

The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach

Katherine Goldsmith

Abstract.

Since the Genocide Convention was created in 1948, its effectiveness has been hindered by debates on what the definition actually means. It has been widely accepted that the meaning of “intent,” within the Genocide Convention, refers to specific or special intent, *dolus specialis*. However, as more trials have taken place, creating more understanding of the crime of genocide, the linking of *dolus specialis* with the intent definition, that was so easily accepted at the first genocide trial (Akayesu at the International Criminal Tribunal for Rwanda [ICTR]), has been repeatedly put into question. The new approach being put forward as the most appropriate interpretation of “intent” is the knowledge-based approach. The Vienna Convention on Treaties states that interpretations of laws should follow the treaty’s original purpose and objective, and should do this by looking at the preparatory work and its circumstances. By looking at the *Travaux Préparatoires* of the Genocide Convention and Raphael Lemkin’s original writings on the subject, this article will discuss which approach fits the original intentions of both the drafters of the Convention and Lemkin himself, to determine which interpretation should be used in the future when considering the crime of genocide.

Recommended Citation

Goldsmith, Katherine (2010) "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach," *Genocide Studies and Prevention: An International Journal*: Vol. 5: Iss. 3: Article 3.

Available at: <http://scholarcommons.usf.edu/gsp/vol5/iss3/3>

Keywords.

Genocide Convention, intent, Raphael Lemkin, Darfur, ICTR, ICTY

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Key words: Genocide Convention, intent, Raphael Lemkin, Darfur, ICTR, ICTY

The Origins of the Term “Genocide”

While studying at the University of Lvov, Raphael Lemkin, a twenty-one-year-old Polish Jew, came across an article on Soghomon Tehlirian. Tehlirian was an Armenian Genocide survivor on trial for the murder of Mehmet Talaat, one of the orchestrators of the Armenian Genocide, who had at the time escaped prosecution. “Lemkin asked [his professor] why the Armenians did not have Talaat arrested for the massacre. The professor said there was no law under which he could be arrested. ‘Consider the case of a farmer, who owns a flock of chickens,’ he said. ‘He kills them and this is his business. If you interfere, you are trespassing.’”¹ Finding this gap in international law intolerable, Lemkin began work on an international law proposal for this sort of crime.

Raphael Lemkin originally created two new international laws: “barbarity” and “vandalism.” These laws were presented to the Fifth International Conference for the Unification of Penal Law in Madrid in 1933,² in Lemkin’s absence. Because of travel visa problems and opposition from the Polish government, he could not attend. His proposal also referenced the discrimination taking place in Germany against the

Jews as a cause for concern. Although receiving little positive response from leaders, he continued to press for action on this issue.

Lemkin then became caught up in World War II. He escaped to Sweden in 1940, and then the United States in 1941. While documenting his findings on Nazi actions and laws imposed in occupied Europe, he continued lobbying the US government to take action to stop these atrocities. On hearing Winston Churchill's 1941 speech referring to the situation in occupied Europe as "a crime without a name," Lemkin realized that he needed to find the appropriate name for this crime.

In 1944, Lemkin's *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* was published containing the word "genocide" to describe the "crime without a name." Lemkin stated that genocide (from the Greek term for race or tribe, *genos*, and the Latin word for killing, *cide*,) was "the destruction of a nation or of an ethnic group."³

Genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. . . . Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.⁴

When World War II ended, the extent of the Nazis' atrocities was revealed and the Allies began discussing appropriate punishments for these crimes. The Nuremberg Trials were established, in 1945, with jurisdiction over three categories of crimes: "crimes against peace," "war crimes," and "crimes against humanity." Though genocide was cited in the indictments, the convictions reflecting the actions of the Nazis were regarded as crimes against humanity.

After the Nuremberg Trials, many were concerned with the gap in international law that meant the actions taken by the Nazis before the war, being out of the context of war, were not covered under the Nuremberg Charter. Lemkin consistently lobbied at the UN for a resolution on the crime of genocide. Due largely to his efforts, the United Nations General Assembly began discussions on whether genocide should be a crime under international law.

On 11 December 1946, the General Assembly Resolution 96(I) declared "that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable."⁵ The General Assembly then referred the issue to the Economic and Social Council asking them to create a draft convention for the crime of genocide.

On 9 December 1948, less than two years after the General Assembly declared genocide a crime under international law, General Assembly Resolution 260(III)A unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide, Article II of which defines genocide as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁶

The UN Convention is highly important, as it is the key international law that creates a legal obligation for action in cases of genocide. Once a situation of genocide has been determined, under the rules of the Convention the “contracting parties” may refer the situation to the UN, which has the responsibility to act, in line with the purpose of the Convention, to prevent further atrocities and punish any already committed. Since the adoption of the Convention, the UN’s response has been paralyzed by legal debates about what the definition actually means, and whether a situation is or is not genocide, according to the definition in the Convention.

As stated above, the Convention was created to prevent and punish the crime of genocide. Although punishment is self-explanatory, genocide prevention can mean either preventing genocidal actions from ever taking place or preventing further atrocities once genocide has arguably begun. For the purpose of this article, it means the latter. It is worth pointing out that though action should also take place to stop other mass atrocities and crimes against humanity, these actions are more in relation to the first meaning (prevent genocide ever taking place). Genocide prevention, in the sense of prevention before it ever takes place, could in turn prevent many other atrocities when effective steps are put in place. At the early stages of genocide, for example, there are many acts that are crimes in their own right. Similarly, preventing other international human rights abuses, such as hate crimes, could in turn have a positive effect on preventing genocide. Because this article concerns prevention meaning preventing further atrocities once genocide has begun, it will not look at preventing other crimes. In addition, this article explores the Genocide Convention, so arguments around intent will be looked at in relation to the crime of genocide only.

