

History of the Interpretation of Genocidal Intent: A Case for a Knowledge-Based Approach

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The scholar Raphael Lemkin in his book *Lemkin on Genocide* lists 41 genocides dating from Biblical times to the year 1944.¹ Though an ancient reality, it was not until 1944 that Lemkin in his book *Axis Rule in Occupied Europe* joined the Greek word *genos*, meaning race or tribe, and the Latin word *cide*, meaning killing, to coin the word genocide,² and not until the creation of the Genocide Convention in 1948 that genocide became criminalized under international law. While the new legal concept of genocide has been subject to much critique and interpretation, it is arguably its unique intent requirement that is most controversial. This paper aims to analyze the intent requirement of the crime of genocide, ultimately arguing that genocidal intent be interpreted through a looser knowledge-based approach that is complementary with the history of intent in the Genocide Convention. Through analysis of the works of Lemkin and the drafters of the Genocide Convention, it will be shown that though intent is essential in the crime of genocide, neither of these foundational sources provide a clear indication or consensus on the type of intent “intent to destroy...as such”³ indicates. It is thus necessary to turn to other international documents and case law to determine what is genocidal intent. It will be argued that both the International Law Commission (ILC) and International Criminal Court (ICC) indicate that genocidal intent is a higher level of intent than general intent, but they do not dictate that a strict approach of specific intent must be adopted. Finally, it will be shown that though the cases of Akayesu in the International Criminal Tribunal for Rwanda (ICTR) and Jelisić in the International

¹ Lemkin, Raphael, and Steven L. Jacobs. *Lemkin on Genocide*. Lanham: Lexington Books, 2014, 17. 41 genocides were listed in Lemkin’s II Outline to his book. Ultimately, Lemkin’s History of Genocide discussed 13 cases of genocide.

² Lemkin, Raphael. *Axis Rule in Occupied Europe*. Washington: Carnegie Endowment for International Peace, Division of International Law, 1944.

³ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx> [accessed 25 May 2019]

Criminal Tribunal for Yugoslavia (ICTY) seem to provide slightly different approaches to genocidal intent, the recent Karadžić conviction of the ICTY indicates that genocidal intent be interpreted through a loose knowledge-based approach. In addition to complementing case law and international treaties on genocide, a looser knowledge-based approach as articulated in the Karadžić trial allows courts to actually prosecute perpetrators of genocide and, in doing so, protect vulnerable groups from persecution as per the original purpose of the Genocide Convention while vindicating the suffering of victims.

I. Possible Understandings of Genocidal Intent

Under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), adopted by the General Assembly on December 9th, 1948, genocide is defined as

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.⁴

While the Convention articulate some sort of intent, the type of intent “intent to destroy...as such” constitutes is ambiguous.

To understand the possible understandings of this genocidal intent, it is first crucial to differentiate intent from motive. Intent and motive are two distinguishable legal concepts

⁴ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

though they are often confused with each other. In her article “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”, Katherine Goldsmith defines intent as the “state of mind at the time of committing the crime” while motive is “what drives the perpetrator to commit their crime, why they did it.”⁵ In the Genocide Convention, “intent to destroy” relates to intent, not motive. Mileno Sterio, a Professor of Law and Associate Dean at Cleveland-Marshall College of Law, explains that the drafters of the convention utilized the phrase “as such” to exclude motive as an element of the crime of genocide.⁶ Cécile Tournaye in his article “Genocidal Intent Before the ICTY” asserts that the ICTY determined that someone’s motive in participating in a crime is irrelevant to crime of genocide. A perpetrator of genocide fulfills the intent requirement even if his personal motives are non-discriminatory but instead “to obtain personal economic benefits, or political advantage or some form of power.”⁷ It is therefore intent, not motive, as indicated in “intent to destroy...as such” that is essential yet ambiguous in genocide’s legal definition.

So what are the possible understandings of this genocidal intent?

In law, intent can be differentiated as specific/special intent and general intent.

Specific intent, or *dolus specialis*, is the highest level of intent. In a memorandum for the Office of the Prosecutor of the ICTY, Katerina Mills defines special intent as when “a special

⁵ Goldsmith, Katherine. "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* 5, no. 3 (2010): 243. doi:10.1353/gsp.2010.0018..

⁶ Sterio, Milena. "The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide." *EMORY INTERNATIONAL LAW REVIEW* 31, no. 2 (2017): 275. <http://law.emory.edu/eilr/content/volume-31/issue-2/articles/karadzic-genocide-conviction-inferences-intent-redefine.html>.

⁷ *Jelisi* Appeal Judgement as quoted in Tournaye, Cécile. "Genocidal Intent Before the ICTY." *International and Comparative Law Quarterly* 52, no. 2 (2003): 452. doi:10.1093/iclq/52.2.447.

mental element is required such that the defendant has the mental purpose to break the law.”⁸ In special intent, it is not just the results of someone’s actions that are important but their intentions in doing an act. Mills provides Larceny as an example of a crime with special intent as it’s crucial to determine that an individual took an object because they wanted to steal it and not because they thought it was theirs. Devrim Aydin in his article “The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts” similarly describes special intent as when a perpetrator acts in order to achieve a special and forbidden purpose or goal. This forbidden goal is part of the definition of the offense and it is therefore really the purpose of the perpetrator that is punished.⁹ In contrast, Mills defines general intent as “the intent to do what the law prohibits, but the prosecution does not have to prove the defendant intended the particular harm that resulted.”¹⁰ With general intent, the focus is on the results of someone’s actions, not on whether they intended those results. Aydin explains general intent as when an act has been committed consciously and willingly, but the purpose is irrelevant.¹¹ These two categories of intent frame the debate as to the intent requirement in genocide.

An alternative framing of “intent to destroy... as such” differentiates between a purpose-based and knowledge-based approach to intent. The purpose-based approach to intent is most similar to the requirement of *dolus specialis*. This approach holds that the *purpose* of the criminal’s actions is crucial and must be proven in order for the criminal to be

⁸ Mills, Katerina. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide? December 01, 1999. Accessed August 06, 2019. <https://student.nesl.edu/userfiles/file/wcmemos/millsf99.htm>.

⁹ Aydin, D. "The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts." *The Journal of Criminal Law* 78, no. 5 (2014): 432. doi:10.1350/jcla.2014.78.5.943.

¹⁰ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

¹¹ Aydin, "The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts.", 431.

convicted. A purpose-based approach to intent in genocide would mean that in order for one to be convicted, the prosecution must prove that the purpose of the perpetrator in their actions was to “destroy a group in whole or in part.”¹² The knowledge-based approach, which in some ways mirrors the general intent requirement¹³ though not in its entirety, requires the prosecution to prove a perpetrator had “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”¹⁴ For the crime of genocide, a knowledge-based approach to intent would require the prosecution to prove perpetrators had “willingly commit[ed] a prohibited act with the knowledge that it would bring about the destruction of a group,” or that their actions would contribute to other people’s actions which would together bring about the destruction of a group.¹⁵ These two approaches to intent are also crucial to understanding the dialogue on the intent requirement in genocide.

