as a crime against humanity.[325]

It should be noticed however, that Nyiramasuhuko is far from being the first and only woman accused for atrocity crimes committed in the African country. Thousands of other women have in fact been convicted by national courts and *Gacaca* proceedings throughout Rwanda.[326]

Pauline Nyiramasuhuko was tried jointly with other five persons, including her son, who was a student at the time of the genocide, and four other men, who served as *Préfet* and *Bourgmestre* at the Butare *préfecture*.[327]

Such a proceeding was among the longest and most complex ever undertaken by the ICTR. As the Chamber noted,

> "the Prosecution and the six Accused presented a total of 189 witnesses. Almost 13,000 pages of documents were tendered into evidence, resulting in 913 exhibits. These proceedings have produced more than 125, 000 transcript pages. […] The Judgment, excluding the annexes, will be approximately 1500 pages in length".[328]

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[324] M. A. DRUMBL, *"She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko,2011,* in *Michigan Journal of International Law,* 2012, p. 566.
[325] Ibid., p. 562.
[326] Ibid., p. 563.
[327] *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalon Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Elie Ndayambaje* (Case No. ICTR 98-42-T), Summary of Judgment and Sentence, June 24, 2011, para. 2. See: http://www.unictr.org/Portals/0/Case/English/Nyira/judgement/110624_summary.pdf (accessed in January 2014).
[328] Ibid., para. 5.

All six accused persons came from the southern Rwandan *préfecture* of Butare. They were subsequently commonly known as the "Butare Group" or the "Butare Six".[329] During the genocide, the Butare *préfecture* was one of the most Tutsi-populated *préfectures* in the country.[330]

Although with their own specific charges and convictions, all six accused were found guilty by the ICTR Trial Chamber II.[331]

Thus far, each of them has appealed the convictions. The "Butare case" is indeed still pending on appeal.[332]

As far as Pauline Nyiramasuhuko is concerned, according to the Chamber, at the time of the Rwandan genocide, the former Minister of Family and Women's Development entered into an agreement with members of Kambanda's Government to kill Tutsis within the Butare *préfecture.* By so doing, Pauline Nyiramasuhuko conspired with the Interim Government to commit genocide against the Tutsi people living in Butare.[333]

Furthermore, as the violence throughout Rwanda unfolded, more and more Tutsis sought refuge in places they considered safe. The Butare *préfecture* office was one of those. "Hoping to find safety and security, they instead found themselves subject to abductions, rape, and murder".[334] As the Chamber found out indeed, Pauline Nyiramasuhuko ordered the *Interahamwe* to kill Tutsis in the Butare *préfecture* office. She also ordered them to rape Tutsi women. She was thus found responsible as a superior for killings and rapes committed by members of the *Interahamwe*.[335]

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[329] M. A. DRUMBL, *"She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko,2011,* in *Michigan Journal of International Law,* op. cit., p. 561.
[330] Ibid., p. 567.
[331] Ibid., p. 561.
[332] Ibid., p. 571.
[333] *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalon Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Elie Ndayambaje* (Case No. ICTR 98-42-T), Summary of Judgment and Sentence, June 24, 2011, para. 7. See: http://www.unictr.org/Portals/0/Case/English/Nyira/judgement/110624_summary.pdf (accessed in January 2014).
[334] Ibid., para. 21.
[335] Ibid., para. 27.

Despite the fact that one of the six accused persons in the "Butare case" was a woman, the trial judgment is gender neutral. Pauline Nyiramasuhuko's gender is never discussed, she is presented as a perpetrator of hideous crimes indifferently from her male coperpetrators.[336]

On the contrary, stakeholders and victims who condemned Pauline Nyiramasuhuko's conduct did consider the accused person's gender as an aggravating factor. According to them, she is a worse perpetrator precisely because she is not only a woman, but also a mother and grandmother. On the other hand, according to those who defended her behavior, including Nyiramasuhuko herself, the fact of being a woman, a mother and a grandmother emphasizes the impossibility of her culpability.[337]

For the whole time of the proceeding in fact, Pauline Nyiramasuhuko never pleaded guilty.[338]

In determining the sentence, rather than focusing on Nyiramasuhuko's gender, the text of the judgment emphasized the accused person's role as a Minister at the time of the genocide and thus considered this latter point as an aggravating factor.

"Nyiramasuhuko's position as Minister for Family and Women's Affairs during the events made her a person of high authority, influential and respected within the country and especially in Butare *préfecture* from where she hails. Instead of preserving the peaceful co-existence between communities and the welfare of the family, Nyiramasuhuko, on a number of occasions, used her influence over *Interahamwe* to commit crimes such as rape and murder. This abuse of general authority *vis-à-vis* the assailants is an aggravating factors".[339]

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[336] M. A. DRUMBL, *"She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko,2011,* in *Michigan Journal of International Law,* op. cit., p. 564.
[337] Ibid., p. 582.
[338] Ibid., p. 569.
[339] *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalon Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Elie Ndayambaje* (Case No. ICTR 98-42-T), Judgment,

After having considered all this, the Chamber, while delivering its sentence on 24 June 2011, found the accused person guilty of conspiracy to commit genocide,[340] genocide,[341] the crimes against humanity of extermination,[342] rape[343] and persecution,[344] and the war crimes of violence to life[345] and outrages upon personal dignity.[346] Pauline Nyiramasuhuko was thus sentenced to a single sentence of life imprisonment.[347]

4.2 Domestic courts

4.2.1 NGTs, National Genocide Trials

At the time of the adoption of the Convention on Genocide, there were many who doubted the effectiveness of Article VI, concerning jurisdiction over the "crime of crimes". Besides the still only imagined international tribunals, Article VI stated that only the courts of the state where acts of genocide had occurred, had the power to try those responsible for similar atrocities. Yet, being genocide commonly considered a "crime of state", there were reasons to believe that national courts would presumably not have been willing to prosecute such a crime. Nevertheless, reality sometimes turned out to be different. The most

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June 24, 2011, para. 6207. See: http://www.unictr.org/Portals/0/Case/English/Nyira/judgement/110624_judgement.doc (accessed in January 2014).

[340] *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalon Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Elie Ndayambaje* (Case No. ICTR 98-42-T), Summary of Judgment and Sentence, June 24, 2011, para. 38. See: http://www.unictr.org/Portals/0/Case/English/Nyira/judgement/110624_summary.pdf (accessed in January 2014).

[341] Ibid., para. 39.

[342] Ibid., para. 43.

[343] Ibid., para. 44.

[344] Ibid., para. 45.

[345] Ibid., para. 47.

[346] Ibid., para. 48.

[347] Ibid., para. 99.

determined and operative example of territorial prosecution is certainly Rwanda.[348]

Before 1994, the country's justice system embodied only about 700 judges and magistrates, the majority of whom did not possess any formal legal training. As it can be expected, the situation got even worse when the genocide occurred and the number of experts further decreased. As Schabas reported, once he visited the country in November 1994, there were only about 20 lawyers with legal formation. As soon as the massacre came to an end, various international missions provided Rwanda with aid programs. The Office of the High Commissioner for Human Rights even tried to bring together as many foreign lawyers as possible who were willing to cooperate in the Rwandan devastated juridical infrastructure. Yet the government of the African country was of the opinion that "justice in Rwanda would be done by Rwandans", with only limited help and assistance from abroad.[349]

Thus national prosecutions started, which firstly took the form of National Genocide Trials (NGTs) in established Rwandan courts, and secondly, from 2001, of *Gacaca* jurisdictions. Concerning the latter, they will be better explained in the following paragraph. While the ICTR, as already seen, had the power to prosecute planners and instigators of genocide, national courts had jurisdiction over most serious offenders who had remained in the country.[350]

First trials started at the end of 1996. They were immediately criticized by the whole public opinion because of their lack of internationally recognized rules of fairness. This inadequacy, however, was to be found in inexperience rather than bad faith. As the time passed, the quality of the trials progressively improved.[351]

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[348] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 416-418.
[349] W. A. SCHABAS, *Genocide Trials and Gacaca Courts,* in *Journal of International Criminal Justice,* 2005, p. 883.
[350] K. P. APUULI, Procedural due process and the prosecution of genocide suspects in Rwanda, in *Journal of Genocide Research,* op. cit., pp. 11-12.
[351] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 418.

The national legislative statute of 1996 classified the offenders in four different categories, depending on the crime they had committed and on the role they had played. Belonging to the first group were the organizers and planners of the genocide, individuals who covered position of authority at the time of the massacre. This category of people sometimes coincided with those who were to be prosecuted by the ICTR. The second group was characterized by those persons not belonging to the first category, who had committed murder or other hideous crimes that led the victim to death. The third and fourth category respectively covered other serious crimes against persons and properties.[352]

Thanks to the so-called 'Confession and Guilty Plea Procedure', offenders could confess their guiltiness and thus take advantage of a reduction in punishment, which varied depending on the category of people someone belonged to. Concerning the first category of offenders, because of the gravity of their criminal acts, no mitigation in punishment was conferred.

Confessions of the accused were to be confirmed not only by the Prosecutor but also to the court itself. An accurate and precise description of the facts, including information about eventual accomplices as well, was to be given by the offender.

The 'Confession and Guilty Plea Procedure' proved to be very advantageous. The numbers spoke for themselves. By the end of 1998, less than two years after the adoption of that system, up to 9.000 prisoners had confessed their guiltiness. By early 2000, the number of confessions had grown to more than 20,000.[353]

Nonetheless, despite the fact that the truth of the offenders' admissions was to be confirmed by the court, the risk of false confessions was very high. It is important to notice that prisoners in pre-trial detention were forced to spend a long time languishing in overcrowded prisons, characterized by inhumane squalor and suffering. Rather than continue to live in such horrible conditions,

[352] W. A. SCHABAS, *Genocide Trials and Gacaca Courts,* in *Journal of International Criminal Justice,* op. cit., p. 885.
[353] Ibid., pp. 885-887.

they preferred to confess something they did not actually commit, thus hoping for a chance to get out of prison earlier.[354]

Concerning the assessment of the penalty, national tribunals allowed capital punishment to be carried out. As already seen, the ICTR excluded the application of a similar sentence, even with regard to the ultimate "crime of crimes". The maximum sentence the international tribunal allowed was life imprisonment. It thus often happened that those charged by domestic courts with less serious counts than criminals tried by the ICTR, namely the planners of genocide, were subject to harsher penalties. Only in April 1998 for instance, up to twenty-two offenders were publicly executed in Rwanda.[355]

As the time passed, the situation progressively changed. Frequent were the debates in the African country concerning the utility of capital punishment.

Since April 1998, even if there were still hundreds of death sentences imposed, no more executions had been carried out.

The 2004 legislation *de facto* maintained the death penalty only for people belonging to the first category of offenders.[356]

Yet, it was only in July 2007 that death penalty was completely abolished by Rwandan legislation. For the transfer of missing genocide cases from the ICTR to the national tribunals a requirement was needed, and that was the abolition of capital punishment. Thus Rwanda eventually agreed and subsequently modified its legislation.[357]

In 2005, up to 10,000 offenders were tried by national courts. The result was certainly positive, having considered the conditions of the Rwandan juridical system immediately following 1994.

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[354] K. P. APUULI, Procedural due process and the prosecution of genocide suspects in Rwanda, in *Journal of Genocide Research,* op. cit., pp. 17-18.

[355] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 462-466.

[356] W. A. SCHABAS, *Genocide Trials and Gacaca Courts,* in *Journal of International Criminal Justice,* op. cit., p. 895.

[357] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 466-467.

Yet, about other 80,000 accused persons were spending their time in prisons, in pre-trial detention. That is why, in 2005, the Rwandan government devised a second level of national justice known as *Gacaca,* which aimed at the prosecution of minor and less involved offenders.[358]

4.2.2 *Gacaca* courts

Back in February 1997, Paul Kagame, at that time Vice-President of the country, acknowledged that alternative forms of justice were needed to be taken into account in order to promote reconciliation in Rwanda. In 1998 a proper Commission was established, with the aim of discovering those new methods. Thus the proposal to introduce the so-called *Gacaca* courts capable of involving Rwandan population in judicial proceedings. Organic Law no. 40/2000 'on the Establishment of "*Gacaca* Jurisdictions" and the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 ad 31 December 1994' was adopted in January 2001. Following an experimental period, this system of popular justice, aiming at the prosecution of those responsible for minor criminal cases, became fully operational in 2005.[359]

The name G*acaca* means 'the grass' or 'the lawn' in Kinyarwanda language. The term referred to the ancient community court system, which was used in the past to solve disputes, mainly concerning properties, at the local level. Such a system was commonly administered by local leaders or elders. People who participated in those *Gacaca* trials were used to sit outside, on the grass precisely.[360]

Considerable was the importance of the re-introduction of such a system in the Rwandan society after the tragic events of 1994.

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[358] W. A. SCHABAS, *Genocide Trials and Gacaca Courts,* in *Journal of International Criminal Justice,* op. cit., p. 888.
[359] Ibid., pp. 879-891.
[360] Ibid., p.891.

Being an example of local justice, the *Gacaca* model was characterized by transparency and democratic values. Common sense and consensus were on the basis of those juridical proceedings, which directly involved the population in dispensing justice.[361]

Gacaca courts as well, as did national tribunals, encouraged perpetrators to admit their guiltiness. By confessing their crimes, offenders could thus benefit from a reduction in penalty or from an alternative to prison, the latter meaning any kind of community service the court imposed.[362]

Several were the advantages provided by *Gacaca* jurisdictions.

First of all, speeding up trials and simplifying juridical proceedings would have meant a significant and progressive reduction in the number of prisoners waiting for trial in jails.

Local *Gacaca* courts were able to directly involve the population in the administration of justice. Unlike the ICTR and, to a lesser degree, national tribunals, both perceived by the most as distant realities, the system of *Gacaca* courts was capable of making people believe that a justice producing tangible results was actually possible. By punishing all those who bear a part of responsibility, even a small one, for the atrocities of the previous years, and by giving them the possibility to tell once for all the truth and to repent in front of the whole community for the offences committed, the *Gacaca* system thus contributed to a gradual, yet imaginable, reconciliation among Rwandans.[363]

Gacaca was a decentralized system of justice, administered by non-professionals judges elected by the communities at the local level. Each *Gacaca* court was made up of a General Assembly, a Bench and a Coordinating Committee. The General Assembly included all Rwandan citizens over the age of

[361] K. P. APUULI, Procedural due process and the prosecution of genocide suspects in Rwanda, in *Journal of Genocide Research,* op. cit., pp. 14-18.
[362] See: http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml (accessed in November 2013).
[363] J. FIERENS, Gacaca Courts: Between Fantasy and Reality, in *Journal of International Criminal Justice,* 2005, p. 901.

18. A total of 24 people, aged over 21 years, were elected by the Assembly. Five of them held the post of the delegates to the Assembly at the higher level. The other 19 served the Bench at the local level. Among them, five members constituted the Coordinating Committee.[364]

Despite such an organization, being a system of popular justice, the *Gacaca* method is inevitably characterized by several shortcomings, the first one being the lack of respect for rights of the defence.

