Chapter 2
A Critique of Individualistic Approaches to Genocidal Intent

Abstract In this chapter, my discussion begins with a critique of individualistic approaches to interpreting the genocidal intent element. I criticize the knowledge-based approach mainly in view of its legal implications of attaching principal liability to subordinate actors. I ask whether there still remains room for aiding and abetting liability of genocide in the territory of the knowledge-based theory. In the context of a systematic genocidal campaign, there should be only a few who lacks knowledge of such overall context of violence, which factually overlaps with the destructive consequences to a significant extent. Therefore, in terms of the crime of genocide, the applicable scope of the knowledge standard is almost limitless. What I argue is that the knowledge-based understanding of genocidal intent risks shaking the basic legal foundation of differentiating principals and accessories. In the next section, I criticize the mistaken understanding of the purpose-based approach to genocidal intent involving the notion of intensity of volition, surrounding the term 'special intent'. This criticism is based on the conceptual distinction between 'general intent' and 'special intent'. I also explain that the correct account of the purpose-based theory should employ the notion of 'desire in a broad sense' that is conceptually compatible not only with positive emotions but also with negative emotions. Then, my second challenge to the knowledge-based analysis relies heavily on the distinctive feature of the two *mens rea* concepts of 'direct intent/purposely' and 'indirect intent/knowingly'. I understood that the former is always directed toward 'desired main effect', while the latter, by definition, corresponds to 'unwanted or uninterested side-effect'. I then demonstrated that 'destruction of a group' should always be perceived as a 'main effect' desired by an actor. Yet, the actual practice of the *ad hoc* tribunals where genocidal intent has been primarily inferred from the overall context of genocidal campaigns kept me from proclaiming the victory of the purpose-based theory over its knowledge-based counterpart. How can you infer my mind primarily from the general context which is geographically and temporally far exceeds my personal realm? In this context, I put the title of the last section of the analysis of individualistic approaches to genocidal intent as 'Complications and Frustrations'. These observations urged me to depart from the individualistic analysis.

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2.1 The Traditional Individualistic Understanding of Genocidal Intent: Its Pure Subjectivity

The modern international criminal law that developed in the aftermath of the World War II is based on the principle of 'individual responsibility'—as opposed to 'collective responsibility'—as proclaimed by the International Military Tribunal at Nuremberg as follows: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such

crimes can the provisions of international law be enforced".[1] The enthusiasm to punish individuals rather than groups or any other entities for the commission of core international crimes has been upheld and maintained by subsequent international criminal courts. As a consequence, the ICC Statute ultimately provides that "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute".[2] From this perspective, it is natural to understand the genocidal intent element pursuant to an *individualistic* approach, which has been the pervasive view shared by both scholars and practitioners in the field thus far. Although this book tries to propose and expound the concept of collective genocidal intent, as opposed to its individualistic counterpart, it is necessary to explore the traditional individualistic concepts of genocidal intent for a better construction of the collectivist theory. Thus, drawing on the relevant case law and scholarly literature, this chapter seeks to provide an overview and critique of the individualistic approach to interpreting genocidal intent.

The prior individualistic approaches can largely be classified into two categories: the 'purpose-based approach' and the 'knowledge-based approach'. Although proponents of each of these two approaches have divergent understandings of genocidal intent, they do concur that the genocidal intent element is a *mens rea,* with no necessary connection to the *actus reus*. Hence, the concept of genocidal intent as grasped by them is purely of a subjective nature involving only the inner state of mind of an individual perpetrator of genocide. Both of the purpose-based and the knowledge-based theories define the individualistic genocidal intent element one way or another, and thereby propose a standard for distinguishing principals from accessories.[3] An observation made by the Office of the Prosecutor of the ICTY in the *Jelisić* case and the *Krstić* case well summarizes the individualistic approach to genocidal intent, encompassing both the purpose-based and the knowledge-based approaches. In its Pre-Trial Briefs, the Prosecution submits that

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[1] The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 447, *as cited by* Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 128. *See also* Prosecutor v. Tadić, Appeals Judgment, 15 July 1999, para 186 ("The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)".). For a brief discussion on the unsuccessful USSR proposal, submitted during the drafting negotiations of the Genocide Convention, to criminalizing organizations that commit or incite genocide, see Bush 2009, p. 1227. Through a meticulous examination of unpublished documents, Jonathan A. Bush shows in this article, *inter alia*, that, jurists at Nuremberg were of the view that criminal charges against organizations (in particular, corporations) were legally permissible, though not actually adopted.

[2] ICC Statute, Article 25(1)–(2).

[3] This aspect indeed guides my discussion contained in Sect. 2.4 *infra*. *See* Kress 2006, p. 495 ("The precise construction of the word 'intent' [i.e., genocidal intent] and the resulting delineation between principal and accessory participation in the case of genocide […]".).

the accused committed genocide with the requisite genocidal intent if (i) "he consciously desired the acts to result in the destruction, in whole or in part, of the group, as such"; (ii) "he knew his acts were destroying, in whole or in part, the group, as such"; or (iii) "he knew that the likely consequence of his acts would be to destroy, in whole or in part, the group, as such".[4] Thus, the Prosecution is of the view that either the purpose-based genocidal intent (category (i)) or the knowledge-based genocidal intent (categories (ii) and (iii)) can legally fulfill the 'intent to destroy' element.[5] Regardless of whether they (categories (i) through (iii)) are equivalent to such domestic legal concepts as '*dolus directus* (*dolus directus* in the first degree; direct intent; purposely)', '*dolus indirectus* (*dolus directus* in the second degree; indirect intent; oblique intent; knowingly)', or '*dolus eventualis*' (advertent recklessness; recklessness; conditional intent) respectively,[6] it is evident

[4] Prosecutor v. Jelisić and Češić, Prosecutor's Pre-Trial Brief, 19 November 1998, para 3.1. *See also* Prosecutor v. Jelisić, Trial Judgment, 14 December 1999, para 85 (according to the Trial Judgment, the Prosecution in this case did plead the knowledge-based notion of genocidal intent.); Prosecutor v. Krstić, Prosecutor's Pre-Trial Brief pursuant to Rule 65 ter (E) (i), 25 February 2000, para 90; Prosecutor v. Sikirica et al., Prosecutor's Second Revised Pre-Trial Brief, 13 October 2000, para 141.

[5] Note that during the oral argument before the *Jelisić* Appeals Chamber, the Prosecution clarified that the category (iii) standard of '*dolus eventualis*/recklessnes' is only applicable to aiding and abetting genocide. Prosecutor v. Jelisić, Appeals Judgment, 5 July 2001, p. 16, footnote 77.

[6] Thomas Weigend explains these three forms of the Continental notion of intent employing the following terms: "intention (*Absicht*)", "knowledge (*Wissentlichkeit*)" and "conditional intent (*bedingter Vorsatz*)". Weigend 2011, p. 261. While Weigend identifies *dolus indirectus* with 'knowledge', George Fletcher however is of a different view when he states that "Continental [criminal] statutes have no comparable form" of 'knowingly' as provided in the Model Penal Code. Fletcher 2000, pp. 442–443. It seems that Fletcher was more concerned with the interaction of the volition and the cognition within the Continental notion of *dolus indirectus*. Concerning the first two categories of intent—i.e., *dolus directus* and *dolus indirectus*—, there is not much conceptual difference between the Continental tradition and the Anglo-American tradition. *See e.g.*, Taylor 2004, p. 106 ("there are three alternative forms of intention in German law: intention in the narrow 'purpose' sense, certain knowledge and *dolus eventualis*. The first two forms will be broadly familiar to an English-speaking audience and do not require a great deal of explanation".). Taylor's article thus focuses on explaining the German notion of *dolus eventualis* for English-speaking audience. Throughout this chapter, I will cite *mens rea* concepts of many national jurisdictions, which will suggest such similarity between the Continental tradition and the Anglo-American tradition. For an international case law in which *dolus eventualis* is identified with 'advertent recklessness', see Prosecutor v. Tadić, Appeals Judgment, 15 July 1999, para 220; Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para 357. See also, *Ibid*. at 121, footnote 447 (citing many international judgments, states that "[t]he concept of subjective or advertent recklessness known in common law systems is generally treated as equivalent to the notion of *dolus eventualis* in the continental law systems".). Note however that, while the Continental notion of *dolus eventualis* places emphasis on the perpetrator's *subjective* attitude toward the risk—such as 'being indifferent to the result', 'reconciling himself to the result'. or 'accepting the result', the Anglo-American concept of (advertent) recklessness pays more attention to the *objective* probability of the risk. For a more explanation, *see* Fletcher 2000, pp. 444–449 (observing that the closest analogue to *dolus eventualis* in the Anglo-American system is the Model Penal Code provision on 'purposeful conduct' as to attendant circumstances.).

that all these *mens rea* are of an *individualistic* nature as clearly indicated by the phrases "*he* consciously desired" and "*he* knew". Hence, according to the individualistic approach, *individual* genocidal intent of the accused—i.e., *his own* genocidal inner state of mind—is a requisite for establishing the accused's criminal liability. Genocidal intent, then, always resides *within* the mind.[7] In the same way, the Trial Chambers of the ICTR state that genocidal intent is "characterized by a *psychological nexus* between the physical result and the mental state of the perpetrator".[8] Consequently, the individualistic approach declares that the genocidal intent element "should be met *individually*"[9] by showing that the accused "*personally possessed* […] the specific intent to commit the crime at the time he did so".[10]

These are the main features of the individualistic approach to genocidal intent agreed with by both the purpose-based and the knowledge-based approaches. But, as to the question of the *content* of genocidal intent, their answers diverge. While the purpose-based approach stresses the volitional aspect of genocidal intent, the knowledge-based approach claims that cognitive knowledge is sufficient to satisfy the genocidal intent element. The latter view has been voiced more recently, coinciding with the inception of active international criminal prosecutions at the ICTY and the ICTR. Before proceeding further, let us examine these two approaches. In what follows, I explain the two approaches and criticize the knowledge-based approach.

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[7] In the *Krstić* Trial Judgment, however, genocidal intent first resides *outside* the mind. This *external* genocidal intent is afterwards to be imputed to the accused through his 'sharing' thereof. Such 'sharing' was established from the point when Krstić was aware of the "widespread and systematic killings [of military-aged men in Srebrenica] and became clearly involved in their perpetration[.]" Prosecutor v. Krstić, Trial Judgment, 2 August 2001, para 633. For more discussion, *see* Sect. 4.2.2.2 *infra*. Note that the theme of this book—i.e., the notion of collective genocidal intent—conceptually exists *outside* the mind as an *external* element. Some commentators use the term 'external elements' in explaining the *actus reus*. *See* e.g., Duff 1990, p. 7. For more discussion, *see* Sects. 4.1.1 and 4.1.2 *infra*.

[8] Prosecutor v. Rutaganda, Trial Judgment, 6 December 1999, para 60; Prosecutor v. Musema, Trial Judgment, 27 January 2000, para 166. (emphasis added). In this respect, the jurisprudence of the ICTR on genocidal intent is said to accommodate a 'descriptive' nature of the concept of intent (as opposed to a 'normative' or 'moral' nature). *See* Tadros 2007, p. 214 ("[…] the concept of intention is a purely descriptive concept: it is a concept that describes the psychology of an agent. It is not, as some have claimed, a moral concept".). For an opposing view that places a significant emphasis on the normative characteristic of intention, *see* Duff 2013, pp. 155–177 (referring to intention as a "thick normative concept", Duff argues that "intention is not, and should not be, a purely descriptive concept".). For a mixed approach, *see* Maljević 2011, p. 353 (with regard to the Criminal Code of Bosnia and Herzegovina, some commentators are of the view that the law understands 'intent' as a notion of a psychological-normative nature.).

[9] Mettraux 2006, p. 263. (emphasis added).

[10] Prosecutor v. Rutaganda, Appeals Judgment, 26 May 2003, para 525. (emphasis added).

2.2 An Overview of the Purpose-Based Approach

It is generally said that the traditional purpose-based approach to interpreting genocidal intent places a significant emphasis on its *volitional* aspect.[11] It is commonly believed that this approach originated in *Akayesu* at the ICTR. Genocidal intent ("intent to destroy"), generally connoting the purpose-based notion, has been referred to by international judges and commentators as '*dolus specialis*', 'special intent', 'specific intent', 'specific genocidal intent', 'particular intent',[12] 'particular state of mind', 'exterminatory intent'[13] and so forth. Although the relevant international case law has never used phrases such as the 'purpose-based approach' or 'purpose-based genocidal intent',[14] commentators are, in general, of the view that the case law of the ICTR and the ICTY follows the purpose-based

[11] Unless otherwise specified, the conception of 'volition', for the purpose of this book, indicates an attitude towards a *result* and/or *consequence* of a conduct, which should be distinguished from the concept of 'volition' in the sense that it prompts or induces bodily movements/actions. For the former usage of the term 'volition', *see* Csúri 2011, p. 366 ("[In Hungarian criminal law,] [t]he volitional/emotional side [of intent] […] describes the perpetrator's attitude towards the consequence of his act".). For the latter usage of the term 'volition', *see* Moore 2009, p. 101 (pointing out that a bodily movement is caused by a volition); Jain 2011, p. 378 (explaining that in Indian criminal law, intent, volition and motive are distinct concepts, and volition "indicates the desire that impels the bodily motion that constitutes a conscious act".). For an understating of 'volition' that encompasses both the former and the latter usages, *see* Rinceanu 2011, p. 424 (under Romanian criminal law, "[t]he volitional element (*factorul volitiv*) is that element of the intent that comprises the possibility of the freedom to perform the physical action that is required to accomplish the pursued purpose. In other words, the volitional element is the psycho-physical capacity […] of the offender for self-determination and control of his activities. The volition/will is the aptitude that impels the physical activity of the offender. The volitional element must be aimed at the result of the offense or the commission of the conduct. […] The volition activates the physical causality of the act. The volitional element is generally missing […] where there is a lack of capacity for self-determination and self control".). For the meaning of the notion of 'volition' generally understood in the field of international criminal law, *see* Clark 2008, p. 219, footnote.42 (observing that, in the context of the ICC Pre-Trial Chamber's interpretation of Article 30 ("Mental Elements") of the ICC Statute, the concept of 'volition' is used […] in the sense of an "attitude towards the result [or consequence], not as it is sometimes used in the common law to describe the voluntariness of an act (as opposed to acting, say, in a state of automatism)".). In this connection, note that George Fletcher points out a difficulty in distinguishing the notions of 'volition' and 'desire'. *See* Fletcher 2000, p. 450.

[12] Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr. Nicodeme Ruhashyankiko, Special Rapporteur, UN Doc. E/CN.4/Sub.2/416 (1978), paras 96 and 99.

[13] Prosecutor v. Jelisić, Trial Judgment, 14 December 1999, para 83.

[14] Instead of the term 'purpose-based approach', the ICC Pre-Trial Chamber in *Al Bashir* uses the term "traditional approach". Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, 4 March 2009, p. 49, footnote 154.

approach.[15] For instance, while explicitly rejecting the knowledge-based concept of genocidal intent, the ICTY Trial Chamber in *Blagojević and Jokić* straightforwardly upholds the purpose-based approach by stating,

> It is not sufficient that the perpetrator simply knew that the underlying crime would *inevitably* or *likely* result in the destruction of the group. The destruction, in whole or in part, must be the *aim* of the underlying crime(s).[16]

I think this observation is quite insightful because it contains all the key notions representing the three competing *mens rea*: 'direct intent/purposely' ("aim"), 'indirect intent/knowingly' ("inevitably … result in"), and '*dolus eventualis*/recklessness' ("likely result in").[17] This explanation of the essential characteristic of "intent to destroy"—i.e., 'aim' that signifies the *mens rea* classification of 'direct intent/purposely'—is in line with the landmark statement of the purpose-based notion of genocidal intent made by the ICTR Trial Chamber in *Akayesu* as follows:

> Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator *clearly seeks to produce the act* charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[18]

At this juncture, it is important to note that the purpose-based concept of genocidal intent ("clearly seek to produce") is closely related to the concept of '*dolus specialis*/special intent/specific intent'. Yet, in the context of the scholarly discussions of the purpose-based nature of genocidal intent centering around the notion of 'strong/intensive volition', the adjective '*specialis*/special/specific' has been the source of all the confusions that will be explicated in subsection 2.5.1 below. The *Akayesu* Trial Chamber further explains the 'special intent' by saying,

> Special intent is a well–known criminal law concept in the Roman–continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the *clear intent* to cause the offence charged. According to this meaning,

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[15] *See* Kress 2006, pp. 492–493 ("[a]fter an initial period of some uncertainty, the jurisprudence of ICTR and ICTY now seem to concur in the view that a perpetrator of the crime of genocide must act with the aim, goal, purpose or desire to destroy part of a protected group".); Sliedregt 2007, p. 193 ("the formula used by the [ICTY and the ICTR] insists on a purpose-based interpretation of genocidal intent […]"); Vest 2007, p. 794 ("The interpretation of genocidal intent by the ad hoc Tribunals is not absolutely consistent but nevertheless reveals a clear preference for a purpose-based reading […]".); Marchuk 2014, p. 137 ("The jurisprudential line of interpretation [of genocidal intent] is also purpose-oriented".). Note that the ICC Pre-Trial Chamber in *Al Bashir* also endorses the purpose-based approach primarily based on the literal interpretation of the ICC Statute and the Elements of Crimes. Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, 4 March 2009, p. 49, footnote 154.

[16] Prosecutor v. Blagojević and Jokić, Trial Judgment, 17 January 2005, para 656.

[17] It was also the case with the relevant view the ICTY Office of the Prosecutor. *See* footnote 4 *supra* and accompanying text.

[18] Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, para 498. (emphasis added).

> special 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.[19]
>
> With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the *clear intent* to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.[20]

In explaining the meaning of 'special intent' which encompasses the concept of 'genocidal intent', it is conspicuous that the Chamber keeps using the word "clear"—i.e., "*clearly* seeks to produce", "*clear* intent to cause", and "*clear* intent to destroy". In this connection, one might ask what the term 'clear intent' really means. Is there a legal distinction between 'clear intent', 'ambiguous or unclear intent', and, simply, 'intent'?[21]

On the ICTY side, probably the most often cited purpose-based definition of genocidal intent is found in the Appeals Judgment in the *Jelisić* case, which states, "[t]he specific intent [of genocide] requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute [providing genocide], *seeks to achieve the destruction*, in whole or in part, of a national, ethnical, racial or religious group, as such".[22] Similarly, subsequent case law from the *ad hoc* tribunals uses phrases such as "clearly intended the result charged",[23] "ulterior purpose to destroy",[24] or "surplus of intent"[25] in explaining the concept of genocidal intent.

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[19] *Ibid.* para 518. (emphasis added). Quoting the same paragraph from *Akayesu*, however, Claus Kress stresses the evasive nature of the concept of '*dolus specialis*/special intent' as follows: "This statement quite considerably underestimates the complexity of the matter. Neither the 'Roman–continental systems' nor the legal family of the common law can be relied upon for a clear cut and uniform concept of *dolus specialis* ('*dol special*', '*special intent*', '*Absicht*'/'*erweiterter Vorsatz*', '*dolo especifico*', '*oogmerk op*', '*amesos dolos/skopos*' etc.) as meaning aim, goal, purpose or desire. It is thus highly improbable whether a valid comparative law argument could be developed in support of the assertion put forward in *Akayesu*. But apart from this, the definition of genocide does not use any of those terms, but simply the word 'intent' which leaves the necessary room to have due regard to genocide's specific interplay between individual and collective acts". Kress 2006, p. 494.

[20] Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, para 520. (emphasis added). For a discussion concerning the phrase "knew or should have known", *see* Sect. 4.1.3 *infra*.

[21] The *Jelisić* Trial Chamber is of the view that the fact that the accused killed Muslim victims "arbitrary" tends to disprove the existence of the "clear intent to destroy a group". *See* Prosecutor v. Jelisić, Trial Judgment, 14 December 1999, para 108.

[22] Prosecutor v. Jelisić, Appeals Judgment, 5 July 2001, para 46. For subsequent judgments that appear to endorse the expression "seeks to achieve the destruction", *see e.g.,* Prosecutor v. Sikirica et al., Judgement on Defence Motions to Acquit, 3 September 2001, p. 27, footnote 165; Prosecutor v. Stakić, Trial Judgment, 31 July 2003, p. 147, footnote 1100; Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, p. 72, footnote 363; Prosecutor v. Blagojević and Jokić, Trial Judgment, 17 January 2005, para 656.

[23] Prosecutor v. Rutaganda, Trial Judgment, 6 December 1999, para 58.

[24] *Ibid.* para 59.

[25] Prosecutor v. Stakić, Trial Judgment, 31 July 2003, para 520.

Apparently following the phrase used by the ICTY Prosecution ("consciously desired"),[26] the Darfur Report states that "an aggravated criminal intention or *dolus specialis* […] implies that the perpetrator *consciously desired* the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such […]".[27] The phrase "consciously desired" also sounds similar to the language of "conscious object" found in the definition of "purposely" in the Model Penal Code.[28] The *Jelisić* Trial Judgment further provides a good example of the purpose-based interpretation of genocidal intent when it acquits the accused because his acts "are not the physical expression[s] of an *affirmed resolve to destroy* in whole or in part a group as such".[29] The crux of the purpose-based approach has been summarized by Kai Ambos when he says, "[i]n sum, the case-law's approach is predicated on the understanding, as originally suggested by *Akayesu*, that 'intent to destroy' means a special or specific intent which, in essence, expresses the

[26] Note that the phrase "consciously desired" was previously used by the ICTY Prosecution in *Jelisić* case and *Krstić* case. *See* footnote 4 *supra* and accompanying text.

[27] International Commission of Inquiry on Darfur, Established Pursuant to Resolution 1564 (2004), Report to the United Nations Secretary–General, 25 January 2005, para 491. The phrase "consciously desired" represents the volitional level, as understood by the Darfur Commission, required by the concept of genocidal intent. The report also mentions the cognitive level of genocidal intent by stating that "[the perpetrator] knew that his acts would destroy in whole or in part, the group as such". *Ibid*. It seems there is only one additional instrument in which the term 'aggravated criminal intent' is used in relation to genocide: Prosecutor v. Karadžić and Mladić, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para 92 ("[…] genocide requires that acts be perpetrated against a group with an *aggravated criminal intent*, namely, that of destroying the group in whole or in part".). For a view that characterizes the term 'aggravated criminal intent' as being 'less precise' in explaining the notion of genocidal intent, *see* Ambos 2014, pp. 21–22.

[28] American Law Institute, Model Penal Code § 2.02(2)(a) (defining four levels of culpability: purposely, knowingly, recklessly and negligently. Among these four levels, 'purposely' contains the strongest volitional element when it is defined that "[a] person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a result […]"). Note also that American Law Institute, Model Penal Code §1.13(12) states, "'intentionally' or 'with intent' means 'purposely'". On the basis of the phrase "conscious object", Kai Ambos observes that the Model Penal Code defines the "purposely" standard "in a cognitive sense". *See* Ambos 2009, p. 843. The phrase "conscious object" should however be understood as indicating the required level of volition vis-à-vis a consequence of an action. In my view, the reason why the drafters of the Model Penal Code avoided using such terms as 'desire' or 'wish' is that they were concerned about the emotional connotation attached thereto. Having a consequence as a "conscious object" is irrelevant to an actor's positive emotion (e.g., enthusiasm or want) or negative emotion (e.g., regret, sorrow or repugnance) of an actor. Rather, it has more to do with a rational choice or decision. For more discussion on this point, *see* Sect. 2.5.2 *infra*.

[29] Prosecutor v. Jelisić, Trial Judgment, 14 December 1999, para 107. (emphasis added).

volitional element in its most intensive form and is purpose-based".[30] It seems to me that it is mainly the nuance of emotion, enthusiasm, eagerness and intensity that conceptually accompanies the purpose-based notion of genocidal intent. It is therefore generally thought by the proponents of the purpose-based analysis that genocidal intent must connote something *intense*. In the subsection 2.5.1 below, I will argue against this line of understanding. At any rate, according to the purpose-based approach, genocidal intent is regarded as an element which is very difficult to prove.[31] It was in this context that the knowledge-based approach was proposed as an alternative interpretative method of the concept of genocidal intent.

2.3 An Overview of the Knowledge-Based Approach

The knowledge-based approach leads to the lightening of the burden of proving the genocidal intent element by introducing a theory that places an emphasis on the cognitive aspect of intention (as opposed to the volitional aspect stressed by the purpose-based approach). This approach claims that, while the purpose-based notion of genocidal intent is to be applied to high-level actors, 'knowledge' should be considered sufficient to constitute the genocidal intent element, at least for

[30] Ambos 2009, p. 838; Ambos 2014, p. 24. (emphasis added). *See also* Schabas 2009, p. 363 ("genocide requires the prosecution to establish the highest level of specific intent".); Schomburg and Peterson 2007, p. 129 ("[…] genocide thus requires an extraordinarily high standard with regard to the *mens rea* (subjective element), often referred to as a *surplus* of intent"); Fournet 2007, p. 61 ("an extremely high standard of proof regarding the mental element in the sense that a very specific intent to destroy the group […]"); Szonert-Binienda 2012, p. 699 ("the proof of specific intent, which is the highest standard of proof to be met"); Kelly 2011, p. 435 ("[t]he higher threshold for the *mens rea* element on charges of genocide requires a showing of specific intent to commit the crime".); Turns 2007, p. 426 ("that very high level of specific intent"); Nersessian 2006, p. 98 ("[…] genocide—a narrowly-defined offense that covers limited acts committed with the highest degree of specific intent"); Saul 2001, pp. 508–509 ("[t]he requisite criminal intention for genocide is clearly a higher level of intention than for ordinary crimes".). As opposed to the general understanding of the case law approach that places an emphasis on the strong degree of volition, there is a differing view. Zahar and Sluiter suggest that what the Trial Chamber in *Akayesu* meant was to exclude recklessness from the scope of genocidal intent. *See* Zahar and Sluiter 2007, p. 163. *See also* Cassese 2008, p. 137 ("This intent amounts to *dolus specialis*; that is, to an aggravated criminal intention, […] It logically follows that other categories of mental element are excluded: recklessness (or *dolus eventualis*) and gross negligence".). Kai Ambos considers this view as "critical but misleading". Ambos 2014, p. 23, footnote 152.

