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CLARIFYING GENOCIDAL INTENT: A NEW INTERPRETIVE DOCTRINE

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ESSAY

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The ulterior intent provision of the international crime of genocide is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. This special intent clause is the hallmark of genocide, yet it lacks uniform understanding and universality. Consequently, it has drawn interpretations across the mens rea spectrum, including dolus directus, dolus indirectus, and the broader notion of dolus eventualis. It shall be the aim of this essay to clarify genocidal intent and propound a clear and understandable interpretive doctrine, in the absence of which genocide will remain perennially susceptible to divergent interpretations. The doctrine shall necessitate the purposeful targeting of an individual by reason of his or her membership of a protected group together with the foresight and desire to destroy the group, in whole or in part. Put simply, genocidal dolus specialis can only encompass dolus directus. Although there is considerable academic support for the broadening of intent beyond this strictly goal-oriented standard to a result-oriented, or knowledge-based approach, to do so would be to subvert the concept of genocide as originally envisaged by Raphael Lemkin, and the notions of genocidal intent as envisaged at the preparatory stage of the Genocide Convention. Moreover, it would blur the distinction between genocide and crimes against humanity, and would only serve to undermine the rule of law.
I. INTRODUCTION: THE EVOLUTION OF GENOCIDE

The intentional destruction of groups is a primitive concept rooted in base evolutionary imperatives, and rationalized by ideologies like utilitarianism, irredentism and fanaticism. Its rhetoric pervades ancient religious texts. It stains history, even pre-history. However, until the mid Twentieth Century, it was a crime without international provision: “a crime without a name.”

It was not until 1933 that a multilateral convention criminalizing deliberate group destruction was propounded. Its Polish author submitted that the Law of Nations should be broadened to incorporate new offences safeguarding transnational danger. Most notable among his proposals were the offences of barbarity and vandalism, the former of which was defined as “the premeditated destruction of national, racial,

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1 See, e.g., Peter Singer, How Can We Prevent Crimes Against Humanity, in HUMAN RIGHTS HUMAN WRONGS, 92-137 (Nicholas Owen ed., 2003) (referring to the biblical depiction of mass persecution, for example the Israelites’ systematic slaying of Midianites, in which the perpetrators derived a genetic benefit from their actions).
2 Kurt Jonassohn & Karin S. Björnson, Genocide During the Middle Ages, in ENCYCLOPEDIA OF GENOCIDE, 275, 276 (Israel W. Charny ed., 1999).
4 See, e.g., NUMBERS 31:1-18, Revised Standard Version (Midianites were systematically massacred); SAMUEL, 15:3 (Amelekites were massacred); DEUTERONOMY, 20:17 (God ordered the total destruction of Hittites, Amorites, Canaanites, Per’izzites, Hivites and Jeb’usites).
religious and social collectivities.” The proposals were rejected by the League of Nations at the 5th Conference for the Unification of Penal Law, Madrid. The author of the 1933 report was pioneering jurist Raphael Lemkin. He was learned in the history of group destruction, and conscious of the lack of legal redress, and so he had made it his *raison d’être* to criminalize these group offences in international law. It was in 1944, now a war refugee residing in America, in his seminal work on the Axis rule in occupied Europe during the Second World War, that he evolved his Madrid Report into a new offence of “genocide,” a neologism of the Greek *genos* (race), and the Latin *cide* (to kill).

Lemkin defined genocide as:

> [A] coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.

Lemkin’s definition laid the groundwork for the international codification of genocide four years later.

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9 *RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE* (1944) [hereinafter Lemkin]

10 *Id.* at 79.
The International Military Tribunal at Nuremberg was the first legal tribunal to adopt Lemkin’s notion of genocide, but strictly as a war crime. This was the extent of its restrictive ambit on genocide. Moved to address this limitation, the United Nations General Assembly adopted Resolution 96(I) of 1946, affirming genocide as a crime under international law, the punishment for which “was a matter of international concern”¹¹ and calling on the Economic and Social Council to draw up a draft convention for said crime. In 1948 the United Nations General Assembly unanimously adopted the Convention on the Prevention and Punishment of Genocide (hereinafter, Genocide Convention) to address the “odious scourge that [had] inflicted great losses on humanity.”¹² The offence, which incorporates the first stage of Lemkin’s definition, was defined as follows:

Article II

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;

(e) Forcibly transferring children of the group to another group.
[Emphasis added].

