

# Core Crimes and the Characterization of Mai-Kadra Atrocities in Ethiopia

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## Abstract

*Atrocity crimes have become a regular incident over the past four years in Ethiopia. It worsened especially after the outbreak of the war between the Federal Government and Tigray Region on November 4, 2020. The Mai-Kadra incident was one of such situations where heinous mass killing was committed against civilians on November 9, 2020, shortly after the outbreak of the war. Different bodies reported the atrocities committed during the incident and tried to characterise the situation in different ways. This article characterises the material facts of the Mai-Kadra incident in light of International Criminal Law rules, case law, and jurisprudence. A doctrinal research methodology is employed to gather data from reliable reports and human right organisations. Accordingly, the study uncovers the potential characterization of the Mai-Kadra incident as 'crimes against humanity' and 'war crimes'. It is however less likely that the incident qualifies as 'genocide' mainly because of the difficulty to infer special genocidal intent from the circumstances of the case.*

**Keywords:** Characterization, Atrocity Crimes, Mai-Kadra, Genocide, Crimes Against Humanity, War Crimes

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## Introduction

Atrocity crimes fall under most serious crimes committed against humans and often occur in countries where there is some level of violence or instability. It is related to the three legally defined International Crimes, i.e. Genocide, Crimes against Humanity and War Crimes.<sup>80</sup> Atrocity crimes have been committed in different parts of Ethiopia for a long time although it has become very common recently. In the past, the country has applied the persecution mode of transitional justice through establishing ad-hoc “*red-terror trials*” for the former Derg officials. In these trials, the major crimes at issue were genocide and war crimes.<sup>81</sup>

After the overthrow of the Derg regime, the Tigray People Liberation Front (TPLF) ruled Ethiopia for over 27 years by establishing and dominating Ethiopia’s ruling coalition named Ethiopian People Democratic Revolutionary Front (EPDRF) from 1991 to 2018. Despite the fast economic growth of the country, EPDRF ruling was known for prevalent violations of

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<sup>80</sup> These crimes are defined in different international treaties and national laws. Some of major international treaties include Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force 12 January 1951; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), (Hereinafter the ICTY Statute); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), [Hereinafter the ICTR Statute]; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, (ICC Statute) and The 1949 Four Geneva Conventions and the 1977 Additional Protocols.

<sup>81</sup> See generally, Tadesse Simie Metekia, *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis International Standards*, University of Groningen, PhD thesis, published (2020); Marshet Tadesse, *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, International Criminal Justice Series, Asser Press (2018).

human rights.<sup>82</sup> It has held several elections, but all of them were generally considered unfair and used repressive laws such as the anti-terrorism law (Proclamation No. 652/2009), Civil Societies law (Proclamation No. 621/2009) as well as draconian provisions of the Criminal Code to silence critics and close opposition political parties, NGO's and human rights organizations.<sup>83</sup> Because of the repressive ruling of the party, the country was hit by a wave of protests in December 2015. In response, the EPRDF imposed a nation-wide state of emergency several times between 2016 and 2018 in which both federal and regional security forces injured, killed, and detained thousands of protestors.<sup>84</sup> The protests continued across the country until the sudden resignation of the then Prime Minister Hailemariam Desalegn in February 2018.

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<sup>82</sup> In particular, excessive violations of civil and political rights that has become a hallmark of the EPRDF government. See Amnesty International, Ethiopia: 25 Years of Human Rights Violations, Public Statement, AI INDEX: AFR 25/4178/2016 (2 June 2016).

<sup>83</sup> Hilary Matfess, Ethiopia: Counter-Terrorism Legislation in Sub-Saharan Africa, *Small Wars Journal* (April 11, 2017), <http://smallwarsjournal.com/jrnl/art/ethiopia-counter-terrorism-legislation-in-sub-saharan-africa> accessed on December 20, 2021.

<sup>84</sup> Ethiopian Human Rights Council (EHRCO), 142 Special Report: Human Rights Violations Committed During the State of Emergency in Ethiopia: Executive Summary 6–11 (May 28, 2017), <https://ehrc.org/wp-content/uploads/2017/07/HRCO-142nd-Special-Report-English-Executive-summary-2.pdf> (the full report is available in Amharic only at [https://ehrc.org/wp-content/uploads/2017/05/የሰብዓዊ-ሙብዳኝ-ጉባዔ\\_142ኛ-ልዩ-መግለጫ-ግንቦት-2009-ዓ% E3% 80% 82ኛ.pdf](https://ehrc.org/wp-content/uploads/2017/05/የሰብዓዊ-ሙብዳኝ-ጉባዔ_142ኛ-ልዩ-መግለጫ-ግንቦት-2009-ዓ% E3% 80% 82ኛ.pdf)); Human Rights Watch, “Fuel On The Fire”: Security Force Response to the 2016 Irreecha Cultural Festival (September 19, 2017), available on <https://www.hrw.org/report/2017/09/19/fuel-fire/security-force-response2016-irreecha-cultural-festival>, accessed on December 20, 2021; Human Rights Watch, ‘Such a Brutal Crackdown: Killings and Arrests in Response to Ethiopia’s Oromo Protests’, (June 2016) 21 – 45, available on: <https://www.hrw.org/report/2016/06/15/such-brutal-crackdown/killings-and-arrests-responseethiopias-oromo-protests> accessed on December 20, 2020.

Subsequently, Abiy Ahmed (Dr.), Chairman of the EPRDF's Oromo People's Democratic Organization (OPDO), sworn-in as new Prime Minister of Ethiopia in April 2018. He received wide-spread support because of the immediate changes he brought about in the country. For instance, he immediately called for reconciliation and reform in the country including liberalisation of the political system in general.<sup>85</sup> Accordingly, his administration freed hundreds of political detainees, dropped terrorism charges against opposition party leaders in exile, and allowed them to return home.<sup>86</sup> Despite all significant legal, political and economic policy transitions, the country was however knocked by violence, armed conflict and extensive practice of mob justice by non-state actors. This eventually resulted in degenerating peace and security, and rule of law in the country. Anti-reform elements within Ethiopia's leadership circles also pushed back, showing their dissent in the reforms.<sup>87</sup>

Violence in several parts of the country has killed hundreds of people and displaced thousands since 2018. In October 2019 and June 2020, ethnically and religiously motivated conflicts took hundreds of innocent lives and destroyed properties in many parts of Ethiopia. In particular, the occurrence of

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<sup>85</sup> Ahmed Soliman, Ethiopia's Prime Minister Show Knack for Balancing Reform and Continuity, Chatham House (April 27, 2018), available on <https://www.chathamhouse.org/expert/comment/ethiopia-s-prime-minister-shows-knack-balancingreform-and-continuity>, accessed on December 21, 2021.

<sup>86</sup> Aaron Maasho, Exiled Ethiopian opposition group holds talks with government, Reuters (May 14, 2018), <https://af.reuters.com/article/topNews/idAFKCN1IF220-OZATP>; Mahlet Fasil, News: Ethiopia frees Andargachew Tsige, drops charges against Berhanu Nega, Jawar Mohammed and two media orgs (May 28, 2018), available on, <http://addisstandard.com/news-ethiopia-frees-andargachew-tsige-dropscharges-against-berhanu-nega-jawar-mohammed-and-two-media-orgs/>, accessed on December 19, 2020.

<sup>87</sup> Ethiopia's Reforms Challenged by Party in Ruling Coalition, New York Times [AP] (June 13, 2018), <https://www.nytimes.com/aponline/2018/06/13/world/africa/ap-af-ethiopia-new-prime-minister.html>, accessed on December 19, 2020.

atrocities has tremendously increased.<sup>88</sup> Over those years, political tension between the Federal Government and TPLF was mounting and finally resulted in the outbreak of a deadly armed conflict in the Tigray region on November 4, 2020, which also extended to Amhara and Afar Regions. The war took place for more than two years until a peace agreement is signed between the two parties in Pretoria, South Africa on November 2, 2022 and numerous heinous and inhuman attacks were committed against civilians, most of which could fall under International Crimes.

This article specifically examines atrocities committed in the Mai-Kadra incident on the 9<sup>th</sup> of November 2020, shortly after the armed conflict between the Federal Government and Tigray Region started and characterise them in light of core crimes as proscribed under the domestic and International Criminal Law. The Mai-Kadra incident is selected because of two reasons: first, there are sufficient reliable sources of reports about the incident, and second, different bodies characterize the situation generally in different ways. For instance, the UN High Commissioner for Human Rights, Michelle Bachelet, stated that ‘if verified, the attack could amount to a war crime’.<sup>89</sup> On the other hand, the EHRCO generally indicated the probability that the atrocities committed in Mai-Kadra incident could be characterized in

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<sup>88</sup> The country has ranked as the 7<sup>th</sup> most likely country in 2019-2020 growing from 32<sup>nd</sup> place in the previous 2018-2019 assessment to experience a mass killing. See generally, Early Warning Project <https://earlywarningproject.ushtm.org/countries/ethiopia>. The UN has also been repeatedly warning such. See for instance, Michelle Nichols, U.N. official warns of high risk of atrocities in Ethiopia, Press release, Reuters, New York, available on <https://www.reuters.com/article/us-ethiopia-conflict-un/u-n-official-warns-of-high-risk-of-atrocities-in-ethiopia-idUSKBN2A60BG> accessed on 24 Dec. 2021.

<sup>89</sup> R2P Monitor, A Bimonthly Bulletin by the Global Centre for the Responsibility to Protect, Issue 54, (15 November 2020), p. 16.

three ways i.e. War Crimes or Crimes Against Humanity or Genocide.<sup>90</sup> On the other hand, the Joint Investigation Team (EHRC and the UN Office of the United Nations High Commissioner for Human Rights (OHCHR)) report showed that the acts may amount to Crimes Against Humanity and War Crimes.<sup>91</sup> Thus, different bodies tried to characterise the atrocities of Mai-Kadra in divergent ways. Against this backdrop, this article has critically examined the atrocities committed in light of the core crimes proscribed under the Statute of ICTR, ICTY, and ICC including the relevant case laws and jurisprudence of International Criminal Law.

