

## **ADOPTING A STRICT LIABILITY APPROACH TOWARD GENOCIDE**

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### **ABSTRACT**

The Genocide Convention lists intent as a critical element that must be proven to secure convictions for genocide. Many defendants have been acquitted or convicted of lesser crimes due to the difficulty in proving genocidal intent. The argument presented in this paper is that the large-scale negative impact of genocide on humanity should be considered when defining its scope in penal legislation. *A fortiori*, the crime of genocide should be given similar consideration to other crimes that have been classified as strict liability crimes due to their severity and cost to society. Intent as an element should, therefore, be deduced from the general purpose of the perpetrator's acts. Although the strict legality principle is not perfect and has some flaws, it is still the most just, effective, coherent, persuasive, and proper reading of the genocide convention. The goal here is to contribute to the conversation on the limitations of genocidal intent to the effectiveness of the enforcement of the crime of genocide in international criminal law.

**Keywords:** Genocide, Intent, Convictions, Penal legislation, International criminal law, Strict liability

### **INTRODUCTION**

Before the organized brutalities of the Nazis against the Jews, the term "genocide" did not exist.<sup>2</sup> Although there were killings on a large scale and mass destruction that occurred during wars, they could not be used to properly

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<sup>2</sup> L Daniel and N Sznajder, 'The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights' (2004) 3 *J Hum Rights* 143, 157.

capture the core of the Nazi's actions against Jews.<sup>3</sup> The word '*genocide*' derived from two words, "*genos*" and "*cido*," which mean 'people' and 'killed,' respectively, was coined by Raphael Lemkin, a Polish Lawyer who combined the two Greek words to define genocide and went on to explain it as the intentional extermination of certain groups based on political, social, cultural, language, national feelings, religion, and the economic existence of national identity.<sup>4</sup> This definition restricted the scope of genocide to destructive acts directed against individuals in a group rather than personal injury or harm caused to one in the manner of homicide or bodily injury. After the dust of World War II settled, the Allies began to evaluate what penalties would be suitable for the wrongdoings of Nazi Germany. This led to the Nuremberg Trials in 1945. The Trials covered crimes against peace, war crimes, and crimes against humanity.<sup>5</sup> At the time, discussions around genocide as a crime had started, and it was even mentioned in the trial documents, but none of the accused persons were convicted of it, rather, convictions for crimes against humanity and its accompanying sentences were meted out to convicted persons.<sup>6</sup>

Following this outcome, Lemkin, along with others, advocated more avidly for a UN Resolution addressing genocide. Their efforts intensified after it became glaringly apparent during the Nuremberg Trials that the Nuremberg Charter did not cover a lot of the actions that Adolf Hitler led against the Jews.<sup>7</sup> These efforts to establish penal laws against genocide resulted in productive discussions at the UN General Assembly. On 11 December 1946, the General Assembly Resolution 96(I) declared as follows: "*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,*

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<sup>3</sup> L David, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 *Chi J Int'l L* 303.

<sup>4</sup> *Ibid*

<sup>5</sup> G Katherine, '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' (2010) 5 *Genocide Studies and Prevention* 238, 257.

<sup>6</sup> It is interesting to note that during the Nuremberg Trials, the indictment included a charge of "*deliberate and systematic genocide*" and prosecutors mentioned genocide in their closing arguments. See D L Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 *Texas International Law Journal* 231, 249.

<sup>7</sup> *Ibid* 249

*political or any other grounds—are punishable.”* The General Assembly went further to state emphatically that genocide was homicide on a large scale which was repugnant to moral law “*and the spirit and aims of the United Nations.*”<sup>8</sup> On December 9, 1948, the General Assembly recognized genocide as a crime under international law. The adoption of the Convention marked a significant achievement in criminalizing genocide. However, the wording of the Convention took a narrow approach, which limited the scope of Lemkin’s definition of genocide rather than expanding it. As a result, political and cultural groups were excluded from being recognized as textbook victims of genocide. Furthermore, the Convention introduced the requirement of proving intent in genocide trials<sup>9</sup>, which is the central point of focus in this paper.

The Convention defined Genocide in the following terms: “*acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.*”<sup>10</sup> According to this definition, to establish a case of genocide, a prosecutor must also prove the intent to destroy the targeted group. A critical challenge within this framework is the necessity to prove genocidal intent—*dolus specialis*. This requirement demands direct evidence of the perpetrator's intent to destroy the group, which is often difficult to obtain. Hence, proving intent is currently a significant challenge, especially for complex crimes such as genocidal rape, religious genocide, and newer forms of genocide involving multiple actors and diverse conduct classes. This challenge is compounded when there are multiple defendants involved. Determining an actor’s mental state is a nuanced process, and rarely is the answer a simple yes or no. Conclusions, to this end, can differ widely among scholars and jurists.

The complexity of proving intent has resulted in significant hurdles for prosecutors, leading to numerous acquittals despite the presence of compelling

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<sup>8</sup> ‘The Crime of Genocide,’ 55th Plenary Meeting, UN Doc A/RES/96(I) (1946).

<sup>9</sup> L Matthew, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 *Boston University International Law Journal* 1.

