

A CRITICAL ANALYSIS OF THE LAW OF GENOCIDE

Written by *Pranshu Sehgal*

5th Year BBA LLB (Hons.) Student, School of Law, Christ University, Bengaluru

INTRODUCTION

The Convention against Genocide, rose from the ashes of Holocaust. The ICTY and ICTR have been set up for a purpose which can be explained in two limbs as follows:

- a. To prevent genocide.
- b. To punish those committing the horrendous and monstrous act of genocide.

Article 6 of the *Rome Statute* defines Genocide as:

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.

Under the above mentioned definition it is clear that the definition is an exclusive definition and only when any of the acts as mentioned from (a) to (e) is fulfilled can the act of genocide be said to be committed. The same is an unambiguous and a settled position in the law.

The genocide offence has two separate mental elements, namely a general one that could be called 'general intent' or 'intent to destroy'.¹ The 'intent to destroy' constitutes an additional subjective requirement that complements the general intent and goes beyond the objective elements of the offence.² Further, genocide requires an ulterior intent ("surplus" of intent³)

¹ International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to SC Res. 1564.

² Otto Triffterer, 'Genocide', above note 2, pp. 402–403.

³ Prosecutor v. Milomir Stakić, Trial Judgement, Case No. IT-97-24-T, 31 July 2003, para. 520. See also Prosecutor v. Omar Hassan Ahmad Al Bashir, para. 119 (which, in essence, characterizes genocide as a crime of (concrete) endangerment) and (para. 1324: 'completed when the relevant conduct presents a concrete threat to the existence of the targeted group').

characterized by an extended – with regard to the *actus reus* – mental element or transcending internal tendency.⁴

Crime of Genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.⁵ Crime of Genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.⁶

Intention to Destroy

The reference to ‘intent to destroy, in whole or in part’ was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.⁷

“It might be possible to infer requisite genocidal intent and the necessity of the substantive part from the ‘desired destruction of more limited number of persons selected for the impact of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.’”⁸

The Commission of Experts noted, such an attack ‘must be viewed in the context of the fate of what happened to the rest of the group.’ There shall be a precise logic to exterminate such a group whereby the survival of the group is in jeopardy.

The recent authorities that develop the ‘significant part’ interpretation use the phenomenon of selective killing of certain segments of a group as evidence of intent to destroy the group as a whole, assuming it is predicated on a calculation that destruction of a ‘significant’ members of the group will irrevocably compromise the existence of what remains.

A campaign resulting in the killings, of a finite number of members of a protected group might not qualify as genocide, despite the high total of casualties, because it did not show an intent by the perpetrators to target the very existence of the group as such.⁹

⁴ Prosecutor v. Radoslav Brdjanin, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para. 695: specific intent ‘characterises the crime of genocide’.

⁵ Report of International Law Commission on the Work of its 48th Session, 6th May-26th July 1996, p.125.

⁶ Report of International Law Commission on the Work of its 48th Session, 6May-26July 1996, p.125.

⁷ Draft Statute for the ICC. Part 2. Jurisdiction, Admissibility and Applicable Law, UN Doc. A/AC.249/1998/CRP.8, p.2, n. 1.

⁸ Prosecutor v. Jelisić (Case No. IT-95-10-T), Judgement 14 December 1999, para. 82.

⁹ Prosecutor v. Krstić (Case No. IT-98-33-T), Judgement, 2 August 2001, para. 590.

If a specific part of the group, is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.¹⁰ In a criminal prosecution for genocide, a prosecutor must allege the existence of a group. An indictment must recite that the accused performed an act against a member of a named group, with intent to destroy that group. Here the attacks carried out by BUF were sudden and sporadic against the people of that particular town. There was no particular targeted group or targeted killings as open firing was carried out. For genocide to take place, there must be a plan, even though the Convention does not explicitly requires this.¹¹

The prohibited act must be committed against an individual because of his membership in a particular group.¹² The intention must be to destroy a group and not merely individuals who are coincidentally members of a particular group. Such a prohibited act must be committed against the individual because of his membership in the group¹³, it must be the group which is targeted, and not merely individuals within the group.¹⁴

Though, the grey area of law here is that there whether the group actually shall be affected to such an extent or can a particular act of killing where the intention is to kill a particular person be termed as a mere killing or shall it be termed as genocide?

