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THE MENTAL ELEMENT OF THE CRIME OF GENOCIDE

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Abstract

Many scholars studying substantive criminal law examine the crime in an analytical way to determine the elements of crime. Those scholars determine the elements of crime as the material or objective (actus reus) and the mental or subjective element (mens rea). In accordance with this, crime consists of an act that has reflected to the external world (material element) and the psychological bond that links the act to the perpetrator (mental element).

The elements of the crime of genocide are derived from the definition of Article 2 of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. According to this, the crime of genocide is committing any of the acts enumerated in the Convention with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The mental element of genocide is mentioned neither in the Convention nor during the Nuremberg trials. The discussion on the mental element of the crime of genocide or “the genocidal intent” took place within the international criminal law for the first time during the trials at international courts for Former Yugoslavia and Ruanda to prove the genocidal intent.

This article discusses the definition of genocide, mental element of the crime in substantive criminal law, mental element of crime of genocide and the jurisprudence of the international tribunals related to the issue.

Keywords: Criminal law, international criminal law, crime of genocide, elements of crime, intention, genocidal intent.

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1. Introduction

There was not a certain term in law and criminal law until the systematic Nazi atrocities aiming the destruction of particularly the Jews (Holocaust) during the Second World War. Although the terms -such as “massacre, mass killing, and destruction”- to qualify the broad and systematic Nazi practices intending the destruction of Jews and other targeted groups indicated the gravity of the incidents, these terms did not demonstrate the purpose of the Nazis. A certain legal term for the atrocities of Nazis intending the destruction of the targeted group was not coined yet. Nazis killed members of a certain group. Hereby, the target of the Nazis was not individuals of the group one by one, but directly the targeted group whole or in part. The destruction of the members of the group by the perpetrators to destroy, in whole or in part, the targeted group is the characteristic of this crime, which is qualified as “genocide” by law today. By this crime, victims were targeted because they had the characteristics of a certain group. The perpetrators’ actual purpose was the destruction, in whole or in part, of an ethnic, racial, national or religious group to which the targeted people belong, by committing one or more acts enumerated in the “Convention on the Prevention and Punishment of the Crime of Genocide” (hereinafter Genocide Convention).

It is not a coincidence that the definition of “genocide” was coined in 1944 by Raphael Lemkin for these “crimes without a name”. Lemkin was a Polish who was obliged to settle in America after he witnessed the policies of Nazis during the Second World War. Lemkin proposed the term *genocide* to qualify the broad and systematic destruction policy of Nazis against Jews during the Second World War. Lemkin tried to explain the crime of killing the members of a group by the term *genocide*, which he combined from the Latin word *genos* (community, people, race) and the word *cide* (killing). Lemkin thought that the crime of genocide involves a wide range of actions, including not only deprivation of life but also the prevention of life (abortions, sterilizations) and also devices considerably endangering life.

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and health (systematic killing in internment camps, deliberate separation of families for depopulation purposes and so forth), the acts are directed against groups, as such, and individuals were selected for destruction only because they belong to these groups. Although killing the members of a targeted group is one of the distinguishing characteristic of crime of genocide, Lemkin referred 8 different acts of genocide of political, social, cultural, economic, biological, physical, religious and moral character intending the extermination of the existence of a group.\(^2\) Lemkin was criticized as being a romantic for referring to eight different genocidal acts based on the systematic oppression policies of the Nazis against Jews.\(^3\) Despite the definition and efforts of Lemkin, the scope of the crime of genocide has been held narrower under international law. The conducts through which this crime might be committed and the elements of the crime have been formulated under the Genocide Convention.

The crime of genocide was not mentioned during the Nuremberg and Tokyo trials where Nazi atrocity policies and massacres were brought before the international military courts and the term ‘genocide’ did not take place in the trial records. Although following the Nuremberg and Tokyo trials; wars, widespread armed conflicts and massacres took place in different regions of the world, a “destruction” similar to “Holocaust” that can be qualified as genocide did not occur. Perhaps due to its impact, there were not adequate academic studies for a long time about the crime of genocide. However, genocide has been brought to the agenda once again following the international crimes committed in Former Yugoslavia and Rwanda and genocidal acts have attracted the attention of the international public opinion. With the trials of International Criminal Tribunal for former Yugoslavia (hereinafter ICTY) and International Criminal Tribunal for Ruanda (hereinafter ICTR) the existence of the Genocide Convention was remembered. During ICTY and ICTR trials and following the decisions of these tribunals; the crime of genocide, the scope and elements of this crime


have attracted the attention of criminal lawyers, and an increase in academic studies was observed. The elements of crime of genocide and particularly genocidal intent took place in the Rome Statute of International Criminal Court (ICC). Despite of numerous recent academic discussions and publications, the definition and *actus reus* of the crime of genocide in the ICC Rome Statute have been reiterated in exactly the same way from the 1948 Genocide Convention. The crime of at Genocide Convention, (art.2) is defined as:

> "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."

