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An Issue of Intent: The Struggles of Proving Genocide

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INTRODUCTION

In December of 1948, the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) was codified into law.² The term “genocide” was first coined by Raphael Lemkin, a Polish lawyer, combining the ancient Greek word *genos* meaning race or tribe and the Latin word *cide* meaning killing.³ Lemkin described genocide as having two phases: (1) the destruction of the national pattern of the oppressed group, and (2) the imposition of the national pattern of the oppressor.⁴

However, even before the term “genocide” was officially codified by the Genocide Convention in 1948, the term had made an appearance in an international court. Sidney Alderman, an American working on the Nuremberg Trials, recalled that Raphael Lemkin was constantly approaching him with requests for the term genocide to be included within the indictments.⁵ The term itself was included in the third count of the indictment where it covered war crimes.⁶ The

¹ Juris Doctor Candidate, 2024, Seton Hall University School of Law

² *The Convention on the Prevention and Punishment of the Crime of Genocide (1948)* <[Genocide Convention-FactSheet-ENG.pdf \(un.org\)](#)> (Visited May 15, 2023)

³ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* at 79 (Lemkin specified “by ‘genocide’ we mean the destruction of a nation or of an ethnic group.”); See also *United Nations Office on Genocide Prevention and the Responsibility to Protect* [United Nations Office on Genocide Prevention and the Responsibility to Protect](#) (Visited May 15, 2023)

⁴ *Id.*

⁵ John Q. Barrett, *Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945-1946* at 44 (“[Raphael Lemkin was] constantly coming to see me, trying to be sure that his word genocide was used in the indictment. Finally, over some opposition from other members of our staff, I got the word genocide into the last draft of the indictment, and I am quite certain that Prof. Lemkin has always been greatly pleased that it appeared in that document.”)

⁶ *Id.* at 45 (The statement itself reads “The murders and ill-treatment were carried out by diverse means, including shooting, hanging, gassing, starvation, gross overcrowding, systematic under-nutrition, systematic imposition of labor tasks beyond the strength of those ordered to carry them

inclusion of the term in this indictment shows two things. First, by including the term alongside the other war crimes that were committed, such as the shooting, hanging, gassing, starvation and other cruelties, the prosecutors of the Nuremberg Trials were able to show the severity of the term.⁷ It also shows that the term itself carried with it a certain intent dating back to its origins, as indicated by the inclusion of the phrase “in order to destroy particular races and classes of people and national, racial, or religious groups.”⁸ The term was then spoken in court for the first time on November 20, 1945, as the indictment was read to the defendants.⁹ It was once again spoken in court on July 27, 1945, as British chief prosecutor Sir Hartley Shawcross discussed it in his closing statement.¹⁰ The term was soon codified into law by the Genocide Convention in 1948.

Prior to that codification, however, there was a concern that the Nuremberg Trials themselves would simply be seen as a political sham rather than an attempt to actually achieve justice and convict those that had committed atrocities during World War 2. This concern was further apparent during the Tokyo War Crimes Trial, wherein it seemed as though the particular view of the future that was being envisioned was “peculiarly American.”¹¹ In his famous dissent, Judge Pal noted the rationale for using the atomic bomb simply accentuated the hypocrisy shown

out, inadequate provision of surgical and medical services, kickings, beatings, brutality and torture of all kinds, including the use of hot irons and pulling out of fingernails and the performance of experiments by means of operations and otherwise on living human subjects. In some occupied territories the defendants interfered in religious matters, persecuted members of the clergy and monastic orders, and expropriated church property. They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.”

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 47

¹⁰ *Id.*

¹¹ Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT'L L. & POL. 373 (1991) at 383

by the Americans, and was “outraged by the concept of trying leaders for crimes of which the prosecutors were themselves guilty.”¹² Judge Pal held the belief that the use of an atomic bomb on Hiroshima and Nagasaki was “a prime example of a crime against humanity,” the exact same crime the Allies were trying Japan of and had already tried German Nazis of in the Nuremberg Trials.¹³ Had the crime of genocide been codified at the time of the Nuremberg Trials, it is possible that the prosecutors who were looking to convict the defendants with genocide may very well also have been guilty of that very crime, mirroring the concerns of Judge Pal.

Post codification, the term lay unused from a legal perspective for a number of years, as the first actual guilty verdict of genocide did not occur until 1998. This isn't to say that the term fell into obscurity; over the years, a variety of factors increased the attention given to the subject of genocide.¹⁴ Those issues include: interests being piqued by the earlier works of genocide, the dissolution of the Soviet Union and end of the Cold War, efforts of the genocide institutes around the globe, the 100-day genocide in Rwanda, the ongoing concern throughout the 1990s that genocide had been and was possibly continuing to be perpetrated in different parts of the former Yugoslavia, the establishment of the International Criminal Tribunal for the former Yugoslavia, the establishment of the International Criminal Tribunal for Rwanda, the establishment of the International Association of Genocide Scholars, the massacre of 8,000 Muslim boys and men in Srebrenica, the adoption of the Rome Statute of the ICC, an increase in university courses being taught on genocide, university-based institutes of genocide studies that offer degree programs in genocide studies, summer institutes with foci on a combination of human rights, crimes against

¹² *Id.* at 407

¹³ *Id.*

¹⁴ Totten, Samuel (2011) "The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues," *Genocide Studies and Prevention: An International Journal*: Vol. 6: Iss. 3: Article 4. at 215

humanity and genocide, the creation of the *Journal of Genocide Research*, the development of the concept of the Responsibility to Protect, the establishment of the ICC, the explosion of violence in Darfur, the establishment of the International Network of Genocide Scholars, the creation of *Genocide Studies and Prevention: an International Journal*, and the indictment of Omar al-Bashir.¹⁵

