Intent to Destroy an Ethnic Group: A Failed Promise of *In Dubio Pro Reo?*

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

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February 2019

Declaration

I, **ROY KIPLANG'AT KITUR**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: Thokitur

Date: 5/04/2019

This Research Proposal has been submitted for examination with my approval as University Supervisor.

Signed:.....

Date:.....

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CHAPTER 1: INTRODUCTION

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced[1]

1. Background

"...the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity..."[2] The year 1948 brought with it the Convention on the Prevention on Punishment of the crime of Genocide (hereinafter the Convention), the first form of codification of law with regards to the crime of genocide.[3] Subsequent statutes like the Rome Statute[4], the ICTR statute[5] and the ICTY statute[6] borrow the language put down in the Convention verbatim. Naturally, one would conclude that the considerations and conclusions of the drafters of the Genocide Convention were indeed the most universally accepted such that subsequent drafters adopted their language almost entirely.[7]

An analysis of the crime of genocide invites one to conclude that there exist objective and subjective elements to it.[8]

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[1] *France et al v Goring et al* (1946) 22 International Military Tribunal 203.
[2] *Prosecutor v Radislav Krstic* (Appeal Judgement) IT-98-33-A, 19th April 2004 ¶36
[3] Article 2, Convention on the Prevention and Punishment of the Crime of Genocide 9th December 1948 A/RES/260.
[4] Article 6, Rome Statute of the International Criminal Court, 17th July 1998, vol 21857 no 3854
[5] Article 2, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
[6] Article 4, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993
[7] See as examples the *International Criminal Court Act*, 2001 (United Kingdom), *International Crimes Act* No 16 of 2008 (Kenya), *Implementation of the Rome Statute of the International Criminal Act* 27 of 2002 (South Africa), *Act to Introduce the Code of Crimes against International Law*, 2002 (Germany).
[8] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004 ¶490.

The subjective elements revolve around the different *mens rea* required to satisfy the crime of genocide are especially clear from the provisions of the Rome Statute. First, the required mental elements required to be held responsible for carrying out any of the prohibited conducts.[9] Herein, what seeks to be established is the existence of ordinary criminal intent and knowledge. Since the Rome Statute is quite explicit about this provision, there have been little debate surrounding this first subjective element.[10] The "intent to destroy, in whole or in part..." any of the protected groups presents the second subjective element attached to this crime. This element has been the subject of one of the most robust debates in the field of International Criminal Law since the close of the twentieth century. This element contains two important but equally controversial elements of the crime; the first part being the "intent to destroy" (hereinafter Intent) and the second part being the "in whole or in part".[11]

The intent is the *sine qua non* that not only distinguishes the crime of genocide from other crimes, but also makes it the crime of crimes.[12] The ICTR in the seminal *Akayesu* case established the "dolus specialis" requirement for the fulfilment of this intent.[13] As a result, this intent has subsequently been referred to as "genocidal intent" or "specific intent"[14] in various fora. This position has been the prevailing position in the ICTR and the ICTY as well as other courts prosecuting this crime.[15] The objective elements on the other hand speak to the prohibited conducts[16] and the protected groups.[17] There exist little to no debate about what amounts to the

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[9] Article 30, Rome Statute of the International Criminal Court, 17th July 1998, vol 21857 no 3854.

[10] Report of the International Commission of Inquiry on Darfur ¶491.

[11] *Prosecutor v. Ignace Bagilishema* (Appeal Judgement: Reasons), ICTR-95-1A-A, 3 July 2002 ¶64.

[12] *Prosecutor v. Goran Jelisic* ¶49; *Prosecutor v. Jean Kambanda*, ICTR 97-23-S, Judgment and Sentence (4 September 1998) ¶16.

[13] *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶518.

[14] *Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija* (Sentencing Judgement), IT-95-8-S, 13 November 2001 ¶59.

[15] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009), 838.

[16] Article II (a)-(e) Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948
Article 4(2) (a)-(e) Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993
Article 2(2) (a)-(e), Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
Article 6 (a)-(e), Rome Statute of the International Criminal Court, 17th July 1998, vol 21857 no 3854

prohibited conduct since the Convention and the subsequent statutes have put forth a limited list of acts that fall under this. The other objective sub-element concerning the four protected groups: national, ethnical, racial or religious groups, has elicited some form of debate among scholars as well as some level of difficulty in the courts[18] pertaining to the parameters of these groups. This paper will focus on the intent to destroy in whole or in part an ethnic group. Whether or not the ambiguity in the drafters' intention coupled with the interpretation offered by the ad hoc tribunals and academia run the risk of entrenching perpetual violations of the principle of legality.

2. Statement of the Problem

This dissertation seeks to interrogate the interpretation of the "intent to destroy...an ethnic group" elements individually to see whether or not the principle of legality and the promise of strict construction of criminal statutes is a long abandoned promise in the discourse of genocide.

3. Justification of Study

The lack of consensus regarding the precise interpretation of the elements of the crime of genocide is disconcerting for a number of reasons.

First, genocide is the crime of crimes therefore a definite understanding of its elements is imperative. Having regard to the UN General Assembly resolution on genocide calling on legislation to prevent and punish this crime, the need for a definite understanding of the elements of the crime is indispensable in achieving this.[19]

Secondly, certainty, especially in the terms of criminal law are essential for the subjects of the law to order their acts in conformity to the law. Legal certainty has been recognized as a

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[17] Schabas W, 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda' 6 *J. Int'l & Comp L* (2000) 386.
Hopkins A, 'Defining the Protected Groups in the Law of Genocide: Learning from the experience of the International Criminal Tribunal for Rwanda' Vol 1 *Dalhousie Journal of Legal Studies* Vol 1 (2010) 27.
Cryer R, *An introduction to International Criminal law and Procedure*, Cambridge, 3rd Edition, 2014, 212.

[18] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999 ¶98; *Prosecutor v. Goran Jelisic* (Trial Judgement), IT-95-10-T, 14 December 1999 ¶¶70-71.

[19] UNGA, *The Crime of Genocide,* 96(1), 1946.

fundamental tenet of the rule of law.[20] It also forms part of the requirements for the law to count as legitimate.[21] Uncertainty as to the meaning of such vital elements of the crime runs the possibility of casting aspersions on the judicial process of prosecuting perpetrators. Further, a misconstruction of the intent could result in the wrongful conviction of persons and also conversely, the wrongful acquittal of perpetrators.

This dissertation would therefore attempt to investigate the proposals regarding the precise interpretations, the motivations behind these proposals and why ICL practitioners think the way we do and whether or not some of the motivations are dangerous to the guarantee of legality in international criminal proceedings.

4. Statement of Objectives

4.1. Main Objective

This dissertation seeks to square in on the motivations behind the interpretation of the ambiguous provisions of the Genocide Convention regarding the nature of genocidal intent and the definition of an ethnic group.

4.2. Specific Objectives

The specific objectives of this dissertation are as follows:

1. To interrogate the varying definitions of the protected groups in the genocide Convention, more specifically that of the ethnic groups.
2. To interrogate the competing purpose-based intent and knowledge-based intent schools of thought .
3. To find out whether a broad interpretation of the two elements has been preferred, whether such broad interpretation runs afoul of the strict construction promise of international criminal law and whether such considerations are legitimate.

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[20] Maxeiner R, 'Some Realism about legal certainty in globalization of the Rule of Law' 31 *Houston Journal of International Law*, 1 (2008), 27-46.

[21] Fuller L, *The Morality of Law*, Yale University Press, New Haven, 1964.

4. Literature Review

The landscape of scholarly work on the elements of genocide is as varying in the number of positions as is it is varying in the reasons for those positions held.

The Ethnic Question

Weiss-Wendt considers the dicey and choppy deliberations in the Committee that came up with the draft of the Genocide Convention, primarily the political and diplomatic concessions that gave us the final list of protected groups.[22] This paper agrees with the strict construction formulated by Weiss-Wendt in so far as it offers the most potent fidelity to *in dubio pro reo* and a guarantee for stronger defence rights. However, this paper is concerned with the normative and policy considerations with making construction of the definition so narrow that modern-day atrocities that have been committed ala Rwanda would have difficulties falling within the strict objective definition framework. While fidelity to strict definitions is desirable, what of properly labeling atrocities committed? In so far as this problem persists, this paper is not fully convinced of the merits of strict definitions.

Mark Drumble wonders whether the narrow framework of the Genocide Convention is sufficient to protect modern-day groups from genocidaires as opposed to the mid 20th century formulation.[23] While this paper agrees that modern-day groups are markedly different from the existing groups in the mid to late 1940s, the method proposed by Mark Drumble is somewhat untenable in the view of this writer. Not only does this formulation seek to reject the possibility of an exhaustive list, it also seeks the development of the crime outside of a codified statute. While this might have been prudent in the mid 20th century, this paper is of the view that the modern day ICL regime is heavily reliant on codified statutes like the Rome Statute.

Some, like Frank Chalk and Kurt Jonassohn suggest that the existing formulation and interpretation is so restrictive that, technically speaking, none of the post-convention acts of genocide fit perfectly within the formulation. Hence an expanded view or an outright expansion is needed.[24]

The writer of this paper considers the strict construction as proposed by Weiss-Wendt as properly in conformity with the difficult *in dubio pro reo* guarantee, however, at the same time, this paper considers the normative value in expanding the prescribed interpretations as proposed by Mark Drumble. That indeed, *sans* said expansion, the crime of genocide remains to be an academic enterprise with little to no practical value in the long run. The writer of this paper is also cautious of the expansions proposed by Frank Chalk and Kurt Jonassohn to be a risky venture that ought not to be entirely adopted granted the danger of an endless expansion of the same.

This paper, hopefully, will propose a balance to be drawn between the cautious expansionist view of Mark Drumble and the strict fidelity to *in dubio pro reo* as proposed by Weiss-Wendt.

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[22] Weiss-Wendt Anton, 'The Soviet Union and The Gutting of the Genocide Convention' Madison: Universtiy of Wisconsin Press, 2017,

[23] Drumbl Mark, 'Genocide: The Choppy Journey to Codification' *Washington & Lee Public Legal Studies Research Paper Series,* Working Paper Series No. 2018-17

[24] Frank Chalk and Kurt Jonassohn, *'The History and Sociology of Genocide,'* Yale University Press, 1990.

The Intent Question

Purpose-Based Intent

Antonio Cassese represents the prevailing judicial position when he agrees with the purpose-based Intent required as per case law from the ICTY and ICTR.[25] He posits that all other forms of intent are excluded other than the specific purpose-based intent.[26]

Just like the strict construction school of thought offered the guarantees of *in Dubio Pro Reo* the purpose-based intent school of thought does this and much more. First and foremost, it positions the crime of genocide properly as an intent crime and not just any intent, but an elevated and aggravated *Absicht*. This paper is sympathetic to this view for two reasons, first this properly differentiates the crime of genocide from other international crimes as the crime of crimes and secondly, allows us to properly label the crime of genocide as the crime of crimes. Secondly, the writer of this paper considers the ambiguity that exists from the wording of the text and is convinced that this approach properly grants the accused person the benefit of doubt as opposed to other formulations that exist.

