Running Head: Identifying the Crime of Genocide

**Problematic Aspects in Identifying the Elements of the**

**Crime of Genocide under International Criminal Law**

**American University of Central Asia**

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Genocide has been difficult to qualify in history for various reasons. Under International Criminal Law, Genocide is recognized as an international crime under Article 5 of the Rome Statute[[1]](#footnote-1) and by the Convention on the Prevention and Punishment of the Crime of Genocide, otherwise known as the Genocide Convention[[2]](#footnote-2). The Genocide Convention provided a list of four protected groups, referring to the national, ethnic, religious, and racial groups as protected groups under the Convention. The research undertaken has found issues with the application of this legal norm, or rather gaps in the law. As John Quigley has stated in his book, much of the uncertainty around qualifying mens rea of genocide focuses not only on the applicability of the Genocide Convention, but also its interpretation[[3]](#footnote-3). In the case of the Khmer Rouge killings in the 1970s, genocide was not qualified at all due to opponents being members of a political affiliation (communists), which is omitted in Article 2 of the Convention. However, research has shown that the Convention can still be applied in some cases. In the case of General Garcia Meza, the January 1981 mass killings of Bolivians were not qualified as genocide at all until Supreme Court hearings in Bolivia did just that. In their verdict they mentioned a “bloody massacre in Harrington Street” and later qualified Meza’s actions as “destruction of a group of politicians and intellectuals”, which was later understood as the Supreme Court qualifying the victims to be under the national protected group (Quigley, Chapter 6, Bolivia: Bloody Massacres). Furthermore, an example of a state legally being able to punish genocide of political opponents is Ethiopia, due to the fact that they actually added genocide as an article in their penal code, and included both the protected groups under the Convention and also included political opponents as a group under national law (Quigley, Chapter 6, Ethiopia: Destroying Political Groups). This is very relevant to the chapter concerning protected groups of my thesis, because it does show that unclear legislation or gaps in the law can lead to ineffective enforcement of international criminal law. Numerous changes have been proposed, most notably by Carole Lingaas, who believes that it is necessary to look at mens rea of the perpetrators instead of actus reus requirements (which group was affected)[[4]](#footnote-4). Lingaas describes how in recent years international courts review the mens rea of the genocidal act and how the perpetrator viewed the people he was trying to harm, such as in the case of the Darfur crisis. For example, Lingaas states that “Judge Ušacka’s dissenting opinion promises further debate on the contours of the protected groups. She noted that subjective criteria, like stigmatization of the group by the perpetrators, as well as objective criteria, like the particulars of a given social or historical context, had to be considered (Lingaas, pg 17).”

One of the biggest issues concerning genocide is separating it from numerous counts of murder and sadism. In the case of Goran Jelisic, a Bosnian Serb commander in control of Lucka camp, it was ruled that he in fact was a sadist. The killings did not follow a systematic pattern, because some prisoners were killed, some were tortured, and some were released, which did not display concrete evidence of dolus specialis, or specific intent. Olaf Jensen discusses this case and its similarities with the Schwammberger case[[5]](#footnote-5), because Schwammberger was charged with 37 counts of murder instead of genocide, despite that the fact that law of Germany had genocide as a provision in its penal code (Jensen, pg 7). According to Jensen[[6]](#footnote-6), “what the trial against Schwammberger reveals about his actions is that even perpetrators of the Holocaust who were clearly part of the genocidal process would not fulfill the standards the Trial Chamber as set in the Jelisić case due to the non-contextual interpretation of a genocidal process (Jensen, *Appeal Chamber*).” Once again, the cases shown clearly state that genocide is very hard to prosecute under mens rea requirements, which indicates a need for reform or different ways of interpreting the Genocide Convention and other relevant legal norms.

However, the issue of qualifying genocide is made simpler by other cases, such as the Krstic case, which allowed for a court to use the definition of the term “in whole or in part” offered by Genocide Convention in a broad manner. There has been concern over the International Criminal Tribunal for the former Yugoslavia using it as justification to only look at quantitative indicators for qualifying genocide (counting how many people have been killed), but the Krstic case proves that “in whole or in part” can be qualified by using the mens rea aspect. As stated in the Trial Judgment: “the victim of the crime of genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason but a group as such[[7]](#footnote-7).” Furthermore, Cherif Bassiouni of the Chief of Experts responsible for investigating humanitarian law violations in the former Yugoslavia stated that the definition of genocide in the Convention is “sufficiently pliable to encompass not only the targeting of an entire group, as stated in the convention, but also the targeting of certain segments of a given group, such as the Muslim elite or Muslim women[[8]](#footnote-8) (Schabas, pg 237).” It was this reasoning that had allowed the ICTY to successfully charge Krstic by alleging that he targeted “military-age Muslim men”.