Illustration – A single person entering a mosque/temple/church, in order to kill a person of a particular sect and openly firing, will the act, with respect to the killing of people of a particular qualify as a simple murder or will the same qualify as the monstrous and barbaric act of ethnic cleansing/genocide?

Selective destruction of the group would have a lasting impact upon the entire group.¹⁵ “Many instances,” reads the resolution, ‘of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part’.¹⁶ Genocide is an odious crime, regardless of the group which fell victim to it and the exclusion of political groups might be regarded as justifying genocide in the case of such groups¹⁷ as, the criterion for belonging to a

¹⁰ Prosecutor v. Krstic, (Case No. IT-98-33-T), Judgement, 2 August 2001, para. 12; Bosnia and Herzegovina v. Yugoslavia, 26 Feb. 2007, para 198.

¹¹ Schabas, W.A. (2000), Genocide in International Law, p. 207, Cambridge University Press, Cambridge.

¹² Draft Code of Crimes against the Peace and Security of Mankind, ILC, UN GAOR, 51st sess., Supp. (No. 10), p.89, UN Doc. A/51/10 (1996).

¹³ Report of International Law Commission on the Work of its 48th Session, 6 May-26 July 1996, note 26 above, p. 88.

¹⁴ Prosecutor v. Sikirica et al. (Case No. IT-95-8-I), 4 Judgement 3 September 2001, para. 89.

¹⁵ Prosecutor V. Krstic IT-98-33-A, 19 April 2004, para. 595.

¹⁶ Draft Conventions on Genocide, GA Res. 180, preamble UN GAOR.

¹⁷ UN Doc., E/447, p.22.

group was objective, not subjective.¹⁸ A sub-group is quite heterogeneous, but distinguishable can be regarded as a sub-group of the main group. 'Accepting the position of countries that wanted the Convention to protect "definite groups distinguished from other groups by certain well-established", immutable criteria'.¹⁹ Social conception of genocide wouldn't allow exclusion of sub-groups which are distinguishable.²⁰ Allegations of Genocide have been made for violence against sub-group members such as the group's political leaders. The actor may intend to destroy the sub-group as a means towards destroying the entirety of the group. The sub-group could be viewed as a part of the group, leading to culpability for an intent to destroy the group 'in part'.²¹ The victim shall be a part of the group in the eyes of the beholder. The victim is perceived by the perpetrator as belonging to a group slated for destruction.²² To conclude beyond all reasonable doubt that the choice of victim arose from a precise logic to destroy the most representative figure.²³ In such cases such an attack would always been seen as an attack against the group and would be destruction of the group 'in part'. Thus, even a single killing can be termed as a genocide, when in the eyes of the beholder such killing was with respect to, an attack upon the particular group, wherein there was knowledge with the actor that the victim is part of the group.

Thus, if there by the very fact a systematic or planned attack upon a group or a member of the group, because of the fact that the same is because of the membership of a person to the particular group, the same may constitute an act of genocide. Neither was there any systematic attack nor was the same a planned attack, which does not constitute genocide.²⁴

Intent to destroy

*Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where the intent has been unequivocally established.*²⁵

The term intent to destroy is a special intent or *dolus specialis*, defining it as 'the specific intention, required as constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'²⁶. In other words there 'shall be a clear intent to

¹⁸ William A. Schabas: *Genocide in International Law* P. 137 (Cambridge).

¹⁹ *Prosecutor v. Stakic* (Case No. ICTR-99-52-A), Judgement, 28 November 2007, paras 496.

²⁰ Spain, Supreme Court, Criminal Chamber, 4 November 1998, para. 5, accessible at www.derechos.org/nizkor.

²¹ Quigley, John B. (2006) *The Genocide Convention : an international law analysis*, p. 181.

