

## SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

# What does ‘intent to destroy’ in genocide mean?

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### **Abstract**

*Genocide is a crime with a double mental element, i.e. a general intent as to the underlying acts, and an ulterior intent with regard to the ultimate aim of the destruction of the group. The prevailing view in the case-law interprets the respective ‘intent to destroy’ requirement as a special or specific intent (dolus specialis) stressing its volitional or purpose-based tendency. While this view has been followed for a long time in legal doctrine without further ado, it has recently been challenged by knowledge- and structure-based approaches, which have not received sufficient attention. A historical, literal, systematic and teleological interpretation of the ‘intent to destroy’ requirement, taking into account the particular structure of the genocide offence and the meaning of ‘intent’ in comparative law, reveals that the traditional view can no longer be maintained. It should be replaced by a combined structure- and knowledge-based approach that distinguishes according to the status and role of the (low-, mid- and top-level) perpetrators. Thus, the purpose-based intent should be upheld only with regard to the top- and mid-level perpetrators, whereas for the low-level perpetrators knowledge of the genocidal context should suffice. Lastly, this new*

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*approach requires a fresh look at the ‘intent to destroy’ requirement in cases of participation in genocide.*



## **Preliminary remarks: the ‘intent to destroy’ requirement in the particular structure of the genocide offence**

The genocide offence has *two separate mental elements*, namely a general one that could be called ‘general intent’ or *dolus*, and an additional ‘intent to destroy’.<sup>1</sup> A general intent normally relates to all objective elements of the offence definition (*actus reus*) and has now been defined in international criminal law by Article 30 of the Statute of the International Criminal Court (ICC) as basically encompassing a volitional (intent) and/or a cognitive or intellectual (knowledge) element.<sup>2</sup> In the case of genocide, the general intent relates to the opening paragraph as well as to the acts listed in the offence<sup>3</sup> and directed against one of the protected groups.<sup>4</sup> The perpetrator must, for example, know that his actions target one of the protected groups, since the group element is a factual circumstance as defined by Article

- 1 See also *International Commission of Inquiry on Darfur*, Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to SC Res. 1564, 18 September 2004, Annex to letter dated 31 January 2005 from the UN Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, para. 491; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 (ICC-02/05-01/09), para. 139; Otto Triffterer, ‘Genocide, its particular intent to destroy in whole or in part the group as such’, *Leiden Journal of International Law (LJIL)*, No. 14, 2001, pp. 399–408, at pp. 400ff.; Otto Triffterer, ‘Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender ‘Elements of Crimes’ für alle Tatbestände des Völkermords’, in Bernd Schünemann *et al.* (eds.), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001*, Beck, Munich, 2001, pp. 1438ff.; William Schabas, ‘The *Jelisić* case and the *mens rea* of the crime of genocide’, *LJIL*, Vol. 14, Issue 1, 2001, pp. 125–139, at p. 129; Elies van Sliedregt, ‘Joint criminal enterprise as a pathway to convicting individuals for genocide’, *Journal of International Criminal Justice (JICJ)*, No. 5, 2007, pp. 184–207, at p. 195; Robert Cryer, ‘The definitions of international crimes in the Al Bashir Arrest Warrant Decision’, *JICJ*, No. 7, 2009, pp. 283–296, at 293. The double intent structure has apparently been overlooked by the International Law Commission (ILC), see ‘Report on the Work of its Forty-Eighth Session to the U.N.’, UN GAOR, 51st session, Supp. No. 10, UN Doc. A/51/10 (1996), p. 87, referring only to (one) *mens rea* and *actus reus*. Roberta Arnold, ‘The *mens rea* of genocide under the Statute of the International Criminal Court’, *Criminal Law Forum (CLF)*, No. 14, 2003, pp. 127–151, at pp. 135–136 also argues in favour of one intent, considering that the ‘special intent’ is an element of the *mens rea* and encompasses the general intent. She ignores, however, that in the genocide definition the points of reference of the ‘general’ and ‘special’ intent are different. She also confuses intent with motive (misinterpreting the German doctrine in fn. 43).
- 2 Art. 30(1) reads: ‘Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.’
- 3 See Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 (hereinafter Genocide Convention), now the identical Art. 6(a)-(e) of the ICC Statute.
- 4 See also Otto Triffterer, ‘Genocide ...’, above note 1, pp. 400, 403.

30(3) of the ICC Statute.<sup>5</sup> In contrast, the ‘intent to destroy’ constitutes an additional subjective requirement that complements the general intent and goes beyond the objective elements of the offence definition.<sup>6</sup> One should therefore speak more precisely of an ulterior intent<sup>7</sup> (“surplus” of intent<sup>8</sup>) characterized by an extended – with regard to the *actus reus* – mental element or a transcending internal tendency (*‘überschießende Innentendenz’*).<sup>9</sup> Indeed genocide, thus understood, is a crime of ulterior intent or a goal-oriented crime (*Absichts- oder Zieldelikt*).<sup>10</sup> In practical terms, this means that the genocidaire may intend more than he is realistically able to accomplish. A case in point would be a white racist who intends to destroy the group of black people in a large city but, acting alone, will only be able to kill a few members of this group. Taking seriously the specific-intent-crime structure of genocide, his genocidal intent would suffice to fulfil the offence elements if only one of the underlying acts, *in casu* the ‘killing [of] members’ of the said group (ICC Statute, Art. 6(a)), were to be accomplished.

As for crimes against humanity, on the one hand genocide essentially constitutes such a type of crime in its similarity to persecution for particular discriminatory reasons (ICC Statute, Art. 7(1)(h)).<sup>11</sup> The ‘intent to destroy’ requirement turns genocide into ‘an extreme and the most inhumane form of

- 5 Art. 30(3) reads: ‘For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.’
- 6 See also Otto Triffterer, ‘Genocide ...’, above note 1, pp. 402–403.
- 7 See e.g. Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law*, Ashgate, Aldershot, 2002, p. 3.
- 8 *Prosecutor v. Milomir Stakić*, Trial Judgement, Case No. IT-97-24-T, 31 July 2003, para. 520. See also *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, paras 119ff, which, in essence, characterizes genocide as a crime of (concrete) endangerment (para. 124: ‘completed when the relevant conduct presents a concrete threat to the existence of the targeted group ...’).
- 9 See also *Prosecutor v. Radoslav Brđjanin*, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para. 695: specific intent ‘characterises the crime of genocide’.
- 10 See in detail the excellent work of Alicia Gil Gil, *Derecho penal internacional: Especial consideración del delito de genocidio*, Tecnos, Madrid, 1999, pp. 178f., 231ff., 258ff.; A. Gil Gil, ‘Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs’, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)*, No. 111, 2000, pp. 394–395. See also Daniel David Ntanda Nsereko, ‘Genocide: A crime against mankind’, in Kirk Gabrielle McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. I, *Commentary*, Kluwer, The Hague et al., 2000, pp. 124ff., 137; William Schabas, *Genocide in International Law*, 2nd edn, Cambridge University Press, Cambridge, 2009, pp. 259, 262, 264ff.; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, para. 120 with fn. 140 (‘crime of *mens rea*’). On the structure of the crime of genocide, see also Kai Ambos and Stefan Wirth, ‘Sentencing, cumulative charging, genocide and crimes against humanity’, in André Klip and Göran Sluiter (eds), *Annotated Leading Cases: The International Criminal Tribunal for Rwanda 1994–1999*, vol. II, 2001, pp. 703ff.
- 11 Cf. e.g. *Prosecutor v. Goran Jelisić*, Trial Judgement, Case No. IT-95-10-T, 14 December 1999, para. 68; also *Prosecutor v. Georges Ruggiu*, Trial Judgement, below note 124, para. 21 (with reference to *Kupreškić et al.*). The German Supreme Court (BGH), *Neue Zeitschrift für Strafrecht (NSTZ)*, no. 19, 1999, p. 396, at p. 401 also views genocide as ‘part of a crime against humanity.’ On the German jurisprudence, see Kai Ambos and Stefan Wirth, ‘Genocide and war crimes in the former Yugoslavia before German criminal courts (1994–2000)’, in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin-Verlag Spitz, Berlin, 2001, pp. 769ff.

persecution.<sup>12</sup> On the other hand, the ulterior intent distinguishes genocide from persecution<sup>13</sup> and all other crimes against humanity and contributes to its particular wrongfulness and seriousness.<sup>14</sup> Yet while genocide may then be qualified as a special intent crime, this does not answer the question as to the concrete meaning and degree of this intent.

## The meaning of ‘intent to destroy’

### The case-law

Leaving the terminological variety of the case-law aside,<sup>15</sup> let us turn immediately to the meaning of the ‘intent to destroy’ requirement. The seminal *Akayesu*

- 12 *Prosecutor v. Zoran Kupreškic et al.*, Trial Judgement, Case No. IT-95-16-T, 14 January 2000, para. 636: ‘... genocide is an extreme and most inhumane form of persecution.’ See also Kirk Gabrielle Swaak-Goldmann, ‘Persecution’, in Kirk Gabrielle McDonald and Olivia Swaak-Goldman, above note 10, pp. 247ff., on the elements of the offence of persecution.
- 13 On the distinction made recently between a genocidal and persecutory intent, see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, para. 141ff. discussing in particular ethnic cleansing. See also Daniela Demko, ‘Die von der Genozidkonvention geschützten “Gruppen” als Regelungsgegenstand des “Specific Intent”’, *Schweizerische Zeitschrift für Internationales und europäisches Recht*, vol. 19, no. 2, 2009, pp. 223–246.
- 14 Cf. *Prosecutor v. Goran Jelisic*, TJ, above note 11, paras 66, 79, 82; concurring W. Schabas, above note 10, pp. 11, 13, 15; similarly Ntanda Nsereko, above note 10, p. 119. For a distinction based on the legally protected good, cf. Gil Gil, *Derecho penal internacional*, above note 10, pp. 123, 125–126, 159ff., 177ff.; A. Gil Gil, ‘Tatbestände’, above note 10, pp. 393–394, according to which genocide protects a collective good, i.e. the group as such, and crimes against humanity protect individual rights; similarly Alexander Greenawalt, ‘Rethinking genocidal intent: The case for a knowledge-based interpretation’, *Columbia Law Review*, no. 99, 1999, pp. 2293–2294; even more broadly Martin Shaw, *What is Genocide?*, Polity, Cornwall, 2007, reprint 2008, p. 28 (‘... the idea of genocide as the *intentional destruction of social groups* remains foundational’ (emphasis in the original), pp. 33ff., 154ff. (p. 154: ‘violent social conflict’ with the ‘aim to destroy civilian social groups ...’). As for the *concurus delictorum*, when multiple actions with genocidal intent are committed, this results in a single genocide (i.e. a single offence) (*Handlungseinheit*) in ideal concurrence (*Idealkonkurrenz*) with crimes against humanity (cf. A. Gil Gil, ‘Tatbestände’, above note 10, pp. 396–397; also German Supreme Court, above note 11, pp. 401ff., with case note by Ambos. On the relationship between genocide and other serious crimes see Shaw, above note 14, p. 28: ‘whether genocide constitutes a crime against humanity (which in non-legal terms is self-evident) remains contentious’, and p. 34: ‘Genocide involves mass killing but it is much more than mass killing.’
- 15 The following terms have been employed: ‘special intent’ (*Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 498; *Prosecutor v. Athanase Seromba*, Trial Judgement, Case No. ICTR-2001-66-I, 13 December 2006, paras. 175, 319); ‘dolus specialis’ (*Prosecutor v. Jean-Paul Akayesu*, op. cit., para. 498; *Prosecutor v. Juvénal Kajelijeli*, Trial Judgement, Case No. ICTR-98-44A-T, 1 December 2003, para. 803; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Trial Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 91; *Prosecutor v. Georges Rutaganda*, Trial Judgement, Case No. ICTR-96-3-T, 6 December 1999, para. 59; *Prosecutor v. Ignace Bagilishema*, Trial Judgement, Case No. ICTR-95-1A-T, 7 June 2001, para. 55; *Prosecutor v. Alfred Musema*, Trial Judgement, Case No. ICTR-96-13-A, 27 January 2000, para. 164); ‘genocidal intent’ (*Prosecutor v. Clément Kayishema*, op. cit., para. 91); ‘specific intent’ (*Prosecutor v. Juvénal Kajelijeli*, op. cit., para. 803; *Prosecutor v. Clément Kayishema*, op. cit., para. 91; *Prosecutor v. Ignace Bagilishema*, op. cit., para. 55); ‘specific genocidal intent’ (*Prosecutor v. Ignace Bagilishema*, op. cit., para. 55); ‘exterminatory intent’ (*Prosecutor v. Goran Jelisic*, TJ, above note 11, para. 83); ‘specific intention’ (*Prosecutor v. Akayesu*, op. cit., para. 498; *Prosecutor v. Georges Rutaganda*, op. cit., para. 59). This terminological variety did not end with the *Jelisic* Appeals Chamber’s preference for the term ‘specific intent’ (*Prosecutor v. Goran Jelisic*, Appeal Judgement, Case No. IT-95-10-A, 5 July 2001, para. 45). The Chamber stressed that it does