Another issue that the crime of genocide poses under mens rea is the role of complicity and how it’s shaped interpretation of the law in history. Daniel Greenfield talks at length about this in his “Redefining International Criminal Law: New Interpretations and New Solutions”[[9]](#footnote-9). This text gives further review of the crime of complicity in genocide, and argues that it was wrong for the international criminal tribunals to recognize complicity and aiding and abetting as the same crime with the same mens rea requirements (Greenfield, 924). Greenfield argues that aiding and abetting consists of the person planning for the genocide to occur and has a specific motive for it, while people complicit in genocide do not always plan ahead for the occurrence of genocide and join the crime on the spot. In effect, genocide may not have always been the purpose for complicity. Complicity does not always affect those who join the crime by actively participating in it, the French Connection by Hazel Cameron[[10]](#footnote-10) also states that French actors are responsible for complicity for not actively participating to stop the genocide even though they had the means. This is referred to as inaction in her article. In fact, Cameron goes further to state that the French military’s actions in repelling Rwandan Patriotic Front invaders from Uganda in 1990 led to the Rwandan military purchasing more hardware to prepare for coming acts of genocide, as she states that ” Since these events, it has been argued that the French military involvement in Operation Noroît was responsible for escalating the levels of Rwandan government brutality and “encouraging further purchases of military hardware at the expense of basic necessities” within the country (Cameron, *French Military Intervention in Rwanda: Operation Noroit*.” French military assistance also led to the strengthening of Hutu civilian forces, not just military, which is described the following way: “there is corroborated evidence that the French military were also responsible for actively training thousands of the civilian Hutu militiamen of the Interahamwe and the smaller Impuzamugambi.”

Hate speech also plays a key role in qualifying the mens rea of genocidal intent. Shannon Fyfe describes this process very well in her article “Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law”. This article actually reviews hate speech as a concept and discusses the historical background and its use during highly famous Rwandan cases such as the Media case, and establishes when criminal liability comes into effect. Shannon Fyfe also provides recommendations on dividing it into three criminally liable groups for hate speech depending on the intensity. The groups are genocidal hate speech, genocidal incitement speech, and genocidal participation speech (Fyfe, pg 5). This is a very interesting approach to the problem, because as was stated by Fyfe, incitement to commit a crime is very narrowly defined in domestic courts, but the problem is qualifying it on the level of international law. One issue with the application of hate speech provisions in order to qualify a crime is the fact that many delegations have expressed concern that hate speech already falls under complicity or aiding and abetting, and should not be qualified as its own degree of a crime. Fyfe disagrees with this notion due to historical precedents. These sources show that the crime of genocide is itself difficult to prosecute from its very beginning, even though as a serious international crime, it should be able to prevent its commission by stopping possible perpetrators at the stage of using hate speech.

Naturally, there have been many instances of speech, specifically hate speech, leading to the deaths of many people as a result of the genocide that ensued. One example of this is the Rwandan genocide, which saw the extensive use of media networks against the victims. As was discussed by Jamie Metzl, the source identifies the level of support for incitement to genocide committed by radio operators of RTLM and Radio Rwanda, otherwise referred to as workers of the Ministry of Information of Rwanda[[11]](#footnote-11). This source answers the questions I have had regarding state participation in genocidal acts, and offers information regarding the procedure conducted by Rwandan media personnel, and the collusion between them and other forces in the genocide. While the topic of state involvement is too broad for the scope of my thesis work, it is still important to note that the majority of Hutu militants were not in fact employed officially by the state. Many of them were civilians who had decided to partake and who aided and abetted official Hutu military forces. Once the radio networks identified or publically threatened a Tutsi or a sympathizer of the Tutsi group, the Hutu militias acted to kill or attack the person named by the operators, showing a sophisticated level of intent and organization. Metzl states that “Despite the inadequacies of Rwanda's information infrastructure, the killings were carried out in a highly systematic and synchronized manner, the result of careful advance planning… s. RTLM broadcasts organized roadblocks and read lists of names of "enemies," who were tracked down and executed by militias (Metzl, pg 630-631).”

