

1971 Killing of the 'Bengali' Intellectuals: An Analysis from the Perspective of the 1948 Genocide Convention

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Abstract

The lessons of the history of past genocidal incidents expose that the educated and the leaders, collectively called 'intellectuals', have often been a distinct target by the perpetrators. The Pakistani military and its local collaborators targeted and killed Bengali intellectuals during the 1971 Bangladesh Liberation War. As the Bangladesh genocide is still internationally overlooked, the issue of killing the Bengali intellectuals during such genocide has not obtained much attention. This article thus examines the massacre of the Bengali intellectuals in the war from the perspective of the 1948 Genocide Convention. More specifically, the authors critically analyse the killing of the Bengali intellectuals in light of the definition of 'genocide' and the travaux preparatoires of the Convention. This article reveals that the killing of Bengali intellectuals by the Pakistani military and its local collaborators during the 1971 Bangladesh Liberation War should be considered crime of genocide.

INTRODUCTION

The history of the Holocaust (1941-1945) and the subsequent genocides in some countries, for example, Bangladesh (1971) and Cambodia (1975-1979), manifest that the 'intellectuals' have been targeted as a group and victimised by the perpetrators.¹ Adolf Hitler targeted the Polish intellectuals during World War II (WWII) and executed the '*Intelligenzaktion Pommern*', a Nazi German operation that eliminated the intellectuals.² The objective of this operation pictures the 'Operation Liquidation', implemented by the Pakistani military and its local collaborators³ (hereinafter 'perpetrators') during the Bangladesh Liberation War. A similar operation against the intellectuals was traced during the Cambodian genocide.⁴ Therefore, this

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¹ Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* (New York: Oxford University Press, 2010) 10; Wardatul Akmal, "Atrocities against Humanity During the Liberation War in Bangladesh: A Case of Genocide," *Journal of Genocide Research* 4, no.4 (August 2002): 543, 559, <https://doi.org/10.1080/146235022000000463>; Howard J. De Nike, John Quigley, and Kenneth J. Robinson, *Genocide in Cambodia: Documents from the Trial - Pol Pot and Ieng Sary* (Philadelphia: University of Pennsylvania Press, 2000) 1-3.

² Matt Killingsworth, Matthew Sussex and Jan Pakulsi, *Violence and the State* (Manchester: Manchester University Press, 2016) 42-44.

³ The term "local collaborators" include three auxiliary forces created by the leaders of *Jamaat-e-Islami* Pakistan, namely, the *Al-Shams* (the sun), the *Al-Badr* (the moon), and the *Razakars*. Hussain Haqqani, *Pakistan between Mosque and Military* (Washington, D.C.: Carnegie Endowment for International Peace, 2005) 79.

⁴ Nike, Quigley and Robinson, "Genocide in Cambodia".

study poses a question as to whether an operation particularly targeting the intellectuals of a nation can be considered a genocidal policy within the definition of genocide provided in the 1948 *Prevention and Punishment of the Crime of Genocide*⁵ (hereinafter '*Genocide Convention*'). The definition of genocide specifies four protected groups such as national, ethnical, racial, and religious groups.⁶ Many scholars, delegates, and legislators have questioned the exhaustiveness of the groups listed in the definition from the time of its adoption.⁷

The Indian subcontinent was divided into India and Pakistan based on the 'two-nation theory'⁸ in 1947.⁹ Pakistan was comprised of two parts, east and west, and a majority of its population was Muslim. East Pakistan (now Bangladesh) was populated by nearly 85 percent Muslims, and its people were liberal in their religious practices.¹⁰ In contrast, the population of West Pakistan (now Pakistan) was about 97 percent Muslim, and they had different religious practices and rituals.¹¹ The people of the then East Pakistan were identified as 'Bengalis'.¹² In 1971, Pakistani military launched an attack called the 'Operation Searchlight' on the night of 25 March, intending to destroy Bengali nationalism in one blow.¹³ Subsequently, Bangabandhu Sheikh Mujibur Rahman, the founding father of Bangladesh, declared the independence of Bangladesh on 26 March 1971.¹⁴ From then on, the Liberation War of Bangladesh took place for nine months until this country achieved its victory on 16 December 1971.

During the war, the perpetrators indiscriminately killed the Bengali people, raped the Bengali women, and destroyed cultural property to wipe out the memory and heritage culture of the Bengalis. One of the unique operations that they implemented

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, signed 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('Genocide Convention').

⁶ *ibid*, art 2.

⁷ David Shea Bettwy, "The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law?," *Notre Dame Journal of International & Comparative Law* 2, no. 1 (2011): 171, 176, <https://scholarship.law.nd.edu/ndjicl/vol2/iss1/4>.

⁸ 'Two-Nation Theory' denotes 'the thesis that Hindus and Muslims in India were two distinct communities that could not coexist within a single state without dominating and discriminating against the other or without constant conflict'. See Clinton Bennett, "Two-Nation Theory," in *Islam, Judaism, and Zoroastrianism*, ed. Zayn R. Kassam, Yudit Kornberg Greenberg and Jehan Bagli (Dordrecht: Springer, 2018) 695.

⁹ Paul R. Brass, "The partition of India and Retributive Genocide in the Punjab, 1946–47: Means, Methods, and Purposes" *Journal of Genocide Research* 5, no. 1 (2003): 71, 76, <https://doi.org/10.1080/14623520305657>.

¹⁰ Tanweer Akram, "A Critical Evaluation of the ICJ Report on the Bangladesh Genocide," SSR, (April 16, 2007) 1, 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=981254 (accessed February 23, 2021).

¹¹ *ibid*.

¹² '*Bengalis*' are the members of an Indo-Aryan ethnic group who are native to the Bengal region that includes Bangladesh, and a few Indian States such as West Bengal, Tripura, and Assam's Barak Valley. Donald N. Wilbur, *Pakistan: Its People, Its Society, Its Culture* (New Haven: HRAF Press, 1964) 219.

¹³ Rudolph J. Rummel, *Statistics of Democide: Genocide and Mass Murder Since 1900* (Munster: LIT, 1998) 153.