While it is unclear what type of intent “intent to destroy...as such” refers to, an analysis of the drafting and application of genocidal intent will indicate that genocidal intent is more related to specific intent than general intent and should be interpreted through a loose knowledge-based approach.

II. Ambiguity in the Original Intentions of Lemkin and the Drafters of the Convention

To properly analyze genocidal intent, it is crucial to look at the works of Lemkin and the drafting history of the Convention as the preparatory work of treaties like the Genocide

¹² UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*.

¹³ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

¹⁴ Knowledge as defined by the International Criminal Court (ICC) as cited in Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 245.

¹⁵ Ibid.

Convention can be useful indicators of the original purpose and object of the treaty. The Vienna Convention on the Law of the Treaties states that when a treaty is “ambiguous or obscure...[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”¹⁶ The Vienna Convention also states that interpretations of laws “should follow the treaty’s original purpose and objective, and should do this by looking at the preparatory work and its circumstances.”¹⁷ To understand the ambiguous “intent to destroy” in the Genocide Convention, it is therefore crucial to analyze the writings of Lemkin and the preparatory work of the drafters of the Genocide Convention in order to understand the purpose and context of the Genocide Convention.

Lemkin and Intent

As a lawyer in Poland, Lemkin was always interested in combating the persecution of racial and religious groups. As early as 1933, he submitted a paper to the League of Nations designating barbarity and vandalism as two new crimes in international law¹⁸ which he would eventually develop into the crime of genocide. When he escaped Poland and came to America in 1941, he dedicated his life to not only defining genocide as a concept, but ultimately guaranteeing its acceptance as a legal concept into international law.

Lemkin categorized genocide not by the actions committed, but by the plan to destroy a group. In *Axis Rule in Occupied Europe*, Lemkin discusses the genocide being perpetrated by the Nazis even before the extent of the atrocity was seemingly available. For example,

¹⁶ As cited in Greenawalt, Alexander K. A. "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation." *Columbia Law Review* 99, no. 8 (1999): 2270. doi:10.2307/1123611.

¹⁷ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 236,

¹⁸ Cooper, John. *Raphael Lemkin and the Struggle for the Genocide Convention*. Basingstoke: Palgrave Macmillan, 2015, 18.

Lemkin does not mention the concentration camps in his book and works with the numbers of the Institute of Jewish Affairs of the American Jewish Congress in New York which stated that only 1,702,500 Jews were murdered,¹⁹ greatly understating the close to 6 million Jews who were actually murdered.²⁰ Even with the understated facts regarding the atrocities of the Holocaust, Lemkin argued it constituted a genocide not only against the Jews, but against nations like the Poles²¹ since Hitler had a plan articulated even before the war began to create a biologically superior Germany through any means necessary.²² For Lemkin, genocide was not characterized by an outcome or the “immediate destruction of a nation”, but rather was meant 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.”²³ What differentiates genocide is not the extremity of the actions committed, but this “coordinated plan” directed against a “national group as an entity” that targeted people not as individuals but “as members of a national group.”²⁴ Physical, biological and cultural genocide (three forms of genocide distinguished by Lemkin) all share the common premediated goal of the destruction of a culture that make them a unique crime. This intent, a planned destruction of a group, was therefore the core of Lemkin’s understanding of genocide.

Intent was also essential to Lemkin’s understanding of genocide as a legal term. As a legal term, Lemkin understood genocide as having two parts. The first encompassed all actions that infringe upon the life, liberty, health, corporal integrity, economic existence and

¹⁹ Lemkin, *Axis Rule in Occupied Europe*, 89.

²⁰ Holocaust FAQ. Accessed August 07, 2019. <http://www.auschwitz.dk/holofaq.htm>.

²¹ Lemkin, *Axis Rule in Occupied Europe*, 79. From the beginning of his defining genocide, Lemkin takes it for granted that the genocide perpetrated by the Nazis was not just against Jews but also Poles and Czechs.

²² *Ibid.*, 81.

²³ *Ibid.*, 79.

²⁴ *Ibid.*, 79.

the honor of an individual specifically “because they belong to a national, religious or racial group.”²⁵ Intent is similarly stressed in the second part of the legal definition which focuses on policies that “[aim] at the destruction”²⁶ of a group. According to Lemkin, genocide inherently contains some sort of intent.

Lemkin held that all those participating in a genocidal campaign should be defined with criminal accountability. Lemkin believed people should be held accountable for committing genocide, giving orders to commit genocide and inciting others to commit genocide,²⁷ and that all parties should be punished for genocide, even lower level perpetrators who were receiving orders.²⁸ Genocidal intent according to Lemkin would therefore seemingly be applicable to all levels of those who perpetrate genocide.

Intent was clearly important in Lemkin’s understanding of genocide, but besides for the references to intent mentioned above, he does not discuss nor provide any clear indication on the type of intent that would be required to convict someone of genocide. This is because though we here are focusing on intent, Lemkin’s definition of genocide was centered not on the level of intent of the perpetrators but on the victims themselves. Indeed in both *Axis Rule in Occupied Europe* and *Lemkin on Genocide*, Lemkin centers the term genocide around the importance and value of retaining cultures. To target a nation is a uniquely horrible crime because “the world represents only so much culture and intellectual vigor as are created by its component national groups.”²⁹ Destroying a group means destroying their culture which is

²⁵ Ibid., 93.

²⁶ Ibid.

²⁷ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

²⁸ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 247.

²⁹ Lemkin, *Axis Rule in Occupied Europe*, 91.

each group's unique contribution to world civilization.³⁰ As Lemkin wrote to Austrian president Karl Renner,

I used your arguments about the universal cultural value to national groups, and about their significance as contributing factors to world civilizations. I argued that if the Greeks were exterminated before they gave to the world Socrates and Plato, if the Jews before they gave to the world the Bible, and the French were obliterated before they produced their great literature and political philosophy, the world would have been deprived of these treasures.³¹

Lemkin's concern for the preservation of culture is highlighted by his unique classification of cultural genocide as genocide. The goal of destroying a group and its unique culture creates an "irretrievable [loss]"³² and should be criminalized accordingly. Alexander Greenawalt, author of "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation", writes that Lemkin was "[l]ess concerned with the evil motivations of genocidal acts themselves than with the preservation of the rich array of nations and cultures that constituted the world community."³³ While a coordinated plan of destruction is critical in Lemkin's explanation of genocide, it cannot be determined what, if any, type of intent Lemkin had envisioned since intent was not the focus of his work.

The Drafters of the Genocide Convention and Intent

Different drafts of the Genocide Convention were discussed by the Secretariat and Ad Hoc Committee before the final version was voted on in the UN Sixth Committee. By reviewing these drafts and committee discussions around the wording of the convention, we can better understand what type of intent the drafters of the convention ultimately meant by "intent to destroy...as such. "

³⁰ Lemkin and Jacobs. *Lemkin on Genocide*, 9.

³¹ Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, 93.