<sup>10</sup> Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

evidence of genocidal acts. The existing limitations tied to the requirement for specific intent have sparked debates about the need to reconsider the criteria for prosecuting genocide. This paper aims to contribute to this ongoing discourse by exploring the proposition that a strict liability approach, which prioritizes the severity and scale of the acts rather than the specific intent, could better align with the objectives of the Genocide Convention. By shifting the focus to the nature of the acts and their impact on the targeted group, a strict liability standard may help address the challenges related to providing evidence and bolster accountability for perpetrators.

In examining this hypothesis, the paper will analyze relevant international conventions, case law, and legal scholarship using a black letter methodology of case law and statute analysis to assess the potential benefits of adopting a strict liability framework. It will also consider the implications of such a shift for international criminal justice and the broader goal of preventing and punishing genocide. While it is true that the question of whether genocide should be considered a strict liability crime is undoubtedly complex and contentious, the advantages of doing so outweigh the drawbacks. This approach would not only align more closely with the original aims of the Genocide Convention but also provide a more practical and effective means of prosecuting those responsible for such heinous crimes.

## **THE REQUIREMENT OF GENOCIDAL INTENT**

Generally, the concept of intent in criminal law flows from the maxim; “*actus non facit reum nisi mens sit rea*,” which posits that for a person to be found guilty of a crime, the prosecution must show that he knowingly and willingly committed the crime he is accused of– the *mens rea* (“guilty mind”)<sup>11</sup>. This guilty mind is often sufficiently proven by showing that the accused intended to commit the act, resulting in the commission of the crime for which she is charged.<sup>12</sup> Genocidal intent as a sort of special intent (*dolus specialis*)<sup>13</sup> refers to the direct and special intent of a perpetrator in destroying, wholly or partly,

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<sup>11</sup> A guilty mind has been interpreted by jurists to mean, intent or motive or generally expressing a preconceived plan to commit a crime. See *Prosecutor v Kayishema & Ruzindana* (ICTR-95-1-T) (International Criminal Tribunal for Rwanda, 1999) 276.

<sup>12</sup> Albert Levitt, 'Origin of the Doctrine of Mens Rea' (1923) 17 *Illinois Law Review* 117.

<sup>13</sup> N Pisani, 'The Mental Element in International Crime' in F Lattanzi and W Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Aquila: IL SERENTE EDITTRICE, 2004).

a national, ethnic, racial, or religious group. This definition effectively excludes negligence to act as a basis upon which to infer an intent to commit genocide because genocidal intent requires that the perpetrator knowingly and willfully acted to commit the crime.<sup>14</sup>

The intent to commit genocide might not always be qualified as a ‘special or specific intent.’<sup>15</sup> The regime of international law in this area only requires that an act be committed with the ordinary intent “*to destroy.*” It is deemed sufficient that the perpetrator does not have a motive because, in genocide cases, the reason why the accused sought to destroy the victim group is not a key determinant of guilt or innocence.<sup>16</sup> Thus, the scope of a perpetrator's motives is irrelevant, and while they may be geared towards the achievement of the destruction of a group of people and may also point to intent, no liability attaches unless the destructive acts were accompanied by the hatred of the targeted groups and the genocidal intent to destroy them.<sup>17</sup>

### **How the Courts Assess Genocidal Intent**

The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* noted that “*intent is a mental factor which is difficult, if not impossible, to determine directly, at least without a confession.*”<sup>18</sup> In that case, the accused, Jean-Paul Akayesu, the mayor of Taba, in Rwanda, was found guilty of genocide by the ICTR. This was the first time that an international tribunal ruled that rape could constitute genocide. In that case, the tribunal found genocidal intent from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. The tribunal also stated that other factors, such as the scale of atrocities committed, their general nature, in a region or a country,

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<sup>14</sup>GP Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 *Journal of International Criminal Justice* 539.

<sup>15</sup> Alexander K A Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259.

<sup>16</sup> *Prosecutor v Stakic* (Case No IT-97-24-T) (Judgment, 2003) 45.; See also *Prosecutor v Jelusic* (Case No IT-95-10-A) (Judgment, 5 July 2001) 49. (noting the “irrelevance” of motive to criminal intent); *Prosecutor v Tadic* (Case No IT-95-1-A) (Judgment, 15 July 1999) 269.

<sup>17</sup> A T Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 829, 837.

<sup>18</sup> *Prosecutor v Akayesu* (Case No ICTR-96-4-T) (Judgment, 2 September 1998) 523. *Akayesu's* formulation for inferring genocidal intent was widely adopted and followed in subsequent ICTR decisions. See *Prosecutor v Georges Rutaganda* (Case No ICTR-96-3-T) (Judgment, 6 December 1999) 61.

or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act. Thus, intent can be established through evidence of the perpetrator's words, actions, and surrounding circumstances, the scale and pattern of the atrocities, the language used, and any evidence of a plan or policy to target a particular group.<sup>19</sup>

Over the years, the Tribunals have considered the following factors in establishing genocidal intent: (1) statements indicating genocidal intent;<sup>20</sup> (2) the scale of the atrocities committed;<sup>21</sup> (3) systematic targeting of the protected group; and (4) evidence suggesting that the commission of the *actus reus* was consciously planned.<sup>22</sup> These factors are not exhaustive, as the courts may consider other factors depending on the facts presented. The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber noted in the *Jelusic case* that no two precise factors determine the presence of genocidal intent, even seemingly straightforward verbal expressions of genocidal intent, combined with dozens of murders targeting a protected group, is not necessarily sufficient contextual evidence from which to infer genocidal intent. Instead, courts conduct a holistic inquiry into whether the overall factual context constitutes “the physical expression of an affirmed resolve to destroy ... a group as such”.<sup>23</sup>

The courts have applied this holistic approach in several cases. In the *Kayishema and Ruzindana Case*,<sup>24</sup> genocidal intent was inferred from the combination of several factors, including the scale and pattern of the atrocities, the language used, and the targeting of a specific group. This was also the case

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<sup>19</sup> *Ibid*

<sup>20</sup> A witness testifying that the accused had publicly declared that if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found to abort the pregnancy was used to infer intent. See, *Akayesu (n 17)*.