This wording has subsequently been incorporated verbatim into Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia, Article 2 of the Statute of the International Criminal Tribunal for Rwanda and Article 6 of the Rome Statute of the International Criminal Court.

To rephrase, a defendant must commit any one of the five “genocidal” acts against one of four protected groups. This genocidal actus reus must additionally be accompanied by a corresponding mens rea in accordance with the interpretive guidelines set out in Article 30 of the Rome Statute. Once it has been proved beyond reasonable doubt that a defendant has intentionally perpetrated a genocidal act, conviction will rest on a second ulterior mens rea element, which, “goes beyond the mere performance of the act.” This specific intent clause forms the subject of this essay.

13 Id.
II. GENOCIDAL INTENT: THE DOLUS SPECIALIS ELEMENT

The second *mens rea* element of genocide in international law is defined as the “…intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” In the interests of consistency, this element will from hereon in be referred to as genocidal *dolus specialis*.

This auxiliary mental element demarcates genocide from the relatively lesser offence of crimes against humanity, and, remarks Ambos, “contributes to its particular wrongfulness and seriousness.” Indeed, in the *Akayesu* judgement, it was described as the crux, or “constitutive element” of genocide. In the interests of the rule of law, it is thus imperative that genocidal *dolus specialis* is wholly indubitable.

Bingham identifies as a key principle of the rule of law that it must be “accessible and so far as possible be intelligible and predictable.” Of this he reasons, “we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty.” Said the European Court of Human Rights, “a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.” Moreover, the law cannot serve as a deterrent, if the potential criminal does not know from what it is he or she is being deterred.

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21 *Id.*


23 *Id.* at 38.
Although genocidal *dolus specialis* is *prima facie* “intelligible and predictable,” as Van der Vyver notes, *mens rea* may assume three forms: *dolus directus*, *dolus indirectus* and *dolus eventualis*.\(^{24}\) While it is submitted that the *dolus specialis* should be confined to *dolus directus*, there is considerable academic support for the two broader alternatives, and thus an interpretative debate has now arisen, the rule of law undermined. These three distinct interpretations will now be considered in turn.

### III. THE KNOWLEDGE-BASED INTERPRETATION: DOLUS INDIRECTUS AND DOLUS EVENTUALIS

The *dolus indirectus* and *dolus eventualis* *mens rea* standards are result-oriented. That is to say, they shift the emphasis from the mind of the offender to the consequences of his or her actions. This is often termed the knowledge-based approach.

What follows is a chronological summation of genocide jurisprudence in which the knowledge based interpretation was supported or considered. The scholarly proposals for the introduction of this broader standard will then be subject to thorough analysis.

In the case of *Jelisic*, it was put to the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber that genocidal intent could encompass a *dolus indirectus* standard. Counsel for the prosecution submitted that the Trial Chamber

“erred in law”\(^{25}\) by limiting the requisite genocidal intent to what it termed “a civil law *dolus specialis* standard.”\(^{26}\) It posited that this standard is without “fixed meaning”\(^{27}\) and could be broadened to include standards of conscious desire and knowledge of the destructive nature of the act. It is plain from reading the Trial Chamber transcript that at no point in its judgement did it refer to *dolus specialis* as a standard of intent, only as a synonym of genocidal intent. At no point did the Chamber adopt a civil law *dolus specialis*. It employed only a strict *dolus directus* standard, for which there was a fixed meaning. Consequently, it rejected the appeal on this point and acquitted Jelisic on the count of genocide because he “…killed arbitrarily rather than with the clear intention to destroy a group.”\(^{28}\)

