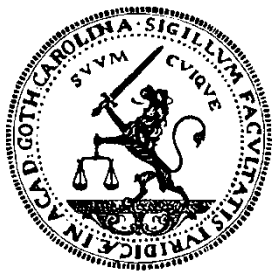

FACULTY OF LAW
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Collective Genocidal Intent in Sri Lanka

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Summary

The end of the Sri Lankan war was marked by a devastating loss of life, with hundreds of thousands of casualties. Amidst this tragedy, victims have claimed that the crimes committed against them constitute genocide, specifically targeting the Eelam Tamils solely because of their ethnic identity. However, denialists argue that there is insufficient evidence to support the presence of genocidal intent or the existence of plans and policies that corroborate such intent. These arguments stem from a traditional understanding of genocidal intent, which requires direct proof of specific intent within the minds of the perpetrators.

In contrast, Sangkul Kim's theory of collective genocidal intent presents a different perspective. According to Kim, genocidal intent consists of two layers: collective and individual genocidal intent. The collective genocidal intent is defined as an objective legal standard that can be inferred from a "manifest pattern of conduct" and the "reason for targeting a group," both of which are objective elements of genocidal intent.

This thesis argues that both elements of collective genocidal intent can be established in the case of the Eelam Tamils in Sri Lanka. The presence of a manifest pattern of conduct, characterized by non-random, repetitive and systematic attacks on the Eelam Tamil population, supports the inference of collective genocidal intent. Additionally, the targeting of the Eelam Tamils based solely on their group identity provides further evidence of genocidal intent. The evidence of which comes from the historical and political context of the treatment of Eelam Tamils in Sri Lanka.

By adopting Kim's theory and applying it to the Sri Lankan context, this thesis seeks to challenge the traditional understanding of genocidal intent and provide a compelling legal argument for inferring genocidal intent in the case of the Eelam Tamils. The fulfilment of both objective elements of genocidal intent supports the victims' claims and sheds light on the broader implications for understanding and addressing genocide in Sri Lanka.

Preface

I am pleased to present this thesis as a significant contribution to my Master of Laws (LLM) program at Lund University. This work not only marks an important academic achievement but also reflects a deeply personal odyssey for me.

I begin by commemorating the countless Tamil victims whose lives were tragically cut short during the conflict. Their stories of suffering, pain, and loss have left an indelible impact on me, serving as a constant reminder of the imperative for justice and accountability. The resilience and unwavering spirit they demonstrated have been a driving force propelling me to explore the intricate legal complexities encompassing their plight.

I extend my heartfelt appreciation to my dedicated academic advisor, Dr. Christoffer Wong. His invaluable guidance and expertise have played a pivotal role in shaping the trajectory of this thesis.

Additionally, I acknowledge the exceptional faculty members and researchers at RWI and Lund University. Their teachings have equipped me with the ability to critically analyse the legal terrain and make meaningful contributions to the ongoing discourse concerning the rights of marginalized communities. Gratitude is also owed to my mentor, Dr. Rita Ray, whose reminder to always be impactful resonates, as well as to Arul Murugan, who introduced me to the realm of international law.

To my family and friends, your unwavering presence throughout this transformative journey has been a cornerstone of my strength. I am appreciative of the late-night conversations, the reassuring words during moments of uncertainty, and the shared jubilation with each modest triumph..

Abbreviations

Here are the given abbreviations arranged in alphabetical order:

ECCHR –European Center for Constitutional and Human Rights
GPS – Global Positioning System
ICC – International Criminal Court
ICRC – International Committee of the Red Cross
ICTR –International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the former Yugoslavia
LLRC – Lessons Learnt and Reconciliation Commission
LTTE – Liberation Tigers of Tamil Eelam
NFZ – No Fire Zone
NFZ2 –No Fire Zone 2
NFZ3 – No Fire Zone 3
NFZ1 – No Fire Zone 1
OISL – OHCHR Investigation on Sri Lanka
PTK – Puthukkudiyiruppu
POE – Panel of Experts
RAF – Rwandan Armed Forces
RPG – Rocket-Propelled Grenade
RPF – Rwandan Patriotic Front
SLA – Sri Lankan Armed Forces
UAV – Unmanned Aerial Vehicle
UNHRC – United Nations Human Rights Council
VRS – Vojska Republike Srpske

1 Introduction

1.1 Background

Article II of the 1948 Genocide Convention defines genocide as any act committed with the intention of destroying, in whole or in part, a national, ethnic, racial, or religious group. The acts listed include killing, causing bodily or mental harm, deliberately inflicting conditions of life meant to destroy the group, imposing measures to prevent births within the group, and forcibly transferring children of the group to another group.[1]
The key phrase in the definition is "with intent to destroy," which is often referred to as genocidal intent, special intent, or dolus specialis. Genocidal intent is the crucial element in determining whether an act constitutes genocide.[2] Many victim communities have described the atrocities they experienced as genocide, with some communities, such as the Armenians, having struggled for a century to gain recognition of genocide.[3]

Despite its importance, proving genocidal intent in court can be challenging, leading prosecutors to opt for charges of war crimes or crimes against humanity instead.[4] This difficulty in proving intent is one of the unique problems associated with the concept of genocidal intent.[5] Crimes under international law ('international crimes') differ from ordinary crimes under municipal law ('domestic crimes') in that international crimes require a specific context within which the crime is committed ('the contextual element').[6] Thus, what makes a crime a crime against humanity of torture rather than a domestic crime is the contextual element that the torture is committed as part of a widespread or systematic attack against a civilian population;[7] what makes a crime a war crime of taking of hostages is the

[1] The Convention on the Prevention and Punishment of the Crime of Genocide (1948)
[2] Guénaël Mettraux, 'Special Genocidal Intent/Dolus Specialis', in *International Crimes: Law and Practice: Volume I: Genocide*, Oxford University Press (2019) ¶ 161
[3] Thomas de Waal, 'The G-Word: The Armenian Massacre and the Politics of Genocide' 94 (1) *Foreign Affairs* (2015) ¶ 136–48
[4] A. Murray, 'Does International Criminal Law Still Require a 'Crime of Crimes'? A Comparative Review of Genocide and Crimes against Humanity', 3 *Göttingen Journal of International Law* (2011) ¶ 589–615; J. Hagan and W. Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanization and Genocidal Victimization in Darfur', 73 *American Sociological Review* (2008) ¶ 875–902
[5] Carola Lingaas, 'Dehumanising Ideology, Metaphors, and Psychological Othering as Evidence of Genocidal Intent', 22 *International Criminal Law Review* ¶ 1044-1067
[6] Supra note 2, ¶ 153
[7] ICCSt 7(1)(f)

nexus between the hostage-taking and an international armed conflict;[8] what makes a crime a crime of aggression rather than simply crimes of destruction of life or property, trespass or unlawful occupation is the existence of an act of aggression;[9] and what makes a crime genocide as opposed to ordinary crimes of murder is the intention "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (a 'genocidal intent').[10] The contextual element of genocide differs from the contextual element of the other international crimes mentioned above in that it refers to the volitional status of the defendant.[11] This is in contrast to factual elements, the existence of which can, prima facie, be established by means of objective facts.[12] Literal interpretation of the Rome Statute gives an impression that the crime of genocide hinges on the subjective mental state of an individual or group of individuals.

The Appeals Chamber in Krstić, which was the first instance where the ICTY found someone guilty of the crime of genocide as an aider and abettor, made the following observation in its judgment.

> "Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established"[13]

Genocide, often referred to as the 'crime of crimes,' requires genocidal intent.[14] The ICTY Appeals Chamber in Krstić emphasizes the necessity of interpreting this aspect strictly in order to accurately depict the unmatched gravity and responsibility associated with this offense.[15] The common understanding is that genocide is a 'crime of mens rea'.[16] The manner in which the concept of genocidal intent is interpreted and the different approaches taken play a crucial role in determining the mode of liability for principals and accessories in cases of genocide accusations.[17] The

[8] ICCSt 8(2)(a)(viii)
[9] ICCSt 8 *bis*
[10] ICCSt 6
[11] Kai Ambos, 'What does 'intent to destroy' in genocide mean?', 91 (no. 876) *International Review of the Red Cross* (2009) ¶ 833-858
[12] Supra note 5
[13] IT-98-33-A, *Prosecutor v Krstić (Radislav)*, Appeal Judgment, International Criminal Tribunal for the Former Yugoslavia, 19 April 2004 ¶ 134
[14] William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd ed.). Cambridge: Cambridge University Press (2009)
[15] Supra note 13, ¶ 36.
[16] Sangkul Kim, "Rethinking the 'Crime of Mens Rea'", *Forum for International Criminal and Humanitarian Law Policy Brief Series* No. 59 (2016)
[17] See chapter 2

conceptual scope of the genocidal intent has been interpreted differently by different scholars. Some argue that the scope should be limited to an individual's internal volition, while others argue that an individual's cognitive knowledge of the consequence of the genocidal act can help extend the scope of liability for genocidal crimes.[18] The former is known as the purpose-based approach, while the latter is called the knowledge-based approach.[19]

The term "crime of mens rea" is coined to highlight the recognition that genocidal intent revolves around an individual's mental state, specifically whether they possess the specific intent to wholly or partially destroy a group. This places emphasis on two key aspects: the individual themselves and their state of mind. In contrast to this understanding, international judges deviate by inferring genocidal intent from the overall context of the genocidal campaign, thereby shifting the focus away from the individual and their state of mind. These cases will be further elaborated on in Chapter 3. In my perspective, there exists a conflict between the individualistic approach to genocidal intent and the fact that genocide is a crime perpetrated collectively. Again, in chapter 3, I have explained how Judges have tried to fit evidences from an overall genocidal campaign to fit into a framework of an individual perpetrator of genocide. In this way. individualistic approach to genocidal intent is only proclaimed symbolically. As a result, genocide suspects have objected that their intent is inferred from act of others rather than being individually established. The collective nature of genocide still remains intrinsic and has silently influenced the judicial interpretation of the crime.

In the aftermath of the civil war in Sri Lanka, the international community began to pay attention to the mounting evidence of mass atrocities.[20] The Tamil diaspora, the Eelam Tamil community, and the people of Tamil Nadu referred to these crimes as genocide, drawing from their lived experiences on the island and witnessing various forms of state-sponsored atrocities.[21]

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[18] Supra note 11, ¶ 839-840

[19] Alexander K. A. Greenawalt 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', 99(8) *Columbia Law Review* (1999) ¶ 2259-2294

[20] International Crisis Group, *War Crimes in Sri Lanka*, Report number 191, 17 May 2010

[21] Oliver Walton, 'Framing disputes and organizational legitimation: UK-based Sri Lankan Tamil diaspora groups' use of the 'genocide' frame since 2009', 38 (6) *Ethnic and Racial Studies* (2015) ¶ 959-975; 'NPC passes resolution asking UN to investigate genocide of Tamils by Sri Lanka state', *Tamil Guardian,* 9 February 2015; 'Tamil Nadu Assembly resolves for UN referendum on separate Eelam', *Tamilnet*, 27 March 2013; Athithan Jayapalan, 'Politics of Primordial Loyalties and Its Transnational Dimensions: Tamilness as Pan-ethnic and Supranational', 17(2) *Studies in Ethnicities and Nationalism* (2017) ¶ 251; Christopher Powell and Amarnath Amarasingam. 'Atrocity and Proto-Genocide in Sri Lanka' in *Understanding Atrocities: Remembering, Representing and Teaching Genocide*,

On the other hand, the Sri Lankan government consistently denied any commission of international crimes.[22]

Commentators, human rights organizations, and media professionals recognize the occurrence of international crimes and frequently highlight that both parties involved, namely the LTTE and the SLA, were responsible for war crimes and crimes against humanity.[23] Consequently, they assert that both perpetrators should face accountability. While these statements hold merit, there has been insufficient examination of the claim of genocide from a legal and academic standpoint.

Among the few legal texts that address the claim of genocide is the legal brief published by the UNROW of the George Washington School of Law, which called for an independent international investigation on Sri Lanka.[24] Another notable instance is the judgement from the Permanent People's Tribunal on Sri Lanka, which, in its session held in Bremen, Germany, ruled

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edited by Scott W. Murray, 1st ed., University of Calgary Press (2017) ¶ 19–48; Rachel Seoighe, 'Reimagining narratives of resistance: memory work in the London Tamil diaspora', 21(9) *State Crime Journal* (2021) ¶ 169-195; Monika Hess and Benedikt Korf, 'Tamil diaspora and the political spaces of second-generation activism in Switzerland', 14(4) *Global Networks* (2014) ¶ 419–437; Suthaharan Nadarajah and Vicki Sentas, 'The Politics of State Crime and Resistance - Self-determination in Sri Lanka', In *State Crime and Resistance* ed., Elizabeth Stanley and Jude McCulloh. Abingdon, Oxon: Routledge (2013) ¶ 68-83; Camilla Orjuela, 'Remembering genocide in the diaspora: Place and materiality in the commemoration of atrocities in Rwanda and Sri Lanka' 26 (5), *International Journal of Heritage Studies* (2020) ¶ 439–453; Rachel Seoighe, 'Discourses of Victimization in Sri Lanka's Civil War: Collective Memory, Legitimacy and Agency', 25(3) *Social & Legal Studies* (2016) ¶ 355–380; Rachel Seoighe, *War, Denial and Nation-Building in Sri Lanka – After the End*, Palgrave Macmillan (2017) ¶ 321; Catherine Ruth Craven, 'Constraining Tamil Transnational Political Action: Security Governance Practices beyond the Sending State', 7(4) *Journal of Global Security Studies* (2022) ¶ 7 ; Karthick Ram Manoharan, 'Counter-media: TamilNet and the creation of metanarratives from below' 33(3) *Continuum: Journal of Media & Cultural Studies* ¶ 386-400 ; Isabel Alonso-Breto & Cheran Rudhramoorthy, 'Ocean as heritage: On Tamil poetry and Identity, Transnational politics, and the recognition of genocide', 82 *Revista Canaria de Estudios Ingleses* (2021) ¶ 201-212; Janany Jeyasundaram, Luisa Yao Dan Cao and Barry Trentham, 'Experiences of Intergenerational Trauma in Second-Generation Refugees: Healing Through Occupation', 87(5) *Canadian Journal of Occupational Therapy* (2020) ¶ 412-422; Tanuja Thurairajah, 'Performing nationalism: The United Nations Human Rights Council(UNHRC) and Sri Lankan Tamil diasporic politics in Switzerland' 188 *The Geographical Journal* (2021) ¶ 28– 41; Vivetha Thambinathan, ' "The Thirst of Tamils is the Homeland of Tamil Eelam": Methodology as a Form of Repatriation', 21 *International Journal of Qualitative Methods* (2022)

[22] 'Sri Lanka's Defence Secretary denies war crimes as calls for an ICC referral continue to mount', *Tamil Guardian*, 1 January 2021

[23] Kate Cronin-Furman, 'No Accountability for War Crimes in Sri Lanka', *Foreign Affairs*, 29 September 2020; International Crimes Evidence Project (ICEP), *Island of impunity? Investigation into international crimes in the final stages of the Sri Lankan civil war*, Public Interest Advocacy Centre, 1 February 2014

[24] UNROW Human Rights Impact Litigation Clinic, 'Justice for Genocide: Sri Lanka's Genocide Against Tamils', September 2014

that an ongoing genocide against Tamils was taking place in Sri Lanka.[25] Both of these legal texts inferred genocidal intent from the systematic nature of the attacks and the historical context of hate crimes and discrimination against Tamils in Sri Lanka.

1.2 Purpose and research question

This dissertation expands upon the previous work conducted by the aforementioned organizations, delving into the jurisprudence surrounding the inference of genocide and genocidal intent from the contextual analysis of genocidal campaigns, as reflected in the case laws of international criminal tribunals. The aim of this study is to present a compelling legal argument for inferring genocidal intent from the overall context of the campaign. To accomplish this, the dissertation conceptually delineates genocide intent into two categories: collective genocidal intent and individual genocidal intent, drawing upon the scholarship of Sangkul Kim, and applies these concepts within the specific context of the Tamil question in Sri Lanka. By doing so, this research seeks to contribute to the understanding of genocidal intent and shed light on the legal arguments that can be made regarding the inference of such intent based on the broader contextual analysis of the genocidal campaign in Sri Lanka.

1.3 Methodology, Material & Outline

In this master thesis, the methodology employed is legal doctrinal analysis, which involves the examination of case laws from ICTR, ICTY and ICC. The aim is to analyse these cases and apply the derived conclusions to the situation in Sri Lanka. Specifically, the focus is on determining whether genocidal intent can be inferred from the available evidence concerning the war in Sri Lanka up to the present day.

In the next chapter, it is important to explore the evidentiary practices of international tribunals regarding genocidal intent. While these tribunals may nominally proclaim an individualistic approach, their assessment of evidence often follows a collective approach. This observation raises the

[25] Permanent Peoples' Tribunal & The International Human Rights Association, 'People's tribunal on Sri Lanka', December 2013

need for an alternative approach that considers the objective circumstances surrounding the Sri Lankan case. Consequently, the following two chapters will delve into specific cases that have employed an individualistic approach to genocidal intent, leading to a reconceptualization of the collective theory as proposed by Sangkul Kim.

With a departure from the individualistic approach, the subsequent chapters aim to examine the collective theory of genocidal intent and collective genocide. This reconceptualization, inspired by Sangkul Kim's work, is essential to adequately address the complexities of the Sri Lankan situation. By analysing relevant cases and reassessing the theoretical framework, these chapters will provide a more comprehensive understanding of genocidal intent and its application in the context of Sri Lanka.

In the next chapter, using the theoretical framework which I have built till now , I have checked whether the facts we have till now regarding the war is enough to infer collective genocidal intent through the theoretical model of genocidal intent by Sangkul kim. I summarise the overall arguments in the next chapter. Building upon the theoretical framework established in the previous chapters, Chapter 4 takes into account the facts and evidence available regarding the war in Sri Lanka. The objective is to determine whether these pieces of evidence are sufficient to infer collective genocidal intent using Sangkul Kim's theoretical model. By employing the refined framework, this chapter conducts a thorough analysis to ascertain the extent to which collective genocidal intent can be inferred in the Sri Lankan context. In the final chapter, the key arguments and findings from the preceding chapters are summarized and synthesized. The examination of international tribunals' evidentiary practices, the reconceptualization of the collective theory of genocidal intent, and the application of the theoretical framework to the Sri Lankan context are brought together in a coherent manner. This chapter provides a comprehensive overview of the thesis, highlighting the main points and conclusions derived from the analysis.

2 Rethinking Genocidal Intent: A Critical Assessment of Individualistic Approaches

The concept of individual responsibility in modern international criminal law is based on punishing individuals, rather than groups or other entities, for the commission of international crimes.[26] This approach has been upheld by subsequent international criminal courts and is reflected in the ICC Statute.[27] As a result, scholars and practitioners in the field have largely embraced an individualistic approach to genocidal intent, which focuses on the inner state of mind of an individual perpetrator of genocide. I explain and analyse the traditional individualistic approaches in the following sections of this chapter.

The individualistic approach to genocidal intent can be classified into two categories: the purpose-based approach and the knowledge-based approach[28]. Both approaches view genocidal intent as *mens rea* and it is not necessarily be connected to the *actus reus* of the genocide.[29] If genocidal intent does not necessarily have to be connected to the actus reus of the crime, then it suggests that the mens rea must be subjective in nature.[30] This implies a dual intent requirement, where a general mens rea is needed for the genocidal acts, and a specific intent is necessary for the complete or partial destruction of the group.[31] The subjective mens rea indicates that the intent to commit genocide resides within the perpetrator's mind, and the prosecutor must prove this genocidal intention to establish their case.[32] In the pre-trial brief at the ICTY, the prosecutor aimed to establish the genocidal intent of the accused by stating that "he consciously desired the acts to result in the destruction, in whole or in part, of the group, as such," or

[26] IT-94-1-AR72, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ¶ 128; Jonathan A. Bush, the prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said, 109 (5) Columbia Law Review (2009) ¶ 1094-1262
[27] ICC Statute, Art. 25(1)-(2)
[28] Kai Ambos, 'What does 'intent to destroy' in genocide mean?', 91 (no.876) *International Review of the Red Cross* (2009) 833
[29] Claus Kress, 'The Crime of Genocide under International Law', 6 *International Criminal Law Review* (2006) 461, ¶ 495
[30] Supra note 5
[31] Supra note 5
[32] Supra note 5

that "he knew his acts were destroying, in whole or in part, the group, as such," or even that "he knew that the likely consequence of his acts would destroy, in whole or in part, the group, as such."[33]

By using phrases like "he knew" or "he consciously desired," the prosecutor linked the genocidal intent to the individual mind of the accused and the genocidal intent inhabits within the mind of the accused.[34] This highlights the individualistic approach to genocidal intent, where the focus is on the specific mental state of the individual while committing the genocidal act. In addition to the pre-trial brief submitted by the ICTY prosecutor, the ICTR chambers in *Rutaganda* and *Musema* has also acknowledged that the link between a genocidal act and the mental state of the perpetrator is of a psychological nature.[35] Therefore, the inference of genocidal intent must come from the individual's mind, specifically whether they "*personally possessed* […...] the specific intent to commit the crime" at the time of its commission.[36]

While the purpose-based approach emphasizes the volitional aspect of genocidal intent, the knowledge-based approach stresses on the cognitive aspect of genocidal intent.[37] This chapter seeks to summarize Kim's critique of the individualistic approach to interpreting genocidal intent, drawing on his analysis of relevant case laws and scholarly literature.

