



## Rethinking Genocidal Intent: An Interpretation under the International Law and the Jurisprudence of International Criminal Tribunals

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**Abstract.** Many criminal lawyers and scholars of criminal law have applied an analytical method to examine the elements of crime, and such elements are comprised of subjective elements (*mens rea*) and objective elements (*actus reus*). According to this, a crime is either an act or omission with a psychological bond relating to the physical act of the criminal. Regarding the crime of genocide, its elements are derived from the definition of genocide under the Genocide Convention and the Rome Statute. The Genocide Convention defines genocide as the commission of an act with the intent to destroy, either wholly or partly, a national, racial, ethnical, or religious group. However, the 'genocidal intent' or mental element to commit the crime of genocide was not considered in the military trials of Nuremberg and Tokyo. This 'genocidal intent' received its very first attention during the trials of two ad hoc international tribunals for the Former Yugoslavia and Rwanda. This paper attempts to discuss the definition of genocide under the Genocide Convention and the Rome Statute. This paper, then, focuses on the mental element of genocide and the approach of the international criminal courts during the trial of genocide.

**Keywords:** Genocidal intent, Genocide convention, Particular group, International criminal law, Destruction



**Abstrak.** Banyak ahli hukum pidana dan sarjana hukum pidana telah menerapkan metode analisis untuk mengkaji unsur-unsur kejahatan dan unsur-unsur tersebut terdiri dari unsur subyektif (*mens rea*) dan unsur obyektif (*actus reus*). Menurut ini, kejahatan adalah perbuatan atau kelalaian dengan ikatan psikologis yang berkaitan dengan perbuatan fisik pelaku kejahatan. Mengenai kejahatan genosida, unsur-unsurnya diturunkan dari pengertian genosida di bawah Konvensi Genosida dan Statuta Roma. Konvensi Genosida mendefinisikan genosida sebagai tindakan yang bertujuan untuk menghancurkan baik seluruhnya atau sebagian, kelompok bangsa, ras, etnis atau agama. Namun, 'niat genosida' atau unsur mental untuk melakukan kejahatan genosida tidak dipertimbangkan dalam pengadilan militer di Nuremberg dan Tokyo. 'Niat genosida' ini mendapat perhatian pertama selama persidangan dua pengadilan internasional *ad hoc* untuk Bekas Yugoslavia dan Rwanda. Tulisan ini mencoba untuk membahas definisi genosida di bawah Konvensi Genosida dan Statuta Roma. Artikel tersebut kemudian berfokus pada unsur mental genosida dan pendekatan pengadilan pidana internasional selama persidangan genosida.

**Kata kunci:** niat genosida, konvensi genosida, kelompok tertentu, hukum pidana internasional, penghancuran

## 1. Introduction

Until the systematic atrocities of Nazis against the Jews during the Second World War, the term ‘genocide’ had no legal definition. Other terms such as massacre, mass killing, and destruction were used to describe the oppressive practice of Nazis, which were done with the intent to destroy the Jews and other particular groups. However, the purpose of the Nazis was not demonstrated by these terms. Besides, any legal term to address those atrocities was not legally made. Indeed, any individual in a group was not targeted by the Nazis, but they had the intention to destroy any particular group either wholly or partly.<sup>1</sup> At this point, killing the members of a group for destroying, in whole or in part, is the core characteristic of the crime of genocide now. Under the Convention on the Prevention and Punishment of the Crime of Genocide, the crime of genocide is committed when the perpetrator has clear intent to destroy particular groups on the basis of national, ethnic, racial, or religious identity.

The definition of the term ‘genocide’ was first coined in 1944 by Raphael Lemkin, a Polish lawyer who was forced to flee to America. He witnessed the atrocities of the Nazis during the Second World War and proposed the concept of ‘genocide’ to identify the systematic actions of Nazis against the Jews during the Second World War<sup>2</sup>. Basically, Lemkin introduced the term ‘genocide’ to indicate the crime of killing the members of a certain group by combining two Greek words *genos* and *cido*, which mean people or community and killed, respectively. According to Lemkin, a wide range of actions fall under the crime of genocide, including the killing of human life and birth prevention, a systematic approach to killing, separation from family life, and other similar actions that endanger life and health. Such oppressive acts are operated on individuals, and the reason behind this is only that they belong to some targeted groups. One of the distinguishing features of genocide is the killing of the members of a certain group, but according to Lemkin, genocide is the intentional extermination of certain groups on the basis of political, social, cultural, language, national feelings, religion, and the economic existence of

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<sup>1</sup> Devrim Aydin. “The interpretation of genocidal intent under the genocide convention and the jurisprudence of international courts.” *The Journal of Criminal Law* 78, no. 5 (2014): 423-441.