It is a fact that the crimes listed in the Genocide Convention have been committed even before the Genocide Convention and that many massacres have been committed in history, which can be qualified as genocide. On different times and backgrounds of the history of humanity, broad and systematic atrocities intending the destruction of ethnic, religious, racial and national groups have been imposed. When these massacres were committed, there was no international judicial mechanism forbidding, defining or punishing these oppressions. There was also no certain judicial term qualifying the broad and systematic atrocities intending the destruction of ethnic, religious, racial and national

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4 The present definition of genocide was a political compromise reached in 1948 in order to accommodate the concerns of the delegates of Great Britain and the former Soviet Union Republics who argued that the inclusion of political and other groups in the definition of genocide would have discouraged the states from signing and finally ratifying the Genocide Convention. Some scholars argues that the exclusion of targeted groups such as women, social or economic classes, cultural and political groups undermines the adjudication of the crime of genocide and hence catalyzing impunity in preventing and prosecuting genocide. Those argues that the crime of genocide ought to be redefined in order to protect all victim groups See, Simeon Sungi, ‘Redefining Genocide: The International Criminal Court’s Failure To Indict On The Darfur Situation’, Journal of Theoretical and Philosophical Criminology (2011) 63 - 88, at 64 et. seg.
groups. Because of the lack of an national or international definition of genocide and judgements such atrocities are still politically and historically arguable. If the Nazi oppressions would have happened in an earlier era instead of the 20th century, all these oppressions could have gone not beyond a tale of brutality. With the development of group rights together with the human rights law, judicial efforts have been invoked to prevent these kinds of oppressions. Even though acts similar to genocide have been witnessed in earlier times, it has been denominated recently in history and its perpetrators have been judged very recently. The punishment of genocide is parallel to the development of individual criminal responsibility in international law. This is the reason why the judicial history of genocidal acts starts with the Genocide Convention, although genocidal acts have a much older history. However from this date individuals accused with genocide have been prosecuted in national and international criminal courts. The reason for coining an act named genocide is to prevent that the liability for systematic massacres intending the destruction of certain groups shall not be left with impunity, as it happened in the past. The importance of Lemkin, the Genocide Convention and the Nuremberg trials lies here.

2. The Crime of Genocide at Nuremberg and Tokyo Trials

The oppressive practices of Nazis against civilians were qualified as “atrocities, massacres and cold-blooded mass executions” during the Moscow Conference in October 1943, which was organized by the three victorious heads of state of the Second World War. However, the crime of genocide was not mentioned in the London Agreement of 8 August 1945, which was the legal basis of the Nuremberg trials. The acts within this scope were qualified as “crimes against humanity” and the acts of the Nazis were qualified as “atrocity.”

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Nazi leaders were accused of crimes against peace, war crimes and crimes against humanity—which were against the international customary rules established to that date and the Hague Conventions of 1899 and 1907- at the Nuremberg trials which were also a turning point for the international law. Acts constituting genocide were tried at the Nuremberg trials, but they were not defined as an independent crime, as mentioned above.

“Crimes against humanity” (killings before the outbreak or during the war, destruction, enslavement, exile and other inhuman acts against a civilian community) and “political, racial or religious oppression” could only be considered as a crime during Nuremberg trials provided that “crimes against peace” or “war crimes” were committed or that the above mentioned crimes were committed in relation to these crimes. The most important reason of this was the genocide policy against the Jews which was considered as “Holocaust”. Holocaust does not consist only of the first category of acts enumerated within the definition of “crimes against humanity.” It was a systematic and broad organization, whose aim was the “Endlösung” (Final Solution) which means the cleansing of Europe from Jews. The oppression that gypsies, homosexuals, mental and physical disabled and political opponents have experienced along with the Jews was evaluated within the same scope. The oppression experienced by Jews was taken into account during the accusations and trials, but the legal nomination of the purpose of this oppression was not made. The killing and massacre of Jews was qualified as “murder against humanity” in the indictment. The opinion that the legality principle “Nullum crimen nulla poena sine praevia lege poenali” (No crime, no punishment without a previous penal law) was violated during Nuremberg trials with the trial of “genocidal acts” which did not formally take place in any legal document of that time is

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10 O’brian, supra note 9, at 518.
arguable. However, the Court did not qualify these acts of Nazis as “genocide” and thus did not try them for this non-existing crime. The Court qualified the acts of Nazis against the international legal norms of that time and considered them within the scope of “crime against humanity.” Today, acts that can be considered as crime of genocide were considered as crimes against humanity until the crime of genocide was established with the Genocide Convention.

As mentioned above, Lemkin held the scope of the crime wide by mentioning political, social, cultural, economic, biological, physical, religious and moral genocide. Despite the intense efforts of Jews who were targeted in a serious and widespread way during the war, during the Nuremberg trials the Court played an important role throughout the definition of the crime of genocide by stating that not only Jews but also non-German and non-master race nations and ethnic groups were also targeted by Nazis. Thus, not only Jews, but also some other groups with the characteristics stated in the Convention were protected against the crime of genocide.\(^{11}\) In terms of substantive criminal law, the legal entity or interest desired to be protected by the crime was not only Jews and their existence. The circumstance elements of the crime of genocide; in other words, the legal value protected by this crime is the right of any religious, racial, national or ethnic group to exist with these characteristics.\(^{12}\) The systematic crimes committed against those groups were not Jewicide, but it was genocide. Therefore, the intent of the perpetrator could be the destruction of a group other than the Jews. At the courts established within the Poland territory which had been under the German occupation in 1944, the acts were held wide and decisions were taken considering that the perpetrators’ intent was the destruction of Polish Jews.\(^{13}\) As seen,

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\(^{12}\) Circumstance elements are such things as a “humanbeing” in homicide, “property of another” in theft, “a civilian population” in crimes against humanity, “a protected person” in war crimes and “a national, ethnical, racial or religious group as such” in genocide. See, Roger Clark, ‘Elements of Crimes in Early Decisions of Pre-Trial Chambers of The International Criminal Court’, 6 *New Zealand Yearbook of International Law* (2009) 208 - 238, at 214.

\(^{13}\) Nersessian, *supra note*, 11, at 253; Schabas, *supra note*, 1, at 41.
these trials and decisions are “reflexive” and far away from the scope of the Genocide Convention that will be prepared later.

