

Rethinking the ‘Crime of Mens Rea’

By Sangkul Kim

FICHL Policy Brief Series No. 59 (2016)

1. Individuality vs. Collectivity

Scholars and practitioners have not hesitated to call genocide a ‘crime of *mens rea*’. This nickname stems from the definition of genocide in Article II of the 1948 Genocide Convention, which has been exactly copied by subsequent international instruments such as Article 4 of the ICTY Statute, Article 2 of the ICTR Statute and Article 6 of the ICC Statute. The provision reads:

[...] [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Compared with other core international crimes such as crimes against humanity and war crimes, this crime definition of genocide is unique in that there does not exist an objective contextual element equivalent to a “widespread or systematic attack against a civilian population” (crimes against humanity) or “international [non-international] armed conflict” (war crimes). For crimes against humanity and war crimes, a specific underlying act (such as murder or torture) perpetrated by an individual is required to be connected to the respective contextual element, which suggests that the substantive legal structure of these two international crimes is two-layered: ‘conduct level’ and ‘context level’. In the case of genocide, however, there is no clue for an objective contextual element within the crime definition. Accordingly, it is difficult to apply the two-layered structure to the crime of genocide. In this context, let us think

about the following hypothetical by George Fletcher: There lived a Sinophobe in New Haven who desires that at least a part of Chinese people on the globe to be wiped out. One day he decided to kill the first two Chinese men he saw on the street and he did so. Did he commit genocide?

On its face, this question sounds ridiculous. How could this apparently simple murder constitute the ‘crime of crimes’? Yet, a careful reading of the definition of the crime of genocide compels us to say that the Sinophobe committed genocide. All the elements seem to be met: “intent to destroy a national group in whole or in part” and “killing members of the group”. That is to say, this crime definition seems to proclaim that the crime of genocide has a single-layered structure: there exists only the ‘conduct level’, and the ‘context level’ is absent. While the ‘conduct level’ signifies individuality, the ‘context level’ signifies collectivity. It follows therefore that, within this definition, there is no sign of collectivity, which is clearly contradictory to the inherently collective nature of genocide.

In sum, the definition of genocide as currently provided in the 1948 Genocide Convention and the Statutes of international courts has counterintuitive implications. This conflict between the individualistic definition of genocide and the fundamentally collective nature of genocide has been the source of confusions and difficulties in applying the definition of genocide to actual cases. Unfortunately, the extent of such confusion as a matter of substantive analysis has been pervasive in the relevant international jurisprudence.

2. Genocide with a Single Victim?

The *travaux préparatoires* of the 1948 Genocide Convention provide that the French delegation ardently argued that, if there exists a genocidal intent, an attack on a single individual could still constitute the crime of geno-

cide.¹ Pieter Drost is of a similar view. He argues that, if a perpetrator's *mens rea* is directed against a multiplicity of victims, his act of killing only one member of a group can still constitute genocide.² In Drost's understanding, genocide is indeed a 'crime of *mens rea*'. He further observes that, provided that killing only one member of a group is committed "with a connecting aim" (or "with the intent to commit similar acts in the future and in connection with the first crime"), a single homicide constitutes genocide. The ICTR Trial Chamber in *Mpambara* also observes that "[t]he *actus reus* of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group".³

This line of understanding had been well reflected in the German Code of Crimes against International Law ('CCAIL') of 2002 which provided the underlying acts of genocide as follows: "Kills a member of the group"; "Causes serious bodily or mental harm to a member of the group [...]"; and "Forcibly transfers a child of the group to another group"⁴ (emphasis added). In the 1948 Genocide Convention and other international instruments, these italicized nouns were provided in the plural form. The majority of the ICC Pre-Trial Chamber in *Al Bashir* also understands that the case law of the ICTY and the ICTR is of the view that the crime of genocide is to be completed if an underlying act against a single victim has been committed with genocidal intent.⁵

3. "Destruction" as *Mens Rea*?

Is it true that the conduct of killing a single individual or forcibly transferring a child of a group to another group by itself is sufficient to constitute the crime of genocide, provided that the act has been committed with genocidal intent? What is exactly the *actus reus* required to constitute this crime? Is it only one of the five underlying acts committed against a single or a couple of victims? What about the "destruction" of a group in whole or in part?