¹⁴ *ibid*; See also Constitution of the People's Republic of Bangladesh, schedules 6 and 7.

is the 'Operation Liquidation' to kill the intellectuals, including professors and teachers, journalists, activists, doctors, artists, writers, engineers, civil servants, lawyers, etc.¹⁵ The Ministry of Liberation War of Bangladesh recently defined the 'intellectuals' who were killed during the 1971 war.¹⁶ The definition specifies that:

"Litterateurs, philosophers, scientists, artists, teachers, researchers, journalists, lawyers, physicians, engineers, architects, sculptors, government and non-government employees, politicians, social workers, cultural activists, musicians, and people involved in filmmaking, theatre and arts, who were killed by the Pakistani forces or went missing between March 25, 1971, and January 31, 1972, would be defined as martyred intellectuals."¹⁷

This paper analyses the killing of Bengali intellectuals during the 1971 Liberation War of Bangladesh from the perspective of the definition of genocide provided in the *Genocide Convention*. The objective is to determine whether the Pakistani military strategy of killing the Bengali intellectuals constitutes a genocidal policy under the auspices of the *Genocide Convention*.

This research has been conducted based on international legal instruments and documents, cases, international principles, scholarly articles and books, as well as various organisational reports. Following this introduction, this article briefly describes the historical background to the 1971 Bangladesh Liberation War. The next part explains and critically appraises the concept of genocide in international criminal law. Subsequently, the central part of the article analyses the killing of the Bengali intellectuals in light of the *Genocide Convention*. In the final part, the overall findings of this study are summed up.

BACKGROUND TO 1971 KILLING OF THE 'BENGALI' INTELLECTUALS

After the partition of British India in 1947, the Pakistan government began executing several discriminatory policies to control the economy, and ruling powers of East Pakistan.¹⁸ In the 1952 language movement, the Bengali politicians, intellectuals, nationalists, and university students expressed their disapproval against West Pakistan's 'one state language' policy to make 'Urdu' the only state language of

¹⁵ Anthony Mascarenhas, *The Rape of Bangla-Desh* (Delhi: Vikas Publications, 1972) 116-117; Mofidul Hoque, "Bangladesh 1971: A Forgotten Genocide," *The Daily Star*, March 4, 2013, <http://www.thedailystar.net/bangladesh-1971-a-forgotten-genocide-50941> (accessed February 23, 2021).

¹⁶ Mohiuddin Alamgir, "Martyred Intellectuals: Govt finalises definition," *The Daily Star*, February 11, 2021, <https://www.thedailystar.net/backpage/news/martyred-intellectuals-govt-finalises-definition-2042665> (accessed February 23, 2021).

¹⁷ *ibid.*

¹⁸ Akmam, "Atrocities against Humanity During the Liberation War in Bangladesh".

Pakistan.¹⁹ The Bengali people demanded to grant official status to 'Bangla' because most of the people of East Pakistan used to speak in this language.²⁰ This movement was the first stepping stone towards the independence of Bangladesh.

Before the 1971 Bangladesh Liberation War, the *Awami* League, a dominant political party of East Pakistan, won 167 seats out of 313 seats in the 1970 election of Pakistan and became the National Assembly's single majority party.²¹ However, West Pakistan refused to transfer power to the newly elected *Awami* League party.²² Also, the Pakistani military launched the 'Operation Searchlight' to kill primarily Bengali policemen, soldiers and military officers, intellectuals and East Pakistani students.²³ Following this attack, Bangabandhu Sheikh Mujibur Rahman declared the independence of Bangladesh on 26 March 1971 that spiked a full-scale war between East and West Pakistan.²⁴ After the nine-month war, Bangladesh obtained victory on 16 December 1971. However, the perpetrators killed an estimated 3 million Bengali people,²⁵ raped 0.2 – 0.4 million Bengali women, deported approximately 10 million people to the neighbouring country – India - and destroyed thousands of houses and properties.²⁶

During the war, the perpetrators implemented another operation called 'Operation Liquidation' to kill the Bengali intellectuals throughout the entire period of war.²⁷ In particular, the first attack on the intellectuals was conducted on the very night of 25 March 1971 when professors of universities, doctors, and political party activists were killed.²⁸ Again, on 14 December 1971, many Bengali teachers, doctors, engineers, physicians, lawyers, journalists, literature and artists were killed.²⁹ Rummel stipulates that:

¹⁹ Monsur Musa, "Politics of Language Planning in Pakistan and the Birth of a New State," *International Journal of the Sociology of Language*, no. 118 (1996): 63, 80, <https://doi.org/10.1515/ijsl.1996.118.63>.

²⁰ *ibid.*

²¹ Drong Andrio, "India's Role in the Emergence of Bangladesh as an Independent State," *Vestnik RUDN: International Relations* 16, no. 4 (December 2016): 736, 737, <https://doi.org/10.22363/2313-0660-2016-16-4-736-744>.

²² *ibid.*

²³ *ibid.*, 43.

²⁴ *ibid.*

²⁵ Anwar Ouassini, "Kill 3 Million and the Rest Will Eat of Our Hands: Genocide, Rape and the Bangladeshi War of Liberation," in *Genocide and Mass Violence in Asia*, ed. Frank Jacob (ed), (Berlin/Boston: De Gruyter Oldenbourg, 2019) 42.

²⁶ Archer K. Blood, *The Cruel Birth of Bangladesh: Memoirs of an American Diplomat* (Dhaka: University Press Limited, 2002) 62-63; Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1975) 81.

²⁷ Md. Pizuar Hossain, "Another Chapter in World History When Intellectuals were Targeted," *The Daily Star*, December 14, 2018, <http://www.the-dailystar.net/supplements/martyred-intellectuals-day-2017-another-chapter-world-history-when-intellectuals-were-targetted-1672981> (accessed February 24, 2021).

²⁸ Suzannah Linton, "Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation" *Criminal Law Forum* 21, no. 2 (June 2010): 3, 6, <https://doi.org/10.1007/S10609-010-9119-8>.

²⁹ Akmam, "Atrocities against Humanity During the Liberation War in Bangladesh," 550.

