https://dx.doi.org/10.4314/olj.v13i1.3

THE GENOCIDAL *MENS REA* REQUIREMENT OF THE CRIME OF GENOCIDE UNDER THE ETHIOPIAN CRIMINAL LAW: DOMESTIC PRACTICE *VIS-À-VIS* THE INTERNATIONAL JURISPRUDENCE

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Abstract

Genocide is one of the most heinous crimes under international law, and it differs from other core crimes in that it requiresthe genocidal acts committed with 'intent to destroy' a protected group, in whole or in part. This article examines how Ethiopian courts have interpreted and proved the genocidal mens rea element in cases involving the crime of genocide, juxtaposing in light of international jurisprudence aimingto draw lessons from the approaches of the latter and have a critical understanding of the genocidal mens rea element of genocide. It examines the relevant legal provisions, cases, reports and academic literature on the subject, and compares them with the international practices using a doctrinal comparative legal research methodology. The research claims thatthe Ethiopian courts have treated genocide as a 'crime of plan' rather than a 'crime of specific intent'. It also maintains that the Ethiopian courts have conducted unsubstantiated genocidal trials. Moreover, the research asserts that Ethiopian courts turned genocide into a crime of a general intent by failing to establish the nexus between the physical result of genocide and the psychological state of individual perpetrators; and overemphasizing the victims' membership to a protected group. To this effect, Ethiopian courts risk trivializing the 'crime of crimes' and casting a shadow over the stigma attached to genocide. Besides, the article points out that, Ethiopian courts wrongly assumed that a genocidal plan was a prerequisite to establishing the genocidal intent. Therefore, it recommends that Ethiopian courts address and resolve these problems in future genocide trials.

Keywords:*Domestic Practice, Ethiopian Courts, Genocide, Genocidal mens rea, International ad hoc Criminal Tribunals, International Jurisprudence,*

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1. Introduction

Genocide, the 'odious scourge', the 'greatest of all crime', a 'crime of crimes', is a *jus cogens* crime that imposes *erga omnes* obligation on every state under international law.[1] This crime differs from other core crimes (such as crimes against humanity and war crimes) and ordinary crimes (such as homicide or murder, torture and rape), in that it requires the existence of intent to destroy a protected group. The intent to destroy a protected group is, thus, the core element that gives meaning to the underlying acts in the crime of genocide; it is the soul or essence of the crime. This requirement sets genocide apart as a particularly heinous crime that is subject to prosecution under international law. The aim of those committing genocide is to destroy, in whole or in part, members of a protected group, with individuals being targeted solely based on their affiliation with that group. The prohibition against the crime of genocide, thus, is aimed at safeguarding the protected groups' rights to survival and liberating mankind from such an odious scourge.

The meaning and proof of intent to destroy requirement, which endows genocide its speciality, however, appeared to be one of the most problematic and challenging aspects of the crime of genocide in international criminal law jurisprudence, and has emerged to be contentious. As a result, it has provoked an intensive scholarly discussion and created controversies in the application of international criminal law. These controversies remain unresolved and continue to be the subject of academic debate in the international criminal jurisprudence. Despite the difficulties, however, as the International Court of Justice (ICJ) boldly reckoned, the genocidal *mens rea* must be defined very precisely and established.[2] In the proceedings of international *ad hoc* criminal tribunals, great care was taken in defining and establishing the requirement for genocidal intent.

Ethiopia, which is not new for prosecuting and punishing genocide, have so far prosecuted thousands of individuals for genocide. Accordingly, the

[1] *Reservations to the Conventionon Genocide* (Advisory Opinion) [1951] ICJ Rep 59 ¶ 23.
[2] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 921 ¶ 187.

Ethiopian Courts have entertained plenty of genocide cases in the different trials, namely, the *Dergue* trials,[3] Oromo Liberation Front (OLF) civil and military leaders' and members' trials,[4] the *Anuak-Nuer* trials,[5] the *CUD* officials and members' trials,[6] and the *Oromo-Gumuz* trials.[7] Ethiopian courts, in the aforementioned genocide trials, have interpreted and applied either the Ethiopian Penal Code[8] or the Ethiopian Criminal

[3]The *Dergue* trials refer to the trials conducted before federal and regional courts to prosecute the officials and members of the *Dergue* for the offenses committed in the *Dergue*-WPE regime. The TGE established the Special Public Prosecutor's Office (Hereinafter 'the SPO') and mandated it to investigate and prosecute the crimes committed during the *Dergue* regime. See, The Special Public Prosecutor's Office Establishment Proclamation No. 22/92, entered into force 8 August 1992.Accordingly, thousands of former *Dergue* officials and members stood trial for the core international crimes including genocide. See, for instance, Federal High Court (FHC), *Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Trial Judgment) File No. 1/ 87 (12 December 2006); Amhara Supreme Court (ASC), *Special Prosecutor v Abera Ayalew et al.* (Trial Judgment) File No. 16170 (4 December 2006); Oromia Supreme Court (OSC), *Special Prosecutor v Colonel Debebe Hurrissie et al.* (Trial Judgment) File No. 2/89 (24 Apr 2003); Tigray Supreme Court (TSC), *Special Prosecutor v Tekeleberhan Negash et al.* (Trialjudgment) File No. 1/91 (04 November 2002).

[4] The OLF military and civil members trials refer to the trials conducted before the then Central High Court, later named the Federal High Court, to prosecute the OLF military and civil members for the atrocities committed against the ethnic *Amharas* and the 'EPRDF spies' in West and East Hararge, Oromia region. See, for instance, FHC, *Prosecutor v Beyan Ahmed et al.* (Trial Judgment) FileNo. 03139 (13 October 2004).

[5] The *Anuak-Nuer* trials are the trials conducted before the FHC to prosecute acts of killings perpetrated against 32 South-Sudanese refugees identified as belonging to the *Nuer* ethnic group. See, FHC, *Prosecutor v Gure Uchala Ugira et al.* (Trial Judgment) File No. 31855 (25 March 2005).

[6] The CUD officials and members trials refers to the trials conducted before FHC to prosecute members of an opposition political party named Coalition for Unity and Democracy (CUD) for an attempted genocide against the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) members and *Tigrian* ethnic group following the 2005 post-election conflict. See for instance, FHC, *Prosecutor v Hailu Shawul et al.* (Judgment) File No. 43246/97 (30March 2007); FHC, *Prosecutor v Berehene Kahasay et al.* (Judgment) File No. 45671/98 (19 April 2007).

[7] The *Oromo-Gumuz* trials are the trials conducted between 2008-2009 to prosecute alleged acts of genocide perpetrated by accused belonging to the *Gumuz* ethnic group against those they identified as belonging to the *Oromo* ethnic group and *vice versa*. See, for instance, FHC, *Prosecutor v Tadesse Jewanie Mengesha et al.* (Trial Judgment) File No. 70996(24 August 2009); FHC, *Prosecutor v Aliyu Yusufe Ibrahim et al.* (Trial Judgment) File No. 71000 (6September 2009).

[8]The Penal Code of the Empire of Ethiopia 1957, Proclamation No. 158/ 1957, Extraordinary Negarit Gazeta, 23 July 1957, entered into force 5 May 1958 (Hereinafter 'the Penal Code').

Code.[9]These codes have borrowed the Genocide Convention's definition of genocide with some modifications. Particularly, the *mens rea* element of genocide definition of these codes is more or less similar to that of the Genocide Convention. However, akin to the Genocide Convention and other international instruments, the element of 'intent to destroy in whole or part of the protected group' of genocide is defined nowhere in the penal and criminal codes. Perhaps more significantly, it is unclear whether the concept of special intent or *dolus specialis* gets emphasized in the definition of criminal intention under Article 58 of the penal and criminal codes.

In the aforementioned genocide trials, one can easily guess that Ethiopian courts possibly have also faced the challenges and complexity pertaining to the interpretation and proof of the specific intent element of the crime of genocide. Concerning this problem, it would not also be wrong to assume the worst possible scenario given the relative limitations related to the educational background and experience of prosecutors and judges in the area of international criminal law.[10] Besides, the Ethiopian justice machineries lacked the necessary material and financial resources to effect in-depth investigations and scrutiny.[11] Thus, it is safe to assume that what has been challenging and perplexing to international criminal courts have also posed challenges to Ethiopian courts. Exploring how Ethiopian courts entertained the perplexing issues pertaining to special intent compared to international criminal courts, hence, is vitally required.

The study, thus, aims to investigate the domestic practice of interpreting and proofing the specific intent element of the crime of genocide juxtaposing in light of international jurisprudence to draw lessons from the approaches of the latter and have critical understanding on the genocidal *mens rea* element

[9]The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/ 2004, entered into force 9 May 2005(Hereinafter 'the Criminal Code').
[10]Tadesse Simie Metekia, *Prosecution of Core Crimes in Ethiopia: Domestic Practice Vis-a-Vis International Standards,* vol 15 (Koninklijke Brill NV 2021), P238.
[11]Id.,P 92. See also, Marshet Tadesse Tessema, *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, Vol 18 (Asser Printing Press 2018), Pp.188, 280; Yacob Haile-Mariam, 'The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 HICLR 667http://reference. sabinet.co.za/ sa_ epublication article/ju_ahrlj_v6_n1_a4<accessed 10 December 2022>.

of genocide by employing a doctrinal comparative legal research methodology.[12]

The article consists of five sections. Following this introduction, the second section briefly explains the legal elements of the crime of genocide. The third section discusses the understanding, interpretation and practice of establishing the genocidal *mens rea* element of the crime of genocide under international jurisprudence. The fourth section briefly addresses the concept of criminal intention under the Ethiopian criminal law. The fifth section examines the domestic practice of interpretation and establishing of the genocidal *mens rea* element of the crime of genocide juxtaposing with the practice of international jurisprudence. Finally, section sixth concludes the study.

[12]The assumption for the use of comparative analysis is that the national and international prosecutions of genocide are practically counterpart in the sense that both domestic and international courts functionally enforce international rules that regulates the prevention and punishment of genocide. Besides, domestic legislations that criminalize genocide are often enacted to implement the state's obligations under the Genocide Convention. To this effect, The FDRE Constitution under Article 28(1) stipulates that '[c]riminal liability of persons who commit crimes against humanity, *as defined by international agreements ratified by Ethiopia* and by other laws of Ethiopia, such as *genocide*– shall not be barred by a statute of limitation'.Thus, it can tacitly be inferred that the constitution recognizes the international agreement as a locus of the definition of genocide. See, The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995,entered into force on 21 August 1995 (Hereinafter 'the FDRE Constitution or Constitution') Art. 28(1) [Emphasis added].

Besides, the Criminal Code listed crime of genocide under Book II title II of the special part of the code which is titled as 'crimes in violation of international law'. See, the Criminal Code, Book III Title II Chap. I. Moreover, according to the Federal Courts Establishment Proclamation, one of the cases on which the federal courts exercise jurisdiction is *crimes committed in violation of international laws*. This demonstrates the Ethiopian law has the international legal order as the locus of the criminal prohibition for genocide because genocide is one of the crimes that can be committed in violations of international law as stipulated in the Criminal Code. See, The Federal Courts Establishment Proclamation No.1234/2021, Art. 4(3).

In *Colonel Mengistu et al*., the Federal Supreme Court (FSC) held that, 'the Genocide Convention is the source of the Ethiopian law on genocide'. See, FSC, *Special Prosecutor v Colonel Mengistu et al.* (Appeals Judgment) Files No. 30181 (26 May 2008), P68. See also, Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009),P41;Kai Ambos, *Treatise on International Criminal Law,* Vol I: Foundations and General Part (Oxford University Press , 2013), P65.

2. The Legal Elements of the Crime of Genocide under the International and Ethiopian Law

The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as:

> (…) any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[13]

As noted by Marshet Tadesse 'the semantics of the crime of genocide has remained unchanged'[14] since the date of the adoption of the convention. Above all, it was incorporated *tel quel* into the Statutes of the *ICTY*,[15] the *ICTR*,[16] the ICC[17] and the African Criminal Court.[18] Interestingly, the definition of the crime that was once not even known in the criminal law of a single nation has been transposed into the national laws of different countries, including Ethiopia.

The crime of genocide, as defined under Article 2 of the Genocide Convention, consists of two requisite elements: the mental element or *mens*

[13]Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Hereinafter 'Genocide Convention or the Convention'), Art. 2.
[14]Marshet, *supra* note 11, P72.
[15]'Statute of the International Criminal Tribunal for the Former Yugoslavia', UNSC Res 827 (25 May 1993) UN Doc S/RES/827, annex [Hereinafter 'ICTY Statute'], Art. 4.
[16]'Statute of the International Criminal Tribunal for Rwanda', UNSC Res 955 (8 November 1994) UN Doc S/RES/955, annex [Hereinafter 'ICTR Statute'], Art.2.
[17]Rome Statute of the International Criminal Court Rome Statute of the International Criminal Court (adopted 7 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 [Hereinafter 'Rome Statute'], Art. 6.
[18]Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014) annex https://au.int/en/treaties/protocol-statute-african-court-justice-and-humanrights<accessed 20 December 2022> [Hereinafter 'Malabo Protocol'] Art 28B(f). In fact, the protocol included acts of rape or other forms of sexual violence to the material acts. See, ibid, Art. 28B (f).

rea (subjective element) and the material element or *actus reus* (objective element).[19]The *mens rea* of the crime of genocide, defined as the 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such,' is addressed in the opening clause or chapeau of article 2; whereas, the five prohibited acts enumerated under subparagraphs of article 2.