However, the purpose-based intent approach suffers an odd defect as it doesn't cover the mischief that may arise where the actions and results on the ground do not match the intent expressed overtly by the perpetrators hence a misnomer would likely occur that genocide be committed and due to the lack of convicted genocidaires, it seems that there was no genocide.

There exists a second school of thought that backs the idea of knowledge-based intent being sufficient to find one guilty of genocide.

Knowledge-Based Intent

Otto Triffterer arrives at this position through policy considerations. He asserts that it is quite implausible, almost impossible, to prove the thoughts of a man in the absence of his expression of it, either in speech or in written form, beyond reasonable doubt. This therefore makes the prosecution of the crime unnecessarily difficult in most cases.[27] This paper is concerned by the approach adopted by Triffterer in as far as it makes criminal procedure prescriptions using general policy considerations. While it may be prudent, on a general policy level to ensure by all means prosecution of a crime is easier, the interpretation of Statute in criminal procedure should not, in the view of this writer, be considered as such. In fact, criminal procedure should as much as possible concern itself with ensuring that no harm is occasioned against the accused. This paper agrees with the concerns of Triffterer, but while it may be prudent, goes against the very principles that should underpin criminal procedure.

On the other hand, Alicia Gil Gil arrives at a similar position as Otto does but using different considerations. She grounds her conclusion on the similarities of the structure of genocide and attempted genocide. Owing to the similarity in the structure, she concludes that knowledge of the plan

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[25]Cassese A and Gaeta P, Cassese's International Criminal Law, 3ed, Oxford University Press, Oxford, 2008, 45.
[26]Cassese A, 'Genocide' in Cassese A, Gaeta P, Jones J (eds*), The Rome Statute of the International Criminal Court: A commentary volume 1A,* Oxford University Press, Oxford, 2002, 338.
[27] Triffterer O, 'Genocide, its particular intent to destroy in whole or in part the group as such,' Vol 14 *Leiden Journal of International Law*, (2001), 399-408

to destroy a protected group, which is sufficient to prove intent in attempted genocide, should be sufficient to prove Intent in the crime of genocide itself as well.[28]

This paper considers the analogous manner Alicia draws her conclusions from. Similarly, while the principle of legality would reject interpretation through analogy, Alicia finds a way to sneak it in. This paper is in agreement with the conclusion she draws but draws contention with her method.

Alex Greenawalt, Mahmoud Cherif Bassiouni, Peter Manikas and Harmen van der Wilt all agree with the idea of knowledge-based intent being sufficient.[29]

The issues drawn hereabove so far have highlighted the points of contention with the method used to arrive at the conclusion and how those methods are an affront to the principle of legality. However there are considerations regarding the content of knowledge-based intent. Compared to the purpose-based intent, this paper is convinced that application of a simple knowledge-based intent would expand the understanding of genocide to the extent that the grave nature of the crime of genocide is considerably diluted. Application of knowledge-based intent considerably reduces the crime of genocide to an extent that it may no longer be called an intent crime.

Structure-Based Intent

A different school of thought is that of the proponents of a structure-based intent. Hans Vest posits that once the existence of genocide is proven in a certain context, then to successfully prosecute persons individually for the crime, prosecutors simply have to prove that the perpetrator had knowledge of the consequence of the overall conduct.[30]

Claus Kress identifies Genocide ass a special crime against humanity, and in a bid to bring into some structural congruity with said crime, he points to the existence of some structural context of genocide within which individual perpetrators operate and proposes an interesting formulation that's a structure based intent relying as well on knowledge-based intent as opposed to the purpose-based intent.[31]

Kai Ambos attempts to refine the thoughts of Hans Vest by agreeing with him partially. He posits that different levels of intent should be sufficient for different levels of perpetrators. Purpose-based intent to be required of high level perpetrators whereas the structure-based intent be sufficient for mid- and low-level perpetrators.[32]

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[28] Gil Gil A, *Derecho Penal Internacional: Especial Consideration dei delito de genocidio*, Editorial Tecnos, 1999, 259.

[29] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294

Bassiouni C and Manikas P, *The Law of the International Criminal Tribunal for the former Yugoslavia*, Ardsley Transnational Publishers, 1996.

Wilt H, 'Genocide, Complicity in Genocide and International v Domestic Jurisdiction' Vol 4 *Journal of International Criminal Justice,* (2006), 239.

[30] Vest H, 'A structure-based concept of genocidal intent,' Vol 5 *Journal of International Criminal Justice*, (2007), 790.

[31] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578

[32] Ambos K, 'What does 'intent to destroy' in genocide mean', 838.

While this paper acknowledges the insufficiency and inadequacies inherited from the drafters of the Genocide Convention, it also considers as a matter of policy the importance of constraining the limits of a crime to the express provisions of the crime.

Consequently, this paper first agrees with the normative formulation of the knowledge-based intent in light of the apparent silence on any marked distinction between the "regular" intent for any other crime and the "special" intent in the drafting of the Convention. Nonetheless, this paper disagrees that this formulation as posited primarily by Otto Triffterer sufficiently captures the special nature of the crime of genocide warranting special opprobrium.

On the other hand, the massively restrictive nature of the purpose-based intent as proposed primarily by the tribunals and further by Cassese, a firm defender of the tribunals, bears problematic elements of its own. While genocide is the crime of crimes, the writer of this paper is of the opinion that it ought to be the crime of crimes not because of the difficulty of prosecution but because of its particularly disgusting nature. Sticking religiously to purpose-based intent focuses the discussion on how difficult it ought to be to prosecute the crime rather than its inherently destructive and abominable nature. Therefore, while this formulation presents a proper foundation for understanding the nature of genocidal intent, this paper is not convinced of the merits to uphold it strictly in all instances.

As somewhat of a compromise, the structure-based intent proposed by Kai Ambos seems to be the most cogent formulation in the opinion of this writer. First, for its attempt to properly place genocide within the genus of crimes against humanity with regards to the implied requirement of a system or policy of sorts. Secondly, the prudence in splitting intent levels between high-, mid- and low-level perpetrators, is noteworthy practically speaking. Finally, the fact that this formulation acknowledges the egregious nature of the crime of genocide even compared to other international crimes by adopting a high level intent for the high level perpetrators, makes this formulation particularly inviting.

However, what this paper eventually concludes to be the problematic element that ultimately ought to be resolved with all the three formulations is the absence of express wording to dispel the ambiguities that arise, part of which shall be considered in the recommendations herein.

5. Theoretical framework

This paper revolves around two "competing" and simultaneously "complementing" theories. These are two theories of interpretation of law. First, the purposive interpretation of law and secondly, the strict interpretation of law theory. These two theories will form the basis of my analyses with a view of establishing whether they can co-exist within the ambit of international criminal law and if so, to what extent they can do so. If not, which theory of interpretation ought to guide the interpretation of the elements of the crime of genocide.

Former President of the Israeli Supreme Court, Aharon Barak, is the leading proponent of purposive interpretation of the law.[33] It is upon this theoretical framework of interpretation that this dissertation is founded. The concept of purposive interpretation,. according to Barak, contains two elements: the subjective and the objective purpose.

The subjective purpose speaks to the authorial intent in that one interrogates the intent of the minds behind the wording of the text of the law. It is with this subjective purpose in mind that I shall attempt to establish the mindset of the various negotiating parties at the international plane during the drafting of the Convention. As a result, I could possibly pin down the authorial intent.

The objective purpose, on the other hand, revolves around the intention of the system. Herein lies the obligation to analyse what the Convention seeks to achieve. The title of the Convention, the preamble, the *travaux preparatoires* are some of the items being interrogated in this regard.

Having established both the subjective and the objective purpose, points of congruence between the two represent the most desired interpretation of a word, clause, or text in general.

On the other hand, there's a robust claim for the principle of legality in criminal law. Consider Sandesh Sivakumaran's declaration in his speech to ASIL in 2009, "the principle of nullum crimen sine lege is a fundamental principle of criminal law. It has particular resonance at the international level given the relative lack of clarity surrounding certain international legal norms."[34] Consider, Article 22 of the Rome Statute as well that demands and promises the guarantee of *in dubio pro reo*.[35] All these read together suggest that three elements exist within the principle of legality discourse, (1) no crime without express provisions for the same; (2) the demand for strict construction of said provisions; and (3) if doubt exists, construe it in favour of the accused. In addition to protecting rule of law values, the principle of legality also polices the separation of powers by ensuring legislative primacy, and thus democratic legitimacy, in substantive rulemaking.[36]

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[33] Barak A, *Purposive Interpretation in Law,* Princeton University Press, 2005.
[34] Beth Van Schaack, 'Proceedings of the Annual Meeting (American Society of International Law)' , Vol. 103, *International Law As Law* (2009)
[35] Article 22 Rome Statute of the International Criminal Court, 17th July 1998, vol 21857 no 3854
[36] Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals,' Vol. 97 *Georgetown Law Journal* (2008) pp 119-181, at 123

This theory of strict construction demands a look at the criminal texts and offering the interpretation that most visibly presents itself and, more importantly, to resolve ambiguities in favour of the accused. This paper shall point out how the strict construction has been upheld and how the construction of the elements of the crime of genocide needs this theory or at least a portion of it.

With the battle between which of these theories sustain interpretation of the crime of genocide, this paper will explore to what extent the two theories are symbiotic and to what extent they aren't. Further, in the forced marriage between the two, how do the theories co-exist when they come into play?

6. Hypothesis

The broad interpretation of the elements of the crime of genocide are a result of victim-focused teleological approaches instead of strict construction in favour of the accused.

7. Assumptions

1. That the principle of legality, especially regarding strict construction of crimes is sacrosanct in criminal proceedings.
2. That majority of international criminal law practitioners were initially heavily influenced by their backgrounds that favoured broad interpretation and this invited the broad interpretation of criminal statutes in international criminal law.

8. Methodology and Approach

This research was mainly desk-based with a thorough review of primary, secondary and tertiary sources of literature. It gathers wisdom espoused in a variety of relevant sources such as Hansards, committee reports, judicial decisions, philosophical treatises, statutes, Constitutions, journal articles, text books, book chapters, books and reputable news sources (both newspapers and internet sources)

9. Limitations

The limitations I would expect to face include that of language barriers. Some of the texts I would have to review would primarily be in languages such as French, German or Spanish and their translated versions could probably alter the meaning of some provisions to some extent.

10. Chapter Breakdown

The objectives of this research dissertation are to be met in five separate chapters. The current chapter serves as an introduction into the subject of the research. Herein are the background of the research, .

Chapter 2 and 3 will involve an analysis of the historical development of the drafting of the Convention with a particular focus on the development of the protected groups formulation and the intent to destroy. The Chapters will then proceed to interrogate the judicial solutions to any ambiguity arising and the responses from academia.

In Chapter 4, the paper will take a turn to find out what motivated the practitioners in the late 90s and early 2000s to arrive at their preferred mode of interpretation. The paper will look at human rights law influences in international criminal law and the effect of the same.