<sup>21</sup> The ICTY in *Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, 633 (ICTY, 2001)* determined that the murder of 7,000 to 8,000 Bosnian Muslim men – out of a geographically limited population of at least four times that number provided a sufficient scale of killing for a finding of genocidal intent on the part of the perpetrators.

<sup>22</sup> P. Ryan. ‘Proving Genocidal Intent: International Precedent and ECCC Case 002’ 129 *Rutgers L. REV.* 63 (2010) 4.

<sup>23</sup> Though *Jelusic* personally murdered dozens of Muslims, the Tribunal found that he had acted “arbitrarily rather than with the clear intention to destroy a group” *Jelusic (n15)*

<sup>24</sup> *Kayishema (n10)*

in the 2007 *Bosnia Case*<sup>25</sup>, where the ICTY weighed all the evidence, including testimonies from witnesses and intercepted communications between Bosnian Serb military commanders, documents seized during the war, and reports from forensic experts of the exhumed remains of victims to determine whether former Bosnian military commander, Ratko Mladic had committed genocide between 1992-1995 when more than 7000 Muslim males were forcibly removed from Srebrenica and surrounding areas. Genocidal intent may also be inferred from aiding and abetting. Here, the abettor assumes the genocidal intent possessed by the principal actor.<sup>26</sup> Thus, co-conspirators do not need to prove to have independently possessed the requisite intent to commit genocide.

The scope of what constitutes genocidal intent for a very long time was broad and included anything that could prove that genocidal conduct was not merely a consequence of some other objective not aligned with the destruction of a group. However, the ICTR, in its decision in *Bagilishema*<sup>27</sup>, raised that standard by requiring that proof of genocide must be of a specific intent beyond a reasonable doubt. Thus, when a defendant commits acts satisfying the *actus reus* of genocide while motivated by racial, ethnic, national, or religious animus, it is insufficient unless it is directly linked to an intention proven beyond a reasonable doubt to destroy a protected group and nothing less.<sup>28</sup>

### **Implications of the Intent Requirement on the Enforcement of the Genocide Convention**

The jurisprudence on genocidal intent has massive consequences on successive prosecutorial outcomes. It is, therefore, not surprising that most of the crimes committed by the Khmer Rouge were not viewed as genocide because there

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<sup>25</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) [2007] ICJ Rep 43.

<sup>26</sup> In *Akayesu* (n16) 545 the Tribunal found that an individual can be held responsible as an accomplice to genocide if they knowingly helped or encouraged one or more persons to commit genocide, while being aware that such persons were engaged in genocide, even if the individual did not have the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group themselves.

<sup>27</sup>The Chamber believes that a crime of genocide is proven if it is established beyond a reasonable doubt that, firstly, one of the acts listed under Article 2(2) of the Statute was committed, and secondly, that this act was committed against a specifically targeted national, ethnical, racial, or religious group with the specific intent to destroy, in whole or in part, that group. Genocide, therefore, requires analysis under two main points: the prohibited underlying acts and the specific genocidal intent or "dolus specialis, see *Bagilishema* (n15) 55.

<sup>28</sup> In *Jelusic*(n15) 61-64 The Tribunal found genocidal intent lacking despite the accused's demonstrated apparent hatred of Muslims.

was no proof beyond reasonable doubt that it was not intended to destroy political enemies.<sup>29</sup> Perhaps these political considerations slowed down the start of the Extraordinary Chambers in the Courts of Cambodia (ECCC) for years -as the Cambodian government insisted on maintaining a casting vote over most proceedings - this was a warning of the difficulties that confront international justice today when it has proved very hard, for example, to bring the Myanmar military to account for the atrocities against the Rohingya population.<sup>30</sup> Another example of this challenge is seen in the application filed by The Gambia against Myanmar in November 2019<sup>31</sup>; the question remains whether the Gambia can prove beyond a reasonable doubt that the atrocities committed by the Myanmar authorities were committed with genocidal intent.

In *Musema*<sup>32</sup>, the accused nearly escaped punishment when the ICTR found that the evidence gathered could not support the charge. However, he was finally convicted based on the part of the evidence presented to the courts that showed that he was an active participant in attacks, and his alibi for that period could not be held under the scrutiny of the court. He was also found to have raped a woman and encouraged others to rape the said woman. For these repulsive acts, the ICTR found Mus ema guilty of genocide and crimes against humanity and sentenced him to life imprisonment. His conviction was more for complicity than for the actual commission of genocide in the true sense of the word.

There have been several instances where the court declined to convict alleged perpetrators because of the high threshold of proving the specific intent of genocide. One such example is the case of Bosnian Serb General Radislav Krstic, who was initially convicted by the ICTY of genocide for his role in the Srebrenica massacre, where more than 8,000 Bosniak men and boys were killed.<sup>33</sup> However, his conviction was later overturned by the appeals chamber

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<sup>29</sup> Anne Heindel, 'Overview of the Extraordinary Chambers in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS' in John D Ciorciari & Anne Heindel (eds, 2009) 91.

