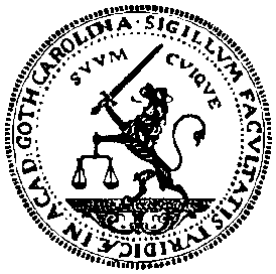

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Genocidal intent

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Table of contents

Summary

The prevailing view in the international case law interprets the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group" requirement in Article II of the Convention on the Prevention and Punishment of Genocide as a special or specific intent (*dolus specialis*). This interpretation of genocidal intent has been criticized by many scholars regarding its stringent requirement of *mens rea.* Consequently, several alternative knowledge-based approaches have been developed. In this regard, this thesis examines the notion of genocidal intent, and thereby the traditional purpose-based approach and various alternative individualistic approaches within legal doctrine of international criminal law. The main purpose of this thesis is to analyze the concept of genocidal intent and thus investigate whether genocidal intent should be understood in a broader sense than the purpose-based notion of genocidal intent. The analysis is conducted both from a standpoint regarding the penal character of prohibition and a humanitarian perspective.

In order to understand the genocidal intent on a deeper level, this thesis analyzes case law and the literal, historical, and teleological interpretations of the phrase "intent to destroy". After examining the case law, this thesis identifies several issues with the purpose-based approach. Also, it concludes that the literal interpretation of the "intent to destroy" does not clearly mandate that genocidal intent should be construed in a particular manner. On the other hand, a historical and teleological interpretation of intent indicate that genocide is a special crime and should be distinguished from crimes against humanity and war crimes by its genocidal intent.

The knowledge-based approach is developed as an alternative approach to the notion of the purpose-based reading of genocidal intent. It simply suggests that the perpetrator's knowledge of the genocidal campaign should suffice to meet the "intent to destroy" requirement, as opposed to the purpose-based understanding, which requires the perpetrator's conscious desire for the destruction of the protected group.

Opponents to the purpose-based approach criticizes it for being a source of confusion and difficulties in applying the definition of genocide in practice. As a solution, the knowledge-based theory suggests lowering the *mens rea* requirement to *dolus directus* in the second degree (indirect intent) with regard to the low-level perpetrators. However, the knowledge-based theory expands the definition of genocide and has inconsistencies in addressing the objective of *mens rea*, which does not align with the integrity of the offence and the *nullum crimen* principle. Also, the purpose-based theory employs the complicity theory, which is deemed a better solution in comparison to the knowledge-based theory. Therefore, this thesis concludes that the purpose-based approach should not be interpreted in a broader sense.

Sammanfattning

ICTR, ICTY och ICC har tolkat rekvisitet ”avsikt att helt eller delvis förgöra en nationell, etnisk, rasmässigt bestämd eller religiös folkgrupp” i artikel II i FN:s folkmordskonvention som *dolus specialis*. Denna tolkning av uppsåtskravet har kritiserats av många på grund av dess stränga uppsåtskrav. Följaktligen har olika alternativa tolkningar utvecklats i doktrin. I detta avseende undersöker denna avhandling folkmordets *dolus specialis*, samt den traditionella tolkningen av formuleringen ”avsikt att förgöra” och olika alternativa individualistiska tolkningar inom den rättsliga doktrinen för internationell straffrätt. Huvudsyftet med denna avhandling är att analysera konceptet folkmordets *dolus specialis* och därigenom undersöka huruvida folkmordsuppsåt bör förstås i en bredare räckvidd än den traditionella tolkningens. Analysen genomförs både utifrån legalitetprincipen och brottsofferperspektiv.

För att förstå folkmordsbrottets *dolus specialis* på en djupare nivå analyserar denna avhandling rättspraxis, förarbeten samt bokstavstolkning och den teleologiska tolkningen av formuleringen ”avsikt att förgöra”. Efter att ha granskat rättspraxis identifierar denna avhandling flera problem med den traditionella tolkningen till folkmordsuppsåt. Dessutom drar den slutsatsen att varken bokstavstolkningen av ”avsikt att förgöra” eller förarbeten kräver att formuleringen bör tolkas på ett särskilt sätt. Å andra sidan antyder den teleologiska tolkningen av ”avsikt att förgöra” att uppsåt till folkmord bör förstås som speciellt uppsåt för att skilja folkmordet från brott mot mänskligheten och krigsbrott.

En alternativ tolkning har utvecklats till den traditionella tolkningen. Den föreslår att förövarens kunskap om den folkmordsplan bör vara tillräcklig för att uppfylla kravet på ”avsikt att förgöra”, till skillnad från den traditionella tolkning som kräver att förövaren medvetet önskar förstörelsen av den skyddade gruppen.

Motståndarna till den traditionella tolkningen kritiserar den för att vara en källa till förvirring och svårigheter vid tillämpningen av definitionen av

folkmord i praktiken. Som lösning föreslår den alternativa teorin att sänka uppsåtskravet till *dolus directus* i andra graden (indirekt uppsåt) när det gäller förövare på lågnivå. Dock utvidgar denna teori definitionen av folkmord och är inkonsekvent när det gäller att identifiera objektet för uppsåt, vilket inte överensstämmer med legalitetsprincipen och brottets integritet. Dessutom använder den traditionella tolkningen medverkansläran, vilket anses vara en bättre lösning jämfört med den alternativa tolkning som föreslår att inkludera indirekt uppsåt. Därför drar denna avhandling slutsatsen att rekvisitet ”avsikt att förgöra” inte bör tolkas i en bredare räckvidd.

Preface

I would like to thank everyone who supported and encouraged me over these four and a half years.

Abbreviations

ICC	The International Criminal Court
ICTR	The International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICJ	The International Court of Justice
ILC	The International Law Commission
JCE	Joint Criminal Enterprise
UNGA	The United Nations General Assembly

1 Introduction

Genocide has been described as “the crime of crimes”[1] and a “disease of the spirit”[2]. Indeed, it is undoubtedly one of the most heinous crimes that human beings can commit. Although genocide is as old as humanity, it was only established as a crime under international law in 1946 with the adoption of the General Assembly Resolution 96(1). Nearly two years later, the Convention on the Prevention and Punishment of the Crime of Genocide[3] was adopted. Article II of the Genocide Convention that was also adopted in verbatim in Statute of the International Criminal Tribunal for the former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda, defines genocide as follows:

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

The famous scholar Georg Schwarzenberger described the Genocide Convention as being “applicable when unnecessary and inapplicable when

[1] *Kambanda*, Trial Judgement, para. 16.
[2] Mark Harmon, *Karadzic and Mladic*, Transcript, p. 894, 8 July 1996.
[3] Hereinafter Genocide Convention.

necessary."[4]. Over the decades, there have been many attempts to label atrocities and gross violations of human rights as genocide, including those of Myanmar towards its Rohingya population,[5] of China in Tibet,[6] of Iraq against the Kurds,[7] of Israel in Lebanon[8] and Palestine[9], the Khmer Rouge in Cambodia,[10] and of the United States towards its African American population[11] and Aboriginal populations[12]. Up until the 1990s, there had been no conviction for genocide and some scholars explained this by stating that "the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it".[13]

In 1998, the Rome Statute of the International Criminal Court was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Genocide is defined in Article 6 of the Rome Statute and the definition is also taken from article II of the Genocide Convention word for word. The crime of genocide is now one of the four categories of offence within the subject matter jurisdiction of the International Criminal Court and is considered the most serious international crime, which gives rise to individual criminal responsibility.

In Rwanda, over the course of around 100 days in April–July 1994, the extremist element of the Rwandan majority Hutu population killed approximately 800 000 people belonging to the Rwandan minority Tutsi population.[14] Consequently, in 1998, the first conviction of genocide took

[4] Schwarzenberger, p. 143.

[5] See Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III, ICC 01/19.

[6] See the United Nations General Assembly debate on Tibet in 1959: UN Doc. A/PV.812, para. 127; UN Doc. A/PV.833, paras. 8, 28.

[7] UN Doc. A/5429 (1963).

[8] UNGA Res. 37/123 D; UN Doc. S15419 (1982); UN Doc. S/15406 (1982); UN Doc. A/37/489, Annex (1982); UN Doc. A/37/489, Annex (1992).

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, No. 2024/43.

[10] See UNGA Res. 52/135, preamble; UN Doc. A/53/850-S/1999/231, annex, para. 65.

[11] See Patterson.

[12] Bassiouni, at pp. 271ff.

[13] Chalk and Johansson, at p. 11.

[14] Leitenberg, pp. 8, 15 and 78; Thompson, pp. 1–2.

place, when the ICTR found Jean-Paul Akayesu guilty of genocide.[15] The ICTR employed a purpose-based approach, construing the genocidal intent as *dolus specialis*, describing it as the "key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator".[16]

Also, in July 1995, between 7 000 – 8 000 Bosnian Muslims were murdered in just one week by the Bosnian Serb Army.[17] The ICTY followed the *Akayesu* findings concerning the stringent interpretation of genocidal intent. Applying the special intent requirement in *Jelisic* case, the Trial Chamber did not find Jelisic guilty of genocide due to insufficient evidence to sustain his responsibility, but instead, convicted him to 40 years of imprisonment for the other crimes he pleaded guilty.[18] Similarly, in another case, *Krštic*, the ICTR did not convicted Radislav Krštic for genocide, instead, found him guilty of aiding and abetting for genocide.[19]

The government of Sudan and its surrogates, the Janjaweed, killed over 400 000 civilians in Darfur between 2003 and 2005.[20] As a result, the United Nation Security Counsel referred the situation to the International Criminal Court and an international commission of inquiry was established to investigate violations in Darfur. The Commission also interpreted the genocidal intent as *dolus specialis*.[21] In 2009, at the Prosecutor's request, Pre-Trial Chamber I issued an arrest warrant for Omar Hassan Al-Bashir, the President of Sudan. However, the Chamber did not consider that he possessed the special intent.[22]

In brief, the phrase "intent to destroy" in the chapeau part in the article II of the Convention, often referred to special intent, *dolus specialis*, genocidal

[15] *Akayesu*,Appeals Judgement, p. 143.
[16] *Akayesu*, Trial Judgement, paras. 122, 498, 517 and 518.
[17] *Krštic*, Appeals Judgement, para. 2.
[18] *Jelisic*, Trial Judgement, paras. 718 – 726.
[19] *Krštic*, Appeals Judgement, paras. 135 – 151.
[20] Tatum, p. 149.
[21] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564, 18 September 2004, para. 491 (Hereinafter the Darfur Report).
[22] *Al-Bashir*, paras. 139–141.

special intent or specific intent, has been described in the international case law as the key element that distinguishes the crime of genocide from large-scale killings. However, the interpretation of this phrase has been a matter of controversy and a consistent source of confusion for a long time due to difficulties of interpreting and applying special intent. Although a large part of the doctrine has followed the purpose-based interpretation of genocidal intent in the sense of a special, ulterior intent or *dolus specialis*, many scholars have criticized and challenged this narrow understanding.

Due to the evidentiary issues with the purpose-based approach, various alternative approaches have emerged. Alexander Greenawalt argued that the literal and historical interpretation of the "intent to destroy" does not give any indication as to the purpose-based reading and has instead advanced the knowledge-based approach, which requires that the knowledge of the overall context of the genocidal campaign should suffice for genocidal liability.[23] Other scholars followed Greenawalt's knowledge-based approach. Hans Vest and Claus Kress argued for a structure-based reading of the genocidal intent and understood it as twofold, i.e. conduct and context level. Ambos advanced this approach even further and described it as a combined structure- and knowledge-based approach, arguing that the purpose-based approach should be upheld only with regard to the high- and mid-level perpetrators while the knowledge-based approach with regard to the low-level perpetrators.[24]

Although genocide is "the crime of crimes" and represents the gravest form of criminal offense, the interpretation of the notion of genocidal intent should strike a balance between two key interests: On one hand, it should uphold the penal character of the prohibition and its humanitarian purpose on the other. While the penal character of the prohibition is pulling the interpretative process in one direction, the Convention's stated purpose, i.e. to protect the national, ethnical, racial or religious groups from destruction and prevent the crime of genocide, is pulling it in another. As mentioned above, the international case law adheres to the strict interpretation of the genocidal

[23] Greenawalt, at p. 2288.
[24] Ambos (2010), at pp. 833–857.

intent and thereby protects the offence's integrity and thus fundamental rights of the defendants. Opposed to the case law, some scholars find indications of a less stringent understanding of the "intent to destroy" requirement in light of the provision's humanitarian purpose.[25] In respect to these considerations, the precise meaning of the genocidal intent remains unsolved.