The material element of the crime of genocide consists of two elements: protected groups and prohibited acts. Protected groups are the four human groups that are considered the victims of genocide. Genocide can only occur against individuals belonging to one of these groups, and if the individual victim lacks membership to one of these groups, genocide will not occur.[20]Prohibited acts are the five objective conducts or acts that constitute the crime of genocide. These acts must be carried out to accomplish the goal of genocide: the destruction of the target group. The acts must be committed against the members of the targeted national, racial, ethnic, or religious group, and the individuals must be selected based on their membership to at least one of the protected groups.

The mental element is the requisite intention to commit the underlying prohibited act (the general intent) and the additional specific intent that requires the prohibited acts committed with the intent to destroy the protected group. The special intent requirement has been considered as a vital element that distinguishes genocide from other core crimes of international criminal law, in particular the crimes against humanity.[21] As one author noted 'genocide is special crime';[22] and it is this specific intent requirement that endows genocide its speciality. A reference to specific

[19]ICTY*, Prosecutor v Krstic* (Trial Judgment) IT-98-33-T (2 August 2001) ¶ 542;ICTR, *Prosecutor v Kayishema et al.* (Trial Judgment) ICTR-95-1-T (21 May 1999) ¶ 90. See also, William A. Schabas, *Genocide in International Law* (2nd edn, Cambridge University Press 2009), P172. Some writers, however, characterizes genocide by three constitutive elements. For instance, Kai Ambos suggests three constitutive elements for genocide; namely, the *actus reus*, the corresponding *mens rea* and the extended mental element (special subjective element). Kai Ambos, *Treatise on International Criminal Law*, Vol 2 (Oxford University Press, 2014) P5.

[20]David Nersessian, '*The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*', Texas International Law Journal(2007), Vol.37, P260.

[21]ICTR*, Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) ¶ 498ICTY*, Prosecutor v Jelisic* (Trial Judgement) IT-95-10-T (2 August 2001) ¶ 66.

[22]Alexander K.A Greenawalt, *'Rethinking Genocidal Intent : The Case for a Knowledge-Based Interpretation'* Columbia Law Review(1999),Vol.99, P2259.

intent in the text of genocide definition extends the *mens rea* element to a whole or ina part of a protected group, rather than being directed at an individual.[23] Thus, the prosecutor is required to prove the existence of the specific intent on the part of the perpetrator to warrant the entrance of a guilty genocide verdict. However, the meaning of this element has appeared to be one of the perplexing and challenging elements of the crime of genocide in international criminal law jurisprudence.

Ethiopia, as the first nation to ratify the Genocide Convention,[24] is among the few countries that domesticated the criminalization of genocide shortly after the Genocide Convention came into force.[25] As the Federal Supreme Court (FSC) rightly stated in *ColonelMengistu et al*. the source of Ethiopian law on genocide is the Genocide Convention.[26] Besides, currently, the Convention is an integral part of the law of the land as per Article 9(4) of the FDRE Constitution.

The Penal code under Article 281 defined genocide as follows:

> Art. 281. — *Genocide; Crimes against Humanity.*
>
> Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace: (a) Killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, (…).

[23]Nersessian, *supra* note 20, P263.

[24] Ethiopia has signed the Genocide Convention on 11 Dec. 1948 and ratified it on 1 Jul. 1949, before any signatory state. The status list of the convention can be checked at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en<accessed 26 November 2022>.

[25] Ethiopia has incorporated the Convention's crime of genocide in its penal code in 1957, nine years after the adoption of the Convention. See, The Penal Code, Art. 281.

[26]FSC*, Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Appeals Judgment), File No. 30181 (26 May 2008), P68.

As can be seen from the aforementioned definition, the title of the article employs both the terms 'genocide' and 'crimes against humanity' with a semicolon separating them. In the *Dergue* trials, the SPO in all of the indictments phrased the crime under which the *Dergue* officials accused as 'genocide; crimes against humanity'. This led the defendants in *ColonelMengistu et al.* object to the indictment for the dismissal of the charge on the ground of obscurity. The defendants claimed it was not clear whether they were charged for genocide or crimes against humanity.[27] The SPO in its response admitted that the Article consists of two different crimes; and it further described genocide as a subset of crimes against humanity and explained the defendants were charged under the crime of genocide not crimes against humanity.[28] The Federal High Court (FHC) then ruled that the phrase 'crimes against humanity' is an adjunct that explains the crime of genocide as one form of crimes against humanity and held that the subject matter of article 281 was exclusively genocide.[29] Scholars share the view that the additional phrase 'crimes against humanity' in the title of the article was only meant to describe genocide as one category of crimes against humanity and had no additional meaning.[30] As Tadesse rightly stated 'the phrase 'crimes against humanity' in Article 281 was a redundant addendum to the word 'genocide'[31] because the material and *mens rea* elements listed under Article 281 are the notorious constituent elements of genocide under international criminal law jurisprudence. Besides, the article's use of semicolon instead of conjunction ('and') indicates the offence was one which is 'genocide'.The new Criminal Code has cleared the flaw of the Penal Code by removing the reference to genocide as a crime against humanity from the title of the provision on genocide.[32]

The Criminal Code defines genocide as:

> Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a nation, nationality, ethnical, racial,

[27]FHC*, Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Ruling on Preliminary Objections) File No. 1/87 (10 October 1995), Pp104-105.
[28]*Id*.,P104.
[29]*Id*.,P105.
[30]Marshet, *supra* note 11, P103; Taddese, *supra* note 10, Pp199-201.
[31]Taddese,*Id*.,P200.
[32]The Criminal Code, Art. 269.

> national, colour, religious or political group, organizes, orders or engages in: (a) killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance, (…).[33]

Akin to the Genocide Convention and other international instruments, the definition of genocide set forth under Article 281 of the repealed Penal Code and Article 269 of the Criminal Code consists of two requisite elements, namely the requisite intent (*mens rea*) and the prohibited acts (*actus reus*). Concerning the material elements, the Codes similarly outline five exhaustive individual acts of genocide that may, if the required *mens rea* is met, be able to warrant conviction under genocide.[34] The lists of prohibited acts under these Codes are more or less closely similar to that of the Genocide Convention but not one and the same.With regard to the protected groups, the Penal Code listed five groups, namely, national, ethnic, racial, religious and political as protected;[35] whereas, the Criminal Code enlarged the scope of the protected group with an addition of 'nation', 'nationality' and colour to the list of protected groups to the five groups under the Penal Code.[36] The enumeration of additional protected groups to the list of groups set forth under the Genocide Convention is nothing wrong as long as there is no international obligation that abides states not to do so. Indeed, the addition of other groups, in particular, the political group to the list of protected groups is commendable because it responds to the wide criticism aimed at the Genocide Convention for being blind spots and providing narrow protection.

With regard to the *mens rea,* akin to the Genocide Convention, both codes specify the required special intent of the crime of genocide. The Criminal Code, in the opening paragraph of Article 269 provides that: 'whosoever, in

[33]The Criminal Code, Art.269
[34]The Penal Code, Art. 282;The Criminal Code, Art. 269.
[35]The Penal Code, Art. 281.
[36]The Criminal Code, Art. 269.

time of war or in time of peace, *with intent to destroy, in whole or in part*, [a protected group] (…)'. Thus, it's discernible from the reading of the provisions of these codes, in order to convict individuals for the crime of genocide under Ethiopian criminal law it must be proved that the individual act of genocide is committed with intent to annihilate the protected group in whole or in part. Nevertheless, the Amharic version of the Penal Code instead of using 'በማሰብ' (a verb form of the noun'አሳብ'which denotes 'intention') in the opening paragraph of the provision on genocide, employed'በማቀድ' (a verb form of 'ዕቅድ' which in literal terms mean 'plan'). However, the Amharic version of the Criminal Code has fixed this confusion as it employed 'በማሰብ' instead of 'በማቀድ'.

As far as the ingredients of genocidal *mens rea* are concerned, the phrase 'as such' which was, in the view of the Appeals Chamber of the ICTR, added to the chapeau of Article II of the Genocide Convention '[to]reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime'[37] is missing from Ethiopian criminal legislations. The implications of the exclusion of the phrase as such from the definition of genocide and its practical effect on genocide trials under Ethiopian criminal jurisprudence are yet not clear. Overall, apart from the missing phrase of 'as such' from the genocide definition, both Codes reproduced the wordings of Genocide Convention on the ingredients of the required *mens rea* element of genocide.

3. The Genocidal *Mens Rea* Requirement of the Crime of Genocide and Its Interpretation and Proof under the International Criminal Law Jurisprudence

The section discusses the issues of interpretation and practice of establishing the genocidal *mens rea* requirement of the crime of genocide in the international jurisprudence.

[37]ICTR, *Prosecutor v Niyitegeka* (Appeal Judgment) ICTR-96-14-A (9 July 2004) ⁋ 53.

3.1. The Interpretation of Genocidal *Mens Rea* Requirement of the Crime of Genocide

The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber emphasized that courts can only convict a perpetrator if they have committed the acts with the intent to destroy the targeted group.[38] This makes genocide a 'crime of ulterior intent or a goal-oriented crime,' making it a 'special crime'.[39] However, the specific intent of genocide has been a contentious issue, with debates over whether it requires the perpetrator to commit acts with all their will to achieve the destruction of the targeted group, or if it is sufficient for the perpetrator to know the destructive objective of the campaign. Dealing with these issues, the international *ad hoc* tribunals have dwelled on the notion of intent rather than knowledge, and as a result, adopted the approach commentators in the literature referred the 'purpose-based'. Yet, the purpose-based approach has faced critical scrutiny from academic commentators.Scholars have contrasted the purpose-based approach and come up with different approaches that ought to be followed in elucidating the specific intent of genocide; namely: knowledge-based and dual approaches. Each of these approaches will be meticulously discussed separately in the following subsections.

3.1.1. The Purpose-based Concept of Genocidal *Mens Rea*: The Prevailing Approach in International Case Law

The purpose-based interpretation of genocidal intent which dwells on intent and places a significant emphasis on the *volitional* aspect, instead of the knowledge and cognitive aspect, originated in the seminal *Akayesu* case, which greatly contributed to elucidating the 'intent to destroy' requirement of genocide. The *Akayesu* Trial Chamber referred the 'intent to destroy' as a 'special intent' or *dolus specialis*'.[40] The Chamber stated the special intent as a well-known concept of criminal law in the Roman-continental legal system and described it as 'the key element of an intentional offence, which offence

[38]ICTY, *Prosecutor v Krstic* (Appeal Judgment) IT-98-33-A (19 April 2004) ¶ 134
[39]Kai Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' International Review of the Red Cross (2009),Vol.91, P 835. See also, ICTY, *Prosecutor v Jelisic* ,*supra* note 21, P66;Greenawalt, supra note 22,P2259.
[40]*Prosecutor v Akayesu*, *supra* note 21, ¶ 498.

is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.'[41]

More importantly, the *Akayesu* Trial Chamber defines the special intent as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator *clearly seeks to produce the act charged*'[42] or, in other words, has 'the *clear intent to cause the offence*'.[43] Thus, according to this Chamber, the perpetrator is only culpable if he/she clearly intended the destruction of a group, and it is not sufficient for him to have known that he was contributing to the destruction of a group. This interpretation of genocidal intent has been essentially adhered to in the subsequent case law of the ICTR.[44] The *Rutaganda* Trial Chamber, in addition to the findings of the *Akayesu* also construed the genocidal intent as an *aim* to destroy a group,[45] or, in other words, as an *ulterior purpose* to destroy one of the protected groups.[46]

The case law of the ICTY, concurring with the case law of ICTR, followed the purpose-based interpretation of genocidal intent, with even more straightforward explanations. In *Jelisic,* the prosecutor pleaded with the broader understanding of the required intent requirement and proposed the purpose-based and knowledge-based interpretation of genocidal intent as alternatives.[47] However, the *Jelisic* Trial Chamber rejected the proposed mere knowledge standard, and employed the *Akayesu* definition. The Chamber confirmed that 'an accused could not be found guilty of genocide if he himself did not share the *goal of destroying* in part or in whole a group even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of a group'.[48] The Chamber acquitted *Jelisic* because it was not satisfied that *Jelisic,* who used to call himself the Serbian Adolf*,* 'was motivated by the *dolus specialis* of the crime

[41]*Id.*, ¶ 518.
[42]*Id.*, ¶ 498[Emphasis added].
[43]*Id*., ¶ 518 [Emphasis added].
[44]ICTR, *Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T (6 December 1999) ¶ 61; ICTR*, Prosecutor v Bagilishema* (Trial Judgment) ICTR-95-1A-T (7 June 2001) ¶ 62*;* ICTR, *Prosecutor v Musema* (Trial Judgment) ICTR-96-13-T (27 January 2000) ¶164.
[45]*Prosecutor v Rutaganda,Id.*, ¶ 55.
[46]*Prosecutor v Rutaganda,Id.*,¶ 60.
[47]*Prosecutor v Jelisic, supra* note 21, ¶ 85.
[48]*Prosecutor v Jelisic, supra* note 21, ¶ 86[Emphasis added].