Gacaca proceedings did not follow any internationally recognized rules concerning fair trials. One of the most important rights, the right to be defended, was there not allowed. Even if accused persons could present their defence, they could not be assisted by any counsel. Another universally recognized right for an accused person is the possibility for the latter to remain silent. *Gacaca* jurisdictions did not authorize such a circumstance to occur.[365]

Besides the lack of fair trials, *Gacaca* system of justice was characterized by other weaknesses. Among all stood the absence of an impartial judgment in accordance with the law, a strong diversification in penalties and a lack of separation between prosecutor and judge.[366]

Gacaca courts were supposed to finish their work by the end of 2008. Yet, because of the huge number of confessions and denunciations occurred, the expectation needed to be reconsidered.[367]

Gacaca trial officially ended on 4 May 2012. Up to that period, more than 1,2 million people were tried by about 12,000 local courts spread throughout the country.[368]

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[364] W. A. SCHABAS, *Genocide Trials and Gacaca Courts,* in *Journal of International Criminal Justice,* op. cit., pp. 893-895.

[365] J. FIERENS, Gacaca Courts: Between Fantasy and Reality, in *Journal of International Criminal Justice,* op. cit., p. 912.

[366] K. P. APUULI, Procedural due process and the prosecution of genocide suspects in Rwanda, in *Journal of Genocide Research,* op. cit., p. 18.

[367] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 418-419.

[368] See: http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml (accessed in November 2013).

5. UN initiatives to prevent and react to genocide

Raphael Lemkin, while referring to General Assembly Resolution 96(I), once affirmed that: "By declaring genocide a crime under international law and by making it a problem of international concern, the right of intervention on behalf of minorities slated for destruction has been established"[369]. The subsequent Convention on Genocide, however, did not specify the nature of a similar right.

During the years of the Cold War the issue of humanitarian intervention was forgotten and it re-emerged only in the 1990s when the UN Security Council authorized military intervention in Iraq in order to protect the Kurdish minority living there.[370] Yet, as it has been seen up to now, the opposite example, the one in which an humanitarian intervention is not authorized by the Security Council, turned out to be possible as well. Once the genocide occurred in Rwanda, some permanent members, although perfectly aware of the mass slaughter of Tutsi civilians taken place there, proved unwilling to act. Because of their right of veto, they had the power to prevent any further UN interventions.

By the late 1990s, even if it was largely accepted that the issue of humanitarian intervention fell within the mandate of the Security Council, there were many suggesting that those kind of interventions, aiming at the prevention of genocide and other atrocities, could in some extraordinary cases be undertaken even without an authorization coming from the Security Council.
What happened in Kosovo in 1999 was a clear example of this situation. Despite the Russian veto, a military intervention was undertaken by the United States and its NATO allies in the region with the aim of protecting the Kosovar minority from persecution exercised by the government of Yugoslavia. A similar intervention, although illegal because of the absence of a prior authorization

[369] R. LEMKIN, 'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law,* p. 145 at p. 150, W. A. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., p. 525.
[370] UN Doc. S/RES/688, April 5, 1991. W. A. SCHABAS refers to it in *Genocide in International Law,* op. cit., p. 526.

from the Security Council, was considered legitimate because it achieved the objective of protecting civilians. Thus the expression 'responsibility to protect' as the focal point of new humanitarian interventions began to circulate. An important change of perspective was occurring. The attention progressively shifted from the international community's "right of intervention" in internal affairs to its "responsibility to protect" populations suffering from international crimes. [371]

Such a term first appeared in the report of the International Commission on Intervention and State Sovereignty (ICISS) in December 2001. [372] It will be subsequently commonly utilized to designate the historic commitment the world leaders made at the UN 2005 World Summit on the occasion of the sixtieth anniversary of the United Nations. Yet before analyzing such a noteworthy event, it is important to consider what happened in the previous years.

The ICISS was established in response to the deeply criticized humanitarian interventions of the 1990s. The Commission sought to find out a global political consensus as far as intervention within the international system is concerned. In such a context, the doctrine of the 'responsibility to protect' focused on three key elements: the responsibility to prevent, react and rebuilt. Prevention is considered as the "single most important dimension of the responsibility to protect". When prevention fails, violations of humanitarian law must be answered with appropriate measures, including the use of military force if needed. The authorization of a similar intervention should still be conferred by the Security Council. Yet the permanent members should all agree not to prevent resolutions authorizing military intervention for human protection purposes. Lastly, following an intervention, full assistance with recovery, reconstruction and reconciliation in the state where the crimes occurred must be provided. [373]

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[371] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 530-532.
[372] See: http://www.responsibilitytoprotect.org/index.php/about-rtop (accessed in November 2013).
[373] See: http://responsibilitytoprotect.org/R2PSummary.pdf (accessed in November 2013).

After 11 September 2001 international measures aiming at the prevention of terrorism and proliferation of weapons of mass destruction slowed down the efforts that were made until that moment to prevent genocide and other mass atrocities.

However, faced with ongoing humanitarian emergencies, the one concerning the mass slaughter of Darfurian civilians amongst all, the international community returned on the matter.[374]

In 2004, the High Level Panel on Threats, Challenges and Change formed by the then Secretary-General Kofi Annan clarified that:

> "The principle of non intervention in internal affairs cannot be used to protect genocidal acts or other atrocities.[…] the successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo, and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community. There is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of *every* State when it comes to people suffering from avoidable catastrophe.[…] And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community".[375]

On 7 April 2004, on the occasion of the tenth anniversary of the Rwandan genocide, The Secretary-General himself launched his so-called 'Action Plan to Prevent Genocide'. After having recognized previous international failures, he affirmed that the risk of upcoming genocides continued to be real. Believing that

[374] See: http://www.responsibilitytoprotect.org/index.php/about-rtop (accessed in November 2013).

[375] 'A more Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change', UN Doc. A/59/565, December 2, 2004, paras. 200-3. W. A. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 531-532.

preventing similar atrocities was a collective responsibility, he outlined a five-point action plan.

He first considered the importance of preventing armed conflict, because of its belief that in a context of war, genocide and other mass slaughter are more likely to happen.

Secondly, he focused the attention on the protection of civilians, whenever the efforts to prevent armed conflict fail. He thus specified that the UN peacekeepers are entitled to use force not only in self-defence but also while protecting local civilians who are threatened with violence.

The third point of Kofi Annan's plan consisted in ending impunity, through the establishment or the maintenance of national and international tribunals prosecuting those responsible for hideous crimes. Reconciliation in a country which had experienced the brutality of the crime of genocide would be impossible if perpetrators of similar atrocities are not brought to justice.

Fourthly, the Secretary- General considered the understanding of early and clear warning as a fundamental step to prevent genocide. After having acknowledged previous UN failure in Rwanda, he underlined the importance of recognizing the risk of possible genocide, in order to promptly act and prevent it. A similar task aiming at gathering useful information is to be undertaken by a new figure introduced be the Secretary General, the one of the Special Adviser on the Prevention of Genocide. The person appointed to this role should first of all work closely with the High Commissioner in order to collect as much information as possible on potential or existing cases of genocide. The adviser has the duty to warn the Security Council and other parts of the UN system of possible threats of genocide. Moreover, he has the power to advice the Security Council on the prevention or reaction to a situation of genocide.

The final point of Kofi Annan's Action Plan referred to the need to take swift and decisive action when, despite all efforts, a genocide is going to happen. According to the Secretary-General, military action is included, yet it should be

used only in extreme cases, where other peaceful and diplomatic solutions had proved to be useless.[376]

The year following the publication of Secretary-General's Action Plan, world leaders met at the United Nations 2005 World Summit. There, they made the historic commitment thereafter known as the 'Responsibility to Protect'. Such an engagement was based on three fundamental conditions.

Firstly, it recognized that each State bears the primary responsibility concerning the protection of its population from genocide and other international crimes.

Secondly, it affirmed that the whole international community should assist States in the fulfillment of a similar responsibility.

Thirdly and lastly, it acknowledged that it is a task of the international community to use suitable diplomatic, humanitarian and any other peaceful means to protect populations suffering from those hideous crimes. Whenever a State fails or is unwilling to ensure protection to its people, the international community must react by taking stronger measures. The collective use of force is allowed, yet it must be authorized by the Security Council.[377]

In the same year of the UN World Summit, the General Assembly adopted a resolution which provided the survivors of the 1994 Rwandan genocide, especially orphans, widows and victims of sexual violence, with the assistance they needed.[378] The General Assembly resolution is of considerable importance also because it included a special request to submit to the Secretary-General. Such a request consisted in the establishment of a specific outreach programme, thereafter known as "The Outreach Programme on the Rwanda Genocide and the United Nations".[379]

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[376] See: http://www.un.org/News/Press/docs/2004/sgsm9245.doc.htm (accessed in November2013).

[377] See: http://www.responsibilitytoprotect.org/index.php/about-rtop (accessed in November 2013).

[378] Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence, UN Doc. A/RES/60/225, March 22, 2006, para. 2.

[379] Ibid., para. 5.

The latter is an information and educational programme administered by the UN Department of public Information. The programme has two main important objectives. Firstly, learning the lessons of the past in order to help nowadays generations not to repeat the same mistakes and to prevent other hideous crimes to occur. Secondly, raising widespread awareness of the difficulties that survivors of genocide still have to face nowadays. To achieve its goals, the programme includes occasions of debates, conferences, roundtable discussions and so on in Africa and other regions of the world as well. Educational material, such as print and audio-visual resources, is provided to partners supporting the initiative. The programme's mandate was extended in 2007, 2009 and 2011.[380]

[380] See: http://www.un.org/en/preventgenocide/rwanda/index.shtml (accessed in November 2013).

Chapter III: Darfur

CONTENTS:

1. A brief history of the Darfur conflict

In the years when the doctrine of the 'Responsibility to Protect' began to emerge and the then Secretary-General, Kofi Annan, publicly revealed his 'Action Plan to Prevent Genocide', millions of innocent civilians were suffering from violence and other human rights violations in the underdeveloped African region of Darfur, in western Sudan.

Estimates talk of about 300,000 deaths and up to 2,7 million of displaced people within the region since 2003, with several hundred thousand more who have fled into neighboring countries looking for protection. During these past ten years frequent have been the episodes of burned and destructed villages, looting, rape and torture of innocent civilians.[381]

Yet in order to better understand the origins of the conflict in Darfur and the reluctance shown by the international community to intervene to stop a similar massacre, an overview to the broader situation concerning Sudan must be provided.

Sudan is the largest country of the African continent, with a population of about 39 million inhabitants.[382] Because of the multitude of tribes which populate the country, it is different to establish a commonly recognized national identity in Sudan. Over the last years, however, an Islamic-African-Arab culture has become predominant in the North. Even though the Arabic language is now considered by most Sudanese as a *lingua franca*, differences concerning the religion still distinguish the Sudanese population. Islam prevails in the North, whereas Christianity and other traditional religions characterize the South of the country.[383]

[381] See: http://endgenocide.org/conflict-areas/sudan/sudan-backgrounder/ (accessed in December 2013).
[382] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 40.
[383] Ibid., para. 40-41.

The territory of Sudan is characterized by an irregular distribution of wealth. Most regions of the country mainly rely on a subsistence economy, based on agriculture and pastoralism. There are a few areas, however, like the fertile region of El Jezzira and the capital city of Karthoum, which respectively benefit from commercial agriculture and industrial development. Moreover, in recent years oil has been discovered in the South of the country.[384] As it will be seen hereafter, besides constituting a reason of internal conflict, the issue of the exploitation of natural resources will influence international responses in both conflicts of Sudan and Darfur as well. In the last years an increase in direct foreign investment in Sudan from countries such as China, Malaysia, India, Kuwait and the United Arab Emirates has been seen.[385]

Since the independence from British-Egyptian colonization occurred on 1 January 1956, the Sudan has alternated periods of military regimes and democratic experiences.[386]

The years following the independence were characterized by the progressive spread of the Arabic language and the Islamic religion from the North of the country. This led to unrest and subsequent strong reactions in the South, which triggered the first Sudanese war.[387]

In 1969 Colonel Gaafar Mohamed Al-Nimeiri took power. Although he had the merit to sign the Addis Ababa peace agreement with the southern rebels in 1972, thus assuring a degree of autonomy to the South, in the last years of his government he ended up generating new reactions.

Once the presence of oil resources was discovered in the southern territories of the region, he publicly showed his desire to incorporate such areas to the North.

[384] Ibid., para. 42.
[385] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research,* 2007, p. 195.
[386] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 43.
[387] Ibid., para. 44.

This eventually led to 22-year long Second Sudanese Civil War between the North and the South, which began in 1983.[388]

General Omar Hassan Al-Bashir, the current President, took power in 1989. [389]

In order to make oil exploration easier, the areas inhabited by civilians were completely cleared by Sudanese government forces.[390]

Since the beginning of the conflict, more than 2 million persons have died and other 4,5 million have been forced to flee from their homes.[391]

Only in 2002 the Government and the main rebel group from the South, the so-called Sudan People's Liberation Movement (SPLM/A), eventually agreed on initiating peace talks. A series of protocols were signed in the following years, concerning issues such as the right to self-determination for citizens of southern Sudan and the declaration of a permanent cease-fire. The Comprehensive Peace Agreement (CPA) signed on 9 January 2005, included all previous protocols and eventually marked the end of the longest conflict in Africa.[392]

According to United Nations Security Council Resolution 1590, adopted on 24 March 2005, the Security Council decided to establish a peacekeeping mission, the United Nations Mission in Sudan (UNMIS), having as main objectives of its mandate the support in the implementation of the CPA, as well as the assistance in the protection of civilians, especially vulnerable groups such as refugees, displaced people, women and children.[393]

On 9 July 2011, the same day UNMIS ended its operations, South Sudan became completely independent.[394] Despite this important achievement, issues

[388] Ibid., para. 45.
[389] Ibid., para. 47.
[390] See: http://endgenocide.org/conflict-areas/sudan/sudan-backgrounder/ (accessed in December 2013).
[391] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 50.
[392] Ibid., para. 50.
[393] UN Doc. S/RES/1590, March 24, 2005, paras. 1-4.
[394] See: http://unmis.unmissions.org/ (accessed in December 2013).

concerning border demarcation and agreements over oil still continue to threaten the relations between the North and the South of Sudan.[395]

The 22-year long conflict between the North and the South of the country has deflected attention from the terrible situation the Sudanese western region of Darfur has experienced since 2003.

The underdeveloped African region of Darfur is part of the Great Sahara region. Although it has some fertile agricultural areas, most of the territory is made up of desert land.[396]

Darfur is populated by different tribal groups. They share the same religion, Islam, and although some of them keep maintaining their own traditional language, Arabic is generally spoken.