²² *Prosecutor v. Rutaganda* (Case no. ICTR 96-3-T), Judgement 6 December 1999, para. 56.

²³ *Prosecutor v. Jelusic* (Case No. IT-95-10-T), Judgement, 14 December 1999, para. 93.

²⁴ *Genocide: A Commentary on the Convention*, *Yale Law Journal* 58, p. 1142, p. 1147 (1949).

²⁵ *Prosecutor v. Krstic*, para. 134.

²⁶ *Prosecutor v. Jean-Paul*.

cause the offence²⁷. This definition is also commonly known as the ‘*Akayesu definition*’, which focuses upon the aim to destroy one of the protected group by the actor.

In the judgement of Jelusic, the trial court relied upon this test and stated that there was no ‘motivation’ per se which could be found as there was no selective killing or systematic killing, but rather there was random killing which was carried out.²⁸ It was stated:

‘He killed arbitrarily rather than with the clear intent to destroy a group.’

This was subsequently overruled as in the appeal the chamber held that a certain randomness in the perpetrator’s killings does not rule out the specific intent. Further, in the Krstic, the intent to kill was ‘military-aged Bosnian Muslim men of Srebrenica²⁹’ as he was aware with respect to the fatal impact of the same.

Random killings

Genocide consists of an attack on the life of a human group or of an individual as a member of such group³⁰ with the purpose of destroying the whole or part of that human group.³¹ There shall always be an ulterior motive in order to destroy the group and so that the consequence of the same is always directed towards the group. The reference to ‘intent to destroy, in whole or in part’ was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.³² The actor intends to destroy the group generally but victimises only those to whom he has access. If in part means, a substantial part and if a group inhabits in more than one locality then an official whose conduct is limited to one locality wouldn’t entertain an intent that would amount to constitute genocide.³³

In view of the particular intent requirement, which is the essence of the crime of genocide, the relative proportionate scale of the actual or attempted physical destruction of a group, or a significant section thereof, should be considered in relation to the factual opportunity of the accused to destroy a group in a specific geographic area within the sphere of his control, and not in relation to the entire population of the group in a wider geographic sense.³⁴

²⁷ Prosecutor v. Jean-Paul.

²⁸ Prosecutor v. Goran Jelusic.

²⁹ Prosecutor v. Radislav Krstic.

³⁰ UN Doc. E/623/Add.1.

³¹ ‘Relation Between the Convention of Genocide on one hand and the Formulation of the Nuremberg Principles’, Chapter I, No. 1.

³² Preparatory Committee Decisions feb. 1997, p. 3, fn. 1.

³³ John Quigley P. 174.

³⁴ Prosecutor v. Karadzic and Mladic (Case No. IT-95-18-R61, IT-95-5-R61), Transcript of Hearing of 27 June 1996, pp. 15-16.

The entire meaning of ‘intent to destroy’, *de jure*, states that there shall be a particular fragment of people that shall be cleansed, so much so that the sect as a whole, or the sect so affected through the victimization of the act of genocide done upon them shall affect them geographically. But is it necessary for a particular group to be affected so much so that they are cleansed geographically or their existence comes in question? Or can a single act of killing, motivated by the intent to destroy, can constitute the act of genocide?

Is the destruction of viable entity required?

According to Justice Shahabuddeen’s view, while the terms of the Genocide Convention and the ICTY Statute specify that the "listed act" - or actus reus of the crime of genocide must consist of an act of physical or biological destruction, it is sufficient to demonstrate that the intent with which that act was perpetrated encompassed the destruction of the group.^{35 36}

In *Krstic* the Chamber took up the same view and opined,

*“No doubt, mere displacement does not amount to genocide. But, in this case, there was more than mere displacement. The killings, together with a determined effort to capture others for killing, the forced transportation or exile of the remaining population, and the destruction of homes and places of worship, which was executed with intent to destroy a group in whole or in part within the meaning of the chapeau to paragraph 2 of article 4 of the Genocide Convention.”*³⁷