judgement understood the ‘intent to destroy’ as a ‘special intent’ or *dolus specialis*, defining it as ‘the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged’<sup>16</sup> or, in other words, has ‘the clear intent to cause the offence’.<sup>17</sup> The Chamber described the genocidal intent as the ‘key element’ of an intentional offence, which is ‘characterized by a psychological relationship between the physical result and the mental state of the perpetrator’.<sup>18</sup> The subsequent case-law of the International Criminal Tribunal for Rwanda (ICTR) basically followed the *Akayesu* findings,<sup>19</sup> requiring in addition the aim to destroy one of the protected groups.

The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) took the same approach. Rejecting the Prosecutor’s attempt to introduce a mere knowledge standard,<sup>20</sup> the *Jelusic* Trial Chamber applied the *Akayesu* definition. In this case, however, it was not convinced that *Jelusic* was ‘motivated’ (*sic*) by the *dolus specialis* of the crime,<sup>21</sup> as he performed the executions only randomly<sup>22</sup> and acted by virtue of his disturbed personality.<sup>23</sup> Thus ‘he killed arbitrarily rather than with the clear intent to destroy a group’.<sup>24</sup> The Appeals Chamber confirmed, again dismissing the Prosecutor’s knowledge approach,<sup>25</sup> that the ‘specific intent requires that the perpetrator [...] seeks to achieve’<sup>26</sup> the destruction of a group. It further made clear that the existence of a personal motive, e.g. personal economic benefits or political advantage, does not exclude the perpetrator’s specific intent.<sup>27</sup> The Chamber equally conceded, this time against the Trial Chamber and in accordance with the Prosecutor, that a disturbed or borderline personality, as identified in *Jelusic*, does not *per se* exclude ‘the ability to form an intent to destroy a particular protected group’.<sup>28</sup> Similarly, the Chamber considered that a certain randomness in the perpetrator’s killings does not rule out

not attribute to this term any meaning it might carry in national jurisdictions (*ibid.*, para. 45 with fn. 81). See also *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 695. For an ‘interchangeable’ use of *dolus specialis* and specific intent see *Prosecutor v. Milomir Stakić*, TJ, above note 8, para. 520.

16 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 498.

17 *Ibid.*, para. 518.

18 *Ibid.*, para. 518.

19 *Prosecutor v. Georges Rutaganda*, TJ, above note 15, para. 61; *Prosecutor v. Ignace Bagilishema*, TJ, above note 13, para. 62; *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 164: ‘clearly intended the result charged’.

20 *Prosecutor v. Goran Jelusic*, Prosecutor’s Pre-Trial Brief, Case No. IT-95-10-PT, 19 November 1998, para. 3.1 (perpetrator ‘knew the likely consequence’ that the committed acts would destroy a group in whole or in part). See also *Prosecutor v. Goran Jelusic*, TJ, above note 11, para. 42; *Prosecutor v. Radislav Krstic*, TJ, above note 29, para. 569 (‘consciously desired’ the destruction of the group or ‘knew his acts were destroying’).

21 *Prosecutor v. Goran Jelusic*, TJ, above note 11, para. 108.

22 *Ibid.*, para. 106.

23 *Ibid.*, para. 105.

24 *Ibid.*, para. 108.

25 *Prosecutor v. Goran Jelusic*, AJ, above note 15, para. 52.

26 *Ibid.*, para. 46.

27 *Ibid.*, para. 49, citing *Prosecutor v. Dusko Tadic*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para. 269.

28 *Ibid.*, para. 70.

the specific intent.<sup>29</sup> It also confirmed the irrelevance of motive,<sup>30</sup> thereby implicitly criticizing the Trial Chamber’s use of the term ‘motivated’ in relation with intent.

Following the same line, the *Krstić* Trial Chamber held that genocide embraces only acts ‘committed with the goal of destroying all or part of a group’.<sup>31</sup> It convicted Krstić for genocide; his intent to kill the ‘military-aged Bosnian Muslim men of Srebrenica’ was grounded on the finding that he was ‘undeniably [...] aware of the fatal impact’ that the killings would have on the community.<sup>32</sup> However, the Appeals Chamber, while reaffirming the ‘stringent requirement of specific intent’ in light of the seriousness of the genocide offence and explicitly rejecting a mere knowledge requirement,<sup>33</sup> overturned Krstić’s conviction for genocide. As it could not find the special intent in Krstić, but only his knowledge of the other perpetrators’ genocidal intent, it convicted him only for aiding and abetting genocide.<sup>34</sup> The *Sikirica* Trial Chamber dismissed straight away ‘an examination of theories of intent’, since it considered the special intent as a ‘relatively simple issue of interpretation’ and held further that the offence ‘expressly identifies and explains the intent that is needed’.<sup>35</sup> In substance, the Chamber followed the *Jelisić* Appeal Judgment’s ‘seeks to achieve’ standard.<sup>36</sup> The *Blagojević* and *Brdjanin* judgements also called for a goal-oriented approach<sup>37</sup> and rejected a mere knowledge requirement.<sup>38</sup>

In sum, the case-law’s approach is predicated on the understanding, as originally suggested by *Akayesu*, that ‘intent to destroy’ means a special or specific intent which, in essence, expresses the volitional element in its most intensive form and is purpose-based. This position is shared by other authorities. Thus the International Court of Justice (ICJ) also refers, citing the ICTY, to a ‘special or specific intent’ as an ‘extreme form of wilful and deliberate acts designed to destroy a group or part of a group’.<sup>39</sup> The Court of Bosnia-Herzegovina held in the Kravica cases involving genocide charges in connection with the events in Srebrenica that genocidal ‘intent can only be the result of a deliberate and

29 *Ibid*, para. 71.

30 *Ibid*, para. 71.

31 *Prosecutor v. Radislav Krstić*, Trial Judgement, Case No. IT-98-33-T, 2 August 2001, para. 571.

32 *Ibid*, para. 634.

33 *Prosecutor v. Radislav Krstić*, Appeal Judgement, Case No. IT-98-33-A, 19 April 2004, para. 134.

34 *Ibid*, paras 135ff.

35 *Prosecutor v. Dusko Sikirica*, Judgement on defence motions to acquit, Case No. IT-95-8-T, 3 September 2001, paras 58 and 59.

36 *Ibid*, para. 59, fn 165; for this standard see above note 24.

37 *Prosecutor v. Vidoje Blagojević and Dragan Jokic*, Trial Judgement, Case No. IT-02-60-T, 17 January 2005, para. 656 (‘destruction [...] must be the aim of the underlying crime.’); *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 695.

38 *Prosecutor v. Vidoje Blagojević and Dragan Jokic*, TJ, above note 37, para. 656 (‘not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group.’).

39 ICJ, *Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, 26 February 2007, para. 188 (citing *Prosecutor v. Zoran Kuprešić et al.*, above note 12, para. 636). See also ILC, above note 1, p. 88 (‘intention ... to destroy’).

conscious aim.<sup>40</sup> The Darfur Commission of Inquiry similarly speaks, on the one hand, of ‘an aggravated criminal intent, or *dolus specialis*’ that ‘implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction’ of a protected group. On the other hand, however, it requires in addition knowledge of the perpetrator ‘that his acts would destroy, in whole or in part, the group as such.’<sup>41</sup> Last but not least, in the *Al Bashir* Arrest Warrant Decision the ICC Pre-Trial Chamber I, while at least taking note of the ‘knowledge-based approach’, followed the traditional approach as to top-level perpetrators and denied genocidal intent.<sup>42</sup>

## Dissenting views in the doctrine

While a large part of the doctrine basically follows the case-law and interprets the intent to destroy in the sense of a special, ulterior intent,<sup>43</sup> some scholars have recently challenged this view.<sup>44</sup> In her fundamental work on the elements of

40 *Prosecutor v. Milos Stupar et al.*, First Instance Verdict, Case No. X-KR-05/24, 29 July 2008, p. 56; available at <http://www.sudbih.gov.ba/?opcija=predmeti&id=22&jezik=e> (visited 5 June 2009).

41 Darfur Report, above note 1, para. 491. The Commission ultimately rejects a genocidal intent, since it finds ‘more indicative elements’ that speak against it (*ibid.*, para. 513ff.), e.g. the selective killings (para. 513) and the imprisonment of survivors in camps where they received humanitarian assistance (para. 515). Thus it finds instead an ‘intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare’ (para. 518). For the same result see Andrew T. Cayley, ‘The Prosecutor’s strategy in seeking the arrest of Sudanese President Al Bashir on charges of genocide’, *JICJ*, vol. 6, no. 5, 2008, pp. 829–840, at pp. 837ff. For a critique on the Darfur Report’s findings, see M. Shaw, above note 14, p. 168ff. (essentially following Eric Reeves, ‘The report of the International Commission of Inquiry on Darfur: A critical analysis (Part I)’, *H-Genocide*, 2 February 2005).