Part two of the Rome Statute of the International Criminal Court clarifies that the crime of genocide falls under the jurisdiction of the International Criminal Court (“ICC”).¹⁶ The ICC clarifies:

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.¹⁷

Notably, the Genocide Convention, as approved on December 9, 1948, held the same acts as the Rome Statute to constitute acts of genocide.¹⁸ The Genocide Convention went on to list genocide itself, the conspiracy to commit genocide, direct and public incitement to commit genocide, the attempt to commit genocide and complicity in genocide were punishable acts.¹⁹ Similar to common

¹⁵ *Id.*

¹⁶ *Rome Statute of the International Criminal Court* Art. 5. (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”)

¹⁷ *Id.*

¹⁸ *Convention on the Prevention and Punishment of the Crime of Genocide* at 2.

[Doc.1 Convention on the Prevention and Punishment of the Crime of Genocide.pdf](#) (Visited May 15, 2023)

¹⁹ *Id.*

law crimes, genocide requires the proof of both *actus reus* and *mens rea*.²⁰ Specifically, in order to find someone guilty of genocide, the prosecution needs to show that the defendant actually committed the actions they are accused of, and they did so with the intent of destroying, in whole or in part, a national, ethnical, racial or religious group. The *actus reus* of genocide isn't necessarily difficult to prove; the *mens rea* element is difficult to prove because the specific intent to destroy a national, ethnical, racial or religious group of the defendant, otherwise known as the *dolus specialis*, must be shown.²¹ As a result, genocide is difficult for the ICC to prove and other charges are often used in its place. In fact, of the 31 currently active cases under the ICC, only former Sudanese President Omar al-Bashir faces charges of genocide.²²

Preliminary Statement of the Issue

The ICC classified genocide as one of the four crimes it saw fit to hold jurisdiction over.²³ However, in deciding what should constitute guilt of the crime of genocide, the ICC opted to adopt the definition used by the original Genocide Convention, including the special intent they

²⁰ *What is Mens Rea and Actus Reus?* [What is Mens Rea and Actus Reus? - Law Legum](#) (Visited May 15, 2023) (“Both the term is very old and is based on the Latin Maxim ‘*actus non facit reum nisi mens sit rea*’ which means an act does not make the actor guilty unless his mind is guilty too.”)

²¹ *United Nations Office on Genocide Prevention and the Responsibility to Protect* [United Nations Office on Genocide Prevention and the Responsibility to Protect](#) (Visited May 15, 2023) (“The intent is the most difficult element to determine. To constitute genocide, there must be a proven intent on the part of perpetrators to physically destroy a national, ethnical, racial or religious group. Cultural destruction does not suffice, nor does an intention to simply disperse a group. It is this special intent, or *dolus specialis*, that makes the crime of genocide so unique. In addition, case law has associated intent with the existence of a State or organizational plan or policy, even if the definition of genocide in international law does not include that element.”)

²² *International Criminal Court* [cases | International Criminal Court \(icc-cpi.int\)](#) (Visited May 15, 2023)

²³ *Rome Statute of the International Criminal Court* Art. 5.

proposed..²⁴ This *dolus specialis* burden has been met in the past by showing that genocide was “the only reasonable inference which can be drawn from the said pattern of conduct.”²⁵ One example where it was specifically shown was in “the killing of more than 800,000 Tutsi and moderate Hutu in Rwanda by Hutu extremists in 1994; the massacre of Bosnian Muslim men and boys by Bosnian Serbs in Srebrenica in 1995; and the forced displacement of and attacks on ethnic groups by Sudanese forces and militias in Darfur in the early 2000s.”²⁶ In order for these convictions to have occurred, prosecutors had to have shown “the existence of a group protected under the Genocide Convention, genocidal acts and an intent to destroy at least part of the group.”²⁷ As discussed earlier, proving the special intent to destroy at least part of the group is where prosecutors struggle, so the ICC and other Tribunals turn towards the other three crimes that are governed by international law and ICC jurisdiction. This difficult burden has allowed those believed to be guilty of genocide to be acquitted by the ICC.²⁸ The acquittal of those that have committed atrocities has led to disappointment to those that have witnessed or even experienced these actions.²⁹

²⁴ *Id.*

²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* at 11 [CrY Summary of the Judgment of 3 February 2015 \(icj-cij.org\)](#) (Visited May 15, 2023)

²⁶ Parker Claire, *Amid Accusations of Genocide, experts say use of the term is complicated at 2.*

²⁷ *Id.*

²⁸ Ed Vulliamy, *Ratko Mladić will die in jail. But go to Bosnia: you'll see that he won* [Ratko Mladić will die in jail. But go to Bosnia: you'll see that he won | Ed Vulliamy | The Guardian](#) (Visited May 15, 2023) (“Mladić’s pogroms included more mass-murder, torture, mutilation and rape, in the camps at Omarska, Trnopolje and Keretem in north-west Bosnia. To the east, in Višegrad, civilians – including babies – were herded alive into houses for incineration, or down to a bridge to be shot, or chopped into pieces, and hurled into the river Drina. Then there was the wholesale demolition of countless towns and villages, and the ‘cleansing’ of all non-Serbs, by death or deportation; the razing of mosques and Catholic churches; the gathering of women and girls into camps for violation all night, every night. And the rest. None of this, apparently, is genocide. Mladić was acquitted on that count. This raises the question: then what is?”)

