2012

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Joshua Marcus

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Recommended Citation

Available at: https://ir.lib.uwo.ca/undergradtjr/vol3/iss1/2

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Intent to Destroy: A Look at the Legal Ramifications of Intent in Genocide

Joshua Marcus

Abstract
This paper will outline the debate that has arisen in international law due to the requirement for an action to have been “committed with intent to destroy, in whole or in part, a... group, as such” to be considered an act of genocide. It seeks to summarize and define the usage of ‘intent’ as it relates to the UN Convention on the Prevention and Punishment of Genocide and determine how international courts can adequately determine the intention of accused genocidaires. An examination of the two principal approaches to establishing intent, as required in the prosecution of these cases, will be conducted. The structure-based and knowledge-based approaches to understanding genocidal intent will be evaluated, with the preference given to the latter as it allows for an increased ability for courts to determine the culpability of the accused and a more effective prosecution of genocidaires.

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) sought to prevent a repetition of the atrocities which took place during World War II by defining and codifying and defining the crime of genocide in international law. From the early biblical era to modern-day Sudan, this heinous crime has plagued the world for centuries in almost every corner of the globe. After much debate and discourse, the then-newly formed institution of the United Nations agreed to a workable definition of
'genocide' and undertook “to prevent and to punish” further acts of this atrocious nature. The core of the resolution lay in Article II, which defined the crime itself. The resolution states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.¹

Though controversial, this definition continues to inform the legal framework behind genocide legislation. This paper will analyze the debate that has arisen in international law because of the requirement for an action to have been “committed with intent to destroy, in whole or in part, a… group, as such” to be considered an act of genocide. This paper will begin by outlining and defining what the usage of ‘intent’ refers to within the Convention and how international courts can adequately determine the intention of accused genocidaires. Afterwards, an examination of the two principal approaches to establishing intent, as required in the prosecution of such cases, will be conducted. The first is the ‘structure-based approach,’ which requires a conscious desire on the part of the accused to destroy the group in question. The second is the ‘knowledge-based approach,’ which instead qualifies intention as whether the individual knew, or ought to have known, that their actions would ultimately lead to the destruction of the group. Preference will be given to the latter approach, as it allows the courts to more easily determine the culpability and prosecution of genocidaires.

Intent is a mental element of a crime that is exceptionally difficult to prove in law, particularly when it is analyzed within the context of an already complicated international-legal framework. Before addressing the debate surrounding the notion of intent, a proper understanding of the term must be established. The most common interpretation of the term, as determined by jurisprudence,

is to consider intent in the context of genocide as a *dolus specialis* or special intent. The landmark case in which this term was first employed was in the trial of Jean-Paul Akayesu, a former mayor of a town in Rwanda, who was charged with the crime of genocide by the International Criminal Tribunal for Rwanda (ICTR) in the mid 1990s. The ICTR defined intent as “the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.”\(^2\) In other words, the specificity of the intention of the accused must be to "destroy, in whole or in part, a... group, as such" and not to kill in a seemingly random fashion.

The use of specific intent in law is not uncommon. As Otto Triffterer illustrates, in order for an offense to be unlawful, an action requires, in addition to an *actus reus*, the equivalent *mens rea*.\(^3\) However, in cases such as genocide, the crime is punishable only if the offender acts with an additional specific intent.\(^4\) This concept of specific intent is not exclusive to international law; it is commonly found in US law in addition to *mens rea* in cases of crimes that require more serious prosecution such as ‘assault with a weapon,’ and ‘assault with intent to rape.’

Proponents of this interpretation of intent argue that specific intent is necessary in distinguishing the crime of genocide from other international crimes, such as crimes against humanity, confirming genocide as is considered to be the more serious of the two.\(^5\)

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\(^3\) *Actus reus* is defined as "the voluntary and wrongful act or omission that constitutes the physical components of a crime. Because a person cannot be punished for bad thoughts alone, there can be no criminal liability without actus reus." *Webster's New World Law Dictionary*, s.v. "Actus Reus." *Mens rea* is defined as "the defendant’s guilty state of mind, as an element in proving the crime with which he or she is charged." *Webster's New World Law Dictionary*, s.v. "Mens Rea."