[31] Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, para 523 ("On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine".). Numerous subsequent case law and commentators have approvingly cited this sentence.

mid- or low-level participants of genocidal atrocities.[32] What it really means is that, by a showing of 'knowledge', a court can convict a mid- or low-level actor of genocide as a *principal* (as opposed to an accessory).[33] In this sense, the knowledge-based approach to genocidal intent is considered to be a good example of an expansion of definitions of crimes that casts serious doubts on international criminal law's faithfulness to the fundamental principles of personal culpability, legality, and fair labeling, as illustrated by Darryl Robinson as follows:

> Despite [international criminal law's] claim of exemplary adherence to these fundamental principles, recent scholarship has questioned this adherence in specific areas, most notably the doctrine of 'joint criminal enterprise'. […] [S]erious issues about [international criminal law's] compliance with its fundamental principles may also be found in many other doctrines, including sweeping modes of liability, *expanding definitions of crimes*, and reticence towards defences.[34]

One can assume that the advent of the knowledge-based approach is a product of the 'expand it' movement within ICL. This movement played a crucial role at the beginning of the operations of the ICTY and the ICTR by making ICL workable through the application of the "victim-focused teleological reasoning"[35] that was prevalent in the area of human rights law and humanitarian law.[36] As summarized by Robinson,[37] in view of the subsequent development of the scholarly approaches such as (i) a 'restrict it' approach that criticizes the 'expand it' movement from the standpoint of the basic criminal law principles of legality, culpability, and fair labeling;[38] and (ii) an 'international' approach that in turn criticizes

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[32] In the same vein, a commentator explains the knowledge-based approach as follows: "Normally, the participants of such collective operations can be roughly divided into two categories: a small number of string-pullers and masterminds behind the genocidal plot on the one hand, and on the other a much larger number of interchangeable 'foot soldiers', henchmen and followers who contribute to the execution of the plan. Of these two types of perpetrators, the argument [of the knowledge-based approach] runs, only the leading figures need to act purposefully, whereas with regard to the others, a certain degree of knowledge is sufficient". Tams et al. 2014, p. 141.
It seems, however, that, among the proponents of the knowledge-based approach, Claus Kress and Hans Vest do not differentiate leadership-level actors and mid- or low-level participants in applying the knowledge-based approach. *See* Kress 2005; Vest 2007.

[33] For a similar view, *see* Bantekas 2010, p. 48 ("The school of thought in support of the so-called 'knowledge-based' doctrine argues that mid-level and lower-ranking executioners that are merely aware of the ultimate object of a genocidal campaign should be deemed liable *as principals* to genocide".). (emphasis added).

[34] Robinson 2008, p. 927. (emphasis added).

[35] *Ibid*. at 929.

[36] See generally, *Ibid.*; Robinson 2013; Sliedregt 2012a, p. 1186 ("[Cassese] believed that the rudimentary character of international criminal law allowed for progress and a certain flexibility with regard to the principle of legality".), citing Cassese 2008, p. 32, footnote 1.

[37] Robinson 2013, pp. 127–129.

[38] *See e.g*., Ambos 2007, pp. 173–174 (discussing the conflict between the JCE doctrine and the principle of culpability).

the 'restrict it' approach emphasizing the difference between ICL and domestic criminal law,[39] it would be accurate to conclude that the knowledge-based approach appeared in the midst of an overall trend of interpreting "the rules on genocide […] in such a manner as to give them their maximum legal effects"[40] pursuant to the 'expand it' approach.

Though Alexander Greenawalt's 1999 article is generally considered the leading authority of the proposal of the knowledge-based approach,[41] already in 1993, M. Cherif Bassiouni advanced a knowledge-based concept of genocidal intent applicable to *executors* of underlying acts. It is to be noted that Bassiouni's distinction between high-level decision makers and subordinate actors in applying the knowledge-based approach has been followed by its subsequent proponents. In his "proposed text" of 'Article 19: Genocide' in the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind, Bassiouni observes:

> 3. Intent to commit Genocide, as defined above, can be proven by objective legal standards with respect to decision makers and commanders. With respect to executants, *knowledge* of the nature of the act based on an objective reasonable standard shall constitute intent.[42]

In 1995, knowledge as a *mens rea* of genocide for subordinate actors was also suggested during the Ad Hoc Committee meetings for the establishment of the International Criminal Court:

> There was a further suggestion to clarify the intent requirement for the crime of genocide 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*. Some delegations felt that it might be useful 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.[43]

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[39] *See generally* Luban 2010. For a critical overview of the 'restrict it' approach, *see* Osiel 2009, p. 118 *et seq*. For a proposal for independent criminology, penology, and victimology of international criminal law, *see* Drumbl 2005.

[40] International Commission of Inquiry on Darfur, Established Pursuant to Resolution 1564 (2004), Report to the United Nations Secretary–General, 25 January 2005, para 494.

[41] Greenawalt 1999.

[42] Bassiouni 1993, pp. 235–236. (emphasis added). In relation to "decision makers and commanders", Bassiouni is here proposing a quite radical genocidal intent theory which replaces a traditional purpose-based genocidal intent with a "particular objective pattern of conduct". *Ibid*. at 234. It seems Bassiouni's observation in this respect was insightful in that the *ad hoc* tribunals subsequently developed the relevant jurisprudence on the theme of genocidal intent placing a significant evidentiary emphasis on the 'objective pattern of conduct' feature.

[43] U.N. G.A. Rep. of the Ad Hoc Comm. on the Establishment of the Int'l Criminal Court, para 62, U.N. Doc. A/50/22, GAOR, 50th Sess., Supp. No. 22, 6 September 1995. (emphasis added). *See also* Options Paper on "Applicable Law" by Canada, Ad Hoc Committee on the Establishment of an International Criminal Court, August 14–25, 1995, at 5–6 ("A third option is to include the relevant provisions of international conventions in the Statute (as in Option 2)

In 1996, M. Cherif Bassiouni and Peter Manikas further suggested,

> This means that: (a) policymakers and others at any level of decisionmaking must have the requisite specific intent to "destroy in whole or in part" the protected group by the means described in the Article; and (b) those who execute the policy must intend to commit the acts enumerated in the Article, and also have intent, *knowledge*, or reasonable belief that they are acting in furtherance of the policy to "destroy in whole or in part the protected group".[44]

At this point, it is worth noting that all these initial proposals of the knowledge-based approach to interpreting genocidal intent already came up with a differentiated *mens rea* scheme for decision makers, planners and commanders on the one hand, and for physical executors at the low-level on the other. Such a special concern for subordinate actors' genocidal responsibility has also been reflected in an observation of the International Law Commission (hereinafter ILC) in its 1996 report as follows:

> 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 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 the aspects of the comprehensive genocidal plan or policy. […] For example, a soldier who is ordered to

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Footnote 43 (continued)

but, rather than modify the definitions (as in Option 2), elaborate the meaning of specific elements for the purpose of the Statute. […] Ambiguity or uncertainty of meaning of the phrase "with intent to destroy" in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, for example, could be resolved by defining its meaning for the purposes of the Statute (e.g. "with intent to destroy" could be defined to include both an intention to destroy and knowledge that destruction is a likely consequence of one's acts)".). In my view, given that the knowledge/foresight of a *likelihood* of causing a consequence is the cognitive level required for '*dolus eventualis*/recklessness' (as opposed to the cognitive level of 'knowledge/foresight of virtual/practical certainty' for 'indirect intent/knowingly'), this opinion of the Canadian delegations seems rather excessive as it signifies a possibility of 'reckless genocide'.

[44] Bassiouni and Manikas 1996, p. 529. (emphasis added). This proposal must be read in conjunction with the following elaboration: "The Genocide Convention […] requires that the perpetrator act with 'specific intent'. The distinction between 'general intent' and 'specific intent' exists in the world's major criminal justice systems. In the criminal justice systems of continental Europe, the Roman law concept of '*dolus*' is similar to 'specific intent'. It is *dolus* that must be established, requiring a showing that the actor either specifically sought to produce a particular result or knew that his conduct was part of an overall plan or practice designed to eliminate in whole or in part a certain group of people. It is this element of specific intent which distinguishes genocide from crimes against humanity, war crimes, and common crimes". *Ibid*. at 527.

> 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.[45]

In this paragraph, the ILC is trying to construct a *mens rea* framework based on the knowledge of subordinate actors of a genocidal campaign. For those low-level participants, the purpose-based genocidal intent is plainly excluded by the ILC. By stating that "the definition of the crime of genocide *requires* a degree of knowledge", the ILC gives a status of an 'element of the crime' to the *mens rea* of knowledge at least in relation to physical perpetrators of underlying acts. In this regard, this observation sounds radical. The cited paragraphs above, from Bassiouni to the ILC, reflect the long-standing apprehension that a strict interpretation of the genocidal intent element would provide room for mid- or low-level actors to flee from punishment. This was demonstrated by a concern expressed by the USSR delegation during the drafting negotiations of the Genocide Convention as follows:

> The perpetrators of acts of genocide would in certain cases be able to claim that they were not in fact guilty of genocide, having had not intent to destroy a given group, either wholly or partially; they might likewise assert that they had simply carried out superior orders and that they had been unable to do otherwise.[46]

In 1999, a scholarly article offered an articulated proposal for the knowledge-based approach. Alexander Greenawalt's landmark article on the knowledge-based approach to interpreting genocidal intent has gained much support from scholars in the field. "Drawing upon a more traditional understanding of intent",[47] Greenawalt argues, "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 *consequences* of their actions".[48] Despite the conditional phrase of "in defined situations" (which has not been specifically substantiated in the article), this is certainly a bold statement, especially because it implies a significant expansion of the scope of principal culpability of the 'crime of crimes'.[49] Thus, Greenawalt proposes an interpretative

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[45] Report of the International Law Commission on the Work of Its Forty-Eight Session, May 6-July 26, 1996, at 45, U.N. Doc. A/51/10. (emphasis added).

[46] U.N. GAOR, 6th Comm., 3d Sess., 73d mtg. at 96, U.N. Doc. A/C.6/SR.73, Oct. 13, 1948. Karadžić during his trial at the ICTY actually made an observation in which he reported the accounts of his subordinates who physically committed killings at Srebrenica that they did not have genocidal intent. For more discussion on this argument made by Karadžić, *see* Chap. 4, footnotes 243 and 244 *infra* and accompanying text.

[47] Greenawalt 1999, pp. 2264–2265.

[48] *Ibid*. at 2259 (1999) (emphasis added). Though a text almost verbatim in language appears in the body of the article (pp. 2264–2265), I cite here a text from the 'abstract' because the key word "principal culpability" is omitted in the body.

[49] *See* Prosecutor v. Kayishema and Ruzindana, Appeals Judgment, 1 June 2001, para 367 (opining that, while the description of genocide as a 'crime of crimes' in the trial judgment should be understood to express a general appreciation, there is no hierarchy among the core international crimes provided in the Statute.).

approach that renders it possible to punish subordinate actors as principals if they "knew that the goal or manifest effect of the genocidal campaign was the destruction of the group in whole or in part".[50] In short, the most significant implication of this proposal lies in the fact that, through the knowledge of the destructive result, mid- or low-level actors, regardless of their position or rank, can be convicted as *principals* of the crime of genocide without a need to resort to any expansive liability doctrines.[51]

In view of the wide conceptual scope of intent in both the Continental and the Anglo-American legal traditions and the ambiguous and confusing understanding of it during the drafting negotiations of the Genocide Convention, Greenawalt concludes that the drafting history mandates neither the purpose-based approach nor the knowledge-based approach.[52] Greenawalt further understands that the 'intent' under the ICC Statute "embraces a relatively broad understanding of intent analogous to the Model Penal Code definition of 'knowledge'".[53] In this respect, it appears that the notion of 'knowledge' when Greenawalt speaks of the 'knowledge of the destructive consequence' falls into the concept of 'indirect intent/knowingly' as the *mens rea* of knowledge in the Model Penal Code adopts the 'practical certainty' standard.[54] In any event, it should be remembered that Greenawalt's knowledge-based approach is premised on the notion that the perpetrator knows the *result or consequence of destruction*. In this respect, Greenawalt further observes,

> [The knowledge-based] approach emphasizes the *destructive result* of genocidal acts instead of the specific reasons that move particular individuals to perform such acts. It addresses the related problems of subordinate actors and ambiguous goals by unhinging the question of genocidal liability from that of the perpetrator's particular motive or desires with regard to the group as a whole.[55]

Currently, many commentators follow the knowledge-based approach. Among them, Hans Vest also maintains that the 'practical certainty' standard should be applied to his version of the knowledge-based approach. In particular, he claims

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[50] Greenawalt 1999, p. 2288 ("In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part".).

[51] *Ibid*. at 2288 (1999) (note the phrase "without relying on an expansive liability framework"). The difficulty in attributing individual responsibility in a mass criminality tends to entice legislators and legal theorists into expanding the scope of the (i) concept of intention, and/or (ii) the doctrines of modes of liability. For instance, Thomas Weigend explains that, in resolving the problem of attribution in relation to the crimes committed during the World War II and also the crimes of the German Democratic Republic decades later, the German courts and scholars have produced a satisfactory result by cautiously expanding both the traditional modes of liability and the notion of intent. Weigend 2014, p. 255.

[52] Greenawalt 1999, p. 2266.

[53] *Ibid*. at 2269 (1999).

[54] American Law Institute, Model Penal Code, § 2.02(2)(b) (1962). For more discussion on the cognitive standards of *mens rea* including the 'practical certainty' standard, *see* Sect. 2.5 *infra*.

[55] Greenawalt 1999, p. 2288. (emphasis added).

that "the knowledge-based standard of genocidal intent is established when the perpetrator's knowledge of the *consequences* of the overall conduct reaches the level of practical certainty".[56] One implication of this position is that '*dolus eventualis*/recklessness' is not sufficient to constitute the genocidal intent element. Thus, in view of (i) the characterization of a subordinate actor's knowledge as being directed at the destructive consequence, and (ii) the proposal of the practical certainty standard that signifies the *mens rea* of 'indirect intent/knowingly', Vest's version of the knowledge-based approach appears to be largely in line with that of Greenawalt. This already reduced notion of genocidal intent (from a purpose-based concept equivalent to 'direct intent/purposely' to 'indirect intent/knowingly' that accompanies a foresight of a consequence to a practical certainty) was even further degraded to the level of '*dolus eventualis*/recklessness' when Claus Kress proposed 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".[57] Kai Ambos advances yet another proposal for a knowledge-based approach according to which the notion of knowledge means a low-level actor's "knowledge that his acts are part of an overall genocidal context or campaign".[58] The scheme of knowledge in relation to an act forming part of an objective context reminds us of the parallel requirement in the ICC's definition of crimes against humanity that "[t]he perpetrator knew that the conduct was part of […] a widespread or systematic attack against a civilian population".[59] More specifically, it appears that Ambos' view on this point is at least partly influenced by the 'structural congruity' between genocide and crimes against

[56] Vest 2007, p. 793. (emphasis added). It is important to note that Hans Vest rightly places a significant emphasis on the collective dimension of genocide, which, he considers, conceptually reshapes the genocidal intent element into an "extended subjective element [that] refers to the overall context of the collective action (in German *Gesamttat*) combining the efforts of different perpetrators and accomplices". *Ibid*. at 784.

[57] Kress 2005, p. 577. Otto Triffterer seems to be of the same view when he observes that "*[d]olus eventualis* […] is sufficient to […] have […] the particular 'intent to destroy […]". Triffterer 2001, p. 399. According to Claus Kress, Alicia Gil Gil is also of the same opinion. Kress summarizes her view by saying that "[a]ccording to her, the individual perpetrator of genocide must, first, know of the existence of a genocidal campaign and secondly, act with at least *dolus eventualis* as regards the occurrence of the destructive result". Kress 2005, p. 567. Already in 1985, Leo Kuper also advanced a similar proposal of genocidal intent via *dolus eventualis*. He seemed to consider that genocidal intent might take on either the form of 'indirect intent/knowingly' or '*dolus eventualis*/recklessness'. Kuper 1985, p. 12 ("I will assume that intent is established if the foreseeable consequences of an act are, or seem likely to be, the destruction of a group".). For a critical view on introducing *dolus eventualis* into the reading of genocidal intent, *see* Ambos 2014, p. 31 ("[…] a lower mental standard, for example *dolus eventualis* or even recklessness, cannot be admitted, since it would radically change the character of the genocide offence in terms of its wrongfulness and speciality vis-à-vis crimes against humanity".).

[58] Ambos 2009, p. 858. *See also* Ambos 2014, p. 31.

[59] ICC Element of Crimes provides a common subjective contextual element for all offences of crimes against humanity as follows: "The perpetrator knew that the conduct was part of […] a widespread or systematic attack against a civilian population".

humanity.[60] In the end, he concludes that "[t]he combination of the structure- and knowledge-based approaches suggested here calls for a knowledge-based reading of the 'intent to destroy' requirement in the case of low-level perpetrators with regard to *the genocidal context as the object of reference of the intent to destroy*".[61]

What then is the reason behind proposing the knowledge-based approach to genocidal intent? Although Greenawalt shared the enduring concern that obedient executors at the low-level might "escape liability for genocide" by exploiting the strict standard of the purpose-based notion of genocidal intent,[62] the main reason that seemed to urge him to propose the knowledge-based approach lie in the ICTR's troublesome practice of *presuming* genocidal intent while doctrinally upholding the strict purpose-based notion of genocidal intent. Greenawalt critically quotes the *Akayesu* Trial Chamber's observation 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".[63] Apparently, Greenawalt was troubled by the practice of seemingly presuming the genocidal intent element proclaimed as the gist of the 'crime of crimes' "largely by virtue of the fact that a perpetrator participates in a genocidal campaign".[64] Inferring individual *mens rea* from a genocidal campaign, a context of violence or an overall circumstance of such an extensive temporal and geographical scope as the atrocities in Rwanda is certainly a questionable practice.[65]

[60] *See* Ambos 2014, p. 30 ("[…] all this means that a simple, low-level *génocidaire* as well as a perpetrator of a crime against humanity must (only) act with knowledge of the respective context required by both crimes".). The term 'structural congruity' was introduced by Claus Kress when he argued that "[…] the construction of individual genocidal intent in accordance with the knowledge-based approach would bring the definitions of genocide and crimes against humanity into *structural congruity*, to the extent that both definitions apply to the participation of individual perpetrators in a *systemic* act".). (emphasis in original). Kress 2005, p. 575 (2005).

[61] Ambos 2014, p. 31. For more discussion on Ambos's "genocidal context as the object of reference of the intent to destroy", *see* Sect. 2.4.2 *infra*.

[62] Greenawalt 1999, p. 2281.

[63] *Ibid*. at 2282. The practice of inferring genocidal intent from "other culpable acts systematically directed against the same group" is repeatedly endorsed by the Appeals Chamber of the *ad hoc* tribunals. *See e.g*., Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 33 ("The genocidal intent may be inferred, among other facts, from evidence of "other culpable acts systematically directed against the same group".); Prosecutor v. Gacumbitsi, Appeals Judgment, 7 July 2006, para 44 ("In the Appeals Chamber's view, it is appropriate and consistent with the Tribunal's jurisprudence to consider, in determining whether the Appellant meant to target a sufficiently substantial part of the Tutsi population to amount to genocide, that the Appellant's actions took place within the context of other culpable acts systematically directed against the Tutsi population. The Trial Chamber's findings discussed above clearly establish that the Appellant was an active participant in those culpable acts".). For more discussion on the *ad hoc* tribunals' practice of inferring individual genocidal intent from 'acts of others'. *see* Sect. 4.1.2 *infra*.

[64] Greenawalt 1999, p. 2282.

[65] The Appeals Chamber of the ICTY, for instance, has taken a cautious approach in finding an individual *mens rea* by inference. Accordingly, the Chamber is of the view that "that inference must be the only reasonable inference available on the evidence". Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 41, and sources cited therein.

In the end, Greenawalt expressed his doubt by stating that the ICTR's practice of presuming individual genocidal intent "begs the question as to whether the specific intent standard does any work at the individual level".[66] In this context, it is noteworthy that a wanted or unwanted effect of the knowledge-based approach is that it tends to justify such practices of inferring individual genocidal intent from the overall context and circumstances because it is exactly the *mens rea* of knowledge that normally attends the *actus reus* of 'circumstance'.[67] In this manner, courts are free from the accusation of "squeez[ing] ambiguous fact patterns into the specific intent paradigm" because the paradigm itself has been broadened by virtue of the knowledge-based notion of genocidal intent.[68] In this respect, would it be an overstatement if one claims that the knowledge-based approach is an example of extending a crime definition itself in order to legitimize a doubtful practice? This question seems to be in line with an observation that "the issue of subordinates not personally sharing the destructive purpose of the high-level authors of the genocidal plot does not necessarily call for lowering the intent requirements to mere knowledge".[69] In the following section, I will elaborate on the problematic aspects of the knowledge-based approach in more detail.

2.4 Rethinking the Knowledge-Based Approach (I): Some Observations

2.4.1 A Hypothetical: An Insomniac Commander

> "Sleep no more! Macbeth does murder sleep,"
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> – William Shakespeare, Macbeth act 2, sc. 2, lines 39–40.

On the basis of the overview of the purpose-based and the knowledge-based approaches that I provided in the previous sections, let us think about a hypothetical that reads as follows:

An old woman approached a militia commander with a contract offer to destroy a protected group. The militia commander accepted the contract. He acted in

[66] Greenawalt 1999, p. 2282.

[67] *See* ICC Statute, Article 30(3) ("[…] 'knowledge' means awareness that a circumstance exists […]".); American Law Institute, Model Penal Code, § 2.02(2)(b) ("A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of […] the attendant circumstances, he is aware […] that such circumstances exist[.]"). Similarly, Otto Triffterer observes, "[w]e can prove by circumstantial evidence what the perpetrator was aware of and of which facts he had knowledge". Triffterer 2001, p. 405.

[68] Greenawalt 1999, p. 2281 ("[t]he danger of adhering to a specific intent standard in such situations is not merely that culpable perpetrators will escape liability for genocide, but perhaps more ominously that the evidentiary problems will compel courts to squeeze ambiguous fact patterns into the specific intent paradigm".).

[69] Tams et al. 2014, p. 147.

accordance with the detailed terms of the contract, and, after all, one third of the members of the group were killed by his subordinates. While the relevant facts satisfy all the material elements of genocide, the commander himself did not desire the destruction of the group at all. Rather, he was very concerned about the destructive consequence of the deadly operations meticulously planned and performed by his militia unit. The commander even wanted to hit the old woman when she said to him, "I have a clear intent to destroy the group". However, he stayed calm because she offered an enormous amount of money. Throughout the genocidal campaign, each time he carefully drafted, reviewed and signed on killing orders, he expressed a deep regret at the overall context of violence reported to him on a daily basis. He often suffered from insomnia because of his revulsion for what he was doing, which gave him extra time to refine the killing plan throughout the night. The prosecutor charged him with genocide. Now as a judge, would you convict him of genocide?

In terms of the question of genocidal intent, the proponents of the prior purpose-based approach that places an emphasis on the intensity of volition would claim that the commander is not guilty of genocide as a principal, because his mental state has not reached the level of volitional element in its most intensive form. On the other hand, the expected answer from the camp of the knowledge-based approach is twofold. First, if the theory does not differentiate among high-, mid-, and low-level actors, the commander would certainly be convicted of genocide as a principal (together with his subordinates) on the basis of his knowledge (of the destructive consequences, the context of genocidal campaign and/or the old woman's genocidal intent). Second, if the theory treats the high-ranking actors differently from subordinate actors (applying the purpose-based theory to the former, and the knowledge-based theory to the latter), an awkward result ensues: while the insomniac commander would be acquitted of genocide as a principal due to the fact that his state of mind did not reach the level of volition in its most intensive form, his subordinates would be convicted of genocide as principals for their knowledge. Can you accept this answer from the proponents of the knowledge-based theory? In what follows, let us critically consider what underlies this counterintuitive result.

2.4.2 Consequence or Context? On Valid Objects of Knowledge

Kai Ambos claims that the knowledge-based approach requires a showing of low-level perpetrators' knowledge of "the genocidal context as the object of reference of the intent to destroy".[70] As we will see in this subsection, when he argues for this position, he does not accept the destructive consequence as a valid object of knowledge. In this context, it should be noted that Ambos's version of knowledge-based approach is, at least theoretically, different from other scholars like Alexander

[70] Ambos 2014, p. 31.

Greenawalt, Hans Vest or Claus Kress in that his concept of knowledge is directed at the *overall context* of violence that falls into the *actus reus* of 'circumstance' (as opposed to destructive consequence that corresponds to the *actus reus* of 'consequence'). Although 'knowledge of an overall context' also forms part of Kress's version of the knowledge-based approach (together with *dolus eventualis* vis-à-vis the destructive consequences), that of Ambos seems to involves the knowledge of an overall context *only*.[71] On this issue, Ambos observes:

> As to the ultimate destruction of the group, the low-level perpetrator can, by definition, have no knowledge thereof but may only wish or desire this result, since it is *a future event*. In any case, his attitude towards this ultimate consequence is not decisive for the required intent to destroy.[72]

His contention that the 'context' should be the *only* reference point of subordinate actors' knowledge is also explained:

> [A] simple, low-level *génocidaire* as well as a perpetrator of a crime against humanity must (only) act with knowledge of the respective context required by both crimes. […] The context serves in both cases as the object of reference of the perpetrator's knowledge, in other words, the knowledge needs not to be directed at the ultimate destruction of the group *in the future*, but only at the overall genocidal context. Indeed, the ultimate destruction of the group is only *a future expectation* which as such cannot be known, but only hoped for or desired.[73]

In my view, however, there is no problem in relating the knowledge-based genocidal intent to the destruction of a group *in the future.* That is because, within the *mens rea* framework of 'indirect intent/oblique intent/knowingly', the 'knowledge' is directed at a result or consequence *in the future* by taking the conceptual form of 'foresight'.[74] Thus, there seems to be no grounds to exclude the destruction of a group (destructive consequence) from the pool of valid objects of knowledge by reason of its *timing*.[75] Furthermore, given the considerable extent of factual

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[71] Note that I use the adverb 'only' with caution. Without specifying particular reasons, Ambos also mentions 'masterminds' genocidal intent' and 'possibility of destruction' as an object of knowledge. *See* Chap. 2, footnotes 132, 133 and 137 *infra* and accompanying text.

[72] Ambos 2009, p. 858. (emphasis added).

[73] Ambos 2014, p. 30. (emphasis added). See also *Ibid*. at 32

[74] For more about Ambos's understanding of the notions of 'knowledge' and 'foresight/foreseeability' (in the context of discussing the JCE III doctrine), *see* Ambos 2007, pp. 174–175. Though my conceptual framework of intention is based on the notion of 'foresight' (cognitive side of intention), Ambos expresses a seemingly directly opposite view as follows: "In fact, knowledge is a standard for intent crimes (*see* ICC Statute, Article 30), while foreseeability belongs to the theories of recklessness and negligence". *Ibid*. at 175.

[75] Although Gabriel Hallevy's opinion is apparently similar to that of Ambos, it actually supports my position. In line with Ambos, Hallevy is of the view that 'cognition/knowledge' can only relate to occurrences in the past and present, but not in the future. However, he conceptually distinguishes 'the occurrence in the future' and 'the possibility of the occurrence in the future'. Since Hallevy classifies the latter as an event *in the present*, he concludes that 'the *possibility* of a result/consequence to occur in the future' can be an object of 'cognition/knowledge'. Hallevy 2014, pp. 37–38. In this context, it seems that recognizing the notion of *'foresight* of a result/consequence' as a form of 'cognition/knowledge' would make the relevant analysis simpler and easier.

overlap between the 'destructive consequence' and the 'overall genocidal context/campaign'. it appears that accepting only the genocidal context as an object of knowledge (while excluding the destructive consequence) is not persuasive. Indeed, the genocidal context/campaign itself includes a process of destruction in which numerous small destructions are being produced.[76] Let us consider a case of high-level actors. In *Krstić*, the ICTY Trial Chamber draws its conclusion on the question of the accused's genocidal intent on the basis of the accused's knowledge of the destructive consequence as follows:

> Having already played a key role in the forcible transfer of the Muslim women, children and elderly out of Serb-held territory, General Krstić 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. General Krstić thus participated in the genocidal acts of "killing members of the group" under Article 4(2)(a) with the intent to destroy a part of the group.[77]
>
> In the present case, General Krstić participated in a joint criminal enterprise to kill the military-aged Bosnian Muslim men of Srebrenica with the *awareness that such killings would lead to the annihilation* of the entire Bosnian Muslim community at Srebrenica. His intent to kill the men thus amounts to a genocidal intent to destroy the group in part.[78]

The object of knowledge in both paragraphs above is the destructive consequence that conceptually exists *in the future* to which the standard of the 'foresight to a virtual/practical certainty' is applicable.[79] Put otherwise, national criminal law theories on the *mens rea* of 'indirect intent/knowingly'. in particular, the distinction between the 'desired main effect' and 'permitted side-effect' should be considered to be applicable to the relevant discussions of the notion of the knowledge-based genocidal intent, because such phrases as "fatal impact" and "would lead to the annihilation" connote an expected occurrence *in the future*.[80] In the same vein,

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[76] In this respect, consider Bruno Latour's observation: "Actors [are] simultaneously held by the context and holding it in place, while the context [is] at once what makes actors behave and what is being made in turn". Latour 2005, p. 169, *as cited in* Osiel 2009, p. 3, footnote 11.