²⁹ *Id.*

However, it cannot be ignored that the public has certainly abused the term “genocide” and has warped it into meaning something entirely different from the legal definition.³⁰ The United Nations has made efforts to only refer to it in the correctly for several reasons:

- (i) its frequent misuse in referring to large scale, grave crimes committed against particular populations; (ii) the emotive nature of the term and political sensitivity surrounding its use; and (iii) the potential legal implications associated with a determination of genocide.³¹

Furthermore, as mentioned, the crime of genocide is only one of four crimes that the ICC has jurisdiction over, with the others being crimes against humanity, war crimes, and crimes of aggression; Scholars have argued that these three crimes are just as serious as genocide.³² So while it is true that a guilty verdict of the crime of genocide holds symbolic value for those that have gone through these atrocities, the remaining three crimes that the ICC has jurisdiction over can still be relied upon in order for victims of crimes against humanity to achieve some semblance of justice. However, this can still be seen as a hollow victory for those that have experienced the horrors of genocide, and changing the *mens rea* requirement to a more attainable level could be a

³⁰ Parker Claire, *Amid Accusations of Genocide, experts say use of the term is complicated* at 2 (“For the public, the label carries immense moral significance. Politicians deploy it to rally global attention and for ‘naming and shaming’ perpetrators of atrocities with the hope that they will change their behavior”) See also *Kremlin says Biden’s ‘genocide’ comments are wrong and unacceptable* [Kremlin says Biden's 'genocide' comments are wrong and unacceptable | Reuters](#) (Visited May 15, 2023)

³¹ United Nations Office on Genocide Prevention and the Responsibility to Protect, *When to Refer a Situation as “Genocide”*

³² *Why Genocide is Difficult to Prove Before an International Criminal Court* [Why genocide is difficult to prove before an international criminal court : NPR](#) (Visited May 15, 2023) (“There’s no hierarchy here. Crimes against humanity is what the Nazis were charged with for the Holocaust”)

means of not only achieving justice for those that deserve it, but to also uphold the goals of the United Nations and the ICC as a whole.

Thesis Statement

While it is true that the ICC has developed ways for those that have experienced the horrors of potential genocide to achieve some form of justice, such as relying on the remaining three crimes of crimes against humanity, war crimes, and crimes of aggression, the current burden for the prosecution to meet is too high and needs to be amended so as to help victims achieve true justice. It would be beneficial for the ICC and other Tribunals to rely on a different standard than the current *dolus specialis* standard they have been using, ideally one with a lower *mens rea* requirement; lowering the standard while still maintaining a higher level of intent than the remaining three crimes in the Rome Statute would make the burden of proving genocide more achievable, while still keeping the intent of the Genocide Convention and preserving the uniqueness of the crime of genocide.

Difficulty in Proving Genocide and Meeting the Dolus Specialis Requirement

The difficulty of proving genocide in the court of law tracks back to the court's interpretation of what *dolus specialis* means. Courts have held that, even if the *actus reus* is shown, prosecutors need to show that the intent of committing genocide is the only reasonable inference that can be drawn from the facts; if genocide was the intent, but the facts show there was also another intent behind the actions, the prosecutor will have failed to prove genocide and the defendant will be exonerated.

As previously discussed, the challenge of proving genocidal comes down to proving the *mens rea* of the defendant. In the Bosnian case of Ratko Mladić, there was clearly no issue in proving the *actus reus*: he had committed mass-murders, torture, mutilation and rape. However,

prosecutors were unable to show that he had the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

Intent is much harder to prove because prosecutors do not have a smoking gun in most cases.³³ One of the ways to show genocidal intent is to obtain evidence of orders made by the defendant or someone the defendant works for up the chain of command.³⁴ Another way is to show a clear pattern of actions that would result inevitably in a group's destruction.³⁵ This could involve the siege and shelling entire cities.³⁶ There also needs to be an establishment that the victims of the alleged genocide were specifically and deliberately targeted because of either a real or perceived membership of one of the four protected groups under the Genocide Convention.³⁷ These groups are a national group, an ethnical group, a racial group, or a religious group.³⁸

The *actus reus* of genocide, inversely, does have physical evidence that prosecutors can rely on and point to. One scholar has opined that there are ten distinct stages of genocide, all of which have preventative steps that can be taken to prevent or stop possible genocide from occurring.³⁹ The first step is to analyze the classifications of cultures and groups of people.⁴⁰ The distinctions are looked at as an "us vs. them" mentality.⁴¹ The preventative measure that can be taken at this stage is "to develop universalistic institutions that transcend ethnic or racial divisions, that actively promote tolerance and understanding, and that promote classifications that transcend

³³ Claire Parker, *Amid Accusations of Genocide, Experts Say Use of the Term is Complicated* at 2.

³⁴ *Id.*

³⁵ *Id.* at 3.

³⁶ *Id.*

³⁷ *The Convention on the Prevention and Punishment of the Crime of Genocide (1948)* at 5. [Genocide Convention-FactSheet-ENG.pdf \(un.org\)](#) (Visited May 15, 2023)

³⁸ *Id.* at 4.

