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Reframing Genocide

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Abstract

Genocide has recently taken center stage in international affairs. Both Israel and Hamas and Russia and Ukraine have accused one another of committing genocide or having genocidal aims, and each side has denounced allegations against themselves. The legal accuracy of these accusations depends, inter alia*, upon whether the allegedly genocidal acts were committed with "intent to destroy," as required by the Genocide Convention. Courts and commentators nearly all assume that the "intent to destroy" describes an individual's internal mental state and the* mens rea *of the crime of genocide.*

In this Article, I argue that this individualistic interpretation of genocide is inaccurate and unworkable. Genocide is not a discrete act committed by an individual perpetrator. It is a collective process arising out of particular structural conditions. Furthermore, the gap between the enormity of genocidal intent and the capacity of individuals renders any determination regarding the intentions of individual perpetrators highly speculative. And the structural conditions that make genocide possible also make it difficult for courts to disentangle individuals' intentions. As a result of these difficulties, criminal tribunals and the International Court of Justice have produced inconsistent and convoluted jurisprudence. Worse, the individualistic interpretation has stymied efforts at prevention by making it easy for states to deny allegations of imminent or ongoing genocide based on uncertainty about the innerworkings of individuals' minds.

The alternative structural approach I propose understands genocide as a collective process in which the structural context exhibits an "intent to destroy." Accordingly, whether a situation counts as genocide would not depend on the internal mental states of individual perpetrators, but rather, objective indicators of genocidal structures. Reframing the definition of genocide in this way streamlines judicial decision-making

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and makes it harder for states to get away with ignoring, contributing to, or committing genocide.

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INTRODUCTION

Genocide has recently taken center stage in international affairs. Both Israel and Hamas[1] and Russia and Ukraine[2] have accused one another of committing genocide or having genocidal aims, and each side has denounced allegations against themselves. The allegations have sparked controversy around the world, with politicians, pundits, and activists coming to vastly different conclusions about when and where the genocide label is appropriate. This controversy reflects more than just preexisting loyalties to a particular country or group. And it is not merely a problem of politicians, journalists, and ordinary people not understanding the law. The debate reveals instead, I suggest, the profound confusion surrounding the definition of genocide, even in the judicial opinions and legal commentary meant to elucidate it.

The term genocide, which combines the Greek term *genos*, meaning race or tribe, with the Latin *cide*, meaning killing, was coined by Raphael Lemkin.[3] Lemkin, an international legal scholar who escaped Poland before Nazis took the lives of dozens of his family members in the Holocaust, was among the most vocal proponents of a convention on genocide.[4] On December 9, 1948, the recently established United Nations ("UN") General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention").[5] The Convention defines genocide as any of five enumerated acts "committed with *intent to destroy*, in whole or in part, a national,

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[1] *See, e. g.*, Stephanie van den Berg & Anthony Deutsch, *World Court Says Israel Must Take Steps to Prevent Acts of Genocide in Gaza*, REUTERS (Jan. 26, 2024, 5:51 AM), https://www.reuters.com/world/middle-east/world-court-rule-urgent-measures-gaza-genocide-case-2024-01-26/ [https://perma.cc/Y5PV-L9KL]; Stephanie van den Berg & Henriette Chacar, *Palestinians Ask War Crimes Court to Probe Israel over Genocide Allegations*, REUTERS (Nov. 10, 2023), https://www.reuters.com/world/middle-east/palestinian-groups-ask-war-crimes-court-investigate-genocide-accusations-2023-11-10 [https://perma.cc/4P8M-UKKH]; Steven Lubet, *The War of Words over Gaza Makes the Entire World Less Safe*, THE HILL (Nov. 13, 2023, 9:00 AM), https://thehill.com/opinion/international/4306053-the-war-of-words-over-gaza-makes-the-entire-world-less-safe/ [https://perma.cc/BH37-P5D5].

[2] *See* Julian Borger, *Zelensky Accuses Russia of Genocide and Urges World Leaders to Attend Peace Summit*, THE GUARDIAN (Sept. 19, 2023), https://www.theguardian.com/world/2023/sep/19/zelenskiy-russia-genocide-un-general-assembly [https://perma.cc/QLC8-RM2G]; Stephanie van den Berg, *World Court to Hear Russian Objections to Ukraine Genocide Case*, REUTERS (Sept. 17, 2023, 3:49 AM), https://www.reuters.com/world/europe/world-court-hear-russian-objections-ukraine-genocide-case-2023-09-17/ [https://perma.cc/5ESP-X42C].

[3] *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (1944).

[4] *See* SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 23–24, 49, 51–78 (2007).

[5] U.N. Convention on the Prevention and Punishment of the Crime of Genocide art. II., Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

ethnical, racial or religious group, as such."[6] The enumerated acts are "Killing," "Causing serious bodily or mental harm to," "Imposing measures intended to prevent births within," "Forcibly transferring children of," and "Deliberately inflicting . . . conditions of life calculated to bring about [the] physical destruction in whole or in part" of the group.[7] While the International Court of Justice ("ICJ" or "Court") is the designated arbiter of disputes over the interpretation of the Genocide Convention,[8] the prevailing understandings of its terms have primarily been developed by two *ad hoc* criminal tribunals—The International Criminal Tribunal for the Former Yugoslavia[9] ("ICTY") and The International Criminal Tribunal for Rwanda[10] ("ICTR")—which both adopted the Genocide Convention's definition verbatim.[11]

The "intent to destroy" is often considered the most essential and elusive element of the crime, difficult to define and to prove.[12] These difficulties have manifested in inconsistent and convoluted jurisprudence from the criminal tribunals and the ICJ.[13] States, taking advantage of this lack of clarity, have frequently pointed

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[6] *Id.* art. II (emphasis added).

[7] *Id.*

[8] *Id.* art. IX.

[9] S.C. Res. 827, Statute of the International Criminal Tribunal for the Former Yugoslavia (May 25, 1993).

[10] S.C. Res. 955, art. 1, Statute of the International Criminal Tribunal for Rwanda (Nov. 8, 1994).

[11] *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[12] *See* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶ 695 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (commenting that it is the "intent to destroy" that "characterises the crime"); Stefan Kirsch, *The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct*, 42 CREIGHTON L. REV. 347, 351 (2009) ("It is often said that the distinguishing characteristic of genocide, as compared to all other crimes under international law, is its *dolus specialis*, or special intent."); JOHN QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 116 (2006); Hans Vest, *A Structure-Based Concept of Genocidal Intent*, 5 J. INT'L CRIM. JUST. 781 (2007); KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOLUME II: THE CRIMES AND SENTENCING 18–25 (2014); Paul Behrens, *Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia*, 28 LEIDEN J. INT'L L. 923 (2015).

[13] *See* Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2265–70 (1999); John R.W.D. Jones, *"Whose Intent Is It Anyway?": Genocide and the Intent to Destroy a Group*, *in* MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 467 (Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking & Nicholas Robson eds., 2003); Vest, *supra* note 12, at 794; Kai Ambos, *What Does Intent to Destroy in Genocide Mean?*, 91 INT'L REV. RED CROSS 833 (2009) [hereinafter Ambos, *Intent to Destroy*]; Chanthima Neth, *The Issue of Mens Rea in the Crime of Genocide and Why It Needs to Be Amended*, 7 LEGAL ISSUES J. 15, 19 (2019); David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 268 (2002); Devrim Aydin, *The*

to a dearth of evidence of an "intent to destroy" to deny that genocide is imminent or ongoing and to justify not doing anything to stop it.[14] In this way, the confusion around the meaning of genocide and the "intent to destroy" has impeded the realization of the Genocide Convention's goals of punishment and prevention by undermining the legitimacy of trials for genocide, the ability of states and other actors to conform their behavior to the law, and the imperative for states and other actors to acknowledge and address atrocities before it's too late.

The legal scholarship on genocide has recognized these challenges to varying degrees. The international criminal law literature has criticized the inconsistency and unworkability of the criminal tribunals' interpretations.[15] The atrocity prevention literature has lamented how difficult it is to prove the elements of genocide while events are still ongoing and how states use that difficulty to justify inaction.[16] Both strands of the literature indicate that the main reason for these challenges is the stringency of the "intent to destroy" requirement.[17]

In this Article, I contend that the source of the confusion around the definition of genocide is more fundamental: the prevailing understanding of genocide as an individual crime and the "intent to destroy" as an individual's internal mental state. While courts and commentators differ in their exact interpretations, they are nearly unanimous that the "intent to destroy" describes an individual's internal mental state and the *mens rea* of the crime of genocide.[18] This individualistic understanding was

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Interpretation of Genocidal Intent Under the Genocide Convention and the Jurisprudence of International Courts, 78 J. CRIM. L. 423, 438 (2014); Katherine Goldsmith, *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach*, 5 GENOCIDE STUD. & PREVENTION 238 (2010).

[14] *See, e.g.*, POWER, *supra* note 4, at 332, 419, 512–13; Nahal Toosi, *Leaked Pompeo Statement Shows Debate over 'Genocide' Label for Myanmar*, POLITICO (Aug. 13, 2018, 2:38 PM), https://www.politico.com/story/2018/08/13/mike-pompeo-state-department-genocide-myanmar-775270 [https://perma.cc/RZS4-VGHB]; *see also* Todd F. Buchwald & Adam Keith, *By Any Other Name: How, When, Why the US Government Has Made Genocide Determinations*, UNITED STATES HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/m/pdfs/Todd_Buchwald_Report_031819.pdf [https://perma.cc/8JPJ-Z9R8] (noting that officials were especially focused on the question of intent when investigating atrocities in Darfur).

[15] *See* Greenawalt, *supra* note 13, at 2265–70; Jones, *supra* note 13; Vest, *supra* note 12, at 794; Ambos, *Intent to Destroy, supra* note 13; Neth, *supra* note 13, at 19; Nersessian, *supra* note 13, at 268; Aydin, *supra* note 13, at 438; Goldsmith, *supra* note 13.

[16] *Cf.* David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229 (2006); Zachary A. Karazsia, *An Unfulfilled Promise: The Genocide Convention and the Obligation of Prevention*, 11 J. STRATEGIC SEC. 20 (2018) ("Proving intent before action is the Achilles heel of the Genocide Convention.").

[17] *See, e.g.*, Vest, *supra* note 12; Greenawalt, *supra* note 13, at 2265–70; Goldsmith, *supra* note 13.

[18] *See*, *e.g.*, Claus Kreß, *The Crime of Genocide Under International Law*, 6 INT'L CRIM. L. REV. 461, 484–86 (2006); AMBOS, *supra* note 12, at 22; Prosecutor v. Krstić, Case

likely bolstered by the fact that the first international courts to issue judgments interpreting the definition of genocide were criminal tribunals responsible for trying individual perpetrators.[19] The ICJ has only issued two final judgments regarding the existence of state responsibility for genocide, both brought against Yugoslavia.[20] Each of the judgments drew extensively from the ICTY's jurisprudence and largely endorsed the individualistic interpretation it had developed.[21]

Four interrelated problems plague the individualistic understanding. First, it is inaccurate. Genocide is not a discrete act committed by an individual perpetrator.[22] Rather, as historical and social science research has made clear and courts have acknowledged, genocide is a collective process arising out of particular structural conditions.[23] Second, the gap between the enormity of genocidal intent and the capacity of individuals renders any determination regarding the intentions of individual perpetrators highly speculative. Indeed, criminal courts have relied extensively on circumstantial evidence to infer an individual defendant's "intent to destroy" and struggled to sift through multiple actual and potential motivations with which the defendant may have acted.[24] The ICJ, tasked with deciding questions of state responsibility, has the added challenge of determining whose intentions and motivations to impute to the state and which to disregard.[25] Third, the structural conditions that make genocide possible have also made it difficult for courts to disentangle individuals' intentions. Genocidal structures influence people's desires, motivations, and goals, while also rendering them superfluous by channeling their activities toward genocidal aims, which they may or may not share.[26] Fourth and

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No. IT-98-33-T, Judgement, ¶ 549 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 498 (Sept. 2, 1998); *but see* SANGKUL KIM, A COLLECTIVE THEORY OF GENOCIDAL INTENT 1–2 (2016) (also noting that prevailing understandings of the "intent to destroy" regard it as *mens rea* while also suggesting an alternative to that approach); Jones, *supra* note 13, at 468 (arguing that "the intent specific to genocide should be considered an attribute of the plan and not regarded as a *mens rea* requirement that must be proved in relation to an individual accused").

[19] *See infra* Section II.A.1.

[20] *See infra* Section II.A.2.

[21] *See infra* Section II.A.2.

[22] *See infra* Section II.B.1.

[23] *See generally* MARTIN SHAW, WHAT IS GENOCIDE? (2007); *see also* Sheri P. Rosenberg, *Genocide Is a Process, Not an Event*, 7 GENOCIDE STUD. & PREVENTION 16 (2012); DANIEL FEIERSTEIN, GENOCIDE AS SOCIAL PRACTICE: REORGANIZING SOCIETY UNDER THE NAZIS AND ARGENTINA'S MILITARY JUNTAS (Douglas Andrew Town trans., 2014); Jacques Semelin, *What Is 'Genocide'?*, 12 EUR. REV. HIST. 81, 87 (2005); *see also Krstić*, IT-98-33-T ¶ 549; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 305 (2d ed. 2009) (noting the difference between collective and individual motive); Claus Kreß, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 EUR. J. INT'L L. 619, 620 (2007); Vest, *supra* note 12, at 784; Kirsch, *supra* note 12, at 347; KIM, *supra* note 18, at 6.

[24] *See infra* Section I.A.

[25] *See infra* Section I.A.

[26] *See infra* Section II.B.3.

finally, structures, including but not limited to genocidal ones, also influence the determinations that judges, state officials, and other actors make regarding the existence of individuals' "intent to destroy."[27]

To correct this fundamental misunderstanding and better serve the Genocide Convention's goals, I propose replacing the individualistic interpretation of genocide with a structural one, which can be applied by states, courts, and other actors for purposes of both punishment and prevention. The most straightforward way to do so would be to amend the definition of genocide in the Genocide Convention and all statutes that have incorporated it.[28] However, this effort would not only encounter political and practical stumbling blocks, but it is also, I contend, unnecessary. The language in the current definition admits multiple interpretations, both structural and individualistic.[29]

Read in "context" and with the "object and purpose" of the Genocide Convention in mind,[30] I argue that a structural interpretation is most appropriate. Under this interpretation, the "intent to destroy" is best understood as an attribute of the structural context—the complex of overlapping and intersecting norms, institutions, laws, and practices in which people operate at a particular time. It may seem bizarre to claim that a clause with the word "intent" is not the intent requirement[31] for genocide. However, as social theorists have posited, structures display their own logics and channel people's activity toward their own aims.[32]

Genocide, accordingly, should be understood as a collective process in which the structural context exhibits an "intent to destroy" ("a genocidal structural context") and at least one of the enumerated acts of genocide ("Killing," "Causing serious bodily or mental harm," etc.) has occurred. Adapting a schema developed by French philosopher Louis Althusser, I divide structures into two broad categories:

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[27] *See infra* Section II.B.3.

[28] *See* Genocide Convention, *supra* note 5, art. II, XVI; Rome Statute, *supra* note 11, art. 6, art. 121.

[29] *See infra* Section III.B.2.

[30] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[31] The *mens rea* requirement is often also referred to as the intent requirement.

[32] *See* WILLIAM H. SEWELL JR., LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION 129 (2005) (describing structures as the "principles" that "pattern [social] practices"); PIERRE BOURDIEU, THE LOGIC OF PRACTICE 53 (Richard Nice trans., 1990) (referring to the "principles" that organize patterns, "collectively orchestrated" toward "ends" that are not the product of "conscious aims"); ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS 62, 106 (1979) (explaining that "social structure" involves a "patterning of interaction" and that "[s]tructural principles govern the basic institutional alignments in a society."); IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 53 (Samuel Freeman ed., 2011) (drawing on the work of Jeffrey Reiman to highlight the ways that structures create "channels" for the actions of individuals, "guiding and constraining them in certain directions, but not disabling their flow").

ideological and repressive.[33] For a structural context to be genocidal, I suggest that it should have both repressive structures that target a protected group and ideological structures that promote stigmatization, dehumanization, and/or violence against the group.

Much of the international criminal law literature proposes applying a less stringent "knowledge-based" standard in evaluating the *mens rea* of genocide but never questions that the "intent to destroy" *is* the *mens rea*.[34] The atrocity prevention literature responds to the problem of proving individual mindsets while events are still unfolding by suggesting that the "intent to destroy" be dropped for prevention, presumably leaving it in place unaltered for criminal punishment.[35]

What I am proposing is a more radical reframing of the definition of genocide—that turns not on the inner workings of an individual's mind but the structural context in which allegedly genocidal acts take place. This shift from individual to structure has the potential to expand the horizon of possible responses to genocide. Scholars have noted a "turn to criminal law" in human rights since the 1990s.[36] Concurrently, debates surrounding atrocity prevention and the Responsibility to Protect ("R2P") principle, which was developed by an international commission to improve responses to mass atrocity, have disproportionately focused on military intervention.[37] The structural approach resists the creep of criminal standards into

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[33] *See* LOUIS ALTHUSSER, ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES 75–76 (G. M. Goshgarian trans., 2014).

[34] *See, e.g.*, Vest, *supra* note 12, at 796; Greenawalt, *supra* note 13, at 2265–70; Goldsmith, *supra* note 13.

[35] *See, e.g.*, Scheffer, *supra* note 16; Karazsia, *supra* note 16.

[36] Karen Engle, *Proceedings of the 112th Annual Meeting: Remarks by Karen Engle,* 112 AM. SOC'Y INT'L L. PROC. 84 (2018); *see also* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005); Aziza Ahmed, *Proceedings of the 112th Annual Meeting: Remarks by Aziza Ahmed*, 112 AM. SOC'Y INT'L L. PROC. 87 (2018); *see also* Gabriella Blum, *The Shadow of Success: How International Law Has Come to Shape the Battlefield*, 100 INT'L L. STUD. 133 (2023). *See* Lisa Guenther, *"We Charge Genocide": Anti-Black Racism in the United States as Genocidal Structural Violence*, *in* LOGICS OF GENOCIDE: THE STRUCTURES OF VIOLENCE AND THE CONTEMPORARY WORLD 143 (Anne O'Byrne & Martin Shuster eds., 2020) for the claim that genocide has always prioritized the criminal.

