WHAT DISTINGUISHES THE EVIL OF GENOCIDE
AND HOW SHOULD WE RESPOND TO IT?

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Abstract: Despite the Genocide Convention in 1951 pledging to abolish all cruel and unfair forms of torture and death to innocent civilians for religious, national and ethnic reasons, there has been an alarming denunciation from the international rules of genocide in recent years. In the light of the recent difficulties experienced by the people of Zimbabwe under the Zanu-PF party, and Saddam Hussein’s trial and subsequent hanging for ‘crimes against humanity’ in December 2006, an increasingly pressing question must be asked: ‘what impact is the Genocide Convention having over 67 years after its ratification?’ This article provides a crucial examination of the history behind the laws on genocide and a detailed discussion of the current legal position of the Genocide Convention in today’s international arena. A critical debate as to the very nature of genocide also aims to refresh the severity of the crime in our minds. What distinguishes the act of genocide from all other evil crimes in international law, and how do we deal with it in today’s international climate?

1. Introduction.

‘Genocide’ loosely signifies an act committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group. Many definitions of genocide exist, including the following by Chalk and Jonassohn: ‘genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group.’¹ The word itself was thought up by Dr. Raphael Lemkin (1900-1959) in his work *Axis Rule in Occupied Europe.*² Genocidal acts continue to be committed despite the introduction of a Genocide Convention,³ and the Courts and Tribunals which have jurisdiction over this crime have had to canvass the vague wording of the provisions themselves. But what distinguishes genocide from other crimes, and are we dealing with it successfully?

2 ‘Genocide’ comes from the ancient Greek word ‘genos’ (tribe, race) and the Latin ‘cide’ (killing), from Lemkin, R. ‘Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress.’ (1944), available from www.preventgenocide.org/lemkin
3 For example: the Korean war, the intertribal Burundi killings between the Tutsi and Hutu groups, the reported massacre of Ugandans during the rule of former President Idi Amin, the slaying of dissidents in Equatorial Africa after independence was secured from Spain in 1968, the killing of Cambodians during the reign of Pol Pot, the mass killings of members of the Muslim minority in Chad in 1979, and the deaths of 180,000 Kurds in Northern Iraq as part of Saddam Hussein’s Anfal campaign in the 1980’s. This, of course, does not include the most recent examples of President Robert Mugabe’s violent Zanu-PF party, and (questionable) reluctance of the Burmese government to let aid into their country after the devastating Cyclone Nargis in May 2008.
2. The development of genocide in international criminal law.

The idea that individuals can be personally liable for international crimes has been slow to develop. The International Military Tribunals at Nuremburg and Tokyo were ad hoc bodies to deal with the aftermath of World War II.\(^4\) The provisions of the Nuremburg Charter were affirmed by the General Assembly in 1946 in Resolution 95(1).\(^5\) The International Law Commission (ILC) formulated the following crimes under international criminal law:

Principle 6:
The crimes hereinafter set out are punishable as crimes under international law:
  a) crimes against peace; b) war crimes; c) crimes against humanity.\(^6\)

At this point, genocide was embedded within crimes against humanity. Lemkin proposed an offence of barbarity in 1933.\(^7\) This included acts of economic extermination and brutal attacks on the dignity of individuals causing damage to the collectivity to which they belonged. His ground-breaking legislation proposed: 1) the punishment of acts aimed at destroying the life, bodily integrity, liberty, dignity and the economic existence of a racial, religious or social collectivity; 2) both instigators and accomplices to acts of barbarity carry the same punishment as the author; and 3) all perpetrators were to be prosecuted and punished independently of the place where the act was committed (this was keeping in line with the principle *forum loci deprehensionis* or ‘universal repression’ based on the principle that an offender can be brought to justice in the place where he is apprehended because he is regarded as an enemy of the whole international community).\(^8\) Real efforts were made after World War II to develop substantive rules relating to crimes against the peace and security of mankind.\(^9\) On December 13, 1946, the United Nations General Assembly unanimously adopted Resolution 96(I), which condemned genocide as a crime under international law and requested that the Economic and Social Council draft a convention.\(^10\) Lemkin noted that the only obstacle at this point was to draft provisions

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\(^4\) Under General Assembly Resolution 177 (II): paragraph (a) the International Law Commission was established in 1947 and was immediately directed to formulate principles of international law recognized in the Charter of the Nuremberg Tribunal.


\(^8\) Taken from articles 1, 6 and 7 of Lemkin’s proposed legislation to the 5\(^{th}\) Conference for the Unification of Penal Law, documented in Lemkin, R. (1933), *Ibid*.