Finally, I conclude at Chapter 5 by answering the research problem and confirming the hypothesis.

CHAPTER 2: THE ETHNIC GROUP - FLAWED AB INITIO?

INTRODUCTION

"We are in the presence of a crime without a name."[37] August 1941, World War II was well and truly underway. Sir Winston Leonard Spencer-Churchill declared with much unease and discomfort, referring to the atrocities being committed by Nazi Germany. Three years later, Raphael Lemkin, a Polish Jew who by then was living in the United States of America, began his writings that would give birth to "the crime of crimes".

2.1. Historical Development: The Brewing of Ambiguities

In 1944, Lemkin first introduces the word "genocide" to the legal lexicon, defining it as the "destruction of a nation or of an ethnic group".[38] His formulation of the word genocide came from the Greek words *"genos"* meaning tribe or race. In the spring of 1945, Lemkin published another article wherein he added that genocide is the "destruction of an entirely national, religious or racial group".[39] This is the first time religious groups are mentioned with regards to the crime of genocide, a formulation that would survive months of drafting negotiations to appear in the final text of each criminal statute with the crime of genocide. With his final article in his campaign for the recognition of the crime of genocide, Lemkin restated that genocide was the destruction of national, racial and religious groups thereby creating the first somewhat consistent categories of protected groups.[40]

Following the conclusion of the Nuremberg trials in 1946 and undoubtedly Lemkin's campaign, the United Nations General Assembly finally pronounced itself on this and set the ball rolling on the process of finally defining the crime of genocide and granting it international recognition. The Fifty-fifth plenary meeting through Resolution 96(1) achieved three important things. First,

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[37] Prime Minister Winston Churchill's Broadcast on August 24, 1941 to the World about the Meeting with President Roosevelt, British Library of Information (http://www.ibiblio.org/pha/policy/1941/410824a.html) Accessed November 21, 2018

[38] Lemkin R, 'Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress,' *Carnegie Endowment for International Peace* (1944)

[39] Lemkin R, 'Genocide - A Modern Crime,' *Vol 4 FREE WORLD Magazine* (1945), 39-43

[40] Lemkin R, 'Genocide,' *Vol 15 American Scholar* (1946), 227-230

acknowledged genocide as an international crime; secondly, defined the crime of genocide as a denial of the right of existence of entire human groups. The Assembly mentioned "racial, religious, political and other groups" as having been the victims of destruction entirely or in part. [41] This is the first expansion to the protected groups with the inclusion of the political groups. Third, the Assembly requested the Economic and Social Council to undertake the necessary studies with a view of drafting a Convention on the crime of genocide.

The Economic and Social Council, in March 1947, then instructed the Secretary-General to undertake the necessary studies, in consultation with the General Assembly Committee on the Codification and Development of International Law, the Commission on Human Rights, and after reference to Member Governments, prepare a draft and submit to the Council.[42] By June 1947, the Secretary General had completed the first draft with the assistance of the Division of Human Rights, and a group of three experts: Henry Donnedieu de Vabres (Professor at the Paris Faculty of Law), Raphael Lemkin and Vespasien Pella (President of the International Association for Penal Law) and submitted it to the Economic and Social Council.[43] Article I of the Draft Convention listed the protected groups as racial, national, linguistic, religious or political human beings.[44] This is a further expansion to the protected groups with the inclusion of linguistic groups. The commentary submitted to the Council together with the draft also added that the list under Article I was not exhaustive.[45] This, in the writer's view, is somewhat of a contradiction with the commentary itself that demands specificity by stating that, "...if the notion of genocide were excessively wide, the success of the convention...would be jeopardised..."[46]

As evidence of the importance of the Convention and the sense of urgency within the international community, the General Assembly instructed the Economic and Social Council to

[41] United Nations General Assembly Resolution 96(1), 11 December 1946
[42] Economic and Social Council Resolution 47 (IV), 28 March 1947
[43] Draft convention on the crime of genocide prepared by the Secretary-General in pursuance of the Economic and Social Council resolution 47 (IV) (E/447, 26 June 1947)
[44] Article I, Draft convention on the crime of genocide prepared by the Secretary-General in pursuance of the Economic and Social Council resolution 47 (IV) (E/447, 26 June 1947)
[45] Comments on the Draft Convention (26 June 1947), page 17
[46] Comments on the Draft Convention (26 June 1947), page 16

proceed with the continued drafting of the Convention with haste instead of waiting for contributions from states.[47]

Through Resolution 117 (VI), the Economic and Social Council established an ad hoc committee to effectively prepare a draft of the Convention working with the draft delivered by the Secretariat. The ad hoc committee was composed of: China, France, Lebanon, Poland, Union of Soviet Socialist Republic, United States of America and Venezuela.[48] The ad hoc committee met between 5 April to 10 May 1948 under Chairman John Maktos, the representative for the USA.

The ad hoc committee finally adopted a final draft on 30 April 1948 by five votes to one with one abstention which was submitted to the Economic and Social Council on 24 May 1948.[49] The draft deleted the linguistic groups that had been included in the draft by the Secretariat and strictly listed the protected groups to be national, racial, religious or political groups only.[50] The ad hoc committee adopted the inclusion of national, racial and religious groups unanimously. On the other hand, political groups were accepted by four votes to three on 20 April 1948. The minority opinion on the inclusion of political groups was primarily delivered by the representative for USSR, Mr. Platon Morozov, submitting that political groups lack the stability of the other groups mentioned. Further, that political groups have not the same homogeneity and are less well defined. Together with Mr. Aleksander Rudzinski- the representative for Poland- they added, rather interestingly so, that inclusion of political groups would go contrary to the definition of genocide according to science.[51] However, for their spirited arguments, they failed to support this reference to science with actual scientific explanations. Finally, the minority argued that inclusion of political groups would make governments wary of ratifying the Convention and jeopardise the chances of success of the Convention before it even took off.[52]

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[47] United Nations General Assembly Resolution 180(II), 21 November 1947
[48] Economic and Social Council Resolution 117(VI) of 3 March 1948
[49] Report of the Ad Hoc Committee on Genocide and draft Convention drawn up by the Committee, 5 April-10 May 1948 (E/794)
[50] Article II, Report of the Ad Hoc Committee on Genocide and draft Convention drawn up by the Committee, 5 April-10 May 1948 (E/794)
[51] Report of the Ad Hoc Committee on Genocide and draft Convention drawn up by the Committee, 5 April-10 May 1948 (E/794), page 13
[52] Report of the Ad Hoc Committee on Genocide and draft Convention drawn up by the Committee, 5 April-10 May 1948 (E/794), page 14

The Sixth Committee of the General Assembly, on diverse dates between 30 September and 2 December 1948, held a total of fifty-one (51) meetings negotiating and drafting each and every article from the draft prepared by the ad hoc committee on genocide.

From the very first meeting of the Sixth Committee, the onslaught against the inclusion of political groups kicked off. Brazil's representative, Mr. Amado, railed against the inclusion of political groups stating that "...they lacked the necessary homogeneity and stability..."[53] Mr. Rafaat was more uninhibited in his analysis, terming the inclusion of political groups as dubious mostly because of the constant changes of political opinions.[54] Mr. Morozov added that political groups were far from the scientific meaning of genocide and would weaken the convention and hinder the fight against genocide while the Polish representative, Mr. Lachs deemed the inclusion of political groups to be an artificial extension that shouldn't be within the province of genocide .[55] No "scientific definition" of genocide was presented by the representative of USSR, especially considering that the very word "genocide" had only been coined 4 years earlier and nobody, not even Lemkin then had a clear and definite conception as to what genocide was. So an assertion that a scientific definition of genocide existed was a rather bold and largely undefended position. Sir. Hartley Shawcross on the other hand observed quite aptly that the only group that one is automatically a part of by birth is a racial group, pointing out that one can leave a national or religious group as they could also leave a political group.[56] As he observed, notwithstanding the relatively inferior stability of political groups, why not protect them? However, the most interesting of defences for political groups came from Correa, the Cuban representative. Highlighting the fact that racial, religious or national groups could quite possibly be persecuted or destroyed based on their political opinions[57], the writer of this paper is convinced this nuanced position was the most insightful regarding the enumeration of the protected groups. That the groups might be targeted for a cocktail reasons.

[53] Sixth Committee of the General Assembly, Summary records of meeting no. 63, A/C. 6/ SR. 63
[54] Sixth Committee of the General Assembly, Summary records of meeting no. 63, A/C. 6/ SR. 63
[55] Sixth Committee of the General Assembly, Summary records of meeting no. 64, A/C. 6/ SR. 64
[56] Sixth Committee of the General Assembly, Summary records of meeting no. 69, A/C. 6/ SR. 69
[57] Sixth Committee of the General Assembly, Summary records of meeting no. 74, A/C. 6/ SR. 74

In the middle of the heated debates regarding political groups, the Swedish representative suggested the inclusion of the word "ethnical" to replace "political".[58] This is the first time we see a mention of ethnic groups in the discussions, the 13th day of October 1948. This suggestion would, to a great extent, make the Sixth Committee in the subsequent meetings more open to the idea of dropping the inclusion of political groups. This Swedish proposal was met by little to no resistance initially and was promptly supported by the representatives of the USSR and Belgium.[59]

With this in mind, a vote to retain political groups in the Article II protection on the 15th of October 1948 resulted in 29 members voting in favour of retaining it, 13 votes against and 9 abstentions.[60] With the first vote on the political groups ending with the retention of the same, arguments against the inclusion of ethnic groups started cropping up. The representatives of Egypt, Uruguay and Belgium (who were strong supporters of their inclusion initially) submitted that ethnic and racial groups had the exact same meaning, therefore it would be redundant to include both groups in the Convention.[61] A more nuanced opinion was posited by Demesmin from Haiti, that with the prevailing situation where there had been considerable intermingling between races in some regions, especially the Americas, then it would make it impossible to protect some groups as racial groups and the inclusion of ethnic groups was necessary.[62] This position seems to suggest that ethnic groups, once more, are at the very most, a subset of racial groups. The inclusion of ethnic group was put to a vote and it was adopted by 18 votes to 17 votes with 11 abstentions.