[37] *See, e.g.*, Scheffer, *supra* note 16; Tasnim Motala, *The Genocide Name Game: The Case for Crimes Against Humanity to Prevent Genocide*, 37 QUINNIPIAC L. REV. 611 (2019); Karazsia, *supra* note 16; *see generally* Cristina G. Badescu, *Authorizing Humanitarian Intervention: Hard Choices in Saving Strangers*, 40 CANADIAN J. POL. SCI. 51, 59 (2007) (addressing debates regarding the "use of force for humanitarian purposes"); NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 6 (2000) (exploring the "legitimacy of using force against states who grossly violate human rights"); Jeremy Sarkin & Carly Fowler, *The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to Be Learned from the Role of the International Community and the Media During the Rwandan Genocide and the Conflict in Former Yugoslavia*, 33 SUFFOLK TRANSNAT'L L. REV. 35 (2010) (discussing the role of media in influencing international governments' willingness to intervene militarily to prevent genocide and other atrocities).

questions of prevention and state responsibility.[38] It also encourages prevention efforts focused on impeding the development of, and discontinuing contributions to, genocidal structures rather than stopping individual wrongdoers on the precipice of committing atrocities.[39] In this way, the structural approach shifts the timeline for prevention backward long before violent intervention to stop individual wrongdoers looks like the only option.[40]

While not primarily designed to be punitive, the structural approach also has the potential to facilitate the punishment of genocide, especially at the International Criminal Court ("ICC"). Established in 2002, the ICC has jurisdiction over genocide, defined with the same language as the Genocide Convention, but has yet to try a genocide case.[41] Separating the question of whether genocide took place from the question of whether sufficient evidence exists to convict an individual defendant of committing an act of genocide clarifies and streamlines the inquiry. Under my proposal, to convict individual defendants, courts would still need to find that they acted with "intent and knowledge," the default mental element designated in the Rome Statute establishing the ICC, which will likely hear most if not all, international criminal trials for genocide moving forward.[42] Applying the definitions of "knowledge and intent" from the Statute to my proposed structural interpretation, a conviction would require that the court determine that the defendant, at a minimum, knowingly committed one of the enumerated acts within a structural context exhibiting an "intent to destroy."[43] Thus, while the structural interpretation removes the "intent to destroy" from the realm of *mens rea*, *mens rea* does not disappear from the inquiry altogether. The structural interpretation simply removes one layer of what some commentators have called a dual *mens rea* requirement for genocide convictions, consisting of (1) the "intent to destroy" and (2) the *mens rea* specific to the enumerated acts.[44]

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[38] *See infra* Section III.B.

[39] *See infra* Section III.B.

[40] *Cf.* Joseph Hoover, *Reconstructing Responsibility and Moral Agency in World Politics*, 4 INT'L THEORY 233 (2012).

[41] The ICC has, however, issued an arrest warrant for Omar Al Bashir, the former president of Sudan, which included three counts of genocide against Fur, Masalit and Zaghawa ethnic groups. *See generally* Prosecutor v. Al Bashir, ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010).

[42] *See* Rome Statute, *supra* note 11, art. 30.

[43] My proposal thus shares much in common with knowledge-based proposals and related proposals that treat the "intent to destroy" like the "widespread and systematic" contextual requirement for "crimes against humanity." *See, e.g.*, Vest, *supra* note 12; Greenawalt, *supra* note 13, at 2265–70; Goldsmith, *supra* note 13.

[44] *E.g.*, Ambos, *Intent to Destroy, supra* note 13, at 834 ("The genocide offence has *two separate mental elements*, namely a general one that could be called 'general intent' or *dolus*, and an additional 'intent to destroy'"); Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT'L L. 309, 400 (2001) ("As the decisive criterion, this last mentioned subjective element is often called 'genocidal intent.' But this formulation is deceiving. It easily can be – and quite often is – understood

This Article proceeds as follows. Part I outlines the ways that confusion regarding the meaning of the "intent to destroy" has undermined the realization of the Genocide Convention's goals of prevention and punishment. Part II argues that these challenges are symptomatic of the prevailing individualistic understanding of the definition, elaborating four key reasons it has been so detrimental. Part III lays out the structural interpretation I am proposing. Part IV details how the structural interpretation could better induce courts, states, and other actors to acknowledge and address genocide. It also responds to some likely objections—including that the approach is overly expansive, is unfaithful to the text, and that, realistically, the definition of genocide is irrelevant to state practice. The Conclusion summarizes the argument and reflects on the possibility of a structural approach to other crimes.

Now is the time to embrace a structural interpretation of genocide. The ICJ has five pending cases regarding alleged acts of genocide. The first three (*The Gambia v. Myanmar*, *Ukraine v. Russia*, and *South Africa v. Israel*) involve accusations that the respondent state is committing (or has committed) genocide. The two more recent cases (*Nicaragua v. Germany* and *Sudan v. United Arab Emirates*) claim that the respondent state is supporting the commission of genocide.[45] Dozens of countries have applied to intervene in the cases against Myanmar, Russia, and Israel. International attention to the provisions of the Genocide Convention, therefore has never been higher. More significantly, a structural interpretation of genocide could aid states and other actors in identifying and dismantling genocidal structures as they develop rather than waiting for courts to assess individuals' intentions after mass violence has already occurred.

I. THE MUDDLING OF THE MEANING OF GENOCIDE AND THE CONVENTION'S UNFULFILLED PROMISE

Following World War II and the horrors of the Holocaust, the adoption of the Genocide Convention was a hopeful moment in which the international community came together to "liberate mankind from . . . the odious scourge" of genocide.[46] Over seventy-five years later, the Convention's aims have not been fulfilled. Mass killings, many of which have been referred to as genocide, have taken place with

as an overall expression of the complete subjective, the mental side of genocide. However, such an understanding is not only misleading but *contra legem*, insofar as there are *two* subjective elements required to establish criminal responsibility for genocide . . . .").

[45] Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. Rep. 6 (Jan. 26); Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. Rep. 3 (Jan. 23); Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. Rep. 211 (Mar. 16); Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Provisional Measures, 2024 I.C.J. Rep. 2 (Apr. 30, 2024); Proceedings Instituted by Sudan against the United Arab Emirates (Sudan v. UAE), Application Instituting Proceedings (Mar. 5, 2025).

[46] Genocide Convention, *supra* note 5, pmbl.

astonishing frequency. Violence against Bosnian Muslims in the former Yugoslavia, Tutsis in Rwanda, and Kurds in Iraq are a few of the more commonly cited examples.[47]

Despite warnings that genocide was imminent or ongoing, states have justified their failures to acknowledge and address genocide by claiming the definition does not apply to the situation at hand. When U.S. officials, for example, offer reasons for not labeling a particular situation genocide, they often indicate that it is a "legal" question and point in particular to a lack of evidence of intent.[48] As a few commentators have pointed out, it is hard to garner evidence of the intent of perpetrators when genocidal conditions are still developing.[49] One author even described the need to "[p]rov[e] intent before action" as "the Achilles heel of the Genocide Convention."[50]

The courts entrusted with interpreting the definition of genocide have done little to correct states' wielding of the "intent to destroy" provision as a shield to deflect invocations of their obligations to prevent, and not commit, genocide. Indeed, the courts' muddled genocide jurisprudence has, in some ways, made it easier for states to do so. In this Part, I discuss four issues plaguing the genocide jurisprudence: (1) inconsistency in standards for proving an "intent to destroy"; (2) broad discretion exercised by courts in choosing among multiple possible motivations of the alleged perpetrators; (3) heavy reliance on circumstantial evidence; and (4) little guidance regarding what constitutes a violation of the obligation of prevention. Together, these issues have bolstered states' efforts to avoid addressing genocide and undermined the legitimacy of the international legal regime governing the prevention and punishment of genocide.

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[47] *See id.*; *see generally* Barbara Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955*, 97 AM. POL. SCI. REV. 57 (2003).

[48] *See, e.g.*, POWER, *supra* note 4, at 332, 419, 512–13; Toosi, *supra* note 14. Regarding Myanmar, the US State Department did eventually declare the attacks against Rohingya genocide, but only several years after the events took place. Samantha Power, in her tome on U.S. responses to genocide in the late twentieth century, quotes State Department spokesperson Christine Shelly's response to a reporter's question about Rwanda, which emphasized that genocide "has a very precise legal meaning" and that more information on the "intentions of those who are committing the crimes" was necessary. POWER, *supra* note 4, at 512–13. Power went on to serve in the Obama administration on atrocity prevention and later as U.S. ambassador to the United Nations.

[49] *See* POWER, *supra* note 4, at 512–13; Karazsia, *supra* note 16; *see also* Scheffer, *supra* note 16.

[50] Karazsia, *supra* note 16, at 23 ("The difficulty in proving intent, in real-time, has created a daunting task for the international community; therefore, this mandate limits the effectiveness of prevention strategies to retroactivity and not concurrent with exigent circumstances."); *see also* Scheffer, *supra* note 16, at 230 ("During the early years of the administration, officials seemed incapable of definitive action unless and until genocide was determined to have occurred, and even then action was problematic because either too much time had elapsed, and the killing had subsided, or the larger responsibility any timely and effective response might trigger was too much to shoulder politically.").

A. Inconsistent Standards

Courts and commentators have articulated a vast array of standards for determining whether the "intent to destroy" element of the definition of genocide has been met. The prevailing interpretation is what has been labeled the "purpose-based approach," which understands the "intent to destroy" to be a specific intent or *dolus specialis* element, requiring that destruction was the alleged perpetrator's aim or goal.[51] In practice, however, the standards applied in tribunal judgments have varied. Judgments sometimes suggest that the perpetrator needs to be motivated by a desire to destroy[52] and sometimes that they must "clearly seek" destruction.[53] At other times, courts have only asked whether the defendant knew,[54] or *should have* known, of the destructive consequences of their actions or of someone else's "intent to destroy."[55] Courts' application of the inconsistent standards has also been inconsistent. The result has been that "the disposition of actual cases reflects both reasoning and results that are hard to square with the general statements of law contained in the very same cases."[56]

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[51] *See, e.g.*, Neth, *supra* note 13; SCHABAS, *supra* note 23, at 257; *see generally* Alexander K.A. Greenawalt, *"With Intent to Destroy, in Whole or in Part": Genocide, Ethnic Cleansing, and a Lost History*, 2024 WIS. L. REV. 933 (2024) [hereinafter Greenwalt, *With Intent to Destroy*].

[52] *See, e.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 108 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) ("It has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide."); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, ¶ 26–27 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) ("The Trial Chamber rejected the Defence's argument that the killing of these men was motivated solely by the desire to eliminate them as a potential military threat. . . . This evidence further supports the Trial Chamber's conclusion that the extermination of these men was not driven solely by a military rationale . . . . The killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent.").

[53] *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 498 (Sept. 2, 1998) ("Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged."); Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement, ¶ 524 (May 26, 2003).

[54] Within international case law, knowledge is most commonly used as a standard in cases in which accomplice liability is alleged. *See Krstić*, IT-98-33-A ¶ 134; *see generally* Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement, (Jan. 27, 2000). Many academic commentators have promoted variations on the "knowledge-based approach." *See, e.g.*, Greenawalt, *supra* note 13, at 2265–70.

[55] Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 595 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); *Akayesu*, ICTR-96-4-T, ¶ 520; LEO KUPER, THE PREVENTION OF GENOCIDE 9–10 (1985).

[56] Greenawalt, *With Intent to Destroy, supra* note 51, at 942; *see also* KIM, *supra* note 18, at 8.

B. Multiple Possible Motivations

One source of the inconsistency in applying the "intent to destroy" provision is the broad discretion exercised by courts in choosing amongst multiple motivations with which the perpetrators may have acted. In criminal trials for genocide, the court must sort through several apparent reasons the defendant had for committing an act—following orders, fear of punishment, hate of the group, dislike of the individual, power, professional advancement, desire to see the group eliminated, desire to fit in, etc.—and decide whether independently or in combination they amount to an "intent to destroy."[57]

A juxtaposition of the ICTY's trial of Bosnian Serb commander Goran Jelisić[58] and Israel's 1961 trial of Nazi official Adolf Eichmann[59] demonstrates the range of interpretations available to courts assessing multiple possible motivations.[60] In *Jelisić*, the defendant admitted to killing several Bosnian Muslims at the police station and Luka detention camp in Northern Bosnia in 1992.[61] The ICTY trial chamber found him guilty of crimes against humanity and violations of the laws or customs of war, but he was acquitted of genocide.[62] It determined that despite evidence that Jelisić expressed anti-Muslim sentiment, referred to himself as the Serbian "Adolf," stated his desire to "cleanse" the Muslims, and declared to detainees that only a small percentage of them would survive, he did not have the requisite specific intent for genocide.[63] To support this determination, the trial chamber pointed to, among other things, his "disturbed personality," enjoyment of "holding the power of life or death over detainees," "bloodthirsty manner," "pride

[57] *Cf.* Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001); Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgement, ¶ 53 (July 9, 2004); QUIGLEY, *supra* note 12, at 122 ("Many of those who participated in mass killings in Rwanda characterized their motivation as lying in such practical concerns."); MOSHE PEARLMAN, THE CAPTURE AND TRIAL OF ADOLF EICHMANN 464 (1963); HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

[58] *See* Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

[59] Att'y Gen. Gov't Isr. v. Eichmann, 36 I.L.R. 18 (DC Jer 1961), *aff'd* 36 I.L.R. 277 (Isr. 1962). Eichmann was not technically charged with genocide. Counts one through four of his indictment were for "crimes against the Jewish people," which were defined under Israeli law using nearly identical language to that of the Genocide Convention. *Compare* § 1(b), Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, 4 LSI 154 (1950) (Isr.), *with* Genocide Convention, *supra* note 5.

[60] The two cases differ in their venue (domestic court versus international tribunal) and the law applied ("crimes against the Jewish people" under Israeli law and the crime of genocide under the statute for the ICTY). The point of the juxtaposition is to demonstrate the variety of interpretations available to adjudicators when multiple possible motivations are evident.

[61] *Jelisić*, IT-95-10-T, ¶ 58, 108.

[62] *Id.*

[63] *Id.* ¶¶ 102–03.

in the number of victims," and desire to "terrorise them."[64] Because of these other explanations for his behavior, the chamber held that "it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide."[65]

The *Jelisić* trial chamber's conclusion that the defendant lacked genocidal intent because he was especially sadistic stands in contrast to assumptions made in and surrounding the *Eichmann* case. In its judgment, the Israeli trial court emphatically rejected Eichmann's claims that he was not an antisemite, was just following orders, and was a mere "'small cog' in the extermination machinery."[66] Even more to the point, when Hannah Arendt, a German Jewish political theorist who escaped the Nazis and settled in the U.S., observed in her reporting on the trial that Eichmann was "not a 'monster'"[67] nor a "perverted sadist,"[68] critics excoriated her for denying his guilt.[69] Thus, they came to the same conclusion based on a *lack* of sadistic tendencies that the *Jelisić* court did based on the *presence* of such tendencies.

The *Jelisić* appeals chamber did simplify the analysis of multiple possible motivations when it clarified that a defendant can be found to have an "intent to destroy" even when they exhibit other "personal motive[s]" such as "economic benefits, [] political advantage [,] or some form of power."[70] Similarly, the ICTR, which heard several cases in which the defendant had multiple possible motives,[71] found that the "intent to destroy" the protected group need not be a defendant's only reason for committing an enumerated act to be convicted of genocide.[72] Courts have not, however, provided any clear rule on how to determine when apparently non-genocidal motivations might outweigh apparently genocidal ones.

When states bring suits to the ICJ alleging that another state committed genocide, they have the added challenge of ascribing an internal mental state to a nonhuman entity. It is common to ascribe the acts of officials to a state.[73] Ascribing

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[64] *Id.* ¶¶ 104–05.

[65] *Id.* ¶ 108.

[66] Att'y Gen. Gov't Isr. v. Eichmann, 36 I.L.R. 18, ¶ 180 (DC Jer 1961), *aff'd* 36 I.L.R. 277 (Isr. 1962).

[67] *Id.* at 90.

[68] *Id.* at 351.

[69] *See, e.g.*, Michael Ezra, *The Eichmann Polemics: Hannah Arendt and Her Critics*, 9 DEMOCRATIYA 141 (2007) (reviewing the criticisms leveled against Arendt in response to her reporting on the Eichmann trial).

[70] Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

[71] *See generally* QUIGLEY, *supra* note 12, at 122 (noting that many perpetrators of killings in Rwanda reported being motivated by "practical considerations" such as "pleasing certain authorities or avoiding negative consequences").

[72] *See, e.g.*, Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Judgement, ¶ 53 (July 9, 2004).

[73] *See, e.g.*, Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 supp. n.10, at 44 (2001) (presenting draft articles for the Responsibility of States for Internationally Wrongful Acts, where article four gives relevant text).

an "intent to destroy" to a state is more complicated because of the multiplicity of individuals whose activity contributes to the genocide. A head of state may authorize a military campaign to clear a particularly lucrative piece of land of all inhabitants, knowing that the process of clearing the area will result in the deaths of thousands of people from an ethnic minority group. The head of state may have no ill will toward the group, as such, but find that demonizing its members helps garner public support for the campaign. A pilot may drop bombs on what their superiors authorized as a legitimate target but do so hoping to wipe out as many of the "natives" as possible. A military unit may include soldiers with vastly different goals as they rape, pillage, and kill inhabitants of villages from a stigmatized group. Some of them might engage in violence because they like the power, some might do it to fit in, some might have historical grudges against people in that group, and others might genuinely believe all group members are the enemy. The commander may not have known his subordinates would engage in so much excessive violence, while *his* superiors might have been counting on it. Such diverse desires, motivations, and goals, and the weightiness of the genocide charge, make it difficult to infer and distinguish a state's "intent" from that of any one individual.

In its very limited jurisprudence on genocide,[74] the ICJ has recognized a distinction between the "intent to destroy" from "other reasons or motives the perpetrator may have,"[75] while at the same time suggesting that the existence of other reasons or motives may preclude a finding that the "intent to destroy" was missing. In *Bosnia and Herzegovina v. Serbia and Montenegro*, the Court suggested that evidence Serbian leadership sought to "create a larger Serb State, by a war of conquest as necessary" contradicted the "intent to destroy" because, the Court speculated, their aims may have been achieved with displacement alone.[76] Similarly, in *Croatia v. Serbia*, the Court points to motives such as creating "an ethnically homogeneous Serb state" and "punish[ing]" the "civilian population" to support their finding that an "intent to destroy" was not the "only reasonable inference to be drawn."[77] The ICJ has thus failed to clarify the confusion in the criminal jurisprudence about how to determine which motivations are genocidal and how to

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[74] The only two final judgments the ICJ has issued regarding the existence of genocide were both brought against the former Yugoslavia. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26); Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3 (Feb. 3). The I.C.J. has also issued opinions on at least five other matters, in which the Genocide Convention has been invoked in some way. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Legality of Use of Force (Yugoslavia v. U.S.), Provisional Measures, 1999 I.C.J. 916 (June 2); Armed Activities on Territory of Congo, 2006 I.C.J. Rep. 6. (Feb. 3); Questions relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422 (July 20).