³² Lemkin and Jacobs. *Lemkin on Genocide*, 9.

³³ Greenawalt "Rethinking Genocidal Intent", 2272.

On March 28th, 1947, the Economic and Social Council asked Trygve Lie, the Secretary General, to work with legal experts in writing a genocide convention. Lemkin, Professor Donnedieu de Vabres from France and Professor Vespasian Pella from Romania worked to draw up this first draft known as the Proposed Draft Convention by the Secretariat.³⁴ The first draft defined genocide as “a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development.”³⁵ This language is seen as indicating a strict intent requirement. Mills asserts that this language in the first draft categorizes genocide as a specific intent crime since it is necessary that the perpetrators intent is to exterminate a group.³⁶ Greenawalt notes that the use of the word “purpose” shows that the intent standard according to the first draft is clearly purpose based.³⁷

The draft then went to an Ad Hoc Committee created by the Economic and Social Council for further deliberation. In the draft of the Ad Hoc Committee, genocide was defined as “any of the following deliberate acts committed with the 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.”³⁸ The word “purpose” was removed from the Proposed Draft Convention by the Secretariat and “intent” and “on the grounds of” were added instead. The use of “intent” and “on the grounds of” seems to be repetitive since both replace “purpose” and seem to indicate a specific intent requirement. Greenawalt discusses that these words are only redundant if intent automatically refers to specific intent. The drafters must

³⁴ Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, 89.

³⁵ 4 U.N. ESCOR, U.N. Doc F/477 (1947). Article I:II.

³⁶ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

³⁷ Greenawalt "Rethinking Genocidal Intent", 2274.

³⁸ 7 U.N. ESCOR Supp. (no 6), U.N. Doc E/794 (1948).

have defined intent not as specific intent and therefore added the term “on the grounds of” to indicate, in this draft, the requirement for specific intent.³⁹ A different possible differentiation between “intent” and “on the grounds of” could be that the latter is referring to motive, not intent. Greenawalt rejects this suggestion since the Ad Hoc Committee (mistakenly) seemed to join intent and motive. This conflation of intent and motive is evident when Mr. Ordonneau, the French representative, “repeated 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.”⁴⁰ Ordonneau seems to be saying that it is not enough for a perpetrator to have knowledge of the genocide, but needed intent to destroy them. However, Ordonneau then says “[i]t was there that the unlawful *motive* of persecution entered,”⁴¹ clearly equating intent with motive. It is therefore more likely that “intent” on its own does not refer to special intent which is why the committee also included the phrase “on the grounds of.”

Mr. Ordonneau was the only delegate to mention *dolus specialis* during the committee sessions. The Committee’s Summary Record of the Twenty-Sixth Meeting states that “Mr. Ordonneau (France) considered that the term “motives” in paragraph A 4 was not exact from a legal point of view. It was a question of what French law called *dolus specialis*, a term which could scarcely be translated otherwise than by the “specific motives” or “particular intents”.”⁴² While Ordonneau seems to be reading the requirement of *dolus specialis* into the draft, Goldsmith argues that he only mentioned *dolus specialis* because that was the highest form of intent in French law. The fact that nobody discussed *dolus specialis*

³⁹ Greenawalt "Rethinking Genocidal Intent", 2274.

⁴⁰ As cited in Ibid.

⁴¹ As cited in Ibid.

⁴² E_AC.25_SR.26-EN p.12 as referenced in Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide".

after Ordonneau mentioned it indicates that it was not really considered amongst the delegates.⁴³ It seems Ordonneau is also conflating intent and motive again here by translating *dolus specialis* as special motive, further devaluing his reference to special intent. While the Proposed Draft Convention by the Secretariat seems to articulate a purpose-based specific intent requirement, as the Convention developed in the Ad Hoc Committee it becomes less clear what approach the drafters are taking towards intent.

The UN Sixth Committee was created to draw up a final version of the convention. The significant contribution of this Committee was the addition of “as such” to replace “on the grounds of.” Since intent on its own does not seem to refer to any single type of intent as seen in the Ad Hoc Committee’s draft, it is the new phrase of “as such” which would indicate the genocidal intent requirement. It was the Venezuelan delegate who, in response to fear that perpetrators of genocide could manipulate the definition and claim they did not have intent,⁴⁴ suggested adding “as such” in order to encompass motive without having to enumerate specific acts.⁴⁵ The significance of replacing “on the grounds of” with “as such” was unclear even to the drafters of the convention. The delegates from Belgium, New Zealand and Haiti disagreed with the Venezuelan delegate and argued that a specific enumeration motive needed to be in the definition of genocide otherwise genocide wouldn’t be a purpose-based crime. However, other delegates disagreed that substituting “on the grounds of” with “as such” removed a motive requirement.⁴⁶ Mr. Rios, the delegate from Uruguay, articulated these divergent understandings of “as such”. When he said,

⁴³ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 247.

⁴⁴ Greenawalt "Rethinking Genocidal Intent", 2277.

⁴⁵ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

⁴⁶ Greenawalt "Rethinking Genocidal Intent", 2277.

[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.⁴⁷

Rios tried and failed to create a working group to resolve this problem, leaving the understanding of “as such” inconsistent amongst the drafters.

During the sessions, Mr. Amado, the delegate from Brazil, was the only one to mention *dolus specialis*. During the 72nd meeting, it is stated that,

Mr. AMADO (Brazil) considered that genocide was characterized by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the act described in the convention, that act could still not be called genocide. Whereas it was important to retain the concept of *dolus specialis*, it was superfluous to keep in the text the idea of premeditation or to ‘add to it the formula “acts punishable by law”; that would only be repeating what had already been clearly stated in article 1 of the draft convention.⁴⁸

Amado equates *dolus specialis* with “idea of premeditation,” though those two things are not identical. Similarly, in the 76th session, Amado

considered that the *dolus specialis* which was a factor constituting genocide, was included in the intention of the perpetrator of the crime. The mere fact that an act was committed with the intent to destroy one of the protected groups was sufficient to constitute genocide. The determination of the motives was useful only in connection with the application of the penalty, not in connection with the definition of the crime and the restrictive enumeration contained in article II of the draft convention might even be dangerous.⁴⁹

⁴⁷ Ibid., 2278.

⁴⁸ A_C-6_SR-72-EN p.87 as referenced in Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide".

⁴⁹ A_C-6_SR-76-EN p. 127 as referenced in Ibid.

Here, Amado seems to be conflating *dolus specialis* with the “determination of motives.” Like Mr. Ordonneau in the Ad Hoc Committee, Amado mentions *dolus specialis* but doesn’t seem to fully understand its implications and meaning and nobody discusses it further after it is mentioned. The drafting by the UN Sixth Committee therefore provides no clear indication of the type of intent that is required in genocide.