Yet, whether some of these tribes are principally sedentary agriculturalists, others are nomadic cattle and camels herders.[397]

Despite the importance of belonging of one's own tribe, frequent episodes of intermarriage and socio-economic relations between different groups have contributed to render the distinction less precise.[398]

Following the drought and famine of the 70s and 80s, tensions between sedentary and nomadic tribes progressively increased. Because of scarce resources, cattle herders, looking for pasture and water, started to invade agriculturalists' more fertile areas.[399]

Most nomadic groups were composed of Arabic speaking tribes, such as Rizeigat, Mahaiya, Irayqat and Beni Hussein. Sedentary agriculturalists, on the contrary, commonly identified as non- Arabs, included tribes such as the majority Fur, and Masaalit and Zaghwa. Once the economic pressure began to be felt, this social distinction among tribes was gradually seen as corresponding to ethnic

[395] See: http://endgenocide.org/conflict-areas/sudan/sudan-backgrounder/ (accessed in December 2013).
[396] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 55.
[397] Ibid., para. 52.
[398] Ibid., para. 53.
[399] Ibid., para. 55.

differentiation.[400] The distinction between Arab and African, which in the past was rarely perceived as a reason of conflict, started in those years to gain more and more importance.[401]

A number of nomadic tribes converged together and gave birth to a sort of alliance named the Arab Gathering. In reply to this, some members of the Fur tribe created a contrasting group, known as the African Belt.[402]

In those years the so-called "Islamic Legion" began to take shape. In the 1980s, the Libyan Colonel Gaddafi, started to recruit Arabs coming from the Sahelian zone, including those from Darfur, and to provide them with weapons and racist indoctrinations concerning Arab superiority. Although the "Legion" was pulled down in the late 1980s, as it will be seen hereunder, leaders of the *Janjaweed* fighters, central figures of the conflict in Darfur which erupted in 2003, were once members of such a lineup.[403]

Yet, moving back to the economic tensions and the subsequent inter-tribal conflicts of the 1980s, it is important to underline that the latter were further aggravated by an increasingly easier access to weapons in the region in those years. Several external powers, in order to contain Libyan expansionistic aspirations in the neighboring Chad, introduced arms in Darfur. From the region, a number of armed attacks were subsequently launched by Chadian nomadic groups that, following the drought of those years, emigrated into the more fertile areas of Darfur. Facilitated by such an increased access to weapons, more and more tribes thus began to organize and arm themselves in defence of the interests of their own community.[404]

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[400] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 195.

[401] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 60.

[402] Ibid., para. 59.

[403] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research,* op. cit., p. 71.

[404] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, paras. 56,58.

Despite some modest attempts to mediate the tensions by the Government in 1990, clashes between Arab and African tribes continued in the following years. The Government of Al Bashir gradually started to be criticized by some Darfurian people, because of its unwillingness to halt the conflict effectively.[405]

As a result of this same resentment, two Non-Arab insurgent groups, whose members came essentially from the tribes of Fur, Massalit and Zaghawa, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), began organizing themselves against the Government, the latter considered as the primary cause of the socio-economic problems the region of Darfur was at the time living. Both rebel groups, although not interconnected one with the other, demanded similar rights. They both firmly believed in the importance of an equal participation in government by all regions of the Sudan. They noted that Darfur and its people, as well as other areas of the country, have been largely marginalized. Moreover, they strongly criticized the government for the irregular distribution of wealth and development of Sudan. It is important to notice that both groups spoke in the name of all the Darfurian population, with no distinction between one or another tribe.[406]

In the beginning of 2003, the rebel movements launched their first offensives against the Government installations. As it happened a decade previously in Rwanda with the attacks of Tutsi refugees from Uganda, here in Darfur as well the subsequent counterinsurgency led by the Government was directed not only against SLA/M and JEM rebels, but also against innocent civilians of Non-Arab tribes.[407]

President Al Bashir was asked by some respected Darfurians to open negotiations with the rebels in order to find out a peaceful accommodation to

[405] Ibid. para. 59.
[406] Ibid. para. 62.
[407] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research,* op. cit., p. 72.

stop the rebellion. The President, however, turned out firmly resolute to put an end to the violence with a military campaign.[408]

Without a sufficient number of soldiers at its disposal, because many of its troops were engaged in the conflict in the South, the Government started to recruit new forces among local Darfurians which were disposed to fight against the rebels.[409] The majority of Arab nomadic tribes, given the difficult climatic conditions of the time, identified a similar call as an opportunity to encroach Non-Arab lands. Considerable was the subsequent response.[410]

The term used to label these newcomers, *Janjaweed*, was a traditional Darfurian world meaning armed men riding horses or camels.[411] Such a term had already been used previously, during the tribal clashes of the 1990s, and it designated Arab nomadic fighters who were used to attack villages of sedentary non-Arab communities.[412]

Although Sudanese State authorities denied any relationships between the *Janjaweed* militia and State actors, survivors testified that ruthless fighters were acting under the Karthoum Government command.[413]

The Commission of Inquiry as well ascertained that unequivocal links existed between the militia and the State.[414]

As it had previously happened in Rwanda with the *Interahamwe* militia, in Darfur the *Janjaweed* fighters, armed and trained by the Sudanese Government, caused the death of hundred thousand innocent civilians. They were told by the Central Government to eliminate the Africans, in order to defend their Arab tribes.[415]

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[408] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 196.
[409] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, paras. 66-67.
[410] Ibid., para. 68.
[411] Ibid., para. 69.
[412] Ibid., para. 100.
[413] Ibid., para. 98.
[414] Ibid., para. 111.
[415] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 196.

Studies and interviews with survivors attested a repeated and widespread use of racial derogatory epithets during the attacks against non-Arab people.[416]

Janjaweed fighters undertook a frightful campaign of terror. Villages of non-Arab tribes were most of the time burned or destroyed, their inhabitants often raped, kidnapped, or forced to flee, their properties depredated.[417]

During the conflict several were the attempts to politically negotiate a cessation of hostilities. Yet both the Government and the rebel groups proved not well-disposed to make compromises.[418]

The conflict has not brought to an end yet. Nevertheless, as it will be seen in the conclusive paragraph, the government and some of the main rebel groups signed cease-fire agreements under UN-African Union influences in the last two years.[419]

2. Inadequacy of international responses to the conflict

2.1 Great Powers' influences on UN decisions concerning intervention

As already pointed out before, the early years of the conflict in Darfur paradoxically corresponded to the period in which the doctrine of the 'Responsibility to Protect' began to circulate.

Such a doctrine stated that Nation-States, as well as the whole international community, share a common responsibility concerning the protection of all individuals against genocide and all other kind of mass atrocities and human

[416] M. VANROOYEN, J. LEANING, K. JOHNSON, K. HIRSCHFELD, D. TULLER, A. C. LEVINE & J. HEFFERMAN, *Employment of a livelihoods analysis to define genocide in the Darfur region of Sudan,* in *Journal of Genocide Research,* 2007, p. 353.

[417] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research*, op. cit., p. 71.

[418] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 70.

[419] See: http://www.un.org/apps/news/story.asp?NewsID=46598&Cr=Darfur&Cr1=#.Uq8nLfTuLSg (accessed in December 2013).

right abuses. Whenever a State fails or proves unwilling to take action in order to protect its population, the international community shall intervene, peacefully or, in some extreme cases, even military, to ensure people under threat an adequate protection.[420]

The international community, once having understood that the Sudanese state proved reluctant to act and give protection to its population, should have intervened, yet failed to do so. As it will be seen hereafter, despite the fact that the situation in Darfur was completely adverse to humanitarian intervention, mainly because of internal impediments by the central government, the international community, instead of debating for so long on whether genocide actually was occurring in the region or not, could have done more to halt the humanitarian disaster. In 2005, UN Special Rapporteur Philip Alston, in his first report to the Commission of Inquiry, referred to:

> "excessive legalism which manifests itself in definitional arguments over whether a chronic and desperate situation has risen to the level of genocide or not. In the meantime, while some insist that the term is clearly applicable and others vigorously deny that characterization, all too little is done to put an end to the ongoing violations. At the end of the day the international community must be judged on the basis of its action, not on its choice of terminology".[421]

Whether the long debate concerning the label "genocide" in relation to the Darfur crisis will be better analyzed in the following paragraph, here the attention will focus on how the international community have reacted to the tragic events that are still occurring in the African region.

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[420] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 205.

[421] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Mr. Philip Alston)UN Doc. E/CN.4/2005/7, December 22, 2004, para. 36. W.A. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., p. 567.

As the International Coalition for the Responsibility to Protect, an organization which regroups non-governmental organizations from all regions of the world, pointed out: "world leaders with the power to stop the atrocities have failed to react to protect Darfuris due to conflicting geopolitical interests and a lack of political will".[422]

As it happened in Rwanda in 1994, military intervention in Darfur was seriously considered only after a long period of time. UNAMIR II proved available to intervene in Rwanda when the genocide was almost over. Yet concerning Darfur, an African, rather than international response, was taken into account only in late July 2004. A peacekeeping force, the African Union Mission in Sudan (AMIS), was established in the region more than a year after the beginning of the terrible massacre.[423]

Within the UN there were permanent states with veto power, such as China and Russia, which strongly opposed any UN intervention into the region. [424]

They both believed that international pressure would not have halted the conflict. On the contrary, they were of the opinion that until the Karthoum Government did not approve any international initiatives, peaceful dialogue was the only possible mediation effort.[425]

What it must be said is the fact that since a long time both countries have been entertaining a strong economic and political relationship with the Government of Sudan. Both China and Russia heavily invest in Sudanese oil. What is more, both countries supply with weapons the African state.[426] Brian Wood, Amnesty International's expert on military and police, recognized that both countries,

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[422] See: http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur (accessed in December 2013).

[423] T. PIIPARINEN, *Reconsidering the silence over the ultimate crime: a functional shift in crisis management from the Rwandan genocide to Darfur,* in *Journal of Genocide Research,* op. cit., p. 72.

[424] See: http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide (accessed in December 2013).

[425] See: http://www.un.org/News/Press/docs/2006/sc8823.doc.htm.

[426] See: http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide (accessed in December 2013).

although perfectly aware of the fact that weapons they introduced in Sudan were going to be used against innocent civilians, continued in their interests.[427] Moreover, noteworthy is the fact that both China and Russia are among Sudan's strongest political and diplomatic allies.[428]

It appears therefore clear that, before taking any important decision, each countries weighted up their own various interests.

Concerning the policy of the United States on the Darfur crisis, the situation is even more particular and noteworthy.

Contrary to how things had previously gone in Rwanda, as it will be better seen in the following paragraph, both the then US Secretary of State Collin Powell and the President George W. Bush publicly declared that genocide was actually taken place in the region of Darfur in those years. It was the first time that a country accused another state of committing a crime of genocide, while it was still taking place.[429]

The reasons that lay behind a similar 'genocide determination' have long been analyzed. Three possible explanatory theories have been taken into account throughout these years.

First of all, the US Administration might have turned out so determinate in considering the Darfur crisis as genocide because of its willingness to avoid previous failures to occur once again. On the tenth anniversary of the tragic experience occurred in Rwanda, the US could not afford other similar mistakes.

A second theory took into consideration the public pressure that the US Administration perceived in a period so close to the 2004 national elections.

[427] See: http://www.amnesty.it/armi-da-cina-e-russia-continuano-ad-alimentare-il-conflitto-in-darfur (accessed in December 2013).

[428] See: http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide (accessed in December 2013).

[429] E. MAYROZ, *Ever again? The United States, genocide suppression, and the crisis in Darfur,* in *Journal of Genocide Research,* 2008, p. 366-369.

Appropriate and valuable decisions were needed to be taken, especially in a similar framework.[430]

Lastly, the relationship between the US and the Sudanese Government should have been taken into account as well. Besides the fact that the US, contrary to other countries, such as the above mentioned China and Russia, did not have any particular economic interests in the Sudan, it should also be said that the Bush Administration had long criticized Sudanese actions, especially against Christians in the South.[431]

Nevertheless, such a determination in labeling the situation in Darfur as genocide was not followed by a similar US determination to act in order to stop the massacre. The United States promptly refer the ongoing crisis to the UN Security Council.[432]

The idea to intervene military, because of the risks involved, had never been seriously taken into account by the US Administration. Being Sudan a Muslim country, a military intervention could have been seen by the Sudanese government as another western invasion against Arabs.[433] It is important to remember that in those years the US was fighting in Iraq.[434] Moreover, logistical difficulties, especially concerning the absence of modern roads and railways capable of reducing the distance from supply sources, were often mentioned by the US Government as another obstacle to adequately respond to the crisis in Darfur.[435] Lastly, the possibility that the Karthoum Government could have suspended humanitarian aids following a military intervention into the region, was considered by the US administration as well.[436]

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[430] Ibid., p. 371.
[431] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 199.
[432] E. MAYROZ, *Ever again? The United States, genocide suppression, and the crisis in Darfur,* in *Journal of Genocide Research,* op. cit., p. 359.
[433] Ibid., pp. 362, 364.
[434] Ibid., p. 365.
[435] Ibid., p. 362.
[436] Ibid., pp. 362, 364.

Nevertheless, alternatives to the use of force were possible, yet not adequately considered by the US. More diplomatic pressure upon the Sudanese Government should have been exerted. Considering the role the US had in January 2005 in finalizing the Security Comprehensive Peace Agreement between the North and the South of Sudan, as well as the fact that the African country was an important counter-terrorism supporter, the American Government proved very cautious in responding to the events occurring in Darfur.[437]

Despite all of the above mentioned preoccupations, being the US "the primary power capable of applying pressure on the international community to enforce collective security and the 'Responsibility to Protect' ideal"[438], more could have done on its behalf. First of all, the US could have exerted much more pressure on China and Russia, thus limiting their opposition with regard to any UN Security Council actions. Moreover, the international media could have been better utilized in order to publicly denounce the atrocities that were occurring in Darfur. Much more pressure could have been applied also in relation with Arab League countries. What is more, the US could have more actively supported the deployment of African Union's troops in the region, providing them with adequate military supplies.[439]

On this matter, the above mentioned African Union Mission in Sudan (AMIS), a force of 150 troops founded by the African Union (AU) in October 2004, primarily operating in the region of Darfur, proved inadequate to respond to the humanitarian disaster because of its lack of resources. The number of its military personnel was increased to about 7000 in the year that followed, but the intensity of the violence could still not be contained.[440]

[437] Ibid., pp. 364-365.
[438] Ibid., p. 374.
[439] Ibid., pp. 375-381.
[440] See: http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur (accessed in December 2013).

Although the Security Council approved and supported the establishment of such an African mission at the time[441], a UN peacekeeping force, aiming at the reinforcement of AU troops, was seriously taken into account only in late 2006.

UN Security Council Resolution 1706, adopted on 31 August 2006, urges for the expansion of UNMIS' mandate. The Security Council, aware of the fact that the violence in the western region of Sudan continued to escalate, proposed the deployment of additional capabilities in the territory of Darfur.[442]

China and Russia, together with the country of the Qatar, abstained from voting.[443] To motivate such an abstention they agreed on the fact that the consent of the Government of Sudan was needed before any action to be taken.[444]

The proposal of the deployment of a UN peacekeeping force in Darfur in fact, due to the Sudanese Government opposition, never became operational.[445]

It is only in 2007 that the UN Security Council succeeded in authorizing the deployment of an African Union-United Nations Hybrid Operation in Darfur (UNAMID), which incorporated and replaced previous AMIS.

Security Council Resolution 1769, dated 31 July 2007, was adopted unanimously. The resolution affirmed that such a joint AU/UN peacekeeping force was to be composed of a total of 26,000 personnel.[446] The unity of command and control of the mission was to be provided by the United Nations' organs.[447]

The main tasks of UNAMID focus on the protection of civilians, the security concerning humanitarian aids, the monitoring and supervision of the

[441] UN Doc. S/RES/1564, September 18, 2004, para. 2.
[442] UN Doc. S/RES/1706, July 31, 2007, paras. 1-2.
[443] See: http://www.un.org/News/Press/docs/2006/sc8821.doc.htm (accessed in December 2013).
[444] See: http://www.un.org/News/Press/docs/2006/sc8823.doc.htm (accessed in December 2013).
[445] See: http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur (accessed in December 2013).
[446] UN Doc. S/RES/1769, July 31, 2007, paras. 1-2.
[447] UN Doc. S/RES/1769, July 31, 2007, para. 7.

implementation of agreements, as well as the support and assistance in the political process.[448]

The joint AU/UN peacekeeping force, however, due to lack of resources and Sudanese Government's continuous interferences, took almost two years to become fully operational.[449]

Its initial 12-month mandate has been continuously extended throughout these years. Resolution 2113, the most recent one, adopted on 30 July 2013 decided to extend the mandate of UNAMID up to 31 August 2014.[450]

2.2 Diplomatic initiatives

A number of diplomatic initiatives, alternative to military intervention, aiming at solving the Darfur crisis, have been undertaken throughout all these years. Most of the agreements, although with few concrete results, were negotiated under the auspices of the African Union or the United Nations.