The first section sets the scene through discussions on the general context of the conflict, notably the dynamics before the deadly conflict started between the Federal Government and Tigray Region. The next section meticulously describes what happened in Mai-Kadra on November 4, 2020, shortly after the war started. The third section then presents the legal characterization of the Mai-Kadra incident in light of the definitional elements of each of the core crimes i.e. Genocide, Crimes Against Humanity and War Crimes.

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<sup>90</sup> የኢትዮጵያ ሰብዓዊ መብቶች ጉባኤ (ኢሰመጉ) ማይካድራ ሉሙራ አብደራፊ አብርሃ-ጅራ ዳገሻ ኢሰመጉ ታህሳስ አዲስ አበባ፣ ኢትዮጵያ የምዝገባ ቁጥር 1146 (2014 ዓ.ም) (Hereinafter, EHRCO Full Report), pp. 34-36.

<sup>91</sup> Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia, published on 3 November 2021 (Hereinafter, JIT Report), p. 5.

## **1. Setting the Scene: Brief Background of the Mai-Kadra Atrocity**

### **1.1 Overview of Ethnic Conflicts in Ethiopia**

Under the leadership of Prime minister Meles Zenawi,<sup>92</sup> the EPRDF government was known for both repression of Human Rights and rapid economic growth through the Developmental State (DS) path. The EPRDF had controlled the larger socio-economic and political sphere of the country through its undemocratic machinery, This was a major source of dissatisfaction among citizens which later led to popular uprisings.

Conflicts also took place in various parts of the country,<sup>93</sup> and often they were associated with the claim for land in the boundaries between territorialized ethnic groups.<sup>94</sup> The state structure which is based on ethnic federalism contributes to tensions and conflicts between various ethnic groups.<sup>95</sup> Ethnic groups engage in competition on various historical, political, cultural, and social issues. Inter-ethnic conflicts arose across the boundaries of regional

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<sup>92</sup> Meles Zenawi left his study at the Addis Ababa University in 1975 together with others to join TPLF and fight the Derg regime and was chairman of the TPLF since 1985. He later became a head of EPRDF and Prime Minister of Ethiopia from 1991-2012.

<sup>93</sup> Major causes of the conflict were: disagreements on the possession or use of land, grazing land or water resources, and settlements, regional autonomy, access to public resources and use of language in education and administration. Lovise Aalen, *The politics of Ethnicity in Ethiopia: actors, power and mobilisation under ethnic federalism*, African Social Studies Series, V. 25, Leiden, Boston, Brill, 2011, p. 70.

<sup>94</sup> Jon Abbink, *Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism*, *Journal of Contemporary African Studies*, (2006) 24 (3).

<sup>95</sup> Bekalu Atnafu Taye, *Ethnic Federalism and Conflict in Ethiopia*, *African Journal for Conflict Resolution AJCR* 2017/2, (2017), available on: <https://www.accord.org.za/ajcr-issues/ethnic-federalism-conflict-ethiopia/> accessed on February 15, 2022.

states.<sup>96</sup> Although different considerations are provided under the Constitution to demarcate and form boundaries of the regional administrations,<sup>97</sup> language is mainly used to delimit demarcations which, in turn, contributes to ethnic and political division in the country. The regional administrations arranged through an ethno-linguistic grid against the population with a history of mobility eventually led to an increased inter-ethnic conflict in the country.<sup>98</sup>

Following the sudden death of PM Meles Zenawi, Hailemariam Desalegn was elected as Prime Minister and led the federal government for about six years. During his period, the country was frequently hit by anti-government protests mainly in the Oromia region and some parts of Amhara.<sup>99</sup> As a result, PM Hailemariam Desalegn resigned in February 2018 and Dr. Abiy Ahmed sworn in as Prime Minister on April 2, 2018. Abiy received popular support as he showed interest to reform the country and remorse for extensive human rights abuses. As highlighted before, he promised to settle the deeply entrenched problem of ethnicity and political division by releasing political prisoners, allowing opposition political parties in exile to enter the country, and revising different laws which unduly restrict the civil and political rights of citizens. Another outstanding achievement is the resolution of the enduring

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<sup>96</sup> Jon Abbink, *supra* note 15, 390; Tigabu Legesse, Ethnic Federalism and Conflict in Ethiopia: What lessons can other jurisdictions draw? *Africa Journal of International and Comparative Law*, (2015) 23 (3), p. 2.

<sup>97</sup> Constitution of the Federal Democratic Republic of Ethiopia, 1995, *Federal Negarit Gazzeta*, Proc. No. 1, 1st Year, No.1, Art. 46 (2).

<sup>98</sup> David Turton, *Ethnic Federalism: The Ethiopian experience in comparative perspective*, Oxford, James Currey, (2006), p. 14.

<sup>99</sup> The main causes of anti-government protest were briefly explained in the introductory section above.

border dispute between Ethiopia and Eritrea following the peace agreement in July 2018.<sup>100</sup>

## **1.2 Escalation of Mass Outrages and Political Divisions**

As outlined above, despite reforms introduced in Ethiopia since PM Abiy Ahmed came to power in April 2018, the country still stood at a crossroads where horrendous crimes have been frequently committed. Subsequently, lack of peace and security become the fundamental challenges to realize the reform package. Almost in every region, heinous crimes are committed. Long-suppressed claims over access to land and perceived injustices from the past resulted in violent conflicts.<sup>101</sup> Powerful non-state actors lead insurrection and irregular youth movements commit grave crimes. Ethnically motivated attacks have been committed throughout the country. Several such incidents, which possibly raise the application of international criminal law can be mentioned.

In one of such instances, an inter-communal clash in the Ethiopian Somali Region in 2018 displaced over three million people. The incident was the world's largest conflict-related internal displacement in one country that year.<sup>102</sup> Since 2018 ethnic Amharas have been killed and displaced at different times by an armed group from West Welega Zone in the Oromia region. For instance, on November 2, 2020, in the Oromia Region, West Wollega Zone, Guliso Woreda, Gawwa Qanqa village, an armed group called Onag Shene (also call itself Oromo Liberation Front- OLF) brutally killed

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<sup>100</sup> Especially because of this achievement he was awarded the Nobel Prize for Peace in 2019.

<sup>101</sup> The existing claim over the areas known as Wolakait and Raya is a typical case of dispute between the Amhara and Tigray Region in Ethiopia.

<sup>102</sup> UN OCHA, 'Ethiopia: Oromia –Somalia Conflict-Induced Displacement, Situation Report No. 4, 20 June 2018.

hundreds of ethnic-Amharas after gathering them for assembly in a school compound.<sup>103</sup> Similarly, in Benishangul-Gumuz Region Metekel Zone, an insurgent group has been frequently killing civilians belonging to *Shinasha, Amhara, Agewu, and Oromo* ethnic groups.<sup>104</sup> Following the death of popular Oromo Singer named Hachalu Hundessa, more than 239 people died, many were injured and thousands fled from their homes from June 29 to July 2, 2020, due to the security crisis in the Oromia Region.<sup>105</sup> The Ethiopian Human Rights Commission (EHRC) investigative report concluded that the attacks met the elements of Crimes against Humanity<sup>106</sup> While the investigative report made by the Ethiopian Human Right Council (EHRCO) similarly regarded it as mass atrocity in which the final stages of the crime of genocide has occurred.<sup>107</sup>

Meanwhile, the TPLF and Federal Government disputed on different political matters. One of the major issues was the establishment of a single party called the Prosperity Party (PP). The constituent parties of EPRDF<sup>108</sup> moved to merge into PP and PM Abiy called on TPLF to join the new party. Yet TPLF declined to join the new coalition, setting a major line of dissent with the prime minister and the federal government. The other source of hostility is

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<sup>103</sup> Joint investigation report, *supra* note 12, p. 5.

<sup>104</sup> Thousands of innocent people were killed in this Region, especially in the area named Metekel. Still the killing has also been taking place despite an intervention made by the Federal Government. The attack was frequently made by a group of persons who were armed with heavy and silent weapons including arrows.

<sup>105</sup> Ethiopian Human Right Commission (EHRC), 'It Did Not Feel Like We Had A Government': Violence and Human Rights Violations following Musician Hachalu Hundessa's Assassination, Investigation Report, (2020), p. 54.

<sup>106</sup> *Id.*

<sup>107</sup> የኢትዮጵያ ሰብዓዊ መብቶች ጉባኤ (ኢሰመጉ) ኢትዮጵያ፡ በዘር ማጥፋት ወንጀል አፋፍ ላይ! [147ኛ ልዩ የሰብዓዊ መብቶች ዘገባ] ጥቅምት 2013 ዓ.ም አዲስ አበባ፣ ኢትዮጵያ, p. 67.

<sup>108</sup> These are the Oromo Democratic Party (ODP), Amhara Democratic Party (ADP) and Southern Ethiopian Peoples' Democratic Movement (SEPDM).

related to the postponement of the 6<sup>th</sup> national election by the Federal Government because of the COVID-19 pandemic. In response to the actions of the Federal government, TPLF opposed the decision and conducted its election in Tigray Region and became the winner. The Federal Government then declared the election unacceptable and subsequently suspended the Tigray Regions budget except for lower administrative units. As the tension escalated, both started to conduct heavy military preparation and training which finally resulted in a full-fledged war on the 4<sup>th</sup> of November 2020.

## **2. The Mai-Kadra Atrocity Incident**

On November 3, 2020, Tigray forces attacked the Northern Command of the ENDF and controlled large amounts of weapons.<sup>109</sup> In response, PM Abiy Ahmed declared a law enforcement operation against TPLF and its force on November 4, 2020. Since the war started, mass atrocities and gross human rights violations have been committed. Mai-Kadra is one of the main incidents where atrocities took-place on 9 November 2020, shortly after the outbreak of the war.