42 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, above note 1, para. 139–40 with fn. 154 following the ICJ’s position (above note 39) and stating (in fn. 154) that the ‘knowledge-based approach’ would only make a difference as to low- or mid-level perpetrators and is therefore not relevant for the ICC. The majority of the Chamber (Judge Ušacka dissenting) ultimately reject the genocide charge, arguing that from the evidence presented the existence of a specific genocidal intent ‘is not the only reasonable conclusion’ that can be drawn (*ibid.*, para. 202 ff., p. 205). Critique by Claus Kress, ‘The crime of genocide and contextual elements’, *JICJ*, vol. 7, no. 2, 2009, pp. 297–306, at p. 305. The App. Chamber reversed the decision with regard to genocide because of the (erroneous) standard of proof used by the Pre-Trial Ch. and directed it to decide anew whether an arrest warrant should be issued also with regard to that crime (ICC-02/05-01/09-OA, 3 Febr. 2010).

43 Antonio Cassese, *International Criminal Law*, 2nd edn, Oxford University Press, Oxford *et al.*, 2008, p. 137; Ntanda Nsereko, above note 10, pp. 117, 124; Payam Akhavan, ‘The crime of genocide in the ICTR jurisprudence’, *JICJ*, vol. 3, no. 4, 2005, pp. 989–1006, at p. 992; Elies van Sliedregt, above note 1, p. 191 ff.; David Nersessian, ‘The contours of genocidal intent’, *Texas International Law Journal*, no. 37, 2002, pp. 231–276, at p. 265; Jan Hübner, *Das Verbrechen des Völkermordes im internationalen und nationalen Recht*, Peter Lang, Frankfurt a.M. *et al.*, 2004, pp. 152 ff.; Johan D. Van de Vyver, ‘Prosecution and punishment of the crime of genocide’, *Fordham International Law Journal*, no. 23, 1999, pp. 286–356, at p. 308; Johan D. Van de Vyver, ‘The International Criminal Court and the concept of mens rea in international criminal law’, *University of Miami International and Comparative Law Review*, no. 12, 2004, pp. 57–149, at pp. 84 ff.; R. Arnold, above note 1, pp. 142, 150; W. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, pp. 214 ff., 219, 221; Angela Paul, *Kritische Analyse und Reformvorschlag zu Art. II Genozidkonvention*, Springer, Berlin *et al.*, 2008, pp. 254, 257 (‘aimed at the physical destruction’); M. Shaw, above note 14, p. 82; Stefan Kirsch, ‘Two notions of genocide’, *Creighton Law Review*, no. 42, 2009, pp. 347–360, at p. 352.

44 Apart from the authors quoted in the text, Schabas, in the new edition thereof (above note 10), also now follows the knowledge-based approach, p. 252 f., 254 (‘An approach to the knowledge requirement that

genocide, Gil Gil takes the view that the concept of intention (*intención*) must be understood in a wider sense and encompasses the concept of *dolus eventualis*<sup>45</sup> or conditional intent.<sup>46</sup> She justifies this for genocide by invoking the parallels between its structure and that of attempt. Attempt, according to Gil Gil an inchoate crime, requires on the one hand general intent, including *dolus eventualis*, with regard to the *actus reus* of the attempted crime, and on the other hand unconditional will (*voluntad incondicionada*) or intention (*intención*) as a transcending subjective element (*elemento subjetivo trascendente*) with regard to the constituent acts of the offence and the criminal result.<sup>47</sup> As to these constituent acts, e.g. the killing of a member of the group in the case of genocide, *dolus eventualis* would be sufficient, combined however with intention in the sense of the unconditional will with regard to the remaining acts – i.e. the killing of other members of the group – necessary to bring about the final result of the crime, or at least knowledge of the co-perpetrators’ intention to that effect, and at the same time the presumption that the realization of these acts is possible. Otto Triffterer<sup>48</sup> arrives at the same result, allowing in principle for *dolus eventualis*, but his argument is based less on doctrinal than policy considerations. In essence, he argues that a literal and historical interpretation of the intent requirement is not conclusive, but that from a teleological perspective it makes no difference whether one acts with a special intent or only *dolus eventualis* with regard to the destruction of the group.<sup>49</sup> His position is mainly motivated by the difficulty to prove a special intent and hence to obtain convictions for genocide.<sup>50</sup>

Other writers have argued that the ‘intent to destroy’ encompasses the entire scope of direct intent, i.e. also includes positive knowledge (*dolus directus* of the second degree). Alexander Greenawalt makes the case for such a knowledge-based approach on the basis of a historical and literal interpretation of the intent concept in the Genocide Convention and in national (criminal) law, which he finds inconclusive, leading to ‘multiple interpretations’.<sup>51</sup> He argues that ‘principal

considers recklessness about the consequences of an act to be equivalent to full knowledge provides an answer to such an argument.’) and 264 (‘The knowledge-based approach, [...] whereby the mens rea of both perpetrator and accomplice is assessed not by their goal or purpose but by their knowledge of the plan or policy, avoids these difficulties.’).

45 On the continental concept of *dolus eventualis* that can be situated somewhere between purpose/knowledge and recklessness/negligence, see George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, New York, 1998, p. 123; and Kai Ambos, ‘General principles of criminal law in the Rome Statute’, *CLF*, no. 10, 1999, p. 1 ff., at p. 21 with further references.

46 A. Gil Gil, *Derecho penal internacional*, above note 10, pp. 231 ff., 236 ff., 258, 259, with reference to her mentor Cerezo Mir in notes 124 and 127 and further references in note 136. See also, for a summary of her position, A. Gil Gil, ‘Tatbestände’, above note 10, p. 395.

47 A. Gil Gil, *Derecho penal internacional*, above note 10, p. 241.

48 O. Triffterer, ‘Genocide ...’, above note 1, pp. 403ff.

49 *Ibid.*, pp. 404–405. See also Otto Triffterer, ‘Can the “Elements of Crimes” narrow or broaden responsibility for criminal behavior defined in the Rome Statute?’, in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the ICC*, Martinus Nijhoff Publishers, Leiden *et al.*, 2009, pp. 381–400, at p. 390, where he argues that with regard to the context element (as defined in the Elements of Crimes, above note 85) ‘general intent’ would be sufficient.

50 O. Triffterer, ‘Genocide ...’, above note 1, pp. 405–406 (‘much more difficult to be proven ...’).

51 A. Greenawalt, above note 14, pp. 2265 ff. (2279).



culpability should extend to those who may lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions'.<sup>52</sup> In cases in which a 'perpetrator is otherwise liable' for genocide, the requirement for genocidal intent is fulfilled if that person 'acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group ...'.<sup>53</sup> Greenawalt's reading of the intent requirement of the Convention combines two elements: selection of group members based on their membership in the group, and knowledge of the destructive consequences of the respective conduct for the survival of the group.<sup>54</sup> Hans Vest follows the knowledge-based approach and develops it further, focusing on the twofold structure of genocidal intent.<sup>55</sup> According to Vest, this structure consists of the 'mixed individual-collective point of reference' of the intent: while the general intent refers to the individual acts (*Einzeltaten*) of the genocide definition, the 'intent to destroy' refers to the collective or broader action inherent in any genocide conduct,<sup>56</sup> i.e. to 'the overall conduct of the genocidal campaign and its consequences' (*Gesamttat*).<sup>57</sup> As to this 'collective' or 'contextual' intent, 'practical certainty' on the part of the perpetrator as to the genocidal consequence of the collective operation he is participating in suffices as an intent standard: 'the knowledge-based standard of genocidal intent is established when the perpetrator's knowledge of the consequences of the overall conduct reaches the *level of practical certainty*'.<sup>58</sup> In fact, John Jones had already earlier drawn a similar distinction between the intent as an attribute of the genocidal plan and of the individual participating in it.<sup>59</sup> He argued that the intent to destroy is (only) an attribute of the genocidal plan, whereas the individual participating in this plan only needs – as in the case of crimes against humanity – to possess intent with regard to the underlying acts (e.g. Art. 6 (a)–(e) of the ICC Statute) and knowledge with regard to the genocidal context. Claus Kress follows, in essence, this structure-based approach distinguishing between the 'collective level of genocidal activity' and the 'individual genocidal conduct'.<sup>60</sup> Accordingly, in the 'typical case' of

52 *Ibid*, pp. 2259, 2265.

53 *Ibid*, p. 2288 (emphasis added).

54 *Ibid*, p. 2289.

55 Hans Vest, 'A structure-based concept of genocidal intent', *JICJ*, vol. 5, no. 4, 2007, pp. 781–797, at pp. 790 ff. (793), originally *Genozid durch organisatorische Machtapparate*, Nomos, Baden-Baden, 2002, pp. 101 ff.; H. Vest, 'Humanitätsverbrechen: Herausforderung für das Individualstrafrecht?', *ZStW*, no. 113, 2001, pp. 457–498, at pp. 480 ff.

56 H. Vest, above note 54, 'A structure-based concept...', pp. 785–786, 789–790.

57 *Ibid*, p. 790.

58 *Ibid*, p. 793 (emphasis in the original).

59 John Jones, "'Whose intent is it anyway?'" Genocide and the intent to destroy a group', in L.C. Vorah *et al.* (eds), *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, The Hague, 2003, pp. 467–480, at pp. 468, 471, 473, 477, 479–480.

60 Claus Kress, 'The Darfur Report and genocidal intent', *JICJ*, vol. 3, no. 3, 2005, pp. 562–578, pp. 572 ff.; see also recently C. Kress, '§ 6 Völkermord', in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum Strafgesetzbuch*, vol. 6/2 *Nebenstrafrecht III/Völkerstrafgesetzbuch* (VStGB) (2009), § 6 VStGB, mn. 82ff., pp. 563–564; *ibid*, above note 74, pp. 304 ff. Essentially the same argument for the knowledge-based approach is made by A. Paul, above note 43, pp. 255 ff., especially referring to H. Vest

genocide the low-level perpetrator must, on the one hand (drawing a parallel with crimes against humanity), act with knowledge of the collective genocidal attack,<sup>61</sup> and on the other hand (following Gil Gil), with *dolus eventualis* as to the at least partial destruction of a protected group.<sup>62</sup>

## The structure- and knowledge-based approaches combined

### *The ambiguous meaning of the intent concept*

The knowledge-based approach rests on the premise that the concept of ‘intent’ is not limited to a pure volitional or purpose-based reading. This is correct. Greenawalt demonstrates convincingly that the historical and literal interpretation of the Genocide Convention is not conclusive in that regard.<sup>63</sup> As to a literal interpretation, the wording of Article 6 of the ICC Statute (modelled on Article 2 of the Genocide Convention) is by no means clear: while the French and Spanish versions of the ICC Statute’s Article 6 seem to suggest a volitional interpretation by employing a terminology which, *prima facie*, expresses purpose-based conduct (*l’intention de détruire*; *intención de destruir*), the English version (‘intent to destroy’) is already unclear in its wording since the meaning of ‘intent’ is ambiguous. While traditional common law knows specific intent crimes implying aim and purpose, e.g. burglary,<sup>64</sup> intent or intention was always understood in both a volitional and cognitive sense.<sup>65</sup> Modern English law still includes in the definition of intention, apart from purpose, ‘foresight of virtual certainty’; at best, the core meaning of intent or intention is reserved to desire, purpose etc.<sup>66</sup> In *R. v. Woollin* the House of Lords, with regard to a murder charge, defined intention by referring to ‘virtual certainty’ as to the consequence of the defendant’s

(p. 258) and suggesting a concrete reform proposal (pp. 273, 323–324). Also, Elise van Sliedregt, above note 1, at pp. 192–193, finds Kress’ approach ‘appealing’ but ultimately sticks to the ICTY/ICTR’s under-theorized view with the formal argument that it ‘cannot be ignored’. Following Claus Kress’ collective-individual distinction, see also S. Kirsch, above note 43, pp. 352 ff.