<sup>2</sup> Stone, Dan. “Raphael Lemkin on the Holocaust.” *Journal of Genocide Research* 7, no. 4 (2005): 539-550

national identity<sup>3</sup>. However, Lemkin faced criticism for being too passionate to refer certain genocidal acts only on the basis of extermination faced by the Jews in the hands of Nazis<sup>4</sup>. However, the current legal definition of genocide is much narrower than which was provided by demonstrated by Lemkin. At present, the 1948 Genocide Convention is the one to determine a conduct if it has the elements of genocidal act or not.

However, the crime of genocide was not entertained by the Nuremberg and Tokyo trials where the massacres by the Nazis were tried by the international military court. The crime of genocide was actually brought into light by the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Ruanda (ICTR), which tried the international crimes perpetrated in the former Yugoslavia and Rwanda respectively. The trials of both ICTY and ICTR took the attention of international lawyers and the crime of genocide was incorporated in the Statute of the International Criminal Court (ICC) in the same way as described by the Genocide Convention. The Convention in its Article 2 defines ‘genocide’ 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.*

It is to be remembered that even before the adoption of the Genocide Convention, the genocidal acts listed in the Convention occurred in past. Throughout the history of human era, broad and systematic atrocities took place in several regions of the world targeting ethnical, racial, religious and national groups. At the time of commission of those massacres, no international law was there to forbid and punish the criminals by defining and addressing their systematic

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<sup>3</sup> Raphael, Lemkin. “Genocide as a crime under international law.” *American Journal of International Law* 41, no. 1 (1947): 145-151.

<sup>4</sup> Alexander, Greenawalt, KA. “Rethinking genocidal intent: the case for a knowledge-based interpretation.” *Columbia Law Review* 99, no. 8 (1999): 2259-2294. doi:10.2307/1123611.

crime of destruction (Melson, 1996). As there was no legal definition of ‘genocide’ in international law as an international crime, some judicial proceedings of atrocities are argued even today. The Nazis might not have reached beyond a take of brutality if they had committed the massacres in an earlier era instead of the 20<sup>th</sup> century. However, the acknowledgement of group rights under the international human rights law has somehow invoked the judicial approach for preventing and punishing the perpetrators of such crimes. At this point the history has witnessed several destructive acts similar to genocide but its perpetrators have faced judicial efforts very recently.<sup>5</sup> For the development of individual criminal liability under international law, the punishment of the crime of genocide is very crucial. This is the reason why the trials of genocide started with the adoption of Genocide Convention, although the history has witnessed the several acts of genocide from much older period.<sup>6</sup> Since the adoption of the Genocide Convention, both national and international courts have prosecuted individuals accused of genocidal acts. The legal definition of ‘genocide’ was critically necessary to prevent the systematic massacres of destroying particular groups and punishing those who escaped from legal sanction even after committing such massacres, as has taken place in the past.

## 2. Discussion

### 2.1. The Legal Definition of Genocide under the 1948 Genocide Convention

Towards the formation of the definition of genocide, Raphael Lemkin made the most significant effort. According to Lemkin, the international laws of that time including the 1907 Hague Convention was not sufficient to safeguard the minority class of citizens. Moreover, the oppressive acts of Nazis against Jews were also not covered by any legal instrument. Notably Lemkin considered eight sorts of crimes as the crime of genocide. However, later on the International Conference was held in Madrid in the year of 1933 which has the prime role in the incorporation of expression in the genocide convention. Lemkin tried to introduce and define a new crime that covers every oppressive act of Nazis against Jews but the Madrid conference did not accept this. The principles of not targeting civilians

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<sup>5</sup> Omer Bartov. “Seeking the roots of modern genocide: On the macro-and microhistory of mass murder. In *The Specter of Genocide: Mass murder in historical perspective*, edited by Robert Gellately and Ben Kiernan.” *Cambridge: Cambridge University Press* (2003): 75-96.