The International Criminal Tribunal for Rwanda’s (ICTR) judgement in *Akayesu* is often cited as the epithet of ad hoc tribunal jurisprudence on genocidal *dolus specialis*. It is a seminal case in many regards, rendering the first conviction for the crime of genocide. However, on closer analysis, the Trial Chamber’s judgement on genocidal intent is susceptible to divergent interpretations. Some scholars submit that *Akayesu* supports a purposive, *dolus directus* standard.\(^{29}\) They draw on rhetoric like, “clearly seeks to produce the act charged,”\(^{30}\) and, “clear intent to destroy.”\(^{31}\) Some allude to the broader language used, for instance: “the offender is culpable if he knew or should

\(^{25}\) Prosecutor v Jelisic, Case No. IT-95-10-A, Prosecution’s Brief, at para. 5.5 (Jul. 5, 2001) [hereinafter Jelisic Prosecution Brief].

\(^{26}\) Prosecutor v Jelisic, Case No. IT-95-10-A, Judgement, at para. 42 (Jul. 5, 2001) [hereinafter Jelisic Judgement].

\(^{27}\) Jelisic Prosecution Brief, *supra* note 24, at para 4.22.


\(^{31}\) Id.
have known that the act committed would destroy, in whole or in part, a group,“32 as indicative of a knowledge-based approach. 33 Akhavan posits that this paradox is due to the Trial Chamber flitting between dolus specialis and dolus generalis standards.34 Read in context, it is to be assumed that Akayesu’s reference to broader general intent standards is anomalous.

Prosecution counsel nevertheless relied on the ambiguous Akayesu judgement before the ICTY Trial Chamber in Sikirica et al, in its judgement on Defence Motions to Quit.35 It submitted that for the Trial Chamber in this case to limit its construction of genocidal intent to dolus directus would run contrary to the ruling in Akayesu. The Trial Chamber in Sikirica was quick to dismiss this submission. It reasoned that from a literal interpretation of the dolus specialis clause “…the meaning of intent is made plain…”36 and that consequently “it is unnecessary to have recourse to theories of intent.”37 Although the foregoing Trial Chamber judgement is rather enigmatic, it can and has been inferred from its judgement that it was advocating a strict purposive interpretation.38 Ambos deduced that “[i]n substance, the Chamber followed the Jelisic Appeal Judgement’s “seeks to achieve” standard.”39

32 Akayesu Judgement, supra note 19, at para. 520.
35 Prosecutors v Sikirica, Case No IT-95-8-T, Judgement on Defence Motions to Acquit (Sept. 3 2001) [hereinafter Sikirica Judgement].
36 Id., at para 60.
37 Id.
39 Ambos, What Does ‘Intent to Destroy’ in Genocide Mean?, supra note 18, at 838.
In like manner, it has been contended that the Trial Chamber in *Krstic* adopted a broad knowledge-based interpretation of genocidal intent. However, while the *Akayesu* judgement was enigmatic on genocidal intent, the *Krstic* judgement has simply been misconstrued. Scholars will allude to paragraph 595 of the judgement, in which the Chamber evinces the Bosnian Serb forces’ genocidal intent to destroy the Bosnian Muslim victim group because they “knew, by the time they decided to kill all of the military aged men, that the combination of those killings, with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population…” However, this is not the application of a *mens rea* standard. The Chamber here is merely inferring intent from the evidence, which includes, but is not limited to, the Bosnian Serb forces’ knowledge that their acts were likely to destroy, in whole or in part, the victim group.

The Chamber’s analysis of the *dolus specialis* was rendered in paragraph 571, in which it briefly considered and dismissed *dolus eventualis*, before concluding, “[f]or the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompass only acts committed with the *goal* of destroying all or part of a group.”