of genocide' as he targeted and killed Muslims '*arbitrarily* rather than with the *clear* intention to destroy [them]'.[49] The Appeals Chamber left the legal standard set out by the Trial Chamber intact and it aptly noted 'specific intent requires that the perpetrator […] *seeks to achieve*' the destruction of a group.[50]

This interpretation has been largely adhered in subsequent case law of the ICTY, as it reaffirmed the purposeful standard of the degree of the required intent in the crime of genocide. The Trial Chamber in *Krstic* characterizes genocide as 'acts committed with the goal of destroying all or part of a group'.[51] The *Krstic* Appeals Chamber also rejected the knowledge-based interpretation of intent and confirmed the strictness of the specific intent requirement, which according to the Chamber reflects the gravity of the crime of genocide.[52]Besides, in *Sikirica,* the ICTY Trial Chamber followed *Jelisic* Appeal Judgment's 'seeks to achieve' standard. The *Blagojevic* Trial Chamber also rejected the knowledge-based genocidal intent interpretation in stating '[i]t is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group'.[53] Similarly, in *Brdjanin* judgment a goal-oriented approach was a preferred approach to elucidate the specific intent of the crime of genocide.[54]

The *ad hoc* tribunals' established jurisprudence of the interpretation of the specific intent of the crime of genocide has also been followed by other authorities. The ICJ in the case involving Bosnia-Herzegovina and Serbia-Montenegro, referring the *Kupreskicet al* ICTY Trial Chamber jurisprudence, referred to the specific intent of genocide as an 'extreme form of wilful and deliberate acts designed to destroy a group or part of a group'.[55]Correspondingly, the Darfur Commission of Inquiry in its report

[49]*Prosecutor v Jelisic, supra* note 21, ¶ 108 [Emphasis added].
[50]*Prosecutor v Jelisic* (Appeal Judgement) IT-95-10-A (5 July 2001) ¶¶ 42-52, 46[Emphasis added].
[51]*Prosecutor v Krstic*, *supra* note 19, ¶ 571.
[52]*Prosecutor v Krstic, supra* note 38, ¶ 134.
[53]ICTY, *Prosecutor v Blagojevic and Jokic* (Trial Judgment) IT-02-60-T (17 January 2005), ¶ 656.
[54]ICTY, *Prosecutor v Brdjanin* (Trial Judgement) IT-99-36-T (1 September 2004) , ¶ 695.
[55]*Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 2,¶ 188.

states that 'an aggravated criminal intention or *dolus specialis* (…) implies that the perpetrator *consciously desired* the prohibited acts he committed to result in the destruction' of the protected group'.[56] However, the Commission, in addition to the offender's desire to destroy, requires that the individual perpetrator 'knew that his acts would destroy, in whole or in part, the group as such'.[57] Hence, it does not merely adopt the purpose-based approach but also includes foresight or *dolus eventualis* regarding the realization of the destruction in its interpretation, thereby posing a more stringent two-fold requirement to establish genocidal intent. Lastly, the ICC Pre-Trial Chamber in *Al Bashir* Warrant Decision followed the purposive-based interpretative approach referring to it as 'traditional approach'.[58]

To recapitulate, the essence of purpose-based interpretation of genocidal intent relies on intent and focus is placed on each individual offender. In general, the *ad hoc* tribunals jurisprudence view is that the 'intent to destroy' in the crime of genocide requires a perpetrator to act with the *aim*, *goal*, *purpose* or *desire* to destroy part of a protected group,which in essence, 'expresses the volitional element in its most intensive form'.[59] Hence, the case law's approach to the interpretation of intent is narrow; as a result deviates from the traditional understandings of intent which encompassed abroad range of mental states, including the cognitive aspect. Critics have claimed the purpose-based approach raises problematic evidentiary issues which have allowed many *genocidaires* to escape conviction for the crime;[60] or which 'will compel the court to squeeze ambiguous fact patterns into the

[56]'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur' (1 February 2005) UN Doc. S/2005/60 , ¶ 491 [Emphasis added] (Hereinafter 'Darfur Report'). Previously the phrase 'consciously desired' was used by ICTY Prosecution in*Jelisić* and *Krstić* cases. *Prosecutor v Jelisic* (Appeal Judgement) *supra* note 50, ¶ 42; *Prosecutor v Krstic* (Trial Judgment) *supra* note 19, ¶ 569. 'Conscious desire' is a defining element of the 'purpose' level of culpability under the Model Penal Code. It defined 'purpose' as follows: '[a] person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a result (…)'. Model Penal Code, Section 1.13(12) [Emphasis added].

[57]Darfur Report ,*Id*., ¶ 491.

[58]ICC, *Prosecutor v Omar Al Bashir* (Warrant Decision) Pre-Trial Chamber IICC-02/05-01/09 (4 March 2009), ¶¶ 139-40.

[59]Ambos, *supra* note 39, P838.

[60]Katherine Goldsmith, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5 Genocide Studies and Prevention 238, 241;Greenawalt (n 22) 2280-81.

specific intent paradigm;'[61] or make the judgment unpredictable.[62] Consequently, commentators reject a purpose-based approach in favor of a knowledge-based or mixed approach, which this study will discuss under the following sub-sections.

3.1.2. The Knowledge-based Concept of Genocidal *Mens Rea*

The knowledge-based understanding of genocidal intent/specific intent emphasizes the cognitive aspect of *mens rea* or intention, in contrast to the volitional aspect the purpose-based approach dwells on.[63] The approach, according to the proponents, has the advantage of easing the burden of proving the specific intent element of genocide which is inherent in the purpose-based approach.[64] Perhaps, in the *ad hoc* tribunals, the prosecution in some cases has proposed and pleaded with the knowledge-based understanding of specific intent as an alternative.[65] The scholars' propositions of knowledge-based understanding of genocidal intent are not identical as it has different variants.[66]

Generally speaking, the knowledge-based approach of genocidal intent shifts the emphasis from the volitional aspect of intent to the cognitive aspect of intent. According to this approach, to make an individual perpetrator

[61]Greenawalt, *supra* note 22, P2281.
[62]Hans Vest, *A Structure-Based Concept of Genocidal Intent*,Journal of International Criminal Justice (2007),Vol.5, P795.
[63]*Id.*,P796.
[64]*Ibid.*
[65]*Prosecutor v Krstic* (Trial Judgment), supra note 19, ¶ 569: '[the Prosecutor] contends that the acts have been committed with the requisite intent if : the accused consciously desired to result in the destruction (…) or *he knew his acts were destroying*, in whole or in part, the group, as such; or *he knew that the likely consequence of his acts would beto destroy*, in whole or in part, the group, as such' [Emphasis added]. See also, *Prosecutor v Jelisic, supra* note 21, ¶ 85: '[the Prosecutor] claims that it suffices that he *knows that his acts will inevitably*, or even *only probably*, result in the destruction of the group in question' [Emphasis added].
[66] See, for instance, Greenawalt, supra note 22, P 2259; A. Gil Gil, Derecho Penal Internacional: Especial consideracion del delito de genocidio (Madrid, Editorial Tecnos, 1999), P259 ff., cited in Hans Vest, 'A Structure-Based Concept of Genocidal Intent' Journal of International Criminal Justice(2007),Vol.5,P781;Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such',* Leiden Journal of International Law (2001), Vol.14, P403;Hans Vest, 'A Structure-Based Concept of Genocidal Intent', Journal of International Criminal Justice(2007), Vol.5, P783;Claus Kress, *'The Darfur Report and Genocidal Intent,* Journal of International Criminal Justice (2005), Vol.3, P562.

answerable for the genocidal act(s) committed, it is not required that the perpetrator acted with the purpose, aim, or goal of destroying the protected group, instead proof of knowledge of the genocidal campaign and the eventual destructive result of the genocidal act(s) is sufficient. The approach has an assumption that genocide can only be committed with collective action and hence, ruled out the possibility of lone *genocidaire* without showing persuasive justifications. Besides, in determining individual genocidal intent, it relies on the test of the perpetrator's knowledge of the feasibility of destructive result of the genocidal act(s). Critics have claimed shifting an emphasis from the mental state of the perpetrator to the destructive result contradicts the very essence of crime because genocide is defined by the specific intent to bring destruction, not by the destructive result of the genocidal act(s).[67]

3.1.1. The Dual Approach of the Genocidal *Mens Rea* Concept

Kai Ambos, a German jurist and judge, suggested 'a twofold solution distinguishing between low-level and mid-/high-level perpetrators',[68] which is, at least, partially influenced by the 'structural congruity' between the crime of genocide and crimes against humanity.[69] According to his 'twofold solution', there is a 'twice twofold structure', namely, 'the two mental elements [the 'general intent' and 'intent to destroy'] and the dual point of reference (individual acts and genocidal context) which 'requires a differentiation according to the status and role of the participant in the genocidal enterprise.'[70] As a result, he maintains the traditional purpose-based with regard to the top- and mid-level perpetrators; and proposes the knowledge-based interpretation to be applicable to low-level perpetrators for doctrinal and policy justifications.[71]

[67]Janine Natalya Clark, '*Elucidating the Dolus Specialis : An Analysis of ICTY Jurisprudence on Genocidal Intent'*, Criminal Law Forum (2015), Vol. 26, P 518. See also, Nina H. B. Jørgensen, 'The Definition of Genocide : Joining the Dots in the Light of Recent Practice', International Criminal Law Review(2001), Vol.1, P 293.
[68]Ambos, *supra*note 39, P845.
[69]*Id.*,P848.
[70]*Id*.,P858.
[71]*Ibid*.

3.2. The Relevance of Genocidal Plan or Policy in the Context of 'Intent to Destroy' Requirement of Genocide

The case law of international *ad hoc* tribunals, as held in *Jelisic* Appeals Judgment, has indicated the existence of genocidal plan or policy is not a legal prerequisite for a finding that genocide has been committed.[72] The *Jelisic* Trial Chamber claimed that the drafters of the Genocide Convention intentionally omitted a requirement of premeditation; which evidenced that genocide could be unplanned and possibly committed at an isolated level by the individual social deviant.[73] Even though the case law of international *ad hoc* tribunals rejected a genocidal plan or policy as a constituent element of the crime of genocide, it emphasized the existence of a genocidal plan or policy will provide strong evidence of an intention to destroy a protected group. In this regard, the *Jelisic* Appeals Chamber noted that 'in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases (…). The existence of a plan or policy may facilitate proof of the crime'.[74]

Considering the practical aspects, the *Kayishema* Trial Chamber even went further in emphasizing that 'it is not easy to carry out genocide without such a plan, or organisation'.[75] Besides, the Chamber held that, given its inherent gravity, it is hardly possible to think of the crime of genocide absent some or indirect involvement on the part of the state.[76] Casssese has also claimed that even genocidal acts of killing and causing serious bodily or mental injury against members of a protected group are 'hardly conceivable as isolated and

[72] *Prosecutor v Jelisic*, *supra* note 50, ¶ 48: ('existence of a plan or policy to commit genocide is not a legal ingredient of the crime of genocide'). See also, *Prosecutor v Jelisic* supra note 21, ¶ 100; *Prosecutor v Kayishema et al., supra* note 13, ¶¶ 91, 94:('a specific plan to destroy does not constitute an element of genocide'); ICTR, *Prosecutor v Kayishema et al.* (Appeal Judgment) ICTR-95-1-A (1 June 2001) ¶ 138; *Prosecutor v. Blagojevic and Jokic* , supra note 53, ¶ 656.

[73] *Prosecutor v Jelisic*, *supra*note 21, ¶ 100.

[74] *Prosecutor v Jelisic, supra* note 50, ¶ 48. See also, *Prosecutor v Kayishema et al.* , *supra* note 19, ¶ 276 ('the existence of [genocidal] plan would be strong evidence of the specific intent requirement for the crime of genocide');*Prosecutor v Kayishema et al., supra* note 72, P138.

[75] *Prosecutor v Kayishema et al.*, *supra*note 72, ¶ 94.

[76] *Ibid*.

sporadic events' if the state agents do not tolerate, approve and condone.[77] Shabas, underlying the paramount practical importance of a genocidal plan or policy in the crime of genocide, boldly noted that there had not been any convictions for crimes of genocide in the absence of planning or policy, unlike convictions for crimes against humanity.[78] Despite the *ad hoc* tribunals' preference fora purpose-based approach in elucidating genocidal intent, judges on every occasion discuss the existence of a genocidal plan or policy, and use the defendant's knowledge of such circumstances to determine the existence of genocidal intent;[79] an attempt to 'introduce the knowledge-based approach through the evidentiary backdoor'.[80]

The *Kayishema* Trial Chamber emphasized the importance of a genocidal plan or policy in the crime of genocide, stating that it is not easy to carry out such acts without such a plan or organization. The Chamber also noted that even genocidal acts against protected groups are not isolated events if state agents do not tolerate, approve, and condone them. The Chamber noted that there have not been convictions for crimes of genocide without planning or policy, unlike crimes against humanity. Despite the preference for a purpose-based approach, judges often discuss the existence of a genocidal plan or policy, using the defendant's knowledge to determine intent.