3. An International Legal Definition Derived From The History: The 1948 Convention on Genocide

Lemkin’s studies have a particular place in the definition of the crime of genocide. Lemkin realized that the 1907 Hague Convention and international law were inadequate for the protection of national minorities and that the acts of the Nazis targeting Jews have not been defined in any legal document to that time; thus, he pursued his studies on this basis. As mentioned above, Lemkin had mentioned 8 different kinds of crime of genocide. International Conference for Unification of Criminal Law held in Madrid in 1933 had an important place for the formation of the expression which takes place in the Convention. Lemkin tended to define “a new crime” covering all the acts of the Nazis against Jews, but it was not accepted during this conference. Lemkin’s definition also included existing rules as not harming civilians during the attack, the execution of the war and during the war. The aim of this definition was to express all the acts of the Nazis within a single type of crime.  

14 On the other hand, the impact of Lemkin’s intense lobbying activities was felt relating the Resolution 96 (I) of 11 December 1946 of the General Assembly of the United Nations and thus it has been stated that:

“Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in

the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.”\textsuperscript{15}

The Genocide Convention was established within the framework of the principles set forth at the Nuremberg trials and thus the crime of genocide was affected by the progress of the trials. According to the Convention, crime of genocide can be committed in time of war but also in time of peace. Genocidal acts might be committed within the territory of the state where the group lives or through the occupation of another state’s territory and by targeting the groups settled there. As a matter of fact, not only the Jews within the German territory, but also the Jews of the occupied countries were exposed to extermination policies.\textsuperscript{16} Thus, the crime of genocide might target the members of a group living in a certain country and as well as some parts of the group in different countries. Article 1 of the Genocide Convention states that:

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

The crime of genocide shall not be considered as a political crime; therefore, the perpetrators of the crime of genocide might be extradited to the demanding country to carry out trials regarding the crime of genocide. Article 7 of the Convention states that

“Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”

Resolution 96 (I) defined the crime of genocide, proposed elements of the crime and listed the groups protected. But it is mentioned neither in the Genocide Convention nor

\textsuperscript{15} UN Doc. A/BUR.50.
during the preparatory debates that the crime can be committed with intent or special intent.\textsuperscript{17} Since it is stated in Article 2 of the Convention that “genocide means any of the following acts committed with \textit{intent to destroy}”, the analytical examination of the crime demonstrates that this crime can only be committed intentionally. On the other hand, a crime named as “genocide” has not been mentioned during the Nuremberg trials. As it will be analyzed hereinafter, a discussion on the mental element of the crime of genocide took place within the international criminal law for the first time during the ICTY and ICTR trials because the proof of the crime of genocide is strictly based on the proof of the genocidal intent.

4. The Mental Element of Crime in Substantive Criminal Law

Criminal lawyers examine the crime in an analytical way to determine the elements of the crime, to understand its scope and in how this crime might be committed. The purpose of the analytic method is to clearly determine the limits of the punishable act. Today authors examining the crime in an analytical way predominantly tend to a dual division. According to this dual division, the crime consists of two elements, the material or objective element (\textit{actus reus}) and the mental or subjective element (\textit{mens rea}).\textsuperscript{18} In accordance with this, crime consists of an act that has reflected to the external world (material element/actus reus) and the psychological bond that links the act to the perpetrator (mens rea /mental element).\textsuperscript{19}

\textit{Mens rea} is a requisite for criminality in modern criminal law and it is also one of the basic concepts of substantive criminal law. According to this, the existence of an act inflicted by the perpetrator is not alone adequate to accept a conduct as a crime and to punish. It is required that this conduct is the result of the perpetrator’s guilty mind (conscious will).

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\item[\textsuperscript{17}] For a summary of the history of the resolution, see UN DOC. E/621.
\item[\textsuperscript{18}] According to another approach adopted by some German and Italian criminal lawyers, along with the \textit{mens rea} and \textit{actus reus} (material and mental element of the crime), the acts done by the author has to be contrary to the law. For them “\textit{unlawfulness}” is another element of the crime. However, this division is a technical discussion carried out among criminal lawyers. Considering the regulation of the ICC Statute, it is apparent that the Statute accepts that the crime is constituted of the material and mental element by adopting dual division.
\item[\textsuperscript{19}] See, Michael Jefferson, ‘Criminal Law’, (Essex: Longman, 2006) at 41 \textit{et seq.}
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Therefore, for the punishment of the perpetrator he/she should have committed the crime “knowingly and willfully”.\textsuperscript{20} It is not adequate for an act to compose a crime that it has reflected to the external world as defined by the law (existence of an act which is prohibited by the law) and that there is a causal relation between the conduct of the perpetrator and its result. Conduct has to be the result of the perpetrator’s guilty mind.\textsuperscript{21} \textit{Mens rea} is also called ‘culpability’ means that the perpetrator’s act is a blameworthy behavior (guilty mind) which is forbidden by law.\textsuperscript{22} Culpability appears as “intention” (\textit{dolus}) or negligence (\textit{culpa}). Intention may occur as ‘direct intention’ (\textit{dolus directus}) or ‘recklessness’ (\textit{dolus eventualis}).\textsuperscript{23} Genocidal intent is a form of special intent (dolus specialis) which can only encompass dolus directus. In this sense the genocidal intent means direct and special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. ICTY stated this point in Krstic Case and stated “for the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompass only acts committed with the genocide which encompass only acts committed with the \textit{goal} of destroying all or part of a group”.\textsuperscript{24} Negligence is mainly the avoidance of the result. Because of the fact that the crime of genocide cannot be committed through negligence, this issue will not be taken into consideration.