<sup>6</sup> Devrim Aydin. Loc. Cit.

and abiding by other related norms of war were also proposed by the definition of Lemkin. Actually, Lemkin attempted to cover all the criminal acts of Nazis in one single crime<sup>7</sup>. Realizing the fact, the General Assembly of the United Nations (UN) in Resolution 96 (1) of 11 December stated that:

*“Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.”*

The principles framed by the Nuremberg trials subsequently led the adoption of the Genocide Convention and played a major role in framing the definition of the crime of genocide. As per the Convention, the crime of genocide may not necessarily take place during the war only but also in peace time. The crime of genocide may be committed targeting any particular group of a State or by occupying a state’s territory where the people of particular group reside. It is a fact that not only the Jews residing in German were exterminated but the Jews of other occupied territory also faced extermination policies<sup>8</sup>. Thus, the members of certain groups residing in a country may be target of genocidal acts. Article 1 of the Genocide Convention reads:

*The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.*

In addition, according to the Genocide Convention, the genocide does not fall within the category of political crime. Thus, the perpetrators of genocidal act can be extradited to the requiring country for facing criminal trial. Article 7 of the Genocide Convention states that:

*“Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition”.*

*“The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”*

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<sup>7</sup> David, Nersessian, L. “The contours of genocidal intent: Troubling jurisprudence from the international criminal tribunals.” *Texas International Law Journal* 37, no. 2 (2002): 231-275.

<sup>8</sup> Ronzitti, N. *Enciclopedia del diritto* 17. Milano: Giuffrè Editrice, 1969

Resolution 96 (1) of the UN however designed the definition of the crime of genocide along with necessary elements and listed certain protected groups. However, neither the Genocide Convention nor in the preparatory debates it was mentioned that the crime of genocide take place with intent or special intent. As the Article 2 of the Genocide Convention states about the commission of certain acts with the intent to destroy which amounts to genocide, it can clearly be deducted that the perpetrator of genocide must have a precise intent to commit the crime<sup>9</sup>. Besides, the ICTY and ICTR trials were the first international forum to discuss the mental element of genocide because the crime of genocide can only be proved upon proving the genocidal intent of the criminal.

## **2.2. The Interpretation of the “genocidal intent” in the Rome Statute of the International Criminal Court (ICC)**

On July 17, 1998, a UN diplomatic conference in Rome accepted the Rome Statute of the International Criminal Court, which went into effect on 1 July 2002. Its provisions are based on the lessons learned from the trials at Nuremberg, Tokyo, the ICTR, and the ICTY as well as the development of international criminal law. Genocidal acts were assessed as crimes against humanity since the crime of genocide had not yet been defined during the Nuremberg trials<sup>10</sup>. The Genocide Convention served as the foundation for debates of genocide during the ICTY and ICTR trials. The Rome Statute copies the definition of genocide from the 1996 ICC Preparatory Committee draft language, which was in accordance with the Genocide Convention. The crime of genocide as established in 1948 is consistent with international customary law and *jus cogens*, as highlighted by the UN International Law Commission’s recommendatory conclusion in 1951.<sup>11</sup> As a result, Article 2 of the Genocide Convention and the Rome Statute both define the crime of genocide in the exact same terms. One of the actions enumerated in Article 6(a)-(e) alone is not sufficient to establish the existence of genocide,

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<sup>9</sup> Otto, Triffterer. “Genocide, its particular intent to destroy in whole or in part the group as such.” *Leiden Journal of International Law* 14, no. 2 (2001): 399-408.

<sup>10</sup>, Hans-Heinrich, Jescheck . “The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute.” *Journal of International Criminal Justice* 2, no. 1 (2004): 38-38

<sup>11</sup> Devrim Aydin. Loc. Cit.

according to Article 6 of the Rome Statute. Article 6 of the Rome Statute states that:

*For the purpose of this statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

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

It is also a requirement of the Rome Statute is that the act of genocide shall be committed having the purpose to destroy a particular group either in whole or in part. At this point, Article 30 of the Statute has interpreted the mental element of the crime of genocide:

- 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*
- 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) 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.*
- 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.*

The 'intent to destroy' under the Article 6 and the definition of 'intent' under the Article 30 are complementary expressions of the same idea.<sup>12</sup> The concepts of 'genocide' and 'intent to destroy' the group are covered in Articles 6 and 30, respectively, while 'general intent' (*dolus generalis*) is specified in Article 30. According to Article 30, 'unless otherwise provided', the essential ingredients of a crime must be committed with knowledge and intent for a person to be considered guilty of it and fall under the purview of the ICC. Genocide cases before the ICC must take into account both Articles 6 and 30 of the Rome Statute. The phrases 'unless otherwise provided' in Article 30 and 'purpose to destroy', which were both repeated identically as in the Genocide Convention, in Article 6, are both coherent.