<sup>30</sup> Jonathan Head, 'Khmer Rouge: What Did a 16-Year Genocide Trial Achieve?' (22 September 2022) BBC News <https://www.bbc.com/news/world-asia-62992329> accessed 20 February 2024.

<sup>31</sup> Kamal Ahmed, 'ICJ Ruling Takes Rohingyas One Step Closer to Justice' (10 April 2023) The Daily Star <https://www.thedailystar.net/opinion/views/news/icj-ruling-takes-rohingyas-one-step-closer-justice-3079091> accessed 20 February 2024.

<sup>32</sup> *Prosecutor v Alfred Musema* (Judgment and Sentence) (ICTR-96-13-T, 27 January 2000).

<sup>33</sup> *Prosecutor v. Krstić*, (Case No IT-98-33-T) (Judgment, 2 August 2001) 633.



of the ICTY, which ruled that the prosecution had failed to prove that *Krstić* had genocidal intent.<sup>34</sup> The Appeals Chamber found that the evidence did not establish *Krstić's* direct involvement in assisting executions. However, the Appeals Chamber found that the evidence did establish that *Krstić* knew that the killings were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances, the Appeals Chamber found that *Krstić's* criminal responsibility was that of an aider and abettor to murder, extermination, and persecutions and not of a principal perpetrator. Furthermore, the Appeals Chamber found that *Krstić* was aware of the intent to commit genocide on the part of some members of the VRS Main Staff. However, there was a demonstrable failure by the Trial Chamber to supply adequate proof that *Krstić* possessed genocidal intent. It is unacceptable that he was not convicted of the crime he committed (genocide) despite receiving a forty-year sentence for other crimes he committed.

Another example is the case of Jean-Pierre Bemba, a Congolese politician and military commander who was accused of war crimes and crimes against humanity, including rape and murder, committed by his troops during the Central African Republic conflict. Bemba was initially convicted of these crimes, but his conviction was overturned on appeal, with the appeals chamber of the International Criminal Court ruling that the prosecution had failed to prove that he had knowledge of the crimes committed by his troops or that he had intended to commit them.<sup>35</sup> In all of these cases, the defendants were not convicted for perpetrating genocide as principal actors because the prosecution could not prove genocidal intent.

The Russia-Ukraine war, which has been ongoing since 2014, has typically not been considered genocide because Russian sympathizers may argue that there has not been evidence of a systematic attempt to destroy the nationals of Ukraine and that if any culpability should arise, it should be for war crimes.<sup>36</sup> Prosecutors who attempt to take Russia on for genocide will have to deal with the problem of insufficient evidence to back their claims because intent cannot

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<sup>34</sup> *Prosecutor v. Krstić* (Case No IT-98-33-A) (Judgment, 19 April 2004) 135.

<sup>35</sup> *Prosecutor v. Bemba Gombo*, (ICC-01/05-01/08-3343) (Judgment, Trial Chamber III, 21 March 2016) 212.

<sup>36</sup> Ashish Kumar Sen, 'Is Russia Committing Genocide in Ukraine?' (21 September 2022) *US Institute of Peace* <https://www.usip.org/publications/2022/09/russia-committing-genocide-ukraine> accessed 20 February 2024.

be proven without establishing that a general plan to commit genocide is evidenced by documents, policy statements, confessions, or that a long-term systematic pattern of such atrocities is attributable to the perpetrator. Proving Russia's culpability will be especially difficult because they claim that they attacked to stop Ukraine from committing genocide against the Russian-speaking population in Ukraine.<sup>37</sup> Thus, their argument might be that the use of force was justified and proportionate to their need to protect the Russian-speaking population in Ukraine. These political considerations muddy the work of prosecutors, further complexifying the already existing complexity of proving genocidal intent in today's world.

Similarly, one could argue that the self-determination efforts of Palestine and the violence of Israel against them are political issues best discussed outside of the concept of genocide. In recent times, the Republic of South Africa has alleged that Israel has violated the Genocide Convention with regard to its actions in Gaza. Israel rejected these allegations in proceedings before the International Court of Justice (ICJ). However, the ICJ granted the interim measures sought by South Africa and issued orders to Israel asking them to *"take all measures within its power" to prevent the commission of acts prohibited in the Convention, in particular killings, causing serious physical or mental harm, the deliberate infliction of conditions of life calculated to bring about the physical destruction of the population in whole or in part, and the imposition of measures intended to prevent births.*"<sup>38</sup> The outcome of this case is difficult to predict because even though the ICJ has determined prima facie that it has jurisdiction over the case because genocide is *erga omnes* and States can be held liable for Genocide, intent to commit genocide will be hard to prove because the violent acts of Israel may easily fit in war crimes or even more convincing will be the argument that there is a breach of international humanitarian law rather than genocide properly so-called.

The aforementioned cases underscore the significant influence of the intent requirement not only in the prosecution of genocide but also in determining whether an individual can be charged with genocide, even when committing

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<sup>37</sup> Alexander Hinton, 'Putin's Claims that Ukraine is Committing Genocide are Baseless, but Not Unprecedented' (The Conversation, 25 February 2022) <https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unprecedented-177511> accessed 20 February 2024.