\textit{“Dolo or dolus” describes the “actus non facit reum nisi mens sit rea” principle.}\textsuperscript{25} This principle means that the act itself does not constitute a crime unless done with a guilty mind. As a general rule of law, a guilty mind is an essential element of crime and this rule ought to be borne in mind in construing all penal statutes. Literally, intent is the expression of a will directed to a certain goal. For the existence of intent, it is required that the perpetrator

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\textsuperscript{20} Jefferson, supra note 19, at 81.


\textsuperscript{22} Smith and Hogan, supra note 21, at 54.

\textsuperscript{23} Clark, supra note 12, at 210; also see, Nicola Pisani, ‘The Mental Element in International Crime” 121-142, in ‘Essays on the Rome Statute of the International Criminal Court’ (Aquila: il Serente Editrice, 2004) at 126 \textit{et seg}.

\textsuperscript{24} Prosecutor v Krstic, Case No IT-98-33-T, Judgement, at para 595 (Aug. 2, 2001).

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commits the crime with ‘knowingly and willfully’. The knowing element required for the existence of the intent is different from the awareness that the act constitutes a crime; the knowing element expresses the accurate knowledge regarding the committed act.

5. Mental Element of the Crime of Genocide or the Genocidal Intent

Intention (dolus) consists of knowing and willing the act that constitutes a crime. General intent comes into question when the law requires that the material act (the act prohibited by law) has been committed consciously and willingly and the purpose, which motivates the perpetrator, is not important for the existence of the crime. The civil law discussion on dolus usually takes a combination of cognitive and volitional elements, conscience and will. Crimes like homicide, assault, robbery and rape are crimes that can be committed with general intent. In these types of crimes the purpose of the perpetrator through committing this crime is not taken into consideration throughout the punishment of the perpetrator. Unless it is enunciated in the law, the motive of the perpetrator to commit the crime; in other words, perpetrator’s purpose by committing the crime is not taken into consideration during the punishment of the perpetrator. However, sometimes law may consider the committing of an act with general intent inadequate for the existence of a crime and also requires a purpose for perpetrator’s act along with the fact that the perpetrator commits the act by knowing and willing it. In various legal systems it is understood and interpreted that “purpose” means “general intent”, and “intent” means “special intent” (specific intent or dolus specialis). “Motive” is the reason that directs the perpetrator to commit the crime; “purpose” is the goal of the perpetrator through committing the crime. The term purpose stresses the volitional element of intending a consequence in the sense of desiring

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26 SauroTassi, ‘il Dolo’, (Milano: CEDAM Editrice, 1992) at 2. See also, Jefferson, supra note 9, at 84.
27 Nersessian, supra note 11, at 263.
29 See, Nersessian, supra note 11, at 264.
30 See, Greenawalt, supra note 3, at 2268; also see, Schabas, supra note, 1, at 217-218.
the latter. On the other hand, “intent” means that the perpetrator commits the crime knowingly and willfully. Special intent occurs when it is required for the existence of the crime or the aggravation of the punishment that the perpetrator acts with a certain purpose. In this case, the law requires that the perpetrator acts with a special purpose along with the conscious and willing existence of the material act. Specific intent requires proof that the actor’s conscious object, or purpose, is to cause the social harm set out in the definition of the offence.

“General intent” comes into question when the perpetrator knows that his conduct is socially harmful and dangerous, and when he desires this harmful and dangerous result. It is adequate for most of the crimes that the perpetrator acts with general intent. On the other hand, special intent comes into question when it is required that the perpetrator acts to achieve a certain purpose which is forbidden by law, along with the fact that the crime is committed by knowingly and willfully. Therefore, special intent only comes into question when the perpetrator commits a typical act to achieve a forbidden purpose by law, and not when he has a certain purpose through committing the crime. Even if the difference between intent and motive under criminal law and the discussions concerning this difference are put aside, it is a fact that the purpose of the perpetrator to commit a crime is not always, 

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32 Jerome Hall, ‘General Principles of Criminal Law’ (2nd edn., New York: Oxford University Press, 1960) at 83. The American Model Penal Code (Paragraph 2.02 (2) (a) offers a similar definition: “A person acts purposely with respect to a material element of an offence when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.” See, Vest, supra note 22, at 783. Different national legal systems use a variety of terms to describe the mental states that accompany the commission of crimes. For a detailed comparative study on mens rea problem in international criminal law. See, Jennifer S. Martinez, Understanding Mens Rea in Command Responsibility, 5 Journal of International Criminal Justice (2007) 638 - 664, at 643 et seq.
33 Prosecutor v. Akayesu, (Case No. ICTR-96-4-T) Judgement, 2 September 1998, para.477; also see, Hall, supra note 32, at 142 et seq.
34 See, Greenawalt, supra note 3, at 2266.
35 See, Vest, supra note 31, at 782; also see, Schabas, supra note, 1, at 218 et seq.
but in certain crimes important. The reason that the motive of the perpetrator is not considered important for criminal law is that the motive has no concern with the culpability.