\(^9\) Lemkin was especially pleased that genocide was included in the indictment of the major war criminals of the Nuremberg trials, implying that by inferring the natural right of existence for individuals, genocide is not only a crime against the rules of war, but a crime against humanity. See Lemkin, R. ‘American Scholar’ (1946) Vol. 15, No. 2, at pages 227 – 230.

\(^10\) The United Nations General Assembly Resolution 96(I) of 13 December 1946 claimed that genocide shocked the conscious of mankind, resulted in great losses to humanity…and was contrary to moral law and to the spirit and aims of the United Nations. Resolution 96(I): ‘The Crime of Genocide’ available at www.un.org/documents.
into criminal law formulae based upon the specific criminal intent to destroy entire human groups.\textsuperscript{11}

In December 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{12} This Convention largely incorporated Lemkin’s clearer proposals for an international treaty on genocide in his 1946 work.\textsuperscript{13} The Convention came into force on January 12, 1951, and by January 1985 there were 96 ratifications. It was assumed that trial and punishment for genocide would take place within a domestic legal sphere, but recognition was given to the possibility of an international criminal court. The Convention affirms the criminality of genocide in time of peace as well as in time of war (Article 1), distinguishing it from war crimes into a category of its own. Article 2 defines the offence:

\textbf{Article 2:}
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, 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.

Persons committing conspiracy, incitement, attempt and complicity to genocide are also punishable, whether they are constitutionally responsible rulers, public officials, or private individuals (Articles 3 and 4). Lemkin would have been particularly pleased with this, as he expressly encouraged equal liability for members of the government and political bodies who gave and executed orders and incited the commission of genocide by whatever means, including formulation and teaching of the criminal philosophy of genocide.\textsuperscript{14} Article 5 states that the parties to the Convention are under an obligation to enact the necessary domestic legislation to give effect to the Convention and to provide effective penalties.\textsuperscript{15} The \textit{Reservations to the Genocide Convention Report}\textsuperscript{16} emphasised that the contracting States to the Convention do not have any interests of their own but a common interest, namely, the accomplishment of those higher purposes which are the \textit{raison d’etre} of the convention.\textsuperscript{17} Practically, the treaty also prescribes the jurisdictional basis for possible prosecutions:

\begin{thebibliography}{9}
\bibitem{Lemkin1946} Lemkin, R. (1946) \textit{loc. cit.} at f.n. 9.
\bibitem{Ibid} \textit{Ibid.}
\bibitem{Forum} To take the United Kingdom as an example, see the Genocide Act 1969. This provision keeps in line with Lemkin’s \textit{forum loci deprehensionis} or ‘universal repression’ idea, which he describes as ‘the symbol and practical application of the higher doctrine of moral and legal solidarity’ in his 1947 work Lemkin, (1947) \textit{loc. cit.} at f.n. 11.
\bibitem{IBid} \textit{Ibid.}, at para. 15.
\end{thebibliography}
Article 6:
Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

This would now include the International Criminal Court if jurisdictional conditions are met; for example the State on whose territory the crime was committed or whose national is accused must be a party to the ICC Statute and make a declaration to this effect under Article 12 of the Statute.\(^\text{18}\) This may be a disadvantage for the growth of the International Criminal Court. In \textit{Bosnia and Herzegovina v Yugoslavia}\(^\text{19}\) the International Court of Justice (I.C.J.) emphasised that the rights and obligations contained within the Genocide Convention were rights and obligations \textit{erga omnes} and that the obligation upon each state to prevent and punish the crime of genocide was not dependant upon the type of conflict involved in the particular situation (whether international or domestic) and was not territorially limited.\(^\text{20}\)

However, at enforcement level it is believed that the Convention has long proved a failure.\(^\text{21}\) It was 1993 before a State brought a case of genocide before the International Court of Justice\(^\text{22}\) and very few cases have been brought to national criminal courts.\(^\text{23}\) It is submitted however that this does not mean that the Convention does not work.

The Statute establishing the International Criminal Court (ICC)\(^\text{24}\) came into force on 1 July 2002. This creates a criminal institution on an international basis and could potentially resolve many problems relating to the punishment of genocide. Lemkin highlighted the need for an adequate mechanism for international co-operation in the punishment of offenders.\(^\text{25}\) The Statute itself is a detailed treaty and firmly establishes genocide as an international crime. Domestic law now need not be the only avenue to prosecute such heinous individuals. Article 5 provides that the jurisdiction of the ICC is limited to ‘the most serious crimes of concern to the international community as a whole’ which are listed as (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) the crime of aggression. The definition of genocide in Article 6 of the ICC Statute follows directly that of the Genocide Convention but in contrast, conspiracy, incitement, attempt, and complicity in genocide listed in Article 3 of the Genocide Convention have not been taken up by the ICC Statute. Could this be because the relevant rules are already laid down in other provisions of the Statute? Disappointingly, the ICC has not yet delivered a genocide conviction.