It is the rise in academic support that provides the soundest basis on which to make a case for a knowledge-based interpretation. This support stems from the innate ambiguity of criminal intent. As Kress remarked:

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42 Id., at para. 571.
First, the word 'intent' lends itself to the purpose, as well as to the knowledge-based approach. Secondly, the drafting history of the Genocide Convention does not give clear directions. Thirdly, there is no compelling domestic law analogy on which to base one interpretation or another. Fourthly, the question cannot be decided by reference to customary international law.

Jones advocates a knowledge-based interpretation because it is consistent with his desire for a liberal, “soft and inclusive” definition of genocide, drawing on historian Winter’s belief that “…the boundaries surrounding genocide ought to be drawn liberally and not excessively.” He conforms to Benjamin Whitaker’s inclusion of broad terms like “…conscious acts or acts of advertent omission” to define genocidal intent. Jones’ submission would have more foundation if the crime of genocide were the only tool in international law with which to prosecute widespread persecutory acts. However, acts that fall short of genocide’s strict dolus specialis requisite may still fall within the more broadly defined ambit of crimes against humanity, the mens rea standard for which is dolus eventualis. It therefore follows that the liberization of the genocidal dolus specialis will only serve to blur the distinction between these two offences. More on the relationship between these two international criminal offences will be said later on in the analysis.

A noted proponent of Jones’ liberal reading of genocidal intent is Greenawalt. In his work *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, Greenawalt also proposes a knowledge-based interpretation as a desirable alternative to what he terms the “prevailing”47 purposive approach. In his nuanced analysis, Greenawalt confers the following meaning on genocidal *dolus specialis*: “… the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.”48

As Greenawalt notes, what he is proposing necessitates “an element of selection,”49 and in this sense it is more akin to *dolus indirectus* than the broader notions of *dolus eventualis* or recklessness; it remains thus, a targeted crime. Nevertheless, Greenawalt’s notions of selection are broadly drawn. Under his proposal, a genocidaire need not selectively target members of a group. Rather, selection is deduced from “the general context in which victims are targeted.”50 As an example, Greenawalt commented that “targeting” could be inferred by “knowledge of the criteria for selection.”51

Greenawalt contends that his approach provides a more traditional interpretation of an ambiguous concept. He alludes to common-law doctrine, pursuant to which intent is predicated on knowledge and foreseeability,52 and civil law jurisdictions, in which similarly broad standards are imposed. However, as Greenawalt himself notes, strict,
specific intent standards are also employed in these arenas. The *mens rea* standard is shaped less by tradition and more by the nature of the offence. It therefore follows that whether or not a knowledge-based interpretation is the more traditional is of little significance.

Greenawalt also alludes to Article 30 of the Rome Statute, Section 1 of which states that “unless otherwise provided” the *mens rea* for crimes falling within the jurisdiction of the court extends to intent and knowledge.\(^{53}\) Section 2 stipulates that intent can be derived from the following:

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

(b) In relation to consequences, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.\(^{54}\)

It is contended that the proviso “unless otherwise provided” exempts genocide from the ambit of Article 30.

Greenawalt’s next argument goes back to the introductory section of this essay on the evolution of genocide. In his analysis of the normative origins of genocide, Greenawalt tentatively infers that because Lemkin proposed a broad range of proscribed genocidal acts, he may have envisaged a more liberal, result-oriented *dolus specialis* standard than his definition of genocide suggests. As Greenawalt posits, the range of acts originally proposed by Lemkin were so broad “it is difficult to imagine


\(^{54}\) *Id.*, Art. 30(2).
that all of them could have fit within a framework of a plan to destroy a group.”

However, it is difficult to square this speculation with Lemkin’s rhetoric. His work is littered with terms that are irreconcilable with a knowledge-based approach, like “coordinated,” “objectives” and, “aiming.” Genocide’s forebear, barbarity, necessitated premeditation. Moreover, the enumerated genocidal acts carry their own actus reus and mens rea standards, without which ulterior mens rea is irrelevant.