In situations where the intent of the perpetrator is to achieve a certain result, it is explicitly stated in the law and the clause includes that the purpose of the perpetrator has to be punished. In this case, not a certain conduct, but the forbidden purpose of the perpetrator which he wants to achieve through this conduct is punished. Thus, the fact that a crime can be committed with special intent is not related to the nature of that crime or the act of the perpetrator, but to the expression of the norm. For instance, in the crime of burglary; not taking a property of someone else in forbidden, but taking a property of someone else to ‘make it one’s own property’ is forbidden. Therefore, this crime is a crime which can be committed with special intent within the scope of various legal systems. In the event that a moveable property (thing) is taken for a purpose other than owning it (to making it one’s own property) burglary cannot be mentioned. With the content of the norm it can be decided whether or not special intent is required for the existence of the crime. As analyzed hereinafter, since the intention of the perpetrator of the crime of genocide is to destroy the protected group whole or in part, this constitutes a crime which can only be committed with special intent. The purpose to destroy the group (genocidal intent) characterizes the mental element of this crime. The reason that special intent is required for the crime of genocide is the strong psychological bond between the act of the perpetrator and perpetrator’s purpose, in other words the purpose through committing the acts characterizes the crime. Special intent is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a

38 See, Kaufman, supra note 23, at 318.
39 See, Alberto Cadoppi and Paolo Veneziani, ‘Elementi di Diritto Penale’, (Padova: CEDAM Editrice, 2002) at 279 - 280; also see, Gelardi, supra note 37, at 120.
41 Cadoppi and Veneziani, supra note 39, at 280.
psychological relationship between the physical result and the mental state of the perpetrator.\textsuperscript{43} If the purpose of the perpetrator by committing the acts enumerated in the Genocide Convention against a victim or/and the victims is not the destruction of the group in whole or in part, the crime of genocide cannot be mentioned. In this case probably the perpetrator shall be prosecuted for crimes against humanity.

The elements of the crime of genocide are derived from the definition of article 2 of the Genocide Convention. According to this, the crime of genocide is committing any of the acts enumerated in the Convention with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The material element of this crime, the acts that constitute the crime are enumerated in article 2. As it is mentioned in the interpretation of the International Law Commission, these are not the type of acts that would normally occur by accident or even as a result of mere negligence.\textsuperscript{44} None of these five acts listed in article 2 of the Convention that constitute the material element of the crime of genocide can be committed by accident or coincidence or negligence. On the other hand, a general intent to commit one of the enumerated acts is not sufficient for the crime of genocide. These acts can only be committed with the purpose of destroying the group which demonstrates the fact that this crime can only be committed with (special) intention or \textit{dolus specialis} in Latin. Since the enumerated acts are intending the destruction of the group, these acts can only be committed by knowing and willing it. Hereby, knowing (the cognitive element) is to know that as a result of the committed acts the whole or a part of the group might be destroyed. And willing (volitional element) is the purpose of destroying the group in whole or in part and acting to achieve this goal. Special intent comes into question, because the purpose of the perpetrator characterizes the crime and the perpetrator’s purpose is being punished. Genocide is therefore formed as an intentional result crime which includes the extended mental element of destroying a protected group such as. The necessary \textit{dolus specialis} for

\textsuperscript{43} Akayesu supra note 33, Par. 518.

\textsuperscript{44} Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Doc. N. A/51/10, p. 44.
the crime of genocide is committing the acts listed in clause 2 of the Convention of Genocide to intent to destroy in whole or in part a national, ethnical, racial or religious group as such.\textsuperscript{45}

6. The Interpretation of Genocidal Intent by International Criminal Tribunals

ICTY was an \textit{ad hoc} court which was established to try various crimes committed in the territory of Former Yugoslavia but the crime of genocide was not considered in the Statute. During the Sikirica, Krstic and Jelisic trials of this court, the crime of genocide came up and the Court commented and rendered decisions regarding the crime of genocide. Although the influence of the English law was apparent regarding the definition and types of the intent during the Celebici case, later the Court commenced to interpret the \textit{mens rea} and intent issue according to international criminal law and international crimes; thus, the Court developed its own original interpretation through the Anglo-Saxon (case law) and continental Europe (Romano-Germanic) system, which is also called the “third way.”\textsuperscript{46} ICTY Appeals Chamber on Jelisic judgement stated that for the existence of the crime of genocide, it is required to approach material element (\textit{actus reus}) and mental element (\textit{mens rea}) together. According to this the Convention stated that it is required that a group whose characteristics are determined by the Convention is targeted and the destruction of this targeted group is aimed through committing one or more acts enumerated in the Convention. The ICTY Appeals Chamber stated that “\textit{Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.}”\textsuperscript{47} ICTR Trial Chamber emphasized that for the existence of the genocide the qualifications of the particular group are important and the members of the group were not targeted as an

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\item Schabas, \textit{supra note}, 1, at 211.
\item See, Elliott, \textit{supra note} 40, at 43.
\item Judgement, \textit{Jelisic (IT-95-10-A, Par. 79)}, Appeals Chamber, 5 July 2001.
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\end{footnotesize}
individual, because they were members of the group. Regarding the Jelisic decision, ICTR referred to the opinion of Lemkin and the Convention of 1948 concerning the material and mental elements of the crime and carried out a literal interpretation and subjected the crime to a traditional evaluation and genocide can only be committed with intent by referring to the Akayesu decision of the ICTR.

ICTR sentenced former prime minister of Rwanda, Jean Kamanda on 1 May 1998 for planning, participating and provoking genocide and committing crimes against humanity; and sentenced Jean-Paul Akayesu on 2 September 1998 for crime of genocide. The judicial determination of ICTR regarding the crime of genocide was later shaped by the Akayesu, Kayishema, Ruzindana, Serushago, Rutaganda, Musema, Ruggia and Bagilishema decisions. During the various judgements of the ICTR, it was stated that the crime of genocide can be committed with special intent and it was specified by using the terms “special intent”, specific intent and specific genocidal intent. Despite these terms, the Court did not render a coherent decision about the existence of special intent regarding crime of genocide. However, it is adequate for the criminal law technique that the crime is committed with intention; for the same crime cannot be committed with both, intent and special intent. If a crime is committed with special intent, it may require a different or heavier punishment. However, in the event of the punishment of the perpetrator’s purpose by putting forward the purpose of the perpetrator, in other words in case of the purpose qualifies the act as a crime, special intent comes into question. ICTR emphasized this point by its decisions. ICTR emphasized with the Akayesu judgement the difference between genocide and the crime against humanity through the fact that the crime of genocide is committed with special intent as crime against humanity means that the group is oppressed, whereas the crime of genocide can only be committed with intent.