As a result of the mass killings in both Yugoslavia and Rwanda in the 1990’s, two International Criminal Tribunals were established by the UN Security Council under Chapter 7 of the UN Charter. The Statutes of the International Tribunal for the Former

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\(^{18}\) This precondition does not apply where the Security Council uses its powers under Chapter VII of the UN Charter to refer a matter for prosecution.

\(^{19}\) \textit{Bosnia and Herzegovina v Yugoslavia} [1996] ICJ Rep. 595.

\(^{20}\) \textit{Ibid.}, at page 615.


\(^{23}\) With the exception of \textit{Eichmann} in the District Court of Jerusalem and then the Israeli Supreme Court: see case \textit{Eichmann}, Israel, District Court of Jerusalem, judgment of 12 December 1961, 36 I.L.R. 5-276.


Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) have both provided for the prosecution of individuals accused of genocide despite their limited jurisdiction. Akayesu was hailed by UN Secretary-General Kofi Annan as:

A landmark decision in the history of international criminal law that brings to life for the first time the ideals of the Genocide Convention adopted over 50 years ago.

Two days later the decision in Kambanda crowned genocide as the ‘crime of crimes’. These were followed by Kayishema and Ruzindana in the ICTR and Jelisic and Krstic in the ICTY.

3. The position of genocide in the international arena.

Genocide is considered to be a ‘peremptory norm’ or ‘jus cogens’, which are fundamental legal obligations owed by States to all others (erga omnes). Legislating for jus cogens is very difficult because of its ad hoc nature. Gardiner believes that jus cogens are rules that are ‘blindingly obvious’ and are ‘clearly a part of international law’. Article 53 of the Vienna Convention attempts to combine jus cogens with a definition:

A peremptory norm is accepted and recognised by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character...

A good example of the ad hoc nature of jus cogens is provided in the Nicaragua case, which described the prohibition of the use of force expressed in Article 2, paragraph 4 of the Charter of the United Nations to be:

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28 Akayesu, ICTR, Trial Chamber I, Judgment of 2 September 1998, case no. ICTR-96-4-I.

29 UN Information Centre ( Pretoria), Statement by U.N. Secretary-General Kofi Annan on the Occasion of the Announcement of the First Judgement in a Case of Genocide by the International Criminal Tribunal For Rwanda. UN Doc. PR/10/98/UNIC, 1998.

30 Judgement, Kambanda (ICTR 97-23-S), Trial Chamber I, 4 September 1998, at para. 16.

31 Kayishema and Ruzindana, ICTR, Trial Chamber II, judgment of 21 May 1999, case no. ICTR-95-1-T, at paras. 41-49.

32 Jelisic, ICTY Trial Chamber I, judgment of 14 December 1999, case no. IT-95-10-T, at paras. 78-83.

33 Krstic, ICTY, Trial Chamber, decision of 2 August 2001, case no. IT-98-33-T, at paras. 539 – 569.


A ‘universal norm’, a ‘universal international law’, a ‘universally recognized principle of international law’, and a ‘principle of jus cogens’.  

The uncertain ad hoc nature of jus cogens does not surround genocide which is considered to be the ultimate peremptory norm. In the Pinochet case, the UK House of Lords held that jus cogens even trumped a State leaders’ immunity. The Barcelona Traction case was considered during the Pinochet judgement because of its logical description of erga omnes:

When a State admits into its territory foreign nationals, it is bound to extend to them the protection of the law. The essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States—they are obligations erga omnes.

In Eichmann, it was argued that Israeli law could not punish acts which occurred outside its territory because this conflicted with international law and exceeded the powers of the Israeli legislature. The Supreme Court of Israel concluded that erga omnes was well established from the times of Grotius and in addition, the United Nations in an early resolution on genocide had urged its members ‘to enact legislation for the prevention and punishment of this crime’. Thus it is the movement of people on an international scale which invokes the rule of jus cogens in order to protect their fundamental interests. Lemkin himself said that the practices of genocide anywhere affect the vital interests of all civilised people. Minorities of one sort or another exist in all countries, and if persecution of any minority by any country is tolerated anywhere, the very moral and legal foundations of constitutional government may be shaken. Logically, just as Saddam Hussein did not escape punishment, President Robert Mugabe should not either, no matter where he is found, charged or tried.