2.1 Purpose – based genocidal intent

The concept of purpose-based genocidal intent is referred to as 'dolus specialis' or 'special intent' and has been referred through various expression such as 'specific genocidal intent', 'particular intent', 'particular state of mind', 'genocidal criminal intent', or 'exterminatory intent' by various international judges and commentators.[38] *Akayesu* at the ICTR was

[33] T-95-10-PT, *Prosecution v. Jelisić and Češić*, Prosecutor's Pre-Trial Brief, 19 November 1998 ¶ 3.1
[34] Sangkul Kim, 'The Collective Theory of Genocidal Intent', A thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Juridical Science (S.J.D.) at the Georgetown University Law Center (2015) ¶ 18
[35] ICTR-96-3-T, *Prosecutor v Rutaganda (Georges Anderson Nderubumwe)*, Trial Judgement, ICTR, Trial Chamber I, 6 December 1999 ¶ 61; ICTR-96-13-T, *Prosecutor v Musema (Alfred)*, Trial Judgement, ICTR, Trial Chamber I, 27 January 2000 ¶ 166
[36] ICTR-96-3-A, *Prosecutor v Rutaganda (Georges Anderson Nderubumwe)*, Appeals Judgement, ICTR, Appeals Chamber, 26 May 2003¶ 166
[37] Supra note 34 ¶ 19
[38] Supra note 34 ¶ 20

the first case where this approach is said to have emanated.[39] The consensus among various scholars is that the ICTY and ICTR chambers have a clear preference for purpose – based approach rather than the 'knowledge – based approach', though these chambers have not explicitly used the phrase 'purpose – based approach'.[40] In *Blagojević* and *Jokić*, the ICTY trial chamber rejected the idea of genocidal intent based solely on knowledge and instead supported the purpose-based approach. The chamber stated that

> "It is not sufficient that the perpetrator simply knew that the underlying crime would *inevitably* or *likely* result in the destruction of the group. The destruction, in whole or in part, must be the *aim* of the underlying crime(s)."[41]

Even though the chamber has not equated genocidal intent directly to mens rea concepts which are based on domestic criminal law. This observation is significant as it covers the three mens rea concepts that compete with each other: "direct intent/purposely" (having a specific aim), "indirect intent/knowingly" (the inevitable outcome of the act), and "dolus eventualis/recklessness" (the likely outcome of the act).[42] In *Akayesu*, the ICTR Trial Chamber also made a notable statement regarding the purpose-based notion of genocidal intent. They emphasized that genocide is distinct from other crimes because it involves a special intent or "dolus specialis." This special intent necessitates that the perpetrator clearly seeks to bring about the result described in the act charged, which is the destruction, in whole or in part, of a national, ethnical, racial, or religious group.[43]

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[39] Supra note 34 ¶ 20

[40] Claus Kress, 'The Crime of Genocide under International Law', 6 *International Criminal Law Review* (2006) 461, ¶ 492-3 ("[a]fter an initial period of some uncertainty, the jurisprudence of ICTR and ICTY now seem to concur in the view that a perpetrator of the crime of genocide must act with the aim, goal, purpose or desire to destroy part of a protected group."); Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', 5 *Journal of International Criminal Justice* (2007), 184-207, ¶ 193 ("the formula used by the [ICTY and the ICTR] insists on a purpose-based interpretation of genocidal intent […]"); Hans Vest, 'A Structure-Based Concept of Genocidal Intent', 5 *Journal of International Criminal Justice* (2007) 781 ¶ 794 ("The interpretation of genocidal intent by the ad hoc Tribunals is not absolutely consistent but nevertheless reveals a clear preference for a purpose-based reading […]."); Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis*, Springer (2014) ¶ 157

[41] IT-02-60-T, *Prosecutor v Blagojević (Vidoje) and Jokić (Dragan)*, Trial Chamber I, 17 January 2005 ¶ 656

[42] Supra note 34, ¶ 21

[43] ICTR-96-4-T, *Prosecutor v Akayesu (Jean-Paul),* Trial judgment, 2 September 1998 ¶ 498

In Akayesu, the term "specific intent" is described as a "clear intent to destroy," "clearly seeks to produce," or a "clear intent to cause."[44] Now, the question arises: How does this "clear intent" differ from 'unclear intent? Does the word 'clear' has any legal relevance?[45] Cases which followed *Akayesu* have also referred to specific intent as something which has some added 'intensity' to the specific intent requirement[46]. They have used the phrases such as 'surplus of intent'[47], or 'ulterior purpose to destroy'[48] etc. However, the prosecutors find that the purpose-based approach to proving genocidal intent challenging[49], prompting the suggestion of a knowledge-based approach as an alternative.

2.2 Knowledge – based approach

By emphasizing the cognitive aspect of intent, as opposed to the volitional aspect emphasized in the purpose-based approach, the knowledge-based approach reduces the burden of proof in proving genocidal intent.[50] For mid- or low-level participants in genocidal atrocities, the genocidal intent element should be constituted solely by knowledge and not by purpose.[51] This is because the level of knowledge about the overall plan or policy may differ within a hierarchical structure. Those at the top of the hierarchy typically possess a greater degree of information, while those at the bottom have less. In such cases, lower-level actors who are directly involved in carrying out the genocide through their actions could potentially evade liability.[52] For instance, a soldier who receives orders from a genocidal mastermind to kill individuals in a particular area might not be aware of the commander's intent to target members of a specific ethnic group from that area.[53] Consequently, the soldier could escape liability by employing a strict

[44] Ibid ¶ 520
[45] Supra note 34, ¶ 22
[46] Supra note 28, ¶ 838
[47] IT-97-24-T, Prosecutor v. Milomir Stakic, Trial Judgement, ICTY, Trial Chamber, 31 July 2003 ¶ 520.
[48] Supra note 35, ¶ 58
[49] IT-97-24-T, Prosecutor v. Milomir Stakic, Trial Judgement, ICTY, Trial Chamber, 31 July 2003 ¶ 523 ("On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine.").
[50] Supra note 34, ¶ 25
[51] Christian J. Tams, Lars Bester and Björn Schiffbauer, *Convention on the prevention and punishment of the crime of genocide: Commentary* (2014), Beck/Hart publishers ¶ 141
[52] Supra note 34, ¶ 29
[53] International Law Commission, U.N. Doc. A/51/10, *Report on the Work of Its Forty-Eight Session*, July 1996, ¶ 45

purpose-based approach that requires proof of specific intent to destroy a group as such, completely or partially.

One of the reasons why this approach was proposed is due to the influence of the human rights movement on international criminal law. The human rights movement sought to advocate for justice on behalf of the victims, and as a result, arguments were put forth to enhance the pursuit of justice from their perspective. This approach aimed to prioritize the rights and interests of the victims in the international criminal justice system.[54] Some of the criticism against this approach from the camp which laid emphasis on legality included violation of the principal of fair labelling, violation of principle of legality, violation of the basic principles of culpability.[55]

A knowledge-based approach to interpreting genocidal intent was proposed by Alexander Greenawalt in 1999.[56] This proposal has gained much support from scholars in the field. According to Greenawalt, individuals who commit genocidal acts while understanding the consequences of their actions should be held criminally responsible, even if they lack a specific genocidal purpose.[57] Subordinate actors can be convicted of genocide as principals according to Greenawalt's proposal if they knew that the genocidal campaign was intended to destroy the group in whole or in part. Mid- or low-level actors, regardless of their position or rank, can be held liable for genocide without relying on expansive liability doctrines.[58] For genocide, this implies an expansion of principal culpability.

Greenawalt argues that neither the purpose-based nor knowledge-based approaches are mandated by the drafting history of the Genocide Convention.[59] He suggests, however, that the ICC Statute's definition of intent, which is based on a broad understanding similar to that of the Model Penal Code's definition of knowledge, is a useful approach that can be implemented in practice[60]. Hans Vest also supports a knowledge-based approach, proposing that practical certainty is required for intent.[61] This

[54] Darryl Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', 26 *Leiden Journal of International Law* (2013) ¶ 127
[55] Kai Ambos, Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice (2007) 159 ¶ 173-4
[56] Alexander K. A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', 99 *Columbia Law Review* (1999), 2259–2294
[57] Ibid., 2265
[58] Ibid., 2288
[59] Ibid.,2259 - 2266
[60] Ibid., 2269
[61] Hans Vest, 'A Structure – Based Concept of Genocidal Intent', 5 *Journal of International Criminal Justice* (2007) ¶ 781

approach appears to be largely in line with Greenawalt's view. Kai Ambos, in his knowledge-based approach to genocidal campaigns, emphasizes that low-level actors should be aware that their acts may be associated with a genocidal context or campaign.[62] The reason behind proposing a knowledge-based approach is to address the difficulty of attributing intent to Individuals who carry out tasks dutifully and compliantly at the bottom hierarchy. However, it has been found that the approach tends to justify the practice of inferring individual genocidal intent from the overall circumstances and context in which they occur.[63]

2.3 Issues with Knowledge based approach

Sangkul Kim's hypothetical scenario of an insomniac commander highlights the dilemma faced by the knowledge-based approach. In this case, an elderly woman offered a contract to a commander of a militia group to destroy a protected group, and he accepted it. Although his subordinates ended up killing one third of the members of the targeted group, the commander himself did not have any desire to destroy them. In fact, he was deeply troubled by the violent actions planned and carried out by his unit and even considered hitting the woman when she expressed her intention to destroy the group. However, he refrained from doing so because of the large sum of money offered. Despite drafting, reviewing, and signing killing orders, he expressed regret for the overall context of violence he was exposed to daily and suffered from insomnia as a result. The prosecutor charged him with genocide, and the question for the judge is whether to convict him or not.[64]

If we follow the purpose – based approach, the commander of the army cannot be convicted of genocide since he has not acquired the specific purpose to destroy a group i.e. he has not satisfied the volitional element of this mens rea model and if we follow the knowledge – based approach , the commander cannot be convicted because the theory distinguishes between high and low ranking commanders , wherein the commander without the purpose to destroy a group would be acquitted as a principal of the crime of genocide and his subordinates with the knowledge that their actions

[62] Supra note 11
[63] Kai Ambos, *Treatise On International Criminal Law, Volume II: The Crimes and Sentencing*, Oxford University Press (2014) ¶ 31.
[64] Supra note 34, ¶ 37

certainly would lead to the destruction of the group would be convicted as principals of the crime of genocide[65]. This is a sub-optimal result which will ensue with a current model of genocidal intent.

Kai Ambos' knowledge – based approach focuses only on the genocidal context or campaign as evidence of the intent to destroy, rather than the knowledge of the consequences of one's actions leading to destruction. He argues that the mere possibility of destruction in the future is not enough to meet the threshold of mens rea for genocide[66]. However, *Krstić* contradicts this approach. In that case, Krstić played a crucial role in the forced transfer of Muslim women, children, and the elderly out of Serb-held territory, and he was aware of the fatal impact that killing the men would have on the Bosnian Muslim community's ability to survive. Based on this fact, the ICTY held that Krstić participated in the genocidal acts of killing members of the group with the intent to destroy a part of the group.[67]

In the Krstić case, it was established that he participated in a joint criminal enterprise with the awareness that killing the military-aged Bosnian Muslim men of Srebrenica would lead to the annihilation of the entire Bosnian Muslim community at Srebrenica. Hence, Krstić's intent to kill the men amounted to a genocidal intent to destroy the group in part. Therefore, Ambos' knowledge-based approach, which excludes the knowledge of the consequences of one's actions leading to destruction, is not sufficient in determining the mens rea for genocide.[68]

2.4 Difficulty of attributing intent to obedient executors at the low-level

Ambo's approach to the knowledge-based approach of genocide has another problem in that it categorizes subordinate actors in the genocidal campaign as principals of the crime, when they should be convicted as accomplices to the crime. This expansion of liability for subordinate actors is done to reduce the risk of escaping criminal responsibility by citing superior orders, but it lacks sufficient justification. Under this approach, principal liability

[65] Supra note 34, ¶ 37
[66] Kai Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing*, Oxford University Press (2014) ¶ 31
[67] IT-98-33-T, *Prosecutor v Krstić (Radislav)*, Trial Judgment, 2 August 2001¶ 634
[68] Ibid., 644

will be presumed if the participation of a subordinate actor is confirmed in the overall genocidal context.[69]

The question of convicting subordinate actors for aiding and abetting genocide based solely on their knowledge of the perpetrator's intent creates confusion, especially when it comes to determining principal liability for those actors. This is particularly problematic in cases where the actus reus of the crime is carried out by a subordinate actor.[70]

For instance, in the case of the forcible transfer of children (ICC statute, Art. 6(e)), it is unclear whether a bus driver who carried out the actus reus of the crime can be convicted as an aider or principal.[71] The lack of clarity in distinguishing between principals and accomplices only adds to the confusion, especially in crimes other than genocide by killing. This violation of the principle of fair labelling means that the authors of the crime have reduced principal liability relative to the lower-level actors' liability in the crime[72]. The lack of consensus on the scope of knowledge within the knowledge-based approach contributes to confusion and imprecision[73]. As there is no agreement on what exactly constitutes knowledge in this approach, it is difficult to establish clear and consistent parameters for its application.

In the Popović et al case, international judges declined to convict a subordinate for the charge of genocide as the principal author of the crime, despite his knowledge of his superior's genocidal intent. The subordinate possessed details of the plan, including the composition of the victims, the systematic nature of the killing, the determination to eliminate every detained Muslim, and the overall genocidal campaign. However, he was found guilty of aiding and abetting genocide under Article 7(1) of the ICTY statute. The judges stated that the central issue was whether his actions, combined with his knowledge of the genocidal intent of others, were sufficient to prove that he not only knew of the intent but shared it. The judges emphasized that the stringent requirements for convicting someone of genocide reflect the gravity of the crime and that the demanding proof of specific intent is a safeguard to ensure that convictions for this crime are not imposed lightly[74].

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[69] Supra note 11, ¶ 833, 847
[70] Supra note 34., at 44
[71] Supra 34., at 53
[72] Elies van Sliedregt, 'The Curious Case of International Criminal Liability', 10 *Journal of International Criminal Justice* (2012) ¶ 1182 – 83
[73] Supra note 42, ¶ 60
[74] IT-05-88-T, *The Prosecutor v. Popović et al*, Trial Judgement, 10 June 2010 ¶ 1404

This case raises questions about the effectiveness of the knowledge-based approach concerning low-level actors. Although the reduced mens rea threshold did not convince the judges in this case to convict Nikolic as a principal, similar to his superior's liability for the crime.

2.5 Issues with purpose – based genocidal intent.

It is often suggested that the volitional element of the genocidal intent involves a strong psychological or emotional element,[75] and this raises the question of whether a defendant can be acquitted if they possessed a less intense form of volition. What distinguishes general intent from special intent? Is it a matter of the intensity of volition? Examining criminal law in various jurisdictions sheds light on this issue. In Australia, general intent relates to conduct, while special intent relates to the outcome or consequence[76]. Iranian criminal law makes a similar distinction[77]. In French criminal law, special intent is referred to as dol spécial, as seen in the Akayesu judgement, and it means the perpetrator had a determined will to achieve a prohibited result.[78] Crimes such as murder, theft, and national security offenses require special intent because they involve a specific result[79]. The crucial difference between general and special intent in French criminal law is not intensity but the object of intent. From this jurisprudence, we can infer that special intent involves a destructive result as an object of intent in cases such as genocide. The intent to commit genocide is not a distinct form of mens rea, but rather falls under one of three classifications. The term "special" in dolus specialis refers to the particular outcome or result that is being targeted, rather than the intensity of volition involved.[80]

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[75] Hans Vest, 'A Structure – Based Concept of Genocidal Intent', 5 *Journal of International Criminal Justice* (2007) ¶ 781, 796

[76] Guy Cumes 'Subjective Aspects of the Offence in Australia' in *National Criminal Law in Comparative Legal Context,* Ulrich Sieber, Susanne Forster & Konstanze Jarvers eds, 2001 Vol. 3.1, ¶321, 327

[77] Silvia Tellenbach, 'Subjective Aspects of the Offence in Iran', in *National Criminal Law in a Comparative Legal Context*, Ulrich Sieber, Susanne Forster & Konstanze Jarvers eds., 2011 Vol. 3.1, ¶389, 392

[78] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The case for a unified approach* (2013), ¶162

[79] Catherine Elliot, *French Criminal Law,* Willian (2001) ¶ 69

[80] Supra note 58, ¶ 71

In criminal law, there are three types of mens rea classifications: directus or direct intent, dolus indirectus or oblique intent, and dolus eventualis or recklessness.[81] Each classification has a varying level of volition. Dolus directus has the highest level of volition among the three, and there are no variations within this classification. However, scholars have different views on the internal degree of variation within the scope of dolus directus.

John Finnis argues that there is no internal variation in the level of volition within dolus directus[82]. On the other hand, Payam Akhavan believes in a "clearly intending the result" for special intent and causing a certain consequence for general intent. This classification seems to equate the accepted definition of general intent with special intent, creating a new classification of clear intention to cause a consequence for special intention. Thus, according to Akhavan, there are four levels of mens rea: special intent, dolus directus, dolus indirectus, and dolus eventualis.[83]

While there are differing views among legal scholars regarding mens rea classifications, Sangkul Kim argues that intent and clear intent are essentially the same[84]. Additionally, R.A. Duff places direct intent as the highest volitional stage without introducing a more stringent clear intent in the hierarchy of mens rea.[85]

According to Kim, introducing a new type of mens rea called special intent, which is outside the standard types of mens rea common to many legal traditions, does not bring clarity to the structure of special intent. Instead, he suggests that special intent should be conceptualized as one of the three forms of mens rea. Kim further asserts that special intent should be seen as equivalent to direct intent, which involves purposely intending a specific outcome, rather than indirect intent, which involves having knowledge of a potential outcome[86].

When an action is taken with the intention of creating a specific outcome, there may be unintended consequences that result from it. These unintended consequences may not have been deliberately intended, but they can still be

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[81] Supra note 34, ¶ 130-171
[82] John Finnis, *Intention and Identity: Collected Essays Volume II*, Oxford University Press (2011) ¶ 146
[83] Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence', 3 *Journal of International Criminal Justice* (2005) ¶ 989, 992-993
[84] Supra note 34, ¶ 81
[85] R.A Duff, *Intention, Agency and Criminal Liability*, Basil Blackwell (1990) ¶ 21, 27, 37 and 74

[86] Supra note 34, ¶ 83

consciously permitted. The knowledge-based approach is better suited to account for these unintended consequences than the purpose-based approach.

The concept of "ulterior intent" arises in the case of genocidal intent, as defined by the Akayesu tribunal, the Al Bashir pre-trial chamber[87] and by the scholar like Kai Ambos. The question that arises is whether ulterior intent should be classified as direct or indirect intent. The term "ulterior" suggests a hidden or secret motive, which is similar to the legal concept of motive[88]. If someone has a secret motive to create a particular outcome, can the resulting consequence be considered an unintended side effect or is it actually the desired main effect of the action?

It's important to note that a secret motive represents the actor's hidden desire to produce a certain outcome. Therefore, any outcome generated cannot be an unwanted side effect of the actor, but is instead the main effect that is secretly wanted or desired. In this way, ulterior intent has more similarities with purpose-based approach than knowledge-based approach.[89]

The purpose – based approach is claimed to be followed by the judges of the ICTY and the ICTR tribunals. The Akayesu tribunal judgement is often cited as the leading authority establishing the doctrinal dominance of the purpose – based approach to inferring genocidal intent of the accused. Kim's interpretation of the judgement finds many contradictions in the judgement in its treatment of the genocidal intent question. According to him, while the purpose – based approach is claimed to the right approach theoretically, in practice what is being followed is the knowledge – based approach.[90] The excerpt from the Akayesu judgement is an example of this contradiction,

> "The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, inter alia, from all acts or utterances of the accused, or *from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such*

[87] ICC-02/05-01/09, *Prosecutor v Al Bashir (Omar Hassan Ahmad)*, Decision on the Prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir, Pre Trial-Chamber I [ICC], 4 March 2009 ¶ 154
[88] Supra note 34, ¶ 83-84
[89] Supra note 34, ¶ 87
[90] Supra note 34, ¶ 109

> *other acts were committed by the same perpetrator or even by other perpetrators*[91]
>
> Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber *is able to infer, beyond reasonable doubt, the genocidal intent of the accused* in the commission of the above-mentioned crimes"[92]

The inference is that the genocidal intent of an individual perpetrator can be made through overall context of the crime. The knowledge of the massacres is considered sufficient enough without going into the state of the mind of the individual for the proof of genocidal intent[93]. When international judges make judgments about mens rea, they use expressions such as "context of violence" or the "surrounding circumstances of massacres". They also consider the "words" and "deeds" of the accused[94]. From an evidentiary perspective, when it comes to high-ranking military and political leaders, words hold more evidential value than deeds because these leaders typically do not personally carry out the acts of genocide. However, Kim believes that in the judicial analysis, the importance given to the circumstances or context is much greater than that given to words and deeds.[95] The over reliance of circumstances or contextual evidence diminishes the scope of the individualistic approach of genocidal intent. Kim observes

> "Yet, doctrinally speaking, the overwhelming probative significance attached to the 'context' is likely to cripple the purpose-based notion of genocidal intent because volitional aspect of mens rea is barely in sync with the actus reus of circumstance. It is 'words and deeds' from which individual volition is to be inferred far more comfortably. It is to be, however, noted that I said "doctrinally speaking." What I mean is that, practically speaking, since context/circumstance of genocide significantly overlaps with destructive consequences in actual genocidal campaigns, there is still

[91] ICTR-96-4-T, *Prosecutor v Akayesu (Jean-Paul)*, Trial judgment, 2 September 1998 ¶ 129.
[92] Ibid., ¶ 728 (emphasis added)
[93] Supra note 34 ¶ 110.
[94] ICTR-95-1-T, *Prosecutor v Kayishema (Clément) and Ruzindana (Obed),* Trial judgment, Trial Chamber II [ICTR], 21 May 1999 ¶¶ 527 and 541.
[95] Supra note 34 ¶ 114

> room for the purpose-based theory to survive (in that the destructive consequence forms the 'desired main effect')"[96].

The purpose-based approach to determining genocidal intent encounters difficulties when considering certain legal cases. For example, in the *Tolimir* case, despite strong evidence of the accused's purpose-based intent demonstrated by his written report proposing the use of chemical weapons, the chamber focused on the accused's knowledge of the "large scale criminal operations on the ground" in determining guilt.[97] Similarly, in the *Popović et al* Trial Judgment, despite evidence of purpose-based genocidal intent, the trial chamber found that the scale of the atrocities, participation in large-scale murders, repetition of discriminatory acts, and exclusive targeting of Bosnian Muslims were more important than the accused's inner state of mind in determining guilt.[98] These two cases are an example where even if the threshold for purpose-based genocidal intent is met, the court still falls back on the context of the crime to determine genocidal intent.

Although the individualistic interpretation of genocidal intent is theoretically sound, it does not align well with the practical reality of genocide as a large-scale criminal enterprise involving multiple actors working together towards a common goal. To address this disparity between doctrine and evidentiary practice, a collectivistic approach to genocidal intent has been proposed by Sangkul Kim. In the following chapter, these concepts will be further explained.

[96] Supra note 34 ¶ 115.
[97] Supra note 34 ¶ 119.

[98] Supra note 34 ¶ 120

3 Collective Genocide

The structure of core international crimes is distinct from other domestic crimes. Crimes such as crimes against humanity and war crimes have contextual elements, such as the requirement of "widespread or systematic attack" and the necessity of "armed conflict," respectively. Therefore, they are often referred to as "contextual crimes." They also have a double – layered structure where the 'conduct level' of the crime need to have a nexus with the 'context level'.[99] Kim argues that such crimes require a "circumstance of a legally meaningful scale" for them to be considered international crimes.[100] He observes,

> "For these two core international crimes, an objective conduct element is surrounded by an objective contextual element. Although sometimes only the former gets the label 'actus reus,' I believe it is more illuminating to view both the conduct and context elements as actus reus, and in what follows I will sometimes refer to them as the 'small' and 'large' actus reus.
>
> Is the two-layered structure also applicable to genocide? In view of the wording of Article II of the Genocide Convention, though there surely exists the 'conduct level' (e.g., "killing members of the group"), it appears there are no words that indicate the 'context level.' Instead, we find a mens rea of 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' in the chapeau of the crime definition of genocide. Thus, on its face, it appears quite problematic to apply the usual formula of a small actus reus ('conduct level') circled by a bigger actus reus ('context level') to genocide".[101]

An interpretation of the chapeau, without an objective contextual element for genocide, presents some intriguing and suboptimal outcomes. For instance, let's consider a hypothetical scenario where an individual with intense hatred against Tamils, wanders the streets of Colombo with the intention to kill Tamils. He enters a church frequently visited by Tamils and opens fire, resulting in a few casualties, not exceeding five. Though he

[99] Antonio Cassese et al, *Cassese's International Criminal Law*, Oxford University Press (2013) ¶ 37-38
[100] Supra note 34, ¶ 127
[101] Supra note 34, ¶ 125

wanted to kill more individuals, he was stopped by a retired police officer who was inadvertently present in the church at that time. Would this person be guilty of committing genocide?

