DOES THE INTERNATIONAL CRIME OF GENOCIDE ALWAYS REQUIRE A GENOCIDAL POLICY?

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The term 'genocidal policy' suggests the idea of an organised regime of criminality for the international crime of genocide. Whilst it is a concept easily accepted in theory, in practice the crime of genocide is far too complex to consider so simply. The presence of a genocidal policy may affirmatively determine criminal culpability, or at least considerably ease the concerns of international judiciaries tasked with establishing as much. However, genocide is an inchoate crime vis-a-vis the protected groups: it is a crime predicated on the mens rea or the génocidaire. The presence of a state genocidal policy may very well establish the stringent mens rea the crime of genocide mandates, yet it is not the only factor that must be considered when determining culpability. Practically, genocidal policies may not always be obvious; they may be disguised as political regimes. Consequently, it is imperative the current broad approach to genocidal mens rea is maintained.

I I INTRODUCTION

The above question encapsulates one of the most obvious disparities between the theoretical and practical application of the crime of genocide in international law. Genocide is defined in Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('Genocide Convention')[1] as follows:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such;
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;

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[1] Genocide Convention (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute) art 6; Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 29 May 1993) 32 ILM 1159 (ICTY Statute) art 4; Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) 33 ILM 1598 (ICTR Statute) art 2.

(e) Forcibly transferring children of the group to another group.

Prima facie, it is clear on the wording of the provision that a genocidal policy need not exist for genocide to occur. However, the crime of genocide is usually committed as part of a state policy and in some cases, courts have been unwilling to support a finding of genocide where a state policy is absent.[1] The situation in Darfur is an ideal example of such an observation. While the International Commission of Inquiry on Darfur did acknowledge that the absence of such a policy did not detract from the gravity of the crimes perpetrated, '[t]he Commission concludes that the Government of the Sudan has not pursued a policy of genocide'.[2] Consequently, neither the State nor the individual perpetrators were found criminally culpable of genocide.[3]

This apparent discrepancy between the theoretical and practical application of the definition of genocide has become a contentious issue, particularly with respect to the *mens rea* element of the crime. By first establishing what is meant by a 'genocidal policy', this paper will reflect upon the theoretical and practical implications a genocidal policy may present when determining criminal culpability for genocide. As an inchoate crime, genocide is based principally on *mens rea* and two popular approaches for determining intent will be examined in regard to the presence of a genocidal policy (or lack thereof). Ultimately, consideration will be paid as to how international courts and tribunals may attribute culpability for genocide, concluding that while the issue of culpability may be simplified by virtue of an existing genocidal policy, it must not be reliant upon one.

II GENOCIDAL POLICY

For the purpose of this paper, 'genocidal policy' refers to a policy coordinating or validating acts intended to bring about, or further the commission of, any of the five prohibited acts listed in Article II of the Genocide Convention. In the original definition of genocide put forward by Lemkin, the crime was identified as a coordinated plan of several separate actions, causally linked by the final goal: destruction, in whole or in part, of a protected group.[4] Weiss-Wendt goes as far to say that genocide cannot be

[1] Micol Sirkin, 'Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations' [2010] Seattle University Law Review 489, 493.

[2] Report of the UN International Commission of Inquiry on Darfur, UN Doc. S/2005/60, §§ 518, 642; William A Schabas, 'Origins of the Genocide Convention: from Nuremberg to Paris' [2008] Journal of International Law 35, 54-55.

[3] Claus Kress, 'The Darfur Report and Genocidal Intent' [2005] Journal of International Criminal Justice 562, 563.

[4] *Goeth*, Poland, Supreme National Tribunal of Poland sitting at Cracow, 5 September 1946, in TWC, vol. 7, 7; R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Governments, proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79-95.

removed from the state itself; the crime requires premeditation and is characteristically driven by ideology.[5] Weiss-Wendt's view is not without foundation. Indeed, in *Greifelt and Others,*[6] the charges laid against the accused rested on the basis that his actions were committed in furtherance of Nazi racial ideology and policy.

Despite these observations, the drafting of Article II of the Genocide Convention does not expressly stipulate that a state policy need be present for the perpetration of the crime.[7] A state genocidal policy is not a legally constitutive ingredient of genocide and the crime can therefore theoretically be committed in isolation from an organised attack.[8] The omission of the policy requirement seems to be in congruence with human rights. Indeed, providing too stringent requirements for the crime may allow actions genocidal in character to go unpunished when they fall 'theoretically short'.