Greenawalt argues that in any event, Lemkin’s definition was less a representation of a generalised definition of genocide than it was a retrospective criminalization of the Axis powers during World War II. It is posited that Lemkin’s definition was in fact rooted in his earlier work, in particular his study of which predated Nazism and the Holocaust. As the introductory section makes plain, Lemkin was not merely a reactionary to the Holocaust; he was a student of genocide. Indeed, the persecution of Armenians and Assyrians, to which his study pertained, is more closely analogous to more recent persecutory acts, which do fall under the auspices of the new genocide definition. Lebor for instance, draws the following similarities between the Ottoman Turk’s actions and the persecution that pervaded the former Yugoslavia in the 1990’s: “Raising militia’s composed of former prisoners to commit atrocities; publicly executing notables and community leaders to break the victim’s will; destroying not just homes but the very means of life; polluting wells, fields and water supplies.”

55 Greenawalt, Rethinking Genocidal Intent, supra note 29, at 2271.
56 Lemkin, supra note 9, at 79.
57 Lemkin, the Evolution of the Genocide Convention, supra note 8, at 21.
58 Greenawalt, Rethinking Genocidal Intent, supra note 29, at 2272.
Greenawalt’s discourse draws on the legislative history of the definition for evidence of a broader *raison d’être*. He interprets the language of UN Resolution 96(I) as “a departure from Lemkin’s initial conception of genocide as a crime consisting of acts that deliberately discriminate against members of particular…groups.”

However, as Greenawalt noted himself, “it did not purport to provide a statutory definition.” It reads more as a condemnation of genocide than anything else.

Continuing his analysis of the drafting history of the Genocide Convention, Greenawalt assayed the debates played out in the Ad Hoc Committee and the Sixth Committee of the General Assembly. Whereas the former adopted the “on the grounds of” proviso, the latter voted twenty-seven to twenty-two to replace the delineation of motives with an “as such” clause, under which the intentional destruction of a predefined group must be “as such.” The issue for the Committee was what this two-word phrase encapsulated. It was not in the Committee’s remit to lay down an interpretive doctrine. Nevertheless, Greenawalt cited the divergent constructions of the “as such” clause as evidence that there was no universal interpretative consensus of *dolus specialis*; there was no sweeping support for a *dolus directus* approach. Of particular interest to Greenawalt was the Uruguayan representative’s summation at the Committee’s Seventy Eighth Meeting, in which he alluded to as many as three interpretative possibilities of the “as such” phrasing. These ranged from the explicit reference to motives to no enumeration of motives at all. Of this, Greenawalt remarked that it was the “…clearest statement of the interpretive possibilities that the

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60 Greenawalt, Rethinking Genocidal Intent, supra note 29, at 2272.
61 Id.
deliberations would see.” The member called for a working group to address this interpretive schism. His proposal was rejected. Greenawalt is correct to assert that there was no uniform understanding of genocidal mens rea at the preparatory stage of the Genocide Convention. However, the contradistinction between motive and intent is so conceptually nuanced that a debate on the incorporation or omission of the former lacks any real significance. As a case in point, a strict purposive interpretation of genocidal dolus specialis can stipulate motive or, simply by re-phrasing, disregard it altogether. In the case of the former, one would say that dolus directus necessitates motive because the defendant must target his or her victim by reason of his or her group identity, and be moved to destroy a group by reason of its type. However, one could also argue that the dolus directus standard requires the defendant to target a member of a proscribed group on any grounds, and desire the destruction of said group for any reason whatsoever.

Moreover, in ad hoc tribunal jurisprudence, the as such phrasing has been taken to mean that the defendant’s intent must pertain to the destruction of a protected group and not merely individuals within said group. The breadth of genocidal intent therefore does not necessarily rest on this two-word clause.