Noteworthy is the consideration that the UN Security Council addressed at the end of the Resolution 1769, the one which proposed the establishment of UNAMID. After recognizing that: "there can be no military solution to the conflict in Darfur" the Security Council "welcomes the commitment expressed by the Government of Sudan and some other parties to the conflict to enter into talks and the political process under the mediation […] of the United Nations Special Envoy for Darfur and the African Union Special Envoy for Darfur."[451]

Back in July 2004, on the occasion of the visit of the Secretary General Kofi Annan to Sudan, a joint communiqué between the Sudanese Government and the United Nations was delivered. Mutual commitments were taken on both sides. Whether the UN ensured its help in the mediation and in the assistance of the implementation of agreements, the Central Government of Sudan

[448] See: http://www.un.org/en/peacekeeping/missions/unamid/ (accessed in December 2013).
[449] See: http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur (accessed in December 2013).
[450] UN Doc. S/RES/2113, July 30, 2013, para. 1.
[451] UN Doc. S/RES/1769, July 31, 2007, para. 18.

committed itself mainly to permit safe access to humanitarian workers, to investigate any human rights violations, to disarm the *Janjaweed* militias, as well as to reach a political solution acceptable to all parties in the conflict.[452]

The agreement was followed by the adoption of Resolution 1556, dated 10 July 2004. The UN Security Council urged the Karthoum Government to respect all the commitments made in the previous Communiqué.[453]

After having recognized that the Government of Sudan had not fulfill its obligations, the Secretary General requested the establishment of an international Commission of Inquiry, aimed "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable".[454]

The Commission's results affirmed that the Central Government and its *Janjaweed* militias were responsible for serious international violations, amounting to crimes against humanity.[455] However, as it will be seen and better explain in the following paragraph, the Commission did not find support for allegations of genocide on behalf of the Sudanese Government.[456]

With the adoption of Resolution 1593, on 31 March 2005, the Security Council decided to refer perpetrators identified by the Commission of Inquiry as being involved in hideous international crimes to the Prosecutor of the ICC.[457]

The United States, together with China, Algeria and Brazil, abstained from voting. While the United States would have preferred an hybrid tribunal to the ICC

[452] Joint Communiqué between the Government of Sudan and the United Nations on the Occasion of the Visit of the Secretary General to Sudan, June 29-July 3, 2004.
[453] UN Doc. S/RES/1556, July 30, 2004, para. 1.
[454] UN Doc. S/RES/1564, September 18, 2004, para. 12.
[455] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, p. 3 (Executive Summary).
[456] Ibid., p. 4 (Executive Summary).
[457] UN Doc. S/RES/1593, March 31, 2005, para. 1.

prosecuting those responsible for hideous international crimes, China believed that perpetrators should have been tried by domestic courts.[458]

Concerning the reaction of the Sudanese Government with regard to a similar decision to refer the situation in Darfur to the Prosecutor of the ICC, the Sudan's First Vice President, Ali Osman Taha, strongly replied that no international assistance was required and that there would not have been any cooperation with the ICC on behalf of the Karthoum government.[459]

On April 2006 another important effort to solve the situation in Darfur was negotiated, this time mainly under the mediation of the African Union, helped by the United States and the United Kingdom as well.[460] The Government of Sudan and the two main rebel groups, the SLM/A and the JEM, met in Abuja, Nigeria, in order to find an ultimate solution to the conflict in Darfur.[461]

Such an agreement, known as the Darfur Peace Agreement (DPA), included various issues, in particular concerning the declaration of a cease-fire and subsequent power and wealth-sharing among the parties.[462]

However, the implementation of such an agreement failed, due to the fact that only a faction of the SLM/A ultimately agreed to sign the document.[463]

More recently, in 2011, another step towards reconciliation was made in Darfur. More than two years of dialogue and negotiations between the major parties to the conflict and international partners brought to the draft of another peace agreement, the so-called Doha Document for Peace in Darfur (DDPD). The implementation of such an agreement, aiming at establishing a permanent ceasefire and a comprehensive peace process in Darfur, was supported both by

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[458] See: http://www.un.org/News/Press/docs/2005/sc8351.doc.htm (accessed in December 2013).

[459] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 202.

[460] E. MAYROZ, *Ever again? The United States, genocide suppression, and the crisis in Darfur,* in *Journal of Genocide Research,* op. cit., p. 361.

[461] Darfur Peace Agreement, May 5, 2006, Preamble.

[462] Ibid., para. 1.

[463] M. LIPPMAN, *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 202.

the United Nations and the African Union. It was firstly signed by the Government of Sudan and one of the rebels group, the Liberation and Justice Movement (LJM) on 14 July 2011.[464]

Up to now, another rebels group, the Justice and Equality Movement (JEM), did sign such an agreement with the Sudanese Government on 10 February 2013, thus renouncing violence and moving the peace process forward.[465]

Mrs. Aichatou Mindaoudou, the United Nations-African Union mediator, although having affirmed that "the road to peace [was] challenging and need[ed] a great deal of resolve, perseverance and concessions from both sides", she did recognize as well that the signing of the document by the JEM, which is one of the main rebels group in Darfur, was "a major breakthrough in the road towards a comprehensive and lasting peace accord in Darfur".[466]

Throughout all these years, the UNAMID has continued in its engagement to urge all other non-signatory movements to sign up to the DDPD.[467]

3. The international "genocide debate"

In 2004, the UN Humanitarian Coordinator for Darfur, Mukesh Kapila, characterized the situation in the western region of Sudan as:

> "the world's greatest humanitarian crisis. […] The only difference between Rwanda and Darfur now is the number involved. […] It is more than just a conflict, it is an organized attempt to do away with a group of people".[468]

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[464] See: http://unamid.unmissions.org/Default.aspx?tabid=11060 (accessed in December 2013).
[465] See: http://www.un.org/apps/news/story.asp?NewsID=44108&Cr=darfur&Cr1=#.UrwFY_TuLSh (accessed in December 2013).
[466] Ibid.
[467] See: http://unamid.unmissions.org/Default.aspx?tabid=11060 (accessed in December 2013).
[468] ERIC REEVES, *Kofi Annan on Darfur,* June 18, 2004, See: http://freeworldnow.blogspot.it/2004/06/kofi-annan-on-darfur-june-17-2004.html MATTHEW LIPPMAN refers to it in *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research*, op. cit., p. 193.

Nevertheless, most foreign Governments and UN institutions proved reluctant to consider the crime which was occurring in Darfur as genocide.

It is on September 7, 2004, more than a full year after the beginning of the conflict in the African region, that the US Congress adopted a resolution which declared that the "atrocities unfolding in Darfur, Sudan are genocide".[469] Following the uninterrupted escalation of violence, in the year which commemorated the tenth anniversary of the 1994 Rwandan genocide, the US Congress adopted Resolution 467, passed unanimously by both the House and the Senate[470], which "urged the Administration to call the atrocities being committed in Darfur with their rightful name: genocide".[471]

Two days later, on September 9, 2004, the US Secretary of State Colin Powell appeared before the Senate Foreign Relations Committee. Based on the findings of an investigation conducted among Darfurians refugees in Chad by an Atrocities Documentation Team (ADT)[472], Powell stated that:

"There is, finally, the continuing question of whether what is happening in Darfur should be called genocide. […] I concluded that genocide has been committed in Darfur and that the Government of Sudan and the *Janjaweed* bear responsibility – and that genocide may still be occurring. […] A full-blown and unfettered investigation needs to occur. Sudan is a contracting party to the Genocide Convention and is obliged under the Convention to prevent and to punish acts of genocide. To us, at this time, it appears that Sudan has failed to do so".[473]

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[469] United States House Congressual Resolution 467, September 7, 2004, para. 1.
[470] E. MAYROZ, *Ever again? The United States, genocide suppression, and the crisis in Darfur,* in *Journal of Genocide Research,* op. cit., p. 362.
[471] United States House Congressual Resolution 467, September 7, 2004, para. 6.
[472] E. MAYROZ, *Ever again? The United States, genocide suppression, and the crisis in Darfur,* in *Journal of Genocide Research,* op. cit., p. 367.
[473] SECRETARY COLIN L. POWELL, Testimony Before the Senate Foreign Relations Committee, Washington, September 9, 2004. W. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., pp. 553-554.

After the Secretary of State's declaration, the then US President George Bush confirmed that "the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide".[474]

Following the specific request made by the US Secretary of State to the UN to establish a proper investigation in Darfur, the Security Council adopted Resolution 1564 on September 18, 2004. Such a resolution called on the establishment of an international commission of inquiry, whose mandate was "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable"[475].

In the space of only 90 days, from October 25, 2004 to January 25, 2005, the five-member Commission, led by the above-mentioned Antonio Cassese, and its investigative staff provided by the Office of the High Commissioner for Human Rights[476], succeeded in the scope of its mandate. During the three months of investigations, regular meetings were organized with Central Government authorities, Governors of different Darfur states, leaders of various rebel forces and common citizens, victims or witnesses of human rights violations.[477]

On January 25, the Commission submitted its findings to the Secretary General. The report provided a detailed 176-page description of the dramatic situation in Darfur, it evaluated the gravity of the crimes there committed and succeeded in

[474] GEORGE W. BUSH, President speaks to the United Nations General Assembly, *White House Press Release*, September 21, 2004. E. MAYROZ refers to it in *Ever again? The United States, genocide suppression, and the crisis in Darfur,* in *Journal of Genocide Research,* op. cit., pp. 368-369.
[475] UN Doc. S/RES/1564, September 18, 2004, para. 12.
[476] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 1.
[477] Ibid., p. 2 (Executive Summary).

the identification of a number of 51 suspected perpetrators of various hideous crimes.[478]

Yet concerning the evaluation on whether acts of genocide had actually occurred in the region or not, the report concluded that although "one should not rule out the possibility that in some instances single individuals, including Government officials, may entertain a genocidal intent,"[479] "the Government of the Sudan has not pursued a policy of genocide". Despite the existence of two elements which constitute the crime of genocide, that are the nature of the *actus reus* and the presence of a group considered as protected by the Convention of Genocide being targeted, "one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent" [480]. Thus the preference to categorize the atrocities committed in Darfur by the Sudanese Government and its *Janjaweed* militias as "crimes against humanity"[481]. As it will be better seen in the following paragraph, in determining whether the crime of genocide actually occurred in the region of Darfur, the UN Commission of Inquiry only focused on whether the Government of Sudan possessed the required genocidal intent.

Neither the Security Council, while referring the situation in Darfur to the International Criminal Court, did not use the term genocide in relation to the crimes there committed.[482]

Lastly, with regard to international non-governmental organizations, although most of them used to consider the dramatic situation in the region of Darfur as an unequivocal example of genocide, there are a few of them, such as Amnesty International and Human Rights Watch, that, agreeing with the findings of the

[478] P. ALSTON, *The Darfur Commission as a Model for Future Responses to Crisis Situations,* in *Journal of International Criminal Justice,* 2005, p. 604.
[479] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 520.
[480] Ibid., para. 518.
[481] Ibid., para. 519.
[482] UN Doc. S/RES/1593, March 31, 2005.

UN Commission, do not identify a similar slaughter of innocent civilians with the crime of genocide.[483]

As it will be better analyzed in following paragraphs, although the Sudanese Government's actions might necessitate the use of the label "genocide", among jurists and commentators working on this subject, there are those who believe that the avoidance of such a term is to be preferable not to make the situation in Darfur even worse and endangered the already fragile Government's cooperation with UNAMID and international NGOs operating there with the aim of protecting innocent civilians.

3.1 Has genocide actually occurred in Darfur?

In order to determine whether genocide has actually taken place in Darfur or not, Article II of the Convention on Genocide needs to be taken into account.

First of all, it is important to establish whether people being targeted by perpetrators of hideous crimes in Darfur did belong to any of the groups considered 'protected' by the Convention, namely a national, ethnical, racial or religious group.

According to the Commission of Inquiry, the notion of "tribe", as defined by anthropologists and consisting in a group of people who speaks the same language and believes to descend from a common ancestor, does not constitute a protected group. However, whenever a tribal group differentiates itself from another on an "racial, national, ethnical or religious" bases, there, it could constitute a protected group.[484] It is thus necessary to establish whether Darfurian tribes do belong to one among the four protected groups of the Convention on Genocide or not.

[483] E. MAYROZ, *Ever again? The United States, genocide suppression, and the crisis in Darfur,* in *Journal of Genocide Research,* op. cit., p. 373.

[484] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, paras. 495-496.

On an objective basis, the Commission of Inquiry analyzed that the targeted tribes (mostly the Fur, Massalit and Zaghawa) did not seem to constitute a particular protected group on their own. They both shared the same religion and language with the people who attacked them. The only difference among victims and perpetrators consisted in the fact that, while the first were sedentary people, the latter were nomadic tribes. On a lesser degree, members of targeted tribes were used to speak their own language in addition to Arabic, whereas Arab tribes exclusively spoke Arabic.[485]

Yet, as it has been previously seen in the chapter concerning the situation in Rwanda, judges of the ICTR, aware of the limitations of the text of the Convention on Genocide, decided to expand the concept of "protected groups" from an objective to a subjective basis. Because of the fact that both Tutsi and Hutu perceived themselves as belonging to an ethnic group, different one from another, the ICTR concluded that they both constituted protected groups.

Concerning Darfur, the Commission established that, due to the fact that those tribes supporting rebels identified themselves as "African", whereas the others which supported the government and its militias as "Arab", the two groups subjectively constituted protected groups.[486]

After having considered this, the attention needs to be focused on the *actus reus*, the objective element of a crime. According to the Convention of 1948, a crime could amount to genocide when the offences are one or more among the following: "killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group".

[485] Ibid., para. 508.
[486] Ibid., paras. 509-510.

The findings of the Commission of Inquiry indicated that most of the offences listed in the Convention had actually taken place in Darfur. During its three-month investigation, the Commission found out ample evidence which confirmed "the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part".[487]

In those years, other investigations took place in the region, thus confirming the findings of the Commission of Inquiry.

