Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such

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Abstract. All crimes of genocide have a common structure: There must be an actus reus, a corresponding mens rea and, in addition, a second subjective element, the “intent to destroy, in whole or in part, a […] group as such.” This so called “genocidal intent,” is characterized by the fact that responsibility for completed genocide does not depend on the result, the perpetrator intended to achieve. The threshold of this intent is not higher than for the mens rea described in Article 30 of the Rome Statute; in particular, no special quality of the volitive side of this intent is required. Dolus eventualis, therefore, is sufficient to commit the actus reus and to have, in addition, the particular “intent to destroy […].” An inherent, additional and independent, contextual criterion, as proposed in The Draft Elements of Crimes is neither admissible nor advisable to limit the punishability of genocide or the jurisdiction of the Court for such crimes.

1. Crimes of genocide, wherever defined in international documents, all have a common structure: there must be an actus reus, like killing one or more members of a group; a corresponding mens rea, as described in Article 30 of the Rome Statute; and, what shapes the character of all these crimes decisively, an intent, “to destroy, in whole or in part, a […] group, as such.”

* Professor, University of Salzburg, Austria. This article is dedicated to the former President of the ICTY, Professor A. Cassese. The author missed at the end of March 2001 the deadline to participate in the collection of essays, edited in his honour by Judge Datuk L.C. Vohrah. I, therefore, take at the middle of April 2001, this opportunity to express my respect and high appreciation to the work that Professor Cassese has completed as First President of the ICTY. This essay is also based on the earlier German publications of the author. For details, see O. Triffterer, Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender ‘Elements of Crimes’ für alle Tatbestände des Völkermordes, in B. Schünemann et al. (Eds.), Festschrift für Claus Roxin 1415 (2001), esp. 1440 et seq.; and O. Triffterer, §321, Völkermord, in O. Triffterer (Ed.), StGB-Kommentar, System und Praxis, Vol. 3, margin, n. 82 et seq. (2001). For the different forms and ‘qualities’ of intent, see O. Triffterer, Österreichisches Strafrecht, Allgemeiner Teil, 2nd ed., Chapter 9, margin n. 25 et seq. (1994), all with further references.


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a) The *mens rea* has to cover all elements of the actual appearances of one of the crimes of genocide. These objective elements are, according to Article 30, typified into three categories: conduct, consequences, and circumstances. But the wording of the *chapeau* of all definitions of genocide in conventional international law, as in Article 6 of the Rome Statute, clearly demonstrates that on the subjective, the mental side of genocide, more is needed than the *mens rea* that merely mirrors the *actus reus* (part of which is that the victim is in fact a member of one of the protected groups and attacked in this capacity by the perpetrator). This additional common element, required for all crimes of genocide, is the “intent to destroy [...].”

As the decisive criterion, this last mentioned subjective element is often called “genocidal intent.” But this formulation is deceiving. It easily can be – and quite often is – understood as an overall expression of the complete subjective, the mental side of genocide. However, such an understanding is not only misleading but *contra legem*, insofar as there are two subjective elements required to establish criminal responsibility for genocide: the *mens rea*, as the pendant to the *actus reus*, and the “intent to destroy [...].” Both may in practice come closely together or even partly overlap, like when a perpetrator kills a considerable number of members of a protected group by blowing up the house in which these persons try to hide, with the intent to destroy ‘in part’ this ‘group, as such.’ Also the wording of Article 6 *litera* (c) and (d), “Deliberately inflicting on the group conditions of life calculated to bring about” respectively “Imposing measures intended to prevent births,” indicate such an overlapping, the two here emphasized words only demonstrating what is anyhow expressed in Article 30 with regard to the points of references for the *mens rea* and the particular intent.