### **2.1 What Happened in Mai-Kadra?**

#### **2.1.1 Brief Description of Mai-Kadra Town**

Mai-Kadra is a small rural town situated in the Northwest part of Ethiopia, close to the border areas of Sudan. Before the armed conflict, the town was part of the administration of the Tigray Region, in the Western Zone, Hafta Humera Woreda. More than 45,000 people live in the Mai-Kadra town and the two ethnic groups, i.e. Tigrayan and Amhara dominantly constitute the

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<sup>109</sup> JIT Report, *supra* note 12, p. 3.

population of the town.<sup>110</sup> Most of the residents of the town speak Amharic and Tigrigna languages. Mai-Kadra is largely known for huge seasonal sesame and millet farming. Thus, individuals from different parts of the country (especially from the Amhara region) go to Mai-Kadra each year in September to work as daily labourers and are traditionally named ‘*Saluks*’. Commonly, they live together often in a group of 5-10 people within a single house. According to both EHRC and EHRCO reports, it was this group of persons (specifically men) who were the principal targets of the massacre.<sup>111</sup>

### **2.1.2 Preparation for the Attack**

When the war started between the Federal Government and the Tigray Region on November 4, things quickly changed in the Mai-Kadra town and the preparations for the massacre began. Especially when it was heard that the Federal Government and its allied forces were approaching the Mai-Kadra town in the north-western part, the local administration, police, and militia forces closed the four main exit routes of the town.<sup>112</sup> As part of the preparation for the attack, members of an informal ethnic Tigrayan youth group called ‘*Samri*’ were set-up and stationed at all checkpoints of the town by local administrations and police.<sup>113</sup> A week before the massacre, they had identified and taken a record of ethnic Amhara residents of the town. Due to the interruption of electricity and telephone services since the war started, mobile phone network service functioning via Ethiopian SIM cards has

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<sup>110</sup> It is further indicated that the people identified as Wolkaite were also residents of the town which is in fact the local name for people of Amhara who were born or have long resided in the area called Wolkait. See Ethiopian Human Right Commission (EHRC), ‘Rapid Investigation into Grave Human Rights Violation in Mai-Kadra’, Preliminary Findings, (24 November 2020) (Hereinafter, EHRC Preliminary Investigation), p. 1. See also, EHRCO Full Report, *supra* note 11, p. 11.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, p. 13.

<sup>113</sup> JIT Report, *supra* note 12, p. 30; EHRC Preliminary Investigation, *supra* note 31, p. 2.

stopped working in the town. Since Mai-Kadra is near the Sudanese border and most people also had Sudanese SIM cards, the local police and the Tigray Special Forces conducted a door-to-door search and destroyed such SIM cards to disable communication.<sup>114</sup> Ever since the war started those who tried to escape to the adjacent areas of the Amhara region, particularly *Saluks* and other non-Tigrayans were forced to stay within the town as the local militia and Tigray Special Forces controlled and closed each exit route.<sup>115</sup>

### **2.1.3 Execution of the Attack**

Acts that led to the immediate execution of the atrocity in Mai-Kadra started in the late mornings of November 9, 2020. The incidence can be described in two phases. Starting from around 11:00 AM, local administration police started to identify non-Tigrayan ethnic residents by checking their identity cards mainly in those specific areas of the town known as “Genb Sefer” and “Kebele 1 Ketena 1” where ethnic Amharas largely live.<sup>116</sup> After the door-to-door raid, around 60 people were detained in one place since they are suspected of using Sudanese SIM cards on their mobile phones against the police order to communicate or call for help. EHRC further reported that women and children belonging to ethnic Tigrayan were made to leave the town a few hours before the attack started.<sup>117</sup>

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<sup>114</sup> EHRCO Full Report, *supra* note 11, p. 13. The joint investigation report by the EHRC and OHCHR indicates that such an act also continued until the day of the massacre. See, JIT Report, *supra* note 12, p. 81.

<sup>115</sup> EHRC Preliminary Investigation, *supra* note 31 p. 2. Moreover, EHRCO investigative report indicated that individuals belonging to Tigrayan ethnic group were armed by the regional administration in the nearby towns called Humera and Dansha apart from Mai-Kadra. See, EHRCO, Preliminary Investigation, *supra* note 11, p. 1.

<sup>116</sup> EHRC Preliminary Investigation, *supra* note 31, p. 2.

<sup>117</sup> *Id.*

The actual attack started after 3:00 PM when the *Samri* along with local police and militia raided “*Genb Sefer*”.<sup>118</sup> Before that, particularly ethnic-Amharas were told to stay at home and keep their doors shut, soon after which *Samri*, accompanied by police and local militia, carried out house-to-house raids, spoke to victims in Tigrigna, identified those who could not respond and began an attack.<sup>119</sup> According to EHRC, the first attack was directed against a former soldier who opposed to re-join the TPLF in the war and was killed in front of his family.<sup>120</sup> Following that, the *Samri* started attacking persons they identified before as Amharas. But also it is reported that few other minority ethnic groups were targeted.<sup>121</sup> The attack was mainly carried out by stabbing with knives, machetes, axes, and hatchets and strangling them with ropes.<sup>122</sup> The actual civilian massacre using such materials was conducted by several *Samri* groups consisting of 20 to 30 youths. They were also accompanied by 3 or 4 local police and militias who shoot at those trying to leave the town.<sup>123</sup> As mentioned above, *Saluke* were the main targets of the attack and since most of them live in a group of 5-10 people within a single house they were easily attacked.<sup>124</sup>

The attack which began on November 9 around 3:00 pm continued throughout the night until the perpetrators left the Mai-Kadra town on early

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<sup>118</sup> *Id.*

<sup>119</sup> JIT Report, *supra* note 12 p. 30. See also, EHRCO, Preliminary Investigation Report on Major Human Rights Violations in and around Maikadra, (December 2020) 2.

<sup>120</sup> This person is known as Abiy Tsegaye who ethnically belongs to Amhara. See EHRC Preliminary Investigation, *supra* note 31 p. 2.

<sup>121</sup> Katharine Houreld, Michael Georgy and Silvia Aloisi, ‘How ethnic killings exploded from an Ethiopian town, A Reuters Special Report, (June 2021), available on: <https://www.reuters.com/investigates/special-report/ethiopia-conflict-expulsions/> accessed on February 20, 2022.

<sup>122</sup> JIT Report, *supra* note 12, p. 30.

<sup>123</sup> EHRC Preliminary Investigation, *supra* note 31, p. 3.

<sup>124</sup> *Id.* See also, Amnesty International, ‘Ethiopia: Investigation reveals evidence that scores of civilians were killed in massacre in Tigray state,’ November 12, 2020.

November 10.<sup>125</sup> The number of people killed in the atrocity was not precisely known due to the ongoing new finding of dead bodies. EHRC estimates 600 deaths in its preliminary investigation of Mai-Kadra town only.<sup>126</sup> On the other hand, some confirm that around 767 civilians were killed.<sup>127</sup> Under EHRCO's report, more than 1,100 civilians were killed in the attack, which includes victims from two other neighbouring towns named Humera (30 KM from Mai-Kadra) and *Dansha*.<sup>128</sup> The EHRC field observation further confirms victims who suffered grave physical, whose bodies were maimed by sharp objects or severely bludgeoned and those dragged on the ground with their necks tied to a rope.<sup>129</sup>

According to EHRCO, it took more than five days –for relatives, Amhara Special Force and Ethiopian National Defence Forces to search and bury the corpus. Burial spots are found at different points in the town and the surrounding. For example, at Abune Aregawi Church, 86 spots each with an average of 5 to 10 bodies buried together are found.<sup>130</sup> It is also confirmed that human bodies buried in mass graves were found in several places.<sup>131</sup> Furthermore, EHRCO investigation team spoke to six women who were raped by more than 10 youths who carried out the attack.<sup>132</sup> Moreover, mass

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<sup>125</sup> *Id.*, p. 4.

<sup>126</sup> EHRC Preliminary Investigation, *supra* note 31, p. 3.

<sup>127</sup> Katharine Houreld *et al.*, *supra* note 42.

<sup>128</sup> EHRCO, Preliminary Investigation Report, *supra* note 40, 3.

<sup>129</sup> Its team also spoke to survivors who managed to escape by hiding inside roof openings, pretending to be dead after severe beatings, fleeing to and hiding in the desert plains. EHRC Preliminary finding, *supra* note 17 p. 3.

<sup>130</sup> EHRCO, Preliminary Investigation Report, *supra* note 42, 2. See also, JIT Report, *supra* note 12, p. 30.

<sup>131</sup> According to EHRCO for instance, 42 people are buried near the Abune Aregawi church compound, 57 people in the area known as *Selela Mesmer*, 56 people on Wolde-Ab Road, 6 people near Kebele 04 bridge area, and 18 people near the flooding area. See, EHRCO, Preliminary Investigation Report, *supra* note 40, p. 2.

<sup>132</sup> *Id.*, p. 3.

destruction of property and looting are also reported.<sup>133</sup> On the other hand, TPLF has denied the allegations about the commission of all the above acts by its allies and rather accused the Amhara forces.<sup>134</sup>

### **3. Legal Characterization of the Mai-Kadra Atrocities**

#### **3.1 Introduction**

There is no doubt that the Mai-Kadra incident constitutes a mass atrocity. Yet, the question is how the material acts committed in the incident can qualify to determine its possible category. The fact that the incident happened in the wake of armed conflict coupled with other factors widens its chance to be characterised in different ways.<sup>135</sup> Accordingly, the analysis in this section relies on the reported material facts and the law indicated above which will help us to draw a good understanding of the potential legal qualification of crimes committed.<sup>136</sup> The case law of ad-hoc tribunals and the ICC are

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<sup>133</sup> The commission of these acts was also reported before the actual attack was carried out. According to the Joint Investigation Team report 'between November 6&9, 2020 Tigray forces attacked farms belonging to non-Tigrayans in nearby areas to Mai-Kadra. The attackers burnt the harvest of 5,000 quintals of sesame in one case and 620 in another. The attacks were considered ethnicity-based, targeting Amharas'. See, JIT Report, *supra* note 12, p. 68.

<sup>134</sup> The New York Times, They Once Ruled Ethiopia. Now They Revolt, 16 November 2020; BBC News, Ethiopia Tigray Crisis: Rights commission to investigate 'mass killings', 14 November 2020.

<sup>135</sup> This is because, as it is known, while genocide and crimes against humanity can be committed either in an armed conflict or peace time, war crimes can only be committed during an armed conflict. This poses the question whether the Mai-Kadar incident can be qualified in different ways, which is dealt with subsequently.