In 2004 and 2005, a team of experts from an American independent organization, called Physicians for Human Rights (PHR)[488], conducted a series of surveys in eastern Chad and Darfur, interviewing a random sample of refugees from each of Darfur's three main non-Arab tribes.[489] Besides the occurrence of organized killings, findings revealed that frequent episodes of torture and rape of civilians did occur in the region at that time,[490] thus causing "serious bodily or mental harm to members of the population belonging to certain tribes".[491]

Furthermore, the findings from the PHR report proved ample evidence mainly of violations which include the deliberate infliction on a group of "conditions of life calculated to bring about its physical destruction in whole or in part"[492]. Interviews with refugees clearly revealed that perpetrators were not used to kill all members of a tribe immediately, instead they forced them to live under harsh conditions which made survival impossible. People were forced to flee from their homes. They watched impotently their villages and social infrastructures being

[487] Ibid., para. 507.
[488] See: http://physiciansforhumanrights.org/ (accessed in December 2013).
[489] M. VANROOYEN, J. LEANING, K. JOHNSON, K. HIRSCHFELD, D. TULLER, A. C. LEVINE & J. HEFFERMAN, *Employment of a livelihoods analysis to define genocide in the Darfur region of Sudan,* in *Journal of Genocide Research,* op. cit., pp. 343-346.
[490] Ibid., pp. 348-350.
[491] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. II (b).
[492] Ibid., Art. II (c).

destroyed, their crops and cattle being thieved.[493] Moreover, the Central Government's continued interference with the delivery of international humanitarian assistance did contribute as well to undermine the physical survival of non-Arab communities.[494]

Lastly, in order to determine whether criminal acts arise to the crime of genocide or not, a particular attention needs to be focused on the *dolus specialis*, "the distinguishing characteristic of this particular crime under international law".[495] Article II of the Convention on Genocide specified that offences amount to genocide when they are committed "with intent to destroy, in whole or in part" one among the four protected groups. And it is precisely on this matter that the Commission drew its conclusion, denying that a crime of genocide actually occurred in the region of Darfur.

Although having recognized, as already mentioned above, "the possibility that in some instances single individuals, including Government officials, may [have] entertain[ed] a genocidal intent, or in other words, attack[ed] the victims with the specific intent of annihilating, in part, a group perceived as an hostile ethnic group"[496], the Commission concluded that, as far as the central Government authorities are concerned, such a specific genocidal intent was missing. Not being able to find evidence of the *dolus specialis* of the supreme political authorities of the state, the Commission thus stated what follows,

"the Government of Sudan has not pursued a policy of genocide. […] Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished

[493] M. VANROOYEN, J. LEANING, K. JOHNSON, K. HIRSCHFELD, D. TULLER, A. C. LEVINE & J. HEFFERMAN, *Employment of a livelihoods analysis to define genocide in the Darfur region of Sudan,* in *Journal of Genocide Research,* op. cit., pp. 345-346.
[494] Ibid., p. 353.
[495] Report of the International Law Commission on the Work of Its Forty-Eighth Session, May 6 - July 26, 1996, p.87. W. SCHABAS refers to it in *Genocide in International Law, The Crime of Crimes,* op. cit., p. 261
[496] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 520.

on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare". [497]

As Schabas recognized, "because of the scope of genocide it seems implausible that it can be committed by an individual, acting alone. […] For a genocide to take place, there must be a plan, even though there is nothing in the Convention that explicitly requires this".[498]

Thus the Commission, in order to determine whether acts of genocide had actually occurred in the region or not, operating under such a theory and according to the opinion that "the very nature of most international crimes implies, as a general rule, that they are committed by State officials or with their complicity",[499] limited itself to analyze whether the Government of Sudan possess such a specific intent.

Yet, according to some commentators, "the decision of the Commission to focus exclusively on the intent of the central government in assessing whether Sudan had committed genocide is at variance with the approach taken by the UN *Ad Hoc* International Criminal Tribunals […], which focus instead on the intent of the perpetrators of the alleged acts of genocide".[500] On their opinion, "the Darfur Commission's exclusive focus on the intentions of the authorities in Sudan's central government appears overly narrow. Thus, even if the Commission was correct in limiting its focus to the responsibility of the 'central government', it still should have […] assessed whether the perpetrators of the genocidal acts

[497] Ibid., para. 518.
[498] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 246.
[499] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 568.
[500] A. B. LOEWENSTEIN, S. A. KOSTAS, *Divergent Approaches to Determining Responsibility for Genocide. The Darfur Commission of Inquiry and the ICJ's Judgment in the Genocide Case*, in *Journal of International Criminal Justice*, 2007, p. 849.

harboured specific intent, and then determined whether their relationship *vis-à-vis* the Sudanese state invoked Sudan's state responsibility".[501]

By focusing its attention only on the Central Government authorities' specific intent, the Commission denied allegations of genocide, yet recognized however, that the Sudanese Government and its *Janjaweed* militias were "responsible for serious violations of international human rights and humanitarian law", which, due to their widespread and systematic character, could arise to crimes against humanity. Among those international crimes, the Commission included killings of innocent civilians, episodes of rape and torture, pillage, displacement and destruction.[502] According to the Commission, "some element emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show the lack of genocidal intent".[503]

In order to prove a similar lack of genocidal intent, four indicative elements are provided by the Commission.

Firstly, witnesses testified the fact that in a number of cases Government forces and militias refrained from killing all members of a tribe. On the contrary, the attackers purposely selected groups of young men, which were considered as rebels, thus sparing the rest of the population.[504] With such an example, the Commission could show that the objective of those who attacked did not correspond to the genocidal intent to "destroy, in whole or in part, a national,

[501] Ibid., p. 856.
[502] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, p. 3 (Executive Summary).
[503] Ibid., para. 513.
[504] Ibid., para. 513.

ethnical, racial or religious group, as such"[505]. Instead, their aim was to kill exclusively men considered by them as rebels.[506]

The second element provided by the Commission to prove the Sudanese Government's lack of *dolus specialis* lies in the fact that people forcibly displaced from their own villages were located by Central Government authorities in proper IDP (Internally Displaced Persons) camps. According to the Commission, such a solution, although amounting to human rights violations, does not outline any genocidal intent to exterminate the group as such.

The Report continues by noticing that the Central Government commonly authorizes international humanitarian organizations to enter the region and assist the population living there.[507] Yet, on this matter, several non-governmental organizations operating in those territories, such as Amnesty International, were not on the same opinion. The region of Darfur has indeed frequently been considered by them as the most dangerous setting for humanitarian workers.[508] It is reported that humanitarian assistance coming from abroad has continually been obstructed by the Central Government, which interfered with the delivery of food and medicine. People operating there to assist Darfurian citizens in need were frequently targeted by Government forces and militias, and thus forced to leave the region.[509]

Moving back to the examples provided by the Commission of Inquiry to prove the lack of genocidal intent, at least as far as Government authorities are concerned, a third element is proposed. Investigations revealed that in several cases, villages inhabited both by Arab and African tribes had not been targeted

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[505] Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, Art. II.

[506] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 514.

[507] Ibid., para. 515.

[508] Amnesty International, *Darfur threats to humanitarian aid,* December 1, 2006. M. LIPPMAN refers to it in*: Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research,* op. cit., p. 196.

[509] M. LIPPMAN, *The Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research,* op. cit., p. 196.

by Government forces and militias, thus confirming the fact that the attackers did not have an intentional purpose to annihilate all African tribes.[510]

Lastly, a fourth element is taken into consideration by the Commission. Based on factual findings, the Report affirms that in a number of instances the intent which motivated the attackers consisted in the desire to loot one's own cattle, rather than to kill members belonging to a group as such. Whenever victims were disposed to leave their cattle to the attackers, the latter refrained from murdering them. On the contrary, whenever they resisted to allow this, the perpetrators did not hesitate and killed them. On the basis of similar observations, the Commission could affirm that genocidal intent was missing.[511]

Rather than speaking of a genocidal policy pursued in Darfur by the Government authorities, the Commission thus concluded that the Government of Sudan, as well as some of its Arab militias, could be held responsible for murder and persecution as crimes against humanity.[512]

Several non-governmental organizations and American commentators did not agree with the findings of the Commission of Inquiry. Instead, they preferred to characterize the situation in Darfur as genocide, on the basis of further proof confirming a genocidal intent as far as Government authorities are concerned.

In February 2005, the New York Times columnist Nicholas Kristof, published a document which supposedly belonged to the President of Sudan. In such a text, President Al Bashir ordered his officials to kill African tribes, to destroy their villages and to loot their properties. He asked his militias to "change the demography of Darfur and make it void of African tribes".[513]

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[510] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 516.

[511] Ibid., para. 517.

[512] Ibid., para. 519.

[513] N. D. Kristof, *The Secret Genocide Archive*, *New York Times*, February 23, 2005. M. LIPPMAN refers to it in *Darfur: the Politics of Genocide Denial Syndrome,* in *Journal of Genocide Research,* op. cit., p. 194.

Interviews with refugees conducted by the above mentioned American organization "Physician for Human Rights" in 2004 and 2005 revealed the Government of Sudan calculated intent to bring about the physical destruction of the non-Arab tribes living in Darfur. Besides the fact that the Central Government did nothing to stop the slaughter, such a genocidal intent was demonstrated by its continued interference with the delivery of humanitarian aids on which refugees rely on to survive, as well as by its enduring opposition to the deployment of a UN peacekeeping force aimed to protect civilians.[514]

Although having denied allegations of genocide concerning the Sudanese Government authorities, the Commission of Inquiry continued by specifying that:

> "genocide is not necessary the most serious international crime. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished".[515]

In this respect, the Commission made reference to the fact that the Appeals Chamber of the ICTR, in *Kayishema and Ruyindana*, considered that no hierarchy between international crimes existed. All of them consist in "serious violations of international humanitarian law", which attract the same sentences.[516]
Such a statement opposed the ICTR previous view that considered genocide as the gravest crime, the so called "crime of crimes"[517].

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[514] M. VANROOYEN, J. LEANING, K. JOHNSON, K. HIRSCHFELD, D. TULLER, A. C. LEVINE & J. HEFFERMAN, *Employment of a livelihoods analysis to define genocide in the Darfur region of Sudan,* in *Journal of Genocide Research,* op. cit., p. 353.
[515] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 522.
[516] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Case No. ICTR 95-1-A), Judgment, 1 June 2001, para. 367. The International Commission of Inquiry on Darfur refers to it in: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 506.
[517] *Prosecutor v. Jean Kambanda* (Case No. ICTR 97-23-S), Sentence, September 4, 1998, para. 16. The International Commission of Inquiry on Darfur refers to it in: Report of the International

Despite the fact that from a legal point of view genocide and other international crimes are of comparable gravity, Schabas underlines that, with its results,

> "the Darfur Commission was anticipating critics, and there were many, who claimed that, in categorizing atrocities as crimes against humanity rather than as genocide, it was in some way trivializing their scale and insulting the victims".[518]

4. The International Criminal Court investigation in Darfur

In order to fulfill its mandate, besides investigating "reports of violations of international humanitarian law and human rights law in Darfur by all parties" and determining "whether or not acts of genocide have occurred", the Commission of Inquiry had to identify perpetrators of grave international crimes there committed and to "suggest means of ensuring that those responsible for such violations are held accountable".[519]

After having established that all parties of the conflict in Darfur, including both the Government of Sudan, its militias, and the rebel forces, were responsible for serious international violations, and that, with the exception of single individuals, the Government of Sudan had not pursued a policy of genocide, the Commission focused its attention on the other two tasks.[520]

Following accurate investigations, the Commission provided a list of 51 persons suspected to bear individual criminal responsibility for international crimes committed in the region of Darfur.[521] The Commission recommended that the sealed file containing the names of the suspects should be delivered to

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Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, para. 505.

[518] W. A. SCHABAS, *Genocide in International Law, The Crime of Crimes,* op. cit., p. 653.

[519] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, p. 2 (Executive Summary).

[520] Ibid., pp. 3-4 (Executive Summary).

[521] Ibid., para. 531.

the Prosecutor of the ICC, who will use it for further investigations and future indictments.[522]

As already anticipated previously in fact, the Commission strongly recommended the UN Security Council to immediately refer the dramatic situation of Darfur to the International Criminal Court.[523]

Recognizing the fact that the Sudanese Government had failed to bring to justice those responsible for serious international crimes, the Commission believed that other mechanisms were needed to do justice.[524]

The Sudanese justice system proved both incapable and unwilling to adequately address the tragic situation in Darfur. Investigations found out that Sudanese domestic laws most of the time go against basic human rights standards. Moreover, interviews with victims, did testify the lack of impartiality of such domestic system.[525]

Besides these shortcomings, according to the opinion that "the very nature of most international crimes implies, as a general rule, that they are committed by State officials or with their complicity", the Sudanese Government proved unwilling to prosecute perpetrators, who most of the time had acted under his orders.[526]

Thus the necessity to refer the situation to an external competent court, identified by the Commission of Inquiry with the newly established International Criminal Court.[527]

On 17 July 1998, the Rome Statute, the treaty establishing the International Criminal Court, was adopted at a conference in Rome. After ratification by sixty

[522] Ibid., para. 525.
[523] Ibid., para. 569.
[524] Ibid., para. 568.
[525] Ibid., p. 5 (Executive Summary).
[526] Ibid., para. 568.
[527] Ibid., para. 569.

countries, on 1 July 2002, the court became fully operational.[528] Up to now, the Rome Statute is joined by 122 countries.[529]

The ICC, an independent international organization based in The Hague, the Netherlands, is the first permanent and treaty-based international criminal court aiming at prosecuting those responsible for serious international crimes, namely genocide, crimes against humanity, war crimes and crimes of aggression.[530]

It is composed of four organs, that are the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry. The Presidency, made up of three judges, has administrative tasks. The Judicial Divisions, consisting of eighteen judges partitioned into the Pre-Trial Division, the Trial Division and the Appeals Division, operate into the three different Chambers. The Office of the Prosecutor, currently headed by Mrs. Fatou Bensouda from the Gambia, receives referrals and other information on international crimes, examines them all and conducts both investigations and prosecutions. Lastly, the Registry, exercises functions mainly regarding non-judicial aspects of the administration and servicing of the ICC.[531]

According to the Rome Statute, the Prosecutor of the ICC can begin an investigation on the basis of a referral from a State Party, as well as from the UN Security Council, which decides, under Chapter VII of the UN Charter, to refer a situation occurring in a country, not necessarily a State Party of the Rome Statute,

[528] See: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (accessed in December 2013).
[529] See: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx (accessed in December 2013).
[530] See: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (accessed in December 2013).
[531] See. http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx (accessed in December 2013).

to the Court.[532] In addition, investigations can be initiated by the Prosecutor *proprio motu* on the basis of information received from individuals or organizations.[533]

Since 2002, 8 situations, all Africans, have been brought before the ICC.

All the three possibilities have been undertaken.[534] Up to now, four States Parties, Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali, have directly referred their situations to the ICC. Concerning the other possibility, the one in which it is the UN Security Council that refer a situation of trouble to the Court, to date, the situations in the region of Darfur, in western Sudan and in Libya, have been brought before the ICC in such a way. Both Sudan and Libya are not state-party to the Rome Statute. Lastly, investigations into the situations in Kenya and Côte d'Ivoire have been initiated in these last years by the Prosecutor *proprio motu.*[535]

Alternatives to the proposal to refer the situation in Darfur to the ICC were accurately examined, yet excluded by the Commission. Concerning the possibility to refer the situation to an *Ad Hoc* International Criminal Tribunal for example, as it previously happened with atrocities committed in the territories of the former Yugoslavia and Rwanda, the Commission assumed that such a solution would have proved less efficient mainly because of two reasons. First of all, those tribunals turned out to be very expensive. Secondly, they proved rather slow in the prosecution of alleged perpetrators.[536] As it will be seen hereafter, however, neither the ICC will be able to live up to initial expectations.

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[532] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 13.

[533] Ibid., Art. 15.

[534] See: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed in December 2013).

[535] Ibid., (accessed in December 2013).

[536] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, paras. 573-574.