b) These above mentioned aspects and some others dealt with later in this essay can be clearly demonstrated by the genocide Adolf Hitler committed before and during World War II. When he tried to convince his commanding generals in early 1938 to accept his plan, to occupy foreign territories, like Czechoslovakia, in order to gain more space for the development of the so-called ‘Aryan race,’ he argued against their objections with the statement: Who, after all, thinks today of the Armenians, indicating correctly that the world at the time of the peace treaties of Sèvres (1920) and Lausanne (1923) and even when Hitler presented and started to execute his plans, was not ready to investigate and prosecute genocide committed by states respectively by their organs. Hitler obviously already at that time had a certain plan and the intent to destroy, in whole or in part, certain groups, like the Jewish people and the Gypsies in Germany and in the countries he was going to occupy; but, so far, he

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2. For details see, for instance, W.A. Schabas, Genocide in International Law 213 (2000) and, in particular, 243 *et seq.;* see also W.A. Schabas, The Jelesic case and the mens rea of the Crime of Genocide, *id.*
did not commit yet any criminal act to start with putting into practice what he intended to achieve, namely “to destroy, in whole or in part, a […] group, as such.”

Whatever happened later when Hitler occupied Czechoslovakia, may remain unjudged here. But at the first pogrom against the Jews during the so called ‘Reichskristallnacht,’ his intention became clear: It appeared in permitting and/or ordering certain acts, resulting in the killing of quite a few Jews and in “causing serious bodily or mental harm to members of the group,” thus committing crimes later defined in the Genocide Convention 1948 and in the corresponding Article 6 of the Rome Statute, with the particular intent, to destroy the European part of that group, as such.

With all due respect to the principle of state sovereignty and non interference in internal affairs, ever since that night, it would have been the time to stop Hitler in order to prevent greater and more numerous harm, which he was obviously intending to achieve, not only with regard to the Jews. There were only a few Germans, belonging to the resistance movement, opposing Hitler’s plans and continuous struggle, to erase the European Jews with the help of especially for this purpose newly invented technical means, used in the concentration camps. Those few Germans paid with their lives for their endeavors to prevent future harm from protected groups. But, as it is expressed at the entrance of the Holocaust Memorial, Yad Vashem, in Tel Aviv: ‘The world stood by silent’!

Should we not be always aware of the lesson Hitler taught us and consequently interpret the elements of genocide? Our aim must be, to shape the definition of this crime so that such appearances, like the genocide committed by Adolf Hitler and his subordinates, will no longer enjoy impunity in the future. But, that is not all: such crimes need to be effectively addressed before the perpetrators have committed the additional harm, namely “to destroy, in whole or in part, a […] group, as such,” and, thus, before the ‘guilty minds’ can realize their particular intent. The drafters of the Genocide Convention and all later definitions of genocide were especially strong motivated by the aim, to criminalize such an intent already at the very first moment when it becomes manifest in one of the acts, which typically characterize the starting points for committing genocide, now listed in Article 6.

c) For the completion of genocide, the actus reus and the corresponding mens rea must be established beyond reasonable doubt, as must, in addition, the genocidal intent in the narrow sense, the “intent to destroy […].” To guarantee the rule of law and respect for the principle nullum crimen sine lege, the two ‘intents’ ought to be strictly separated when it comes to prove the facts necessary to establish the innocence or guilt of an accused.

– The actus reus is the objective appearance of the mens rea, its realization. In comparison, the “intent to destroy […]” does not have to have such a pendant. Rather, for the commission of genocide it is sufficient
that the perpetrator merely intended “to destroy, in whole or in part, a […] group, as such.” This means that the perpetrator must only intend to achieve this consequence or result. For the completion of the crime, therefore, it does not matter whether he was in this regard successful or not or perhaps never will be, for instance, because of effective countermeasures by the protected group or other persons concerned.