4. Distinguishing genocide from crimes against humanity.
What makes genocide different? Cassese notes that both genocide and crimes against humanity share 3 elements: 1) they encompass very serious offences against human dignity that shock our sense of humanity; 2) they do not constitute isolated events but are instead part of a larger context; 3) they are usually carried out with complicity and tolerance of the authorities. Interestingly, in Kayishema and Ruzindana the majority of the ICTR dismissed the charge of crimes against humanity as it was already ‘completely absorbed’ by genocide. In Krstic the Trial Chamber’s refusal to enter convictions for both crimes against humanity and genocide in relation to the same act was described by Palombino as ‘manifestly erroneous’ because of the relationship of reciprocal speciality existing between the two sets of crimes. In reality, genocide is tightly defined so as to disregard imprisonment and torture but to include deaths of a collection of people because of their membership of a protected group. And whereas both offences require the intent to commit the actus reus, genocide also requires a special intent to destroy, in whole or in part, a particular group with knowledge of widespread or systematic practice. In addition, there can be no reckless genocide. Tournaye points out that this permits a distinction between genocide and war crimes, dispelling the theories that the Vietnam war conducted by the Americans amounted to genocide. Could a heavy penalty attached to genocide also distinguish that crime from all other crimes? Not so: in Kayishema and Ruzindana the ICTR Appeals Chamber remarked that all of the crimes under the ICTR Statute are serious violations of international humanitarian law capable of attracting the same sentence, and genocide - as the ‘crime of crimes’ - does not impact on the sentence imposed. This seems disappointing, but there is little else that can be done. Akhavan finds this difficult to accept, implying that there is no legal significance when a ‘general appreciation’ is attached to ‘the pinnacle of evil’. Even Lemkin saw the evil of genocide as an aggravating factor for punishment: ‘criminal intent to kill or destroy all the members of such a group shows premeditation and deliberation and a state of systematic criminality which is only an aggravated circumstance for punishment.’ Whether from the viewpoint of retribution, deterrence, incapacitation or rehabilitation, graduated sentencing may be essential for distinguishing between differing degrees of moral culpability in the context of

\[\text{\textsuperscript{47}}\text{ Cassese, A. (2003). op. cit. at f.n. 21, at page 106.}\]  
\[\text{\textsuperscript{48}}\text{ Kayishema and Ruzindana, ICTR, Trial Chamber II, judgment of 21 May 1999, case no. ICTR-95-1-T, at paras. 41-49.}\]  
\[\text{\textsuperscript{49}}\text{ Ibid., at paras. 577-579.}\]  
\[\text{\textsuperscript{50}}\text{ Krstic, op. cit. at f.n. 33.}\]  
\[\text{\textsuperscript{51}}\text{ Palombino, F.M. ‘Notes and Comments: Should Genocide Subsume Crimes Against Humanity?’ (2005) I.C.J. 3 3 (778).}\]  
\[\text{\textsuperscript{52}}\text{ Ibid., at page 1.}\]  
\[\text{\textsuperscript{53}}\text{ This is the ICTR’s interpretation from Akayesu, op. cit. at f.n. 28, paras. 497, 544-7; Kambanda op. cit. at f.n. 30, para. 16; Kayishema and Ruzindana op. cit. at f.n. 48, para. 91; Rutaganda ICTR, Trial Chamber, judgment of 6 December 1999, case no. ICTR-96-3-T, para 59; Musema, ICTR, Trial Chamber, judgment of 27 January 2000, ICTR-96-13-T, para. 164.}\]  
\[\text{\textsuperscript{54}}\text{ Tournaye, C. ‘Shorter Articles, Comments, and Notes Genocidal Intent before the ICTY’ (2003) I.C.L.Q. 5 2 2 (447).}\]  
\[\text{\textsuperscript{55}}\text{ The fact that the Americans were aware that their tactics entailed a substantial likelihood of destroying a large number of Vietnamese would not meet the level of intent required for genocide.}\]  
\[\text{\textsuperscript{57}}\text{ Lemkin, R. (1946) loc. cit. at f.n. 9.}\]
genocide. Hanging Saddam Hussein seemed to provide little comfort that he was in fact being ‘punished’.

5. The crime of genocide in detail.

Because the Genocide Convention has been adopted into customary international law, it is correct to say that the Convention has its own actus reus and mens rea. ‘International criminal responsibility’ is a difficult concept. Can a State carry a legal intent? Is it best to separate the individuals from the State and then develop clearly defined international crimes and tribunals to try these individuals? A breakdown of the genocide offence follows below.

5.1. The actus reus of genocide.

Article 2 of the Convention clearly defines the conduct that may amount to genocide:

a) killing members of a national or ethical, racial or religious 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 birth within the group;
e) forcibly transferring children of the group to another group.