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48 Judgement, Jelisic (IT-95-10-T, Par. 79), Trial Chamber, 14 December 1999.
49 Jelisic, supra note, 47, Par. 82.
50 Jelisic, supra note, 47, Par. 86 and 99. In Jelisic judgement the expression “dolus specialis” has the same meaning as “specific intent” and indicates the “mental element” (mens rea) of the crime of genocide.
51 Akayesu, supra note, 33, Par. 498.
52 Judgement, Kayishema&Ruzindana (ICTR-95-1-T, Par. 91), Trial Chamber, 21 May 1999.
53 Judgement, Bagilishema. (ICTR-95-1A-A, Par. 55), Trial Chamber, 3 July 2002.
genocide is the destruction of the group. ICTR stated that “Having regard to its Statute, the Chamber believes that the offences under the Statute - genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II - have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive.”

As is seen through the ICTY and ICTR decisions the courts did not invent novel legal norms. The courts interpreted existing legal norms and contributed to legal accumulation regarding international crimes and genocide. These two ad hoc courts have shouldered an important function regarding the determination of the normative meanings of the expressions taking place in the Genocide Convention and regarding the fact that the Genocide Convention became a part of the international customary law.

7. Genocidal Intent at the Rome Statute of International Criminal Court

The regulations of the Statute of International Criminal Court are established with Nuremberg, Tokyo, ICTR and ICTY experiences and the legal accumulation of international criminal law. Since the crime of genocide was not coined yet during Nuremberg trials, genocidal acts were evaluated within the scope of crime against humanity. During the ICTY and ICTR trials, discussions on genocide were based on the Genocide Convention. The Rome Statute of ICC quoted the crime of genocide from the draft text of the 1996 ICC Preparatory Committee as of the Genocide Convention of 1948. The reason is that as

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54 Akayesu, supra note, 33, Par. 469.
55 See, Jescheck, supra note 7, at 50.
emphasized by the recommendatory opinion of the UN International Law Commission in 1951, the crime of genocide as defined in 1948 constitutes contradiction to the international customary law and it was not accepted that a definition other than this was made.\footnote{During the ICC Preparatory Committee the proposal submitted by Algeria, Bahrain, Comoros, Djibouti, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen that “political and social groups” shall also be added to the groups protected by the Genocide Convention and “transferring children to another group” shall be changed into “transferring people to another group” was rejected due to the fact that the Convention is so clear that there is no space for any interpretation regarding this issue and any change in the content of the Convention cannot be accepted. See, UN Doc. PCNICC/1999/WGEC/DP.4, p.3.}

The ICC Rome Statute defines the crime of genocide in exactly the same way as it is in the Genocide Convention of 1948. According to the Rome Statute, for the existence of genocide it is not adequate alone that one of the acts enumerated in Article 6 has been committed. Article 6 of the ICC Statute is as follows:

\begin{quote}
Article 6, Genocide:

For the purpose of this Statute, "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 infliction 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 the group to another group.
\end{quote}

It is also required that this act should be committed with the purpose to destroy the group in whole or in part. Article 30 of the ICC Statute includes the regulation regarding the mental element of the crime. Article 30 of the ICC Statute is as follows:
Article 30, Mental element:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

The expression of “intent to destroy” in Article 6 and the definition of “intent” in Article 30 complement each other. General intent (dolus generalis) is defined in Article 30 and the definition of “genocide” and the “intent” to destroy the group takes place in Article 6. The regulation regarding mental element takes place in Article 30 of the Rome Statute. According to this, “unless otherwise provided” to hold the person responsible of a crime within the jurisdiction of the Court, it is required that the material elements should be realized with intent and knowledge. The second paragraph explains when the person will considered to have acted with intention. The third paragraph explains what knowledge means. Although, in respect of the way it is committed, the crime of genocide is a broad and systematic crime and even if in most of the cases crime comes into question with a prepared plan; parallel to the expression in the Convention, the plan is not required for the existence of the crime, but the existence of the plan is considered to be an evidence of the crime.

Article 6 and 30 of Rome Statute shall be considered together with a genocide case before the ICC. The expression “unless otherwise provided” in Article 30 and the expression “intent to destroy” in Article 6 which was reiterated exactly from the Genocide Convention are
coherent. Although the crimes under the jurisdiction of ICC can be committed with intent, it is accepted that the crime of genocide can be committed with “special intent.”\(^{57}\) According to the Statute, although genocide is an intentional crime, the purpose which is desired to be achieved through the committed acts is important for the punishment of the crime. It is not necessary that this purpose is achieved; it is adequate that one of the enumerated acts is committed to achieve the purpose.

In terms of the criminal law technique and the quality of the intention, it is not right that only the knowledge element out of the “knowledge and willing” elements has been stated as the element of intention in the ICC Statute. Regarding that the mental element consists of “intent and knowledge”, the insistence of the French delegation is important that these two terms shall be linked with “and” to correspond the notions “*intent et volonté*” of French criminal law.\(^{58}\) However, this proposal of the French delegation and this expression of the Statute are not important under general theory of substantive criminal law. The elements of intention are “knowing and willing” in all criminal law systems. The fact that another word is used instead of intention does not change the situation. For instance, Italian criminal law system prefers the Latin “*dolo*” notion instead of “*intendo*”, the elements of the *dolo* are also knowing (coscienza) and willing (volonta). *Wissen und wollen* is used in German criminal law to indicate the elements of intention.