Reviewing the objectives of Lemkin and the drafters of the convention, the intent requirement in genocide still remains unclear. Some take the position that the drafters of the convention required a purpose standard to intent. Mill, for example, writes,

in reviewing the negotiating record for the Genocide Convention, the drafters intended for the specific intent, or mental state, of the perpetrator to be an element of the crime. According to the drafters, the mental state of the accused is what distinguishes genocide from murder since the accused is killing people because of their membership in one of the protected groups, not in their individual capacity. Thus it must be shown that the accused’s intent was to *purposely* destroy the targeted group in whole or in part.⁵⁰

Mills is accurate in that some delegates did consider intent important in differentiating genocide from homicide.⁵¹ The significance of some type of intent, however, does not require that the intent be high level, nor does it exclude a knowledge-based approach of intent as a possibility. Others take the position that the drafters specifically did not define genocidal intent as specific intent. Otto Triffterer, author of “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such”, argues that Lemkin and the drafters never intended for the special intent requirement. To define intent as *dolus specialis* goes “beyond the wording” of the convention and “introduce[s] a concept not precisely defined ... [or] ...

⁵⁰ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

⁵¹ The delegate from Panama said the “characteristic which distinguished genocide from the common crime of murder was the intention to destroy a group.” The US delegate also said that it is “the intent to destroy a group which differentiates the crime of genocide from the crime of simple homicide”. Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 249.

generally accepted in Common Law countries.”⁵² Goldsmith agrees with Triffeterer that intent for the drafters does not refer to a high level of intent.⁵³

An analysis of the drafting of the convention clearly demonstrates, however, that the drafters did not discuss nor agree on the type of intent required in “intent to destroy...as such.” Aydin believes that there is no mention in the drafting or in the actual convention of intent or special intent.⁵⁴ Greenawalt also believes that the drafting history does not clearly mandate a purpose or knowledge-based approach, leaving the question of intent unresolved at the time of the convention’s adoption.⁵⁵ When considering the acknowledged ambiguity in the implications of adding “as such” to the convention, it is clear that the drafters of the convention never fully discussed nor reached a consensus as to the type of intent required in genocidal intent.

Indeed, the ambiguity as to the meaning of Lemkin and drafters of genocide behind “intent to destroy...as such” is evident in the inability to apply the Genocide Convention for close to 50 years after its adoption. Dan Stone in his book *The Historiography of Genocide* writes that the concept of genocide evolved during this time into being more about physical destruction,⁵⁶ possibly due to the difficulty in understanding what intent was referring to in the Convention. Noticing the impracticality of the Genocide Convention, Pieter Drost in 1959 suggested broadening the definition of genocide to “group” and “kill”,⁵⁷ which would allow it to be applied in international law but also essentially strip it of any intent

⁵² Ibid., 246.

⁵³ Ibid., 249.

⁵⁴ Aydin, "The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts.", 429.

⁵⁵ Greenawalt "Rethinking Genocidal Intent", 2266.

⁵⁶ Stone, Dan. *The Historiography of Genocide*. Basingstoke: Palgrave Macmillan, 2010, 31.

⁵⁷ Ibid., 22.

requirement. Jean-Paul Satre, executive president of Bertran Russel's International War Crimes Tribunal, also argued for expanding the definition of genocide. He contended that only actions should be considered when determining a genocide since intent is too difficult to establish as it isn't necessarily premediated and not always even conscious. With this definition of genocide, Satre believed America was guilty of a genocide in Vietnam.⁵⁸ A UN Special Rapporteur in 1978 proposed modifying the Genocide Convention because it "lacked effective international measures to prevent and punish genocide."⁵⁹ These suggestions highlight the confusion of the drafters themselves as to what "intent to destroy...as such" required in the convention.

We have established that an analyses of the works of Lemkin and the drafters of the Convention leaves the question of intent in the Genocide Convention ambiguous. A look at other international treaties and case law is therefore essential in understanding genocidal intent.

III. Intent in the International Law Commission and the International Criminal Court

International Law Commission (ILC) and the Intent Requirement

In 1996, the International Law Commission established by the United Nations to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification"⁶⁰ commented on the Draft

⁵⁸ Ibid., 24.

⁵⁹ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

⁶⁰ Article 13 (1) (a) of the Charter of the United Nations as cited in "International Law, Codification, Legal Affairs, Commission, ILC, Instruments and Reports, Yearbook." United Nations. United Nations, n.d. <http://legal.un.org/ilc/>.

Codes of Crimes against the Peace and Security of Mankind. This was one of the first documents to address what intent meant in the Genocide Convention.⁶¹ The ILC states that “[t]he prohibited [genocidal] act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group.”⁶² The ILC seemed to indicate a specific intent requirement in comment 5 of article 17 when it stated that

a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.⁶³

While general intent according to the ILC is clearly insufficient for the crime of genocide, it is possible that the phrase “specific intent” here is only meant to contrast general intent and does not necessarily refer to a strict purpose-based approach to specific intent. Indeed, Goldsmith argues that the ILC in comment 10 on Article 17 would actually allow for a knowledge-based approach to intent. According to Article 17(10), it seems that “intent can be inferred from knowledge of the discriminatory effects of his acts in destruction of a targeted group.”⁶⁴ Knowledge is defined by the ILC as “knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide,” and this knowledge would vary “depending on the position of the perpetrator in

⁶¹ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 251.

⁶² ILC Draft Code of Crimes Against the Peace and Security of Mankind as cited in Greenawalt "Rethinking Genocidal Intent", 2272.

⁶³ “Draft Code of Crimes against the Peace and Security of Mankind with Commentaries,” in Yearbook of the International Law Commission, UN Doc. A/CN.4/L.532 (1996), 44(17(5)) as referenced in Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide"

⁶⁴ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 251.

the governmental hierarchy or the military command structure.”⁶⁵ The ILC therefore does not allow for general intent to be adequate for the crime of genocide, and though it states that specific intent is required, leaves the possibility for a knowledge-based approach in genocide to be sufficient as well.

Rome Statute of the International Criminal Court (ICC) and the Intent Requirement

In 1999, the Rome Statute of the ICC was drafted. Payam Akhavan, the Principal Legal Advisor of the Prosecutor at the ICTY, explains that some delegates were concerned about the subjective standard of intent so they added an objective element to genocide, requiring not only intent and an underlying act but also that the “conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”⁶⁶ The Rome Statute otherwise defined genocide exactly like Article II of the Genocide Convention. When discussing the mental element of crimes in Article 30, the statute states, “*Unless otherwise provided*, a person shall be criminally responsible...only if the material elements are committed with intent and knowledge.”⁶⁷ The statute then continues to describe general intent. There is debate as to whether “unless otherwise provided” is referring to the crime of genocide, therefore distinguishing genocide as requiring more than general intent, or whether genocide would be included in Article 30 and therefore only require general intent. According to Aydin, “unless otherwise provided is referring to intent to destroy in article 6 -- meaning crimes under the

⁶⁵ “Draft Code of Crimes against the Peace and Security of Mankind with Commentaries,” in Yearbook of the International Law Commission, UN Doc. A/CN.4/L.532 (1996), 44(17(10)) as referenced in *Ibid.*, 243,

⁶⁶ Akhavan, Payam. "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide." *Proceedings of the ASIL Annual Meeting* 94 (2000): 282. doi:10.1017/s0272503700055981.