[75] *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. ¶¶ 187–89.

[76] *Id.* ¶ 372.

[77] *Croat. v. Serb.*, 2015 I.C.J. Rep. ¶¶ 426–29.

weigh evidence of other non-genocidal motives against them. Indeed, the harder question of choosing between multiple individuals' possible motivations for purposes of assigning state responsibility is still to be answered.

C. Overreliance on Circumstantial Evidence

International tribunals' heavy use of circumstantial evidence without a specific link to the individual defendant has also contributed to the inconsistencies in the jurisprudence on the "intent to destroy." The appeals chamber in *Jelisić* included a broad list of "circumstantial evidence," including "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, [and] the repetition of destructive and discriminatory acts."[78] These categories of evidence say little about a defendant's personal goals, motives, or desires. The ICTR's *Akayesu* judgment, the first conviction for genocide in an international tribunal, underscored the irrelevance of the individual defendant's intent when it wrote that it was possible to infer genocidal intent from "the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators."[79] Similarly, courts have indicated that the "existence of . . . a plan," regardless of whether the defendant devised it, could serve as evidence of an "intent to destroy."[80] As with evidence of multiple possible motivations, courts' "great discretion" in applying the "intent to destroy" requirement has led to "inconsistencies and a lack of clarity in the genocide jurisprudence."[81]

D. Little Guidance on Obligations of Prevention

The ICJ's limited jurisprudence has provided limited guidance regarding the scope and substance of states' obligations to prevent genocide. In the only two final judgments the Court has issued regarding genocide, it affirmed both an obligation to prevent genocide and to not commit genocide.[82] The Court asserted that states must act to prevent genocide "the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[83] It further commented that the idea that "the obligation to prevent genocide only comes into being when perpetration of genocide commences," as states often imply, "would

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[78] Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

[79] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 728 (Sept. 2, 1998).

[80] *E.g.*, Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 276 (May 21, 1999); *Jelisić*, IT-95-10-A, ¶ 48.

[81] Motala, *supra* note 37, at 623.

[82] *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. ¶ 167; *Croat. v. Serb.*, 2015 I.C.J. Rep. ¶ 128.

[83] *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. ¶ 431.

be absurd."[84] As the Court remarked, "the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act."[85]

Yet, the ICJ has undermined the significance of those obligations in a few important ways. First, as discussed in relation to the multiple motivations issue, the Court has endorsed a standard for the "intent to destroy" that seems quite high ("only reasonable inference")[86] without much guidance on what situations would meet it. Second, the Court's glacial process ensures that it does not issue a decision regarding obligations of prevention until years after atrocities take place, thus diminishing its ability to enforce those obligations as they arise meaningfully. For instance, Bosnia initially requested provisional measures against Yugoslavia in 1993.[87] At this point, mass killings and expulsions of Bosnian Muslims were already underway, but it was still two years prior to the Srebrenica massacre that the ICJ would later conclude was genocide.[88] The Court's final determination that genocide had taken place in Srebrenica in 1995 (and only in Srebrenica in 1995) was not issued until 2007.[89] By contrast, Helsinki Watch, a predecessor to Human Rights Watch, had already in 1992 "found that the systematic executions, expulsions, and indiscriminate shelling attacks at the very least offered 'prima facie evidence that genocide is taking place.'"[90] The *Croatia* case was similarly slow—it was initiated in 1999, and a final judgment was not issued until 2015.[91] More recently, the Gambia brought its suit against Myanmar in 2019 and the case is still in its preliminary stages, with the Court issuing very generic provisional measures in 2020, which the military has ignored.[92] In the other two ongoing genocide cases regarding events in Ukraine and Gaza, the Court has issued more specific provisional measures more quickly.[93] However, it will probably still be several years before any final determination is made.[94] Third, the ICJ held that in cases decided *after* the occurrence of an allegedly genocidal situation, the Court would only find a violation of the obligation of prevention if the ICJ determines that the situation was, in fact, genocide.[95] Thus, the Court forfeited

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[84] *Id.*

[85] *Id.*

[86] *Croat. v. Serb.*, 2015 I.C.J. Rep.¶ 428.

[87] *See Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. ¶¶ 1, 467–70.

[88] *See generally id.*

[89] *Id.* ¶ 376.

[90] POWER, *supra* note 4, at 375.

[91] *See generally Croat. v. Serb.*, 2015 I.C.J. Rep. 3.

[92] Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. Rep. 3 (Jan. 23).

[93] Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. Rep. 211 (Mar. 16); Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. Rep. 2 (Jan. 24).

[94] *See generally Ukr. v. Russ.*, 2022 I.C.J. Rep. 211; *S. Afr. v. Isr.*, 2024 I.C.J. Rep. 2.

[95] This limitation holds a special irony for the one violation of the obligation of prevention the Court did find—the 1995 Srebrenica massacre—because the case was brought in 1992, three years before the massacre when prevention was still possible, but a judgment on the merits was not made until 2007.

an opportunity to articulate standards for prevention that would not turn on retrospectively proving a perpetrator's intent to destroy.

II. THE FAULTY INDIVIDUALISTIC INTERPRETATION: "INTENT TO DESTROY" AS INTERNAL MENTAL STATE

The issues with the genocide jurisprudence identified in Part I are, I contend, symptoms of a more fundamental problem: the individualistic interpretation of genocide. In this Part, I define the individualistic interpretation, demonstrate how it has been articulated and endorsed by courts and commentators alike, and explain why it underlies many of the problems that have impeded the realization of the Convention's goals of prevention and punishment.

In substantiating these flaws, I make frequent reference to the Holocaust, the 1961 Jerusalem trial of Nazi official Adolf Eichmann,[96] and reactions thereto. While the trial was in a domestic court and did not technically include a charge of genocide, the case has been referred to as the "first reported judgment based upon the provisions" of the Genocide Convention.[97] Counts one through four of the indictment were for "crimes against the Jewish people," which were defined under Israeli law using nearly identical language to that of the Genocide Convention.[98] Deploying the *Eichmann* trial as a case study may seem an odd choice given how much time has elapsed since the events in question and that the Holocaust is often considered an "easy" case of genocidal intent. However, these characteristics are reasons *for* selecting it as a case.[99] The time that has passed since the trial has allowed for the development of a vast body of scholarship regarding the case and the discovery of additional first-person accounts that further supplement a uniquely large volume of testimonial and documentary evidence. Furthermore, analysis of the trial and the controversy that accompanied it demonstrates that identifying an individual "intent to destroy" is still complicated, even in an "easy" case of genocide like the Holocaust.[100]

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[96] *See* Att'y Gen. Gov't Isr. v. Eichmann, 36 I.L.R. 18 (DC Jer 1961), *aff'd* 36 I.L.R. 277 (Isr. 1962).

[97] William Schabas, *The Contribution of the Eichmann Trial to International Law,* 26 LEIDEN J. INT'L L. 667 (2013). Although Nuremberg tribunals held trials of Nazi officials involved in the perpetration of genocide, none of the defendants were charged with genocide (they took place prior to the adoption of the Genocide Convention), nor any equivalent crime. *See* Lilla Ozoráková*, The Road to Finding a Definition for the Crime of Genocide – the Importance of the Genocide Convention*, 21 THE L. & PRAC. INT'L CTS. AND TRIBUNALS 278, 285 (2022).

[98] § 1(b), Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, 4 LSI 154 (1950) (Isr.).

[99] It can be understood as a "least-likely" case study. *See* INGO ROHLFING, *Types of Case Studies and Case Selection*, *in* CASE STUDIES AND CAUSAL INFERENCE: AN INTEGRATIVE FRAMEWORK 61, 62 (2012).

[100] *See id.*

A. *"Intent to Destroy" as an Internal Mental State and Genocide as an Individual Crime*

According to the individualistic interpretation, genocide is an individual crime that a defendant can be charged with and convicted of.[101] The *mens rea* for the crime is the "intent to destroy," and the *actus reus* is any of the enumerated acts. This basic understanding is evident in the case law of the *ad hoc* tribunals and the ICJ. While the scholarly commentary has been critical of how courts and states have interpreted the Genocide Convention, it continues to assume that the "intent to destroy" is an individual's internal mental state and the *mens rea* of the crime of genocide.

1. *The International Criminal Tribunal for the Former Yugoslavia and The International Criminal Tribunal for Rwanda*

The individualistic understanding of genocide has been primarily developed in the jurisprudence of the ICTY and the ICTR, the two *ad hoc* tribunals established by the UN in the 1990s to try international crimes in Yugoslavia[102] and Rwanda,[103] respectively. Each tribunal heard cases in which individual defendants were charged with genocide and complicity with genocide, among many other offenses.[104] In the tribunals' judgments, they describe the "intent to destroy" as the *mens rea* of the crime of genocide.[105] In particular, they refer to it as a form of "specific intent" or *dolus specialis*,[106] requiring that the defendant act with the particular aim or purpose of destroying a group, in whole or in part. While courts' and commentators' interpretations vary, they all assume that the "intent to destroy" exists within individual perpetrators' minds. References to defendants' motives are sprinkled throughout the criminal jurisprudence,[107] even as most commentators[108] insist on the irrelevance of motives to determinations regarding intent. Additionally, courts and commentators often make remarks such as "[o]nly the accused himself has firsthand

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[101] *See infra* Section II.

[102] S.C. Res. 827, *supra* note 9.

[103] S.C. Res. 955, *supra* note 10.

[104] S.C. Res. 827, *supra* note 9; S.C. Res. 955, *supra* note 10.

[105] *See, e.g.*, Prosecutor v. Karadžić, Case No. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 549 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996).

[106] *See, e.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

[107] *Jelisić*, IT-95-10-T; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 549 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v Kupreškić, Case No. IT-95-16-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

[108] *See, e.g.*, QUIGLEY, *supra* note 12, at 122–23; Joe Verhoeven, *Crime de Genocide: Originalite et Ambiguite*, *Le*, 24 REV. BDI 5, 19 (1991). When courts reject discussions of motive, it is usually to say that *additional* non-genocidal motives do not preclude genocidal intent. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, ¶¶ 49, 94 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgement, ¶ 53 (July 9, 2004).

knowledge of his own mental state," indicating that even when courts rely on indirect and circumstantial evidence to prove the "intent to destroy," it is for the express purpose of inferring an individual's "own mental state."[109]

2. The International Court of Justice

The ICJ, the designated arbiter of disputes arising under the Genocide Convention,[110] has also indicated its endorsement of an individualistic understanding of genocide, even for purposes of establishing state responsibility for committing or failing to prevent genocide. It has only made determinations on genocide in two cases, both brought against the former Yugoslavia by Bosnia and Croatia, respectively.[111] In the *Bosnia* judgment, the ICJ referred to the "intent to destroy" as a "specific intent" requirement, which it found had not been "conclusively established" in relation to events other than Srebrenica, noting that "none of those convicted [for crimes related to those events] were found to have acted with specific intent (*dolus specialis*)."[112] The ICJ further discussed the need to distinguish the "intent to destroy" from "other reasons or motives the perpetrator may have."[113] Even when discussing obligations of prevention, the ICJ described states as needing to create a "deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent,"[114] thereby reinforcing the notion that genocide is an individual crime and the "intent to destroy" is something in an individual's mind.

The Court, furthermore, deferred extensively to the ICTY and only designated a situation genocide when the ICTY had found an accused perpetrator guilty of genocide in relation to the same events.[115] Thus, although many popular and academic commentators use the word genocide to describe attacks by Serbian forces on Bosnian civilians throughout the 1992–1995 conflict, the ICJ found that only the 1995 massacre at Srebrenica met the legal definition[116] and that Serbia only violated its obligations to prevent genocide in regard to that one event.[117]

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[109] Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, ¶ 40 (July 7, 2006); *see also* Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgement ¶ 525 (June 1, 2001); Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement, ¶ 525 (May 26, 2003).

[110] Genocide Convention, *supra* note 5, art. IX.

[111] *See generally Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. 43; *Croat. v. Serb.*, 2015 I.C.J. Rep. 3.

[112] *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. ¶ 277.

[113] *Id.* ¶ 189.

[114] *Id.*

[115] *Id.* ¶ 431; *Croat. v. Serb.*, 2015 I.C.J. Rep. ¶ 429.

[116] *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. ¶¶ 180, 431.

[117] *Id.*

3. Academic Commentary

While commentators have been quite critical of international criminal jurisprudence, they have done little to challenge the underlying individualistic understanding of genocide. Indeed, their criticisms tend to center on what they see as the courts' interpretations of the "intent to destroy" as a *mens rea* requirement in which the defendant must have acted with the purpose or aim of destroying the group, in whole or in part, as such.[118] They contend that this standard sets too high of a bar, and their proposals involve lowering it.[119] Legal scholar Alexander Greenawalt, for example, proposes a knowledge-based approach, according to which "culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions for the survival of the relevant victim group."[120] The philosopher Larry May, who emphasizes the collective nature of genocide, criticizes Greenawalt's knowledge-based approach for offering "too meager an intent requirement" while also suggesting that knowledge or even constructive knowledge of a genocidal plan is sufficient.[121] Neither Greenawalt, May, nor any other proponents of alternative understandings ever question that the "intent to destroy" is the *mens rea* of the individual crime of genocide.[122]

Atrocity prevention scholars also tend to view the "intent to destroy" as setting too high of a bar for prevention, while taking for granted its applicability for retrospective assignments of state or individual responsibility. Rather than suggest a different interpretation of the requirement or even a less demanding burden of proof, these scholars have proposed dropping the legal definition entirely for prevention.[123] David Scheffer, who worked for the Clinton administration during the crises in Yugoslavia and Rwanda, for example, argues that governments and international organizations should not be "constrained by [] legal requirements" and that genocide's "political application" should differ from its legal one.[124] Zachary Karazsia, a genocide scholar, celebrates the Responsibility to Protect ("R2P") policy document published by the International Commission on Intervention and State Sovereignty[125] for "eliminating the intent requirement" and replacing it with a "Just Cause" threshold for military intervention once "extreme violence that is causing the death of unarmed civilians on a massive scale" is underway.[126] These arguments

[118] *See, e.g.*, Vest, *supra* note 12; Greenawalt, *supra* note 13; Goldsmith, *supra* note 13.

[119] *See, e.g.*, Vest, *supra* note 12, at 783–84; Greenawalt, *supra* note 13; Goldsmith, *supra* note 13.

[120] Greenawalt, *supra* note 13, at 2265.

[121] LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 126 (2010).

[122] *See, e.g.*, Vest, *supra* note 12; Greenawalt, *supra* note 13, at 2265–70; Goldsmith, *supra* note 13.

[123] *See, e.g.*, Scheffer, *supra* note 16; Motala, *supra* note 37; Karazsia, *supra* note 16.

[124] *See, e.g.*, Scheffer, *supra* note 16.

[125] INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

[126] Karazsia, *supra* note 16, at 24.

imply that the individualistic understanding of the legal definition of genocide should stay in place for all purposes other than prevention.

B. Why the Individualistic Interpretation Is the Underlying Problem

There are four interrelated reasons the individualistic understanding of genocide is fundamentally flawed. First, it is inaccurate. Genocide, as historians and social scientists have emphasized and courts themselves have recognized, is not a discrete act of an individual perpetrator but rather a collective process. Second, the disjuncture between the intentions of an individual perpetrator and the collective process of genocide makes it especially speculative and thus, variable. Third, the dialectical relation between individual agents and the structures they are embedded within makes disentangling individuals' intent particularly difficult. Fourth, structures also influence prosecutors', judges', state officials', and others' judgments about whether an "intent to destroy" exists.

1. Inaccurate

On the most basic level, the individualistic understanding of genocide is inaccurate. Genocide is not a discrete act committed by an individual, but instead, a collective process.[127] While scholars differ regarding the precise definition of genocide, it is well established that genocide involves multiple people and that it unfolds over time.[128] Genocide can only take place in certain structural conditions produced and reproduced by large numbers of people.[129] As legal scholar Rebecca Hamilton points out in her article on "state-enabled crimes," genocide and other international crimes take place within a particular "configuration of situational factors" created by a "political and/or organizational entity," usually a state.[130] The study of Nazi atrocities by Rafael Lemkin, who coined the term genocide, made

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[127] *See generally* FEIERSTEIN, *supra* note 23; LEMKIN, *supra* note 3; POWER, *supra* note 4; ERIC D. WEITZ, A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION (2003); BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR (2007).

[128] *E.g.*, Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 549 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); SCHABAS, *supra* note 23, at 305 ("Genocide is, by nature, a collective crime, committed with the cooperation of many participants"); Kreß, *supra* note 23, at 620; Vest, *supra* note 12, at 784 ("Destroying a national, ethnic, racial or religious group normally depends on a concerted action . . . ."); Kirsch, *supra* note 12, at 347 (describing genocide as a "macro" phenomenon and a "systemic crime"). Sangul Kim similarly emphasizes the collective aspects of genocide in his "collective theory of genocidal intent." *See* KIM, *supra* note 18, at 6. Kim's proposal to use the terms "collective genocide" and "collective genocidal intent," however, appears counterproductive to making that point since it seems to imply that there is a non-collective version of genocide and genocidal intent, which I would argue there are not.

[129] *See generally* Rebecca J. Hamilton, *State-Enabled Crimes*, 41 YALE J. INT'L L. 301 (2016).

[130] *Id.* at 306.

clear that genocide was a collective process when he wrote that it "signif[ies] 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."[131] May describes genocide as a "paradigmatic group crime" because, in addition to targeting a group, genocide is also "perpetrated by a state or other organized group" and relies on "widespread cooperation and complicity by many, if not most, members of a given society."[132]

Criminal tribunals have also emphasized that genocide involves coordination among large numbers of people. In the *Eichmann* judgment, the Israeli trial court described the Holocaust as:

> [A]n enormous and complicated crime . . . wherein many people participated at various levels and in various modes of activity — the planners, the organizers and those executing the acts, according to their various ranks . . . these crimes were committed en masse, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim . . . .[133]

In *Krstić*, the ICTY trial chamber remarked that "the gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in the conception and commission of the crime."[134] The ICTY and the ICTR also implicitly acknowledge the vast numbers of people necessary for genocide to occur when they take note of the "methodical" or "systematic" nature of the acts,[135] "pattern[s] of purposeful action,"[136] "scale of atrocities committed [and their] general nature"[137] and the "general context."[138]

In addition to supporting the *collective* nature of genocide, the literature, court judgments, and the historical record support the understanding of genocide as a *process* that unfolds over time. Historians and social scientists have consistently emphasized that genocide is not an event but a "destructive process," often described

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131 LEMKIN, *supra* note 3, at 79.