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8. Evidentiary Aspects of Genocidal Intent

Genocidal intent and its proof seem to constitute the most serious problem of “crime of crimes.” Genocidal intent is the destruction of a protected group in whole or in part for its characteristics enumerated in the Convention. The distinctive feature of crime of genocide from other crimes is that this crime does not target individuals, but a human group. 59 ICTR stated at its Kambanda judgement that, “Since the purpose of the genocide crime is to destroy in whole or in part a certain racial, ethnic, national or religious group, special intent (dolus specialis) exists here and this crime is “the crime of the crimes.” 60 Special intent is not the mental element of the crime, but a type of the intent and qualifies the crime of genocide. 61

Committing the acts enumerated in the Genocide Convention deliberately may cause other crimes, but to execute the crime of genocide it is required that the acts listed in the article 2 of the Convention are committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The offender must have the knowledge of the consequences that his/her acts in the ordinary course of events would destroy, in whole or in part the group. 62 So the mens rea of the crime of genocide is the special purpose of the perpetrator. His special purpose for committing the listed acts in the Convention is to destroy the group in whole or in part. The purpose of the perpetrator or the “special intent” (dolus specialis) is “genocidal intent” or “intent to destroy whole or in part.” 63

60 ICTR in Prosecutor v. Kambanda case (Par. 16) stated as follows: “Regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge. The crime of genocide is unique because of its element of dolus specialis (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.” Prosecutor v. Kambanda, (ICTR 97-23-S), judgement and sentence, 4 December 1998
61 See, Arnold, supra note 57, at 134.
62 See, Schabas, supra note, 1, at 211-212.
On the other hand, some consider the “special intent” of genocide not as a type of intent, but as the mental element of the crime.\textsuperscript{64} A similar interpretation made in a decision of the ICTR and it was stated that “special intent” which demonstrates the motive of the perpetrator to destroy the group as the mental element of the crime shall definitely exist for genocide.\textsuperscript{65} The general intent and special intent division is a theoretical division and the purpose is to understand the crime and to determine the intent of the perpetrator. That it is determined during the trial that the perpetrator acted with genocidal intent; in other words, the existence of genocidal intent is the existence of special intent.\textsuperscript{66} The important point in terms of criminal law and law on criminal procedures is the determination of whether the perpetrator has acted “intentionally” or not. If it has been determined that the perpetrator committed a crime intentionally, which can be committed with special intent, the problem is solved. The reason for this is that “special intent” is not a type of the mental element of the crime, but a type of the “intent.”

Nevertheless, it is certain that genocide can only be committed intentionally. However, the distinction of this crime from any other mass killing or crime against humanity or ethnic cleansing is that the purpose of the perpetrator is “to destroy the group” and since it is required to consider the purpose of the perpetrator to commit the crime, hereby a crime that can technically be committed with special intent exists. The basic characteristic of this crime is aiming the destruction of a group whose characteristics are enumerated in the Convention. Therefore, the victims of this crime are not targeted because of who they are, but just because of being members of the targeted group and are targeted to destroy the group.\textsuperscript{67} The victims of genocide are exposed to the acts enumerated in the Convention for being a member of the targeted group and to enable the exact crime to be committed.\textsuperscript{68}

\textsuperscript{64} See, Arnold, supra note 57, at 135
\textsuperscript{65} Judgement, \textit{Rutanga} (ICTR-96-3, Par. 61), Trial Chamber, 6 December 1999.
\textsuperscript{66} See, Nersessian, supra note 11, at 264.
\textsuperscript{67} Akayesu, supra note, 33, Par. 521.
\textsuperscript{68} Akayesu, supra note, 33, Par. 522.
ICTY stated that the basic characteristic of the crime of genocide is the purpose of destroying the group and that this purpose is the basis of the crime of genocide; and thus, the crime is committed with special intent. The intent of the genocide shall be taken into consideration in accordance with the general principles of criminal law and the historical process of the preparation of the Convention. Therefore, the mental element of this crime shall be analyzed through both historical and teleological interpretation methods.

Since the intent is a mental factor, the determination of the perpetrator’s intention is highly difficult, as for all crimes. Genocidal intent may be determined through the acts of the perpetrator. One of the criteria applied for the determination of the intent of the crime of genocide is the quantitative characteristics of the destroyed part of the group. ICTR stated in its Kayishema judgement that “when the number of the killed Tutsi people is considered, it is obvious that the purpose was the destruction of the group” however, the Court did not state a certain number and thus, disregarded the quantification of the persons killed.

Another method for the determination of the intent is the “repetition of the destructive and discriminating acts”. Moreover, ICTR stated that the existence of a plan for genocide is an important evidentiary instrument and explicit expressions of the perpetrator about genocide and -although cultural genocide does not take place in the Convention- the destruction of the cultural existence of the protected group were also considered as indicators of genocidal intent by ad hoc courts. For example, ICTY considered the destruction of the institutions and libraries belonging to the Muslims as an evidence of intent of destroying the group in the Karadzic and Mladic judgements. ICTY stated in the Jelisic

70 Akayesu, supra note, 33, Par. 523; Musema, supra note, 55, Par. 167; see, Schabas, supra note, 1, at 210-211.
71 Kayishema&Ruzindana, supra note, 52, Par. 533.
72 See, Nersessian, supra note, 11 at 266; Judgement, Karadzic&Mladic (ICTY-95-5-R61 and IT-95-18-R 61 Par. 294), 11 July 1996.
73 Kayishema&Ruzindana, supra note, 52, Par. 93 and 94. See also, judgement, Krstic (ICTY-98-33, Par. 88), 2 August 2001 and Karadzic&Mladic, supra note, 72, Par. 94 and 95 for similar decisions.
74 Karadzic&Mladic, supra note, 72, Par. 94.
case that perpetrators always targeted members of the same group (in other words, that the perpetrator commits the acts enumerated in the Convention always against the members belonging to a certain group) which indicates the existence of genocidal intent. Moreover, the International Court of Justice stated in the “Yugoslavia et. al.” and “Nuclear Weapons” case that the excessive power used might be related to genocide and the use of excessive power will prove genocidal intent.