⁶⁷ “Rome Statute of the International Criminal Court, 1998.” United Nations. United Nations, n.d. http://legal.un.org/icc/statute/99_corr/cstatute.htm.

ICC can be committed with general intent, but genocide is special intent as provided otherwise.”⁶⁸ Kai Ambos in his article “What Does ‘Intent to Destroy’ in Genocide Mean?” similarly contends that genocide has an additional subjective requirement which complements the general intent articulated in the statute.⁶⁹ Goldsmith, however, argues that regarding genocide the statute only states “intent to destroy.” Since there’s no details there about the type of intent, there’s no reason to conclude that “unless otherwise provided” is referring to genocide. Instead, “unless otherwise provided” is referring to the section of the Convention containing certain prohibited acts.⁷⁰ Goldsmith’s assessment of “unless otherwise provided” seems unlikely. Genocide is the only crime in the Rome Statute to require an intent in its very definition, even if the level of intent is not specified. The unique requirement of intent to destroy as inherent to its very definition would indicate that “unless otherwise provided” refers to intent in genocide, not its prohibited acts. Like the ILC, the ICC would therefore also understand genocidal intent as requiring something higher than general intent, though not mandating that a strict interpretation of specific intent be adopted.

IV. Case Law in Rwanda and the Former Yugoslavia

The International Criminal Tribunal for Rwanda (ICTR) - Akayesu Trial

In 1994, close to one million Tutsi were massacred in Rwanda. At least 2,000 Tutsi were killed in the rural commune of Taba where Jean-Paul Akayesu was mayor. Akayesu was tried and convicted for genocide and direct and public incitement to commit genocide,

⁶⁸ Aydin, "The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts." 436.

⁶⁹ Ambos, Kai. "What Does ‘Intent to Destroy’ in Genocide Mean?" *SSRN Electronic Journal*, 2009. doi:10.2139/ssrn.1618682.

⁷⁰ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide".

marking the first time an international criminal tribunal convicted someone of genocide.⁷¹

According to the language of the judgement, the ICTR seemed to require special intent in the crime of genocide, stating that

the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.⁷²

Though the traditional view of intent as specific intent seemed to be adopted, Akhavan explains that the ICTR allows intent to be “inferred and deduced within the general genocidal context”⁷³ when hard evidence was absent. Since the ICTR held that “intent is a mental factor which is difficult, even impossible, to determine,”⁷⁴ the chamber stated

that 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.⁷⁵

The ICTR also allowed “methodical and systematic planning of the killings and other genocidal acts, weapons employed and the extent of victims’ injuries, and documents which

⁷¹ Amann, Diane Marie. "Prosecutor v. Akayesu. Case ICTR-96-4-T." *The American Journal of International Law* 93, no. 1 (1999): 195. doi:10.2307/2997961.

⁷² Prosecutor v. Akayesu, Case No. ICTR 96-4-T, ¶ 702 as cited in Sterio, “The Karadžić Genocide Conviction”.

⁷³ Akhavan, "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", 280.

⁷⁴ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement ¶ 523 (Sept. 2, 1998) as cited in Sterio, “The Karadžić Genocide Conviction”.

⁷⁵ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, ¶ 485 as cited in Sterio, “The Karadžić Genocide Conviction”..

may reflect participation in or knowledge of the atrocities”⁷⁶ to be taken into account when inferring intent. It was determined that Akayesu had demonstrated a specific intent to destroy the Tutsis through his speeches,⁷⁷ orders and actions.⁷⁸ Mills explains that in light of the fact that Akayesu’s actions were part of a larger plan to exterminate the Tutsi, and because he had knowledge of this plan and he preached about this plan it was determined that he had specific intent.⁷⁹

The Akayesu judgement is crucial in the development of the intent requirement in genocide, as it required a specific intent, but also allowed this intent to be inferred and deduced. According to the ICTR, knowledge of mass killings (knowledge meaning that a perpetrator knows that he is a part of a larger genocidal plan) along with perpetrating one of the prohibited acts in Article II of the Convention satisfies the specific intent requirement.⁸⁰ Greenawalt articulates this restrictive yet expansive interpretation of intent in the ICTR. “The ICTR’s standard”, writes Greenawalt, “suggests that courts should presume specific intent largely by virtue of the fact that a perpetrator participates in a genocidal campaign.”⁸¹ In doing so, it seems that the ICTR is “uphold[ing] the specific intent standard while simultaneously evading it.”⁸² Mills believes the ICTR follows a knowledge-based approach to intent as opposed to purpose-based.⁸³ Goldsmith similarly believes that allowing intent to

⁷⁶ Sterio, “The Karadžić Genocide Conviction”, 281.

⁷⁷ Akayesu had “urged a crowd ‘to unite in order to eliminate what he termed the sole enemy,’ in a manner understood as a call ‘to kill the Tutsi,’ some of whom he named explicitly. As intended, his speech ‘did lead to the destruction of a great number of Tutsi in the commune of Taba.” Amann, “Prosecutor v. Akayesu. Case”, 195.

⁷⁸ Akayesu actually participated “in beatings, killings and rapes of Tutsi”. Ibid., 196

⁷⁹ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

⁸⁰ Ibid.

⁸¹ Greenawalt “Rethinking Genocidal Intent”, 2282.

⁸² Ibid., 2283.

⁸³ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

be inferred from actions is in keeping with the knowledge-based approach to intent⁸⁴. The ICTR's approach to genocide is distinct, as it is both restrictive in requiring specific intent and expansive in its determination of specific intent.

The International Tribunal for Yugoslavia (ICTY)- Jelisić Trial

The International Tribunal for Yugoslavia (ICTY) was created to address the atrocities perpetrated in the former Yugoslavia. In 1998, the ICTY tried Goran Jelisić on the account of genocide. The indictment states,

In May 1992, Goran Jelisić, intending to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical or religious group, systematically killed Muslim detainees at the Laser Bus Co., the Brčko police station and Luka camp. He introduced himself as the “Serb Adolf”, said that he had come to Brčko to kill Muslims and often informed the Muslim detainees and others of the numbers of Muslims he had killed. In addition to killing countless detainees, whose identities are unknown, Goran Jelisić personally killed the victims in paragraphs 16-25, 30 and 33. By these actions, Goran Jelisić committed or aided and abetted.⁸⁵

Even with the evidence against Jelisić, he was ultimately acquitted on the charge of genocide as it could not be proven that Jelisić had genocidal intent. The Jelisić case took on a restrictive interpretation for intent, requiring *dolus specialis*⁸⁶ as was required in the ICTR, stating that it is not enough that the perpetrator “knows that his acts will inevitably, or . . . probably, result in the destruction of the group in question,” but must “seek the destruction in whole or in part of a group.”⁸⁷ As was stated in the ICTY's Prosecutor v. Krstić Case, those not convicted of genocide by the ICTY were not “found to have acted with *specific intent*.”⁸⁸

⁸⁴ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 246.