132 LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT 157 (2005) [hereinafter MAY, CRIMES AGAINST HUMANITY].

133 Att'y Gen. Gov't Isr. v. Eichmann, 36 I.L.R. 18, ¶ 197 (DC Jer 1961), *aff'd* 36 I.L.R. 277 (Isr. 1962).

134 Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 549 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

135 Prosecutor v. Kayishema, Case No. ICTR-95-1-T, ¶¶ 93–94 (June 1, 2001).

136 *Id.* ¶ 93.

137 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 523 (Sept. 2, 1998).

138 *Id.*

as progressing in stages.[139] Indeed, several scholars have called attention to the slower, less spectacular ways that genocide can take place,[140] describing such genocides as "genocide by attrition,"[141] "structural genocide,"[142] or "invisible atrocities."[143] Moreover, even in genocides that are primarily enacted through spectacular violence, the structures that make the spectacular violence possible are developed over much longer periods. Even in Rwanda, where an estimated 800,000 people were killed in a mere 100 days, the massacres were not entirely spontaneous but rather an organized campaign stemming from colonial era racialized ethnic divisions, civil war, eliminationist propaganda, and other factors.[144]

The most common argument against defining genocide as necessarily collective is the lone *génocidaire* hypothetical, a specter that has haunted interpretations of the Convention from its inception.[145] Isn't it possible, the hypothetical asks, that one person could commit genocide all on their own? Legal scholars and courts, supported by the empirical record, have been highly skeptical of this prospect.[146]

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[139] SHAW, *supra* note 23; *see also* Rosenberg, *supra* note 23; FEIERSTEIN, *supra* note 23 (describing genocide as a social practice that proceeds in stages); Semelin, *supra* note 23, at 87.

[140] *See, e.g.*, Michael Vanrooyen, Jennifer Leaning, Kirsten Johnson, Karen Hirschfeld, David Tuller, Adam C. Levine & John Hefferman, *Employment of a Livelihoods Analysis to Define Genocide in the Darfur Region of Sudan*, 10 J. GENOCIDE RSCH. 343 (2008); Sheri P. Rosenberg & Everita Silina, *Genocide by Attrition: Silent and Efficient*, *in* GENOCIDE MATTERS: ONGOING ISSUES AND EMERGING PERSPECTIVES 106 (Joyce Apsel & Ernesto Verdeja eds., 2013); Andrew R. Basso, *Towards a Theory of Displacement Atrocities: The Cherokee Trail of Tears, the Herero Genocide, and the Pontic Greek Genocide*, 10 GENOCIDE STUD. & PREVENTION 5 (2016); Shelley J. Burleson & Alberto Giordano, *Spatiality of the Stages of Genocide: The Armenian Case*, 10 GENOCIDE STUD. & PREVENTION 39 (2016); Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257 (2007); *see generally* Larissa van den Herik, *Economic, Social, and Cultural Rights: International Criminal Law's Blind Spot?*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES 343, (Eibe Riedel et al. eds., 2014).

[141] Helen Fein, *Genocide by Attrition 1939–1993: The Warsaw Ghetto, Cambodia, and Sudan*, 2 HEALTH & HUM. RTS. 10 (1997).

[142] Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 403 (2006).

[143] RANDLE C. DEFALCO, INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE (2022).

[144] *See* MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 190 (2001); Wolfe, *supra* note 142, at 394; Robert Melson, *Modern Genocide in Rwanda: Ideology, Revolution, War, and Mass Murder in an African State*, *in* THE SPECTER OF GENOCIDE 325–26 (Robert Gellately & Ben Kiernan eds., 2003).

[145] *See, e.g.*, 1 HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 1380–89, 1598 (2008) [hereinafter TRAVAUX PRÉPARATOIRES].

[146] *E.g.*, SCHABAS, *supra* note 23, at 246 ("Because of the scope of genocide it seems implausible that it can be committed by an individual, acting alone."); Kreß, *supra* note 23,

Nonetheless, most have conceded that under some unlikely set of conditions, genocide could be the undertaking of an individual,[147] thereby undermining an understanding of genocide as collective by definition.

The problem with the lone *génocidaire* hypothetical is that, for it to work, it has to assume the impossible. Even situations that at first blush appear only to involve one person rely on particular background conditions, which, in turn, rely on the involvement of more people. The *Jelisić* case provided the ICTY with the opportunity to explore this possibility because it involved mass killing by one individual who clearly expressed his anti-Muslim sentiment and desire to "cleanse" the Bosnian Muslim population so that only a tiny fraction survived.[148] The trial chamber, referencing the drafting history, affirmed the possibility of a lone *génocidaire* while also noting "that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system."[149] On appeal, Judge Shahabuddeen, in a partially dissenting opinion, commented that it was unnecessary to consider "whether he acted alone . . . [nor] the legal implications if he did."[150] He noted that Jelisić:

> Was associated with other military personnel, and it was open to a reasonable tribunal to draw an inference that the camp, which was of some size, had been established by others and was being operated by them, and that the accused could not have done what he was alleged to have been doing over a period of time without the sanction of authorities above him.[151]

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at 620 (stating "it is clear that a single human being will not, except in the most exceptional circumstances, be capable of destroying a protected group or a part thereof"); Vest, *supra* note 12, at 784 ("[I]t is normally impossible for a single perpetrator alone to destroy a group as such in whole or in part."); MAY, *supra* note 121; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 549 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) ("The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration."); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgement, ¶ 172 (June 1, 2001) (declining to opine on the "[t]he much-debated question whether genocide could be committed by a person acting alone").

[147] *See, e.g.*, Nersessian, *supra* note 13, at 268 (stating "both ad hoc tribunals accepted the possibility of a lone genocidist"); MAY, *supra* note 121, at 121 ("It is possible that a single person could intend to destroy these groups on his or her own, but it is far more likely that carrying out such an intention will require enlisting the help of lots of other people."); *but cf.* Kreß, *supra* note 23, at 621 ("The general exclusion of the lone perpetrator from the scope of the international crime of genocide is broadly in line with the Genocide Convention case law, and subsequent practice.").

[148] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶¶ 102–03 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

[149] *Id.* ¶¶ 100–01.

[150] Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 16 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) (Shahabuddeen, J., dissenting in part).

[151] *Id.*

This passage indicates that even in situations in which one individual perpetrates most or all the relevant violence, the structures that made that violence possible necessarily involve many other people.

Even for fact patterns that fit the hypothetical more closely, the lone *génocidaire* is not truly acting alone. For example, an individual bent on destroying a group might deploy nuclear weapons, unleash a deadly disease, or poison a water supply.[152] While the acts of launching a nuclear missile or contaminating water supplies could, under certain far-fetched circumstances, be undertaken by one person, they still depend upon the activity of others. For the *génocidaire* to want to destroy the group, he almost certainly would have had to have been influenced by some structural factor that made such an aim desirable. At a minimum, his acts can only plausibly be aimed at a group "as such" to the extent that a sufficient number of others perceive that group as a group. Moreover, the actual perpetration is logistically impossible without the involvement of other people. In the nuclear weapons example, other individuals would have had to develop the nuclear weapons and, advertently or inadvertently, made them available to the *génocidaire*. For all practical purposes, genocide is a collective process.

2. Speculation Required to Close the Gap Between Individual Acts and Genocidal Destruction

Intent is notoriously difficult to define and to prove. While courts and commentators have consistently understood the "intent to destroy" to describe an individual's internal mental state, they have differed regarding what that internal mental state is. Philosophers have also differed in how they define intentions. In his pathbreaking *Philosophical Investigations*, Ludwig Wittgenstein tried to pinpoint what the "inner experience of intending" was by exploring what we refer to when we remember having had an intention to do something.[153] Rather than locating an identifiable intention, he finds only "thoughts, feelings, movements and [] connections with earlier situations."[154] Proving intent, understood as an internal mental state, is also especially challenging because, as courts hearing genocide cases have pointed out, "[o]nly the accused himself has first-hand knowledge of his own mental state,"[155] and even he could be wrong or lying.

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[152] David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 98 (2004); MAY, CRIMES AGAINST HUMANITY, *supra* note 132; MAY, *supra* note 121, at 132.

[153] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 632–45 (G.E.M. Anscombe, P.M.S. Hacker & Joachim Schulte trans., rev. 4th ed. 2009).

[154] *Id.*

[155] Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, ¶ 40 (July 7, 2006); *see also* Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgement ¶ 525 (June 1, 2001); Prosecutor v. Rutaganda, ICTR-96-3-A, Judgment, ¶ 525 (May 26, 2003). Even the assumption that the accused himself knows his own mental state is at best questionable based on what we know about human psychology.

All determinations of intent, therefore, involve some level of ambiguity and inferences based on indirect or circumstantial evidence. In ordinary criminal cases, however, the gap between the alleged acts of the defendant and the outcome intended is relatively small (*e.g.*, the gap between shooting someone in the head and killing them, between removing someone's wallet from their pocket and depriving them of it).[156] Thus, the speculation called for is relatively minimal. The gap between almost any act committed by an individual and the destruction of a group will certainly be much larger. Regardless of whether the alleged acts involve killing multiple people, coordinating the day-to-day operations of an internment camp, or even issuing an order to bomb several villages, the gap between the acts themselves and the destruction of a people is vast. This gap is one major reason that courts end up relying so heavily on circumstantial evidence to prove an individual's "intent to destroy."[157]

This gap also helps to explain why, in genocide cases, the number of possible motivations seems especially vast. Each person who engages in activities that contribute to genocide does so for their own reasons and ends, most likely specific to the particular activity they themselves are undertaking. The "intent to destroy" may only manifest in the patterns of activity of multiple individuals.

3. *Difficulty Disentangling Due to Structural Impacts*

Determining whether an individual perpetrator harbored an "intent to destroy" is further complicated by the fact that the very structures that make genocide possible also make it incredibly difficult to disentangle the aims of individuals from the aims of the structures themselves. Structures are patterns of relations reproduced by people over time, which both enable and constrain social action.[158] These patterns of relations can be expressed in informal norms and practices and more formal laws and institutions. As frames of action, they channel individuals' activities toward aims they might not share. As frames of meaning, they influence what individuals' intentions are.

(a) Channeling Activity with Non-genocidal Motivations Toward Genocidal Goals

Genocidal structures channel people's activities toward the destruction of a protected group, in whole or in part, regardless of the individual intent of those operating within them. Nazi Germany provides a poignant example of the capacity

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[156] *Cf.* MODEL PENAL CODE § 223 (defining theft).

[157] Prosecutor v. Kayishema, Case No. ICTR-95-1-T, ¶ 276 (May 21, 1999); Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 728 (Sept. 2, 1998).

[158] This understanding of structure builds upon the work of several scholars. *See* SEWELL, *supra* note 32; ALTHUSSER, *supra* note 33; *see generally* BOURDIEU, *supra* note 32; GIDDENS, *supra* note 32; YOUNG, *supra* note 32.

of structures to do so.[159] For Eichmann, this capacity is evident in the apparent mismatch between his more mundane motives and the genocidal destruction that he orchestrated. Arendt, (in)famous for the tagline the "banality of evil," observed that Eichmann seemed to be motivated by goals much more mundane than genocidal destruction, namely, obedience to orders, conformity to others' expectations, desires for personal advancement, and feelings of importance.[160] Arendt noted that Eichmann forgot or bungled details of the extermination of millions of people[161] while providing thorough accounts of his successes and failures in obtaining promotions, fights over "spheres of authority," and situations in which he was able to hobnob with his superiors.[162] Deborah Lipstadt, a vehement critic of Arendt's portrayal of Eichmann as banal, made a similar point: "he remembered his salary when he trained at Dachau; he recalled the special brandy a colleague had served him; even his own lawyer marveled that he remembered what he had eaten at a 1934 SS dinner—but not the number of Jews he'd forced into deportation trains."[163] The Nazi regime was able to channel his desire for "personal advancement" and social recognition[164] toward eliminationist aims by offering him the role it did within a well-organized bureaucracy and rewarding him for zealously pursuing its goals.

The ability of structures to channel people's activities toward particular aims is even more evident for those who, unlike Eichmann, did not necessarily share those aims. May observes that transcripts from the tribunals for Rwanda and Yugoslavia are "full of stories of concentration camp guards and officers who were mostly doing their jobs as best they could."[165] Even amongst the Nazis involved in perpetrating the Holocaust, there were, as Arendt points out, some who did not "wholeheartedly agree[] with the late crimes of the regime" and that did not always believe Nazi

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[159] *See, e.g.*, JOANNE PETTITT, PERPETRATORS IN HOLOCAUST NARRATIVES: ENCOUNTERING THE NAZI BEAST (2017); A.D. Moses, *Structure and Agency in the Holocaust: Daniel J. Goldhagen and His Critics*, 37 HIST. & THEORY 194 (1998); Donald Bloxham, *Organized Mass Murder: Structure, Participation, and Motivation in Comparative Perspective*, 22 HOLOCAUST & GENOCIDE STUD. 203 (2008).

[160] *See* ARENDT, *supra* note 57, at 92.

[161] *See id.* at 53. Regarding a meeting at which the extermination of Jewish people was discussed, Eichmann stated, "I cannot recall that I took part in this consultation. Of course, there can be no doubt of it, since my name appears there." Att'y Gen. Gov't Isr. v. Eichmann, 36 I.L.R. 18, ¶ 70 (DC Jer 1961), *aff'd* 36 I.L.R. 277 (Isr. 1962).

[162] ARENDT, *supra* note 57, at 151. Eichmann, for example, remembered with evident satisfaction being invited to go bowling with a Slovakian minister and having drinks with his superiors Heydrich and Müller. *Id.* at 81–82.

[163] DEBORAH LIPSTADT, THE EICHMANN TRIAL 128 (2011). He also seemed motivated by the idea of being part of something bigger than himself, as evidenced by his partiality to slogans. He relished what he called "winged words" such as "My Honor is my Loyalty" and "These are battles which future generations will not have to fight again." ARENDT, *supra* note 57, at 105.

[164] ARENDT, *supra* note 57, at 287.

[165] MAY, CRIMES AGAINST HUMANITY, *supra* note 132, at 163.

propaganda but who nonetheless "acted consistently with a racist or anti-Semitic, or . . . demographic ideology."[166]

Structures can even channel people's activity toward ends they oppose. Most tragic in this regard is the way that Nazi structures could channel the activity of even their victims to serve the Final Solution.[167] Arendt describes how early in the expulsion process, Nazi officials, such as Eichmann, convinced some members of the Jewish leadership to draw up lists of Jews to be deported.[168] She also notes the horrifying fact that, in many cases, Jewish detainees were coerced into performing the actual killing and disposal of bodies in extermination camps.[169] In fact, the Nazis and Nazi Collaborators (Punishment) Law, the criminal statute that served as the basis for the charges against and ultimate conviction of Eichmann, was used primarily to try Jewish collaborators, including the "Kapos" who managed the day-to-day operations of camps.[170] Such criminal trials seek to separate the enthusiastic collaborator cruelly inflicting violence on his people from the innocent victim forced to carry out gruesome tasks. Still, the difference between the categories is not always clear cut, as legal scholar Mark Drumbl's analysis of Holocaust literature reveals.[171] Regardless of where the line is drawn, the "recruitment of the persecuted as agents" of their own destruction is a testament to the power of genocidal structures.[172]

Bureaucratic structures, such as those in place in Germany, are especially good at channeling because they are designed to achieve their goals regardless of who occupies any particular position. It is a hallmark of modern bureaucracies that they mechanize their processes, such that each person has a dedicated role (in Weberian terms, "office") and that the particular person who plays that role (the "incumbent") is irrelevant.[173] As Arendt succinctly put it, "[e]ach cog, that is, each person, must be expendable without changing the system."[174] Indeed, as Lipstadt points out, the testimony of one of the prosecutor's witnesses at the *Eichmann* trial, a Jewish negotiator who attempted to rescue detainees from extermination in exchange for goods, suggested that assassinating Eichmann "would probably not have materially

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[166] Hannah Arendt, *Personal Responsibility Under Dictatorship*, *in* RESPONSIBILITY AND JUDGMENT 17, 43 (Jerome Kohn ed., 2003) [hereinafter Arendt, *Personal Responsibility*].

[167] *See generally id.*; Mark A. Drumbl, *Victims Who Victimise*, 4 LONDON REV. INT'L L. 217, 219 (2016).

[168] ARENDT, *supra* note 57, 116–19.

[169] *Id.*

[170] Drumbl, *supra* note 167, at 218–19. In Europe, some Jewish communities tried Jewish collaborators in "honor courts," which would hear the evidence against alleged collaborators and sentence those they found guilty with expulsion from the community. *See* U.S. HOLOCAUST MEM'L MUSEUM, JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST (Laura Jockusch & Gabriel N. Finder eds., 2015).

[171] Drumbl, *supra* note 167, at 218.

[172] *Id.* at 219.

[173] *See* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (A.M. Henderson & Talcott Parsons trans., 1947).

[174] Arendt, *Personal Responsibility, supra* note 166, at 29.

changed matters,"[175] thus echoing Eichmann's claims that he was interchangeable—that if he had not done it, someone else would have.

(b) Influencing Internal Mental States

The individualistic approach is also complicated by the influence that structures have on individuals' internal mental states. The sociologist and historian, William Sewell, explains that "[a]gents' thoughts, motives, and intentions" are a product of the structures they are embedded within.[176] The philosopher Sally Haslanger elaborates a similar point when she says that structures "serve as frames of meaning within which we act as social beings . . . [o]ur desires and intentions, our sources of pleasure and pain, are partly a function of the schemas we have internalized and which also partly constitute the structure."[177] Indeed, as Althusser's concept of "interpellation" signifies, people's very subjectivity is constituted by the ideological structures they operate within.[178]

Eichmann was certainly a good example of how thoroughly someone can internalize the aims of the ideological structures in which they operate. It now seems clear that Arendt's diagnosis that "[Eichmann] was obviously [] no case of insane hatred of Jews, of fanatical antisemitism"[179] was overstated. However, even her critics do not contend that Eichmann was a virulent, eliminationist antisemite when he joined the Nazi party and the SS.[180] Indeed, recent scholarship purporting to correct Arendt's mischaracterizations all tell a similar story of Eichmann, the traveling salesman in Austria, who almost by "happenstance" joined the Nazi party and then the SS in 1932[181] and became a more committed Nazi and antisemite over the course of his career.[182] As time went on and his responsibilities and status grew,

[175] LIPSTADT, *supra* note 163, at 97.