**References**

1. Daniel Greenfield, “Redefining International Criminal Law: New Interpretations and New Solutions: Criminal Law: The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong, and Why It Matters”, Journal of Criminal Law & Criminology (2008)
2. David Nersessian, “Political Genocide and Customary International Law”, Oxford Scholarship Online (2010)
3. Gattini Andrea, Giulio Cortesi, “Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case”, Leiden Journal of International Law Vol. 28 Iss. 4 (2015)
4. Hazel Cameron, “The French Connection: Complicity in the 1994 Genocide in Rwanda”, African Security Vol. 8 Iss. 2 (2015)
5. Johan D. Van der Vyver, The International Criminal Court And The Concept Of Mens Rea In International Criminal Law, 12 U. Miami Int’l & Comp. L. Rev. 57 (2005)
6. John Quigley, "Review of the Genocide Convention, an International Law Analysis”, British Institute of International and Comparative Law (2007)
7. Jamie Frederic Metzl, “Rwandan Genocide and the International Law of Radio Jamming”, The American Journal of International Law Vol. 91 No.4 (1997)
8. Michael Salter, 'Discrepancies' in the Prosecution for "Incitement to Genocide" during the Nuremberg Process involving the cases of Julius Streicher, Hans Fritzsche and Carl Schmitt, When Law and Hate Collide: Lancashire Law School Working Paper Series Vol. 1
9. Michael Bennett William, “Anti-Semitism on Trial: The Case of Julius Streicher Before the International Military Tribunal at Nuremberg”, Laney Graduate School Dissertations (2009)
10. Milenka Kreco, “Relationship between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia in respect of the Adjudication of Genocide”, Annals of the Faculty of Law in Belgrade Vol. 63 Iss. 3 (2015)
11. Mohammed Elewa Badar, “The Concept of Mens Rea in International Criminal Law : The Case for a Unified Approach”, Studies in International and Comparative Criminal, v.12 (2013)
12. Olaf Jensen, Evaluating genocidal intent: the inconsistent perpetrator and the dynamics of killing, Journal of Genocide Research Vol. 15 Iss. 1 (2013)
13. Paul Behrens, “Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia”, Leiden Journal of International Law Vol. 28 No. 4 (2015)
14. Schabas, William, “Genocide in International Law: The Crime of Crimes”, Cambridge University Press (2000)
15. Shannon Fyfe, “Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law”, Leiden Journal of International Law Vol. 30 Iss. 2 (2017)
16. Timothy J. Stapleton, “A History of Genocide in Africa”, Praeger Security International (2017)
17. Wibke Kristin Timmerman, “Incitement in International Criminal Law”, International Review of the Red Cross Vol. 88 (2006)
18. Carola Lingaas, Defining the Protected Groups of Genocide through the Case Law of International Courts, ICD Brief (2015)

**Cases**

1. Prosecutor v. Streicher, Judgement (International Military Tribunal Oct,1946)
2. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v.Serbia), International Court of Justice, Feb.3,2015.
3. Prosecutor v. Fritzsche, Judgement (International Military Tribunal Aug,1946)
4. Prosecutor v. Schwammberger, Judgement (Stuttgart Regional Court - Landgericht May,1992).
1. Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002. [↑](#footnote-ref-1)
2. Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 Dec. 1948) 78 U.N.T.S. 277, entered into force 12 Jan. 1951. [↑](#footnote-ref-2)
3. John Quigley, "Review of the Genocide Convention, an International Law Analysis”, British Institute of International and Comparative Law (2006) [↑](#footnote-ref-3)
4. Carola Lingaas, Defining the Protected Groups of Genocide through the Case Law of International Courts, ICD Brief (2015) [↑](#footnote-ref-4)
5. Prosecutor v. Schwammberger, Judgement (Stuttgart Regional Court - Landgericht May,1992). [↑](#footnote-ref-5)
6. Olaf Jensen, Evaluating genocidal intent: the inconsistent perpetrator and the dynamics of killing, Journal of Genocide Research Vol. 15 Iss. 1 (2013) [↑](#footnote-ref-6)
7. Prosecutor v. Krstic, Case No. IT-98-33 ICTY, Aug. 2, 2001 [↑](#footnote-ref-7)
8. Schabas, William, “Genocide in International Law: The Crime of Crimes”, Cambridge University Press (2000) [↑](#footnote-ref-8)
9. Daniel Greenfield, “Redefining International Criminal Law: New Interpretations and New Solutions: Criminal Law: The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong, and Why It Matters”, Journal of Criminal Law & Criminology (2008) [↑](#footnote-ref-9)
10. Hazel Cameron, “The French Connection: Complicity in the 1994 Genocide in Rwanda”, African Security Vol. 8 Iss. 2 (2015) [↑](#footnote-ref-10)
11. Jamie Frederic Metzl, “Rwandan Genocide and the International Law of Radio Jamming”, The American Journal of International Law Vol. 91 No.4 (1997) [↑](#footnote-ref-11)