[77] Prosecutor v. Krstić, Trial Judgment, 2 August 2001, para 634. (emphasis added).

[78] *Ibid.* para 644. (emphasis added).

[79] I again emphasize that, in relation to both the Trial Judgment and the Appeals Judgment in *Krstić*, the notion of 'destruction' should be understood as a *future event*. That is because, in terms of definition of the crime of genocide, while grasping the 'group in whole' as the 'Bosnian Muslims'. the Trial and Appeals Chambers in *Krstić* define the 'Bosnian Muslims in Srebrenica' as the 'group in part'/'substantial part'. That is to say, *the past or present event* of killing the Bosnian Muslim men of military age in Srebrenica does not form part of the 'destruction' per se. It only serves as evidence of the *future* destruction of the Bosnian Muslims in Srebrenica. In this sense, despite the fact that both the Trial and Appeals Chambers in *Krstić* are of the view that it is the '*physical* destruction of the Bosnian Muslims in Srebrenica' that constitutes the crime of genocide in this case, I believe that '*biological* destruction of the Bosnian Muslims in Srebrenica' that is foreseen *in the future* is a more precise notion for the *Krstić* case. Thus, in my view, depending on the way you define the 'group in part'/'substantial part'. the nature of destruction in a given case may vary between 'physical destruction' and 'biological destruction'. For more discussion, *see* Chaps. 3, footnotes 116 and 214 *infra* and Chap. 4, footnote 32 *infra*.

[80] For the distinction between 'desired main effect' and 'permitted side effect'. *see* Sects. 2.5.2.2 through 2.5.2.4 *infra*.

when the *Blagojević and Jokić* Trial Chamber explicitly rejects the knowledge-based approach, the knowledge is about the destructive consequence foreseen in the future.

> It is not sufficient that the perpetrator simply knew that the underlying crime would *inevitably* or *likely* result in the destruction of the group. The destruction, in whole or in part, must be the *aim* of the underlying crime(s).[81]

For the reasons specified thus far, I believe that the claim that the genocidal context/campaign is the only objective reference point of the knowledge for the purpose of applying the knowledge-based approach is hard to justify.[82]

2.4.3 Why Principals? A Comparison with Joint Criminal Enterprise and Perpetration by Means

As I said earlier, the most significant legal effect of the knowledge-based approach is to classify the subordinate actors as principals of genocide. With respect to the question of distinguishing principals and accessories concerning the crime of genocide, the Trial Chamber in *Stakić* observes:

> [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 co-ordinating role" and whose "participation is of an extremely significant nature and at the leadership level".[83]

Arguing for the knowledge-based approach vis-à-vis low-level participants in a genocidal campaign, Kai Ambos seems to maintain that they should be convicted "as principals", because they are the "direct executors of the genocidal plan".[84] This view is considered to be a product of applying the 'objective approach' to distinguishing principals and accessories used in Germany.[85] On the other hand, however, he is also of the view that those subordinate actors are "only secondary participants, thus more precisely aides and assistants" because they "were not involved in designing [the genocidal] plan but are […] only used as mere

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[81] Prosecutor v. Blagojević and Jokić, Trial Judgment, 17 January 2005, para 656.

[82] My discussion on the question of valid object of knowledge will continue: *see* Chap. 2, footnotes 126 through 140 *infra* and accompanying text.

[83] Prosecutor v. Stakić, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002, para 50. *See also* Prosecutor v. Krstić, Trial Judgment, 2 August 2001, para 642; Prosecutor v. Blagojević and Jokić, Trial Judgment, 17 January 2005, para 776.

[84] Ambos 2009, p. 847.

[85] For a brief overview of the three German approaches to distinguishing principals and accessories—i.e., the subjective approach, the objective approach, and the Roxin's control theory (Tatherrschaft), *see* Fletcher 2011, pp. 189–190. For an overview of the various standards applied at the *ad hoc* international criminal tribunals in distinguishing principals and accessories, *see* Ambos 2013, pp. 134–135.

instruments to implement it".[86] This observation sounds contradictory to the previous claim that low-level actors should be punished "as principals". Classifying the low-level actors in a genocidal campaign as 'secondary participants', 'aides and assistants', or 'mere instrument' reflects the 'subjective approach' or the 'control theory' to distinguishing principals and accessories. Thus, it is confusing that Ambos seems to apply all three differing approaches at once. As far as the distinction between principal liability and accessory liability is concerned, the knowledge-based approach gets things in a muddle. In this regard, the knowledge-based approach reminds us of the JCE doctrine, which is widely criticized for its overly broad scope of application of the principal liability, mockingly reflected in the joke that JCE stands for 'just convict everybody'.[87] Even JCE, however, is better situated in this respect than the knowledge-based approach, in that its principal culpability scheme is at least based on the 'shared intent' or the 'intent to further the common purpose'.[88] Accordingly, the purpose-based notion of intention is an essential feature of JCE: it renders the doctrine a 'commission' liability; thus, classifying the members of JCE as 'principals' (as opposed to 'accessories'). In this respect, the Appeals Chamber in *Ojdanić* observes,

> The Prosecution's approach is correct to the extent that, *insofar as a participant shares the purpose* of the joint criminal enterprise (as he or she must do) *as opposed to merely knowing about it*, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. The Appeals Chamber therefore regards joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.[89]

Thus, in my view, JCE is more faithful to the principle of fair labeling and the rights of the accused than the knowledge-based approach in that (i) it requires a purpose-based intention ('shared intent' or 'intent to further the common

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[86] Ambos 2009, p. 847. *See also* Ambos 2014, p. 29 ("these low-level perpetrators are, albeit carrying out the underlying genocidal acts with their own hands, in terms of their overall contribution to the genocidal campaign, [to be regarded as] only secondary participants—more precisely, aiders or assistants […] only used as a mere instruments […]".).

[87] *See e.g.*, Ohlin 2007, pp. 85–88.

[88] See also, albeit in a slightly different context, Jens David Ohlin's criticism of Article 25(3)(d) of the Rome Statute for its uniform treatment of 'people who share the group intent' (Article 25(3)(d)(i)) and 'people who do not share the group intent' (Article 25(3)(d)(ii)). Ohlin 2011, p. 746. For an overview of JCE, *see* Haan 2005.

[89] Prosecutor v. Milutinović et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para 20. (emphasis added). Note that, emphasizing the importance of a differentiated treatment between principals and accessories, Jens David Ohlin advances an interesting proposal to specify the JCE liability by splitting it into two separate modes of liability of 'co-perpetrating a joint criminal enterprise' (requiring the *intent* to further the criminal purpose of the group endeavor); and "aiding and abetting a joint criminal enterprise" (requiring the *knowledge* of the group's efforts). This proposal draws upon the *Kvočka* Trial Judgment and the *Stakić* Trial Judgment. Ohlin 2011, pp. 714–715 and 745–746. *See also* Ambos 2007, pp. 169–171 (arguing that JCE III constitutes only a form of aiding and abetting the JCE, whilst it is only JCE I that can be regarded as 'commission' or 'co-perpetration'.). In England and Wales, aiding and abetting a conspiracy is feasible as conspiracy itself is an offence. Cryer 2014, p. 279.

purpose'); and (ii) it sets a boundary of the applicable scope (the commission liability is to be applied to its members only). To the contrary, it is troubling to note that the knowledge-based approach to genocidal intent lacks any such self-restrictive measures. The applicable scope is almost limitless under the name of 'subordinate actors'; and 'knowledge' is sufficient to classify a person as a principal of genocide. Furthermore, such 'knowledge' is subject to an almost automatic presumption provided that a low-level actor was present within an overall genocidal context or campaign performing the *actus reus* of underlying acts. In this manner, it appears that, as far as the issue of principal liability is concerned, the knowledge-based approach introduces a worse version of JCE to the crime definition of genocide through the genocidal intent element.

To sum up: although hardly discussed in a serious manner by commentators,[90] the main legal effect of applying the knowledge-based approach is to facilitate the punishment of subordinate actors *as principals* (as opposed to accessories) by virtue of an extended definition of genocidal intent *itself*. Consequently, through the knowledge-based approach, a court can attach principal liability to them without resorting to an expansive mode of criminal responsibility (e.g., JCE)[91] or to the practice of circumventing the purpose-based notion of genocidal intent through the 'evidentiary backdoor'.[92] It is therefore like planting a very convenient principal liability theory within the crime definition of genocide itself, which might marginalize the utility of Article 25(3) of the ICC Statute.

It is true that Raphael Lemkin was concerned about the possibility of subordinate actors escaping criminal responsibility of genocide by invoking "the plea of superior orders".[93] But it is hard to imagine that he envisaged a sweeping principal

[90] Examples of some commentators who take note of the implication of the knowledge-based approach in this respect are: Jørgensen 2001, p. 293; Bantekas 2010, pp. 48 and 209; Tams et al. 2014, p. 145.

[91] Greenawalt 1999, p. 2288 ("[The knowledge-based approach] addresses the related problems of subordinate actors and ambiguous goals by unhinging the question of genocidal liability from that of the perpetrator's particular motive or desire with regard to the group as a whole. And in the particular case of subordinate perpetrators, it does so *without relying on an expansive liability framework* […]".) (emphasis added).

[92] Kress 2005, pp. 571–572 ("[…] formulat[ing] the rigid purpose-based approach to genocidal intent in the abstract and then circumvent this very standard through the evidential backdoor. […] In his analysis of the *Akayesu* judgment, Greenawalt had already identified the danger that the purpose-based approach to genocidal intent 'will compel courts to squeeze ambiguous fact patterns into the specific intent paradigm'".). *See also* Kress 2006, p. 494; Wilt 2006, p. 242 ("In the absence of complete confessions, prosecutors will have a hard job in inferring 'special intent' from the conduct in question, however heinous it may be. And courts will face the awkward choice between acquittals and 'squeezing ambiguous fact patterns into the specific intent paradigm', as Greenawalt has put it succinctly".); Haren 2006, pp. 223–224.

[93] Lemkin 2008, 93 ("An international multilateral treaty should provide for the introduction, not only in the constitution but also in the criminal code of each country, of provisions protecting minority groups from oppression because of their nationhood, religion, or race. Each criminal code should have provisions inflicting penalties for genocide practices. In order to prevent the invocation of the plea of superior orders, the liability of persons who *order* genocide practices, as well as persons who *execute* such orders, should be provided expressly by the criminal codes of

liability scheme such as the knowledge-based approach. Indeed, the most troubling implication of applying the knowledge-based interpretation of genocidal intent is that it is not clear why mid- or low-level actors should be labeled principals (as opposed to accessories).[94] Wouldn't convicting them of genocide as an accessory be enough?[95] In this respect, one might argue that the proponents of the knowledge-based approach were worrying about sentencing in the sense that it is only the principals to whom grievous penalties are to be imposed. But it cannot be a reason to classify the subordinate actors as principals. That is because, contrary to most of the countries in the Continental tradition in which the criminal code itself provides for a lenient punishment for accessories (in comparison with that of

Footnote 93 (continued)

the respective countries".). Lemkin's concern however is now almost obsolete by virtue of Article 33 of the ICC Statute that permits the invocation of the superior order doctrine only when the order is "not manifestly unlawful". Article 33(2) proclaims that orders to commit genocide are always "manifestly unlawful". That is to say, under the ICC law, the superior order doctrine is not applicable to genocide.

[94] Similarly, *see* May 2010, p. 126 ("My view is that Greenawalt supplies too meager an intent requirement for such an important crime as genocide".). *See also* Mettraux 2005, pp. 214–215 (indicating that, in view of the status of genocide as being "located at the top of the hierarchy of international crimes", one should be cautious not to succumb to the temptation to extend the scope of its application.).

[95] *See e.g.*, Jørgensen 2001, p. 313. Jørgensen's position is that "knowledge of the genocidal plan" can only constitute the 'complicity in genocide' which is still an extremely serious offence. She observes, "it is submitted that culpability for genocide should not extend to those who merely have knowledge of the genocidal plan, with the exception of those accused of complicity. A better approach is to make the knowledge the first stage of inferring special intent. If special intent cannot be inferred then the accused should be found guilty of complicity in genocide which, despite being regarded as a secondary crime, is nevertheless an extremely serious one". Moreover, denying the inherent hierarchy within Article 25(3)(a)–(d) of the ICC Statute, Judge Christine van den Wyngaert observes that "[i]n fact, I fail to see an inherent difference in blameworthiness between 'aiding and abetting' and 'committing' a crime". Prosecutor v. Ngudjolo, Concurring Opinion of Judge Christine van den Wyngaert, 18 December 2012, para 24. In particular, given the 'purposes' standard of *mens rea* required by Article 25(3)(c), she is of the view that it is doubtful whether the ICC would ever follow the *ad hoc* tribunals' sentencing practice of imposing a reduced sentence for 'aiding and abetting'. *Ibid*. para 25. It should however be noted that, in addressing the distinction between principal and accessory liability, Judge van den Wyngaert seems to follow the objective approach. She explains that "[u]nder Article 25(3)(a), only persons who have committed a crime together can be held responsible. The essence of committing a crime is bringing about its material elements. Only those individuals whose acts made a direct contribution to bringing about the material elements can thus be said to have jointly perpetrated the crime". *Ibid*. para 44. Ultimately, taking the example of the Charles Taylor trial at the Special Court for Sierra Leone in which the accused has been sentenced to 50 years imprisonment on the basis of 'aiding and abetting', Judge van den Wyngaert observes that 'masterminds' and 'intellectual authors' of core international crimes are not necessarily labeled 'principals'. *Ibid*. paras 26 and 29. She concludes by stating that "[t]he interpretation of Article 25(3) thus needs to move away from preserving a misguided assumption that accessories are inherently less blameworthy than principals and that the blameworthiness of political and military leaders can therefore only be fully captured by treating them as principals". *Ibid*. para 70.

principals), there is, as Judge Adrian Fulford in *Lubanga* rightly points out,[96] no such legal scheme of mandatory sentencing adjustment both at the *ad hoc* tribunals and the ICC. Thus, at the international criminal courts, there is no reason to label the subordinate actors principals for the purpose of securing a severe sentence. Regardless of whether a person is convicted as a principal or an accessory, the courts have a full discretion in terms of sentencing.

It is acknowledged that, in ordinary scenarios in domestic criminal jurisdictions, accessories do not carry out the *actus reus* themselves. Hence, this domestic scheme of accessory liability is not directly applicable to genocide because, in most cases, subordinate actors prosecuted for the crime of genocide would be the ones who himself performed the *actus reus* of the crime. Labeling such persons accessories would certainly sound awkward to the ears of domestic criminal lawyers, in particular' those from the Anglo-American tradition where 'principals' are those who most immediately perform the relevant conducts provided in the crime definition.[97] Conversely, the peculiar structure of genocide combining the subordinate-level *actus reus* and the leadership-level *mens rea* also causes a conceptual difficulty in labeling them principals due to their obvious lack of the purpose-based genocidal intent.[98] In this respect, one might describe the knowledge-based approach as harsh in a sense that it attaches principal liability to obedient executors too easily. As I see it, this dilemma results from the peculiar structure of the crime definition of genocide in which the core *mens rea* of 'intent to destroy a group' is placed at the 'context level'.[99] What this idiosyncratic conceptual

[96] In the context of challenging the control theory of co-perpetration adopted by the ICC Pre-Trial Chamber and the Majority of the Trial Chamber in *Lubanga*, Judge Adrian Fulford observes as follows: "Whilst it might have been of assistance to 'rank' the various modes of liability if, for instance, sentencing was strictly determined by the specific provision on which an individual's conviction is based, considerations of this kind do not apply at the ICC. […] Under the German legal system, the sentencing range is determined by the mode of liability under which an individual is convicted, and it is therefore necessary to draw clear distinctions between principals on the one hand and accessories on the other. As set out above, these considerations do not apply at the ICC, where sentencing is not restricted in this way, and this example of differences that exist is of significance in this context". Prosecutor v. Lubanga, Separate Opinion of Judge Adrian Fulford, 14 March 2012, paras 9 and 11. On the other hand, while acknowledging that "the legal classifications [under Article 25(3)] have no apparent bearing on punishment[,]" George Fletcher still maintains that "[l]et us hope the [international] courts will read the statute in the conceptual system expressed in the history of the German *Dogmatik*, which distinguishes rigorously between the punishment of perpetrators and accessories […]". Fletcher 2011, p. 190. For an examination of the competing views between the majority and the separate opinion of Judge Fulford in *Lubanga*, *see* Vest 2014.

[97] Smith 1991, pp. 27–28; Sliedregt 2012a, p. 1183; Jain 2013, p. 838.

[98] In the same vein, Kai Ambos observes that "the acts of the subordinate and the thoughts of the superiors complement each other". Ambos 2014, p. 30. *See also* Kress 2006, p. 496. Note, however, that, when Kress mentions "an *actus reus* list formulated from the perspective of the subordinate level with what is typically a leadership standard of *mens rea*", he is not discussing the structure of the genocide definition, but criticizing the purpose-based approach.

[99] The two-layered structure of the crime of genocide composed of the 'conduct level' and the 'context level' will form the main theme of Chap. 3 *infra*.

structure suggests is a personification of the genocidal context (through the collective genocidal intent at the 'context level') which perpetrates the crime of genocide *by means of* subordinate actors.[100] In this sense, one might argue that the crime definition of genocide incorporates within itself the liability doctrine of 'perpetration by means' (also known as 'indirect perpetration' or 'perpetrator behind the perpetrator').[101] That is exactly the third alternative mode of 'perpetration' provided in Article 25(3)(a), which reads: "[…] [c]ommits […] a crime […] through another person, regardless of whether that other person is criminally responsible". As seen from the phrase "regardless of whether that other person is criminally responsible", the criminal liability of a physical perpetrator who is used as a means or an instrument in this context is simply irrelevant to that of a real perpetrator behind him. In my view, this conceptual framework is also directly applicable to the crime definition of genocide where the personified genocidal context, viewed as a real perpetrator, decides everything under the authority of a collective genocidal intent

[100] The notion of 'collective genocidal intent' at the 'context level' forms part of the main theme of Chap. 4 *infra*. It is not unusual to see that international judges use the verb 'occur' in referring to genocide, rather than 'commit'. The idea that genocide 'occurs' seems to (remotely) support my argument of the personified genocidal context. Most importantly, *see* Prosecutor v. Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras 34–36. *See also* Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 32 ("In determining that genocide occurred at Srebrenica, the cardinal question is whether the intent to commit genocide existed".); *Ibid*. para 34 ("[…] a finding that genocide has occurred may be entered".).

[101] ICC Statute, Article 25(3)(a), the third mode of perpetration. For an overview of this mode of liability, see Jessberger and Geneuss 2008; Olásolo and Cepeda 2004, p. 489 *et seq*.; Osiel 2009, p. 91 *et seq*. *See also* Fletcher 2000, p. 639 ("Virtually all legal systems, it should be noted, recognize the institution of perpetration by means. The Model Penal Code provides that an actor is guilty of an offense if, with the requisite state of mind, he 'causes an innocent or irresponsible person to engage in the [proscribed] conduct'. The German code says simply that the perpetrator is anyone who commits the offense himself or 'through another'. Other legal systems recognize the doctrine as implicit in the concept of perpetration".). In order to precisely grasp the theory of the 'perpetrator behind the perpetrator', a historical development of the doctrine of 'indirect perpetration' is of help. When the notion of indirect perpetrator was first invented by German theorists in 19th century, it meant perpetrator behind a mere tool who did not have the requisite intent for the offence. After the Fall of Berlin Wall, the German Court of Justice extended the notion of indirect perpetration so as to encompass the perpetrator behind the perpetrator who also had the requisite intent for the offence. Weigend 2014, pp. 258–260. Note that, through the phrase "regardless of whether that other person is criminally responsible", Article 25(3)(a) of the ICC Statute provides both prongs of 'perpetration by means': (i) perpetration by innocent means (perpetrator behind the innocent agent); and (ii) perpetration by guilty means (perpetrator behind the perpetrator). With regard to the latter, in the Anglo-American tradition where it is generally thought that "a person cannot act through a voluntary act of a third party", such notion of the 'perpetrator behind the perpetrator' is inconceivable. Accordingly, the perpetrator behind the closed door orchestrating another perpetrator's criminal act would be considered aider or abettor. Yet, the ultimate outcome is not that much different from that of the German theory of 'perpetrator behind the perpetrator' as the person behind the closed door is to be treated as a 'perpetrator' pursuant to the 'equivalency theory' and 'conspiracy theory'. For more detailed explanation, *see* Cryer 2014, pp. 270–272.

that exclusively belongs to itself.[102] In this scenario, it is not unreasonable to regard low-level perpetrators as morally and legally equivalent to accessories in spite of the fact that they personally committed the *actus reus*. It thus follows that the crime of genocide is conceptually located on the verge of the leadership crime.[103] In this respect, in terms of the question of distinguishing principals and accessories, the 'subjective approach' or the 'control theory' is suitable to be applied to the crime of genocide. In the *Stashchynsky* case in Germany, the accused, an agent of the KGB, who committed two political assassinations, was convicted as an accessory following the 'subjective approach'[104]; and George

[102] For more discussion, *see* Sect. 4.2.2.5 *infra*. Consider the following observations made by the ICC Trial Chamber in *Lubanga*: In the context of discussing the 'control theory' as a mode of liability falling into the second alternative of Article 25(3)(a) ("commits such a crime […] jointly with others"), the Majority of the Chamber states that "[n]one of the [co-perpetrators] exercises, individually, control over the crime as a shoe but, instead, the control over the crime falls in the hands of a collective as such". Prosecutor v. Lubanga, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para 994. *See also* Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 34 ("The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified".).

[103] For more discussion, *see* Sect. 4.2.3 *infra*. *See also* Prosecutor v. Stakić, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002, paras 50–51 (characterizing the principal perpetrators of genocide as "those who devise the genocidal plan at the highest level and take the major steps to put it into effect" and "who willfully assume a key co-ordinating role and whose participation is of an extremely significant nature and at the leadership level".).

[104] Fletcher 2000, pp. 657–659. For a criticism of the *Stashchynsky* case regarding it as an extreme form of subjective approach and even solipsism, *see* Ohlin 2014, p. 334. Ohlin paraphrases the subjective approach applied to the *Stashchynsky* case as follows: "the defendants could not be principals because they did not view themselves as primary actors and they thought of themselves as supporting others". It is noteworthy that Ohlin argues against this extreme form of subjective approach by saying: "This extreme theory is problematic, not because it is subjective, but because it conflates motive with intention. [*Stashchynsky* did not] have particularly strong personal motives for performing the killing, though [he] performed [his] killings purposely, and [his] lack of a strong personal motive should not disqualify them from being principals even under a subjective theory". In my view, it would be conceptually more precise if we challenge the extreme theory without employing the elusive notion of motive. I think the concept of 'desire in a broad sense' that I will explain in Sect. 2.5.2.4. *infra* enables us to solve the problem *within* the notion of intention, in particular, 'direct intent/purposely'. Currently, another *Stashchynsky* case is not possible in Germany. Demonstrating the historical prevalence of the subjective approach in Germany, Thomas Weigend explains that it was only in 1975 when the German legislature amended the Penal Code (providing 'whoever commits the offence himself or through another person shall be punished as a perpetrator') that "courts found themselves constrained to abandon the extreme subjectivism in distinguishing between perpetrators and accessories". He further notes that, when the East German border guards were prosecuted for shooting fugitives after the Fall of Berlin Wall, the German Federal Court of Justice "did not even consider the possibility that these soldiers might only be aiders and abettors […]". Weigend 2014, pp. 257–258. At present, for the purpose of distinguishing principals and accessories, the German Federal Court of Justice uses the 'overall evaluation' test, taking into account both objective and subjective factors, which grants much discretion to trial courts. *Ibid*. at 258. In contrast, it is to be noted that, historically, the Anglo-American tradition has follows the "objective theory of perpetration" which regards only those who perform the *actus reus* of an offence as principals. Ohlin 2014, p. 327.

Fletcher has observed that even Palestinian suicide bombers should be classified also as an accessory pursuant to the 'control theory'.[105] Labeling subordinate actors of genocide accessories should thus be considered within a reasonable boundary particularly if we follow the 'subjective approach' or the 'control theory'.[106] Put otherwise, the peculiar structure of the crime of genocide keeps compelling such an understanding despite the obvious seriousness of performing *actus reus* with Zyklon B at Auschwitz, machetes in Rwanda and guns at Srebrenica. In this connection, even discussing the subordinate actors' genocidal intent sounds too farfetched because of their being conceptually sidelined, as is the case with their equivalents in the theory of 'perpetration by means'. It is not exaggerating to say that low-level actors in both genocide and 'perpetration by means' are mere instruments who are always 'replaceable'. Concerning both the notions of 'perpetration by means' and 'genocide', law has already expressed its near-indifference to subordinate actors' culpability including their *mens rea*: explicitly in relation to the former (through the phrase 'regardless of whether that other person is criminally responsible'), and implicitly to the latter (through the peculiar structure of genocide currently stipulated in its definition, giving the principal status only to the personified genocidal context).[107] Consequently, labeling low-level actors principals of genocide is hardly justifiable.

2.4.4 Why Knowledge? A Comparison with Aiding and Abetting Genocide

In this subsection, let us consider the problem of attaching principal liability to physical perpetrators of genocide pursuant to the knowledge-based approach by comparison with 'aiding and abetting genocide'. After a period of confusing and inconsistent jurisprudence, now it is settled law for both the ICTY and the ICTR

[105] Fletcher 2011, pp. 189–190.

[106] It is to be noted, however, that the 'control theory' was an objective answer to the subjective approach. Ohlin 2014, p. 331 (observing that ICC's functional control theory defines its mental elements requirement "in a notoriously lax way", which "is predictable because the Control Theory is designed as a functional objective apporoach, which inevitably means that it deemphasizes the mental elements and places far less emphasis on them compared to a subjective approach to imputation".). Citing George Fletcher, Ohlin also characterizes the 'functional control theory' as a "functional variant of an objective theory with a mixture of subjective and objective elements". *Ibid*. at 337.