Akayesu tightly defined the above list: a) killing is ‘murder’; b) serious bodily and mental harm should not necessarily be permanent or irremediable; c) conditions of life calculated to bring about its physical destruction include subjecting a group of people to a subsistence diet, systematic expulsion from homes, and the reduction of essential medical services below minimum requirements; d) measures intended to prevent births within the group consist of sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriages; e) forcibly transferring children can include physical and mental measures. It can be argued that some of these elements only constitute crimes against humanity.

5.2. ‘Group’.

What is meant by ‘group’ in the Convention definition? How are each of the four groups (national, ethnical, racial, religious) defined? Is there an objective test? The ICTR and the ICTY have intervened on these points. In Akayesu the Trial Chamber of the ICTR set out a definition of each group, defining ‘national groups’ as a collection of people who are perceived to share a legal bond of common citizenship coupled with reciprocity of rights and duties; an ‘ethnic group’ as a group whose members share a common language or culture; a ‘racial group’ as a group based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors; and a ‘religious group’ as a group whose members share the same religion, denomination or mode of worship. Also, it

60 Akayesu, op. cit. at f.n. 28.
62 Akayesu, op. cit. at f.n. 28, at paras. 502-509. Lemkin considered the deliberate separation of families for depopulation purposes to be genocidal activity in his 1947 work: Lemkin, R. (1947) loc. cit. at f.n. 11.
was thought that the groups protected against genocide should not be limited to the four groups envisaged in the relevant rules but should include ‘any stable and permanent group’. Cassese remains unconvinced, and believes that the framers of the Convention explicitly intended only the four groups mentioned to be protected. But how is a group identified? The provisions are very vague. Akayesu solved this problem by noting that in Rwanda the Tutsi constituted a group referred to as ‘ethnic’ in official classifications. Because the Tutsi could not be readily distinguished as one of the protected groups under the Genocide Convention, the Trial Chambers went to great lengths to characterise them as an ‘ethnic’ group in order to justify the label of genocide. It has to now be established that (i) the victims were in fact treated as belonging to one of the protected groups; and (ii) they considered themselves as belonging to one of such groups. Can we take from this that the test for ‘groups’ is both objective and subjective? Further mixture of objectivity and subjectivity appeared in Kayishema and Ruzindana where ‘self-identification’ and ‘identification by others’ were considered to be key factors when identifying an ethnic group. Rutaganda pushed the subjective standard even further by noting that for the purposes of applying the Genocide Convention, membership of a group is a subjective concept. The ICTY Trial Chambers shared this subjective approach in Jelisic and Krstic. Akhavan strongly condemns this approach, claiming that while a constructivist approach to identity is appealing, this solely subjective test leads to a theoretical absurdity. A perpetrator could define virtually any group as ethnic, irrespective of its objective attributes, and be held guilty of genocide. Rutaganda however was quick to reign-in the subjective test, concluding that certain groups - such as political and economic groups - were excluded from the Convention definition because of their ‘mobile’ status, suggesting that the Convention intended to cover relatively stable and permanent groups. This is a wholly unsatisfactory outcome. Did the United Nations when drafting the Genocide Convention intend to turn a blind eye to political victims? This would allow President Robert Mugabe slip through a loophole in the Convention, as his party no doubt act on political motives. Hitler also no doubt harboured political reasons for exterminating over one million Jews. Would he be able to escape liability under the Genocide Convention?

5.3. ‘In whole or in part’.

How big is a ‘part’? Krstic held that the perpetrator must view the part of the group they wish to destroy as a distinct entity. All ICTY and ICTR judgements seem to have agreed that ‘substantial’ reflects customary international law. The ‘part’ must represent a large number relative to the whole size of the group and the destruction must target a qualitatively significant part of the group i.e. the elite part of the group. Geographic location will not indicate whether the targeted group is substantial, but it

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63 Akayesu, op. cit. at f.n. 28, at paras 512-515.
66 Kayishema and Ruzindana, op. cit. at f.n. 48, at para 98.
67 Rutaganda, op. cit. at f.n. 53, at para. 56.
68 Jelisic, op. cit. at f.n. 32, at paras. 70-71.
69 Krstic, op. cit. at f.n. 33, at paras. 556 – 560.
71 Rutaganda op. cit. at f.n. 53, at para 56.
72 Krstic, op. cit. at f.n. 33, at paras. 590-597.
73 Jelisic, op. cit. at f.n. 32, at para 82.
can – in combination with other factors – inform the analysis. This seems a little vague, but is likely to develop on an ad hoc basis on individual merits.