³⁹ Gregory H. Stanton, *The Ten Stages of Genocide*

⁴⁰ *Id.*

⁴¹ *Id.*

the divisions.”⁴² The second step is to analyze symbolization.⁴³ In this step, the different classifications of people are given names or symbols, such as “Jews” or “Gypsies,” the idea being to dehumanize or create hatred.⁴⁴ The way to combat this step is to forbid hate symbols and hate speech, though this will fail if unsupported by popular culture enforcement.⁴⁵ The third step is to incite discrimination against the classified groups by using law, custom, and political power to deny the rights of these groups.⁴⁶ Prevention of discrimination would require full political empowerment and citizenship rights for all groups in a society.⁴⁷ The fourth step is dehumanization, where the humanity of the group being segregated against is denied, often being equated to animals, vermin, insects, or diseases.⁴⁸ To combat this, hate radio stations should be shut down and hate propaganda should be banned, but it is also important to not conflate genocidal incitement with protected speech.⁴⁹ The fifth step is to organize the genocide, usually by the state, often through the use of militias to provide deniability of state responsibility or through informal or decentralized organizations.⁵⁰ To combat this step, it is important to outlaw being a member of these militias, the leaders of the militias should have their visas denied, and the United Nations should impose arms embargoes on governments and citizens of countries involved in genocidal massacres and create commissions to investigate violations.⁵¹ The sixth step is polarization where the extremists drive the groups apart by targeting moderates, who are more likely to stop the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

genocide from happening.⁵² To combat this, security protections may be required for moderate leaders or assistance to human rights groups.⁵³ It could also be helpful to seize the assets of extremists as well as their visas to prevent them from traveling.⁵⁴ The seventh step is preparation, where group leaders plan the “Final Solution” to their targeted group, often using euphemisms to cloak their intentions such as “ethnic cleansing,” “purification,” or “counter-terrorism,” while building armies, buying weapons, and making sure they are training and indoctrinating their militia.⁵⁵ To prevent this, arms embargos may be necessary, as well as the prosecution of incitement and conspiracy to commit genocide.⁵⁶ Step eight is the persecution of victims, separating them because of their ethnic identity and preparing death lists.⁵⁷ This is often the step where genocidal massacres begin and where the intent to destroy part of a group can be found.⁵⁸ To prevent this, genocidal emergency must be declared.⁵⁹ Armed international intervention should be prepared, or heavy assistance provided to the victim group to prepare for self-defense should occur, which should be organized by the U.N.⁶⁰ The ninth step is extermination, where the mass killings, often referred to as exterminations, continue to occur.⁶¹ To combat this, it is important to create real safe areas or refugee escape corridors with heavily armed international protection.⁶² At this point, only rapid and overwhelming armed intervention can stop the genocide.⁶³ The final step

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

is denial, which is among the surest indicators of further genocidal massacres.⁶⁴ Mass graves are created, bodies are burnt, evidence is covered up and witnesses are intimidated.⁶⁵ The perpetrators will often lie about their involvement and attempt to lay all of the blame on the victims while blocking any attempts to investigate the crimes.⁶⁶ At this point, the only real way to combat this is punishment by an international tribunal or national court where the evidence can be heard and the perpetrators can be punished.⁶⁷

It is further important to note that, of the four crimes the ICC has jurisdiction over, crimes of genocide are the only crimes that carry such a heavy intent requirement.⁶⁸ One can argue that it is this heavy special intent requirement that makes the crime of genocide unique, as simply relying on the actions of genocide without the intent requirement would cause a lot of overlap with the crime against humanity standard of acts “committed as part of a widespread or systemic attack directed against any civilian population.”⁶⁹ With respect to war crimes, the statute reads “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Rome Statute of the International Criminal Court* Art. 6.

⁶⁹ *Id.*; See also Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Colum. L. Rev. 2259 (1999), <http://digitalcommons.pace.edu/lawfaculty/338/>. at 2292. (The statute lists the following acts as constituting crimes against humanity: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, enforced disappearances of persons, the crime of apartheid and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.)

plan or policy or as part of a large-scale commission of such crimes.”⁷⁰ With respect to crimes of aggression, the statute reads that crimes of aggression are:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁷¹

None of the other three crimes the ICC has jurisdiction over make any mention of proving a specific intent of the defendant in order to meet the burden of proof, which may explain why prosecutors rely on the other three charges to indict and convict war criminals. Instead, these crimes rely on Article 30 of the Rome Statute to define the *mens rea* needed to find a defendant guilty.⁷² The requirement to reach the heightened standard for genocide brings its own risks for prosecutors:

Time and again in the recent past, both individual states and the international community sat and watched as mass atrocities unfolded before deciding whether they would act to staunch them. Reportedly, officials were either not sure (1) whether the actions constituted genocide rather than civil war, ethnic cleansing, crimes against humanity, or something else altogether and/or (2) whether the actual intent of the perpetrators was to destroy in

⁷⁰ *Id.* at 4

⁷¹ *Id.* at 7

⁷² *Id.* at 15 (“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.”)

whole or in part a particular group protected under the UNCG. As a result, state and/or international community officials often insisted on waiting for additional evidence, even as tens and hundreds of thousands were slaughtered, before making a decision one way or the other. Essentially, officials seemed to be saying, ‘Well, if it’s not a case of genocide then we do not have to act, and since genocide is so difficult to ascertain, if not prove, we’d better take our time and be absolutely sure before we make our final decision.’⁷³

It is for these reasons that prosecutors seem to pursue other charges more frequently.⁷⁴

This seems to make the goal of the United Nations difficult to achieve, however. According to the Secretary-General, one of the main goals of the UN is for states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and from their incitement.⁷⁵ If one of the goals of international law is to help States protect themselves from acts of genocide, but the burden to meet genocide is insurmountably high, it stands to reason that the

⁷³ *Id.* at 220

⁷⁴ *Id.* (“Ostensibly, those who developed the proposed convention on crimes against humanity believe that it can replace the UNCG for, some of them argue, it covers virtually the same crimes as the UNCG *and* would do away with the need to engage the thorny issue of intent. That is, unlike the UNCG, where the intent of the perpetrators to destroy in whole or in part a particular group, as such, must be established in order for an act to be considered a case of ‘genocide,’ intent is not needed (or, put another way, not a factor) in determining whether one act or another constitutes a crime against humanity.”)