⁸⁵ *The Prosecutor v Goran Jelisić*, IT-95-10-T (14 Dec 1999), para 3.

⁸⁶ Akhavan, "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", 282.

⁸⁷ *The Prosecutor v Goran Jelisić*, IT-95-10-T (14 Dec 1999), paras 85-86 as cited in Ibid.

⁸⁸ Judgment of Feb. 26, *supra* note 43, at para. 296 (quoting Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, para. 15 (Apr. 19, 2005)) as cited in Quigley, John Bernard. “The International Court of Justice as a

However, unlike the ICTR where knowledge of the genocidal plan in addition to prohibited acts was sufficient in fulfilling the specific intent requirement, the ICTY in Jelisić required that there be “clear knowledge” that the perpetrator “was participating in the ...destruction... of a given group.”⁸⁹ As Mills articulates, according to the Jelisić case, the intent standard is fulfilled when the prosecutor “prove[s] the defendant clearly knew that his actions [were] part of a greater genocidal scheme and his intent was to participate in the destruction of the protected group” while according to the ICTR all that is needed for intent to be satisfied is to “show that the defendant knew of the genocide and then acted”, making the intent standard in Jelisić higher than in the ICTR.⁹⁰

Though the determination of specific intent is higher in Jelisić than in Akayesu, it is not entirely clear whether such an intent standard would be categorized as knowledge-based or purpose-based. Mills believes Jelisić does not use the high purpose standard which would require not just “clear knowledge of one's participation in the genocide” but that the perpetrator “purposely destroy[ed] a group in whole or in part.”⁹¹ If the intent standard in Jelisić is not purpose-based, it can be assumed that it is therefore knowledge-based. Goldsmith disagrees, claiming that specific intent requirement without a knowledge-based approach was used in Jelisić and all prior genocide cases in the ICTY, resulting in the court’s inability to properly convict Jelisić of genocide. Goldsmith believes that the strict intent requirement resulted in certain people being charged with aiding and abetting genocide

Forum for Genocide Cases.” *SSRN Electronic Journal*, 2007: 253. doi:10.2139/ssrn.1017825.

⁸⁹ Prosecutor v. Jelisić, Case No. JL/P.I.S./441-E as cited in Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

⁹⁰ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

⁹¹ Ibid.

instead of perpetrating genocide.⁹² In his article “The International Court of Justice as a Forum for Genocide Cases”, John Bernard Quigley similarly writes that the ICTY prosecutors would avoid genocide charges even in cases where it may be provable “[s]ince prosecuting for genocide requires proof of the intent to destroy a group—over and above the intent that must be proved concerning immediate acts.”⁹³ Like the ICTR, the Jelisić case in the ICTY seems to adopt the restrictive specific intent standard. However, its ruling of how to determine specific intent is less expansive than the ICTR as it requires proving the perpetrator had “clear knowledge” that they participated in a genocide.

Comparing Intent in the Genocide Convention, Akayesu Trial and Jelisić Trial

The Akayesu and Jelisić cases do not provide a unified understanding of “intent to destroy...as such.” So how do they, in relation to the Genocide Convention and international treaties, impact future understanding of genocidal intent?

Some, like Aydin, argue that intent in Akayesu and Jelisić are similar enough, as the intent requirement in the Rome Statute, ICTR and Jelisić all mirror each other in requiring special intent, complementing the ambiguous “intent to destroy...as such” in the Genocide Convention.⁹⁴ Ambos similarly believes that the case law complements the Genocide Convention. In the Convention, genocide contained in addition to the general intent relating to the acts of the crime an ulterior or goal-oriented intent. The case law in Akayesu and Jelisić understood this ulterior intent as special intent.⁹⁵

⁹² Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 244-5.

⁹³ Quigley, "The International Court of Justice as a Forum for Genocide Cases", 255.

⁹⁴ Aydin, "The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts."

⁹⁵ Ambos, "What Does 'Intent to Destroy' in Genocide Mean?".

Others, however, believe the different judgements of the ICTR and Jelisić provide distinct interpretations of the intent requirement. As mentioned, Mills argues that the cases in the ICTR and Jelisić as well as the Genocide Convention all differ from each other. In the Genocide Convention, a perpetrator does need special intent but the focus is on if the individual had a purpose to destroy -- the context or what had happened collectively is unimportant. The ICTR, however, decided that intent can be inferred from the general context (meaning if a collective had a genocidal plan) since if a perpetrator had knowledge of this plan and then acted, it can be inferred that he had intent. The Jelisić case though also allowing context to be considered differs again since it requires that the perpetrator had knowledge he was participating in a genocide. Mills believes the ICTR drifted too far from the Genocide Convention by lowering the standard to knowledge, and that the Jelisić case returned the standard closer to the purpose-based one of the Convention. Future courts, Mills argued, would and should adopt a strict purpose-based approach to genocidal intent.⁹⁶

Goldsmith also believes the ICTR and Jelisić differ from each other as the ICTR took a broader knowledge-based approach to intent while the ICTY was restrictive in requiring strict special intent.⁹⁷ Though she believes that courts are split as to how to define genocidal intent, Goldsmith argues that a knowledge-based approach to intent should be adopted as it is not inconsistent with Lemkin and the drafters of the convention, the ILC began with specific intent but then allowed for knowledge based approach, and the ICC seems to be more lenient in her understanding of “unless otherwise provided” in article 30 of the Rome Statute.

The International Tribunal for Yugoslavia (ICTY)- Karadžić Trial

⁹⁶ Mills. What Constitutes the Actual Intent Requirement for an Accused to be Found Guilty of Genocide?

⁹⁷ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide".

All mentioned academics argued their respective interpretations of genocidal intent prior to the 2016 conviction of Radovan Karadžić by the ICTY. The adoption by the ICTY in Karadžić of an even looser knowledge-based approach to genocidal intent indicates a distancing from the arguably stricter determination of intent in Jelisić. After the Karadžić trial, case law of genocidal intent ultimately indicates a loose knowledge-based approach to genocidal intent.

In March 2016, Radovan Karadžić, the former Bosnian-Serb leader, was convicted by the ICTY for genocide in Srebrenica though acquitted for genocide in Bosnia.⁹⁸ The Chamber's determination of genocidal intent in Karadžić is even less restrictive than in the Akayesu case. As Sterio explains, it was decided that Karadžić did have genocidal intent even though there was no concrete evidence that Karadžić knew that the killings would occur or intended for the killings to take place. Instead, the Chamber inferred his knowledge through circumstantial evidence. The Chamber concluded that the Srebrenica Joint Criminal Enterprise (JCE)⁹⁹ had a common plan that was "tantamount to intent to destroy the Bosnian Muslims in Srebrenica"¹⁰⁰ and Karadžić was a participant in the JCE's genocidal plan and agreed to their objective. The Chamber determined Karadžić's participation in the JCE's

⁹⁸ The Chamber concluded that Karadžić "intended to threaten the Bosnian Muslims against pursuing independence for [Bosnia & Herzegovina] and [show] that he was fully aware that a potential conflict would be extremely violent" But this type of evidence did not constitute genocidal intent. Sterio, "The Karadžić Genocide Conviction", 284.

