



Genocide: A Crime with Intent to Destroy in Whole or in Part

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Abstract. Like all other crimes, genocide has some common elements such as an *actus reus* and a corresponding *mens rea*. Moreover, another subjective element is also present in all crimes of genocide which is the “intent to destroy, in whole or in part, a [...] group as such.” This is also referred to as “genocidal intent” and it indicates that the criminal liability of genocide does not merely rely on the completed result of the committed act but depends on the intention of the perpetrator to achieve. However, the threshold of this intention is not as high as the *mens rea* narrated in Article 30 of the ICC Statute. In addition, there is no requirement for the existence of any special extent of this intention. Indeed, *Dolus eventualis* is adequate to perform the *actus reus* as well as to establish the particular “intent to destroy [...]” The theoretical criterion of The Draft Elements of Crimes is both inadmissible and unadvisable for limiting the criminal liability of genocide or the authority of the Court for trying such crimes

Keywords: Genocide, Genocidal Intent, ICC Statute, *Mens Rea*, Holocaust

Abstrak. Seperti semua kejahatan lainnya, genosida memiliki beberapa elemen umum seperti *actus reus* dan *mens rea* yang sesuai. Selain itu, unsur subjektif lainnya juga hadir dalam semua kejahatan genosida yaitu “niat untuk menghancurkan, seluruhnya atau sebagian, suatu [...] kelompok itu sendiri.” Ini juga disebut sebagai “niat genosida” dan ini menunjukkan bahwa pertanggungjawaban pidana genosida tidak hanya bergantung pada hasil akhir dari tindakan yang dilakukan tetapi tergantung pada niat pelaku untuk mencapainya. Namun ambang batas niat ini tidak setinggi *mens rea* yang dirumuskan dalam Pasal 30 Statuta ICC. Selain itu, tidak ada persyaratan untuk adanya tingkat khusus dari niat ini. Memang, *Dolus eventualis* cukup untuk melakukan *actus reus* serta untuk menetapkan niat untuk menghancurkan [...] tertentu. Kriteria teoretis dari Rancangan Elemen Kejahatan tidak dapat diterima dan tidak disarankan untuk membatasi pertanggungjawaban pidana genosida atau otoritas Pengadilan untuk mengadili kejahatan semacam itu

Kata kunci: Genosida, Niat Genosida, Statuta ICC, *Mens Rea*, Holocaust

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1. Introduction

The crime of genocide is comprised of two individual ingredients, one is known as ‘general intent’ or *dolus*, and the other is ‘intent to destroy’.¹ A generalized intention has a relation with the objective ingredients of the offence definition (*actus reus*),² and is now well described by Article 30 of the International Criminal Court (ICC) Statute as primarily encompassing a volitional or a cognitive ingredient. In respect of genocide, the general intent has relation to the initial paragraph as well as to the acts mentioned in the offence and made against one of the protected groups.³ For example, the perpetrator must have knowledge that one of the protected groups is being targeted by him, since the issue of the protected group is a factual circumstance as described by Article 30(3) of the ICC Statute. On the other hand, the ‘intent to destroy’ installs an extra subjective requirement that complements the general intention and reaches far beyond the objective ingredients of the offence definition.⁴ It is very evident that genocide is actually a goal-oriented crime.⁵ In addition, the crimes of genocide committed in several parts of the world reflect a similar structure;⁶ there shall remain an *actus reus* with prior *mens rea*, secondly, the significant element “intent to destroy, in whole or in part, a [...] group as such.” This is termed as “genocidal intent” and is featured by the issue that the liability for the commission of genocide does not rely on the outcome but on the intention of the perpetrator. The intensity of this violence is not more severe than for the *mens rea* as mentioned in Article 30 of the Rome Statute; particularly no qualified violence is required to prove the intent of the perpetrator.⁷ Even a little extent of violence with particular intent to destroy may become sufficient enough to commit the *actus reus* and thus, the crime of genocide.⁸ The

¹ Payam Akhavan, “The crime of genocide in the ICTR jurisprudence,” *Journal of International Criminal Justice* 3, no. 4 (2005): 989.