A part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity.³⁸ The interpretation of United States of ‘in part’ clearly signifies ‘a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.’³⁹ This ‘viable entity’ approach focuses not on how many, or what percentage, an actor intends to destroy but whether the actor leaves enough group members to sustain the group. If an attack is alleged to be genocide, such attack must be viewed in the context of the fate of what happened to the rest of the group.⁴⁰ By its very nature genocide requires the intention to

³⁵ Para 60 both 194 and 60 – Pre trial chamber of Prosecutor V. OMAR HASSAN AHMAD AL BASHIR No.: ICC-02/05-01/09 Date: 4 March 2009.

³⁶ Prosecutor v Krstic, Case No. IT-98-33A, Appeals Judgment, 19 April 2004, paras. 49-50.

³⁷ Prosecutor V. Krstic IT-98-33-A, 19 April 2004, para. 57.

³⁸ Genocide Convention Implementation Act of 1987, s. 1093(8).

³⁹ US Code 18, Sec. 1093(8).

⁴⁰ ‘Final Report of the Commission of Experts’, UN Doc., S/1994/674, para. 94.

destroy at least, substantial part of the group⁴¹, since the objective and purpose of the Convention is to prevent the destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole⁴², so much that the entirety of the group comes in question and the recovery is not possible.

Thus, it is clear that the genocidal intent can be inferred from the physical acts, and specifically ‘their massive or systematic nature or their atrocity’.⁴³ If the selective destruction is such that the said selective destruction of the group would have a lasting impact upon the entire group.⁴⁴

Thus, it is clear that there is a clear distinguishment upon the concept of intention. Whether the same has to be considered in a narrow sense so as to specifically restrict the same only to the selected killing or can the arbitrary killing be also considered, with respect to the determination of the crime of genocide or whether, intention must be understood in a wider sense or a broader concept and encompasses the concept of *dolus eventualis*⁴⁵ or conditional intent⁴⁶? Further, there is a clearly an ambiguous meaning of the intent concept. The knowledge based approach relies upon the premise that the concept of ‘intent’ is not restricted or limited to a pure volitional or ‘purpose based’ reading. In English Law the definition of intention, apart from purpose, ‘foresight of virtual certainty’ at best. In the case of *R. v. Woollin*, the House of Lords with regard to a murder charge defined intention by referring to ‘virtual certainty’ as to the consequence. Thus, whether purpose based shall be taken into consideration or a test which would define certainty of the act.

ANALYSIS

The above mentioned are the grey areas of the law as under the law of Genocide, which clearly needs to have a settled position.

As far as it can be seen, the best interest would be to see with respect to, why the act was committed, with respect to a prior intention and if the same even affects the particular sect to an extent, in such a case the same shall be termed as genocide.

In whole or in part, shall not be taken or read alone, rather, the same shall be considered only once the pre-determined intent to destroy is fulfilled by the actor, or in other words, when there exists a clear intent on the part of the actor, to attack or rather to act against a particular sect of people

⁴¹ Draft Code of Crimes against the Peace and Security and Mankind, ILC, UN GAOR, 51st sess., Supp. (No. 10), p.89, UN Doc. A/51/10 (1996).

⁴² *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement, 26 February 2007, para. 198.

⁴³ *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgement, 2 September 1998, para. 477.

⁴⁴ *Prosecutor V. Krstic* IT-98-33-A, 19 April 2004, para. 595.

⁴⁵ George P. Fletcher, *Basic Concept of Criminal Law*, Oxford University Press, New York, 1998.

⁴⁶ A. Gil Gil, *Derecho penal internacional*.

only and once, the same intention can be seen, the affect which may be remote or which may be such that the same may affect the entire sect at large by the actor's act. In all these cases, once a clear intent is established and there is even remote damage to the sect, in such a case, the act of genocide shall be decided.

Thus, these clarifications need to be incorporated as in such a case the act of genocide, which is one of the most barbaric crime, will have a vague definition, which can incorporate or rather can also leave out many acts which may or may not be an horrendous act of genocide.