An essential ingredient of the crime of genocide however is the intention, 'to destroy, in whole or in part', the International Criminal Tribunal for Rwanda (ITCR) acknowledging that the crime extends beyond its actual commission (*actus reus*) to the realisation of the broader aim.[9] Thus, while genocidal policy is not the only indicative element of the crime, it is a valuable device when ensuring state and individual accountability in the establishment of the requisite *mens rea*.

III INTENT (*MENS REA*)

Broadly speaking, genocidal intent is two-fold; it requires intent of the *actus reus* (physical act of killing) and the intent that such actions were aimed at the whole or partial destruction of a protected group: *dolus specialis* ('special intent', also referred to as 'genocidal intent').[10] In practice it is comparably simple for the prosecution to establish intent to commit the *actus reus* as opposed compared to the *dolus specialis*. As previously established, the *mens rea* for genocide does not require a genocidal policy; however the complexities faced by the court when establishing individual genocidal

[5] Anton Weiss-Wendt, 'The State and Genocide', *The Oxford Handbook of Genocide Studies* (eds Donald Bloxham, A Drk Moses) OUP, 2010, 81-84.

[6] *Greifelt and Others*, United States, United States Military Tribunal sitting at Nuremberg, 10 March 1948, in TWC, vol. 13, 1-69.

[7] Poala Gaeta, 'On what Conditions can a State be held Responsible for Genocide?' [2007] European Journal of International Law 631, 7.

[8] Micol Sirkin, 'Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations' [2010] Seattle University Law Review 489, 493; *Prosecutor v Jelisić* (Judgement) IT-95-10-A (5 July 2001), 48.

[9] Genocide Convention (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 2; *Prosecutor v Akaseyu* (Judgement) ICTR-96-4-T (2 September 1998), 572.

[10] A. Cassese, P. Gaeta, L. Bing, M. Fan, C. Gosnell and A. Whiting, *Cassese's International Criminal Law* (3rd edn, OUP 2013), 118-119.

intent are immense. The International Criminal Tribunal for the Former Yugoslavia ('ICTY') has acknowledged that an individual may be criminally culpable for the crime of genocide when acting on an individual basis and with the requisite intent.[11] In some cases however, and as was the case in *Jelisić*, the perpetrator may be suffering from a psychological disorder.[12] The question thus remains open as to what qualifies as requisite genocidal intent, particularly in individual perpetrators.

IV METHODS OF INTERPRETATION

There are two approaches to interpretation of the *mens rea*: purpose-based and knowledge-based. The prevailing purpose-based approach falls in line with ICTY and International Criminal Tribunal for Rwanda ('ICTR') jurisprudence, requiring that the perpetrator have the conscious desire or clear intent to cause the whole or partial destruction of a protected group.[13] Stringently applied, this means that the individual perpetrator must be acting deliberately and in pursuit of genocide. The approach makes no mention of a genocidal policy and is faced with practical problems, the most obvious being the application of the positive law defence.[14]

An example will suffice to highlight such shortcomings; perpetrator X physically exterminates a single member of a protected group with full knowledge of, and complicity with, a genocidal regime, but without the kind of individual desire required under the purpose-based approach. X therefore fulfils the *actus reus*, but as they lack the individual intent to destroy they fall short of the required *mens rea*. It is thus possible for such individuals to pursue genocidal goals with impunity, as culpability would fall to the state. International criminal law must therefore acknowledge the presence of state policies underpinning genocidal acts and use them to attribute criminal responsibility for the grave crime.

The structural rigidity of the purpose-based approach has led many academics to favour the knowledge-based approach, where a genocidal policy becomes relevant.

[11] *Prosecutor v Jelisić* (Judgement) IT-95-10-A (5 July 2001), 100-101.

[12] Eszter Kirs, 'Genocide without a Broader Genocidal Policy?' [2011] Miskolc Journal of International Law 36, 40.

[13] Claus Kress, 'The Darfur Report and Genocidal Intent' [2005] Journal of International Criminal Justice 562, 567; *Prosecutor v Akaseyu* (Judgement) ICTR-96-4-T (2 September 1998), 498; *Prosecutor v Krstić* (Judgement) IT-98-33-T (2 August 2001), 134.