² Meir Dan Cohen, “The “Actus Reus” and Offences of “Situation,”” *Israel Law Review* 7, no. 2 (1972): 187.

³ Kai Ambos, “What does ‘intent to destroy’ in genocide mean?,” *International Review of the Red Cross* 91, no. 876 (2009): 833.

⁴ 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.

⁵ Payam Akhavan, *Reducing Genocide to Law: definition, meaning, and the ultimate crime* (New York: Cambridge University Press, 2012), 11.

⁶ Claus Kieß, “The crime of genocide under international law,” *International Criminal Law Review* 6, no. 4 (2006): 461.

⁷ Amal Alamuddin and Philippa Webb, “Expanding jurisdiction over war crimes under Article 8 of the ICC Statute,” *Journal of International Criminal Justice* 8, no. 5 (2010): 1219.

⁸ Md Hasnath Kabir Fahim, “Rethinking Genocidal Intent: An Interpretation under the International Law and the Jurisprudence of International Criminal Tribunals,” *Lex Publica* 9, no. 1 (2022): 58.

mens rea which constitutes *actus reus* must cover all the ingredients of the factual manifestation of one of the crimes of genocide.⁹ These objective ingredients are, as per Article 30, categorized into three types such as conduct, consequences and circumstances. However, the terming of the *chapeau* of all genocide definitions in traditional international law, under Article 6 of the Rome Statute, directly demonstrates that on the subjective, the physiological part of the genocide, more is necessary than the *mens rea* that to little extent highlights the *actus reus*.¹⁰ The “intent to destroy” is the spare common ingredient, necessary for every crime of genocide.

This “intent to destroy” as a subjective ingredient is often termed “genocidal intent.”¹¹ However, this criterion is very much deceitful as it is often considered a total expression of the entire subjective, mental part of genocide.¹² Such cognition does not only mislead but also *contra legem*, to the extent as there remain two subjective ingredients necessary to set up criminal liability for genocide: the *mens rea* and the “intent to destroy [...]”.¹³ Practically these two ingredients may come close or sometimes overlap, such as when a criminal murders a significant number of people of a protected group who were trying to hide, having the intention to destroy ‘in part’ tis ‘group, as such.’¹⁴ The notions of Article 6 *litera* (c) and (d) “*Deliberately* inflicting on the group conditions of life calculated to bring about” respectively “Imposing measures *intended* to prevent births,” denotes such an overlapping, these two considerable words exclusively demonstrate what is represented in Article 30 in respect to the *mens rea* and specific intent.¹⁵

The said aspects including other issues dealt with later can be precisely discussed by the genocide committed by Adolf Hitler at the time of World War II. In early 1938 he tried to manage his commanding militaries to understand his plan for occupying foreign nations such as Czechoslovakia,¹⁶ for gaining more space to develop the so-called ‘Aryan race’, he made his statement with the argument: Who,

⁹ 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.

¹⁰ Gerhard Werle and Florian Jessberger, “Unless otherwise provided’: Article 30 of the ICC statute and the mental element of crimes under international criminal law,” *Journal of International Criminal Justice* 3, no. 1 (2005): 35.

¹¹ Janine Natalya Clark, “Elucidating the Dolus Specialis: An analysis of ICTY jurisprudence on genocidal intent,” *Criminal Law Forum* 26, no. 3-4 (2015): 497.

¹² Aristotle Kallis, *Genocide and fascism: The eliminationist drive in fascist Europe* (New York: Routledge, 2008), 27.

¹³ Pietro Costa and Danilo Zolo, ed., *The Rule of Law History: Theory and Criticism* (Berlin: Springer Dordrecht, 2007), 4.

¹⁴ Lawrence J. LeBlanc, “The intent to destroy groups in the Genocide Convention: the proposed US Understanding,” *American Journal of International Law* 78, no. 2 (1984): 369.