In 1971 the self-appointed President of Pakistan and Commander-in-Chief of the Army, General Agha Mohammed Yahya Khan and his top generals prepared a careful and systematic military, economic, and political operation in East Pakistan (now Bangladesh). They also planned to murder its Bengali intellectual, cultural, and political elite. They also planned to indiscriminately murder hundreds of thousands of its Hindus and drive the rest into India.³⁰

As a result of the plan of killing Bengali intellectuals as indicated in Rummel's statement, numerous intellectuals were kidnapped, blindfolded in their homes, and transported to *Mohammadpur* Physical Training College, known as *Al-Badar* [paramilitary force of Pakistani military] torture camp, where they were first physically tortured.³¹ Later on, they were transported to *Rayer Bazar* slaughterhouse and *Mirpur* graveyard where they all were brutally killed.³²

On 21 December 1971, the *Hindustan Times* reported that:

Ten senior Pakistani army officers were responsible for organising the recent murders of a large number of people, especially intellectuals, in Dacca, Mr. John Stonehouse, British Labour M.P, told PTI [Press Trust of India] in an interview here this morning (New Delhi, December 20). Mr. Stonehouse declined to name the officers but said they were of the ranks of Major- General, Brigadier, Colonel and Captain. He said during his visit to Dacca yesterday (December 19), he got the names of these Pakistani army officers who organised the murders, and members of 'Al-Badar', an extremist Muslim group who carried out this heinous crime just before the surrender of Pakistani forces in Dacca.³³

Another report of the *Hindustan Times*, published on 24 December 1971, states that 'The Bangladesh authorities have recovered a list of nearly 5,000 people in Dacca [Dhaka] City alone from the occupation forces. These persons were to be annihilated. The list included practically every single intellectual in the city.'³⁴

In December 1972, the Bangladesh government published an incomplete list of a total of 1,111 Bengali intellectuals that included 991 academics, 13 journalists, 49 physicians, 42 lawyers, and 16 writers who were killed across 19 districts of Bangladesh during the war.³⁵ Recently, on 13 December 2020, the Bangladesh

³⁰ Rummel, "*Statistics of Democide*," 151.

³¹ *ibid.*

³² *ibid.*

³³ Ministry of External Affairs, New Delhi, *Bangladesh: Bangladesh Documents* (1971) 572.

³⁴ *ibid.*, 573.

³⁵ Ershad Kamol, "Bangladesh to Define Martyred Intellectual, No Full List Yet," *The New Age*, December 13, 2020, <https://www.newagebd.net/article/124271/bangladesh-to-define-martyred-intellectual-no-full-list-yet> (accessed February 25, 2021).

government approved a list of 1,222 martyred intellectuals.³⁶ Various estimates suggest that about 80% of the Bengali intellectuals based in Dhaka city were exterminated.³⁷ Trivedi stated that the dead bodies of many intellectuals could not even be traced and the acts of killing them make it evident that the perpetrators intended to cripple the Bengali nation.³⁸

ANALYSING THE CONCEPT OF GENOCIDE

Lemkin's Definition of Genocide

The term 'genocide' was first formulated by Lemkin, a Polish Lawyer, in 1944 in his book entitled 'Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress.'³⁹ During WWII, Lemkin heard the 1941 speech of Winston Churchill where he indicated the prevailing situation of Europe as 'a crime without a name.'⁴⁰ He decided to find a proper term for this crime and he coined the term 'genocide' for the first time in his work in 1944.⁴¹ This term is derived from the Greek term '*genos*' - meaning race or tribe - and the Latin term '*cide*' - meaning killing.⁴² His idea behind the terminology was annihilating and destructing a nation by killing all of its members.⁴³ This destruction consists of extensive plans to dissolve the base and roots of a group by attacking individuals.⁴⁴

Lemkin's definition of genocide was based on the incidents of the Jewish Holocaust in WWII.⁴⁵ His first definition of genocide was as follows:

It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. Genocide is directed against the national group as an entity, and the actions

³⁶ Syed Samiul Basher Anik, "Govt Approves 1,222 Names of Martyred Intellectuals," *The Dhaka Tribune*, December 13, 2020, <https://www.dhakatribune.com/bangladesh/2020/12/13/govt-finalizes-list-of-1222-martyred-intellectuals-for-announcement> (accessed February 25, 2021).

³⁷ Akram, "Atrocities against Humanity During the Liberation War in Bangladesh," 550.

³⁸ Rabindra Nath Trivedi, *Ten Months in 1971* (1997) 620.

³⁹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* [Carnegie Endowment for International Peace, Division of International Law] (New York: Columbia University Press, 1944) 79.

⁴⁰ Katherine Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach," *Genocide Studies and Prevention: An International Journal* 5, No. 3 (December 2010): 239, 239, <https://digitalcommons.usf.edu/gsp/vol5/iss3/3>.

⁴¹ Raphael Lemkin, "Genocide as a Crime under International Law," *American Journal of International Law* 41, no. 1 (January 1947): 145, 146, <https://www.jstor.org/stable/i312053>.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Bettwy, "The Genocide Convention and Unprotected Groups," 168.

involved are directed against individuals, not in their individual capacity, but as a member of the national group.⁴⁶

Lemkin's idea was to save the 'human groups' from genocide.⁴⁷ In his writings, he referred to other groups of victims, for example, Poles, Gypsies and others who were targeted during WWII.⁴⁸ His priority was to save the victim groups from the perspective of perpetrators, who attacked the individuals for belonging to any particular group.⁴⁹ In his book, he also argued that 'genuine tradition' and 'genuine culture' are destroyed through the act of genocide.⁵⁰ Lemkin's objective behind defining genocide creates a space to argue that when perpetrators target the 'intellectuals' as a human group considering them an essential foundation and part of the life of other national groups, the military strategy of destroying this group can also constitute genocide.

Genocide Convention's Definition of Genocide

Lemkin's notion of genocide was the main root to articulate the 1948 *Genocide Convention*.⁵¹ The *travaux preparatoires* for drafting the Convention reflects what happened during the Jewish Holocaust.⁵² However, when UN General Assembly (GA) resolution 96 (I) codified the definition of genocide on 11 December 1946, it made a non-exhaustive list of protected groups so that all human groups can be protected from the perpetrators of genocide.⁵³ The resolution is widely accepted and is a source of customary law.⁵⁴ The *Ad Hoc* Committee defined the 'intent' in the definition as 'notion of premeditation.'⁵⁵ The drafters also declared that the primary purpose of this crime should be the destruction of 'human groups' valuable to the human race.⁵⁶

The Economic and Social Council (ECOSOC) of the UN prepared the draft of the *Genocide Convention*.⁵⁷ On 9 December 1948, the Convention was adopted by the GA Resolution 260 (III) A.⁵⁸ Article II of this Convention defines that:

⁴⁶ Lemkin, "Genocide as a Crime under International Law."

⁴⁷ Filip Strandberg Hassellind, "Groups Defined by Gender and the Genocide Convention" *Genocide Studies and Prevention: An International Journal* 14, no. 1 (2020): 61, 62, <https://doi.org/10.5038/1911-9933.14.1.1679>.

⁴⁸ Lemkin, "Genocide as a Crime under International Law," 147.

⁴⁹ *ibid.*

⁵⁰ Lemkin, "Axis Rule in Occupied Europe," 91.