At the 128th meeting of the Sixth Committee, with the draft Convention protecting racial, national, religious, political and ethnical groups, the representatives of Iran, Egypt and Uruguay proposed that the protection of political groups be reconsidered. There were varied reasons for this. The representative of the USA argued that it was necessary to do so to get the greatest

[58] Sixth Committee of the General Assembly, Summary records of meeting no. 73, A/C. 6/ SR. 73

[59] Sixth Committee of the General Assembly, Summary records of meeting no. 74, A/C. 6/ SR. 74
[60] Sixth Committee of the General Assembly, Summary records of meeting no. 75, A/C. 6/ SR. 75
[61] Sixth Committee of the General Assembly, Summary records of meeting no. 75, A/C. 6/ SR. 75
[62] Sixth Committee of the General Assembly, Summary records of meeting no. 75, A/C. 6/ SR. 75

number of ratifying governments.[63] The representative of Iran went as far as to point out a 1935 League of Nations Convention on Terrorism that had only been ratified by 3 countries because of political implications.[64] The eventual vote on the deletion of political groups resulted in the successful deletion of the same with 12 votes in favour of doing so against 6, all the rest, largely the East-leaning abstaining on the vote.[65]

On the 3rd of December 1948, the Sixth Committee presented the Report to the General Assembly with no mention of how and why the Committee settled on the four enumerated and conclusive list of protected groups. In fact, an analysis of the report[66] and the corrigendum[67] filed three days later seems to suggest that the list of protected groups was simply a result of political, diplomatic and etymological considerations. These political and diplomatic sparring rounds especially between the states represented in the Committee dealt a huge blow to the possibility of a rich understanding and definitions of each of the protected groups. Case in point, The United States of America had concerns regarding the protection of racial groups especially with the racial segregation in the south of the US.[68] The State Department had to assure the Senate that the lynching of African-Americans would fall outside the scope of genocide.[69] The Senate Foreign Relations Subcommittee on Genocide went as far as to recommend ratification of the Convention with reservations, including the explicit exclusion from the understanding of genocide of 'lynching, race riots, and so forth'.[70] So difficult was the situation for American politicians and diplomats that the United States of America ratified the Convention in 1988, a whole 40 years later. This is largely due to large lobbying groups such as the Daughters of the

[63] Sixth Committee of the General Assembly, Summary records of meeting no. 128, A/C. 6/ SR. 128
[64] Sixth Committee of the General Assembly, Summary records of meeting no. 128, A/C. 6/ SR. 128
[65] Sixth Committee of the General Assembly, Summary records of meeting no. 128, A/C. 6/ SR. 128
[66] Report of the Sixth Committee on the Convention for the Prevention and Punishment of the Crime of Genocide, UNGA A/760, 3 December 1948
[67] Corrigendum to the Report of the SIxth Committee on the Convention for the Prevention and Punishment of the Crime of Genocide UNGA A/760/Corr.2, 6 December 1948
[68] Weiss-Wendt Anton, 'The Soviet Union and The Gutting of the Genocide Convention' Madison: University of Wisconsin Press, 2017, at 228
[69] Weiss-Wendt Anton, 'The Soviet Union and The Gutting of the Genocide Convention' Madison: University of Wisconsin Press, 2017, at 80
[70] Weiss-Wendt Anton, 'The Soviet Union and The Gutting of the Genocide Convention' Madison: University of Wisconsin Press, 2017, at 228

American Revolution who denounced the Convention[71] and the Bricker faction in the US Senate which was "standing on guard against UN encroachments on the right of the Southern states to keep black Americans in check."[72] On the other hand, the USSR, South Africa and a host of Latin American countries dedicated a considerable amount of time debating whether the inclusion of political groups would affect their political arrangements and regimes municipally especially with the suppression of opposition politics in said states.[73] Lemkin also participated in such political and diplomatic speak in the quest of garnering as many ratifications as fast as possible and in the end sacrificing the possibility of a rich understanding of the protected groups in the Convention. In his autobiography published posthumously, Lemkin has this to say, "Every revolutionary regime comes to power by destroying some of its opponents. Later this regime is recognised by other nations, sometimes the whole world. Should political groups be included in the definition of genocide, recognition of a revolutionary regime would imply acceptance of genocide as legal. This would kill the Genocide Convention before it took root in the world society.[74] Interestingly, none of the colonial masters at the time such as the United Kingdom, saw any issues with some of the actions being carried out in their colonies and their possible genocidal nature.

Thus by the time the Convention was opened for signature on the 11th of December 1948, the word "genocide" had gained traction, but with it came the concretisation of silences, of misunderstandings and of unanswered questions regarding the protected groups. At this point, ethnic groups had been mentioned a total of eight times within the Committee sessions, with three of those mentions being of a negative nature suggesting its inclusion was unnecessary. The vote for the inclusion of the ethnic groups was done with not so much as a discussion as to what an ethnic group is and why it ought to be protected, it was simply added in anticipation of the removal of political groups, merely as a replacement. A diplomatic compromise. In the minds of

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[71] Weiss-Wendt Anton, 'The Soviet Union and The Gutting of the Genocide Convention' Madison: University of Wisconsin Press, 2017, at 227

[72] Weiss-Wendt Anton, 'The Soviet Union and The Gutting of the Genocide Convention' Madison: University of Wisconsin Press, 2017, at 273

[73] Drumbl Mark, 'Genocide: The Choppy Journey to Codification' *Washington & Lee Public Legal Studies Research Paper Series*, Working Paper Series No. 2018-17, at 13

[74] Donna-Lee Freeze and Lamkin Rafael, *'Totally Unofficial. The Autobiography of Rafael Lemkin'*, Yale University Press, First Edition 2013 pp 161-162

some of the representatives such as Raafat (Egypt), Manini (Uruguay) and Kaeckenbeeck (Belgium), it was nothing but a redundancy as it meant the same thing as racial groups which were already protected.[75] Would this silence come to cause problems decades later?

2.2. Judicial Fix: Cure or a Curse?

Fast forward 50 years. The Second day of September 1998, and the International Criminal Tribunal for Rwanda was about to deliver the first genocide conviction. Jean-Paul Akayesu, the teacher turned mayor, was indicted on two counts of genocide and one count of incitement to genocide among the fifteen counts.[76] The three-judge bench had the unenviable and honourable mandate to have to first define an ethnic group as protected in the crime of genocide. The Chamber initially contemplates expanding the scope of the protected groups beyond the four in the Genocide Convention. The Court seemed to suggest that the intent of the drafters, as per the *travaux preparatoires* of the Convention, was "clearly to protect any stable and permanent group".[77] The Court added that, "...a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[78] This position indeed was initially somewhat popular during the Sixth Committee deliberations until the Sir. Hartley Shawcross pointed out that the only group one joined automatically by birth is a racial group, that individuals could leave a national or religious group at will and one did not necessarily join them by birth but they were still worthy of protecting in the Convention.[79] The bench went ahead to provide the first objective definition of an ethnic group as, "...a group whose members share a common language or culture."[80] The

[75] Sixth Committee of the General Assembly, Summary records of meeting no. 75, A/C. 6/ SR. 75
[76] The Indictment against Jean-Paul Akayesu
[77] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶511, 516 and 701
[78] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶511
[79] Sixth Committee of the General Assembly, Summary records of meeting no. 69, A/C. 6/ SR. 69
[80] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶513

Chamber noted that the Tutsi did not have its own language or distinct language from the rest of the population.[81] The Court then proceeded, in a 10-line paragraph, to conclude that the Tutsis constituted an ethnic group, and that in any case they were a stable and permanent group at the time of the events and were identified as such by all.[82] The rationale behind this conclusion.were two-fold: first, that the government ethnically classified persons as Hutus, Tutsis or Twa through the identity cards all citizens carried with the designation "ubwako" in Kinyarwanda or "ethnie" in French; and second that all the Rwandan witnesses responded without hesitation and spontaneously to the question of their ethnic identity.[83] The Chamber did not reconcile their definition of an ethnic group and their conclusion. The Court simply relied on the official identification of persons by their ethnic groups by law[84] and self-identification[85] to conclude that the Tutsi constituted an ethnic community. The court nonetheless concluded that the important test was that of stability and permanence and concluded that the Tutsi did indeed constitute a stable and permanent group. However, they provided no evidence and explanations as to what constitutes a stable and permanent group, and what characterised the Tutsi that qualified them to be a stable and permanent group.

On the 21st of May, Trial Chamber II of the ICTR were delivering its first genocide conviction, 8 months after Trial Chamber I delivered Akayesu. This second judgement followed the indictment and joint trial of Clement Kayishema and Obed Ruzindana.[86] Trial Chamber II defined an ethnic group in a broader manner off the bat 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 perpetrators of the crimes (identification by others)."[87] The Chamber's test for ethnic groups was a disjunctive one, offering one objective criterion and two subjective criteria respectively, with the fulfilment of any of the three criteria qualifying a group to be an ethnic group. The Chamber highlighted that the official identification of all persons through their ethnicity, that which is derived from his or her father,

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[81] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶170, Footnote 56
[82] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶702
[83] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶170, 702
[84] Article 57 and 118 of the Rwandan Civil Code of 1998
[85] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶171
[86] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999
[87] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999, ¶98

fulfilled the third criterion of identification by others.[88] Additionally, the fact that scores of survivors who testified before the Court identified themselves as Tutsi fulfilled the second criterion of self-identification.[89] Finally, the Chamber also relied on the fact that Trial Chamber had already concluded that the Tutsi constituted an ethnic group in *Akayesu.*[90] Once again, the Court had failed to rely on the objective criterion but rather opted to rely on subjective criteria to define the ethnic group.

Trial Chamber I had a moment to reconsider the idea of an ethnic group a few months after *Kayishema.* In February 1996, the ICTR confirmed the indictment against Georges Anderson Nderubumwe Rutaganda.[91] The Chamber in this instance acknowledges the identification of an ethnic group through identification by others or through self-identification[92] consistent with the *Kayishema* formulation. However, whereas Trial Chamber II in *Kayishema* held that the test was entirely disjunctive and that subjective identification alone was enough, Trial Chamber I in *Rutaganda* disagrees with this formulation, indicating that a subjective definition alone is not enough.[93] The Chamber highlighted the *travaux preparatoire* and the discussions around stability and permanence as the possible objective standard, adding the fact that such analyses ought to consider the political and cultural context.[94] Therefore, the Chamber in *Rutaganda* seemed to have formulated a two-prong test consisting of subjective and objective requirements. That the group must be stable and permanent and that the group be identified either by others or by self as a distinct ethnic group. While analysing the evidence addressing the classification of the Tutsi community, the Chamber relied upon the evidence tendered that the Rwandan laws as of 1994 required the official identification of all persons with their ethnicity. This acceptance of Hutus, Tutsis and the Twa community as ethnic communities in the Rwandan culture constituted, as per the Trial Chamber, evidence of stability and permanence.[95] Further, the Chamber highlighted the

[88] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999, ¶523 and 524
[89] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999, ¶525
[90] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999, ¶526
[91] *Prosecutor v. Georges Rutaganda* (Trial Judgement), ICTR-96-3-T, 6 December 1999, ¶6
[92] *Prosecutor v. Georges Rutaganda* (Trial Judgement), ICTR-96-3-T, 6 December 1999, ¶56
[93] *Prosecutor v. Georges Rutaganda* (Trial Judgement), ICTR-96-3-T, 6 December 1999, ¶57
[94] *Prosecutor v. Georges Rutaganda* (Trial Judgement), ICTR-96-3-T, 6 December 1999, ¶58
[95] *Prosecutor v. Georges Rutaganda* (Trial Judgement), ICTR-96-3-T, 6 December 1999, ¶374

fact that all the witnesses either quickly identified themselves or identified victims as members of the Tutsi community.[96] It is worth noting that the bench took comfort in the fact that the Defence did not contest the fact that the Tutsis constituted an ethnic community and that the *Akayesu* and *Kayishema* judgements before, notwithstanding the fact that they delivered the *Akayesu* judgement.