5.4. The **mens rea**: evidence; ethnic cleansing; subjectivity.

The **mens rea** for genocide is provided for very clearly in Article 2 of the Convention, which is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Jorgic described the visions of such a perpetrator: ‘[they] do not see the victim as a human being, but only as a member of the persecuted group’. Shaw notes that States may deny genocide by claiming that the intent to destroy a group in whole or in part was in fact absent. Akayesu stated that intention is almost impossible to determine, and so in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. What evidence would be required for this? In reality, the isolated killing of five members of a religious group with the required intention could amount to genocide. The ICTY in Krstic considered evidence relating to the cultural or social destruction of a group in relation to implying intention, despite only physical and biological genocide coming within the ambit of the Convention, and held that physical or biological destruction is often coupled with simultaneous attacks on the cultural and religious property and symbols of the targeted group, and these attacks may be considered as evidence of an intent to physically destroy the group. Perhaps ‘widespread’ and ‘systematic’ practices may take a more evidential standpoint in cases to come to aid the verification of the required **mens rea**. This, of course, means that ethnic cleansing is not to be considered as an act of genocide, but rather an act from which genocidal intent can be inferred. Ethnic cleansing is not provided for under Article 2 of the genocide Convention, and the ICTY has refused to label ethnic cleansing as genocide. Vuckovic established that ‘the forced expulsion of a population with an acceptance that a consequence may be death’ does not characterise the intent to destroy an ethnic group in whole or in part. This is a wise decision: the ICTY is bound to reflect the state of customary international law under the principle **in dubio pro reo**. In other cases however, ‘ethnic cleansing’ has been characterised as

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74 Krstic op. cit. at f.n. 33, at para. 13.
77 Akayesu, op. cit. at f.n. 28, at para. 523.
79 During drafting, Syria proposed a sixth class of acts of genocide: ‘imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’. This was rejected: UN Doc. A/C6/234/119.
80 Krstic, op. cit. at f.n. 33, at para 580; Jelisic, op. cit. at f.n. 32, at paras 78-83. However, The United Nations General Assembly has previously labelled ethnic cleansing as a form of genocide: UN Doc AG/Res./47/121 of 18 Dec 1992.
81 Vuckovic, Federal Republic of Yugoslavia, Supreme Court of Kosovo, decision of 31 August 2001, AP.156/2001, at paras 2-3. See also Kaslic, Germany, Federal Higher Court of Justice, judgment of 21 February 2001, 3 StR 244/00, at paras 7-10.
82 The Prosecutor v Delalic IT-96-21-T (16 Nov 1998), para 413: ‘where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain this.’
genocide. For example, Judge Riad in Karadzic and Mladic held that such a policy can aim to create new borders by violently changing the national or religious composition of the population. Therefore, the policy of ‘ethnic cleansing’ presents in its ultimate manifestation genocidal characteristics.\textsuperscript{83} Interestingly, Krstic held that by killing all the military aged men, the Bosnian Serb forces eliminated all likelihood that they could ever re-establish themselves on that territory.\textsuperscript{84} Physical disappearance from Srebrenica does not amount to physical destruction of the group as such, so did the Chamber flirt with the notion of cultural genocide by treating the combination of the massacres and the forcible transfer as the destruction of the group?\textsuperscript{85} It must be noted that Lemkin did not limit genocide to physical destruction but suggested many forms of genocide including political, social, cultural, language, national feeling, religious, economic, personal security, liberty, health, and dignity.\textsuperscript{86} But it is suggested that Lemkin’s proposals from 1944 should be read in context. Lemkin’s endeavour was to criminalise any wrongful act committed against members of a group out of hatred towards this particular group covering \textit{all} wrongful acts motivated by discrimination.\textsuperscript{87}

5.5. The \textit{mens rea}: \textit{dolus specialis}.

The Jorgic case made reference to an aggravated intention, one which is required above and beyond the requisite \textit{mens rea} under Article 2, otherwise known as \textit{dolus specialis}. Triffterer defines this additional requirement very clearly: ‘…there are two subjective elements required to establish criminal responsibility for genocide: the mens rea, as pendant to the actus reus, and the ‘intent to destroy’…the two intents ought to be strictly separated when it comes to prove the facts necessary to establish the innocence or guilt of an accused.’\textsuperscript{88} Dolus Specialis applies to all material acts of genocide enumerated under Article 2(a)-(e) of the Statute. This special intent requires that the perpetrator ‘clearly intended the result’ signifying ‘a psychological nexus between the physical result and the mental state of the perpetrator’.\textsuperscript{89} This \textit{dolus specialis} can be deduced from the circumstances of an attack carried out under a structurally organized control on the group of which the culprit is aware and which he wills.\textsuperscript{90} Akayesu may have confused this with general intent, as the Trial Chamber held that the offender is culpable because he knew or \textit{should have known} that the act committed would destroy, in whole or in part, a group.\textsuperscript{91} We must be careful not to include recklessness into the Convention definition, as this would soften the evil element which distinguishes genocide from all other crimes. A perhaps too strict judgement can be found in Jelisic, where the defendant could not be found guilty of genocide because he killed arbitrarily. It had not been proved beyond all reasonable doubt that the accused was motivated by the \textit{dolus specialis} of the crime of