⁷⁵ *General Assembly Security Council Responsibility to protect: State responsibility and prevention* [Etpu \(un.org\)](https://www.un.org/ehp/ehp.asp) (Visited May 15, 2023) (“The responsibility to protect is consistent with existing obligations under international human rights, humanitarian and refugee law, which are binding on all States. The obligation of States to actively prevent genocide is established in article 1 of the Genocide Convention. Common article 1 of the Geneva Conventions sets out the obligation of State parties to ensure respect for international humanitarian law in all circumstances. . . . Focusing on the responsibility of States to protect their populations by preventing genocide, war crimes, ethnic cleansing and crimes against humanity, as well as their incitement, the present report assesses the causes and dynamics of such crimes and violations and reviews the array of structural and operational measures that States can take to prevent atrocity crimes. It provides examples of initiatives that Member States are already taking and identifies additional steps that could be taken to prevent atrocity crimes.”)

intent requirement the ICC has applied to the crime of genocide is actively impeding them from accomplishing their goals.

The magnitude of the crime of genocide cannot be overstated. The United Nations addressed this, saying:

Genocide is an extreme form of identity-based crime. Whether real or socially constructed, identity can be subject to manipulation by elites, including as a deliberate tactic for personal or political gain, and may be used to deepen societal divisions. Identity-based conflict can be rooted in differences among national, ethnic, racial or religious groups, whether real or perceived. It is not the differences per se that cause conflict among groups, but rather discrimination based on such differences that creates unequal access to resources and exclusion from decision making processes and leads to a denial of economic, social, cultural, civil and political rights.”⁷⁶

The United Nations specifically went out of their way to discuss genocide specifically and how it can spread and affect populations. The Genocide Convention itself has been ratified or acceded to by 152 States and the Special Advisor on the Prevention of Genocide is working to make the Genocide Convention an instrument of universal membership.⁷⁷

The fact of the matter is that many of the difficulties of proving genocide all seem to come back to showing the intent of the perpetrator; killing members of a group, causing serious bodily or mental harm to members of a group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended

⁷⁶ General Assembly Security Council, *Responsibility to protect: State responsibility and prevention* at 4.

⁷⁷ [United Nations Office on Genocide Prevention and the Responsibility to Protect](#) [United Nations Office on Genocide Prevention and the Responsibility to Protect](#) (Visited May 15, 2023)

to prevent births within a group, and forcibly transferring children of a group to another all have physical evidence associated with them. However, unless you have transcripts or some form of messages going up a chain of command, there are not many ways to meet the *mens rea* requirement of showing the defendant acted with intent to destroy, in whole or in part, a national, ethnical, racial or religious group; as mentioned above, the intent portion of proving genocide does not have a smoking gun that prosecutors can rely on. The *dolus specialis* requirement makes the crime unique and seemingly insurmountable at times.

Charges have been thrown out and ignored by judges for not meeting the *dolus specialis* requirement. In the case of *Croatia v. Serbia*, the ICC discussed what must be done to meet the threshold of *dolus specialis*. The court concluded that:

In the absence of a State plan expressing the intent to commit genocide, such an intent may be inferred from the individual conduct of perpetrators of the acts contemplated in Article II of the Convention. It goes on to explain that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary that this is the only inference that could reasonably be drawn from the acts in question.⁷⁸

To determine if *dolus specialis* was met, the court then addressed two different questions: (1) Did the Croats living in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constitute a substantial part of the protected group; and (2) is there a pattern of conduct from which the only reasonable inference to be drawn is an intent of the Serb authorities to destroy,

⁷⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* at 11 [CrY Summary of the Judgment of 3 February 2015 \(icj-cij.org\)](#) (Visited May 15, 2023)

in part, the protected group.⁷⁹ Croatia attempted to rely on the context and opportunity the Serb forces had of destroying the Croat population.⁸⁰

With respect to the context argument, the court found that “the existence of intent to physically destroy the Croatian population is not the only reasonable conclusion that can be drawn from the illegal attack on Vukovar.”⁸¹ This was due to the fact that the attack “constituted a response to the declaration of independence by Croatia, and above all an assertion of Serbia’s grip.”⁸² With respect to the opportunity argument, the court points out that, of the Croats that had been captured by Serb forces, not all of them had been killed.⁸³ The court rationalizes that the figure Croatia puts forward of 12,500 is small compared to the full size of the targeted group.⁸⁴ The court therefore concluded that “Croatia has failed to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group.” The court ultimately concludes that “*dolus specialis* has not been established by Croatia, its claims of conspiracy to commit genocide, direct and public incitement to commit genocide, and attempt to commit genocide also necessarily fail.”⁸⁵

The court hinges this decision on the “only reasonable inference” standard they put forward. However, through the use of this standard, the court seems to be ignoring the fact that the intent to destroy, in whole or in part, a national, ethnical, racial or religious group can exist alongside other intents. An aggressor can be provoked by a protected group, leading to two intentions: retaliation, and the intent to destroy the group. In this scenario, because the aggressor

⁷⁹ *Id.* at 16

⁸⁰ *Id.* at 17

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 18

⁸⁴ *Id.*

⁸⁵ *Id.*

had two different intents, the court would almost surely rule that genocide has not been proven due to the simple fact that the intent to destroy is not the only reasonable inference to make out of the actions of the aggressor. To allow those that have committed genocide to face appropriate repercussions for their actions, the current “only reasonable inference” standard needs to be done away with.