61 C. Kress, Darfur Report ..., above note 60, pp. 573 ff.

62 *Ibid.*, pp. 576–577.

63 Also correct in this regard, O. Triffterer, ‘Genocide ...’, above note 1, p. 404; see above note 47 and accompanying text.

64 Glanville Williams, *Criminal Law: The General Part*, Stevens, London, 1961, p. 34, but see also p. 49 where he says about the term ‘specific intent’ that the ‘adjective “specific” seems to be somewhat pointless, for the intent is no more specific than any other intent required in criminal law.’

65 See Glanville Williams, *The Mental Element in Crime*, Hebrew University, Jerusalem, 1965, p. 20: ‘Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one’s conduct, or else of foresight that the result will certainly follow.’ See also George Fletcher, *Rethinking Criminal Law*, Little, Brown, Boston *et al.*, 1978, reprint 2000, p. 440, tracing this doctrinal tradition to the nineteenth-century utilitarian John Austin. Recently in this sense Mohamed Elewa Badar, ‘The mental element in the Rome Statute of the ICC: A commentary from a comparative criminal law perspective’, *Criminal Law Forum*, vol. 19, no. 3–4, 2008, pp. 473–518, at p. 479.

66 Andrew Ashworth, *Principles of Criminal Law*, Oxford University Press, Oxford, 6th edn, 2009, pp. 170 f. (171); Andrew Perry Simester and Robert Sullivan, *Criminal Law: Theory and Doctrine*, Hart, Oxford *et al.*, 3rd edn, 2007, p. 120 f. (121). In this sense also I. Kugler, above note 7, p. 4 ff., distinguishing between direct and oblique intention.

actions.<sup>67</sup> The International Criminal Court Act 2001 defines intention for the purpose of the crime of genocide in English law to include a person's awareness that a consequence will occur in the ordinary course of events.<sup>68</sup> Also, the US Model Penal Code, which served as a reference for the ICC Statute in many regards, albeit distinguishing between 'purpose' and 'knowledge' (section 2.02 (a)), defines the former in a cognitive sense by referring to the perpetrator's 'conscious object' with regard to conduct and result.<sup>69</sup>

However, in civil law jurisdictions, too, the distinction between purpose and knowledge and thus the meaning of 'intention' is not always clear-cut. In French law, the expression '*intention criminelle*' was introduced into the former Criminal Code (Article 435) by a legislative act on 2 April 1892 but never explicitly defined. The Code employed the expressions '*à dessein, volontairement, sciemment, frauduleusement, de mauvaise foi*' ('intentionally, voluntarily, knowingly, fraudulent and *mala fide*'). The new Criminal Code refers to criminal intent in Article 121–3 but does not define it either. The French judges seem to consider themselves – in the sense of Montesquieu's famous proverb – to be only the mouthpiece of the law ('*bouche de la loi*') and therefore also refrain from proposing a general definition of criminal intent.<sup>70</sup> In the scholarly literature 'intention' is defined in both a volitional sense<sup>71</sup> and a cognitive sense.<sup>72</sup> On this basis, a distinction between the volitional *dolus directus* and the cognitive *dolus indirectus* is drawn.<sup>73</sup>

In German and Spanish law, the *dolus directus* of first degree ('*dolus specialis*', '*intención*', '*Absicht*') is normally understood as expressing a strong volitional (will, desire) and a weak cognitive (knowledge, awareness) element.<sup>74</sup>

67 *R. v Woollin* [1999] 1 Cr App R 8, HL, at pp. 20–21 ('... the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions ...'). According to the Court of Appeal in *R v Matthews and Alleyne* [2003] 2 Cr App R 30, however, the jury is not obliged to find intention on the basis of foresight of virtual certainty (I am indebted to Professor Ian Dennis, who brought this to my attention). See also section 12 of the Judicial Studies Board, Specimen Directions, available at [www.jsboard.co.uk/criminal\\_law/cbb/index.htm](http://www.jsboard.co.uk/criminal_law/cbb/index.htm) (last consultation 1 February 2010).

68 International Criminal Court Act 2001 (UK) s 66(3) (I am indebted to Professor Ian Dennis, who brought this to my attention).

69 The respective part of section 2.02 (a) reads: 'A person acts purposely with respect to a material element of an offense when [...] 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 ...' (emphasis added). See also G. Fletcher, above note 65, pp. 440 ff.

70 Jacques Pradel, *Droit pénal général*, Cujas, Paris, 17th edn, 2008, p. 468.

71 Bernard Bouloc, *Droit pénal général et procédure pénale*, Sirey, Paris, 16th edn, 2006, p. 238: '*volonté tendue à dessein vers un but interdit par la loi pénale*' ('will that aims to realize an illegal goal').

72 Cf. Crim., 7 January 2003, Bulletin No. 1: '*la connaissance ou la conscience chez l'agent qu'il accomplit un acte illicite*' ('the agent's knowledge or awareness that he commits an illegal act'). See also Emile Garçon, *Code pénal annoté*, art. 1, no. 77; Roger Merle and André Vitu, *Traité de droit criminel*, vol. 1, Cujas, Paris, 7th edn, 1997, No. 579.

73 J. Pradel, above note 70, p. 463; Christiane Hennau-Hublet and Jacques Verhaegen, *Droit pénal général*, Bruylant, Brussels, 3rd edn, 2003, no. 350 ff.

74 Claus Roxin, *Strafrecht-Allgemeiner Teil. Grundlagen: Der Aufbau der Verbrechenslehre*, vol. 1, Beck, Munich, 4th edn, 2006, § 12 mn. 7 ff.; Santiago Mir Puig, *Derecho Penal Parte General*, Reppertor, Barcelona, 7th edn, 2006, p. 244, mn. 82–83.

*Dolus* in this sense means the desire to bring about the result or can be defined as a ‘purpose-bound will’.<sup>75</sup> Yet this apparently straightforward interpretation is by no means uncontroversial. In the Spanish doctrine, ‘*intención*’ is understood by an important part of the doctrine either as intent in a general sense (‘*dolus*’, ‘*dolo*’)<sup>76</sup> or as encompassing both forms of *dolus directus* (desire and knowledge).<sup>77</sup> In legal terminology even the German term ‘*Absicht*’, which in ordinary language possesses a clear volitional tendency, is not invariably understood in a purpose-based sense.<sup>78</sup> Apart from that, the ‘*Absicht*’ need not necessarily refer to all preconditions, transitional stages, intermediate goals or side-effects that are inevitably connected with the desired ultimate aim and are necessary steps to be taken on the way to this ultimate aim (e.g. the destruction of a group). Such inevitable, closely interconnected side-effects or intermediate steps are encompassed by the ‘*Absicht*’ if the perpetrator knows with virtual certainty of their occurrence.<sup>79</sup> On the other hand, the perpetrator may desire or wish the destruction of the group only as an intermediate goal, as a means to a further end.<sup>80</sup> He may, for example, pursue the final aim of a military occupation of a region populated by the affected group and, in order to reach this final goal, kill or deport members of the respective group with intent to destroy it. While in this case this intermediate goal would still be part of the main consequences brought about by the perpetrator’s acts and as such would be willingly, intentionally produced on the way to the final goal, the situation would be different if the destruction of the group would only be an unwelcome side-effect of the perpetrator’s acts to gain final control of the respective region, i.e. it would not be part of the main consequences as envisaged by the perpetrator but only an unfortunate, subsidiary collateral consequence.<sup>81</sup>

From these considerations, it quite clearly follows that a literal interpretation of the term ‘intent’ does not indicate any clear preference for a purpose- or knowledge-based approach.<sup>82</sup> To be sure, genocide requires a general ‘intent to destroy’, not a ‘special’ or ‘specific’ intent in the sense of a ‘*dolus specialis*’. While the ‘intent to destroy’ may be understood as an ulterior intent in the sense of the

75 Mohamed Elewa Badar, ‘*Mens rea* – Mistake of law & mistake of fact in German criminal law: A survey for international criminal tribunals’, *International Criminal Law Review (ICLR)*, no. 5, 2005, pp. 203–246, at p. 222.

76 Cf. Jose Cerezo Mir, *Curso de Derecho penal español, Parte General II: Teoría jurídica del delito*, Tecnos, Madrid, 1998, p. 153; A. Gil Gil, as quoted in above note 10 with further references.

77 Cf. D.M. Luzon Peña, *Curso de Derecho penal: parte general*, Editorial Universitas, Madrid, 2004, p. 416.

78 See generally Klaus Gehrig, *Der Absichtsbegriff in den Straftatbeständen des Besonderen Teils des StGB*, Duncker & Humblot, Berlin, 1986, *passim* (on German law); Beatrice Gukelberger, *Die Absichtsdelikte des Schweizerischen Strafgesetzbuches*, Herbert Lang & Cie, Berne, 1968, pp. 20 ff. (on Swiss law).

79 See H. Vest, ‘A structure-based concept ...’, above note 55, p. 788 with references in fn. 20.

80 Helmut Gropengiesser, ‘The criminal law of genocide. The German perspective’, *ICLR*, no. 5, 2005, pp. 329–342, at p. 339. Generally on this possibility, see I. Kugler, above note 7, p. 4.

81 See generally on the relationship between an intermediate goal and specific intent Wolfgang Joecks, in Joecks and Klaus Miebach, *Münchener Kommentar Strafgesetzbuch*, Beck, Munich, 2003, § 16 mn. 12; C. Roxin, above note 74, § 12 mn. 10 ff.; Kristian Kühl, *Strafrecht Allgemeiner Teil*, Vahlen, Munich, 6th edn, 2008, § 5 mn. 35.

82 For the same view see Claus Kress, *Darfur Report ...*, above note 60, p. 567 ff. (570, 572); *ibid*, above note 60, mn. 83.

double intent structure of genocide explained at the beginning of this paper,<sup>83</sup> it is quite another matter to give this requirement a purpose-based meaning by reading into the offence definition the qualifier ‘special’ or ‘specific’. Even if this qualifier were part of the offence definition, it does not necessarily refer to the degree or intensity of the intent;<sup>84</sup> instead it may also be interpreted, as opposed to ‘general’ intent, in the sense of the double intent structure, i.e. it would merely clarify that the ‘special’ intent to destroy must be distinguished from the ‘general’ intent referring to the underlying acts.<sup>85</sup>

### *A twofold solution distinguishing between low-level and mid-/high-level perpetrators*

If one accepts the above conclusion, i.e. that a literal reading of the intent concept does not unambiguously determine the meaning of the ‘intent to destroy’, a solution must be sought in a systematic and teleological interpretation of this requirement. Clearly, such an interpretation must not, in conformity with the *nullum crimen* principle (principle of strict construction and prohibition of analogy, ICC Statute, Article 22(2)),<sup>86</sup> extend beyond the boundaries set by the letter of the (criminal) law, but if these boundaries are not precisely determined, as demonstrated in the preceding section, the recourse to other methods of interpretation is not only legitimate but also necessary.