1.1 Purpose and Research Questions

The most crucial aspect of the interpretation of the provision of genocide is ensuring that high-level perpetrators are punished while also ensuring that low-level perpetrators, who carries out the genocidal plan, are not acquitted. Additionally, it is important to achieve this without expanding the liability framework, while protecting the fundamental rights of defendants and adhering to the *nullum crimen* principle. In order to achieve these ends, much hinges on how intent in the context of genocide is to be understood.

The purpose of this study is to critically analyze the concept of genocidal intent and thereby the various approaches within the legal doctrine and further examine whether the genocidal intent should be understood in a broader sense than the purpose-based approach. This analysis will be conducted from both a standpoint regarding the penal character of prohibition and a humanitarian perspective. The ultimate goal is to present a better understanding of the concept of special intent in the context of genocide.
To achieve the purpose of this paper, the following questions will be answered:

- What are the literal, historical and teleological interpretations of the genocidal intent?

- How is the genocidal intent interpreted in international case law and legal doctrine?

[25] Mettraux, p. 51.

- What challenges are associated with purpose- and knowledge-based approaches?

1.2 Scope and Limitations

With regard to the limited scope and purpose of this thesis, the focus will be on the concept of special intent in the context of genocide in international criminal law. Therefore, this thesis will not examine the state responsibility for genocide, which falls under public international law in general. Instead, it will focus on individual criminal responsibility.

This study will primarily analyze genocidal special intent based on jurisprudence from international courts. The author chooses to not examine the genocidal intent interpretation of domestic courts regarding the limited scope of this thesis, although it would be relevant. All interpretative approaches to the "intent to destroy" element that will be discussed in this paper also based on international case law and how the genocidal intent should be construed in the concept of international criminal law.

Furthermore, since this study is focused on the interpretation of the "intent to destroy", a deep analysis of the "in whole or in part", "protected groups" or "as such" has been set aside. Regarding prohibited acts enlisted in Article II of the Genocide Convention, they have been given some space in this thesis, but only in relation to the element of genocidal intent.

Lastly, although genocide is typically a crime that can be committed by a collective, except in the most extreme cases, this thesis examines only individualistic approaches to interpreting genocidal intent, and therefore does not address collectivistic approaches.

1.3 Methodology, Material and Previous Research

To fulfill the purpose of this thesis, the legal dogmatic method, which is foundational for an examination of legal sources in according to their

hierarchical order within the legal system, is used.[26] In this thesis, this method is used to investigate both *lex lata* and *lex ferenda*. *Lex lata* describes established law as it exists, while *lex ferenda* answers the question of how it should be.[27] It must be noted that investigating the *lex lata* in international criminal law has its own challenges, since the hierarchy of legal sources are not clear as in domestic law. Additionally, the international criminal law and thus individual criminal responsibility is a relatively young. Moreover, the occurrence of the crime of genocide is relatively rare, resulting in very limited case law on the subject.

International criminal law is said to be a combination of criminal law and public international law principles.[28] It is also a combination of human rights law and criminal law. Robinson points out this uncomfortable combination as the "identity crisis" of international criminal law.[29] As a result of this merger, prosecution and conviction in international criminal law seek to fulfill victims' human rights to a redress. In this regard, it is not possible to investigate genocidal intent solely from a human rights-oriented perspective or a criminal justice-oriented perspective. Therefore, this thesis adopts both perspectives, but considers the integrity of the offence and the *nullum crimen* principle as crucial parts that cannot be compromised.

The legal sources used in this thesis are primarily legislation, preparatory work, case law and legal doctrines. The fundamental part of material studied consists of judgements from the ICTR, ICTY and ICC, academic literature and articles. Initially, *Akayesu* judgements[30] are analyzed in more detail compared to others, particularly concerning its significance as the first case in which a conviction of genocide occurred. Furthermore, articles published by scholars who advanced and developed knowledge-based approach is given priority.

[26] Nääv & Zamboni, p. 21.
[27] Lehrberg, p. 203.
[28] Sliedregt, p. 8.; Ambos (2021), p. 95.
[29] See Robinson, at p. 925.
[30] *Akayesu*, Trial Judgement and Appeals Judgement.

The selection of the various approaches within knowledge-based understanding is made. Alexander Greenawalt's approach holds a significant place in legal doctrine because, although he was not the first to suggest a knowledge-based reading of genocidal intent, he was the first to make an impact, and many other scholars have followed his approach. Hans Vest's knowledge-based approach is also interesting for this thesis because he developed Greenavalt's proposal and construed genocide as a structural crime, he even named his approach structure-based. Further, although Kress' approach does not differ significantly from Vest's, he proposes that *dolus eventualis* should suffice to meet genocidal intent threshold. The selection of Claus Kress' approach contributes to a better understanding of the scope of various approaches. Moreover, Ambos develops the knowledge-based approach even further and elevates it to a different level. He combines structure- and knowledge-based approaches and also suggests applying purpose-based approach to high-level actors. In this regard, selecting to analyze Ambos' interpretation of genocidal intent added a different dimension to this study.

To analyze the literal interpretation of "intent", interpretations from various domestic criminal jurisdictions are examined, such as German, French and US criminal law. However, to analyze the literal interpretation of special intent, i.e. the "intent to destroy", only Australian, French and Iranian criminal laws are examined. The rationale behind this selection is that these three jurisdictions make especially a clear distinction between general and special intent. On the other hand, to analyze the historical and teleological interpretation of genocidal intent, the preparatory work and drafting history are investigated. Discussions and considerations during the drafting of the Genocide Convention hold priority. *Rome Statute of the International Criminal Court – Article-by-Article Commentary* edited by Kai Ambos was of great help to having insight into elements of genocide, particularly the genocidal intent. I would also like to mention Sangkul Kim's dissertation, *A Collective Theory of Genocidal Intent*, which served as a model for structuring arguments in this thesis.

There is a substantial amount of research done in genocidal special intent, which will thoroughly be presented in this thesis. However, there has not been much study analyzing both the purpose- and knowledge-based theories.

1.4 Outline

After the introductory Chapter 1, the second chapter of this thesis presents an overview of the background, including the elements of the crime of genocide. The chapter opens with the history of genocide and continues with a presentation of the *actus reus*, general *mens rea* and specific intent, which is necessary to construe the structure of the genocide and thereby the genocidal intent.

Chapter 3 focuses on genocidal intent. First, the author presents the purpose-based approach by investigating the international case law. Then, the chapter shifts to the knowledge-based approach. It explores the knowledge-based approach by investigating the literal and historical interpretation of genocidal intent of through the meaning of "intent" in various domestic laws and the Convention's drafting history. The chapter also addresses the issues with the purpose-based approach in order to clarify the arguments supporting a knowledge-based approach. Next, it examines various approaches of the knowledge-based theory. After this detailed investigation of the approaches, the chapter critically analyzes the knowledge-based approach and questions its grounds. The last section in this chapter reexamines the purpose-based approach with new lenses, informed by insights of issues with knowledge-based approach.

The final chapter of this thesis presents a summary of findings from chapter 2 and a conclusion that addresses the questions presented above in section 1.1.

2 Background

2.1 The History of the Phenomenon of Genocide

Although massacres with the purpose of exterminating national, ethnical or religious groups have a long history, international law failed to address these types of atrocities until the Second World War. The destruction that the German Nazi regime committed pushed the international community to recognize this kind of criminality as a new category of crime, namely genocide.

The expression "genocide" first coined by Raphaël Lemkin, a Polish Professor and a former prosecutor. The word is formed from the ancient Greek term *genos* meaning race or tribe and the Latin *cide* meaning killing. Although he was not the first to suggest that international law should protect the groups, he was probably the first to outline basic concepts of this notion. He construed genocide as a crime directed against a national group and relating to the actions and plans aimed at the extermination of the core elements of a group's livelihood.[31] Today, this understanding is still considered as the core of the notion of genocide.[32]

The notion of genocide did not have a significant role at Nuremberg. Instead, the International Military Tribunal at Nuremberg adopted the notion of persecution to address the crimes committed against the members of groups during the Second World War.[33] Although the prosecutors alleged that the defendants had "conducted of deliberate and systematic genocide",[34] the notion of genocide was not even mentioned in the Tribunal's judgment, because all the crimes prosecuted at Nuremberg were allegations of war crimes and had connection with war. Because of this restriction, the need to recognize the crime of genocide as a separate international crime became

[31] Lemkin, p. 79.
[32] Mettraux, p. 6.
[33] Nuremberg Charter.
[34] Indictment presented to the International Military Tribunal.

more apparent. Consequently, the General Assembly Resolution 96(1) was adopted on 11 December 1946 and affirmed that:

> "[G]enocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable."

Almost 2 years later, the Genocide Convention was adopted by the General Assembly of the United Nations. The adoption of the Convention ensured that genocide became "a delictum iuris gentium', a crime against all of humanity. Unlike the Tokyo and Nuremberg processes, which mainly focused on the protection of individuals and the prosecuting of crimes committed against them, the Genocide Convention broadened the scope of international law to include the protection of groups as well. In this sense, the Convention represented a significant step forward for international law.[35]

Until the establishment of the ICTY and ICTR, the crime of genocide remained for a long time a crime only on paper. Later, the International Criminal Court and others joined them to apply the notion of genocide. The establishment of these tribunals brought a practical significance to the concept and contributed to interpret the meaning of the "intent to destroy". Thus, the genocide became a concrete reality. Also, from a historical perspective, each tribunal operated within distinct factual contexts, which helped liberate the concept of genocide from the specific historical circumstances in which it originated. This also contributed to the refinement of the concept of genocide.[36]

2.2 Genocide in International Criminal Law

Genocide can be said to have three constitutive elements – the *actus reus*, the general *mens rea* and the special *mens rea.*[37] However, some case law does

[35] Mettraux, pp. 13–14.
[36] Ibid., pp. 14–15.
[37] Ambos (2022), p. 5; *Bagilishema,* TC Judgment, paras. 56–60.

not discuss the general mens rea. For instance, *Krštic* Trial Chamber suggested that there are two elements, the *actus reus* and the special *mens rea*, but this does not mean that the general *mens rea* is not an element of the definition of genocide.[38] This issue will also be further discussed upon in the subsequent chapter.

2.2.1 Actus Reus

2.2.1.1 Perpetrators

The crime of genocide does not require any specific position within the state or non-state organizational structure.[39] However, in this thesis, distinction will be made between high-, mid- and low-level perpetrators in certain approaches.

2.2.1.2 Protected Groups

Article 6 of the Statute does not protect all the groups of individuals. The article lists only national, racial, ethnical and religious groups and this list is exhaustive. Membership of these protected groups is often determined by birth and the provision covers only stable and permanent groups.[40] Also, the general concept of the protected groups does not include the groups that is defined by purely negative characteristics. In other words, the protected groups must be defined by positive characteristics, such as national, racial, ethnical or religious, not the absence of them.[41] Nevertheless, there is no clear distinction between the various groups, and it is possible that they overlap since the social perceptions determines the formation of the groups. However, it is not necessary to categorize the victims under only one group because the

[38] See *Krštic*, Trial Judgement, para 542; *Kayishema and Ruzindana*, Trial Judgement, para. 90.

[39] Kress (2006), at p. 473.

[40] *Brasil*, U.N. GAOR, 3rd session, 6th Committee, p. 57; *Venezuela*, ibid., p. 58; *United Kingdom*, ibid., p. 58; *Egypt*, ibid., p. 59; *Norway*, ibid., p. 61; *Sowjet-Union*, ibid., p. 105; *Iran*, ibid., p. 108; *Poland*, ibid., p. 111.

[41] *Al-Bashir*, Pre-Trial Judgement, para. 135; *Tolimir*, Trial Judgement, para. 735; *Karadžic*, Trial Judgement, para. 541; *Bosnia and Herzegoniva v. Serbia and Montenegro*, 26 Feb. 2007, para. 193ff.

definition of genocide protects all the groups equally. All the members of a protected group must not necessarily possess the same characteristics.[42]

2.2.1.3 Acts of Genocide

Only the acts committed with the intent to destroy, in whole or in part, a protected group, which is listed under the Article 6 of the ICC Statute, constitute the *actus reus* (objective elements). The list is exhaustive[43] and other acts do not form the *actus reus* of the genocide. For instance, cultural genocide, which is a term defining the structural destruction of traditions, language, values or other characteristics of a protected group, does not constitute genocide.