In relation to Gregory Stanton’s “8 Stages of Genocide”,⁷ once genocide reaches the seventh stage (extermination, where the systematic killing begins), in most genocide cases, the majority of killing happens early on. During the Rwandan genocide, for example, “about 80 percent of the victims died in a ‘hurricane of death ... between the second week of April and the third week of May’.”⁸ Although there are many stages before the extermination stage, these earlier stages, as discussed, can show signs of crimes other than genocide. As the legal obligation lies with genocide, many have used this excuse (that these actions are not the beginning of the genocidal process but are a different crime altogether) for non-involvement in stopping the atrocities. Therefore, the possibility of preventive action is rarely, if ever, spoken of until mass violence has commenced. Once it is spoken of, this is where the problematic general conversations regarding genocide begin. It is crucial that preventative action take precedence over general conversations about genocide. A decision could be reached more quickly if the definition of genocide was clearer. One of the main difficulties with the definition concerns the element of “intent.”

The Genocide Convention, as stated above, simply reads, “genocide means any of the following acts committed with intent to destroy, in whole or in part, a ... group, as such.” The type of intent required (e.g., *dolus specialis*, *dolus eventualis*, general, or knowledge-based) is not stated. This absence of a clear definition has resulted in much debate and arguably hindered the effectiveness of the Convention. Although there may be other reasons hindering action, the question surrounding the meaning

of “intent” comes up frequently, and if this barrier was removed, it would be one less obstacle preventing action, and one less excuse for states to use.

The people involved in international law come from different countries with different legal systems, which can cause problems. The different levels of “intent” vary from one system to another, creating conflict when determining what degree of intent is required for different international crimes, and whether a perpetrator is guilty or not. The type of intent regularly associated with genocide is the Romano-Germanic civil law term, *dolus specialis*. Recently, many scholars have argued that *dolus specialis* is too strict and that a knowledge-based approach should be adopted, which is more closely related to the intent required in a common-law legal system.

Specific intent (*dolus specialis*) will be discussed here first, along with the negative effect it has on genocide prevention and punishment. A knowledge-based approach will then be examined. Following this, in order to determine what the Convention means by “intent,” there will be an exploration of the discussions that occurred during the drafting of the Convention and of the reasons the Convention was originally created.

***Dolus Specialis* (Specific Intent)**

Dolus specialis “demands that the perpetrator clearly seeks to produce the act charged.”⁹ In relation to genocide, it means the perpetrator commits an act while clearly seeking to destroy the particular group, in whole or in part.

Genocide has been dubbed the “crime of all crimes” and, for some, should require the highest form of intent. The UN International Law Commission (ILC), in the Draft Code of Crimes against the Peace and Security of Mankind commentaries (1996), states that a general intent would not be sufficient and that genocide “requires a particular state of mind or a specific intent with respect to the overall consequence of the prohibited act.”¹⁰ Guenael Mettraux continues this argument by stating that “genocide was adopted to sanction a very specific sort of criminal action. It would be regrettable to denature genocide for the sake of encompassing within its terms as many categories and degrees of criminal involvement as possible.”¹¹

A prominent argument for the specific intent requirement is that *dolus specialis* is what separates the crime of genocide from other international crimes, e.g., crimes against humanity. This argument is put forward by many, including William Schabas, who states that “[w]hat sets genocide apart from crimes against humanity and war crimes is that the act . . . must be committed with the specific intent to destroy in whole or in part a national, ethnical, racial or religious group as such.”¹² Some argue that this distinction is very important as it holds genocide above crimes against humanity in relation to the seriousness of the crime.

Dolus specialis is seen by some as the only appropriate intent level for the crime of genocide, as allowing any lower form of intent would risk situations that result in the destruction of a group, with no intent of this destruction taking place, being wrongly seen as genocide. Within the same legal system as *dolus specialis*, the intent one level below is known as *dolus eventualis*. In relation to genocide, this means that the perpetrator knows that his/her actions *may* bring about the destruction of a group, but continues to commit these acts. Reducing the level of intent would mean that those not specifically intending the destruction of the targeted group could be open to convictions for genocide. *Dolus eventualis* is too low a level of intent for the severity of the crime of genocide; therefore, the only option for those in that legal system is to require *dolus specialis*. Another lower level of intent is general intent. This requires that the perpetrator intends to commit the killing, but not necessarily

to destroy the group. This term is also too low for the level at which the crime of genocide is held.

Problems with the *Dolus Specialis* Interpretation of the Convention

Before discussing the movement for a knowledge-based approach, we need to consider why this movement arose. The main difficulty with *dolus specialis*, which has been argued for many years, is in obtaining actual proof, beyond a reasonable doubt, that the perpetrator's intention was to destroy the group, in whole or in part. Intent refers to a person's state of mind, a private thought process that, unless explicitly stated, is very difficult, if not impossible, to prove. Lawrence LeBlanc argues,

The most prominent argument on the notion of intent was advanced by Jean-Paul Sartre. Pointing out, quite correctly, that the Genocide Convention "was tacitly referring to memories which were still fresh," namely, to Hitler's "proclaimed . . . intent to exterminate the Jews," Sartre asserted that not all governments, including that of the United States, would be as stupid as Hitler's and proclaim such demonic intentions. . . . The *authors* of such a genocidal plan would not necessarily be "thoroughly conscious of their intention." This would be "impossible to decide. We would have to plumb the depths of their consciences. . . ." ¹³

Cherif Bassiouni adds that

it is not difficult to think of a number of contemporary conflicts, such as those in Cambodia and the former Yugoslavia, where there is obviously no paper trail and where the specific intent can only be shown by the cumulative effect of the objective conduct to which one necessarily has to add the inference of specific intent deriving from omission. ¹⁴

In terms of preventing further atrocities and stopping genocide, proving a perpetrator's state of mind is a massive problem. Perpetrators are fully aware that admitting what they are doing could interfere with achieving their objective. They are therefore unlikely to admit what their intentions are and thus risking possible action against them, especially if the objective of destroying the target group is still taking place.