Such an interpretation must start, systematically, from the structure-based approach as developed by Vest and Kress. This approach rests on the distinction between the general intent with regard to the individual acts (*Einzelthaten*) and the ‘intent to destroy’ with regard to the collective genocidal action (*Gesamtthat*).<sup>87</sup> Both forms of intent encompass the *mens rea* of the genocide offence but a distinction must, as explained at the beginning of this paper, be made between them. The – here relevant – (additional) ‘intent to destroy’ refers to the collective genocidal action and thus encapsulates the context element of the crime of genocide. In other words, while the objective offence definition lacks – contrary to the definition in the ICC’s Elements of Crimes<sup>88</sup> – a context

83 Note 4 above and main text.

84 This is, however, the prevailing view in the general criminal law doctrine as to the meaning of ‘specific intent’, see e.g. Fiandaca Musco, *Diritto Penale, parte generale*, Zanichelli, Bologna, 5th edn, 2008, p. 328 ff.

85 In this sense also O. Triffterer, ‘Überlegungen’, above note 1, pp. 1423, 1438 ff.

86 For a discussion of this principle in international criminal law, see Kai Ambos, ‘Nulla poena sine lege in international criminal law’, in Roelof Haveman and Olaoluwa Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp et al., 2006, p. 17 ff.

87 The *Krstic* Trial Chamber, albeit not with the necessary precision, also distinguished, on the one hand, between the ‘individual intent’ and ‘the intent involved in the conception and commission of the crime’ and, on the other hand, between the ‘intent to destroy’ and the ‘intent of particular perpetrators’. (See *Prosecutor v. Radislav Krstic*, T. Ch., above note 31, para. 549; also referred to by H. Vest, p. 794 with fn. 47, and C. Kress, above note 60, p. 573 with fn 45).

88 See the last Element (no. 4 or 5) to each act requiring that ‘[T]he conduct took place in the context of a manifest pattern of similar conduct ...’ (Preparatory Commission for the ICC, Addendum, Part II. Finalized draft text of the Elements of Crimes. PCNICC/2000/1/Add. 2, 2 November 2000).

element,<sup>89</sup> this element becomes part of the (subjective) offence definition by means of the ‘intent to destroy’ requirement as its ‘carrier’.<sup>90</sup> Turning to the teleological interpretation, the crucial question then goes to the rationale of the ‘intent to destroy’ requirement. As has already been said at the beginning of this paper, the main purpose of this requirement is to distinguish genocide from other crimes, especially ‘general’ crimes against humanity. This purpose, however, does not predetermine the concrete meaning or contents of this requirement. In fact, while this special requirement turns genocide into a special crime against humanity, i.e. a crime directed not only against individuals but against a group as such, it fulfils this function independent of its either purpose- or knowledge-based meaning. In other words the status of genocide as the ‘crime of crimes’, characterized by a special degree of wrongfulness, is not predicated on an either purpose- or knowledge-based reading of the ‘intent to destroy’ element<sup>91</sup> but on its specificity in protecting certain groups from attacks and ultimately destruction.<sup>92</sup>

Against this background it is now possible to suggest a twofold solution distinguishing between low-level and mid-/high-level perpetrators.<sup>93</sup> As to the former, i.e. the easily interchangeable ‘foot soldiers’ of a genocidal campaign who normally lack the means to destroy a group on their own,<sup>94</sup> it is neither necessary nor realistic to expect that they will always act with the purpose or desire to destroy. Indeed, it is possible to think of a collective genocidal campaign without any or only some individual (low-level) perpetrators acting with a destructive purpose or desire.<sup>95</sup> In fact, as these individuals cannot, on their own, contribute in any meaningful way to the ultimate destruction of a group, they cannot express any meaningful, act-oriented will either as to the overall result. It should thus suffice for genocide liability if these perpetrators act with knowledge, i.e. know that they

89 See Kai Ambos, *Internationales Strafrecht*, Beck, Munich, 2nd edn, 2008, § 7 mn. 145. Against a context element for this reason, see also O. Triffterer, ‘Genocide ...’, above note 1, p. 407.

90 Cf. D. Demko, above note 13, pp. 228–229. Similarly, for C. Kress (above note 42, pp. 304–305) the context element of the Elements (above note 88) constitutes the point of reference of genocidal intent (conc. S. Kirsch, above note 43, pp. 354–355). In any case, the context element must not be understood as a requirement of a genocidal plan or policy but the relevant conduct must only occur against the background of a ‘manifest pattern of similar conduct’ (cf. R. Cryer, above note 1, p. 291).

91 For a purpose-based interpretation, however, which is the prevailing view in the German doctrine, see e.g. C. Roxin, above note 74, § 10, mn. 74, § 12 mn. 15, discussing the respective provision in the German law (previously § 220a of the German Criminal Code [Strafgesetzbuch], now § 6 VStGB). For an apparently different view, see O. Triffterer, ‘Genocide ...’, above note 1, pp. 404–405, who does not, however, really discuss the teleological argument.

92 In the same vein C. Kress, Darfur Report ..., above note 60, p. 576.

93 For a similar, albeit not further elaborated ‘differential approach’ see also Harmen Van der Wilt, ‘Genocide, complicity in genocide and international v. domestic jurisdiction’, *JICJ*, vol. 4, no. 2, 2006, pp. 239–257, at pp. 243 ff. A similar distinction was already made by Nina H.B. Jorgensen, ‘The definition of genocide: Joining the dots in the light of recent practice’, *ICLR*, vol. 1, no. 3–4, 2001, pp. 285–313, at p. 309. For a much more sophisticated typology of perpetrators of international crimes that also may be applied to genocide, see Alette Smeulders, ‘Perpetrators of international crimes: Towards a typology’, in A. Smeulders and R. Haveman, *Supranational Criminology: Towards a Criminology of International Crimes*, Intersentia, Antwerp et al., 2008, pp. 233–266, at p. 240 ff.

94 C. Kress, Darfur Report ..., above note 60, p. 577 with note 61, speaks in this regard of ‘the typical case’.

95 See H. Vest, Humanitätsverbrechen, above note 55, at p. 486; concurring C. Kress, Darfur Report ..., above note 60, p. 573.

are a part of a genocidal campaign and thus contribute to the materialization of the *collective* intent to destroy.<sup>96</sup> In other words, a defendant who is a low-level operative must at least know that the masterminds of the genocidal campaign are acting with a genocidal intent construed in the narrow sense.

There are at least four arguments in support of this approach. First of all, the incorporation of a context element in the offence definition by way of its special subject requirement corresponds to the criminological reality of genocidal conduct and campaigns, i.e. that a genocide cannot be committed by a few crazy individuals alone but needs intellectual masterminds and an organizational apparatus to implement their evil plans.<sup>97</sup> Second, in terms of their overall contribution to the genocidal campaign these low-level perpetrators are, albeit carrying out the underlying genocidal acts with their own hands, only secondary participants, thus more precisely aides or assistants.<sup>98</sup> In other words, while they are the direct executors of the genocidal plan and therefore should be convicted as such (i.e. as principals) their executive acts receive only their full 'genocidal meaning' because a plan exists in the first place. As the executors were not involved in designing this plan but are, in a normative sense, only used as mere instruments to implement it, they are not required, even according to the mainstream view held in the case-law and doctrine of international criminal law, to possess the destructive special intent themselves but only to know of its existence. Admittedly, this may be different in cases of a 'spontaneous' genocide if one assumes, *arguendo* and against our first argument, that such cases may exist. Yet the direct perpetrators will then possess the special intent themselves anyway and thus fulfil the subjective requirements for being a principal to genocide. Third, although there is, as explained above, a structural difference between genocide and crimes against humanity in terms of the scope of protection, the former has developed out of the

96 The underlying distinction was recognized in a first draft of the ICC Elements of Crime, see the last element (no. 3 or 4) to each underlying act, here 'Genocide by killing': 'The accused knew [...] that the conduct would destroy [...] such group ...' (Preparatory Commission for the International Criminal Court, Addendum, Annex III, Elements of Crimes, PCNICC/1999/L.5/Rev. 1/Add. 2, 22 December 1999), but the final version retained only the (special) intent requirement (see Elements of Crime, above note 85, art. 6, third element in each case). M. Shaw, above note 14, p. 86 ff. recognizes the organized form of genocide but is critical of the idea of a collective intention. In substance he follows Max Weber's approach of an action-centred sociology with its respective theoretical framework ('Genocidists invariably have multiple goals and deviate from their rationalistic pursuit. The ideal-typical concept of "rational", "intentional" genocide can be no more than a heuristic tool enabling us to grasp the complexity of real cases.', *ibid.*, p. 88).

97 Cf. *Prosecutor v. Krstić*, T. Ch., above note 31, para. 549 ('The gravity and scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration'). See also W. Schabas, above note 10, p. 243 f., at p. 243 (a 'knowledge-based' approach highlights 'the collective dimension of the crime of genocide'), at p. 244 ('genocide presents itself as the archetypical crime of State, requiring organization and planning'); M. Shaw, above note 14, p. 82 ('Genocide has been seen legally as an organized, not a spontaneous, crime; it could not be committed by an individual acting alone.'). I have elaborated on the criminological reality of genocide in my paper 'Criminologically explained reality of genocide, structure of the offence and the intent to destroy requirement', to be published in Alette Smeulers and Elies van Sliedregt (eds), *Collective violence and international criminal justice: An interdisciplinary approach*, Intersentia, Antwerp et al., 2010.

98 For a similar complicity approach, see also C. Kress, *Darfur Report ...*, above note 60, pp. 574–575.

latter<sup>99</sup> and remains in essence a (special) crime against humanity.<sup>100</sup> This ‘structural congruity’<sup>101</sup> justifies construing genocide structurally as a crime against humanity with regard to the ‘knowledge-of-the-attack’ requirement of such crimes (ICC Statute, Article 7). Fourth, in terms of the direct perpetrator’s (hostile) attitude towards the group, it makes no difference whether he acts himself with purpose or knowledge of the overall genocidal purpose.<sup>102</sup> He may even act with a kind of indirect purpose by not distancing himself completely from the overall genocidal purpose. In all these cases the low-level perpetrator expresses his contempt for the respective group and takes a clear decision against the legal interest protected by the genocide offence provisions.

This all means that, apart from the general intent with regard to the underlying acts, a simple, low-level perpetrator must (only) act with knowledge of the respective context required by genocide and crimes against humanity to be held liable for such crimes. He may also possess a purpose-based intent, for example in the case of a ‘spontaneous’ genocide, but this is not a prerequisite for his (subjective) liability. The context serves in both cases as the reference point for the perpetrators’ knowledge, i.e. the knowledge need not concern the ultimate destruction of the group in the future – indeed, this is only a future expectation which as such cannot be known but only hoped or desired<sup>103</sup> – but only the overall genocidal context. As to genocide, this means that the low-level perpetrator participates in an overall genocidal plan or enterprise, i.e. his individual acts constitute, together with the acts of the other low-level perpetrators, the realization of the genocidal will or purpose represented by the leaders or mastermind of the enterprise. The existence of the enterprise interconnects the acts of the low-level perpetrators and, at the same time, links them to the mastermind’s will, i.e. both the acts of the subordinate and the thoughts of the superiors complement each other.