The initial act enumerated in Article 6 of the Statute is killing members of the group. The term "killing" is neutral and not specified by the Statute.[44] However, the French version of the Genocide Convention uses the term "meurtre", meaning unlawful and intentional killing, which is more precise. In the context of genocidal intent, as asserted by the Trial Chamber in *Kayishema*, there is virtually no distinction between "killing" and "meurtre".[45] The Appeals Chamber upheld this view and clarified that the killing must be intentional but not necessarily premeditated, which aligns with the meaning attributed to the term "meurtre".[46]

Another act listed under the Article 6 of the Statute is causing serious bodily and mental harm. The required level of seriousness of the harm committed is a matter of controversary. The International Court of Justice stated that rapes and other crimes of violence could constitute serious bodily or mental harm, however found that "on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (*dolus specialis)* to destroy the protected group, in whole or in part,

[42] Werle and Jessberger, pp. 341–342.
[43] Mettraux, *Genocide*, pp. 285–286.
[44] Schabas, *Genocide* (2022), at p. 128.
[45] *Kayishema and Ruzindana*, Trial Judgement, para. 104.
[46] Ibid, para. 151.

required for a finding that genocide has been perpetrated".[47] The seriousness of the act should reach the threshold that it poses a threat of destruction of the protected group in whole or in part. However, the *mens rea* already requires that the intention must be to destroy the protected group in whole or in part. In other words, the *actus reus* and the *mens rea* of the offence overlap, and this interpretation disregards the structure of the crime of genocide as a specific intent crime. Opposed to this restrictive interpretation, it is irrelevant whether the act suffices to form a threat of the destruction of the group.[48]

The phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction" refers to the destruction of the protected group by "slow death". It may include methods, such as denying members of the group water and food, reducing medical services below a minimum vital standard, systematically expelling them from their homes and forcing deportation, imposing excessive work or physical labor. Of course, these methods do not cause any immediate death, but ultimately lead to the destruction of the group.[49]

Regarding the phrase "imposing measures intended to prevent births within the group", the *travaux préparatories* of Article II of the Genocide Convention suggests that these measures may encompass sterilization, forced abortion, gender segregation and impediments to marriage.[50] Also, the *Akayesu* Trial Chamber stated that measures intended the prevent births may also be mental, for instance rape can lead the person to not procreate through threats or trauma.[51]

The final act of genocide enumerated in Article 6 of the Statute is "[f]orcibly transferring children of the group to another group". The ICTR reflected with

[47] *Bosnia and Herzegoniva v. Serbia and Montenegro*, para. 319.
[48] Schabas, *Genocide* (2022), p. 129; Ambos, (2022), p. 12.
[49] Ambos (2022), p. 12.; Schabas (2022), at pp. 129-130; *Akayesu*, Trial Judgement, paras. 505-506.
[50] UN Doc. E/623/Add.2; UN Doc. E/447, p. 26; UN Doc. A/C.6/SR.82.
[51] *Akayesu*, para. 508.

regard to this act on that the objective may be to sanction acts of threats or trauma, as in the case of measures intended to prevent births.[52]

It must be noted that all acts of genocide set out Article 6 of the Statute constitute the *actus reus* if the acts are committed with the intent to destroy a protected group. In other words, the *mens rea* of the genocide offence must always relate to these acts.

2.2.2 Mens rea - Mental element

The genocide offence is not a simple crime, and it has two separate mental elements. The first one is called general intent (*dolus*), and it relates to all objective elements of the genocide offence definition (*actus reus*). General intent is defined in international criminal law by Article 30 of the Statute of the International Criminal Court as follows:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[52] *Ibid*., para. 509.

Article 30 of the Statute of the ICC is concerned with general *mens rea* in international criminal law. It is a "default rule" for the mental elements of crimes in the Rome Statute.[53] The opening words of Article 30, "unless otherwise provided", indicates that there may be deviations from general *mens rea* as set out by Article 30 if otherwise provided. In other words, the material elements of the offence must be carried out with intent and knowledge, unless another provision require a different level of mental element. At the Rome Conference, there was ambiguity regarding whether sources other than the Rome Statute could 'otherwise provide'. According to some delegations, other sources, such as Elements of Crimes, was subsidiary to the Rome Statute and could not provide a deviation. However, other delegations argued that standards other than in Article 30 were necessary, which is why the explicit use of the term 'otherwise provided' was included in the article. The latter view gained more prominence.[54]

The *mens rea* set out in Article 30 has two elements, namely intent and knowledge. The term "intent" refers to the volitional or willful aspect while "knowledge" pertains to the cognitive or intellectual element. Judges of the International Criminal Court have referred to these volitional and cognitive elements as *dolus*. According to the legal doctrine, there are three forms of *dolus*, namely *dolus directus* in the first degree, *dolus directus* in the second degree and *dolus eventualis*.

Dolus directus in the first degree (direct intent) relates to knowledge by the perpetrator that he or she aims to reach to the prohibited result. The perpetrator knows that his actions will lead to the material elements of the offence and willfully carry out the conduct. In this initial form of intent, perpetrator's volition is dominant.[55]

Dolus directus in the second degree (oblique intent) relates to awareness by the offender that he or she is aware that his actions will most likely bring about the material elements of the crime but does not necessarily have the

[53] Piragoff/Robinson, *Mental Element,* at p. 1329.
[54] Ibid, p. 1332.
[55] Schabas (2016), p. 630.

actual intent. The perpetrator is aware that the consequence will take place "in the ordinary course of events". The cognitive element has greater significance in this form of intent.

Dolus eventualis, the third form of the *dolus,* is where the perpetrator does not mean to bring about the material elements of the offence, but he foresees the consequence of his actions or omissions and the undesired consequences are merely a possibility. The term is an approximate equivalence of recklessness in common law.[56] At the Rome Conference, there was a discussion about whether *dolus eventualis* was captured by the proposed text of Article 30 of the Statute and it was agreed that "it will occur in ordinary course of events" could not be interpreted as *dolus eventualis.*[57] According to the Trial Chamber, the lower standards than *dolus directus* in the second degree were insufficient.[58]

In the case of genocide, the general intent defined by Article 30 of the ICC Statute refers to the objective elements of the crime, namely acts specified in the subsections (a) to (e) of Article 6 and it must be directed against protected groups. As previously noted, the case law does not always distinguish between general *mens rea* and the specific *mens rea* "intent to destroy" as a separate mental element. Nonetheless, it stands to reason that, for instance, a perpetrator must first act with intention to kill a member of a protected group (general intent) in addition to harboring the "intent to destroy" the group (special intent). If an individual did not purposefully kill a member of the group, it is unlikely that the perpetrator had the "intent to destroy" the group.

2.2.3 Specific intent

In the introductory paragraph of Article 6, the crime of genocide requires that acts must be committed "with intent to destroy". This is an additional mental element, namely specific intent or *dolus specialis*. The term "intent to destroy" goes beyond the general *mens rea* outlined by Article 30 and constitutes a deviation from the standard. In other words, the "intent to

[56] Ibid.
[57] Ibid.
[58] *Bemba et al*, ICC-01/05-01/08, para. 360.

destroy" represents an ulterior intention.[59] The "intent to destroy" requirement distinguishes the crimes of genocide from the crime against humanity, specifically persecution. While genocide protects the survival of the protected groups, the provision of persecution protects groups from discrimination, rather than annihilation. Therefore, genocide is "an extreme and the most inhumane form of persecution"[60] and described as the "crime of crimes".

Although the "intent to destroy" is interpreted as *dolus specialis* in international criminal law, this remains a matter of controversy concerning the precise meaning and the level of genocidal intent. So far, a multitude of approaches have been developed. In the case law in international criminal law, the purpose-based approach, which asserts that "the intent to destroy" should be interpreted as ulterior intent or *dolus specialis*, has been predominant. However, this approach has faced criticism in legal doctrine and subsequently, other approaches, such as knowledge-based and structure-based approaches, have emerged. There are dissenting views beside these approaches in the doctrine, which will be further explored in the subsequent chapter.

[59] Piragoff and Robinson, *Mental Element,* p. 1343.
[60] *Kuprečkic et al.,* Trial Judgment, para. 636.

3 Genocidal Intent

3.1 Introduction

As has been stated in the previous chapter, genocidal intent is a matter of controversy within international criminal law due to the ambiguity surrounding the interpretation of the "intent to destroy". In this chapter, we will explore and analyze various interpretation within legal doctrine.

3.2 Purpose-based Approach

In the concept of the purpose-based genocidal intent, the volitional aspect is considered to have a prominent place. Judges in case law and commentators have used several different formulations to refer to genocidal intent, such as "*dolus specialis*", "special intent", "specific intent"[61], "specific genocidal intent"[62], "particular intent"[63], "particular state of mind"[64], "genocidal criminal intent" and "exterminatory intent"[65]. The case law adheres to the purpose-based approach and requires that the perpetrator must have special intent to destroy the protected group in order to meet the genocidal intent threshold. The term "purpose-based approach" has never been explicitly used in the jurisprudence but has only been referred to as "traditional approach" by Pre-Trial Chamber in the *Bashir* case.[66]

The first case, in which the "intent to destroy" is understood as "special intent" and referred to as *dolus specialis,* is *Akayesu.*[67] The ICTR Trial Chamber stated that genocide is set apart from the other international crimes in that it manifests *dolus specialis*. The Chamber defined special intent as "the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged"[68] and

[61] *Kajelijeli*, Trial Judgment, para. 803; *Kayishema*, para. 91; *Bagilishema*, para. 55.
[62] *Bagilishema*, para. 55.
[63] UN Doc. E/CN.4/Sub.2/416, para 96.
[64] Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10**,** Doc. A/51/10, p. 44, para 5.
[65] *Jelisic*, Trial Judgement, para. 83.
[66] *Al-Bashir*, ICC-02/05-01/09, para. 139, n. 154.
[67] *Akayesu*, para. 498.
[68] *Ibid.*

"clear intent to cause the offence"[69]. Genocidal intent is "the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator".[70] In the subsequent cases, the International Criminal Tribunal for Rwanda also followed this approach established in *Akayesu*.[71]

The International Criminal Tribunal for the formal Yugoslavia, for its part, also chose to use the purpose-based interpretation.[72] The Trial Chamber in *Jelisic* rejected the Prosecutor's reasoning in which the perpetrator "knew that the likely consequence of his acts would be to destroy, in whole or in part, the group"[73], and concluded that the defendant was not "motivated by *dolus specialis* of the crime of genocide.[74] The Chamber emphasized the arbitrary nature of his killings and stated that his behaviour did not seem to indicate that he killed "with the clear intent to destroy the group".[75] In this regard, the Chamber simply did not accept that the perpetrator's knowledge of the destructive consequence should suffice.

When the *Jelisic* case reached the Appeals Chamber, the reasoning of the Prosecutor once again proved unsuccessful. The Appeals Chamber reaffirmed that "the specific intent requires that the perpetrator […] seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such".[76] Furthermore, the Court made an important distinction between motive and specific intent, emphasizing that the existence of personal motive, such as personal economic gain, political advantages or power, does not preclude the perpetrator's specific intent.[77] By referring the the *Tadič* case[78], the Chamber confirmed the irrelevance of motive and

[69] *Ibid*., para. 518.
[70] *Ibid*.
[71] See *Rutaganda*, Trial Judgement, para. 61; *Bagilishema*, para.62; *Musema*, Trial Judgement, para.164.
[72] Ambos, (2009), at p. 837.
[73] *Jelisic*, Prosecutor's Pre-Trial Brief, para. 3.1.
[74] *Jelisic*, para. 108.
[75] Ibid., para.108.
[76] *Jelisic*, Prosecutor's Pre-Trial Brief, para. 46, 52.
[77] Ibid., para. 49.
[78] *Tadič*, para. 269, p.120.

"inscrutability of motives in criminal law".[79] According to Ambos, the Appeals Chamber implicitly criticized the Trial Chamber's use of the wording "motivated".[80] Also, in contrast to the Trial Chamber, it admitted that even individuals with a disturbed or immature personality possess "the ability to form an intent to destroy" a protected group.[81]

In another ICTY case *Krštic*, the Trial Chamber followed the purpose-based understanding and said that the characterization of genocide encompasses "only acts committed with the goal of destroying all or part of a group".[82] The Chamber convicted Krštic for genocide and held that:

> "Having already played a key role in the forcible transfer of the Muslim women, children and elderly out of Serb-held territory, General Krštic undeniably was *aware of the fatal impact* that the killing of the men would have on the ability of the Bosnian Muslim community of Srebrenica to survive, as such.[83]

While confirming the Trial Chamber's "stringent requirement of specific intent", the Appeals Chamber rejected the knowledge requirement. It held that Krštic's knowledge of the perpetrators' intent to destroy did not support the inference of his specific intent. The conviction for genocide was overturned and instead, Krštic was found guilty of aiding and abetting genocide.[84]

Another instance where the knowledge requirement was rejected is the case of *Blagojevic and Jokic*. Here, the Trial Chamber held that "it is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group" and added that the "destruction, in whole or in part, must be the aim of the underlying crime(s)".[85]

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[79] *Ibid*., para. 49,71.
[80] Ambos, (2009), at p. 838.
[81] Ibid., para. 70.
[82] *Krštic*, Trial Judgement, para. 571.
[83] *Ibid*., para. 634 (emphasis added).
[84] *Ibid*., Appeals Judgement, paras. 135–144.
[85] *Blagojevic and Dragan Jokic*, Trial Judgement, para. 656.