Negative Effects on the Prevention of the Crime of Genocide

One situation that highlights the controversy surrounding proving specific intent is Darfur, which turned into genocide in 2003. "Since it erupted in 1983, the internal conflict between the North and the South has had a significant impact on Sudan in many ways. It is the longest conflict in Africa involving serious human rights abuses and humanitarian disasters." ¹⁵ While the North and South were negotiating a peace agreement, Darfur, which is situated on the western edge of the country, was left behind. Due to resentment of the government by the Darfuris, an insurgency began against the government. Starting in late 2002, rebel military action began by targeting police offices and looting weaponry. After rebels briefly seized the Sudanese government's airbase in El Fasher in early 2003, the government responded ferociously. The government retaliated, but due to lack of equipment themselves, they recruited local tribes, mostly Arab, as proxy militias. The retaliation arguably went beyond simple counterinsurgency, with entire villages being attacked. Sudanese planes bombed villages, and then government troops and government armed militia (Janjaweed) entered the targeted villages, raping the women, killing people that were left, and polluting the water supply before burning the villages to the ground. (All of this is evidence shown in the UN Report, 2005).

The UN International Commission of Inquiry on Darfur was set up in 2004, to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.¹⁶

For the purposes of this article, the focal part of this report is the section determining whether genocide was committed in Darfur:

The Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children . . . The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called "African" tribes.¹⁷

The Commission's report was highly important, as this was the document that would determine the United Nations' position on Darfur. There can be no dispute that the evidence found by the Commission proved the *actus reus* of genocide. However, the Commission concluded that "the crucial element of genocidal intent appears to be missing; at least as far as the central Government authorities are concerned."¹⁸ An examination of the evidence produced by the Commission shows that there are numerous points that they failed to take into account. The Commission failed to provide details regarding what would be necessary for genocidal intent to be proved. The Commission also failed to consider the decision taken at the Akayesu Trial, regarding intent being proven from actions. Furthermore, the Commission confused motive with intent, stating that "the intent was to drive the victims from their homes, primarily for purposes of counterinsurgency warfare."¹⁹ Intent refers to the person's state of mind at the time of committing the crime. Motive, on the other hand, refers to what drives the perpetrator to commit their crime, why they did it, and proof of this is not required for conviction. The perpetrators intended to commit the prohibited acts (discussed in the Report) and kill a substantial part of the group; the motive behind this was to move the victims off their land. Regardless of motive, they still intended to destroy a substantial part of the group, and are, therefore, committing genocide.

This case also shows how unlikely it is that the perpetrators will express their true intentions. Although, the Commission said they found no genocidal policy, they were not allowed access to all military documents, which could have proved a genocidal policy and intent.

34 . . . In a meeting held on 9 November 2004 with Bakri Hassan Salih, Minister of Defence and other senior Ministry of Defence officials, the Commission requested access to records of the deployment of military aircraft and helicopter gunships in Darfur since February 2003. Again, the Commission undertook to treat such records confidentially. . . . However, a complete set of the records requests was never provided to the Commission.²⁰

The following day, the Commission asked to see records, which they ensured would be kept confidential, of government instructions regarding actions taken by the armed forces against rebels and the civilian population in Darfur's three states.

First, Vice-President Taha ensured this would happen. The Commission was told by the governors of the three states that the minutes of these meetings did not exist, though the Commission had been informed by reliable sources that they did exist. The Commission received a general list of final decisions, but the Commission never saw complete documents.

The specific intention requirement has prevented the Convention from working effectively and five years after the Commission was first established, Darfur is still in a disastrous situation. Genocide has taken place in Darfur, as the evidence in the UN Report proves. Arguably, the decision came down to the issue of intent. A knowledge-based approach would have found genocide occurred and left it open for appropriate action to take place. As it stood, with Antonio Cassese heading the Commission, it chose to adopt a specific (*dolus specialis*) intent approach.

The Commission proved that the Sudanese government was recruiting and arming the Janjaweed, that there was a coordinated plan to target and destroy specific villages, and that the target group was identified as one protected by the Genocide Convention. The *dolus specialis* requirement meant the Commission was unable to establish that genocide occurred in Darfur, where at least 100,000 people had died at the time of the Commission's report. This seriously calls into question the appropriateness of the *dolus specialis* interpretation of the intent requirement in the Genocide Convention. The intent requirement again failed the purpose of the Convention and failed to protect a group that is threatened with destruction.