Greenawalt’s main criticisms of a dolus directus standard pertain to subordinate liability. He argues that such a strict reading of genocidal intent will force tribunals to adopt unsuitably broad evidentiary standards to convict subordinates who would otherwise fall outside the ambit of the definition. He alludes to the Akayesu judgement, in which the ICTR Trial Chamber was prepared to infer genocidal intent

64 Id., at 2279.
65 See e.g., Krstic Judgement, supra note 41, at 561; Akayesu Judgement, supra note 19, at para. 521.
66 Id., at 2281.
from the “general context,” of the offence, including acts perpetrated by other
offenders.\(^{67}\) This argument has support. As Kress noted, there exists “a temptation to
introduce the knowledge-based approach under evidential disguise [that] can be easily
explained in light of the paradigm illustration of the problem at stake provided by the
Eichmann case,”\(^{68}\) in which Eichmann was “imbued” by the District Court of
Jerusalem with the collective intent to destroy.\(^{69}\) Similarly, Kress alluded to potential
structural flaws in the purposive approach:

A so-structured actus reus cannot simply be combined with a mental requirement that
is more typical for the leadership level without running into conceptual problems.\(^{70}\)

In answer to the above, it is submitted that this evidentiary standard is a pragmatic
strategy widely adopted in genocide jurisprudence.\(^{71}\) It is not particularly undesirable,
nor is it unique to genocide. It is also contended that Greenawalt is wrong to question
whether, in light of this broad evidentiary standard, “the specific intent standard does
any work at the individual level.”\(^{72}\) The specific intent standard requires clear intent on
the part of the defendant to destroy a proscribed group because it is a proscribed
group. Regardless of the evidentiary standard adopted, the court still has to be
satisfied that the defendant has met this \textit{dolus directus} requirement.

\(^{67}\) Akayesu Judgement, \textit{supra} note 19, at para. 523.

\(^{68}\) Kress, \textit{The Darfur Report and Genocidal Intent, supra} note 43, at 572.


\(^{70}\) Kress, \textit{The Darfur Report and Genocidal Intent, supra} note 43, at 575.

\(^{71}\) Prosecutor v Rutaganda, Case No. ICTR-96-03-R, Judgement, at para. 61 (Dec. 6, 1999) [hereinafter
Rutaganda Judgement]; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement,
at para. 93 (May 21, 1999).

\(^{72}\) Greenawalt, Rethinking Genocidal Intent, \textit{supra} note 29, at 2282.
Greenawalt similarly questioned the Ad Hoc Tribunal’s broadening of the mens rea requisite for accomplices to genocide. He criticised this as a means to evade a restrictive dolus specialis. It is submitted that the interpretation of genocidal dolus specialis is of no relevance to the liberal mens rea standard employed in cases of complicity. The Trial Chamber in Akayesu held that an accomplice does not even need to satisfy the dolus specialis requisite. It is sufficient that he or she “knowingly” aided or abetted a genocidaire. Desirable or not, this is not a consequence of a narrow dolus specialis. As the Chamber in Akayesu noted, this is the evolution of a traditional legal position on complicity in domestic and international arenas. It therefore pertains to an issue outside the sphere of this debate.

Greenawalt regards the limited reach of a goal-oriented genocidal dolus specialis as a drawback. He comments, for example, that it would fail to criminalize actors that are absent “…a clear objective to destroy the group in its collective sense.” He cites a number of examples, including the persecutory campaign of the Khmer Rouge in Cambodia, as it was “committed in the name of communist ideology.” Greenawalt laments that “a particular mental attitude toward the collective survival of the group as a distinct unit,” as necessitated by a dolus directus standard, may be absent or difficult to prove. It is submitted that if it is the former and the defendant acts absent any purpose whatsoever to destroy a group as such, the defendant is not a genocidaire. However, if it is the latter, a broad evidentiary standard will enable a tribunal, in this instance the Extraordinary Chambers in the Courts of Cambodia (ECCC), to infer the necessary intent from the context of the offence. It so happens that almost a decade on