The departure from a focus on objective analysis as espoused in *Akayesu* to more reliance on self-identification and identification by others in *Kayishema* and *Rutaganda.* This shift seems to be cemented in the judicial discussions of genocide by subsequent judgements. In *Jelisic,* the ICTY held that to attempt to define an ethnic group using objective and scientifically irreproachable criteria would be perilous and concludes by electing to consider the self-identification of a community as such to be the determinant.[97] This position was confirmed in *Brdanin* years later where the Court held that the group may be identified through the subjective criterion of self-identification, but went further than *Jelisic* in finding that identification by the perpetrator was also a sufficient criterion.[98] As recently as 2012 in *Tolimir*, the ICTY referenced these subjective criteria from *Jelisic* and *Brdanin* in defining the protected groups clearly underscoring the near-permanent departure from any hopes of strictly objective constructions of the protected groups.[99]

From a lack of detail as to the meaning of protected groups in 1948, the definition of the ethnic groups crystalised to a subjective question determined on a case by case basis 50 years later. This and its implications to the principle of legality will be revisited in Chapter 4.

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[96] *Prosecutor v. Georges Rutaganda* (Trial Judgement), ICTR-96-3-T, 6 December 1999, ¶375
[97] *Prosecutor v. Goran Jelisić* (Trial Judgement), IT-95-10-T, 14 December 1999, ¶ 70
[98] *Prosecutor v. Radoslav Brđanin* (Trial Judgement), IT-99-36-T, 1 September 2004, ¶683
[99] *Prosecutor v. Zdravko Tolimir* (Trial Judgement), IT-05-88/2-T, 12 December 2012, ¶32

CHAPTER 3 - INTENT TO DESTROY - THE FORK IN THE ROAD

INTRODUCTION

The two most unique and critical elements of the crime of genocide, both of which are so intertwined, are the protected groups and genocidal intent. This Chapter will focus on the development of genocidal intent from the drafting stage to the judicial interpretations.

The genocide offence has two separate mental elements, namely a general one that could be called 'general intent' or dolus, and an additional 'intent to destroy'.[100] The general intent simply refers to the required mens rea in all the related actions underlying the crime of genocide, whose standard has crystallised in the formulation of Article 30 of the Rome Statute to include the volition (intent) and/or knowledge of the outcome.[101] This is largely uncontroversial in the grand scheme of things regarding the crime of genocide. However, the second genre of intent, "the intent to destroy…", the '*dolus specialis*' as it has come to be known as, is the subject of many a genocide conversation. In this chapter, I'll navigate through the major schools of thought regarding the construction of genocidal intent.

3.1. Take it Back to the 1940s

The concept of genocidal intent through the eyes of the drafters morphed at each stage, with different considerations. The 1946 position contained no statutory definition simply providing that, "that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices-whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds-are punishable".[102] This silence was only short-lived, as by 1947, the Secretariat's Draft already provided a rather specific framing of genocidal intent. The Draft defined Genocide

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[100] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 833-858

[101] Article 30, Rome Statute of the International Criminal Court, 17th July 1998, vol 21857 no 3854

[102] United Nations General Assembly Resolution 96(1), 11 December 1946

as a "criminal act directed against any one of the aforesaid groups of human beings [racial, national, linguistic, religious, or political] with the **purpose of destroying** it in whole or in part, or of preventing its preservation or development."[103] (emphasis added). The intent standard in this draft was quite specific and express, it was a purpose-based intent standard.

The ECOSOC Ad hoc Committee draft a few months later defined genocide as "...committed with intent to destroy a national, racial, religious or political group on grounds of the national or racial origin, religious belief, or political opinion of its members."[104] There seems to be some adoption of somewhat redundant language, however this may also be both an acknowledgement and distinction of the intent and motive, the latter of which has routinely been considered to be unnecessary to prove guilt.[105] However, an analysis of the Summary record of the Committee proceedings hints at a different conclusion. Looking at the French representative's position that, "...it was not sufficient to be acquainted with the fact that a group had been destroyed, but that the reason for the destruction had to be determined."[106] He seems to conflate both intent and motive. Similarly, when the US representative proposed the looser "as such" formulation suggesting that potential perpetrators would claim they committed the crimes for motives other than the ones listed[107], the USSR representative fought this position emphasising that "...the qualifying fact was not simply the destruction of certain groups but destruction for the reason that the people in them belonged to a given race or nationality, or had specific religious beliefs." [108] Granted, this statement reads quite ambiguous as to the distinction between motive and intent, however in the end the stricter "on the grounds of..." formulation triumphed over the more accommodating "as such" formulation.[109]

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[103] Article I, Draft convention on the crime of genocide prepared by the Secretary-General in pursuance of the Economic and Social Council resolution 47 (IV) (E/447, 26 June 1947)

[104] Article II, Report of the Ad Hoc Committee on Genocide and draft Convention drawn up by the Committee, 5 April-10 May 1948 (E/794)

[105] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2275

Prosecutor v. Kayishema and Ruzindana (Appeal Judgement), ICTR-95-1-A, 4 December 2001 ¶161

Prosecutor v. Miroslav Kvocka et. al (Appeal Judgement), IT-98-30-1/A, 28 February 2005 ¶106

Prosecutor v. Fatmir Limaj et. al (Appeal Judgement), IT-03-66-A, 27 September 2007 ¶109

[106] U.N. ESCOR, 3d Sess., 12th mtg. at 7, U.N. Doc. E/AC.25/SR12 (1948)

[107] U.N. ESCOR, 3d Sess., 11th mtg. at 1-2, U.N. Doc. E/AC.25/SR11 (1948)

[108] U.N. ESCOR, 3d Sess., 11th mtg. at 1, U.N. Doc. E/AC.25/SR11 (1948)

[109] Report of the Ad Hoc Committee on Genocide, U.N. ESCOR, 7th Sess., Supp. No. 6, at 5, U.N. Doc E/794 (1948)

The discussion in the Sixth Committee mirrored that in the ECOSOC ad hoc committee but with a different result. The Representative of Venezuela proposed the introduction of the term "as such" arguing that the enumeration of motives was "...dangerous...as such a restrictive enumeration would be a powerful weapon in the hands of the guilty and would help them avoid being charged with genocide."[110] Two particular opponents of this formulation were the representatives of Belgium and New Zealand. Kaeckenbeek argued that "it was not sufficient to mention intent as it was now defined...The concept of intent had thus lost some of its clarity on account of an unfortunate confusion between acts and consequences on the one hand and intention on the other."[111] Reid on the other hand observed that "modern warfare was total, and there might be bombing which might destroy whole groups. If the motives for genocide were not listed in the convention, such bombing might be called a crime of genocide."[112] These two reservations have been viewed as an assertion that sans enumeration or mention of motives, genocidal intent ceases to be a purpose-based intent.[113] The words "as such" brought with it confusion as to its exact meaning. The representatives of Egypt, France, Haiti and Brazil for example all explained how differently they understood the term "as such to mean".[114] Nonetheless, the Venezuelan proposal was put to a vote and adopted by 27 votes to 22 with 2 abstentions.[115] Realising the colossal confusion the phrasing had brought, the Uruguayan representative proposed a Working Group be established to consider the implications of the new definition stating that, "the vote had given rise to three different interpretations. Some delegations had intended to vote for an express reference to motives in the definition of genocide; others had intended to omit motives while retaining intent; others again, among them the Uruguayan delegation, while recognizing that, under the terms of the amendment, genocide meant the destruction of a group perpetrated for any motives whatsoever, had wanted the emphasis to be transferred to the special intent to destroy a group, without enumerating the

[110] Sixth Committee of the General Assembly, Summary records of meeting no. 76, A/C. 6/ SR. 76
[111] Sixth Committee of the General Assembly, Summary records of meeting no. 76, A/C. 6/ SR. 76
[112] Sixth Committee of the General Assembly, Summary records of meeting no. 75, A/C. 6/ SR. 75
[113] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at Footnote 91
[114] Sixth Committee of the General Assembly, Summary records of meeting no. 76, A/C. 6/ SR. 76
[115] Sixth Committee of the General Assembly, Summary records of meeting no. 76, A/C. 6/ SR. 76

motives, as the concept of such motives was not sufficiently objective."[116] Clearly, the problem was whether the definition distinguished between a broader intent, special intent and motive.[117] The request for a Working Group came too little too late and was rejected by the Sixth Committee.[118]

This adoption of a text without proper explanation came in light of statements such as this one from the Belgian representative "that the Committee had to vote on the text of a proposal and not on the interpretation of such text, whether that interpretation were given by its author or by other delegation..."[119] and this one from the representative of Greece, "interpretation of the provisions of the convention must be left to those who would have to apply them."[120]

This abdication of drafting responsibility much like with the definition and explanation of the protected group as highlighted in Chapter 2 left the responsibility to the Courts.

3.2. Judicial Interpretation: The Narrow Road

The *locus classicus* when it comes to intent, as is with majority of issues genocide-related is the *Akayesu* case. Trial Chamber I in the ICTR held that , "with regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group."[121] The Chamber distinguished this from the intent of an accomplice to the crime of genocide by holding that, "...the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national,

[116] Sixth Committee of the General Assembly, Summary records of meeting no. 78, A/C. 6/ SR. 78
[117] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2279
[118] Sixth Committee of the General Assembly, Summary records of meeting no. 78, A/C. 6/ SR. 78
[119] Sixth Committee of the General Assembly, Summary records of meeting no. 76, A/C. 6/ SR. 76
[120] Sixth Committee of the General Assembly, Summary records of meeting no. 76, A/C. 6/ SR. 76
[121] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶520

ethnical, racial or religious group, as such."[122] This higher standard expressed in *Akayesu* specifically for principal perpetrators of genocide is an expression of volition in its most intensive form and is purpose-based.[123] This position is seemingly adopted by the ICJ referring to the specific/special intent which is an extreme form of wilful and deliberate acts intended to destroy a protected group in whole or in part.[124] Subsequent decisions spoke to this special intent and its severity in different languages.The ICTY in *Jelisic* held that the standard for intent is that of, "...seeking to achieve the destruction of the protected groups..."[125]. On the other hand, the Court in *Sikirica* dismissed discussions of theories of intent as proposed by the Prosecution, automatically relying on the high standard established in *Jelisic* holding that a simple interpretation of the Statute requires such a high standard.[126] Similarly, the Court in *Blagojevic* and *Brdjanin* both adopted the words, "...goal-oriented approach..." in defining the parameters of specific intent in genocide.[127] The ICC in the *Al-Bashir Arrest Warrant* decision seemingly arrived at this conclusion as well. The Chamber seemed to acknowledge the possibility of knowledge-based intent but only for low- and mid-level perpetrators and as such would not be within the purview of the ICC. For the high-level perpetrators, the Court followed the traditional approach as espoused by *Akayesu.*[128]