[107] Note that, as Chaps. 3 and 4 *infra* will demonstrate, I am not denying the individual criminal responsibility of committing the crime of genocide. What is connoted by the term 'personified genocidal context' is a proposition that collective intention is not a mere accumulation of individual intentions. Mark Osiel states that "[…] mass atrocity's far-reaching scope often lies beyond anyone's complete control or contemplation". Osiel 2009, p. xi. Osiel also cites John Lachs, an "influential Holocaust scholar", who observes that "[i]t is difficult to accept that often there is no person and no group that planned or caused it all[.]" *Ibid*. at 26, citing Lachs 1981, p. 58. For more discussion, *see* Sect. 4.2.2.5 *infra*.

that the required *mens rea* standard for 'aiding and abetting genocide' is knowledge, not purpose-based genocidal intent.[108] Accordingly, the ICTY Trial Chamber in *Blagojević and Jokić* states, "[a]n individual may be held responsible 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".[109] Given, however, that there are views that even accessories to genocide must possess purpose-based genocidal intent,[110] imputing principal liability for genocide to obedient executors who only possessed 'knowledge' is certainly a bold approach. In other words, since the mental element required for 'aiding and abetting genocide' is generally thought to be 'knowledge'. the knowledge-based approach's legal effect of attaching principal liability on the basis of the same *mens rea* standard as aiding and abetting sounds quite dubious. The fact that subordinate actors addressed by the knowledge-based approach in most cases are the ones who carried out the *actus reus* of underlying acts of genocide might be the only argument that appears to offset such a doubt. But, what makes our discussion in this respect even more difficult is that, except for the underlying act of "genocide by killing",[111] the dividing line between 'performing the *actus reus*' and 'performing aiding and abetting' is difficult to draw in relation to all other underlying acts. For instance, how would you distinguish those who perform the *actus reus* of 'deliberately inflicting conditions of life calculated to bring about physical destruction' (ICC Statute, Article 6(c)) and others who merely aided or abetted such infliction? Since the act pattern of inflicting such conditions of life covers a very broad scope,[112] the *actus reus* of this underlying act is almost impossible to spell out. Furthermore, the scope of conduct that potentially falls into the underlying act of 'causing serious bodily or mental harm' (ICC Statute, Article 6(b)) is even wider

[108] *See* Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 140 (knowledge of the "principal perpetrator's genocidal intent"); Prosecutor v. Ntakirutimana, Appeals Judgment, 13 December 2004, para 501 (knowledge of the "principal perpetrator's genocidal intent"). *See also* Prosecutor v. Seromba, Appeals Judgement, 12 March 2008, para 56 ([…] in cases of crimes requiring specific intent, such as genocide, it is not necessary to prove that the aider and abettor shared the *mens rea* of the principal, but that he must have known of the principal perpetrator's specific intent".); Werle 2009, p. 184. For an overview of the relevant case law on *mens rea* of 'aiding and abetting genocide'. *see* Sliedregt 2009, pp. 169–171.

[109] Prosecutor v. Blagojević and Jokić, Trial Judgment, 17 January 2005, para 782.

[110] *See* Mettraux 2005, pp. 212–215 (opposing the knowledge standard for accessory liability of genocide, not to mention principal liability); Mysliwiec 2009, pp. 405–412 (as to accessory liability of genocide, advocating the application of the purpose standard, instead of knowledge).

[111] ICC Statute, Article 6(a); ICC Elements of Crimes, Article 6(a) is entitled "Genocide by killing".

[112] *See e.g.*, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, 21 May 1999, paras 115–6 ("[…] this concept […] include[s] circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion[,] […] methods of destruction which do not immediately lead to the death of members of the group [such as] rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation […]".).

in compass: "acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted […] group. The harm inflicted need not be permanent and irremediable […]".[113] If the Prosecution accuses a number of persons of 'genocide by forcibly transferring children' (ICC Statute, Article 6(e)), how would judges distinguish the ones who carried out the *actus reus* and others who just aided and assisted the crime? Should only the bus drivers be considered the ones who performed the *actus reus*?[114] In these dubious situations, the application of the knowledge-based approach risks shaking the basic legal foundation of differentiating principals and accessories. More specifically, keeping the same *mens rea* threshold for both the principal and accessory liabilities in relation to an offence whose *actus reus* is not clearly distinguishable is destined to seriously undermine the principle of fair labeling and ultimately the rights of the accused.[115] Such an undesirable result was well-phrased by Jens David Ohlin, albeit in a different context, as follows: "The culpability of lower participants is inflated and implicitly, the culpability of higher participants is deflated simply by virtue of their inclusion in the same category as those at the bottom of the culpability ladder".[116] Thus, worrisome implications of applying the knowledge-based approach not only involves the inflating effect vis-à-vis the culpability of subordinate actors (directly through the application of the knowledge-based approach) but also the deflating effect vis-à-vis that of high-ranking decision makers and commanders (indirectly through the extended scope of principal liability resulted from the application of the knowledge-based approach). Consequently, the upshot of the knowledge-based theory is significantly detrimental to the overall trend of the jurisprudence of international criminal courts towards the normative approach (as opposed to the naturalistic approach

[113] Prosecutor v. Brđanin, Trial Judgment, 1 September 2004, para 690. It seems this wide scope of potential acts falling into the concept of genocide is not inconsistent with Raphael Lemkin's original thought. For instance, the first potential act of genocide ever referred to by Lemkin was the "confiscation of property". He observed that, if the confiscations were conducted against individuals for the sole reason of their being members of a group, those acts should constitute the crime of genocide. Lemkin 2008, p. 79.

[114] *See* Prosecutor v. Rutaganda, Trial Judgment, 6 December 1999, para 53 (holding that this underlying act is "aimed at sanctioning not only any direct act of forcible physical transfer, but also any acts of threats or trauma which would lead to the forcible transfer of children from one group to another group".). For a scholarly view that is developed on the basis of clear distinction between genocidal acts and non-genocidal acts, *see* Cupido 2014, pp. 34–35 ("The judicial practice to partially infer genocidal intent from the commission of non-genocidal acts should therefore be looked upon critically".).

[115] As regards the growing importance of the principle of fair labeling in international criminal law, *see* Sliedregt 2012a, pp. 1182–1183 ("Increasingly, value is attached to fair labeling requiring that liability be branded in a way that it fairly represents the nature and magnitude of the law-breaking. […] Fair labeling accounts for the advance of the normative approach to criminal participation and the desire to adhere to the distinction between those who are culpable as principals and those who are culpable as accessories".).

[116] Ohlin 2011, p. 752.

adopted by Anglo-American system) to the principal-accessory distinction, which reflects the spirit of 'fair labeling'—i.e., the "desire to bolster the principal-status" in comparison with that of accessories to international crimes.[117] Furthermore, as I have sketched out at the beginning of this section,[118] the proposal of applying the purpose-based standard to the leadership actors (while applying the knowledge-based theory to subordinate actors) leads to a result that seems to completely ignore the common sense, not to mention the principle of fair labeling—i.e., acquitting the leadership actor, whilst convicting subordinate actors as principals.

It should be further noted that the aiding and abetting provision of the ICC Statute (Article 25(3)(c)) adds another troubling dimension: the phrase "[f]or the *purpose* of facilitating the commission of […] a crime" signifies a stricter *mens rea* standard than 'knowledge'.[119] That is to say, if we follow the knowledge-based approach within the legal framework of the ICC, convicting a person as an aider and abettor of genocide pursuant to Article 25(3)(c) would require even a stronger mental element than that required for the principal liability of genocide pursuant to the knowledge-based notion of genocidal intent.[120] Furthermore, if the Court ever follows the relevant view of William Schabas, a legal effect even more awkward might ensue. That is to say, since Schabas regards the concept of 'purpose' in

[117] *See* Sliedregt 2012a, pp. 1184–1185. For an overview of the normative approach and the naturalistic approach to criminal participation, *see* Sliedregt 2012b, pp. 71–73. As regards the 'overall trend', think of (i) the *ad hoc* tribunal's case law attaching the commission/principal liability to JCE which was originally treated as a form of accessorial liability in its origin—viz. Anglo-American law; and (ii) the move from the unitary codification of modes of liability (e.g., Article 7(1) of the ICTY Statute) to its more differentiated counterpart (Article 25(3) of the ICC Statute).

[118] *See* Sect. 2.4.1 *supra*.

[119] Ambos 2013, pp. 165–166 ("it is clear that purpose generally implies a specific subjective requirement which goes, in its volitional dimension, beyond mere knowledge".). *See also* Ambos 2008, p. 757 ("The formula [of "for the purpose of facilitating"], therefore, ignores the […] jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abettor must only know that his or her acts will assist the principal in the commission of an offence. […] In conclusion, the formulation confirms the general assessment that subparagraph (c) provides for a relatively low objective but relatively high subjective threshold (in any case higher than the ordinary *mens rea* requirement according to article 30)".); Eser 2002, p. 801. For a differing view, *see* Cassel 2007, pp. 310–315 (arguing that the 'purpose' as provided in Article 25(3)(c) needs not be "exclusive or primary". That is, a 'secondary purpose' covering a *knowing* contribution suffices to satisfy the purpose test of aiding and abetting under Article 25(3)(c) of the ICC Statute.). For an overview of the requirement of a secondary actor's intention under the law of complicity, *see* Kadish 1985, pp. 346–349.

[120] From the prosecutorial strategy point of view, the prosecutor might circumvent the *mens rea* standard under Article 25(3)(c) (which is stricter than 'knowledge') by instead invoking the 'common purpose' liability pursuant to Article 25(3)(d) in respect of which "the knowledge of the intention of the group" is provided for as one of the two alternative mental elements. For a relevant discussion, *see* Ohlin 2010, p. 197, footnote 23.

Article 25(3)(c) as something that "amount[s] to a form of specific intent",[121] one might even assert that while a genocidal principal is, following the knowledge-based approach, only required to possess 'knowledge', an aider or abettor must have the 'specific intent' in accordance with the interpretation of the term 'purpose' in Article 25(3)(c). Clearly, this would be an absurd outcome.

At this juncture, a point made by Kai Ambos is noteworthy:

> It is important to note that this higher subjective threshold [of 'purpose' provided in Article 25(3)(c)] only applies to the relation between the contribution and the execution of the crime ('facilitation'). With regard to additional *mens rea* requirements, for example, the 'intent to destroy' in Article 6, it suffices for the assistant to be aware of the perpetrator's special intent, but he need not himself possess this intent.[122]

This observation provides a clarification of the valid object of 'purpose' provided in Article 25(3)(c). As the language reads literally ("[f]or the purpose of *facilitating* the commission"), that 'purpose' must be directed at the act of 'facilitation'.[123] Thus, under this legal framework in conjunction with the knowledge-based approach, a subordinate actor who only has the knowledge of a high-level actor's purpose-based genocidal intent is to be labeled a principal (pursuant to the knowledge-based approach), while another person who possesses the same knowledge of the high-level actor's purpose-based genocidal intent ("it suffices for the assistant to be aware of the perpetrator's special intent") and has the purpose to 'facilitate' (not the purpose to 'destroy') is to be convicted as an aider or abettor. Isn't it an odd result? At this juncture, one might respond that the subordinate actor who is labeled a principal should have carried out the *actus reus* of underlying acts and, thus, should not be considered parallel with the second person who only aided or assisted the commission of the crime. As I have already said, however, the difficulty in distinguishing 'performing the *actus reus*' and 'performing aiding and abetting' particularly in relation to the four underlying acts of genocide other than 'genocide by killing' renders such an argument unconvincing.

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[121] Schabas 2010, pp. 435–436. Since the concept of 'specific intent' has a number of varying definitions, it is unfortunate that Schabas uses the term here. (For those varying definitions, *see* Chap. 2, footnote 222 *infra*). It is considered that Schabas here uses the term 'specific intent' in the sense of 'ulterior intent'. Since 'ulterior intent' should accompany 'desire' (in particular the notion of 'desire in a broad sense' that I will explicate in Sect. 2.5.2.4 *infra*) that forms the definitional basis of 'direct intent/purposely', Schabas' view is considered to be agreeable. I think that Schabas' observation on the 'purpose' requirement under Article 25(3)(c) of the ICC Statute is consistent with what Sanford Kadish explains the intentionality of aider and abettor as follows: "[w]hether the mode of involvement in another's criminal act is influence or assistance, the law of complicity generally requires that the secondary actor act intentionally; that is, he must act with the intention of influencing or assisting the primary actor to engage in the conduct constituting the crime". Kadish 1985, p. 346.

[122] Ambos 2013, p. 166.

[123] *See* Simester and Sullivan 2010, p. 220 (In England and Wales, "[i]t is the assistance or the encouragement, not the ultimate crime, that must be intended by [a secondary party]".).

A related observation made by the ICC itself states,

> In this regard, the literal interpretation of the definition of the crime of genocide in article 6 of the [ICC] Statute and in the Elements of Crimes makes clear that only those who act with the requisite genocidal intent can be principals to such a crime pursuant to article 25(3)(a) of the Statute. Those others, who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can only be held liable as accessories […].[124]

This position is meaningless if one applies the knowledge-based approach because, in so doing, the distinction between the "requisite genocidal intent" and the awareness "of the genocidal nature of the campaign" is negated. We must seriously question whether the knowledge-based approach acknowledges the distinction between 'principal' and 'accessory' in the crime of genocide. That is to say, the knowledge-based theory urges us to doubt that, within a given territory of individual criminal liability of genocide as a whole, whether there still remains any space for the genocidal accessory liability to survive. That is because, owing to the knowledge-based approach, the terrain of principal liability of genocide has been excessively expanded.[125]

Furthermore, another feature of the knowledge-based approach that exacerbates the problem is that the knowledge-based approach has failed to specify the valid object of knowledge,[126] which results in an even broader scope of the principal liability scheme. That is, not only the 'knowledge of the destructive consequences' originally proposed by Greenawalt, but also the 'knowledge of the masterminds' genocidal intent' and 'knowledge of an overall genocidal context/campaign' are recognized as a potential objective reference point of 'knowledge' (for the purpose of applying the 'knowledge-based approach') by the International Law Commission and other commentators as follows:

- a subordinate's "knowledge of the nature of the act based on an objective reasonable standard";[127]
- a subordinate's knowledge that "the ultimate purpose of such a campaign is to destroy";[128]

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[124] Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, 4 March 2009, p. 49, footnote 154.

[125] In this regard, note what James G. Stewart observes: "complicity is the remainder of responsibility by participation left over once perpetration is subtracted. […] the meaning we attach to [complicity] is inexorably bound up in our definition of perpetration […]". Stewart 2014, p. 536.

[126] The discussion of the valid object of knowledge here is a continuation of the similar consideration contained in Sect. 2.4.2 *supra*.

[127] Bassiouni 1993, p. 236.

[128] Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, 4 March 2009, p. 49, footnote 154.

- a subordinate's "knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide";[129]
- a subordinate's knowledge of "the ultimate object of a genocidal campaign";[130]
- a subordinate's knowledge of "the [genocidal] intentions of his superiors";[131]
- a subordinate's knowledge of "the genocidal intent of the main perpetrators";[132]
- a subordinate's knowledge of the fact "that the masterminds of the genocidal campaign are acting with a genocidal intent construed in the narrow sense";[133]
- a subordinate's knowledge of "the destructive effect of this criminal conduct on the group itself";[134]
- a subordinate's knowledge of "the destructive consequences";[135]
- a subordinate's "knowledge of the consequences of the overall conduct";[136]
- a subordinate's knowledge of "the possibility of the destruction";[137]
- a subordinate's knowledge of "the goal or manifest effect of the campaign was the destruction of the group in whole or in part";[138]
- a subordinate's knowledge of the overall genocidal context;[139]
- a subordinate's knowledge of a collective attack directed to the destruction of at least part of a protected group;[140]

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[129] Report of the International Law Commission on the Work of Its Forty-Eight Session, May 6-July 26, 1996, at 45, U.N. Doc. A/51/10. ("This does not mean that a subordinate who actually carries out the plan 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".).

[130] Bantekas 2010, p. 48.

[131] *Ibid.* ("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".).

[132] Ambos 2010, p. 159.

[133] Ambos 2009, p. 847.

[134] Report of the International Law Commission on the Work of Its Forty-Eight Session, May 6-July 26, 1996, at 45, U.N. Doc. A/51/10.

[135] Greenawalt 1999, p. 2259.

[136] Vest 2007, p. 793. Note that Hans Vest adds that a subordinate actor's knowledge should reach "the level of practical certainty". The 'practical certainty' standard representing the cognitive side of intent surely points at the concept of 'indirect intent/oblique intent/knowingly'.

[137] Ambos 2010, p. 159. Note that the 'possibility/likely/probability' standard (corresponding to '*dolus eventualis*/recklessness') representing the cognitive side of intent is a lower standard than that of 'practical certainty' (corresponding to 'indirect intent/oblique intent/knowingly'). Accordingly, recognizing "the possibility of destruction" as an object of knowledge for the purpose of the knowledge-based interpretation of genocidal intent is considered a bold statement because its close connection to the concept of 'reckless genocide'.

[138] Greenawalt 1999, p. 2288.

[139] Ambos 2009, pp. 848–849 and 858.

[140] Kress 2005, p. 577.

In this regard, one might say that the knowledge-based approach not only lowers the standard of genocidal intent from 'purpose' to 'knowledge', but the scope of this already lowered *mens rea* of 'knowledge' is broad and imprecisely specified. A comparison of the knowledge-based approach and 'aiding and abetting genocide' made us doubt whether this well-established mode of liability at both international and national levels—i.e., 'aiding and abetting genocide'—is still applicable in the territory of the knowledge-based approach. For, as we have seen, anyone satisfying the *mens rea* for aiding and abetting will almost inevitably qualify as a principal under the knowledge-based approach.

2.4.5 *Just an Aiding and Abetting Theory? A Wake-Up Call from the Popović et al. Case*

Contrary to the pairing suggested by proponents of the knowledge-based approach—i.e., 'purpose-based genocidal intent required for high-level actors' and 'knowledge-based genocidal intent for mid- or low-level actors', judges might well, in practice, be inclined to decide the opposite way. In other words, it is very likely that they would be reluctant to label a subordinate actor a principal of genocide unless it is clearly shown that he personally had the purpose-based genocidal intent.[141] It is especially so in view of the extraordinary gravity of the crime of genocide. In a sense, it is natural to expect such response from the judges, because doing otherwise would (as I said earlier)[142] result in a complete nonsense—i.e., acquittals (as principals) for high-level actors and conviction (as principals) for subordinate actors.

One such example in which international judges decided in a way contrary to the knowledge-based theory is the *Popović* et al. case at the ICTY in which the Trial Chamber, following the purpose-based approach, refused to convict a low-ranking military officer, Drago Nikolić, of genocide proper. Instead, he was found guilty of 'aiding and abetting genocide' on the basis of his knowledge-based *mens rea*. As to other two defendants, Ljubiša Beara and Vujadin Popović, who were high-ranking military officers, we can find traces of their purpose-based genocidal intent discussed by the Trial Chamber mainly in relation to their knowledge, acts, contribution, utterances and rank.[143] On the other hand, the Trial Chamber amply

[141] In this respect, it is to be noted that the manner in which the purpose-based individual genocidal intent is to be found by international judges in practice might betray the doctrinal meaning outwardly proclaimed by them. In Sect. 4.2 *infra*, I will demonstrate that, contrary to general expectations, the purpose-based individual genocidal intent has been grasped in an objective manner, in particular, at the ICTY. As to the 'reluctance' of judges that I mentioned, Ilias Bantekas also observed that "[t]he ICTY has generally been reluctant to convict lower-ranking personnel of genocide, despite the large number of victims in particular cases". Bantekas 2010, p. 209.

[142] *See* Sect. 2.4.1 *supra*.

[143] For a more detailed discussion on Ljubiša Beara's individual genocidal intent, *see* Sect. 4.2.2.2 *infra*.

acknowledges Nikolić's knowledge of 'superior officers' genocidal intent', 'destructive consequences', and 'overall genocidal context/campaign'. The Chamber affirms Nikolić's knowledge of (i) the "details of the plan" to murder the able-bodied men in Srebrenica[144]; (ii) the "composition of the victims: soldiers and civilians, men, boys and elderly"[145]; (iii) the scale, scope and the systematic and organized manner of the killing operation[146]; (iv) the "sheer determination that every detained Bosnian Muslim male would be killed, including the incident when Popović enjoined the soldiers at an execution site to shoot a young boy"[147]; (v) his superiors' (Beara and Popović) genocidal intent[148]; and of (vi) the overall genocidal campaign.[149] While clearly recognizing the relevant knowledge possessed by Nikolić, who was a "2nd Lieutenant, the lowest rank of officer",[150] the Trial Chamber declined to follow the knowledge-based approach by convicting Nikolić as a principal. Instead, it treated such knowledge only as a proof of *mens rea* required for the mode of liability of 'aiding and abetting' under Article 7(1) of the ICTY Statute. In this respect, the Chamber observes,

> The central issue, however, is whether those actions, combined with his knowledge of the genocidal intent of others, considered in the totality of the evidence, are sufficient to satisfy the Trial Chamber beyond reasonable doubt that Nikolić *not only knew of the intent but that he shared it*. In reaching this determination the Trial Chamber recalls that "[t]he gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed". In this context, "the demanding proof of specific intent" is one of the safeguards to ensure that convictions for this crime will not be imposed lightly.[151]

In the end, on the basis of his knowledge of other participants' genocidal intent,[152] the Chamber held that Nikolić is guilty of aiding and abetting

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144 Prosecutor v. Popović et al., Trial Judgment, 10 June 2010, para 1404.

145 *Ibid.*

146 *Ibid.* para 1405.

147 *Ibid.*

148 *Ibid.* para 1406 ("His knowledge of the genocidal nature of the plan can also be inferred from his close association and interaction with Beara and Popović, whom the Trial Chamber has found harbored genocidal intent".).

149 *Ibid.* para 1407 ("[…] Nikolić knew that this was a massive killing operation being carried out with a genocidal intent".).

150 *Ibid.* para 1412. Despite the importance of the position occupied by Nikolić—i.e., the Chief of Security in the Zvornik Brigade, a post usually reserved for the rank of Major or higher, the Trial Chamber is of the view that, "in the context of an operation directed by Beara and Popović, Nikolić would have little authority of his own". *Ibid*. *See also* Prosecutor v. Popović et al., Appeals Judgment, 30 January 2015, para 515.

151 Prosecutor v. Popović et al., Trial Judgment, 10 June 2010, para 1408. (emphasis added).

152 *Ibid.* para 1017 ("With respect to specific-intent crimes such as genocide and persecution, [an aider or abettor] needs to know that the person or persons in the joint criminal enterprise possessed the genocidal or discriminatory intent".). Note that the Appeals Chamber in the Special Tribunal for Lebanon also follows this approach. Prosecutor v. Ayyash, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, p. 119, footnote 343.

genocide.[153] While the knowledge-based approach proposes the formula of 'the lower the rank, the lower the *mens rea*', the Nikolić example appears to suggest the opposite. In this respect, since the knowledge-based approach does not differ from the purpose-based approach vis-à-vis high-level actors, the Nikolić example compels us to question what is the knowledge-based approach for. In other words, it is doubtful whether the knowledge-based analysis serves any purpose. What the knowledge-based approach ostensibly asserts in relation to low-level participants—i.e., applying the reduced *mens rea* of knowledge—sounds plausible, provided that a lower-level liability is to be attributed to them. Yet, it would be odd to apply a reduced *mens rea* to a lower-level participant, while ascribing the same level of liability as high-level actors. It is especially so if the relevant offence is the 'crime of crimes'. Isn't the Nikolić example a wake-up call? Isn't the knowledge-based approach just a speculative armchair argument? At this juncture, the following observation deserves quotation:

> Knowledge of criminal activity, by itself, is rarely morally significant. Many individuals may be aware of criminal activity but they are not complicit in the conspiracy just because they receive advance knowledge of it. Indeed, when the crime in question is a crime against humanity or a war crime, the whole community may be aware of the activity. […] [M]ere knowledge of criminal activity, with no significant contribution with the intention of furthering the common enterprise, should yield the lowest level of liability.[154]

Now, let us examine the individualistic approaches to genocidal intent from a deeper theoretical perspective in the next section, which also serves the purpose of verifying the theoretical soundness of the knowledge-based approach.

2.5 Rethinking the Knowledge-Based Approach (II): A Purpose-Based Theory of Individualistic Genocidal Intent

In the previous section, I have addressed the inadequacy of the knowledge-based approach from a *macro* perspective by analogy of other legal doctrines. By so doing, I have demonstrated that the knowledge-based analysis fails to differentiate the roles of principal and accessory and leads to counterintuitive results. In this section, I provide another critical analysis of the knowledge-based theory from a *micro* perspective by drawing upon the definitional difference between 'direct intent/purposely' (conceptually connected *only* with the 'desired main effect') and

[153] Prosecutor v. Popović et al., Trial Judgment, 10 June 2010, para 1415. More precisely, it was (i) the limited scope of Nikolić's participation/contribution to the Srebrenica massacre; and (ii) his low-level rank that kept the Trial Chamber from labeling him a principal of genocide. Note that both of these factual aspects were of an objective nature. For a more detailed discussion on Nikolić's genocidal liability, *see* Sect. 4.2.2.2 *infra*.

[154] Ohlin 2007, pp. 79–80.

'indirect intent/knowingly' (conceptually connected *only* with the 'unwanted (or uninterested) but permitted side-effect'). In the course of this study, I argue that genocidal intent should take the form of 'direct intent/purposely' only, because the 'destruction of a group' can only constitute the 'desired main effect' (as opposed to the 'unwanted (or uninterested) but permitted side-effect'). That is to say, it is nonsensical to envisage the 'destruction of a group' as a 'side-effect' that is doctrinally characterized as something 'unwanted (or uninterested) but permitted' by the notion of 'indirect intent/knowingly'. Yet, what I do in this section is not necessarily supporting the prior purpose-based approach. Rather, I will try to develop a more refined purpose-based theory of individualistic genocidal intent. Thus, I begin this section by arguing that purpose-based theorists sometimes go astray, in two related ways. First, they define genocidal purpose in terms of the *intensity* of the perpetrator's desire to destroy a group; more generally, they often build into their conception of desire a kind of emotional commitment. Second, they doctrinally connect this requirement of special intensity or emotion with the notion of special (or specific) intent, *dolus specialis*. In what follows, I argue that both these ideas are mistaken. If, however, we take care to avoid these confusions, the purpose-based theory of individual genocidal intent works far better than the knowledge based-account.

For the purpose of this section, it is to be kept in mind that my arguments are based upon a conceptual framework of 'intention', which has been drawn from comparative studies performed by commentators.[155] The scheme that I want to propose is to be described as follows:

	Volitional element	Cognitive element
Dolus directus/Direct intent/*Dolus directus* in the first degree/purposely	Desire in a broad sense[156]	Either one of the cognitive elements below
Dolus indirectus /Indirect intent/ /*Dolus directus* in the second degree/Oblique intent/ Knowingly	Consciously permit (encompassing 'accept/reconcile oneself to/indifferent to')	Foresight of a consequence to a virtual/practical certainty
Dolus eventualis/(Advertent) Recklessness	Consciously permit (encompassing 'accept/reconcile oneself to/indifferent to')	Foresight of a consequence as being probable/likely/possible

2.5.1 'Special Intent': A Matter of Intensity/Degree, or of Object?