¹⁵ Triffterer, “Genocide, its particular intent to destroy,” 400.

¹⁶ Gerhard L. Weinberg, “Munich after 50 years,” in *World War Two*, ed. Lily Xiao Hong Lee, New York: Routledge, 2016), 16.

after all, thinks today of the Armenians, pointing out that the World during the Peace Treaties of Sevres (1920) and Lausanne (1923) as well as when Hitler attempted to actualize his plans, was unprepared for investigating and prosecuting genocide done by states respectively. From the very beginning, Hitler had serious plans and intentions to destroy, wholly or partly, specific groups such as Jews and Gypsies in Germany as well as in other occupied countries.¹⁷ But yet no crime was committed by him practically with his intention to achieve “to destroy, in whole or in part, a [...] group, as such.” The first approach of Hitler against the Jews was called ‘Reich Kristallnacht’, which revealed his intention. It appeared by means of permitting and allowing particular acts that resulted in killing a big number of Jewish people and in “causing serious bodily or mental harm to members of the group,” thus the committed crimes were illustrated by the Genocide Convention 1948 as well as in accordance with the Article 6 of the Rome Statute, with the specific intention to annihilate the Europeans as a group.¹⁸ During that time, very few Germans opposed and struggled against Hitler’s plan of erasing European Jews with the aid of technical means which were concentration camps.¹⁹ For preventing harm against the protected group, these righteous Germans paid with their lives. However, the entrance of the Holocaust Memorial in Tel Aviv expressed: ‘The world stood by silent!’ The drafters of the Genocide Convention were strongly determined to criminalize any such intent as they observed in the case of Hitler and were motivated by this aim for criminalizing any similar intent at the very initial moment which has now been characterized by Article 6.²⁰

To constitute the crime of genocide, both the *actus reus* and *mens rea* are just beyond reasonable doubt.²¹ Additionally, to ensure the rule of law as well as establish the theory *nullum crimen sine lege*, the two ‘intents’ must be distinguished when it is necessary to establish the issues required for the liability of an accused.²² This is noteworthy that the *mens rea* comes after the *actus reus* but the “intent to destroy [...]” does not bear such features. Besides, to constitute genocide, the perpetrator’s intention “to destroy, in whole or in part, a [...] group, such” is

¹⁷ Dan Stone, “Raphael Lemkin on the Holocaust,” in *The Origins of Genocide*, ed. Dominik J. Schaller and Jürgen Zimmerer (London: Routledge, 2013), 96.

¹⁸ Timothy Williams and Dominik Pfeiffer, “Unpacking the Mind of Evil: A Sociological Perspective on the Role of Intent and Motivations in Genocide,” *Genocide Studies & Prevention* 11, no. 2 (2017): 72.

¹⁹ Samuel P. Oliner and Pearl M. Oliner, *Altruistic personality: rescuers of Jews in Nazi Europe* (New York: The Free Press, 1988), 78.

²⁰ Paola Gaeta, *The UN Genocide Convention: A Commentary* (New York: Oxford University Press, 2009), 21.

²¹ William A. Schabas, “The Jelisić case and the *mens rea* of the crime of genocide,” *Leiden Journal of International Law* 14, no. 1 (2001): 125.

²² Triffterer, “Genocide, its particular intent to destroy,” 408.