Reliance on the Remaining Three Crimes

The remaining three crimes the ICC has jurisdiction over do not have a specific intent requirement, but rather rely on Article 30 of the Rome Statute for their mental state requirement. Because of this, the prosecutors can rely on them to get charges to stick to the defendants. And while it is true that defendants can be imprisoned for a long time through these crimes and the reliance on these crimes does permit prosecutors to cast out a wider net, it doesn’t help to address the greater issue of the victims of genocidal actions not being given the justice they deserve.

As previously mentioned, the ICC has jurisdiction over four crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.⁸⁶ Even if the ICC feels as though it cannot pursue a crime of genocide, that does not inherently mean that they are locked out from pursuing any charges whatsoever. In fact, there are some that don’t view the charges as a hierarchy and characterize the other charges just as seriously as genocide.⁸⁷ While it may be true that victim groups tend to grab for the concept of genocide, a term that is often thrown around in situations where it does not legally apply, the fact of the matter is that crimes against humanity are

⁸⁶ *Rome Statute of the International Criminal Court* Art. 5.

⁸⁷ *Why genocide is difficult to prove before an international criminal court* [Why genocide is difficult to prove before an international criminal court : NPR](#) (Visited May 15, 2023) (“[C]rimes against humanity are just as serious as genocide. There’s no hierarchy here. Crimes against humanity is what the Nazis were charged with for the Holocaust.”)

“absolutely horrific crimes that involve attacks on a civilian population and the dehumanization of the human spirit and human beings.⁸⁸ As discussed earlier, what happened in Srebrenica was labeled and adjudicated as a genocide. This was because the tribunal:

had a specific intent that [they] could demonstrate, and they actually used cell phone intercepts and documents and communications in order to show that. And they also showed that a substantial part of the population was exterminated and that by exterminating the men and boys of Srebrenica – these 8,000 individuals who were slaughtered – that actually made it impossible for the community to ever be constituted again.⁸⁹

The ICC and Tribunals have frequently relied on these remaining charges to secure convictions of international defendants. One example of this is the prosecution of Goran Jelisić, a Bosnian Serb former police officer who was found guilty of having committed crimes against humanity by the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).⁹⁰ Specifically, Jelisić was accused of the killing of five people at the Brčko police station and eight at the Luka camp, shooting an unknown male detainee in the back of the head with a pistol, systematically killing Muslim detainees, beating a woman with a police baton before shooting and killing her, and stealing money, watches, jewelry and other valuables from detainees upon their arrival at the Luka camp with the threat of death to those who resisted.⁹¹ He was arrested on January 22, 1998, and transferred to the ICTY.⁹² He was charged with thirty-two counts: fifteen counts of crime against humanity, sixteen counts of violations of the laws or customs of war, and

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Goran Jelisić Case Information sheet* [cis_jelisić \(icty.org\)](https://www.icty.org/gjc/cases/jelisić) (Visited May 15, 2023)

⁹¹ *Id.*

⁹² *Id.*

one count of genocide.⁹³ Of these thirty-two charges, he pled guilty to thirty-one and not guilty to the single charge of genocide.⁹⁴ By the end of the trial, he was found not guilty of genocide.⁹⁵ Without the other charges attached, Goran Jelisić would have walked free from the Tribunal after the monstrous crimes he had committed. However, because the ICTY was able to charge Jelisić with crimes against humanity and with violating the laws or customs of war, he was still given a sentence of forty years in prison, which he is still serving to this day.⁹⁶

These other crimes further allow the ICC to avoid some of the risks of pursuing a charge of genocide identified by the United Nations. According to the United Nations:

The evidence of intent to destroy in whole or in part is also a key risk factor associated with genocide. Intentions can be difficult to ascertain but may be discernible in propaganda or hate speech or in State policies. The intent to destroy can be manifest in widespread discriminatory practices that culminate in gross violations of human rights against a specific group. The intent to destroy can also be inferred from the widespread or systematic nature of acts and the type of weapons employed.⁹⁷

Therefore, by allowing the ICC and other tribunals to pursue lesser charges that carry the same weight as genocide, they are still able to achieve some sense of justice for victims that have experienced or survived these cruelties.

Reliance on crimes against humanity, war crimes and crimes of aggression further allows the ICC to cast out a much wider net. Of the current cases being overseen by the ICC, there are

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ General Assembly Security Council, *Responsibility to protect: State responsibility and prevention* at 6.

currently twenty-one defendants with charges of crimes against humanity, twenty-two defendants with charges of war crimes and four defendants with charges of offenses against the administration of justice under article 70.⁹⁸

This wider net further allows the ICC to prosecute crimes without having to worry about the obstacle of proving the difficult *mens rea* of intent. For example, with respect to crimes against humanity, the United Nations notes “in contrast with genocide, crimes against humanity do not need to target a specific group. Instead, the victim of the attack can be any civilian population, regardless of its affiliation or identity. . . . it is not necessary to prove that there is an overall specific intent.”⁹⁹ They only point out one crime against humanity that requires any kind of specific intent; to prove persecution, you must show that the defendant had discriminatory intent and they must have acted with knowledge of the attack against the civilian population and that his or her action is part of the attack.¹⁰⁰ Otherwise, simple knowledge of the attack is sufficient to meet the *mens rea* requirement.¹⁰¹ War crimes further differs from genocide by permitting a charge against a defendant who has committed crimes against a diversity of victims, depending on the type of crime.¹⁰²