From this it follows that the purpose-based approach must be upheld for the *top-level perpetrators*, i.e. the intellectual and factual leaders of the genocidal enterprise. They are the brains of the genocidal operation and have the power to get

99 On the origins of the legal prohibition of genocide, see W. Schabas, above note 10, p. 17 ff.; see also *ibid.*, p. 59 ff., on the Genocide Convention and the subsequent normative development.

100 J. Jones, above note 59, p. 479; C. Kress, Darfur Report ..., above note 60, pp. 575–576. Stressing the distinction between genocide and crimes against humanity but still recognizing their affinity, W. Schabas, above note 10, pp. 11, 13 ff., at p. 15 (‘genocide stands to crimes against humanity as premeditated murder stands to intentional homicide. Genocide deserves its title as the “crime of crimes”.’).

101 C. Kress, Darfur Report ..., above note 60, pp. 575–576; *ibid.*, Münchner Kommentar ..., above note 60, mn. 87; C. Kress, above note 42, p. 301.

102 See also A. Paul, above note 60, p. 259 ff., with further references.

103 For a fundamental analysis of knowledge with regard to risks caused by an act and mere wishes, hopes or desires with regard to future results, see Wolfgang Frisch, *Vorsatz und Risiko: Grundfragen des tatbestandsmäßigen Verhaltens und des Vorsatzes. Zugleich ein Beitrag zur Behandlung außertatbestandlicher Möglichkeitsvorstellungen*. Heymann, Cologne *et al.*, 1983, pp. 222 ff. See also O. Triffterer, ‘Genocide ...’, above note 1, p. 406, admitting that the ‘particular intent is directed towards the realization of the expectations of the perpetrator in the future’ but failing to acknowledge that these future expectations can only be desired or wanted, i.e. be the object of hope but not of certainty or knowledge.



it going in the first place. They are the ones who can and must act with the ulterior intent which is, as explained at the beginning of this paper, characteristic of the crime of genocide and turns it into a goal-oriented crime. Who, if not the top-level perpetrators, can realistically possess the ulterior intent directed at the ultimate destruction of a protected group? The harder question is what requirements to set with regard to the *mid-level perpetrators*, i.e. those people who, like Adolf Eichmann, have an important organizational or administrative function without which the genocidal campaign could not have been implemented. These people must act on purpose, since they do not execute the underlying acts – as do the low-level perpetrators – but are rather intellectual perpetrators and are therefore to be compared to the top-level perpetrators. They can thus only be qualified as genocidaire if they share the top perpetrators' purpose-based intent.

The differentiation between top-/mid-level and low-level perpetrators according to their status and role in the genocidal enterprise is also convincing from a policy perspective. By retaining the requirement of a purpose-based intent with regard to the former, it avoids the arbitrary expansion and politicization of the genocide offence down a slippery slope that ultimately leads to the classification of 'ordinary' crimes against humanity as genocide,<sup>104</sup> thereby devaluating the abhorrent character of the latter. In this sense the purpose-based approach has an important function in operating as a 'preventative bulwark',<sup>105</sup> for the discriminatory selection and targeted persecution alone of people or even members of a group do not, contrary to what an *absolute* knowledge-based approach suggests,<sup>106</sup> constitute genocide but 'only' persecutions as a crime against humanity.

In the case of low-level perpetrators, the combined structure- and knowledge-based approach suggested here opts for a knowledge-based reading of the 'intent to destroy' requirement, with the *genocidal context as the point of reference* for that intent. In that respect a lower mental standard, e.g. *dolus eventualis* or even recklessness,<sup>107</sup> cannot be admitted, since it would radically change the character of the genocide offence in terms of its wrongfulness and particularity vis-à-vis crimes against humanity. Also, the argument of the parallel structures of attempt and genocide, as submitted by Gil Gil in support of *dolus eventualis*,<sup>108</sup> is not cogent: while it can be argued that the *actus reus* of genocide is structurally identical to that of an attempt crime, this does not mean that it must have the same subjective requirements. On the contrary, an attempt crime does not necessarily contain a special subjective element that is in any way comparable to the intent to destroy. Furthermore, recognizing a *dolus eventualis* with regard to the genocidal context would be incompatible with the suggested structural congruity between genocide

104 The distinction is also emphasized by *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 469.

105 See in the same vein Nikolas Kajković, 'The politics of the ICJ Genocide case and its interpretation', *LJIL*, vol. 21, issue 4, December 2008, pp. 885–910, at p. 904.

106 A. Greenawalt, above note 14, pp. 2287–2288 and 2293–2294 (stressing the threat to the survival of the group).

107 Against *dolus eventualis*, also A. Paul, above note 60, pp. 262–263.

108 See above note 44 and main text.

and crimes against humanity. For if this congruity allows on the one hand for a knowledge-based approach with regard to genocide liability of low-level perpetrators – drawing on the knowledge-of-the-attack requirement in crimes against humanity – this standard constitutes on the other hand a minimum that would be undermined by a lower standard, such as *dolus eventualis*, as to the context element.

However, the interpretation of the ‘intent to destroy’ *with regard to the ultimate destruction* of the group in the future is a different matter. As has been argued above, such a future expectation cannot be known but only hoped for or desired.<sup>109</sup> Take for example the case of a soldier who knowingly participates in the destruction of a certain ethnic group, i.e. satisfies the knowledge-based interpretation as to the genocidal context, but only acts with indifference as to the group’s ultimate destruction, i.e. with *dolus eventualis*.<sup>110</sup> It would not make sense to require knowledge of this soldier as to their ultimate destruction since he simply cannot possess this knowledge. With regard to this future event he can only act with purpose or desire, i.e. with *dolus directus* in the first degree. Admittedly, he may also take it into account as a possibility or even approve in the sense of *dolus eventualis*,<sup>111</sup> but to allow for *dolus eventualis* would not only be inconsistent with the interpretation of the terms ‘*intent*’, ‘*intention*’, ‘*intención*’ or ‘*Absicht*’ as defended above<sup>112</sup> but would also constitute a forbidden analogy at the expense of the accused and therefore violate the *nullum crimen* principle.<sup>113</sup> Thus if any mental state as to the ultimate destruction is required at all, it must be a purpose-based state of mind.

## Consequences of the combined structure- and knowledge-based approach for other forms of participation in genocide

### The case-law

While the case-law, as shown above, requires a purpose-based intent for any form of perpetration in genocide, it is not completely clear whether participants other

109 Note 100 above, and main text.

110 Cf. A. Gil Gil, *Derecho penal internacional*, above note 10, pp. 262–263 and 261 ff. for further examples.

111 See also C. Kress, *Darfur Report ...*, above note 60, p. 577, considering it ‘more realistic’ to require *dolus eventualis* instead of positive knowledge with regard to the effective destruction of the group.

112 Referring to notes 61 ff above and main text.

113 Apart from that, it is highly controversial whether existing international criminal law as codified in the ICC Statute does recognize *dolus eventualis* as a separate type of intent at all. In my view (K. Ambos, above note 86, § 7 mn. 67 with further references), this is not the case since the perpetrator acting with this type of intent is not aware, as required by Article 30(2)(b) of the ICC Statute, that a certain result or consequence will occur in the ordinary course of events. This awareness standard would only then correspond to *dolus eventualis* if one interpreted this concept in line with some cognitive theories which raise the *dolus eventualis* threshold to probability as to the occurrence of the respective consequence (see C. Roxin, above note 74, § 12 mn. 45–46; now also against the inclusion, ICC, Pre-Trial Chamber II, *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Art. 61(7)(a) and (b) of the Rome Statute etc., 15 June 2009, ICC-01/05-01/08, paras. 360 ff.; for a comment see Kai Ambos, ‘Critical issues in the Bemba confirmation decision’, *LJIL*, vol. 22, issue 4, December 2009, pp. 715–726, at p. 718). In any case, this is not relevant if one considers that the ‘unless otherwise provided’ formula in Article 30 allows for different (higher or lower) mental standards in the offence definitions.

than the direct perpetrator must also act with this kind of intent. As to *complicity*, the *Akayesu* Trial Chamber held that an accomplice to genocide in the sense of Article 2(3)(e) of the ICTR Statute need not necessarily possess the *dolus specialis* himself<sup>114</sup> but must only know or have reason to know that the principal acted with the specific intent,<sup>115</sup> because accomplice liability is accessory to principal liability:

‘[C]omplicity is borrowed criminality (*criminalité d’emprunt*). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.’<sup>116</sup>

Surprisingly, however, the *Akayesu* Chamber demanded the proof of special intent where a person is accused of aiding and abetting, planning, preparing or executing genocide in the sense of Article 6(1) of the ICTR Statute,<sup>117</sup> i.e. it rejected the specific intent requirement in favour of the special genocide complicity but demanded it for the general forms of secondary participation. This inconsistency was rightly dismissed by the *Musema* Trial Chamber, which held that complicity in genocide – independent of its legal basis and form – requires only knowledge of the genocidal intent.<sup>118</sup> As to aiding and abetting the Chamber, thus far following the *Akayesu* Chamber,<sup>119</sup> considered even possible knowledge, i.e. culpable ignorance (‘had reason to know’), as sufficient.<sup>120</sup> While the correct intent requirement for complicity is open to discussion, it does not make sense to distinguish between complicity in the sense of Article 2(3)(e) and Article 6(1) of the ICTR Statute. It was therefore correctly held by the *Krstić* Appeals Chamber that the general participation provision of Article 7(1) of the ICTY Statute should be read into the special genocide provision of the ICTY Statute’s Article 4(3)(e), leading to a common form of ‘aiding and abetting genocide’.<sup>121</sup> As a result, the case-law unanimously takes the view that an aider and abetter need not himself possess the specific intent, but only be aware of such an underlying intent.<sup>122</sup>

114 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 540, 545, 548.

115 *Ibid.*, para. 541.

116 *Ibid.*, para. 528.

117 *Ibid.*, para. 546.

118 *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 181 ff.

119 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 541.

120 *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 182.

121 *Prosecutor v. Radislav Krstić*, AJ, above note 33, paras 138–139. See also *Prosecutor v. Milomir Stakić*, TJ, above note 8, para. 531; *Prosecutor v. Laurent Semanza*, Trial Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 394; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, TJ, above note 37, para. 679.