Only in very rare cases the perpetrator may realize the “intent to destroy […],” which is directed, per se, towards a future result, together with or directly through the commission of the genocidal act, for instance in the case of the above mentioned massacre. But, the example of Adolf Hitler demonstrates that what the perpetrator intends may quite often not be so easy and quick to achieve. The appearances of acts of genocide committed on the territory of former Yugoslavia since 1991 and those later in Rwanda also show, as do many others in the world, that it regularly needs a process, continuing for a while, to achieve such a destruction. Just for this reason such a result has to be only intended and not yet to be achieved in order to prosecute and punish completed genocide already at a time when further harm can still be prevented.

This theoretical framework, characterizing all so-called crimes with an extended mental element (“Verbrechen mit überschießender Innentendenz” respectively “mit erweitertem Vorsatz”) is well-known in Civil Law countries, and is quite often chosen by legislators in order to criminalize acts which, because of this additional – and therefore particular – intent, are especially dangerous. By choosing this type of structure the legislator aims at preventing violations of legally protected values as early as possible, practically before a (greater) damage may occur: before the perpetrator can realize his particular intent, he may be prosecuted for having this intent, however, only when this intent has become manifest by the commission of one of the acts defined as genocide. Only insofar exists a ‘context’ between the genocidal act and the particular intent of the perpetrator, “to destroy […]” (see also Section 3 below).

If one of the five acts listed in Article 6 is not completed but rather only attempted with the “intent to destroy […],” we have attempted genocide. But what happened during the ‘Reichskristallnacht’ 1938, when the first Jews were killed, was completed genocide, because Hitler already at that time intended to finally ‘clean’ Europe of this group. It therefore would have been the time to stop Hitler committing genocide right away or at least try to do so, for instance, by announcing or starting criminal investigations and prosecutions for those crimes on an international level, as later installed at Nuremberg.

- What the perpetrator has thought, expected or organized in regard to how to realize his or her “intent to destroy […]” the group in the future, is of no relevance for the completion of the crime (even though it may count as aggravating or mitigating circumstances). He may expect that the original act by itself will directly lead to such a result, immediately
or later. But he may also expect that it would need further action by himself or by a third person or at least the help of other persons, to realize this particular intent. It does not matter how the perpetrator expects to achieve the future result, insofar as it is decisive that he acts with – and because of – his expectation that the final destruction of the ‘group, as such,’ ‘in whole or in part,’ will be achieved, even if he may not be sure whether this result will occur at all.

2. Since the two subjective mental elements of genocide have different points of reference, though they may, in practice, be partly overlapping, as pointed out already above, they have to be established separately and, therefore, their scope has to be considered independent of each other.

a) Intent as mens rea with regard to the actus reus is the first mental element to be established. The required standard for and degree of the intent can be discerned through the definitions of the different acts of genocide seen in connection with Article 30 of the Rome Statute: “Unless otherwise provided […]” This means that, in principle, dolus eventualis is sufficient, even for “deliberately inflicting conditions of life calculated to bring about physical destruction,” Article 6(c). Correspondingly, the Draft Elements of Crimes do not mention any higher quality for the mens rea, required for the punishment of any act of genocide, as defined in Article 6. With regard to the subjective elements mirroring the actus reus, the issue appears undisputed.4

b) However, quite often jurisprudence and literature do not sufficiently distinguish between this mens rea, “Tatvorsatz” (for example, to kill members of a group), and the additional “erweiterter Vorsatz,” “intent to destroy […]” This may well be the reason why some domestic legal systems require a special or specific intent (in the sense of dolus specialis) for the “intent to destroy […]” as is the case in German-speaking countries and also in relevant literature (for example, William Schabas). Such a qualified form of intent is well known in some Civil Law countries under the German word “Absicht”, but not in the same way in Common Law.