<sup>136</sup> There is on-going investigation by the Federal Office of Attorney General, now renamed as the Ministry of Justice including other incidents that occurred in the war between the Federal Government and Tigray Region. According to the Joint Investigation Report, a total of 202 suspects were identified, charged and were still on trial as of August 2021. Only 30 suspects were in custody while others continued to be tried in absentia. Joint Investigative Report, *supra* note 12, 366.

consulted to assess acts committed in the incident, although they are not binding on the Ethiopian courts.<sup>137</sup> It should be underlined that this is a general way of characterising the incident as a whole in light of the elements of core crimes. Hence, the conclusions may not certainly be applied to establish individual guilt since it must be proved by a Court that the accused personally possessed the required intent to commit the crime.<sup>138</sup>

### 3.2 Genocide

Genocide is ordinarily conceived as a mass killing of a large number of civilians where a state is often involved in such incidents.<sup>139</sup> Looking into the acts committed in Mai-Kadra atrocity, one could notice some constitutes these elements as the local administration was involved in organising a killing

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<sup>137</sup> Both Tadesse and Marshet, who made extensive study on the area, acknowledged that Ethiopian courts never referred to the decision and judgments of International Courts and Tribunals in so far as the practice is concerned. For instance Tadesse avowed that ‘in entering the country’s first genocide conviction at the beginning of 1999 in *Geremew Debele* case, the FHC did not make a single mention of the landmark genocide judgment delivered sixth months before by the ICTR in the case of Akayesu.’ See Tadesse, *supra* note 2, p. 223; Marshet, *supra* note 2.

<sup>138</sup> The person may not also satisfy the requisite intent of the commission of the crime. For instance, although the Trial Chamber of the ICTY in *Krstic* case has generally qualified the killing against the Bosnian Muslims as genocide, the Appellate chamber in contrast has ruled that General *Krstic* is not liable for genocide since he did not personally have a genocidal intent. ICTY, *Prosecutor v. Radislav Krstic* (Appeal Judgement), IT-98-33-A, (19 April 2004), para. 58.

<sup>139</sup> See for instance, Mark Drumbl, ‘The Crime of Genocide’ in Brown, Research Handbook, 38; Hans Vest, ‘A structure-based Concept of Genocidal Intent’ Journal of International Criminal Justice, Volume 5, Issue 4 (2007), 877. Furthermore, the ICTR in *Kayishema and Ruzindana case* held that “given the magnitude of this crime”, it was “virtually impossible” for genocide to be committed without State involvement. See ICTR, *Prosecutor v Kayishema and Ruzindana*, Trial Chamber (Judgement) 95-1-T, 21 May 1999, para. 94.

squad called the *Samri*.<sup>140</sup> Nevertheless, it is difficult to conclude that higher officials were individually involved in the process of organising the group and directing the attacks. Hence, the rules on individual criminal responsibility indisputably require proving the acts of officials who ordered, planned, or participated in any form in the atrocity.

The legal elements of Genocide appear to be proscribed in identical phrasing in the texts of Article 6 of the ICC, Article 4(2) of the ICTY, Article 2(2) of the ICTR, and Article II of the Convention. Likewise, the Ethiopian Criminal Code follows the same approach although it has a few peculiar aspects notably, the extra list of protected groups.<sup>141</sup> In all these instruments, three fundamental elements constitute the crime: First, the underlining *acts* must be committed with the requisite *mens rea*; secondly, this act should specifically be targeted against national, ethnic, racial, or religious *group*, as such, and thirdly, that the act is committed with *intent* to destroy, in whole or in part, the targeted group.<sup>142</sup> The next sections look into Mai-Kadrs incident in light of these constituting elements.

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<sup>140</sup> See section 2.1 above. See also, EHRC Preliminary Investigative Report, *supra* note 31, p. 3.

<sup>141</sup> Apart from the four list of protected groups under the genocide Convention, the Ethiopian Criminal Code has recognized additional categories of *political, nation, nationality, and colour groups*. The *chapeau* of Art. 269 of the 2004 Criminal Code reads as follows:

Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a *nation, nationality, ethnical, racial, national, colour, religious or political group*, organises, orders, or engages in (Emphasis added).

<sup>142</sup> ICTR, *Prosecutor v. Seromba*, Trial Chamber, (Judgement), ICTR-2001-66, 13 December 2006, para. 316; ICTR, *Prosecutor v Bagilishema*, Trial Chamber I (Judgement), ICTR-95-1A-T, 7 June 2001, para 55.

### 3.2.1 Material Acts

In the Mai-Kadra incident, two acts namely, killing and serious bodily injury are mainly reported to have been committed.<sup>143</sup> The acts indeed constitute the *actus reus* of the crime of genocide. Particularly, the acts are committed with genocidal intent.<sup>144</sup> If the acts are committed with specific genocidal intent even the killing of a single victim is sufficient to regard it as genocide. The element ‘killing members of the group’ is not of course defined anywhere in the aforementioned instruments. However, the case law of the ad-hoc Tribunals, which contributed to the development of the definition of the individual acts of genocide, can be invoked in this respect. To this effect, the ICTR, in its several decisions, noted that the individual act of killing is limited to the intentional causing of death or murder.<sup>145</sup> Intentional killing of individuals belonging to members of the protected group is sufficient to regard an act as genocide in so far as it is possible to prove genocidal intent to destroy the group. This could be quite different from the ordinary definition of homicide under Article 538 (1) of the Ethiopian Criminal Code which also includes causing death through negligence. The ICTR in the *Akayesu* case excluded unintentional killing and interpreted the term ‘homicide’ in Article 2(2)(a) of the Statute as an act “committed with the intent to cause death”.<sup>146</sup>

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<sup>143</sup> See section 2 above.

<sup>144</sup> See Art. 6 (a) of the ICC, Art. 4(2) (a) of the ICTY, Art. 2(2) (a) of the ICTR and Art. 2 (a) of the Genocide Convention, and Art. 269 (1) the Ethiopian Criminal Code.

<sup>145</sup> ICTR, *Prosecutor v Musema*, Trial Chamber (Judgement and Sentence), ICTR-96-13-T, 27 January 200, para. 155; ICTR, *Prosecutor v. Jean-Paul Akayesu* Trial Chamber (Judgement), ICTR-96-4-T, 2 September 1998, para. 521; ICTR, *Bagilishema*, Trial Chamber I, *supra* note 63, para 58.

<sup>146</sup> See, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, para. 501. In this particular case, the Court looks into both the English and the French version of the Genocide Convention and decided that the French term (*‘meurtre’*) was to be preferred over the English term ‘killing’, as the latter could refer even to unintentional homicides.

Hence, killing, as an individual act of genocide has to be understood as the deliberate killing of members of a protected group.

In Mai-Kadra, the killing of *Saluks* by the *Samri* group which particularly belongs to the Amhara ethnic group represents the most common act. It was carried out by stabbing with knives, machetes, axes, and hatchets and strangling with ropes which shows the perpetrators' intent to cause death or serious bodily injury. The ICTR is inclined to interpret the term 'killing' broadly 'not only entailing acts that are undertaken with the intent to cause death but also includes acts which may *'fall short of causing death.'*<sup>147</sup> Hence, it might not be difficult for the Prosecutor to show that when the victim is hit using such instruments, he/she probably loses his life or suffers a serious injury. However, the Prosecutor still needs to show that the perpetrators have intentionally killed one or more members of the protected group and that the victims 'must belong to a protected group or considered as such because of mistaken identities' by the perpetrators during the attack.<sup>148</sup> The issues surrounding members of protected groups are discussed in the subsequent section.

Investigative reports also indicated that several people sustained serious injuries following the Mai-Kadra incident.<sup>149</sup> The term 'causing serious bodily harm' to members of the protected group is also not defined anywhere in the above instruments. The ICTR defined that "causing serious bodily harm refers to serious acts of physical violence falling short of killing that seriously injure the health, cause disfigurement, or cause any serious injury to the

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<sup>147</sup> ICTR, *Prosecutor v. Muvunyi*, Trial Chamber, (Judgment), ICTR 2000-55A-T, 15 September 2006, para. 482.

<sup>148</sup> ICTR, *Prosecutor v. Semanza*, Trial Chamber III (Judgement) ICTR-97-20-T, May 15, 2003, para. 319.

<sup>149</sup> See section 2.1.3 above.

external or internal organs or senses.”<sup>150</sup> During the Mai-Kadra incident, it is submitted that several people who suffered grave physical injuries received treatment in different hospitals such as Ahrhajira, Sanja, and Gondar.<sup>151</sup>

Generally, the circumstantial evidence reported in the Mai-Kadra incident precisely shows the fact that the act of killing and serious bodily harm was committed against members of ethnic Amharas. The specific pieces of evidence include the widespread killings of ethnic Amharas mainly in the *Gimbe Sefer* of the Mai-Kadra town, field observation reports of human rights bodies indicating heaps of bodies everywhere in the town in the aftermath of the attack, the manner of perpetration (by stabbing with sharp instruments), presences of seriously injured persons who sustained wounds in their face and neck in the hospital.<sup>152</sup>

### 3.2.2 Protected Group: Ethnicity

Ethnicity is one of the protected groups against the crime of genocide. The ICTR Trial Chamber defined an ethnic-group as ‘one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including

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<sup>150</sup> Akayesu, Trial Chamber (Judgement), *supra* note 66, para. 50; Kayishema and Ruzindana, Trial Chamber (Judgement), *supra* note 60, para. 109; *Musema*, Judgement and Sentence, *supra* note 63, para 156; *Semanza*, Trial Chamber III, *supra* note 69, para 315. See also, *Seromba*, (Trial Chamber), *supra* note 66, para. 317. The person is guilty of causing serious bodily harm even if the injury suffered by the victim is not of a permanent or irremediable nature. See, *Prosecutor v. Muvunyi*, Trial Chamber, *supra* note 68, para. 487; ICTR, *Prosecutor v Kamuhanda*, (Trial Chamber), January 22, 2004, para. 634; ICTR, *Prosecutor v Kajelijeli*, (Trial Chamber), December 1, 2003, para. 815.

<sup>151</sup> EHRC Preliminary Investigation Report, *supra* note 31, p. 2.