Negative Effects on the Punishment of the Crime of Genocide

It has been argued that the *dolus specialis* requirement has allowed many who have committed genocide to escape conviction for that crime. A prime example of this can be seen in the overall failure of the International Tribunal for the former Yugoslavia (ICTY) regarding prosecutions of genocide. Genocide did take place in Srebrenica: "The [Krstic] Trial Chamber concluded that this campaign to kill all the military-aged men was conducted to guarantee that the Bosnian Muslim Population would be permanently eradicated from Srebrenica and therefore constituted genocide."²¹ The Appeals Chamber confirmed this. Prior to Krstic, convictions for genocide by the Trial Chamber were either quashed or reduced to a lesser crime by the Appeals Chamber. Though the ICTY has recently convicted Vujadin Popovic and Ljubisa Beara (both ICTY-05-88-T) of genocide (as long as these are also not quashed or reduced at appeal), the definition of specific intent has still caused much confusion in decisions made at the ICTY. It has allowed people who have given direct orders to commit genocide and keenly participated in the genocide of Bosnian Muslim men, such as Krstic (ICTY-98-33-T) and most recently Drago Nikolic (ICTY-05-88-T), to be convicted of the lesser offense of "aiding and abetting" genocide.

The most significant case from the ICTY is against Goran Jelisic:

The words and deeds of the accused demonstrate that he was not only perfectly aware of the discriminatory nature of the operation but also that he fully supported it. It appears from the evidence submitted to the Trial Chamber that a large majority of the persons whom Goran Jelusic admitted having beaten and executed were Muslim. Additionally, many of the elements showed how Goran Jelusic made scornful and discriminatory remarks about the Muslim population. Often, Goran Jelusic insulted the Muslims by calling them "balijas" or "Turks." Of one detainee whom he had just hit, Goran Jelusic allegedly said that he must be have been mad to dirty his hands with a "balija" before then executing him.²²

Jelesic had openly admitted to prohibited acts, which constituted the *actus reus* for genocide. He was openly using derogatory terms against Muslims, as well as identifying himself as the “Serbian Adolf.” There was much more evidence presented during the trial, which all offers very reliable indications as to Jelesic’s state of mind. The Trial Chamber, however, came to the decision that Jelesic did not possess the required specific intent, and he was found not guilty of genocide. Although this was later found incorrect by an Appeals Chamber, it was decided that a retrial would not take place, meaning he was not convicted of genocide. Although some would argue that he was convicted of other crimes, and received a forty-year sentence, he was still not convicted of the crime he committed, which is unacceptable.

Arguments for a Knowledge-Based Interpretation of the Convention

Many in the international community have moved to change the intent requirement to a knowledge-based approach. This approach is more closely related to the *mens rea* in common-law legal systems. The International Criminal Court (ICC) states “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.”²³ For genocide, if the knowledge-based approach was used it would mean that a person is guilty of genocide if they willingly commit a prohibited act with the knowledge that it would bring about the destruction of a group. Individuals are unlikely to achieve the destruction of a group by themselves; they would have to work with others. Therefore, it is enough evidence if the individual commits an act knowing that it would contribute to other acts being committed against a particular group, which when put together, would bring about the destruction of that group, in whole or in part.

In such countries as the UK, some distinguished commentators consider knowledge as having the same value and intensity as intent, with the difference that intent “relates to the consequences specified in the definition of the crime” (for instance, death as a result of killing, in the case of voluntary murder), whereas knowledge “relates to circumstances forming part of the definition of the crime” (for instance, the circumstance that property belongs to another person, in the case of criminal damage to property).²⁴

An example in English law would be the situation where a person obtains a gun, willingly aims it at someone, and pulls the trigger. Due to the high chance that that victim would die, the perpetrator is seen as having the intent and is therefore guilty of murder, if the victim dies. In the case of genocide, where the collective actions of many individuals is considered, one would have to show that there is a high possibility that a collection of prohibited acts aimed at a particular group would bring about its destruction. Therefore, committing a prohibited act with the knowledge that it would further a genocidal plan should be sufficient to prove intent.

Other countries’ case law refers to foresight of consequence equalling intent. As reiterated in Badar (2008), the Ontario Court of Appeal asserted in *Regina v. Buzzanga and Durocher* that,

As a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor’s foresight of the certainty or moral certainty of less, acted so as to produce it, then he decided to bring it about (albeit regretfully) in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective.²⁵

A prominent argument for the knowledge-based approach of intent is that the *dolus specialis* requirement goes beyond what the Convention actually intended, and what Lemkin foresaw. Otto Triffterer argues this point, adding that requiring *dolus specialis* “would not only go beyond the wording, but would introduce a concept not precisely defined ... [or] ... generally accepted in Common Law countries. And even in Civil Law countries the concept of specific or special intent in the sense of *dolus specialis* is highly disputed.”²⁶ The prevention and punishment of the crime of genocide is challenging enough. To include an intent requirement that is extremely difficult to prove after the fact, and which is a contested term in many civil law countries, renders the Genocide Convention both confusing and ineffective. Such confusion makes the preventive purpose of the Convention nearly impossible to achieve.

The movement for a knowledge-based approach has been given increased weight by international courts moving toward a more lenient form of intent requirement. One of the most important decisions regarding proving intent came from the International Criminal Tribunal for Rwanda (ICTR). The important judgement came in the Akayesu case, in which the trial judges stated,

that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.²⁷

Allowing intent to be inferred from an individual’s actions does not in its strictest form, as specific intent requires, prove that the individual’s actions were intended to destroy a group. It does, however, permit the courts to consider “foresight of consequences”, which is in keeping with a knowledge-based approach.

The Kayishema and Ruzindana case also showed the ICTR’s more lenient approach, which argued that for the *mens rea* to be complete, the prohibited acts “should be done in furtherance of the genocidal intent.”²⁸ Arguably, the tribunal was working under the assumption that if the perpetrator knows of the intent of others to kill a particular group, and knows his/her actions would contribute to this intent, but continues to participate, then in a sense the perpetrator does want the destruction of the group and is, therefore, guilty of genocide.

The Rome Statute of the International Criminal Court, whose jurisdiction includes genocide, shows a more lenient form of intent being required for the crime of genocide. Article 30 states:

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.