<sup>38</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) No 2024/16 (16 February 2024).

genocidal acts in plain view of the public. To address this issue, it is essential to reconsider the specific intent requirement and replace it with a more effective standard while still maintaining an objective benchmark for establishing guilt in cases of genocide. In the following section of this paper, I will outline why I advocate for the consideration of a strict liability approach as the standard for genocide trials.

### **CONSIDERING A STRICT LIABILITY APPROACH TO GENOCIDAL INTENT**

The definition of strict liability varies considerably in academic scholarship worldwide. However, for this paper, strict liability is defined as criminal liability without the requisite intent.<sup>39</sup> In this sense, only the *mens rea* requirement is waived; the actus reus requirement remains.<sup>40</sup> Under strict liability, a defendant (motorist) may be held responsible for speeding even if they did not intend to, were not aware of their actions, or acted without proper care. The only condition for a conviction is that they exceeded the speed limit. The court may overlook intent by stating that the defendant should have foreseen the potential danger of their actions, in line with the traditional concept of strict liability.

This form of strict liability was applied in early common law courts through a mechanism known as “*the moral test*.”<sup>41</sup> This moral test was used to determine cases where culpability required that there be *mens rea* vis-a`-vis some element of the actus reus. In cases where the actus reus was found to be present, the *mens rea* requirement of intent was dispensed of if the crime in itself was extremely repugnant to the prevailing standards of social morality.<sup>42</sup> For example, forced intercourse with a young female itself is morally wrong. So,

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<sup>39</sup> R A Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in A P Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005) 125.

<sup>40</sup> The relationship between the overall actus reus requirement and the requirement that there be a voluntary

act is explored at length in Michael Moore, *Act and Crime: The Implications of the Philosophy of Action for the Criminal Law* (Oxford University Press 1993, paperback edn. 2010).

<sup>41</sup> The classic source of the moral wrong test is said to be *Regina v Prince* [1875] 2 Crown Cases Reserved 154.

<sup>42</sup> *Ibid*

the intent-driven element of ‘knowing the age of the female’ in the actus reus of statutory rape was immaterial.<sup>43</sup>

Common law strict liability is generally not entirely strict in the traditional sense. Rather, it is comprised of instances where liability is imposed regardless of the defendant's mental state with respect to their intended goal at the time of the act. For example, a person may be held responsible for murder when they intended only to commit robbery, but the robbery resulted in death (felony murder). Similarly, a person may be held responsible for aiding in a more serious crime committed by another when they only intended to aid in a lesser crime (the foreseeable additional crimes doctrine for accomplice liability). Other examples include intending to inflict grievous bodily harm but causing death or intending to scare someone but inadvertently causing harm.<sup>44</sup> Strict liability theorists argue that all types of criminal culpability are based on two factors. First, an individual is considered culpable for an act if they committed it intending to achieve the criminal outcome or if they intended the act as a means to another desired end, even if the act was not necessary to achieve that goal. In such cases, strict liability attaches when it is shown that the actor chose to do an act, either as an end, as a means, or as a foreseen side effect.<sup>45</sup> The magnitude and extent of these actions can serve as a basis for inferring intent. It can be assumed that the perpetrator must have been aware that the crime was a predictable outcome of their actions and therefore must have had the necessary intent before committing the act.<sup>46</sup>

Second, the belief that an act is wrongful or that an act was done intending wrongfulness is not always easy to prove during the prosecution. Many examples in history demonstrate that people rely on a certain moral justification for some of the world's most heinous crimes: Hitler, Pol Pot, Mao, Custer, etc. Despite their belief in the justness of their evil actions, the world still viewed them as being responsible and held them responsible for deliberately doing the

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<sup>43</sup> Michael S Moore, 'The Strictness of Strict Liability' (2018) 12 *Criminal Law and Philosophy* 513.-529.

<sup>44</sup> Ibid

<sup>45</sup> Choice is translated into the three modalities of practical rationality (belief, desire, and intention) in Michael Moore, “Intention as a Marker of Moral Responsibility and Legal Punishability”, in Antony Duff and Stuart Green, eds., *The Philosophical Foundations of Criminal Law* (Oxford, 2011)179,205

<sup>46</sup> The thesis of H.L.A. Hart, “Negligence, Mens Rea, and Criminal Responsibility,” in his *Punishment and Responsibility* (Oxford, 1968)186, 209.

wrongs they committed based on the world's view of good and bad.<sup>47</sup> Although morality may be a weak measure for classifying crimes and for imputing strict liability on the one hand, it may be useful as a tool to measure the cost of an act to society. For where an act causes much harm, the moral abhorrence is likely to be high and the ensuing criminal liability will be higher to ensure deterrence.<sup>48</sup>

Considering this, strict liability may then be used as a means to show societal disapproval of a particular act. Usually, the offender is punished according to the amount of normative destabilization they have caused by the message sent with their wrongful act.<sup>49</sup> This framework for the strict liability in penal law may be applied to genocide because the effect of genocidal acts are massive cataclysms and whether an actor intended the outcome or not, the outcome of the acts described in the Convention will always lead to the complete annihilation of the group of people. Although it is important to ensure that any legal framework for holding individuals accountable for acts of genocide is effective, fair, and just, it is also just as important that in setting up such a framework, the substantive costs of genocide be considered.