[14] Alexander K A Greenawalt, 'Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation' [1999] Columbia Law Review 2259, 2279. The positive law defence being that attempted at Nuremberg. The accused said no crime had been committed as they following the law of the German State at the time. International law has rejected such a defence: Rome Statute (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 33.

Under this approach, *dolus specialis* is satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the aim of such a campaign was the whole or partial destruction of said group.[15] Bassiouni and Manikas consider *dolus speicialis* to be established if the perpetrator knew that their conduct was part of an overall plan designed for a genocidal purpose.[16] The inclusion of a genocidal policy significantly lowers the threshold required for the prosecution when establishing intent. In order to demonstrate culpability, all that need be established is that they were aware of the existence of a genocidal policy and their actions were congruent with it. It should be noted that the *dolus specialis* is not supplanted with knowledge of the policy in this case. The perpetrator still needs to intend that their actions bring about the whole or partial destruction of the targeted group. The key difference is that the presence of a policy all but confirms such intent. It therefore falls to the prosecution to show the perpetrator knew of the policy; once that knowledge is proven the *dolus specialis* is all but settled. In effect, the application of the knowledge-based approach in defined situations attributes criminal culpability to those who may personally lack a specific genocidal purpose but who commit genocidal acts in full knowledge of the destructive consequences their actions will cause for the targeted group.[17]

The knowledge-based approach to determining a perpetrators *mens rea* in circumstances of genocide is a practical step forward, though suffers certain shortcomings. To return to the previous example, problems are particularly apparent when determining culpability for derivative responsibility. Essentially, the question is: what crime did X actually participate in? The only possible answer would be to say that X participated in the cooperative genocidal activity.[18] Another danger presented by the presence of a genocidal policy under this approach is when X kills a member of a protected group in complete ignorance of the genocidal policy. As X has fulfilled the *actus reus*, and the genocidal policy constitutes the required intent, X may find themselves criminally liable for genocide even if they had not intended it. Whilst attention may thus be afforded to a genocidal policy in establishing the requisite intent element, the importance of individual intent cannot be underestimated. To avoid the above-identified problem, the

[15] Claus Kress, 'The Darfur Report and Genocidal Intent' [2005] Journal of International Criminal Justice 562, 566.
[16] MC Bassiouni and P Manikas, *The Law of the International Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996), 527.
[17] Alexander K A Greenawalt, 'Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation' [1999] Columbia Law Review 2259, 2265.
[18] Claus Kress, 'The Darfur Report and Genocidal Intent' [2005] Journal of International Criminal Justice 562, 566, 574.

minimum requirement of genocidal intent should be knowledge to the perpetrator that a genocidal policy exists and that such a policy poses a serious threat to the future survival of the whole or part of the targeted group.[19]

V PROSECUTION OF INDIVIDUALS AND SUBORDINATES

Due to the nature of genocide there are significant issues when it comes to attributing individual criminal responsibility. An individual perpetrator cannot realistically desire the destruction of a protected group to result from their own genocidal conduct; rather their desire is that the destructive result be brought about by a collective scheme which their acts contribute.[20] In theory it may be possible for a state to employ a genocidal policy to allow subordinate individual perpetrators to commit genocidal acts with impunity. The wording of Article II of the Genocide Convention seeks to ensure that such an arbitrary abuse of state power and gross violation of human rights never occurs. However, when a state employs an entire bureaucracy to realise a genocidal plan, almost every member of it becomes a subordinate. The genocidal regime deployed in National Socialist Germany, for example, saw the establishment of state regulations designed to limit the rights of Jewish, Polish and other minority groups before ultimately aiming at the complete extermination of the Jewish population in Europe.[21] In the original definition of genocide, Lemkin intended 'to provide for the liability of persons who order genocide practices, as well as of persons who execute such orders'.[22] It appears that the existence of a genocidal policy should never be interpreted as deferring criminal liability. Rather, a policy can be evidence of the genocidal intent of a state, and in the case of an individual, evidence of the requisite *mens rea* should the minimum threshold (knowledge of the policy) be met.