For the purposes of this article, a person has intent where:

In relation to conduct, that person means to engage in the conduct;

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.²⁹

How will adopting the knowledge-based approach affect the purpose of the Convention? In terms of prevention, the Convention is there to protect groups from being destroyed. If there are reports of prohibited acts targeting a protected group

being committed by people that have the ability to destroy the group, in whole or in part, then that should be enough to warrant action. The focus would then return to protecting the groups, rather than focusing on the specific state of mind of the perpetrator. If the knowledge-based approach was adopted, prosecution for the crime of genocide would be possible for all active participants. Any of the prohibited acts willingly committed, with the knowledge of the wider destruction being carried out on the targeted group, would constitute genocide.

The Original Intentions of the Creator and Drafters of the Convention

In order to determine what the Convention means by its definition (“genocide is any of the following acts committed with the intent to destroy, in whole or in part, a group”), the reason for the Convention being proposed, and the discussions that took place during the drafting of the Convention, including arguments for either *dolus specialis* or a knowledge-based interpretation, all need to be reviewed. As Lemkin personally coined the term “genocide,” his original intentions are also important. Throughout Lemkin’s works, he focused on the idea of a group being destroyed and not on the level of intention behind the perpetrators’ actions. When Lemkin first coined the term genocide, there was little emphasis on intent. He saw genocide as a “coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups.”³⁰ He argued that each individual group brings unique qualities to the collective well-being of humankind and destroying one of these groups is a serious crime against all humankind and should be prevented and punished.

Lemkin reiterates this point in his later work, “Genocide: A Modern Crime,” including examples of what the world could be missing out on if it allowed the destruction of a group. His focus remained on the vital diversity of the human race:

Our whole cultural heritage is a product of the contributions of all nations. We can best understand when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie, the Czechs a Hass, and a Dvorak; the Greeks a Plato and Socrates; the Russians, a Tolstoy and a Shostakovich.³¹

Arguments for *Dolus Specialis* during the Drafting of the Convention

Dolus specialis is mentioned three times in the drafting of the Convention: twice by the Brazilian delegate (see A/C.6/SR.72 and A/C.6/SR.76), and once by the French (E/AC.25/SR.26). When Brazil mentioned it, it seemed to refer to premeditation and motive, which were both deemed not necessary within the definition. Arguably, France mentioned the term simply because that is the highest intent used within their legal system. It is worth noting that “mentioned” is the correct word to attach to these statements because, when either country used the term, no other country affirmed the use of the term further, and none pushed for the *dolus specialis* intent to be adopted by the drafters. The term seemed to be completely brushed over by the other countries during the drafting, arguably showing that its inclusion was not at all important to the drafters.

Although not specifically mentioning *dolus specialis*, the Venezuelan delegate raised concerns over the use of more general forms of intent. Referring to a Union of Soviet Socialist Republics (USSR) proposal wanting to change “committed with

intent to destroy” to “aiming at the destruction,” the Venezuelan delegate pointed out that in some countries, military personnel had no choice but to obey orders and, therefore, would risk punishment whatever decision was taken.

According to the definition of genocide given in Article II of the Convention, intent formed the chief element of the crime. By excluding that element the USSR amendment completely altered the nature of genocide, Mr. Perez Perozo [the Venezuelan delegate] gave an example a group of soldiers, ordered by an officer to open fire on a political group and who did so in the belief that they were suppressing disturbances, whereas the officer had really intended the destruction of the group . . . if they obeyed the order, they would have committed genocide and if they did not obey it, they would be guilty of subordination.³²

Arguments for a Knowledge-Based Approach during the Drafting of the Convention

Although not explicitly stating the term knowledge-based approach during the drafting of the Convention, the discussions seemed to be moving more in that direction.

The Secretariat Draft of the Genocide Convention, May 1947, Article I(I) states that “the purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.”³³ Though the list of groups has narrowed through drafting, the main purpose remains the same. Whenever trying to find the correct interpretation of the Genocide Convention, the protection of the groups is paramount and every interpretation needs to be focused on achieving this purpose. If not, the interpretation is incorrect. You cannot have an interpretation of a Convention that does not allow for the purpose of the Convention to be achieved. The Peruvian delegate also pointed out that the “characteristic feature was the destruction of groups,”³⁴ highlighting again the focus being on groups, and not on the perpetrators’ level of intent.

Genocide vs. Homicide: The Original Intent of the Intent Requirement

Throughout the creation and drafting of the Genocide Convention, the importance of the word “intent” within the definition was to separate the crime of genocide from that of general homicide. This is seen in the General Assembly Resolution 96(I), which showed the connection between the two crimes: “Genocide is a denial of the right of the existence of entire human groups, as homicide is the denial of the right to live of individual human beings.”³⁵ In order to distinguish genocide from homicide, intent was included to emphasize that the prohibited acts were committed not to target an individual as an individual, but as a result of his/her association with the targeted groups. The different acts prohibited within the Convention are crimes in their own right. The use of “intent” ensured that people committing general homicide would not be charged with genocide. The crime of genocide is different because while the crime is committed against an individual, it is actually intended to harm the group with which the individual is associated. Focus throughout the years has centered on the latter part of the definition: “the intent to destroy, in whole or in part,” a group.” This is incorrect. The focus should be on the whole first part of the definition: “any of the following acts committed with the intent to destroy . . . a group.” Genocide is the destruction of selected groups.