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However, as Katherine Goldsmith points out, this is conceptual separation and is not necessarily accurate. She argues that genocide is in itself a crime against humanity as evidenced in the Kayishema and Ruzindana Judgements of the ICTR. These judgments state that “the definition of the crime of genocide was based upon that of crimes against humanity,” which the Rome statute defines as “acts…committed as part of a widespread or systematic attack directed against any civilian population.” Special intent, then, can still be used to distinguish between genocide and other charges, dependent upon the specific intent of the genocidaire. To illustrate, if an accused individual is shown to have killed, or intended to kill one thousand civilians selected at random, he could theoretically be charged with a crime against humanity. However, if it turns out that these thousand civilians were all members of a particular religious group, and the specific intent involving the destruction of a particular group can be determined, this can lead to a charge of genocide instead. Practically, this implies that the accused may (as is often the case) intend for more destruction than can be reasonably accomplished. A parallel drawn by professor Kai Ambos “would be a white racist who intends to destroy the group of black people in a large city but, acting alone, will only be able to kill a few members of this group.” At face value, the specific intent exists, and the racist’s actions effectively fit into the definition of genocide, despite the fact that he may have only been successful in killing one or two members of the racial group. But in reality, this example is not what most consider to be a crime of genocide and the racist would likely be charged with a lesser hate crime instead. Needless to say, the complexities of adequately defining the specific intent that is required for the charge of genocide have further complicated the prosecution of the crime.

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6 Ibid., 250.
8 Ambos, 835.
One of the most problematic facets of including ‘intent’ in the definition of genocide is that in addition to defining intent, the courts need to further determine whether the actions of the accused fit into the convoluted description of the requirement. In most cases, governments, groups, and individuals accused of genocide are not explicit in their intentions. Without direct evidence, it is up to the courts to determine the intention of the accused. The Akayesu trial sought not only to define specific intent as it is required to fulfill the crime of genocide, but also to discover how we can determine the intent of the accused in cases where it may be difficult to do so. The trial chamber noted that intent is a mental factor that is hard to determine without a confession or other direct evidence. For this reason, the chamber ruled that courts could infer intention based on a number of presumptions of facts. They stated:

…it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.⁹

Given this precedent, the prosecution in cases related to genocide is able to draw upon facts such as the use of derogatory language towards the targeted group, the extent of injuries and the weapons used in order to demonstrate the sufficient specific intent required.¹⁰

Rather than providing a clear, legal precedent for prosecuting genocide, the Akayesu trial and its requirement of demonstrating

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¹⁰ Ibid., 288.
specific intent has undoubtedly led to further scholastic debate in terms of the many accompanying legal problems that needed to be addressed. It has been argued that the requirement of specific intent has allowed many *genocidaires* to escape conviction for the crime. Goldsmith cites the International Tribunal for the former Yugoslavia (ICTY) as an example in which the confusing definition of specific intent, as it applies to genocide, “has allowed people who have given direct orders to commit genocide, and keenly participated in the genocide of Bosnian Muslim men, such as [Radislav] Krstic…and most recently Drago Nikolic…to be convicted of the lesser offense of ‘aiding and abetting’ genocide.”

To many, requiring specific intent seemed unsatisfactory when it came to adequately prosecuting the crime. In response, the scholastic community has focused their attention on two prominent approaches of addressing the legal issues surrounding intent in genocide: a ‘structure-based approach,’ which focuses on the intended purpose and desire of each individual as they contribute to the genocide, and a ‘knowledge-based approach’ which emphasizes an individual’s knowledge of the effects of his/her actions and how they affect the genocide as a whole.

The structure-based approach towards prosecuting the crime of genocide (commonly referred to as the purpose-based approach) builds upon the requirement of special intent in determining the intention of the accused. Mathilde van Haren best defines the methodology in her report on the Darfur Commission, which took a structure-based approach to determining the specific intent of the accused genocidaires. She states, “The Commission seems to derive the requirement that the perpetrator must have *conscious desire* for the destruction of a group from its assertion that the intent to destroy in whole or in part a protected group is an aggravated criminal intention or dolus specialis [emphasis added].”