The special intent was considered as a "relatively simple issue of interpretation" in the case of *Sikirica*. According to the Trial Chamber, "an examination of the theories of intent" was unnecessary and "what is needed is empirical assessment of all the evidence to ascertain whether the very specific intent […] is established".[86] In essence, the Chamber did not even discuss the meaning of "intent to destroy" and instead, directly adopted the so-called purpose-based approach.

The International Court of Justice shared the same purpose-based understanding regarding the interpretation of the "intent to destroy". The Court, in its Judgement, by citing one of the ICTY cases[87], referred to special intent as an "extreme form of wilful and deliberate acts designed to destroy a group or part of a group".[88]

The Darfur Commission of Inquiry also described the "intent to destroy" as specific intent. The Report stated as follows:

> "Also, the subjective element, or *mens rea,* is twofold: (a) the criminal intent required for the underlying offence […] and (b) the intent to destroy, in whole or in part, the group as such. This second element is an aggravated criminal intention or *dolus specialis*; it implies that the perpetrator *consciously desired* the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such."[89]

Furthermore, the Pre-Trial Chamber in *Bashir* mentioned the knowledge-based approach in a footnote in the Judgement[90], nonetheless adhered to the purpose-based approach.[91] Also, Kai Ambos understood the case law's approach as defining "intent to destroy" as "a special or specific intent which

[86] *Sikirica*, Judgement on defence motions to acquit, paras. 58–59.
[87] *Kupreškic et al.,* para. 636.
[88] *Bosnia And Herzegovina v. Serbia And Montenegro*, Judgment, para. 188.
[89] The Darfur Report, para. 491 (emphasis added).
[90] *Bashir*, para. 139.
[91] *Ibid*., paras. 139, 140.

expresses the volitional element in its most intensive form". In other words, the case law's approach is purpose-based.[92] However, there are several issues about this understanding. For instance, proving the genocidal intent as *dolus specialis* is extremely challenging, and subordinates, who claim that they only followed orders and did not have the special intent, cannot be convicted for genocide. These issues led some scholars to develop the knowledge-based approach as an alternative interpretation, which will be discussed in the following section.

3.3 Knowledge-based Approach

The knowledge-based approach emphasizes the cognitive aspect of intent, as opposed to the volitional aspect emphasized by purpose-based approach. Proving the genocidal intent as *dolus specialis* is, unless explicitly expressed, nearly impossible[93], because special genocidal intent requires that the person "consciously desired" to destroy a protected group. To prove the "consciously desire", we need to access a person's state of mind and private thoughts, which is unrealistic. Although it is relatively simpler to prove high-level perpetrator's genocidal intent, the issue concerning proof of the subordinates' special intent remains unresolved. For instance, a foot soldier, who consciously desired to destroy a group, can escape the conviction for genocide by claiming that he or she did not have the specific intent and only carried out orders. This leads to the exploitation of the stringent requirement of the genocidal intent on the purpose-based understanding. Therefore, knowledge-based approach aims to reduce the burden of proving the genocidal intent by proposing that 'knowledge' should be considered sufficient to constitute the genocidal intent for mid- or low-level perpetrators of genocide.

In the concept of knowledge-based approach, mid-level and low-ranking executioners that are aware of the genocidal plan and policy may be convicted as principals by expanding liability for genocide. This expansion of definition of crimes was a result of the growth of international criminal law in the mid-

[92] Ambos, (2009), at p. 838.
[93] See *Akayesu*, Trial Judgement, para. 523.

1990s.[94] Consequently, human rights movement filled the vacuum in international criminal law. In this sense, it can be assumed that the notion of the knowledge-based understanding of genocidal intent was influenced by "victim-focused teleological reasoning" from human rights and humanitarian law.

Already in 1993, Cherif Bassiouni proposed a knowledge-based understanding of genocidal intent by distinguishing between high-level perpetrators and physical executors of genocidal acts. Also, in 1995, during the Ad Hoc Committee meetings for the establishment of the International Criminal Court, knowledge as a mental element of genocide for low-level actors was suggested. Some delegations suggested that the intent requirement for genocide should be clarified by "distinguishing between a specific intent requirement for the responsible decision makers or planners and a general-intent or knowledge requirement for the actual perpetrators of genocidal acts". It was also suggested to "elaborate on various aspects of the intent requirement without amending the Convention, including the intent required for the various categories of responsible individuals, and to clarify the meaning of the phrase "intent to destroy", as well as the threshold to be set in terms of the scale of the offence or the number of victims".[95]

As regard to distinguishing between high-level actors and their subordinates, the International Law Commission also mentioned this knowledge-based interpretation in its report in 1996:

> "The definition of the crime of genocide would be equally applicable to any individual who committed one of the prohibited acts with the necessary intent. The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan

[94] Robinson, at pp. 927-929.
[95] U.N. Doc. A/50/22, para. 62.

> or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group."[96]

This report shows that low-level participants might be convicted if they had knowledge. In other words, The ILC gives knowledge a status of mens rea. Moreover, it presumes that a subordinate knows the intention of his superiors. It is worth noting that this assumption is problematic in regard to principles necessary for blame and punishment of individuals.

In his article, Alexander Greenawalt advocates the knowledge-based approach on the basis of a historical and literal interpretation of the intent concept in the Genocide Convention.[97] He criticizes the Trial Chamber's strict interpretation of the genocidal intent in *Akayesu* and argues that genocidal intent is an ambiguous concept. He claims that there is nothing in

[96] U.N.Doc. A/51/10, p. 45.

[97] It must be noted that while Greenawalt provides valuable insights, he may not be the most authoritative source.

the text of Genocide Convention that requires a purpose-based reading.[98] In the context of the literal interpretation, first, the concept of intent needs to be analyzed.

3.3.1 What Does Intent Mean?

This section analyzes the meaning of intent in order to investigate whether the purpose-based approach aligns with the literal interpretation of the intent. This discussion is situated within the knowledge-based approach section because knowledge-based theory hinges on ambiguity inherent in the literal interpretation of genocidal intent.

The wording "intent to destroy" in Article 6 of the Statute, adopted in verbatim from article II of the Genocide Convention, is ambiguous, as opposed to French and Spanish versions of the Rome Statute's Article 6 that suggests a volitional understanding.[99] These versions can be understood as purpose-based conduct, while, in English version, "intent to destroy" is not clear as regard to ambiguity of the meaning of intent.[100]

In traditional common law, intent may be understood in both a cognitive and a volitional sense, while special intent corresponds to purpose and aim. In modern English law, intention is defined as desire or purpose.[101] The International Criminal Court Act 2001 defines intention in the context of the genocide in English law to encompass an individual's knowledge that a certain consequence will happen in the ordinary course of events.[102] On the other hand, in the US Model Penal Code, *mens rea* is divided into three various mental states: recklessness, knowledge, and purpose. Although the wording intent is not used in this modeling, intent often corresponds to specific intent, namely purpose.[103]

[98] Greenawalt, at p. 2265.
[99] In French "l'intention de détruire" and in Spanish "la intención de destruir".
[100] Ambos (2009), at p. 842.
[101] Ibid.
[102] ICC Act 2001 (UK), para. 66.
[103] Greenawalt, at pp. 2267,2268.

In the civil law countries, the situation is not different in that the meaning of intent is far from clear. In French law, the precise meaning of intent has never explicitly been defined. The former Criminal Code used the wording "*á dessein, volontairement, sciemment, frauduleusement, de mauvaise foi*" ("intentionally, voluntarily, knowingly, fraudulent, and mala fide"). The new Criminal Code refers to the wording intent but does not explain it, either. However, French courts applies both a strict and a looser concept of intent. This conception, in the French doctrine, corresponds to the volitional and the cognitive aspect of intent. In other words, there is at least a distinction between *dolus directus* and *dolus indirectus*.[104]

In German law, there is a specific terminology to define criminal intent as the desire to bring about specified consequences. For instance, the *dolus directus* in the first degree, "*dolus specialis, Absicht*", describes as having "a strong volitional (will, desire) and a weak cognitive (knowledge, awareness) element". German law employs also *dolus eventualis,* which shows that intent is understood in a broader sense. Yet, the interpretation of intent is still controversial. In Spanish law, intent (*intención*) refers to either intent in a general sense (*dolus)* or both forms of *dolus directus* (desire and knowledge).[105]

The final example of the use of the term intent is from the former Yugoslavia where "crime of crimes" charges emerged. In the criminal law of the former Yugoslavia, intent is in a broad sense to encompass perpetrators who "perform a deed knowing 'it could have criminal consequences' ".[106]

Furthermore, Alexander Greenawalt argues that the Rome Statute of the ICC "embraces a relatively broad understanding of intent analogous to the Model Penal Code definition of 'knowledge'". He claims that nothing in the ICC Statute provides a deviation from the default *mens rea* set out by Article 30. On the other hand, he takes external sources into the consideration if they might provide for a deviation from the standard rule. Even if they do, the

[104] Ambos (2009), at p. 843.
[105] Ibid.
[106] Greenawalt, at p. 2269.

ambiguity persists whether intent holds a special meaning. He concludes that a literal interpretation clearly does not favor a purpose-based understanding, nor knowledge-based interpretation.[107] In this regard, Kai Ambos and Claus Kress also share the same view.[108]

In sum, since the crime of genocide is an international crime and people from different countries with different legal systems are involved, it is challenging to determine what intent clearly means. The level of intent differs in various legal systems. In this regard, the meaning of intent remains uncertain after a literal interpretation.

3.3.2 Drafting History

To determine what genocidal intent means, it is essential to analyze the reason behind the adoption of Genocide Convention and the discussions that took place during its drafting. Arguments for purpose- and knowledge-based approaches – although not explicitly stated during these discussions – may contribute to a clearer understanding on the concept of genocidal intent.

On 11 December 1946, the U.N. General Assembly adopted Resolution 96(1).[109] The Resolution refers to genocide as the destruction of groups, however, does not specify any particular *mens rea*. After nearly half a year, Article I in the Secretariat Draft of the Genocide Convention stated that "the purpose of the Convention is to prevent the destruction" of the groups.[110] In this regard, the main focus is on the prevention of the destruction and protection of the groups, rather than on the perpetrator's degree of intent. Also, in the Article I, genocide is defined as a "criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development."[111] The Secretariat stressed this definition and stated that "the

[107] Ibid.; See also chapter 2.3.
[108] Ambos (2009), at p. 844; Kress (2005), at p. 567.
[109] UN Doc. A/RES/96(I).
[110] UN. Doc. E/447 (1947), para. I.
[111] Ibid.

literal definition must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely …".[112]

The second draft was produced by the Ad Hoc Committee and the phrase "with the purpose of destroying" in the initial draft has been revised to the "intent to destroy". Most notably, the Committee incorporated the phrase "on the grounds" into the definition, thereby refining the genocidal mental element to "intent to destroy a national, racial, religious or political group *on grounds of* the national or racial origin, religious belief, or political opinion of its members.[113] This change in phrasing resulted in a debate regarding distinction between "intent" and "motive". However, the Committee has never reached an agreement. Some delegations suggested changing the phrase to "as such", which was less strict, but the suggestion did not prevail.[114]

The phrase "as such" was reproposed by the Sixth Committee of the General Assembly. According to Greenawalt, this re-introduction reflected the Sixth Committee's "discomfort with such a narrow understanding of genocidal mens rea".[115] The phrase change was suggested by the Venezuelan delegate Mr. Perozo, arguing that the enumeration of motives was "useless and even dangerous" because perpetrators of genocide might exploit the restrictive enumeration and escape the responsibility.[116] On the other hand, some delegations, such as Belgium's, argued that genocide required a definition in terms of motives and stated that "it was not sufficient to mention intent […] in order to distinguish between genocide and other political crimes under common law". He added that the characteristic feature of genocide was "intent to destroy" a protected group and "the concept of intent had thus lost some of its clarity on account of an unfortunate confusion between acts and consequences on the one hand and intention on the other".[117] Expressing similar concerns, the delegation of New Zealand argued that modern war techniques, such as bombing, can destroy a whole group, and without the

[112] Ibid., p. 16.
[113] UN. Doc. E/794 (1948) (emphasis added).
[114] Ibid., at p. 5; Lippman, Drafting, at p. 41.
[115] Greenawalt, at p. 2276.
[116] UN. Doc. A/c.6/Sr. 61-140, at p. 124.
[117] Ibid., at p. 122.

enumeration of the motives, such offenses might possibly be classified as a crime of genocide.[118]

The discussions during the meetings reflect that those who argued for enumeration of motives suggest that genocide should be distinguished from other crimes and understood as a purpose-based crime. It is also clear that there is a concern that the perpetrators may escape the responsibility by exploiting the narrow interpretation of the definition of genocide. During the meetings, there was a suggestion to clarify the distinction between "motive", "intent" and "special intent", however, it was rejected by the Sixth Committee. Thus, genocidal mens rea has never been clarified.[119] In sum, the drafting history does not indicate that the genocidal intent must be interpreted in a particular manner.