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73 Akayesu Judgement, supra note 19, at para. 540.
74 Id., at para. 538-539.
75 Greenawalt, Rethinking Genocidal Intent, supra note 29, at 2285.
76 Greenawalt, Rethinking Genocidal Intent, supra note 29, at 2282.
77 Greenawalt, Rethinking Genocidal Intent, supra note 29, at 2286.
from the publication of Greenawalt’s article, Deputy Secretary of the Communist Party of Kampuchea, Chea Nuon, was charged with, among other offences, genocide, pursuant to Article 4 of the Law on the Establishment of the Extraordinary Chambers.\textsuperscript{78}

On the submission that a knowledge-based interpretation will blur the distinction between genocide and crimes against humanity, Greenawalt argues that a strict \textit{dolus specialis} is not the defining characteristic of genocide. He submits that the principle difference between crimes against humanity and genocide lies in the “interests” they safeguard.\textsuperscript{79} He argues that whereas the former protects civilian populations from persecutory acts, the latter governs “group survival.”\textsuperscript{80} However, if the distinguishing feature of an offence is that it pertains to group survival, it is imperative that its \textit{mens rea} does also. If a defendant does not directly intend the destruction of a group as such, how can it be said that he or she has satisfied the core requisite of the crime. Indeed, the general consensus in ad hoc tribunal jurisprudence is that a purposive \textit{dolus specialis} is necessary to demarcate genocide from other crimes in international law, in particular persecution.\textsuperscript{81} This echoes the sentiments advanced at the \textit{travaux préparatoires} of the Genocide Convention, in which for example the Brazilian representative commented that absent a specific intent to destroy, there was no crime of genocide, however abhorrent the act.\textsuperscript{82}

\begin{footnotesize}
\begin{enumerate}
\item Greenawalt, Rethinking Genocidal Intent, supra note 29, at 2293.
\item Id.
\item Sikirica Judgement, supra note 35, at 58.
\item Summary Records of the meetings of the Sixth Committee of the General Assembly, U.N. GAOR, 3rd Sess., at 109 (Dec. 10, 1948)
\end{enumerate}
\end{footnotesize}
Another advocate of the knowledge-based approach is Claus Kress. In his article, *The Darfur Report and Genocidal Intent*, he proposes the following dolus specialis comprising an internal and contextual mens rea: “(a) knowledge of a collective attack directed to the destruction of at least part of a protected group, and (b) *dolus eventualis* as regards the occurrence of such destruction.”

This is the broadest definition of genocidal intent so far—a reaction to the Commission of Inquiry on Darfur’s (hereinafter the Commission) rendering that the persecutory acts of the Sudanese government did not constitute genocide. Said the Commission: “the policy of attacking, killing and forcibly displacing members of *some* tribes does not evince a specific intent to annihilate, in whole or in part [one of the protected groups].”

Whereas Greenawalt proposed a *dolus indirectus* standard, in furtherance of which a defendant has to target a proscribed group in the knowledge that the goal or effect is its destruction, Kress advocates a *dolus eventualis* standard, pursuant to which the defendant need only know of a genocidal act, in the knowledge that the consequence *may* be the destruction of the victim group.

Kress has adopted this position in light of what he calls the “systemic” nature of the crime of genocide. Said Kress: “genocide, for all practical purposes, is a *systemic crime*. If a collective level of genocidal activity must normally be distinguished from

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85 *Id.*
the level of the individual genocidal conduct, it is worth asking whether the construction of the word “intent” should not be construed accordingly.” 86

It is a valid point that the nature of genocide is such that it demands recourse to the context of a wider genocidal campaign. However, to echo the point made earlier, to remove its strict individual intent requirement is to weaken the distinction between genocide and the lesser persecutory – and systemic- offence of crimes against humanity.