⁵¹ UN ECOSOC, *Report of the Ad Hoc Committees on Genocide* (Report 5 April 1948) 10-11.

⁵² *ibid.*

⁵³ General Assembly Resolution 96(I), *The Crime of Genocide*, 55th session, UN Doc A/RES/96(I) (11 December 1946) 4-5.

⁵⁴ *ibid.*; William A Schabas, *Genocide in International Law: The Crimes of Crimes* (New York: Cambridge University Press, 2009) 56.

⁵⁵ *ibid.*, 5.

⁵⁶ *ibid.*

⁵⁷ Goldsmith, "The Issue of Intent in the Genocide Convention."

⁵⁸ *ibid.*; See also General Assembly Resolution 96(I) (n 53).

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

This definition is not free from criticism. It does not clearly state what sort of intent is required to constitute genocide.⁵⁹ From judicial precedents and views of various scholars, two approaches are seen to determine the 'intent', namely, *dolus specialis* and knowledge-based approach.⁶⁰

Dolus specialis refers to 'special intent' for committing genocide which means the perpetrator commits the apparent act to destroy a particular targeted group, either in whole or in part.⁶¹ In the *Draft Code of Crimes against the Peace and Security of Mankind* ('*Draft Code*'), the UN International Law Commission (ILC) provided that genocide needs a specific intent as regards the committed act.⁶² Jean-Paul Sarte stated that no perpetrators of genocidal actions need to have a thorough understanding of their actions.⁶³ In the *Darfur* case, the Commission stated that the *dolus specialis* could not be proved and hence no judgment in favour of genocide was decided.⁶⁴ In the *Krstić* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) summarised that the military activities which led establishing that they intended to permanently eradicate the Bosnian Muslim population constituted genocide.⁶⁵

According to Article 17(5) of the *Draft Code*, an individual is said to commit genocide only if the activity is conducted to destroy a targeted group in whole or in part, as such.⁶⁶ This 'as such' in the definition refers to the intent to destroy a group as a distinct entity.⁶⁷ Referring to 'knowledge-based approach', this intent can be realised

⁵⁹ Goldsmith, "The Issue of Intent in the Genocide Convention."

⁶⁰ *ibid*, 240-241.

⁶¹ *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), [498].

⁶² *Draft Code of Crimes against the Peace and Security of Mankind* 1996, adopted by the International Law Commission, 48th session, UN Doc. A/CN.4/L532 (1996), 10 ('*Draft Code*').

⁶³ Lawrence J LeBlanc, *The United States and the Genocide Convention* (Durham and London: Duke University Press, 1991) 51.

⁶⁴ *UN Report on Secretary General on the International Commission of Inquiry on Darfur*, Pursuant to Security Council Resolution 1564, 18 September 2004 (2005) 4, 161 ('UN Report on Secretary General').

⁶⁵ *Prosecutor v Radislav Krstić*, Case No. ICTY-95-10-619, Judgment (19 April 2004), [619].

⁶⁶ *Draft Code* (n 62) art 17(5).

⁶⁷ Jason Abrams, "Universal Jurisdiction: Myths, Realities and Prospects: The Atrocities in Cambodia and Kosovo: Observation on Codification of Genocide" *New Eng L Rev* 35, (2001): 303, 304-306.

from the knowledge of the perpetrator's action for destructing the targeted group.⁶⁸ In the case of *Kayishema*, the International Criminal Tribunal for Rwanda (ICTR) observed that if the perpetrators have the knowledge of destruction of the group, by others or by themselves, such actors are guilty of genocide.⁶⁹

Nexus between 'intent' and 'group'

The dispute remains unresolved as to what the drafters intended by 'intent to destroy' in the definition, but it is observed that the ICTY accepted the restrictive approach, *i.e.*, *dolus specialis*, whereas the ICTR focused more on the knowledge-based approach.⁷⁰ As per Article 30(1) of the *Rome Statute*,⁷¹ if a perpetrator has the knowledge of his activity and intends the consequence, he/she is criminally held liable. During the discussion regarding the *Draft Code*, the Greek delegates proposed that the judges should have the free space to decide case-by-case to find out if the intention for committing genocide is present or not.⁷² The France delegates proposed that the Convention should not limit the power of judges to figure out the intention of the perpetrator to destroy a 'group'.⁷³

Approaches to define the protected groups of genocide

The genocide definition articulates that only four groups are protected under the *Genocide Convention*.⁷⁴ To understand the reason behind protecting these groups only, exclusion of other groups, and plausibility for incorporating any other group, it is necessary to understand the *travaux préparatoires* behind the definition. Lemkin first proposed the crime of barbarity according to which perpetrators undergo the actions of extermination out of their hatreds toward a collective group for their race, religion, or social status.⁷⁵ From this point of view, it can be inferred that Lemkin did not aim at limiting the scope and concept of genocide to a selected number of groups only, but to construct this heinous crime as a criminal intent to permanently destroy a human group, which still gives the space for the inclusion of other groups.⁷⁶

The UNGA resolution 96(1) signifies that genocide means denial of the right to exist of entire human groups while under international law this crime is committed against

⁶⁸ Draft Code (n 62) art 17(10).

⁶⁹ *Clément Kayishema and Obed Ruzindana*, Case No ICTR-95-1-T, Judgment (21 May 1999), [91].

⁷⁰ Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (London and New York: Routledge, 2017) 83.

⁷¹ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 30(1).

⁷² *Discussion on the Draft of the Genocide Convention*, 92nd session, UN Doc. A/C. 6/SR 92 (1948).

⁷³ UN ECOSOC, *Summary Record of Thirteenth Meeting - Ad Hoc Committee on Genocide*, UN Doc. E/AC. 25/SR. 13 (1948).

⁷⁴ Genocide Convention (n 5); Scott Straus, "Contested meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide," *Journal of Genocide Research* 3, no. 3 (November 2001): 349, 365, <https://doi.org/10.1080/14623520120097189>.

⁷⁵ Lemkin, "Genocide as a Crime under International Law."