1 UN doc. A/C.6/SR.73, pp. 90–92 (<http://www.legal-tools.org/doc/74af49/>).

2 Pieter Drost, *The Crime of State: Genocide*, Leyden, Sythoff, 1959, pp. 84–86.

3 ICTR, *Prosecutor v. Mpambara*, Trial Judgement, 11 September 2006, ICTR-01-65-T, para. 8 (<http://www.legal-tools.org/doc/ce61de/>).

4 English translation of the CCAIL is available at <http://www.legal-tools.org/doc/a56805/>. For more explanation of the CCAIL, see Steffen Wirth, "Germany's New International Crimes Code: Bringing a Case to Court", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 1, p. 156.

5 ICC, *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09, para. 119 (<http://www.legal-tools.org/doc/e26cf4/>).

A plain reading of the crime definition certainly suggests that "destruction" is not an *actus reus*, but a component of *mens rea*, that is, "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This phrase contained in the chapeau part of the crime definition is referred to as 'special intent', 'specific intent', '*dolus specialis*' or 'genocidal intent'. Since the "destruction of a group in whole or in part" forms part of this *mens rea*, literally speaking, it is not required to be materialized. Given the nature of five underlying acts, drafters should be complimented for this nuanced formulation. That is, from the crime definition of genocide, we can see that, in certain cases, the actual destruction of a group might be a long process: if the perpetrator intended to destroy a group through the underlying act provided in (d) or (e), it will take at least a couple of generations for the destruction, in whole or in part, of the group to actually take place. For this purpose, the International Law Commission used the notion of "biological destruction" (as opposed to that of "physical destruction" for the acts provided in (a) to (c)). As a consequence, for the purpose of determining whether the crime of genocide has been completed, the destruction *per se* is not a reliable source: you simply cannot wait generations in order to decide whether a case at hand constitutes the 'crime of crimes' (genocide).

4. "Destruction" as *Actus Reus*?

Though the "destruction" *per se* is not *actus reus*, the absence of actual destruction in whole or in part of a collective at the 'context level', inflicted by another collective, deprives genocide of the dimension of objective 'scale' that represents the serious criminality of international concern. The contextual element of crimes against humanity or war crimes not only performs the role of substantive element of crime, but also the role of justifying international jurisdiction over the two crimes. In other words, a "widespread or systematic attack against a civilian population" and "international [non-international] armed conflict" have dual functionality: 'element of crime' and 'element of international jurisdiction'.⁶

Despite the absence of an objective contextual element within the crime definition of genocide, one might say that the demanding requirement of genocidal intent ("with intent to destroy") is capable of representing the level of criminality of international concern. In my view, however, this is just a delusion. Apart from cases involving the Srebrenica massacre, there has been no ICTY conviction of genocide. This clearly shows that judges are very reluctant to proceed to convict defendants of

6 For more explanation of the meaning and function of 'jurisdictional element', see M. Cherif Bassiouni, "Crimes Against Humanity", in M. Cherif Bassiouni (ed.), *International Criminal Law, Volume I: Sources, Subjects and Contents*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 476–479.

genocide without there being a certain level of objective scale of violence or destruction.⁷ If it is really the individualistic genocidal intent element that matters, the Trial Chamber in *Jelisić* should have convicted the accused of genocide: the Prosecution adduced sufficient evidence before the Trial Chamber, particularly that of the accused's words and deeds, which points at the accused's individual intent to destroy the Bosnian Muslim group in Brčko area.

5. Objective Scale Matters

What the *Jelisić* Trial Chamber set forth as a reason for its genocide acquittal is the absence of objective scale of violence at the 'context level' (I call it 'collective genocide') which should have provided the Chamber with a contextual basis of finding the accused guilty of genocide at the 'conduct level'.⁸

Indeed, Raphael Lemkin who coined the term 'genocide' in the 1940s was clear in his mind. He clarified that "destruction in part must be of a substantial nature [...] so as to affect the entirety".⁹ He further observed that "the [Genocide] Convention applies only to actions undertaken on a mass scale and not to individual acts [...]".¹⁰ Despite the absence of this collective dimension of genocide within the crime definition, Lemkin's view has been followed by Nehemiah Robinson in 1960,¹¹ the so-called Ruhashyankiko Report of 1978,¹² the so-called Whitaker Report of 1985,¹³ the US Genocide Convention Implementation Act of 1987,¹⁴ the International Law Commission in 1996,¹⁵ and subsequently the case law of the ICTY and the ICTR. The collective dimension of genocide reflected in these materials manifests itself as the 'substantiality requirement' that requires a showing of the destruction of a substantial part of a group.¹⁶ In

this manner, the notion of "destruction" comes out of the realm of *mens rea* and functions as a contextual element. Put differently, "destruction of a substantial part of a group" at the 'context level' becomes an essential objective element of the crime of genocide in parallel with the genocidal intent element.