The purpose of this subsection 2.5.1 is to critically examine the way to grasp the purpose-based concept of genocidal intent, in particular, taking into account the

[155] Most significantly, Sieber et al. (eds) 2011; Heller and Dubber (eds) 2011.

[156] For the definition of this notion, *see* Sect. 2.5.2.4 *infra*.

emphasis placed upon the *intensity/degree* of volition. My ultimate conclusion to be drawn from the whole discussion throughout this Sect. 2.5 is that the purpose-based understanding of genocidal intent is doctrinally preferable to the knowledge-based theory. The main reason for that conclusion is to be explained in the next subsection 2.5.2 in connection with the distinction between the notions of 'main/desired effect' as an object of 'direct intent/purposely' and 'side-effect' as an object of 'indirect intent/knowingly'. For the purpose of this subsection, what I am arguing is that the manner in which the purpose-based genocidal intent is currently understood by paying attention to the *degree or intensity* of volition, under the slogan of '*dolus specialis*/special intent/specific intent' is inappropriate. Instead, I will demonstrate that the legal significance of '*dolus specialis*/special intent/specific intent' lies in the *object* of volition—i.e., the result/consequence of an action desired by an actor. Thus, as will be discussed in this subsection, in a sense that an individual state of mind is directed towards a result/consequence, there is no reason to conceive the genocidal intent dressed with the notion of '*dolus specialis*/special intent/specific intent' in a different manner than the ordinary domestic *mens rea* concepts.

As reflected in the expression "volitional element in its most *intensive* form",[157] the notion of purpose-based genocidal intent has been generally viewed as a subjective element that significantly connotes an *emotional* aspect of an individual inner state of mind.[158] If we follow this logic, in which the essential feature of '*dolus specialis*/special intent/specific intent' is its *intensity*,[159] we might ask the following questions: Is it really possible to legally differentiate 'volition in its most intensive form' from 'volition in its moderate form'? If yes, what is the benefit of drawing such a distinction? Does it make sense to acquit a suspect of genocide because he only possessed 'volition to destroy in its moderate form' falling short of 'volition to destroy in its most intensive form'? As seen from the fact that a prominent commentator characterizes the national law concepts of '*dolus specialis*/special intent/specific intent' as 'enigmatic',[160] a review of the relevant domestic criminal law does not provide a clear explanation of what these concepts

[157] Ambos 2009, p. 838.

[158] *See e.g.*, Vest 2007, p. 796 ("The [purpose-based genocidal intent], with its rather emotional connotation, is open to a very subjective evaluation of evidence".).

[159] I think the notion of emotion tends to connote intensity, as John Finnis states that "'feelings' and 'emotions' have some unwelcome connotations of conscious experience and intensity". Finnis 2011, p. 176.

[160] Schabas 2001, p. 49 ("But it would probably be preferable to eschew importation of enigmatic concepts like *dolus specialis* or "specific intent" from national systems of criminal law. They seem valuable only to the extent that they recall what can in any case be gleaned from the plain words of the definition of the international crime of genocide. The *Sikirica* Trial Chamber accused the Prosecutor of unnecessarily complicating matters by introducing a debate about theories of intent, noting that the matter should be resolved with reference to the text of the provision[.]"). *See also* Cécile Tournaye's comments on the view of the *Sikirica* Trial Chamber which denies a need to consider the theories of intent from national criminal law. Tournaye 2003, p. 450.

really mean.[161] But we can obtain a clue from some national jurisdictions, including Australia, Iran and France, that, while 'general intent' attends the act/conduct element of offences, the notion of 'special intent' concerns the *result or consequence* element.[162] I choose these three because commentators on their law make the distinction between 'general intent' and 'special intent' especially clear. In Australia, 'general intent' and 'special intent' are distinguished in that "the former refers to conduct, and the latter refers to the result or consequence element".[163] Likewise, under Iranian criminal law, "[while] general intent refers to an act, special intent refers to a result".[164] Bearing this in mind, for the purpose of clarifying the key characteristic of the 'enigmatic' notion of '*dolus specialis*/special intent/specific intent', we might briefly look into the French notion of *dol spécial*—the original term that represented the genocidal intent element in *Akayesu*, the first genocide conviction ever rendered by an international court.[165]

In French criminal law, there are two kinds of intention: 'general intent' (*dol général*) and 'special intent' (*dol spécial*).[166] The 'general intent' is composed of "desire" and "awareness".[167] For the purpose of 'general intent', "desire" means simply a 'desire to commit an act' and does not concern the criminal *result* of that act (e.g., death of a person).[168] Under the French doctrine, since voluntariness of taking an *action* is sufficient to show the existence of the "desire", there is little practical value for judges to discuss the "desire" component vis-à-vis the notion of 'general intent'.[169] Likewise, the "awareness" component of 'general intent' is usually presumed as it "simply requires the accused to be aware that they are breaking the law".[170] On the other hand, under French criminal law, 'special

[161] Not only the distinction between the terms (in particular, 'general intent' and 'specific (special) intent') is far from clear throughout the legal systems, but also there exists a widespread confusion about the relevant terminology. *See e.g.*, Hall 1960, pp. 141–145.

[162] Cumes 2011, p. 327; Tellenbach 2011, p. 392.

[163] Cumes 2011, p. 327.

[164] Tellenbach 2011, p. 392. Compare the cases of Australia and Iran with slightly different distinction in Indian criminal law: *see* Jain 2011, p. 378 (while general intent never go beyond the *actus reus* of an offence, specific intent goes beyond thereof.).

[165] *See* Aptel 2002, p. 277 (note a rather laconic view expressed by the author: "[t]he concept of *dolus specialis* corresponds to the French legal concept of *dol spécial*. It is used in certain civil law countries, although its definition is often disputed".).

[166] Elliott 2001, p. 66.

[167] *Ibid.* at 66.

[168] *Ibid.* at 67.

[169] Bell et al. 1998, p. 225. Note, however, that I will argue in the subsequent subsections that, as far as it concerns the *result or consequence* element, the notion of 'desire' is crucial in understanding the true nature of genocidal intent. Thus, for the purpose of my argument, while the notion of 'desire' concerning the act/conduct element plays no role, 'desire' vis-à-vis the result/consequence element is important.

[170] Elliott 2001, p. 66; Bell et al. 1998, p. 225 ("Since there is a presumption that all citizens know the law, this element [of awareness] plays little practical part in the findings of criminal liability […]").

intent' (*dol spécial*) means "the determined will on the side of the perpetrator to achieve the *result* prohibited by law".[171] Thus, a French commentator says, "[a]s a general rule, all crimes defined to require the commission of a result need special intention".[172] French criminal law, therefore, does not hesitate to use the term 'special intent' *for ordinary domestic crimes*, as long as a 'result' is provided in the respective crime definitions.[173] Such crimes include, *inter alia*, (i) the offence of murder (special intent to cause death)[174]; (ii) the offence of theft (special intent to permanently appropriate an object that belongs to another person)[175]; (iii) the offence of non-fatal battery against a person (special intent to injure)[176]; (iv) the offence of providing intelligence information to a foreign power (special intent to incite hostilities or acts of aggression against France)[177]; and (v) the offence of possessing information concerning national defence (special intent to handing it over to a foreign power).[178] So, the principal feature of the French notion of 'special intent' involves a 'result' as an *object* of intent, rather than its *intensity*.[179] Consequently, we may conclude that, at least seen from the French perspective, the concept of genocidal intent as accompanied by the term 'special intent' primarily has to do with the 'destruction' or 'destructive result' as an object of intent.

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171 Badar 2013, p. 162. (emphasis added).

172 Elliott 2001, p. 70. In relation to the Nuremberg Trials (particularly citing the Krupp case before the Nuremberg Military Tribunals under the Control Council Law No. 10), Johan D. van der Vyver conceptually concatenates (i) 'general intent' and 'conduct crime' on the one hand; and (ii) 'special intent' and 'result crime' on the other. *See* Vyver 2004, pp. 69–70. For more discussion on the distinction between 'conduct crime' and 'result crime'. *see* Kim 2011, pp. 214–216. For a view that regards genocide as a 'result crime'. *see* Vest 2007, p. 784. I will further discuss the feature of genocide being a 'result crime' in Sect. 3.3.3 *infra*.

173 I deliberately use the term 'a result' instead of 'a result element'. because only the former encompasses both (a) the result provided in a crime definition as an *actus reus*, and therefore required to be materialized; and (b) the result that only forms part of a *mens rea*, and thus not required to be materialized. Among the five offences mentioned as examples of the 'special intent' offences, only the item (i) 'offence of murder' falls into the category (a). All others from the item (ii) 'offence of theft' to the item (v) 'offence of possessing information concerning national defence' are to be included in the category (b).

174 Elliott 2001, p. 69; Badar 2013, p. 162.

175 Badar 2013, p. 163.

176 Elliott 2001, p. 69.

177 *Ibid.* at 70; Badar 2013, p. 163.

178 Bell et al. 1998, p. 225; Badar 2013, p. 163.

179 In this context, I think it is not important if the 'result' is required to be materialized as an *actus reus* of an offence or not. As to the crime of genocide, it is generally said that destruction is a component of *mens rea* and, thus, not required to be materialized. *See e.g.,* Heine and Vest 2000, p. 186 ("in the case of the crime of genocide, "destroy" is not part of the *actus reus* but refers only to the specific intent".). In this sense, Mohamed Badar is, doctrinally speaking, mistaken when he says 'destruction' as a result element. *See* Badar 2013, p. 426. It should be noted, however, that the recent development in the jurisprudence of genocide has rendered a 'substantial destruction of a group' a quasi-*actus reus* of genocide. In this regard, Badar's observation is to some extent understandable. For more discussion, *see* Sect. 3.3.3 *infra*.

In this respect, Claus Kress rightly points out that "[…] the French distinction between *dol général* and *dol spécial* does not refer to the intensity but to the object of the intent. While the concept of *dol général* refers to the perpetrator's consciousness to act in contravention of a rule of criminal law, the concept of *dol spécial* refers to the occurrence of a specific result".[180] In short, I think that the French notion of 'special intent' (*dol spécial*), together with the similar interpretation of the term in Australia and Iran, provides us with an illuminating insight to comprehend the concepts of '*dolus specialis*/special intent/specific intent' representing the phrase "with intent to destroy": it is not the *intensity* of intent, but the *object* that matters—i.e., the 'destruction' or 'destructive result'. In the same vein, Nehemiah Robinson, a prominent early commentator of the Genocide Convention, plainly observes that "[t]he main characteristic of [g]enocide is its *object*: the act must be directed toward the *destruction* of a group".[181] All these considerations make it apparent that it is misleading to understand the concepts of '*dolus specialis*/special intent/specific intent' from the perspective of the 'intensity/degree' of *mens rea*.[182]

Indeed, the *Jelisić* Appeals Chamber gives us reason to doubt that the relevant international case law on the purpose-based approach adopts the 'intensity/degree' analysis of genocidal intent. Although the pertinent portion of the Appeals Judgment is not crystal clear,[183] we can still precisely grasp the position of the Appeals Chamber because it concurs with the opinion of the Defence.[184] Fortunately, the Appeals Judgment records the tenet of the Defence's view that '*dolus specialis*/special intent/specific intent' does "not refer to the *degree* of the requisite intent […]".[185] So, the notion of genocidal intent conceived by the *Jelisić* Appeals Chamber should be distinguished from the purpose-based genocidal intent analysis emphasizing 'intensity/degree'. In this context, however, it is important to note that the *Jelisić* Appeals Chamber's understanding of genocidal intent is also distinct from the knowledge-based analysis of genocidal intent. Rather, what the Chamber considers '*dolus specialis*/special intent/specific intent' is simply "whether destruction of a

[180] Kress 2005, pp. 567–568. Kress states this for the purpose of making a case for the knowledge-based approach to genocidal intent. Thus, the immediately following argument says, "[t]here is, accordingly, no conceptual problem in also characterizing the knowledge-based definition of individual genocidal intent as a form of *dol spécial* because such knowledge would refer specifically to the occurrence of the destructive result and not just to the illegality of the conduct". For a differing view that regards *dol spécial* as a *mens rea* of a stronger volitional character than *dol général*, *see* Badar and Marchuk 2013, p. 28.

[181] Robinson 1960, p. 58. (emphasis added).

[182] For a different view, *see* Vest 2007, p. 790, footnote 28 ("[t]he argumentation developed here is based on the assumption that genocidal intent to destroy a protected group is referring to the requested standard of the intensity of that intent".).

[183] *See* Prosecutor v. Jelisić, Appeals Judgment, 5 July 2001, paras 41–52.

[184] *Ibid.* para 52 ("Accordingly, the Appeals Chamber agrees with the respondent and holds that prosecution's challenge to the Trial Chamber's finding on this issue is not well founded, being based on a misunderstanding of the [Trial] Judgement".).

[185] *Ibid.* para 43. (emphasis added).

group was intended".[186] This is consistent with the insight drawn from the study of the French notion of 'special intent' above: it is not the intensity of intent, but the object thereof that matters—i.e., the 'destruction' or 'destructive result'.

I believe, at this juncture, the agitated attitude of some commentators towards the notion of genocidal intent as a *mens rea* filled with *Sturm und Drang* needs to be toned down. Of course, the extraordinary content of genocidal intent—i.e., 'to destroy a protected group as such in whole or in part'—is heavy and gruesome. As far as the psychological mechanism is concerned, however, genocidal intent operates in the same way as *mens rea* for ordinary domestic crimes. How can it be different? Regardless of their significance and immensity, all the objects touched by guilty minds are to be processed in the same psychological manner—namely, as objects. Both the 'offence against a petty property' and the 'offence against God' have the same intentional structure: both are guilty minds directed towards *a particular result/consequence*—'damaging petty property' on the one hand, and 'disobeying God' on the other. In this sense, compared with the phrase "volitional element in its most intensive form", the manner in which Claus Kress epitomizes the gist of the purpose-based approach appears to be closer to what should be meant by the purpose-based notion of genocidal intent: "[p]ursuant to the 'purpose-based approach'. the individual perpetrator […] must act with the '*conscious desire*' to contribute to the group's (partial) destruction".[187] Kai Ambos also calls into question the intensity/degree connotation of the term 'special intent' as follows:

> To be sure, genocide requires a general 'intent to destroy'. not a 'special' or 'specific' intent in the sense of a '*dolus specialis*'. While the 'intent to destroy' may be understood as an ulterior intent in the sense of the double intent structure of genocide explained at the beginning of this paper, it is quite another matter to give this requirement a purpose-based meaning by reading into the offence definition the qualifier 'special' or 'specific'. Even if this qualifier were part of the offence definition, *it does not necessarily refer to the degree or intensity of the intent*; instead it may also be interpreted, as opposed to 'general' intent, in the sense of the double intent structure, i.e. it would merely clarify that the 'special' intent to destroy must be distinguished from the 'general' intent referring to the underlying acts.[188]

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[186] *Ibid.* para 51 ("Read in context, the question with which the [Trial] Judgement was concerned in referring to *dolus specialis* was whether destruction of a group was intended. The Appeals Chamber finds that the Trial Chamber only used the Latin phrase [*dolus specialis*] to express specific intent as defined above".). In this context, the phrase "as defined above" indicates paras 45–46 where the Appeals Chamber states, "[t]he Appeals Chamber will use the term "specific intent" to describe the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such. […] The specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such". To sum up, in my view, the Appeals Chamber interprets '*dolus specialis*/special intent/specific intent' as *dolus directus* (direct intent/purposely), nothing more, nothing less.

[187] Kress 2009, p. 305, footnote 30. (emphasis added). Note that, concerning the cited sentence, I understand the term 'desire' broadly as will be discussed in Sect. 2.5.2.4 *infra*.

[188] Ambos 2009, pp. 844–845. (emphasis added). In the context of the Continental tradition, Ambos is rightly of the view that "specific intent corresponds to *dolus directus* of first degree, that is, it emphasizes the volitive element of the *dolus*". Ambos 2014, p. 21. For a similar view, *see* Heine and Vest 2000, p. 185.

In this paragraph, Ambos casts doubt on giving a special meaning to the term '*dolus specialis*/special intent/specific intent'. Instead, he suggests that this term might merely indicate a structure of 'general intent' (concerning the underlying acts) and 'special intent' (concerning the destruction of a group).[189] In the same vein, Nina Jørgensen states,

> Genocide has also been described as requiring an 'aggravated' intent or a 'surplus' of intent because in addition to proving the criminal intent accompanying the underlying acts, such as killings, it must be proved that the perpetrator also intended to destroy, in whole or in part, a protected group.[190]

William Schabas also joins observing,

> 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.[191]

Let me summarize my argument up until this point. The feature of intensity of volition is not the main characteristic of genocidal intent represented by the term '*dolus specialis*/special intent/specific intent'. Instead, the notion '*dolus specialis*/special intent/specific intent' only means that an individual state of mind is directed towards a result/consequence of an action. Genocidal intent can be characterized as *special and specific* because it only concerns the *special and specific result/consequence of 'destruction of a group*'. The adjective 'special' or 'specific', in this context, is apt to be misleading and deceptive. In a similar vein, regarding

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[189] Note that, apparently, the use of the term 'general intent' in this quoted paragraph is not consistent with the distinction between the notions of 'general intent' and 'special intent' in Australia, Iran, and France. That is because some of the underlying acts of genocide themselves require 'result/consequence'—e.g., 'killing' or 'causing serious bodily or mental harm'. I think, however, from a macro-collective perspective, Ambos's use of the terms 'general intent' and 'special intent' is acceptable. In other words, seen from the macro-collective perspective, underlying acts of genocide can be considered being equivalent to 'engaging in a conduct/act'. whilst the destruction of a group is tantamount to the 'result/consequence' of such conduct/act. The way I see it, there are two sets of act-result combination in the crime of genocide: one at the 'conduct level' ('immediate act – immediate result' involving an underlying act) and another at the 'context level' ('collective genocidal act – destruction of a group' involving collective act). The distinction between the 'conduct level' and the 'context level' forms the foundation of the whole discussion contained in Chap. 3 *infra*.

[190] Jørgensen 2011, p. 254. Note that, concerning the meaning of the term 'surplus of intent', Kai Ambos explains the meaning of 'surplus' in connection with the notion of 'extended mental element' when he observes that "[i]t has been said that a specific intent offence requires performance of the *actus reus*, but in association with an intent or purpose that goes beyond the mere performance of the act, that is, a surplus of, or ulterior intent […]". Ambos 2014, p. 21.

[191] Schabas 2002, p. 148. Otto Triffterer opines that the notion of '*dolus specialis*/special intent/specific intent' is highly elusive in both the Continental and the Anglo-American traditions. *See* Triffterer 2001, p. 404.

the common law notion of 'specific intent' in the sense of an intent to commit a further offence, Glanville Williams observes,

> The adjective "specific" seems to be somewhat pointless, for the intent is no more specific than any other intent required in criminal law. The most it can mean is that the intent is specifically referred to in the indictment. There is no substantive difference between an intent specifically mentioned and one implied in the name of the crime.[192]

In this connection, let me briefly talk about the case of Raphael Lemkin. In the chapter entitled 'Genocide' where he coined the term 'genocide', he did not use the terms such as 'special intent' or 'specific intent'. Actually, Lemkin hardly used the word 'intent' or 'intention'. The only reference to the word 'intent' is in a footnote which mentions "Hitler's oft-repeated intention to exterminate the Jewish people in Europe".[193] Three years later in 1947, Lemkin indeed used the term 'specific criminal intent' when he advised on UN member states' national legislation criminalizing genocide as follows: "The main task [in enacting such national legislation] will be to redraft existing provisions into criminal law formulae based upon the specific criminal intent to destroy entire human groups".[194] Given the context, however, it seems the adjective 'specific' in this sentence is employed for general usage. Moreover, in another occasion, Lemkin used the term 'criminal intent' rather than 'specific criminal intent'.[195] As far as the relevant legal doctrine is concerned, the genocidal intent element is not special as a *mens rea*: it should be just identified as one of the three ordinary *mens rea* classifications as generally understood by national criminal law, which is the subject of next subsection.

2.5.2 Genocidal Intent as 'Direct Intent/Purposely'

As demonstrated in the previous subsection, while it is mistaken to understand the notion of 'special intent/specific intent/*dolus specialis*' with the lens of intensity of volition, volition still remains as a useful reference point to clarify the notion of genocidal intent. That is, on the national jurisdictions' side, both the Continental tradition and the Anglo-American tradition largely agree that the *mens rea* of 'direct intent/*dolus directus*/ *dolus directus* in the first degree/purposely' is the one

192 Williams 1961, p. 49.

193 Lemkin 2008, p. 89, footnote 45.

194 Lemkin 1947, pp. 150–151.

195 *Ibid*. at 147 ("All these actions are subordinated to the criminal intent to destroy or to cripple permanently a human group".).

that requires the highest volitional element.[196] In this subsection, I will advance an argument that the genocidal intent element should be understood as taking the form of 'direct intent/*dolus directus*/*dolus directus* in the first degree/purposely' for reasons that (i) the result/consequence of the 'destruction of a group' can only be a 'main/desired effect' (as opposed to a 'side-effect') of an action; and that (ii) only the highest volitional level of 'desire' corresponding to 'direct intent/*dolus directus*/*dolus directus* in the first degree/purposely' can accommodate the result/consequence of the 'destruction of a group'.

2.5.2.1 The Three-Level Hierarchy of *Mens Rea*

In this context, it is important to note that the 'degree of volition' should be understood in relation to the hierarchy of *mens rea* covering (i) 'direct intent (*dolus directus*; *dolus directus* in the first degree; purposely)', (ii) 'indirect intent (*dolus indirectus*; *dolus directus* in the second degree; oblique intent; knowingly)', and (iii) '*dolus eventualis* (advertent recklessness; recklessness)'.[197] Thus, the notion

[196] Triffterer 2001, pp. 405–406 (stating that the term *Absicht* has been chosen for the notion of genocidal intent in German-speaking countries, the author observes that "*Absicht* in the sense of Civil Law theory needs a low intellectual threshold, but an extremely strong volitive element".); Badar 2013, p. 137 (citing Triffterer, states, "*Absicht* or *dolus directus* of the first degree requires a low intellectual threshold, but an extremely high volitional element".). Badar indeed regards genocidal intent as requiring proof of *dolus directus* in the first degree on the part of the accused. *Ibid*. 301–302. *See also* Blomsma 2012, p. 63 ("*Dolus directus* is characterized by a very strong volitional element. The actor shoots at the victim with a firearm because he intends to, he *wants* to kill him".); Ohlin 2013a, p. 104 ("Acting with purpose (*dolus directus*) involves the highest form of volition, i.e. a desire to bring about a particular state of affairs into being. Acting with knowledge (*dolus indirectus*) also involves a volitional component because the actor brings about a state of affairs that is practically certain to obtain, even though that state of affair is not his or her purpose for acting".). For a differing view that points out the cognitive sense of 'Absicht', *see* Ambos 2009, p. 844 (casting doubt on the purpose-based interpretation of 'intent to destroy'. states, "[i]n legal terminology even the German term '*Absicht*'. which in ordinary language possesses a clear volitional tendency, is not invariably understood in a purpose-based sense".).

[197] The *Lubanga* Pre-Trial Chamber shares the same understanding. *See* Prosecutor v. Lubanga, Decision on the Confirmation of Charges, 29 January 2007, paras 351–352 (recognizing the volitional element within each of these three *mens rea*). *See also* Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras 357–360 ("[t]he Chamber stresses that the terms "intent" and "knowledge" as referred to in Article 30(2) and (3) of the [ICC] Statute reflect the concept of *dolus*, which requires the existence of a volitional as well as a cognitive element. As explained previously, *dolus* can take one of three forms depending on the strength of the volitional element vis-à-vis the cognitive element – namely, (1) *dolus directus in the first degree* or direct intent, (2) *dolus directus in the second degree* – also known as oblique intention, and (3) *dolus eventualis* – commonly referred to as subjective or advertent recklessness".). For a succinct but well-presented overview of the Continental scheme of *mens rea* covering '*dolus directus* in the first degree', '*dolus directus* in the second degree', and '*dolus eventualis'*, see *Ibid*. For a historical overview of the German concept of intention, *see* Taylor 2004, pp. 102–108. For a detailed explanation of the Continental scheme of *mens rea*, *see* Blomsma 2012, pp. 59–134; Badar 2013, pp. 130–171.

of 'degree of volition' has *only* two levels corresponding to each level of *mens rea* within this hierarchy: The highest volitional level of 'desire' (corresponding to 'direct intent/purposely') is followed by the next volitional level of 'consciously permitting' (corresponding to both 'indirect intent/knowingly' and '*dolus eventualis*/recklessness').[198] That is to say, 'degree of volition' is a notion external to *each* level of *mens rea*. What I mean is that it is misleading to conceive the 'degree of volition' *internally*—i.e., *within each* of the three levels of *mens rea*. For instance, if the mental states of each of one hundred criminal suspects from various backgrounds fall into the *mens rea* classification of 'direct intent/purposely', those one hundred mental states are legally of the same degree. That is to say, there is no differentiation based on degree *within* the subjective element of 'direct intent/purposely' itself. In this regard, John Finnis, placing the notion of *free choice* at the center of the consideration of moral responsibility,[199] explains the 'direct intent/purposely' as "[c]hoosing to (try to) bring about X, in the sense that if X does not result, one's choice and efforts have failed. In this sense, there is no question of being 'more' or 'less' willing; either one is choosing ('willing') X or one is not".[200] Thus, the notion of 'direct intent/purposely' is "not in itself a matter of degree".[201] In sum, while there is no room for the standard of 'degree of volition'

[198] *See* the chart on page 51 *supra*. I draw this two-level framework of 'volition' mainly based on a review of materials discussing the notion of intention from both domestic and comparative perspectives. For materials in the latter category, *see e.g.*, Sieber et al. (eds) 2011; Heller and Dubber (eds) 2011.

[199] Finnis 2011, p. 149 (emphasis added) (to Finnis, the term 'choice' means an "adoption of a proposal, viz. a proposal for action (or omission) in order to bring about a state of affairs either as an end in itself or as means to some such end".).

[200] *Ibid.* at 146. In this respect, note that, when George Fletcher discusses the difference between a 'strong sense of desiring' and a 'weak sense of desiring', he explains that "[a] bank teller who opens a safe at gunpoint desires (in a weak sense) to save his life, but does not desire (in the strong sense) to turn over the money to the thief. […] Whether we say that the teller desires to open the safe […] depends on whether we use these terms in their strong sense or weak sense". Fletcher 2000, p. 450. Here, it seems that either applying the 'test of failure' or conceptually separating the 'weak sense of desiring' from the notion of *dolus directus* would clarify the matter. First, applying the 'test of failure' to the hypothetical situation: if turning over the money does not result, it is obvious that the teller's choice or effort has not failed. Thus, the teller does not intend (in the sense of *dolus directus*) to turn over the money. Second, it is evident from the fact that the teller desires to transfer the money only in a weak sense of 'desiring'. His 'actual intention/specific intention/purpose/goal/want/desire in the strong sense' is to save his life. Put otherwise, turning over the money should be classified only as a side-effect. Consequently, the teller does not intend (in the sense of *dolus directus*) to turn over the money. Conceptually speaking, it is only the *dolus indirectus* that might be still considered. This example, however, seems to be a bit inappropriate in that the situation is rather closer to the legal notion of 'duress' than 'intent'. The 'test of failure' and the notion of 'side-effect' accompanying the notion of *dolus indirectus* will be discussed further throughout this subsection. For the 'test of failure', *see* Sect. 2.5.2.4 *infra*.