In other words, by taking a structure-based approach, the focus of determining the specific intent is on proving that the accused *consciously desired* the destruction of the

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11 Goldsmith, 244.
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group. This element of desire thereby allows for a workable definition of the specific intent that is required for a crime to be considered genocide.

To illustrate, imagine two soldiers fighting for the same side in a civil war. Each soldier shoots exactly fifty men using the same gun, they are both faced with the same political turmoil, and each of them is following the same orders. The only difference between them is that one man is fighting out of choice and hatred of the other side, while the other man is fighting out of necessity, possibly because of forced conscription. Genocidal guilt would be determined based on the level of each man’s conscious desire to destroy the other group as a whole, meaning one would be guilty of genocide and the other would not.

We see this application of the term ‘intent’ in past rulings on the understanding of Article II, most prominently in the interpretation of the United States’ Senate Committee on Foreign Relations. The Committee’s understanding states that “basic to any charge of genocide must be the intent to destroy an entire group because of the fact that it is a certain national, ethnical, racial, or religious group, in such manner as to affect a substantial part of the group.” Rather than intending to destroy the group “in whole, or in part” as outlined in the UNCG, the committee has defined the dolus specialis as desiring and intending to destroy the entire group. Whether or not this is successful is a moot point as far as initial intention is concerned.

This approach is perhaps the most literal interpretation of intent as it applies in Article II of the UNCG, given that it distinguishes genocide from other international crimes based on the perpetrator’s specific intent. However, the structure-based approach has certain fundamental flaws, the most prominent being that it gives low-level perpetrators an ‘easy out.’ By simply pleading ‘not guilty’ on account of following orders, culprits can often be acquitted of the

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charge of genocide based upon their individual lack of desire to destroy the group, rather than simply killing individuals who all coincidentally happen to be of the same ethnicity or hold the same religious views. That being said, when determining culpability for the crime of genocide, the international community is more often concerned with simply the top and mid-level perpetrators—the brains of the operation who hold the power to initiate genocide in the first place. They are, as Ambos puts it, “the ones who can and must act with the ulterior intent which is...characteristic of the crime of genocide and turns it into a goal-oriented crime.”¹⁴ For this reason, it can be argued that this approach is effective when it comes to charging the true genocidaires. By separating the low-level perpetrators from those considered to be mid or top-level, it allows those who truly made the important decisions to be the ones taking up the effort and cost of international tribunals.

If we are to accept this methodology, however, it should be noted that, legally, this interpretation of the approach essentially violates the Genocide Convention in and of itself. As the UNCG states, “complicity in genocide [shall be punishable]...whether [the accused] are constitutionally responsible rulers, public officials or private individuals.”¹⁵ The initial drafters of the UNCG made it clear that private individuals who are complicit in genocide are just as guilty of the crime as those giving the initial orders. From a strictly legal standpoint then, we cannot exclude them from the crime simply because they did not have the same level of desire to destroy the group as others. This is one of the reasons why many scholars have turned to an alternative approach, one that focuses on the level of knowledge that an accused individual has regarding the effects of their actions.

Most prominently proposed by Alexander Greenawalt, the ‘knowledge-based approach’ towards establishing the intent of accused genocidaires proposes that “principal culpability should

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¹⁴ Ambos, 849.
extend to those who may lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions.\textsuperscript{16} Through this understanding, we can establish the intention of an accused genocidaire based on whether he/she knew, or ought to have known, that their actions would ultimately lead to the destruction, in whole or in part, of a group. This approach addresses the inherent problem of distinguishing between the desires of low, mid and top-level perpetrators that is faced by the structure-based approach and instead allows courts to prosecute any and all members of genocidal groups. Given that it is highly unlikely for an individual to destroy a group by himself, it is clear that generally there must be multiple parties involved if an act is to be considered genocide. Therefore, “it is enough evidence if the individual commits an act knowing that it would contribute to other acts being committed against a particular group, which when put together, would bring about the destruction of that group, in whole or in part.”\textsuperscript{17} By simply acting in accordance with the ultimate goal of genocide and with the knowledge that one’s acts, if continued, will lead to the ultimate destruction of a group, one can be found guilty of genocide regardless of the individual’s ultimate desire to destroy the group or not.