For instance, the number of deaths caused by genocide over the years is alarming; 1932; six to ten million deaths were caused by the famine Joseph Stalin and the Soviet Union inflicted upon Ukraine; Nazi Germany, under Adolf Hitler, killed six million Jewish people in Germany, Poland, the Soviet Union and other areas around Europe during World War II; Khmer Rouge leader Pol Pot's attempt to turn Cambodia into a Communist peasant farming society leading to deaths of up to two million people from starvation, forced labor and executions; Yugoslavia, led by President Slobodan Milosevic, attacks Bosnia killing about 100,000 people; in Rwanda, an estimated 800,000 civilians, mostly from the Tutsi ethnic group, are killed; ISIS fighters attack the northern Iraqi town of Sinjar, home of a religious minority group called the Yazidis killing 500, while 70 children died of thirst and women were sold into

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<sup>47</sup> It is true that we do not uniformly blame the morally ignorant for their wrongful actions done in ignorance; the level of blame hinges on the degree of moral error because our epistemic certainty (about perceiving the correct standard by which to gauge moral error) determines how and why we impute liability.

<sup>48</sup> P H Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (Oxford University Press 2008).

<sup>49</sup> Monika Simmler, *Strict Liability and the Purpose of Punishment* (2020) 23 *New Criminal Law Review* 536.

slavery, etc.<sup>50</sup> These numbers are unacceptable and one way to communicate this is by making genocide a strict liability crime and sending a strong message that acts of genocide will not be tolerated. This could serve as a powerful deterrent against such acts and ensure a system where perpetrators plead ignorance of genocidal intent as a way out of their crimes.

### **A Strict Liability Approach reflects the original objectives of the Genocide Convention**

Lemkin's early writings explored genocide, as a crime that occurred when a group of people were destroyed, without emphasis on the justifications, motives, or exact purposes and motivations the perpetrators had in mind. He defined genocide as a "*coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups*" without much recourse to intent.<sup>51</sup> Similarly, in its original composition genocide, was conceived as a crime against humanity for which the intent component is not a strict requirement. For example, the French presented the following characterization of genocide as a proposed format during the deliberation. Article 1 of the proposed wording stated as follows: "*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.*"<sup>52</sup> 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.*"<sup>53</sup>

Although intent is a requirement in Article 17(5) of the ILC's Draft Codes of Crimes against Humanity and Peace, it goes on in Article 17(10) of the Code to assert that such intent can be inferred from the perpetrator's knowledge of the discriminatory effects of his acts committed in the destruction of an intended group. The perpetrator must have a foundational knowledge of the objectives and consequences of his actions to be held liable but that is not to

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<sup>50</sup> CNN Editorial Research, 'Genocide Fast Facts' (17 March 2023) *CNN News* <https://www.cnn.com/2013/09/20/world/genocide-fast-facts/index.html> accessed 20 February 2024.

<sup>51</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (The Lawbook Exchange, Ltd 2008) 79.

<sup>52</sup> *Genocide, France: Draft Convention on Genocide* UN Doc E/623/Add.1 (5 February 1948).

<sup>53</sup> Kayishema (n 10)

say he must have every detail of a comprehensive plan or policy of genocide or show specific intent. Ignoring the obvious does not exempt an individual from criminal responsibility. It is impossible for a soldier who is ordered to kill only members of a particular group to be unaware of the significance of their membership in that group and the irrelevance of their identity. He cannot ignore the destructive effect of his criminal conduct on the group. As a result, it is possible to infer the necessary degree of knowledge and intent from the nature of the order to commit prohibited acts of destruction against individuals who have been singled out as immediate victims of the crime.<sup>54</sup>

Genocidal intent advocates insist that adopting general intent or strict liability as the legal standard will operate to remove the distinct character of the crime of genocide which separates it from other cruel acts of mass destruction towards ethnic groups or war crimes affecting large populations that are not substantially genocidal acts. These crimes may involve the mass extermination of large groups of people during wars, coup d'états, and the like.<sup>55</sup> In *Akayesu supra*, the court discussing genocidal intent stated, "*Genocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."*<sup>56</sup>

This view that genocide is separate from crimes against humanity is the foremost reason for the intent requirement which does not apply to crimes against humanity. Law Professor, Menachem Rosensaft observes quite profoundly in his article, the Long and Tortured History of Genocide, that this view which is accompanied by the restrictive requirement of proving genocidal intent poses a question of whether we might not have been better off with a convention on the prevention and punishment of crimes against humanity with genocide as a subset rather than a Genocide convention which is quite

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<sup>54</sup> Ibid 45

<sup>55</sup> Devrim Aydin, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 *Journal of Criminal Law* 5, 423, 441.

<sup>56</sup> *Akayesu* (n 17) 498

restrictive.<sup>57</sup> This question will be at the forefront of South Africa's case against Israel in the coming years.

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. Most 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 and, therefore, at the center of the crime. For this reason, they should not be allowed to escape punishment for that crime. To plead ignorance is inappropriate. The intent requirement is thus unsuitable because, regardless of an individual's expressed intentions, before he/she is convicted of genocide based on the principle of strict liability there will be evidence that he/she was or is still actively involved in genocidal acts. The focus should be on preventing group destruction, not only on punishing people with specific intent. We are accommodating the criminality of perpetrators by requiring strict and specific intent, proven beyond a reasonable doubt, as it is in a court of law. There is a high possibility that these perpetrators will not only deny the occurrence of the crime but also destroy all evidence, making it challenging to prove the crime.