The *Colour Oxford English Dictionary* defines “group(s)” as “a number of people or things placed or classed together.”³⁶ One way of destroying the group is by targeting its different parts, which for genocide would be the individuals that make up the

group. The focus should not be on the need to prove that every perpetrator's specific intention is to wipe out the group, but on the prohibited acts that will result in the destruction of the group. During the drafting of the Convention, the Panamanian delegate stated that "the characteristic which distinguished genocide from the common crime of murder was the intention to destroy a group."³⁷ The United States delegate reiterated this point: "The intent to destroy a group[,] which differentiated the crime of genocide from the crime of simple homicide."³⁸ The Belgian delegate concurred.

Throughout the drafting, many discussions focused on finding the correct wording to create an instrument that could be used to protect against the destruction of groups. The word "intent" was not meant to be the focus of the definition, nor of the crime of genocide itself, in the way that it has become.

The Draft Convention (6 June 1947) for the prevention and punishment of genocide stated that "In this Convention, the word 'genocide' is understood to mean criminal acts against any one of the groups of human beings aforesaid, with the purpose of destroying them in whole or in part, or of preventing their preservation or development."³⁹ The next relevant document was the Secretariat Draft on 26 June 1947 from the Economic and Social Council, which refers to genocide as "a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part."⁴⁰ Discussions that took place on 16 April 1948 showed that the Chinese delegation "proposed that genocide should be defined as an act directed against... [groups]."⁴¹ The same day, the Committee adopted a definition "*pending further discussion of the word 'national'*: In this Convention, the word 'genocide' means a criminal act aimed at the physical destruction, in whole or in part, of a group of human beings, for racial, national or religious reasons."⁴²

During discussions on 23 April 1948, the Chinese delegate's proposal of genocide as an "act directed against ... [groups] ... *was adopted by the Committee by six votes to none, with one abstention.*"⁴³ Other important proposals during the drafting came on 29 April 1948 from the United States, defining genocide as the "killing of members of the group with the intention of destroying its physical existence," and "acts causing the death of members of the group."⁴⁴ Lebanon saw genocide as "acts which are intended to ... destroy groups, directly or indirectly."⁴⁵ The wording moved back to "directed against" but finally settled on "intent to destroy." Taken in the context of the words suggested by different delegates before the final text was adopted, and with delegates pointing out the link between homicide and genocide, the word "intent" within the definition does not point toward requiring a high level of intention. The significance is that the people who are targeted are seen not as individuals, but as a part of a group. In order to destroy the group, the individuals need to be destroyed.

Delegates from the USSR and France were some who raised concerns about the definition being interpreted too restrictively. USSR stated that

If the words "committed with the intent to..." were retained, there would be a risk of ambiguity. The perpetrators of acts of genocide would in certain cases be able to claim that they were not in fact guilty of genocide, having had no intent to destroy a given group ... Rather, therefore, than stipulate the intent to destroy, the article should define acts of genocide as acts "resulting in 'destruction.'"⁴⁶

The USSR also proposed including the wording "aiming at the destruction" rather than "with the intent to destroy." On this proposal the French Delegate commented:

The idea of the USSR was apparently to guard against the possibility that the presence in the definition of the word “intent” might be used as a pretext, in the future, for pleading not guilty on the grounds of absence of intent. In the circumstances, the objective concept seemed to be more effective than the subjective concept.⁴⁷

Following this opinion, the Greek delegate expressed the idea that some wanted a less restrictive intent requirement for genocide and “to leave the judge free to decide, in each individual case, whether the element of intention was present or not.”⁴⁸ France agreed, stating:

It was perfectly normal that an international law such as the convention on genocide should contain instructions to the judges charged with its application. It could not be asserted that it would thereby restrict the power of judges to determine the responsibility of the accused.⁴⁹

The delegates wanted the definition broad enough for judges to decide on a case-by-case basis and determine whether the person had “committed any of the . . . acts with the intent to destroy a group.” This implies leniency, not the strictest form of intent.

Evaluating Previous Arguments and Developments

The main argument for a stricter interpretation, made by those who advocate invocation of *dolus specialis* as the intent requirement for genocide, is that it separates the crime as more serious than other international crimes, such as crimes against humanity. This, however, is not true. Genocide is a crime against humanity and was developed from crimes against humanity. Although genocide is a very serious crime, there are incidents of crimes against humanity that are just as shocking. Many of the crimes that were committed during Josef Stalin’s tyranny could not be classified as genocide, yet the number of people who died was much higher than any genocide that has taken place, and the crimes were equally atrocious. The focus as stated throughout this article is the destruction of the group, not constructing a “hierarchy of horrible.”⁵⁰

During the drafting of the Convention, delegates considered genocide to be a particular type of crime against humanity. An example of this is the French proposal, including Article 1 that states “the crime against humanity known as genocide is an attack on the life of a human group or of an individual as a member of such group.”⁵¹ The International Law Commission (ILC) also saw the connection: “The General Assembly affirmed that the persecution type of crimes against humanity or ‘genocide’ constituted a crime under international law for which individuals were subject to punishment.”⁵² This was again pointed out at the ICTR in the Kayishema and Ruzindana Judgement: “The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of ‘extermination and persecutions on political, racial or religious grounds.’ . . . The crime of genocide is a type of crime against humanity.”⁵³

One of the arguments against all perpetrators being punished is that of superior orders. Some raise concerns that if people were only following orders, then they should not be punished. For those who do not have freedom over their actions, this could be an acceptable defence. But, for those willing participants, it is absurd that they should be able to escape prosecution for the crimes they commit just because they were told to do the acts. Superior orders have never been acceptable as a defence in relation to the crime of genocide and should not be allowed as something for people to hide behind to escape conviction. From the first time Lemkin introduced

the term “genocide,” he argued that all parties involved should be punished, regardless of their position within the genocide. In his 1944 book, Lemkin stated, “In order to prevent the invocation of the plea of superior orders, the liability of persons who *order* the genocide practices, as well as of persons who execute such orders, should be provided expressly by the criminal codes of the respective countries.”⁵⁴ Within the final text of the Convention on the Prevention and Punishment of the Crime of Genocide, the idea that all should be punished was retained, showing consistency about superior orders not being an excuse. Under Article 4, “Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁵⁵

The Development of the Interpretation of “Intent” within the Convention

The ILC’s Draft Codes of Crimes against the Peace and Security of Mankind was one of the first detailed documents concerning what was meant by the word “intent” within the definition of genocide. Article 17 of this document focuses on the crime of genocide. Article 17(5) states that “an individual incurs responsibility for the crime of genocide only when one of the prohibited acts is committed with intent to destroy, in whole or in part, a group, as such.”⁵⁶ Although this document states that intent is required, Article 17(10) argues that such intent can be inferred from knowledge of the discriminatory effects of his acts in destruction of a targeted group:

(10) ... Indeed the Convention on the Prevention and Punishment of the Crime of Genocide explicitly recognizes in article IV that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals. The definition of the crime of genocide would be equally applicable to any individual who committed one of the prohibited acts with the necessary intent. The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the destructive effect of this criminal conduct on the group itself. Thus, the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to a particular group and are therefore singled out as the immediate victims of the massive criminal conduct.⁵⁷

This section may mention the individual needing the “necessary” intent, but it also states that intent and knowledge would be enough to be convicted of genocide.

The ILC, as shown above, indicates that if a person commits one of the acts with the knowledge that it is part of an orchestrated effort targeted at a particular group, this would be sufficient for the individual to be convicted of genocide. This again argues for a knowledge-based approach to the requirement of intent in the Convention.

Article 25(3)(d) of the Rome Statute of the International Criminal Court, in relation to crimes committed by a collective for a common purpose, gives examples of the level of responsibility for individuals involved:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(d) In any other way continues to the commission or attempted commission of such crime by a group of persons acting with a common purpose. Such contributions shall be intentional and shall either

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime.⁵⁸

One reason the Genocide Convention was created was to ensure that those guilty of genocide were punished. Although not required for conviction, genocide does usually involve a plan. Genocide is not one act; it is a collection of acts committed by a number of people that when put together, if successful, would bring about the destruction of a group, in whole or in part.

It is correct that genocide would not happen if people did not organize and orchestrate the process and/or plan. However, it is also true that genocide could not go beyond the stages of planning if people did not willingly act. The people who commit the *actus reus* of genocide are not just aiding and abetting, or being complicit in the crime of genocide. These people are in fact at the center of the prohibited acts that constitute genocide, therefore, at the center of the crime. For this reason, they should not be allowed to escape punishment for that crime. All free persons are responsible for their own actions and should be held responsible for them. If someone willingly commits a prohibited act knowing of a coordinated effort by others against a targeted group, then they should know that this will threaten the survival of the group. If they continue to act, they do have the intent for the group to be destroyed, whether they choose to admit it or not. If they are of sound mind, then they are fully aware of their actions and what their actions could lead to. To plead ignorance is inappropriate. People need to consider carefully the actions they take before taking them. The *dolus specialis* requirement is therefore unsuitable because, regardless of an individual's expressed intentions, he/she is still actively involved in genocide and plays a crucial part. Without these actions, the lives of many victims could be spared. The individuals are as much to blame as the people who orchestrated the "plan." A lower form of intent should, therefore, be used as this will not restrict punishment to just a selection of leaders. Aiding and abetting charges should be used for people who did not commit a prohibited act, but still helped enable genocide to occur. The people who committed the prohibited acts are far too involved to be seen only as accomplices. They are at the center of the crime and their acts are the ones that bring about the destruction of the group. Their willingness to commit these acts, with knowledge that they would bring about the destruction of the group, should suffice. The focus should be on preventing group destruction, not only on punishing people with "specific" intent.

If the knowledge-based approach was adopted, while the number of people prosecuted for genocide would increase, it could also have an additional effect on prevention. Genocide is a systematic crime that, to take place, needs the actions of many people. If people knew that by participating in prohibited acts there was a high chance that they would be prosecuted for their part, and if they were convicted of genocide they could spend the rest of their lives in prison (as opposed to a few years if convicted of a lesser crime), this would undoubtedly act as a deterrent. During the drafting of the Convention, the French delegate made this exact point:

Mr. CHAUMONT (France) maintained that the punishment of a soldier, which did not of course exclude the punishment of an officer, was intended to produce the profound psychological effect, the deterrent value of which had been stressed by the representative of Czechoslovakia.⁵⁹

Intent, as discussed above, is a personal state of mind and very difficult to prove if not openly expressed. Stanton determined that denial is the eighth and final stage of genocide, and that it operates throughout the genocidal process. This is because genocide is a crime that aims at completely removing the memory of a group's existence. Perpetrators "deny that they committed any crimes, and often blame what happened on the victims. They block investigations of the crime, and continue to govern until driven from power by force, when they flee into exile."⁶⁰ The perpetrators always state that they are not committing genocide. Their denial is in fact part of the crime. By requiring strict specific intent proven beyond a reasonable doubt as in a court of law, we are actually accommodating their criminality. The possibility that perpetrators will not only deny that the crime is taking place, but also destroy all evidence of the crime, is highly likely. Requiring *dolus specialis* is assisting this stage of genocide and works against the purpose of the Convention:

Genocide being based on the denial of the victims' very existence, it is therefore unsurprising that denial of a given genocide is nothing but the universal strategy of perpetrators who thus typically deny either that the events took place, or that they bear any responsibility for the destruction, or still that the term "genocide" is applicable to what occurred.⁶¹

Conclusion

As stressed throughout this article, the focus has always been, and should remain, on preventing the destruction of particular groups. Lemkin saw the destruction of the group as a crime, because it would mean humanity had lost the unique contribution that the group would bring to the world. For Lemkin, the key purpose of the Convention was to ensure that the group would continue to exist, and that any planned acts systematically orchestrated to threaten its existence would be stopped and punished. The crime of genocide is special because it focuses on groups, as such, as opposed to individuals. The drafting of the Convention developed this idea and left the notion of "intent" open to interpretation. The *Travaux Préparatoires* of the drafters does not support the *dolus specialis* interpretation.