sufficient.²³ Now, it is clear that the perpetrator must only have the intention to achieve the consequences as mentioned by the definition of the Genocide Convention. To complete the crime of genocide, it is unnecessary whether he became successful or not or would never become, as such the countermeasures from the protected people concerned.²⁴ Only in a few cases, the “intent to destroy” may be realized by the perpetrator, which is directed, *per se*, to a probable result, straightly by the act of genocide. However, the illustration of Adolf Hitler portrays that what a criminal intends is not always an easy one to achieve.²⁵ The results from the acts of genocide that took place in the former Yugoslavia since 1991 and in Rwanda show that it requires a continuing process for a particular time to make such destruction.²⁶ This is the reason why such a result must be only intended but not necessarily achieved for prosecuting and punishing committed genocide and as such future harm can be prevented. Such a theory to characterize crimes as having an extra mental ingredient is very common in several Civil Law countries and often chosen by lawmakers for criminalizing acts.²⁷ By adopting such a framework the legislators target to prevent violation of lawfully protected groups before the occurrence of any further dangerous act.²⁸ This is particularly necessary because it can prevent a perpetrator before his realization of his certain intent and he can be even prosecuted for having such destructive intent. But it must be kept in mind that genocide is committed and can be prosecuted only when the intent of a perpetrator is manifested by committing any of the acts mentioned by the Genocide Convention.²⁹

It is to be mentioned that the genocide is attempted only when any of the five acts mentioned in Article 6 is made with the “intent to destroy [...]”.³⁰ But what has been observed in ‘Reichskristallnacht’ of 1938, as the first Jew was murdered, the genocide took place. This is because at that time Hitler had a very clear intent to destroy European Jewish people. During that time, it would be possible to stop

²³ Vahram Ayyazyan, “Genocide: intent, motivation and types”, *Suvremene teme: međunarodni časopis za društvene i humanističke znanosti* 5, no. 1 (2012): 21.

²⁴ Fahim, “Rethinking Genocidal Intent,” 59.

²⁵ Brigitte Hamann, *Hitler's Vienna: a dictator's apprenticeship* (New York: Oxford University Press, 2000), 101.

²⁶ Richard Ashby Wilson, “Judging history: The historical record of the International Criminal Tribunal for the former Yugoslavia,” *Human Rights Quarterly* 27, no. 3 (2005): 908.

²⁷ Mary M. Cheh, “Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction,” *Hastings Law Journal* 42, no. 5 (1991): 1325.

²⁸ Sonja Starr and Lea Brilmayer, “Family separation as a violation of international law,” *Berkeley Journal of International Law* 21, (2003): 213.

²⁹ Fahim, “Rethinking Genocidal Intent,” 61.

³⁰ Guglielmo Verdirame, “The Genocide Definition in the Jurisprudence of the ad hoc Tribunals,” *International & Comparative Law Quarterly* 49, no. 3 (2000): 578.

the commission of genocide by Hitler and prosecute him by establishing the particular intent as per the Genocide Convention which was done later on by the Nuremberg trial. In some cases when a perpetrator has planned and arranged to execute his “intent to destroy [...]” any group, it may not always become relevant to the commission of the crime. The perpetrator may constitute his act immediately after formulating his criminal intent to commit genocide or may delay or may further need action by a third person to execute his intent to destroy. It is quite irrelevant how the criminal expects the execution of his future plan to commit genocide and it to be focused on how he has made his last destruction of the ‘group, as such’, ‘in whole or in part’ to achieve his intent even if he may realize the result of his destruction in near future.³¹ As mentioned earlier the two subjective mental ingredients of genocide have distinguished features, practically they are partly overlapping but for prosecuting the crime they must be established separately and their scopes are independent from one another. In this regard, criminal intent as *mens rea* with the corresponding *actus reus* is the ultimate and initial mental ingredient required to place the criminal responsibility of genocide. This claimed level and standard of the intent can be realized from the definitions of various acts of genocide mentioned in Article 30 of the Rome Statute and it says “Unless and otherwise provided [...]” Thus, the theory *dolus eventualis* is good enough for the mentioned “deliberately inflicting conditions of life calculated to bring about physical destruction” of Article 6(c). In addition, the crime of genocide does not require any higher standard of *mens rea* for punishing any act of genocide as described in Article 6.³² Besides while mirroring the *actus reus* as one of the subjective elements, this issue remains undisputed.