By determining culpability through the use of the knowledge-based approach, low-level perpetrators, who may not actually desire the destruction of the group but remain complicit in these actions, are just as guilty of the crime of genocide as those who premeditate their acts. Just as an individual may not have the desire to destroy a group, but still holds the knowledge of the consequences of his actions, so too does this approach address a similar, yet inverted problem that is faced by the structure-based approach. Given that the actions committed may lead to the destruction of a group, “the low-level perpetrator can, by definition, have no knowledge thereof but may only wish or desire this result, since it is a future event.”\textsuperscript{18}

\textsuperscript{17} Goldsmith, 245.
\textsuperscript{18} Ambos, 858.
member of the Nazi party for instance, who may hold the same ideological views as the leadership, may in fact have no knowledge of the effects of his actions if he is simply spending his days in an office building in Berlin as a cog within the immense bureaucracy that accompanied the Holocaust. Without the knowledge of the consequences of his actions, the Nazi bureaucrat, by the standards of the knowledge-based approach, would not be guilty of genocide.

Acts of genocide are not acts that ordinarily occur by accident. They are, by nature, “conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result.”\textsuperscript{19} The knowledge-based approach therefore offers a practical methodology in determining the intent of accused genocidaires, without discriminating based on level of involvement. That being said, courts are still given discretion when it comes to sentencing. Simply because two people are convicted of acts of genocide does not mean that they will receive the same punishment. It can be inferred that those who were more directly involved will receive harsher or longer punishments than those who are simply complying or following orders. However, just because one man is not doing the killing himself, it does not mean that he should not be held legally accountable for his actions.

The knowledge-based approach gains further credibility in that it defines the mental element required for a crime to be considered genocide in a similar fashion to how it is defined in the Rome Statute. Article 30 of the Rome Statute of the International Criminal Court states that a person shall be held criminally responsible for a crime when “a person has intent where…In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events [emphasis added].”\textsuperscript{20} ‘Knowledge,’ as it applies in the Rome Statute, is subsequently defined similarly to mean “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”\textsuperscript{21} Needless to say, the ICC finds

\textsuperscript{19} Aptel, 276.
\textsuperscript{20} “Rome Statute of the International Criminal Court”
\textsuperscript{21} Ibid.
knowledge of one’s consequences to be a critical aspect of the *mens rea* necessary to be culpable of genocide. Furthermore, the knowledge-based approach to understanding intent as it applies to the UNCG fits well within this legal framework, giving it credence in the eyes of the international legal community. Lastly, we can apply the knowledge-based approach to the Akayesu trial, which, despite the fact that its ruling mainly focused on determining how we can deduce special intent without direct evidence, stated, “The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.”

It is clear that knowledge plays a large role in the international legal system when it comes to defining the act of genocide. What the knowledge-based approach accomplishes is that it ties together the ‘intent’ requirement that is necessary for a crime to be considered genocide with the *mens rea*, or mental element, that is necessary when proving intent within this context. While the structure-based approach is derived predominantly from the notion of a necessary specific intent, it remains focused on the desires of the accused individuals. Regardless of whether it desires a specific end result, however, the knowledge-based approach holds individuals accountable for their actions which results in this undesired effect simply because the individual plays a role in the genocide itself. If the knowledge-based approach were to be taken as the methodology used by courts in determining the intention of those accused of genocide, we would likely see more convictions in cases of genocide and less acquittals based on the defense that genocidaires were simply ‘following orders.’

If the international community is serious about undertaking the prevention and punishment of genocide, it must be able to adequately prosecute those who are committing the crime. Furthermore, in instances where it is necessary to prove a mental element such as intent, a legal framework from which we can derive the necessary information from must exist. What has already

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happened in the past cannot be changed, but through the use of legal precedents and by learning from the mistakes of history, the hope is that international courts will hold those who commit these heinous crimes accountable, and that genocidaires will be brought to justice. Only in this manner can the international justice system promote the United Nation's vision of universal human rights.

References