⁷⁶ Hassellind, "Groups Defined by Gender and the Genocide Convention."

racial, religious, political or any other group.⁷⁷ There is an argument that interpretation of this resolution shows 'other groups' can also be protected as *jus cogens* norm that forbids genocide.⁷⁸ The resolution requested the ECOSOC of the UN to draft the Convention, but later on, the ECOSOC requested the Secretariat's Human Rights Division to complete the drafting.⁷⁹ In the draft Convention, the Secretary-General excluded not only the 'political' and 'any other groups'⁸⁰ but also pointed out that the list of the protected groups was not to be counted as 'exhaustive.'⁸¹ The UNGA incorporated only four groups as protected groups in the definition since historically these four groups were targeted the most in genocides.⁸² As per Nersessian, the four protected groups may have been benefitted from the historical view of the Jewish Holocaust.⁸³ Chalk and Jonassohn expressed that the articles of the Convention are so restrictive that not even a single genocidal incident that happened from its adoption has been covered by it.⁸⁴

In the *Akayesu* case, the Hutu group was alleged to have committed genocidal acts against the Tutsi group in Rwanda.⁸⁵ The Tribunal used an objective view as the Belgian colonisers used identity cards to determine ethnics and the Tutsi group was issued ethnic cards in 1994.⁸⁶ The Tribunal considered them as a separate 'ethnic group' even though they had many similarities with the Hutu population, a determined ethnic group.⁸⁷ It was established in the judgment that from the *travaux preparatoires* of the *Genocide Convention*, a targeted group means targeting 'stable and permanent groups' that can be determined by birth.⁸⁸ This approach of the Trial Chamber means having common characteristics among the four protected groups does not provide any challenge in the case of members, who belong to that group by birth, *i.e.*, automatic membership.⁸⁹

⁷⁷ General Assembly Resolution 96(I), "The Crime of Genocide."

⁷⁸ Hassellind, "Groups Defined by Gender and the Genocide Convention," 61.

⁷⁹ UN ECOSOC Resolution 47 (IV), *Crime of Genocide*, UN Doc E/325 (28 March 1947) 5-6.

⁸⁰ UN ECOSOC Resolution 77(V), *Crime of Genocide*, UN Doc A/362 (6 August 1947) 9.

⁸¹ UN Secretariat Draft, *First Draft of the Genocide Convention*, UN Doc. E/447 (17 June 1947) 11.

⁸² Matthew Lippman, "Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium," *Houston Journal of International Law* 23, no. 3 (2001): 475, 476, <http://www.hjil.org/articles/hjil-23-3-lippman>.

⁸³ David L Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010) 62.

⁸⁴ Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide* (New Haven and London: Yale University Press, 1990) 11.

⁸⁵ *Akayesu*, 6.

⁸⁶ *ibid*, 702.

⁸⁷ William A. Schabas, "Groups Protected by The Genocide Convention: Conflicting Interpretations from The International Criminal Tribunal for Rwanda," *ILSA Journal of International & Comparative Law* 6, no. 2(2000): 375, 378, <https://nsuworks.nova.edu/ilsajournal/vol6/iss2/10>; G. Prunier, *The Rwanda Crisis, 1959-1994: History of A Genocide* (London: Hurst Publishers, 1995) - Rwandan Tutsi were descendants of Nilotic herders on the other hand Rwandan Hutus came from the Bantu origin of South and Central Africa.

⁸⁸ UN General Assembly, *Summary Records of the Meetings of the Sixth Committee*, (21 September - 10 December 1948) 19-21.

⁸⁹ Lemkin, "Genocide as a Crime under International Law."

For the first time, the Trial Chamber raised the question of whether Article 2 of the *Genocide Convention* exclusively limits the protected groups.⁹⁰ As a result, it would be impossible to punish the perpetrators for the physical destruction of any other groups where genocidal actions are clear.⁹¹ According to the Trial Chamber, the drafter's objective to protect and secure a 'stable and permanent group' should be respected.⁹² By applying the concept of the stable and permanent group, the Tribunal included the victim Tutsi group as a separate ethnic group even though they had similarities with the Hutu group – perpetrator group.⁹³ However, it was criticised on the point that if drafters wanted to include 'stable and protected groups', they could have incorporated it in the definition.⁹⁴

The jurisprudence behind such an approach was to expand the section of protected groups in the Convention with 'everyday changing reality.'⁹⁵ Later, in the case of *Augusto Pinochet*, the Spanish Appeal Court stated that genocide should also be seen in social terms and does not necessarily need any criminal law definition.⁹⁶ Many scholars have also suggested introducing a list of new victim categories depending on 'everyday changing reality' under the international customary law.⁹⁷

In the *Kayishema* case, the ICTR showed a different approach to point out the special intent of committing genocide.⁹⁸ The Tribunal supported the subjective approach and expressed that if the members of a group do not share a common language or culture, they can still belong to a particular group if either the victim or perpetrator considers the group 'as such.'⁹⁹ Schabas opined that the definition of genocide needs more specified *actus rea* and an 'objective approach' to identify the members under the protected groups.¹⁰⁰

In the *Jelisić* case, the ICTY accepted the 'subjective approach' to identify if the Bosnian Muslims fall under the four protected groups of genocide definition since the Prosecution specified them as 'Bosnian Muslim People.'¹⁰¹ The Trial Chamber declared that drafters intended to limit the areas of the Convention and protect stable

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ Nersessian, "*Genocide and Political Groups.*"

⁹⁴ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 32.

⁹⁵ Hassellind, "'Groups Defined by Gender and the Genocide Convention,'" 75.

⁹⁶ Reed Brody and Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Boston, Mass: Kluwer Law International, 2000) 100.

⁹⁷ Beth Van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot," *Yale Law Journal* 106, no. 7 (May 1997): 2259, 2277, <http://dx.doi.org/10.4324/9781351157568-5>.

⁹⁸ *Kayishema.*

⁹⁹ *ibid.*, 98.

¹⁰⁰ Schabas, "Groups Protected by The Genocide Convention," 384.

¹⁰¹ *Prosecutor v Goran Jelisić*, Case No ICTY-95-10-A, Judgment (14 December 1999), [70].

groups from an objective view.¹⁰² The Trial Chamber also talked about the positive and negative approaches,¹⁰³ which were, however, denied by another ICTY Trial Chamber.¹⁰⁴ The most crucial fact is that the Trial Chamber stated that it is not inconsistent with the intention of the Convention to consider that the excluded groups are tarnished by perpetrators.¹⁰⁵

Defining the protected groups of genocide

Even after more than a half-century since the 1948 *Genocide Convention*, no exact definitions of the protected groups have been provided by the legislators,¹⁰⁶ nor any certain characteristics were ever discussed for selecting these four groups only.¹⁰⁷ The *Genocide Convention* was first applied in the *Akayesu* case in 1998, after fifty years of its codification and until this time, it was thought to be a dead instrument.¹⁰⁸ Concerning the protected groups, it is now evident that their characteristics change with sociological, technological and scientific developments.¹⁰⁹ It seems that the drafters purposely wanted the State Parties to the Convention to interpret the definition of protected groups.¹¹⁰

In the *Akayesu* case, for the first time, the ICTR tried to define these four protected groups from an objective point of view.¹¹¹ The ICTR defined 'national group' as a group of people sharing common citizenship.¹¹² It mainly focused on the definition given in the *Nottebohm* case,¹¹³ which defined nationality based on the person and state relationship. Nevertheless, Lemkin's referred to the members of the national group as contributors, based upon well-developed national psychology.¹¹⁴

'Ethnic group' was defined as a group of people who share similar language and same physical traits and culture.¹¹⁵ However, Lemkin related nationality with culture and tradition to define ethnicity.¹¹⁶ This inclusion was granted with eleven abstentions and only eighteen to seventeen votes because this idea of ethnicity is believed to be developed with time.¹¹⁷

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *Prosecutor v Milonir Stakić*, Case No. ICTY-97-24-T, Judgment (31 July 2003), [512].