He possesses the intent to partially destroy an ethnic group, and he has indeed killed members of that group, satisfying both the mental element (mens rea) and the physical act (actus reus). If we follow the literal interpretation of the statute, it would paradoxically be classified as genocide. This is consistent with *Mpambara* where the chamber observed,

> "[t]he actus reus of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group".[102]

The *Al Bashir* Pre-trial chamber shared a similar interpretation, suggesting that even a single victim is sufficient for a conviction of genocide if the necessary mens rea is established.[103] This perspective challenges the notion that the destruction of a group, even partially, is part of the actus reus, instead implying that it belongs to the mens rea. Consequently, this viewpoint suggests that genocide only possesses a conduct level and lacks a contextual level, unlike war crimes or crimes against humanity, which have a multi-layered structure.

However, this interpretation contradicts our common understanding of genocide as a mass crime, wherein the scale of the atrocities and the impact on the group as a whole are considered crucial characteristics. Genocide also draws international attention and falls under universal jurisdiction because of the scale and the gravity of the crime. Therefore, it is implausible for the actus reus of genocide can encompass situations where a single member of a protected group is killed or a single child from a protected group is forcibly transferred.[104] Do these scenarios adequately reflect the gravity and seriousness with which genocide is conceptualized? Or does the actus reus solely consist of the five underlying acts outlined in the statute?

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[102] ICTR-01-65-T, *Prosecutor v. Mpambara*, Trial Judgement, 11 September 2006, ICTR ¶ para. 8

[103] ICC-02/05-01/09, *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 ¶ para. 119

[104] Supra note 16

Therefore, the question arises: How can the scale, which constitutes an essential aspect of the contextual element in other international crimes, be incorporated into the legal definition of genocide?[105]

There is a general belief that the actus reus for genocide occurs at the conduct level, while the mens rea (genocidal intent) exists at the context level. In the absence of genocidal intent, mass atrocities can be classified as war crimes or crimes against humanity, or even domestic crimes. This conceptualization of the crime of genocide results in a scenario where a genocidaire has a thick mens rea (intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such) and a thin actus reus, which is quite different from the collective nature of the crime as envisioned by Raphael Lemkin[106]. Here an individual having a thick mens rea engaging in a genocidal conduct, can be only a very powerful person in the hierarchy of a genocidal operation[107]. This perspective suggests that there is always a powerful mastermind or a small group of masterminds orchestrating every genocide. However, it overlooks the collective nature of genocide and gives precedence to an individualistic framework. The complete knowledge of a genocidal plan and its aims is typically limited to the leadership of the campaign. Such a campaign will involve the participation of various individuals from different sectors, including propagandists[108], diplomats[109], compliant jurists[110], police[111], bureaucrats[112], politicians[113], defence ministry officials[114], intelligence operatives[115], religious leaders[116], artists[117], Scientists[118] and individuals from diverse walks of life and professions.

[105] Supra note 16.
[106] Lawrence J. LeBlanc, The United States and the Genocide Convention, Duke University Press (1991) ¶ 23
[107] Claus Kress, "The International Court of Justice and the Elements of the Crime of Genocide", 18 *European Journal of International Law* (2007) ¶ 619-620
[108] Peter Longerich, *Goebbels: A Biography*, Random House (2015)
[109] Jonathan Kirsch, *The Short, Strange Life of Herschel Grynszpan: A Boy Avenger, a Nazi Diplomat, and a Murder in Paris*, Liveright (2014)
[110] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, Harvard University Press (1992)
[111] Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, Harper Perennial; Revised edition (2017)
[112] Gerald D. Feldman & Wolfgang Seibel, *Networks of Nazi Persecution: Bureaucracy, Business and the Organization of the Holocaust*, Berghahn Books (2015)
[113] Dietrich Orlow, *The Nazi Party 1919-1945: A Complete History*, Enigma Books (2008)
[114] Correlli Barnett, *Hitler's Generals*, Grove Press; Reprint edition (2013)
[115] David Kahn, *Hitler's Spies: German Military Intelligence In World War II*, Da Capo Press (2000)
[116] Susannah Heschel, *The Aryan Jesus: Christian Theologians and the Bible in Nazi Germany*, Princeton University Press (2008)
[117] Jonathan Petropoulos, *Artists Under Hitler: Collaboration and Survival in Nazi Germany*, Yale University Press; Illustrated edition (2014)
[118] John Cornwell, Hitler's Scientists: Science, War, and the Devil's Pact, Penguin books (2004)

Each of these individuals plays a role in the execution of the genocidal agenda, albeit with varying degrees of awareness and understanding. In a complex crime like genocide which involves hundreds of thousands of individuals for a successful execution, somebody at the lowest end of the hierarchy implementing routine or bureaucratic orders need not possess a heavy mens rea to destroy the group as such. Consider an intelligence officer who conducts reconnaissance on the movement of medical equipment, food supplies, and ambulances, which are later intentionally targeted to undermine the living conditions of the targeted group. Although this officer may not possess the intent to destroy the group as such, their actions contribute to the harm inflicted. Consequently, this intelligence officer is more likely to be accused of war crimes or crimes against humanity or aiding or abetting the genocide, as proving their specific intent to destroy the group as principals becomes challenging. However, it is easier to establish their intent for the underlying acts they performed.

Lemkin saw genocide as a crime committed by one group against another group.[119] This perspective highlights the collective nature of genocide and emphasizes the importance of group dynamics in the commission of this crime.[120] While similar to crimes under domestic law, international crimes require the participation of multiple actors for their commission. An individual may commit a war crime or crime against humanity, but for such crimes to have taken place, multiple people must be involved in the project of war or a systematic attack with significant scale must have been committed/ongoing, even for an individual to be accused of such international crimes.[121] In the context of genocide, it is theoretically possible for an individual to commit genocide, as the statutory definition of genocide does not explicitly require a contextual element beyond the mens rea (intent) that indicates a larger scale for categorizing a crime as genocide.[122] While individuals bear ultimate criminal responsibility for the commission of genocide, the strategies and plans for genocide are often transmitted from individuals to a larger group.[123] Within this group, individual members may not necessarily possess an overall intent to destroy the group as a whole, but

[119] Dr. David Nersessian, Defining a Crime Without a Name in *Genocide and Political Groups*, Oxford University Press ¶ 6-13
[120] Mark J. Osiel, 'Modes of Participation in Mass Atrocity', 38 (3) *Cornell International Law Journal* (2005) ¶ 793-822
[121] Supra note 34, ¶ 127
[122] Gerhard Werle & Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 3rd Edition (2010) ¶ 309; David Luban, A Theory of Crimes Against Humanity, 29 (no.45) Yale Journal of International Law (2004) ¶ 85 – 98
[123] Janna Thompson, 30 (no.4) 'Genocide as an Intergenerational Wrong', Public Affairs Quarterly (2016) ¶ 335–50

they still play their respective roles in the execution of the genocidal plan.[124] In this manner, sociological reality of genocide contradicts the individualistic understanding of genocidal intent.[125] Taking the attention from the individual action will make us look into the complex dynamics and collective nature of genocide, where the actions of individuals within a group contribute to the broader genocidal agenda, even if their personal intent may not be the overarching goal.[126]

William Schabas, a genocide expert, believes that while it's possible for a single individual to commit genocide, it's unlikely to happen in reality.[127] In fact, the idea that an individual acting alone can carry out genocide is seen by Schabas as a simplistic and naive academic hypothesis that distracts from the true nature of the crime.[128] In order for genocide to take place, it requires the coordination and participation of multiple people, much like other international crimes that have a dimension of scale.[129]

While the International Criminal Court's (ICC) statute doesn't explicitly mention the collective dimension of genocide, it is inherent in the crime's commission. In fact, the ICC's "elements of the crimes" indicate that the conduct of genocide must occur in the context of a manifest pattern of similar conduct directed against the targeted group.[130]

According to scholar Kim, there are two levels of genocidal intent - collective and individual.[131] The collective genocidal intent is at the 'context level' and refers to an intent shared by multiple actors similar to 'common purpose/plan'[132] or the 'State or organizational policy'[133]. On the other hand, individual genocidal intent is at the 'conduct level' and pertains to the

[124] Guenter Lewy, 'Can there be genocide without the intent to commit genocide?', 9(4) *Journal of Genocide Research* (2007) ¶ 661–674
[125] Bradley Campbell. 'Genocide as Social Control' 27 (no.2) *Sociological Theory*, (2009) ¶ 150–72
[126] Jelena Subotic, 'Expanding the scope of post-conflict justice: Individual, state and societal responsibility for mass atrocity', 48 (no.2) *Journal of Peace Research*,(2011) ¶ 157-169
[127] Supra 34, ¶ 128
[128] William Schabas, 'Darfur and the "Odious Scourge': The Commission of Inquiry's Findings on Genocide', 18 *Leiden Journal of International Law* (2005) ¶ 871, 877 (2005); Claus Kress, 'The International Court of Justice and the Elements of the Crime of Genocide', 18 *European Journal of International Law* (2007) ¶ 619, 621
[129] Tracy Isaacs, 'Individual Responsibility for Collective Wrongs', in *Bringing Power To Justice? : The prospects of the International Criminal Court* , Joanna Harrington, Michael Milde & Richard Vernon eds., (2006) ¶ 167, 170-71
[130] ICC element of Crimes
[131] Supra 34, ¶ 131
[132] ICCSt, Art. 25(3)(d)
[133] ICCSt, Art. 7(2)(a)

specific actions of an individual that contribute to genocide.[134] According to Kim's theory of genocidal intent, the mens rea associated with individual conduct reflects an individual's personal state of mind, However, the genocidal intent at the context level, which is shared by multiple actors, exists beyond the individual's inner state of mind.[135] While an individual's inner state of mind can be subjective, the context level intent, similar to a policy or a plan, is objective in nature and can be inferred from the facts surrounding the genocidal operation[136].

Kim's conceptual distinction between the collective and individual genocidal intent is different from the double intent structure of the crime of genocide, which includes a "mens rea for underlying acts" and a "genocidal intent" to destroy the targeted group.[137] The traditional understanding of genocidal intent leaves an individual to have a genocidal intent with a double intent structure i.e., mens rea targeting a group as such and the other mens rea towards the conduct codified in the statute. By rejecting the theoretical possibility of a lone genocidaire and aligning the interpretation of the law with the social reality of past genocides, Kim's conceptualization of genocidal intent provides clarity regarding the issue of a heavy mens rea.[138] According to Kim, the presence of an objective collective genocidal intent at the context level, coupled with a mens rea for the conduct level, brings forth a clearer understanding of the required level of intent in legal terms.

The prominent genocides of the 20th century, the Rwandan, the Jewish, Bosnian Muslim genocides were carried out by a group of individuals who collectively planned and executed the genocidal plan against another group. The tribunals that have dealt with genocide cases so far have convicted individuals who were involved in the planning and execution of the genocidal plan[139]. In such cases, the collective genocidal intent at the context level is present, along with the objective element of collective genocide. However, if there is an extremely rare occurrence of genocide by a single actor, then that crime will have a single layer structure with an actus reus and a mens rea. Nevertheless, in cases of group genocide, the tribunals first consider the collective dimension of the crime at the context level and then analyse the conduct level of the individual and their intent. This process is implicit in the judgements delivered by ICTY and ICTR.

[134] Supra note 34, ¶ 132
[135] Supra note 34, ¶ 132
[136] Supra note 34, ¶ 132
[137] Supra note 34, ¶ 133
[138] Supra note 34, ¶ 132
[139] Thierry Cruvellier & Rugiririza, 'Rwanda: The most Judged Genocide in History', *Justiceinfo*, 4 April 2019

Therefore, it is important to distinguish between the two layers of genocide: the collective acts at the context level and the individual acts at the conduct level.

3.1 Exploring the Underlying Principle of 'Collective Genocide' in Legal Judgments

In international criminal tribunals, judges follow a different approach while deciding the culpability of an individual for war crimes or crimes against humanity, compared to genocide charges. For war crimes or crimes against humanity, they first check whether there is an armed conflict or a systematic or widespread attack against a civilian population taking place. If yes, then they analyse the evidence against individuals to determine their culpability.[140] However, for genocide charges, judges first declare whether genocide has occurred or not, without referring to any individuals involved. After that, they investigate whether the concerned individual has committed any genocidal act.[141]

Kim argues that the legal determination of culpability for the crime of genocide is peculiar because it includes an element not explicitly defined in the crime itself.[142] This element is the declaration of genocide committed by anonymous actors before analysing individual charges. Kim refers to this as "collective genocide."[143] For example, when we say "the Rwandan Hutus committed genocide against Tutsis" or "Nazis committed genocide against Jews," we are referring to groups rather than specific individuals or genocidal acts.[144] The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) reveals how the concept of collective genocide refers to both the objective context of a genocidal campaign and the subjective intention of a genocidal plan at the context level.[145] The next chapter focuses on the concept of collective genocide at the context level as part of the case law of ICTR and ICTY. In summary, Kim suggests that the determination of collective genocide as part of the context level is unique to

[140] Supra note 34, at 134
[141] Supra 34, at 135
[142] Supra 34, at 135
[143] Supra 34, at 135
[144] Supra 34, at 135
[145] Supra 34, at 135

the crime of genocide, and this concept is an essential aspect of legal culpability for this crime.[146]

3.2 Collective genocide as substratum in the international case laws

3.2.1 Akayesu

In the case of Jean Paul Akayesu, the International Criminal Tribunal for Rwanda (ICTR) found him guilty of genocide based on his individual genocidal intent, which was established through the determination of a collective genocidal intent by the Hutus against Tutsis in Rwanda in 1994. The chamber's judgment in the section 'Genocide in Rwanda in 1994?'[147] made this finding. However, it is unclear whether this finding has any legal relevance to Akayesu's culpability. The fact that a collective genocide was happening in Rwanda at that time need not be the basis for determining the individual genocidal intent of the accused. The chamber asked two questions: firstly, whether the massacres that took place in Rwanda between April and June in 1994 constitute genocide,[148] and secondly, whether the conduct of the accused constitutes genocide.[149] The first question deals with the commission of collective genocide, while the second question deals with the genocide defined in the genocide convention and the ICC statute. Neither of these legal instruments includes the concept of collective genocide. Nevertheless, the chamber asked this question, which is not required by these laws. According to Kim, this highlights the unique nature of the crime of genocide and the importance of understanding the concept of collective genocide as it relates to determining individual culpability in cases of genocide[150]. The chamber observes,

> "As regards the massacres which took place in Rwanda between April and July 1994, as detailed above in the chapter on the historical background to the Rwandan tragedy, the question before this Chamber is whether they constitute genocide. Indeed, it was felt

[146] Supra 34, at 135
[147] Supra 43, at 727-730
[148] Supra 43, at 112-129
[149] Supra 43, at 727-730
[150] Supra 34, at 137

> in some quarters that the tragic events which took place in Rwanda were only part of the war between the Rwandan Armed Forces (the RAF) and the Rwandan Patriotic Front (RPF). The answer to this question would allow a better understanding of the context within which the crimes with which the accused is charged are alleged to have been committed"[151]
>
> "In light of this evidence, the Chamber finds beyond a reasonable doubt that the acts of violence which took place in Rwanda during this time were committed with the intent to destroy the Tutsi population, and that the acts of violence which took place in Taba during this time were a part of this effort"[152]

The court's duty was to determine if the accused was individually responsible for committing genocide and had the intent to do so. However, the court went beyond this obligation and concluded that the armed forces as a whole had a collective intent to commit genocide against the Tutsi population.[153] The reason for this decision was that the court recognized that genocide, like other contextual crimes such as crimes against humanity, requires a certain context in order for the crime to take place.[154] Therefore, it is not possible for an individual to commit genocide without the support and involvement of a larger group. The court has concluded that a collective genocide did occur, even though the prosecution did not argue for the charge of collective genocide.[155] The court also rejected the argument that the massacres were merely an unintended consequence of the war.[156] Instead, the chamber held that the genocide was committed against the Tutsi group, in addition to the ongoing conflict between the RAF and RPF. This means that the tragic events that occurred in Rwanda in 1994 were not solely a result of the war, but also involved the deliberate targeting of the Tutsi population as a collective. The approach of relying on the idea of collective genocide to establish responsibility for genocide was adopted in subsequent cases in the ICTY and ICTR after the *Akayesu* ruling.

[151] Supra 43, at 112
[152] Supra 43, at 169
[153] Supra 43, at 112-129

[155] Supra 34, at 141
[156] Supra 34, at 142

3.2.2 Kayishema and Ruzindana

In this case, the court asked itself three questions: firstly, whether the elements of genocide were present in Rwanda; secondly, whether the elements of genocide were present in Kibuye; and thirdly, whether the accused had a genocidal intent in the specific incidents he was allegedly involved in. The court extensively examined the overall context of the genocide in Rwanda and Kibuye before addressing Kayishema's and Ruzindana's genocidal intent.[157] Although the law did not require the court to answer all three questions, the court, like in the Akayesu case, chose to do so.

Out of the three questions that the court asked itself, only the answer to the third question was included in the "legal findings" section.[158] With regards to the question of whether genocide took place in Rwanda in 1994, the court took a similar approach to the *Akayesu* and concluded that there was a plan by the leadership of the Rwandan government at the time to annihilate the Tutsi people. Although one might question whether this finding is legally relevant to determining individual culpability, the court answered in the affirmative, stating that

> "The question of genocide in Rwanda is so fundamental to the case against the accused that the trial chamber feels obliged to make a finding of fact on this issue".[159]

The court's statement that it feels obliged to make a finding on the question of whether genocide occurred in Rwanda can be viewed as an essential aspect of the crime, similar to the definition of the crime of genocide in the ICC Statute, which requires both genocidal acts and specific intent to destroy a group. By treating collective genocide as an element of the crime, it becomes similar to the definition of genocide in the ICC Statute, although it is at the context level.[160] They further explained that such a finding would provide a better understanding of the context in which perpetrators committed the crimes alleged in the indictment. Like in Akayesu, the court looked first at the underlying acts at the context level and then at the collective genocidal intent, i.e., the genocidal intent at the "context level."

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[157] Supra 34, at 144
[158] Supra 34, at 144
[159] Supra 94, at 273-291
[160] Supra 34, at 146

The court acknowledges that the finding of collective genocide does not directly determine the guilt of an individual.[161] However, the impact of such a finding is significant, to the point that a guilty verdict for genocide cannot be rendered without first concluding that genocide did, in fact, occur in Rwanda. The court recognized that it would be difficult to hold individuals responsible for their actions without acknowledging the mass atrocity that occurred.[162]

The chamber reached a verdict that a collective genocide against the Tutsi population in Rwanda had indeed occurred based on various factors such as the widespread nature of the attacks[163], the scale of civilian victimization[164], and the fact that victimization happened mostly to the Tutsi population[165]. The chamber also found evidence of a plan for genocide and that the violence was not just sporadic[166]. The degree of organization and coordination in carrying out the killings was a crucial factor that was considered in determining the nature of the killings.[167] The propaganda campaign during the killing in a specific period of 1994,[168] the use of identification documents by the armed forces[169], militia, and paramilitary forces to identify potential victims were all factors taken into account to arrive at this conclusion.[170]

In relation to the occurrence of genocide in Kibuye, the chamber examined whether the broader plan of genocide observed in the entire country was also executed at the prefecture level by local officials.[171] The court concluded that the plan of genocide was indeed carried out locally based on the extensive involvement of government officials,[172] the immediate and organized nature of the attacks following the assassination of the Rwandan president,[173] and the communication between central command and the préfet Kayishema.[174] The court found that the involvement of local authorities in Kibuye, coupled with the background of mass killings in the area, led to the conclusion that genocide did occur in the region.