But even in Civil Law countries the legislators treat crimes that have the same theoretical structure as genocide differently. Fraud, for instance, needs, besides an actus reus the corresponding mens rea, the intent to deceive with regard to initiate a property disposal of the deceived person and to cause a material damage. But punishable is such a conduct only if the perpetrator acts with an additional intent, to gain an illegal profit for himself, or for a third person. Whether for this particular intent – which does not have to be realized for the completion of the crime – dolus

3. For details see Triffterer, Kriminal-politische und dogmatische Überlegungen, supra introductory footnote, at 1438 et seq. and Section 3 below.
4. For details see D. Piragoff, Article 30, in O. Triffterer (Ed.), Commentary on the Rome Statute (1999); and Schabas, Genocide, supra note 2, both with further references.
eventualis is sufficient, as in Austria, or a specific (special) intent in the sense of “Absicht”, dolus specialis, is required, as in Germany, depends exclusively on what the legislator has decided and expressed in the wording of the definition of that crime. It is up to its discretion.

c) Looking at the definitions of genocide in international instruments, they always correspondingly demand “intent to destroy [...]” Nowhere is mentioned an additional adjective, like specific, special, particular, or general intent. The word intent, characterizing this genocidal intent in the narrow sense, therefore needs to be interpreted.

aa) To interpret “intent to destroy [...]” to mean specific or special intent would not only go beyond the wording, but would introduce a concept not precisely defined and generally accepted in Common Law countries. And even in Civil Law countries the concept of specific or special intent in the sense of dolus specialis is highly disputed. There is neither agreement on the differentiation between dolus specialis, dolus principalis, dolus directus (in the first or second degree), and dolus eventualis, nor on the notion of “Absicht”, chosen for the genocidal intent in German-speaking countries. However, according to the prevailing opinion, “Absicht” is a qualified form of intent, in which the volitive, emotional part dominates. “Absicht”, thus, requires an extraordinarily strong will, which comes close to an emotional element. But such a qualification does not find any expression at all in Article 30. It also does not appear in the definitions of genocide either, nor can it be deducted from the wording in the chapeau of Article 6. General intent as an overall expression including all forms (and qualities) of mens rea, covers a broader concept of intent, even though it is going partly beyond the notion of dolus eventualis; but at least, by not excluding any form and quality of intent, it is closer to the wording of Article 30 which does not limit the necessary mental element to the quality of special intent, dolus specialis.

The historical development of Article 6 of the Rome Statute does not help to decide about the notion of “intent to destroy [...]” as a subjective, additional particular element of genocide. But, for sure, the drafters did not intend to introduce a notion of intent which is highly disputed in many of the major legal systems of the world. Even national laws, demanding special intent or holding dolus eventualis as sufficient, do not give reasons for one or the other decision. Teleological aspects, therefore, may be helpful.

bb) It is the “intent to destroy [...]” that shapes the crime of genocide and differentiates this crime, for instance, from an ‘ordinary’ killing. It is the intent to destroy that makes the perpetrator so dangerous and the expected harm so tantamount, compared, for instance, with a mere murder, even mass murder.

Does it, in substance, really make a difference for the punishability of genocide, whether someone is aiming with all his will to achieve such a destruction “in whole or in part”, of the “group, as such”? Should it not be sufficient that he commits a genocidal act just with an ordinary intent
“to destroy,” meaning that he accepts that his act ought to or most probably might have this additional consequence? Who kills a group or part of it by a massacre for sadistic motives, but knowing that he may eliminate the group by the act, and who merely agrees to this additional consequence, does he not fulfil the minimum requirements for genocidal intent? Should he not be responsible for committing genocide in the same way as a person acting exactly in the same way and with the same knowledge, but motivated by his hate against this group and therefore aiming to achieve the additional result with all his emotional will?

“Absicht” in the sense of Civil Law theory needs a low intellectual threshold, but an extremely strong volitive element. Therefore, this qualified form of intent does not appear to be suitable as a prerequisite to make behavior punishable, which, because of the social harm that already occurred and the additional danger it represents, needs prosecution and punishment, already at an early stage, before the final harm can be achieved, as the example of the genocide Hitler and his subordinates committed on several groups demonstrates.