Indeed, jurisprudence as well as literature do not always differentiate between the *mens rea* and “intent to destroy [...]” in Civil Law countries but have few different features in Common Law countries.³³ In Civil Law countries the lawmakers consider that all crimes have a similar theoretical framework as genocide. Now focusing on the definitions of genocide from various global instruments, they always claim the “intent to destroy [...]” Nothing is said about any extra objective such as the specific, special, particular, or general intent of the perpetrator. Here the term intent that indicates genocidal intent narrowly thus needs interpretation. Interpreting “intent to destroy [...]” and understanding the specific or special type of intent would need something more than wording rather bring a new idea that has not been properly clarified in many Common Law countries. Moreover, in Civil Law countries, the conceptualization of specific or

³¹ Fahim, “Rethinking Genocidal Intent,” 72.

³² Roberta Arnold, “The Mens Rea of Genocide under the Statute of the International Criminal Court,” *Criminal Law Forum* 14, no. 2 (2003): 128.

³³ Micaela Frulli, “Are crimes against humanity more serious than war crimes?,” *European Journal of International Law* 12, no. 2 (2001): 329.

special intent in the term of *dolus specialis* is very much disputed.³⁴ Intent in the general sense as an entire expression covers all sorts of *mens rea*, and includes a wider concept of intent, even if it partially goes out of the concept of *dolus eventualis*; but not by departing any type or standard of intent, it is similar to the provisions of Article 30 which has not limited the required mental ingredient in respect of the level of special or specific intent.³⁵ As a subjective and particular component of genocide, Article 6 of the Rome Statute fails to assist in deciding the concept of “intent to destroy [...]” but surely the drafters had no intention to bring out a new notion of intent having disputed features in different legal systems of the world. Even domestic laws asking for special or specific intent as sufficient, do not provide clarifications for some decisions. The “intent to destroy [...]” is the fact that gives shape to the crime of genocide and creates a difference from other crimes such as ordinary killing.³⁶ A perpetrator becomes so dangerous having the particular intent for destroying and the probable damage is too tantamount when compared with a mere murder or even mass murder.

2. The Practice of the International Court the Ad Hoc Tribunals

The specific or special intent as per the Civil Law principle requires a less intellectual level but an extraordinarily volitive ingredient.³⁷ Thus such a particular type of intent is not a suitable one to be a prerequisite for making behavior penalized, which, due to the social damage that has already taken place and the added threat it bears, needs to be prosecuted and punished, at an initial stage, before the absolute damage can be made, as the genocide done by Adolf Hitler and his subordinates on numerous groups of people. Such a special intent may often represent the typical feature of genocidal intent, as found in the case of Hitler and from the trial of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).³⁸ The jurisprudence at the international level has established that the perpetrator has to act having a specific or special intent “to destroy” and he had the aim to cause huge

³⁴ Yusuf Aksar, “The Specific Intent (Dolus Specialis) Requirement of the Crime of Genocide: Confluence or Conflict between the Practice of Ad Hoc Tribunals and the ICJ,” *International Relations/Uluslararası İlişkiler* 6, no. 23 2009: 113.

³⁵ Katherine Goldsmith, “The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach,” *Genocide Studies and Prevention* 5, no. 3 (2010): 238.

³⁶ LeBlanc, “The intent to destroy groups in the Genocide Convention,” 385.

³⁷ Mohamed Elewabadar, “Mens rea—Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals,” *International Criminal Law Review* 5, no. 2 (2005): 203.

³⁸ Ambos, “What does ‘intent to destroy’ in genocide mean?,” 833.

destruction. Again, it is nowhere clearly mentioned that this certain intention must be a strong desire as a significant element and has to be denied, in cases where such gravity on the emotional part is absent.³⁹ Moreover, such a certain intention can be and has been established before the international forum by circumstantial evidence as no global platform has yet clarified the notion of the specific or special intent of a perpetrator to commit genocide.⁴⁰ But the truth is this specified intent is dire necessary if specific intent has to be proven as this is quite difficult. However, circumstantial evidence can play a vital role to show that the perpetrator had previous knowledge of those facts which could possibly take place.⁴¹ Such mental ingredients may be proven by deducting from particular affairs of the behavior, by other ingredients of the *actus reus* as well as from other circumstantial facts of the crime. Thus, these issues could be concluded to prove innocence or even guilt.