¹⁰⁵ *Jelisić*.

¹⁰⁶ Carola Lingaas, "Defining the Protected Groups of Genocide through the Case Law of International Courts," International Crime Database (December 2015): 1, 4.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*; *Akayesu*.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*, 5.

¹¹² *Akayesu*, 512.

¹¹³ *Nottebohm case (Liechtenstein v Guatemala)*, ICJ Report, Judgment (6 April 1955), [22].

¹¹⁴ Lemkin, 'Axis Rule in Occupied Europe,' 79-80.

¹¹⁵ *Akayesu*, 513.

¹¹⁶ Lingaas, "Defining the Protected Groups of Genocide," 6.

¹¹⁷ Eric D Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton: Princeton University Press, 2003) 17.

The ICTR defined a 'religious group' as a group of people sharing the same religion and method of worship.¹¹⁸ This group was incorporated for the reason that it is more likely to be a permanent and stable group than a political group.¹¹⁹ Therefore, from this point, it can be noted that a religious group does not have to be a national group, rather it must be of a long and stable manner.¹²⁰ It is immaterial whether this belief evolves from a particular tradition or based on a 'single world religion'.¹²¹

The 'racial group' was defined by the ICTR as a group of members having similar physical traits mostly hereditary and is commonly recognised through the geographical region, despite differences of their language, culture, nation, or religious identity.¹²² Though understanding the term 'racial' was parallel to the other three groups, it was not a challenge in 1948 whereas now it has become a challenge with time.¹²³ At present, with the technological development throughout years, the DNA coding confirms that all human races are biologically the same.¹²⁴

Stable and permanent nature of groups

In the *Akayesu* case¹²⁵ the tribunal meant, by referring to a 'stable and permanent group', that individuals by birth automatically belong to these groups and are not debatable, which could only define Tutsi as ethnics.¹²⁶ As per the ICTR, this was the reason why political and other economic groups were excluded from the definition.¹²⁷ However, this concept creates more confusion as the status of these four protected groups change, *i.e.*, they are neither stable nor permanent.¹²⁸

In the case of a 'national group', nationality can be changed by crossing borders, cessations, or succession of states.¹²⁹ Race has the most progressive development depending on the changes in society.¹³⁰ Religion is a personal conception, which an individual has the liberty to change.¹³¹ On the other hand, the political group is

¹¹⁸ *Akayesu*, 515.

¹¹⁹ Claus Krieb, "The Crime of genocide under International Law" *INT'L CRIM. L. REV* 6, no. 4 (2006): 461, 479.

¹²⁰ *ibid.*

¹²¹ *ibid.*, 469.

¹²² *Akayesu*, 516.

¹²³ Schabas, 381.

¹²⁴ Michelle Brattain, "Race, Racism, and Antiracism: UNESCO and the Politics of Presenting Science to the Postwar Public," *The American Historical Review* 112, no. 5 (December 2007): 1386, 1393, <https://doi.org/10.1086/ahr.112.5.1386>.

¹²⁵ *Akayesu*.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Schabas, "Groups Protected by The Genocide Convention," 382.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ Agnieszka Szpak, "National, Ethnic, Racial and Religious Groups Protected against Genocide in the Jurisprudence of the Ad Hoc International Criminal Tribunals," *European Journal of International Law* 23, no. 1 (2012): 155, 160, <https://doi.org/10.1093/ejil/chs002>.

argued to be excluded due to its overlapping concept with nationality.¹³² Moreover, after this *Akayesu* case, no state so far has ever taken the approach of a 'stable and permanent group' to determine members of any group.¹³³

Acts of Genocide

According to Article 2 of the *Genocide Convention*, five different acts form the crime of genocide. Firstly, as regards 'killing members of the group', the ICTY determined in the *Brdjanin* case that killing has to be directed towards the four protected groups.¹³⁴ In the *Gacumbitsi* case, the ICTR held that it has to be established that the perpetrator participated, ordered or abetted the killing to destroy the group as such, in whole or in part, and even killing of one member suffices the act to be genocide.¹³⁵ Secondly, in terms of 'causing serious bodily or mental harm to members of group', the ICTR held in the *Seromba* case that to constitute genocide, the inflicted harm, bodily or mental, should threaten the destruction of a group.¹³⁶ Moreover, mental harm means inflicting threat, terror or intimidation.¹³⁷ In the *Blagojevic* case, the ICTY determined that for Article 4 of the ICTY Statute, serious bodily or mental harm should be evaluated based on each case with the context of circumstances of the case.¹³⁸

Thirdly, about 'deliberately inflicting (on the group) conditions of life calculated to bring about its physical destruction in whole or in part', in the *Stakic* case, the ICTY held that act of genocide means the group members are not killed instantly by the perpetrators.¹³⁹ In the *Kayishema and Ruzindana* case, the ICTR held that expulsion from home, excessive work; unhygienic conditions and lack of medical facilities are also acts of genocide.¹⁴⁰ Additionally, in respect of 'imposing measures intended to prevent births within the group', the ICTR held in both the *Akayesu* case¹⁴¹ and the *Kayishema* case that this genocidal act includes sexual mutation, sterilisation, forcefully controlling birth, separating sexes and prohibiting marriages.¹⁴² The Chamber also pointed that rape or the threat to not procreate also falls under this act.¹⁴³ Lastly, in the case of 'forcibly transferring children of the group to another group', in both the *Akayesu* case and the *Kayishema* case, the ICTR held that the purpose of this act is not forcible transfer alone, but also to traumatise them which

¹³² *ibid.*

¹³³ *ibid.*, 179.