War crimes also have a much easier *mens rea* requirement to meet, with the only mental element being intent and knowledge with regards to the individual act and the contextual element

⁹⁸ *Trying individuals for genocide, war crimes, crimes against humanity, and aggression cases | International Criminal Court (icc-cpi.int)* (Visited May 15, 2023)

⁹⁹ *United Nations Office on Genocide Prevention and the Responsibility to Protect United Nations Office on Genocide Prevention and the Responsibility to Protect* (Visited May 15, 2023)

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

of the conduct taking place in the context of and being associated with an international/non-international armed conflict.¹⁰³

It can certainly be argued that by lowering the special intent of genocide, it would dilute the standing that the crime of genocide has in the ICC. The remaining three crimes rely on the *mens rea* given by Article 30 of the Rome Statute, but the crime of genocide itself makes itself unique by containing the special intent requirement. Some scholars have indeed argued that a different interpretation of this special intent “erodes its special place within the hierarchy of international criminal norms,” and point to “the overlap between [a lower interpretation of the *mens rea*] and the separate category of ‘crimes against humanity’.”¹⁰⁴ This argument doesn’t take into account though that “Genocide and crimes against humanity ‘[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.”¹⁰⁵

By relying on these crimes with a lower *mens rea* standard, prosecutors can surely achieve some kind of justice for the victims. However, the fact that the crime of genocide exists as a means of protecting certain groups from something as heavy as extermination inherently shows that a conviction of another crime does not carry the same sense of closure that a conviction of genocide would for those that have survived.

¹⁰³ *Id.*

¹⁰⁴ Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Colum. L. Rev. 2259 (1999), <http://digitalcommons.pace.edu/lawfaculty/338/> at 2292.

¹⁰⁵ *Id.* at 2293; See also The first conviction, in The Prosecutor v. Jean Kambanda, Judgement and Sentence, ICTR-97-234 (Int’l Crim. Trib. Rwanda, Trial Chamber) &ttp://~vww.ictr.org/>

Achieving True Justice

A common way for victims that have survived hardship to gain some kind of closure is to see the people who committed the atrocities against them receive the punishment they deserve for the crimes they committed. This idea of helping the victims of genocide achieve true justice is a good example of the need to lower the intent requirement, as those that have survived genocidal acts that see defendants get found not guilty are often left disappointed.

Victims of the crime of genocide go through some of the most inhumane treatment imaginable; this is arguably doubly so for those that survive these hardships, as they have to live with the memories and trauma of what they endured. For those survivors, and for those victims, it is important to convict the perpetrators to help give the victims a sense of justice and grant them some semblance of closure. The difficulty of proving the *dolus specialis* of genocide, however, has resulted in these victims and survivors from feeling a sense of disappointment, as if the perpetrators that caused them so much pain and suffering aren't facing the true consequences of their actions.

Achieving true justice is undoubtedly an important part of survival; it makes sense that those that have experienced any kind of trauma crave some kind of resolution and retribution against those that have wronged them. The same can be said about those that have experienced the atrocities of international crime. A relatively recent example of this can be traced to the conflict of the Darfur region in western Sudan. Between the years of 2003 and 2007, hundreds of thousands of citizens were killed and more than two million citizens were forced to flee.¹⁰⁶ In response, the ICC issued an warrant for war crimes and crimes against humanity against President Omar al-

¹⁰⁶ *Conflict in Darfur* [Sudan - Conflict in Darfur | Britannica](#) (Visited May 15, 2023)

Bashir, alleging that al-Bashir was criminally responsible for what had happened in Darfur.¹⁰⁷ One year later, the ICC issued another warrant, this time for genocide.¹⁰⁸

The first major hearing for Ali Kosheib, a “Janjaweed” militia leader accused of international crimes in Darfur, began in May of 2021.¹⁰⁹ Accordingly, “[t]he remaining ICC suspects face charges of war crimes, crimes against humanity, and genocide committed in Darfur.”¹¹⁰ Elfadel Arbab, a survivor of the conflict in Darfur, said “[w]e want to see, as victims, that he will plead guilty.”¹¹¹ Guy Josif Adam, another survivor, said “[e]ven though there is overwhelming evidence, there is always that fear that you will never know what the outcome of the ruling will look like.”¹¹² Elise Keppler, associate director at the Human Rights Watch, described the trial as a “really incredible moment for the people of Darfur . . . and for the effort to see justice when the worst crimes are committed.”¹¹³ She went on to say “[j]ustice is about the dignity of the victims and your sense of community. . . justice will happen when people can restore their dignity.”¹¹⁴

¹⁰⁷ *Id.* (This was the first instance of the ICC had sought the arrest of a sitting head of state.)

¹⁰⁸ *Id.*

¹⁰⁹ *ICC: First Major Hearings on Darfur Crimes: Sudan Should Transfer al-Bashir, Other Suspects to International Criminal Court* [ICC: First Major Hearings on Darfur Crimes | Human Rights Watch \(hrw.org\)](https://www.hrw.org/news/2021/05/14/icc-first-major-hearings-on-darfur-crimes) (Visited May 15, 2023) (“Ali Kosheib, the *nom de guerre* of Ali Mohammed ali, was a leader of the “Janjaweed” militia who also held command positions in Sudan’s auxiliary Popular Defense Forces and Central Reserve Police. On April 27, 2007, the ICC issued the first arrest warrant for Kosheib, which charged him with 50 counts of crimes against humanity and war crimes for his alleged responsibility for rapes, destruction of property, inhumane acts, and attacks and killing of civilians in four villages in West Darfur in 2004 and 2004.”)