Genocide thrives on the denial of the victims' very existence, it is, therefore, to be expected that anyone committing the crime will deny that such events have taken place, shrink responsibility for the destruction, or agree that genocide'' applies to what occurred.<sup>58</sup> Before specific intent was held to be the required intent in the Akayesu trial, no legal document or UN paper had associated it with the crime.<sup>59</sup> While considering the Travaux Préparatoires, it was argued that judges should have the flexibility to interpret cases on an individual basis, given the unique circumstances and varying levels of involvement. However, this was not intended to permit a judge's ruling to limit future decisions. It is adequate for most crimes in that the perpetrator acts with

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<sup>57</sup> Menachem Rosensaft, 'The Long and Tortured History of Genocide' (30 April 2019) *Tablet News* <https://www.tabletmag.com/sections/news/articles/the-long-and-tortured-history-of-genocide> accessed 20 February 2024.

<sup>58</sup> Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate Publishing Company 2007) 83.

<sup>59</sup> K Goldsmith, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5(3) *Genocide Studies and Prevention* 238



general intent.<sup>60</sup> In such cases, the law may consider committing an act with the general intent of willingly and knowingly engaging in criminal conduct as a sufficient basis to impute guilt without the need to prove specific intent geared towards showing that the perpetrator was motivated towards achieving a particular criminal result.<sup>61</sup> This approach to imputing intent becomes very practicable when considered in light of the very heinous nature of the crime of genocide and the resulting large-scale destruction which makes it easy to impute wrongdoing on the part of genocide perpetrators without the need to show a genocidal intent per se. It follows that one can be held liable for a crime if the evidence points to a staggering awareness of the effects of his actions, thus, the issue of proving intent was not mentioned during the Nuremberg trials because the evidence before the court directly pointed to the vast extermination of Polish Jews. The court correctly concluded without any doubt based on the actions of the Nazi forces that the perpetrators' intent was ultimately the destruction of Polish Jews even if they denied intending to achieve that effect.<sup>62</sup>

Similarly, a strict liability approach will allow courts to decide based on all the evidence presented before them, whether the scope of the harm caused and the scale of the acts that were committed supposes that the perpetrator must have foreseen that his actions would result in genocide. This standard eliminates the second requirement for intent and makes it easy to convict without being inhibited by the current challenges discussed above. This approach is worthwhile and serves its purpose of protecting groups while simultaneously maintaining the distinct identity of the crime of genocide within the canon of international criminal law.<sup>63</sup> Accepting the foresight of consequence as the intent is the strict liability approach that reflects the ideal the Genocide Convention is trying to achieve.<sup>64</sup> Requiring strict proof of genocidal intent is a high price to pay to preserve the unique character of the crime of genocide because the ends of justice can only be achieved on a large scale if the effects

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<sup>60</sup> David L Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 *Texas International Law Journal* 231, 124.

<sup>61</sup> *Ibid*

<sup>62</sup> Radu Ioanid, *The Holocaust in Romania: The Destruction of Jews and Gypsies under the Antonescu Regime, 1940-1944* (Ivan R Dee 2008).

<sup>63</sup> Alexander K A Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259.

<sup>64</sup> Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) *Criminal Law Forum* 486.

of the actus reus are used to attribute genocidal intent and in some cases even to impute complicity.<sup>65</sup>

An example of the benefit of inferring genocidal intent from genocidal acts can be seen in the Karadžić case. This case demonstrated an evolution in judicial interpretation of the Convention, as ICTY judges in Karadžić appeared to be more willing to infer genocidal intent from genocidal acts and to embrace a broader view of the Convention.<sup>66</sup> For his role in the 1992-1995 Bosnian war and the July 1995 Srebrenica massacre, Karadžić was charged with genocide, crimes against humanity, and severe breaches of the Geneva Convention. According to the Trial Chamber, his actions in Bosnia met the actus reus of genocide, but the specific mens rea was not proven.<sup>67</sup> The Trial Chamber opined that genocidal intent could not be inferred from the speeches, statements, and actions of Karadžić and other members of the joint criminal enterprise, or the overall pattern of the crimes. Although Karadžić and others may have engaged in ethnic cleansing by removing Muslim Bosnians from many parts of Bosnia, this finding did not establish genocidal intent on their part. Ultimately, the statements cited by the prosecution and actions of Karadžić were taken as an intent to intimidate Bosnian Muslims into not pursuing independence rather than an intent to commit genocide.<sup>68</sup> Thus, Karadžić was acquitted of genocide on account of his actions in Bosnia.

Notwithstanding this, Karadžić was convicted of genocide for the killings in Srebrenica, the ICTY Trial Chamber reached this conclusion based on an inference. The prosecution was never able to find concrete evidence that Karadžić truly knew that the killings would occur and that Karadžić intended for the killings to take place. Instead, the prosecution's case was circumstantial. The Trial Chamber relied on the conversations between Karadžić and his co-actors to infer that Karadžić knew about the killings in Srebrenica. The Trial

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<sup>65</sup> See Krstić (*n* 20) concluded that Krstić participated in a joint criminal enterprise to kill the Bosnian Muslim military-aged men from Srebrenica. The decision was controversial given the absence of elements to demonstrate specific intent. The Appeals Chamber reversed this finding and concluded that Krstić merely knew that a genocidal criminal enterprise was underway (aiding and abetting). See also Krstić (*n* 33) (reversing the controversial trial court decision which has compromised further efforts towards prosecuting participating persons or complicit individuals)

<sup>66</sup> M Sterio, 'The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide' (2017) 31 *Emory International Law Review* 271.