Such an “Absicht” may be quite often the typical appearance of genocidal intent, as can be seen in the case of Hitler and from the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’). But this jurisprudence does not demand such an “Absicht”, as known especially in the German, Austrian, and Swiss jurisprudence and literature. The international jurisprudence establishes quite often that the perpetrator acted with the specific, special intent “to destroy” and that he in fact was aiming at such destruction. But it nowhere expressly states that this particular intent needs an extremely strong will as an indispensable element and, therefore, has to be denied, if this intensity on the emotional side is lacking.

In addition, this particular intent can be – and has been proven – on the international level regularly by circumstantial evidence and in none of the decisions the emotional part of “Absicht” has been expressly mentioned. But this part of the particular intent would be necessary if “Absicht” is required and is very difficult to prove. We can prove by circumstantial evidence what the perpetrator was aware of and of which facts he had knowledge. These mental elements can be established by deduction from certain aspects of the conduct, by other elements of the actus reus and also from circumstances which are not elements of the crime. Therefore, such facts could be established for proving the innocence or guilt, for instance, in the Akayesu case.5

But to establish that not only the intellectual side of the “intent to destroy,” but also the will of the perpetrator was directed with all possible emotional engagement and strength to destroy the group, and, thus to realize the genocidal intent, even though he in fact was not successful in

this regard, is much more difficult to be proven by circumstantial evidence or inferences than the fact that the objective appearance of the crime, the actus reus, was the result of an intentional behavior. Besides, a premeditated, well founded, and calculated behavior is much more dangerous for the protected values than a foolish execution of a strong will, by which the perpetrator knows what he wants to achieve, but does not have the intellectual capacity to choose the most effective means to get there.

The Draft Elements of Crimes adopted by the Preparatory Commission for the International Criminal Court clarify the two components of the mental element described in Article 30. They differentiate, under paragraph 2 in their General Introduction, between “intent, knowledge or both, set out in Article 30.” They thus express that intent or knowledge may be sufficient to fulfil the requirement of mens rea, which means the threshold for each of them may be differently high in cases where both elements may be required. What is valid for the mens rea covering the actus reus, must be accepted also for the additional, particular (genocidal) intent: because, both have exactly the same structure. The only differences between them are their points of reference. While the mens rea encompasses the actus reus, the intent to destroy does not refer to something that has already appeared. It may (meanwhile) have a point of reference already existing in reality, but it does not have to have such a point yet when the genocidal act is committed and becomes punishable. It is rather typical and sufficient that this particular intent is directed towards the realization of the expectations of the perpetrator in the future. The crime of genocide may even be completed and prosecuted as such (and not only as an attempt), when the “intent to destroy in, whole or in part, […] a group, as such” could not be realized at all and thus finally failed.

It does not matter, as the Preparatory Commission has clearly expressed, in what degree and quality one or the other component of the mental element or both exist in order to establish the subjective element of a crime. Decisive is that the necessary minimum requirements for intent are fulfilled, when the particular genocidal intent is to be established.

3. The structure of the crime of genocide appears pretty clear by the wording of its definition. If Article 6 is compared with Article 7, it becomes obvious that genocide needs no context with a “widespread or systematic attack,” as required for crimes against humanity; nor is mentioned in Article 6 that genocide falls within the jurisdiction of the Court “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes,” as expressed in Article 8 paragraph 1 with regard to war crimes. This differentiation between those three articles just mentioned was established on purpose during the Rome

Conference: to open the possibility to prevent genocide at an early stage, when it is not yet decided and perhaps cannot even be foreseen for sure, whether the expectation of the perpetrator expressed in his particular intent “to destroy […]” could be or would not be achieved at all.

It is well established that this structure and definition of genocide, as contained in Article 6, make it possible to prosecute individual acts against individual members of a protected group, when committed with the “intent to destroy […].” Such acts may, in principle, not need an international criminal court to be dealt with properly, because domestic jurisdiction may take adequate care of them. But again, as the example of Adolf Hitler demonstrates, such a person may enjoy impunity by its national legal system right from the beginning of its criminal activities and therefore should fall, if necessary, within the jurisdiction of the International Criminal Court.