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\item\textsuperscript{83} Karadzic and Mladic\textit{ op. cit.} at f.n. 78, at para 94.
\item\textsuperscript{84} Krstic,\textit{ op. cit.} at f.n. 33, at paras. 590-597.
\item\textsuperscript{85} Tournaye, C. (2003)\textit{ loc. cit.} at f.n. 54, at page 9.
\item\textsuperscript{86} Lemkin, R. (1944)\textit{ loc. cit.} at f.n. 2. A more detailed list appeared later in Lemkin, R. (1945)\textit{ loc. cit.} at f.n. 25.
\item\textsuperscript{87} Tournaye, C. (2003)\textit{ loc. cit.} at f.n. 54, at page 5.
\item\textsuperscript{88} Triffterer, O. ‘Genocide, its Particular Intent to Destroy in Whole or in Part the Group as Such’ (2001) Leiden Journal of International Law, vol. 14, No. 2, 400.
\item\textsuperscript{89} Musema \textit{op. cit.} at f.n. 53, at paras. 164 and 166.
\item\textsuperscript{90} See Jorgic, Germany, Federal Constitutional Court, judgment of 30\textsuperscript{th} April 1999, at paras 19-22. \textit{op. cit.} at f.n. 75.
\item\textsuperscript{91} Akayesu \textit{op. cit.} at f.n. 28, at para 520.
\end{itemize}
\end{footnotesize}
genocide.\textsuperscript{92} \textit{Jelisic} may be accused of narrowing the law. Perhaps \textit{Jorgic} is a better alternative, where systematic expulsion can be an \textit{indication} of the required intent. The concept of an aggravated intention however leads to a clearer distinction between genocide, murder, and other crimes against humanity.\textsuperscript{93}

6. Intending genocide in today’s international climate.

The application of genocide has been problematic in other areas. Eboe-Osuji\textsuperscript{94} notes that the two Tribunals (ICTR and ICTY) have shown some difficulty in distinguishing ‘complicity in genocide’ in Article 2(3)(e) of the ICTR Statute and ‘aiding and abetting genocide’ under Article 6(1) of the ICTY Statute. He proposes that they are in fact distinguishable from one another as a result of \textit{Akayesu}, which noted that for aiding and abetting under Article 6(1) there is a requirement for a special \textit{mens rea} to destroy the targeted group in whole or in part, and that complicity in genocide does not require this special \textit{mens rea}; all that is required is the knowledge on the part of the accused that he is assisting a genocidal enterprise.\textsuperscript{95} \textit{Krstic} offered a different approach to the problem, and simply saw an overlap between the two provisions:

The drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide…the consequence of this approach…is that certain heads of individual criminal responsibility overlap.\textsuperscript{96}

\textit{Semanza} went one step further and declared a state of redundancy between the two concepts within the ICTR Statute.\textsuperscript{97} The \textit{Krstic-Semanza} approach contradicts the maxim \textit{ut res magis valeat quam pereat}, which encourages judges to explore any avenue of statutory construction to give effect and meaning to the problematic statute rather than declare a redundancy. Can President Robert Mugabe’s Zanu-PF Party be said to be aiding his genocide? \textit{Akayesu} is not without its critics. The Trial Chamber in \textit{Stakic}\textsuperscript{98} noted with respect to aiding, abetting, planning, preparing and executing genocide, the distinction in \textit{Akayesu} was ‘not sustainable in law’ because specific genocidal intent was required for each mode of participation.\textsuperscript{99} There are other problems with \textit{Akayesu}. Great contradictions lie within the judgement.\textsuperscript{100} Eboe-Osuji remarks that the great weakness of \textit{Akayesu} was its focus on \textit{mens rea} as the pivotal point of distinction between complicity and aiding and abetting genocide.\textsuperscript{101} This reliance runs against the current jurisprudence of the Tribunals. The requisite \textit{mens rea} should be derived from the act of participation coupled with the knowledge that it will assist the principal in the commission of the criminal act.\textsuperscript{102} Professor Schabas strongly maintains that an accomplice to genocide must have the intent to destroy in