The first jurisprudence of the ICC on Al-Bashir Case in the Situation of Darfur is the most recent legal documents about the interpreting the crime of genocide and the proof of genocidal intent. In its 4 March 2009, decision, Pre-Trial Chamber I rejected the Prosecutor’s application in respect of genocide stating that it would issue an arrest warrant for genocide only if there were reasonable grounds to believe in the existence of genocidal intent. On 3 February 2010, the Appeals Chamber (Par. 30) stated that the existence of genocidal intent must eliminate any reasonable doubt. ICC issued an arrest warrant on July 12, 2010, for President Omar al-Bashir of Sudan for genocide committed in Darfur considering that there were reasonable grounds to believe that Omar Al Bashir was criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator for genocide. Atrocities committed in Sudan by the Sudanese armed forces and Sudanese government-backed militia “Janjaweed” against civilian populations and ethnic groups (the Fur, Masalit and Zaghawa) were listed in the decision and Al Bashir was believed to be criminally responsible as an indirect perpetrator or indirect co-perpetrator because of these atrocities. Al Bashir was accused with killing members of the group, causing serious bodily or mental harm to members of the group whole or in part, committed against a racial, religious, national or ethnic group with the

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75 Jelisic, supra note, 47, Par. 73.
76 ICJ’s Judgement, Legality of the Use of Force (Yugoslavia v. U.K., U.S.A. and others. ICJ, 2 June 1999)
77 Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf, last visited, 10.10.2012)
specific intent (*dolus specialis*) of destroying the group in whole or in part as such. The Court considered those systematically directed atrocities against the protected groups as circumstances and evidence of genocidal intent.

Crime of genocide can only be proved whether or not the material element of the crime and the acts enumerated in the Convention has been committed. Other acts of the perpetrator to commit the acts enumerated in the Convention are also important for the determination of the perpetrator’s intent. For example, if a genocide plan has been prepared and that there is an organization for this task demonstrates the perpetrator’s preparations to commit genocidal acts.79

9. Concluding Remarks

Genocidal acts experienced before the 1948 Genocide Convention was referred to with political-social evaluations such as massacre, brutality, barbarity. The term “genocide” was coined by Lemkin in 1944 and its legal definition has been made with the 1948 Convention on Genocide. Atrocities which are elements of genocide did not exist or defined as genocide in any criminal code of any country until the Genocide Convention. However, the crime of genocide has also been criminalized in many domestic criminal law systems following the preparation of the Genocide Convention.

Today the crime of genocide which constitutes one of the *jus cogens* rules of international law is under the analysis field of international law on one hand and the criminal law on the other hand. 1948 Convention on Genocide is the fundamental legal document for the determination and definition of the crime of genocide regarding international criminal law. The statutes of the ICTY and the ICTR mirrored the definition of genocide contained in the

79 See, Schabas, *supra note*, 1, at 210 *et seq.*
Genocide Convention. Also the definition of the crime of genocide in Article 6 of the ICC Statute is identical to the definition of genocide set out in the 1948 Convention. These tribunals have applied customary and human rights laws in interpreting the crime of genocide during the trials. Although a large number of national criminal codes have codified the crime of genocide, the existence of genocide should be determined through an evaluation of the Convention and the decisions of the ad hoc courts together.

In terms of substantive criminal law, for the existence of the crime, the material and mental element of the crime determined in the definition of the crime should have been realized. While the actus reus (material element) of the crime is the act, the mens rea (mental element) of the crime is culpability. The elements of the crime of genocide are derived from the definition of Article 2 of the Genocide Convention and also article 6 of the ICC Statute. According to this article, the crime of genocide is committing any of the acts enumerated in the Convention with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The circumstance elements or material element (actus reus) of the crime of genocide is “committing any of the acts enumerated in the Article 2 of the Convention against a national, ethnical, racial or religious group as such.”

The mental element of genocide is intention. Genocide can be committed only intentionally. Because the enumerated acts in Article 2 of the Genocide Convention and also Article 6 of the ICC Statute can be committed intentionally. Intention means that the perpetrator committed the crime with knowledge and willing. The purpose of the perpetrator is “intent to destroy in whole or in part a national, ethnical, racial or religious group as such”. So the perpetrator should also commit the crime with a special purpose that is the intent to destroy the targeted group. This special purpose of the perpetrator in crime of genocide is called “genocidal intent” which is called “special intent” (dolus specialis) in general theory of substantive criminal law.
The crime of genocide can only be committed intentionally and through one of the acts enumerated in the 1948 Convention and ICC Statute. The basic characteristic of the crime is the purpose of the perpetrator committing the crime and this is the intention of destroying a group in whole or in part. Since the purpose of the perpetrator for the crime of genocide is the reason of which the act has been forbidden, the point in question is “special intent” or “genocidal intent”. In the event that the perpetrator has no genocidal intent; massacre, murder, ethnic cleansing, and even crimes against humanity would come up; but not genocide.