¹¹⁰ *Id.* (“In addition to al-Bashir, they are Ahmed Haroun, former state minister for humanitarian affairs and former governor of Southern Kordofan state; Abdulraheem Mohammed Hussein, the former defense minister; and Abdallah Banda Abakaer, leader of the rebel Justice and Equality Movement in Darfur. All except for Banda are in Sudanese custody.”)

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Another trial involving Ratko Mladić, a warlord who was accused of one count of genocide in Srebrenica and one count of genocide in Bosnia, held two separate results: Mladić was found guilty of genocide regarding the mass-murdering of 8,000 men and boys in Srebrenica but not guilty of genocide regarding the mass-murder, torture, mutilation and rape in Bosnia.¹¹⁵ Kelima Dautović, one of the survivors of the Bosnian crimes, said in response to the acquittal, “[i]t’s so disappointing, but hardly surprising . . . maybe they didn’t want to call it a genocide because it happened under the eyes of the international community that was there, supposedly protecting us. Whatever, I hope the historians do a better job than the judges.”¹¹⁶

The victims of these crimes are clearly scarred by the actions of the defendants, and achieving justice goes a long way in the process of healing those wounds. The Tribunals that were established to try these cases have the responsibility of providing these victims with the opportunity to achieve their justice. Yet, “in setting the bar exceptionally high in determining genocide, the tribunal made it nearly impossible to prove the commission of the crime.”¹¹⁷ This lack of achieving justice for victims is precisely why the current standard is too high. By establishing a different requirement, one that makes meeting the high bar of *dolus specialis* while still maintaining the uniqueness of the charge, prosecutors may have a better chance of providing victims and survivors of genocidal acts to achieve the true justice they deserve.

¹¹⁵ Ed Vulliamy, *Ratko Mladić will die in jail. But go to Bosnia: you’ll see that he won* [Ratko Mladić will die in jail. But go to Bosnia: you’ll see that he won | Ed Vulliamy | The Guardian](#) (Visited May 15, 2023)

¹¹⁶ *Id.*

¹¹⁷ *Genocide charges are just too hard to prove – even in former Yugoslavia* [Genocide charges are just too hard to prove – even in former Yugoslavia | Letters | The Guardian](#) (Visited May 15, 2023)

Proposing a Lower Standard

The high bar of *dolus specialis* is what seems to be getting in the way of achieving true justice for victims and survivors of genocide, so proposing a lower standard that still makes the crime of genocide unique from crimes against humanity is the only logical step to help those that have suffered these atrocities. A way of achieving this could be to remove the requirement that genocidal intent is the only reasonable inference that can be drawn from the facts and replace it with a standard that analyzes if someone who committed the *actus reus* of genocide had an adequate understanding of the destructive consequences of their actions for the survival of the relevant victim group.

As explained earlier, the court in *Croatia v. Serbia* described their interpretation of *dolus specialis* as requiring the genocidal intent to be the sole intent that can be reasonably inferred from the facts.¹¹⁸ This would mean that if any other reasonable explanation can be inferred, the defendant would be found not guilty of genocide. For example, between 1962 and 1972, upwards of fifty percent of the Northern Aché Indians were killed with the purpose of clearing their territory for economic development.¹¹⁹ Under the current accepted meaning of *dolus specialis*, the fact that the intent of genocide accompanied the intent of economic development, the defendants in this case were found to be not guilty of genocide even though they had clearly targeted fifty percent of the Northern Aché Indians.

¹¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* at 17 [CrY Summary of the Judgment of 3 February 2015 \(icj-cij.org\)](https://www.icj-cij.org/summary-of-the-judgment-of-3-february-2015) (Visited May 15, 2023)

¹¹⁹ Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Colum. L. Rev. 2259 (1999), <http://digitalcommons.pace.edu/lawfaculty/338/> at 2285; See also Mark Mfinzel, Manhunt, in *Genocide in Paraguay* 19,38-39 (Richard Arens ed., 1976).

To avoid situations like this and to help victims of genocide achieve the true justice that they deserve, it has been proposed that “in cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group in whole or in part.”¹²⁰ This type of proposal would emphasize “the destructive result of genocidal acts instead of the specific reasons that move particular individuals to perform such acts.”¹²¹ By putting more of a focus on the destructive results of genocidal acts while still maintaining a higher degree of intent than the one provided in Article 30 of the Rome Statute, the crime of genocide would still maintain its uniqueness among the four crimes the ICC has jurisdiction over while also sitting at an achievable bar for prosecutors to meet and ultimately allow victims of genocide to achieve the true justice they deserve.

Conclusion

Even though the ICC has three crimes that do not have as high of a *mens rea* requirement for them to fall back on, the current *dolus specialis* requirement is too high of a burden to allow for victims and survivors of genocide to achieve some semblance of true justice. By lowering the standard a bit to one that focuses more so on whether or not the perpetrators of the atrocities acted in furtherance of a campaign that targeted a members of a protected class, it would lower the current extreme standard that the courts recognize and allow the ICC and other Tribunals to fulfill the goals set forward by the United Nations: to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and from their incitement. By lowering the standard

¹²⁰ Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Colum. L. Rev. 2259 (1999), <http://digitalcommons.pace.edu/lawfaculty/338/> at 2288.

¹²¹ *Id.*

but maintaining a more advanced form of intent, the remaining three crimes would differ from the crime of genocide, prosecutors would still be able to fall back on those other crimes, and ultimately make proving the crime of genocide more achievable.