<sup>67</sup> *Prosecutor v Karadžić* (Case No IT-95-5/18-T) (Judgment, 24 March 2016). 2537, 6071.

<sup>68</sup> *Ibid* 2605

Chamber also drew inferences about the content of these conversations, without any direct evidence linking to specific intent. After establishing that Karadžić knew about the Srebrenica killings, the prosecution also needed to demonstrate, beyond a reasonable doubt, that Karadžić intended for the killings to take place. The Trial Chamber determined this based on yet another inference: the Chamber found that Karadžić adopted and embraced the expansion of the plan to kill Bosnian Muslim men and boys in Srebrenica during his conversation with Deronjić on the evening of 13 July 1995. The Trial Chamber also established that Karadžić's failure to prosecute the direct perpetrators of the Srebrenica massacre, as well as his praise and reward of the direct perpetrators, demonstrated Karadžić's genocidal intent.

In the Chamber's view, there was no doubt that the accused knew that the thousands of Bosnian Muslim male detainees being held by the Bosnian Serb Forces in the Srebrenica area constituted a very significant percentage of the Bosnian Muslim males from Srebrenica. Based on Karadžić's actions and knowledge about the events at Srebrenica, the Trial Chamber inferred that Karadžić must have agreed with the other actors in the massacre that Bosniaks should be eliminated from Srebrenica. The Chamber also relied on the fact that, despite his contemporaneous knowledge of its progress as set out above, the accused did not intervene to halt or hinder the killing aspect of the plan to eliminate between the evening of 13 July and 17 July. Instead, he ordered that the detainees be moved to Zvornik, where they were killed.

The decision of the Trial Chamber provided a broader interpretation of the *mens rea* requirement for genocide, using circumstantial evidence as a basis for conviction. Marko Milanovic has noted, "*It is clear that had it not been for the phone conversation and subsequent meetings with Deronjić, Karadžić could not have been convicted as a participant in the genocidal JCE.*"<sup>69</sup> Had the Tribunal decided to require a smoking gun type of evidence to convict, Karadžić would certainly have been acquitted resulting in an outcome that reflects poorly on the efficacy of the Genocide Convention.

Going forward, a sure way to ensure that intent is not used to undermine the efficacy of the Genocide Convention will be to amend the definition of Genocide to include an inference of intent from genocidal acts rather than the

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<sup>69</sup> Marko Milanovic, 'ICTY Convicts Radovan Karadzic' (25 March 2016) *EJIL: Talk!* accessed 20 February 2024.

requirement of standalone proof. This strict liability approach will streamline judicial decisions on the subject and increase the efficacy of the Genocide Convention to punish perpetrators of genocide in alignment with the objectives of the Convention.

## **CONCLUSION**

This paper suggested that adopting a strict liability approach to interpreting the Genocide Convention, which prioritizes the severity of genocidal acts over the specific intent behind them, could better serve the Convention's objectives and enhance accountability for perpetrators. This proposal was informed by a comprehensive analysis of the inherent challenges associated with proving genocidal intent under current legal standards, which frequently lead to acquittals despite compelling evidence of genocidal actions.

The analysis revealed three primary findings. Firstly, the challenge of proving genocidal intent, which requires demonstrating a specific intention to destroy a targeted group, presents significant difficulties. This often leads to acquittals when direct evidence of intent is lacking, even when substantial evidence of genocidal acts is present. Secondly, adopting a strict liability approach, which focuses on the gravity of the acts rather than intent, could simplify the burden of proof and ensure that individuals involved in genocidal acts are held accountable. This shift would align more closely with the fundamental objectives of the Genocide Convention, which prioritize the protection of targeted groups and the prevention of mass atrocities. Thirdly, implementing strict liability could enhance deterrence by clearly signaling that genocide will not be tolerated, thus fostering greater accountability and potentially preventing future genocides.

Despite these insights, the paper acknowledges several limitations. While theoretically promising, the proposed strict liability approach faces practical and ethical challenges. The complexity of international law and the diverse interpretations of the Genocide Convention could hinder the effective implementation of strict liability. Furthermore, the paper's reliance on legal theory and analysis, rather than empirical data or case studies, limits the ability to assess the practical impacts of the proposed approach fully. To address these limitations, future research should focus on empirical studies to evaluate the effectiveness of strict liability in various legal contexts. Comparative studies could offer insights into how different jurisdictions handle genocidal intent and

the potential integration of strict liability. Additionally, a review of case law from international tribunals could provide a more nuanced understanding of how genocidal intent and strict liability are applied in practice.

Given the ongoing challenges in prosecuting genocide and ensuring justice for victims, legal scholars, policymakers, and international bodies must consider adopting a strict liability standard for genocide. Such a change could enhance the efficacy of international justice systems, improve accountability for perpetrators, and contribute to preventing future atrocities. Under a strict liability regime, prosecutors would not need to prove that an accused individual had the specific intent to commit genocide. This could simplify the burden of proof in genocide cases and make it easier to prosecute individuals for acts of genocide. This approach represents a vital step towards achieving justice for victims and upholding the principles enshrined in the Genocide Convention.

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