On 31 March 2005 the UN Security Council adopted Resolution 1593 which referred the situation in Darfur since 1 July 2002, date in which the ICC became fully operational, to the Prosecutor of the International Criminal Court.[537]
The United States, which had long opposed such a referral, eventually allowed the resolution to pass, yet, together with China, Brazil and Algeria, abstained from voting.[538]

The US Administrations, except for the initial period, have long refused their support to the ICC. Under the Clinton mandate, the United States signed the Rome Statute, but did not ratify it. During the Bush Administration the hostility toward the ICC increased even more. Reasons for such an opposition are to be found in the US initial claims over the ICC, subsequently rejected by other nations. The US in fact wished to maintain its control over the institution, both by granting the UN Security Council the exclusive power to bring a situation before the Court and by assuring immunity to US officials.[539]
According to Schabas, the insistence shown by the United States on a genocide determination, which brought to the establishment of a specific Commission, aimed at determining whether or not acts of genocide actually took place in the region of Darfur, delayed the Security Council decision to refer the situation to the ICC.

"The investigative work conducted by the Commission of Inquiry might well have been undertaken by the Prosecutor of the International Criminal Court from the outset, in September 2004. […] The United States waited until the end of March 2005 before agreeing, in the form of an abstention, to refer the Darfur case to the ICC. This wasted precious time and arguably delayed, by six months or so, the threat that perpetrators would be held accountable internationally. In other words, the sterile

[537] UN Doc. S/RES/1593, March 31, 2005, para. 1.
[538] See: http://www.un.org/News/Press/docs/2005/sc8351.doc.htm (accessed in December 2013).
[539] See: http://www.amicc.org/usicc/ (accessed in December 2013).

debate about whether the Darfur atrocities are genocide or "merely" crimes against humanity did not enhance justice, it did the opposite".[540]

As can be expected, the Sudanese Government did not welcome UN Resolution 1593. In the years that followed, besides refusing to turn suspected criminals over to the court, it paradoxically even named Governor Ahmed Mohammed Haroun, one of the three Sudanese persons wanted by the court, as the Minister of Humanitarian Affairs, as well as the chief investigator for human rights abuses.[541]

Following UN Resolution 1593, on June 6, 2005, the then Prosecutor Luis Moreno Ocampo initiated investigations in the situation in Darfur.[542]

On February 2007 the first warrants of arrest were issued by Pre-Trial Chamber I for the Minister of State Ahmad Muhammad Harun and the *Janjaweed* leader Ali Muhammad Ali Abd-Al-Rahman, better known as Ali Kushayb. Both are allegedly criminally responsible for various counts of crimes against humanity and war crimes. The two suspects have not been captured yet.

Besides them, the Sudanese President Omar Al-Bashir and the current Minister of National Defense Abdel Raheem Muhammad Hussein, for whom the Court have issued other two arrest warrants, still remain at large. The Court charged them too with numerous counts of crimes against humanity and war crimes.

Furthermore, as it will be better seen in the following paragraph, the Court, while issuing a second warrant of arrest to the President Al-Bashir on July 12, 2010, added charges of genocide against him.

Besides these three members of the Sudanese Government and a leader of the *Janjaweed* militias, other cases involving members of the main rebel groups have

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[540] W. SCHABAS, *Genocide, Crimes Against Humanity and Darfur: The Commission of Inquiry's Findings on Genocide*, 2005, Cardoza Law Review, p. 1707.

[541] M. VANROOYEN, J. LEANING, K. JOHNSON, K. HIRSCHFELD, D. TULLER, A. C. LEVINE & J. HEFFERMAN, *Employment of a livelihoods analysis to define genocide in the Darfur region of Sudan,* in *Journal of Genocide Research,* op. cit., p. 355.

[542] See: http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide/icc (accessed in December 2013).

been brought before the Court as well. Three summons to appear were issued respectively for Bahar Idriss Abu Garda, Abdallah Banda Anakaer Nourain and Saleh Mohammed Jerbo Jamus. All of them appeared voluntary before the Court. Whether charges of war crimes against Abu Garda, the Chairman and General Coordinator of Military Operations of the United Resistance Front, were not confirm by Pre-Trial Chamber I, things went on differently with regard to the other two accused persons. The Court committed them both to trial for charges of war crimes. Yet, proceedings against Saleh Mohammed Jerbo Jamus, former Chief of Staff for the SLA, terminated on 4 October 2013, following the death of the accused person. The trial against Abdallah Banda Anakaer Nourain instead, Commander-in-Chief of JEM Collective-Leadership, is supposed to start on 5 May 2014.[543]

4.1 The case against President Al-Bashir

The case against the current President of Sudan, Omar Hassan Ahmad Al Bashir, the first in which the International Criminal Court accused a sitting Head of State[544], is surely one of the most interesting and debatable cases issued by the tribunal.

On 14 July 2008, the then Prosecutor of the ICC, Luis Moreno Ocampo, after accurate investigations, filed an Application requesting the Pre-Trial Chamber to issue a warrant of arrest against the Sudanese President for genocide, crimes against humanity and war crimes.[545]

According to Article 58 (1) of the Rome Statute, "at any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the

[543] See: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed in December 2013).
[544] See: http://www.un.org/apps/news/story.asp?NewsID=30081&Cr=darfur&Cr1=icc#.UsHlQPTuLSh (accessed in December 2013).
[545] Public Redacted Version of the Prosecutor's Application under Article 58, ICC -02/05, July 14, 2008, para. 413.

Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfy that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court".[546]

On the basis of such a consideration, the Prosecutor concluded that:

> "there are reasonable grounds to believe that Omar Hassan Ahmad Al Bashir bears criminal responsibility for the crime of genocide under Article 6 (a) of the Rome Statute, killing members of the Fur, Masalit and Zaghawa ethnic groups, (b) causing serious bodily or mental harm to members of those groups, and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; for crimes against humanity under Article 7 (1) of the Statute, committed as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture, and (g) rapes; and for war crimes under Article 8 (2) (e) (i) of the Statute, for intentionally directing attacks against the civilian population as such, and (v) pillaging a town or place".[547]

Although not having neither physically nor directly committed any of the alleged crimes, the Prosecutor recognized that Al Bashir, being Commander in Chief of the Armed Forces, acted through members of his state apparatus, the army and the *Janjaweed* militias, by personally directing them to commit hideous crimes.[548]

Concerning the specific count for the crime of genocide, the Prosecutor, after having confirmed the occurrence of genocide on the basis of the objective element, focused his attention on the accused person's *mens rea*. On this matter, he pointed out what follows:

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[546] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 58 (1) (a).

[547] Public Redacted Version of the Prosecutor's Application under Article 58, ICC -02/05, July 14, 2008, para. 1.

[548] Ibid., paras. 39-40.

"The systematic targeting of victims on account of their membership of a particular group; the deliberate failure to differentiate between civilians and persons of military status; the perpetration of acts which violate the very foundation of the groups such as mass rapes and mass expulsions from the land with no possibility to return or to reconstitute as a group; the utterances of perpetrators; the sophisticated strategy of concealing crimes; and the existence of a plan constitute the facts of this case from which the existence of the intent required for genocide is the only reasonable inference".[549]

The Prosecutor's decision, requesting the Pre-Trial Chamber to issue a warrant of arrest against the Sudanese President, gave rise to some criticisms. Amongst all, noteworthy is Professor Antonio Cassese's opinion. The latter criticized the Prosecutor's decision mainly for three reasons.

First of all, in order to have more chances to arrest the Sudanese President, the request to the Pre-Trial Chamber should have been made secretly.

Secondly, Cassese did not understand the reason not to condemn other Government of Sudan authorities, that together with Al Bashir, influenced political and military decisions at the time.

Lastly, Cassese was of the opinion that, because of the difficulty to prove charges of genocide at trial, the Prosecutor should have accused Al Bashir "only" of crimes against humanity and war crimes, equally grave, but easier to prove.[550]

Based on these considerations, Cassese firmly believed that the Prosecutor's request to issue a warrant of arrest for crimes against humanity, war crimes and even genocide against Al Bashir would have terrible consequences for the population of Darfur. According to him, such a decision would not only undermined the relationship between Sudanese authorities and peacekeeping

[549] Ibid., para. 45.

[550] A. Cassese, *Il Colpo di Scena del Procuratore*, July 15, 2008. See: http://ricerca.repubblica.it/repubblica/archivio/repubblica/2008/07/15/il-colpo-di-scena-del-procuratore.html (accessed in December 2013).

forces, it would also interfere with the delivery of international humanitarian assistance on which million of people depended on.[551]

Cassese's anticipations actually turned out to be true.

Since the warrant of arrest was issued, the UN Secretary General reported that between six to ten foreign aid organizations have had their licenses revoked by the Sudanese authorities, some also had their assets seized.[552]

According to the Harvard scholar Alex De Waal, who in 2006 served as adviser to the African Union mediation team for the Darfur conflict, due to the vulnerable situation the African region of Darfur was living, tensions between justice and peace needed to be carefully balanced. In his opinion,

> "there is a very serious downside risk to indicting a sitting head of state, in fact, basically indicting an entire government structure, when there are no measures in place, no mechanisms, actually to protect the people in whose name this is being issued. […] We've seen a very predictable adverse response from that same Sudanese government. Now, yes, we all support justice, but can justice be pursued at the expense of withdrawing essential humanitarian support that keep millions of people alive?".[553]

Moving back to the request of the Prosecutor, on 4 March 2009 Pre-Trial Chamber I issued a warrant of arrest against the Sudanese President Al Bashir. After having analyzed the Prosecutor's Application, the Chamber recognized that there were reasonable grounds to consider Al Bashir "criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator" for attacks against

[551] Ibid.
[552] See: http://www.un.org/apps/news/story.asp?NewsID=30081&Cr=darfur&Cr1=icc#.UsHlQPTuLSh (accessed in December 2013).
[553] See: http://www.democracynow.org/2009/3/6/hrws_richard_dicker_and_scholar_mediator (accessed in December 2013).

civilians and pillage as war crimes, and for murder, extermination, forcible transfer, torture and rape as crimes against humanity.[554]

The Prosecutor's allegations for genocide were omitted by the Chamber.

Given that the Prosecution itself did not find "any direct evidence in relation to Omar Al Bashir's alleged responsibility for the crime of genocide; and that therefore its allegations concerning genocide [were] solely based on certain inferences that, according to the Prosecution, [could] be drawn from the facts of the case"[555], the Pre-Trial Chamber I drew its conclusions.

In the view of the Pre-Trial Chamber I, "if the existence of a [Government of Sudan's] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in Article 58 of the Statute would not have been met".[556]

Based on this consideration, the Pre-Trial Chamber I concluded that the evidence provided by the Prosecutor did not suffice to prove that genocidal intent was the only reasonable conclusion, as opposed to an intent to commit crimes against humanity or war crimes.[557] Consequently, the Pre-Trial Chamber I denied allegations of genocide to the warrant of arrest against Al Bashir.

On 13 March, 2009, the Prosecutor filed an appeal against such a decision. Almost a year later, the Appeals Chamber, in its judgment dated 3 February, 2010, overturned the Pre-Trial Chamber I decision.

According to the Appeals Chamber, the Pre-Trial Chamber I went beyond the standard of proof required by Article 58 of the Rome Statute for an issuance of a

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[554] *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09),Warrant of Arrest for Omar Hassan Ahmad Al Bashir, PTC I, March 4, 2009, p. 7. See: http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf (accessed in December 2013).

[555] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), Decision on the Prosecution's Application for Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, March 4, 2009, para. 111. See: http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf (accessed in December 2013).

[556] Ibid., para. 159.

[557] Ibid., para. 205.

warrant of arrest.[558] In the view of the Appellate Judges, "requiring that the existence of genocidal intent must be the *only* reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt". They continued by stating that "if the only reasonable conclusion based on the evidence is the existence of genocidal intent, then it cannot be said that such a finding establishes merely "reasonable grounds to believe". Rather, it establishes genocidal intent beyond reasonable doubts".[559] By demanding such a standard of proof, the Pre-Trial Chamber I decision "amounted to an error of law".[560] Thus the Appeals Chamber asked the Pre-Trial Chamber I to readdress the matter in light of the correct standard of proof.[561]

On 12 July, 2010, the Pre-Trial Chamber I issued a second warrant of arrest against the Sudanese President adding charges of genocide. It recognized that "on the basis of the standard proof as identified by the Appeals Chamber, there are reasonable grounds to believe that Omar Al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups".[562] It thus considered the Sudanese President "criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator", for three counts of genocide: genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.[563]

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[558] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09 OA), 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", Appeals Chamber, February 3, 2010, para. 39. See: http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf (accessed in December 2013).
[559] Ibid., para. 33.
[560] Ibid., para. 39.
[561] Ibid., para. 42.
[562] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), Second Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, July 12, 2010, pp. 7-8. See: http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf (accessed in December 2013).
[563] Ibid., p. 8.

4.2 Reactions following the issuance of the two warrants of arrest

The decision to issue a second warrant of arrest for charges of genocide against the Sudanese President has been largely criticized by jurists and commentators. According to Schabas, "the Pre-Trial Chamber was doing the Prosecutor a big favor, by narrowing the arrest warrant to charges that he had realistic chance of proving".[564] The "reasonable grounds" standard that suffice when disposing a warrant of arrest, could not be applied at trial as well. Article 66 (3) of the Rome Statute affirms that " in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."[565]

On the basis of past experiences, Schabas took the example of the ICTY, in which "the Prosecutor obtained indictments against many suspects on charges of genocide but only succeeded in proving a few of them". According to the Canadian Professor of Human Rights Law:

> "There is a certain magic or mystique about the world 'genocide'. Charges of crimes against humanity are often regarded as being almost banal, alongside the 'crime of crimes'. This is not legally accurate, of course. Crimes against humanity are among 'the most serious crimes of concern to the international community as a whole'. They are what the Nazis were convicted of at Nuremberg. But for many, absent charges of genocide it is as if the violence and suffering are being downgraded unacceptably. The corollary of this is that labeling something genocide creates enormous political momentum".[566]

[564] W. A. SCHABAS, *Genocide Charges Confirmed at International Criminal Court*, July 13, 2010. See: http://humanrightsdoctorate.blogspot.it/2010/07/genocide-charges-confirmed-at.html (accessed in December 2013).
[565] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 66 (3).
[566] W. A. Schabas, *Genocide Charges Confirmed at International Criminal Court*, July 13, 2010. See: http://humanrightsdoctorate.blogspot.it/2010/07/genocide-charges-confirmed-at.html (accessed in December 2013).

With regard to such a genocide determination, a few days after the disposal of the second warrant of arrest against Al Bashir, the British newspaper "The Guardian" published an article authored by the Prosecutor of the ICC, which focused on the situation in Darfur. Such an article was largely criticized by William Schabas for being misleading from a legal point of view.

The Prosecutor publicly denounced that the situation in Darfur amounted to genocide. According to Luis Moreno Ocampo,

> "the genocide is not over. Bashir's forces continue to use different weapons to commit genocide: bullets, rape and hunger. […] The Court also found that Bashir is deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated about their physical destruction. Millions of Darfuris are […] experiencing an ongoing genocide".[567]

On Schabas' opinion, the Prosecutor's statements may mislead readers by making them believe that the Court has actually confirmed the occurrence of the crime of genocide. Up to that time instead, the Court had merely disposed a warrant of arrest against the Sudanese President for charges of genocide, charges that must be confirmed at subsequent stages.[568]

The misleading character of the Prosecutor's words has been criticized by several Sudanese organizations as well. Following the publication of Luis Moreno Ocampo's article in the British newspaper, the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG) filed a Notification, requesting the Pre-Trial Chamber to review the Prosecutor's public

[567] LUIS MORENO OCAMPO, *Now End this Darfur Denial*, July 15, 2010, The Guardian. See: http://www.theguardian.com/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur (accessed in December 2013).