¹³⁴ *Prosecutor v Radoslav Brdjanin*, Case No. IT-99-36, Judgment (1 September 2004), [689].

¹³⁵ *Prosecutor v Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment (17 June 2004), [632].

¹³⁶ *Prosecutor v Athanase Seromba*, Case No. ICTR-2001-66, Appeal Chamber (12 March 2008), [46].

¹³⁷ *ibid.*

¹³⁸ *Prosecutor v Vidoje Blagojevic and Dragon Jokic*, Case No. IT-02-60, Judgment (17 January 2005), [646].

¹³⁹ *Stakic*, 518.

¹⁴⁰ *Kayishema*, 115-116.

¹⁴¹ *Akayesu*, 507-508.

¹⁴² *ibid.*; *Kayishema*, 117.

¹⁴³ *ibid.*, 86.

would ultimately cause the transfer of one group's children forcibly to another group.¹⁴⁴

DISCUSSION

The killing of intellectuals is often addressed as a crime against humanity since they do not generally fall into the protected groups under the definition of genocide. Thereby, Michael Nicholson, a British Journalist, first coined the term 'eliticide' or 'elitocide', which means 'the killing of the educated or leadership of an ethnic group.'¹⁴⁵ He argues that the elites are targeted for their identity.¹⁴⁶ The essential characteristics for eliticide are such as the ethno-hierarchical identification of victims, the intention of the perpetrators behind targeting them, and the socio-political result.¹⁴⁷ Eliticide is a growing concept and has not been internationally accepted. Moreover, this term also features characteristics similar to genocide.¹⁴⁸

By 'eliticide', intelligentsias of ethnics are only meant where it is evident that intelligentsias from different professions irrespective of nationality, ethnicity, race or religion are targeted in genocide. Therefore, it is more suitable to consider the intellectuals of a country within the protected group. Regarding this, Fournet opined that genocide and crimes against humanity are 'two distinct legal qualifications' and calling genocide as the crime against humanity is simply an 'aberration and absurdity.'¹⁴⁹ Genocide is a greater offence whose shock and stigma has a long-lasting impact.¹⁵⁰ Hence, genocide should not be covered under the veil of crimes against humanity or any other crime.

This argument attracts the approaches of the International Crimes Tribunal of Bangladesh (ICT-BD) regarding killing of the Bengali intellectuals during the 1971 Bangladesh Liberation War. The ICT-BD was established under the *International Crimes (Tribunals) Act 1973 (ICT Act)* that defines genocide as follows:

Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:

- (i) killing members of the group;
- (ii) causing serious bodily or mental harm to members of the group;

¹⁴⁴ Akayesu, 509; Kayishema, 118.

¹⁴⁵ Leona Toker, "Literary Reflections of Eliticide: Georgy Demidov and Precursors," *Verbeia* 3, (2019): 1, 84.

¹⁴⁶ *ibid*; Pakulsi, "Violence and the State," 43.

¹⁴⁷ *ibid*.

¹⁴⁸ Adam Jones, "Why Gendercide? Why Root-and-Branch? A Comparison of the Vendee Uprising of 1793-94 and the Bosnian War of the 1990s," *Journal of Genocide Research* 8, no. 1 (August 2006): 9, 23, <https://doi.org/10.1080/14623520600552835>.

¹⁴⁹ Fournet, "The Crime of Destruction and the Law of Genocide," 50.

¹⁵⁰ *UN Report on Secretary General*.

- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent births within the group;
- (v) forcibly transferring children of the group to another group.¹⁵¹

An analogy can be drawn between the definitions of genocide provided in the 1948 *Genocide Convention* and the 1973 *ICT Act* because both the definitions are quite identical. The only difference lies in the inclusion of the 'political group' in addition to the national, religious, ethnical and racial groups in the *ICT Act's* definition.

The issue of killing the Bengali intellectuals was distinctively raised before the ICT-BD in the trial of the local collaborators who, among other things, assisted, or abetted, or facilitated the Pakistani military to commit crimes against the Bengali intellectuals during the 1971 war. In the case concerning *Ali Ahsan Muhammad Mujahid*, the Prosecutors tried to prove, beyond a reasonable doubt, that a particular group of intelligentsias were kidnapped by the perpetrators with full intent to kill them.¹⁵² In the case concerning *Ashrafuzzaman Khan*, it was stipulated that the incident of intellectual killing should be recognized as 'crimes of serious gravity', which was highly harmful for human civilisation.¹⁵³ Besides, in the case concerning *Motiur Rahman Nizami*,¹⁵⁴ the Prosecutors presented that the operations launched against the intellectuals on 25 March 1971 and afterwards can be considered attacks against the pro-independence group of Bengali people.¹⁵⁵ However, the killing of the intellectuals was declared a 'crime against humanity' in all the verdicts of the ICT-BD.

During the 1971 Liberation War of Bangladesh, the killing of the intellectuals involved a separate and maybe the most horrific planning at the time while the perpetrators already knew that they would lose the battle.¹⁵⁶ The perpetrators executed their plan to destroy the intellectuals so that the country cannot be rebuilt again. All the individuals listed as 'martyred intellectuals' in Bangladesh were not necessarily front-line soldiers, but they were separately targeted from other members of their professions. It is seen from the incidents of killing the Bengali intellectuals that the people who were targeted under a common campaign were mostly the educated people.

From the aforementioned discussion, three arguments can be made from the perspective of the incidents of killing the Bengali intellectuals and the definition of

¹⁵¹ International Crimes (Tribunals) Act 1973, s 3(2)(b).

¹⁵² *Chief Prosecutor v Ali Ahsan Muhammad Mujahid*, ICT-BD (IV) of 2012, [242, 459-460 and 487].

¹⁵³ *Chief Prosecutor v Ashrafuzzaman Khan and Chowdhury Mueen Uddin*, ICT-BD (I) of 2013, [449].

¹⁵⁴ *Chief Prosecutor v Motiur Rahman Nizami*, ICT-BD (III) of 2011, [77].

¹⁵⁵ *ibid*, 285.