3.3.3 Issues with Purpose-based Interpretation

As mentioned before, the purpose-based approach has been challenged with other approaches regarding several issues with the narrow interpretation of genocidal intent. The most significant problem with the purpose-based understanding is the difficulty of proving genocidal intent regarding subordinate perpetrators who claim to be carrying out the genocidal orders of the superiors.

In this regard, Greenawalt's example regarding the Holocaust highlights these evidentiary problems. The Holocaust was administrated by state, meaning that the entire bureaucracy and the military chain of command were executing their superiors' orders. Despite their high-level ranking positions, they were in fact subordinates. Indeed, one might argue that the *dolus specialis* requirement does not preclude a subordinate from having a special intent, but the issue becomes more apparent in a scenario where the head of a death camp ensures the killings of the members of the protected group upon their arrival at the camp. He is ordered to carry out a task in full knowledge, contributing to the destruction of the group. However, his task does not require any control

[118] Ibid., at pp. 119,120.
[119] Greenawalt, at p. 2279.

of the membership of the victims, since they were selected before they arrived at the camp. To prove the special genocidal intent in such a case, it must be demonstrated that the perpetrator consciously desired the destruction of the group. It is almost impossible to show that the head of the death camp had specific intent to destroy the group, unless he does not expressly state, especially considering that he had no specific task that could serve as evidence of his genocidal intent.

Article 33 of the ICC Statute states that "orders to commit genocide or crimes against humanity are manifestly unlawful", meaning that individuals who invoke the superior orders as defense cannot escape from the liability. The head of the camp in the hypothetical scenario cannot possibly avoid conviction for genocide by invoking superior orders, but he can avoid the conviction simply by arguing that he had not special intent due to the superior orders he received, which is absurd.

In regard to the evidentiary issues, the Trial Chamber in *Akayesu* case used circumstantial evidence to demonstrate mens rea. The Chamber found Akayesu guilty by looking into his public statements where he called for the extermination of Tutsi, in addition to his participation in the genocidal campaign.[120] Also, the Chamber stated that "it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others."[121] Greenawalt criticizes the ICTR's practice of presuming specific intent "by virtue of the fact that a perpetrator participates in a genocidal campaign", while ideologically adhering to a stringent interpretation of genocidal intent (*dolus specialis*). In other words, the Court theoretically follows the purpose-based approach, but in practice, it adheres to the knowledge-based approach. In this context, he questions whether the special intent standard is effective at all at the individual level.[122] Indeed, the ICTR's

[120] *Akayesu*, Trial Judgement, paras. 332-362.
[121] *Ibid.*, para. 523.
[122] Greenawalt, at p. 2282.

broad evidentiary standard of presuming specific intent is problematic regarding inconsistency between its theory and evidentiary practice. This reflects the challenge in maintaining the purpose-based interpretation. It must be noted that, "presuming" is Greenawalt's own description of the Court's process of evaluation of all evidence.

Moreover, in the *Tolimir* case, the Trial Chamber placed greater emphasis on the accused's knowledge of "large-scale criminal operations on the ground" and "genocidal intentions of the JCE[123] Members", rather than Tolimir's words. The Prosecution argued that the accused's "complete lack of humanity and utter contempt for human life" is demonstrated in a written report, in which Tolimir proposed to another high-level perpetrator that "we could force Muslims to surrender sooner if we destroyed groups of Muslim refugees fleeing from the direction of Stublić, Radava, and Brloška Planina" and that the "best way to destroy them would be by using chemical weapons or aerosol grenades or bombs". Also, the Prosecution stated that this document manifests "the accused's accurate and truthful proposal to destroy fleeing groups of civilians" and "if Tolimir was able to propose the destruction of the women and children fleeing their homes in Žepa, this Trial Chamber can reasonably infer that" Tolimir had no doubts concerning execution of potential Muslim soldiers. [124] While Tolimir's words alone were strong enough to prove his specific genocidal intent, the Chamber did not solely base its decision on the accused's words. Rather, his words were only a part of the facts, including his knowledge of overall context of violence. From these considerations, it is evident that the Chamber rejected the notion of special intent without context, which does not align with purpose-based approach.

Similarly, in the *Popovic* et al Trial Judgement, the factors the Chamber considered to be decisive in finding the accused's specific genocidal intent were "the scale of atrocities committed", Popovic's " vigorous participation in several aspects of massive killing operation, in particular his direct participation in the organization of large-scale murders", "[t]he systematic,

[123] Joint criminal enterprise. See Section 3.4.3 for more detail.
[124] *Tolimir*, Trial Judgement, para. 1170.

exclusive targeting of Bosnian Muslims" and "the repetition by Popovic of destructive and discriminatory acts".[125] However, Popovic explicitly expressed his state of mind by saying "all the balija have to be killed".[126] The Chamber also found that "Popovic aimed to spare no one amongst the Bosnian Muslims within his reach, not even a young boy" and he "remained determined" to kill injured Bosnian Muslim men in the hospital even after the large-scale killings were complete.[127] These factual findings, namely his words and deeds, alone were sufficient to meet the special genocidal intent threshold, but the Chamber based his decision on the context of the genocidal campaign, in particular the "scale of atrocities" and his participation in the massive killings. In addition, the Chamber also considered the accused's knowledge of the genocidal plan and the genocidal intent of other perpetrators, and stated that "an examination of circumstances of the killings and Popovic's *knowledge* and participation provides a clear picture as to his state of mind".[128] In summary, the conclusion to be drawn from the evidentiary practice of the courts is that knowledge-based approach appears to be more suitable for describing the court's interpretation of the phrase "intent to destroy", rather than purpose-based approach.

Regarding the evidentiary difficulties to prove purpose-based genocidal intent, it is not the most valid argument in favour of it as a matter of substantive law. However, it certainly provides a reason to reconsider the traditional approach that the international case law applied thus far.[129]

Another issue with the purpose-based understanding arises in situations where the perpetrators knowingly engage in the destruction of protected groups, but the ideology driving the persecution evades to be captured within the framework of specific intent. For instance, during the period between the 1960s and 1970s, Northern Aché Indians in Paraguay were targeted by the government as part of the campaign aimed at freeing Aché territory for

[125] *Popovic* et al, para. 1180.
[126] *Ibid*., para. 1179.
[127] *Ibid*.
[128] *Ibid*., para. 1178 (emphasis added).
[129] Kress, at p. 572.

economic development. As a result, fifty percent of the indigenous people were killed. Regarding the attacks on the Aché people, the Paraguayan Defence Minister argued that the purpose of the campaign was economic development, rather than the destruction of the group.[130] In this example, to some extent, the Aché Indians were targeted for extermination based on the devaluation of their lives simply because of their group identity. Similarly, one might argue that the purpose of the campaign in the Holocaust was German purity, not to destroy the protected group, and consequently, it was not the genocide. In other words, the line between targeting a group because they are seen as hindering economic development and targeting them with discriminatory indifference to their lives is blurry. In this context, purpose-based approach provides a basis for individuals who committed those atrocities to evade prosecution for genocide. Yet, specific intent requirement might be intended to prevent the expansion of the definition of genocide, thereby avoiding categorizing every significant destruction to genocide. However, according to Greenawalt, this argument holds merit only in cases where there is no discriminatory selection of victims.[131]

The purpose-based approach interprets the "intent to destroy" as special intent or *dolus specialis*, but the issue is that the precise meaning of the special intent is still unclear. In the previous section, the meaning of "intent" has been discussed, while in this section, the focus shifts to analyzing whether special intent refers to degree of volition or correlates with the consequences of the acts committed.

The notion of purpose-based genocidal intent has been understood as a mental element that signifies an "emotional" aspect of a perpetrator's inner state of mind. Ambos understands the case law´s special intent approach as "the volitional element in its most intensive form".[132] In this regard, the question that needs to be asked is: Is special intent really determined by its intensity? To answer this question, first, it is necessary to have a better understanding

[130] Münzel, pp. 13–15.
[131] Greenawalt, at p. 2286, 2287.
[132] Ambos (2009), at p. 838.

of the concept of special intent in criminal law by examining some national jurisdictions that make a clear distinction between general intent and special intent.[133] Therefore, Australian, Iranian and French criminal law has been selected for analysis due to their clear distinction between general and special intent.

In Australian criminal law, general intent refers to conduct, while special intent to the result or consequence element.[134] Similarly, Iranian criminal law makes the same distinction by referring general intent to the act and special intent to the result.[135] In French criminal law, special intent corresponds *dol spécial* and the term was represented genocidal intent element in *Akayesu*, the first conviction for genocide by an international court.[136]

The *Akayesu* Trial Chamber stated that "[s]pecial intent is a well-known criminal law concept in the Roman-continental legal systems".[137] In this regard, it is worth examining the concept of special intent in French criminal law in more detail because the distinction between *dol general* and *dol special* in other "Roman-continental legal systems" is not clear as in French law. French criminal law has two types of intent, i.e. general intent (*dol général*) and special intent (*dol spécial*).[138] The "general intent" consists of both "desire" and "awareness". In the concept of "general intent", "desire" means a "desire to commit an act" and does not relate to the criminal result of that act.[139] In French doctrine, willingness to act proves that a person has a "desire".[140] Similarly, the "awareness" refers to an individual's consciousness that they are violating the law.[141] On the contrary, "special intent" means the perpetrator's will to achieve the result prohibited by law.[142] Under French law, all crimes related to requirement of a result are classified as special intent

[133] Kim, at pp. 66-67.
[134] Cumes, pp. 321-327.
[135] Tellenbach, pp. 389ff.
[136] Aptel, at p. 277.
[137] *Akayesu*, Trial Judgement, para. 518.
[138] Elliott, p. 66.
[139] Ibid.
[140] Bell, p. 222.
[141] Elliott, p. 66.
[142] Badar, p. 162.

crimes, such as murder and theft.[143] In the paradigm of the offence of murder, special intent refers to causing death. If we follow this French notion of special intent, genocidal special intent refers to the result of the destruction. In other words, in the context of genocide, the object of special intent is the destruction ("intent to destroy"). Also, Kress in his article states that:

> "[…] the French distinction between *dol general* and *dol special* does not refer to the intensity but to the *object* of the intent. While the concept of *dol general* refers to the perpetrator's consciousness to act in contravention of a rule of criminal law, the concept of *dol special* refers to the occurrence of a specific result."[144]

The *Jelisic* Appeals Chamber also confirmed this approach, as opposed to international case law supporting the purpose-based understanding.[145] The Prosecution argued that the Trial Chamber attributed to *dolus specialis* "a definition as to the degree or quality of intent that exists in certain civil law jurisdictions".[146] The Defence disagreed with the Prosecution and held that *dolus specialis* was used in the Trial Judgement as an alternative expression of "special intent" and "did not refer to the degree of the requisite intent as alleged by the prosecution".[147] The Appeals Chamber agreed with the Defence and stated that the Prosecution's challenge was based on a misunderstanding. In this regard, the Appeals Chamber's opinion distinguishes from the purpose-based approach by rejecting the notion that specific intent is determined by its intensity. It must be noted that the Appeals Judgement simply confirmed the French notion of special intent but did not indicate anything about knowledge-based approach.[148]

From all these comparative criminal law considerations, purpose-based genocidal intent should have been interpreted as special intent that refers to

[143] Elliott, p. 70.
[144] Kress, at p. 567.
[145] *Jelisic*, Appeals Judgement.
[146] *Jelisic*, para. 42.
[147] *Jelisic*, para. 43.
[148] Kim, pp. 71–72.

the result of the act in the Article 6 of the Statute, namely destruction. However, the international case law indicates that special intent refers to the volitional element as to its degree or intensity.[149] There is no doubt that this is questionable.

In this regard, Ambos doubts that *dolus specialis* (special intent) has a special meaning. He suggests "a double intent structure" that special intent referring to the destruction of the group must be distinguished from the general intent referring to the underlying acts. In this respect, Schabas also states that:

> "But for 'killing' to constitute the crime of genocide, it must be accompanied by the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.' This presumably is all that is meant by the *dolus specialis*, or the special intent, or the specific intent, of the crime of genocide. Importation of enigmatic concepts like *dolus specialis* or 'specific intent' from national systems of criminal law may have unduly complicated matters."[150]

In other words, the special intent is characterized as *special or specific* because it merely refers to a *specific or special result or consequence of the destruction of a group* in domestic criminal law. However, the international case law does not interpret in this way.