\textsuperscript{92} \textit{Jelisic, op. cit.} at f.n. 32, at paras. 107-108.
\textsuperscript{93} \textit{Kayishema op. cit.} at f.n. 48, at para. 91.
\textsuperscript{94} Eboe-Osuji, C. “‘Complicity in Genocide’ versus ‘Aiding and Abetting Genocide’ – Construing the Difference in the ICTR and ICTY Statutes” (2005) I.C.J. 3 1 (56), at page 1.
\textsuperscript{95} \textit{Akayesu op. cit.} at f.n. 28, at paras. 485, 540 and 544-548.
\textsuperscript{96} \textit{Krstic, op. cit.} at f.n. 33, at para. 640.
\textsuperscript{97} \textit{Semanza}. ICTR, Trial Chamber III, Judgment of 15 May 2003, case no. ICTR-97-20-T, at para. 394.
\textsuperscript{98} \textit{Motion for Judgement of Acquittal, Stakic} (IT-97-24-T), Trial Chamber II, 31 October 2002.
\textsuperscript{99} \textit{Ibid.}, at para. 60.
\textsuperscript{100} For example, contrast ‘an accused is liable as an accomplice to genocide…even though the accused himself did not have the specific intent’ at para 545 to ‘it must be proven that such a person acted with specific genocidal intent’ at para 547.
\textsuperscript{102} \textit{Kayishema and Razindana op. cit.} at f.n. 48, at para. 186.
whole or in part a national, racial, ethnical or religious group in accordance with Article 2 of the Genocide Convention, but English legal authority contradicts this stance holding the view that accessories only need to intend to assist the principal, knowing that the principal was contemplating to commit a crime. Besides, the intention which Professor Schabas supports under Article 2 of the Genocide Convention only adheres to the act of genocide itself. There is an absence of clear statutory language for the \textit{mens rea} of complicity under Article 2(3)(e) ICTR, and indeed any other participatory mode in relation to genocide. It may simply depend on the domestic legislation enforced.

The personal motive of the perpetrator does not count towards a genocide conviction and does not preclude the perpetrator from also having the specific intent to commit genocide. An intent to physically destroy a group, in whole or in part, to gain a piece of land, for instance, would not be sufficient to make the intended mass destruction genocidal. Victims must be chosen by reason of their membership in the group whose destruction was sought. In \textit{Kupreskic} the victims were targeted because of such belonging. What matters is the intent to attack persons on account of their ethnic, racial, or religious characteristics. This however is difficult to prove and easy to deny. Saddam Hussein strongly denied that he was guilty of genocide throughout his entire trial, and it is said with confidence that when President Robert Mugabe is finally brought to justice, he will deny the slaughtering and deaths in Zimbabwe to the very end.

7. Conclusion.

There have been times, particularly as a result of the creation of the ICTY and the ICTR, where the response to genocide has been re-active rather than pro-active. It is submitted though that this is the nature of the crime, because genocide is only identifiable when the physical effects of the crime begin to show. By the time targeted ethnic or religious groups are separated, or broadcasts appear from hate-groups, or armies are trained and equipped, the intent to commit genocide on the part of the perpetrator has probably been rooted and manifesting for some time. A very large international organisation of any kind cannot bring to account the individual (and somewhat hidden) cause of this problem until it is wildly exhibited, which is a regretful part of genocide which we may have to accept.

The possibility of an International Criminal Court conviction is ruled out if a country who commits genocide has not accepted the jurisdiction of the Court. In addition, because the statutes and case law surrounding genocide are so vague, a successful conviction cannot move forward until the quagmire of ill-defined statutory definitions and requisite intentions has been waded through. President Robert Mugabe faces almost daily global criticism. At the time of writing, the results of the presidential poll in Zimbabwe had not been announced after a two month delay, amid claims of violence at the hands of his political party. Most people saw the trial of Saddam Hussein and his defiance against the judge and the Court which tried him. It


\textsuperscript{105} Krstic, op. cit. at f.n. 33, at para 561.

\textsuperscript{106} \textit{The Prosecutor v Zoran Kupreskic} IT-95-16-T (14 Jan 2000), at para 636.
did not feel, from an observer’s standpoint, that he was being punished for the deaths of many. On the face of it, he received the same treatment, the same trial and the same penalty as what the next man would have received for the death of one victim. What is difficult to accept, is that we can not offer a greater punishment for the crime of genocide than we can for the killing of one man. Perhaps the fall from grace will be greater for the defendant, but what respite does that bring for the victims and their families, of which where may be many thousands? Despite the efforts of the international community, the crime of genocide is so evil that it could never be punished appropriately.