For a better understanding of the Courts' insistence on the purpose-based intent, the *Krstic* case provides the best understanding since the Trial Chamber found him guilty of genocide primarily relying on a knowledge-based intent while the Appeals Chamber overturned the conviction citing the improper intent standard relied upon by the Trial Chamber.[129] At the Trial Stage, the Prosecution invited the Chamber to be convinced of the formulation of intent on the part of the accused citing that "...he knew his acts were destroying...or he knew that the likely consequences

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[122] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶545

[123] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 833-858 at 838

[124] ICJ, Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para. 188

[125] *Prosecutor v. Goran Jelisić* (Trial Judgement), IT-95-10-T, 14 December 1999, ¶ 108

[126] *Prosecutor v. Dusko Slkirika, et al* (Trial Judgement), IT-95-8-T, 3 September 2001, ¶ 59

[127] *Prosecutor v. Vidoje Blagojevic and Dragan Jokic* (Trial Judgement), IT-02-60-T, 17 January 2005, ¶ 656; *Prosecutor v. Radoslav Brdjanin* (Trial Judgement), IT-99-36-T, 1 September 2004, ¶ 695

[128] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, para. 139–40

[129] *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, 2 August 2001
Prosecutor v. Radislav Krstic (Appeals Judgement), IT-98-33-A, 19 April 2004

of his acts would be the destruction of..."[130] The Defence on the other hand insisted that the Court stick to the previously established higher form of purpose-based intent.[131] The Trial Chamber shone a light on their inspiration during the determination, evident through some of the footnotes referencing academic texts in support of knowledge-based intent.[132] Relying on evidence brought before the Court, the Chamber concluded that although General Krstic did not conceive the plan to kill the Bosnian Muslim men, he participated in the Joint Criminal Enterprise to kill the men with the awareness that such killings would lead to the annihilation of the Bosnian Muslim community in Srebrenica. His intent thus amounted to genocidal intent.[133]

The General on appeal, raised the issue of intent through Counsel. The Appeals Chamber reviewed the standard applied by the Trial Chamber in finding that Krstic possessed the requisite genocidal intent. First, the Chamber pointed out the findings of the Trial Chamber that Krstic was unlikely to have ever instigated a plan such as the one devised for mass execution of Bosnian Muslim men.[134] Further, the Chamber held that Krstic's particular intent as directed towards a forcible displacement and that "...it would be erroneous, however, to link Krstić's specific intent to carry out forcible displacement with the same intent possessed by other members of the Main Staff, to whom the forcible displacement was a means of advancing the genocidal plan."[135] The clincher from the Appeals Chamber's determination can be found a few lines after this analysis where the Court concluded as follows: "As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been

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[130] *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, 2 August 2001, ¶ 569
[131] *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, 2 August 2001, ¶ 570
[132] *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, 2 August 2001, footnote 1276; referencing Eric David, *'Droit des Conflits Armes'*, Greenawalt Alexander, *'Rethinking Genocidal Intent: The Case for a knowledge-based interpretation'*, Gil Gil Alicia, *'Derecho Penal Internacional, especial consideracion del delito de genicidio'*.
[133] *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, 2 August 2001, ¶ 644
[134] *Prosecutor v. Radislav Krstic* (Appeals Judgement), IT-98-33-A, 19 April 2004, ¶ 131
[135] *Prosecutor v. Radislav Krstic* (Appeals Judgement), IT-98-33-A, 19 April 2004, ¶ 133

unequivocally established."[136] This, in my view, restored the judicial analysis of genocidal intent to the original standard established in *Akayesu*. That due to the gravity of the crime of genocide, the required intent is similarly high.

All through the lifetime of the ad hoc tribunals, this stringent requirement of purpose-based intent seemed to be the near unanimously accepted standard of intent. .

3.3. The Rise of Knowledge-based Intent

As the ICTR was delivering its first few genocide convictions, growing discontent with the judicial interpretation of the genocidal intent became observable. Before the close of the 20th century, Alexander Greenawalt penned what could be called the first substantial critique of the purpose-based intent formulation coupled with the very first potent proposal for a knowledge-based intent[137] followed almost immediately by Alicia Gil Gil with a somewhat similar approach.[138] Over the next decade, more and more scholars would contribute to this growing body of thought in favour of a knowledge-based intent with some alterations.

The common concerns held by the opponents of the purpose-based intent are largely similar and revolve around three grounds: (1) the possibility of mid- and low-level perpetrators relying on orders to prove their lack of intent[139]; (2) the misinterpretation of the unclear position of the drafters of the Genocide Convention couple with the unconvincing reliance on national law

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[136] *Prosecutor v. Radislav Krstic* (Appeals Judgement), IT-98-33-A, 19 April 2004, ¶ 134

[137] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294

[138] Gil Gil A, *Derecho Penal Internacional: Especial Consideration dei delito de genocidio*, Editorial Tecnos, 1999, 259

[139] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2279-2285; Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 833-858. at pp 846-849; Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 573-574

principles[140]; and finally (3) the difficulties of fulfilling the evidentiary burden accompanied by the purpose-based intent.[141]

These motivations for their proposals are intriguing and valid, however they do not form the crux of the discussion herein. This part of the paper shall delve into the considerations of the different scholars in arriving at their conclusions.

Alexander Greenawalt begins the consideration with a journey through the drafting process in the late 1940s highlighting the rather vague understanding of the word intent as proposed in the Genocide Convention. His analysis of drafters' confusion from the Secretariat draft to the Sixth Committee draft comes to a head with this statement from the Venezuelan representative in the Sixth Committee, "[T]he vote had given rise to three different interpretations. Some delegations had intended to vote for an express reference to motives in the definition of genocide; others had intended to omit motives while retaining intent; others again, among them the Uruguayan delegation, while recognizing that, under the terms of the amendment, genocide meant the destruction of a group perpetrated for any motives whatsoever, had wanted the emphasis to be transferred to the special intent to destroy a group, without enumerating the motives, as the concept of such motives was not sufficiently objective"; adding that the distinction between the result of the wording speaking to the "idea of motive", "special intent" and "intent", which were the clearest possibilities from the wording of the Convention, were clearly not addressed.[142] Bearing in mind that the wording of the Convention gives rise to a myriad of possibilities, he acknowledges that the purpose-based approach by the *Akayesu* decision didn't go contrary to the wording of the Convention, in fact it was very much in line with the wording of the Secretariat

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[140] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 567, 570; Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2265-2279; Triffterer O, 'Genocide, its particular intent to destroy in whole or in part the group as such,' Vol 14 *Leiden Journal of International Law*, (2001) at pp 404; Schabas William, *Genocide in International Law*, Cambridge University Press, 2009, pp 260; Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 833-858. at pp 844

[141] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2281-2282; Triffterer O, 'Genocide, its particular intent to destroy in whole or in part the group as such,' Vol 14 *Leiden Journal of International Law*, (2001) at pp 405-406

[142] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2279

Draft that was drafted in part by Lemkin.[143] However with the problems of strenuous evidentiary burden being placed on the Prosecution, the probability of foot soldiers relying on orders to prove their lack of intent as well as the possibility of groups claiming ambiguous motives to escape the definition of genocide (he gives an example of political motives), he sought to creatively cure this supposed mischief.[144] Focusing on the nature of genocide and what exactly about genocide is particularly abhorrent, Greenawalt deftly proposes this formulation, "in cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part."[145] Greenawalt posits that his position emphasises the destructive result of genocidal acts instead of the specific reasons that move particular individuals to perform such acts drawing from what he terms as the Convention's core concern for the permanent losses to humanity that result from the annihilation of the enumerated groups.[146] It is quite evident that Greenawalt's formulation presupposes the existence of a general genocidal context within which each individual perpetrator acts.

Otto Triffterer, on the other hand, proposes the knowledge-based intent using a different formulation. First and foremost, he quite rightly points out that there has never been an additional adjective like "specific", "special", "particular" or "general" before "intent to destroy".[147] Simply put, the assumption that the intent to destroy required a different level of intent has never been founded on any express textual provision. Further, he highlights that to prove *Absicht* (the emotional strong will that underpins purpose-based approach) through circumstantial evidence or inference is much more difficult to prove than the fact that the

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[143] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2279

[144] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2281

[145] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2288

[146] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2288

[147] Triffterer O, 'Genocide, its particular intent to destroy in whole or in part the group as such,' Vol 14 *Leiden Journal of International Law*, (2001) at pp 404

objective appearance of the crime was the result of an intentional behaviour.[148] As a result, Otto posits that "what is valid for the mens rea covering the actus reus, must be accepted also for the additional particular (genocidal) intent...because both have exactly the same structure. Only difference is their points of reference."[149] Otto distinguishes the two levels of mens rea that are required to prove genocide: the first mens rea relates to the underlying acts of genocide (these ones are usually completed); and the second mens rea relates to the destruction of the enumerated groups, an event which largely hasn't already appeared by the time the perpetrators are indicted. Considering the absence of any express textual requirement of a different level of intent for the two actions, he proposes that the intent level sufficient for the underlying acts, which in the Rome Statute is Article 30, should be sufficient for the intent to destroy.

Soon after the Report by the Commission of Inquiry on Darfur was published, Claus Kress penned an article in light of the proposals of the Commission. Kress also had the benefit of a number of ICTR and ICTY cases to critique, both trial and appellate level judgements. The Report stated that: "...the subjective element, or mens rea, is twofold: (a) the criminal intent required for the underlying offence (killing, causing bodily or mental harm, etc.) and (b) the intent to destroy, in whole or in part, the group as such. This second element is an aggravated criminal intent, or dolus specialis; it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy, in whole or in part, the group as such..."[150] Kress points out that it is possible that the Commission deemed the matter to be settled by the *Krstic* decision.[151] With this, he laments the refusal by the tribunals to give full consideration to the growing and convincing arguments for a knowledge-based intent.[152] Kress goes ahead to explain why the seemingly settled purpose-based intent was founded on grounds that were seemingly

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[148] Triffterer O, 'Genocide, its particular intent to destroy in whole or in part the group as such,' Vol 14 *Leiden Journal of International Law*, (2001) at pp 405-406

[149] Triffterer O, 'Genocide, its particular intent to destroy in whole or in part the group as such,' Vol 14 *Leiden Journal of International Law*, (2001) at pp 406

[150] Darfur Report para 491

[151] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 564

[152] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 570

uncompelling. First, the *Akayesu* (and the ICTR by extension) purpose-based approach backed by analogy from domestic law was problematic because there was no clear or unanimous approach of *dolus specialis*, both between common law and civil law jurisdictions, and even worse, between different civil law jurisdictions.[153] Secondly, the *Krstic* (and the ICTY by extension) purpose-based approach premised on the supposed existence of a customary international law was problematic because it was insufficient in two parts. First, the Chamber's assertion that the drafting history of the Genocide Convention points to a definite support of purpose-based approach[154], this the Chamber does so without any exhaustive analysis of the *travaux preparatoires* of the Convention.[155] Further, Kress posits that the customary law argument was not only strangely indeterminate and reluctant, but also the way it was used by the Chamber was open to methodological challenges.[156] Kress submits that customary law may be used to externally delineate international criminal responsibility, in that whether or not individual criminal responsibility exists at all, and not the internal delineation between primary and derivative individual criminal responsibility as the Chamber in *Krstic* did.[157] From this premise, Kress proposes a remedy that somewhat brings the crime of genocide into structural congruity with crimes against humanity.[158] Whether this would lead to the erosion of the specificity of the crime of genocide compared to other crimes against humanity, Kress posits that the specificity of the crime of genocide compared with crimes against humanity must reside in the nature of the systemic act and not in the way primary and derivative individual criminal responsibility for participation in the respective systemic act are distinguished.[159] He first points out the necessity to distinguish the collective and individual genocidal intent. Consequently he proposes that individual genocidal intent requires: (a) knowledge of a collective attack directed to the

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[153] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 570

[154] *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, 2 August 2001, ¶ 571

[155] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 570

[156] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 570

[157] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 571

[158] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 575

[159] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 576

destruction of at least part of a protected group; and (b) dolus eventualis as regards the occurrence of such destruction.