VI THE DANGERS OF A GENOCIDAL POLICY REQUIREMENT

There is sound reason for Article II of the Genocide Convention's omission of the requirement of genocidal policy when attributing criminal culpability for genocide. If a policy were made an essential element of the offence, the most important concern would be states using their power arbitrarily, enacting policies stated to be of economic,

[19] Alexander K A Greenawalt, 'Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation' [1999] Columbia Law Review 2259, 2291.
[20] Claus Kress, 'The Darfur Report and Genocidal Intent' [2005] Journal of International Criminal Justice 562, 566, 566.
[21] *Goeth*, Poland, Supreme National Tribunal of Poland sitting at Cracow, 5 September 1946, in TWC, vol. 7, 2-4.
[22] Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Governments, proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 93.

industrious etc. means but are in reality genocidal in nature. One such example is the campaign under the Khmer Rouge in Cambodia which constituted genocide, particularly targeting Muslim Chams and other minority groups, but was stated to be committed in the name of communist ideology.[23] Another example is the attacks against Paraguay's Northern Aché Indians which again effectively resembled genocide but was allegedly pursued in furtherance of economic development.[24]

This pattern of conduct was also experience during the Nazi regime; where a policy of deportation devolved into what became the 'Final Solution'. Considered in *Eichmann,*[25] the District Court of Jerusalem noted that a policy of relocation and enforced emigration of mainly Jews and Poles became one of "liquidation" where Jews, Poles and other minorities targeted under the Nazi regime were expelled to places of mass extermination.[26] Genocide is fundamentally tied to the Nazi atrocities, as is the Armenian genocide;[27] however it should be noted that not all genocides will not be so well "documented" as the one implemented by the Nazis. It therefore appears reasonable to suggest that the International Commission of Inquiry on Darfur placed too-high an emphasis on the lack of genocidal policy for its finding that no genocide had been committed in Darfur.[28]

The danger in mandating the requirement of a genocidal policy as an element of the offence under the Genocide Convention would be the consequent introduction of a 'technicality defence' i.e. when genocidal policies are not affirmatively established as extant, the offence could not be maintained. International courts and tribunals must therefore maintain an expansive approach to the applicable law and exhibit a willingness to look beyond obvious policies or regimes which may appear materially "political" but are essentially and operatively genocidal.

[23] Alexander K A Greenawalt, 'Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation' [1999] Columbia Law Review 2259, 2285; Susan Dicklitch and Aditi Malik, 'Justice, Human Rights, and Reconciliation in Postconflict Cambodia' (2010) 11 *Human Rights Review* 511, 516-517.

[24] Alexander K A Greenawalt, 'Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation' [1999] Columbia Law Review 2259, 2285; Susan Dicklitch and Aditi Malik, 'Justice, Human Rights, and Reconciliation in Postconflict Cambodia' (2010) 11 *Human Rights Review* 511, 516-517.

[25] *The Attorney General v Eichmann* (The District Court of Jerusalem) Case No. 40/61 (11 December 1961).

[26] Ibid [57]-[59], [69]-[73], [89]-[90].

[27] Sareta Ashraph, 'Acts of Annihilation, the Role of Gender in the Commission of the Crime of Genocide' (2017) 103 *Confluences Méditerranée* 15, 17-18; Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide* (University of Pennsylvania Press, 2016) 36; Donna-Lee Frieze, *Totally Unofficial: The Autobiography of Raphael Lemkin* (Yale University Press, 2013) xi.

[28] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc S/2005/60 (25 January 2005) §§ 518, 642; William A Schabas, 'Origins of the Genocide Convention: From Nuremberg to Paris' [2008] *Journal of International Law* 35, 54-55.

VII CONCLUSION

This paper has sought to provide an argument highlighting both the advantages and disadvantages of the presence of a genocidal policy in determining criminal intent. In answer to the question: 'does genocide always require a genocidal policy' the immediate, and widely accepted, answer is no. However, there are practical advantages to the existence of such a policy when determining state culpability and the requisite *mens rea* and *dolus specialis* of individual perpetrators. History teaches us that in most cases of genocide there will always be a genocidal policy present, and in circumstances where such a policy is absent, the courts have found no individual genocidal intent to be established.[29] However, the judgement in *Jelisić,*[30] is firm indication that international tribunals are prepared to attribute individual criminal responsibility for perpetrators acting on an individual basis with the requisite intent. The present definition provided in Article II of the Genocide Convention therefore remains relevant and appropriate in protecting international human rights and individuals against the arbitrary power of the state. Thus, while a genocidal policy should always be used by international courts and tribunals effectively, it should not be made a necessary element of genocide.

[29] Claus Kress, 'The Darfur Report and Genocidal Intent' [2005] Journal of International Criminal Justice 562, 577.
[30] *Prosecutor v Jelisić* (Judgement) IT-95-10-A (5 July 2001), 100-101.