[176] SEWELL, *supra* note 32, at 128.

[177] SALLY HASLANGER, RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE 21 (2012).

[178] ALTHUSSER, *supra* note 33. In a German case regarding genocide against Bosnian Muslims, the Constitutional Court recognized the possibility of such a process of interpellation. "It suffices if the actor internalizes the intent regarding the elements held by a structurally organized central formation, and if applicable with respect to only a part of the group." QUIGLEY, *supra* note 12, at 134 (quoting BVerfG, 2 BvR 1290/99, ¶ 20, Dec. 12, 2000).

[179] ARENDT, *supra* note 57, at 26.

[180] *See* DAVID CESARANI, BECOMING EICHMANN: RETHINKING THE LIFE, CRIMES, AND TRIAL OF A "DESK MURDERER" (2006); LIPSTADT, *supra* note 163; BETTINA STANGNETH, EICHMANN BEFORE JERUSALEM: THE UNEXAMINED LIFE OF A MASS MURDERER (Ruth Martin trans., Alfred A. Knopf 2014).

[181] LIPSTADT, *supra* note 163, at 46 ("His decision to join does not seem to have been motivated by a deep—or even a shallow—ideological position. In fact, it seems somewhat happenstance.").

[182] *See* CESARANI, *supra* note 180; LIPSTADT, *supra* note 163; STANGNETH, *supra* note 180.

he was thoroughly "interpellated" into the ideology of the Third Reich.[183] That is to say, Nazi structures increasingly began to define who he was.[184] Eichmann was good at his job, not because he came into it wanting to exterminate Jews, but because he so seamlessly took on his role. Eichmann's activities were so efficiently channeled toward the aims of the Third Reich, and his sense of self was so entwined with achieving it that acting against the Final Solution became "unthinkable."[185] Indeed, if Eichmann had one outstanding quality, it was his almost total interpellation into the Nazi project.

Another tragic testament to the power of structures to influence people's intentions is the mass killings of Tutsi in Rwanda. There, both long-term narratives regarding ethnic difference and short-term propaganda dehumanizing Tutsis and promoting "Hutu power" made it possible for individual Hutus to take up arms against Tutsis in their own communities.[186]

4. Structural Influences on Decision-Makers

Structures also influence the judgments of the prosecutors, judges, state officials, and ordinary individuals trying to make determinations regarding genocide, albeit likely to a lesser degree than those living in the societies where the alleged genocide is taking place. Possible structural influences on decision-makers include professional incentives, nationalism, media narratives, and biases based on ethnicity, race, religion, gender, or class.[187] Even in ordinary criminal trials, judgments about *mens rea* are frequently affected by bias.[188] The inconsistency and malleability of existing standards in genocide cases make it easier for implicit and explicit biases to play a part in judgments about whether particular defendants exhibited an "intent to destroy." For example, a recent study of judicial outcomes at the ICTY, which tried defendants from various ethnic backgrounds for international crimes, suggests that Serb defendants were disproportionately convicted.[189] There

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[183] *See* ALTHUSSER, *supra* note 33, at 190.

[184] *See id.*

[185] *See* ARENDT, *supra* note 57, at 92.

[186] *See* MAMDANI, *supra* note 144, at 14.

[187] *See generally* SEWELL, *supra* note 32; YOUNG, *supra* note 32; HASLANGER, *supra* note 177.

[188] *See, e.g.*, Francis X. Shen, *Minority Mens Rea: Racial Bias and Criminal Mental States*, 68 HASTINGS L.J. 1007 (2017); Blake M. McKimmie, Jane M. Masters, Barbara M. Masser, Regina A. Schuller & Deborah J. Terry, *Stereotypical and Counterstereotypical Defendants: Who Is He and What Was the Case Against Her?*, 19 PSYCH., PUB. POL'Y, & L. 343 (2013); Mariah Sorby & Andre Kehn, *Juror Perceptions of the Stereotypical Violent Crime Defendant*, 28 PSYCHIATRY, PSYCH. & L. 645 (2021).

[189] Barry Hashimoto & Kevin W. Gray, *Judicial Bias and Ethnic Disparities at the ICTY: Evidence from 30 Years of Prosecutions* (July 17, 2024) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.4860722.

does not seem to be any evidence of animosity by judges against Serb defendants, but more subtle biases may still have been at play.[190]

State officials' determinations are likely influenced by their personal prejudices, roles within the bureaucracy, and perceptions of their state's national interest. As an example, a 2016 U.S. State Department report determined that ISIS ("Islamic State of Iraq and the Levant") was committing genocide against the Yazidis in Iraq but that there was insufficient evidence to label atrocities by the Myanmar military against Rohingya genocide.[191] There are many factors that might have led to that determination, including U.S. officials' perceptions that U.S. geopolitical and economic interests would be served by maintaining relations with Myanmar but not ISIS. This conjecture is bolstered by the fact that the U.S. did eventually (six years later) recognize the attacks against Rohingya as genocide once those interests had diminished.[192]

We might also suspect that biases have made it easier for U.S. officials to ignore or dismiss allegations that genocide was committed against Native Americans despite a history replete with massacres, violent displacement, assimilationist policies, and other devastating practices.[193] Defenders of European settlers insist that they never intended to destroy them but sought freedom, civilization, and advancement.[194] Attempts by Black Americans to apply the genocide label to the horrors of slavery and Jim Crow have fared even worse. When the Civil Rights Congress presented their "We Charge Genocide" petition to the UN regarding the treatment of Black Americans, Lemkin, the international lawyer who invented the term genocide, avowed that "by no stretch of imagination can one discover in the United States an intent or plan to exterminate the Negro population," most likely to reassure White Americans and improve chances the U.S. would ratify the Convention.[195] Several U.S. lawmakers, ironically, implicitly endorsed their claims when they opposed ratifying the Genocide Convention due to concerns that it would

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[190] *See id.*

[191] *See, e.g.*, U.S. DEP'T STATE, *Atrocities Prevention Report: Targeting of and Attacks on Members of Religious Groups in the Middle East and Burma* (Mar. 17, 2016), https://2009-2017.state.gov/j/drl/rls/254807.htm [https://perma.cc/8GEC-ZQGA]. Six years later, the State Department determined that Rohingya had been subject to genocide. Antony J. Blinken, Sec'y State, U.S. DEP'T STATE, *Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma* (Mar. 21, 2022), https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/ [https://perma.cc/M3DU-AZB4] [hereinafter U.S. DEP'T STATE, *Genocide in Burma*].

[192] U.S. DEP'T STATE, *Genocide in Burma*, *supra* note 191.

[193] *See* Glenn T. Morris & Simon Maghakyan, *The U.S. Has Finally Acknowledged the Genocide of Armenians. What About Native Americans?*, WASH. POST (Apr. 29, 2021), https://www.washingtonpost.com/opinions/2021/04/29/us-biden-armenian-genocide-native-americans-recognition/ [https://perma.cc/554Q-DSXN]; Wolfe, *supra* note 142.

[194] *See, e.g.*, Guenter Lewy, *Can There Be Genocide Without the Intent to Commit Genocide?*, 9 J. GENOCIDE RSCH. 661 (2007).

[195] Guenther, *supra* note 36, at 136–40.

be used to challenge the decimation of the Native American population and violence and abuse against Black Americans.[196]

Furthermore, the same ideological structures that make genocide possible can also influence those making judgments about whether it counts as genocide, even people who are not members of the society in which the events took place. Consider, for example, the antisemitism central to the Holocaust. It affected not just Nazi Germany but also many of the countries that could have resisted the internment and eventual extermination of Jewish residents or that could have done more to assist and protect refugees.[197]

In these ways, the very structural conditions that make genocide possible also make the individualistic interpretation, endorsed by international courts and academic commentators, untenable. The individualistic interpretation is producing jurisprudence that is inconsistent and thwarting the Convention's goal of prevention. Tweaks to the interpretation, therefore, are not enough. A new understanding of genocide is needed—one that appreciates, instead of ignoring, the structural context that characterizes genocide.

III. PROPOSED STRUCTURAL INTERPRETATION: "INTENT TO DESTROY" AS STRUCTURAL CONTEXT

The best way to correct the individualistic interpretation of the "intent to destroy" would be to amend the text of Article II of the Genocide Convention and the statutes that have adopted the Convention's definition.[198] A better, more precise definition of genocide would explicitly refer to it as a collective process of destruction, which individuals can plan, incite, or contribute to but cannot commit alone. I do not think, however, that such a massive overhaul is likely or necessary. In this Part, I offer an alternative interpretation of the current definition as it is written in the Genocide Convention. According to this interpretation, genocide exists when the overall structural context exhibits an "intent to destroy" ("a genocidal structural context") and at least one of the enumerated acts of genocide ("Killing," "Causing serious bodily or mental harm," etc.) has occurred.

A. Genocide Versus Acts of Genocide

My proposed structural interpretation clearly distinguishes between *genocide*—the collective process—and *acts of genocide*—discrete undertakings that individuals can carry out. The relationship between genocide and acts of genocide that I am suggesting reflects what legal scholar Claus Kress has called a "characteristic interplay between individual and collective act."[199] *Genocide*—the collective

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[196] POWER, *supra* note 4, at 119–20.

[197] *See, e.g.*, SAUL S. FRIEDMAN, NO HAVEN FOR THE OPPRESSED: UNITED STATES POLICY TOWARD JEWISH REFUGEES, 1938–45 (1973).

[198] *See* Genocide Convention, *supra* note 5, art. II, XVI; Rome Statute, *supra* note 11, art. 6, 121.

[199] Kreß, *supra* note 18, at 470–71.

process—exists when there is a structural context that exhibits an "intent to destroy" and one or more perpetrators commits one or more of the enumerated acts of genocide. An *act of genocide*—the individual deed—exists when a perpetrator commits one of the enumerated acts in the context of genocide—the collective process. This interplay mirrors the dialectical relationship between structure and agency, which theorists of structures understand to be co-constitutive.[200] Individual acts of genocide produce and reproduce genocidal structures, and genocidal structures transform individual acts into acts of genocide.[201] Thus, while I have described my proposed approach as a "structural" one to contrast it with the overly individualistic prevailing approach, it is premised on a dialectical relationship between individual agents and the structural context that they both influence and are influenced by.[202]

Criminal courts, while largely treating genocide as an individual crime, have also implicitly acknowledged a distinction between genocide as a collective process and acts of genocide as individual deeds. One example of such an acknowledgment was the ICTR decision to take judicial notice of the fact that genocide had taken place in Rwanda as a matter of "common knowledge."[203] By doing so, the tribunal recognized that the question of whether genocide had taken place was independent of the question of whether particular individuals committed acts of genocide.

Another way courts have implicitly embraced the distinction is the practice of first inquiring into whether a genocidal plan existed and then whether the defendant participated in the plan.[204] The plan is always conceived of as involving multiple

[200] SEWELL, *supra* note 32, at 144.

[201] In distinguishing between genocide and acts of genocide, I am not endorsing efforts to use the term "act of genocide" as a lesser designation than "genocide." *See* POWER, *supra* note 4, at 362–64 (describing how State Department officials would acknowledge the "acts of genocide" rather than genocide itself occurring in Rwanda). No act of genocide, as I understand it, is possible independent of genocide itself.

[202] *See, e.g.*, SEWELL, *supra* note 32, at 144.

[203] Prosecutor v. Karemera, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 35 (June 16, 2006); *see also* Prosecutor v. Rwamakuba, Case No. ICTR98-44C-T, Judgement, ¶¶ 2, 210 (Sept. 20, 2006); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgement and Sentence, ¶ 16 (Sept. 12, 2006); Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgement, ¶¶ 5, 340 (Dec. 13, 2006). The decision to take judicial notice of genocide has received mixed reviews from commentators. *See, e.g.*, Rebecca Faulkner, *Taking Judicial Notice in the Genocide in Rwanda: The Right Choice*, 27 PENN ST. INT'L L. REV. 895 (2009); Ralph Mamiya, *Taking Judicial Notice of Genocide - The Problematic Law and Policy of the Karemera Decision*, 25 WIS. INT'L L.J. 1 (2007); Kirk G. Shannon, *Passing the Poisoned Chalice: Judicial Notice of Genocide by the ICTR*, 19 REV. QUEBECOISE DE DROIT INT'L 95 (2006); Kirsch, *supra* note 12, at 348.

[204] Prosecutor v. Kayishema, Case No. ICTR-95-1-A, ¶ 525 (June 1, 2001); Prosecutor v. Karadžić, Case No. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996). Both the ICTY and ICTR have noted that a plan or policy is not

individuals working collectively within a particular structural context.[205] Despite this similarity, proposals to require proof of a genocidal plan or policy, such as the one included in the ICC Elements of Crimes,[206] differ because they typically leave the understanding of the "intent to destroy" as an individual's internal mental state in place.[207] The plan or policy requirement, therefore, becomes an extra element that must be proven to establish that genocide is imminent, ongoing, or has already occurred. By contrast, the structural approach transforms the understanding of the "intent to destroy" without increasing the evidentiary burden of those alleging genocide.

B. "Intent to Destroy" as Structural Context

The key difference between my proposed interpretation and the prevailing one is that the "intent to destroy" is understood to describe the overall structural context, not an individual's internal mental state. As I define it, a structural context is a complex of "overlapping and interlocking"[208] structures within which individuals operate. A central feature of structures is that they both enable and constrain human behavior. As with social theorist Pierre Bourdieu's *habitus*, structures can be "collectively orchestrated without being the product of the organizing action of a conductor."[209] They do not "presuppos[e] a conscious aiming at ends or an express mastery of the operations necessary in order to attain them."[210] The ends to which they are collectively orchestrated are what I am calling their "intent."[211] In some

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a "legal ingredient" of the crime of genocide, but can serve as evidence for inferring intent. *E.g.*, Prosecutor v. Karemera, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 21 (June 16, 2006); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, ¶ 225 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

[205] *See Kayishema*, ICTR-95-1-A; *Karadžić*, IT-95-5-R61, IT-95-18-R61.

[206] Preparatory Comm'n for the Int'l Crim. Ct., Rep. of the Preparatory Comm'n for the Int'l Crim. Ct., Add., Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/I/Add.2, 6–7 (Nov. 2, 2000); *see also* Harmen G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction*, 4 J. INT'L CRIM. JUST. 239, 241–248 (2006) (walking through specific intent element for genocide); *cf.* Behrens, *supra* note 12, at 925–26 (criticizing the ICJ's Croatia decision for indicating that a "pattern of conduct" was an independent additional requirement for a finding of state responsibility for genocide).

[207] *But see* Jones, *supra* note 13 (arguing that the "intent to destroy" should be construed as a plan or policy requirement).

[208] SEWELL, *supra* note 32, at 209 (describing "societies" as "the sites of a multitude of overlapping and interlocking cultural structures").

[209] BOURDIEU, *supra* note 32, at 53.

[210] *Id.*

[211] In embracing the idea that a structure can display an intent, I am not promoting the idea that the individuals embedded within them lack agency. Indeed, despite some characterizations of structure as precluding agency, the conception of structure I am utilizing

highly organized structures, the intent might be explicitly articulated in a mission statement or assertions of people in positions of authority. In many others, it will not, but it can still be identified due to structures' observable "logics," "patterns," and "principles."[212]

1. Structural Versus Collective Intent

While this structural intent is similar to conceptions of collective or shared intent in that it extends the notion of intent beyond a lone individual, it differs in how it does so. May, in his discussion of genocidal intent, helpfully outlines four types of collective intention, drawn from the work of philosopher Raimo Tuomela: (1) "the aggregated intentions of individual persons," (2) "private intention in a group context," (3) "individual sharing of intent," and (4) "intent of a group that is not reducible to the intentions of the individual members of the group."[213] May contends that the first two, while sometimes referred to as collective intent, are not properly collective.[214] He argues that "the intent to destroy" be understood as collective in the third sense, as the "sharing of intent."[215] Sharing an intent involves individuals "see[ing] themselves" as participating in a "group effort."[216] My understanding of structural intent differs from May's "shared intent" (as well as the first two types of collective intention he describes) because it does not depend on individuals' intentions, understood as internal mental states, at all.

According to the structural interpretation I propose, the "intent to destroy" is a characteristic of the structural context. While at least some individuals acting within that context will likely share that intent, the existence of an "intent to destroy," and thus genocide, does not turn on whether they do so. The fourth category that May describes is closest to my proposal in this way. May labels this category "full-blooded collective intent" because it is not "reducible to the intentions of the individual members of the group" but dismisses it as an "empty set" because a group cannot be said to "act or have intentions all of its own."[217] Rather, even states, often imbued with agency, can only be said to "act or have intentions" vicariously "through the various individuals who serve in various roles within the State

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here is one that "presuppose[s]" it. GIDDENS, *supra* note 32, at 53; *see also* SEWELL, *supra* note 32, at 143 (explaining that he "sees agency not as opposed to, but as constituent of, structure"). Structures and agency are mutually constitutive: Structures are built and maintained, produced and reproduced, by people exercising agency and their agency is in turn enabled and constrained by structures. *Id.* at 128, 205.

[212] *See* YOUNG, *supra* note 32, at 70; SEWELL, *supra* note 32, at 129; BOURDIEU, *supra* note 32, at 52–56; GIDDENS, *supra* note 32, at 62; Charles Taylor, *Foucault on Freedom and Truth*, 12 POL. THEORY 152, 168–69 (1984).

[213] MAY, *supra* note 121, at 118.

[214] *Id.* at 118–19.

[215] *Id.*

[216] *Id.* at 119–20.

[217] *Id.* at 118.

structure."[218] Here, May demonstrates the difference between this fourth category of collective intent and my conception of structural intent and why, despite his keen appreciation for the collective aspects of genocide, he ultimately maintains an individualistic interpretation of it.[219] Whereas "full-blooded" collective intention involves ascribing intent to a group of individuals,[220] my proposal involves ascribing intent to a structural context. The structural context is produced and reproduced by multiple individuals, often organized into groups, but it is not the groups themselves that "have" the intent. Furthermore, May is uncomfortable with groups having intent because he understands intent to be the internal mental state of an "organic" entity.[221] My proposal, by contrast, is that intent need not refer only to the internal mental states of individuals but instead can also refer to the discernible aims of structures independent of the mindsets of any "organic" individual.