<sup>152</sup> The ICTR has employed these grounds in the renowned *Akayesu* case. See, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, para. 116. See also *Kajelijeli*, (Trial Chamber), *supra* note 71, para 835.

perpetrators of the crimes (identification by others).<sup>153</sup> Hence, the victim must identify themselves as belonging to a certain ethnic group or the perpetrator believed that the victim belonged to the group. This is otherwise called ‘subjective distinction’ based on perception.<sup>154</sup> On the other hand, there is ‘objective identification’ of a protected group on factual distinction by looking into the conventional reality of its existence.<sup>155</sup>

Although ICTR previously employed an objective approach, eventually it adopted a combination of both subjective and objective approaches in the *Semanza* case.<sup>156</sup> It is also suggested in practice to combine both approaches as mere reliance on the subjective one could be used to protect even fictitious groups.<sup>157</sup> During the Mai-Kadra incident, the main targets of the attack were ethnic Amharas.<sup>158</sup> The prosecutor may not certainly face difficulty to prove that Amharas are ethnic-group since it is an objectively identified fact.<sup>159</sup> It is

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<sup>153</sup> Kayishema and Ruzindana, Trial Chamber (Judgement), *supra* note 60, para. 98. See also Akayesu, Trial Chamber (Judgement), *supra* note 66, para. 513.

<sup>154</sup> The ICTR Trial Chamber employed a subjective test in the *Akayesu* case. See, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, paras 512-515

<sup>155</sup> Robert Cryer, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 4<sup>th</sup> Revised edition, (2019).

<sup>156</sup> *Semanza*, Trial Chamber III, *supra* note 69, para. 317. See also ICTR, *Prosecutor v. Brđanin*, Trial Chamber, (Judgement), 1 September 2004, para. 209; *Kayishema and Ruzindana* Trial Chamber (Judgement), *supra* note 60, para. 98. See also, Robert Cryer, *et al.*, *supra* note 76, 214.

<sup>157</sup> *Id.*

<sup>158</sup> Some of the reports (esp. EHRC) separately indicate that ‘Welkaites’ are involved in the incident. However, Welkaite is the local name of the area in the west part of the then Tigray administration and there is no such ethnic identity officially recognized as ‘Welkaite’ under the Ethiopian context. See, EHRC Preliminary Investigation *supra* note 31 p. 3.

<sup>159</sup> Amharas as ethnic identity is officially recognized by institutions such as the Central Statistical Agency and the House of Federations. See, Central Statistical Agency of Ethiopia, ‘Census 2007 Report: National Statistical’, 72-73, available on <http://www.csa.gov.et/census-report/complete-report/census-2007>, accessed on 30 April 2022. In establishing a federal state structure of Ethiopia in 1994, the FDRE

also conceivable considering that both ethnic groups -Amharas and Tigrayans predominantly live in the area. Although these ethnic groups had years of intermarriage and coexistence, still ethnic grid distinction is not blurred. Equally, the perpetrators identified ethnic Amharas for an attack as opposed to the group they belong to, i.e. ethnic Tigrayans which also forms a subjective approach as decided by the ICTR in *Bagilishema* case.<sup>160</sup> Be that as it may, there is room in both ways to establish that the acts in the Mai-Kadra incident were mainly directed against a protected group- ethnic Amharas. In practice, Ethiopian courts showed a predisposition towards the objective requirement.<sup>161</sup>

It is yet indicated that few other minority ethnic groups notably from the South were also part of the Mai-Kadra attack.<sup>162</sup> One may think that the presence of these groups may dilute the requisite *intent* to destroy the group. However, this might not pose a problem since during the Nazi Holocaust, while the majority of victims were Jews, other minority groups namely, Roma (Gypsies), homosexuals, Jehovah's Witnesses, and people with disabilities suffered damages from the Nazi genocidal acts.<sup>163</sup> Similarly, during the Rwandan genocide few minorities such as Twa, and moderate Hutu were

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Constitution restructured the country into nine Regional States composed of different ethnic groups to which the 'Amhara Region' is the major one.

<sup>160</sup> The ICTR in *Bagilishema* case held that in cases where 'it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group... if a victim was perceived by a perpetrator as belonging to a protected group, the victim should be considered by the chamber as a member of protected group, for the purpose of genocide'. See, *Bagilishema*, Trial Chamber I, *supra* note 63 para 65.

<sup>161</sup> Tadesse, *supra* note 2, p. 232.

<sup>162</sup> Among the 176 lists indicating the name of individuals killed, 4 were identified as South/Debube, without explicit mention of their specific ethnic identity. See, EHRCO Full report, *supra* note 11 p. 16-22.

<sup>163</sup> Minority Victims of the Holocaust, Holocaust Museum Houston Library, available on, <https://hnh.org/library/research/minority-victims-guide/>, accessed on 28, April 2022

killed.<sup>164</sup> Equally, the Prosecutor can refer to the ICTR's ruling of the subjective test that the inclusion of members of a few other ethnic groups is because the perpetrators erroneously believe that they belong to the ethnic-Amharas.<sup>165</sup> Furthermore, if these victims had a mixed identity such as half Amhara and half other ethnicities, there is still the possibility to say that they were targeted because of their membership in a protected group as it was held by the ICTR in the *Ndinabahizi* case.<sup>166</sup> Nevertheless, it is still possible for the defence to raise the inclusion of a few other ethnic groups as a challenge for the absence of the requisite *mens rea* of intent to destroy a group on the part of the perpetrators. The prosecutor thus owes the burden to prove otherwise.

### 3.2.3 The Mental Element

Establishing Genocidal intent is perhaps the most daunting task in the prosecution of such cases. As such, there is always a double *mens rea* requirement for the crime of genocide, i.e. the commission of an act 'with intent to destroy a protected group' and the requisite *mens rea* for the commission of the underlining acts. Several people may participate in the act, but for an individual to be regarded as a *genocidaire*, he/she should commit the act with the required genocidal intent.<sup>167</sup> Without confession, determining the special intent of the accused is often a difficult task since items of evidence that directly prove such intent may not be easily found. Because of this, the ICTR and the ICTY held in various judgments that genocidal intent can be inferred from several presumptions of fact or circumstantial

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<sup>164</sup> Rwandan Genocide, History.com Editors, Last updated April 19, 2022, available on <https://www.history.com/topics/africa/rwandan-genocide> accessed on May 12, 2022

<sup>165</sup> *Semanza*, Trial Chamber III (Judgement), *supra* note 69, para. 319.

<sup>166</sup> ICTR, *Prosecutor v. Ndinabahizi*, Trial Chamber, (Judgement and Sentence), ICTR-2001-71-I, 15 July 2004, paras 469

<sup>167</sup> *Kayishema and Ruzindana* Trial Chamber (Judgement), *supra* note 60, para 170.

evidence.<sup>168</sup> Similarly, the ICTR in its various cases indicated different factors that need to be considered to infer a genocidal intent. The Court's decision in the *Nchamihigo* case seems to compressively encompass these factors. It held that:

In the absence of direct evidence, the following circumstances have been found, among others, to be relevant for establishing intent: the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim's membership in a protected group and the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.<sup>169</sup>

While most of these factors also occurred in Mai-Kadra, it is still difficult to prove the others. The preparatory acts before the execution of the actual attack notably, the closure of the four main exits of the Mai-Kadra town followed by an order to make every Amhara Ethnic member stay at home, and let women and Children of Tigrayan ethnic origin leave the town possibly shows initial

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<sup>168</sup> The ICTR, in its several cases held that intent may be inferred/proven by circumstantial evidence -where it is impossible to adduce direct evidence of the perpetrator's intent to commit genocide, such intent may be inferred from the surrounding facts and circumstances. See for instances, *Prosecutor v. Muvunyi*, Trial Chamber (Judgement), *supra* note 68, para. 480; *Kayishema and Ruzindana* Trial Chamber (Judgment), *supra* note 60, para. 93; *Kajelijeli*, Trial Chamber, *supra* note 71, para. 806. See also, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, para. 523.

<sup>169</sup> ICTR, *Prosecutor v. Nchamihigo*, Trial Chamber, (Judgement) ICTR-01-63-T, November 12, 2008, para. 331. See also, ICTR, *Prosecutor v. Zigiranyirazo*, Trial Chamber, ICTR-01-73-T, December 18, 2008, para. 398; *Prosecutor v. Muvunyi*, Trial Chamber (Judgement), *supra* note 68, para. 480.

measures taken to carry out the attack.<sup>170</sup> Further, *Samri's* attacks on ethnic Amharas (*Saluks*), mainly residing in identified places before this incident, indicate the systematic nature of the attack against victims on account of their membership in an ethnic group. Hence, one may argue that the perpetrators are aware of their attack being directed against ethnically identified groups. Similarly, several factors show the broader scope of the atrocity namely, the number of deaths and serious bodily injuries, mass graves and burial sites, dead bodies found scattered on streets, and the gravity of the attack are evidence from which genocidal intent can be inferred.<sup>171</sup>

Conversely, it appears quite difficult to establish special intent considering the overall context in which the crime occurred and whether the perpetrator's actions constitute violation of the foundation of the group. The fact that the Mai-Kadra atrocity occurred in the period of an armed conflict opens doubt as to whether mass killings are committed with genocidal intent or to win the war. This is not to say that crime of genocide is not committed during the war. Although the Mai-Kadra act is committed following the outbreak of war between the Federal Government and the Tigray Region. If it is committed with the intent to defeat the opposing party, such act indeed does not satisfy the requisite special *mens rea* to qualify as genocide. This might be the case if the killing of *Saluks*-ethnic Amharas (who are mainly male members of the society) is to remove them from joining the enemy force that was approaching the town and avert a future military threat.

To appraise the above two factors, it is vital to see the Mai-Kadra incident in light of the Bosnian case in which military-aged male members of Muslim Srebrenica were killed by the Bosnian Serb forces. The defence team in the *Krstić* case argued that the purpose of the killing was not to destroy the group

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<sup>170</sup> See section 2.1.2 above.