William Schabas considers this conundrum and without explicitly raising the merits of either school of thought as against the other as a matter of principle but rather the relative ease of proving intent with each approach. He opens by reflecting on the points of inquiry in both approaches, highlighting that the purpose-based approach results in a focus on individual offenders and their own personal motives whereas the knowledge-based approach directs the inquiry towards the plan or policy of a state or similar group.[160] He draws an important point from the *Eichmann* case where the District Court of Jerusalem satisfied itself of the existence of a plan and Eichmann's knowledge of the plan determined his requisite intent to destroy.[161] He compares this to the Trial Chamber in *Akayesu* that did not insist on proof of a greater genocidal plan in its deliberation, perhaps because the issue in Rwanda was self-evident.[162] Schabas is seemingly guided by this pronouncement from *Gacumbitsi,* "by its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred."[163] Quite similar to the Kress formulation, Schabas seemingly proposes the establishment of the genocidal context (which he calls the policy) and then an inference of the individual perpetrators' individual genocidal intent.[164] As did Greenawalt and Kress, Schabas navigates through these formulations on the backdrop that the drafters of the Convention provided no convincing illumination as to their intent, stating that, "these debates were confusing and sometimes contradictory, and it is particularly dangerous to rely on isolated remarks from certain delegations in attempting to establish the intent of the drafters. The wording represents a compromise aimed at generating consensus between States with somewhat different conceptions of the purposes of the convention."[165]

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[160] Schabas William, *Genocide in International Law,* Cambridge University Press, 2009, pp 240
[161] *A-G Israel v Eichmann* (District Court, Jerusalem), 36 ILR 18 (1968), ¶195
[162] Schabas William, *Genocide in International Law,* Cambridge University Press, 2009, pp 247
[163] *Prosecutor v Sylvestre Gacumbitsi,* (Appeals Judgement), ICTR-2001-64-A, 7 July 2006, ¶40
[164] Schabas William, *Genocide in International Law,* Cambridge University Press, 2009, pp 267
[165] Schabas William, *Genocide in International Law,* Cambridge University Press, 2009, pp 260

Kai Ambos manages to present a two-fold solution to this problem he observes in the same manner as Otto Triffterer. First, just like Otto and Kress before him, he submits that a literal interpretation of the term 'intent' does not indicate any clear preference for a purpose- or knowledge-based approach.[166] Consequently, he posits that the 'intent to destroy' is simply an ulterior motive in the sense of a double intent structure, and that a general 'intent to destroy' is sufficient as opposed to a 'special' or 'specific' intent in the sense of *dolus specialis*.[167] By relying on the structural congruity argument furthered by Kress, holding genocide to be a special crime against humanity, Ambos also sets up the foundation with the existence of a genocidal context as the first step.[168] He then proceeds to make a distinction that differentiates low-level perpetrators from mid- and top-level perpetrators. A defendant who is a low-level operative must at least know that the masterminds of the genocidal campaign are acting with a genocidal intent construed in the narrow sense.[169] On the other hand, top-level perpetrators must possess the purpose-based intent because they are the intellectual and factual leaders of the genocidal enterprise.[170] As for mid-level perpetrators, Ambos posits that they have to share the top-level perpetrators' purpose-based intent.[171]

From a rather bare position in 1948, genocidal intent was dressed with the purpose-based dress by the ad hoc tribunals then almost immediately after, and still ongoing, academia took to stripping her off the purpose-based dress and garbing her with the less demanding but still sensible knowledge-based dress.

Chapter 4 shall pick this up and its implications on the principle of legality.

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[166] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 835-858, at pp 844

[167] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 835-858, at pp 844-845

[168] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 835-858, at pp 848

[169] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 835-858, at pp 847

[170] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 835-858, at pp 848-849

[171] Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 835-858, at pp 849

CHAPTER 4 - HOW DID WE GET HERE?

Having outlined the development of two key and specific elements of genocidal intent, this Chapter shall focus on the interpretive approach that has been favoured, the implication on the principle of legality and finally, how the Courts have approached these issues in the most recent decisions. Part one of the Chapter shall focus on the somewhat problematic interpretive approach adopted by ICL practitioners that might explain the rather broad and subjective conclusions expounded in the second and third chapters above.

4.1. Victim-focused teleological reasoning

International Criminal Law experienced explosive growth in the mid-1990s in the face of Rwanda and the former Yugoslavia. This resulted in a sudden and urgent need for international criminal lawyers, who at the time were very few. As a result, the vacuum was initially filled primarily by international lawyers with training or experience in International Humanitarian Law and Human Rights Law.[172] These practitioners adopted the forms and principles of criminal law but understood them through the lens of the normative assumptions from their native domains of expertise.[173] For purposes of examples, the very first judgement by Trial Chamber I of the ICTR- the conviction against *Akayesu*- was delivered by a bench consisting of Laity Kama, Lennart Aspegren and Navanethem Pillay. All three with established human rights roots both regionally and nationally prior to taking up office in the tribunal and even more robust human rights assignments after their terms in office ended. On the other hand, the more robust proponents of the knowledge-based intent such as William Schabas and Alexander Greenawalt also have roots in human rights law and international humanitarian law.*

The underlying principle governing international criminal law is perfectly captured in the Rome Statute, that a person shall not be held liable for a crime unless at the time it took place, it

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[172] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 928

[173] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 928

**This is in no way an indictment of their brilliance, neither is it a study of these individuals.

constitutes a crime[174] and that the definition of a crime shall be strictly construed and shall not be extended by analogy. Further, in cases of ambiguity, the definition shall be construed in favour of the accused.[175] On the other hand, human rights law is typified by its 'liberal', 'broad', 'progressive' and 'dynamic' approach to interpretation.[176]

Consequently, it can be observed that when ICL practitioners fall back to the familiar human rights interpretive approaches, a technique commonly used is: (1) to adopt a purposive interpretive approach; (2) to assume that the exclusive object and purpose of an ICL enactment is to maximise victim protection; and (3) to allow this presumed object and purpose to dominate over other considerations, including if necessary the text itself.[177] Darryl Robinson observes that the principle of strict construction fails to restrain this technique because it is only consulted when 'all other canons fail to interpret the question'.[178] Therefore, applying broad teleological interpretations that favour the victims at the onset of any question means there is no room for ambiguity to resolve through strict construction[179] because all ambiguities have already been resolved against the accused.[180] Robinson laments that "the problem with victim-focused teleological reasoning is that it conflates the 'general justifying aim' of the criminal law system as a whole – which may be a utilitarian aim of protecting society–with the question of whether it

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[174] Article 22(a) of the Rome Statute

[175] Article 22(b) of the Rome Statute.

[176] *A v. Australia*, Communication No. 560/1993, 3 April 1997, A/52/40 (Vol. II), Annex VI, sect. L (at 125–46);
Keith Cox v. Canada, Communication No. 539/1993, 31 October 1994, A/50/40, Vol.II, Annex X, sect. M (at 105–29);
Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 [1985] IACHR 2, at ¶6-12;
East African Asians v. The United Kingdom, [1973] ECHR2 (14 December 1973),¶192–195.

[177] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 934;
Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18th September 2004 ¶ 494;
Prosecutor v. Hadzihasanovic, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, (Appeals Chamber), Case No. IT-01-47-AR72, 16 July 2003 (Partially Dissenting opinion of Judge Shahabuddeen at ¶ 11-24)

[178] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 934;
Prosecutor v Zejnil Delalic et al, (Trial Judgement) Case No. IT-96-21-T, 16 November 1998, at ¶ 413

[179] Schabas W,'Interpreting the Statutes of the Ad Hoc Tribunals', in L.C. Vohrahetal. (eds.), *Man's Inhumanity to Man* (2003), at 886

[180] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 934

is justified to punish a particular individual for a particular crime..."[181] As a foundational point, Robinson seeks to distinguish between the aims of criminal law in general to protect society from individuals from the need to protect the individual from the excesses of society through principled restraints.[182]

The subsequent subsections of this Chapter shall discuss the interpretive approaches witnessed in Chapter 2 and Chapter 3 of this paper, considering the underlying victim-focused motivations in those approaches. Subsequently, the paper will delve into a brief discussion of the practitioners behind these positions and their legal backgrounds that potentially fed into the victim-focused interpretation.

4.1.1. The Ethnic Question

As highlighted in Chapter 1, the definition of an ethnic group went through virtually zero insightful elaboration during the drafting process in the Sixth Committee. In fact, one could conclude that the inclusion of ethnic groups was motivated by the diplomatic concession to replace the political groups as proposed by the Swedish representative[183] and to address the issue of mixed race individuals who might not fall squarely within any existing race.[184]

With this general ambiguity as to the precise definition of an ethnic group, this writer submits that at this point, courts should have adopted the interpretation that would grant the accused a benefit, as the *Delalic* decision would call it "construction of the statute *contra proferentem*".[185] The Chamber in *Akayesu* presented an objective definition of an ethnic group as "a group whose members share a common language or culture"[186], a definition that the court realised would not result in a genocide conviction since the Tutsis did not have a distinct language from the rest of the population.[187] This is the "problem" that the Court sought to solve, and the solution for the

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[181] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 938

[182] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 938;
H.L.A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law,* Oxford University Press, Second Edition (2008), at pp 81

[183] Sixth Committee of the General Assembly, Summary records of meeting no. 73, A/C. 6/ SR. 73

[184] Sixth Committee of the General Assembly, Summary records of meeting no. 75, A/C. 6/ SR. 75

[185] *Prosecutor v Zejnil Delalic et al,* (Trial Judgement) Case No. IT-96-21-T, 16 November 1998, at ¶ 413

[186] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶511

[187] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶170 and footnote 56

Court was to be found in a broader interpretation of the issue. The writer of this paper observes that the technique highlighted by Darryl Robinson[188] indicative of a Human Rights victim-focused teleological approach came into play here.

First, the adoption of a purposive interpretive approach as opposed to a strict textual interpretive approach. This can be seen in the language of the *Akayesu* judgement when the Chamber holds that the purpose of the Convention was, "clearly to protect all stable and permanent groups."[189] While this was the reason majority of the delegates quoted for the exclusion of political groups, [190] there is insufficient evidence from the deliberative proceedings that this was the ultimate goal of the Genocide Convention project.