Put another way, my contention that structures can have their own intent does not anthropomorphize structures—implying structures are imbued with their own mental states. Structures do not think, feel, or desire, but the patterns of relations that constitute them can be oriented toward a particular aim, which I am calling their "intent." This understanding of intent resonates with that of some ordinary language philosophers who suggest that "intention has no reality separable from action such that there is simply nothing capable of being 'had' as a state of mind or anything else."[222] Instead, they understand intentions as attributes of actions,[223] thus moving intention out of the realm of internal mental states and into the world of more objectively discernible evidence of the actions themselves. Understood in this way, structural intent can be more easily analogized to individual intent since it is an objectively observable attribute of structures, which are the product of accumulated actions. However, one need not embrace this view of individual intent to endorse my proposal. Understanding intent as an internal mental state for individuals in no way precludes understanding it as the discernible aim of a pattern of social relations for a structural context.

2. Textual Support

The interpretation of the "intent to destroy" as an attribute of the structural context is bolstered by the passive and ambiguous wording of Article II of the Genocide Convention, which states that "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."[224] This definition provides no clear subject for the "intent

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[218] *Id.*

[219] *See id.*

[220] *Id.*

[221] *See id.*

[222] Bebhinn Donnelly-Lazarov, *Intention in Criminal Law: The Challenge from Non-Observational Knowledge*, 30 RATIO JURIS 451, 459 (2017); *see generally* G.E.M. ANSCOMBE, INTENTION (2d ed. 1963).

[223] Donnelly-Lazarov, *supra* note 222, at 459.

[224] Genocide Convention, *supra* note 5, art. II.

to destroy." To the extent there is a subject, it is the acts themselves. To describe the "intent to destroy," therefore, as an attribute of the structural context (which is, again, the product of accumulated acts) is just as reasonable (more so, I argue, when considered in light of the aims of the Convention) as the interpretation of the "intent to destroy" as an individual's internal mental state.

Furthermore, while the drafting history indicates that some of the delegates had an individualistic understanding of genocide, the *travaux preparatoires* also reveal concerns about individualistic and subjective interpretations of the "intent to destroy."[225] In discussions regarding whether a premeditation requirement should be included, the Yugoslav delegate expressed worry regarding the possibility of "making suppression dependent upon a subjective psychological condition, and not upon the objective character of the criminal act alone."[226] He further worried that doing so would "allow many cases of genocide to go unpunished."[227] The delegate from the Union of Soviet Socialist Republics ("USSR") expressed a similar concern regarding the "committed with the intent to" language, which he argued would create a "risk of ambiguity" and possibly allow some "perpetrators of acts of genocide . . . to claim that they were not in fact guilty of genocide."[228] The United Kingdom delegate worried that the "guilty" could use the "pretext that they had not been impelled by motives contained in the proposed list."[229] These concerns are not decisive evidence against an individualistic understanding of genocide (nor could they be),[230] but they do complicate efforts to claim that drafters unambiguously embraced it.

C. Indicators of a Genocidal Structural Context

To determine whether a structural context is genocidal, courts, states, and other actors could consult the types of circumstantial evidence that the ICTY and the ICTR have already used to infer individual intent. They could also refer to the extensive literature on "stages," "warning signs," and other features of genocide.[231] In this

[225] *See generally* TRAVAUX PRÉPARATOIRES, *supra* note 145, at 1376–1419.
[226] *Id.* at 1376.
[227] *Id.*
[228] *Id.* 1381–89.
[229] *Id.* at 1415–19.
[230] The Vienna Convention does not prioritize drafters' intentions above other principles of interpretation. Vienna Convention, *supra* note 30, art. 32.
[231] One thing to note is that not all variables that correlate with genocide, which are appropriate as "warning signs" will be appropriate indicators of a genocidal structure. For example, some research on atrocity prevention includes conditions that make societies vulnerable to genocide, including conditions such as geography, meteorological events, demographics, and poverty, which in and of themselves do not indicate that structures aimed at destruction are in place. There are many resources that include among their variables both conditions creating vulnerability and indicators of genocidal structures. *See* Stephen McLoughlin, Jess Gifkins & Alex J. Bellamy, *The Evolution of Mass Atrocity Early Warning*

Article, I do not endeavor to offer detailed guidance on how to do so. Indeed, I think there are likely multiple possible ways courts and other actors could implement my suggested approach. However, I will propose one possible way they could do so here.

For a structural context to exhibit an "intent to destroy," I propose that it should have both ideological and repressive structures aimed at destroying a protected group (in whole or in part, as such). What I am calling the structural context is similar to what Althusser called a "state apparatus," which could be repressive ("RSA") and/or ideological ("ISA").[232] The RSA consists of the "government, administration, army, police, courts and prisons," and the ISA is composed of laws, social hierarchies, cultural norms, mores, values, religious and educational institutions, and state propaganda.[233] To determine whether such structures are in place, courts and other actors could start with the "signs of an intent to destroy" listed in the UN Framework of Analysis for Atrocity Crimes.[234] On this list, there are several structures that I would characterize as ideological, including:

- political and media documents that either explicitly or implicitly target a protected group (10.1);
- "widespread or systematic discriminatory or targeted practices . . . against the lives, freedom or physical and moral integrity of a protected group" (10.3);
- policies seriously limiting reproductive rights or removing children from the group (10.4);
- and "[e]xpressions of public euphoria at having control over a protected group and its existence" (10.7).[235]

The list also includes structures that are more repressive in nature:

- "Targeted physical elimination, rapid or gradual, of members of a protected group, including only selected parts of it, which could bring about the destruction of the group" (10.2);

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in the UN Secretariat: Fit for Purpose?, 30 INT'L PEACEKEEPING 477 (2023); Jennifer Leaning, *Early Warning for Mass Atrocities: Tracking Escalation Parameters at the Population Level*, *in* RECONSTRUCTING ATROCITY PREVENTION 352 (Alex Zucker, Sheri P. Rosenberg, & Tibi Galis eds., 2015); Harff, *supra* note 47.

[232] *See generally*, ALTHUSSER, *supra* note 33. While Althusser uses the word "state" in his description, not all the structures he describes as constituting the state apparatus are officially affiliated with the state. Genocides often involve mobilization of what can similarly be called a "state apparatus." However, to avoid confusion regarding genocides that less directly implicate the state, I choose to employ a broader term—"structural context." I also intend for structural context to be less economically deterministic than Althusser's state apparatus.

[233] *Id.* at 75–76.

[234] UNITED NATIONS, FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES: A TOOL FOR PREVENTION 19 (2014).

[235] *Id.* The numbers in parentheses correspond to the list of "signs of an intent to destroy."

- "[w]idespread or systematic violence against the . . . protected group, even if not yet reaching the level of elimination" (10.3);
- "methods or practices of violence that are particularly harmful . . . dehumanize . . . [or] that reveal an intention to cause humiliation, fear or terror to fragment the group, or . . . to change its identity" or that are "prohibited under international law, including prohibited weapons against" the group (10.5-6);
- "Attacks against . . . homes, farms, businesses or other livelihoods . . . and/or of their cultural or religious symbols and property" (10.8).[236]

I contend that ideological and repressive structures aimed at destruction are necessary because ideological structures without any repressive structures may not present a plausible threat of destruction. Conversely, repressive structures without any ideological structures are unlikely to have the destruction of a particular group "as such" as its aim.

The situation of the Rohingya, a predominantly Muslim ethnic minority group from Myanmar, provides a helpful example of how both ideological and repressive structures develop over time.[237] The military government instituted a new citizenship law in 1982 that gave priority to members of certain "national races" and subsequently excluded the Rohingya from a list of the "national races," thus beginning a decades-long campaign of insisting that there was no such thing as Rohingya in Myanmar (10.1).[238] At the end of the 1980s, after crushing a popular uprising, authorities began a drive to distribute new national ID cards to replace the National Registration Cards held by Myanmar citizens at the time.[239] In Rohingya towns and villages, security officers confiscated the older cards without issuing new ones (10.3).[240] Authorities also imposed regulations on the Rohingya population since the 1990s that required them to get special permission to marry and limited them to two children per family (10.4).[241] In 2012, massive violence was perpetrated against Rohingya without interference from, and often with the cooperation of,

[236] *Id.*

[237] Simon-Skjodt Ctr. for Prevention Genocide, *"They Want Us All to Go Away": Early Warning Signs of Genocide in Burma*, U.S. HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/genocide-prevention/countries/burma/burma [https://perma.cc/FEK5-YXWG] (last visited Sept. 12, 2024, 12:15 PM); ALLARD K. LOWENSTEIN INT'L HUM. RTS. CLINIC, YALE LAW SCHOOL, PERSECUTION OF THE ROHINGYA MUSLIMS: IS GENOCIDE OCCURRING IN MYANMAR'S RAKHINE STATE? (James Silk & Soo-Ryun Kwon eds., 2015); PENNY GREEN, THOMAS MACMANUS & ALICIA DE LA COUR VENNING, COUNTDOWN TO ANNIHILATION: GENOCIDE IN MYANMAR (2015).

[238] Hum. Rts. Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar of its Thirty-Ninth Session, U.N. Doc. A/HRC/39/CRP.2, ¶ 479 (2018) [hereinafter 2018 FFM Report].

[239] *Id.* ¶ 73, 479.

[240] *See id.*

[241] FORTIFY RTS., POLICIES OF PERSECUTION: ENDING ABUSIVE STATE POLICIES AGAINST ROHINGYA MUSLIMS IN MYANMAR 24 (2014).

security forces in the area.[242] Rohingya homes and businesses were rampaged and subsequently put to other uses (10.8).[243] Following this violence, over 100,000 Rohingya were confined to "internally displaced person" camps where most still live today (10.3).[244]

Throughout the 2010s, Rohingya were increasingly excluded from professions they had previously practiced and denied access to livelihoods, health care, and education, and security forces engaged in sporadic torture, arbitrary detention, and rape of Rohingya (10.3).[245] Rohingya women reported especially demeaning forms of sexual abuse (10.5).[246] Islamophobia was rampant, with Buddhist chauvinist monks and other leaders promoting hatred and violence against Muslims, especially the Rohingya (10.3).[247] Facebook, which had only been introduced to the country recently, was flooded with anti-Muslim and anti-Rohingya messaging (10.3).[248] Mosques and other religious sites were attacked, and Rohingya were limited in their ability to gather to worship (10.8).[249] In 2015, the Pyidaungsu Hluttaw (the Myanmar Parliament) enacted a set of "Race and Religion Protection Laws" that extended polices that had been used against Rohingya for decades (10.4).[250] That same year, human rights icon and Nobel Peace Prize recipient Aung San Suu Kyi's National League for Democracy (NLD) swept parliamentary elections, the first in the nation's history in which Rohingya were denied the right to vote and no Muslims were elected to Parliament (10.3).[251]

Then in 2016 and 2017, security forces built up their presence in areas where the Rohingya lived and engaged in clearance operations that involved the burning down of entire villages and mass rape, torture, and killings (10.2 and 10.3).[252] Sexual violence was undertaken in humiliating and gruesome ways, and young children and

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[242] TIRANA HASSAN & MATTHEW SMITH, HUM. RTS. WATCH, "THE GOVERNMENT COULD HAVE STOPPED THIS": SECTARIAN VIOLENCE AND ENSUING ABUSES IN BURMA'S ARAKAN STATE (2012), https://www.hrw.org/report/2012/08/01/government-could-have-stopped/sectarian-violence-and-ensuing-abuses-burmas-arakan [https://perma.cc/Z4PM-MVXH].

[243] *See id.*

[244] *See id.*

[245] 2018 FFM Report, *supra* note 238, ¶¶ 499–623.

[246] *See id.* ¶¶ 620–21.

[247] *See, e.g.*, Niklas Foxeus, *Buddhist Nationalist Sermons in Myanmar: Anti-Muslim Moral Panic, Conspiracy Theories, and Socio-Cultural Legacies*, 53 J. CONTEMP. ASIA 423 (2023).

[248] AMNESTY INT'L, THE SOCIAL ATROCITY: META AND THE RIGHT TO REMEDY FOR THE ROHINGYA (2022), https://www.amnesty.org/en/documents/asa16/5933/2022/en/ [https://perma.cc/2QQP-JTYY].

[249] *See, e.g.*, 2018 FFM Report, *supra* note 238, ¶¶ 604, 684.

[250] *See id.* ¶ 600.

[251] *See id.* ¶¶ 489–90.

[252] *See id.* ¶¶ 749–1384; AMNESTY INT'L, "WE ARE AT BREAKING POINT": ROHINGYA: PERSECUTED IN MYANMAR, NEGLECTED IN BANGLADESH (2016), https://www.amnesty.org/en/documents/asa16/5362/2016/en/ [https://perma.cc/E4XQ-J2F7].

babies were tortured and killed (10.5).[253] Exact numbers are unknown, but it is estimated, on the low end, that at least 20,000 were killed while hundreds of thousands of Rohingya fled to Bangladesh (10.2).[254] After the "clearance operations," massive pro-military demonstrations took place in Yangon and other locations across the country (10.7).[255]

The persecution of the Rohingya thus includes ample examples of ideological and repressive indicators of a genocidal structural context. It also demonstrates how genocidal structures build upon one another and escalate over time, often in plain sight of anyone paying attention.

IV. PREVENTING AND PUNISHING GENOCIDE: HOW STATES AND COURTS CAN EMBRACE THE STRUCTURAL INTERPRETATION

The structural approach I am proposing offers a consistent definition of genocide that can be adopted by states seeking to prevent genocide, by the ICJ in interstate disputes regarding obligations under the Genocide Convention, and by the ICC and other criminal courts in trials of individual perpetrators.[256] By shifting the focus from subjective individual mindsets to more objective structural conditions, my approach minimizes powerful actors' ability to make biased and hypocritical assessments of potentially genocidal situations. It also encourages prevention and accountability measures centered on identifying, not contributing to, and dismantling genocidal structures.

A. States

A structural interpretation of genocide would empower states when they seek to prevent genocide and constrain states when they seek to avoid acknowledging or addressing it. By drawing attention to the critical role of genocidal structures, the structural interpretation I am proposing expands the time horizon and possible strategies for prevention.[257] When genocide is conceived of individualistically as a discrete crime committed by a small number of perpetrators, it is easy to imagine

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[253] *See, e.g.*, 2018 FFM Report, *supra* note 238, ¶¶ 789, 1372.

[254] PENNY GREEN, THOMAS MACMANUS & ALICIA DE LA COUR VENNING, GENOCIDE ACHIEVED, GENOCIDE CONTINUES: MYANMAR'S ANNIHILATION OF THE ROHINGYA (2018), http://statecrime.org/data/2018/04/ISCI-Rohingya-Report-II-PUBLISHED-VERSION-revised-compressed.pdf [https://perma.cc/3K6K-Z2FR].

[255] *Thousands March in Support of Myanmar Military*, VOA NEWS (Oct. 29, 2017, 9:40 PM), https://www.voanews.com/a/thousands-march-in-support-of-myanmar-military/4090915.html [https://perma.cc/7CGB-DMXV].

[256] Furthermore, while I do not include a separate discussion of it here, other actors such as NGOs and businesses could also embrace the structural approach, identifying and avoiding contributing to genocidal structures.

[257] *See, e.g.*, Scheffer, *supra* note 16; Motala, *supra* note 37; Karazsia, *supra* note 16; Badescu, *supra* note 37; WHEELER, *supra* note 37; Sarkin & Fowler, *supra* note 37; *but see* Leaning, *supra* note 231.

genocide prevention as requiring emergency intervention to incapacitate evil would-be *génocidaires*. When genocide is understood structurally as a process that develops because countless individuals produce and reproduce genocidal structures over time, the timeline for prevention extends backward, and the opportunities for stopping the genocide multiply.

In particular, states interested in preventing genocide could identify genocidal structures that they may be supporting. While discussions of atrocity prevention disproportionately focus on foreign states' obligations to *intervene in* genocidal situations,[258] a structural understanding helps reveal how states *contribute to* them. The U.S., for example, contributed to the atrocities in East Timor by communicating to Indonesia that it would not oppose their invasion of the country after the Portuguese "decolonized."[259] After the invasion, U.S. officials continued to support the Indonesian regime, knowing that the Timorese were being massacred, frequently with U.S.-made weapons.[260] Iraqi forces used U.S. weapons and chemicals against the Kurds while the U.S. was providing Saddam Hussein with intelligence and aid.[261] In Myanmar, the U.S., and other states actively supported the Burmese government and military as it committed atrocities against the Rohingya.[262] The U.S. only

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[258] *See, e.g.*, Badescu, *supra* note 37; WHEELER, *supra* note 37; *see generally* Alex J. Bellamy & Tim Dunne, *R2P in Theory and Practice*, *in* THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT 3 (Alex J. Bellamy & Tim Dunne eds., 2016); Scheffer, *supra* note 16; Motala, *supra* note 37; Karazsia, *supra* note 16.

[259] Scott Sidell, *The United States and Genocide in East Timor*, 11 J. CONTEMP. ASIA 44 (1981); Helen Davidson, *U.S. Knew Indonesia Intended to Stop East Timorese Independence "Through Terror and Violence*,*"* THE GUARDIAN (Aug. 28, 2019, 12:00 PM), https://www.theguardian.com/world/2019/aug/29/us-knew-indonesia-intended-to-stop-east-timorese-independence-through-terror-and-violence [https://perma.cc/P9DQ-FCVB].

[260] Sidell, *supra* note 259.

[261] *See, e.g.*, Seymour M. Hersh, *U.S. Secretly Gave Aid to Iraq Early in Its War Against Iran*, N.Y. TIMES (Jan. 26, 1992), https://www.nytimes.com/1992/01/26/world/us-secretly-gave-aid-to-iraq-early-in-its-war-against-iran.html [https://perma.cc/LCF4-49P6]; *Frontline: The Arming of Iraq* (PBS radio broadcast Sept. 11, 1990), https://www.pbs.org/wgbh/pages/frontline/shows/longroad/etc/arming.html [https://perma.cc/PR7T-YTVT].