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[161] Supra 94, at 273
[162] Supra 34, at 146
[163] Supra 94, at 289
[164] Supra 94, at 289
[165] Supra 94, at 291
[166] Supra 94, at 275-278
[167] Supra 34, at 147
[168] Supra 94, at 279-282
[169] Supra 94, at 287-288
[170] Supra 94, at 283-286
[171] Supra 34, at 149
[172] Supra 94, at 309-311
[173] Supra 94, at 268-298
[174] Supra 94, at 309-311

3.2.3 Rutaganda and Musema

Unlike the *Akayesu*[175] or *Kayishema*,[176] this case did not explicitly label the overall conduct of the armed forces and other groups as genocide against the Tutsi population. However, the chamber did connect Rutaganda's individual conduct to the wider context of the massacre.[177] This approach resembles the conceptual structure of crimes against humanity, where the chamber noted that there was a systematic and deliberate attack against the Tutsi population.[178] As in previous cases, the chamber deemed it necessary to establish the overall context of mass violence before finding the individual guilty. Kim argues that a similar approach was followed in the Musema case,[179] where the chamber noted that the acts with which Musema and his subordinates were charged were committed as part of a widespread and systematic perpetration of criminal acts against members of the Tutsi group.[180]

3.2.4 Karemera et al

The Appeals Chamber in the case of Karemera et al acknowledged that determining whether genocide occurred in Rwanda is crucial for the prosecution's case.[181] It is an essential aspect but not the sole requirement. In this particular case, the chamber relied on judicial notice of collective genocide based on previous case laws, instead of directly examining the available evidence to establish whether it was a case of collective genocide.[182] By doing so, Karemera establishes that individual convictions for genocide can only be made after firmly establishing the occurrence of collective genocide.[183]

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[175] Supra 43, at 112-129
[176] Supra 94, at 113-121
[177] Supra 34, at 151
[178] Supra 34, at 151
[179] Supra 34, at 156
[180] Supra 35, at 400
[181] ICTR-98-44-AR73(C), *Prosecutor v. Karemera et al*., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ICTR, 16 June 2006 ¶ 36
[182] Ralph Mamiya, 'Taking Judicial Notice of Genocide? The Problematic Law and Policy of the Karemera Decision', 25 (1) *Wisconsin International Law Journal* (2007) ¶ 1-22
[183] Göran Sluiter & Koen Vriend, 'Defending the 'Undefendable'? Taking Judicial Notice of Genocide', in *The Genocide Convention: The Legacy of 60 years* (H.G. van der Wilt et al. eds., 2012) ¶ 81

3.2.5 Krstić, Popović et al, Karadžić and Tolimir

In the Krstić case, the ICTY chamber explicitly determined that the attack by Serbian forces on Bosnian Muslim members constituted collective genocide, without delving into the individual genocidal acts and specific intent of the accused.[184] According to the chamber, genocidal intent "must be discernible in the criminal act itself, apart from the intent of particular perpetrators."[185] This implies that genocidal intent is a collective attribute. The chamber used a knowledge – based approach to establish the collective genocidal intent of the Bosnian forces.[186] The chamber concluded that the Bosnian armed forces were aware of the destructive consequences of their actions.[187] While only men of military age were systematically massacred, this occurred when the forcible transfer of the rest of the Bosnian Muslim population was well underway.[188] The chamber argued that the Serb forces could not have failed to recognize the lasting impact that the selective destruction of the group would have on the entire group. Furthermore, the disappearance of two or three generations of men would have a catastrophic impact on the survival of a traditionally patriarchal society, which the Serb forces had to be aware of.[189]

In the case of Popović, the ICTY chamber also determined that the Bosnian armed forces had committed collective genocide against the Bosnian Muslim population.[190] They concluded that the members of the armed forces had a collective genocidal intent to commit genocide, which they inferred from various factors. These factors included the nature of the victims who were targeted[191], the level of coordination and organization in the killings,[192] the widespread nature of the attacks that occurred across different units of the military,[193] the various locations where people were detained and killed,[194] and the indiscriminate killing that did not distinguish between

[184] IT-98-33-T, *Prosecutor v Krstić (Radislav)*, Trial Judgment, ICTY, 2 August 2001¶ 598
[185] Ibid., 549
[186] Supra 34, at 158
[187] IT-98-33-T, *Prosecutor v Krstić (Radislav)*, Trial Judgment, ICTY, 2 August 2001¶ 595
[188] IT-98-33-A, *Prosecutor v Krstić (Radislav)*, Appeal Judgment, ICTY, 19 April 2004 ¶ 15,19
[189] Supra 34, at 160
[190] IT-05-88-T, *Prosecutor v. Vujadin Popović*, Trial Judgement, ICTY, 10 June 2010 ¶ 837 – 866
[191] Ibid., 866
[192] Ibid., 856
[193] Ibid., 863
[194] Ibid., 858 – 859

civilians and combatants.[195] Other factors included a spike in killings on July 13,[196] the forced transfer of the population that excluded military-aged males,[197] and the killing of vulnerable populations such as children, the disabled, and elderly people.[198]

The Tolimir case also used a similar argument to declare collective genocide based on the circumstances in which men were separated,[199] identified[200] and killed[201]. The chamber determined that these acts were committed with the purpose of physically destroying the Bosnian Muslim population.[202]
The Jelisić case was different from the other cases that dealt with collective genocide at the ICTY. The other cases focused on the Srebrenica massacre in 1995 instead of the events in 1992.[203] The defendants in this case were acquitted of the charge of genocide because the trial chamber was not convinced that the defendant had individual genocidal intent to destroy the Muslims in the Brčko area.[204] The chamber noted that it is difficult to prove an individual's genocidal intent if the crimes committed are not widespread or backed by an organization or system.[205] Since there was no evidence of collective genocide at the context level, the individual was acquitted even though there was evidence of killing at the "conduct level."[206] The lack of evidence of collective genocide at the Brčko area was a significant factor in the decision to acquit.[207] The chamber used the term "all-inclusive genocide" to refer to the collective genocide in the Brčko area.[208] The chamber concluded that the prosecutor had not provided enough evidence to establish beyond a reasonable doubt that there existed a plan to destroy the Muslim group in Brčko or elsewhere that would fit the murders committed by the accused.[209] The chamber reached this conclusion even after being present with evidences of the accused's words and deeds exhibiting his intent to destroy the Bosnian Muslims in the Brčko area.

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[195] Ibid., 860
[196] Ibid., 858
[197] Ibid., 862
[198] Ibid., 860
[199] IT-05-88/2-PT, *Prosecutor v Tolimir (Zdravko*), Trial Judgement, ICTY, 18 December 2008, ¶ 769
[200] Ibid
[201] Ibid
[202] Ibid., 1157
[203] Supra 34, at 163
[204] IT-95-10-T, *Prosecutor v Jelisić (Goran),* Trial judgment, ICTY, 14 December 1999 ¶ 101
[205] Ibid
[206] Supra 34, at 163
[207] Supra 204, at 107
[208] Supra 204, at 88 – 98
[209] Supra 204, at 98

This means that the ICTY and ICTR have used case laws to show that the concept of "collective genocide" is just as important as the standard definition of genocide found in the statute. Collective genocide refers to the idea that genocide can happen within a larger context, and the court needs to examine this context before determining an individual's guilt. In other words, the court cannot simply focus on one person's actions, but must consider the broader situation in which the genocide occurred.

3.3 The Substantiality argument

While many tribunals have said that a specific number of victims isn't required to prove genocide, they have consistently said that the number of victims targeted for attacks must be substantial enough to satisfy the "in whole or part" requirement and demonstrate genocidal intent.[210] This is because the law is meant to protect the group as a whole, and an attack on the group cannot be insignificant and have little impact on the group's survival.[211] In other words, the targeted victims must make up a substantial portion of the group to establish genocidal intent and demonstrate a serious threat to the group's existence.

So now the question arises whether this need to establish substantiality in targeting is concerned with individual genocidal intent or the contextual element of collective genocidal intent.[212]

Kim argues that killing a single victim cannot be considered genocide unless it is part of a larger context where a substantial part of the protected group is being destroyed. Without this genocidal context, the killing of a single victim would only be considered homicide. It is also impossible for a single individual to kill a substantial portion of a group on his own, unless he is part of larger genocidal campaign where he has the necessary infrastructure and organisation to do it.[213] However, in the trial chamber case of Ndindabahizi, the context of ethnic killing in Rwanda was considered in determining the genocidal intent of the killers. Even though only one person

[210] Supra 34, at 169
[211] Nehemiah Robinson, *The Genocide Convention: A Commentary*, Institute of Jewish Affairs, World Jewish Congress (1960), 63
[212] Supra 74, at 174

was killed, the intent of the perpetrators was to destroy the Tutsi population of Kibuye and of Rwanda as a whole.[214]

This case highlights the double-layer structure of genocide, where the act of killing a single victim is analyzed at the "conduct level" while the context level is analyzed based on the substantiality argument regarding the underlying acts listed in the statute. This substantiality argument acts as an objective qualifier at the context level, similar to the "widespread or systematic attack" in crimes against humanity, because the widespread or systematic nature of the attack can be determined objectively.[215] If the substantiality argument is followed, killing or any other underlying acts listed in the statute without a legally meaningful scale would not be recognized as collective genocide.[216]

When discussing the intent required for the crime of genocide, it is commonly believed that the perpetrator's mental state is what matters. However, it is also important to consider the actual outcome of destruction in defining genocidal. Destruction is part of the material element of the crime of genocide and must be taken into account when determining collective genocide The ICTY and ICTR view destruction as a quasi-element of genocide, meaning that proof of the destructive consequences of targeting a substantial part of a group must be shown.[217] This requirement turns the crime of genocide into a "result-crime."[218] This element of destruction can be seen as more of an ‘actus reus’ than a ‘mens rea’. However, the two-layered structure of genocide can reconcile this apparent contradiction between mens rea and actus reus. The quasi-element of "targeting a substantial part of a group" can form part of an objective contextual element of genocide in the two-layered structure.

In essence, with the exception of rare cases involving individual perpetrators, the contextual element of collective genocide must be fulfilled, meaning that a substantial portion of the protected group must have been targeted. The resulting destruction that occurs due to this targeting is an integral part of collective genocide.

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[214] ICTR-2001-71-I, Prosecutor v Ndindabahizi (Emmanuel), Trial Judgement, ICTR, 15 July 2004 ¶ 470 – 71
[215] Supra 34, at 178

[217] ICTR-2001-64-T, *The Prosecutor v. Sylvestre Gacumbitsi*, Trial Judgement, ICTR, 17 June 2004 ¶ 258
[218] Supra 34, at 184

Throughout the discussed cases from ICTY and ICTR, when these international tribunals use the term "genocide," they are not only referring to the statutory definition of genocide committed by an individual through acts defined in the statute. They also encompass the concept of collective genocide, which involves multiple anonymous actors perpetrating genocide in an organized manner. Unlike crimes against humanity, where the contextual element of a widespread and systematic attack against the civilian population is purely an actus reus without a mental element, collective genocide includes both collective conduct (actus reus) and collective genocidal intent (mens rea). The recognition of collective genocide, even without a statutory basis, holds consistent and significant evidentiary value.

Furthermore, when examining the definition of genocide in the statute, it becomes apparent that, apart from the term "intent," every key word in the definition relates specifically to a collective. Therefore, the crime of genocide, contrary to an individualistic interpretation, is fundamentally a collective crime committed by one group against another.

4 Collective genocidal intent

Through our exploration of previous chapters and examined cases, we have gained insights into the utilization of the notions of collective genocide by judges in international criminal tribunals. One notable instance is found in the Krstić Trial Judgment, where a judge makes the following observation:

> "As a preliminary, the Chamber emphasises the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint perpetration, the intent to destroy, in whole or in part, a group as such must be *discernible in the criminal act itself*, apart from the intent of particular perpetrators. It is then necessary to establish whether the accused being prosecuted for genocide share the intention that a genocide be carried out"[219]

It becomes clear from this judgment that there exists an additional intent related to the conception and commission of the crime, distinct from individual intent. This ruling offers a clear differentiation between these two concepts. Furthermore, the criminal act of destroying the group must be visibly and unmistakably apparent, unlike individual intent. This requirement is due to the extensive scale and profound gravity of the crime, which can never go unnoticed. Some scholars have also subscribed to this dichotomy.[220]

According to the philosopher David J. Velleman, shared intentions can exist beyond individual mental states. Similarly, philosopher Brook Jenkins

[219] IT-98-33-T, *Prosecutor v Krstić (Radislav)*, Trial Judgment, 2 August 2001¶ 549

[220] 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 Cassesse*, L.C. Vohrah et al. eds., (2003) ¶ 467; Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', 49 *International Comparative Law Quarterly* (2000) ¶ 584-588; George Fletcher and Jens David Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *Journal of International Criminal Justice*, (2005) 539 ¶ 545-48; Claus Kress, 'The International Court of Justice and the Elements of the Crime of Genocide', 18 *European Journal of International Law*, (2007) 619 ¶ 622-23; Javid Gadirov, 'Collective Intentions and Individual Criminal Responsibility in International Criminal Law', in *Pluralism in International Criminal Law,* Elies van Sliedregt & Sergey Vasiliev eds., (2014) 342, ¶ 355

Sadler expresses her support for the notion that intentions are not solely confined to mental states.[221] This external intent, as argued by Kim, is separate from the perpetrator's internal state of mind.[222] While the mens rea of the perpetrator may be subjective, Kim suggests that this additional intent should be regarded as part of the objective element at the contextual level. Kim provides examples of how various tribunals have referred to this additional intent,

> "the relevant case law, the notion of collective genocidal intent has been referred to as "genocidal plan/plan of genocide," "wider plan to destroy," "wider-ranging intention to destroy," "overall intent, " "scheme to perpetrate the crime of genocide," "intention to commit all- inclusive genocide," "[Bosnian Serb forces'] intent to kill all the Bosnian Muslim men of military age in Srebrenica," "specific intent of the Bosnian Serb Forces" "specific intent of such [physical] perpetrators," "a lethal plan to destroy the male population of Srebrenica once and for all," "criminal plan to kill the Bosnian Muslim men originated earlier by General Mladić and other VRS officers," "killing plan," "the intention of the perpetrators of these killings," "the resolve of the perpetrators of these massacres," "an intention to wipe out the Tutsi group in its entirety" and so forth."[223]

Kress argues that collective intent, in contrast to individual intent, can be characterized as objective in nature, representing the purpose behind a coordinated effort to annihilate a group entirely or partially. Even if these plans originate from the thoughts of specific individuals, they acquire a distinct existence of their own. These plans can take the form of ideologies, schemes, or strategies that possess an "impersonal, objective existence" often referred to as the overarching genocidal plan[224].

The presence of collective genocidal intent is crucial, as it provides meaning and legal significance to individual genocidal intent. The objective existence of a collective intent is essential for orchestrating the group's destruction, and as we have previously observed, it exists independently of an individual's inner state of mind. Therefore, the ICTY chambers made deliberate efforts to establish the existence of collective genocide and

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[221] Brook Jenkins Sadler, 'Shared Intentions and Shared Responsibility', in *Shared Intentions and Collective Responsibility*, 30 (no.29) Midwest Studies in Philosophy, Peter A. French & Howard K. Wettstein eds. (2006)115 ¶ 125
[222] Supra note 34, at 222
[223] Supra note 34, at 223 – 224
[224] Claus Kress, The Crime of Genocide under International Law, 6 *International Criminal Law Review* (2006) 461¶ 495-496

collective genocidal intent before proceeding to convict individuals for their involvement in the operation.[225] This approach ensured that individual culpability for genocide was assessed in light of the broader collective intent. The commission of inquiry, tasked with investigating the atrocities in Sudan, arrived at a conclusion in line with the ICTY cases. They determined that even if individual perpetrators had genocidal intent, the charges of genocide could not be sustained. Furthermore, the commission found that the Sudanese government did not pursue a policy of genocide.[226] In this context, the term "policy of genocide" can be understood as a collective genocidal intent, attributed to the government as the creator of the policy rather than any individual.[227] The intent held by the government can only be of a collective nature, rather than of individualistic nature.

The Trial Chamber in the Tolimir case concluded that the Bosnian Serb forces were engaged in a systematic pattern of killing.[228] They reached this inference by considering various factors. Firstly, they observed that the armed forces were strategically positioned in distant locations to actively participate in the massacres.[229] Additionally, the killings were carried out in an organized and methodical manner.[230] The disposal of the thousands of dead bodies by burying them and the subsequent concealment of evidence by relocating and reburying the bodies further supported the existence of a systematic approach.[231] Moreover, the involvement of officials from multiple layers within the government hierarchy in the perpetration of the crimes was considered significant.[232]

Based on these observations, the Trial Chamber inferred that this was a clear policy conceived by the Bosnian Serb forces and executed by them in a systematic manner.[233]

Now, with the recognition of collective genocidal intent as a significant element of the crime of genocide, defendants have raised objections regarding how their individual intent towards the crime can be inferred from

[225] Supra note 34, at 226
[226] International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005 ¶ 518
[227] George Fletcher and Jens David Ohlin, Reclaiming Fundamental Principles of Criminal Law in the Darfur Case, 3 *Journal of International Criminal Justice* (2005), 539 ¶ 545
[228] IT-05-88/2-PT, Prosecutor v Tolimir (Zdravko), Trial Judgement, ICTY, 18 December 2008, ¶ 769
[229] Ibid.,770
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Supra 34, at 232

the overall context in which the genocidal campaign is orchestrated.[234] While the chambers have not explicitly acknowledged collective genocide as a distinct concept, it has played a crucial role in determining the defendants' individual genocidal intent. Numerous cases in international criminal tribunals bear witness to this approach. For instance, the Akayesu trial chamber stated,

> "The Chamber has already established that genocide was committed against the Tutsi group in Rwanda in 1994, throughout the period covering the events alleged in the Indictment. Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes"[235]

Although the trial chamber had the option to rely solely on the words and deeds of the accused to infer individual genocidal intent, they chose to consider the overall context of the genocidal campaign in Rwanda in 1994 in order to make that inference.[236] It appears that the collective genocidal intent at the context level is influencing the determination of individual genocidal intent at the conduct level. The trial chamber presented evidence that contributed to establishing individual genocidal intent. They examined the scale of the atrocities committed in the region, the systematic nature of the attacks carried out not only by the defendant but also by others involved, and the overall pattern of atrocities in the region[237]. They also took into account the exclusion of non-Tutsi groups and the subsequent targeted attacks against Tutsi groups.[238] It is not just this particular chamber, but the ICTY chamber also provided similar reasoning, which was cited in this judgment. The ICTY chamber found evidence of individual genocidal intent through the repetition of destructive and discriminatory acts, as well as the actions of perpetrators that were part of a pattern of similar conduct by other individuals, all of which undermined the group's basic foundations of life.[239]

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[234] Supra 34, at 233
[235] ICTR-96-4-T, Prosecutor v Akayesu (Jean-Paul), Trial judgment, 2 September 1998 ¶ 730
[236] Ibid.,728
[237] Ibid.,524
[238] Ibid
[239] Ibid

While it may be acceptable to derive the collective genocidal intent from the overall context of the genocidal campaign, the trial chamber's inference of individual genocidal intent raises concerns about the compromised scope of individual intent. It is expected that an individual's genocidal intent should reflect their own inner state of mind and psychological status. Even if there exists an overarching genocidal campaign with a clear policy, determining an individual's guilt based on their own individual intent seems legally questionable. By relying on such inferences, the trial chamber may have compromised the accuracy and fairness of assessing an individual's intent for the purposes of determining their guilt.

Otto Triffterer offers a critique of the legal reasoning employed in inferring genocidal intent from the overall context of a genocidal campaign. Triffterer argues that introducing a contextual element into the definition of genocide would raise the threshold for proving the crime, making it difficult to establish the charge in cases where the mass atrocities are in their early stages.[240] According to Triffterer, the contextual element would only be satisfied by full-scale atrocities, excluding lesser but still significant acts of genocide from being considered in court.[241] However, Kim disagrees with this perspective, asserting that even with the chambers inferring individual genocidal intent from the overall context, proving the element of genocidal intent remains challenging. Kim suggests that the difficulty in establishing genocidal intent persists despite the inclusion of contextual factors in the analysis.[242]

Kim extends the argument by asserting that the inference of individual genocidal intent from the collective genocidal intent has become a crucial and accepted practice within the courts.[243] According to Kim, the courts are willing to engage in this line of reasoning. In support of this claim, Kim highlights the insightful reasoning presented by the Akayesu chamber.

> "On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent *can be inferred from a certain number of presumptions of fact.* The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular

[240] Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', 14 *Leiden Journal of International Law* (2001), 399 ¶ 406-408
[241] Ibid.,408
[242] Supra 34, at 235
[243] Ibid

act charged *from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others"*[244]

"The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, inter alia, from all acts or utterances of the accused, or *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"[245]

Given the gravity of genocide, often referred to as the "crime of crimes," it is essential to maintain a high standard of legal rigor when establishing an individual's guilt. Even when an individual commits a criminal act, they can raise defenses such as negligence, lack of specific intent, or coercion, which challenge the automatic presumption of a guilty mind.[246] However, in the context of genocide in international tribunals, the genocidal intent of an individual is presumed based on the intent of other individuals or collective actions. This practice has been objected during the appeals by the defendants.[247]

In *Rutaganda,* the defendant raised an objection to the chamber's inference of his individual intent from the prevailing genocidal context at that time. However, the trial chamber dismissed his appeal, asserting that his intent was determined based on his own actions and statements.[248] They took into consideration his active participation in the massacres targeting the Tutsi people and also noted his role in ordering the commission of the crimes.[249] In *Gacumbitsi,* the defendant appealed on similar grounds, but the chamber rejected the appeal for similar reasons. Additionally, the chamber considered the scale of the massacres to determine the "substantiality component" of the defendant's genocidal intent, which is the extent to which his intent was directed towards a substantial portion of the population.[250]

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[244] ICTR-96-4-T, *Prosecutor v Akayesu (Jean-Paul)*, Trial judgment, 2 September 1998 ¶ 523
[245] Ibid., 728
[246] Supra 34, at 236
[247] ICTR-96-3-A, *Prosecutor v Rutaganda (Georges Anderson Nderubumwe)*, Appeals Judgement, ICTR, Appeals Chamber, 26 May 2003 ¶ 522
[248] Ibid., 530
[249] Ibid., 529
[250] ICTR-2001-64-A, *Sylvestre Gacumbitsi v. The Prosecutor,* Appeal Judgement, International Criminal Tribunal for Rwanda (ICTR), 7 July 2006 ¶ 44

However, it should be noted that in both cases, the trial chamber did not solely rely on the actions and words of the defendants to infer their individual genocidal intent. This indicates that the collective genocidal intent still played a role in influencing the inference of individual genocidal intent. Furthermore, the reasoning of the chambers did not completely dismiss the defendants' objection regarding the consideration of the general context of mass atrocities committed by others. Regardless of whether the defendants' specific actions or words were directly taken into account for legal analysis, the chambers did take into consideration the overall pattern of conduct in Rwanda, such as the systematic identification and selection of Tutsi people as targets.[251] This contextual information was deemed relevant for determining the defendants' individual genocidal intent, as it helps establish that the defendants targeted individuals based on their group membership. Without considering such contextual factors, it would be challenging to prove that the defendants specifically targeted the victims because of their membership in the targeted group. The Krstić appeals chamber takes a contrasting approach by stating,

> "The Defence also argues that the record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica. The absence of such statements is not determinative. Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime. *The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified.* If the crime committed satisfies the other requirements of genocide, and if the evidence supports the inference that the crime was motivated by the intent to destroy, in whole or in part, a protected group, a finding that genocide has occurred may be entered"[252]

The italicized portion of the aforementioned statement contradicts the position taken by the ICTR chambers. Not only did they emphasize that the words and actions of the accused are not crucial for inferring individual genocidal intent, but they also stated that this intent does not necessarily have to be attributed to any specific individual. In contrast to the *Rutaganda* judgment, which relied on the accused's actions and words for conviction,

[251] Ibid
[252] IT-98-33-A, Prosecutor v Krstić (Radislav), Appeal Judgment, International Criminal Tribunal for the Former Yugoslavia, 19 April 2004 ¶ 34

the genocidal intent described in the Krstic chamber is fundamentally distinct. It exists outside the mind of the an individual, therefore it is an objective element of the crime. The international criminal tribunals have not provided clear guidance on what constitutes the essential elements of individual genocidal intent and how it can be inferred. The confusion surrounding individual genocidal intent would only dissipate if the chambers were willing to declare that whatever they are inferring from the overall circumstances or context of the genocidal campaign is actually indicative of collective genocidal intent, rather than individual genocidal intent.

4.1 Manifest pattern of conduct as contextual element

John R.W.D raises an intriguing point regarding the Jelisić trial. He highlights the curious aspect from a perspective of criminal law, stating that if we consider the accused solely as an individual, the ease or difficulty of proving their mens rea (criminal intent) should not be influenced by the criminal conduct of others. The approach taken by the Jelisić Trial Chamber would only make sense if we perceive the special intent associated with genocide as a characteristic of the overall plan in which the accused willingly participated, rather than viewing it as solely a question of their individual mens rea.[253]

Alternatively, to put it another way, the concept of individual genocidal intent becomes irrelevant when an individual willingly becomes part of a genocidal plan orchestrated by the leadership. The Krstic chamber, therefore, has conceptualized collective genocidal intent as a genocidal plan that exists beyond the internal mindset of the perpetrators.

M. Cheriff Bassiouni has presented a comparable argument suggesting that the genocidal intent of the commanders and decision-makers involved in the genocidal operation can be deduced through an "objective legal standard," specifically an "objective pattern of conduct."[254] The *Kunarac* trial chamber provides an explanation for the concept of "pattern of conduct" when

[253] 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 Cassesse*, L.C. Vohrah et al. eds., (2003) ¶ 473

[254] M. Cherif Bassiouni, *Article 19: Genocide, in Commentaries on the International Law Commission's 1991 Draft Code of Crimes agianst Peace and Security of Mankind* (1993), 233 – 36

discussing the contextual elements related to crimes against humanity.[255] They refer it as 'improbability of random occurrence' of the relevant acts. [256]According to the chamber, a "pattern of conduct" refers to the "non – accidental repetition of similar criminal conduct on a regular basis".[257] Such repetitive acts are indicative of systematic occurrences.[258] This implies that the opposite of a "pattern of conduct" would be a random event that happens irregularly. Additionally, a "pattern of conduct" suggests predictability and resembles a systematic act with a clear rationale for its regular recurrence.