3.3.4 Greenawalt's Interpretation of Genocidal Intent

After pointing out the issues with the purpose-based approach in his article in 1999, Greenawalt proposed an alternate approach, so-called knowledge-based approach. He suggested that "in defined situations, principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions"[151] Thus, he suggests this alternative interpretation as a solution to related problems of subordinates who avoid the liability of the crime of genocide. In cases where an individual

[149] See section 3.2.
[150] Schabas (2002), p. 148.
[151] Greenawalt, at. p. 2259.

committed a prohibited act set out in the definition of the offence of genocide, the requirement of genocidal intent should be satisfied if the individual engaged in activities supporting a genocidal campaign against the protected group and was aware of that the goal of the campaign was the destruction of the group.[152] His suggestion is simply to punish subordinate actors as principles. In order to maintain the Genocide Convention's main purpose for the protection of the enumerated groups from annihilation, he argued that this interpretative approach emphasizes *the destructive result* of genocidal *actus reus*, rather than focusing on the specific motives or purposes driving individuals to perform such acts. For mid- and low-level perpetrators, the knowledge-based approach punishes the individuals as principles without a need to extend the liability framework.[153]

Greenawalt's approach lies simply on two elements: *"selection of group members on the basis of their group identity"* and *knowledge concerning the destructive consequences of an individual's actions for the survival of the group*. He construes *knowledge as to consequences of acts* in the light of traditional criminal law doctrine and the drafting history of the Convention. He concludes that the genocidal intent should be understood in line with Article 30(2b) of the Rome Statute.[154] This knowledge requirement is considered as a solution to the evidentiary difficulties in the context of conviction of subordinate actors.

On the other hand, the *selection of group members based on their group identity* can´t be inferred from the same article, Article 30 of the Statute, but should be understood, according to Greenawalt, in line with the notion that genocidal acts may involve, i.e. "killing members of the group".[155] In other words, the perpetrator must select the victims on the basis of membership of the group. This conclusion is aligned with the general context of the Convention's drafting history, which demonstrates a concern for the

[152] Ibid., at p. 2288.

[153] Ibid.

[154] Namely "[…] a person has intent where [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events".

[155] Rome Statute, Article 6(a).

persecution of individuals based on their memberships of the protected groups. This "targeted selection" requirement supports the notion of genocide as a targeted crime. Thus, this approach does not require a specific intent while also preventing the expansion of the concept of genocide.[156]

However, Greenawalt's knowledge-based approach does not require that every single person must necessarily select victims based on their group identity. It interprets targeted selection in the general context. For instance, a perpetrator who targets pre-selected victims and has knowledge that the victims belong to the targeted group can be convicted for crime of genocide. Knowledge of the selection being on the basis of group membership should be enough to meet the threshold for conviction. Similarly, the approach does not require that perpetrators act out of hostility toward the group.[157]

Knowledge-based approach presents challenges regarding the phrase "in part" in the chapeau part of Article 6 of the Statute. In the scenario where a perpetrator murders only two members of a protected group, knowledge requirement sets a relatively low threshold for genocidal liability without any purpose-based intent requirement. Therefore, a high bar must be set regarding the threshold for "part". It must be at least substantial part of a group who faces a threat of massive destruction. It must be noted that, in the paradigm of killing only two members of the group, even the strict purpose-based approach faces challenges.[158]

Greenawalt's reading of genocidal intent seems to be clear and easy to follow, but it expands the definition of genocide. Thereby, the crime of genocide and the crimes against humanity overlaps. The listed acts in Article 7 of the Statute constitute the crimes against humanity when "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[159] To distinct the knowledge-based reading from the crimes against humanity, it appears that the special intent requirement is

[156] Greenawalt, at p. 2289.
[157] Ibid.
[158] Ibid., at pp. 2290–2291.
[159] Rome Statute, Article 7.

necessary. In this regard, Greenawalt argues against this objection by asserting that the concept of genocide advanced from the definition of the crime against humanity outlined the Nuremberg Charter.[160] According to Greenawalt, any acts of genocide would also constitute a crime against humanity regardless of how one interprets the *mens rea* requirements of genocide.

However, Greenawalt accepts that genocide is a special crime. In accordance with the *Akayesu* Trial Judgement asserting that the crimes against humanity is intended to protect civilian populations from persecution while the crime of genocide aims to safeguard certain groups from extermination, Greenawalt asserts that the decisive feature of the distinction between these two core international crimes lies in the interests of the prohibitions.[161] In other words, acts that threaten the survival of a protected group constitute the crime of genocide. On the other hand, the crimes against humanity require a looser *mens rea*, merely the existence of a widespread or systematic attack on any civilian population. He argues that the crimes against humanity does not require that the perpetrator has any "knowledge regarding *the consequences of his acts* for the collective survival of any particular group", as opposed to the crime of genocide. In most cases, the crimes against humanity does not reach to the level of genocide.[162]

3.3.5 Structure-based Approach

Hans Vest followed the knowledge-based approach and developed it further to a structure-based reading. He construed the genocidal intent "as intention to achieve a consequence which goes beyond the result that constitutes the actus reus".[163] He suggested a "two-fold approach which is based on a volitional ('intent') and/or a cognitive ('certain knowledge') element".[164] He advanced a particular structure, which described as a "*mixed individual-collective point of reference* of the intent to destroy a protected group". In this

[160] Greenawalt, at p. 2293; UN Doc. A/51/10, p. 86; Nuremberg Charter, at. article 6(c).
[161] *Akayesu*, Trial Judgement, para. 469.
[162] Greenawalt, at p. 2294 (emphasis added).
[163] Vest, at p. 781.
[164] Ibid.

context, the general intent is related to individual acts (*Einzeltaten*), while the "intent to destroy" is related to the collective action (*Gesamttat*).[165]

In his article, Vest bases his structure-based interpretation of the "intent to destroy" on the notion that the crime of genocide has a different concept of an extended subjective element not known in domestic criminal law". He derives this argument from the two-fold character of the *mens rea*. For instance, the term "destroying" or "killing" refers to both conduct and the consequence of that conduct. However, as opposed to "killing members of the group", the phrase "intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such" does not directly relate to the individual *actus reus*. Normally, the result crimes are understood to require that the perpetrator brings about the desired consequence through their personal actions. However, in the context of genocide, it is normally not possible for an individual alone to destroy a protected group. Therefore, the crime of genocide is different from other result crimes. According to Vest, the genocidal *mens rea* is considered as an "extended subjective" or "extra-subjective criterion" and it relates to the conduct and consequence of a "collective action".[166]

From Vest's point of view, the "intent to destroy" refers to the "*overall context of the collective action"*. This conceptual approach can be explained with the structure of the crimes against humanity or war crimes. Both the crimes against humanity and war crimes have a two-layered structure, namely the conduct level and the context level.[167] These two layers must follow the nexus requirement. For instance, murder as a crime against humanity[168] has two dimensions: conduct of murder (conduct level) and widespread and systematic attack against a civilian population (context level). These two layers must be linked (the nexus requirement).[169] Simply, an objective conduct element should be complemented by an objective contextual element.

[165] Ibid., at pp. 785–786.
[166] Ibid., at pp. 783–784.
[167] Cassese et al, p. 37–38.
[168] Rome Statute, Article 7(1)(a).
[169] See *Kunarac* et al, Appeals Judgement, para. 99.

In the paradigm of the crime against humanity of murder, the murder (*actus reus*) must be committed with knowledge of the widespread or systematic attack. If we apply this two-layered structure to the crime of genocide, it seems to be complicated. With respect to the *actus reus*, the "killing members of the group" must be committed with general intent (the conduct level). This *actus reus* can be considered as *the individual act* underlying the crime of genocide. However, the provision of genocide does not explicitly express a contextual element.[170] According to Vest, the contextual element is "inherent to its *mens rea* where it has been incorporated in the extended subjective element".[171] Then, the perpetrator must necessarily commit the killings with intention to destroy the group in the context of *a collective action* consisting of a group of other perpetrators (nexus).[172] From these considerations, Vest draws a conclusion that the genocidal intent has a unique legal technique, "*a systemic structure"* not directly set out in the definition of genocide in the ICC Statute. This systemic structure is described as *a mixed individual-collective point of reference*.

Regarding the degree of the "intent to destroy", Vest argues that a perpetrator who knows with certainty that his conduct will inevitably lead to a certain result, which is connected with his purpose, has the requested intention. To illustrate this argument, consider two scenarios. In the first scenario, a person intends to kill his wife in order to collect life insurance money and places a bomb on the airplane his wife is traveling on. His purpose is only to kill his wife, but he knows for sure that other passengers will also die. He does not desire any harm upon other passengers and hopes for their survival. However, the plan goes as planned and 200 persons die. In the second scenario, another person wants to kill all the passengers on the airplane and sets a bomb accordingly. Everything goes as planned and 200 persons die. According to Vest's argument, both of these cases should be handled equally. In the case of genocide, Vest argues that genocidal intent should be understood in a broader sense and encompass both the concept of *dolus directus* in the first

[170] See Chapter 2.2.4.
[171] Vest, at. p. 785.
[172] Ibid.

grade and *dolus directus* in the second grade. However, he asserts that *dolus eventualis* does not meet the genocidal intent threshold.[173]

In his article, Vest also discusses the terms virtual and practical certainty. In a scenario where a killing squad partially destroys an ethnic group in obedience to their superior orders, according to Vest, it is clear that this operation is genocidal in its character when it becomes "practically certain" that the overall context will lead to a destruction of the group. It is unrealistic to expect that a single perpetrator should know all the details of the genocidal campaign, and therefore virtual certainty of the consequences forms unrealistically high threshold. However, a single perpetrator can have a practical certainty of the basic characteristics of the campaign and its consequences. Consequently, Vest argues that genocidal intent is established "when the perpetrator's knowledge of the consequences of the overall conduct reaches the *level of practical certainty*".[174]

Vest asserts that the *Krštic* Trial Judgement supports his two-fold approach by emphasizing "the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime".[175]

In sum, Vest's structure-based approach views the genocidal intent in a broader sense. In this sense, he argues that knowledge-based approach's focus shift from the volitional aspect to the cognitive aspect of *mens rea* is an important advantage, not a flaw. According to Vest, the cognitive element and aim inferred from knowledge is much easier to "objectify" than the purpose-based reading of genocidal intent because, regarding its emotional connotation, the purpose-based reading of intent is much more open to a subjective evaluation of evidence. Consequently, he argues that his proposed level of practical certainty standard would be an improvement.[176]

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[173] Ibid., at p. 789.

[174] Ibid., at. p. 793.

[175] *Krštic*, Trial Judgement, para. 549; The Trial Chamber used a similar technique in *Jelisic*, Trial Judgement, para. 88.

[176] Vest, at. pp. 796–797.

3.3.6 Kress' approach

After Vest's proposed structure-based approach, which degraded genocidal intent to the *dolus directus* in the second degree (indirect or oblique intent), Claus Kress proposes, in his article about the Darfur Report, to further degrade the genocidal *mens rea*, namely to *dolus eventualis.*[177]

Kress suggests that the judges of the International Criminal Court should take a fresh look on the meaning of genocidal intent, rather than following the case law of the International Criminal Tribunals. He agrees with Greenawalt concerning ambiguity surrounding the literal, historical and comparative law interpretation of genocidal intent. Additionally, he adds that customary international law does not offer much in this regard. He views the crime of genocide as a *systemic* crime and his starting point is the distinction between the collective and individual genocidal intent.