[201] Finnis 2011, p. 146. Compare this with the opinion of the Canadian Supreme Court in *Lewis* concerning 'motive' which states, "each case will turn on its own unique set of circumstances. The issue of motive is always a matter of degree". *See* Lewis v. The Queen, [1979] 2 S.C.R. 821 at 822, 47 C.C.C. (2d) 24, at http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2635/index.do. Accessed 23 December 2015.

to vary *within* each notion of *mens rea* ('internal degree' denied), the distinction between 'direct intent/purposely', 'indirect intent/knowingly' and '*dolus eventualis*/recklessness' is basically a matter of such degree ('external degree' affirmed).[202] (Although 'indirect intent/knowingly' and '*dolus eventualis*/recklessness' share the same volitional element of 'consciously permitting', they are to be distinguished by differing cognitive elements: 'foresight of a consequence to a virtual/practical certainty' for 'indirect intent/knowingly' and 'foresight of a consequence as being probable/likely/possible' for '*dolus eventualis*/recklessness'.). Accordingly, since the 'internal degree' is denied, defining the 'direct intent/purposely' per se with such a phrase as 'most intensive' should be avoided: because it misleadingly connotes that there is something like 'most intensive', 'a bit less most intensive', 'strongly intensive', 'moderately intensive', or 'weakly intensive' direct intent/purposely. The danger of employing the *internal* degree of volition in understanding the concept of 'direct intent/purposely' has been aptly warned against by John Finnis when he observed,

> The fact is that the emotional dispositions or attitudes which enable us to speak of *degrees* of willingness and unwillingness do not control, and are often scarcely or in no way correlated with, the choices one makes. One's enthusiasm, one's reluctance, one's repugnance, and so forth, are not the ground of one's choice.[203]

Compare this with Payam Akhavan's opinion as follows:

> The term *dolus specialis* refers to the *degree* rather than *scope* of intent. By way of comparison, *dolus generalis* requires that the perpetrator 'means to cause' a certain consequence 'or is aware that it will occur in the ordinary course of events', whereas special intent requires that the perpetrator 'clearly intended the result', signifying 'a psychological nexus between the physical result and the mental state of the perpetrator'. The ICTR Appeals Chamber has not elaborated on this qualitative hierarchy of intent, merely indicating that the perpetrator 'seeks' to destroy a group by means of the enumerated acts.[204]

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[202] *See e.g.*, Silverman 2011, p. 494 ("[a]lthough eschewing the word "intent", the Model Penal Code recognizes three levels of mental fault that imply some degree of intention on the part of the actor: purpose, knowledge, and recklessness".); Petrig 2011, p. 457 ("[u]nder Swiss criminal law three types of intent are distinguished. These are based on the quality and intensity of the intellectual and volitional component of intent as well as their combination: first degree *dolus directus*, second degree *dolus directus*, and *dolus eventualis*".); Maljević 2011, p. 352 ("The Criminal Code [of Bosnia and Herzegovina] differentiates between two types of intent: direct intent (*direktni umišljaj*) and indirect intent (*eventualni umišljaj*). The two types of intent are differentiated according to the intensity with which the intellectual and volitional elements of culpability are realised. […] A perpetrator acts with direct intent when he was aware of his deed and wanted its perpetration. So defined, direct intent represents the highest level or the most serious form of culpability in which both the intellectual and the volitional element are present in their highest intensity".). As to the 'intellectual' element of 'direct intent', only a minimum level of cognition may still constitute the 'direct intent/purposely' insofar as it comes together with the highest level of volition—i.e., 'desire'.

[203] Finnis 2011, p. 147. (emphasis added).

[204] Akhavan 2005, pp. 992–993. (emphasis in original).

In addition to differing on what distinguishes the notions of 'special intent' and 'general intent',[205] it appears that Akhavan and I each have a different understanding of the phrase 'degree of volition' or 'degree of intent' in connection with the notion of genocidal intent. While my understanding of the volitional 'degree' of *dolus specialis* must correspond to one of the three levels of *mens rea*,[206] he seems to assume an additional *level* which is stronger than '*dolus directus* (*dolus directus* in the first degree; direct intent; purposely)'.[207] That is because Akhavan classifies the 'direct intent/purposely' ("means to cause a certain consequence") as "*dolus generalis*".[208] In other words, as to the *mens rea* category of 'means to cause a certain consequence' (Article 30 of the ICC Statute), I think it should be regarded as 'direct intent/purposely', which reflects the highest volitional aspect of 'desire' directed at a 'desired main effect'. How can you "means to cause" something without *desiring* it?[209] In contrast, by classifying 'means to cause a certain consequence' as "*dolus generalis*", Akhavan seems to place the notion of "*dolus specialis*" outside the three-level hierarchy of *mens rea*. Assuming that the concept of *dolus specialis* (as he interprets it, 'clearly intending the result') is something 'qualitatively' higher or stronger than what he calls the *dolus generalis*,[210] I might observe that he

[205] For a discussion on the distinction between 'special intent' and 'general intent', *see* Sect. 2.5.1 *supra*.

[206] As said earlier, they are: (i) '*dolus directus* (*dolus directus* in the first degree; direct intent; purposely)', (ii) '*dolus indirectus* (*dolus directus* in the second degree; indirect intent; oblique intent; knowingly)', and (iii) '*dolus eventualis* (advertent recklessness; recklessness)'.

[207] For a similar position, *see e.g.*, Prosecutor v. Stakić, Trial Judgment, 31 July 2003, para 520 ("[Genocide] is, in fact characterized and distinguished by a 'surplus' of intent. […] The *level* of this intent is the *dolus specialis* or 'specific intent', terms that can be used interchangeably".). (emphasis added).

[208] Although I am not sure exactly how Akhavan defines the term '*dolus generalis*', it seems evident that his understanding of the term is different from mine in that he relates '*dolus generalis*' to the 'result/consequence' element. As I explained in Sect. 2.5.1 *supra*, it is '*dolus specialis*' that should be directed toward the 'result/consequence' element, while '*dolus generalis*' concerns the 'act/conduct' element.

[209] This notion of 'desire' encompasses both the positive emotions and negative emotions. Thus, you can, for instance, desire something either with enthusiasm (positive emotion) or repugnance (negative emotion). 'Desire' in this sense connotes 'reason/rationality' rather than 'emotion'. I will call 'desire' in this sense 'desire in a broad sense' in Sect. 2.5.2.4 *infra*.

[210] In a similar vein, the *Kupreškić* et al. Trial Chamber understands that the *mens rea* threshold for genocide is higher than that for persecution as follows: "As set forth above, the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. […] Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide". Prosecutor v. Kupreškić et al., Trial Judgment, 14 January 2000, para 636. Note that it seems the International Court of Justice endorses the view of the *Kupreškić* et al. Trial Chamber. *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, para 188 (26 February). In my view, however, it is not the degree or level ("higher"/"lower") of *mens rea*, but its content that differentiate genocidal intent from persecutory intent.

presumes a four-level-hierarchy of *mens rea* in understanding the concept of genocidal intent dressed with *dolus specialis*. I do not believe it is legally meaningful to differentiate between 'intent' ('means to cause a certain result') and 'clear intent' ('clearly means to cause a certain result'). Let me explain further.

It is needless to say that the distinction between *dolus directus* (*dolus directus* in the first degree; direct intent; purposely)' and '*dolus indirectus* (*dolus directus* in the second degree; indirect intent; oblique intent; knowingly)' has been extensively discussed throughout the Continental tradition and the Anglo-American tradition.[211] There is, however, hardly any discussion of the supposed concept of 'clear intent'. This concept is outside the scope of ordinary discussion on intent in the domestic law context by leading theorists. For instance, H.L.A. Hart distinguishes 'bare intentions', 'intentional actions' and 'further intentions'.[212] In his schema, there is no room for another kind of intention called 'clear intent'. Calling it the 'core notion' or 'central notion', R.A. Duff also places the *dolus directus* (purpose) at the top of the hierarchy of *mens rea*.[213] He articulates,

> There is, courts and commentators seem to agree, a *central notion* of 'actual' (or 'specific') intention or 'purpose': but they differ on whether that notion need be defined at all; and on whether, if it needs defining, it should be defined in terms of 'desire' (or 'want'), or of 'decision', or of acting 'in order' to bring a result about. That *core notion* may also include consequences that are 'inseparable' from the agent's end – though it is not clear what it is for a consequence to be thus 'inseparable'. There is also, many would say, a broader notion of intention which encompasses consequences of whose occurrence the agent is 'almost certain' or 'has no substantial doubt'. But while it is clear since *Moloney* that the law does not count as intended consequences which are foreseen only as likely or probable, it is not clear whether the law takes foresight of a morally certain consequence to amount to a 'specific intent'.[214]

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[211] *See e.g.*, Duff 1990, p. 73 ("the perennial issue of the relation between intention and foresight".). For a view that stresses the similarity between *mens rea* concepts in the Continental tradition and the Anglo-American tradition, especially with respect of the notion of 'indirect intent'. *see* Bantekas 2010, pp. 40–41. For a differing usage of the term 'indirect intent' at the *ad hoc* international criminal tribunals, *see* Cassese et al. 2013, pp. 48–49 (contrary to domestic criminal law, the *ad hoc* tribunals abandon the 'virtual certainty'/'practical certainty' standard of 'indirect intent'. which results in equating the meanings of 'indirect intent' and 'recklessness'/'*dolus eventualis*' following the lower standard of 'probability'/'likeliness'.).

[212] Hart 2008, p. 117 *et seq*.

[213] For the purpose of indicating the 'intention in action' (equivalent to *dolus directus*), Duff uses such terms as 'actual intention'. 'specific intention'. and 'purpose'. *See* Duff 1990, pp. 21, 27, 37, 40 and 74. Note also that Duff, in other occasions, uses the term 'specific intent' in a different sense: indicating the *mens rea* equivalent to H.L.A. Hart's 'further intent'. (See *Ibid*. at 18–19). For the conceptual scope of 'specific intent'. *see* Chap. 2, footnote 222 *infra*.

[214] Duff 1990, p. 27. (emphasis added). See also *Ibid*. at 43 ("I shall focus initially on intended action (intending a result), rather than on intentional action (bringing a result about intentionally), since these notions are distinct: intended agency [equivalent to *dolus directus* (purposely)] reveals the core meaning of the concept of intention; the idea of intentional agency [equivalent to *dolus indirectus* (oblique intent; knowingly)] involves an extension of that core notion".). Duff explains *dolus directus* as follows: (i) "The agent wants (or desires) that result"; (ii) "She believes that what she does might bring that result about"; (iii) "She acts as she does because of that want and that belief"; and (iv) "What she does causes that result". (See *Ibid*. at 66). In his view, intention (equivalent to *dolus directus*) is "best defined" without referring to such notions of desires or wants. Instead, he prefers the phrase "in order to". (See *Ibid*. at 72–73).

In this paragraph, Duff is discussing the three kinds of intention: (i) a "core notion" of intention, (ii) a "broader notion of intention" accompanying the cognitive standard of 'certainty/virtual certainty/practical certainty/moral certainty', and (iii) another "broader notion of intention" accompanying the cognitive standard of 'probability/likeliness/possibility'. First, the "core notion" of intention connotes 'desire',[215] 'want', 'decision', or acting 'in order to' bring about a result, and called 'actual intention', 'specific intention', or 'purpose'. This "core notion" of intention, thus, means the 'direct intent/*dolus directus*/*dolus directus* in the first degree/purposely'. Second, the "broader notion of intention" defined by the standard of foresight to a 'certainty/virtual certainty/practical certainty/moral certainty' of a consequence falls into the notion of 'indirect intent/*dolus indirectus*/*dolus directus* in the second degree/oblique intent/knowingly'. Third, another "broader notion of intention" attending a foresight of a 'probable/likely/possible' consequence equals '*dolus eventualis*/(advertent) recklessness'. Hence, introducing a *mens rea* such as *dolus specialis* outside this framework generally shared by both the Continental and the Anglo-American systems would only confuse the whole discussion on the issue of genocidal intent. The genocidal intent element dressed with 'special intent/specific intent/*dolus specialis*' should be conceived as one of the three forms of *mens rea*. In our journey to the conclusion that genocidal intent should be regarded as 'direct intent/purposely', in the next sub-subsection, let us explore why it cannot take the form of 'indirect intent/knowingly' which is exactly the *mens rea* classification that represents the genocidal intent element in the knowledge-based analysis.

2.5.2.2 Destruction as an 'Unwanted (or Uninterested) but Permitted Side-Effect'?

Employing the term 'motive', the *Akayesu* Trial Chamber states that the destruction of a group itself ought to form part of a reason for action as an ulterior motive as follows:

> The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realization of an *ulterior motive*, which is to destroy, in whole or in part, the group of which the individual is just one element.[216]

In like manner, there are scholars who appear to understand genocidal intent as something equivalent to 'ulterior intent'. For example, Kai Ambos categorizes the

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[215] For the importance of 'desire' in defining 'intention' in both the Continental tradition and the Anglo-American tradition, *see* Fletcher 2000, p. 440 ("In German and Soviet law, it is generally assumed that an actor intends a result only if he desires to bring about that result. There is considerable support for an analogous account of intending in the common law".).

[216] Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, para 522. *See also* Prosecutor v. Jelisić, Trial Judgment, 14 December 1999, para 108 ("The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was *motivated by* the *dolus specialis* of the crime of genocide".). (emphasis added).

'intent to destroy' as 'ulterior intent' in the sense that it indicates something beyond the *actus reus* of the offence definition.[217] In this sense, the notion of 'ulterior intent' can be identified with the Anglo-American notion of 'specific intent' (in the sense of H.L.A. Hart's 'further intention').[218] Pointing at the genocidal intent element, the ICC Pre-Trial Chamber in *Al Bashir* also specifically employed the term 'ulterior intent'.[219] The Cambridge Dictionary defines the word 'ulterior' as "(of a reason) hidden or secret".[220] This notion of 'ulterior intent' is the closest legal term to the concept of 'motive' as both share the character of hiddenness.[221] In terms of a reason or motive for an action, you don't hide something unless you really want (to do) something. So, if your reason or motive for an action is characterized or called as 'ulterior', it indicates that what you secretly want cannot be an 'unwanted (or uninterested) but permitted side-effect'. Instead, it must be the 'desired main effect' of your ulterior motive or intent. The term 'ulterior intent' is generally used in respect of the category of crimes that require an intent to produce a consequence beyond the *actus reus* required by the definition of the crime in question—e.g., the intent to commit an additional felony in the course of a burglary.[222] This feature of requiring an intent to cause a result beyond the *actus reus* also seems to fit in with the crime definition of genocide because it is generally

[217] Ambos 2009, pp. 835–836 and 849. *See also* Ambos 2010, p. 159. For a view expressing a preference for the term 'ulterior intent' in indicating the genocidal intent element (citing Ambos), *see* Tams et al. 2014, p. 132.

[218] *See e.g.*, George Fletcher identifies the 'specific intent' (in the sense of the intent to realize a particular objective, excluding undesired side-effects) with the term 'ulterior intent' (as in the offense of burglary: the intent to commit a felony). Fletcher 2000, pp. 453–454. For more explanation, *see* Chap. 2, footnote 222 *infra* and accompanying text.

[219] Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, 4 March 2009, p. 49, footnote 154.

[220] Cambridge Dictionaries Online at dictionary.cambridge.org.

[221] Williams 1961, p. 48 ("Motive is ulterior intention – the intention with which an intentional act is done. Intention, when distinguished from motive, relates to the means, motive to the end".).

[222] Although burglary is generally said to be a 'specific intent' crime, I think the term 'ulterior intent' is preferable to the term 'specific intent'. That is because the term 'specific intent' covers not only the case of 'ulterior intent' (e.g., the intent to commit a further offence in burglary), but also other species of intent. Richard Card lists them as follows: (i) "the intention which must be proved to secure a conviction for a particular offence for which intention is the only state of mind specified in relation to an element"; (ii) "a direct intention" (as distinct from an 'oblique intention'); (iii) "a further intention" (i.e., 'ulterior intention'); and (iv) "a state of mind, required for particular offences only, in relation to which the defendant may successfully plead its absence by relying on evidence of voluntary intoxication". Card 2006, p. 101; Ormerod 2011, p. 136. *See also* Fletcher 2000, p. 453 (explaining that the term 'specific intent' can mean: (i) "a well-defined, particular intent (e.g., an intent to deprive the owner permanently of his property)" (i.e., 'ulterior intention'); (ii) "an intent to realize a particular objective (if the intent is specific in this sense, undesired side-effects are not included)" (i.e., 'direct intention'); or (iii) "an intent that affects the "species or degree" of a crime and therefore may be negated by a claim of intoxication".).

said that the destruction of a group is not required to be materialized.[223] That is to say, apparently, the main feature of the concept of 'ulterior intent' is precisely the one shared by that of 'intent to destroy', in that 'ulterior intent' crimes "specify, as part of the *mens rea*, an intent to do something that is not part of the *actus reus*".[224] Indeed, the United States Code on genocide expressly specifies that genocidal intent is a 'specific intent' by providing, "with the *specific intent to destroy*, in whole or in substantial part, a national, ethnic, racial, or religious group as such".[225] Against this theoretical background, how relevant is the notion of 'ulterior intent' to our ongoing discussion of genocidal intent in connection with the distinction between 'direct intent/purposely' and 'indirect intent/knowingly'? Let us refer to George Fletcher:

> Though legal systems may differ on this point, there is good reason to believe that in the patterns of manifest and subjective liability, the "intent" required is a genuine intent—as we understand that word in ordinary English. Take larceny as an example. It is hard to imagine "an intent permanently to deprive the owner of his property" unless that were *the goal rather than a side-effect* of the actor's conduct. All inchoate offenses arguably require a narrowly defined intent to consummate the ultimate offense. This is most clearly true about crimes defined as "assault with intent to rape or murder". It is also true about burglary and the intent to commit a felony after entry. It is also true about criminal attempts, though some writers have reservations. Legal systems typically employ some term to indicate that what is required in these cases is not simply an "intention" the way the term is ordinarily understood. Anglo-American lawyers are wont to refer to a "specific intent"—in one of the many acceptations of that term. The Model Penal Code's definition of "purposeful" commission covers these cases. German lawyers distinguish between Vorsatz (intention) and Absicht (purpose or aim) and use the latter term to refer to the intent requirement in larceny, fraud and various forms of inchoate offenses.[226]

Fletcher's discussion in this paragraph centers around the distinction between the 'desired main effect' and the 'permitted side-effect' when he uses the phrase "the goal rather than a side-effect". Sharing the fundamental feature of 'desired main effect', Fletcher uses all the following terms interchangeably: "genuine intent", "goal", "a narrowly defined intent", "not simply an intention", "specific intent", "purposeful", and "Absicht (purpose or aim)". In this context, the 'ulterior intent' feature of the genocidal intent element suggests that the purpose-based understanding of genocidal intent, at least theoretically, prevails over its knowledge-based counterpart. Put otherwise, genocidal intent as an ulterior intent cannot

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223 *See* e.g., Badar 2008, p. 499 ("Another difficulty appears in applying the rule of '*mens rea* coverage' to particular crimes which require a proof of 'special intent' […]. In such types of offences, this 'ulterior intent' has no material element to cover, since the actual destruction of a group is not an ingredient element of the offence".). Note, however, that I will argue that the actual destruction of at least a substantial part of a group is legally required. *See* Sect. 3.3 *infra*.

224 *See* Simester and Sullivan 2010, pp. 138–139. *See also* Horder 1996, pp. 154–155 (taking an example of "wounding with intent to do grievous bodily harm is an ulterior intent crime because the *mens rea* (the intent to do grievous bodily harm) goes 'beyond' the *actus reus* (the wounding)").

225 18 U.S.C. § 1091 (2006). (emphasis added).

226 Fletcher 2000, pp. 443–444. (emphasis added).

be directed towards a 'permitted side-effect'. Instead, genocidal intent as an ulterior intent requires that destruction of a group should be the 'desired main effect' of an actor's conduct. Thus, it is only the notion of 'direct intent/purposely' (at the exclusion of 'indirect intent/knowingly') that can conceptually accommodate the view that identifies the genocidal intent element with the notion of 'ulterior intent'.[227] That is to say, a combination of 'indirect intent/knowingly' and the 'ulterior intent' feature of genocidal intent is not feasible. The destruction of a group must be a purpose itself, and cannot just be accompanied as a 'permitted side-effect' of what the actor purposely intended.

Leaving the argument based on the analogy between genocidal intent and 'ulterior intent' behind, let us move one step closer to the problem of 'destruction of a group' being a 'side-effect'. Drawing on national criminal law concepts of 'knowledge' represented by such terms as 'indirect intent', '*dolus indirectus*', '*dolus directus* in the second degree', 'oblique intent', or 'knowingly',[228] I would paraphrase the knowledge-based approach proposed by commentators as follows: *foreseeing* the destruction of a group as a virtually/practically certain 'side-effect' of conduct that itself pursues another 'desired main effect' (cognitive element) + *consciously permitting* that foreseen destruction (volitional element) = individual genocidal intent. Although Greenawalt and most of other commentators who proposed the knowledge-based approach did not explicitly mention any such distinction between the notions of 'side-effect' (as accompanied by *mens rea* variously labeled 'indirect intent/*dolus indirectus*/*dolus directus* in the second degree/oblique intent/knowingly') and 'desired main effect' (as accompanied by *mens rea* variously labeled 'direct intent/*dolus directus*/*dolus directus* in the first degree/purposely'),[229] I think this distinction is the key to unravelling the confusion and misconception that has plagued the whole discussion of the concept of genocidal intent. Let me explain further.

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[227] In a similar vein, Car-Friedrich Stuckenberg explains that "[i]n German law […] many offences contain an ulterior intent formulated as *Absicht* […]". Stuckenberg 2014, p. 318. At the same time, Stuckenberg further makes it clear that the current terminology of *Absicht* means 'purpose'. *Ibid*.

[228] *See e.g.* Blomsma and Roef 2015, p. 106 ("Indirect intent exists when the actor knows his conduct will almost certainly bring about consequences that he does not desire or primarily aim at. It deals with side effects that the actor knows are almost certain to occur".). Blomsma and Roef further explain the notion of 'side-effect' as follows: "the result known or believed to be a condition of the achievement of the purpose is considered to be intended, even when it is not desired". *Ibid*. at 107.

[229] Greenawalt, however, takes note of the proper definition of 'indirect intent/oblique intent/knowingly' when he states, "[a]ccording to the traditional common law-doctrine, criminal perpetrators intended the consequences of their actions if they knew to a practical certainty what the consequences of those actions would be, regardless of whether or not they deliberately sought to realize those consequences". Greenawalt 1999, p. 2266. The following quotation also seems to suggest that Greenawalt had in mind the distinction between 'desired main effect' and 'permitted side-effect': "However, to the extent that victims already are singled out on the basis of their group membership, the requirement that broader group destruction be a desired rather than foreseen consequence may be overly strict". *Ibid*. at 2287–88. It is also to be noted that, in the context of discussing the concept of intent from a comparative law perspective, Carl-Friedrich Stuckenberg observes that "[w]hile the concept of 'purpose' or *animus*, which points to the *direct or main*

Despite an almost complete absence of any serious consideration of the knowledge-based concept of genocidal intent in conjunction with the notion of 'side-effect', Hans Vest's summary of Greenawalt's knowledge-based proposal deserves our attention:

> Greenawalt's proposal has been extensively quoted as it seems to be eventually the most elaborated alternative interpretation with regard to the character and intensity of genocidal intent. It has already been mentioned that knowledge that a certain conduct will lead not only to the *intended consequence* but also inevitably to *another result* constitutes a special form of genocidal intent. As there is absolutely no uncertainty left, the desire of a perpetrator that such consequence may not occur becomes completely irrelevant. Taking a certain consequence for granted should be seen as a particular form of desiring this consequence in the sense of intention or purposefulness. This knowledge-based variant of genocidal intent may be called *indirect o[r] oblique intent*.[230]

Seen from the perspective of the *mens rea* framework that I proposed at the outset of this section,[231] I would say that the quoted paragraph is mixing up volitional aspects and cognitive aspects of *mens rea*. At any rate, in this paragraph, the terms "intended consequence" and "another result" are important to note in that the former signifies 'direct intent/purposely' and the latter 'indirect intent/oblique intent/knowingly'.[232] Throughout this Sect. 2.5, I use the term 'desired main effect' for what Vest called the "intended consequence" and 'permitted side-effect' for "another result" that the actor knows will inevitably happen but still permits it even though it is not the 'desired main effect'. What is meant by Vest's summary of the knowledge-based approach is that (i) the *mens rea* of the knowledge-based genocidal intent reflects the notion of 'indirect intent/oblique intent/knowingly' that, by definition, only concerns a side-effect (of another main effect)[233]; and, thus, (ii) the 'destruction of a group' as a side-effect is compatible with the notion of genocidal intent: the genocidal intent element is to be met when the actor knew that his conduct will *inevitably* lead to the side-effect of the 'destruction of a group'. The problem in this understanding is that the concept of 'side-effect' is, by definition, something that provides an actor with a 'reason against' (conceptually

Footnote 229 (continued)

effects of a deliberate action, is fairly easy to grasp – even small children know to defend themselves with 'I didn't mean it' – and largely beyond dispute, the most serious definitional problems concern the *side effects* of an action and the requisite delimitation of the notion of intent or intention to the bottom, that is, where the nether region of intent end and where the respective lesser form of culpability begins […]". Carl-Stuckenberg 2014, p. 313. (emphasis in original).

230 Vest 2007, p. 793. (emphasis added).

231 *See* the chart on page 51 *supra*.

232 In the cited paragraph, the term "consequence" that subsequently follows the phrase "another result" in three occasions corresponds to "another result"—i.e., 'permitted side-effect': note the term "consequence" as used in the phrases "such consequence may not occur …"; "Taking a certain consequence for granted …"; and "a particular form of desiring this consequence …".

233 For one of the rare discussions distinguishing the 'desired main effect' and 'permitted side-effect' in connection with genocidal intent, *see* Vyver 1999, p. 307 ("*dolus indirectus*, in which event certain (secondary) consequence in addition to those desired by the perpetrator of the act were foreseen by the perpetrator as a certainty, and although the perpetrator did not desire those secondary consequences he/she nevertheless committed the act and those consequences did set in".).

encompassing both 'unwanted'[234] and 'uninterested') engaging in his act.[235] Put otherwise, applying the notion of 'indirect intent/oblique intent/knowingly' to a genocide case means: despite such a cognitive realization that 'destruction of a group' as an unwanted or uninterested side-effect to happen to a virtual/practical certainty,[236] the actor still volitionally permits it *in order to* achieve the 'desired main effect' (which is distinct from the 'destruction of a group' as a side-effect). In this way, the crucial and decisive feature of 'destruction of a group' is marginalized through the application of the knowledge-based approach. In this respect, is it an overstatement to says that the knowledge-based theory completely change the essential characteristic of the crime of genocide by detaching it from the notion of 'destruction of a group'? Under the conceptual framework of 'indirect intent/oblique intent/knowingly', the 'destruction of a group' is only to be 'consciously permitted' by an actor. It is never 'desired' by him, because it can't be.