The observation made by the Kunarac chamber introduces a fresh perspective on the concept of the "manifest pattern of similar conduct" within the element of crimes defined by the International Criminal Court (ICC) in relation to the crime of genocide. Within the ICC's element of crimes, the term "manifest" serves as an objective qualification, and the interpretation of the contents of the "pattern of conduct" can be guided by the insights provided by the Kunarac chamber. In the context of the ICC, the term "manifest" can be understood as denoting "a systematic, clear pattern of conduct," as expressed by Judge Anita Ušacka in the Al Bashir Arrest Warrant decision.[259] Therefore, when combined, the notion of a manifest pattern of similar conduct implies a systematic and clearly identifiable pattern of criminal conduct that occurs regularly and non-accidentally.

The Akayesu trial chamber provides us with the definition of the "systematic", they say "the concept of 'systematic' may be defined as thoroughly organized and following a regular patter on the basis of common policy involving substantial public and private resources"[260].

4.2 Why target the group?

Akayesu trial judgement is considered to be an impactful judgement on the issue of genocidal intent.[261] For the purpose – based approach, this

[255] IT-96-23-T, *Prosecutor v Kunarac (Dragoljub) and ors*, Trial judgment, ICTY, 22 February 2001 ¶ 698
[256] Supra 34, at 242
[257] Supra 34, at 242
[258] Supra 34, at 243
[259] ICC-01/05-01/13 OA 4, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ¶ 19,
[260] ICTR-96-4-T, *Prosecutor v Akayesu (Jean-Paul)*, Trial judgment, 2 September 1998 ¶ 580
[261] Supra 34, at 243

judgement is considered to be provide a decisive reasoning however, some sections of the judgement are contrary to this belief. for example

> "520. With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable *because he knew or should have known* that the act committed would destroy, in whole or in part, a group"[262]

> "521. *In concrete terms*, for any of the acts charged under Article 2 (2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather *on account of* his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual".[263]

In paragraph 520, there is a simultaneous suggestion of both the purpose-based approach and the knowledge-based approach. This is evident in the phrase "he knew or should have known," where the first part "he knew that the act committed would destroy the group" seems to indicate a purpose-based approach. On the other hand, the second part "should have known that the act committed would destroy the group" indicates a knowledge-based approach. Furthermore, the expression "would destroy" in the context is somewhat confusing as it also implies a type of mens rea known as dolus eventualis.[264]

In the following paragraph, the chamber aims to provide a more concrete explanation of the previous paragraph. It focuses on one of the key characteristics of genocide, which is the rationale behind targeting specific groups. There is often a question of why these groups were targeted. Was it because they were a distinct group, or were they targeted as individuals who coincidently happened to be part of a group? This paragraph seeks to address these questions, but upon closer examination, one can notice the

[262] Supra 260., at 520
[263] Supra 260., at 521
[264] Supra 34., at 244

absence of a grammatical subject when stating "victim is chosen not because of...," implying that the person responsible for selecting the victims for targeting is not mentioned in the statement. This would only make sense if the victims were selected at a contextual level. This implies that as part of the collective genocidal intent at the contextual level, victims are chosen, identified, and targeted as a group for various reasons.[265] It also means that if the victims are not selected at the contextual level as part of the collective genocidal intent, then the selection of victims for targeting at the conduct level would not amount to genocidal intent. For example, a soldier going rogue and killing members of a protected group due to personal hatred against that group cannot be considered as having genocidal intent because the reasons for targeting are not rooted in the contextual level, but rather at the conduct level.

The historical or political background of groups plays a crucial role in determining the genocidal intent at the contextual level.[266] In order to understand the collective genocidal intent of the Nazi regime, it is essential to consider the national socialist ideological construction of Jews as enemies and the prevalent historical anti-Semitism in Europe. Similarly, in the Akayesu trial chamber, an extensive examination of the historical and political backdrop was conducted in the chapter titled "Historical Context of the 1994 Events in Rwanda."[267] Other cases from the ICTR, specifically Kayishema and Ruzindana have also followed a similar approach. Within the chapter from Akayesu, the chamber highlights the plans of Hutu extremists for avoiding power sharing, they observe,

> "The ethnic tensions were used by those in power in 1994 to carry out their plans to avoid power sharing. The responsible parties ignored the Arusha Accords and used the militias to carry out their genocidal plan and to incite the rest of the Hutu population into believing that all Tutsis and other persons who may not have supported the war against the RPF were in fact RPF supporters. It is against this backdrop that […] thousands of people were slaughtered and mutilated in just three short months".[268]

When we compare the crimes of extermination as a crime against humanity and genocide, the significance of the "reasons for targeting" becomes

[265] Supra 34., at 245
[266] Supra 34., at 246
[267] ICTR-96-4-T, *Prosecutor v Akayesu (Jean-Paul),* Trial judgment, 2 September 1998 ¶ 78 – 111
[268] ICTR-95-1-T, *Prosecutor v Kayishema (Clément) and Ruzindana (Obed)*, Trial judgment, Trial Chamber II [ICTR], 21 May 1999 ¶ 54

evident. According to the ICC's element of crimes, extermination as a crime against humanity involves the perpetrator killing one or more persons, including subjecting them to conditions of life intended to bring about the destruction of part of the population[269]. On the other hand, genocidal intent consists of the elements "to destroy," "in whole or in part," and "a group, as such."

By comparing these elements, we notice that the only element missing from extermination as a crime against humanity is "a group, as such." This distinction reveals that what sets genocide apart is the presence of an element that encompasses the reasons for targeting a group as a collective. This becomes the sole difference between the two crimes. In conclusion, the "reasons for targeting" hold crucial significance as an essential element of collective genocidal intent at the contextual level, making it a fundamental component of genocide.[270]

[269] ICC Elements of Crimes, Article 7(1)(b)
[270] Supra 34., at 247

5 Collective Genocidal intent in Sri Lanka

The civil war between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan armed forces officially came to a brutal end on May 18, 2009.[271] However, this marked the beginning of a new chapter in the struggle for justice and accountability. In the aftermath of the war, severe allegations of genocide, crimes against humanity, and war crimes were charged by civil society groups, international organizations, and non-governmental organizations.[272]

Immediate calls for accountability and justice were demanded by the victims who had suffered greatly during the conflict. The Sri Lankan government responded by establishing a domestic mechanism called the Lessons Learnt and Reconciliation Commission (LLRC) to investigate the alleged crimes. However, despite the passage of time, no prosecutions or convictions have been made for these crimes.[273]

The official position of the Sri Lankan government has been one of denial. They claim that their military operation was a humanitarian operation aimed at combating a terrorist organization that held civilians as hostages and used them as human shields.[274] According to their narrative, they adhered to a policy of zero civilian casualties.[275] However, this government version has been challenged by the Commission of Inquiry led by UN High Commissioner Navi Pillay. The final report presented by the High Commissioner in the United Nations Human Rights Council (UNHRC) confirmed the allegations levelled against the Sri Lankan government.[276] Despite these findings, the Sri Lankan government denied the accusations, and numerous military and civilian officials involved in the war were

[271] Nithyani Anandakugan, 'The Sri Lankan Civil War and Its History', Revisited in 2020, *Harvard International Review*, 31 August 2020
[272] Daniela Gavshon, 'A Catalogue of Suffering Behind the Calls for Action on Sri Lanka's War Crimes', *Justsecurity*, 12 February 2021
[273] Amnesty International, *when will they get justice? Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission*, ASA 37/008/2011, 7 September 2011
[274] Megan Price. 'The End Days of the Fourth Eelam War: Sri Lanka's Denialist Challenge to the Laws of War', 36(1) *Ethics & International Affairs*, (2022) 65–89.
[275] Ibid., 76
[276] The Office of the High Commissioner, *Report of the OHCHR Investigation on Sri Lanka*, A/HRC/30/CRP.2, 16 September 2015 ¶ 219

rewarded with prestigious government positions in embassies and cabinet ministries.[277]

Amidst the conflicting narratives surrounding the war and war crimes, a significant aspect that has not received much academic attention is the plea for recognition of the crimes committed against the most affected community—the Eelam Tamils—as acts of genocide.[278] The Northern Provincial Council, representing the Eelam Tamils, passed a historic resolution demanding an international investigation into the genocide. Additionally, the Tamil Nadu Legislative Assembly, representing 80 million Tamils in India, unanimously called for an independent international investigation into the genocide.[279] Similarly, in Canada, resolutions recognizing the Tamil genocide have been passed, and laws have been enacted mandating the teaching of the history of Tamil genocide in schools.[280]

Since genocide is commonly regarded as a "crime of mens rea" or intent, some sceptics argue that the lack of sufficient documented evidence, such as explicit hate speech or internal military documents outlining genocidal plans, similar to what is seen in the Holocaust or other atrocities, hinders the confident assertion of genocidal intent in the prosecution of the war. The European Center for Constitutional and Human Rights (ECCHR) is one prominent voice expressing this viewpoint. In their report titled "Study on Criminal Accountability in Sri Lanka as of January 2009," the ECCHR acknowledges the claims of genocidal intent but offers observations that cast doubt on the conclusive evidence supporting such claims.

> "The most important requirement of the crimes of genocide is the special intent to destroy. Often, a conviction for the commission of the crime of genocide fails because a special intent to destroy cannot be proven without any reasonable doubt. The destruction of the group must be the perpetrators (preliminary) goal. The intent must

[277] Sondra Anton and Tyler Giannini, 'When War Criminals Run the Government: Not Too Late for the International Community to Vet Sri Lankan Officials', *Justsecurity*, 16 March 2021

[278] Anji Manivannan, 'Emerging Voices: Sri Lanka's Tamils Need Genocide Recognition and Innovative Justice Mechanisms', *Opiniojuris*, 15 October 2019

[279] Oliver Walton, 'Framing disputes and organizational legitimation: UK-based Sri Lankan Tamil diaspora groups' use of the 'genocide' frame since 2009', 38 (6) *Ethnic and Racial Studies* (2015) ¶ 959-975; 'NPC passes resolution asking UN to investigate genocide of Tamils by Sri Lanka state', *Tamil Guardian*, 9 February 2015; 'Tamil Nadu Assembly resolves for UN referendum on separate Eelam', *Tamilnet*, 27 March 2013

[280] 'Canada's Parliament recognises Tamil Genocide in landmark motion', *Tamilguardian,* 18 May 2022; Bill 104, Tamil Genocide Education Week Act, 2021

be directed to achieve this goal. Genocide cannot be committed by an individual perpetrator as accompanying crime to other crimes such as persecution or the forced displacement of groups. Without intense and highly professional investigations it is not possible to establish such a special intent. *Documents, speeches, internal memoranda as well as witness statements about internal meetings and talks are necessary to prove such intent. Often suspected persons did not make public statements or signed documents, which would prove their special intent to destroy a certain group of people within an armed conflict*."

"At the moment, some facts point to the fulfilment of acts constituting the material element of genocide. However, one of the most decisive elements regarding the crime of genocide is the special intent with which the material element must be fulfilled. Without investigations by a competent authority and focusing especially on this mental element, a determination about the commission of the crime of genocide is not possible. It is decisive whether the commission of the crimes was driven by the overall aim to destroy the Tamil population in northern Sri Lanka in total. As said regarding the commission of the other crimes, a thorough investigation is essential to confirm suspicions"[281]

Another one prominent voice being the former UN high commissioner Navi Pillay, she says,

"[O]nly a Court of law having heard all the evidence can decide whether genocide was committed. *The crucial element of the crime of genocide is — the prosecution has to prove an intention to destroy from the policy, the plans and the actions.* This is why human rights activists don't use the word loosely; Lawyers and judges don't either; Journalists do; And, of course, activists being passionate that their sufferings must be on the highest scale. Let me assure you that crimes against humanity are equally as serious as genocide. So, I hope someday that what happened in Sri Lanka and is still happening will be tested in a criminal jurisdiction — whether it is the International Criminal Court, a Hybrid Court or a Special Tribunal, which will hear the evidence to make that decision. I am not responsible — Of course, the OISL initiative was taken when I was still High Commissioner; That report came out after I retired.

[281] European Center for Constitutional and Human Rights, Study on Criminal Accountability in Sri Lanka as of January 2009 (2010) ¶ 79 – 80

> But I could readily answer that question that in the Human Rights Council, we are limited to addressing human rights issues. Very often, we identify — we say these human rights violations are so gross that they could amount to crimes against humanity. That will be the explanation why the OISL had a limited mandate on what they could do and not".[282]

These assertions are contrary to what we have seen from the Kristic appeals chamber,

> "The Defence also argues that the record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica. The absence of such statements is not determinative. *Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime. The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified*. If the crime committed satisfies the other requirements of genocide, and if the evidence supports the inference that the crime was motivated by the intent to destroy, in whole or in part, a protected group, a finding that genocide has occurred may be entered"[283]

Similarly, the Akayesu chamber stated,

> "On the issue of determining the offender's specific intent, the Chamber *considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.* The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or *by others"*[284]

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[282] Navi Pillay explains 'human rights' limitations in Geneva on Tamil genocide, *Tamilnet*, 21 March 2021

[283] IT-98-33-A, *Prosecutor v Krstić (Radislav)*, Appeal Judgment, International Criminal Tribunal for the Former Yugoslavia, 19 April 2004 ¶ 34

[284] ICTR-96-4-T, *Prosecutor v Akayesu* (Jean-Paul), Trial judgment, 2 September 1998 ¶ 523

> "The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, inter alia, from all acts or utterances of the accused, *or 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*"[285]

Due to the Sri Lankan government's resistance to establishing effective investigative mechanisms, the lack of evidence is a natural outcome. The government's persistent culture of impunity has contributed to the scarcity of concrete evidence. While there is legal merit to the argument that individuals cannot be prosecuted or convicted solely based on limited evidence regarding the specifics of the crimes committed, the inference of collective genocidal intent can still be drawn from an enormous amount of evidence that has emerged from numerous reports by the United Nations and international non-profit organizations following the conclusion of the war.

The cumulative body of evidence supports the case for recognizing the contextual element of collective genocidal intent as an objective legal standard that exists beyond the individual perpetrators' mindset. These evidences establish a strong foundation for asserting the existence of a genocidal intent, even in the absence of direct and explicit documentation of plans or hate speech. In this chapter, I will argue that the two essential elements of collective genocidal Intent in Sri Lanka i.e., the reasons for targeting and the manifest pattern of criminal conduct are present in this situation.

5.1 To destroy Eelam Tamils, as such – Reasons for targeting

Sri Lanka (Ceylon till 1972) is home to several ethnic and religious groups, including the Eelam Tamils or the Sri Lankan Tamils, Hill Country Tamils

[285] Ibid., 728

or the Indian Tamils, Sri Lankan Moors, Sinhalese, Malays, Burghers and the Veddas.[286]

The Eelam Tamils are indigenous to Sri Lanka and predominantly reside in the northern and eastern parts of the island. They primarily practice Hinduism, although a small portion of the community practices Christianity.[287] The Hill Country Tamils, also known as Malaiyaha Tamils, were largely brought from Tamil Nadu, India, during the 19th and 20th centuries as indentured laborers to work in tea, coffee, rubber, and coconut plantations. They predominantly reside in the central highlands of the island.[288]

The Sri Lankan Moors are Muslims who identify Tamil as their mother tongue but identify primarily with their religion or the Moor identity.[289] The Sinhalese people primarily speak Sinhala and are predominantly followers of Theravada Buddhism, although a minority also practice Christianity.

Prior to gaining independence, Sri Lanka had been ruled by various colonial powers including the British, Dutch, and Portuguese. Before the country was unified into a single administrative entity by the British, there were three major kingdoms on the island: the Kingdom of Kandy, the Kingdom of Jaffna, and the Kingdom of Kotte.

The Kingdom of Jaffna exerted control over the northern parts of the island and was led by Tamil kings. On the other hand, the Kingdom of Kandy and the Kingdom of Kotte held sway over significant territories inhabited by the Sinhalese. When Sri Lanka gained independence in 1948, it was widely regarded as a relatively well-administered country and boasted one of the highest human development indices in Asia. Unlike' many countries in Asia, the transfer of power from the British colonial rule to Sri Lanka was a peaceful process. The transition was marked by diplomatic negotiations and agreements rather than violent conflicts or upheaval.

[286] Robert N. Kearney, 'Ethnic Conflict and the Tamil Separatist Movement in Sri Lanka' 25 (9) *Asian Survey* (1985) ¶ 899
[287] Urmila Phadnis, 'Ethnicity and Nation-Building in South Asia: A Case Study of Sri Lanka' 35 (3) *India Quarterly* ¶ 333
[288] Mythri Jegathesan, 'Claiming Ūr: Home, Investment, and Decolonial Desires on Sri Lanka's Tea Plantations' 91(2) *Anthropological Quarterly* (2018) ¶ 642
[289] Kristian Stokke and Kirsti Ryntveit, 'The Struggle for Tamil Eelam in Sri Lanka' 31 *Growth and Change* (2000) ¶ 288

There is a common perception that Buddhism is a peaceful religion that promotes non-violence.[290] This perception is partly due to the fact that Buddhism, unlike some other monotheistic religions that originated in Asia, does not aggressively engage in proselytization. Despite the general perception of Buddhists as pacifists, the Sinhalese community held the belief that they were justified in resorting to violent measures in order to safeguard and uphold the authenticity of "true" Theravada Buddhism. [291]The Sinhalese people claim that their ancestors were the first to arrive on the island from North India.[292]

This belief is derived from the Mahavamsa, also known as the "Great Chronicle," which was written around the 6th century CE and subsequently updated in the following centuries. The Mahavamsa explains the rise and supremacy of Buddhism in Sri Lanka, and a majority of Sinhalese people consider this text to be sacred and indisputable. Understanding this belief is crucial in comprehending why they vigorously defend the principles espoused in it.[293]

According to the Mahavamsa, Prince Vijaya and his 700 followers landed on the island after the prince was exiled by his father from the Vanga Kingdom, located in the Bengali-speaking region of the Indian subcontinent. The Mahavamsa claims that the Sinhala Buddhists on the island are the descendants of Prince Vijaya. [294] The text further asserts that the daughter of the king of Vanga was forced to cohabit with a lion, resulting in the birth of a boy and a girl. The son, Sinhabahu, murdered his lion father, became a king, and married his sister, Sinhasivali. They had two sons, with Vijaya being the eldest and the exiled prince.[295]

This mythological narrative solidifies the Sinhalese as an ethnic and political entity, as the descendants of Vijaya are believed to be descendants of the lion. This symbolism is reflected in the country's flag, which prominently features a lion holding a sword. However, this flag has faced criticism from ethnic and religious minorities since its establishment after independence.

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[290] Eske Møllgaard, 'Slavoj Žižek's critique of western Buddhism', 9(2) *Contemporary Buddhism* ¶ 176
[291] Jonathan Fox, *Ethnoreligious Conflict in the Late Twentieth Century: A General Theory*, New York: Lexington Books (2002) ¶ 78
[292] Neil De Votta, *Sinhalese Buddhist Nationalist Ideology: Implications for Politics and Conflict Resolution in Sri Lanka*, East-West Centre Washington (2007) ¶ 1
[293] Ibid., 5
[294] Alan Strathern, 'The Vijaya Origin Myth of Sri Lanka and the Strangeness of Kingship' 203 *Past & Present* (2009) ¶ 3
[295] Supra 292., at 6

The Mahavamsa also asserts that Prince Vijaya landed on the island on the day of Buddha's death, which has led to a common belief among the Sinhalese that the island is the land of the Sinhalese (*Sihadipa*) and that it is honoured with the responsibility to preserve and propagate Buddhism (*Dhammadipa*).[296] This belief is further reinforced by the notion that Lord Buddha himself visited the island on three occasions. According to the Mahavamsa, he first visited the southeast of the island where he subdued the Yakshas (demonic beings), then he travelled to the north and subdued the Nagas (serpent beings), and finally, he ordained the south as the designated land for Buddhism.[297]

The historical battles described in the Mahavamsa between Tamil and Sinhalese kings were utilized to solidify the notion that the Tamil-Sinhalese conflict has endured for over 2000 years. In the 19th and 20th centuries, Buddhist nationalists actively propagated this idea to reinforce the significance of the Sinhalese-Buddhist identity and emphasize the historical roots of their community. One such narrative involves King Dutthagamani, who hailed from the southern part of the island and became distressed when the Chola King Ellara seized the throne from him.[298] The Mahavamsa recounts this conflict, detailing how Dutthagamani engaged in battle with the Chola king and emerged victorious. Notably, Dutthagamani's army included 500 ascetic monks, and he carried a spear containing a relic of the Buddha into battle.[299]

After committing a massacre during the war, Dutthagamani expressed remorse for the killings. The disciples of Buddha, known as arhats, consoled him by stating, "Only a one and a half human being have been slain by thee, o lord of men. The one had come unto the (three refuges), the other had taken unto himself the five precepts. Unbelievers and men of evil life were the rest, not more to be esteemed than beasts. But as for thee, thou wilt bring glory to the doctrine of the Buddha in manifold ways; therefore, cast away care from the heart, O ruler of men."[300]

This text not only perpetuated the myth of a 2000-year-old Tamil-Sinhalese conflict but also dehumanized non-Sinhalese individuals for the

[296] Supra 292., at 6; A. R. M. Imtiyaz, 'Sinhalanized Nation-Building Project: A Symbol of Illiberalism?' 21(1/2) Indian Journal of Asian Affairs (2008) ¶ 18
[297] Neil De Votta, Sinhalese Buddhist Nationalist Ideology: Implications for Politics and Conflict Resolution in Sri Lanka, East-West Centre Washington (2007) ¶ 6
[298] Supra 292., at 7
[299] Supra 292., at 7
[300] Supra 292., at 8

preservation, protection, and propagation of Buddhism.[301] It provided a religious justification for a war doctrine that sanctioned massacres against non-Buddhists and non-Sinhalese. The Sinhalese came to believe that they were the first inhabitants of the island, and those who occupied it before them were considered sub-human. This reasoning solidified their belief in being the true "sons of the soil."[302]

These historical and mythical narratives found in the Mahavamsa have significantly influenced the collective consciousness of the Sinhalese population, contributing to the construction of their ethnic, religious, and historical identity in Sri Lanka.[303] This framework serves as the foundation of modern Sinhala Buddhist nationalism and is crucial in understanding the subsequent conflicts that emerged between Tamils and Sinhalese in the post-independence period.[304]

Adding to this complex historical narrative, the presence of indigenous Tamils in India, numbering around 80 million, coupled with the existence of a billion Hindus, has led the Sinhalese community in Sri Lanka to develop a minority complex, despite being the majority on the island.[305] This has fostered a normalized political discourse in Sri Lanka, perpetuating the belief that Sinhala Buddhists are under constant threat from external powers, and that Tamils, by extension, are portrayed as invaders or immigrants from India.[306]

This discourse creates a sense of vulnerability and insecurity within the Sinhalese community, further fuelling nationalist sentiments.[307] It reinforces the idea that the Sinhalese population must unite and protect their Buddhist heritage, language, and cultural identity from perceived external

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[301] Supra 292., at 8
[302] Supra 292., at 8
[303] Gananath Obeyesekere, 'Sinhalese-Buddhist Identity in Ceylon', George Devos and Lola Romanucc-Ross, eds., *Ethnic Identity: Cultural Continuities and Change*, Palo-Alto: Mayfield Publishing, (1975) ¶ 231-58; R. A. L. H. Gunawardana, 'The People of the Lion: The Sinhala Identity and Ideology in History and Historiography', Jonathan Spencer, ed., *Sri Lanka: History and the Roots of Conflict*, London: Routledge (1990) ¶ 45-86
[304] A. R. M. Imtiyaz, 'Sinhalanized Nation-Building Project: A Symbol of Illiberalism?' 21(1/2) Indian Journal of Asian Affairs (2008) ¶ 18; Jonathan Spencer, 'Collective Violence and Everyday Practice in Sri Lanka', 24(3) *Modern Asian Studies* (1990) ¶ 619
[305] Stanley Jeyaraja Tambiah, *Sri Lanka--Ethnic Fratricide and the Dismantling of Democracy*, The University of the Chicago Press (1986) ¶ 225
[306] Ibid; Uma Parameswaran, 'Review of "Winds of Sinhala" by Colin de Silva' 57(1) *World Literature Today* (1983) ¶ 175; Michael Roberts 1989. 'Apocalypse or Accommodation? Two Contrasting Views of Sinhala-Tamil Relations in Sri Lanka' 12 (1) *South Asia* (1989) ¶ 70
[307] Robert C. Oberst, 'Federalism and Ethnic Conflict in Sri Lanka', 18(3) *Publius* (1987) ¶ 181

encroachments.[308] This perceived threat has contributed to the marginalization and discrimination faced by the Tamil minority in Sri Lanka, as well as the emergence of policies and actions aimed at preserving Sinhala Buddhist dominance in various spheres of society[309].