<sup>171</sup> *Id.*

as such but to remove a military threat as male members of military age had been targeted.<sup>172</sup> Nevertheless, both the Trial and Appellate Chambers of the ICTY held that such killings did constitute genocide justifying that Bosnian Serb forces effectively destroyed male members of the Bosnian Muslim community in Srebrenica and eliminated all the likelihood that it could ever re-establish itself on the territory.<sup>173</sup> Such ruling of the Court is much related to the second factor indicated by the ICTR above, i.e. ‘ about the perpetration of acts that violate the foundation of the group or as to whether they are considered as such by their perpetrators’. Accordingly, the following similar features can be drawn between the Mai-Kadra and Bosnian incidents: the attacks occurred during an armed conflict; the attack was committed against male members of the society (though not entirely in Mai-Kadra); the attack is directed against a protected group (ethnic-Amharas in case of Mai-Kadra and Muslim in case of Bosnia), the scope of the attack (more than 1000 persons killed in less than a day in Mai-Kadra while 7000-8000 persons were killed in less than two weeks in Bosnia) and burial of bodies in mass graves.

In contrast, it appears however very challenging to infer the genocidal intent in Mai-Kadra based on the grounds laid down by the ICTY above. This is mainly because of two reasons. First, the ICTY has required a high threshold standard of *mens rea*, and second, it has taken other important factors to conclude that the killing of Bosnian Muslims did constitute genocide. One can find these justifications together in the Court's ruling which says that ‘the Bosnian Serb forces knew by the time they decided to kill all the military-aged men, that the combination of those killings with a forcible transfer of the

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<sup>172</sup> ICTY, *Prosecutor v. Krstić*, Trial Chamber, (Judgement) IT-98-33, 2 August 2001, para 597.

<sup>173</sup> Furthermore, the Court held that ‘the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society’. *Id.*

women, children and elderly would inevitably result in the physical destruction of the Bosnian Muslims population at Srebrenica.<sup>174</sup> Accordingly, it might be hardly possible to say that selective destruction of male members of ethnic Amharas in Mai-Kadar was carried out in a way that would have a lasting impact upon the entire group in the town or violate the foundation of the group. This is because, unlike the Bosnian situation, the Mai-Kadra incident is of relatively low in gravity and also there is no report about the forcible transfer of children and women or similar other underlining acts of genocide.

Moreover, intent can also be indirectly inferred from the perpetrator's use of derogatory language or overt statements towards members of the group.<sup>175</sup> In Mai-Kadra too, it was reported that the perpetrators used derogatory words during the attack.<sup>176</sup> However, ICTY held that each piece of evidence has to be taken commutatively (than individually) with others such as the use of discriminatory animus, type of attack, and persons targeted not to 'obscure the proper inquiry' of justice.<sup>177</sup> Hence, that makes it still difficult to infer genocidal intent from derogatory statements.

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<sup>174</sup> *Id.*

<sup>175</sup> ICTR, *Prosecutor v. Muhimana*, (Trial Chamber), ICTR-95-1B-T, April 28, 2005, para. 496; See also ICTR, *Prosecutor v. Karera*, (Trial Chamber), ICTR-01-74-T, December 7, 2007, para. 534; ICTR, *Prosecutor v. Mpanbara*, (Trial Chamber), ICTR-01-65-T, September 11, 2006, para. 8.

<sup>176</sup> According to the EHRCO, it is also taken as one of the factor that indicates the circumstances for the commission of 'crime of genocide'. See, EHRCO, full report, *supra* note 17.

<sup>177</sup> ICTY, *Prosecutor v. Stakić*, Appeals Chamber (Judgement), 22 March 2006, IT-97-24-A, para 55.

### 3.2.4 Intent to Destroy in ‘Whole or in Part’

The other important element of the crime of genocide is the intent to destroy the protected group ‘*in whole or in part*’. Two important issues are raised about this element: the geographical scope of the attack and the extent to which the term ‘*part*’ of the group is determined.

Looking into the case of Mai-Kadra, one could find no such complexity concerning the first issue since it is acknowledged by International Criminal Law<sup>178</sup> and the ICJ that ‘genocide may be found to have committed where the intent is to destroy the group within a geographically limited area’.<sup>179</sup> The principal targets of the attack, ethnic-Amharas, were geographically limited to the area of Mai-Kadra at the time when the atrocity had happened, as Tutsi were considered everywhere in Rwanda during the attack by Hutu genocidaires although they encompass the whole territory of the country.<sup>180</sup> There is no need for the *Samri* group to target other ethnic Amharas all over the country or the Amhara region itself. What matters is to establish the intent to destroy the group in the geographic area it is found.

Relatively, the contested issue is the second one, i.e. the extent to which the term ‘*part*’ of the group is determined. The reference here is not the quantitative threshold of the physical act of the perpetrator but rather his/her

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<sup>178</sup> Trial Chamber of the ICTY in *Jelisc* case held that "international custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone." See ICTY, *Prosecutor v. Jelisc*, Trial Chamber (Judgement) IT-95-10-T, (Dec. 14, 1999) para. 83.

<sup>179</sup> ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Case concerning the application of the Convention on the Prevention of and Punishment of the Crime of Genocide, Judgment of 26 February 2007, para 199.

<sup>180</sup> This is because, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world in order to say that genocide is committed. See, *Akayesu*, Trial Chamber (Judgement), *supra* note 66; ICTR, *Seromba*, Trial Chamber, (Judgement), *supra* note 71, para. 319.

intent to destroy the protected group. The actual number of victims might however be still relevant ‘to assist the trier of fact to conclude the intent based on the behaviour of the offender’.<sup>181</sup> The ICTR explicitly indicated that intention must be targeted towards at least a ‘*substantial*’ part of the group.<sup>182</sup> Likewise, the ICTY in *Jelusic* held that genocide must involve the intent to destroy a ‘*substantial*’ part, although not necessarily a ‘*very important part*’.<sup>183</sup> Nevertheless, the meaning of the term ‘*substantial*’ remains difficult to interpret. In *Krstic’s* case, the ICTY ruled that ‘if a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as *substantial*’.<sup>184</sup> Accordingly,

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<sup>181</sup> William Schabas, Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia, *Fordham International Law Journal*, Volume 25, Issue (2001) 40. He further explained that ‘The greater the number of actual victims, the more plausible the deduction that the perpetrators intended to destroy the group, in whole or in part.’ *Id.*

<sup>182</sup> *Semanza*, (Trial Chamber III), *supra* note 69, para 316. The Court in the *Kayishema* case also said ‘that ‘in part’ requires the intention to destroy a considerable number of individuals’. See, ICTR, *Kayishema*, Trial Chamber, (Judgment), *supra* note 60, para. 96&97. See also, ICTR, *Prosecutor v Bagosora et al*, Trial Chamber (Judgement), ICTR-98-41-T, 18 December 2008, para 2115.

<sup>183</sup> *Jelusic*, Trial Chamber (Judgement), *supra* note 99. See also, ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Chamber (Judgment), IT-99-36-T), 2004, para. 701. The ICJ also indicated that ‘the part targeted must be *significant* enough to have an impact on the group as a whole’ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Case concerning the application of the Convention on the Prevention of and Punishment of the Crime of Genocide, (2007), at 198. In general, the intended destruction must refer at least to a “*substantial part*” of the relevant group seems accepted very well.

<sup>184</sup> ICTY, *Prosecutor v. Krstić*, Appeals Chamber, (Judgement), IT98-33-A, 19 April 2004, para. 12. Such decision of the Appellate Chamber has affirmed the Trial Chamber has conclusion that, in terms of the requirement of Art. 4(2) of the Statute that an intent to destroy only ‘part’ of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, and the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim

‘the fate of Srebrenica Muslim is regarded as emblematic of that of all Bosnian Muslims’,<sup>185</sup> in a sense that the specific part of Srebrenica Muslims is essential to the survival of the overall group –Bosnian Muslims. True that ethnic Amharas living in Mai-Kadra town constitute part of the protected ethnic Amharas in Ethiopia, yet it remains difficult to determine whether the targeted population is *substantial* enough to have an impact on the survival of whole Amharas to infer requisite genocidal intent.

The other relevant factors in determining ‘*substantiality*,’ according to the Appellate Chamber of ICTY in the *Krstic* case, are the prominence of the targeted individuals within the group and the number of the targeted population. This means both quantitative and qualitative considerations should be taken into account.<sup>186</sup> In both cases, the assessment of substantiality has to consider the effect that the targeting of this part has on the group as a whole.<sup>187</sup> The qualitative aspect is plainly expressed by the same Court in the case of *Sikirica* in which relatively small numbers of killings occurred in concentration camps. The Trial Chamber in this case observed that "they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service."<sup>188</sup> In the Mai-Kadra case, the *Saluks*, ethnic Amharas, who were the principal target of the attack, are seasonal labourers who work on large sesame and millet farms in the borders of the town.<sup>189</sup> Indeed these persons are of military age and could be called

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community at Srebrenica. See *Krstić*, Trial Chamber, (Judgement), *supra* note 93, para 595.

<sup>185</sup> Robert Cryer, *et al*, *supra* notes 76, p. 224.

<sup>186</sup> *Id.*

<sup>187</sup> *Jelisić*, Trial Chamber (Judgement), *supra* note 99, para 82.

<sup>188</sup> See ICTY, *Prosecutor v. Sikirica*, Trial Chamber (Judgement), IT-95-8-I, Aug. 3, 2001, para. 80

<sup>189</sup> See section 2.1 above.

and possibly join the Federal Government/Amhara Special force approaching the Mai-Kadra town at the time. However, it would be doubtful to say that the *Samri* Groups' choice of *Saluks* arose from a clear reason to destroy either the most significant figures of the ethnic-Amharas community in Mai-Kadra or to threaten the survival of the community in Ethiopia as a whole.<sup>190</sup> Hence, such determination rather needs strong evidence which helps to infer the intention of members of *Samri* Groups with certainty that the killing of *Saluks* -men members of ethnic Amhrans, inevitably and fundamentally resulted in the annihilation of Amharas at Mai-Kadra and impacted the survival of the community as such.

Furthermore, the ICTY Chamber in the Bosnian case has also taken into account the fact that women and children were transferred from the area to affirm that 'part' of the group was the Bosnian Muslims of Srebrenica. In contrast, during the Mai-Kadra incident, there was no such specific report evidencing the transfer of women and children by the perpetrators unless they were part of the attack and victims of rape in some places of the town. As opposed to the discussions above, Ethiopian Courts in practice did not consider the 'substantiality' requirement and it was simply supported that any attack conducted with the intent to destroy could constitute genocide.<sup>191</sup>

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<sup>190</sup> In similar fashion, the ICTY Trial Chamber in *Jeliscic* case noted that it might be possible to infer the requisite genocidal intent from the "desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such." But, the Court finally found that it was not possible "to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of that community." See *Jeliscic*, Trial Chamber, (Judgement), *supra* note 99, paras. 82&. 93.