3.3. Establishingthe 'Intent to Destroy' Element of Genocide

In addition to the issues related to the meaning and degree of the required intent, proof of genocidal intent constitute one of the most problematic facets of the crime of genocide, in particular to its 'intent to destroy' requirement. Intent is a state of mind that cannot be easily ascertained by material facts. Fuller once remarked, 'if intention is a fact, it is a private fact inferred from outward manifestations'.[81] The seminal *Akayesu* judgment also pointed out that 'intent is a mental factor which is difficult, even impossible, to

[77]Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), Pp140-41.
[78]Schabas, *supra* note 19, P246.
[79]*Id*., 247.
[80] Claus Kress, *The Crime of Genocide under International Law,* International Criminal Law Review(2006), Vol.6, P571.
[81]Lon L Fuller, *The Morality of Law* (*Storr's Lectures on Jurisprudence*) (2nd edn, Yale University Press 1969), P72.

determine'.[82] The problem linked to proof of intent was more explained in *Gacumbitsi* Appeals Judgment: '[b]y its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state.[83] The *Kayishema et al* Appeals Chamber also stated 'explicit manifestations of criminal intent are (…) often rare (…)'.[84]

When the required intent is highly specific, such as the requirement of intent to destroy in the crime of genocide, it would be less susceptible to direct proof; hence poses more challenge to ascertain.[85] Ascertaining general intent whichis linked to physical acts is relatively a straightforward task as it can easily be inferred from the commission or omission of physical acts; this is not true for a special intent. Thus, there are inherent evidentiary problems linked to proof of genocidal intent. Perhaps, it is the evidentiary problems related to genocidal intent which caused the emergence of divergent approaches to genocidal intent interpretation in international criminal law jurisprudence.

The case law of international *ad hoc* criminal tribunals has greatly contributed to how to determine the intent of the perpetrator in cases where it looks difficult to do so. As pointed out above, genocidal intent is not susceptible to direct proof, thus, its existence can only be inferred from the factual circumstances of the crime.[86] The ICTR Trial Chamber in *Akayesu* prominently noted, 'in the absence of a confession from the accused, his intent can be inferred from a certain number of *presumptions of facts*',[87] and 'may be demonstrated by a pattern of purposeful action'.[88] Importantly, the case law required that '[w]here an inference needs to be drawn, it has to be *the only reasonable inference available on the evidence*'.[89] Besides, it's also

[82]*Prosecutor v Akayesu* (Trial Judgment), *supra* note 21, ¶ 523.
[83]ICTR, *Prosecutor v Gacumbitsi* (Appeals Judgement) ICTR-2001-64-A (7 July 2006), ¶ 40.
[84]*Prosecutor v Kayishema et al.* (Appeals Judgment), *supra*note 72, ¶ 525.
[85]Fuller, *supra* note 81, P72.
[86]*Prosecutor v Jelisic* (Appeal Judgement), supra note 50, P47;*Prosecutor v Krstic* (Appeal Judgment), *supra* note 38, ¶ 34
[87]*Prosecutor v Akayesu* (Trial Judgment), supra note 21, ¶ 23 [Emphasis added].
[88]*Prosecutor v Kayishema et al.* (Trial Judgment), *supra* note 19, ¶ 93.
[89]*Prosecutor v Brdjanin* (Trial Judgement), *supra* note 54, ¶ 970 [Emphasis in the original]. See also, ICTY, *Prosecutor v Stakic* (Decision on Rule 98 bis Motion for Judgement of Acquittal) IT-97-24-T (31 October 2002), ¶ 17.

noted that all available evidence should be taken altogether in ascertaining a genocidal *mens rea*, instead of considering it separately.[90]

While the approach of *Akayesu* is to a very large extent followed by the subsequent case law of the *ad hoc* tribunals, there are facts and circumstances that the chambers commonly used as indicia of the genocidal intent. These indicia can be categorized into three, namely, the evidence of context, the words and deeds of the perpetrator, and the existence of a plan or policy.The evidence of the context is useful in determining the intention of the perpetrator especially 'where the intention of a person is not clear from what that person says or does'.[91]With regard to words and deeds of the perpetrator, the Trial Chamber in *Bagilishema* pointed out 'the [a]ccused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action'.[92] In *ad hoc* tribunal's case law, derogatory utterances of the perpetrator before, during or after the commission of the acts have been considered as a reference to possession of genocidal intent. For instance, in *Kayishemaet al* Trial Judgment, the utterances of the two defendants, such as referring to the Tutsis as 'coach-roaches', 'dirt' or 'filth', were taken into account to infer genocidal intent.[93]

Last but not least, even though genocidal plan or policy is not a legal ingredient of the crime of genocide, it has paramount evidentiary importance in establishing a genocidal intent. The case law of *ad hoc* tribunals commonly underlined that for the purpose of proving genocidal intent, 'the existence of a plan or policy may become important in most cases'; as a result used it to practically infer genocidal intent.[94]However, only seldom can one find official documents or statements that can outline the existence of a genocidal plan or policy. When the prosecution is unable to tender into

[90]ICTY, *Prosecutor v Stakic* (Appeal Judgment) IT-97-24-A (22 March 2006) ⁋ 55;ICTY, *Prosecutor v Karadžić* (Trial Judgment) IT-95-5/18-T (24 March 2016) ⁋ 550.
[91]*Prosecutor v Bagilishema*, *supra* note 44, ⁋ 63.
[92]*Ibid.*
[93]*Prosecutor v Kayishema et al* (Appeals Judgment), *supra* note 72, ⁋ 538. See also, ICTR, *Prosecutor v Ntakirutimana* (Judgment and Sentence) ICTR-96-10, ICTR-96-17-T (21 February 2003) ⁋ 828, *Prosecutor v Jelisic* (Trial Judgement), *supra* note 21,⁋ 102
[94]*Prosecutor v Jelisic* (Trial Judgement), *supra* note 21, ⁋ 48See also, *Prosecutor v Kayishema et al* (Appeals Judgment), *supra* note 72, ⁋⁋ 94, 276; *Prosecutor v Krstic* (Trial Judgment), *supra* note 19, ⁋⁋ 572-73; ICTY, *Prosecutor v Sikirica et al.* (Judgement on Defence Motions to Acquit) IT-95-8-T (3 September 2001), ⁋⁋ 62, 92.

evidence a direct proof to outline genocidal plan or policy it can be inferred from other facts or circumstances. In this regard the *Kayishemaet al* Judgment identified helpful indicia that can infer the existence of a plan: 'the existence of lists of persons to be executed (…); the dissemination of extremist ideology through (…) media; the use of the civil defence programme and the distribution of weapons to the civilian population; and the 'screening' carried out at many roadblocks.[95]

4. The Concept of Criminal Intention under the Ethiopian Criminal Law

According to Article 23(2) of the Criminal Code, the mental or moral element is a required condition for the existence of crimes. The repealed Penal Code of Ethiopia had also the same stipulation.[96] Therefore, a crime is only completed and punishable when this element is present in the author of the illegal act perpetrated.[97]The Ethiopian Penal and Criminal Codes recognize two broad forms of degree of *mens rea*:criminal intention and criminal negligence.[98] Criminal intention can be divided into direct intention and indirect intention.[99]

Direct intention is when someone 'performs an unlawful and punishable act with full knowledge and intent in order to achieve a given result'.[100] The 1957 Penal Code defined direct intention similar to the Criminal Code; however, in the English translation of the Code, the phrase 'in order to achieve a given result' was missing.[101] Perhaps, the Amharic translation of the Penal code, like the Criminal Code, included the mentioned phrase.Therefore, the direct intention in Ethiopian criminal law implies both

[95]*Prosecutor v Kayishema et al.* (Appeals Judgment), *supra* note 72, ¶ 139.
[96]The Penal Code of Ethiopia, Art. 23(2): It reads '[t]he criminal offence is only completed when all its legal, material and moral ingredients are present'.
[97]The Criminal Code, Art. 23(4).
[98]The Penal Code, Art. 57(1), 58(1); The Criminal Code, Art. 57(1), 58(1).
[99]The Penal Code, Art. 58(1) ; The Criminal Code, Art. 58(1). Perhaps, the Criminal Code nowhere employs the words 'direct' and 'indirect' intention to refer the classification of criminal intention under Article 58. It is the Explanatory Note (*Hateta mikniat*) of the Criminal Code which referred the classification of criminal intention under Art. 58(1)(a) and 58(1)(b) as 'direct' and 'indirect' intention, respectively. 'The Explanatory Note of the Amended FDRE Criminal Code,P36.
[100]The Criminal Code, Art. 58(1)(a).
[101]The Penal Code of Ethiopia, Art. 58(1).

knowledge (cognitive) and intent (volition); and these two elements must be present in combination for direct intention to be realized. With regard to the meaning of these elements, the Ethiopian criminal law does not give definitions for it. According to Graven, the drafter of the Penal Code, knowledge relates to the awareness of factual circumstances and consequences that would follow the conduct, whereas intent, on the other hand, refers to the 'desire to act or to produce the consequences the act brought about'.[102]However, it is not easy to understand what 'intent' really connotes in criminal law, as the meaning of criminal intent over time has not been consistently clear.[103] The term 'intent' denotes different meanings in various jurisdictions and it's the source of confusion and controversy in some legal system.

Coming to the second degree of criminal intention, the Criminal Code stipulates that, intention also refers performing 'an unlawful and punishable act with full knowledge and intent', but without aiming at a specific result, yet foreseeing the possibility of such a result occurring.[104] Even though the explanatory note of the criminal code refers this concept 'indirect intention', the truth is that the concept covered under this provision is only *dolus eventualis* as the degree of possibility mentioned under the provision does not cover certainty; i.e. 'such consequences *may* follow' instead of 'such consequences will certainly follow'.[105]

This makes one curious about the status of *dolus indirectus* in the Ethiopian criminal law.The question is that, does the phrase 'with full knowledge and intent in order to achieve a given result' encompass the undesired result that the doer has certain knowledge in the inevitable circumstance? Graven claims that intent encompasses undesired result which the doer has certain knowledge that a given result would occur.[106] According to him, in these cases the undesired result that involves knowledge of certainty or near

[102]Jean Philippe Graven, *An Introduction to Ethiopian Penal Law* (The Faculty of Law, Haile Sellassie I University in association with Oxford University Press 1965),P153-54, 155.
[103]Greenawalt, supra note 22, P2266.
[104]The Criminal Code, Art. 58(1)(b). See also, The Penal Code of Ethiopia, the second paragraph of Art. 58(1).
[105]The Criminal Code, Art. 58(1)(b).
[106]Graven, *supra*note 101, P156.

certainty 'deemed to be desired'.[107] Dejene Girma concurs with this view and holds that a person who has knowledge of certainty 'should be punished as though he desired the result' because 'such knowledge is assimilated to desire'.[108]

With regard to a particular will to achieve the criminal result that is prohibited by law, known as a '*specific intent*' in French law or *Abischt* in German law, there are list of crimes in the special part of the Criminal Code that require this kind of intent to be realized, though not mentioned in the general part. For instance, in the crime of theft the law requires the existence of 'intent to obtain or procure the unlawful enrichment'.[109] Perhaps in the case of theft or other related crimes like robbery and corruption related crimes, the law presumes the existence of such intent if material acts are committed intentionally.[110] The Criminal Code called such element of the crime '*special intent'*,[111] and it only mentions this term once in all its provisions. Concerning the crime of genocide, neither the Criminal Code nor the Penal Code presumes the existence of 'intent to destroy', thus it needs to be proved. These codes neither define what 'intent' in the context of genocide denotes. In the next sections, this study will examine how the intent to destroy element of genocide is conceptualized and established by Ethiopian courts.

5. The Interpretation and Application of the 'Genocidal *Mens Rea'* in Ethiopian Genocide Trials: The Domestic Practice

Ethiopia, afterratifyingthe Genocide Convention, incorporates the crime of genocide in its domestic law in 1957, only nine years after the Convention was adopted. It also has experience in prosecuting and punishing genocide. This is the nation that held one of the largest trials in Africa for the crime of genocide (politicide), known as the '*Dergue trial*' or the '*Red-Terror Trial*',

[107]Ibid.
[108]Dejene Girma Janka, *A Handbook on the Criminal Code of Ethiopia* (Revised ed., 2021) Pp78-9.
[109]The Criminal Code, Art. 665.
[110]The Criminal Code, Art. 663(1). See also, The Penal Code, Art. 628(1).
[111]The Criminal Code, Art. 623(2). See also, The Penal Code, Art. 628(2).

which some colloquially call an 'African Nuremberg'.[112] Besides, there were also other genocide trials that involved hundreds of accused and convictions in the past. The trials involved criminal acts that took place in Ethiopia after the fall of the *Dergue* regime from 1991 to 2008, either in the context of armed conflict as in the case of the OLF civil and military leaders and members trials, or during the periods of post-election violence (theCUD officials and leaders trials) or clashes between ethnic groups (the *Anuak-Nuer* and *Oromo-Gumuz* trials).

Ethiopian genocide trials were predicated on two different domestic laws, i.e. the Penal Code and Criminal Code. Given the discrepancies between the two versions of the Penal Code and the Amharic version's usage of 'plan' instead of 'intent' in stipulating the genocidal *mens rea*, the courts' practices on interpretation of genocidal *mens rea* in these trials are not the same across-the-board. Thus, the examination of the practice of the courts would take this into consideration. In addition, even though the Federal High Court heard all Ethiopian genocide trials, except some trials involving mid- and low-level *Dergue* officials and members, there were no uniform understanding and application of the genocidal *mens rea* of the crime of genocide in the rulings and judgments of the court. Therefore, this study will attempt to examine the Ethiopian courts' practice of interpreting and establishing genocidal *mens rea*under different subsections by categorizing the issues thematically.