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<sup>12</sup> Devrim Aydin. *Loc. Cit.*



While it is acknowledged that crimes subject to the jurisdiction of the ICC can be committed with ‘special purpose’, genocide is one such crime.<sup>13</sup> Although genocide is an intentional crime, the statute states that the goal that was intended to be reached by the acts that were committed is crucial for the punishment of the crime. This goal need only be accomplished by one of the listed acts; it is not required that it be accomplished in its entirety. On the other hand, it is incorrect that only ‘knowledge’, not ‘knowledge and willing’ has been designated in the Rome Statute as the element of intention. In all criminal law systems, the elements of purpose are ‘knowing and willing’. It makes no difference if a different term is used in place of ‘intention’.

### **2.3. The ‘genocidal intent’ in the Crime of Genocide: Understanding the Mental Element**

Every criminal act consists of two significant constituents, namely, the mental or subjective element (*mens rea*) and the material or objective element (*actus reus*).<sup>14</sup> Accordingly, crime is an act or omission that has a bond with the psychology of the perpetrator. Any criminal conduct inflicted by a perpetrator will not be punishable unless done with a guilty mind or *mens rea*.<sup>15</sup> Therefore, it must be proved that the perpetrator committed the crime ‘knowingly and willfully’.<sup>16</sup> *Mens rea* is also referred as ‘culpability’ which appears to be ‘intention’ (*dolus*) or ‘negligence’ (*culpa*).<sup>17</sup> Moreover, intention can be derived as ‘direct intention’ (*dolus directus*) or ‘recklessness’ (*dolus eventualis*).<sup>18</sup> At this point, genocidal intent is a sort of special intent (*dolus specialis*) that exclusively encircles *dolus directus*.<sup>19</sup> Thus, genocidal intent indicates to the direct and special intent of the perpetrator for destroying, wholly or partly, a national, ethnical, racial or religious group, as such. This view was expressed by the ICTY in *Prosecutor vs. Krstic* case (2001) as: ‘for the

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<sup>13</sup> Roberta Arnold. “The Mens Rea of Genocide under the Statute of the International Criminal Court.” *Criminal Law Forum* 14, no. 2 (2003): 127-151.

<sup>14</sup> Devrim Aydin. Loc. Cit.

<sup>15</sup> Jefferson, Michael. *Criminal Law. The Foundation Studies in Law Series*. Pearson Education UK, 2006.

<sup>16</sup> Jefferson, Michael Loc. cid

<sup>17</sup> John Cyril, Smith. and Hogan, Brian. *Criminal Law*. London: Butterworths, 1999

<sup>18</sup> John Cyril, Smith. and Hogan, Brian. Loc. cit

<sup>19</sup> Pisani, N. “The Mental Element in International Crime in F. Lattanzi et W. Schabas.” *Essays on the Rome Statute of the International Criminal Court*. Aquila: il Serente Editrice, 2004.

purpose of this case, the Chamber will therefore adhere to the characterization of genocide which encompass only acts committed with the goal of destroying all or part of a group'. On the other hand, negligence being the avoidance of a result cannot be considered as intent for the crime of genocide.

Intention (*dolus*) indicates to a knowing and willful act that turns into a crime.<sup>20</sup> General intention is usually considered when the perpetrator commits any prohibited act consciously and willingly and the purpose, by which the perpetrator is motivated, is unnecessary to establish the crime. For illustration, crimes that can be committed with a general intent include homicide, assault, robbery, and rape. However, in some instances, the law may also ask for the perpetrator's purpose along with the fact that the act of the perpetrator was a knowing and willing act. Numerous jurists opined that 'purpose' indicates to 'general intent' and 'intent' refers to 'special intent' (*dolus specialis*). Using the word "purpose" emphasizes the volitional aspect of intending a consequence in the sense of wanting the latter<sup>21</sup>. Besides, 'intent' means that the crime was committed by the perpetrator willfully and knowingly<sup>22</sup>. When the commission of the crime or the severity of the penalty depend on the offender acting with a specific intention, this is known as special intent. In this situation, the law stipulates that in addition to the material act's conscious and willing existence, the offender must also act with a specific goal. Proof of the actor's conscious object, or purpose, to do the social harm specified in the offense's description is required for specific intent.<sup>23</sup>

When the offender is aware of how hazardous and detrimental his actions are to society and wants them to happen, his "general intent" is called into doubt. For the majority of crimes, general intent is sufficient on the part of the perpetrator. On the other hand, particular intent calls for both the fact that the crime was committed knowingly and intentionally, as well as the fact that the perpetrator acted to attain a specific goal that was prohibited by law. As a result, special intent only exists when a crime is committed with the intention of achieving a legally prohibited goal and not because the offender was motivated by a particular

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<sup>20</sup> George P. Fletcher, and Jens David Ohlin. "Reclaiming fundamental principles of criminal law in the Darfur case." *Journal of International Criminal Justice* 3, no. 3 (2005): 539-561.