That is to say, the distinguishing feature of 'direct intent/purposely' and 'indirect intent/oblique intent/knowingly' is the *volitional* aspect of each *mens rea*—i.e., 'desiring' for the former and 'consciously permitting' for the latter.[237] The 'desired main effect' can only be triggered by the volitional level of 'desiring' that exclusively belongs to 'direct intent/purposely'. Contrastingly, the *cognitive* aspect is not adequate to function as a distinguishing feature between 'direct intent/purposely' and 'indirect intent/knowingly'. That is because, as the chart that I put at the beginning of this section shows, the same cognitive standard of the 'foresight of a consequence to a virtual/practical certainty' is applicable to both 'direct intent/purposely' and 'indirect intent/knowingly'. In both the Continental tradition and the Anglo-American tradition, 'indirect intent/oblique intent/knowingly' is certainly considered as a form of intention. For instance, let me repeat the typical textbook example. For the purpose of receiving an inheritance, a person who killed his wife by exploding an airplane, with 100 other passengers also aboard, is legally considered as *intentionally* killing those other passengers even if he did not want any of them to die (or was simply indifferent to their fate). Notwithstanding his uneasiness for the *unwanted or uninterested* fate of all those passengers at his fingertips, his knowledge to a virtual/practical certainty of their

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[234] I take the term "unwanted" from Glanville Williams' account of 'indirect intent/knowingly'. *See* Chap. 2, footnote 241 *infra* and accompanying text. I use the term "unwanted" in a broad sense: it means that the foreseen 'side-effect' is simply not part of things that an actor actively want. Thus, the term 'unwanted' does not necessarily connote an actor's opposition for the 'side-effect' to occur. In other words, a foreseen 'side-effect' to which an actor is merely indifferent can still fall into the notion of 'unwanted'. For a literature in which the term 'unwanted side-effect' is used in the same sense, *see* e.g., Blomsma and Roef 2015, p. 108. For clarification, throughout this subsection, I use the term 'unwanted or uninterested' instead of 'unwanted'.

[235] For more discussion on the meaning of "reason against", *see* Chap. 2, footnote 245 *infra* and accompanying text.

[236] For the precise meaning and connotation of the phrase 'virtual certainty', *see* Norrie 2002, p. 50 ("[…] 'virtual certainty' is a kind of certainty (the only kind in fact that ever exists) and not a kind of high probability or chance".).

[237] *See* the chart on page 51 *supra*.

deaths (and his conscious permission thereof) suffices to constitute an intention (more specifically, 'indirect intent/oblique intent/knowingly'). In this respect, the knowledge-based approach puts the 'destruction of a group' into the same fact pattern of this '100 people on board' whose deaths are just an *unwanted (or uninterested) side-effect* caused by an actor who had in mind another desired main effect. The distinction between 'desired main effect' and 'unwanted (or uninterested) but permitted side-effect' is all the more important for Greenawalt's version of the knowledge-based approach in which the object of knowledge is a result/consequence of an act—i.e., the destruction of a group.[238]

In short, the ultimate difficulty caused by the application of the knowledge-based approach (conceptually reflecting the 'indirect intent/oblique intent/knowingly') to the crime of genocide is the cognitive dissonance between the 'destruction of a group' and 'unwanted/uninterested but permitted side-effect'. The term of 'side-effect' always connotes the concept of 'despite'. I take medicine for my health *despite* its side-effect of drowsiness that I don't want (or I don't really care about). I bomb Hiroshima to end the World War II *despite* its side-effect of killing innocent civilians that I don't want (or I don't really care about). Thus, what is really meant by me is to take medicine *for my health*; and to bomb Hiroshima *to end the World War II*. The side-effects of my actions are just a secondary consideration (or, in some cases, non-consideration). In line of this reasoning, what the knowledge-based approach tries to do is to put the 'destruction of a group' in this conceptual paradigm of 'despite': I engage in action despite its side-effect of destroying a group. In this context, the 'destruction of a group' only forms part of my secondary consideration (or non-consideration). The 'desired main effect' of ending the World War II tends to excuse the side-effect of killing innocent civilians in Hiroshima. Is there any 'desired main effect' that tends to excuse the side-effect of destroying a group or committing genocide? Isn't committing genocide the last thing in the world to fall into the category of 'side-effect' of something primarily pursued? Given the boundless evilness of human mind which knows no end,[239] switching the stage of discussion from the individualistic level to the collective level would clarify the matter, whilst, in that case, we leave the realm of *mens rea*. The factual circumstances of genocidal campaigns involving a State or State-like entity putting all its resources toward the purpose of destroying a protected group is certainly in discordance with the notion of destruction being a 'side-effect'.[240] In what follows, I will further address this problem from a theoretical and conceptual perspective.

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[238] Strictly speaking, within the crime definition of genocide, 'destruction' is not an *actus reus* of 'consequence', but a component of *mens rea*. Yet, in view of the development of the relevant case law in which a destruction of a substantial part of a group is always required to be shown, regarding the destruction of a group as a result or consequence is not incorrect. For more discussion on the legal character of 'destruction', *see* Sect. 3.3 *infra*.

[239] Jeremiah 17:9 (KJV: "The heart is deceitful above all things, and desperately wicked: who can know it?")

[240] Strictly speaking, this sentence may not fit with other observations in this Sect. 2.5.2.2. That is to say, all other discussions are made from an *individualistic* perspective, whilst this sentence connotes the *collective* genocidal intent that is the main theme of Chap. 4 *infra*.

As to the distinction between 'direct intent/purposely' and 'indirect intent/knowingly', Glanville Williams observes,

> Direct intention is where the consequence is what you are aiming at. Oblique intention ['indirect intent/knowingly'] is something you see clearly, but out of the corner of your eye. The consequence is (figuratively speaking) not *in the straight line of your purpose*, but a side-effect that you accept as an inevitable or "certain" accompaniment of your direct intent (desire-intent). There are *twin consequences* of the act, x and y; the doer *wants* x, and is prepared to accept its *unwanted* twin y. Oblique intent is, in other words, a kind of knowledge or realization.[241]

In this paragraph, the phrase "twin consequences" is very helpful: despite being brought into the world at the same time, one being 'wanted' (as a 'desired main effect') and another 'unwanted or uninterested' (as a 'permitted side-effect).[242] Article 25 of the Criminal Code of the Russian Federation is an example in which this paradigm of 'wanted' vis-à-vis 'direct intent/purposely' versus 'unwanted' vis-à-vis 'indirect intent/knowingly' is clearly provided in national criminal law.[243] Article 25 of the Criminal Code of Russian Federation, entitled "Crime Committed Intentionally" provides,

> An act committed with direct intent or indirect intent shall be deemed to be a crime committed intentionally.
>
> A crime shall be deemed to be committed with direct intent if the person was aware of the social danger of his actions (omissions), foresaw the possibility or inevitability of socially dangerous consequences ensuing from them, and *wished for these consequences to ensue*.
>
> A crime shall be committed with indirect intent if the person was aware of the social danger of his actions (omissions), foresaw the possibility of socially dangerous consequences ensuing, and *did not wish them*, but consciously permitted these consequences, or was indifferent to them.

There are also traces which show this distinction between the *wanted or desired* main effect and the *unwanted (or uninterested) but permitted* side-effect is also recognized by international criminal law when the ICC Pre-Trial Chamber in *Bemba* refers to the notion of "*undesired* proscribed consequence" in explaining the '*dolus directus* in the second degree'.[244] While it is conceptually feasible for the wanted

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[241] Williams 1987, pp. 420–421. (emphasis added).

[242] For a doubtful view that a 'side-effect' might sometimes be wanted, *see* Duff 1990, p. 74 ("The [extended] paradigm [of intent] distinguishes an action's intended effects, which an agent acts in order to bring about, from its foreseen side-effects, which she expects and *might want*, but does not act in order to bring about".). (emphasis added).

[243] Article 25, Criminal Code of the Russian Federation (*Ugolovnij Kodeks Rossijskoj Federacii*), as translated and cited in Paramonova 2011, p. 438. (emphasis added). Given the phrase "or was indifferent to them", it seems the Russian version of 'indirect intent' also covers *dolus eventualis*.

[244] Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras 358–389 (emphasis in original). The ICC Pre-Trial Chamber in *Bemba* is of the view that the standard to distinguish '*dolus directus* in the first degree' and '*dolus directus* in the second degree' is 'desire'. In particular, the Chamber explains the latter as an "awareness that his or her acts or omission "will" cause the *undesired* proscribed consequence".

baby ('desired main effect') to be born without the unwanted baby ('permitted side-effect'), the reverse is not possible. That is, the unwanted baby ('permitted side-effect') can only be born together with a twin brother ('desired main effect'): the latter always being the first-born child. In a similar vein, Antony Duff states,

> There are thus three categories of foreseen effect of my action: intended effects, which provide my *reasons for* action; expected side-effects which provides *reasons against* the action; and expected side-effects which, since they provide *no reason either for or against* the action, are irrelevant to it. I bring the first two kinds of effect about intentionally, since I am properly held responsible for them: but I do not bring the third kind of effect about intentionally; such effects should not figure in descriptions of my intentional actions, since I am not properly held responsible for them.[245]

If 'destruction of a group' is something 'wanted' or something providing you with a 'reason for' an action, your state of mind should be classified as 'direct intent/purposely'. Putting 'destruction of a group' into the paradigm of 'indirect intent/knowingly' makes the destruction something 'unwanted (or uninterested)' or something providing you with a 'reason against' your action. That is to say, it is counterintuitive to see that, theoretically speaking, what the knowledge-based notion of genocidal intent presumes is the fact that 'destruction of a group' is an *unwanted or uninterested* (but permitted) side-effect, which provides an actor with a 'reason against' an action. Isn't the 'destruction of a group' being a 'reason for' action the minimum culpability requirement for genocidal liability? Doesn't the rationale behind requiring a showing of an accessory's knowledge of high-ranking actors' genocidal intent for the liability of aiding and abetting genocide consist in checking whether the accessory's mental state was in line with that of principals, together directed toward the destruction of a group? Is it too much to require a more active and positive level of *mens rea* for principal liability beyond that involving 'unwanted (or uninterested) but only permitted side-effect'? Is the knowledge-based theory really applicable to actual cases of genocide? Would you convict a person of genocide as a principal when the destruction of Jews, Tutsis and Bosnian Muslims was actually something unwanted by him? In the insomniac commander hypothetical, did the commander want the destruction of a group? (Didn't he in fact mourn the tragedy?) How do you define the notion 'want'? What is the *mens rea* classification that fits with the state of mind of the commander? Is it 'direct intent/purposely'? Or, 'indirect intent/knowingly'? In order to answer this question, the following study is necessary.

2.5.2.3 Destruction as a 'Desired Main Effect' on the 'Straight Line of Your Purpose'

In addition to the dichotomy of 'desired main effect' and 'permitted side-effect' as a distinguishing feature between 'direct intent/purposely' and 'indirect intent/

[245] Duff 1990, p. 79. (emphasis added). *See also Ibid.* at 82 ("I bring about intentionally those foreseen side-effects which are relevant to my actions as providing reasons against them; it is for these side-effects that I am properly held responsible".).

knowingly', the phrase "[is or is not] on the straight line of your purpose" in the above quoted paragraph from Glanville Williams points at another crucial criterion to discern these two *mens rea* classifications.[246] That is to say, 'direct intent/purposely' concerns only the 'desired main effect' which is always 'on the straight line of your purpose'. If a consequence/effect is not 'on the straight line of your purpose', it can only constitute the 'permitted side-effect' which is an object of 'indirect intent/knowingly'. What the phrase '[is or is not] on the straight line of your purpose' signifies is twofold: the first implication (paying attention to the term 'purpose') is that the 'test of failure' (to be explained below) distinguishes the 'desired main effect' ('direct intent/purposely') and the 'permitted side-effect' ('indirect intent/knowingly') as the former always forms a 'reason *for* action' as briefly discussed above; and, the second implication (paying attention to the term 'line') acknowledges that not only the ultimate consequence/effect but also intermediate consequences/effects are to be encompassed by the notion of 'direct intent/purposely'. Let us have a closer look at each of these two aspects.

First, the phrase "[is or is not] on the straight line of your purpose" signifies that the 'desired main effect' (pursued by 'direct intent/purposely') always forms part of a *reason for* action because it constitutes at least a part of your *purpose*. On the other hand, the 'permitted side-effect' that is not "on the straight line of your purpose" does not constitute any such *reason* because it is irrelevant to your *purpose*. In this regard, Antony Duff clarifies,

> An intended effect provides at least a part of her *reason for* action; its non-occurrence entails at least the partial *failure* of her action: a foreseen side-effect forms no part of her reason for action; its occurrence or non-occurrence is irrelevant to the success or failure of her action.[247]

Duff here relates a 'reason for action' to the 'test of failure' expressing the idea that, without a reason, there is no success or failure. He employs the 'test of failure' in verifying whether an individual state of mind falls into the category of 'direct intent/purposely'.[248] More specifically, we can distinguish the 'desired main effect' (direct intent/purposely) and the 'permitted side-effect' (indirect intent/knowingly) by applying the 'test of failure'.[249] If a non-occurrence of what you foresee as 'virtually/practically/morally certain' or as 'probable/likely/possible' is conceived as a *failure* in your eyes, what you foresee should be categorized

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[246] Similarly, Jeremy Bentham uses the metaphor of "the links in the chain of causes by which the person was determined to do the act". *See* Flannery 1995, p. 378 (1995).

[247] Duff 1990, p. 74. (emphasis added).

[248] Even before Antony Duff, John Finnis also made a similar observation. *See* Chap. 2, footnote 200 *supra* and accompanying text.

[249] Antony Duff explains, "We can draw the distinction between intended effects and foreseen side-effects by the 'test of failure'. If my action does not produce an expected effect, will it have been a failure? If so, that effect is one which I acted with the intention of bringing about [thereby 'direct intent/purposely' becomes applicable to me]; if not, it is merely a foreseen side-effect of my action [thereby 'indirect intent/knowingly' becomes applicable to me]". *See* Duff 1990, pp. 60–63.

as a 'desired main effect'. And, your mental state at such an occasion is to be legally characterized as 'direct intent/purposely', but not 'indirect intent/knowingly'. Contrastingly, if an occurrence or non-occurrence of an object of your foresight of 'a virtual/practical/moral certainty' or of 'a probability/likeliness/possibility' is neither a success nor a failure to you, it cannot constitute a 'desired main effect'. It thus follows that the *mens rea* of 'direct intent/purposely' is not applicable to you in that occasion, but only the possibility of applying 'indirect intent/knowingly' remains. The 'direct intent/purposely' concept to be tested in this manner does not have internal degrees; you just either have it (when the test result is 'you failed') or not (when the test result is 'you did not fail').[250] Accordingly, there is no such distinction as 'clear direct intent/purposely' and 'ordinary direct intent/purposely'.

Second, the phrase "[is or is not] on the straight line of your purpose" signifies that there are multiple spots where "your purpose" can sit because "your purpose" might be linear.[251] In other words, "your purpose" can sit either at the end of the line or somewhere in the middle.[252] Thus, not only the ultimate object of your purpose (at the end of the line), but also an *intermediate* object of your purpose (somewhere in the middle) still forms a part of your reason for action, and subsequently to be characterized as a 'desired main effect'.[253] In this respect, Itzhak Kugler states,

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[250] Similarly, proposing a distinction between 'purposive intentions' (corresponding to 'direct intent/purposely') and 'non-purposive intentions' (corresponding to 'indirect intent/knowingly'), Jack W. Meiland suggests the two tests to distinguish the two concepts: (i) the test of 'trying'; and (ii) the test of 'deciding not to doing (changing your mind)'. That is, (i) if you can say 'I tried to bring it about', you had the 'purposive intention'; and (ii) if you could say 'I decided not to bring it about (I changed my mind about bringing it about)', you had the 'purposive intention'. For more explanation, *see* Meiland 1970, pp. 9–11. For a close similarity between Jeremy Bentham's distinction between direct and oblique intentions and Jack W. Meiland's distinction between purposive and non-purposive intentions, *see* Zaibert 1998, p. 473.

[251] In the same vein, Hans Vest uses the phrase "a (endless and diverging) continuum of means-to-end-relations" concerning the genocidal intent element. *See* Vest 2007, pp. 793–794.

[252] An old example in which the destruction of a group is clearly described as an intermediate consequence/effect of a genocidal campaign is an indictment of the U.S. Military Tribunal under Control Council Law No. 10 in the Subsequent Nuremberg Proceedings. The relevant part of the indictment, albeit concerning the charge of crimes against humanity, reads: "The acts, conduct, plans and enterprise charged in para 1 of this Count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics. The object of this program was to strengthen the German nation and the so-called 'Aryan' race at the expense of such other nations and groups […]". United States v. Ulrich Greifelt et al. ('RuSHA Case'), Case No. 8, Indictment, at 5 (1947–1948), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf. Accessed 23 December 2015.

[253] *See e.g.*, Paramonova 2011, p. 439 ("The volitional content of the intent refers to either wishing the ensuing of socially dangerous consequences […]. The wish is characterized as striving for certain results which appear as a final goal, or as an intermediate stage of the conduct, or as a means for achieving these goals".). Greg Taylor points out that "[a]fter all, as is sometimes said, an actor's final goal (getting rich, enjoying life more) is, generally speaking, unlikely to be punishable in itself". Taylor 2004, p. 106.

> The consequence need not be desired as an end in itself; it may be desired as *a means to* another end. For example, if a person causes the death of his relative in order to receive an inheritance, he is considered, from the perspective of the law, to act with intent to cause his death, although for him the death is only desired as *a means to* a further end (to receive the inheritance), so that he may be convicted of an offence conditioned upon an intention to cause death.[254]

In connection with this paragraph, note also the following observation from Jeroen Blomsma:

> It is irrelevant whether the actor wished for or in fact mourns the consequence. For example, he might mourn the consequence of death because he killed an innocent person, but *want it anyway* to cover up his crime. The death is *the means to* further the end of covering up the crime. Not primarily desired goals that are understood *as necessary means for* the end-goal qualify as *dolus directus* as well.[255]

An actor's purpose that sits in the middle of the 'straight line of his purpose' (as opposed to 'sitting at the end of the line') is described by both of these two commentators as something *desired* as a "means to" a further end. Indeed, the phrase 'an end or a means to a further end' is a set phrase frequently used by scholars in relation to the notion of 'direct intent/purposely'.[256] And since the "means" *sitting on the line* should be classified as a 'desired main effect', the relevant state of mind of the actor is to be characterized as 'direct intent/purposely'.

Let us then apply the 'test of failure' and the 'test of the straight line of your purpose', to the hypothetical of insomniac commander. First, it is obvious that the non-occurrence of the destruction of the group should have been perceived by him as a failure. That is because the commander cannot receive the enormous amount of money that the old woman promised without first achieving the destruction. We can, therefore, safely conclude that his mental state is to be classified as 'direct intent/purposely'. Second, for the commander, the destruction of a group was just a means to a further end of being wealthy and affluent. However, the test of 'straight line of purpose' says that the destruction of a group being an intermediate object of his purpose does not keep a court from applying the *mens rea* of 'direct intent/purposely' to him.[257] Thus, both tests indicate that the insomniac commander's state of mind should be interpreted as 'direct intent/purposely'. But he expressed deep regrets, and even suffered from insomnia. In this respect, isn't it too harsh to say that his mental state fits in with the highest volitional level of 'desire' (corresponding to 'direct intent/purposely')? That's the subject of the next sub-subsection.

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[254] Kugler 2002, p. 4. (emphasis added). *See also* Kugler 2011, p. 362 ("[…] it is not necessary for the actor to desire the result as an end in itself. Intention is established even if the actor only needs the result to occur as a means to another end".).

[255] Blomsma 2012, p. 67. (emphasis added).

[256] *See e.g.,* Finnis 2011, pp. 142 and 176 ("whether as its end or as a means to that end"); Hart 2008, p. 122.

[257] *See* Bassiouni and Manikas 1996, p. 529 (in the context of 'ethnic cleansing' in the Former Yugoslavia, observing that the atrocities "would still constitute genocide even if the ultimate goal, or motive, was expulsion".).

2.5.2.4 The Notion of 'Desire in a Broad Sense'

Explaining the *mens rea* of 'direct intent/purposely', Itzhak Kugler observes,

> [S]ome scholars […] suggest that we should define 'intention' without using the notion of *desire or wish* because sometimes when we act in order to achieve a certain result which is only needed by us as a means to another end, we may be very sorry that we have to cause that result. If a person causes the death of his dog in order to put it out of its pain, he may be very sad when he is acting. In this case we say that he intends to kill the dog, since he acts in order to kill it, in spite of the fact that he is very sorry that he must cause the death of the dog. The fact that in these kinds of cases the actor is sad and sorry has led some scholars to suggest that we cannot say that in such cases there is a *desire or wish* that the result […] ensue. And this, in turn, has led them to claim that intention should not be defined in terms of *desire or wish*.[258]

So, there is a view that says that this 'direct intent/purposely' "should not be defined in terms of desire or wish" in view of the fact that the actor might be sad, sorry or even mourns the result that he himself is bringing about. In this context, it is important to note that the notion 'desire or wish' as used in this quoted paragraph connotes a positive *emotional* attitude (e.g., want, will, eagerness or enthusiasm), while excluding its negative counterparts (e.g., reluctance, sorrow or repugnance). At this juncture, a crucial question in understanding a clear distinction between 'direct intent/purposely' and 'indirect intent/knowingly' emerges: how do you define the concept of 'desire' as the volitional element of 'direct intent/purposely'? It is to be remembered that, in the *mens rea* framework that I proposed in the beginning of this section,[259] it is the volitional element of 'desire' (that exclusively belongs to 'direct intent/purposely') that distinguishes 'direct intent/purposely' and 'indirect intent/knowingly' (because they might share the same cognitive element of 'foresight of a consequence to a virtual/practical certainty'). In this regard, pay attention to the term 'desire' in the following quotation from David Ormerod. Does the term have the same meaning as 'desire' used in the quoted paragraph from Kugler?

> Everyone agrees that a person intends to cause a result if he acts with the *purpose* of doing so. If D has resolved to kill V and he fires a loaded gun at him with the *object* of doing so, he intends to kill. It is immaterial that he is aware that he is a poor shot, that V is nearly out of range, and that his chances of success are small. It is sufficient that killing is his *object* or *purpose*, that he *wants* to kill, that he acts *in order to* kill. Note that the focus is on D's *purpose*, not his *desire* or *wish* as to the consequences. D can intend by having a result as his *purpose* without *desiring* it, as where D gives V a lethal injection to put him out of his pain, but wishes he did not have to.[260]

In this paragraph, the notion of "desire" directed towards the consequence of an action is used as opposed to those concepts of "purpose", "object", "want", and "in order to". They all signify a pro-attitude toward a consequence. In the context of this paragraph, the "desire" and 'purpose/object/want/in order to' are, however, differentiated in that the former connotes a pro-attitude based on 'emotion' and the

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[258] Kugler 2002, p. 4 (2002). (emphasis added).

[259] *See* the chart on page 51 *supra*.

[260] Ormerod 2011, pp. 106–107. (emphasis added).

latter a pro-attitude based on 'reason'. In the quoted paragraph above from Kugler, the term 'desire' also connotes 'emotion', rather than 'reason'. While the desire as an *emotion* cannot accompany any negative emotions such as regrets, 'purpose/object/want/in order to' as being a *reason* can.[261] So, you may have a 'purpose/object/want/in order to' with regrets, reluctance, sorrow or repugnance, as was the case in the hypothetical of the insomniac commander. In this context, you are free to replace the 'purpose/object/want/in order to' with such terms as 'desire' because both share the common character of being a pro-attitude. What is important is not the term used, but the content. To the extent that a term of a pro-attitude contains a content of 'reason' or 'rationality' (as opposed to 'emotion'), that term is free to accompany any negative emotions such as regrets, reluctance, sorrow or repugnance. In this respect, John Finnis observes that "one can choose and intend to do what is utterly repugnant to one's dominant feelings. —that is the important reality (or the most important of the realities) which [English] judges recall when they state, at large, that *one can intend what one does not desire*".[262] The oft-cited phrase "most unwillingly but yet intentionally"[263] also signifies the same. Citing John Austin's account saying "intended consequences not always desired", George Fletcher further clarifies:

> Yet an influential analysis beginning with John Austin in the nineteenth century holds that intending should be considered apart from the issue of desiring. It would follow that acting intentionally consists merely in "having" certain cognitive states, such as the foresight of consequences and the knowledge of what one is doing. The Model Penal Code offers a definition of acting "purposely" that minimizes the importance of the desires, wishes, or wants of the actor. The critical facts in deciding whether someone purposely commits an offense are his "conscious object" [vis-à-vis the results of his conduct].[264]

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[261] In a different context of discerning '*dolus directus* in the first degree' and '*dolus directus* in the second degree', Mohamed Elewa Badar opines that, '*dolus directus* in the second degree' can 'regret'. Badar 2013, p. 424.

[262] Finnis 2011, p. 174–175 (emphasis added) (describing the contrasting views of English judges and the legal academics on the meaning of intention: judges distinguish intention and desire; legal academics assert that "to intend a consequence is to desire it".). For national criminal codes which explicitly contain a negative description of 'not desiring' in their definition of intent (particularly, indirect intent and *dolus eventualis*), *see* the italicized phrases as follows: Article 19(1) of the Romanian Criminal Code ("An act is committed with intent when the offender: […] (b) foresees the result of his action and, *even though he does not intend it*, accepts the possibility of its consequences".); Article 18 of the Uruguayan Criminal Code ("[…] An action is considered intentional when the result coincides with the intention […]. A result *which was not wanted* but which was foreseen is considered intentional. […]"). (all English translations from Sieber et al. (eds) 2011, pp. 423, 438 and 473 respectively.

[263] *See* the quoted text from *Lynch* case (1976) before the Court of Appeal of England and Wales in Duff 1990, p. 19. In *Lynch*, the accused was found to be guilty of aiding and abetting murder on the basis of his intentional act of reluctantly driving a member of IRA to the killing site under duress. Thus, strictly speaking the intent in this context is an intent concerning the conduct of aiding/abetting as such. See *Ibid*. at 24 (comparing with cases involving a direct attack on a victim in which the attacker's "intent will have been the same as his desire and motive", the author says, "[i]n the more problematic kind of case, the jury may need to be told that 'a man may intend to achieve a certain result whilst at the same time not desiring it to come about'".).

[264] Fletcher 2000, pp. 440–441.