Regarding the issue with proving the genocidal intent of subordinate actors, Kress also argues that subordinates should be convicted as principal perpetrators. In the context of the crime of genocide, perpetrators may be characterized as direct or principal perpetrators or as a secondary figure as accomplice.[178] However, the notion that the principal liability should extend to subordinate participants is dubious. In this matter, Kress argues that the complicity approach adopted by the ICTR and ICTY also presents serious problems.[179] He also asserts that the knowledge-based approach to individual intent in the case of crimes against humanity can be applied to the individual genocidal intent. Although the crime of genocide does not explicitly require the contextual element while the crimes against humanity does, both crimes are *systemic* crimes. He argues that the knowledge-based reading of genocidal intent does not diminish the specificity of genocide because "the specificity of the crime of genocide compared with crimes against humanity must reside in the *nature of the systemic act* and not in the way *primary and derivative*

[177] Kress, at. p. 562.
[178] Krštic, Trial Judgement, para. 643.
[179] Kress (2005), at. p. 574.

individual criminal responsibility for participation in the respective systemic act are *distinguished*".[180]

On the other hand, Kress' knowledge-based approach differs from Greenawalt's and Vest's concerning the level of the genocidal intent. Kress agrees with the Spanish scholar Gil Gil who argues that *dolus eventualis* should suffice.[181] In this regard, he does not elaborate his argument, but only states that, in light of the systemic nature of genocide, the knowledge requirement in Darfur Report[182] can only imply that "individual perpetrator must *foresee as substantially certain* that the collective activity will *effectively result* in the destruction of at least part of the group". In sum, he suggests that "individual genocidal intent requires (a) *knowledge* of a collective attack directed to the destruction of at least part of a protected group, and (b) *dolus eventualis* as regards the occurrence of such destruction".[183]

3.3.7 A Combined Structure- and Knowledge-based Approach

Kai Ambos is also one of the scholars who advocates the knowledge-based approach. Ambos advanced another proposal for the knowledge-based interpretation of the genocidal intent. He proposes a combined structure- and knowledge-based approach that distinguishes according to the status and role of the perpetrators. He argues that the purpose-based approach should be applied to only the top- and mid-level perpetrators, while for the low-level perpetrator's knowledge of the genocidal context should be sufficient.[184]

He argues that the literal interpretation of genocidal intent does not determine the meaning of the "intent to destroy" and therefore a systematic and teleological interpretation of the genocidal intent is necessary. He agrees with Vest's and Kress' structure-based approach and makes a distinction between

[180] Ibid., at p. 576.
[181] Gil Gil, at p. 259.
[182] See the Darfur Report, "… the perpetrator […] knew that his acts would destroy, in whole or in part, the group as such.", para. 491.
[183] Kress (2005), at. pp. 576–577.
[184] Ambos (2009), at p. 833.

the individual acts and the genocidal collective action. He also argues that the contextual element of the crime of genocide is "a part of the (subjective) offence definition by means of the 'intent to destroy' requirement as its 'carrier'" since there is no context element in the objective offence definition.[185]

With regard to the teleological interpretation, he first confirms the main purpose of the "intent to destroy" requirement, i.e. to distinguish genocide from other crimes. He presents the same argument as Vest's and Kress'. The crime of genocide as the "crime of crimes" is predicated on its specificity in protecting national, racial, ethnical or religious groups from destruction, not on an either purpose- or knowledge-based approach.[186]

It is possible to conceive a genocidal campaign without any low-level individuals acting with desire to destroy a protected group. In this sense, Ambos asserts that a low-level perpetrator should be convicted if he or she acts with knowledge of that masterminds of the genocidal campaign are acting with a purpose-based genocidal intent. He supports this approach with four arguments. Firstly, the low-level perpetrators alone cannot commit genocide without any intellectual masterminds. Secondly, the low-level perpetrators are the direct executors of the genocidal campaign and therefore should be convicted as direct perpetrators, i.e. as principals. Since they are used as instruments to achieve the genocidal campaign, they do not have the destructive desire, knowledge should suffice. Third, the crime of genocide has developed from the crimes against humanity, and these two have a "structural congruity". Therefore, with respect to this "structural congruity" between these two core crimes, the "knowledge-of-the-attack" requirement should also be applied to the crime of genocide. And lastly, it makes no difference whether low-level perpetrators act with conscious desire or knowledge of the overall genocidal intent.[187]

[185] Ibid., at pp. 845–846.
[186] Ibid., at p. 846.
[187] Ibid., at pp. 847–848.

In regard with high-level perpetrators, Ambos argues that they are the masterminds of the genocidal enterprise and therefore, the purpose-based approach should be upheld for these perpetrators. However, the ambiguity remains regarding the mid-level perpetrators that have important administrative status, but they are not the masterminds, such as the previously mentioned the head of a death camp. They are not physical perpetrators as the low-level perpetrators, but they hold an important role to achieve genocidal campaign. Ambos argues that the mid-level perpetrators should be qualified as top-level perpetrators, since they are intellectual perpetrators and not the direct executors of the underlying acts, and therefore they must possess the purpose-based genocidal intent.[188]

In other words, Ambos' proposed approach adheres to the purpose-based reading of the "intent to destroy" requirement for top/mid-level perpetrators, while suggesting broadening the *mens rea* standard to *dolus directus* in the second grade for the low-level actors. This combined structure- and knowledge-based approach does not accept a lower mental element, such as *dolus eventualis* because then the *nullum crimen* principle would be violated by a forbidden analogy to the detriment of the accused.[189]

3.4 Issues with Knowledge-based Approach

Although knowledge-based approach has been developed in regard with issues with purpose-based approach, this broadened understanding of genocidal intent also has various problematic aspects. In this section, these problematic aspects will be analyzed.

3.4.1 A Challenge of Distinct Requirements Based on Status

Sangkul Kim highlights one of the issues with knowledge-based approach by a hypothetical scenario of an insomniac commander. In this hypothetical scenario, an old woman offers a contract to a commander, seeking the destruction of a protected group and the commander accepts it. Although the militia commander did not desire to destroy the group, he acted in accordance

[188] Ibid., at pp. 848–849.
[189] Ibid., at p. 850.

with the contract and a substantial part of the targeted group was destroyed. The commander attempted to kill the old woman when she explicitly stated her intention to destroy the protected group, driven by deep concern over the consequences of the attacks performed by his subordinates. However, he refrained from killing her when she offered money. He suffered from insomnia plagued by the guilt of contributing to the group's destruction.

In regard with purpose-based approach that emphasizes the volitional element in its most intensive form, the commander cannot be convicted, because his state of mind does not show any "conscious desire". However, applying the knowledge-based approach leads to two distinct conclusions. Firstly, in respect with the knowledge-based reading of genocidal intent that does not differentiate perpetrators based on their status, the commander must be convicted as a principal, because this approach requires the knowledge of the destructive consequences, the context of genocidal campaign and/or the mastermind's genocidal intent. Secondly, in respect with the knowledge-based understanding that employs structure-based reading of the "intent to destroy", the commander cannot be convicted for the crime of genocide as a principal, because for top-level perpetrators, the purpose-based state of mind is required. However, his subordinates must be convicted as principals in regard to their knowledge of the genocidal purpose. This scenario clearly shows that the knowledge-based theory is not completely consistent.

3.4.2 Context or Consequence?

The Elements of Crimes states regarding Article 6 of the Rome Statute that:

> "The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."

Ambos argues that a teleological interpretation could indicate a context element since acts committed with genocidal intent reaches "the demanded gravity threshold only when carried out in an organized and systematic fashion".[190] Article 6 itself does not explicitly require a contextual element

[190] Ambos (2022), p. 18; See also, Cryer, p. 219.

and this issue was a subject of the Pre-Trial Chamber judgment in *Al Bashir*. The Majority of the Pre-Trial Chamber I stated that protection provided by the legal norm defining the crime of genocide "is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent and hypothetical.[191] It is also stated that the definition in Article 6 of the ICC Statute and the contextual element requirement in the Elements of Crimes is not an "irreconcilable contradiction", which means the presence of one does not negate the other.[192] In this regard, Ambos claims that the contextual element in Article 6 is a part of the "intent to destroy" requirement, as its "carrier" or "holder".[193] But it must be noted that this is not a prevailed approach.

It must be emphasized that Ambos' proposed knowledge-based approach differs from those of Greenawalt, Vest, and Kress in that Ambos focuses the concept of knowledge is directed at the overall context of violence, rather than destructive consequence. Even, Ambos rejects the idea of considering the destructive consequence as a legitimate object of knowledge. In other words, Ambos' concept of knowledge falls into the *actus reus* of "circumstance, as opposed to destructive consequence that refers to the *actus reus* of "consequence".[194] His reason is that low-level perpetrator cannot have knowledge but can only wish the destructive consequence because it is in the future. However, rejecting the destructive consequence as a valid object of knowledge because of its occurrence in the future appears to be no ground.[195]

Also, the *Krštic* Trial Chamber observes that Krštic was "aware of the fatal impact" and he participated in killing "with awareness that such killing would lead to the annihilation".[196] These observations shows that the ICTY accepted the destructive consequence as a valid object of knowledge even if occurrence would be in the future. In this regard, justifying Ambos' argument concerning

[191] *Al-Bashir*, Pre-Trial Judgement, para. 124.
[192] *Al-Bashir*, Pre-Trial Judgement, para. 132.
[193] Ambos (2022), p. 18; See also, Schabas, *Genocide*, at p. 123.
[194] Kim, p. 38.
[195] Ibid., p 39.
[196] *Krštic*, Trial judgement, paras. 634–644.

the overall context of genocide as a merely valid object of knowledge is a challenge.

3.4.3 Low-level Perpetrators as Principals?

As explained in the previous sections, the knowledge-based approach classifies the subordinate perpetrators as principals. This is the most significant legal effect of the knowledge-based reading of genocidal intent. The ICTY makes a distinction between principles and accessories regarding the crime of genocide. The *Stakic* Trial Chamber states:

> [I]n most cases, the principal perpetrator of genocide are those who devise the genocidal plan at the highest level and take the major steps to put it into effect. The principal perpetrator is the one who fulfils "a key coordinating role" and whose "participation is of an extremely significant nature and at the leadership level."[197]

In regard to low-level perpetrators, Ambos claims that they should be convicted as principals, since they are the "direct executors" of the genocidal campaign. On the other hand, he also claims that subordinates are "only secondary participants, thus more precisely aides and assistants" and "mere instruments".[198] These two statements seem to be contradictory and a matter of confusion. Sangkul Kim argues in his assertation that the knowledge-based reading of genocidal intent reminds of the JCE doctrine, which is criticized for its exceedingly broad scope of application of the principal liability.[199]

The Joint criminal enterprise theory was introduced by the *Tadic* Appeals Chamber and this doctrine considers each member of an organized group individually responsible for crimes committed for a common criminal purpose.[200] JCE doctrine requires that the participant must share the purpose of the JCE and rejects merely knowledge concerning principal culpability.[201]

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[197] *Stakic* Rule 98 *bis* Acquittal Decision, para. 50.
[198] Ambos (2009), at p. 847.
[199] Kim, pp. 42–43.
[200] *Tadic*, Appeals Judgement, para. 190.
[201] *Milutinovic* et al, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, para. 20.

In this sense, the knowledge-based approach suggests a much broader scope of application of the principal liability than JCE. However, by convicting subordinates as principals, the knowledge-based approach extends only the definition of genocide without expanding the criminal responsibility. Nonetheless, this is unreasonable because it makes Article 25(3) of the Statute void.

To be noted, it may appear natural for some that physical perpetrators should be convicted as principals. In domestic criminal law, accomplices are generally those who do not perform the *actus reus* of the offence themselves. Especially, in the Anglo-American tradition, principals are the physical perpetrators who immediately carry out the *actus reus*.[202] However, the situation is not the same in the context of genocide because the crime of genocide has a unique structure, which combines the subordinates' *actus reus* and the high-level actors' *mens rea*.[203]

Also, classifying subordinate perpetrators as principals seems to be deeply problematic regarding international legal policy. There is no doubt that the crime of genocide is not a leadership crime such as the crime of aggression, and in this regard, the definition of genocide constitutes the liability of individuals who order genocide as well as of persons who execute these orders.[204] However, there is already a complicity theory to punish low-level perpetrators and the reason for convicting subordinates as principals instead of as accomplices is not clear, nor convincing. One might argue that pursuing justice for victims and condemning perpetrators is crucial, but this cannot be a reason to classify low-level actors as principals. This could also pose a significant risk of wrongful convictions. Therefore, labeling subordinate actors as principals is no doubt hard to justify, since they are not considered as principals in the context of international criminal law.

Additionally, Ambos' knowledge-based proposal of genocidal intent for mid-level perpetrators presents a dilemma. While low-level perpetrators may be

[202] Cowley and Padfield, pp. 78ff; Jackson, pp. 11–13.
[203] Ambos (2022), p. 30.
[204] Lemkin, p. 93.

convicted as principals, mid-level perpetrators are still required to have special intent despite their crucial role in genocide. It may be bold to assert, but this leads to injustice as not all perpetrators are treated equally.