<sup>191</sup> Tadesse, *supra* note 2 p. 280.

### 3.3 Crimes Against Humanity

The customary international law definition of crimes against humanity requires the commission of listed inhuman acts in the context of a ‘widespread or systematic attack directed against a civilian population’.<sup>192</sup> The act of killing and causing bodily injury, which was widely committed in Mai-Kadra, are at the forefront of the list of inhuman acts both under the ICC statutes and tribunals. Although the Mai-Kadra incident happened during an armed conflict, such an aspect is not required under the current International Criminal Law.<sup>193</sup> Hence, even in the absence of an armed conflict, the Mai-Kadra incident may still qualify as such provided that other requirements were fulfilled notably, ‘widespread or systematic attack’. The same is also true for the requirement of discriminatory grounds (only stated under the ICTR statute) which is relevant except in the specific case where the crime of persecution is itself an underlining offense. Then, the remaining question requiring more inquiry is whether the Mai-Kadra incident fulfills the threshold of widespread or systematic attack to qualify as a crime against humanity? If so, how? The subsequent section addresses these and other issues.

#### 3.3.1 Widespread or Systematic Attack against Civilian Population

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<sup>192</sup> The ICTR further indicated that any act which is ‘inhuman’ in nature and character may be qualified as crimes against humanity provided that the *chapeau* elements of such crime are met. See, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, para. 585.

<sup>193</sup> The ICTY Statutes restrict the application of crime against humanity to those committed during an armed conflict. Yet, the ICTR statutes, national case laws, views of experts do not provide the requirement of armed conflict in the definition of crime against humanity. See, Robert Cryer, *et al*, *supra* note 76, p. 231.

The terms ‘widespread or systematic’ are non-cumulative requirements defined in different ways under International Criminal Law. The term ‘widespread’ commonly refers to the ‘scale of the act perpetrated and the number of victims’.<sup>194</sup> Yet, there is no clear upper and lower numerical limit. It can be satisfied by the commission of numerous acts or a single act of exceptional gravity.<sup>195</sup> It simply connotes the large-scale characteristics of an attack, involving many victims. As indicated before, the Mai-Kadra atrocity is carried out by the *Samri* group with considerable seriousness and directed against a multiplicity of victims on a massive scale. This is certainly evidenced by a large number of killings and serious bodily injury, dead bodies on the streets, various burial sites, and mass graves following the incident. Consequently, one can safely conclude that the scale of the attack satisfies the element of ‘widespread’ as defined in pertinent human rights instruments.

Turning to the term ‘systemic, one could see that it is also qualified through several attributes drawing a line between such acts and others. The ICTR in *Seromba* and other cases defined ‘systematic’ as [a criminal act] thoroughly organised, following a regular pattern, based on a common policy, and involving substantial public or private resources.<sup>196</sup> In Mai-Kadra, reports

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<sup>194</sup> ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 920; *Bagosora et al*, Trial Chamber (Judgement), *supra* note 103, para. 2165; ICTY, *Prosecutor v. Tadić*, (Trial Chamber II), IT-94-1-T, 7 May 1997, para 206; *Al Bashir Arrest Warrant*, Pre-Trial Chamber I, ICC-02/05-01/09-3, (2009), para. 81.

<sup>195</sup> ICTY, *Prosecutor v. Blaskic*, Trial Chamber (Judgement), IT-95-14-T, 3 March 2000, para. 206; ICTY, *Prosecutor v. Dario Kordic, Mario Cerkez* (Trial Chamber), IT-95-14/2-T, 26 February, 2001.

<sup>196</sup> *Seromba*, Trial Chamber, (Judgement), *supra* note 63, para. 356; ICTR, *Prosecutor v. Bisengimana*, Trial Chamber, (Judgement) April 13, 2006, para. 45; ICTR, *Prosecutor v. Simba*, (Trial Chamber), December 13, 2005, para. 421; ICTR, *Prosecutor v. Kamuhanda*, Trial Chamber, (Judgement), ICTR-95-54A-T, 22 January 2004, para. 666. Whereas, the ICTY in *Blaskic* case included other factors

indicated that the attacks against victims by the *Samri* group were made in an organised way in which a group of 20 to 30 youth individuals, each accompanied by an estimated 3 to 4 armed police and militia, carried out the massacre.<sup>197</sup> Before the actual attack started, preparatory acts were made by the police such as checking residents' identity cards in the areas known as 'Genb Sefer' and the neighbourhood where ethnic Amharas largely reside. In addition, they detained those ethnic Amharas who were caught using Sudanese SIM card service to access the Mobile Phone network and communicate as such to prevent any communication or call for help.<sup>198</sup> These circumstances manifestly indicate the systematic and organised pattern of conduct, as distinguished from random or isolated acts committed by independent actors.

The involvement of local administration and police in organising the *Samri* group could also indicate the use of substantial public or private resources for the commission of the attack. In particular, the assistance and participation of police and militia in the carnage by shooting at those who attempted to escape behind the attack of the *Samri* group proves the involvement of state machinery. More importantly, the two most relevant grounds emerging in recent cases Laws of International Criminal Law, i.e. the organised nature of the attacks and improbability of their random occurrence<sup>199</sup> were manifestly shown during the Mai-Kadra incident. Finally, it seems that there is no controversy about the civilian nature of the victims as far as the Main-Kadra

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such as plan or object and implication of higher level authorities. See ICTY, *Prosecutor v. Blaškić*, Trial Chamber, (Judgement), IT-95-14-T, (2000).

<sup>197</sup> See section 2.1.3 above.

<sup>198</sup> *Id.*

<sup>199</sup> ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 920; *Al Bashir Arrest Warrant*, Pre-Trial Chamber I, *supra* note 125, para. 81.

incident is concerned since the attack was apparently carried out against a civilian population who was not in any way involved in the war.<sup>200</sup>

### 3.3.2 Mental Element: The Link between the Perpetrators and the Attack

It is the ‘widespread or systematic’ context of the attack against a civilian population that makes an act a crime against humanity. Accordingly, the perpetrator's knowledge/awareness of the context is necessary to make the person responsible, unlike other ordinary crimes.<sup>201</sup> The perpetrator should know the broader context of the attack and his/her acts form part of the attack. While the tribunals require the perpetrator to knowingly take the risk that his/her action is part of an attack,<sup>202</sup> under the ICC, the perpetrator is not required to have detailed knowledge of the attack or the characteristics of the policy.<sup>203</sup> The perpetrators need not pursue the goals or purposes of the overall attack. The law requires their knowledge of the context and even motive is not required.<sup>204</sup> The knowledge can be inferred from the relevant facts and circumstances.<sup>205</sup>

In this consideration, it seems quite easy (if not definitively possible) for the prosecutor to prove the perpetrator's knowledge about the widespread or systematic attack in the Mai-Kadra incident. When several *Samri* groups consisting 20 to 30 youth groups were organised to attack civilians in

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<sup>200</sup> See section 2.1.1 above.

<sup>201</sup> *Semanza*, (Trial Chamber III), *supra* note 69, para. 332; ICTY, *Prosecutor v. Tadić*, Trial Chamber II, (Judgement) IT-94-1-T, 7 May 1997, para. 656; ICTY, *Prosecutor v. Kupreskic et al.* (Trial Judgement), IT-95-16-T, 14 January 2000, para 138.

<sup>202</sup> *Id.*

<sup>203</sup> ICC Elements of Crime, Art. 7, Crime against Humanity ‘Introduction’, para. 2.

<sup>204</sup> ICTY, *Prosecutor v. Tadić*, Appellate Chamber, (Judgement), IT-94-1-A, 15 July 1999, para. 272.

<sup>205</sup> ICC Elements of Crime, ‘General Introduction’, para. 3.

identified places, it was factually reasonable to say that members of the group acted in the knowledge of such wide-spread or systematic context of the attack. Hence, in such a conceivable situation, it would hardly be possible for the perpetrators to credibly deny that his/her action forms part of the broader attack against civilians. Furthermore, it is reasonable to say that the perpetrators know the likely consequence of their acts i.e. by stabbing victims with sharp instruments they intended to cause either death or serious bodily harm. Generally, one can logically infer from above the perpetrators' awareness of the broader context in which their act occurred.

### 3.3.3 Material Act: Extermination

One of the underlying offences of crimes against humanity is extermination.<sup>206</sup> It is similar to murder as both involve killing, however, extermination signifies mass or large-scale killing.<sup>207</sup> Hence, the commission of extermination requires elements of mass destruction while murder crimes against humanity 'can occur on the basis of a single killing which is committed in the context of wide spread or systematic attack'.<sup>208</sup> Although there is no minimum number of victims to qualify as an act of extermination, the ICTY Trial Chamber in *Lukić* case held that killing of at least 60 people in Bikavac was 'killing on a large scale and [met] the element of mass destruction required for extermination'.<sup>209</sup> One can reach the same conclusion as the crimes against humanity of extermination committed in the Mia-Kadra

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<sup>206</sup> See, Art. 5 (b) of the ICTY Statute, Art. 3 (b) of the ICTR Statute and Art. 7 (b) of the ICC Statute.

<sup>207</sup> *Kayishema and Ruzindana*, Trial Chamber (Judgement), *supra* note 60, para. 147. ICC, Elements of Crime, Art. 7(1)(b). ICTY, *Prosecutor v. Lukić and Lukić*, Trial Chamber III (Judgment), IT-98-32-1-T, 20 July 2009, para. 938.

<sup>208</sup> Robert Cryer, *et al*, *supra* notes 76, at 243. See also, Guénaël Mettraux, *International Crimes and the Ad hoc Tribunals*, OUP, Oxford 2005, p. 177.

<sup>209</sup> ICTY, *Prosecutor v. Lukić and Lukić*, Trial Chamber III (Judgment), IT-98-32-1-T, 20 July 2009. The Appellate Chamber has also confirmed such.

incident in which more than 1000 civilians were killed in mass by the *Samri* group on November 9 and 10, 2020.