<sup>21</sup> Hans, Vest, "A structure-based concept of genocidal intent." *Journal of international criminal justice* 5, no. 4 (2007): 781-797

<sup>22</sup> Jenny, Martinez S. "Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond." *Journal of International Criminal Justice* 5, no. 3 (2007): 638-638.

<sup>23</sup> Devrim Aydin. Loc. Cit.

motive<sup>24</sup>. In this instance, the offender is penalized for his or her unlawful intent rather than any specific behavior. So, the ability to commit a crime with particular intent has nothing to do with the nature of the crime or the actions of the offender and everything to do with how the law is expressed. It is possible to determine whether special purpose is necessary for a crime to exist based on the language of the statute.<sup>25</sup> As discussed, the crime of genocide is one that can only be committed with specific purpose because the perpetrator's goal is to completely or partially destroy a protected group. The mental component of the crime of genocide is characterized by the desire (genocidal intent) to destroy the group. Genocide requires unique intent since there is a close psychological connection between the act and the aim of the offender.<sup>26</sup> Certain crimes call for special intent as a component element, which means the accused must have the deliberate intent to commit the crime at hand. This definition holds that particular intent is the essential component of an intentional offense, which is characterized by a psychological connection between the physical outcome and the perpetrator's mental state. The crime of genocide is not established if the perpetrator's goal in carrying out one of the actions listed in the Genocide Convention against a victim or victims is not the whole or partial annihilation of the group. In that situation, the offender will likely face charges for crimes against humanity.

Article 2 of the Genocide Convention discussed the elements required to establish the crime of genocide. As per the Article 2, 'genocide' means committing any of the acts listed in paras (a)-(e) of that Article with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. According to the International Law Commission's understanding, genocide is not the kind of act that would often result from a mistake or even simple neglect<sup>27</sup>. The material ingredient of the crime of genocide i.e., the five actions listed in Article 2, cannot be committed by accident, coincidence or negligence. However, a general intent to commit one of the listed actions is insufficient to constitute the crime of genocide. These criminal acts can only be committed by a perpetrator having the purpose to destroy a group which denotes that the crime can only be committed with special

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<sup>24</sup> Michelle, Gelardi, *il Dolo Specifico*. Padova: CEDAM Editrice, 1996

<sup>25</sup> Devrim Aydin. Loc. Cit.

<sup>26</sup> Kai Ambos. "What does 'intent to destroy' in genocide mean?" *International Review of the Red Cross* 91, no. 876 (2009): 833-858.

<sup>27</sup> International

intention or *dolus specialis*. The issue of special intent comes into consideration because the purpose of the criminal features the crime and it is that purpose which makes the perpetrator liable to penalty.

#### **2.4. The Trials of Genocide in Nuremberg and Tokyo**

The Moscow Conference which was held in October 1943 considered the oppressions by Nazis over the civilians as ‘atrocities, massacres and cod-blooded mass execution’. In fact, the London Agreement of 1945 being the legal basis of the Nuremberg trial did not include the crime of genocide. The crimes committed by the Nazis were qualified as ‘atrocities’ and ‘crimes against humanity’. Prosecution against the Nazis was initiated for war crimes, crimes against peace and crimes against humanity<sup>28</sup>. These crimes were the direct violation of customary international law and the provisions of the Hague Conventions of 1899 and 1907. However, the Nuremberg trial itself was a remarkable incident for development of international criminal law. Some criminal acts, amount to the crime of genocide were tried during the Nuremberg trials but not as any specific and particular crimes, as discussed above.

The Nuremberg trials only considered ‘crimes against humanity’ and ‘political, racial or religious oppression’. It is notable that these two mentioned crimes were committed in pursuance of other two crimes namely ‘crimes against peace’ and ‘war crime’. The reason behind this was ‘the Holocaust’ which was the genocidal approach against the Jews. The initial kind of acts expressed in the definition of ‘crime against humanity’ was not the only thing consisted by the Holocaust. It was a systematic action with the ultimate goal to clean Europe from Jews and this was considered as the final solution.<sup>29</sup> At the time of trial, the oppression which was suffered by Jews was considered; however, the goal of such oppression was not focused in a serious extent. It is argued that the principle of ‘no crime, no punishment without a previous penal law’ not overruled during the Nuremberg trials. To be remembered that the court did not consider the crimes of the Nazis as the crime of genocide and no trial was made for any crime that was not in existence.<sup>30</sup> The court expressed its view that the acts of Nazis were the violation

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<sup>28</sup> O'Brian, W. *International Crimes in D. L. Sills and R. K. Merton* (eds.), International Encyclopedia of the Social Sciences, vol. VII. New York: MacMillan, 1968

<sup>29</sup> Devrim Aydin. Loc. Cit.