However, for establishing that not only the intellectual part of the “intent to destroy” but also the desire of the criminal was formed by having every mental engagement and determination for destroying a group and thus for realizing the intent to commit genocide, even if he failed in this respect, is much complex for proving with circumstantial evidence than the matter that the *objective* outlook of the crime, the *actus reus*, was the output of a mental attitude.⁴² In addition, a prepared, well-established, and certain action is highly dangerous for the protected group of people. Thus, the perpetrator usually has knowledge about his desire to achieve but lacks the intellectual strength to choose the most efficient ways to reach there.⁴³ The Preparatory Commission for the International Criminal Court clarified the two composing components of the mental ingredient as mentioned in Article 30.⁴⁴ The difference is found in paragraph 2 of the General Introduction, between “intent, knowledge or both, set out in Article 30.” It is observed that the intent is good enough for fulfilling the existence of *mens rea* and it means the intensity of them can be higher than one another in different cases but both are required. The *mens rea* bring the *actus reus* has to be acknowledged as an additional intent of genocide.⁴⁵ Indeed both of these two have almost the same structure and the mere

³⁹ Fahim, “Rethinking Genocidal Intent,” 68.

⁴⁰ Cecile Aptel, “The intent to commit genocide in the case law of the International Criminal Tribunal for Rwanda,” In *Criminal Law Forum*, 13, no. 3 (2002): 273.

⁴¹ Michael Tomz, “Domestic audience costs in international relations: An experimental approach,” *International Organization* 61, no. 4 (2007): 821.

⁴² Joshua Marcus, “Intent to Destroy,” *Undergraduate Transitional Justice Review* 3, no. 1 (2012): 5.

⁴³ Ervin Staub, *The roots of evil: The origins of genocide and other group violence* (New York: Cambridge University Press, 1989), 98.

⁴⁴ Alexander KA. Greenawalt, “Rethinking genocidal intent: the case for a knowledge-based interpretation,” *Columbia Law Review* 99, no. 8 (1999): 2259.

⁴⁵ Daniel M. Greenfield, “The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters,” *The Journal of Criminal Law and Criminology* 98, no. 3 (2008): 921.

difference between them is the points of reference. On one side, *mens rea* actualize the *actus reus* while the intent to destroy refers to something that is going to happen.⁴⁶ The intent may bear a point of reference in reality but it is not necessary to have this point when genocide is already committed. Typically, it is observed that the particular intention goes towards the design and aim of the perpetrator in the near future. To be noted that the crime of genocide can even take place and also be punished even if the “intent to destroy, in whole or in part, [...] a group, as such” has not been realized and failed.⁴⁷ However, the Preparatory Commission has explicitly the way how the degree, quality, or any other ingredient of the mental element exists for establishing the subjective element of a crime. To establish the particular genocidal intent, the minimum requirement is that the intent of the perpetrator is accomplished.

The definition of genocide by the Genocide Convention has been well clarified. Comparing Article 6 with Article 7, it is understood that genocide does not require a “widespread or systematic attack,” as required in case of crimes against humanity as well as “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” by Article 8 regarding war crimes.⁴⁸ Such dissimilarity among these three Articles was also raised during the Rome Conference for opening a new way to stop and prevent genocide at an initial stage, when the intention of the perpetrator is not yet seen or expressed his certain intent “to destroy [...]” might be or might not be achieved. It is well settled that the norm and definition of genocide given by Article 6 makes it feasible for prosecuting a perpetrator’s acts to destroy the members of a particular protected group when to committed having the “intent to destroy [...]” Actually, for trying such crimes of genocide, the domestic courts are competent enough rather than any international court.⁴⁹ Any national government by making a piece of law for prosecuting international crimes can try the criminals of genocide within the national territory. But the problem has been seen in the case of Adolf Hitler when he and his subordinate commanders received state-sponsored impunity from the inception of their criminal acts under the authority of national legislation. In such cases, the case shall fall under the jurisdiction of the International Criminal Court.⁵⁰ These issues can necessarily oppose any element of any similar context as mentioned in Article 7 and 8 as a pre-condition to punish a perpetrator under the jurisdiction of the

⁴⁶ Larry May, “State Aggression, Collective Liability, and Individual Mens Rea,” *Midwest Studies in Philosophy* 30, no. 1 (2006): 309.