IV. THE PURPOSIVE INTERPRETATION: DOLUS DIRECTUS

A purposive reading of genocidal intent gives rise to a dolus directus standard, pursuant to which the defendant must foresee and desire the destruction of the victim group. Commonly termed special or specific intent, it is the predominant interpretation in ad hoc tribunal jurisprudence, and reflects a more liberal, subjective philosophy. As Akhavan posits, “modern criminal law’s movement away from lex talionis favours the paramount importance of intentionality rather than results as the measure of wrongdoing.” 87

While the Akayesu judgement on genocidal intent is paradoxical, subsequent judgements have been more transparent in their purposive philosophy. The ICTY Trial Chamber judgement in Jelisic is a prime example. In its analysis of ulterior genocidal intent it held that the defendant must act i) discriminatorily; and ii) have a wider intent to destroy the group, such that he or she “…selects his victims because

they are part of a group which he is seeking to destroy,"⁸⁸ [emphasis added]. This construction was derived from, *inter alia*, supplementary documentation to the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind,⁸⁹ the authors of which stipulated that intent must extend to the destruction of a group as a “separate and distinct entity.”⁹⁰ The Chamber was unable to reconcile this standard with Jelisic’s mental state, which it described as, “opportunistic and inconsistent.”⁹¹ It was unable to adduce “the physical expression of an affirmed resolve to destroy in whole or in part a group as such.”⁹² Accordingly, Jelisic was acquitted on the count of genocide. The Appeals Chamber reaffirmed this stance.

The ICTR Trial Chamber in *Rutaganda* defined genocidal *dolus specialis* as, “…a key element…characterised by a psychological nexus between the physical result and the mental state of the perpetrator.”⁹³ Its counterpart the ICTY adopted the same purposeful standard in *Prosecutor v. Krstic*,⁹⁴ characterising genocidal intent as “…acts committed with the *goal* of destroying all or part of a group.”⁹⁵ Some Scholars have attempted to derive broader meanings from this judgement, but these misconstructions have already been dismissed.

⁹⁰ *Id.*, at para. 88.
⁹¹ *Id.*, at para. 105.
⁹² *Id.*, at para. 107.
⁹³ Rutaganda Judgement, *supra* note 70, at para. 60.
⁹⁴ Prosecutor v Krstic, Case No. IT-98-33-A, Judgement and Sentence (Apr. 19, 2004).
⁹⁵ *Id.*, at para. 571.
V. CLARIFYING GENOCIDAL INTENT: A NEW INTERPRETIVE DOCTRINE

In light of the preceding analysis, it is proposed that genocidal *dolus specialis*, namely the *intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*, is to be read in light of the following doctrine:

The accused shall possess the requisite *dolus specialis* if he i) purposely targets persons based on their membership of a national, ethnical, racial or religious group; and ii) Foresees and desires the destruction, in whole or in part, of aforesaid group.

VI. CONCLUSION

In the final analysis, a goal-oriented *dolus specialis* reflects the subjective element of genocide as envisaged by Lemkin. Moreover, absent a universal consensus at the preparatory stage of the Genocide Convention, it is the most accurate representation of the will of its drafters. It is a literal, and by extension, apposite reflection of the *dolus specialis* as defined in the Genocide Convention and subsequent legislation.

It is this strict *dolus specialis* provision that defines and elevates genocide. To broaden the reach of the clause such that it incorporates dolus indirectus and dolus eventualis standards would be to strip the crime of its character and blur the distinction between genocide and the offence of crimes against humanity.
Furthermore, arguments for a broader, result-oriented *dolus specialis* are largely flawed and often based on misconstructions of the nature and evolution of genocide and the intentions of its drafters.

Nevertheless, genocidal *dolus specialis* requires clarification, in the absence of which it will remain perennially susceptible to divergent opinion. As new cases go to new ad hoc tribunals or the permanently established International Criminal Court, and they will – humankind’s propensity to commit mass persecutory crimes is relentless – it is imperative that they are judged equally. The legal machinery governing genocide must meet Bingham’s standards of accessibility, intelligibility and predictability. Genocide must be clearly defined and distinguished from other international persecutory offences.

Therefore, in the interests of the rule of law, and the principles that flow from it, a new interpretive doctrine has been advanced, pursuant to which genocidal intent necessitates the purposeful targeting of victims based on their membership of a protected group, with the foresight and desire to bring about the whole or partial destruction of said group.