In 1948, the Tamil-speaking population in Sri Lanka, comprising both Eelam Tamils and Hill Country Tamils, accounted for 33% of the total population. However, with the introduction of citizenship laws, the Hill Country Tamils were disenfranchised, leading to a decline in the Tamil population's proportion to 20%.[310] The purpose of these laws was twofold: to render Tamil opposition in the parliament ineffective and to prevent Tamils from gaining significant representation in central Sri Lanka.[311]

As a result of these laws, many Tamil names were excluded from the citizenship list, placing the burden of proof on those whose names were omitted to prove their citizenship.[312] This arbitrary deprivation of fundamental rights had a significant impact on the Hill Country Tamils, even if they were born in Sri Lanka and had never resided anywhere else[313]. It is important to note that these individuals had made significant contributions to the wealth and development of Sri Lanka through their labour in the plantations.[314]

In 1949, the Sri Lankan state initiated a large-scale colonization effort by Sinhalese settlers in the lands traditionally inhabited by the Tamils, known as the Gal Oya Multi-Purpose Project.[315] The prime minister at the time explained the motive for this colonization effort, stating:

> "Today you are brought here and given a plot of land. You have been uprooted from your village. You are like a piece of driftwood in the ocean; but remember that one day the whole country will look up to you. The final battle for the Sinhala people will be fought on the plains of Padaviya. You are men and women who will carry this

[308] Supra 303
[309] Dharsha Jegatheeswaran, 'The cycle continues: The endurance of majoritarian politics in Sri Lanka', *London School of Economics blog,* 14 August 2020
[310] Virginia A. Leary, 'Ethnic Conflict and Violence in Sri Lanka', Report of a Mission to Sri Lanka in July-August 1981 on behalf of the International Commission of Jurists,110 at 11
[311] Walter Schwarz, *Tamils of Sri Lanka*, Minority Rights Group Report (1983)
[312] Ibid
[313] Paul Sieghart, *Sri Lanka, A Mounting Tragedy of Errors*, International Commission of Jurists Report (1984) 106, at 14
[314] Ibid.
[315] Patrick Peebles, 'Colonization and Ethnic Conflict in the Dry Zone of Sri Lanka' 49(1) The Journal of Asian Studies (1990) ¶ 37

> island's destiny on your shoulders. Those who are attempting to divide this country will have to reckon with you. The country may forget you for a few years, but one day very soon they will look up to you as the last bastion of the Sinhala".[316]

The influx of Sinhalese settlers through the colonization efforts had a profound impact on the demographic composition of the Eastern Province of Sri Lanka, particularly in Trincomalee and Batticaloa.[317]

Professor Chelvadurai Manogaran who studied the state strategy of altering the demographics says,

> "An analysis of ethnic composition of Tamil-majority districts indicates that between 1953 and 1981 Sinhalese population in the Trincomalee District increased by 465%, while the Tamil population increased by only 149% during the same period. Moreover, the Sinhalese population in the Eastern Province, as a whole, increased by 435% while the Tamil population increased by a mere 145% during the same period. In the Northern Province, Sinhalese population increased by 137%, while the Tamil population increased by only 92% during the same period. Moreover, the Tamil population did not exceed 10% of the total population in any of the Sinhalese majority districts in 1981, whereas the Sinhalese population in the Tamil-majority districts of Vavuniya, Trincomalee, and Amparai are as high as 16.55%, 33.62%, and 37.5%, respectively….. It is estimated that almost a quarter of the island's population was moved from the Wet Zone to the Dry Zone between 1946 and 1971, under peasant colonization schemes".[318]

The successful colonization of contested regions enabled the government to create a new district in the east by the 1960s. This new district, Amparai, had a predominantly Sinhalese population, comprising almost eighty per cent, and was formed by dividing the original Batticaloa district, which had

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[316] Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide*, Zed Books (2016) ¶ 101

[317] Patrick Peebles, 'Colonization and Ethnic Conflict in the Dry Zone of Sri Lanka' 49(1) *The Journal of Asian Studies* (1990) ¶ 40; Neelan Tiruchelvam, 'Ethnicity and Resource Allocation,' in *From Independence to Statehood* ¶ 185-95; Bruce Matthews, 'Radical Conflict and the Rationalization of Violence in Sri Lanka', 59 (2) *Pacific Affairs*, (1986), ¶ 33; Greg Alling, 'Economic Liberalization a Nationalism: The Cases of Sri Lanka and Tibet', 51(1) *Journal of International Affairs* (1997) ¶ 127-28

[318] Manogaran Chelvadurai Sinhalese Settlements and Forced Evictions of Tamils in the Northeast Province', *Tamilnation*, 25 October, 2010

a majority Tamil population even during the period of independence.[319] Dirk Moses highlights a significant aspect regarding genocide, emphasizing its intrinsic connection to colonial processes. In such scenarios, the colonizers aim to replace the original inhabitants of the land.[320] However, what often goes unnoticed is the underlying structural violence that accompanies these schemes, as the perpetrators camouflage their intentions behind the guise of "developmental schemes" or "agrarian reforms," as seen in the case of Sri Lanka.[321]

Following Sri Lanka's independence, there was a growing demand to establish Sinhalese as the exclusive official language, excluding Tamils.[322] This demand gained momentum, and in 1956, Sinhala was officially declared the sole official language of the government. Eelam Tamils had historically placed significant value on education due to the influence of missionaries and the availability of educational opportunities in their dryland areas,[323] viewed education as a means of social mobility and securing employment in government positions and professional services.[324]

The substantial representation of Tamils in these sectors became a source of resentment among the dominant Sinhala Buddhist majority.[325] The perception of Tamils maximising their educational outcomes and occupying positions of influence and power fuelled feelings of discontent and led to growing tensions between the two communities.[326] During the language debates in the parliament, the S.W.R.D who later became the prime minister of Ceylon and legislated the “Sinhala Only Act” said,

> “I believe there are a not inconsiderable number of Tamils in this country out of a population of eight million. Then there are forty or

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[319] Neil DeVotta, ‘Control Democracy, Institutional Decay, and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka’, 73(1) Pacific Affairs (2000) ¶ 61
[320] Dirk Moses; Dan Stone, *Colonialism and Genocide*, Routledge Publishers (2007)
[321] ibid
[322] Supra 292, at 18
[323] Lange, Matthew, An Education in Violence: British Colonialism and Ethnic Conflict in Cyprus and Sri Lanka’, SSRN 22 August 2020
[324] Kristina Hodelin, ‘A Colonial Model Minority? Migration and Social Mobility of Jaffna Tamils in Malaya Before World War II’ 34 (1/2) *Indian Journal of Asian Affairs* (2021) ¶ 17
[325] Sumatra Bose, ‘Decolonisation and State Building in South Asia’ 58(1) *Journal of International Affairs* (2004) ¶ 109
[326] Neil DeVotta, *Blowback Linguistic Nationalism, Institutional Decay, and Ethnic Conflict in Sri Lanka*, Stanford University Press (2004); Chandra Richard de Silva, ‘Sinhala-Tamil Ethnic Rivalry: The Background,’ R Goldmann and A. Jeyaratnam Wilson, eds., *From Independence to Statehood: Managing Ethnic Conflict in Five African and Asian States* New York: St. Martin's Press (1984) ¶ 116; Schwarz, *The Tamils of Sri Lanka*, Minority Rights Group (1983) ¶. 9-10

> fifty million people just adjoining, and what about all this Tamil literature, Tamil teachers, even the films, papers, magazines, so that the Tamils in our country are not restricted to the northern and eastern provinces alone; there are a large number, I suppose over ten lakhs, in Sinhalese provinces. And what about the Indian labourers whose return to India is now just fading away into the dim and distant future? The fact that in the towns and villages, in business houses and in boutiques most of the work is in the hands of Tamil-speaking people will inevitably result in a fear, and I do not think an unjustified fear, of the inexorable shrinking of the Sinhalese language ..."[327]

While the Tamil Language (Special Provisions) Act provided some relief by allowing for the use of the Tamil language in certain educational and administrative contexts, the overall impact of the Sinhala Only Act was significant.[328] The Sinhala Only Act solidified the de facto status of Sinhala as the predominant language of power in Sri Lanka[329]

In the 1970s, the educational achievements of Eelam Tamil students in qualifying examinations and their higher enrolment in fields such as engineering, natural sciences, and medical education drew attention. In response, a policy of standardization was introduced, which implemented different qualifying marks for Sinhalese and Tamil students.[330] Under this policy, the qualifying mark for Sinhalese students was set lower, while Tamil students were required to achieve a higher mark.

The implementation of the standardization policy had detrimental effects on Tamil students, particularly in terms of access to higher education and employment opportunities.[331] Many talented and deserving Tamil students were denied admission to universities, effectively excluding them from higher education and hindering their integration into Sri Lankan society.[332] This discriminatory policy perpetuated a sense of alienation among the

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[327] A. Jayaratnam Wilson, *Politics in Sri Lanka, 1947-1979*, Palgrave Macmillan London (1979) 320 ¶ 19
[328] Neil DeVotta, 'Sri Lanka at Sixty: A Legacy of Ethnocentrism and Degeneration' 44 (5) *Economic and Political Weekly* (2009) ¶ 48
[329] Supra 292 at., 19
[330] Neil DeVotta, 'Standardization and ethnocracy in Sri Lanka', WIDER Working Paper 2022/86, United Nations University World Institute for Development Economics Research ¶ 1; Neil DeVotta, 'Control Democracy, Institutional Decay, and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka', 73(1) *Pacific Affairs* (2000) ¶ 60
[331] S. Ratnajeevan H. Hoole, 'Standardisation – A Different Perspective from Dr. M.Y.M. Siddeek's', *Colombo Telegraph*, 26 December 2016
[332] Supra 292., at 9

Tamil community. Additionally, the district quota system introduced in 1972 further exacerbated the discrimination faced by Tamil youth in education.[333] These policies cumulatively led to the decline of the proportion of Tamils in the bureaucracy and armed forces to merely five percent and one percent, respectively. This is a sharp contrast to the figures in 1956 when Tamils constituted 30 percent in the bureaucracy and 40 percent in the armed forces.[334]

In 1972, a new constitution was enacted in Sri Lanka, which declared that Buddhism would be given the foremost place in the country and that it was the duty of the State to protect and promote Buddhism.[335] This constitutional change resulted in the removal of previous minority protection clauses, eroding the safeguards that were in place for minority communities.[336]

Along with this constitutional amendment, the name of the country was changed from Ceylon to the Republic of Sri Lanka.[337] This change reflected a shift in the country's identity and was influenced by various factors, including the political climate and the aspirations of the majority Sinhala Buddhist population.

Walter Schwarz, in his report on the minority rights of Tamils in Sri Lanka published in 1983, described one of the reasons behind this move. The change in the constitution and the emphasis on Buddhism was seen as a manifestation of the growing ethno-nationalist sentiment among the Sinhala majority, which sought to assert their cultural and religious dominance in the country.

> "The Bandaranaike government had directed that unless a Tamil public servant passed a proficiency test in Sinhala in stages over three years, his annual increment would be suspended and he would eventually be dismissed. Mr. Kodiswaran, a Tamil in the executive clerical service, declined to sit for the exam and in 1962 his increment was stayed. He sued the government on the ground that

[333] A. Jayaratnam Wilson, *The Break-up of Sri Lanka*, C. Hurst & Company, London, Orient Longman Limited (1988)
[334] 'Crossed in Translation', *The Economist*, 4 March 2017, available at economist.com
[335] Section 6 of the 1972 Constitution; Benjamin Schonthal, 'Securing the Sasana through Law: Buddhist constitutionalism and Buddhist-interest litigation in Sri Lanka', 50(6) *Modern Asian Studies* (2016) ¶ `1972
[336] K. M. de Silva, 'Sri Lanka (Ceylon) The New Republican Constitution', 5(3) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* (1972) ¶ 47
[337] 'Ceylon Becomes the Socialist Republic of Sri Lanka', *The New York Times*, 23 May 1972 available at nytimes.com

> the regulation was unreasonable and illegal as the Official Language Act of 1956 transgressed the prohibition against discrimination provided for in section 29 of the (Sri Lanka) Constitution...The Sri Lanka government thereupon abolished appeals to the Privy Council, thereby disposing of Kodeeswaran's case. And the Republican Constitution of 1972 did away with the safeguards for minorities enshrined in the original section 29."[338]

As the anti-Tamil policies of the government continued to escalate, the Federal Party, which represented the Eelam Tamils since the 1950s, became increasingly frustrated. The party advocated for federal devolution of power as a peaceful and non-violent means to address the grievances of the Tamil community. In their pursuit of a fair power-sharing arrangement, the Federal Party engaged in several negotiations with Sinhala parties.[339] The nature and outcome of these power-sharing deals were examined by Professor Marshall Singer during a hearing on Sri Lanka at the US Congress Committee on International Relations Subcommittee on Asia and the Pacific on November 14, 1995.

> "...One of the essential elements that must be kept in mind in understanding the Sri Lankan ethnic conflict is that, since 1958 at least, every time Tamil politicians negotiated some sort of power-sharing deal with a Sinhalese government - regardless of which party was in power - the opposition Sinhalese party always claimed that the party in power had negotiated away too much. In almost every case - sometimes within days - the party in power backed down on the agreement..."[340]

The deteriorating ethnic relations were accompanied by recurring incidents of violence against Tamils, such as the events in 1956, 1958, 1961, 1974, and once more in 1977, with allegations of complicity and, at times, direct involvement of state officials.[341] The violence that erupted followed a

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[338] Supra 311

[339] Urmila Phadnis, 'Federal Party in Ceylon Politics Towards Power or Wilderness?' 4(20) *Economic and Political Weekly* (1969) ¶ 841

[340] 'US Congress Committee on International Relations Subcommittee on Asia and the Pacific - Hearing on Sri Lanka - November 14,1995', *Tamilnation*

[341] Stanley Jeyaraja Tambiah, *Buddhism Betrayed? Religion, Politics, and Violence in Sri Lanka,* The University of Chicago Press (1992); A. Jeyaratnam Wilson, *The Break-up of Sri Lanka: The Sinhalese-Tamil Conflict,* Hurst Publishers (1988); Jagath P. Senaratne, *Political Violence in Sri Lanka, 1977-1990: Riots, Insurrections, Counter-Insurgencies, Foreign Intervention* VU University (1997); A. Jeyaratnam Wilson, *Sri Lankan Tamil Nationalism: Its Origins and Development in the Nineteenth and Twentieth Centuries* UBC Press (2000); V. Kanapathipillai, 'July 1983: The Survivor's Experience' in *Mirrors of*

recurring pattern: whenever the Tamils opposed Sinhalese-only policies and other discriminatory measures, whether through nonviolent protests or sporadic acts of terrorism, the response from the Sinhalese government and people exhibited a disturbing sense of intense paranoia and hostility.[342]

Regarding the violence in 1956,[343]

> "On 5th June 1956, the date the 'Sinhala Only' Bill was introduced by (Prime Minister) Bandaranaike in the House (of Parliament), as an act of protest, Chelvanayakam, the leader of the Federal Party, led a party of 300 Tamil volunteers and staged a sit-down Satyagraha (peaceful protest) of the kind popularised by Mahatma Gandhi in the days of the Indian freedom struggle.
>
> It was a peaceful sit-down protest outside the House, on the Galle Face Green... On that day, the police were all around but allowed the Satyagrahis to be beaten up... Some Tamil Satyagrahis were thrown into Beira Lake near the Parliament House. From that moment every Tamil seen on roads of Colombo was attacked. Tamil office employees going home from work in public transport were caught and man-handled. Tamils had to stay indoors for personal safety for days on end.
>
> Sinhalese hooligans took charge of the situation and went on a rampage of arson and looting of Tamil shops and homes. The rioting and violence were instigated by the government and actively supported by the Sinhalese organisations and Bhikkhus (Buddhist priests) to frighten Tamils into accepting the 'Sinhala Only' Act...
>
> The violence and rioting spread to Gal Oya and Amparai where, under an irrigation and re-settlement scheme, thousands of Sinhalese had been resettled in clusters around thinly distributed Tamil villages in the Eastern province. In the race riots in 1956, 150 people died. They included many Tamil women and children..."[344]

Violence: Communities, Riots, and Survivors in South Asia, edited by V. Das, Oxford University Press, (1990) ¶ 321-344

[342] Jonathan Spencer, 'Popular Perceptions of the Violence: A Provincial View' In *Sri Lanka in Change and Crisis*, ed. James Manor. New York: St. Martin's Press (1984) ¶ 194

[343] Damien Kingsbury, *Sri Lanka and the Responsibility to Protect: Politics, Ethnicity and Genocide,* Routledge Publishing (2012) ¶ 54

[344] Satchi Ponnambalam, *Sri Lanka - The National Question and the Tamil Liberation Struggle*, Zed Books Ltd, (1983)

Regarding the violence in 1958,

> "News trickled out from Queens House that the Governor General had announced, off the record at the press conference, that the riots had not been spontaneous. What he said was: *'Gentlemen, if any of you have an idea that this was a spontaneous outburst of communalism, you can disabuse your minds of it. This the work of a master mind who has been at the back of people who have planned this carefully and knew exactly what they were doing. It was a time bomb set about two years ago which has now exploded.'*... What are we left with (in 1958)? A nation in ruins, some grim lessons which we cannot afford to forget and a momentous question: Have the Sinhalese and Tamils reached the parting of ways?"[345]

Regarding the violence in 1961,

> "This is not a question of an army man here and there, after liquor, indulging in excess (in 1961 against Tamils in Jaffna). *No, there is some plan, some purpose. There is an indication that they are going on instructions and preparing for some trouble because the purpose of the government in imposing an emergency and allowing army and navy personnel to behave in that fashion is to intimidate... the Tamil minority in this country. That is the fact. That is the purpose*."

- Sri Lankan Opposition Member of Parliament, Edmund Samarakody, Hansard, 3 May 1961 on Prime Minister Mrs.Srimavo Bandaranaike & the Sri Lankan Army in Jaffna[346]

Regarding the violence in 1977,

> " The outbreak in mid-August (1977) of the anti-Tamil pogrom (the third such outbreak in two decades) has brought out the reality that the Tamil minority problem in Sri Lanka has remained unresolved now for nearly half a century, leading to the emergence of a separatist movement among the Tamils. As on previous occasions, what took place recently was not Sinhalese - Tamil riots, but an anti-Tamil pogrom. Although Sinhalese were among the casualties, the large majority of those killed, maimed and seriously wounded are Tamils. The victims of the widespread looting are largely Tamils.