5.1. The Understanding and Interpretation of Genocidal Mens Rea in Ethiopian Genocide Trials

5.1.1.Genocide: a Crime of Plan?

In the trials of the OLF civil and military leaders and members, *Dergue*, and *Anuak-Nuer*, which were conducted based on the Penal Code, the prosecutor has indicted the suspects for perpetrating genocidal acts with 'a plan to destroy' the protected groups. In all of the indictments of these trials, the prosecutor, while indicating the required genocidal *mens rea*of the crime of genocide, employs the Amharic words 'ለማጥፋት በማቀድ' which can literally

[112]John Ryle,'An African Nuremberg', *The Newyorker* (2 October 1995), P50 https://www.Newyorker.com/magazine/1995/10/02/an-african-nuremberg< Accessed 25 April 2023>; Marshet, *supra* note 11, P158.

be translated as 'with a plan to destroy'.[113] Perhaps, in most of the *Dergue* trials involving the mid- and low-level perpetrators, the SPO in defining the genocidal *mens rea* in its indictments used terms like 'ለማጥፋት የተነደፈውን ኣጠቃላይ ዕቅድ በመቀበል' and 'በደራጃቸው በገብረበርነት በማቀድ' which can literally be translated as 'accepting the general plan designed to destroy' and 'in corroboration, planned within their ranks'.[114]As discernible from these indictments, the entire accusation of these trials relied on the existence of plan (ዕቅድ) to annihilate the protected group/s, if the prosecutor not meant to refer intent by 'በማቀድ'. However, there is no evidence within these trials that shows the prosecutor meant 'intent' not 'plan'.

With regard to the *Dergue* trials, as Tadesse rightly observed, the language and the context of the usage of 'ዕቅድ'in the indictmentdiscern that the SPO meant to refer plan not intent.[115] In these trials, the SPO listed evidences showing existence of plan in the indictments and used the term 'designed' (የተነደፈውን) in relation to plan in trials concerning the mid- and low-level perpetrators. Presumably, had the Special Prosecutor intended to refer 'intent', it would not have gone further in listing the evidences of existence of plan or using the term designed.

In *Anuak-Nuer* trial, in addition to stating 'with a plan to destroy', the prosecutor in its indictment uses some confusing words that poses some ambiguity. The prosecutor begins explaining its indictment using phrases such as 'with a strong desire' (በከፍተኛ ፍላጎት),'absolute willingness' (ፍፁም ፍቃደኛ በመሆን) and 'with intent to cause harm against others' (በከፍተኛ ፍላጎት

[113] See, for instance, FHC*, Federal Prosecutor v Beyan Ahmed et al.* (Indictment)File No. 173/86, 58/86 (02 February1995), Pp 4, 7-8;FHC*, Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Indictment) File No. 401/ 85 (16 November 1995), P11;ASC*, Special Prosecutor v Asefa Mekonnen et al.* (Indictment), File No. 164/85 (3February 1999),P 4;OSC*, Special Prosecutor v Colonel Debebe Hurrissie et al.* (Indictment), File No 2/89 (24 Apr 2003); FHC*, Federal Prosecutor v Gure Uchala Ugira et al.* (Indictment) File No. 586/96 (04 January 2004),Pp 2-3.

[114] See, for instance, FHC*, Special Prosecutor v Geremew Dabale* (Indictment), File No. 109/85 (23 December 1996), P1*;*ASC*, Special Prosecutor v Girma Neway et al.* (Indictment) File No. 65/85 (3 December 1996), P2; TSC*, Special Prosecutor v Ayana Mengistu et al.* (Indictment), File No. 25/85 (23 November 1998),P6;FHC, *Special Prosecutor v Tesfaye Woldesilassie et al.* (Indictment), File No. 268/85 (8 November 2000),P5.

[115]Taddese, *supra* note 10, P 274.

ሆነ ብለው ሰዉ ለሞጉዳት).[116] Perhaps, as discussed in previous section, terms such as 'desire' and 'will' were used by the international *ad hoc* criminal tribunals in defining the special intent of the crime of genocide. However, it is not clear whether the prosecution intended to bring in these terms for the purpose of defining the required genocidal *mens rea* of the crime of genocide. The FHC, which conducted this trial, did not discuss any of these terms and did not mention either plan or intent in its ruling and judgment.

More importantly, there are no explanations why the prosecution in those three trials opted for the Penal Code's Amharic version's wording 'with a plan to destroy' instead of the English version's 'ለማጥፋት በማሰብ' (with intent to destroy). Even from the evidentiary reason point of view, it is not clear why the prosecution opted for 'plan' instead of 'intent', given the nature of the evidentiary burden attached to the proof of the existence of a plan. As a matter of fact, proving the existence of plan and intent beyond reasonable doubt equally requires vigorous effort in a trial setting. Nevertheless, whereas 'intent to destroy', as demonstrated in the case law of the international *ad hoc* tribunals, can be inferred from different circumstantial evidence, it is more onerous to find and prove the existence of a plan in some circumstances. Moreover, according to the practices of the international *ad hoc* tribunal, if the prosecutor had opted for the English version's 'intent to destroy,' it would not have been necessary to show that there was a designed plan in place to destroy the protected group because the existence of plan is not a prerequisite to establish the 'intent to destroy' requirement, though it has evidentiary importance in establishing intent.

One could argue that the reason why the prosecution in these trials chose to use the wording of the Penal Code's Amharic version is because of the authoritative nature of the Amharic version in case of discrepancies between

[116] The indictment reads: 'ተከሳሾቹ (...) በከፍተኛ ፍላጎት ሆነ ብለው ሰዉ ለሞጉዳት ፍፁም ፍቃደኛ በመሆን በዘር ፣ በልማድ እና በሃይማኖት አንድ የሆነዉን የኑዌር የብሄረሰብ በመላው ለማጥፋት በማቀድና የጥፋቱን ስራ በማቋቋም (…)' which can literally be translated as 'the accused (…) with a strong desire to intentionally cause harm against others and with absolute willingness planned to destruct the *Nuer* ethnic group as a whole (…). FHC, *Federal Prosecutor v Gure Uchala Ugira et al.* (Indictment) Criminal File No. 586/96 (25 March 2004), P2.

the English and Amharic versions.[117] However, the law that makes the Amharic version authoritative in case of inconsistency only appeared in 1995.[118]The 1942 Administration of Justice Proclamation only obliges all laws to be published in the official gazette in both the Amharic and English languages, but it did not incorporate a clause that confers authoritativeness to the Amharic version.[119] Besides, there is no convincing legal reason why in all circumstances, the Amharic version takes precedence over the English, absent a clause that confer such authoritativeness. Instead, when the inconsistency of such nature appears in the law, courts supposed sort out it by applying the rule of interpretations. In this regard, the FDRE Constitution recognizes the Genocide Convention's definition of Genocide[120] and even addresses the issue of core crimes under chapter three, which is required to be interpreted in a manner conforming to the principles of international instruments Ethiopia has ratified.[121]Thus, in order to sort out the inconsistency between the two versions of the Penal Code, the prosecution could have had resort to the Genocide Convention and use the wording of the English version of the Penal Code in accordance with Article 28(1) and 13(2) of the Constitution.

As far as the *Dergue* trials are concerned, presumably the Special Prosecutor opted for the Amharic version's wording 'with a plan to destroy' on account of a belief that genocide is basically a crime that requires the existence of state plan or policy. In some *Dergue* trials, the Special Prosecutor, in response to the preliminary objections against its indictment, persistently referred genocide 'a state-sponsored' and 'systematic' crime in the sense that it requires state plan or policy and action.[122] In its final report, the SPO also

[117] According to Marshet Tadesse and Tadesse Simie, Ethiopian laws in Amharic take precedence over their English translations when there are discrepancies between the two versions. Marshet, *supra* note 11, P 77;Taddese, *supra*note 10, P190, foot note 3.

[118]Federal Negarit Gazetta Establishment Proclamation, Proclamation No. 3/ 1995, Art. 2(4): 'the Federal Negarit Gazeta shall be published in both the Amharic and English Languages; in case of discrepancy between the two versions the Amharic shall prevail'.

[119]Administration of Justice Proclamation, Proclamation 1/1942, Art. 22.

[120]The FDRE Constitution, Art 28(1): '(…) so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, (…)'.

[121]The FDRE Constitution, Art. 13(2).

[122] See, for instance, FHC*, Special Prosecutor v Geremew Dabale (*Response on the Preliminary Objections*)* FileNo. 952/89 (9 February 1998), P5; OSC, *Special Prosecutor v Tedla Desta et al.* (Response on the Preliminary Objections) File No. 1/89 (27 May 1999) P5; ASC*, Special Prosecutor v Asaye Berhanu et al.* (Response on the Preliminary

indicated that the *Dergue* has committed genocide in accordance with state plan and policy.[123] These demonstrate that, like some international criminal law scholars,[124] the SPO had a firm belief that genocide is a crime of state plan or policy; which as a result might have influenced its decision to prosecute the *Dergue* officials on the basis of the existence of plan to destroy. However, the same could not explain why the prosecution chose to use the phrase 'with the plan to destroy' in the Amharic version of the Penal Code during the trials of OLF civil and military leaders and members as well as the *Anuak-Nuer* trial because in these two trials the involvement of state is nowhere mentioned. Significantly, neither the FHC (the trial court) nor the FSC (the appellate court) in all these three trials conceptualized and interpreted what the plan to destroy expression of the indictment mean in that context.

Perhaps more importantly, the Ethiopian courts conducted these trials based on the prosecutor's indictments, which accused the defendants of planning to destroy the protected group. In fact, the court never mentioned the 'plan to destroy' expression in its rulings and judgments for both the *Beyan Ahmed et al.*[125] (among the OLF civil and military leaders and members trials) and *Gure Uchala Ugira et al.*[126] (the *Anuak-Nuer* trial), even though the trials resulted in numerous convictions for genocide. In addition, the court did not discuss the required genocidal *mens rea* of the crime of genocide in a meaningful manner throughout the entire proceedings of these trials. In *Dergue* trials, there were cases in which the court repeatedly mentioned the expression of plan (ዕቅድ) in its rulings and judgments,[127] though it did not in most cases discussed how and when the said plan were designed.

Objections) File No. 54/91 (11 October 1999), P2; SNNPR SC*, Special Prosecutor v Tefera Endalew* (Response on the Preliminary Objections)File No. 15/93 (11 May 2001),P2.

[123]Special Prosecutor's Office, 'Dem Yazele Dossie: Begizeyawi Wotaderawi Dergue Weyem Mengist Abalat Benetsuhan Zegoch Laye Yetefetseme Wenjel Zegeba' (Addis Ababa: Far-East Trading P.L.C., January 2010) [Hereinafter '*Dem Yazele Dossie*'],Pp104-07.

[124]Schabas, supra note 19, P240;Mahmoud Cherif Bassiouni, *Crimes Against Humanity* (Cambridge University Press 2011), P117.

[125] *Federal Prosecutor v Beyan Ahmed et al.* (Trial Judgment)*, supra* note 4.

[126]*Federal Prosecutor v Gure Uchala Ugira et al.* (Trial Judgment), *supra*note 5.

[127]FHC, *Special Prosecutor v Geremew Dabale* (Trial Judgment)File No. 952/89(23 December 1996), P7;FHC*, Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Trial Ruling) File No 1/ 87 (21 January 2003), P62.

Significantly, the Federal High Court in all these three trials failed to conceptualize and interpret the concept of a 'plan to destroy' expression of the indictments and the Penal Code's Amharic version.

To conclude, as previously discussed, the case law of international *ad hoc* criminal tribunals uniformly established that the existence of the genocidal plan or policy is not a legal ingredient of the crime of genocide, despite its evidentiary importance in establishing the genocidal intent.[128] Even though, the *Kayishema et al.* Appeals Chamber admitted 'it is not easy to carry out [sic] genocide without (…) a plan, or organisation', it still stressed that 'a specific plan to destroy does not constitute an element of genocide'.[129] However, unlike the international jurisprudence, the entire accusations of the OLF civil and military leaders and members trials, the *Dergue trials* and the *Anuak-Nuer* trial were hinged on the existence of plan to destroy instead of the intent to destroy. Thus, it is fair to say, as far as these three trials are concerned, genocide was considered 'a crime of plan' as opposed to a crime of special intent. Furthermore, in the context of the international *ad hoc* criminal tribunals, the task of interpreting and conceptualizing the genocidal *mens rea* requirement is always conducted before its application to individual cases. However, the Ethiopian courts in the aforementioned trials have never conceptualized and interpreted the concept of 'plan to destroy' requirement in their rulings and judgments; consequently, in the context of these trials, the meaning of 'plan to destroy' is left unknown.