122 ICTY: *Prosecutor v. Radislav Krstić*, AJ, above note 33, para. 140; *Prosecutor v. Dusko Tadić*, AJ, above note 25, para. 229; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, TJ, above note 37, para. 782; Appeal

As to *incitement* to commit genocide, the *Akayesu* Trial Chamber called for a specific intent as regards incitement within the meaning of Article 2(3)(c) of the ICTR Statute:

‘The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’<sup>123</sup>

This was confirmed by other ICTR judgements.<sup>124</sup> There is no reason to hold otherwise for ‘instigation’ as a form of (secondary) participation within the meaning of the ICTR Statute’s Article 6(1) if one considers with the Appeals Chamber, on the basis of the French version of the Statute (*‘incitation’*), that this is to be understood synonymously to ‘incitement’.<sup>125</sup>

Similarly, the *Musema* Trial Chamber made the case for specific intent in the case of *conspiracy* to commit genocide:

‘With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus, it is the view of the Chamber that the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto*, the intent required for the crime of genocide, that is the *dolus specialis* of genocide.’<sup>126</sup>

Judgement, Case No. IT-02-60-A, 9 May 2007, para. 127; *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 730; *Prosecutor v. Radoslav Brdjanin*, Decision on Motion for Acquittal pursuant to Rule 98 bis, Case No. IT-99-36-T, 8 November 2003, para. 66; *Prosecutor v. Radoslav Brdjanin*, Decision on Interlocutory Appeal, Case No. IT-99-36-A, 19 March 2004, para. 7. According to *Prosecutor v. Milorad Krnojelac*, Appeal Judgement, Case No. IT-97-25-A, 17 September 2003, para. 52 concerning the crime of persecution: ‘... the aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed ...’ See also *Prosecutor v. Mitar Vasiljević*, Appeal Judgement, Case No. IT-98-32-A, 25 February 2004, para. 142. ICTR: *Prosecutor v. Ignace Bagilishema*, TJ, above note 15, para. 71; *Prosecutor v. Gérard Ntakirutimana et al.*, Appeal Judgment, Case No. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, para. 500; *Prosecutor v. Laurent Semanza*, TJ, above note 121, paras 394–395; *Prosecutor v. Athanase Seromba*, Appeal Judgement, Case No. ICTR-2001-66-A, 12 March 2008, para. 56.

123 *Prosecutor v. Jean-Paul Akayesu*, TJ, above note 15, para. 560.

124 Cf. *Prosecutor v. Georges Ruggiu*, Trial Judgement, Case No. ICTR-97-32-I, 1 June 2000, para. 14; *Prosecutor v. Ferdinand Nahimana*, Trial Judgement, Case No. ICTR-99-52-T, 3 December 2003, para. 1012.

125 *Prosecutor v. Jean-Paul Akayesu*, Appeal Judgement, Case No. ICTR-96-4-A, 1 June 2001, para. 474 ff.

126 *Prosecutor v. Alfred Musema*, TJ, above note 15, para. 192.

As to Joint Criminal Enterprise (JCE), it is uncontroversial that all participants in a JCE I must ‘share’ the (specific) intent of the respective offence,<sup>127</sup> but the standard for a JCE III is controversial.<sup>128</sup> The *Stakić* Trial Chamber took a strict doctrinal stance:

‘... the application of a mode of liability can not replace a core element of a crime. [...] Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to “commit” genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of “escalation” to genocide, or genocide as a “natural and foreseeable consequence” of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Art. 4(3)(a).<sup>129</sup>

Yet this position did not meet with the approval of the Appeals Chamber. It held in *Brdjanin* that JCE III is, ‘as a mode of liability’, not ‘different from other forms of criminal liability which do not require proof of intent’.<sup>130</sup> Consequently, a member of a JCE III may be convicted for genocide if it was reasonably foreseeable for him that one of the objective acts of the genocide offence would be committed and that it would be committed with genocidal intent.<sup>131</sup>

Still more confusing is the situation in the case of superior responsibility. While the *Stakić* Trial Chamber held that the superior needs to possess the requisite specific intent,<sup>132</sup> the *Brdjanin* Appeals Chamber saw no

‘inherent reason why, having verified that it [superior responsibility] applies to genocide, Article 7(3) should apply differently to the crime of genocide than to any other crime in the Statute. [...] In the case of genocide, this implies that the superior must have known or had reason to know of his or her subordinate’s specific intent. [...] [S]uperior criminal responsibility is a form of criminal liability that does not require proof of intent to commit a crime on the part of a superior [...]’<sup>133</sup>

127 See recently *Prosecutor v. Milan Milutinovic et al.*, Judgement TC III, IT-05-87-T, 26 February 2009, para. 109.

128 On the three forms of JCE as developed by the *Tadic* Appeals Chamber (Judgement of 15 July 1999, IT-94-1, para. 185 ff.) see Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, *JICJ*, vol. 5, no. 1, March 2007, pp. 159–183. While JCE I and its variant JCE II are similar to a form of co-perpetration (without the requirement of an essential contribution) JCE III serves to impute excessive acts to all members of a JCE if these are only foreseeable to these other members.

129 *Prosecutor v. Milomir Stakić*, TJ, above note 8, para. 530 and 558. See also *Prosecutor v. Milomir Stakić*, Decision on Rule 98 bis Motion for Judgement of Acquittal, Case No. IT-97-24-T, 31 October 2002, para. 93; *Prosecutor v. Radoslav Brdjanin*, Dec. TC, above note 122, para. 57.

130 *Prosecutor v. Radoslav Brdjanin*, Dec. AC, above note 122, para. 7. See also *Prosecutor v. Milomir Stakić*, Appeal Judgement, Case No. IT-97-24-A, 22 March 2006, para. 38.

131 *Prosecutor v. Radoslav Brdjanin*, TJ, above note 9, para. 709; *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, Case No. IT-02-54, 16 June 2004, para. 291, 292, 300; conc. Cayley, above note 41, p. 839.

132 *Prosecutor v. Milomir Stakić*, Decision 98 bis, above note 129, para. 92.

133 *Prosecutor v. Radoslav Brdjanin*, AC, above note 122, para. 7; see also *Prosecutor v. Brdjanin*, TJ, above note 9, para. 720.

Thus while (only) the subordinates need to possess the specific intent, the superior does not<sup>134</sup> and the case-law turns, in fact, a specific intent crime into a crime of negligence.

The asserted position: a twofold distinction between top-/mid- and low-level perpetrators on the one hand, and principal and secondary forms of participation on the other

The starting point for the position proposed here is twofold.<sup>135</sup> First, it follows from the combined structure- and knowledge-based approach taking into account the status and role of the perpetrators. If the purpose-based reading of the ‘intent to destroy’ requirement is maintained only for top- and mid-level perpetrators, then the question arises for them alone whether their mere participation in genocide other than direct perpetration must be treated differently. In contrast, with regard to the low-level perpetrators the knowledge-based approach defended above must also apply to other forms of participation. Second, a distinction must be made between the different forms of ‘commission’ or ‘participation’ other than (direct) perpetration. More specifically, it should be made between principal-like forms of participation and other secondary forms of participation. Consequently, all forms of perpetration other than direct or immediate perpetration, namely co-perpetration (including joint criminal enterprise) and perpetration by means, as well as similar forms of intellectual and/or mental control of the genocidal conduct (soliciting, inducing, incitement, conspiracy) are to be treated like direct perpetration.<sup>136</sup> This means that in the case of top- and mid-level participants a purpose-based intent is required, while in the case of low-level participants knowledge as to the genocidal context is sufficient. In contrast, secondary participation in its weakest form, i.e. complicity by aiding or assisting a principal, requires only knowledge as to the existence of the principal’s special intent.<sup>137</sup> This lower

134 *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, TJ, above note 37, para. 686; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, TJ, above note 15, para. 92; *Prosecutor v. Andre Ntagerwa et al.*, Trial Judgement, Case No. ICTR-99-46-T, 25 February 2004, paras 653–654.

135 For the necessary background on the forms of participation in international criminal law, see Kai Ambos, ‘Article 25: Individual criminal responsibility’, in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC*, 2nd edn, 2008, pp. 743 ff.

136 Also for joint criminal enterprise III see George William Mugwanya, *The Crime of Genocide in International Law*, Cameron, London, May 2007, pp. 131–132; for conspiracy see Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, United States, 2007, p. 318; a different view for incitement is given in Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2nd edn, 2007, mn. 438 (knowledge is sufficient).

137 In the same vein *Prosecutor v. Radislav Krstic*, AJ, above note 33, para. 140 ff., with further references from the jurisprudence (fn. 235) and national law (fn. 236 ff.); for knowledge also *Prosecutor v. Emmanuel Nindabahizi*, Trial Judgement, Case No. ICTR-2001-71-I, 15 July 2004, para. 457 with further references; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, AJ, above note 121, para. 127 with further references; *Prosecutor v. Athanase Seromba*, AJ, above note 122, para. 146; *Prosecutor v. Frans van Anraat*, Judgement, AX6406, Rechtbank’s Gravenhage, 09/751 003-04, 23 December 2005, para. 6.5.1. and 8 (in which the defendant was convicted only for crimes against humanity and for lack of knowledge, not for genocide). See also Erwin van der Borgh, ‘Prosecution of international crimes in the Netherlands: An analysis of recent case-law’, *Criminal Law Forum*, vol. 18, no. 1, March 2007,

standard also follows from the rationale of any form of secondary participation, in particular assistance in a crime. If such a secondary participation is, as correctly recognized by the *Akayesu* Trial Chamber,<sup>138</sup> a form of derived or accessorial responsibility ('borrowed criminality') with regard to the main act or principal conduct,<sup>139</sup> it suffices that the accomplice acts with knowledge of the genocidal purpose of the principal perpetrators.

If these principles are now applied to the forms of participation discussed in the case-law, the result is this: with regard to complicity the distinction in *Akayesu* cannot be followed.<sup>140</sup> It simply makes no sense to treat complicity under the Genocide Convention differently from general complicity. With the adoption of the Rome Statute, we can proceed from the assumption that there is a general law of complicity that is equally applicable for all international crimes. It is hence correct and in perfect harmony with the above considerations if the *Akayesu* Chamber and the subsequent case-law take the view that the accomplice (assistant in a crime) need only know of the main perpetrators' special intent without possessing it himself. To give an example: if A organizes a genocidal campaign against Jews with the requisite intent to destroy this religious group and B assists in the killing of some Jews while being aware of A's genocidal purpose, B acts with the sufficient knowledge as to the genocidal context. This view also finds support in

pp. 87–136, at pp. 125–126; Harmen G. van der Wilt, 'Genocide, complicity in genocide and international v. domestic jurisdiction: Reflections on the van Anraat case', *JICJ*, vol. 4, no. 2, May 2006, pp. 239–257, at pp. 246–247; Helmut Gropengiesser and Helmut Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen: Deutschland*, edition iuscrim, Freiburg i.B., 2003, vol. 1, pp. 107–108; Chile Eboe-Osui, "'Complicity in genocide' versus "aiding and abetting genocide": Construing the difference in the ICTR and ICTY Statutes', *JICJ*, vol. 3, no. 1, March 2005, pp. 56–81, at pp. 63 ff.; van Sliedregt, above note 1, p. 194; Payam Akhavan, 'The crime of genocide in ICTR jurisprudence', *JICJ*, vol. 3, no. 4, September 2005, pp. 989–1006, at p. 994; Hernan Folgueiro, 'El crimen de genocidio etc.', in Pablo F. Parenti *et al.* (eds), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: Origen y evolución de las figuras, elementos típicos, jurisprudencia internacional*, Ad Hoc, Buenos Aires, 2007, p. 176; W. Mugwanya, above note 134, pp. 132–133 (different on page 201!). In favour of a purpose-based intent, however, Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford *et al.*, 2005, pp. 259–260, 287; Alex Obote-Odora, 'Complicity in genocide as understood through the ICTR experience', *JCLR*, vol. 2, no. 4, March 2002, pp. 375–408, at pp. 377, 382 ff., 387, 397 ff.; also apparently Roger S. Clark, 'Drafting a general part to a penal code: Some thoughts inspired by the negotiations on the Rome Statute of the ICC and by the Court's first substantive law discussion in the Lubanga Dyllo confirmation proceedings', *CLF*, vol. 19, no. 3–4, December 2008, pp. 519–552, at pp. 547 ff., referring to Article 25(3)(c) and (d) of the ICC Statute.