⁴⁷ David Alonzo-Maizlish, “In Whole or in Part: Group Rights, the Intent Element of Genocide, and the Quantitative Criterion,” *New York University Law Review* 77 (2002): 1369.

⁴⁸ Williams and Pfeiffer, “Unpacking the Mind of Evil,” 73.

⁴⁹ Jan Wouters and Sten Verhoeven, “The domestic prosecution of genocide,” in *Elements of Genocide*, edited by Paul Behrens and Ralph Henham (London: Routledge, 2013), 179.

⁵⁰ Aydin, “The interpretation of genocidal intent,” 424.

International Criminal Court.⁵¹ The Preparatory Commission in its report has not precisely expressed the structure of this element and the provisions of the Introduction of the Draft Elements show that the decisions were left to the International Criminal Court “to be decided by the Court on a case-by-case basis.”⁵² This provision does not seem to be in accordance with the interest of justice as it harms the theory *nullum crimen sine lege*. This suggestive ingredient shall not be received by the Assembly of States Parties nor the ICTY and the ICTR, while realizing the definitions of genocide mentioned in their Statutes.⁵³

3. Conclusion

The discussed elements do not contradict the provisions of Article 6 but determined its suitability as the material part that requires to be encompassed by the *mens rea*, or shall perform as a criterion to ascertain the jurisdiction of the Court. Thus, the Preparatory Commission in no way suggests any interpretation or clarification but adds a new element. This proposal exceeds the direction of the Commission in the Final Act of the Rome Conference as well as mentioned in Article 9 of the Rome Statute. Furthermore, this added element is not admissible as no alteration can be made in Articles 5 and 6 during the first seven years of the enforcement of the Statute which has been expressed by Article 121 and Article 123. Moreover, if such an element serves as an integral part to be brought by the *mens rea*, an overlapping may occur with the specific intent “to destroy [...]” and it is not desirable. On the other hand, there is a necessity in the criminal procedure for an additional ingredient that narrows down the way to punish the crime of genocide as well as the jurisdiction of the International Court. The content expressed by this additional element somehow lies in the particular intent or may perform as an orientation to interpret the concept of the particular intent. The scope to understand a particular intent only remains if the act is performed in the context of “similar conduct directed against that group”, which must be undertaken by the criminal or a third party, or if any certain genocidal act “was conduct that could itself affect such destruction” is not a faulty one. Therefore, such contextual ingredient has to be removed and objective, material element free from the fact of limiting the definition of the crime of genocide shall be accepted with the element of the *mens rea* and with the proof of its existence in the mind of the perpetrator. In addition, if such a conclusion cannot be made, a compromise

⁵¹ Aydin, “The interpretation of genocidal intent,” 424.

⁵² Lee Kimball, “The seventh session of the preparatory commission for the 1982 UN convention on the law of the sea,” Kingston, Jamaica, 27 February–23 March 1989, and UN Headquarters, New York, USA, 14 August–1 September 1989. *Marine Policy*, 1990, 14.1: 88-93.

⁵³ Aksar, “The Specific Intent,” 113.

can be made for all the acts of genocide by eliminating the proposed or suggested element only as a significant criterion for the responsibility of genocide before the International Criminal Court. This aforesaid suggestion or proposal shall be taken into consideration without thinking whether the particular elements have been raised and brought in the meeting of States Parties or whether they are previously considered by any international tribunals like ICTY and ICTR for aiding the interpretation of the application of the provisions of the Genocide Convention in national laws.

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