<sup>30</sup> Ibid.

of the rules of international law and fell under the scope of ‘crimes against humanity’. So, it is very evident that the acts of Nazis were not qualified as ‘genocide’ by the courts and no trial was made for committing a crime that did not exist under law <sup>31</sup>. The international crimes which are qualified as genocide in present days were treated as the crimes against humanity before the adoption of Genocide Convention.

## **2.5. The International Criminal Tribunals and the ‘genocidal intent’**

International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the United Nations (UN) as an ad hoc court for trying numerous crimes that took place in the Former Yugoslavia, but the court’s statute did not consider the crime of genocide. But importantly, at the trials of the *Sikirica*, *Krstic* and *Jelavic*, the ICTY made comments and rendered verdict on the crime of genocide.<sup>32</sup> The concept and types of intent were clearly influenced by English law, but the ICTY later decided to interpret the *mens rea* and intent issues in accordance with international criminal law and international crimes. According to the ICTY Appeals Chamber’s ruling in the *Jelavic* case, both the material element (*actus reus*) and the mental element (*mens rea*) must be considered in order to establish the crime of genocide. The judgment states that in order to violate the Genocide Convention, a group whose characteristics are specified by the Convention must be targeted and its destruction must also be the goal of one or more of the crimes listed in the Convention. It was stated by the ICTY Appeals Chamber:

*Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.*

The ICTY Trial Chamber emphasized that the characteristics of the particular group are crucial for the existence of genocide and that members of the group were not specifically targeted as individuals but rather because they were members of

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<sup>31</sup> O’Brian, W. *International Crimes in D. L. Sills and R. K. Merton* (eds.), *International Encyclopedia of the Social Sciences*, vol. VII. New York: MacMillan, 1968

<sup>32</sup> Devrim Aydin. Loc. Cit.

the group.<sup>33</sup> In the *Jelisić* ruling, the ICTY cited Lemkin's opinion as well as the Genocide Convention's provisions regarding the physical and psychological components of the crime; it applied a literal reading and conducted a conventional analysis of the crime.

The International Criminal Tribunal for Rwanda (ICTR) condemned Jean Kambanda, the former prime minister of Rwanda, on May 1, 1998, for planning, encouraging, and committing crimes against humanity. On September 2, 1998, Jean-Paul Akayesu received a similar sentence for the same offense. The ICTR in its various decisions stated that the crime of genocide can be perpetrated with special intent which was referred by the terms like 'special intent', 'specific intent' and 'specific genocidal intent'. Despite the use of these terms, the court failed to reach a logical conclusion regarding whether the crime of genocide entailed special intent.<sup>34</sup> The act of genocide must, however, be committed with intent because it is impossible to commit the same crime with both general and specific intent. In the case of *Prosecutor vs. Akayesu* (1998), the ICTR emphasized that the distinction between genocide and crimes against humanity is that the former is committed with specific intent since it includes the extermination of the group, whilst the latter involves the oppression of the group. In the *Akayesu* ruling, the ICTR mentioned that:

*Having regard to its statute, the Chamber believes that the offences under the statute—genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II—have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive.*

The rulings of the ICTY and ICTR demonstrate that these courts have not created any new legal standards. They have contributed to the evolution of the law pertaining to international crimes and genocide by interpreting already-existing legal principles. These two ad hoc courts have taken on a significant role in

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

determining the normative meanings of the Genocide Convention's terms and in interpreting the Convention so that it has become a recognized body of international law. It is pertinent to mention that in Bangladesh, the International Crimes Tribunal (ICTB) was established under the International Crimes Tribunal Act, 1973. This act, however, did not replicate the same definition of genocide as enumerated in the Genocide Convention 1948 and the ICC Statute.<sup>35</sup> The Act, 1973 of ICTB added 'political group' as a protected group though such a category of the group is not internationally recognized