[568] W. A. SCHABAS, *Inappropriate Comments from the Prosecutor of the International Criminal Court*, July 16, 2010. See: http://humanrightsdoctorate.blogspot.it/2010_07_01_archive.html (accessed in December 2013).

statements.[569] The Applicant organizations noted that the propriety of those statements, which considered the situation in Darfur as genocide[570], had not been previously "raised or considered by the Pre-Trial Chamber in any public proceedings" and, for that reason, they should have been submitted to judicial consideration.[571] According to the Pre-Trial Chamber I however, such a Submission, due to the information being incomplete[572], were declared inadmissible and therefore rejected.[573]

More generally, the ICC decision to indict a sitting Head of State has been largely criticized. Criticism came from the UN Security Council as well. In the annual Report that the Security Council delivered to the General Assembly, the one that covered the period from 1 August 2009 to 31 July 2010, it was noted that, although some members proved favorable to the warrant of arrest against Al Bashir, there were others, such as China and Russia, who were of the opinion that such a decision would have undermined the political progress made until then towards a settlement of the conflict. For that reason, those members also urged the Security Council to agree on the request made by the African Union for a deferral of the warrant of arrest against President Al- Bashir.[574]

With regard to this last point, a step back is needed to be taken.

African states have largely supported the establishment of the ICC. Senegal was the first country which ratified the Rome Statute, back on February 2, 1999.[575] Up to now, 34 African countries are members of the ICC.[576]

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[569] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), Notification of Public Statement by the Prosecutor, PTC I, July 30, 2010, paras. 1-5. See: http://www.icc-cpi.int/iccdocs/doc/doc916228.pdf (accessed in December 2013).
[570] Ibid., para. 3.
[571] Ibid., para. 4.
[572] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), Decision on "Notification of Public Statement by the Prosecutor", PTC I, August 6, 2010, para. 7. See: http://www.icc-cpi.int/iccdocs/doc/doc919393.pdf (accessed in December 2013).
[573] Ibid., p. 5.
[574] Report of the Security Council, August 1, 2009 – July 31, 2010, p. 8.
[575] See: http://www.amicc.org/docs/Anti-African.pdf (accessed in December 2013).

Despite a similar initial support, as it will be seen in the following paragraph, under the influence of the African Union, things changed in recent years.

4.3 African Union reluctance to cooperate with the ICC

The AU, the above-mentioned intergovernmental organization, established in 2002 and consisting of 53 African states,[577] has recently criticized the ICC of being anti-African, mainly for two reasons.

Firstly, the AU objects the fact that all the situations the ICC is investigating involve crimes that have taken place in African countries.

Secondly, the organization claims that the Court has not conduct any investigations into countries, other than Africa, in which grave international crimes occur as well.[578]

According to the scholar De Waal, many African states now perceive the Court as "some sort of alien imposition from outside". In his opinion, "they don't want the court looking so closely at what they, themselves, are doing. But part of it is a sense that the court has double standards and that there's a neocolonial afoot". Although De Waal personally does not see much evidence confirming that, he admits the importance of such a widespread perception.[579] According to Jean Ping, former Chairperson of the AU Commission, the ICC seems to exist only for judging Africans, thus denying crimes occurring in other parts of the world.[580]

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[576] See: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed in December 2013).

[577] See: http://www.amicc.org/docs/Anti-African.pdf (accessed in December 2013).

[578] Ibid.

[579] A. GOODMAN, J. GONZÁLEZ, *HRW's Richard Dicker and Scholar, Mediator Alex de Waal Debate International Criminal Court Indictment of Sudanese President for Mass Killings in Darfur*, March 6, 2009. See: http://www.democracynow.org/2009/3/6/hrws_richard_dicker_and_scholar_mediator (accessed in December 2013).

[580] C. AYAD, T. HOFNUNG, *Diplomatie. Jean Ping, de l'Union africaine, dénonce l'ambivalence des Occidentaux,* July 30, 2009. See: http://www.liberation.fr/monde/2009/07/30/nous-sommes-faibles-alors-on-nous-juge-et-on-nous-punit_573310 (accessed in December 2013).

Louise Arbour, former Prosecutor of the ICTY and UN High Commissioner for Human Rights, added that the possibility for the UN Security Council to refer a situation occurring in a state not party to the Rome Statute to the Court made matters even worse. The situations in Sudan and Lybia, both African states, as already seen, were referred to the ICC in such a way. African states, which had not joined the ICC, were obliged to appear before the Court, whereas other non-signatory states, members of the UN Security Council, such as the United States, China and Russia, were not, due to their power to exercise their right of veto.[581]

Once the proceedings against the Sudanese President Al Bashir were initiated by the Prosecutor of the ICC, the AU sought to halt them by requesting the Security Council to suspend prosecutions for one year.[582] Au members were of the opinion that an indictment against a sitting Head of State would have terrible consequences on the peace efforts in Darfur.[583]

According to Article 16 of the Rome Statute, "no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".[584]

Such a request was refused by the Security Council, mainly because of the strong opposition shown by the United States.[585] The US was widely expected to oppose such a deferral due to domestic pressure in the period of the election of the new

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[581] Y. BOISVERT, *La fragile justice internationale fragilisée,* June 17, 2013. See: http://www.lapresse.ca/debats/chroniques/yves-boisvert/201306/15/01-4661752-la-fragile-justice-internationale-fragilisee.php (accessed in December 2013).

[582] W. A. SCHABAS, *African Union Amendment to Article 16 of Rome Statute Analysed*, October 31, 2010. See: http://humanrightsdoctorate.blogspot.it/2010/10/african-union-amendment-to-article-16.html (accessed in December 2013).

[583] D. MCKENZIE, *African Union urges United Nations to halt al-Bashir case,* February 5, 2010. See: http://edition.cnn.com/2010/WORLD/africa/02/05/sudan.bashir.genocide/ (accessed in December 2013).

[584] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 16.

[585] W. A. SCHABAS, *African Union Amendment to Article 16 of Rome Statute Analysed*, October 31, 2010. See: http://humanrightsdoctorate.blogspot.it/2010/10/african-union-amendment-to-article-16.html (accessed in December 2013).

American President. Ambassador Richard Williamson, the US special envoy for Sudan, once admitted that "if asked, […] the United States, even if it was 191 countries against one, would veto an Article 16 [resolution]".[586]

In July 2009, after the refusal to address the AU demand, AU Heads of State met in Sirte, Lybia, and adopted a resolution deciding that "the AU Member States shall not cooperate […] relating to immunities, for the arrest and surrender of President Omar Al Bashir of Sudan".[587] Such a request was reiterated the following year, in July 2010, during the summit in Kampala, Uganda, after the second warrant of arrest against Al Bashir.[588]

The issue of immunity concerning prosecutions of the ICC has largely been debated.[589] The Rome Statute claims that there is no immunity before the Court. According to what states Article 27 (2), "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".[590] The problem raised by the AU concerns the fact that Article 27 could only be applied to States-Parties to the Court. Not being Sudan a State Party, due to the fact that it did sign but not ratify the Rome Statute, such an Article could not be applied. Although many commentators argue that the Sudanese President's immunity has been lost once the resolution of the Security Council referred the situation to the ICC, Schabas replies by stating that "the

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[586] V. VAN OUDENAREN, *US will veto attempts to defer ICC move against Sudan president:Official,* September 24, 2008. See: http://www.sudantribune.com/spip.php?article28738 (accessed in December 2013).

[587] Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) – Doc. Assembly/AU/13 (XIII), July 3, 2009, para. 10.

[588] Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) – Doc. Assembly/AU/10(XV), July 27, 2010, para. 8.

[589] W. A. SCHABAS, *African Union Defying International Criminal Court*, July 10, 2009. See: http://humanrightsdoctorate.blogspot.it/2009/07/african-union-defying-international.html (accessed in December 2013).

[590] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 27 (2).

Security Council only triggers prosecutions at the Court, it does not change the Statute".[591]

A similar opposition to the ICC, recently shown by several African states, only slow down the concrete results of the Court. According to the above-mentioned Louise Arbour, in a period in which the *Ad hoc* Tribunals are concluding their work, comparisons are invited.

Although largely criticized, the ICTY and the ICTR have achieved concrete results. More than 200 cases have been brought before the tribunals, many judgments have been issued and several high-level perpetrators have been charged for hideous international crimes. By comparison, as Louise Arbour noticed, in ten years the ICC has issued only one judgment, the one against Thomas Lubanga in July 2012. Other proceedings have been initiated by the Court, yet, as it has been seen up to here, results are still so far away.[592]

Moving back to the two non-binding resolutions adopted by the AU, it should be noticed that, among AU members, there were also some, such as Chad, Botswana and Uganda, which strongly resisted those resolutions. As the Ugandan foreign ministry once affirmed, "as a signatory to the Rome Statute, the Ugandan Government re-iterates its commitment to the Statute and support to the ICC. This position is shared by the other African States Parties to the Statute who clearly expressed it".[593]

At the time of the adoption of Resolution 1593, the one referring the situation in Darfur to the ICC, three African states and members of AU, namely Algeria, Benin and Tanzania, were also members of the UN Security Council. Whether Algeria abstained from voting, believing that a domestic solution would have been

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[591] W. A. SCHABAS, *African Union Defying International Criminal Court*, July 10, 2009. See: http://humanrightsdoctorate.blogspot.it/2009/07/african-union-defying-international.html (accessed in December 2013).

[592] Y. BOISVERT, *La fragile justice internationale fragilisée,* op. cit. See: http://www.lapresse.ca/debats/chroniques/yves-boisvert/201306/15/01-4661752-la-fragile-justice-internationale-fragilisee.php (accessed in December 2013).

[593] See: http://www.amicc.org/docs/Anti-African.pdf (accessed in December 2013).

preferable, Benin and Tanzania voted in favor of the referral of the situation to an international tribunal.[594]

More recently, on January 17, 2013, following the election of the new Chairperson of the AU Commission (AUC), Nkosazana Dlamini-Zuma, who replaced the already-mentioned Jean Ping, several African civil society organizations and international organizations with a presence in Africa wrote a letter to the new AUC Chairperson, asking him to take into consideration their recommendations. According to them, "the ICC's current focus on African situations where serious crimes in violation of international law have been committed and the court's efforts to deliver justice to African victims should be welcomed, not criticized".[595] Being the ICC a "court of last resort", the AU should be able to "assist states in enhancing their domestic technical and legislative capacity to dispense justice".[596] Whenever a state is unable or unwilling to prosecute national criminals, the ICC should intervene and all those members who had joined the Rome Statute should support the activities of such a Court. As a consequence of this, the AU should not renew any decisions that call for non-cooperation with the ICC.[597] Lastly, the signatory organizations urged the new Chairperson to move forward with the establishment of an AU-ICC Liaison Office in Addis Ababa, which would have improved the communications between the two institutions.[598]

The difficulty faced by the Court in bringing Al Bashir to trial has been seen in the refusal shown by some African members of the ICC, which failed to arrest him, once he had entered into their territories. Since the issuance of the two warrants of arrest, the Sudanese President visited in fact several African countries. Some of them, such as Chad and Kenya, both States Parties of the ICC,

[594] Ibid.
[595] Letter from African Civil Society to AU Commission Chairperson on Combatting Impunity, January 17, 2013. See: http://www.hrw.org/news/2013/01/17/letter-african-civil-society-au-commission-chairperson-combatting-impunity (accessed in December 2013).
[596] Ibid., para. 2.
[597] Ibid., para. 3.
[598] Ibid., para. 5.

had a legal obligation to arrest him, yet failed to do so. Under Article 59 (1) of the Rome Statute in fact, "a State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question".[599] Following the two warrants of arrest against Al Bashir, the Pre-Trial Chamber I made a request to all States Parties to the Rome Statute for the arrest and surrender of the Sudanese Presidence, recalling their "obligation to comply with the procedure provided for in Article 59".[600]

A week after the second warrant of arrest, in July 2010, the Sudanese President visited the neighboring country of Chad, to attend a meeting. It was the first trip he made to an ICC State Party. Chad authorities, although legally obliged, failed to arrest Al Bashir. Despite the fact that, as already mentioned before, Chad had previously supported the ICC prosecution, in those more recent months bilateral relations between the two countries has increasingly improved. On the opinion of the most, Chad would have risked to enter into a conflict with Sudan, if it had arrested Al Bashir.[601]

Another state that had to face the competing demands of the ICC and the African Union is Kenya. In August 2010, on the occasion of the adoption of a new constitution, Al Bashir visited the country. Being a State Party to the Rome Statute, Kenya was legally obliged to arrest the Sudanese President. Nevertheless, no action was taken by Kenyan authorities.[602]

Some have argued that, besides fearing the imposition of sanctions from the AU, Kenya had an interest in supporting the Comprehensive Peace Agreement in

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[599] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, Art. 59 (1).

[600] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, The Registrar, March 6, 2009, 21 July 2010 p. 5. See: http://www.icc-cpi.int/iccdocs/doc/doc642283.pdf (accessed in December 2013), http://www.icc-cpi.int/iccdocs/doc/doc919506.pdf (accessed in December 2013).

[601] X. RICE, *Chad refuses to arrest Omar al-Bashir on genocide charges,* July 22, 2010. See: http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir (accessed in December 2013).

[602] B. PLETT, *Court worry at Omar al-Bashir's Kenya trip,* August 28, 2010. See: http://www.bbc.co.uk/news/world-africa-11117662 (accessed in December 2013).

Sudan. Being Kenya a neighbor to Sudan, it was important not to undermine the ongoing Sudanese peace process.[603]

Yet, as the South African professor of law Max Du Plessis pointed out:

> "the only individual who has truly benefited from Kenya's (in)action is Al Bashir, an odious leader allegedly responsible for genocide and mass atrocities against his own people and, now increasingly, a symbol of Africa's divided and divisive position on international criminal justice. That his indictment has become a complex international law problem for the continent and the international community at large is a continuing shame for the victims of violence in Sudan".[604]

[603] M. DU PLESSIS, *The African Union, the International Criminal Court and al-Bashir's visit to Kenya*, September 15, 2010. See: http://www.issafrica.org/iss-today/the-african-union-the-international-criminal-court-and-al-bashirs-visit-to-kenya (accessed in December 2013).
[604] Ibid.