Secondly, the Courts seemed to assume that the exclusive object and purpose of the enactment is to maximise victim protection. This is evident in the subjective approach where the determining factor is identification by self or by the perpetrators. Following evidence tendered by the Prosecution witnesses, the Court ignored the more objective definition of ethnic groups they had already presented and instead decided that the *sine qua non* for the definition would be the subjective identification of the victims by self or by others (in this case, the official government records).[191] This subjective position became the standard test in subsequent decisions, almost uniformly using the victim position to define such a crucial element of the crime.[192]

Finally, the Courts took this objective and purpose (of protection of victims) to dominate over other considerations, including some express pronouncements during the drafting of the Convention itself. The Chamber in *Jelisic* quite blatantly exhibit this position when they held that, "...to attempt to define a national, ethnical or racial group today using objective and

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[188] Robinson Darryl, 'The Identity Crisis of International Criminal Law,' Vol 21 *Leiden Journal of International Law* (2008) 925-963, at pp 934

[189] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶511, 516 and 701

[190] E.g. The Brazilian recommendation in the Sixth Committee of the General Assembly, Summary records of meeting no. 69, A/C. 6/ SR. 69;
The Polish recommendation in the Sixth Committee of the General Assembly, Summary records of meeting no. 75, A/C. 6/ SR. 75

[191] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶79

[192] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgement), ICTR-95-1-T, 21 May 1999, ¶98, 523 and 524;
Prosecutor v. Zdravko Tolimir (Trial Judgement), IT-05-88/2-T, 12 December 2012, ¶32;
Prosecutor v. Radoslav Brđanin (Trial Judgement), IT-99-36-T, 1 September 2004, ¶683

scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation."[193] This position expresses two thoughts that demonstrate this victim-based approach and the potential danger it poses to the guarantee of the principle of legality. First, the idea that using objective and scientifically irreproachable criteria for definition would be perilous runs against the express of some of the delegates during the drafting of the Convention such as the representative of USSR, Mr. Morozov who posited that deviation from the scientific meaning of genocide would weaken the Convention and hinder the fight against genocide.[194] The second part of the Court's statement paints an even more disturbing picture for the sanctity of the principle of legality, that the important consideration was whether a test would correspond with the perception of the persons. This, in the writer's view, almost speaks to some reverse construction in that the Court was keen to deliver a judgement favourable to the position of the victims, therefore the construction would have to be consistent with this ultimate goal. The goal wasn't strict construction of the elements of the crime, the goals was to fulfill the definition of genocide. The judicial process was simply a means to this heavily desirable end.

The evidence of the existence of this victim-based approach is visible in the court's pronouncements regarding the definition of an ethnic group. The three-part technique proposed by Darryl Robinson has been proven hereabove, what about the interpretation of genocidal intent?

4.1.2. The Intent Question

Unlike the ethnic question which was greatly expanded by the courts, the intent question was expanded by academia. This grants us a unique privilege of observing similar practice by the bench and academia subtly influenced by the same goals.

In light of the ambiguity presented by the drafters as to what constitutes 'genocidal intent' as canvassed in Chapter 3, the demands of *in dubio pro reo* would, in the writer's view, guide the

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[193] *Prosecutor v. Goran Jelisić* (Trial Judgement), IT-95-10-T, 14 December 1999, ¶ 70

[194] Sixth Committee of the General Assembly, Summary records of meeting no. 64, A/C. 6/ SR. 64

Courts to a restrictive interpretation of the question of intent in favour of the accused. The courts seem to have taken this approach requiring an elevated purpose-based intent to destroy. The ICTR[195], the ICTY[196] and surprisingly, the ICJ[197] all require and set the standard for intent high to be a volitional purpose-based intent for all the would-be genocidaires. In fact, the ICTY in *Sikirika* expressly rejected propositions by the Prosecutor to entertain the possibility of expanding this intent standard.[198] This continued demand for a higher level of intent for the genocidal intent to destroy for all perpetrators by the courts was viewed to be somewhat untenable by some academic quarters. Consequently, citing different concerns with the purpose-based formulation of intent, these scholars took different roads to arrive at the same conclusion, that of the expansion of the genocidal intent standard. These approaches have been canvassed in Chapter 3. In this part, the paper shall attempt to exhibit evidence of the victim-based interpretive approach in arriving at their conclusions, contrary to the strict *in dubio pro reo* demands of international criminal law. Where an ambiguity presented itself, the knowledge-based school of thought offers an interpretation that would grant more latitude for conviction, centering the victims over the accused. Further, an analysis of the texts show that all the concerns with the purpose-based intent revolve around the difficulties of securing conviction.

The first concern for majority of, if not all of the proponents of the knowledge-based intent, is the ambiguity of the drafters' position.[199] Knowledge-based intent considers the fact that genocidal intent could be interpreted either way, the restrictive purpose-based manner or the

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[195] *Prosecutor v.Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998 ¶545

[196] *Prosecutor v. Goran Jelisić* (Trial Judgement), IT-95-10-T, 14 December 1999, ¶ 108;
Prosecutor v. Vidoje Blagojevic and Dragan Jokic (Trial Judgement), IT-02-60-T, 17 January 2005, ¶ 656;
Prosecutor v. Radoslav Brdjanin (Trial Judgement), IT-99-36-T, 1 September 2004, ¶ 695

[197] ICJ, Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para. 188

[198] *Prosecutor v. Dusko Sikirika, et al* (Trial Judgement), IT-95-8-T, 3 September 2001, ¶ 59

[199] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol *99 Columbia Law Review*, (1999) 2293-2294, at pp 2265-2279;
Triffterer O, 'Genocide, its particular intent to destroy in whole or in part the group as such,' Vol 14 *Leiden Journal of International Law*, (2001) at pp 40;
Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 570

broader knowledge-based manner.[200] A strict understanding would demand that the approach more favourable to the accused would be preferred in international criminal proceedings.

The second and third concerns are somewhat related. First, that mid- and low-level perpetrators would escape liability due to the difficulty of proving individual intent in a system that does not acknowledge Joint Criminal Enterprises. Second, the difficult evidentiary burden placed on prosecutors to secure convictions in the absence of public speeches and written records.[201] The solution to this "problem" seems to be one of analogy. Kress, Schabas and Kai Ambos all seem to construct the crime of genocide as one would crimes against humanity to achieve some structure that would legitimise a knowledge-based intent. They propose that proof of a general genocidal context ought to be the first step, thereafter individual knowledge of this proven context [202] A reading of Article 22 of the Rome Statute speaks to the prohibition of any extension to any definition by analogy.[203] Would this construction by analogy stand in the face of the demands of strict construction in criminal law? This writer submits that it shouldn't.

Indeed, while other reasons might exist for the desire to expand the definition of genocide, principles of interpretation from human rights and humanitarian law that allow and encourage broad definitions may have indeed subtly influenced this expansion as well.

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[200] Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 567;
Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 833-858. at pp 844

[201] Schabas William, *Genocide in International Law,* Cambridge University Press, 2009, pp 264-265

[202] Schabas William, *Genocide in International Law,* Cambridge University Press, 2009, pp 267;
Ambos K, 'What does 'intent to destroy' in genocide mean' Vol 91 *International Review of the Red Cross* (2009) 833-858. at pp 846;
Kress Claus, 'The Darfur Report and Genocidal Intent,' *Journal of International Criminal Justice 3* (2005) 562-578, at pp 573

[203] Article 22(3) of the Rome Statute

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

The aim of this paper was not to determine whether the conclusions by the Court or by academia regarding the specific elements of the crime of genocide are right. In fact, the writer of this paper aligns himself with the noble cause of prosecuting and rightful conviction of perpetrators. For the sake of justice for the victims, for the aspirations of peace in the international order and in a more selfish manner, for the growth and development of international criminal law. While the normative conclusions drawn from these expanded interpretations might be seen to serve noble goals, a real danger might present itself in the absence of some sort of introspection. As H.L.A Hart pondered with the problem of consolidating the 'general justifying aim' of the criminal law system as a whole – which may be a utilitarian aim of protecting society - with the question of whether it is justified to punish a particular individual for a particular crime, so should International Criminal Law practitioners. With the severity of crimes in international criminal law posing a great threat for bias against the accused, we should reflect not only on the law but why we interpret the law the way we do and whether such interpretations of the law are in conformity with the strict demands of criminal law.

As Theodore Meron stated in his speech to the 2009 American Society of International Law, "the ICC's statute-based approach makes the principle of legality less of an issue in this tribunal"[204], the existence of a permanent court in the form of the ICC offers a unique opportunity to actually develop International Criminal Law principles with the promise of high chances of indelibility. Granted, the Court is now 20 years old and some change, but questions of "meta-International Criminal Law" as Prof. Kevin Jon Heller calls it, are never time bound, they're never dated. We must always think about why we think the way we do. We must aspire to develop international criminal law thinking, almost independent of other disciplines.

[204] Beth Van Schaack, 'Proceedings of the Annual Meeting (American Society of International Law) , Vol. 103, *International Law As Law* (2009)'

Recommendations

This paper recommends that, in light of the clear concerns already proposed by practitioners with the ambiguities within the crime of genocide, it would be prudent to consider amendments to the criminal statutes providing for the crime of genocide. The domestic statutes could be an appropriate place to start granted the relative ease with which that could be done. However, for the sake of the development of uniform international criminal law principles independent of national criminal statutes, amendments to the Rome Statute and the Elements of Crime would be the best approach to regulate and regularise the internal inconsistencies and concerns from different schools of thought.

As to the substantial amendments that could be introduced, this writer is convinced of the merits of translating the broad interpretations of the elements into text.

First, regarding the protected groups, I would propose two directions of amendments. The increase of the enumerated groups to reflect modern day realities such as protection of sexual orientation groups. The second direction would be a proposal as to the identification into these protected groups. The subjective self-identification and/or identification by others (perpetrators or the State) may be effectively introduced into the criminal texts to cement the validity of these tests.

Secondly, regarding the intent to destroy question and whether or not the knowledge-based intent is to be favoured over the purpose-based intent, while the elements of crime presently present decent guidance, I am convinced it can achieve more in this regard. Maybe a suggestion of a higher threshold or an unequivocal statement suggesting no difference in the intent compared to other crimes. From my analysis of the two separate thoughts, I am convicted of the merits of a structural-based intent with different levels for low- mid- and top-level perpetrators with a cocktail of knowledge-based and purpose-based in place.

Recommendations for further Research

Considering the narrow scope of this paper, focusing on two elements of the definition of genocide, it would be imprudent to respond to all issues that arose during the course of this research. Future work could be conducted around the infiltration of human rights thinking in other international criminal law points such as modes of liability and defences. In the immediate instance, I would recommend specific research on the question of superior responsibility and the battle between broadening its scope and narrowing it.

Further, over and above the victim-focused teleological reasoning, future research could interrogate how else IHL and IHRL assumptions have influenced and distorted ICL principles. I would also recommend the possibility of investigating the psychological factors in play during the pendency of such grave criminal proceedings and its influence on the Court's interpretation of criminal statutes.

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