[262] *See, e.g.*, *Germany Offers Military Training to Myanmar*, THE NATION (May 1, 2017), https://www.nationthailand.com/in-focus/30313902 [https://perma.cc/V23L-SK2K]; Gili Cohen, *Israel Sold Advanced Weapons to Myanmar During Anti-Rohingya Ethnic Cleansing Campaign*, HAARETZ (Oct. 24, 2017), https://www.haaretz.com/israel-news/2017-10-24/ty-article/israel-sold-arms-to-myanmar-during-ethnic-cleansing-campaign/0000017f-db6c-d856-a37f-ffece3470000 [https://perma.cc/LC8J-DPYD]; Damien Mcelroy, *Britain to Offer Military Training to Burma to Help End Ethnic Conflicts*, THE TELEGRAPH (July 14, 2013, 8:36 PM), https://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/10178638/Britain-to-offer-military-training-to-Burma-to-help-end-ethnic-conflicts.html [https://perma.cc/9WJC-JF4D]; Shibani Mahtani, *Myanmar Hoping U.S. Will Lift Sanctions*, WALL ST. J. (Nov. 26, 2015, 11:03 PM), https://www.wsj.com/articles/myanmar-hoping-u-s-will-lift-sanctions-1448597024 [https://perma.cc/R6TU-LXKQ]; *India, Myanmar Kickstarts Maiden Joint Training Exercise*, UNITED NEWS OF INDIA (Nov. 20, 2017), https://www.proquest.com/globalnews/docview/1966088449/citation/76872138756D4CEC

recognized that genocide had taken place five years after the worst of the violence and almost a decade after the warning signs were evident.[263] Regarding Rwanda, there is widespread consensus that the UN, France, and the U.S. mishandled the genocide and many have also noted that colonial and neo-colonial forces created the conditions for and exacerbated the atrocities that occurred.[264] Furthermore, the U.S. has provided Israel with long-term financial and political support and many of the weapons that have killed thousands of Palestinian civilians in Gaza.[265] States interested in preventing atrocities would identify possibly genocidal structures and refrain from contributing to them.

In addition to identifying, discontinuing contributions to, and dismantling genocidal structures, state officials embracing a structural approach could also take steps to recognize and repair historical genocides, including ones that they committed or contributed to. Doing so is especially important for current and former Western imperial powers in the global North, who, despite having orchestrated and supported some of the worst genocides,[266] are often presumed to be the "saviors" whose intervention is needed to rescue people in the global South. Recognizing genocides committed by imperial powers in the global North also provides a broader set of cases to draw lessons from and can enhance the legitimacy of the international human rights system, which has frequently been accused of hypocrisy and racism.

States could also place pressure on other states that are developing or contributing to genocidal structures. The most formal way is to file an interstate suit at the ICJ. The Gambia, South Africa, Nicaragua, and Sudan have pursued this

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PQ/64 [https://perma.cc/VZ29-BC68]; *Myanmar (Burma): U.S. Promises to Strengthen Myanmar's Anti-narcotics and Security Campaigns*, THAI NEWS SERV. (Aug. 28, 2017), https://www.proquest.com/globalnews/docview/1932605082/citation/18D673AD117B476CPQ/39 [https://perma.cc/K25Q-KXPR]; *Myanmar/United States/Thailand: Myanmar Invited to US-Thailand Military Drills Despite Rohingya Issue*, ASIA NEWS MONITOR (Dec. 25, 2017), https://www.proquest.com/globalnews/docview/1980490679/citation/18D673AD117B476CPQ/61 [https://perma.cc/B5FR-2CQ4].

[263] U.S. DEP'T STATE, *Genocide in Burma*, *supra* note 191.

[264] *See, e.g.*, Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 90 (2003) ("it is now well acknowledged that significant international actors such as the United Nations itself, failed to address the growing dangers in Rwanda"); Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999); GERALD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 340 (1995).

[265] *See, e.g.*, Michael Crowley & Edward Wong, *Gaza War Turns Spotlight on Long Pipeline of U.S. Weapons to Israel*, N.Y. TIMES (Apr. 6, 2024), https://www.nytimes.com/2024/04/06/us/politics/israel-us-weapons.html [https://perma.cc/RSL9-K43G].

[266] *See* Wolfe, *supra* note 142; *see generally* EMPIRE, COLONY, GENOCIDE: CONQUEST, OCCUPATION, AND SUBALTERN RESISTANCE IN WORLD HISTORY, (A. Dirk Moses ed., 2008); Sidell, *supra* note 259; DAMIEN SHORT, REDEFINING GENOCIDE: SETTLER COLONIALISM, SOCIAL DEATH AND ECOCIDE (2016); KIERNAN, *supra* note 127.

strategy.[267] States could follow their example and bring suits more frequently and sooner. They could also intervene in cases once they are initiated. States can also apply diplomatic pressure to coordinate responses at the UN and regional bodies such as the European Union ("EU"), Common Market of the South ("MERCOSUR"), and the Association of Southeast Asian Nations ("ASEAN"), and ensure asylum for those fleeing violence and persecution.

Of course, not all states will perceive taking these steps as aligning with their interests–economic, geopolitical, and military—regardless of how they understand the definition of genocide. Shifting the analysis from subjective individual mindsets to more objective structural conditions, the structural interpretation nonetheless makes it harder for them to justify failing to do so. While it is easy to claim ignorance of someone's internal mental state, it is harder to deny the buildup of genocidal structures, especially given the amount of information we now have about the way genocides are carried out.[268] Other states can themselves take actions to counteract the genocidal structures in place—without necessarily commenting on the baseness of the motivations of individuals contributing to them—and increase the reputational cost for states that do not follow suit.[269]

B. The International Court of Justice

As the designated arbiter of disputes under the Genocide Convention,[270] the ICJ is uniquely well positioned to clarify that the definition of genocide should be interpreted structurally. It should state unequivocally that the question of whether a given situation is genocide does not turn on the internal mental state of an individual but instead requires an analysis of whether structures in place are aimed at destruction and, which, if any, of the enumerated acts have occurred. It should elaborate that states' obligations of prevention include, first and foremost, an obligation not to contribute to genocidal structures in their territory or elsewhere.

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[267] Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. Rep. 3 (Jan. 23); *see, e.g.*, Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. Rep. 6 (Jan. 26).

[268] *See, e.g.*, KIERNAN, *supra* note 127; FEIERSTEIN, *supra* note 23; Harff, *supra* note 47; McLoughlin et al., *supra* note 231.

[269] *See generally* Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45, 96 (2009); Ryan Brutger & Joshua D. Kertzer, *A Dispositional Theory of Reputation Costs*, 72 INT'L ORG. 693 (2018); JONATHAN MERCER, REPUTATION AND INTERNATIONAL POLITICS (2018); Adam S. Chilton, *The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study*, 15 CHI. J. INT'L L. 110 (2014); Songying Fang, *The Informational Role of International Institutions and Domestic Politics*, 52 AM. J. POL. SCI. 304 (2008); Julia C. Morse & Tyler Pratt, *Strategies of Contestation: International Law, Domestic Audiences, and Image Management*, 84 J. POL. 2080 (2022).

[270] Genocide Convention, *supra* note 5, art. IX.

In addition to clarifying the definition of genocide and the content of obligations under the Convention, the ICJ can also use initial requests for provisional measures as opportunities to identify genocidal structures that are developing or already in place and to provide specific instructions for prevention. The ICJ's 2020 provisional measures order in the case brought by The Gambia against Myanmar sidestepped the question of whether there was even *prima facie* evidence of an "intent to destroy," arguing that their role at that point was only to determine the existence of a plausible right to relief and that that determination did not require specific evidence regarding the "intent to destroy."[271] On the one hand, the Court's strategy represents a move away from the individualistic approach to genocide because provisional measures then do not turn on proving an individual's internal mental state. On the other hand, a more decisive move away from the individualistic approach would not sidestep the question of the "intent to destroy" but instead determine whether sufficient evidence of genocidal structures exists.

The Court could then articulate specific measures the state in question could take to dismantle genocidal structures and prevent acts of genocide from taking place. Until recently, provisional measures approved by the Court have been quite general, doing little more than reiterating states' obligations under the Convention.[272] In the case brought by The Gambia, the Court directed Myanmar to "take all measures within its power" to prevent the commission of the enumerated acts, to "ensure that its military, as well as any irregular armed units . . . do not commit" any of the enumerated acts, to preserve evidence, and to make regular reports to the Court.[273] More robust provisional measures would have identified particular laws to repeal, practices to discontinue, and even military units to break up.

Over the last few years, the ICJ has started to issue bolder provisional measures. In the Ukraine case, the Court ordered Russia to "suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine."[274] In the suit brought by South Africa against Israel regarding its operations in Gaza, the ICJ refused South Africa's request for a similar order initially but did include specific measures regarding incitement and "urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip" and, in a subsequent judgment, ordered a narrower suspension of military activities, in relation to Israel's military offensive against Rafah.[275] The ICJ could, in adopting a more structural approach, continue to provide

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[271] *Gam. v. Myan.*, 2020 I.C.J. Rep. 3.

[272] *See id.*; *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. ¶ 431; *Croat. v. Serb.*, 2015 I.C.J. Rep. ¶ 428.

[273] *Gam. v. Myan.*, 2020 I.C.J. Rep. 3.

[274] Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. Reports 211 (Mar. 16).

[275] Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. Rep. 6 (Jan. 26); Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v.

even greater specificity in its orders about what needs to be done to dismantle genocidal structures and prevent genocidal acts.

To increase the likelihood that its provisional measures and judgments will be more impactful, the Court would also need to speed up its processes, which have been especially protracted for genocide cases. The structural interpretation should make it at least a little easier for the Court to do so because the evidence of genocidal structures should be more readily available than evidence of individuals' internal mental states. Relatedly, the Court would have less reason to delay a final judgment until criminal cases had determined individual perpetrators' guilt.

The ICJ, of course, is limited in various ways. It can only issue provisional measures and judgments regarding genocide when states institute proceedings.[276] Perhaps more critically, the ICJ has no independent means of enforcing its judgments. Although the ICJ provisional measures and judgments are binding upon parties,[277] the ICJ depends on voluntary state compliance and actions taken by the UN Security Council, which has shown minimal interest in addressing genocide.[278] The ICJ judgments do nonetheless carry weight and can help increase the reputational costs to states for failing to acknowledge or address genocide.[279]

Isr.), Request for Modification of 26 Jan. 2024 Provisional Measures, 2024 I.C.J. 192, ¶¶ 45–47 (Mar. 28); Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Request for Modification of Mar. 28 Provisional Measures, 2024 I.C.J. 192, ¶¶ 50–53 (May 24).

[276] States, in turn, are likely to be more encouraged to bring suits if the ICJ starts issuing more timely and substantive orders.

[277] STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, ch. III, art. 41.

[278] The U.N. Security Council has rarely taken action to address genocide, especially as it is unfolding. Its authorization for military intervention in Libya, while framed in terms of R2P, did not mention genocide prevention. *See generally* Karen Smith, *Why the United Nations Keeps Failing Victims of Atrocity Crimes*, JUST SECURITY (Nov. 9, 2023), https://www.justsecurity.org/90005/why-the-united-nations-keeps-failing-victims-of-atrocity-crimes/ [https://perma.cc/8MMK-E9GT]; Tor Dahl-Eriksen, *R2P and the UN Security Council: An "Unreliable Alliance*,*"* 36 INT'L J. WORLD PEACE 33 (2019).

[279] *See* Scharf, *supra* note 269, at 45 ("governments have found that the term 'genocide,' with its roots in the Holocaust, has a unique power to create often irresistible public pressure on a government to act"); *cf.* Brutger & Kertzer, *supra* note 269; MERCER, *supra* note 269; Chilton, *supra* note 269; Fang, *supra* note 269; Morse & Pratt, *supra* note 269; ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 40 (2008) (asserting that "there seems to be nearly universal agreement that states are, indeed, concerned with their reputations," even among "critics of reputational theories"); Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599, 2602–03 (1997) (commenting that "international law norms now help construct national identities and interests"); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002) (finding limited reputational effects of treaty non-compliance under certain conditions).

C. Criminal Courts

International criminal courts, as I have intimated, have played an outsized role in elaborating the definition of genocide, especially as they cemented an individualistic interpretation of the "intent to destroy." They undoubtedly will continue to play a significant role moving forward. Because the relatively recently established ICC has yet to try a genocide case, it can consider the definition of genocide anew. While it may feel like the individualistic interpretation is well-entrenched, only a relatively small number of individual defendants have been tried for genocide. The ICC will certainly look to the ICTY and the ICTR as persuasive authority, but the fact that it is interpreting a different statute with different default rules and that the existing jurisprudence is so inconsistent and convoluted means that the ICC would have good reason to reconceive the "intent to destroy" structurally.

A structural approach would streamline the ICC and other courts' efforts to obtain criminal accountability for perpetrators of genocide. The ICC would need to carefully distinguish the question of whether genocide is occurring or has occurred from whether individuals are guilty of perpetrating acts of genocide. If the ICJ has already made a genocide determination involving the structural context in which an individual defendant is accused of having perpetrated an enumerated act, the ICC could adopt the ICJ's finding. If the ICJ has not, the ICC could make its own determination regarding the structural context and cite it in subsequent decisions. Once it is established that a genocidal structural context is or was in place, the ICC would be in a better position to grant requests by the prosecutor to institute provisional measures and/or issue an arrest warrant, even while atrocities are still ongoing.

During the trial, parties could focus less on the question of whether circumstantial evidence of an "intent to destroy" can be imputed to the defendants and instead focus on whether defendants committed the acts of genocide with which they are charged. Parties could also focus on whether the defendant directly carried out an act or whether they met the requirements for one of the inchoate or derivative offenses listed in the Rome Statute.[280] The distinction between genocide and acts of genocide could help clarify the differences between these types of offenses, a line that was often muddled in the judgments of the *ad hoc* tribunals.[281] Thus, an attempt is an attempt to commit an act of genocide, not to orchestrate a genocide oneself. Similarly, to "aid" or "abet" genocide is to aid or abet in the commission of a particular act of genocide, not a genocide more generally.[282]

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[280] Both the Genocide Convention and the Rome Statute also contemplate various inchoate and derivative offenses. While not a focus of this Article, the structural approach has the potential to simplify the analysis for those other offenses as well by making clear that the principal offense is the commission of the enumerated acts and that these other offenses must articulate a relation to those acts.

[281] *See* SCHABAS, *supra* note 23, at 306–67.

[282] The Genocide Convention lists several such offenses: "[c]onspiracy to commit genocide," "[d]irect and public incitement to commit genocide," "[a]ttempt to commit

The ICC would, moreover, need to determine whether each defendant had the requisite *mens rea*. Rather than asking whether the defendant harbored an "intent to destroy," the Court would ask if they committed the act(s) with which they are charged with "intent and knowledge," the default mental element in the Rome Statute.[283] Intent, according to the statute, "means to engage in the conduct" and "to cause that consequence or [be] aware that it will occur in the ordinary course of events."[284] "Knowledge" is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[285] At a minimum, therefore, the defendant must be aware of all the circumstances indicated in the description of the crime and of any consequence that "will occur in the ordinary course of events."[286] The circumstances and consequences for each of the enumerated acts differ. Still, they all share what is sometimes called the *chapeau*, the initial portion of the definition that includes the "intent to destroy."[287] Thus, regardless of the specific enumerated acts charged, the court must find that the defendant was aware of a structural context characterized by an "intent to destroy."

My proposal thus resembles suggestions that the "intent to destroy" be construed as a contextual element much like the "widespread and systematic attack" requirement within "crimes against humanity."[288] The advantage of doing so is that criminal courts have already developed extensive jurisprudence elaborating what is involved in proving a contextual element, including the "nexus" between the defendant's act and the contextual element.[289] The "nexus" for crimes against humanity is the knowledge that "there is an attack on the civilian population and that his act is part of the attack."[290]

Greenawalt's knowledge-based approach, while likely having a similar practical effect for prosecutions, is technically different.[291] The difference is one of circumstance versus consequence. Greenawalt proposes that "culpability for

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genocide," and "[c]omplicity in genocide." Genocide Convention, *supra* note 5, art. III. The Rome Statute does not repeat the same list, specifies other acts that incur individual criminal liability, including when a person "[o]rders, solicits or induces," "aids, abets or otherwise assists," or "attempts" the commission of any of the crimes in its jurisdiction. Rome Statute, *supra* note 11, art. 25(b)–(c).

[283] Rome Statute, *supra* note 11, art. 30(1).

[284] *Id.* art. 30(2).

[285] *Id.* art. 30(3).

[286] *Id.* art. 30.

[287] *See* William A. Schabas, *The "Odious Scourge": Evolving Interpretations of the Crime of Genocide,* 1 GENOCIDE STUD. AND PREVENTION: AN INT'L J. 93, 100 (2004).

[288] Vest, *supra* note 12, at 785–90 ("Though the genocide provision makes no explicit reference to a contextual element, such element is *inherent* to its *mens rea* where it has been incorporated in the extended subjective element of destroying a protected group in whole or in part."); Jones, *supra* note 13; *see also* KIM, *supra* note 18, at 167 (referring to the "intent to destroy" as "transform[ing] to an *actus reus*").

[289] *See, e.g.*, Prosecutor v. Kunarac*,* Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 418 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

[290] *Id.* ¶ 418(ii)

[291] Greenawalt, *supra* note 13.

genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions for the survival of the relevant victim group."[292] This technical difference matters because knowledge of consequences, as Greenawalt has noted, is consistent with some "traditional understanding[s] of intent."[293] As such, his knowledge-based approach still treats the "intent to destroy" as the *mens rea* of the crime and thus embraces a more individualistic interpretation of genocide, in which genocide is the act of an individual perpetrator. Similarly, Larry May's proposed interpretation of the "intent to destroy" is also distinct from my structural interpretation but likely would be practically quite similar for purposes of criminal prosecution.[294] Instead of arguing that the standard should be knowledge of destructive consequences, May proposes that it is the intention to participate in a plan.[295] His proposal differs from mine in that he, like Greenawalt, maintains that the "intent to destroy" is the *mens rea* of genocide[296] and that a "plan" is usually understood to describe something narrower than what I call a "structural context."[297] If the "plan" were construed quite broadly, the practical difference from mine for criminal prosecutions would also be minimal.

The structural interpretation could also aid other non-carceral efforts at remedy, repair, and transitional justice. It draws attention to the structures that made the genocide possible, who developed them and how, states' contributions to the development of genocidal structures, and missed opportunities for averting or mitigating the harms. This attention could help expand accountability beyond the individuals whose activities warrant criminal charges and also include actors who contributed to the overall context, including international actors. As legal scholars Antony Anghie and B.S. Chimni argue, "any attempt to identify responsibility for these tragedies and to create systems of accountability should also inquire into the roles that these other international actors played in promoting and exacerbating the situation."[298] This kind of accountability process would not be aimed at punishment but rather considering alternative modes of promoting understanding and repair.