⁹⁹ The JCE is a concept adopted by the ICTY. It is defined as "a mode of liability created by judges on the International Criminal Tribunal for the Former Yugoslavia (ICTY) that allows the tribunal to bring charges against members of a group responsible for war crimes or crimes against humanity even if there is no evidence that the particular individuals physically participated in the crimes. JCE is distinct from the doctrine of conspiracy in American criminal law in that actual perpetration of the acts is required, rather than just a meeting of the minds." Ash, Elliott T. "Joint Criminal Enterprise." Legal Information Institute. Legal Information Institute, May 30, 2015. https://www.law.cornell.edu/wex/joint_criminal_enterprise.

¹⁰⁰ Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 5736 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadzic/tjug/en/160324_judgement.pdf as cited in Sterio, "The Karadžić Genocide Conviction", 285.

genocidal plan by inferring that he knew about the killings in Srebrenica. The inference for Karadzic's knowledge of the killings came from a conversation he had had with Miroslav Deronjić, the civilian administrator of the Srebrenica region. At the time, thousands of Bosnian Muslim males were being held on buses and detention centers in Bratunac. Through an intermediary, Karadžić and Deronjić spoke in code to discuss and then decide to move the detainees to Zvornik to be killed, demonstrating according to the Chamber "malign intent behind the conversation."¹⁰¹ This specific conversation along with the constant communication Karadžić had with Deronjić and considering Karadžić's high level position, the Chamber inferred that Karadžić knew about the killings in Srebrenica. The Chamber not only inferred that Karadžić had knowledge of the killings, but also inferred that he intended for the killings to take place. The Chamber even stated that it "can only make a positive determination as to the Accused's agreement to the expansion of the means so as to encompass the killing of the men and boys as of the moment of the conversation with Deronjić."¹⁰² Because Karadžić remained "actively involved" even after he knew about the plan by "disseminating false information about what happened there"¹⁰³ and he didn't prosecute the perpetrators but instead praised them, the Chamber concluded that it was reasonable to infer that he intended for the killings to take place.

The Karadzic conviction was a crucial step in broadening the intent standard for genocide. In the Akayesu judgement, Akayesu's knowledge of the genocidal plan was proven and then intent was inferred from his knowledge. But, in the Karadžić judgement,

¹⁰¹ Ibid., 286

¹⁰² Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 5811 Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf as cited in Ibid., .287

¹⁰³ Ibid., 288

knowledge of the killings was inferred, and from this inference they inferred intent. It seems that in the Karadžić trial a “beyond a reasonable doubt” standard for special intent was replaced with an “only reasonable inference” standard.¹⁰⁴ The interpretation of intent is novel as it again seemed to require special intent but had an even broader determination of this intent as it allows for a ‘double inference’ where intent is inferred through an inferred knowledge. Sterio comments that though the double inference allowance for intent is a questionable legal position, it is necessary as it may be the only way to prosecute for genocide when using a special intent requirement.¹⁰⁵

If Akayesu and Jelisić may have had slightly different understandings of genocidal intent, the adoption in the Karadžić trial of a loose knowledge-based approach clearly demonstrates the international courts’ reliance on an expansive interpretation of “intent to destroy...as such.” Case-law therefore ultimately indicates a looser knowledge-based approach to specific intent.

Hence, while Lemkin and the drafters of the Convention don’t clearly indicate the type of intent in genocidal intent, the ICC and ILC interpret genocidal intent as being more than general intent but don’t specifically delineate a strict specific intent. With the recent Karadžić trial, case law supports that a loose knowledge-based approach to the specific intent of genocide be adopted.

V. Implications of a Loose Knowledge-Based Approach to Genocidal Intent

Critical Benefits of a Knowledge-Based Approach to Genocidal Intent

¹⁰⁴ Ibid., 287

¹⁰⁵ Ibid., 289

Adopting a loose knowledge-based approach to genocidal intent is not only consistent with the history and application of genocidal intent, it is also critically important in allowing courts to hold perpetrators of atrocities accountable. This is because a strict interpretation of genocidal intent is difficult to apply, resulting in perpetrators of genocide going unpunished for their crimes.

When adopting a strict interpretation of intent, perpetrators can easily be left unpunished as such genocidal intent is difficult to prove. Leo Kuper, a sociologist who specialized in the study of genocide, correctly noted that “governments hardly declare and document genocidal plans in the manner of the Nazis.”¹⁰⁶ Sterio concurs and believes this to be true in the cases of Akayesu and Karadžić.¹⁰⁷ As Greenawalt discusses, because of the difficulty of finding evidence of special intent, genocidal intent has “difficulty translating from the level of general characterization to that of individual criminal liability,”¹⁰⁸ making it “exceedingly difficult to apply as an evidentiary matter.”¹⁰⁹ The need for proof of special intent could, writes Greenawalt, “compel courts to squeeze ambiguous fact patterns into the specific intent paradigm.”¹¹⁰ By continuing to determine genocidal intent through the allowance of ‘double inferences’ as was done in Karadžić, however, evidence for genocidal intent can more easily and realistically be identified, allowing perpetrators to be held accountable for their crimes.

There is also a specific challenge in prosecuting subordinate perpetrators that comes with interpreting genocidal intent as a purpose-based special intent. Greenawalt writes that

¹⁰⁶ As cited in Stone, *The Historiography of Genocide*, 25.

¹⁰⁷ Sterio, “The Karadžić Genocide Conviction”, 291.

¹⁰⁸ Greenawalt “Rethinking Genocidal Intent”, 2264.

¹⁰⁹ *Ibid.*, 2279.

¹¹⁰ *Ibid.*, 2281.

subordinates, especially in cases of administrated massacres, can always evade genocide convictions by claiming they did not have special intent but were just carrying out orders of superiors.¹¹¹ Goldsmith also thinks that by requiring purpose-based special intent, low level perpetrators escape liability and can only be punished for aiding and embedding even though low level perpetrators are at the center of the crime and need to be punished. Genocide, explains Goldsmith, is coordinated attacks done by many people who all need to be punished, even if they don't express their intentions like special intent requires.¹¹² It is especially important that low level perpetrators be punished for genocide as Lemkin originally intended for the crime of genocide to be applicable for all levels of perpetrators. While a strict special intent requirement is problematic as it would not allow for low level perpetrators of genocide to be punished, a looser knowledge-based approach to intent allows for "intent to destroy...as such" to be more easily applicable to even low level perpetrators.

Additionally, interpreting genocidal intent as specific intent is problematic when it comes to ambiguous motives. Often, acts of genocide are committed such that there is a "discriminatory extermination in a campaign of persecution" but the persecution "lacks a clear objective to destroy the group in its collective sense."¹¹³ Such was the case in Cambodia where the Muslims Chams were persecuted in the name of communist ideology. Even without the "clear objective", perpetrators are still devaluing the lives of individuals because of their group identity and should be punished as perpetrators of genocide. However, specific intent would "[require] more than discriminatory selection accompanied by knowledge of the

¹¹¹ Ibid., 2279-2282.