5.1.2. Genocide as a Crime of Unexplained Special Intent: The Trials of CUD Officials and Members, and the *Oromo-Gumuz*

In the CUD leaders and members' trials, whereas the Federal Prosecutor in *Hailu Shawulet al*. and *Kifle Tigne et al.* indicted accused for an attempt to commit genocide against ethnic *Tigrians* and/or the EPRDF members;[130] it has indicted 5 individuals for committing genocide against ethnic *Tigrians*

[128]See, for instance, *Prosecutor v Jelisic* (Appeal Judgement), *supra*note 50, P48; *Prosecutor v Kayishema et al.* (TrialJudgment), *supra* note 19, P94.
[129]*Prosecutor v Kayishema et al.* (Trial Judgment)*, supra* note 19, P94.
[130]FHC, *Federal Prosecutor v Hailu Shawul et al.* (Trial Ruling)*, supra* note 6,P14; FHC*, Federal Prosecutor v Kifle Tigne et al.* (Indictment)Criminal File No. 00860/2 (09 February 2006), P7.

and the EPRDF supporters in *Berhane Kahsay et al*.[131] All the three trials, which were conducted in on the basis of Article 269 of the Criminal Code, the prosecutor in defining the required genocidal *mens rea* in its indictments referred 'with *intent* to destroy' (ለማጥፋት በማሰብ). In this regard,these indictments depart from the previous trials indictments, which were brought on the basis of a plan to destroy.However, in all of these trials, in contrast to the practice of international *ad hoc* criminal tribunals, the trial court failed to conceptualize and interpret the concept of intent to destroy. Instead, the court focused on what is required to establish or prove intent, which it directly touched upon. Thus, even though genocide was considered a crime of special intent in these trials, it remains unexplained.

However, Judge Aseffa Abraha, who reads the plan into the law, touched Article 58 (1) (b) in his dissenting opinion of *the Berhane Kahsay et al.* ruling.[132] Judge Aseffa claimed that once a plan to destroy was contrived, it is sufficient to accept the consequence that may possibly result from the execution of the plan.[133] Thus, he interpreted intent to the extent of including *dolus eventualis*. Regrettably, Judge Aseffa stopped discussing the issue shortly and did not go into detail.

Furthermore, the *Oromo-Gumuz* trials, which were conducted on the basis of the Criminal Code, like the CUD leader and members' trials were predicated on the intent to destroy as far as the genocidal *mens rea* is concerned. In three separate trials, the Federal Prosecutor indicted the accused for perpetrating genocidal acts on ethnic *Oromos* in two of the cases,[134] and against ethnic *Gumuz* in one case.[135] In all three cases in these trials, the prosecution essentially referred to 'intent' (አሳብ) in defining the required

[131]*FHC, Federal Prosecutor v Berhane Kahsay et al.* (Indictment) Criminal File No. 01828 (29 March 2006), P2.
[132]*FHC, Federal Prosecutor v Berhane Kahsay et al.* (Trial Ruling: The Dissenting Opinion of Judge Aseffa Abraha) File No. 45671 (14 June 2006),P55.
[133]*Ibid.*
[134]FHC*, Prosecutor v Tadesse Jewanie et al.* (Indictment) Criminal File No. 04941/2000 (3 Semptember 2008) August 2009); FHC, *Federal Prosecutor v Tesfaye Neno et al.* (Indictment) Criminal File No. 00902/2001 (19 December 19 2008).
[135]FHC, *Prosecutor v Aliyu Yusufe Ibrahim et al.* (Indictment) Criminal File No. 04942/2000 (2008).

genocidal *mens rea* of the indictments.[136] Judge Aseffa Abraha, who dissented on the rulings and judgments of all the three cases of the *Oromo-Gumuz* trials, interestingly stressed, in *Aliyu Yusufe et al.,* that genocide requires distinct and additional mental state different from the one that the law requires for the physical acts of genocide.[137] However, neither the majority nor the dissenter has guided the meaning of intent to destroy requirement of the crime of genocide. In another words, they all failed to explain how they understood intent in the context of the required genocidal *men's rea* in the crime of genocide. Despite recognizing the difficulty of establishing genocidal intent, even the dissenting judge falls short of giving interpretation to intent in the context of the genocidal *mens rea*.

To sum up, in the CUD leaders and members trials and the *Oromo-Gumuz* trials genocide was entertained as the crime of special intent, as opposed to a crime of plan in the trials of OLF leaders and members, *Dergue* and *Anuak-Nuer*. Nevertheless, the trial court did not discuss or explain what intent does mean in the context of genocidal *mens rea* requirement of the crime of genocide as stipulated under Article 269 of the Criminal Code. In these trials, the trial court before conceptualizing and defining the intent to destroy element proceeded to the issue of proof of genocidal intent. However, it is nonsensical to rush to the issues of evidence without first identifying what is to be proven in relation to proof of the existence of special intent. In this regard, it is imperative to note that what to prove will either be the perpetrators possession of purpose, desire, will or aim in the commission of genocidal acts as demonstrated in the jurisprudence of international *ad hoc* criminal tribunals or knowledge of existence of collective intent to destroy as the knowledge-based approach proponents insist.

[136]FHC*, Prosecutor v Tadesse Jewanie et al.* (Indictment) Criminal File No. 04941/2000 (3 Semptember 2008),P10; FHC, *Prosecutor v Aliyu Yusufe Ibrahim et al* (Indictment), supra note 102,P 8;FHC, *Federal Prosecutor v Tesfaye Neno et al.* (Indictment) Criminal File No. 00902/2001 (19 December 19 2008), P4.

[137]FHC, *Prosecutor v Aliyu Yusufe Ibrahim et al.* (Trial Ruling: The Dissenting Opinion of Judge Aseffa Abraha)File No. 71000 (21 May 2009),P52.

5.1.3. Genocide: a Crime of General Intent?

The crime of genocide protects the interest of protected groups and the crime target to eliminate the group, in whole or in part. Genocide is different from other core crimes in that it focuses not on the killing of individuals but on the destruction of groups. However, in the Ethiopian genocide trials, there were cases in which convictions were entered for acts committed against individuals who were not identified as belonging to the targeted protected group.In the *Dergue* trials, there were cases in which the prosecutor indicted the accused for acts of killing that they committed against individuals whom the indictments did not describe as belonging to political opposition groups. In *Mengistu et al.* trial, the Special Prosecutor accused the defendants of genocide for the act of killing committed against the Ethiopian Orthodox Patriarch, Abune Tewoflos Wolde-Mariam.[138] The indictment does not indicate the accused killed the Patriarch on the basis of his membership in one of the political opposition groups. The FHC convicted the defendants for genocide committed against the Patriarch.[139] The FSC, however, reversed the judgment on the ground of lack of genocidal intent and convicted the accused of aggravated homicide.[140]

In *Beyan Ahmed et al.*, the prosecutor indicted the accused for genocide committed against individuals identified as the 'EPRDF spies'.[141] It is discernible from the overall trial that these acts were committed in the context of the armed conflict between the OLF and the Transitional Government, with the defendants also accused of war crimes. The indictment did not indicate deceased were members of the EPRDF; but spies of the EPRDF. The court nowhere in the ruling or judgment discussed the accused plan/intend to destroy the members of the EPRDF. Neither did the court mention the accused killed the victims on account of their membership in the EPRDF. Despite this, the FHC convicted the accused for the genocide they committed against individuals identified as EPRDF spies.[142]

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[138]FHC*, Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Indictment-Count 91), File No. 401/ 85 (16 November 1995),P 47.
[139]FHC, *Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Trial Judgment), File No. 1/ 87 (12 December 2006).
[140]*FSC, Special Prosecutor v Colonel Mengistu Haile-Mariam et al.* (Appellate Judgment) . File No. 30181 (26 May 2008),P72.
[141]FHC*, Prosecutor v Beyan Ahmed et al.* (Indictment)File No. 173/86, 58/86 (02 February1995), Pp 4, 7-8.
[142]*Prosecutor v Beyan Ahmed et al.* (Trial Judgment), *supra*note 4, P18.

5.2. Establishing Genocidal *Mens Rea* in the Ethiopian Genocide Trials

In the work of international *ad hoc* criminal tribunals, establishing genocidal *mens rea* happened to be one of the most problematic and challenging tasks in the prosecution of the crime of genocide. As demonstrated in the case law of the *ad hoc* tribunals, to enter a guilty verdict for genocide, the court should unequivocally establish that a person standing in the bail dock acted with intent to destroy the targeted protected group. As briefly discussed in the preceding section, in accordance with the case law of the *ad hoc* tribunals, the person is deemed to have acted with intent to destroy if he/she acted with desire, will, aim or goal to annihilate the targeted protected group. Importantly, it was also established in the *ad hoc* tribunals' case law that the proof of existence of intent to destroy relied on circumstantial evidence, such as context, words and deeds of the perpetrator and existence of plan or policy.

Coming to the Ethiopian genocide trials, since the first three trials were conducted on the basis of the existence of plan to destroy, it will be interesting to see how the courts entertained the issue related with proof of existence of plan. In the CUD leaders and members' and the *Oromo-Gumuz* trials, the FHC failed to conceptualize the intent to destroy element of the crime of genocide. Hence, in such scenario, it will be intriguing to see how it established the existence of intent to destroy. Therefore, these issues will be discussed separately below.

5.2.1. Establishing Plan in the OLF Civil and Military Leaders and Members, *Dergue* and *Anuak-Nuer* Trials

5.2.1.1. The OLF Civil and Military Leaders and Members Trials

In finding two accused guilty for genocide in *Beyan Ahmed et al*., which was predicated on the plan to destroy, the FHC regrettably failed to discuss whether plan to eliminate *Amharas* and the 'EPRDF spies' existed behind the commission of the genocidal acts in both its ruling and judgment.[143] Even

[143] *Ibid.*

though the court was supposed to analyse whether the prosecution proved the existence of a plan to destroy the group/s, it did not discuss how and when the plan to destroy the group/s was designed; or alternatively how the existence of plan inferred from the evidence availed in the trial; and how the acts of the accused related with this plan. The court only analysed whether the accused committed the material acts referred to in the indictments against the ethnic *Amharas* and EPRDF spies. When convinced that the evidence established the commission of the genocidal acts, it convicted the accused of the crime of genocide. The FSC upheld the trial court's ruling and judgment without touching upon this issue.[144] Nonetheless, this is not how the crime of genocide is understood and entertained in international criminal law jurisprudence.

5.2.1.2. The Anuak-Nuer Trial

The indictment of the *Anuak-Nuer* trial, which was brought on the basis of the Penal Code, referred to the plan to destroy as a required genocidal *mens rea* of the crime of genocide. Perhaps, in addition to stating 'with a plan to destroy', the prosecutor in its indictment employed some confusing words that posed some ambiguity which the FHC failed to discuss in its ruling or judgment. The trial, which did not mention either plan or intent in ruling or judgment, did not discuss how the evidence established the existence of a plan to destroy the ethnic *Nuers*. In this regard, the FHC, in the same manner as *Beyan Ahmed et al*., entered a guilty verdict regarding three defendants for the crime of genocide, though without substantiating the existence of a plan to destroy the *Nuer* ethnic group. In doing so, it turned genocide into a crime of a general intent.

5.2.1.3. The Dergue Trials

The indictments of the *Dergue* trials indicated that the genocidal acts committed during the *Dergue* regime were predicated on the plan of the state to destroy the political opposition groups. According to the SPO's indictments, the *Dergue* had a plan to eliminate political opposition groups in the country. In the proverbial 'big fish' trials and other few trials, the

[144]*Federal Prosecutor v Beyan Ahmed et al.* (Appeals Judgment), File No. 17722, 17706, 17738, 17707 (11 December 2006).

indictments explained the accused planned to destroy the political groups and committed the genocidal acts according to the said plan. On the other hand, the indictments against most of the mid- and low-level perpetrators alleged that the accused accepted the extensive or overall plan designed to eliminate the opposition political groups. In addition, it states that they planned within their ranks to execute the plan.

When it comes to establishing the existence of the alleged plan to destroy and establishing nexus between individual acts and the alleged concerted plan to destroy the political groups, the courts practice is devoid of consistency and clarity. In *Mengistu et al*., even though it did not substantiate the meaning of plan to destroy, the FHC in its ruling conducted an in-depth analysis in establishing the existence of the extensive plan to destroy and the link between individual acts and the alleged plan. In other *Dergue* trials cases, similar analysis is missing.Therefore,it is important to examine how the court established the plan in the *Mengistu et al*. trials separately from how it was established in other cases.

I. Establishing Genocidal Plan in Mengistu *et al.* Trials

In *Mengistu et al*. trial, the FHC analysed evidences rigorously to establish whether the *Dergue* had a plan to destroy the political groups. In pronouncing its ruling, the first thing the court did was establishing the existence of collective or overall or extensive plan to destroy the political groups.[145] Perhaps, in its analysis, the court, in a way that poses ambiguity, referred plan to 'intent to destroy' (የማጥፋት ሃሳብ),[146] 'intent or desire' (ሃሳብ ወይም ፍላጎት),[147] 'intent and desire' (ሃሳብና ፍላጎት),[148] and 'desire to destroy' (የማጥፋት ፍላጎት)[149] on few occasions. Yet, the court only focused on establishing the existence of plan and the nexus between plan and the individual acts without discussing intent or desire in the entire ruling.

[145]FHC, *Special Prosecutor v Colonel Mengistu Hailemariam et al.* (Trial Ruling),File No 1/ 87 (21 January 2003), Pp 6 ff.
[146]*Id*.,P 7.
[147]*Ibid.*
[148]*Id*.,P14.
[149]*Id*.,P12.