The ILC's statements began with a specific intent approach, but also allowed for the knowledge-based approach. The courts seem to be split: The ICTY has taken the restrictive approach, which has left it with questionable results. The ICTR, on the other hand, has convicted many defendants, both because Rwanda was clearly a case of genocide, but also because the ICTR has adopted a broader, knowledge-based interpretation and has convicted defendants on evidence of the person's involvement

and foresight. Although there are currently no case study examples of the International Criminal Court's interpretation of intent within the genocide definition, Article 30 of the statute shows an obvious move toward a knowledge-based approach. Some have argued that "unless otherwise provided" means that because genocide is known as a specific intent crime, intent is already provided. However, the challenged section of the Convention's definition simply states "committed with *intent* to destroy, in whole or in part," and does not detail what type of intent is required. It is therefore argued that the "unless otherwise provided" stipulation should refer to the section in the Convention containing the prohibited acts. For example, the word "deliberately" in the following quotation points to the act requiring premeditation and positive action rather than recklessness or knowledge: "(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."⁶²

The use of *dolus specialis* as the intent required by the Genocide Convention completely goes beyond the original intent of the Convention's drafters, and especially beyond the intent of Raphael Lemkin. Before *dolus specialis* was held to be the required intent in the Akayesu trial, no legal document or UN paper had associated it with the crime. Although an argument was put forward in the *Travaux Préparatoires* to allow judges the freedom to interpret, this was because all cases would involve different circumstances and levels of involvement, requiring a case-by-case interpretation. It was not meant to allow a judge's decision to restrict future decisions.

Once violence has begun, however, if it becomes obvious that a group is being systematically targeted with acts, such as that prohibited by the Genocide Convention, then prevention efforts should commence. Hopefully prevention, beginning with early warning systems, will one day be effectively used by governments to alleviate tensions before violence begins. The key to genocide prevention is early action. We cannot let another situation like Darfur take place. When the existence of a group is threatened, the intentions of perpetrators are seldom openly expressed. It is unacceptable that more than sixty years after the Holocaust was uncovered, a genocide hidden from the world by the Nazis, genocides are still occurring and that the international "community" continues to ignore them.

Genocide is a very serious crime and should remain as such. Although it is uncommon, when it does take place, it is not just because a few people wanted it to happen. People need to take responsibility for their actions. A general intent would be too low a standard for the crime of genocide, but committing an act with the knowledge that it will help an ongoing plan to destroy a group is sufficient evidence to prove intent to commit genocide. If perpetrators are only attacking a section of the group, such as men, then it is still obvious that this would have a devastating effect on the existence of that group. For someone to escape punishment because they either did not possess a plan to eliminate an entire group, or simply did not concern themselves with the consequences of their actions, is unacceptable. Adopting the *dolus specialis* requirement renders the Genocide Convention's preventive purpose incredibly difficult. By adopting the knowledge-based approach, anyone willingly committing a prohibited act knowing that it would contribute to an ongoing offensive against a group would be liable for conviction for that crime.

The move away from the creator's and drafters' original meaning of intent in the Genocide Convention urgently needs to be corrected. The focus needs to return to protecting groups. The knowledge-based interpretation is the most suitable means for achieving this end. As demonstrated by the evidence above, this approach would

not only restore the original intent of the Genocide Convention, but would also give it a new power that is now vitiated by debates over whether atrocities possess the “specific intent” to qualify as genocide. This knowledge-based meaning of intent is what was always intended by Lemkin and the drafters when they decided to adopt the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, and it is what should be required now.

Notes

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3. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79.
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5. “The Crime of Genocide,” Resolution 96(I), 55th Plenary Meeting, UN Doc. A/RES/96(I) (11 December 1946). All of the Genocide Convention drafting meeting reports can be found in Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Vols. I and II (Boston: Martinus Nijhoff Publishers, 2008).
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16. *Ibid.*, 2.
17. *Ibid.*, 3.
18. *Ibid.*, 4.
19. *Ibid.*, 161.
20. *Ibid.*, 15–16.
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22. *Prosecutor v. Jelicic*, Judgment, ICTY-95-10 (14 December 1999), para. 75.
23. *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998).

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25. Mohamed Elewa Badar, "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective" *Criminal Law Forum* (2008), 486.
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31. Raphael Lemkin, "Genocide: A Modern Crime," *Free World* 4 (April 1945): 39–43. The quotation is drawn from a version available at <http://www.preventgenocide.org/lemkin/freeworld1945.htm>
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53. *Prosecutor v. Kayishema and Ruzinanda*, Judgement, ICTR-95-1-T, Para. 89.
54. Lemkin, *Axis Rule in Occupied Europe*, 93.

55. *The Convention on the Prevention and Punishment of the Crime of Genocide*, UN Doc A/810, art. 4.
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