In this respect, the *Krstić* Appeals Chamber makes it clear that the genocidal intent and the requirement of "targeting a whole or a substantial part of a group" constitute the *two* key "requirements" of genocide. The Chamber states that "[t]he gravity of genocide is reflected in the stringent requirements [...] – the demanding proof of specific intent *and* the showing that the group was targeted for destruction in its entirety or in substantial part [...]".¹⁷ These developments, without any doubt, tell us that genocide is not a 'crime of *mens rea*'. The crime of genocide should be understood to have a two-fold structure consisting of 'context level' and 'conduct level' as is also the case with crimes against humanity and war crimes.

6. The Collective Dimension of Genocide in the Case Law

The discussion thus far leads us to conclude that the collectivity at the 'context level' (as opposed to the individuality at the 'conduct level') has unduly been overlooked as a matter of substantive analysis, that is, in theory and conception. As a matter of the practical application of law, however, the case law of the *ad hoc* international criminal tribunals has, advertently or inadvertently, paid due attention to the collectivity of genocide at the context level.

In *Akayesu*, the first-ever conviction on genocide in the history of the ICTR, the Trial Chamber holds that the accused is guilty of genocide. It is crucial to note that the Chamber's finding on the accused's individual genocidal intent is based upon its preceding finding of a collective genocidal intent. More specifically, before considering the accused's individual crime of genocide in the commune of Taba,¹⁸ the Chamber first finds a collective crime of genocide throughout Rwanda in 1994 in a section titled, "Genocide in Rwanda in 1994?".¹⁹ Hence, the Chamber concludes that "genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group".²⁰

7 These cases include *Jelisić*, *Stakić*, *Sikirica*, *Brđanin*, and *Karadžić* (Count 1). Only the cases involving the Srebrenica massacre, such as *Krstić*, *Popović et al.*, *Tolimir* and *Karadžić* (Count 2), have succeeded in securing genocide convictions.

8 For a similar reasoning, see ICTY, *Prosecutor v. Karadžić*, Transcript, 28 June 2012, IT-95-5/18-T, p. 28769.

9 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series, 1976, p. 370, as cited in Lawrence J. LeBlanc, *The United States and the Genocide Convention*, Duke University Press, Durham, 1991, p. 44, note 21.

10 LeBlanc, *ibid.*, p. 45, note 23, 1991. See also Raphael Lemkin, "Genocide as a Crime under International Law", in *American Journal of International Law*, 1947, vol. 41, p. 151 ("[...] especially in cases where such tensions result in large scale criminality").

11 Nehemiah Robinson, *The Genocide Convention: A Commentary*, Institute of Jewish Affairs, New York, 1960, p. 63.

12 UN doc. E/CN.4/Sub.2/416, para 54.

13 UN doc. E/CN.4/Sub.2/1985/6, para. 29.

14 18 U.S.C. § 1091(a).

15 UN doc. A/51/10, p. 45.

16 The "substantiality" should be understood as an objective element. Namely, a subjective understanding thereof – that is, "intending to destroy at least substantial part of a group" – should be regarded

as misleading. I believe that the validity of this proposition can be demonstrated by the ICTY Chambers' consistent practice that has refused to acknowledge genocide other than in Srebrenica.

17 ICTY, *Prosecutor v. Krstić* ('*Krstić* Appeal Judgment'), Judgment, 19 April 2004, IT-98-33-A, para. 37 (<http://www.legal-tools.org/doc/86a108/>).

18 ICTR, *Prosecutor v. Akayesu*, Judgment, 2 September 1998, ICTR-96-4-T, paras. 727–730 (<http://www.legal-tools.org/doc/b8d7bd/>).

19 *Ibid.*, paras. 112–129.

20 *Ibid.*, para. 126.