## 2.6. Aspects of Genocidal Intent: Evidence from International Law

The most pressing issues with the crime of genocide appear to be establishing genocidal intent and providing evidence for it. The distinction between the crime of genocide and other crimes is that it targets a human group rather than an individual.<sup>36</sup> The ICTR stated in the *Prosecutor vs. Kambanda* (1998) judgment that, "Since the purpose of the genocide crime is to destroy in whole or in part a certain racial, ethnic, national or religious group, special intent (*dolus specialis*) exists here and this crime is "the crime of the crimes".<sup>37</sup> Special intent is a sort of intent that qualifies as genocide but is not the mental component of the crime.<sup>37</sup> The crimes listed in Article 2 of the Genocide Convention may result from deliberate acts, but in order for the crime of genocide to be proven, those acts must have been carried out with the intention of eradicating a national, ethnic, racial, or religious group, in whole or in part. The perpetrator must be aware that his actions would normally have the effect of destroying the group, either completely or in part (Schabas, 2001). Therefore, the special purpose of the criminal constitutes the *mens rea* of the crime of genocide. On the other hand, some people view the "special intent" of genocide as the mental element of the crime rather than a specific form of intent<sup>38</sup>. In a judgement by the ICTR, a similar interpretation was made, and it was stated

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<sup>35</sup> Maruf Billah. "Prosecuting Crimes against Humanity and Genocide at the International Crimes Tribunal Bangladesh: An Approach to International Criminal Law Standards." *Laws* 10, no. 4 (2021): 1-34.

<sup>36</sup> Cécile Aptel. "The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda." *Criminal Law Forum* 13, no. 3 (2002): 273-291.

<sup>37</sup> Roberta Arnold. Loc. Cit.

<sup>38</sup> William, Schabas, A. "Was genocide committed in Bosnia and Herzegovina? first judgments of the International Criminal Tribunal for the former Yugoslavia." *Fordham International Law Journal* 25, no. 1 (2001): 23-53



that “special intent”, which shows the perpetrator’s desire to destroy the group as the mental component of the crime, shall unquestionably exist for genocide. The general intent and special intent division is a theoretical divide whose goal is to comprehend the crime and ascertain the perpetrator’s intent.<sup>39</sup> That the presence of genocidal intent establishes the presence of special intent, or that it is found during the trial that the offender acted with genocidal intent. In terms of criminal law, the key question is whether the act was committed “intentionally” or not. The issue is resolved if it is discovered that the offender committed a crime on purpose, which can be done with special intent. This is due to the fact that “special intent” is a type of “intent” rather than a type of the “mental element” of the crime. However, it is undeniable that genocide can only be perpetrated with intention. The fact that the perpetrator’s purpose is “to destroy the group” separates this crime from other crimes like mass killings, crimes against humanity, or acts of ethnic cleansing.<sup>40</sup> The Genocide Convention defines this crime as having as its primary goal the destruction of a particular group. As a result, the victims of this crime are not targeted for this crime because of who they are; rather, they are targeted simply because they belong to the group that is being targeted. Victims of genocide are targeted because each individual is just one element of the targeted group.

According to the ICTR, the intent to destroy the group constitutes the crime of genocide’s constitutive element and forms its basis; as a result, the crime is committed with specific intent<sup>41</sup>. In accordance with general criminal law principles and the historical development of the Convention, the intent of the genocide must be taken into consideration. Therefore, the mental element of this crime should be analyzed using both teleological and historical interpretation approaches. As the mental element, the determination of the intent of a criminal in all the crimes is a difficult one. At this point, the genocidal intent can be ascertained by the acts of the criminal. One of the basic requirements that can be applied to determine the genocidal intent is the quantitative features of the destroyed part of the group. The ICTR stated in its judgement of *Prosecutor vs. Musema* (2000) that “when the number of the killed Tutsi people is considered, it

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<sup>39</sup> Roberta Arnold. Loc. Cit.

<sup>40</sup> Devrim Aydin. Loc. Cit.

<sup>41</sup> David, Nersessian, L. “The contours of genocidal intent: Troubling jurisprudence from the international criminal tribunals.” *Texas International Law Journal* 37, no. 2 (2002): 231-275.



is obvious that the purpose was the destruction of the group.” However, in this case, the court disregarded the quantification of the people killed by not specifying the exact number of people killed.<sup>42</sup> Another means to determine the intent is the ‘repetition of the destructive and discriminating acts’<sup>43</sup>. Even in case of cultural genocide, the plan to commit genocide is a fundamental element though such case is not provided in the Genocide Convention regarding the destruction of the cultural existence of any protected group. For illustration, the ICTY in the judgements of *Karadzic* and *Mladic* (1996) took into consideration the destruction of several establishments and libraries which belonged to Muslims as a part of cultural genocide. In the *Jelavic* case (2001), the ICTY mentioned that the perpetrator has consistently and continuously targeted only the members of a particular group which reveals the presence of genocidal intent. It is noteworthy that the International Court of Justice (ICJ) cited in the *Legality of Use of Force (Yugoslavia vs United States of America and Others)* case (1999) that the unrestricted use of power may cause genocide and the use of any means and methods in excessive way will prove genocidal intent.