¹⁵⁶ Professor Rafiqul Islam, "Massacre of the Bengali Intellectuals in 1971," *The Dhaka Tribune*, December 14, 2019, <https://www.dhakatribune.com/magazine/arts-letters/2019/12/14/massacre-of-the-bengali-intellectuals-in-1971> (accessed March 2, 2021).

genocide provided in the *Genocide Convention*. The Bengali intellectuals can be defined as a group of people who had the potential to offer leadership in Bangladesh and were educated and above-average people with regard to their knowledge and wisdom. Some of them used to promote human rights and human dignity and contribute to speak against all kinds of exploitation, injustice, and atrocities committed by the Pakistani authorities. They aimed to ensure a fair and better society for the present and future generations. Again, their intellectual capacity was the main weapon to obstruct and fight against the perpetrators, exploiters and corrupts in the society. In addition, the Bengali intellectuals were targeted as a distinct group, as they were ultimately working and trying to secure the national life of the state. In other words, the perpetrators carried out the operation of killing the Bengali intellectuals particularly distinguishing them from other groups. Therefore, whether one adopts the *dolus specials* approach or knowledge-based approach, or subjective or objective view, the intent to attack this group for its permanent destruction is clear.

Although the definition of genocide given in the *Genocide Convention* was a result of WWII, the principal argument of this study for recognising intellectuals within the protected group is that the perpetrators attack them separately from other groups. Furthermore, this research shows that even special campaigns and operations are executed to kill the intellectuals only. Thus, the following arguments attempt to make it clear why the intellectuals should fall within the ambit of any protected group based on the existing criticisms and developments of the definition of genocide.

To begin with, the four protected groups have no internationally accepted definition. The members of national, religious, ethnical, and racial groups have a historical record of being targets of genocide, as well as the intellectuals. Moreover, they also have overlapping situations where they cannot be distinguished. On the other hand, the history of the Bangladesh Liberation War exposes that it is easy to distinguish the intellectuals of a country, and they do not arguably have any overlapping or growing concept.

Second, one common feature found in all the four protected groups is either they share common citizenship, religious belief, similar hereditary physical traits, or they have common language and culture. In the case of Bangladesh, the targeted intellectuals were abducted, deported, tortured, bodily and mental harmed, and finally killed. These acts are explicit genocidal acts under Article 2 of the 1948 *Genocide Convention*. Moreover, such actions were separately imposed on this group for their permanent annihilation.

Last, intellectuals cannot be referred to be a 'stable and permanent group', or more specifically, a permanent group. Nevertheless, this concept is still debatable, as discussed in the *Akayesu* case of the ICTR. This article argues that as the perpetrators target the individuals because they consider them to belong to the

intellectual group, the intellectuals ought to be protected under the Convention. The ICTY in the *Jelisić* case held that defining the protected groups from the objective and the scientific view is nothing but a 'perilous exercise', rather targeted groups shall be classified depending upon the particular context of each case.¹⁵⁷ One might argue that the intellectuals can be included in the political group which was wilfully excluded by the drafters of the *Genocide Convention*. However, a politician can be an intellectual, but all intellectuals need not be politicians. Moreover, the political or economic group has no exact definition, but intellectuals can be defined from the historical background within the national, political, or economic groups. The restrictive approach towards this definition has overlooked intellectuals who have often been vulnerable to genocide from the beginning as much as the other protected groups were.

The arguments above should be applicable in the case of the killing of the Bengali intellectuals as the execution of the 'Operation Liquidation' by the perpetrators of the Bangladesh Liberation War resulted in their partial destruction. Remarkably, the perpetrators targeted them as a separate group to kill them and make Bangladesh talentless. However, due to the restrictive approach of the definition of genocide provided in the *Genocide Convention*, which is also adopted in the 1973 ICT Act, except for including the 'political group' in the later definition, the ICT-BD's verdicts do not offer that the concerned operation constitutes genocide.

CONCLUSION

This article finds that the *travaux preparatoires* of the 1948 *Genocide Convention* broadened the scope to interpret the definition of genocide.¹⁵⁸ As there is no specific definition of the four protected groups of genocide such as national, religious, ethnical, and racial groups, various definitions have been developed by the judicial interpretations. The definitions of these groups given by the ICTR in the *Akayesu* case have received the most attention. The ICTR defined 'national group' as a group of people sharing common citizenship and 'ethnic group' as a group of people who share similar language and same physical traits and culture. In addition, a 'religious group' includes a group of people sharing same religion and method of worship, and 'racial group' means a group of members having similar physical traits mostly hereditary. Accordingly, this paper suggests that the evolving interpretations of the protected groups of crime of genocide can consider the issue of killing intellectuals, who are targeted as a distinct group by the perpetrators.

From the historical analysis of the killing of Bengali intellectuals through implementing the 'Operation Liquidation' during the 1971 Bangladesh Liberation War, it appears that the intellectuals are targeted and killed because they are the potential leaders and/or contributors to reshaping a nation. This distinct identity

¹⁵⁷ *Jelisić*.

¹⁵⁸ Bettwy, "The Genocide Convention and Unprotected Groups," 171.

made them the victims of genocide in 1971 because the perpetrators believed that their destruction would weaken the infrastructure of the emerging country. Therefore, the strategy of killing the intellectuals as a weapon of destroying the brains of a country can be regarded as genocide under Article 2 of the *Genocide Convention*.

It should be mentioned that the prohibition of genocide is now a *jus cogens* norm.¹⁵⁹ Hence, in the case of killing intellectuals, although it does not necessarily go unpunished and may constitute crimes against humanity under international criminal law, the development of the elements of the four protected groups integrated into the definition of genocide creates a scope to establish it as the crime of genocide. In 2014, Ambassador Dr. William Soto, Global Embassy of Activists for Peace, proposed in Justice for Peace campaign in the Paraguay Supreme Court for some amendments in the *Genocide Convention*.¹⁶⁰ He suggested that with the dynamic transformation of time, changes should be brought in the *Genocide Convention* from the perspective of different groups that have been overlooked over time.¹⁶¹

Nevertheless, this article suggests that it is essential to determine how the perpetrators in each case have made the intellectuals their target and what result is generated based on their acts. If their actions demonstrate their intention to destroy the intellectual group, in whole or in part, such actions can be considered genocide under the *Genocide Convention*. Accordingly, this article concludes that execution of the 'Operation Liquidation' by the perpetrators during the 1971 Liberation War of Bangladesh amounts to genocide against the Bengali intellectuals.

¹⁵⁹ *Advisory Opinion on Reservations to Convention on Prevention and Punishment of Crime of Genocide*, ICJ Report (28 May 1951) 15-23.

¹⁶⁰ "Amendment to the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute," a proposal of the Global Embassy of Activists for Peace at Justice for Peace campaign in the Supreme Court of Justice, Paraguay, March 18, 2014, <http://embajadamundialdeactivistasporlapaz.com/en/press/news/amendment-convention-prevention-and-punishment-crime-genocide-and-rome-statute> (accessed March 4, 2021).

¹⁶¹ *ibid.*

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