### 3.4. War Crime

By definition, a war crime can only be committed during an armed conflict which is a *serious* violation of the rules and regulations of warfare.<sup>210</sup> This section, as a way to analyse the Mai-Kadra situation, explores common elements across all types of war crimes. Such crimes are largely established by showing the existence of an armed conflict, identifying the type of armed conflict, establishing the nexus between the conduct and the armed conflict, and defining the status of both the perpetrators and the victims. The issue of the existence of armed conflict is not a question as such in the Mai-Kadra incident as the atrocity happened on the fourth day of the outbreak of full-fledged armed conflict between the Federal Government and the Tigray Region.<sup>211</sup> Likewise, the issue of the type of armed conflict is not relevant in this case since the Ethiopian Criminal Code does not provide a distinction based on the type of armed conflict (international and non-international).<sup>212</sup>

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<sup>210</sup> Such as deliberate killing, torture, rape or deportation of protected people, namely civilians.

<sup>211</sup> This also fairly similar with the ICC ruling in *Lubanga* case in which it held that “an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between such groups within a State”. See, ICC, *Prosecutor v. Lubanga*, ICC, Trial Chamber I, (Judgement), ICC-01/04-01/06, 14 March 2012, para. 533.

<sup>212</sup> Unlike the ICC where such distinction is clearly prescribed, the Ethiopian Criminal law provisions on war crimes are applicable irrespective of the nature of the conflict. Although there is no such a clear indication, the implicit exclusion of the nature of an armed conflict in the application of provisions on war crimes under the Criminal Code can be inferred from Art. 270. The provision does not define or classify the application of the subsequent Art.s on war crimes based on the nature of the armed conflict. More interestingly, this is crucial because the recent atrocities committed in the country including Mai-Kadra are indeed the result of internal armed conflict between the Federal Government and Tigray Region although it may be characterised

Regardless of such categorization, which is a controversial issue in the area, the rules and customs of war recognized equally apply if any war crimes were committed in Mai-Kadra during the period of the conflict. The other two common elements rather relevant to the case are considered in the ensuing sections.

### 3.4.1 The Nexus Element

Conducts committed in an armed conflict must have a nexus to the armed conflict to be qualified as war crimes.<sup>213</sup> If the conduct lacks this nexus, it can be qualified as an ordinary crime or under exceptional and extreme cases as crimes against humanity. The Mai-Kadra attack was carried out during the period of an armed conflict and the conduct occurred while the armed conflict was approaching the town although there was no military activity at the time between the Federal Government and Tigray Region. In this respect, the ICTY held that there is no need for military activities at the time and place of the crime and it can be temporary and geographically remote from the actual fighting.<sup>214</sup>

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as an ‘internationalised’ as well due to the involvement of Eritrean troops later. In practice, the Federal High Court in the *Legesse Asfaw et al* case similarly applied the 1957 Penal Code provisions of war crime despite acknowledging the non-international character of the armed conflict. See, Tadesse, *supra* note 2 at 309. Likewise, pursuant to the definition given by ICTY armed conflict does not only encompass armed conflict between two or more states but also includes ‘protracted armed violence between governmental authorities and organised groups or between such groups within a state’. ICTY, *Prosecutor v. Tadić*, Appellate Chamber, (Judgement), IT-94-1-A, 15 July 1999, para. 77. See, ICC, *Prosecutor v. Lubanga*, Trial Chamber, (Judgement), ICC-01/04-01/06, (2012), para. 533.

<sup>213</sup> This is more clearly indicated under the ICC Elements of Crime under Art. 8(2) (a)-I, which reads ‘in the context of and associated with’.

<sup>214</sup> ICTY, *Prosecutor v. Kunarac*, ICTY Appellate Chamber (Judgment), 12 June 2002, para 57.

The next issue is the specific nexus between the conduct of the perpetrator and the conflict. The ICTY requires that the conduct must be ‘closely related to the conflict.’<sup>215</sup> To establish such link, the tribunal in the *Kunarac* case devised the test of whether the presence of an armed conflict ‘played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, how it was committed, or the purpose for which it was committed.’<sup>216</sup> It is also necessary that the perpetrator acted in furtherance of or under the pretext of the armed conflict.<sup>217</sup>

Looking into the Mai-Kadra incident and, the context in which the conduct is committed, one cannot say that the *Samri* group was involved in the attack because of a private dispute or personal conflict. Instead, the purpose of the attack outwardly seems to attack those victims deemed to be on the side of the enemy. Furthermore, it may probably be because of the perpetrator’s (*Samri* group) assumption that the principal targets of the attack (*Saluks*) would join the Federal Government force and fight against the Tigray Region, to which the *Samri* belong. This can also be justified by the fact that the victims were disproportionately male, on account that they would most likely join a party to the conflict and engage in hostilities. Therefore, it can be tenably concluded that the conduct of the perpetrator during the Mai-Kadra atrocity was committed in the context of and associated with an armed conflict.

### 3.4.2 The Status of the Perpetrators

When it comes to the status of the main perpetrators, i.e. *Samri* group during the Mai-Kadra atrocity, a question may arise whether they are a member of an

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<sup>215</sup> *Tadić*, Appellate Chamber, (Judgement), *supra* note 133, para 70.

<sup>216</sup> Robert Cryer, *et al*, *supra* note 76, at 275; ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, (Judgement), 12 July 2002, IT-96-23/1-A, para. 58.

<sup>217</sup> *Id.*

armed force or combatants to show the nexus of their conduct with the conflict. This is however not a requirement under the case-law of the International Criminal Law as it was held by the ICTR in the *Akayesu* case.<sup>218</sup> Like combatants or members of armed conflict, the conduct of civilians can be a war crime, if the nexus requirement is met.<sup>219</sup> The only requirement is the perpetrator's knowledge of the factual existence of an armed conflict and that such an attack is directed toward protected persons/property under the rules of International Humanitarian Law.<sup>220</sup> Hence, one can say that members of the *Samri* group were aware of the existence of the ongoing armed conflict between the Federal Government and the Tigray Region which was officially declared by both sides and known across the country. As shown above, the atrocity was committed while the conflict was approaching Mai-Kadra town.

With regard to the issue of victims, several war crimes require that the victim is in the hands of or in the power of the adverse party during the commission of the alleged crime.<sup>221</sup> Article 4 of Geneva Convention IV defines civilian persons as those who are in the hands of an adverse party to the conflict or occupying power of which they are not nationals.<sup>222</sup> The provision appears to apply to state-to-state armed conflicts. However, the ICTY in *Tadić* ruled that ethnicity rather than nationality can also serve as a ground to regard that

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<sup>218</sup> ICTR, *Prosecutor v Jean-Paul Akayesu*, Appellate Chamber (Judgement), ICTR-96-4-A, 1 June 2001, para. 445.

<sup>219</sup> *Id.*

<sup>220</sup> The ICTY requires that the perpetrator was aware that his or her acts were linked to a conflict of an international nature. See, ICTY, *Prosecutor v. Naletilić and Martinović*, Appellate Chamber, (Judgement) IT-98-34-A, 3 May 2006, para 120. Whereas, the ICC Statute only requires the awareness of the factual circumstances that established the existence of an armed conflict in accordance with its Elements of Crime under Art. 8(1) (a) (i). However, it appears that the situation in Mai-Kadra can be justified in both cases.

<sup>221</sup> See, Geneva Convention IV, Art. 4; Geneva Convention III, Art 4, ICC Statute Art. 8(2) (b) (x)-I, Element 4.

<sup>222</sup> Geneva Convention IV, Art. 4

victims were in the hands' adverse party.<sup>223</sup> The Court emphasises the substance of relation between the victims and the party to the conflict who held them.<sup>224</sup> In Mai-Kadra, too, ethnic Amharas were killed, seriously injured, and detained by the *Samri* group which belongs to the Tigryan ethnic group even though all of them were Ethiopian nationals.

### **3.4.3 Material Acts**

The most common conduct which was committed during the Mai-Kadra incident and can amount to war crime is murder or wilful killing.<sup>225</sup> The basic elements of the crime are the same and also resemble the crimes against humanity of murder. The other is wilful causing of serious bodily injury or health hazards.<sup>226</sup> This category of offense definition also includes acts committed in the incident that deliberately cause permanent or long-lasting and serious harm without amounting to torture.<sup>227</sup> Moreover, the destruction and looting or pillage of civilian property before and after the incident may also fall under the act of war crime. But all of the acts need to be serious in gravity to criminalise as such.

### **Conclusion**

The commission of the underlying offense of genocide i.e. killing and serious bodily injury against the protected group- ethnic Amharans in the Mai-Kadra incident is justifiably determined in this article. However, it is hardly possible to infer genocidal intent from the circumstances of the case mainly because of

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<sup>223</sup> *Tadic*, Appellate Chamber, (Judgement), *supra* note 133, para 166.

<sup>224</sup> Robert Cryer, *et al*, *supra* note 76, p. 277.

<sup>225</sup> See section 2.1.3 above.

<sup>226</sup> *Id.*

<sup>227</sup> See for instance, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, para 502; ICTR, *Prosecutor v. Blastics*, ICTY Trial Chamber I, (judgement) 3 March 2000, para 156.

the uncertainty in the context in which the crime occurred and whether the perpetrator's act is in violation of the very foundation of the Ethnic group. The absence of strong material facts justifying these issues mainly leaves doubt as to the existence of genocidal intent on the part of the perpetrators. It is found that the Bosnian Muslim genocide in Srebrenica and the Mai-Kadra atrocity have some common features. but the latter becomes relatively low in gravity and hence it appears way more difficult to satisfy the 'substantiality' test to infer genocidal intent from the circumstances of the case. In respect of crime against humanity, the decisive elements, i.e. 'widespread or attack and the perpetrators' knowledge of the context during the attack as developed under customary law were fairly satisfied based on the determination of material facts of the case. Moreover, the incident can also qualify as a war crime since it was committed in the context of and associated with an armed conflict. Notably, factual circumstances indicate the perpetrators' awareness of prohibited acts against civilians such as killing, serious bodily injury, unlawful detention, and forceful transfer.