Conclusions

1. An overview to the nowadays situation in both states

1.1 Rwanda between economic growth and authoritarian practices

Twenty years have passed since the terrible genocide against the Tutsi population occurred in Rwanda. Last 7 January, the African country launched 'Kwibuka20', a series of activities aimed at preparing Rwandans and the world for the 20th Commemoration of the tragic event, on 7 April 2014. The launch was marked by the lighting of the so-called Kwibuka Flame at the Kigali Genocide Memorial Centre. Kwibuka means 'to remember' in Kinyarwanda language. Such a symbolic flame will travel through the whole country of Rwanda, before returning to the capital city on 7 April. During these three months, community conversations and other symbolic events will take place throughout the country, in order not to forget the atrocities committed and to reflect on the achievements reached in the past twenty years.[605]

As the Minister of Foreign Affairs and Cooperation Louise Mushikiwabo affirmed on the occasion of the launch of 'Kwibuka20', "in the last twenty years, Rwandans have experienced pain and challenges, but we have also seen progress and opportunity".[606]

The economic progress Rwanda has made since the end of the genocide is unquestionable. Under the presidency of Paul Kagame, the Tutsi leader who proved capable to halt the slaughter of innocent civilians in July 1994, Rwanda not only proved able to rebuilt itself in the aftermath of the genocide, it also

[605] See: http://www.gov.rw/Flame-of-Remembrance-lit-as-Rwanda-launches-Kwibuka20-commemorative-activities?lang=en (accessed in January 2014).
[606] Ibid.

experienced an extraordinary economic growth in agriculture, tourism and other social services, basic infrastructure and entrepreneurship as well.[607]

As Paul Kagame affirmed in October 2013, while delivering the annual 'State of the Nation' and 'End of Year address',

> "Rwanda's stability affords us the basis to continue to work on building our economy, which is both the foundation and pulse of our development. This year's figures reflect continued growth of our economy. Currently, growth stands at 6.6% and is predicted to be higher in the coming year. Beyond these figures is the continued improvement in the well-being of Rwandans."[608]

Besides a similar economic growth, improvements in education, health and justice have been seen as well.

Concerning education, in 2013 primary and secondary school enrollment respectively increased by 7% and 6%. University as well has seen a noteworthy increase by 10%.[609]

With regard to the health sector, since the terrible situation Rwanda had to face in the aftermath of the genocide, striking achievements have been reached there as well. Data reveal that in the past twenty years life expectancy has doubled, from 28 to 56 years. Maternal and childhood mortality has remarkably declined as well.[610]

Concerning the justice sector, during its "End of Year address" President Kagame underlined that "laws continue to be reviewed where necessary, based on international best practices". With regard to this, he added that "the

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[607] J. RUXIN, *16 Years after the Genocide, Rwanda Continues Forward,* April 6, 2010. See: http://kristof.blogs.nytimes.com/2010/04/06/16-years-after-the-genocide-rwanda-continues-forward/?_r=0 (accessed in January 2014).

[608] See: http://www.gov.rw/President-Kagame-delivers-the-State-of-the-Nation-calling-for-increased-service-delivery-at-local-level?lang=en (accessed in January 2014).

[609] Ibid.

[610] S. FIRTH, *A Victory for Rwanda,* December 17, 2013. See: http://www.usnews.com/news/articles/2013/12/17/a-victory-for-rwanda (accessed in January 2014).

European Court of Human Rights declared that the justice system in Rwanda meets international legal standards".[611]

Once the genocide ended, more than 120,000 people were accused of bearing responsibility for the atrocities occurred in Rwanda. As it has been seen, in order to deal with such a huge number of perpetrators, the government adopted three different justice systems. Whether the ICTR is expected to conclude its work by the end of this year, *Gacaca* courts officially closed on 4 May 2012. Rwanda's national tribunals instead are still continuing their work.[612]

The huge number of persons that have been tried during these years clearly reflect Kagame's idea that only by halting impunity, reconciliation in Rwanda will be possible.[613] Such a number increased even more once the government decided to pass new anti-genocide laws. In its reconciliation policies, Kagame sought to erase ethnic divisions and to promote national unity. In this respect, in 2001 the Rwandan government adopted a law against divisionism, which banned the use of the labels "Hutu" and "Tutsi" in public discourses.[614] Two years later, another law was passed, this time against negationism. Such a law punished all those who had denied the occurrence of the genocide, as well as any person who had minimized it or attempted to justify its grounds.[615] Lastly, in July 2008, a law prohibiting any form of "genocide ideology" was approved.[616]

By so much focusing on the past genocide however, contrary to Kagame's expectations, efforts aiming at reconciliation between Hutu and Tutsi turned out having the opposite result. An increasing propensity to commonly compare Tutsi

[611] See: http://www.gov.rw/President-Kagame-delivers-the-State-of-the-Nation-calling-for-increased-service-delivery-at-local-level?lang=en (accessed in January 2014).
[612] See: http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml (accessed in January 2014).
[613] E. ZORBAS, *What does reconciliation after genocide mean? Public transcripts and hidden transcripts in post-genocide Rwanda,* in *Journal of Genocide Research,* 2009, p.130.
[614] L. WALDORF, *Revisiting Hotel Rwanda: genocide ideology, reconciliation, and rescuers,* in *Journal of Genocide Research,* 2009, p. 103.
[615] Ibid., p. 107.
[616] Ibid., p. 111.

to victims and Hutu to offenders became even more detectable among the population.[617]

The example concerning the arrest of the oppositional leader Victoire Ingabire for having suggested that innocent Hutus who died in the genocide deserved to be mourned alongside Tutsis, clearly focuses on this aspect.[618]

Furthermore, contrary to Kagame's initial promises, what makes matters even worse in contemporary Rwanda is the widespread perception that not only Tutsis monopolize the government, they are also the only ones who benefit from Rwandan economic growth.[619]

According to some scholars, the authoritarian way in which Kagame is rebuilding the country could eventually undermine recent important economic achievements.[620]

Efforts aiming at reconciliation were once again challenged when a report commissioned by the United Nations betrayed the atrocities committed against Hutus in the Democratic Republic of Congo by the Government of Rwanda.[621]

Back in 1994, once the RPF conquered the capital city of Rwanda and put an end to the genocide, more than one million Hutus fled to Zaire, now the Democratic Republic of Congo (DRC). Although the killing was over in Rwanda, in 1996 Kagame's troops invaded neighboring eastern Congo looking for the genocide orchestrators.[622] It is in late 2005 that UN peacekeepers discovered three mass graves of hundreds of civilians in eastern Congo. Following such a shocking discovery the United Nations decided to conduct a proper investigation in the

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[617] Ibid., p. 104.

[618] T. P. LONGMAN, *After Genocide, Stifled Dissent*, June 29, 2012. See: http://www.nytimes.com/2012/06/30/opinion/stifled-dissent-in-rwanda.html?_r=1& (accessed in January 2014).

[619] Ibid.

[620] Ibid.

[621] Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010.

[622] J. CRON, *U.N. report accuses Rwanda of massacre in Congo,* August 27, 2010. See: http://edition.cnn.com/2010/WORLD/africa/08/27/congo.un.genocide/ (accessed in January 2014).

territory. The investigation, aimed at conducting a mapping exercise of the most serious violations of human rights and humanitarian law committed in the DRC between March 1993 and June 2003, began in 2008.[623] The final report, dated August 2010, affirmed what follows:

"Several incidents listed in this report point to circumstances and facts from which a court could infer the intention to destroy the Hutu ethnic group in the DRC in part, if these were established beyond all reasonable doubt. The apparently systematic and widespread nature of the attacks, which targeted very large numbers of Rwandan Hutu refugees and members of the Hutu civilian population, resulting in their death, reveal a number of damning elements that, if they were proven before a competent court, could be classified as crimes of genocide".[624]

Paul Kagame, who initially denied the presence of Rwandan troops in the DRC, subsequently admitted having ordered and planned the invasion. According to him, however, most of those who died in Congo were genocide perpetrators.[625]
Yet what the UN reports found out was something completely different. "The majority of the victims were children, women, elderly people and the sick, who were often undernourished and posed no threat to the attacking forces."[626]
Thus far, however, the Rwandan President remains unpunished. According to several human rights activists, Kagame's allies in the United States and United Kingdom don't want him investigated.[627]

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[623] See: http://www.ohchr.org/en/countries/africaregion/Pages/rdcProjetmapping.aspx (accessed in January 2014).
[624] Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, para. 515.
[625] M. FAUL, *A second Rwanda genocide is revealed in Congo*, October 10, 2010. See: http://www.nbcnews.com/id/39603000/ns/world_news-africa/#.UtURSvTuLSh (accessed in January 2014).
[626] Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, para. 31.

Kagame's recent threats to withdraw peacekeepers from Darfur only makes Rwandan President's arrest even harder. Rwanda has indeed some 3,300 soldiers and 86 police serving within the UNAMID in Darfur. Although being subsequently dropped, similar threats were carefully taken into account.[628]

2.1 The ongoing crisis in Darfur

As it has previously been seen, the peace process in Darfur is slowly moving forward. Back in 2011, one of the main rebels groups, the Liberation and Justice Movement (LJM), signed with the Sudanese Government the Doha Document for Peace in Darfur (DDPD), an agreement which aimed at establishing a permanent ceasefire and a comprehensive peace process in Darfur.[629] Up to now, however, only another rebels group, the Justice and Equality Movement (JEM) did sign such an agreement.[630]

The joint AU-UN peacekeeping force, whose mandate has recently been extended until 31 August 2014,[631] is continuing in its engagement to urge all other non-signatory movements to sign up the DDPD.[632]

As Mrs Fatou Bensouda, the current Prosecutor of the ICC, pointed out last December, "the situation in Darfur continues to deteriorate and the plight of Darfur victims continues to go from bad to worse".[633]

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[627] M. FAUL, *A second Rwanda genocide is revealed in Congo*, October 10, 2010. See: http://www.nbcnews.com/id/39603000/ns/world_news-africa/#.UtURSvTuLSh (accessed in January 2014).
[628] *UN relief as Rwanda 'drops Darfur peacekeeper threat*', September 27, 2010. See: http://www.bbc.co.uk/news/world-africa-11417721 (accessed in January 2014).
[629] See: http://unamid.unmissions.org/Default.aspx?tabid=11060 (accessed in December 2013).
[630] See: http://www.un.org/apps/news/story.asp?NewsID=44108&Cr=darfur&Cr1=#.UrwFY_TuLSh (accessed in December 2013).
[631] UN Doc. S/RES/2113, July 30, 2013, para. 1.
[632] See: http://www.un.org/apps/news/story.asp?NewsID=44108&Cr=darfur&Cr1=#.UrwFY_TuLSh (accessed in December 2013).
[633] Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), December 11, 2013, p.2.

The eighteenth Report of the Prosecutor to the UN Security Council states what follows:

"The Office continues to monitor a number of trends that could constitute Rome Statute crimes, including: alleged attacks by the Ministry of Defence, either targeting or indiscriminately affecting civilians and other persons, as well as alleged attacks on civilians by rebel movements; alleged acts affecting the persons displaced and alleged abductions of, and attacks on, humanitarian aid workers and peacekeepers, among others".[634]

According to Fatou Bensouda, similar crimes "will not stop unless this Council and the Rome Statute States Parties show a determination to apprehend their authors".[635] Members of the Sudanese Government, which have been indicted by the International Criminal Court, still remain at large.[636]

As it has been seen, the Sudanese President, against whom the ICC issued two warrants of arrest, had been able to travel to various African countries, some of them even States Parties to the Rome Statute, without being arrested.

Yet, not only African countries have been visited by Al Bashir recently.

In June 2011 the Sudanese President was met in China by the President Hu Jintao. The main item on the agenda was how to continue the strong economic relations between China and Sudan, despite the expected splitting of the African country into two states.[637] As already said previously in fact, for years Sudan, in exchange for weapons supplies, provided China with oil.

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[634] Eighteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), December 11, 2013, para. 30.

[635] Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), December 11, 2013, p.3.

[636] See: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed in January 2014).

[637] M. MOORE, *Sudan's al-Bashir given red carpet treatment by China,* June 29, 2011. See: http://www.telegraph.co.uk/news/worldnews/asia/china/8605319/Sudans-al-Bashir-given-red-carpet-treatment-by-China.html (accessed in December 2013).

Not being a State Party to the Rome Statute, China was not legally obliged to arrest Al Bashir. Nonetheless, with the adoption of Resolution 1593 referring the situation in Darfur to the ICC, the UN Security Council, "while recognizing that States not Party to the Rome Statute have no obligation under the Statute, urge[d] all States […] to cooperate fully" with the court.[638] Moreover, following the issuance of the two warrants of arrest, the ICC Registry transmitted requests for Al Bashir's arrest and surrender to all United Nations Security Council members that are not States Parties to the Rome Statute,[639] China included. Nonetheless, instead of being arrested, Al Bashir had been cordially welcomed by the Chinese President.[640]

According to the Prosecutor of the ICC,

> " it is a serious indictment on this Council and on States Parties that Mr Bashir […] [has] been able to travel to various countries without fear of arrest. This Council's silence even when notified of clear failures and/or violations by UN Members States of their obligations to comply with this Council's resolutions only serves to add insult to the plight of Darfur's victims".[641]

The case concerning Al Bashir is continuing to trigger new international debates. In September 2013, the Sudanese President applied for a United States visa to attend the opening of the year's session of the UN General Assembly

[638] UN Doc. S/RES/1593, March 31, 2005, para. 2.
[639] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (ICC-02/05-01/09), Request to all United Nations Security Council Members that are not States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, The Registrar, March 6, 2009, July 21, 2010. See: http://www.icc-cpi.int/iccdocs/doc/doc642266.pdf (accessed in December 2013), http://www.icc-cpi.int/iccdocs/doc/doc919516.pdf (accessed in December 2013).
[640] M. MOORE, *Sudan's al-Bashir given red carpet treatment by China,* June 29, 2011. See: http://www.telegraph.co.uk/news/worldnews/asia/china/8605319/Sudans-al-Bashir-given-red-carpet-treatment-by-China.html (accessed in December 2013).
[641] Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), December 11, 2013, p.3.

meeting in Washington.[642] A "colossal embarrassment" was avoided by the American Government when Al Bashir changed his mind and decided to cancel his trip to the United States.[643] According to the above-mentioned Resolution 1593 the United States, urged by the Security Council to "cooperate fully with the Court",[644] was supposed to arrest the Sudanese President. Furthermore, in accordance with the Genocide Accountability Act of 2007, the prosecution of offences amounting to genocide is allowed if "the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States".[645] Nonetheless, however, the United States is also bound by a 1947 agreement with the UN not to "impose any impediments to transit to or from the headquarters district of representatives of Members or official of the United Nations".[646] In accordance with such an agreement Sudan was thus legally permitted to send Al Bashir to Washington.[647]

Still more recently, in December 2013, in order not to be arrested, the Sudanese President did not travel to South Africa to participate to Nelson Mandela's funeral. The African country, as it should be remembered, is not only a State Party to the ICC, it is also one of the few countries which have applied the Rome Statute into its national laws. Following past South African officials' statements, which indicated the government strong intention to arrest Al Bashir should he set foot on their country, the Sudanese President decisively avoided such a possibility to occur.[648]

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[642] See: http://endgenocide.org/most-unwelcome-sudans-president-bashir-plans-trip-to-u-s/ (accessed in January 2014).
[643] See: http://endgenocide.org/bashir-embarrassment-avoided-now-what/ (accessed in January 2014).
[644] UN Doc. S/RES/1593, March 31, 2005, para. 2.
[645] Genocide Accountability Act of 2007, One Hundred Tenth Congress of the United States of America, 1st Session, S. 888, January 4, 2007, para. 5.
[646] Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, Article IV, Section11.
[647] See: http://endgenocide.org/your-top-5-questions-about-bashirs-potential-travel-to-the-us/ (accessed in January 2014).
[648] *Sudanese President to skip Mandela funeral amid ICC arrest fears: report*, December 9, 2013. See: http://www.sudantribune.com/spip.php?article49129 (accessed in January 2014).

According to what has been said up to now, Mrs. Fatou Bensouda's previsions seem inevitably true. "Without stronger action by the Council and States Parties, the situation in the Sudan is unlikely to improve".[649]

[649] Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), December 11, 2013, p.3.

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