[345] Tarzie Vittachi, *Emergency '58: the story of the Ceylon race riots,* Andre Deutsch (1958)
[346] 'Sinhala Army attacks Tamil Satyagrahis', *Tamilnation*

> And among those whose shops and houses were destroyed, the Tamils are the worst sufferers. Of the nearly 75,000 refugees, the very large majority were Tamils, including Indian Tamil plantation workers..."[347]

In 1981, a group of Sinhalese individuals carried out a destructive act by setting fire to the Jaffna Public Library. This deliberate act of arson resulted in the destruction of a significant cultural and intellectual treasure, reducing 97,000 manuscripts to ashes. Among the lost materials were ancient texts, books, and palm-leaf manuscripts, some of which were stored in fragrant sandalwood boxes. The library housed valuable historical scrolls on herbal medicine as well as manuscripts authored by renowned intellectuals, writers, and dramatists.[348]

The incident unfolded while Sinhalese cabinet ministers watched the burning from a veranda, symbolizing a severe attack on Tamil identity, memory, and history.[349] The Jaffna Public Library, which stood as one of the largest libraries of its time, represented a vital repository of knowledge and cultural heritage.[350] The destruction of such a significant institution not only resulted in the loss of irreplaceable documents but also struck at the core of Tamil intellectual and literary traditions.[351] Journalist Francis Wheen visited the library soon after the destruction: "Today its rooms are thickly carpeted with half-burnt pages, fluttering in the breeze which comes through the broken windows. Inspecting the charred remains, I met a heartbroken lecturer from the local teacher training college . . . [who said] 'The Sinhalese were jealous of the library.'"[352]

In the period leading up to July 1983, the violence against Tamils in Sri Lanka escalated significantly. Disturbing reports emerged of arbitrary detentions, torture, media blackouts, and increasing discrimination against Tamils in hospitals, universities, and government offices.[353] Tamils were

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[347] Edmund Samarakkody, 'Behind the Anti-Tamil Terror: The National Question in Sri Lanka', *Workers Vanguard*, 7 October 1977, 6 – 10
[348] Thamil Venthan Ananthavinayagan, 'The Burning of Jaffna Public Library: Sri Lanka's First Step Toward Civil War', *The diplomat*, 31 May 2020.
[349] Celia W Dugger, 'Rescuing Sri Lankan Heritage from War's Ashes', *New York Times*, 19 August 2001
[350] Gananath Obeyesekere, 'The Origins and Institutionalisation of Political Violence' In *Sri Lanka in Change and Crisis*, ed. James Manor. New York: St. Martin's Press (1984) ¶ 153–174; Rebecca Knuth, *Burning Books and Leveling Libraries: Extremist Violence and Cultural Destruction*, Praeger Publishers (2006) ¶ 80-87;
[351] Ibid
[352] Francis Wheen, 'The Burning of Paradise', *New Statesman,* 17 July 1981
[353] PEARL action*, Black July: A Tamil Genocide*, available at Blackjuly

subjected to detention by the military, and many were killed. Emergency regulations were put in place, granting the army the power to dispose of dead bodies without judicial inquest or post-mortem examination.[354]

During June, racist violence erupted across the entire island. On July 1st, the government banned the publication of Tamil-run newspapers such as the 'Saturday Review' and 'Suthanthiran.[355] Press censorship was imposed, both locally and internationally, on any news related to national security and law and order.[356] In response to these oppressive actions, a guerrilla outfit named the Liberation Tigers of Tamil Eelam (LTTE), led by Velupillai Prabhakaran, emerged.[357] The LTTE would later become one of the most formidable militant organizations in the world.[358]

In a significant event, the LTTE ambushed the Sri Lankan military on July 23rd, killing 13 soldiers. This incident increased the resolve to intensify the attack on Tamils. The country witnessed a widespread pogrom against Tamils, resulting in the deaths of approximately 3,000 Tamils, while around 100,000 Tamils fled abroad.[359] The violence also led to the destruction of over 8,000 homes and 5,000 shops owned by Tamils. Industrial base built by Tamils over generations which includes whole sale and retail trade was effectively destroyed.[360] In a shocking act of brutality, 53 Tamil political prisoners were murdered by Sinhala prisoners. Among the victims, three prisoners were forced to kneel, and their eyes were gouged out as punishment for expressing their support for the birth of Tamil Eelam, an independent Tamil state demanded by various militant youth groups.[361] With regard to the collusion of the state officials, one witness reported,

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[354] Ibid
[355] Ibid
[356] Ibid
[357] Kate Cronin-Furman and Mario Arulthas, 'How the Tigers Got Their Stripes: A Case Study of the LTTE's Rise to Power', *Studies in Conflict & Terrorism* (2021) ¶ 1- 20
[358] Sameer P. Lalwani, 'Size Still Matters: Explaining Sri Lanka's Counterinsurgency Victory over the Tamil Tigers', 28(1) *Small Wars & Insurgencies* (2017) ¶ 120; Chris Smith, 'In the Shadow of a Cease-fire: The Impacts of Small Arms Availability and Misuse in Sri Lanka', *Small Arms Survey* (2003) ¶ vii; Kyle Flynn, *The Liberation Tigers of Tamil Eelam: A Revolution in Military Affairs*, A Master 's Thesis submitted to the faculty of the Graduate School of Arts and Sciences of Georgetown University in partial fulfilment of the requirements for the degree of Master of Arts in Security Studies; Joanne Richards, *An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE*), 10 CCDP Working Paper (2014)
[359] Ibid
[360] Ibid; Jonathan Spencer, 'Collective Violence and Everyday Practice in Sri Lanka', 24(3) *Modern Asian Studies* (1990) ¶ 616
[361] Ibid

> "Most notable matter that was observed was that the gangs carried official Householders Lists and stopped their vehicles in front of the homes or offices of the Tamil people. If the UNP Government of J. R. Jayewardene had not provided them with those official documents, how could the gangs have had access to them? It meant two things. The Government deliberately delayed the burial of the corpses of the soldiers on July 24 to plan an attack on the Tamil people in Colombo and the suburbs to provide their own goons with documents to make sure that only Tamils were attacked. Any other political party or group could not have managed both these things without State power".[362]

The president claimed these mobs as heroes of the Sinhalese people, portraying them as an integral part of the mass movement led by common citizens. Unfortunately, state institutions failed to take significant steps to curb the violence or condemn it.[363] In a subsequent interview, President Jayawardene remarked,

> "I am not worried about the opinion of the Jaffna people...now we cannot think of them, not about their lives or their opinion…the more you put pressure in the north, the happier the Sinhala people will be… Really if I starve the Tamils out, the Sinhala people will be happy."[364]

No official, public and impartial enquiry was conducted on the violence by the government and this pogrom heralded the most brutal civil war between the Tamil insurgent groups and the Sri Lankan Armed Forces.[365]

In summary, the period from 1948 to 1983 in Sri Lanka was marked by a series of state policies and actions that targeted the Tamil population. These policies aimed at bringing about demographic changes in Tamil-inhabited areas, resulting in the destruction of Tamil property through pogroms and the enactment of legislation that marginalized Tamils from education and employment opportunities. Minority protections were revoked, and Tamil religious sites and cultural properties were destroyed. Tamil newspapers were banned, and the liberal political space which Tamils had until now was effectively closed.

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[362] A.R.M. Imtiyaz, Ben Stavies, 'Ethno-Political conflict in Sri Lanka', 25(2) *Journal of Third World Studies* (2008) ¶ 140
[363] Bruce Matthews, 'Radical Conflict and the Rationalization of Violence in Sri Lanka', 59(1) *Pacific Affairs*, (1986) ¶ 28-44
28-44.
[364] Supra 362
[365] Supra 362

These discriminatory measures, coupled with arbitrary detention and torture, contributed to the establishment of a Sinhala Buddhist hegemony and the marginalization of Tamils from civil, political, cultural, educational, religious, and economic spheres in Sri Lanka. The cumulative effect of these policies and actions was the systematic oppression and marginalization of the Tamil community.

For more than three decades, the moderate Tamil political representatives have made numerous non-violent attempts to bring about change in Sri Lanka's unitary state structure, which is centred around Sinhala Buddhist interests. However, these attempts have largely failed to achieve the desired transformation. The continued concentration of power by the Sinhala Buddhist majority, both through constitutional and extra-constitutional means, has been a driving force behind the targeting of Tamils.[366]
The president D.S Senanayake in his speech before the Sinhala settlers in the Tamil dominated area, reveals the reason why the republic of Sri Lanka continues to target Eelam Tamils as such,

> "If parity is granted, it will mean disaster to the Sinhalese race.... Tamil with their language and culture and the will and strength characteristic to their race...would come to exert their dominant power over us."[367]

The ruling class in Sri Lanka harboured deep insecurities regarding the status of the Sinhala Buddhist majority in relation to the Tamil population. These insecurities manifested in various ways:

Electoral concerns: The electoral strength of the hill country Tamils posed a threat to the Kandyan Sinhalese elite's legislative power in the parliament.[368] To counter this, the government disenfranchised over half a million hill country Tamils, effectively marginalizing their political influence. The fear of losing power to the Tamils drove the Sinhalese elite to employ violent means and suppress even legitimate political grievances raised by the Tamil community which included demands for devolution and federal decentralisation. This resulted in a reduction of Tamil legislative

[366] K. M. De Silva, *Reaping the Whirlwind: Ethnic Conflict, Ethnic Politics In Sri Lanka*, Penguin India (2000)
[367] International Human Rights Association Bremen, *Genocide against the Tamil People: Discriminatory Laws and Regulations,* (submitted at Permanent people's tribunal on Sri Lanka)
[368] Roshan De Silva Wijeyeratne, 'Citizenship law, nationalism and the theft of enjoyment: a postcolonial narrative', 4 *Law Text Culture* (1998) ¶ 43

strength in the parliament, leading to the Sinhalese obtaining a 2/3rd majority.

Cultural apprehensions: The ruling class was wary of the rich literary tradition of the Tamil language. They feared that granting equal status to Tamil would lead to Sinhalese embracing Tamil culture, influenced not only by Eelam Tamils but also by the thriving Tamil publishing, film, and literary culture in Tamil Nadu.[369] To prevent this, the decision was made to make Sinhala the official language.

Educational achievements: The government resented the educational achievements of Tamil students, which often resulted in their dominance in prestigious positions within bureaucracy, scientific fields, and engineering professions.[370] In response, laws were enacted to limit the entry of Tamil students into higher education, thereby curbing their professional advancement.

Religious concerns: The Sri Lankan government, predominantly led by Sinhalese, viewed the spread of Hinduism, Christianity, or Islam practiced by the Tamil-speaking population as a threat.[371] To curtail this, Buddhism was given the foremost position in the constitution, allowing for discrimination against Tamil speaking population on religious grounds.[372]

Colonization efforts: In order to dilute Tamil identity and prevent territorial claims, the government promoted the colonization of Tamil lands with Sinhalese settlers. This project aimed to sever the link between Tamils and their geographical space, making it difficult for them to politically organize themselves as a people with a contiguous territory capable of challenging the unitary state structure.[373]

Economic rivalry:

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[369] Donald L Horowitz, *The Deadly Ethnic Race Riot*, Berkeley: University of California Press (2001) ¶ 282; K.M De Silva, *Managing Ethnic Tensions in Multi-Ethnic Societies: Sri Lanka 1880–1985*. Lanham, Md.: University Press of America (1986) ¶ 174 - 178

[370] Neil DeVotta, 'Standardization and ethnocracy in Sri Lanka', WIDER Working Paper 2022/86, United Nations University World Institute for Development Economics Research

[371] Gananath Obeyesekere, 'The Origins and Institutionalisation of Political Violence' In *Sri Lanka in Change and Crisis*, ed. James Manor. New York: St. Martin's Press (1984) ¶ 155

[372] Benjamin Schonthal, 'Constitutionalizing Religion: The Pyrrhic Success of Religious Rights in Postcolonial Sri Lanka', 29(3) *Journal of Law and Religion* (2014) ¶ 470-490

[373] Neil DeVotta, 'Control Democracy, Institutional Decay, and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka', 73(1) *Pacific Affairs* (2000) ¶ 61

The government's envy of the flourishing Tamil trade, commerce, and entrepreneurship in Colombo and other regions of the island was evident. The Tamil communities had established extensive networks across India, Southeast Asia, and beyond, bolstering their economic prowess.[374] In the aftermath of the Black July pogroms, the then finance minister of Sri Lanka, Ronnie De Mel, made a statement acknowledging that Tamils had a dominant presence in various sectors contributing to Sri Lanka's prosperity.[375] Before 1977, Sinhalese individuals, including heavy and small industrialists, shopkeepers, and traders, utilized their ethnic identity to gain preferential treatment in obtaining quotas, licenses, and scarce resources. However, the implementation of open market reforms presented the Tamils with opportunities to excel as successful traders and industrialists in their own right. This economic growth had a transformative impact on previously marginalized Tamil groups, elevating them to the middle- and upper-class strata. In contrast, their Sinhalese counterparts struggled to compete with the influx of affordable and superior imports into the market, leading to a decline in their prominence as industry leaders.[376]

However, during the tragic events of Black July, the government was implicated in facilitating mobs that targeted and looted Tamil-owned businesses, effectively undermining the economic strength of the Tamil community on the island. These incidents marred the thriving commercial landscape that Tamils had diligently built, causing significant losses and disruptions to their businesses.[377]

Erasure of identity and memory: The government feared the historical associations and ties that Eelam Tamils had with the northern and eastern parts of the island due to their long-standing residence. To undermine their identity and erase the memory of their community and its history, the largest Tamil library, built by them, was deliberately burned to ashes.[378]

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[374] Newton Gunasinghe, 'The Open Economy and its Impact on Ethnic Relations in Sri Lanka', in Winslow, Deborah W. and Michael D. Woost, eds, Economy, Culture and Civil War in Sri Lanka (Bloomington and Indianapolis: Indiana University Press, 2004) ¶ 100; David Rudner, 'Banker's Trust and the Culture of Banking among the Nattukottai Chettiars of Colonial South India', 23(3) Modern Asian Studies (1989) ¶ 417-458; Heiko Schrader, 'Chettiar Finance in Colonial Asia', 121(1) Journal of Social and Cultural Anthropology (1996) ¶ 101-126

[375] The wages of envy, The Economist, 20 August 1983

[376] Supra 370., at 64

[377] Dhananjayan Sriskandarajah, 'Socio-economic inequality and ethno-political conflict: some observations from Sri Lanka', Contemporary South Asia (2005) ¶ 341-356

[378] Vasuki Nesiah, 'Monumental History and the Politics of Memory: Public Space and the Jaffna Public Library' *Lines Magazine*, February 2003

These various policies and actions reflect a systematic effort to marginalize, disempower, and erase the Tamil population's political, cultural, educational, economic, and historical presence in Sri Lanka. In conclusion, during the period from 1948 to 1983, prior to the outbreak of the full-scale civil war, the state actors in Sri Lanka displayed a collective genocidal intent towards the Tamil population. This intent was driven by multiple factors, which I have extensively discussed in this chapter.

While these reasons continued to be relevant even during the period from 1983 to 2009, it is important to acknowledge the limited scope of this dissertation. My assumption is that after 1983, Eelam Tamils were targeted militarily because Eelam Tamils could provide a serious military threat to the preservation of unitary state structure. But the focus of this study is to provide a political and historical understanding of why Tamils were targeted during this limited timeframe.

The period examined reveals a pattern of deliberate actions and policies by the Sri Lankan state aimed at marginalizing, discriminating against, and suppressing the Tamil population. The reasons for targeting the Tamils included concerns over political power-sharing, cultural influence, educational achievements, religious differences, territorial control, economic strength, and historical connections.

While these factors collectively made Tamils as targets, it is important to acknowledge that the situation evolved and further complexities emerged during the subsequent years of the civil war. These complexities and the subsequent conflict require further research and analysis which is beyond the scope of this dissertation.

In summary, the period examined highlights the underlying political and historical reasons behind the targeting of Eelam Tamils in Sri Lanka which is one of the elements of the collective genocidal intent. In the next chapter, I will explain another element of collective genocidal intent – manifest pattern of similar conduct

5.2 Manifest pattern of similar conduct – Pattern of destruction of Eelam Tamils

As discussed in previous chapters, the presence of a "manifest pattern of similar conduct" is a crucial element in establishing collective genocidal intent. By examining the events during the final phase of the Eelam war, which took place between January and May 2009, I will shed light on the systematic nature of the attacks against the Tamil population.

During this specific timeframe, the declaration of No Fire Zones and the subsequent shelling of Tamil civilians became emblematic of the deliberate targeting of the Tamil population. These actions were not accidental but were carried out in a calculated manner.

It is important to examine this specific timeframe as it represents a significant turning point in the Eelam war and highlights the intentional targeting of Tamil civilians. By understanding the systematic nature of these attacks, we can gain a deeper insight into the collective genocidal intent that characterized this phase of the conflict.

In the subsequent sections of this chapter, I will delve into the details of the No Fire Zones, the deliberate bombings within these zones, and the implications of these actions in relation to the systematic targeting of the Tamil population.

5.2.1 Creation of No Fire Zones

During the period from January to May 2009, the Sri Lankan government established three No Fire Zones (NFZs), also known as "safe zones," in an attempt to demonstrate to the international community that they were committed to protecting civilians from the ongoing hostilities. This declaration of NFZs was part of the government's narrative of framing their final military offensive as a humanitarian operation.[379]

However, it is important to note that these NFZs were declared without any consultation with the Liberation Tigers of Tamil Eelam (LTTE), the insurgent group fighting for Tamil independence. The government's declaration of the NFZs effectively communicated to the Tamil civilian

[379] Office of the High Commissioner, *Report of the OHCHR Investigation on Sri Lanka (OISL)*, 16 September 2015 ¶ 150 (hereafter OISL)

population that they should actively move to these designated geographical spaces in order to avoid harm.[380]

Furthermore, the declaration of NFZs also indicated that the Sri Lankan Armed Forces (SLA) would only direct their fire outside these zones. This implied that objects or targets located outside the NFZs would be subject to attack, unless they were protected under the principles of international humanitarian law.

These designated geographical spaces, which were declared as No Fire Zones (NFZs), were located within the territory under the de facto control of the Liberation Tigers of Tamil Eelam (LTTE).[381] It is important to note that while the LTTE is designated as a terrorist organization by many countries, within the areas under their control, they established a parallel administration to cater to the civilian population's needs.[382]

This parallel administration set up by the LTTE included various institutions and services aimed at meeting the civilian population's requirements. These services encompassed a range of sectors such as banking, judicial institutions, orphanages, colleges, police stations, and hospitals.[383]

The OISL (Office of the High Commissioner for Human Rights Investigation on Sri Lanka) report highlights that the first declared No Fire Zone (NFZ) overlapped with an area where the LTTE had prior military presence, as analyzed through UN satellite pictures.[384] This raises a question: if the Sri Lankan Armed Forces (SLA) wanted Tamil civilians to concentrate in a specific area for their safety, why did they choose an area near the LTTE's existing military positions?[385]

According to statements made by the Secretary of Defense in the Lessons Learnt and Reconciliation Commission (LLRC), the intention was for the

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[380] Ibid., 151
[381] Ibid
[382] Karthick Ram Manoharan, 'Remembrance of LTTE's Past', 50 (30) *Economic and Political Weekly* (2015) ¶ 38–40; N. Malathy, *A Fleeting Moment in My Country: The Last Years of the LTTE De-Facto State*, Clarity press (2012)
[383] Kristian Stokke, 'Building the Tamil Eelam State: emerging state institutions and forms of governance in LTTE-controlled areas in Sri Lanka', 27 (no.6) *Third World Quarterly*,1021 - 1040
[384] OISL ¶ 150
[385] Nicola Perugini, Neve Gordon, 'Distinction and the Ethics of Violence: On the Legal Construction of Liminal Subjects and Spaces', *Antipode* (2017) ¶ 1385–1405; Nicola Perugini, Neve Gordon, Proximate 'human shields' and the challenge for humanitarian organizations', *ICRC blog*, 18 November 2021 available at https://blogs.icrc.org/law-and-policy/2021/11/18/proximate-human-shields/

military to restrict their actions in these zones and for civilians to move closer to SLA-controlled territories.[386] The official objective was to push the LTTE to the rear while encouraging civilians to move towards areas controlled by the SLA. However, if this official policy were to be realized, it would create a situation where Tamil civilians would be sandwiched between the LTTE and SLA forces.

To further implement this policy, the SLA dropped 127,000 leaflets to inform Tamil civilians about the NFZs.[387] The leaflets conveyed the message that the SLA was waiting to provide security from shelling and offered a financial incentive of Rs 100 per day.[388] Additionally, the leaflets assured the presence of communication facilities in these zones and promised that shell attacks or aerial attacks would not be conducted in these areas.[389]

5.2.2 Infrastructure of Targeting

The military policy of sandwiching Tamil civilians between the LTTE and SLA aligns with the official narrative of a civilian rescue operation aimed at those held hostage by the LTTE.[390] The SLA had access to real-time battlefield intelligence through UAVs, which provided information on LTTE positions, reserves, and the concentration of Tamil civilians.[391] This intelligence gathering was likened to "looking at something with your own eyes" by a general.[392] The UAVs can transmit high resolution images which live streamed the targets to the military.[393]

After each attack, aerial intelligence assets confirmed the targets hit, enabling the artillery and air force to recalibrate their targets and minimize Tamil civilian casualties in case of any unintended attacks.[394] The SLA also possessed precision weapons, and security forces were trained to provide

[386] OISL ¶ 146
[387] OISL ¶ 151
[388] OISL ¶ 151
[389] Ibid
[390] Radha D'Souza, 'Sandwich Theory and Operation Green Hunt, *Sanhati*, 15 December 2009 available at Sanhati.com ; Neve Gordon and Nicola Perugini, 'Human Shields and Proportionality: How Legal Experts Defended War Crimes in Sri Lanka', *Justsecurity*, 12 November 2020 available at Justsecurity.com; International Crisis Group, 'Appendix B: Executive Summary, Report of UN Panel of Experts on Accountability in Sri Lanka' Reconciliation in Sri Lanka: Harder than ever' (2011) ¶ 42-46
[391] Ibid., 146 – 150; Eitay Mack, 'Israeli complicity in Sri Lanka war crimes must be investigated', *Al Jazeera*, 27 June 2023 available at Aljazeera.com
[392] OISL ¶ 151
[393] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka ¶ 16 (Hereafter POE)
[394] OISL ¶ 151

accurate targeting and assessments following each attack.[395] The Air Force Commander personally evaluated targets before authorizing the firing of weapons.[396]

When artillery was fired from the ground, the Army Commander maintained radio communication with the artillery forces to provide instructions.[397] Aerial surveillance assets were available 24 hours a day, detecting LTTE movements and relaying information to the Air Force or Navy for targeting purposes.[398] The procedure involved sending UAVs or the Beechcraft to capture pictures of target locations, which were then relayed to attack squadrons to determine the appropriate weapons to use.[399] The Director of Air Force Operations and the Air Force Commander both checked the targets to ensure accuracy in their attacks.

The Sri Lankan Army Commander confirmed the existence of locating devices with radar capabilities that communicated the areas where artillery was falling, providing day and night coordination.[400] These locating devices had a range of 35 km. The overall infrastructure included a control room with real-time intelligence on targets, instructions given to subordinate actors, and a feedback loop for battle damage assessment.[401]

All these measures were in place to avoid targeting the Tamil civilian concentration gathering within the No Fire Zones, as designated by the government.

5.2.3 What weapon to use?

The choice of weapons used to attack targets is a crucial factor in determining the intent behind an attack and the potential for civilian casualties. Even when targets are selected carefully to minimize harm to civilians, different weapons possess varying levels of accuracy, range, and impact.[402] These factors influence whether an attack is intentionally directed at civilian targets or if civilian deaths were an unintended consequence of an attack on a military target.

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[395] Ibid
[396] Ibid
[397] Ibid
[398] Ibid
[399] Ibid
[400] Ibid
[401] Ibid
[402] OISL ¶ 149

Two broad categories of weapons are direct fire and indirect fire.[403] Direct fire occurs when there is a clear line of sight between the weapon and the intended target. These weapons are designed for precise targeting, as the operator can directly observe the target before firing.[404]

On the other hand, indirect fire involves weapons that do not require a direct line of sight.[405] Instead, shells or projectiles are launched on a high trajectory, falling over a wider area to maximize the explosive impact.[406] These weapons are referred to as area weapons since they cover a broader zone rather than specifically targeting a single point.[407]

The choice between direct fire and indirect fire weapons depends on the specific objectives of the military operation, the nature of the targets, and the desired level of precision. It is crucial to consider these factors when assessing whether civilian casualties were the result of intentional targeting or unintended collateral damage in military engagements.

Given that the Sri Lankan Armed Forces had direct fire weapons and a targeting infrastructure for precise targeting, it would be logical to deploy these weapons in order to minimize civilian casualties. Using indirect fire weapons within the NFZs would not be necessary unless there was an intention to cause harm and maximize the number of Tamil civilian casualties. The availability of direct fire weapons and the ability to target specific military objectives suggests that there were alternative options for conducting operations in a way that prioritized the safety and protection of Tamil civilians within the NFZs.