138 Note 114 above, and main text.

139 Obviously, there are various theories on the rationale of secondary participation (for one example see Claus Roxin, *Strafrecht Allgemeiner Teil*, vol. I, *Besondere Erscheinungsformen der Straftat* [2003] § 26 mn. p. 11 ff.), but they all agree on the dependence of the secondary participation on the main act/conduct.

140 In this regard I depart from my earlier view expressed in Kai Ambos, 'Art. 25. Individual criminal responsibility', in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC*, 1st edn, 1999, mn. 30; see for the author's view the new 2nd edition, 2008, Beck *et al.*, Munich *et al.*, special print, mn. 32. For critique, also Greenawalt, above note 14, pp. 2282 ff.; H. Van der Wilt, above note 93, pp. 244 ff.; Grant Dawson and Rachel Boynton, 'Reconciling complicity in genocide and aiding and abetting genocide in the jurisprudence of the United Nations *ad hoc* tribunals', *Harvard Human Rights Journal*, vol. 21, issue 2, 2008, pp. 241–279, at pp. 256 ff.; Daniel M. Greenfield, 'The crime of complicity in genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia got it wrong and why it matters', *Journal of Criminal Law and Criminology*, vol. 98, issue 3, 2008, pp. 921–952, at pp. 945 ff.

national case-law<sup>141</sup> and in the specialized literature.<sup>142</sup> It applies to all who assist, independent of their status in the genocidal apparatus, for the decisive factor in this case is not the assistant’s hierarchical level but the fact that he acts only as an assistant and therefore need not possess a purpose-based intent himself.

The knowledge standard in cases of mere assistance is also sound for policy reasons. To require a purpose-based intent on the part of the assistant himself would entail impunity in the many cases where the destruction of a particular group is not the assistant’s aim or goal, but is only accepted by him as a predictable side-effect.<sup>143</sup> Imagine, for example, a company that uses forced labourers who belong to a particular group and imposes conditions of life upon them calculated to lead to the partial or complete physical destruction of the group in question (ICC Statute, Article 6(c)), but whose primary goal is not the destruction of the group but the maximization of profit through the use of cheap labour. Indeed, the often existing complicity of big business in protracted armed conflicts and thus in genocide committed in the course of such conflicts is a strong argument for accepting a knowledge standard.<sup>144</sup> One can even accept a lower standard, e.g. *dolus eventualis* – as did the Court of Appeal of the Netherlands in the *Van Anraat* case<sup>145</sup> – or culpable ignorance – as did the *Akayesu* and *Musema* Chambers<sup>146</sup> – as long as this lower standard is included in the applicable concept of intent. It is, however, misleading to equate the ‘had reason to know’ standard with *dolus eventualis*,<sup>147</sup> for this would only be correct if one reduces this form of intent to a pure cognitive standard without any volitional underpinning.

As for *incitement* and *conspiracy*, the particular character of these modes of participation as criminalizing forms of ‘anticipated’ criminal conduct (*Vorverlagerung*) in view of the (abstract) endangerment or risk that they pose to legally protected interests, in this case the attack on the existence of the group, calls for a restriction that can only be achieved at the subjective level by requiring a purpose-based intent to destroy.<sup>148</sup> Such a restriction will not create a loophole with

141 BayObLG (Bayerisches Oberstes Landesgericht), *Neue Juristische Wochenschrift* (NJW), no. 51, 1998, pp. 392 ff., with case note by Kai Ambos, *Neue Zeitschrift für Strafrecht*, no. 18, 1998, p. 139.

142 Cf. R. Arnold, above note 1, pp. 145, 151; H. Van der Wilt, above note 93, p. 246; H. Van der Wilt, ‘Genocide v. war crimes in the Van Anraat appeal’, *JICJ*, vol. 6, no. 3, July 2008, pp. 557–567, at p. 560. Dissenting, W. Schabas, above note 10, pp. 221, 259, 300 ff., who criticizes the distinction in *Akayesu* but in the end argues for the requirement of the special intent to destroy for all forms of participation.

143 According to Günter Heine and Hans Vest, ‘Murder/willful killing’, in McDonald, Swaak and Goldman (eds), above note 10, vol. I, p. 175, at p. 186, the result, side-effects and preconditions cannot be distinguished due to the collective nature of genocide; the knowledge requirement must therefore be retained.

144 See the excellent observations by H. Van der Wilt, above note 93, pp. 256–257.

145 This did not, however, make a difference *in casu* since the Court considered that the businessman Van Anraat did not even dispose of sufficient information from which he could have inferred genocidal intent of his business partner (the Iraqi government of Saddam Hussein); for a discussion and references, see H. Van der Wilt, above note 140, pp. 557 ff., supporting the Court’s position at p. 561 (still leaving it open in H. Van der Wilt, above note 93, pp. 247–248); see also Alexander Zahar and Goran Sluiter, *International Criminal Law: A critical Introduction*, Oxford University Press, 2007, pp. 494–496.

146 Notes 118 and 119 above, and main text.

147 See H. Van der Wilt, above note 93, p. 247 with fn. 34.

148 Cf. also W. Schabas, above note 10, p. 27, on incitement.



regard to criminal liability, because both the inciter and the conspirator generally act with the required intent to destroy; in the case of incitement this intent is often provoked in the addressees of the inciting conduct. As for our distinction between different levels of perpetrators, it seems obvious that inciters and conspirators normally belong to the top- or mid-level of the criminal apparatus.

With regard to JCE III and superior responsibility, the case-law's approach of downgrading the specific intent to either foreseeability (JCE III) or negligence (superior responsibility) demonstrates the common function of both JCE III and superior responsibility to overcome evidentiary problems.<sup>149</sup> Yet such an approach ultimately means that on the basis of JCE or superior responsibility a superior, who is by definition a top- or at least mid-level participant, is no longer punished as a (co-)perpetrator (by omission in the latter case), but only as a mere assistant, since only in this case can knowledge of the genocidal context – instead of a purposed-based intent to destroy on the part of the (top- or at least mid-level) perpetrator himself – be considered sufficient;<sup>150</sup> unlike the assistant, the perpetrator, to be characterized as such, must himself possess the (specific) subjective element of the wrongful act.<sup>151</sup> If, taking another line, one holds the superior liable for having negligently failed to adequately supervise his subordinates (low-level perpetrators) who committed genocide with (a purpose- or knowledge-based) intent to destroy, he cannot be held responsible for a commission of genocide by omission but only for his negligent absence of supervision, i.e. for a conduct that amounts to a form of secondary participation.<sup>152</sup> For this very reason, the German International Criminal Law Code (*Völkerstrafgesetzbuch*)<sup>153</sup> distinguishes between a principal-like commission by omission for the failure to prevent the subordinates' crimes (section 4) and *accomplice liability* for the (intentional or negligent) failure to

149 In a similar vein, Allison Danner and Jennifer Martinez, 'Guilty associations: Joint criminal enterprise, command responsibility, and the development of international criminal law', *California Law Review*, no. 93, 2005, pp. 75–169, at p. 152.

150 For the same view, see Antonio Cassese, *International Criminal Law*, Oxford University Press, 2nd edn, 2008, at p. 216; see also W. Schabas, above note 43, p. 312, where, in this case, he considers 'complicity, not command responsibility' as 'the proper basis for guilt'. In the new edition (above note 10) at pp. 365–366, Schabas also criticizes the conviction of Nahimana by the ICTR (Case no. ICTR-99-52-A) on the basis of superior responsibility and states that he 'could have been charged as part of a joint criminal enterprise to incite genocide, one for which he would then readily have been convicted as the directing mind of a notorious radio station whose broadcasts dramatically contributed to the carnage. Such an approach would also more accurately describe his culpability.'). About the relevant case-law which seems to follow the same line see E. van Sliedregt, above note 1, at p. 193 ff.

151 For the same result see E. Van Sliedregt, above note 1, pp. 203–204, considering JCE as a form of participation and treating it, in fact, as complicity; also W. Schabas, above note 1, p. 132, when stating that 'the commander who simply "should have known" cannot possibly[!] have the specific intent ...' (yet not explicitly distinguishing between perpetration and complicity). Apparently W. Schabas (above note 10, at p. 270) changed his position on this point, since he assumes that 'the plain words of the statutes of the *ad hoc* tribunals and of the International Criminal Court, recognizing the application of command responsibility to genocide, make it at least theoretically possible for a superior or commander to be found guilty of genocide where the mental element was only one of negligence.'

152 In this sense R. Arnold, above note 1, at p. 151.

153 *Bundesgesetzblatt* 2002 I 2254.

properly supervise the subordinates (section 13) and to report the crimes (section 14).<sup>154</sup>

## Conclusion

The traditional interpretation of the intent to destroy requirement in genocide as purpose-based will stem from too narrow a reading of the concept of intent, equating it with the volitional element of intent. Nor does it sufficiently account for the particular structure of the offence. This twice twofold structure – the two mental elements and the dual point of reference (individual acts and genocidal context) – requires a differentiation according to the status and role of the participant in the genocidal enterprise. While the traditional purpose-based reading of the intent to destroy requirement can be maintained with regard to the top- and mid-level perpetrators, with regard to the low-level perpetrators a knowledge-based interpretation is more convincing for doctrinal and policy reasons. Consequently, a low-level perpetrator need not himself act with a ‘special’ intent (purpose or desire) to destroy a protected group, but only with the knowledge that his acts are part of an overall genocidal context or campaign. In practical terms, such an approach would overcome or at least mitigate the well-known evidentiary problems linked to a purpose-based concept of intent. As to the ultimate destruction of the group, the low-level perpetrator can, by definition, have no knowledge thereof but may only wish or desire this result, since it is a future event. In any case, his attitude towards this ultimate consequence is not decisive for the required intent to destroy.

As to the forms of participation in genocide other than perpetration, a twofold distinction between top-/mid- and low level perpetrators on the one hand and principal and secondary forms of participation on the other is suggested. In the case of top-/mid-level perpetrators, the required intent to destroy depends on the form of participation (if it is a perpetration – or principal-like participation – a purpose-based intent is required); in the case of low-level perpetrators, knowledge concerning the overall genocidal context always suffices.

154 Concurring, A. Cassese, above note 150, pp. 244–247; Chantal Meloni, ‘Command responsibility: Mode of liability for the crimes of subordinates or separate offence of the superior?’, *JICJ*, vol. 5, no. 3, July 2007, pp. 628–637, at p. 637 with fn. 108.