The very citable legal documentation of the ICC on the proof of genocidal intent and the crime of genocide is the *Prosecutor vs Omar Hassan Ahmed Al-Bashir* case (2010) of Darfur, Sudan. In its hearing of 4 march 2009, the ICC Pre-Trial Chamber I denied the application of the prosecutor regarding genocide stating that it would provide a warrant of arrest for the crime of genocide only upon the satisfaction of the existence of genocidal intent. The Appeals Chamber on 3 February 2010 mentioned that the existence of genocidal intent must not contain any reasonable doubt. A warrant of arrest was issued on 12 July 2010 against President Omar Al-Bashir of Sudan for commission of genocide in Darfur, Sudan on the basis that there were reasonable grounds of criminal responsibility for the act of genocide. The arrest warrant listed a number of atrocities carried out in Sudan against civilian populations and ethnic groups by the Sudanese military and the State-sponsored militia known as ‘Janjaweed’. Al-Bashir was accused of being criminally responsible for these atrocities as an indirect perpetrator or indirect co-perpetrator. Al-Bashir was charged with killing and causing serious mental or physical injury to other members of the specified targeted ethnic groups, in whole

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<sup>42</sup> Devrim Aydin. *Loc. Cit.*

<sup>43</sup> David ,Nersessian, L. “The contours of genocidal intent: Troubling jurisprudence from the international criminal tribunals.” *Texas International Law Journal* 37, no. 2 (2002): 231-275.

or in part, with the specific intent (*dolus specialis*) of destroying them. The court found the conditions and proof of genocidal intent to be the systematic crimes committed against the protected groups. The crime of genocide can be established on the basis of material elements of the crime committed and the subsequent acts as described by the Genocide Convention.<sup>44</sup> In addition, other prohibited acts of the perpetrator should also be considered to determine the intent of the perpetrator. It will be evident that the perpetrator is preparing to carry out genocidal acts if a genocide plan has been designed and there is evidence of organization to carry it out.

### 3. Conclusions

Before framing the Genocide Convention in 1948, the acts of genocide were referred to as massacre or brutal killing. The criminal law of any nation did not previously mark the atrocities that formed the existing elements of genocide before 1948. Raphael Lemkin first coined the term 'genocide,' and his efforts brought the promulgation of the Genocide Convention into reality. The 1948 Genocide Convention has shown light many national criminal laws to prosecute the crime of genocide considering the elements described by the Convention. Today the law relating to genocide has become a significant *jus cogens* rule of international law and introduced a field of analysis for criminal law. Today the Genocide Convention is regarded as the prime international instrument to determine and prosecute the crime of genocide with regard to the Rome Statute. This Convention assisted in drafting the statutes of ICTY, ICTR, and ICTB. Moreover, the 1948 Convention's definition of genocide is the same as the concept of the crime of genocide in Article 6 of the Rome Statute of the International Criminal Court. As these tribunals during the trial interpreted the crime of genocide under the head of human rights laws and customary law, a review of the Genocide Convention and the rulings of these tribunals is still required to assess if genocide was actually committed, despite the fact that a vast number of country criminal laws have codified the crime.

Per the rule of criminal law, to establish a crime, the material element (*actus reus*) and mental element (*mens rea*) of that particular crime must be determined. In terms of the crime of genocide, these elements are found in the definitions of Article 2

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<sup>44</sup> Devrim Aydin. *Loc. Cit.*

of the 1948 Genocide Convention and Article 6 of the ICC Statute. In accordance with the discussions of these Articles, committing any of the crimes listed in them with the purpose of destroying, in whole or in part, a national, ethnical, racial, or religious group constitutes the crime of genocide. The crime of genocide only takes place when committed with a particular intention and by committing any of the prohibited acts mentioned by the Genocide Convention and the Rome Statute. Here the intention of the perpetrator is “intent on destroying in whole or in part a national, ethnical, racial or religious group, as such.’ So, the genocide must be committed by the perpetrator with a specific purpose to destroy a particular targeted group, and this specific purpose of the perpetrator in committing genocide is known as ‘genocidal intent’ as well as ‘special intent’ (*dolus specialis*) under the substantive criminal law. Thus, it is very evident that in case of the absence of the genocidal intent of a perpetrator, any such crime will be treated as ethnic cleansing, mass killing, or crime against humanity but not the crime of genocide.

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