5.2.4 Non – random bombing of NFZs

5.2.4.1 NFZ1

On January 20, 2009, the SLA announced the establishment of the first No Fire Zone (NFZ1)[408] covering an area of 35.5 sq. km.[409] As the announcement was made, Tamil civilians began to concentrate within the

[403] Ibid
[404] Ibid
[405] Ibid
[406] Ibid
[407] Ibid
[408] International Crisis Group. 'Appendix C: Map of the first "No Fire Zone"', War Crimes in Sri Lanka (2010) ¶ 40
[409] OISL ¶ 156 – 165

NFZ1, especially since international organizations were present there.[410] Among the medical facilities within NFZ1 was the Vallipunam hospital, whose coordinates were provided to the military leadership two days prior to the declaration of NFZ1.[411]

However, between January 21 and 22, shells were fired from SLA-controlled territory and exploded inside the hospital compound. This resulted in the death of five civilians and injury to 22 others.[412] The ambulance, temporary medical shelter, and other buildings were damaged, and even patients who were already being treated for injuries sustained further harm.[413] Witnesses reported hearing launches of multiple launch rocket systems (indirect fire) and witnessing a doctor being fatally injured, with his stomach ripped open.[414]

In early February, cluster bombs were used to target the hospital once again. Satellite imagery reviewed by the OISL revealed four rooftop impacts on three different buildings and two impact craters within the hospital compound.[415] These bombings resulted in the destruction of several hospital buildings.[416] Furthermore, OISL observed over 50 additional impact sites within a 1 km radius around the hospital, which was declared a buffer zone by the SLA.[417]

The OISL report noted that there were no LTTE positions near the hospital and no justification for targeting a medical facility, which is protected under the laws of war, especially within a declared NFZ1 that was supposed to be free of military operations.[418] The intentional attack on the hospital indicates a clear intention to kill both injured civilians and combatants, as well as the medical workers treating them.[419] Despite having surveillance assets, a battle damage assessment mechanism, and the coordinates of the hospital provided by the ICRC, the SLA engaged in indirect fire, indicating a deliberate intent to cause maximum casualties.[420]

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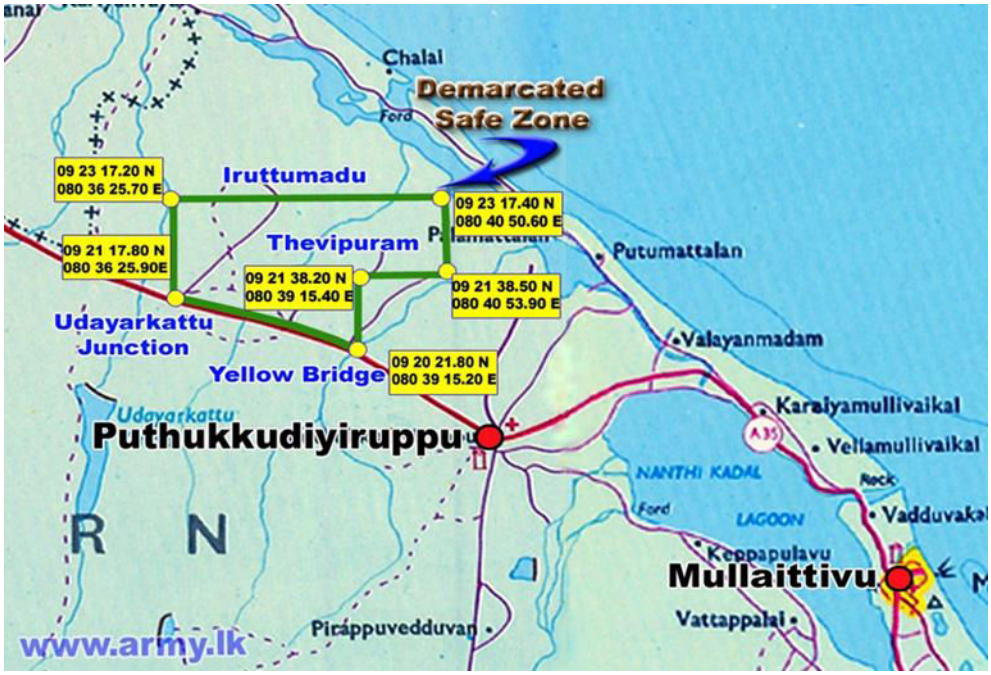
[410] Ibid
[411] Ibid; POE 23
[412] OISL ¶ 156-165
[413] Ibid
[414] Ibid
[415] Ibid
[416] Ibid
[417] Ibid
[418] Ibid
[419] Ibid
[420] Ibid



Inside the NFZ1, there was a hospital called Udayaarkaadu Hospital, which was located within a large school.[421] The hospital consisted of 11 buildings marked with the red cross emblem, and there were also makeshift structures around the hospital.[422] The GPS coordinates of the hospital, similar to the Vallipunam Hospital, were relayed to the military leadership. Additionally, there was a United Nations facility established near the hospital within NFZ1, and its GPS coordinates were also communicated.[423] However, despite the presence of these humanitarian facilities, they were subsequently targeted and shelled, resulting in the deaths of multiple Tamil civilians.[424]

On January 23rd, the national staff of the International Non-Governmental Organizations (INGOs) and the United Nations (UN) personnel, who were part of the World Food Programme (WFP) agreement with the Sri Lankan government, established a hub close to the Suthanthirapuram junction along the A35 highway. They informed the Sri Lankan Army (SLA) about their location to ensure coordination.[425] Following this development, a significant number of Tamil civilians sought refuge in this area and set up temporary shelters just north of the A35 highway. Additionally, the Assistant

[421] Ibid
[422] Ibid
[423] Ibid
[424] Ibid
[425] POE 24

Government Agent (AGA) also established a food distribution center nearby.[426]

However, the situation in the area was tense. During the day, there were sporadic shelling incidents that posed a threat to the safety of civilians and aid workers. During the evening, the food distribution center itself was shelled, resulting in the loss of many Tamil lives. It is evident that the hub established by the international and national aid workers, along with the food distribution center set up by the AGA, was intended to provide much-needed assistance to the displaced Tamil civilians. [427] The UN officials frantically made calls to the head of UN security in Colombo and the Vanni force commander at his headquarters, as well as the Joint Operation HQ in Colombo, demanding an immediate halt to the shelling.[428] This UN hub stood as the sole international presence within the war zone, with only embedded journalists and Tamil journalists present besides them. Although the shelling briefly ceased after the phone call, it resumed later. When the UN officials ventured outside the bunker the next morning, they were horrified to discover pieces of dead babies hanging from trees and mangled bodies scattered all around.[429] Notably, there were no LTTE military presence within the compound, as the nearest presence was 500 meters away from the UN hub. The UN security officer who has military background found out that the shelling is coming from the SLA positions.[430]

On January 24th, the Udayaarkaadu hospital located inside NFZ1 was hit by shells, despite the hospital being clearly marked with a red cross emblem. In the following two days, the UN hub also faced shelling, prompting the UN workers, along with the AGA and the ICRC, to make the decision to relocate their base.[431] Hundreds of civilians lost their lives during these shelling attacks.[432]

In contrast, the scenario was different across the yellow bridge further along the A35, where there were only a few instances of shelling.[433] It must be noted that the areas outside the NFZ experienced fewer shelling incidents, while hospitals and other protected sites inside the NFZ were incessantly bombed.[434]

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[426] POE 24
[427] POE 24
[428] Ibid
[429] Ibid
[430] Ibid
[431] POE 25
[432] Ibid
[433] Ibid
[434] Ibid

After the shelling, the humanitarian workers relocated to Pudukuddiyiruppu (PTK). Witnesses described the aftermath as a horrifying scene, with bodies of civilians scattered on and beside the road as they made their way to PTK. Another witness mentioned that virtually nothing was left standing in NFZ1, indicating extensive destruction.[435] When the hospital was moved to a new facility without the red cross emblem, it was not targeted, suggesting a deliberate intention to destroy medical infrastructure specifically serving Tamil civilians within NFZ1.[436] Furthermore, the PTK Hospital, which was located outside NFZ1, was also subjected to shelling using multiple launch rocket systems (MBRL) and heavy artillery. Prior to the shelling, UAV surveillance was conducted. The hospital suffered significant damage and witnessed a devastating loss of life. Despite the absence of LTTE presence within the hospital compound, the shelling persisted for several days.[437]

5.2.4.2 NFZ2

[435] Ibid
[436] Ibid
[437] Ibid

The second no fire zone (NFZ2), officially known as the civilian safety zone, was declared on February 12, 2009.[438] It covered a narrow strip of land with an area of 14 sq. km. The establishment of NFZ2 and its details were communicated to all parties involved.[439] This zone witnessed a high concentration of Tamil civilians as the SLA was gradually cornering the LTTE from all sides. The estimation was that 300,000 to 330,000 Tamil civilians were in that small strip of land.[440] SLA shelled continuously from February 6, using MBRL, long-range artillery, howitzers, and mortars. They also resorted to aerial bombardment, RPGs, and small arms fire from close range in densely populated areas to maximize Tamil civilian casualties.[441] Despite the government's public declarations on 25th February and 27th April that it had completely halted the use of heavy weaponry, the reality on the ground was contrary.[442] The heavy artillery fire on Tamil civilian settlements was part of their core tactic to win the war quickly. Satellite images analyzed by a UN panel of experts revealed that the SL artillery system positioning was adjusted to target Tamil civilians within the NFZ. During this time, the LTTE had very few weapons left, while the SLA relentlessly rained shells on Tamil civilians from all directions.[443]

[438] OISL ¶ 165-173
[439] Ibid
[440] POE 28
[441] Ibid
[442] POE 29
[443] Ibid

Following the shelling, the PTK Hospital was relocated to Putumattalan, which served as a makeshift hospital clearly situated within NFZ2.[444] The hospital buildings had red cross emblems displayed on the rooftops and walls.[445] Adjacent to the hospital, a UN hub was established, marked with a UN flag.[446] The GPS coordinates of the hospital and UN hub were provided to the SLA, similar to previous instances.[447]

Between February 9 and April 20, the hospital experienced continuous shelling.[448] Despite being situated within the boundaries of NFZ2, the medical workers believed they would be spared from attacks. However, both aerial bombings and artillery shelling occurred.[449] The ICRC described the scenes as "nothing short of catastrophic."[450] Witnesses reported the usage of cluster munitions, and RPGs were used in a manner that reduced their accuracy but maximized civilian casualties.[451]

The Valayarmadam church, located within NFZ2, was subjected to continuous shelling, resulting in the deaths of many civilians who sought shelter inside.[452] Adjacent to the church, there was a hospital facility situated just 150 meters away. Additionally, there were humanitarian camps in close proximity.[453] On April 21-22, the church and the hospital were repeatedly shelled, creating a horrifying scene. Witnesses described the aftermath, stating, "it was a terrible sight: There were body parts blown everywhere.[454] I even saw hands hanging on the trees. I saw human body parts all over the vehicles." Witnesses also reported cluster bomb explosions. According to the OISL report, there were no LTTE presence near the church during these attacks.[455]

Furthermore, the food distribution queues within NFZ2 were repeatedly shelled.[456] Prior to the shelling, information regarding the location of the distribution points was relayed to the SLA.[457] Witnesses also reported the

[444] OISL ¶ 165-173
[445] Ibid
[446] Ibid
[447] Ibid
[448] Ibid
[449] Ibid
[450] Ibid
[451] Ibid
[452] Ibid
[453] Ibid
[454] Ibid
[455] Ibid
[456] Ibid
[457] Ibid

presence of UAV surveillance before the attacks occurred.[458] Additionally, on 8th April a primary health clinic involved in distributing milk powder was shelled.[459] Similar to the food distribution centres, the information about the milk powder distribution was communicated to the SLA. The OISL report confirms the absence of LTTE presence in these distribution and health centres as well.[460] A large group of women and children were killed in this attack in Ambalavanpokkanai, some of the deceased mothers were holding their cards which made them eligible for the delivery of milk powder.[461] On 25th March, an MBRL attack on Ambalavanpokkanai killed approximately 140 people, including numerous children.[462]

Due to the relentless shelling in NFZ2, the hospitals were forced to relocate to Mullivaikkal, which was still within the zone. Two makeshift medical facilities were set up, one being a primary health care facility and the other a converted school building serving as a hospital.[463] The SLA was informed of the GPS coordinates for these facilities on April 26th. Witnesses describe the situation as distressing, with scenes of carnage and thousands of people wounded by shelling, bombing, RPGs, and even rifle bullets. The operating theatre in Mullivaikkal was described as nothing more than a shelter, while patients lay outside in the sand due to a lack of beds, and decomposing bodies added to the overwhelming conditions.[464] The UN POE report describes the Mullivaikkal hospitals this way

> "Conditions were extremely poor. The hospital had four doctors and ran two improvised operating theatres. Some of the patients, including those with serious head injuries and other fatal injuries, were merely made comfortable, but no attempt could be made to save them. With few beds available, wounded patients often remained in front of the hospital, some on mats and others lying on dust and gravel, under sheets set up for shelter, cradled by their loved ones or alone, With the severe shortage of gauze or other sterile bandages, old clothes or saris were used as bandages. No gloves were available, and the conditions were grossly unhygienic, giving rise to high risk of infections. In this hospital, amputations were performed to save the life of the patient, as there was simply no other way to treat wounds. Due to the severe shortage of

[458] Ibid
[459] Ibid
[460] Ibid
[461] POE 31
[462] Ibid
[463] Ibid
[464] Ibid

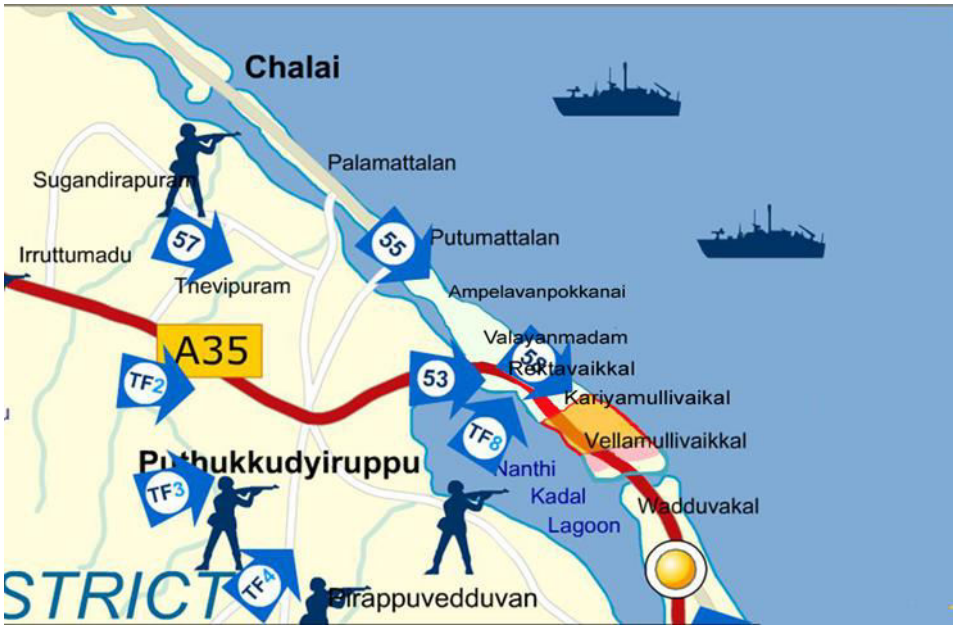
> anaesthetics, the little that remained was mixed with distilled water, but many amputations were performed without anaesthesia. Despite widespread malnutrition, some people continued to donate blood, but a general shortage of blood meant that a patient's own blood was often used, caught in a plastic bag, to be filtered through a cloth and re-transferred back into the same patient."[465]

On April 20th, following repeated shelling in NFZ2, the zone was divided into two parts. Around 100,000 civilians were taken into SLA custody as terrorist suspects, while approximately 150,000 civilians remained in NFZ2.[466] On April 27th, Mullivaikkal hospital was subjected to continuous shelling. Witnesses vividly describe the horrific scene, with bodies scattered everywhere, the smell of smoke from shells lingering in the air, and the overwhelming presence of blood and the screams of the injured.[467] Numerous women and children were reported dead. The OISL report confirms that there were eight separate impacts on the roofs of four hospital buildings within the hospital compound. Additionally, the report states that there was no presence of the LTTE in Valayarmadam and Mullivaikkal hospitals.[468]

[465] POE 34
[466] OISL ¶ 165-173
[467] Ibid
[468] Ibid

5.2.4.3 NFZ3

Safe Zone declared on 8 May 2009(source: Ministry of Defence)



Situation as at 13 May 2009 (source: Ministry of Defence)

On May 8th, 2009, the government declared the final and third no fire zone (NFZ3) within the previously designated NFZ2, which was under LTTE

control and spanned approximately 2 square kilometres.[469] The relevant information, including maps, was shared with international organizations and various divisions of the SLA.[470] Leaflets were also dropped to announce the establishment of NFZ3.[471]

Tens of thousands of Tamil civilians were crammed into this small strip of land.[472] The LTTE was positioned ahead of the civilians until May 12th. The shelling that occurred in this zone moved ahead of the LTTE positions and striked the Tamil civilians.[473] There was a health facility in NFZ3 that provided care for the civilians.[474] However, on May 12th, shells targeted the admission ward of this facility, resulting in the deaths of patients and medical workers.[475] Dead bodies began to pile up, and there was a severe shortage of medical supplies to treat the injured. On the same day, injured civilians with burn injuries indicated the possible use of chemical weapons.[476] The hospital was shelled again on May 13th, and the relentless shelling prevented the ICRC ship from evacuating the injured civilians.[477] By May 14th, the hospital had become completely immobilized.[478] Seriously injured individuals were left to suffer, and medical workers resorted to moving towards the SLA-controlled area with white flags.[479] Witnesses reported seeing hundreds of dead bodies scattered throughout NFZ3.[480] The OISL report suggests that the SLA may have engaged in the burial and burning of these bodies.[481]

5.2.5 Conclusion

The killings that occurred in all three NFZs exhibit a consistent pattern that is neither random nor accidental but rather deliberate, systematic, and organized. There are several key factors that contribute to this pattern.

Firstly, the government's declaration of no fire zones and the call for Tamil civilians to seek refuge within these zones were followed by repeated

[469] Ibid., 173 – 176
[470] Ibid
[471] Ibid
[472] Ibid
[473] Ibid
[474] Ibid
[475] Ibid
[476] Ibid
[477] Ibid
[478] Ibid
[479] Ibid
[480] Ibid
[481] Ibid

shelling of the very areas designated as safe. This pattern of declaring NFZs and then subjecting them to shelling is evident across all three zones.

Secondly, the presence of surveillance assets, the provision of GPS coordinates by humanitarian workers, and the established command structure for target selection and battle damage assessment all indicate a deliberate and calculated approach to the attacks. The use of indirect fire, which often leads to indiscriminate harm to civilians, is another common feature observed in all three NFZs.

Thirdly, the repetition of this pattern over a span of four months and across multiple locations strongly suggests that these incidents cannot be mere coincidences or isolated accidents. The consistent targeting of NFZs demonstrates a systematic and intentional strategy.

Fourthly, the deliberate targeting of medical infrastructure and food distribution centers within the NFZs further underscores the systematic nature of these attacks. Such targeting reveals a calculated effort to disrupt essential services and exacerbate the suffering of the civilian population.

Fourthly, when considering the overall pattern of conduct, it becomes apparent that there is an objective element of genocidal intent. Tamil civilians were coerced into relocating to spaces that were already designated to be targeted with indiscriminate fire. This pattern establishes a "manifest pattern of conduct," which is a crucial contextual element indicating collective genocidal intent.

Finally, after considering the absence of LTTE presence in the hospitals located within the NFZs, which eliminates the possibility of attacks being unintended consequences of military targets within the hospital compounds, and taking into account the unlikelihood of the LTTE targeting hospitals within their own territory where their injured cadres are treated, the fourth argument presented in this section emerges as the only plausible inference that can be objectively drawn from all the facts discussed.
Taken together, the consistent and repetitive nature of the attacks, the deliberate targeting of specific locations, and the overall pattern of conduct all point to a systematic and organized effort to inflict harm upon Tamil civilians, suggesting a collective genocidal intent.

5.3 Summary

In this chapter, I have presented two main arguments to support the assertion of a collective genocidal intent against the Tamil population in Sri Lanka.

Firstly, I delved into the historical and political context that led to the selection of Eelam Tamils as a target of attack. I explained how the construction of Sri Lanka as a preserve of Sinhala Buddhism, tied to the territorial identity of the country, created a belief system in which Sinhala Buddhists were considered the rightful custodians of the land. I discussed the mytho-historical portrayal of a centuries-old conflict between Tamils and Sinhalese, which further solidified the notion of Sinhala Buddhists as the "sons of the soil." I argued that targeting Tamils was a means to maintain the unitary state structure and establish supremacy in various aspects of society, including cultural, political, economic, educational, religious domains.

Secondly, I focused on the systematic and organized nature of the destruction of Tamil civilians within the NFZs. I refuted claims of unintentionality by highlighting the command structure involved in target selection, communication, battlefield intelligence, and damage assessment. I emphasized the repetitive and non-random pattern of criminal conduct observed throughout the attacks on the NFZs. This pattern aligns with the concept of a "manifest pattern of conduct," fulfilling another crucial element of collective genocidal intent.

In conclusion, the evidence presented supports the argument that Eelam Tamils were deliberately targeted as a distinct group, and the attacks on them followed a manifest pattern of criminal conduct. These findings strongly suggest the presence of a collective genocidal intent against the Tamil population in Sri Lanka.

6 Conclusion

In the first chapter, I highlighted the limitations of individualistic approaches to understanding genocidal intent. By critiquing knowledge-based and purpose-based approaches, I demonstrated their inadequacy in capturing the complexity of collective genocidal intent.

Moving on to the next chapter, I explored how the concept of collective genocide is reflected in the case laws of international criminal tribunals. I explained that collective genocide comprises both collective conduct and collective genocidal intent. I emphasized the significance of "substantial" destruction of a group as a collective actus reus, occurring at the context level. Additionally, I presented the structure of genocide as two-layered, distinguishing it from the traditional double-layered structure. This approach recognizes that genocide is a crime of scale, encompassing both the context level and the conduct level.

In the subsequent chapter, I delved into the concept of collective genocidal intent, emphasizing that individual genocidal intent cannot exist without the collective genocidal intent at the context level. I also elucidated how collective genocide transcends the minds of individual perpetrators and possesses an objective nature that can be deduced. I identified the two essential elements of collective genocidal intent as the "reason for targeting" and the "manifest pattern of conduct."

In this chapter, I applied the concept of collective genocidal intent to address two crucial questions: Why were Eelam Tamils targeted as a group between 1948 and 1983? And did the killings in the NFZs follow a non-random, repetitive, and organized pattern? I argued that both conditions are indeed fulfilled in this case, providing evidence of a collective genocidal intent against the Eelam Tamils in Sri Lanka.

In summary, this dissertation has challenged the traditional approach of seeking genocidal intent solely from the subjective perspective of individual perpetrators involved in the final phase of the Eelam War. Instead, it has argued that the collective or overall genocidal intent can be discerned through an objective legal standard. This standard involves analysing the pattern of criminal conduct and taking into account the historical and political context of discrimination and oppression faced by the Eelam Tamils. By adopting this approach, the dissertation aligns with the practices

observed in international criminal tribunals and provides a more comprehensive understanding of collective genocidal intent.

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