It is exactly this usage of the term “genocide” that I call ‘collective genocide’. I am not sure whether it can legitimately constitute a legal finding because the concept of “genocide” here is not strictly a legal notion – that is, not related to any specific individual defendant or defendants. Put differently, the generic notion of “genocide in Rwanda” deviates from the definition of genocide focusing on the ‘conduct level’ as its necessary ingredient. Rather, it seems more precise to characterize it as being a generic concept deficient of any statutory basis. For the purpose of finding the accused’s individual genocidal intent, the Chamber’s reasoning and answer in respect of the question of “Genocide in Rwanda in 1994?” (‘collective genocide’ and ‘collective genocidal intent’) actually provides a critical substantive legal ground. In one way or the other, the subsequent case law of the ICTY and the ICTR has consistently addressed the collective dimension of the crime of genocide, albeit in an oblique and indirect manner.

7. A Collective Theory of Genocidal Intent

A rare exception that deals with the collectivity of genocide in a straightforward way, in particular the notion of collective genocidal intent, is the Trial and Appeals Judgment in *Krstić*. If I take up the *Krstić* Trial Chamber’s words, the notion of collective genocidal intent is an “intent to destroy [...] apart from the intent of particular perpetrators”.²¹ Since it is an intent “apart from the intent”, it exists external to the individual inner state of mind (the realm of *mens rea*).²² And, since it exists externally, the collective genocidal intent “must be discernible in the criminal act itself [...]”.²³ The term “criminal act” in this sentence of course means collective actions performed by a collective at the ‘context level’. In the same vein, the Appeals Chamber in *Krstić* also observes that “[t]he inference that a particular atrocity was moti-

vated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified”.²⁴

The emphasis placed by these Chambers upon the significance of collective genocidal intent leads us to doubt whether the enormous attention that has been paid to the concept of individualistic genocidal intent is worthwhile. There is an impressive number of scholarly articles addressing the true meaning of genocidal intent, in particular, surrounding the two divergent interpretative approaches: the purpose-based theory on one hand, and the knowledge-based approach on the other.

Recently, I have published a monograph entitled *A Collective Theory of Genocidal Intent*.²⁵ Tackling one of the most confusing and controversial issues in the field of international criminal law – the genocidal intent element – this monograph seeks to develop an account of genocidal intent from a collectivist perspective. Drawing upon the two-layered structure of the crime of genocide composed of the ‘conduct level’ and ‘context level’, it detects the genocidal intent element at the ‘context level’. The genocidal intent found in this manner belongs to a collective, which significantly departs from the prior individualistic understandings of the notion of genocidal intent. I argue that the crime of genocide is not a ‘crime of *mens rea*’. Furthermore, collective genocidal intent at the ‘context level’ operates in a way that renders the crime of genocide itself a criminal enterprise. The idea of genocide as a criminal enterprise also suggests that genocide is a leadership crime in respect of which only the high-level actors can be labeled as principals (as opposed to accessories).

Dr. Sangkul Kim is Research Fellow with the Centre for International Law Research and Policy. He has previously worked as Associate Legal Adviser at the Office of the Prosecutor of the International Criminal Court (2004-2008).

ISBN: 978-82-8348-038-2.

FICHL-PURL: <https://www.ficHL.org/pbs/59-kim/>.

LTD-PURL: <http://www.legal-tools.org/doc/afab3c/>.

21 ICTY, *Prosecutor v. Krstić* (‘*Krstić* Trial Judgment’), Judgment, 2 August 2001, IT-98-33-T, para. 549 (<http://www.legal-tools.org/doc/440d3a/>).

22 Quoting the philosopher David J. Velleman’s account of shared intention which states that “intentions may be extramental, existing outside of mental states”, philosopher Brook Jenkins Sadler says she is “sympathetic to the idea that intentions are not necessarily mental states”, see Brook Jenkins Sadler, “Shared Intentions and Shared Responsibility”, in P. French and H. Wettstein (eds.), *Shared Intentions and Collective Responsibility*, 30 *Midwest Stud. Phil.*, 2006, vol. 30, p. 125, note 29.

23 *Krstić* Trial Judgment, para. 549, see *supra* note 21.

24 *Krstić* Appeal Judgment’, para. 34, see *supra* note 17.

25 Sangkul Kim, *A Collective Theory of Genocidal Intent*, T.M.C. Asser Press, The Hague, 2016.