D. Objections

My proposal is certain to provoke many objections. In this section, I respond to several of them—that it makes the definition of genocide too expansive, is unfair to

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[292] *Id.* at 2265.
[293] *Id.*
[294] MAY, *supra* note 121, at 127.
[295] *Id.*
[296] *Id.* at 121–29.
[297] *See id.*
[298] Anghie & Chimni, *supra* note 264; *see also* Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMPAR. L.J. 167, 168 (1997) (arguing that criminal tribunals for Rwanda and Yugoslavia "only make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems that unleashed the genocides in the first place").

defendants, misreads the text, unsettles settled law, does not provide a clear enough rule, and places unwarranted faith in international law's influence on state behavior.

1. Expansiveness

Critics may be concerned that the structural interpretation I have proposed would water down the definition of genocide, robbing it of its status as the "crime of crimes."[299] The gist of the argument is that by "relaxing" intent standards, my approach will overly expand the number of situations that can be characterized as genocide. The structural interpretation indeed opens up more situations to be designated genocides. In particular, by using objective criteria rather than inquiries into individuals' subjective mindsets, my proposed approach makes it harder for powerful states to engage in biased and hypocritical assessments of the "intent" of the perpetrators. Conversely, the decrease in subjectivity can also help in the other direction. It makes it harder for decision-makers to read nefarious motivations where the structural conditions do not indicate an "intent to destroy."

Another variation of the expansiveness question asks, why genocide? Why not crimes against humanity or war crimes? It is true that many instances of alleged genocide also involve war crimes and/or crimes against humanity. It is also true that a hyper-fixation on genocide can give the impression that these other atrocities are insignificant. My short answer is that recognizing more situations as genocide and identifying war crimes and crimes against humanity are not mutually exclusive. A longer response is that the term genocide seems to be especially significant for both members of victim groups and policymakers,[300] and for now, no treaty assigns states obligations of prevention for those other categories of international crimes, as the Genocide Convention does for genocide.[301] Moreover, other international crimes could also benefit from a more structural approach. Although the *mens rea* requirements for these other international crimes are not as demanding as for genocide and thus can often be recognized more quickly after they are committed, a structural approach could help interested actors identify and dismantle dangerous structures before atrocities are underway.

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[299] Lemkin originally referred to genocide as the "crime of crimes" and it has subsequently been taken up by others, including Schabas in his treatise on genocide. *See* Raphael Lemkin, *Genocide as a Crime Under International Law*, U.N. BULLETIN 70, 70 (1948).

[300] *See, e.g.*, Buchwald & Keith, *supra* note 14, at v; William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1715–18 (2006); Greenawalt, *With Intent to Destroy, supra* note 51, at 940–41.

[301] An effort to draft a treaty to prevent and punish crimes against humanity, however, is well underway. *See UN Decision to Advance Crimes Against Humanity Treaty*, HUM. RTS. WATCH (Nov. 18, 2022, 12:57 PM), https://www.hrw.org/news/2022/11/18/un-decision-advance-crimes-against-humanity-treaty [https://perma.cc/9ZKQ-XEEA].

2. Fairness to Defendants

The defendant-level corollary to the expansiveness objection is the argument that the structural interpretation would make it too easy to find individuals guilty of genocide. The first response to this objection is to note that the structural approach I am proposing decenters criminal prosecution of individual defendants as the primary means of addressing genocide. It focuses on identifying genocidal structures as they develop and holding states accountable.

More to the point, the structural approach still protects defendants from being unfairly convicted of genocide when they were unaware of the genocidal context, did not substantially contribute to the genocide, or only did so under extreme duress. It still requires proof that a defendant committed one of the enumerated acts (killing, causing substantial bodily harm, etc.) within a genocidal structural context "with knowledge and intent." Under the Rome Statute, "knowledge and intent" means that, at a minimum, the defendant must knowingly commit the criminal act, which, in this case, would include being aware of the structural context that exhibits an "intent to destroy."[302] Furthermore, the defense of duress would still be available, such that those who commit acts in response to threats to their own or others' lives would be able to refute their guilt.[303]

This standard, moreover, is no less demanding than the "knowledge-based approach" favored by many legal commentators nor the lowered standards that criminal tribunals have often implemented in practice, in which defendants only needed to have constructive knowledge of someone else's intent or plan and for which very high-level circumstantial evidence is imputed to a defendant.[304] If anything, removing the need to determine if an individual defendant personally harbored an "intent to destroy" may give courts more space to consider the acts that the defendants themselves committed and the defenses they may have available.

3. Textualist

Another possible objection is that the structural approach veers too far from the text of the Genocide Convention in claiming that the "intent to destroy" is not the intent requirement for genocide. As discussed above, however, the text itself is quite ambiguous.[305] A better version of the Convention would more clearly distinguish between the collective process of genocide, for which states can be responsible, and the individual acts of genocide, for which individual perpetrators can be responsible. Amending the Convention (and statutes based on it) is unlikely, given the political will that would be necessary to do so, and its ambiguity means that it is open to multiple interpretations.

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302 Rome Statute, *supra* note 11, art. 30, art. 6.
303 *Id.* art. 31(1)(d).
304 *See supra* Section II.A.3.
305 *See supra* Section III.A.2.

The text of Article II does not specify that the "intent to destroy" is the mental element of a crime or that it must belong to an individual. Grammatically, it is an attribute of the acts themselves. Reading the "intent to destroy" as referring to the structural context in which the enumerated acts take place is, therefore, at least as consistent with the text as inserting an individual perpetrator into the definition. As noted above, the understanding of the "intent to destroy" as an individual's *mens rea* produces the awkward result that each commission of an enumerated act is itself a genocide. This awkwardness is evident in legal scholar William Schabas's paraphrasing of the definition in his treatise: "Genocide is one of the five 'acts' of the subparagraphs of article II of the Convention, committed with the 'intent' defined in the chapeau."[306] As emphasized above, if genocide is *one* of the acts, then what in common parlance we call genocide would consist of hundreds, if not thousands, of genocides.

More crucially, understanding the "intent to destroy" as describing a structural context rather than an individual's internal mental state better serves the "object and purpose" of the Genocide Convention. The prevailing individualistic interpretation has frustrated the Convention's goal of prevention because it has made it easy for states party to the Convention to justify their failures to acknowledge or address genocide based on uncertainty regarding whether the definition has been met.[307] It has also resulted in inconsistent and convoluted criminal jurisprudence, which has not assisted the goal of punishment either.

Moreover, while some of the drafters clearly had an individualistic understanding of genocide, the drafting history also reveals that those who decided on the final wording of the Convention differed in their understandings of the agreed-upon terms and that several of them were concerned that the definition would be interpreted too narrowly.[308] Delegates, as noted above, expressed fears that too much emphasis on internal mental states (premeditation, motivations, intent) would impede accountability for genocide.[309] These comments are not conclusive evidence in favor of the structural approach I am proposing (nor is any so-called evidence of drafters' intent). Still, they suggest that the drafting history is more ambiguous than some proponents of an individualistic approach would make it out to be.

4. *Settled Law*

Even accepting that a structural interpretation of the "intent to destroy" would be better, some may contend that at this point, the definition of genocide is settled law, and to change the interpretation now would be too disruptive. While the concern is valid, I think it would be misplaced in this situation. First, relative to other areas of law, genocide jurisprudence is young. The individualistic understanding has only been implemented by international criminal tribunals in relation to two situations—

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[306] SCHABAS, *supra* note 23, at 241.
[307] *See supra* Section I.B.
[308] *See supra* Section III.B.2.
[309] *See supra* Section III.B.2.

Rwanda[310] and Yugoslavia[311] in the 1990s—and the ICJ has only made genocide determinations twice, both in cases brought against the former Yugoslavia.[312] More recent ICJ cases concerning Myanmar, Ukraine, Palestine, and Sudan have not been decided yet and thus present an opportunity to clarify the definition of genocide and correct any misconceptions.[313] Even more importantly, as the vast critical literature demonstrates, there is, in fact, no settled understanding of genocide.[314] Instead, we have a complicated and contradictory patchwork of standards and inconsistent and strained evaluations of evidence.

5. Not Clear-Cut Enough

I contend that a benefit of the structural approach is that it leaves less room for discretion regarding the existence of an "intent to destroy" because it is based on objective characteristics of structural conditions rather than individuals' internal mental states. Critics may (correctly) point out that the structural approach fails to provide a clear-cut rule and thus still leaves room for decision-makers to differ regarding whether a particular situation is genocide. Also, there are additional questions regarding the meaning of "in whole or in part," "destroy," and "as such" that the structural approach will not fully resolve. However, decision-makers' discretion under the structural approach is more constrained than it has been under prevailing understandings of the definition of genocide. At a minimum, it removes the ability of states to summarily dismiss allegations of genocide based on insufficient evidence of individual perpetrators' mindsets. More broadly, because structural conditions are more easily observable, the points of contention between people reaching different conclusions can be brought into better focus. For example, there may be disagreements amongst states, activists, and scholars about whether allegedly discriminatory practices are widespread or systematic enough to indicate an "intent to destroy" or about whether mass killings of civilians took place. The disagreements will not, however, be about what was going on in the minds of the officials engaging in the discriminatory practices or the security forces carrying out the killings. Additionally, as I have stressed, courts already look to structural conditions as "circumstantial evidence," sometimes described in very vague terms. Courts using a structural approach could identify more specific indicators of genocidal structural conditions less open to multiple interpretations.

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[310] *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998).

[311] Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

[312] *See generally Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. Rep. 43; *Croat. v. Serb.*, 2015 I.C.J. Rep. 3.

[313] *See supra* Section IV.B.

[314] Greenawalt, *With Intent to Destroy, supra* note 51, at 942; *see also supra* Section I.A.

6. Realist

A final objection, quite different from the earlier ones, is that legal interpretations of the Genocide Convention are irrelevant because states will do what they want regardless. One way to respond to the realist objection would be to reject the premise and insist that the problem is definitional. If the definitional issues are resolved, states will be "liberated"[315] to acknowledge and address genocide, as one commentator put it. It is also possible, as another commentator put it, that in the past, "States and international bodies were, for the most part, aware of" the events constituting genocide, but simply "did not know what they were legally, politically, or morally obligated to do to stop them."[316]

Such responses are probably accurate to a certain extent in some cases. However, there is also plenty of evidence that genocide designations are affected by states' perceived national interests. To name just one example, when Biden broke with tradition in 2022 by referring to Russia's attacks on Ukraine as genocide (a remark he and his administration later walked back),[317] his statement was not as controversial as it might have been if it were not for the US's strong support for Ukraine and opposition to Russian expansionist ambitions at the time.

Recognizing that states' perceived national interests affect their responses to genocide, however, is different from saying that legal definitions have absolutely no effect on state behavior. To start, it just cannot be true that states view genocide designations as totally irrelevant because if it were, states would not need to avoid using the term.[318] As shown by government documents and relayed by former staffers, officials from the U.S. made it a policy to avoid describing atrocities against

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[315] Scheffer, *supra* note 16, at 229–30.

[316] Motala, *supra* note 37, at 623.

[317] *See, e.g.*, Carol E. Lee, Josh Lederman & Courtney Kube, *Biden Genocide Comment Raised Concern Among some U.S. Officials*, NBC NEWS (Apr. 15, 2022, 2:33 PM), https://www.nbcnews.com/politics/national-security/genocide-accusation-russia-biden-willing-get-ahead-government-rcna24601 [https://perma.cc/9DFN-EY7C]; Kevin Liptak, *Biden's "Genocide" Declaration Not Expected to Trigger Immediate Changes to US Policy*, CNN (Apr. 13, 2022, 3:41 PM), https://www.cnn.com/2022/04/13/politics/joe-biden-genocide-ukraine/index.html [https://perma.cc/J89F-EP7P]; Tyler Pager, *Biden Calls Russia's War in Ukraine a 'Genocide,'* WASH. POST (Apr. 12, 2022, 7:14 PM), https://www.washingtonpost.com/politics/2022/04/12/biden-calls-russias-war-ukraine-genocide/ [https://perma.cc/N3WT-CNHM].

[318] Both Turkey and China have gone to great lengths to deny allegations of genocide and prevent other countries for using the term to describe events in their territory. *See, e.g.*, Hans Gutbrod & David Wood, *Turkey Will Never Recognize the Armenian Genocide*, FOREIGN POL'Y (June 14, 2021, 12:19 PM), https://foreignpolicy.com/2021/06/14/armenia-turkey-genocide-ottoman-empire-history-rapprochement-diplomacy-public-opinion/ [https://perma.cc/C2P3-8FMR]; Stephanie Nebehay, *China Rejects Genocide Charge in Xinjiang, Says Door Open to U.N*, REUTERS (Feb. 22, 2021, 9:35 AM), https://www.reuters.com/article/world/china-rejects-genocide-charge-in-xinjiang-says-door-open-to-un-idUSKBN2AM1UW/ [https://perma.cc/8BF7-GSJV].

Kurds in Iraq, Bosnian Muslims in Yugoslavia, and Tutsi in Rwanda as genocide.[319] Their avoidance, at least in part, was due to fears of triggering prevention obligations under the Genocide Convention.[320] For example, a discussion paper prepared by the Department of Defense warns, "Be Careful. Legal at State was worried about this yesterday—Genocide finding could commit [the U.S. government] to actually 'do something.'"[321] Furthermore, even in the George W. Bush administration, known for being especially hostile to international law, there was a sense that a State Department finding that genocide was going on in Darfur might "act as a spur to the international community to take immediate and forceful actions to respond to ongoing atrocities."[322] And, as Rebecca Hamilton postulated in her book on the topic, it seems likely that the designation made U.S. officials feel compelled to support an ICC referral, which they otherwise would have avoided.[323]

International relations scholarship also supports the proposition that international human rights law and perceived violations thereof can affect the behavior of states.[324] One way it does so is through what are called reputational effects.[325] While early work on reputational effects tended to focus on international audiences,[326] more recent research suggests that international law also influences domestic audiences.[327] One study that specifically looked at the term genocide found that it "has a unique power to create often irresistible public pressure on a government to act."[328] States that fail to meet their obligations under the Genocide Convention thus risk incurring reputational costs, in addition to more overt legal and political costs imposed by courts, other states, and/or UN bodies. These costs could, in turn, tip the balance in favor of genocide prevention for some states in some situations.

States, international organizations, and activists who are interested in acknowledging and addressing specific genocides can identify genocidal structures, avoid contributing to them, and pressure relevant actors to do the same. Eliminating the excuse of insufficient evidence of an individual's internal mental state forces

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[319] POWER, *supra* note 4, at 511–14.

[320] Only in 2007 did the ICJ judicially endorse the view that Article I was a binding obligation to prevent genocide, but US officials were already assuming so long before then.

[321] POWER, *supra* note 4, at 511.

[322] Rebecca Hamilton, *Inside Colin Powell's Decision to Declare Genocide in Darfur*, THE ATLANTIC (Aug. 17, 2011), https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/ [https://perma.cc/Q5HH-MMYK].

[323] *See* REBECCA HAMILTON, FIGHTING FOR DARFUR: PUBLIC ACTION AND THE STRUGGLE TO STOP GENOCIDE 68 (2011).

[324] *See, e.g.*, Brutger & Kertzer, *supra* note 269; MERCER, *supra* note 269; Chilton, *supra* note 269; Fang, *supra* note 269; Morse & Pratt, *supra* note 269.

[325] *See, e.g.*, Brutger & Kertzer, *supra* note 269; MERCER, *supra* note 269; Downs & Jones, *supra* note 279.

[326] *See, e.g.*, Brutger & Kertzer, *supra* note 269; MERCER, *supra* note 269; Downs & Jones, *supra* note 279.

[327] Chilton, *supra* note 269; Fang, *supra* note 269; Morse & Pratt, *supra* note 269.

[328] Scharf, *supra* note 269.

would-be deniers to make their arguments according to more objective indicators. If they fail to do so persuasively, they risk incurring reputational costs, especially if those states and other actors who are interested in preventing genocide impose them upon them.

Another related realist objection is that the ICJ and other courts will be wary of taking on any position that states will ignore or that will incur the wrath of the major powers that the ICJ depends upon for funding and legitimacy.[329] This objection is premised on the notion that courts, like other institutions, are interested in self-preservation. While I do not doubt that judges consciously or unconsciously consider such political concerns at times, there are also plenty of reasons to think that the judges act on principle and that inaccurate, ineffective, and inconsistent implementation of the Genocide Convention will be more harmful to the Court and the world it serves in the long run.

The structural approach to genocide requires a reinterpretation of one of the Genocide Convention's definition's key terms. This approach shifts the focus from the subjective mindset of individuals to more objective indicators of structural conditions. This shift will undoubtedly meet resistance, especially among those most invested in maintaining the status quo. However, it more accurately reflects how genocide actually occurs, relies on a plausible reading of an ambiguous text, and, most importantly, offers a path to better serve the goals of the Convention than is possible under the existing individualistic interpretation.

CONCLUSION

The question of whether a situation amounts to genocide is inevitably a fraught one. The charge of genocide carries monumental legal, moral, and political significance. Victims and their descendants often apply the label in hopes of stopping ongoing violence and achieving recognition and repair. Alleged perpetrators and their supporters fear the condemnation, reputational costs, and risk of military or economic coercion that a genocide designation might entail. Contemporary debates about genocide, however, reflect more than just the adversarial fervor of two parties with opposing interests. They reveal a more fundamental confusion about what genocide is and how it can be prevented. This confusion is impeding the goals of the Genocide Convention by undermining the possibility of prevention and the legitimacy of punishment. To clear up the confusion and better meet the Genocide Convention's goals, I have proposed replacing the prevailing individualistic interpretation of genocide with a structural one, which conceives of genocide as a collective process made possible by particular structural conditions.

The analysis in this Article is not unique to genocide. There are other crimes, including other international crimes such as persecution and apartheid, that are also necessarily collective and involve a particular structural context, making divining

[329] *See* S. Gozie Ogbodo, *An Overview of the Challenges Facing the International Court of Justice in the 21st Century*, 18 ANN. SURV. INT'L & COMPAR. L. 93 (2012).

individuals' internal mental states especially difficult. It is possible that a more structural understanding of those crimes would also facilitate prevention and streamline criminal processes for punishment. Domestic injustices involving state or corporate actors may also benefit from a more structural approach.

For genocide, the need for a different approach to achieving the Genocide Convention's goals of prevention and punishment is glaring. Opportunities for prevention are squandered, and the legitimacy of punishment efforts is challenged by the inconsistent and convoluted jurisprudence developed at criminal tribunals. More than seventy-five years after the adoption of the Genocide Convention, when the ICJ has a record five genocide cases on its docket, and debates regarding genocide abound, it is an opportune moment to reject the failing individualistic approach and adopt a structural one. While there will always be many reasons that the goals of the Convention go unfulfilled, a faulty understanding of its terms need not be one of them.