¹¹² Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 252.

¹¹³ Greenawalt "Rethinking Genocidal Intent", 2285.

consequences of one's actions.”¹¹⁴ With specific intent, the “intention must be to destroy the group . . . as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.”¹¹⁵ The requirement of purpose-based specific intent ultimately results in the miscategorization of many instances as non-genocidal. Fully adopting a knowledge-based approach, however, would more easily allow cases of ambiguous motives to be determined as genocides.

Knowledge-based approach to Genocidal Intent and Keeping with the Original Purpose of the Convention

Adopting a loose knowledge-based approach to intent not only allows for proper evidence of intent to be collected and low level perpetrators and those with ambiguous motives to be punished. It is in keeping with the purpose of the Genocide Convention. The Vienna Convention states that treaties should follow their original purpose. The purpose of the Genocide Convention is partly to punish perpetrators of genocide. As Aydin writes, “[t]he reason for defining genocide in legal terms is to prevent those who commit systematic massacres in order to destroy certain groups from doing so with impunity and escaping liability, as has happened in the past.”¹¹⁶ While punishing perpetrators is an important aspect of the Genocide Convention, the purpose was ultimately to protect groups, beyond the punishing of perpetrators. This is evident in the drafting of the convention. Goldsmith points to the Secretariat Draft of the Genocide Convention which states that “the purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political

¹¹⁴ Ibid., 2286.

¹¹⁵ Ibid.

¹¹⁶ Aydin, "The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts.", 426.

groups of human beings.”¹¹⁷ The ICTR also made this purpose clear when it stated that the “[t]he crime of genocide exists to protect certain groups from extermination or attempted extermination.”¹¹⁸ Criminalizing genocide functions as a deterrent for perpetrators thereby preventing genocide and protecting groups. If perpetrators of genocide can’t be convicted because special intent is too difficult to prove, however, then groups can’t properly be protected. Requiring special intent would result in the Genocide Convention losing its ability to protect groups, which is the Convention’s ultimate purpose. As Goldsmith writes, “the possibility that perpetrators will not only deny that the crime is taking place, but also destroy all evidence of the crime, is highly likely. Requiring *dolus specialis* is assisting this stage of genocide and works against the purpose of the Convention.”¹¹⁹ The interpretation of the Genocide Convention must match its original purpose, to protect groups, and only by allowing for a loose knowledge-based approach to intent can groups properly be protected.

Indeed some contend that in order for the Genocide Convention to properly protect groups in modern times, the restrictive definition of genocide in the Genocide Convention must be changed since though Lemkin intended for genocide to denote an “old practice in its modern development,”¹²⁰ he and the drafters did not anticipate the modern day warfare the Convention is grappling with today. Sterio recommends eliminating the phrase “as such” in the Convention, making the definition completely about the objective *actus reus* of the crime.

¹¹⁷ ECOSOC, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947) as cited in Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 248.

¹¹⁸ *Prosecutor V Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para, 469 as cited in Aydin, "The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts.", 434.

¹¹⁹ Goldsmith. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 253.

¹²⁰ Lemkin, Raphael. *Axis Rule in Occupied Europe*. Washington: Carnegie Endowment for International Peace, Division of International Law, 1944.

Alternatively, she suggests reinterpreting genocidal intent to the low level intent required in ethnic cleansing, essentially removing the distinction between ethnic cleansing and genocide. She argues that the two intents - intent for ethnic homogeneity in ethnic cleansing and intent to destroy in genocide- are not actually distinct, and should therefore be considered one and the same. Whether it is through actually modifying the Genocide Convention to exclude “as such” or essentially reinterpreting genocide as ethnic cleansing, Sterio argues that the solution to genocidal intent is not to use questionable legal analysis as was done in Karadžić but to change the definition of genocide so that it can correspond to modern day conflicts.¹²¹ Sterio seems to consider her approach to intent as the modern version of Lemkin’s genocide.

Yet ridding genocide of its unique intent requirement which is essentially what Sterio is suggesting is not modernizing Lemkin’s genocide but disregarding what genocide was supposed to mean. Though Lemkin’s main focus was on protecting groups because of their unique cultural contribution to the world and not on the varying levels of intent of the perpetrators, the intent requirement was always essential to his definition of genocide. To have genocide without its unique intent seems paradoxical. In the opinion of this author, the less extreme approach of maintaining the Genocide Convention as is but loosely interpreting intent through a knowledge-based approach allows the Convention to continue its purpose of protecting groups in modern times while retaining the intent requirement that is essential to its definition.

Knowledge-Based Approach to Genocidal Intent and Vindicating the Suffering of Victims

¹²¹ Sterio, “The Karadžić Genocide Conviction”.

For victims of horrible atrocities, the label of ‘genocide’ can vindicate and validate their struggles, causing, as Akhavan writes, a “temptation to adopt expansive interpretations.”¹²² A connection can be drawn between the genocide label and the historical legacy of a conflict. Sterio writes of the importance and necessity of imposing the genocide label in bringing “necessary closure” and providing a “historical narrative” by establishing a “relevant legacy” to the atrocities committed.¹²³ Yet broadly applying the label of genocide, however morally appealing, might also have a negative effect. Genocide is considered a “crime of crimes”.¹²⁴ By loosely applying the genocide label, genocide loses its unique implications of evil and horror. While the genocide label may vindicate the struggle of victims in the moment, overuse of the label ultimately rids genocide of its significance and with that the validation of past genocide victims. The knowledge-based approach best navigates this balance as unlike a lower level of intent like general intent, it still requires that genocidal intent be proven in order for the genocide label to be applied. A knowledge-based approach would therefore allow for more but not all atrocities to be determined as genocides while still maintaining its association as the “crime of crimes.”

VI. Conclusion

Genocidal intent as defined in the Genocide Convention should be interpreted through a loose knowledge-based approach of specific intent as was done in the Karadžić trial. Such an interpretation of genocidal intent does not contradict Lemkin and the drafters of the Convention who provided no indication of what type of intent genocide would require.

¹²² Akhavan, "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", 282.

¹²³ Sterio, "The Karadžić Genocide Conviction", 294.

¹²⁴ ICTR Trial Chamber in the Kambanda case as cited in Akhavan, "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", 282.

The ILC and ICC both require an intent higher than general intent for genocide, which a knowledge-based approach to specific intent would fulfill. Case law in the ICTR and ICTY require specific intent, but, especially with the recent Karadžić trial, indicate a knowledge-based determination of specific intent. A looser knowledge-based approach to the specific intent of genocide also best allows for the Genocide Convention to be applied but not over applied, allowing the convention to successfully hold perpetrators of genocide accountable, protect groups, and vindicate the struggles of victims.

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4 U.N. ESCOR, U.N. Doc F/477 (1947).

7 U.N. ESCOR Supp. (no 6), U.N. Doc E/794 (1948)

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