This background makes it necessary to oppose any element, introducing a context similar to those mentioned in Articles 7 and 8 as a prerequisite for punishment or for the exercise of the jurisdiction of the Court. But exactly for one or both of these purposes the Draft Elements propose to include at the end of each of the definitions of the crimes of genocide:

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.

In the Report of the Preparatory Commission on these Draft Elements the notion and precise location of this Element is not clearly expressed. The third hyphen of the Introduction to the Elements for genocide rather shows that both decisions were left to the Court “to be decided by the Court on a case-by-case basis.” Such procedure appears not to be in the interest of justice, because it violates the principle nullum crimen sine lege. This proposed element, therefore, should not be accepted by the Assembly of States Parties nor by the ICTY or the ICTR, when applying the definitions of genocide contained in their Statutes.

This proposed element does transgress the wording of Article 6, independent of the fact, whether it should be used as a material element, which needs to be encompassed by the mens rea, or should serve only as a criterion to limit the jurisdiction of the Court. The Preparatory Commission thus does not propose an interpretation of the existing definition, but an additional new element. Such a proposal goes beyond the mandate imposed on the Commission in the Final Act of the Rome Conference and, in addition, described in Article 9 of the Rome Statute. Such an additional element is further inadmissible, because Articles 5 and 6 cannot be changed within the first seven years after the Statute enters into force (Articles 121 and 123).

In addition, if this element should serve as a material element to be encompassed by the mens rea, there would be an overlapping with the particular intent “to destroy […],” which is not desirable.
Furtheron, there exists no need, not even under aspects of criminal policy, for such an (additional) element, narrowing the scope of punishable crimes of genocide and/or the jurisdiction of the Court. Because what is described by this element is anyhow included into the notion of the particular intent or can serve as an orientation for interpreting the notion of the particular intent (see also Section 1c above, second hyphen).

Whether the chance to realize the particular intent only exists if the act is put into a context with "similar conduct directed against that group," which should be undertaken by the perpetrator or third persons, or whether an individual genocidal act "was conduct that could itself effect such destruction," is not decisive. Therefore, this last contextual Draft Element should be eliminated, as an objective, material element independent of the fact, whether it should serve to limit the definitions of all crimes of genocide, by demanding that this Element is encompassed by the mens rea of the perpetrator, or should limit the jurisdiction of the Court and thus its existence has to be proven by the Prosecutor if he or she wants to start proceedings before the Court.

If this result cannot be achieved, a compromise could be:
- for all five acts of genocide this proposed additional Element should be eliminated as an inherent, independent criterion for the punishability of genocide by the Court;
- in case the Draft Elements describing the particular intent, for instance, under number 3 of the Draft Elements for Article 6 lit a, which is verbally repeated for all other acts of genocide, needs at all clarification, this number 4 may serve this purpose by being included into number 3 as an explanation in the following way:

Such an intent exists in particular, when the conduct should take place in the context of a manifest pattern of similar conduct directed against that group or should itself effect such destruction; in all cases it is sufficient that the perpetrator acts with general intent.7

4. The above mentioned proposals should be kept in mind independent of whether the Draft Elements are discussed in the Assembly of States Parties, to be adopted there, or whether they are considered by the ICTY and the ICTR as a help for interpreting the application of the genocide provisions in their Statutes.8

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7. See for more details Triffterer, Kriminalpolitische und dogmatische Überlegungen, supra introductory footnote, at 1441 et seq.

8. The decision of the Appeals Chamber in the Jelisic case (IT-95-10-A) dating 5 July 2001 was available only after this Article went into print in April 2001. However it does not raise aspects nor does it make the foregoing considerations superfluous or expresses an opinion contrary to them. See in the Jelisic judgment of the Appeals Chamber para. 42 et seq.