3.4.4 Complicity: Maybe Not a Bad Idea?

The *Akayesu* Trial Chamber employed a broad complicity framework and, thus a more liberal interpretation of the genocidal intent established as a solution to the restrictive framework of the specific intent. According to the complicity doctrine, the *mens rea* standard is not purpose-based genocidal intent, but rather knowledge.[205] The Trial Chamber in *Blagojevic and Jokic* asserts that a person may be convicted for aiding and abetting genocide "if it is shown that he assisted in the commission of the crime in the knowledge of the principal perpetrator's specific intent".[206]

However, although the ICTR and ICTY applied the complicity theory, convicting low-level perpetrators as accessories is not entirely devoid of issues. Regarding the other underlying acts of the crime of genocide, it sounds unreasonable to classify both the ones who perform the underlying acts of genocide and the ones who actually aid and abet performing these acts in the same category. For instance, the underlying act of the "deliberately inflicting conditions of life calculated to bring about physical destruction" can be understood in a broad scope. Similarly, the underlying act of "causing serious bodily or mental harm" has a very broad scope and includes "acts of torture, rape, sexual violence or inhuman or degrading treatment".[207] And lastly, the act of "forcibly transferring children of the group to another group" has multiple dimensions. Both the one who actually carries out the transfer and the one who assists are labeled for aiding and abetting genocide, which undermines the principle of fair labeling. Also, it must be noted that complicity theory is, in a sense, very reasonable if one considers genocide as

[205] *Krštic*, Appeals Judgement, para. 140; *Ntakiutimana*, Appeals Judgement, para. 501.
[206] *Blagojevic and Jokic*, Trial Judgement, para. 782.
[207] *Al-Bashir*, Pre-Trial Judgement I, para. 26.

a collective crime wherein all individual perpetrators are complicit in a larger crime.[208]

However, applying the knowledge-based approach makes it even worse, because the knowledge-based theory requires the same *mens rea* requirement, i.e. knowledge, for both the principal and accomplice liability while the complicity theory at least applies the special intent requirement for principals and knowledge for accomplices. There seems to be no issues with applying the theory to the underlying act of "killing the members of the group", since performing the *actus reus* and performing aiding and abetting overlap. However, regarding the other underlying acts of the crime of genocide, it is hard to draw a clear line between performing the *actus reus* and performing aiding and abetting. As elaborated above, the underlying acts other than "killing", have a very wide scope. In this regard, applying the same knowledge requirement to both the ones who carry out the *actus reus* and the ones who assist seems to be deeply problematic. Also, it is hard to determine the one who actually carries out the *actus reus*, for instance, with regard to the underlying act of "forcibly transferring children". Is it merely the bus driver who should be considered as physical perpetrator? Or the one who arranges transfer? As seen in this example, the knowledge-based approach fails to uphold the principle of fair labeling, and thereby the fundamental rights of the defendants by requiring the same *mens rea* level for both principals and accomplices even when the line between them is unclear.[209]

Returning to the complicity theory, in the Continental tradition, complicity typically results in a less severe punishment. On the other hand, the Anglo-American tradition does not differentiate principal and accomplice mode of liability. For instance, if an individual assists in a burglary and is found guilty, he will be convicted of burglary, not complicity, alongside the principal offender. In other words, in the Anglo-American criminal code, there is no need to distinguish between the principal and the accomplice.[210] However,

[208] Greenawalt, at p. 2284.
[209] Kim, pp. 52-53.
[210] Cowley and Padfield, p. 81.

the international criminal liability framework is different from both the Continental and Anglo-American traditions. At the international criminal courts, both at the *ad hoc* tribunals and the ICC, there is a distinction between principals and accessories, but there is no legal scheme of mandatory sentencing adjustments based on this distinction.[211] In this regard, for instance, Charles Taylor, the former Liberian president, has been convicted for 50 years of imprisonment for aiding and abetting war crimes committed in Sierra Leone.

In a sense, the complicity doctrine seems to ensure that low-level perpetrators, who carry out the genocidal plan, are not acquitted without any consequences of their acts. This is crucial from both a humanitarian perspective and for maintaining the purpose of the Convention. In addition, the doctrine is achieving this without expanding the liability framework, while adhering to the *nullum crimen* principle. Furthermore, in respect with the problem with fair labeling, the international courts' practice of imposing more or less severe punishment on aiders and abettors according to their role in acts seems to justify this doctrine.

3.4.5 Inconsistencies in Understanding the Object of Knowledge

Another issue with the knowledge-based approach is that it faces the challenge of specify the object of knowledge. As previously discussed, Greenawalt suggests that a subordinate perpetrator's "knowledge of the destructive consequences" should suffice to meet the genocidal intent threshold, while Ambos rejects this notion and claims that only "knowledge of overall context of the genocidal campaign" is sufficient. Moreover, there are other suggestions regarding the valid object of knowledge, such as "knowledge that the ultimate purpose of such campaign is to destroy in whole or in part the targeted group",[212] "knowledge of the consequences of the overall conduct"[213], "knowledge of a collective attack directed to the

[211] See *Lubanga*, Judgment Pursuant to Art. 74 of the Statute, Separate Opinion of Judge Adrian Fulford, paras. 9 and 11.

[212] *Al.Bashir*, Arrest Warrant Decision, p. 49, n. 154.

[213] Vest, at. p. 781.

destruction of at least part of a protected group",[214] and knowledge "that the masterminds of the genocidal campaign are acting with a genocidal intent construed in the narrow sense"[215].

In this sense, the knowledge-based approach appears to fail in defining a precise concept of knowledge required as a valid object. Furthermore, considering that this approach also lowers the genocidal intent threshold, it can be concluded that the knowledge-based approach understates the importance of the genocidal intent. This stands in contrast to established international case law and the considerations in the Convention's drafting history. Moreover, with the lowered threshold and uncertain definition of the object of knowledge, it is extremely challenging to protect the integrity of the offence and thus the fundamental rights of the defendants.

3.5 Back to the Purpose-based approach

After analyzing the knowledge-based approach and thereby broadening the perspective, in this section, the purpose-based approach will be re-evaluated with fresh insights.

As previously elaborated, the purpose-based approach adopted by the case law requires that the perpetrator must have special intent, *dolus specialis*. The ICTR, ICTY and ICC understands the phrase "intent to destroy" as "conscious desire" and a key element of the physiological relationship between the physical result and the perpetrator's state of mind. On the other hand, the knowledge-based approach primarily suggests that the perpetrator's knowledge of the genocidal campaign or plan should be sufficient to meet the requirement of the genocidal *mens rea*.

The international courts' interpretation of the "intent to destroy" has been the source of confusion and challenges in applying the definition of the genocide to actual cases. The courts consider the genocide as a specific crime and therefore the genocidal intent is a key element that distinguishes genocide

[214] Kress (2005), at. p. 577.
[215] Ambos (2005), at. p. 847.

from other crimes, i.e. the crimes against humanity and war crimes. However, the proponents of the knowledge-based theory claim that there is no reason to interpret the "intent to destroy" in purpose-based reading, because nothing indicates that the genocidal intent should be construed in a very restrictive scope in light of the literal, historical and teleological interpretations. This critique is quite justified considering the meaning of intent in domestic law. The "intent" is mostly understood both as "purpose" and "knowingly". Also, in various domestic criminal laws that distinguish general and special intent, special intent (*dolus specialis)* is interpreted as special or specific because it only refers to a specific result of the crime. In this regard, it is unclear why the international courts chose to interpret genocidal intent as purpose-based. In addition, the drafting history of the Convention shows that the purpose of the provision of genocide is the prevention and punishment of genocide but not convicting the physical perpetrators for genocide does not sound reasonable. Although there was a concern about conflating genocide with other crimes, this argument does not justify a narrow reading of genocidal intent.

Another critique of the traditional approach is that it allows subordinates to avoid the liability for the crime of genocide. Although the crime of genocide is not exclusively a leadership crime, the case law indicates otherwise. The genocidal intent threshold is so high that it is nearly impossible to meet. On the other hand, the requirement of the knowledge-based approach that knowledge of the overall context of the genocidal campaign suffice expands the definition of genocide. It does not align with the penal character of the provision of genocide. This requirement almost mean "just convict everybody for genocide" and this is unreasonable. For instance, an individual may murder his neighbours, who are members of the protected group, during genocide with intent to steal money and valuable items in their home. According to the knowledge-based approach, this individual's knowledge of genocidal campaign suffices to convict him for genocide, which contradicts the offence's integrity.

The international courts' solution for the issue with subordinates is to convict low-level actors as accomplices. Compared to the knowledge-based theory, which suggests convicting subordinates as principals, the complicity theory is deemed more reasonable because it does not expand the framework of liability. While the complicity doctrine may undermine the principle of fair labeling, this argument does not justify classifying subordinates as principals, especially considering that the distinction between the liability of principals and accessories does not exist in all criminal systems, such as the Anglo-American tradition. In the realm of international criminal law, there is no stipulating that complicity results in a less severe sentence, and the courts also have complete discretion regarding sentencing.

Another critique of the purpose-based approach is that, while courts theoretically uphold the purpose-based approach, they evidentially follow the knowledge-based approach. The practice of the international chambers indicates that this critique is justified. In the case of *Tolimir* and *Popovic*, the chambers did not base the convictions on the perpetrators' state of mind but rather on their knowledge of the large-scale attacks on the ground and genocidal intentions of the masterminds. One might argue that it is the result of the process of evaluation of all evidence, which is widely accepted. Nevertheless, the *Tolimir* and *Popovic* judgements show that the state of mind of perpetrators was not decisive, but the perpetrators' knowledge of overall context of genocide. In this regard, the purpose-based approach is lacking.

Although the purpose-based approach has its challenges and there is no certain and definitive explanation of how the case law establishes genocidal intent requirement, the knowledge-based approach does not have much more to offer. There is an inconsistency regarding the object of knowledge requirement, specifically whether subordinates' knowledge should be directed toward the destructive consequence of genocide or the overall context of genocidal campaign. In this regard, the knowledge-based approach is more problematic from the point view of the integrity of the offence because it also lowers the mens rea requirement and fails to present a superior solution.

The purpose-based approach emphasizes a monolithic version of genocidal intent and overstates its significance. It presumes a strong and direct relationship between genocidal intent and *actus reus* without providing rigorous criminological analysis of this correlation. Moreover, it fails to consider the collective nature of the crime of genocide. in contrast, the knowledge-based approach understates the importance of genocidal intent. It fails to present a clear formulation of the object of knowledge. Also, the distinction between the crime of genocide and the crimes against humanity becomes blurred.

4 Concluding Remarks

This thesis examined the notion of genocidal intent, and thereby the traditional purpose-based approach and various alternative individualistic approaches within legal doctrine in international criminal law. The main purpose of this thesis is to analyze the concept of genocidal intent and to investigate whether genocidal intent should be understood in a broader sense than as the purpose-based approach.

Since genocide is established as an international crime in 1946, it remained only a crime on paper until the1990s. The ICTR, ICTY and ICC strictly adhered to the purpose-based notion of genocidal intent. A large part of the doctrine has followed the case law and interpreted the "intent to destroy" in a sense of a special or ulterior intent. The *Akayesu* Trial Chamber was the first to interpret the "intent to destroy" as a special intent (dolus specialis). Other courts also followed this purpose-based reading of the "intent to destroy" requirement. However, some scholars challenged this reading. Greenawalt advanced a knowledge-based theory and criticized the "narrow" interpretation of genocidal intent. He suggested a knowledge-based approach on the basis of a literal and historical interpretation of the genocidal intent. He claimed that the mens rea requirement of genocide should include dolus directus in the second degree, i.e. perpetrator's knowledge of the genocidal campaign. He also claimed that the case law theoretically follows the purpose-based approach but evidentially rejects it. He argued that a literal and historical interpretation of genocidal intent do not indicates interpreting the "intent to destroy" in a specific manner. After an analysis of the literal meaning of intent, this thesis also concludes that there is an ambiguity regarding the meaning of the "intent to destroy" and the literal interpretation does not mandate that genocidal intent should be construed as either purpose-based or the knowledge-based.

Regarding the historical and teleological interpretation of genocidal intent, the draft history shows that there was a concern about expanding the definition of genocide to the point where it overlaps with crimes against

humanity. In terms of the teleological interpretation, the main purpose of the "intent to destroy" requirement is to distinguish genocide from other crimes. Proponents of the knowledge-based approach claim that the distinction does hinges not on the "intent to destroy" requirement but on its specificity. However, this is not entirely accurate. For instance, when a civilian population that is systematically attacked is also a protected group, it becomes challenging to distinguish genocide from crimes against humanity if knowledge-based approach applied. Therefore, it can be concluded that the historical and teleological interpretations do not seem to support a knowledge-based approach.

One reason that knowledge-based approach is developed is the purpose-based approach is insufficient for convicting subordinates of genocide. The *mens rea* threshold for the purpose-based approach is so high that it is nearly impossible to prove subordinates' special intent. However, the case law has already adopted a complicity theory to adress this issue. After analyzing these two theories, this thesis concludes that the complicity theory is a better solution than the knowledge-based theory from the standpoint regarding a penal character of the provision of genocide. Also, the knowledge-based approach does not provide a certain definition of the objective of genocidal *mens rea*, while it lowers the "intent to destroy" requirement to *dolus directus* in the second degree (indirect intent).

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