In the *Mengistu et al.* trial ruling, the FHC concluded that *Dergue* had a collective plan to eliminate the political opposition groups.[150] In reaching at this conclusion, the court analysed different kind of evidences. These evidences are: evidences of the *Dergue* announcements, orders, meetings and campaigns of violence such as 'let the red-terror intensify' (ቀይ ሽብር ይፋፋም) and 'free measures' (ነፃ እርምጃ) campaigns;[151] and the establishments of institutions that later on carried out the designed plan such as *Dergue* Campaign and Security Investigation Unit, *Dergue* Prison, *Dergue* Investigation Compatriots, Information Evaluation Department, and et cetera.[152] Moreover, evidences of measures taken to revamp institutions that aimed at intensifying violence against political opposition groups were also analysed.[153] Lastly, evidences demonstrating direct participation of the *Dergue* higher official in orchestration and execution of the plan were analysed by the court.[154] Thus, as far as the proof of the existence of the collective genocidal plan is concerned, the *Mengistu et al*. trial practice conforms to the jurisprudence of the international *ad hoc* criminal tribunals, particularly the *Kristic* Trial Judgment[155] and *Kayishema* Appeals Judgment.[156]

Perhaps more importantly, it is important to note how the court in the *Mengistu et al* trial determined the nexus between individual acts of genocide and the overall plan to eliminate political groups. To establish this link, the FHC relied solely on the defendants' membership in the *Dergue*. It stressed that the decision and plan of the *Dergue* belongs to all members irrespective of their participation in designing and orchestrating the plan to annihilate the political groups. In this regard, the court stated that,

> The organization cannot function as a group without its members. Therefore, all the decisions or plans are the work of the members, or at least the members directly support or participate in this decision and plan by continuing or joining as a

[150] *Id.*,P16.
[151] *Id.*,Pp 8-9.
[152] *Id.*,Pp 9-11.
[153] *Id.*,Pp11-12.
[154] *Id.*,Pp14-16.
[155] *Prosecutor v Krstic* (Trial Judgment), *supra* note 19, ⁋⁋ 572 ff.
[156] *Prosecutor v Kayishema et al* (Appeals Judgment), *supra* note 72, ⁋ 139.

> member of the group and helping the group continue to exist and put the decision or plan into action.[157]

The accused appealed this ruling to the FSC claiming that they were convicted on account of their membership to the *Dergue* even though their participation in the genocidal acts was not established by evidence.[158] The FSC, which reviewed the ruling and judgment of the FHC on appeal, concurs with the trial court on this issue. In establishing the nexus, the FSC noted that 'according to Proclamation No. 1/1967, the power was not given to a single member of the *Dergue* or to certain members of the *Dergue*, but to the entire military group'.[159] Thus, 'the decision given by the *Dergue* is not the decision of one individual or a few members of the *Dergue*, rather the decision of all its members.'[160] It also stated, since the defendants continued and joined as members of the *Dergue*, they cannot claim innocence and say they never did anything wrong.[161] In the end, the FSC concludes that the defendants either directly or indirectly involved in the *Dergue* plan to destroy the political groups.[162]

Therefore, both the FHC and FSC established the link between the individual genocidal conducts with the overall collective plan to destroy the political groups on the basis of the defendants' membership to the *Dergue*. According to the courts, every member of the *Dergue* accepted *Dergue's* plan to destroy political groups on the day it decided to stay or join in the *Dergue* membership; consequently, it attributed the *Dergue's* plan to its members. The courts' approach presumes that every wrong doings (killing, causing bodily or mental injury, or torture) by the members of the *Dergue* was

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[157]*Special Prosecutor v Colonel Mengistu Hailemariam et al* (Trial Ruling), supra note 127), P9.Translation is by the researcher. The original (Amharic) text reads: 'ደርጉ እንደ አንድ ቡድን ያለ አባላቱ ሊቆምም ሆነ ስራዉን ሊያከናዉን አይችልም:: ስለዚህ ዉሳኔዎቹ ወይም እቅዶቹ ሁሉ የአባላቱ ስራዎች ናቸዉ ወይንም ቢያንስ አባላቱ በቀጥታ በመደገፍ ወይንም በባህሪ ማለትም ባለመቀወምና በዚህ ዉሳኔና እቅድ በሚሰራ ቡድን ዉስጥ በአባልነት ቀጥለዉ ወይንም አዲስ ተቀላቅለዉ በመስራት ቡድኑ መኖሩን እንዲቀጥልና ዉሳኔዉን ወይንም እቅዱን በስራ ላይ ማዋል እንዲችል በመርዳት ይሁንታ የሚሰሩ እቅዶችና ዉሳኔዎች ስለሆኑ የአባላት እቅድና ዉሳኔዎች ማለትይ ቻላል::'

[158]*Special Prosecutor v Colonel Mengistu Haile-Mariam et al.* (Appellate Judgment), *supra* note 26, P10.

[159]*Id*, P21.

[160]*Ibid.*

[161]*Id.*,P22.

[162]*Id.*,P25.

committed in furtherance of *Dergue's* plan to destroy and each individual actor acted with a plan to destroy.

However, as *Krstic* Trial Judgement noted, it is always 'necessary to establish whether the accused being prosecuted for genocide shared the intention that a [sic] genocide be carried out'.[163] In *Mengistu et al*., the FHC and FSC should have established with evidence that the individual perpetrators shared the plan to destroy the political groups. Establishing the overarching plan of a genocide is one thing, while establishing that an individual perpetrator shared that plan is another.[164] Whether the individual perpetrators shared the overarching plan to destroy can only be proved by facts that have nexus with the commission of the crime. The fact that an accused was a member of the *Dergue* has no nexus with the commission of the alleged crime; instead, the prosecution needs to prove that those members committed the underlying acts that can establish the crime. Thus, it is impossible to draw conclusive evidential inference from membership to the *Dergue* that the defendants shared the *Dergue's* plan to destroy political groups. In this regard, as the ICTR Appeals Chamber in *Kayishema et al.* noted, even though having an affiliation to a criminal group may have relevance in determination of the *mens rea*,[165] it cannot be conclusive evidence to infer the accused shared the plan/intent to destroy.

While the approach the courts followed in *Mengistu et al.* to establish the nexus might work for the defendants who came up with the overarching plan, it is problematic and erratic to apply it for those who did not participate in the decision or design of the overall plan. This approach completely shifts the burden of proof from the prosecution to the accused, which as a result affects the principles of presumption of innocence and individual criminal responsibility. Perhaps, as the proponents of the knowledge-based approach propose, the courts could have established the individual level of genocidal *mens rea* based on knowledge of a collective plan to destroy the political groups and that they were acting in furtherance of the plan.

[163] *Prosecutor v Krstic* (Trial Judgment), *supra*note 19, ⁋ 549.
[164] *Ibid.*
[165] *Prosecutor v Kayishema et al.* (Appeal Judgment), *supra*note 72, ⁋160.

II. Establishing Genocidal Plan in Other Cases of the Dergue Trials

In most *Dergue* cases, even though the acceptance of the overall plan to destroy the political groups and plan of execution within different ranks mentioned in the indictments, courts did not discuss how and when the overarching plan to destroy were laid out.[166] In these cases, courts failed to meaningfully substantiate the existence of an overall plan to destroy in their rulings or judgments. Neither did the courts discuss how the defendants accepted the laid out overall plan to destroy the political groups. Besides, the courts nowhere analysed in a meaningful manner that acts of the defendants were committed in furtherance or pursuance of the overarching plan to destroy political groups. Yet, the courts in these cases convicted the defendants for perpetrating genocidal acts with plan to destroy the political opposition groups. It is not clear why the courts, especially the FHC, abstained from discussing the issue in the same manner as the *Mengistu et al.* trial.

In some other *Dergue* cases, courts enter guilty verdict without mentioning the required genocidal *mens rea* of the crime of genocide. In *Girma Neway et al*. Judgment, the ASC convicted the defendants for the crime of genocide allegedly committed against the victims identified as belonging to the TPLF. In this judgement, while deciding whether the defendants' act fall under the charges of genocide or aggravated homicide, the court ruled that the accused perpetrated acts of killing against the victims because of their membership to the TPLF.[167] The court, however, did not discuss whether these acts of killings were perpetrated in pursuance of the plan or intent to eliminate the

[166]FHC*, Special Prosecutor v Geremew Dabale* (Trial Judgment), *supra*note 127;OSC, *Shaleka Tesemma Wagaye et al* (Trial Ruling), File No. 19/92 (20 December 2001);TSC, *Special Prosecutor v Ayana Mengistu et al.* (Trial Ruling), File No. 3/90 (18 April 2002).

[167] The court noted that, 'It is clear that the killing was politically motivated, as the defendants decided to kill the victims and carried out the killings by identifying them as members of an anti-people gang organization TPLF. This type of killing is included under the crime of genocide.' Translation is by the researcher. The original (Amharic) text reads: 'ተከሳሾች ሟቾች እንዲገደሉ የወሰኑት እና ጨሳኔዉም እንዲፈፀም ያደረጉት ሕወሀት የተባለ ፀረ ህዝብ የወንበዴ ድርጅት አባላት በመሆን የተለያዬ ተግባራት ፈጽመዋል በሚል በመሆኑ የግድያዉ ምክንያት ከፖለቲካ ጋር የተቆራኘ ለመሆኑ ግልፅ ነዉ:: ይህም አይነቱ የግድያ ወንጀል [ዘርን የማጥፋት ክስ] ስር የሚካተት ይሆናል.' ASC*, Special Prosecutor v B.General Girma Neway et al.* (Trial Judgment) File No. 24/90 (25 December 1995), P271.

members of the TPLF nor did it discuss whether the defendants acted with plan/intent to destroy TPLF. Yet, it convicted the defendants for the crime of genocide as if discriminatory killing suffice to establish the crime of genocide.[168] In doing so, the court turned genocide into a crime of a general intent. Besides, it also confused the crime of genocide with the crime of persecution that does not require the intent of destroying groups. In this regard, there are also other cases in which the courts entered guilty verdict for the crime of genocide in the same manner as the *Girma Neway et al*.[169]

5.2.2. Establishing 'Intent to Destroy' in CUD Officials and Members' Leaders and Members and *Oromo-Gumuz* Trials

The CUD officials and members' trials and the *Oromo-Gumuz* trials were conducted on the basis of the Criminal Code. Thus, the prosecutor's indictments employed the 'with intent to destroy' wording of the Genocide Convention in explaining the required genocidal *mens rea* of the crime of genocide. Below, the study will separately examine how the FHC and FSC entertained the issue of proof of intent to destroy in these two trials.

5.2.2.1. The CUD Officials and Members' Trials

The CUD officials and members trials indictments essentially referred and relied on 'intent' **(ኦሳብ)** as a requiredgenocidal *mens rea*.Even though the courts did not discuss the meaning of intent in the context of the genocidal *mens rea* requirement, the CUD officials and members trials paid more close attention to how the required genocidal *mens rea* should be established or proved. In this regard, in the main case *Hailu Shawul et al*., the FHC appreciably emphasized the necessity of establishing the existence of genocidal intent and the nexus between the psychological state of the perpetrators and the physical result.[170]

In a case where 96 higher officials, members and affiliates of the CUD stood trial for attempting to commit genocide against ethnic *Tigrians* and the

[168]*Ibid.*
[169]FHC*, Special Prosecutor v Desta Awulachew et al.* (Trial Ruling) File No. 650/89 (3 January 2002);OSC*, Special Prosecutor v Colonel Debebe Hurrissie et al.* (Trial Ruling) File No.8/89 (25 June 2002); FSC, *Special Prosecutor vMekonnen Gelan* (Appeals Judgment) File No. 21331 (24 May 2006).
[170]*FHC, Federal Prosecutor v Hailu Shawul et al.* (Trial Ruling)*, supra* note 6,P193.

members of EPRDF, the FHC discussed whether the alleged genocidal acts were committed with intent to destroy, in whole or in part, ethnic *Tigrians* and/or the members of EPRDF.[171] The court stressed that the existence of genocidal intent could be established from the manner of participation and the deeds of the defendants in the commission of the alleged conducts.[172] In this case, akin to the international *ad hoc* criminal tribunals,[173] the FHC emphasized that it is not appropriate to infer the defendants' intent only by what they have said or written, instead, it is possible to derive the intention of the accused from the manner of the commission of the genocidal acts.[174] The court relying on the context in which the acts were committed (when and how the acts committed), concluded that the evidences did not demonstrate the existence of genocidal intent.[175] In an acquittal ruling rendered by the majority, with Judge Leul Gebre-Mariam dissenting,[176] the court acquitted all defendants for this crime, citing lack of genocidal intent as a ground for acquittal.[177] Therefore, as far as proof of genocidal *mens rea* is concerned, the court's approach, in this case, corresponds with that of international jurisprudence.

In another separated trial, the Federal Prosecutor accused 5 individuals for committing genocide against an individual identified as belonging to *Tigrian* ethnic group and a member of the EPRDF.[178] The indictment primarily employed 'intent' in referring the genocidal *mensrea* requirement. After hearing the evidence, the court ruled that the presented evidence does not establish the existence of a 'plan (ዕቅድ) to destroy political or ethnic group, which according to the court, is the essential element of the crime of genocide.[179] The court further stated, 'there is no evidence to support the existence of the plan (ዕቅድ), and therefore, it is not possible to conclude that

[171] *Ibid*.
[172] *Ibid*.
[173] ICTR, *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T (1 December 2003), P807; *Prosecutor v Bagilishema* (Trial Judgment), *supra*note 44, P63.
[174] FHC, *Federal Prosecutor v Hailu Shawul et al.* (Trial Ruling), *supra* note 6,P194.
[175] *Ibid.*
[176] *Ibid* (The Dissenting Opinion of Judge Leul Gebre-Mariam), P198, ff.
[177] *Id.*,P194.
[178] FHC, *Federal Prosecutor v Berhane Kahsay et al.* (Indictment) Criminal File No. 01828(29 March 2006), P 2.
[179] FHC, *Federal Prosecutor v Berhane Kahsay et al.* (Trial Ruling),File No. 45671 (14 June 2006), P7.

the defendants orchestrated and executed the genocide'.[180] Consequently, the court acquitted the defendants for the crime of genocide and convicted them under other ordinary crime.[181]

Judge Aseffa Abraha, who dissented the majority's ruling, claimed that genocide requires the existence of plan to destroy the protected group.[182]He expressed in his dissenting opinion that the CUD had already established a plan to isolate/segregate the *Tigrians* and EPRDF, and the accused carried out their actions following this plan and should thus be convicted for the crime of genocide.[183] In conclusion, both the majority and the dissenter considered the existence of a plan a prerequisite to establishing the required intent to destroy element of the crime of genocide, an approach that deviates from that of the international jurisprudence.

5.2.2.2.The Oromo-Gumuz Trial

The indictments of the *Oromo-Gumuz* trials essentially referred to 'intent to destroy' as a genocidal *mens rea* requirement of the crime of genocide.[184] As discussed above, none of the three separate trials meaningfully discussed what 'intent' in the context of the genocidal *mens rea* requirement connotes. However, the FHC, in these trials, directly addressed the issue of establishing genocidal intent, especially in *Tadesse Jewane et al*. and *Tesfaye Neno et al*. Interestingly, in all three cases, the rulings were passed by a majority, with Judge Aseffa Abraha dissenting at both the ruling and judgment stages.

In *Aliyu Yusufeet al*., the prosecutor accused the defendants of perpetrating genocide against individuals identified as belonging to the *Gumuz* ethnic group.[185] According to the indictment, the accused committed acts of killings and bodily injury against ethnic *Gumuz* with intent to destroy, in whole or in part, members of the *Gumuz* ethnic groups.[186] In the trial that resulted in 58

[180]*Ibid.*
[181]*Ibid.*
[182]FHC, *Federal Prosecutor v Berhane Kahsay et al.* (Trial Ruling: The dissenting opinion of Judge AseffaAbraha), *supra*note 99, P10.
[183]*Id.*,Pp 9-11.
[184]*Prosecutor v Tadesse Jewanie et al.* (Indictment), *supra*note 134, P10;*Prosecutor v Aliyu Yusufe Ibrahim et al*. (Indictment), *supra*note 135, P8;*Prosecutor v Tesfaye Neno et al.* (Indictment), *supra* note 134, P2.
[185]*Prosecutor v Aliyu Yusufe Ibrahim et al.* (Indictment)*, supra* note 135, P 8.
[186]*Ibid*.

convictions for the crime of genocide, the majority failed to explain whether the accused committed the acts with the intent to eliminate ethnic *Gumuz* at both stages of ruling and judgment. Thus, the accused in this case were convicted of genocide without the court establishing the existence of genocidal intent. However, Judge Aseffa Abraha, who dissented at both the stages of ruling and judgment, claimed that the special intent was missing and the defendants should thus be found not guilty of genocide.[187]

According to Judge Aseffa, in order for the crime of genocide to be considered complete, the intent to destroy and physical acts must be established simultaneously.[188] He also acknowledges, establishing the intent requirement is a difficult task among the two and thus requires careful analysis.[189] In discussing what establishing the genocidal intent takes, he boldly claimed that the existence of '*a coordinated plan'* or '*strategic administrative plan'* to destroy is one of the crucial requirements for the crime of genocide to exist.[190] According to him, the evidence produced by the prosecution did not establish such a plan.[191] In this regard, the judge mentioned that the defendants could not design a coordinated plan because they lacked the education that could have enabled them to contrive such a plan.[192] He also mentioned other evidences that could help establish genocidal intent: the words or statements and orders of the defendants,[193] the existence of historical hate sentiment against the targeted group[194] and the repetitive nature of such attacks;[195] which according to the judge was not proved in the case.

While Judge Aseffa's effort to discuss the issues of proof of genocidal intent is commendable, it is necessary to note that the existence of genocidal plan is not a legal requirement for the crime of genocide, despite its relevance in facilitating proof of genocidal intent. Besides, contriving a genocidal plan

[187]FHC, *Prosecutor v Aliyu Yusufe Ibrahim et al.* (Trial Ruling: The Dissenting Opinion of Judge Aseffa Abraha), File No 71000 (21 May 2009), P50.
[188]*Id.*,P52.
[189]*Ibid.*
[190]*Id.*,Pp53-54.
[191]*Id.*,P54.
[192]*Ibid*.
[193]*Id.*,P52.
[194]*Id.*,P53.
[195]*Id.*, P54.

does not require some education; in such circumstances, only the accused's state of mind matters most. Apart from this, as the Judge rightly mentioned, the words or statements and orders of the defendants, the existence of hatred towards the targeted group and the nature of the attack might be relevant in establishing genocidal intent.

In *Tadesse Jewane et al*, the majority judgment, unlike the *Aliyu Yusufe et al*. judgment, tried to explain the existence of genocidal intent. In a trial that the court convicted 102 individuals belonging to *Gumuz* ethnic group for committing genocide against the ethnic *Oromos,* the ruling and judgment failed to discuss the meaning of intent in the context of genocidal *mens rea* requirement. However, the FHC, in establishing the genocidal *mensrea,* referred to the manner of commission of the genocidal acts, the words and statements of the defendants at the time of commission of the acts (such as 'kill all the men'), the racist sentiment demonstrated in the commission, such as 'all red people are the same', the distribution of weapons and the status of the participants in the crime.[196]

Similarly in *Tesfaye Neno et al*., the court ruled that the defendants committed genocidal acts against the ethnic *Oromos* with intent to eliminate the *Oromos* from that area.[197] In establishing the existence of genocidal intent, the majority Judgment referred to the nature of the commission of the acts (which the court called 'massacre or mass atrocity'), the words defendants spoken during the commission of the acts (such as 'do not spare a single Oromo'), the existence of plan to eliminate the *Oromo* from the area though not sufficiently substantiated in a meaningful manner and the commission of other intentional crimes (such as 'rape').[198] The court, inferred from these evidences that the underlying acts were committed with intent to annihilate the *Oromos* from the area.

To summarize, the Oromo-Gumuz trial directly addressed the issues of proof of genocidal *mens rea* in more detail than its predecessors. However, even though the judges were the same in three of the separate trials, the court failed to explain establishing the existence of genocidal intent in *Aliyu*

[196]FHC, *Prosecutor v Tadesse Jewanie et al.* (Trial Judgment)*, supra* note 7, Pp 63-64.
[197]*FHC, Federal Prosecutor v Tesfaye Neno et al.* (Trial Judgment)File No. 74796 (30 April 2009), P42.
[198]*Id.*,Pp41-42.

Yusufe et al. In *Tadesse Jewane et al.* and *Tesfaye Neno et al*., the FHC, in the same manner as the international *ad hoc* criminal tribunals, tried to infer the existence of genocidal intent from circumstantial evidence, despite all odds. Yet, despite the courts expected to define what to prove (desire or knowledge, or both) before proceeding to establishing intent, the courts gave no attention to the interpretation of intent to destroy requirement.

6. Concluding Remarks

Genocide is a *jus cogens* crime that requires the intent to destroy a protected group, setting it apart from other core crimes and ordinary crimes. The crime is aimed at safeguarding the rights of protected groups and liberating mankind from such a scourge. Despite its vitality,the meaning and proof of intent to destroy requirement appearedto be one of the challenging aspects of international criminal law jurisprudence. The ICJ has emphasized the need for precise definition of genocidal *mens rea*. International *ad hoc* criminal tribunals have primarily understood the concept of 'intent' as a desire, purpose, aim, or goal, deviating from traditional understandings of intent.

Ethiopian genocidal trials have been conducted based on domestic criminal law, with no reference to the Genocide Convention in the indictments, rulings, and judgments. Three of these trials relied on a 'plan to destroy' instead of 'intent to destroy' as a requirement of genocidal *mens rea*, possibly due to a discrepancy between the Amharic and English version of the Penal Code. Ethiopian courts could have resolved these discrepancies by referring to the Genocide Convention, which is the source of Ethiopian genocide law according to the FSC.By analysing the Convention's definition of genocide, the courts could have aligned domestic practice with international jurisprudence. Thus, it can be maintained that in some trials, Ethiopian courts have treated genocide as 'a crime of plan' rather than 'a crime of specific intent'.

The Ethiopian genocide trials are known for not substantiating the intent to destroy or plan to destroy requirement in their rulings or judgments, despite the element being the essence of the crime of genocide. Ethiopian courts failed to discuss the domestic laws applied in genocide trials, which,as a result, led to unsubstantiated rulings and verdicts. Despite the fact that international jurisprudence requires a precise definition of intent in the

context of genocidal *mens rea*, the trials have never provided an interpretation of how it should be understood and applied.In some trials, the courts entirely avoided mentioning, let alone discussing, the genocidal *mens rea* requirement of the crime of genocide at both the ruling and judgment stages. Thus, it is not possible to know the Ethiopian courts understanding of intent or plan in the context of the requirement of genocidal *mens rea*. In the context of the genocidal *mens rea* requirement, which is the essence of the crime of genocide, it can be reasonably concluded that Ethiopian courts have conducted unsubstantiated genocide trials. In this regard, Ethiopian courts have much to learn from the international jurisprudence.

In addition to interpreting the intent to destroy element of the crime of genocide, international *ad hoc* criminal tribunals thoroughly examine the existence of genocidal intent in every genocide trial. The domestic practice of establishing the genocidal *mens rea*, unlike its international counterparts, is devoid of consistency, clarity and uniformity. In the trials in which the plan to destroy was employed as a genocidal *mens rea* requirement, such as those involving the OLF civil and military leaders and members and *Anuak-Nuer,* the court entirely failed to discuss whether the accused had a plan to destroy the protected group or if the genocidal acts were committed in pursuance or furtherance of such a plan. In *Dergue* trials, the approach followed by the courts is devoid of consistency. Whereas the court thoroughly examined whether there was a plan to destroy the political groups in *Mengistu et al.* trial, such examination was missing in most of the trials involving the mid- and low-level perpetrators. In some *Dergue* trials, including the *Mengistu et al*. which examined the existence of collective plan to destroy, whether individual perpetrator shared the plan to destroy was only inferred from membership in *Dergue*. However, such approach contravenes the principle of presumption of innocence and individual criminal responsibility.

Ethiopian courts have repeatedly failed to establish a nexus between the physical result of genocide and the psychological state of the perpetrator. Evidence demonstrating the commission of physical acts was considered enough to prove that genocide had occurred. The courts by placing too much emphasis on the victims' membership to protected group,turned genocide in to 'a crime of general intent'.In most cases, the courts found the defendants

guilty without first determining whether there was intent to destroy the protected group. As a result, the importance of connecting these acts to the intent to commit genocide was overlooked. This led to defendants being found guilty simply because they had carried out the prohibited acts and the victim was a member of a protected group. In doing so, the Ethiopian courts stimulate curiosity on whether any attack on a protected group was automatically considered an act of genocide. However, this is neither how genocide is understood in international criminal jurisprudence nor how it is supposed to be understood in Ethiopian criminal justice. In other cases, despite the courts attempted to discuss establishing the existence of genocidal intent, but they wrongly considered the existence of a plan a prerequisite to establishing the required intent to destroy element of the crime of genocide.

Based on the findings of this study, the researcher recommends:

- Ethiopian courts, in genocide trials, should refer to the Genocide Convention while pronouncing rulings and judgments. Doing so would help them resolve discrepancies and ambiguities in domestic criminal law.
- Ethiopian courts should methodically conceptualize or interpret the intent to destroy requirement of the crime of genocide before proceeding to establish the genocidal intent. This would enable them to know and identify what to prove in determining the existence of the required mental element.
- The Ethiopian courts should unequivocally determine the existence of genocidal intent before entering an acquittal or guilty verdict. In the process, they need to establish a nexus between the physical result of genocidal acts and the psychological state of the perpetrators at an individual level.
- Ethiopian courts need to avoid considering the existence of a genocidal plan as a legal requirement for the crime of genocide. While the existence of a plan may facilitate proof of genocidal intent, it is not a legal ingredient of the crime of genocide, neither in international law nor in domestic criminal law.
- In genocide trials, Ethiopian courts would be better off if they refer to the case law of international *ad hoc* criminal tribunals for a better

understanding of interpretation and proof of the genocidal intent, the essence of the crime of genocide.

- Further research needs to be conducted on the approach of genocidal *mens rea* interpretation that Ethiopian courts need to adopt, with due consideration given to the concept of criminal intention under Ethiopian criminal law and the country's practical realities.

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