What is indicated by all these discussions is that the notion of 'direct intent/purposely' should be defined in terms of 'reason' or 'rationality' because 'emotion' is irrelevant. In this regard, distinguishing 'sense (a) of desire' (desire based on reason/rationality) and 'sense (b) of desire' (desire based on emotion), John Finnis observes,

> The [English] judges [as opposed to English legal academics] are right insofar as 'intention', 'intend', and 'with intent' unequivocally belong with sense (a) of 'desire'; these terms refer to what is *freely chosen* just insofar as it is *chosen* as an intelligent and rationally appealing option, desirable in sense (a), whether it is also desired in sense (b) *or not*. […] The conception of intention used in moral and legal reasoning, properly understood, is tightly linked to sense (a) of 'desire' precisely because it is tightly linked to the moral significance of *choice*.[265]

Thus, choice being the decisive content of intention renders the notion of intention free from emotion. We make choices sometimes happily, and at other times painfully. And, by making a choice, we intend something. To sum up, when it is said that "intention should not be defined in terms of desire […]",[266] the term "desire" means a 'desire as an *emotion*'. Put differently, there is no problem to define intention in terms of desire as far as the concept of desire is a 'desire as a *reason*'. But we should be cautious at this point that the purpose of this conceptual analysis is just not to exclude the desire with negative emotions such as regrets, reluctance, sorrow or repugnance from the realm of 'direct intent/purposely'. That is, both the 'desire with positive emotions' and 'desire with negative emotions' can constitute 'direct intent/purposely'. Thus, the notion of 'direct intent/purposely' is capable of accompanying all the concepts of 'desire as a reason', 'desire with positive emotions', 'desire with negative emotions' and 'desire with neither the positive nor the negative emotions'. When they say "intention should not be defined in terms of desire", what they are concerned with is that they just do not want to be deceived by negative emotions. They know that the notion of 'direct intent/purposely' is broad enough to encompass the actor's regrets, reluctance, sorrow or repugnance. In this respect, I think it is preferable to use the notions of 'desire in a broad sense' and 'desire in a narrow sense' in explaining the 'direct intent/purposely',[267] rather than the combination of 'desire as an emotion' and 'desire as a reason'.[268] Let us keep in mind that 'direct intent/purposely' should be defined in

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[265] Finnis 2011, pp. 175–176. (emphasis in original). In this respect, it is noteworthy that, for the purpose of clarifying the definition of 'intention', especially in reference to the concept of 'desire', John Finnis emphasizes the distinction between 'intelligible/rational factors' and 'factors contributed by feeling, sense and imagination'. It appears that the former concerns the 'desire based on reason', and the latter 'desire based on emotion'. *Ibid*.

[266] *See* Chap. 2, footnote 258 *supra* and accompanying text.

[267] For a similar observation in which 'want in a broad sense' and 'want in a narrow sense' are differentiated, *see* Kugler 2002, pp. 4–5.

[268] Alternatively, provided that there is a general consensus on the term that can represent the volitional element of 'direct intent/purposely', simply stop using the term 'desire' would be another option.

terms of 'desire in a broad sense' that covers both the positive emotions and the negative emotions. In this connection, Otto Triffterer seems to suggest something similar:

> 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. […] [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.[269]

I believe one of the most significant causes of the pervasive confusion and difficulty that troubled the relevant discussions on genocidal intent thus far is that commentators have failed to catch the notion of 'desire in a broad sense'. A careful conceptual scrutiny of such crucial distinctions as 'desired main effect versus permitted side-effect' and 'desire in a broad sense versus desire in a narrow sense' has hardly been performed. This heedlessness has permitted the issue of 'degree/intensity of volition' to occupy the center of whole discussions on the notion of genocidal intent under such vain slogans as '*dolus specialis*/special intent/specific intent' and 'purpose-based approach versus knowledge-based approach'. In a very rare example in which the notion of 'permitted side-effect' is mentioned, we still notice conceptual confusions as follows:

> 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?[270]

Applying the *mens rea* framework that I proposed at the beginning of this section,[271] it seems the legal concepts used in this paragraph connote *mens rea* classifications as follows: (i) "ought to": the cognitive standard of the 'foresight of a virtual/practical certainty' vis-à-vis 'indirect intent/knowingly'; (ii) "most probably might": the cognitive standard of the 'foresight of a high probability' vis-à-vis

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[269] Triffterer 2001, pp. 405–406. (emphasis added). Likewise, Hans Vest observes, "[i]nterestingly, the case law of the ad hoc Tribunals seems never to have underlined the emotional engagement and strength of the perpetrator's intent to destroy the protected group except in the *Jelisić* Judgments". Vest 2007, p. 796.

[270] Triffterer 2001, pp. 404–405. (emphasis added). Hans Vest also briefly mentions the notion of "side-effect" in his article on genocidal intent. *See* Vest 2007, pp. 788–789.

[271] *See* the chart on page 51 *supra*.

'*dolus eventualis*/recklessness'; and (iii) "additional consequence": the permitted side-effect as the object of 'indirect intent/knowingly'. Given that Triffterer conceptually relates 'aiming to' to 'additional result' and so forth, the quoted paragraph sounds confusing. Talks on the theme of genocidal intent always return back to 'degree/intensity of volition', which is unfortunate. The phrase "aiming with all his will" tends to be delusive as it suggests that there exists something like "aiming with his moderate will". In a real life, surely, such distinction can be made. But, in the law of *mens rea*, there is no such distinction. If you aim, it is legally irrelevant whether you aimed something with all your will or with just some portion of your will. Insofar as you 'desired' something based on a reason and rationality, the law characterizes your mental state as 'direct intent/purposely'. The weighty content of genocidal intent as contained in the phrase 'to destroy a group, in whole or in part, as such' cannot affect the law of *mens rea* insofar as that content is to be wrapped by an individual state of mind. The theory of *mens rea* does not discriminate between a weighty content and a light content. If the genocidal intent element wants to receive a special treatment, it must give up being a *mens rea*.

To sum up, genocidal intent as a *mens rea* is a 'direct intent/purposely' directed to the 'desired main effect' of the destruction of a group.[272] Non-occurrence of 'destruction of a group' should be conceived as a *failure* to the actor (the test of failure), and the destruction must be on the straight line of your purpose being the ultimate end or an intermediate end for a further end (the test of the straight line of your purpose). A person can possess genocidal intent with such negative emotions of regret, sorrow or repugnance, because the volitional element of 'desire' for 'direct intent/purposely' is to be defined as 'desire in a broad sense'. In other words, the genocidal intent element understood in this manner on the basis of a rational choice and decision is to be legally established regardless of the emotion, be it of a positive or a negative nature, of an actor. The insomniac commander's mental state, therefore, should be classified as 'direct intent/purposely': In addition to passing the two tests of 'test of failure' and 'test of the straight line of your purpose', he had the 'desire in a broad sense' which is the volitional element of 'direct intent/purposely' despite his regret and sorrow.

2.6 Complications and Frustrations: Individualistic Genocidal Intent at the *Ad Hoc* Tribunals

In this section, we will look into the relevant case law of the *ad hoc* tribunals. The purpose of this section is to demonstrate how complex and counterintuitive the relevant analysis of the genocidal intent element in the jurisprudence of the tribunals

[272] For the same view, *see* Blomsma and Roef 2015, p. 108; Vyver 1999, p. 308. In this respect, also consider the relevant national jurisprudence, such as Hungary where "in cases when the statutory offense definition contains a particular purpose, like financial advantage or premeditation […], the crime can only be committed with *dolus directus*. The reason behind this is that setting a specific goal cannot be just accepted but must be desired by the offender". Csúri 2011, p. 368.

is. The analysis in Chaps. 3 and 4 surrounding the notions of 'collective genocide' and collective genocidal intent is to be performed against the backdrop of this section in which the complications and frustrations concerning the doctrinal and evidentiary aspects of genocidal intent are to be further revealed. It should be kept in mind that the discussion of the *ad hoc* tribunals' practice in relation to the genocidal intent element contained in this section reflects the mostly one-layered perspective of the case law vis-à-vis the crime of genocide in general and genocidal intent in particular. Contrastingly, the analysis contained in Chaps. 3 and 4 starts from establishing the two-layered structure of genocide—i.e., the 'conduct level' and the 'context level'.

2.6.1 The Akayesu Paradox: Applying the Knowledge-Based Theory to the Purpose-Based Concept of Genocidal Intent?

The claim that the judges of the ICTY and the ICTR issuing decisions on the crime of genocide almost universally support the purpose-based approach tells only a part of the whole story. While it is evident that they appear to espouse the purpose-based notion of genocidal intent *in theory*, the extent to which the knowledge-based approach is implicitly applied *in practice* is so enormous that the doctrinally proclaimed purpose-based definition of genocidal intent has become 'the emperor's new clothes'. Everybody is perplexed, but they still chant. 'The emperor's new clothes' has been predicted and forewarned by commentators by way of such expressions as 'squeezing facts' and 'evidential backdoor'.[273] Most notably, although the *Akayesu* Trial Judgment has been cited by almost all the commentators who explain the purpose-based approach as the leading authority, a careful reading of the judgment surely embarrasses us. It is not uncommon to spot the self-contradictory statements in international decisions dealing with genocide. They often say something like, "[the Trial Chamber's] sole task is to assess the individual criminal responsibility of the accused […]. [T]he seriousness of the charges brought against the accused makes it all the more necessary to examine scrupulously and meticulously all the inculpatory and exonerating evidence, in the context of a fair trial and in full res[p]ect of all the rights of the Accused".[274] Their treatment of facts adduced on the charge of genocide, however, often betrays such

[273] *See* Greenawalt 1999, p. 2281 ("[t]he danger of adhering to a specific intent standard in such situations is not merely that culpable perpetrators will escape liability for genocide, but perhaps more ominously that the evidentiary problems will compel courts to squeeze ambiguous fact patterns into the specific intent paradigm".); Kress 2005, p. 571 ([case law is] "formulat[ing] the rigid purpose-based approach to genocidal intent in the abstract and then circumvent this very standard through the evidential backdoor".).

[274] Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, para 129.

a self-declared legal duty to examine the evidence in a strict manner, which is evident from the following paragraphs from *Akayesu*:

> The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, *inter alia*, from all acts or utterances of the accused, or from the *general context* in which other culpable acts were perpetrated systematically against the same group, *regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators*.[275]
>
> Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is able to infer, beyond reasonable doubt, the *genocidal intent of the accused* in the commission of the above-mentioned crimes.[276]

The core message of these two paragraphs is that one can prove the purpose-based individualistic genocidal intent through non-individualistic overall facts. Unfortunately, the conceptual gap between the purely individualistic purpose-based *mens rea* and the circumstantial facts of a collective nature has largely been overlooked and ignored. It is, however, certainly an overstatement that the accused's personal 'desire in a broad sense' is to be inferred mostly from the contextual circumstances.[277] In this respect, Nina Jørgensen rightly asks, "[i]t may be questioned whether this truly satisfies the [purpose-based] specific intent requirement or is only sufficient to prove knowledge of the genocidal plan".[278]

The two paragraphs cited above can be regarded as a summary of a more detailed discussion on the issue of *collective* genocidal intent in the preceding part of the judgment, from paras 112 to 129, entitled "Genocide in Rwanda in 1994?". There, the *Akayesu* Trial Chamber considers the collective genocidal intent under such expressions as "the intention of the perpetrators of these killings"[279]; "the resolve of the perpetrators of these massacres"[280]; and "an intention to wipe out the Tutsi group in its entirety".[281] For the purpose of the Chamber's analysis contained in paras 112 through 129, the collective genocidal intent represented by these phrases is certainly treated as being distinct from the individual genocidal intent of the accused. Thus, in the final paragraph of the section "Genocide in Rwanda in 1994?", the Chamber says,

> […] the Chamber holds that the fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence it in its decisions in the present case.

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275 *Ibid.* para 728. (emphasis added).

276 *Ibid.* para 730. (emphasis added).

277 For the notion of 'desire in a broad sense', *see* Sect. 2.5.2.4 *supra*.

278 Jørgensen 2001, p. 298. Furthermore, note that Jørgensen is of the view that "the concept of genocide was elaborated against the background of a genocidal scheme that was meticulously documented with the result that it was not difficult to prove the intent of the Nazi leaders". *Ibid*.

279 Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, para 118.

280 *Ibid.* para 119.

281 *Ibid.* para 121.

> Its sole task is to assess *the individual criminal responsibility of the accused* for the crimes with which he is charged, the burden of proof being on the Prosecutor.[282]

Unfortunately, however, this proclamation of the Chamber turns out to be empty because the decision on the accused's individual genocidal intent (paras 727–730) is made mainly on the basis of the evidence already considered to find the 'collective genocide' and 'collective genocidal intent' (paras 112–129).[283] In other words, the evidence supporting individual genocidal intent and collective genocidal intent overlap so much that one might assert that the accused's individual genocidal intent is just an imputed collective genocidal intent which can be inferred from the overall context of atrocities without any significant evidential considerations about the individual state of mind of the accused.[284] In this regard, it appears that, in practice, individual genocidal intent of the accused is established on the basis of his *presumed knowledge* of the overall context of the massacres.[285] That is because, in spite of the absence of any reference to the accused's knowledge of the overall context in the *Akayesu* Trial Judgment, there is no possible legal nexus between the context of massacres and his individual genocidal intent except for that knowledge. In this regard, one might say that a significant portion of the Chamber's reasoning on Akayesu's individual genocidal intent drawing from the context of atrocities is actually applying a version of the knowledge-based approach to genocidal intent. Given that the concept of genocidal intent theoretically understood by the Chamber appears to be in line with the purpose-based definition of genocidal intent,[286] rather than its knowledge-based counterpart, such a covert application of the knowledge-based approach looks puzzling. In this respect, Hans Vest observes,

> Interestingly, the case law of the *ad hoc* tribunals seems never to have underlined the emotional engagement and strength of the perpetrator's intent to destroy the protected group except in the *Jelisić* judgments. Probably feeling that risk, the evidence held to be decisive by the courts has actually always been inferred from the knowledge-based acts of the accused.[287]

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[282] *Ibid.* para 129. (emphasis added).

[283] The notions of 'collective genocide' and 'collective genocidal intent' will be the main themes of Chaps. 3 and 4 *infra* respectively.

[284] In *Akayesu*, in addition to his conviction on the charge of genocide proper (count 1), the Trial Chamber finds the accused guilty of 'direct and public incitement to commit genocide' (count 2) based on his speeches, on several occasions, "calling, more or less explicitly, for the commission of genocide". *See* Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, paras 672–675 and 729. This seems to be the only individualistic evidence considered vis-à-vis the genocidal intent of the accused.

[285] Prosecutor v. Akayesu, Trial Judgment, 2 September 1998, paras 727–730.

[286] *Ibid.* para 498 (stating, "[g]enocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged".).

[287] Vest 2007, p. 796.

As will be explicated in more detail in the next subsection 2.6.2, the purpose-based approach has become nominal as its doctrinal proclaimer—i.e., the case law of the ICTY and the ICTR—betrayed itself by taking a self-contradictory path of proving the doctrinally purpose-based genocidal intent mainly through the circumstantial facts surrounding the overall context. Since it is 'cognition' rather than 'volition' that is more apt to attend the *actus reus* of 'circumstance', it seems that the knowledge-based approach, in practice, prevails over the purpose-based approach at the ICTY and the ICTR. Let us continue our examination on this point of actual proof of the genocidal intent element in more detail in the following subsection.

2.6.2 *Case Law Claiming the Purpose-Based Approach Doctrinally, but Denying It Evidentially?*

The *Krstić* Appeals Chamber reverses the Trial Chamber's conviction of genocide stating,

> As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. *This knowledge on his part alone cannot support an inference of genocidal intent.*[288]

This paragraph appears to be a strong vindication of the purpose-based approach. An individual person's inner state of mind—i.e., his *mens rea* in criminal law terms—generally manifests itself in two forms: words and deeds. So judges usually infer the accused's *mens rea* from his individual words and deeds. This principle has also been applied to genocidal intent, and it is not uncommon to see such observations made by international judges placing an emphasis on individual 'words and deeds'.[289] The relevant case law, however, does not stop there. For the purpose of inferring individual genocidal intent, international judges almost universally add another point of reference which can be represented by such phrases as 'a context of violence' or 'surrounding circumstances of massacres'. In criminal law, inferring *mens rea* indeed involves the consideration of the relevant context.[290] That context, however, is closely connected to the actor and

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[288] Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 134. (emphasis added).

[289] *See e.g.*, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, 21 May 1999, paras 527 and 541. *See also* Sect. 4.1.2 *infra*, text accompanying the notes 77–84.

[290] *See e.g.*, Shapira-Ettinger 2007, pp. 2580–2581 ("The physical, observable act can be proven by direct evidence, but only circumstantial evidence can be offered to prove a mental event".). See also *Ibid*. at 2582 ("The only difference between what happens internally and other external facts is the inherent inaccessibility of the internal facts. Thus, proof of a mental state is never direct because it is not observable by anyone other than the person experiencing it".).

his action.[291] Thus, Duff states that "[w]e discover her intentions by locating this particular action within a broader pattern of actions and reactions; by relating it to an end […], and by relating that to its own wider context".[292] The attention is primarily given to a "particular action" and the "wider context" that belongs to or surrounds the action. Yet, the context and surrounding circumstances from which international judges infer genocidal intent far exceeds such individualistic boundaries of a specific actor and his action. Moreover, the pattern of judicial analysis of genocidal intent carried out by international judges reveals that the probative importance of this category of 'circumstantial' evidence is so colossal as to almost obviate the first two reference points of 'words and deeds'. The prevalence of this phenomenon of heavy reliance on contextual/circumstantial evidence signifies damaging implications for the individualistic approach to genocidal intent in general, and for the purpose-based approach in particular. That is, despite this phenomenon, as Article 30 of the ICC Statute shows, there is still room for the knowledge-based concept of genocidal intent to survive, as 'knowledge' is the sole subjective element applicable to the 'circumstantial' facts.[293] In the same vein, Otto Triffterer observes,

> [Genocidal] 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" [identical to '*dolus directus* in the first degree' in the Continental tradition or 'purposely' in the Model Penal Code] 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*.[294]

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[291] In this respect, the *Bagilishema* Trial Chamber's observation deserves quotation: "Thus evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention of a person is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action". Prosecutor v. Bagilishema, Trial Judgment, 7 June 2001, para 63.

[292] Duff 1990, pp. 131–132. Duff makes the cited observation in discussing the *Hyam* case in England. He further emphasizes the importance of an actor's 'words and deeds' in inferring an individual *mens rea* by stating, "[t]hat wider context includes, of course, her own beliefs, desires and responses. But these are themselves shown, or could in principle be discerned, in her actions: in what she does, in what she says (or would say), and in how she responds or would respond to what happens". *Ibid*.

[293] The ICTY Appeals Chamber in *Krstić* closely relates 'knowledge' (in particular, 'constructive knowledge') to circumstantial evidence. Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 81 ("The Trial Chamber's reliance upon language such as 'must have known' is indicative of the nature of the case against Krstić being one based upon circumstantial evidence".). In a similar vein, William Schabas observes as follows: "Adoption of a 'purpose–based' approach, which dwells on intent, results in a focus on individual offenders and their own personal motives. A 'knowledge–based' approach, on the other hand, directs the inquiry towards the plan or policy of a State or similar group, and highlights the collective dimension of the crime of genocide". Schabas 2009, p. 242.

[294] Triffterer 2001, p. 405 (emphasis added). Yet, contrary to Triffterer, I do not think that the "emotional part" is necessary to constitute the mental element of '*Absicht*/*dolus directus* in the first degree/purposely'. For more discussion, *see* Sect. 2.5.2.4 *supra*.

Yet, *doctrinally speaking*, the overwhelming probative significance attached to the 'context' is likely to cripple the purpose-based notion of genocidal intent because volitional aspect of *mens rea* is barely in sync with the *actus reus* of circumstance.[295] It is 'words and deeds' from which individual volition is to be inferred far more comfortably. It is to be, however, noted that I said "doctrinally speaking". What I mean is that, *practically speaking*, since context/circumstance of genocide significantly overlaps with destructive consequences in actual genocidal campaigns,[296] there is still room for the purpose-based theory to survive (in that the destructive consequence forms the 'desired main effect').

In this connection, let me sketch out some instances in which judges seem to infer the purpose-based genocidal intent from words and deeds, in particular, from words. The priority of words over deeds in this context is due to the fact that the usual suspects in international criminal proceedings are mostly political and military leaders of high ranks who rarely commit the underlying acts of genocide themselves. First, the Appeals Chamber in the *Karadžić* case admits the possibility of genocidal intent of Karadžić and other JCE members on the basis of their utterances.[297] Such evidence includes (i) "in meetings with Karadžić, it had been decided that one third of Muslims would be killed, one third would be converted to the Orthodox religion and a third will leave on their own and thus all Muslims would disappear from Bosnia"[298]; (ii) Karadžić's alleged statement that "his goal was to get rid of the enemies in our house, the Croats and Muslims, and not to be in the same state with them [anymore] and that if war started in Bosnia, Muslims would disappear and be annihilated".[299]; (iii) the Commander Mladić's alleged statement that "my concern is to have them vanish completely"[300]; and (iv) the

[295] For a similar view, *see* Haren 2006, pp. 223–224 ("Although circumstantial evidence certainly is a helpful tool to prove that the perpetrator was aware and had knowledge of the fact that he acted in the furtherance of a genocidal campaign, it, however, is much more difficult to prove by circumstantial evidence that the perpetrator also had a strong will, i.e., he had a conscious desire to destroy a protected group. Consequently, one cannot avoid the impression that when the *Akayesu* Trial Chamber posed a broad evidentiary standard, it circumvented the purposeful standard by introducing the knowledge standard through the evidentiary backdoor. This behavior indeed could be an indication for the purposeful standard to be reconsidered".). Note however that, contrary to the mental element framework under Article 30 of the ICC Statute, the *mens rea* of 'purposely' is applicable to 'circumstance' under the Model Penal Code. *See* American Law Institute, Model Penal Code, § 2.02 (2)(a)(ii) ("A person acts purposely with respect to a material element of an offense when: […] (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist".).

[296] In respect of this overlap, *see also* Sect. 2.4.2 *supra*.

[297] Prosecutor v. Karadžić, Rule 98 *bis* Appeals Judgement, 11 July 2013, paras 97–101.

[298] *Ibid*. para 97 (also note that at the hearing before the Appeals Chamber, "Karadžić's legal advisor accepted that, taken at its highest, this statement could constitute evidence of genocidal intent".). It seems that, in the relevant case law, decisions made during meetings are regarded as something equivalent to utterances.

[299] *Ibid.* para 98.

[300] *Ibid*.

President of Serbia, Slobodan Milosević's statement that "Momcilo Krajišnik, President of the Bosnian-Serb Assembly, wished to kill off all the [Muslims and Croats]".[301] Second, the *Tolimir* Trial Chamber's finding of individual genocidal intent of the accused is partly based on the evidence of the use of derogatory and dehumanizing language on the part of the accused and his colleagues.[302] Given that subordinate soldiers would interpret such use of derogatory language as a green light to behave in the same way, the Chamber concludes that "the Accused encouraged the use of derogatory terms so as to provoke ethnic hatred among members of the Bosnian Serb Forces and an attitude that Bosnian Muslims were human beings of a lesser value, with a view to eradicate this particular group of the population from the Eastern BiH".[303]

These facts of utterances are indeed compatible with the purpose-based notion of genocidal intent. As considered previously mainly in respect of the jurisprudence of the *Akayesu* case, despite the common understanding that the origin of the purpose-based approach is international case law, an actual review of evidence set out therein reveals that there exists a significant discrepancy between the purposed-based definition of genocidal intent and the evidence in support thereof. In broad terms, the most significant reason for this discrepancy is the *excessive reliance placed on 'overall context'* by international judges in proving the purpose-based genocidal intent. Despite the caveat always heralded by the judges that they are *inferring* the *mens rea* of genocidal intent from those circumstances, the gap between such circumstantial evidence and the purpose-based definition of a purely subjective nature is considerable. In this regard, it is not surprising to see that individual defendants habitually complain, 'they infer my intent from the acts of others'.[304]

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[301] *Ibid.*

[302] Prosecutor v. Tolimir, Trial Judgment, 12 December 2012, para 1172. The relevant case law often mentions derogatory language in relation to members of a group targeted. It is to be noted, however, that the probative value of such utterances needs to be assessed cautiously, in particular, in the context of collective violence. Such was the case in *Krstić* where the Appeals Chamber gave no evidentiary weight to the accused's use of derogatory language towards the Bosnian Muslims, because "this type of charged language is commonplace amongst military personnel during war". Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 130. Similarly, in *Popović* et al., both the Trial and Appeals Chamber are of the view that evidence of Popović's use of derogatory language ("balija") did not form part of the decisive factor in finding the accused's genocidal intent. Prosecutor v. Popović et al., Appeals Judgment, 30 January 2015, para 470. The same applies to another defendant Drago Nikolić in *Popović* et al.: Regarding his use of derogatory language, the Trial Chamber observes "there is nothing to suggest [that] this was [something] other than a reflection of an unacceptable but common practice". In this respect, it is to be noted that the Trial Chamber takes into account the culture of the VRS in which the use of such derogatory language was commonplace. Prosecutor v. Popović et al., Trial Judgment, 10 June 2010, para 1399. See also *Ibid*. para 1312; On the other hand, *Tolimir* Trial Chamber indeed draws the accused's genocidal intent partly on the basis of his use of derogatory languages against the Bosnian Muslim group. Prosecutor v. Tolimir, Trial Judgment, 12 December 2012, paras 1168–69.

[303] Prosecutor v. Tolimir, Trial Judgment, 12 December 2012, para 1169.

[304] For a more detailed discussion, *see* Sect. 4.1.2 *infra*.

I think that an example of the most obvious and, perhaps, the strongest evidence demonstrating the existence of the purpose-based notion of genocidal intent can be found in the *Tolimir* Trial Judgment of the ICTY[305]: a written report prepared by the accused in which he proposed to another high-level actor that "we could force Muslims to surrender sooner if we *destroyed* groups of Muslim refugees fleeing from the direction of Stublic, Radava, and Brloska Planina and that the *best way to destroy* them would be *by using chemical weapons or aerosol grenades or bombs*".[306] While characterizing this report as an expression of the accused's "complete lack of humanity and utter contempt of human life", the Prosecution asserts that, from this document in which the accused's ruthless attitude towards women and children fleeing from their homes in Žepa is demonstrated, the "Trial Chamber can reasonably infer" his even harsher stance against the able-bodied men in Srebrenica.[307] Consequently, the Chamber observes that, "[t]aking into consideration the context in which the Accused sent this report and its meaning, […] the only reasonable inference to be drawn by the Majority is that this document manifests the Accused's *determination* to destroy the Bosnian Muslim population".[308] It is important to note in this context, however, that this strong evidence only forms part of the facts on the basis of which the Chamber drew a conclusion that the accused "possessed genocidal intent".[309] In other words, the proof of the *overall context of violence* surrounding the accused's individual participation in and contribution to 'JCE to Murder' and 'JCE to Forcibly Remove' are the key factual platform to find the accused's individual genocidal intent. Moreover, the Chamber's emphasis on the accused's knowledge of the "large-scale criminal operations on the ground" and of the "genocidal intentions of the JCE members" signals a trace of the application of the knowledge-based concept of genocidal intent.[310] Despite the existence of such strong evidence of the accused's purpose-based genocidal intent as his written report proposing the use of chemical weapons etc., it looks as if the *Tolimir* Trial Chamber exclaims that 'without context, there is no genocidal intent'.

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[305] As to the concept of genocidal intent, the *Tolimir* Trial Chamber does not make any clear observation. Yet, the Trial Chamber cites the paragraph 498 of the *Akayesu* Trial Judgment in which the representative expression of the purpose-based approach—i.e., "clearly seek to produce"—is found. Thus, it appears that the Trial Chamber in *Tolimir* follows the purpose-based approach. *See* Prosecutor v. Tolimir, Trial Judgment, 12 December 2012, p. 328, footnote 3117 and accompanying text.

[306] Prosecutor v. Tolimir, Trial Judgment, 12 December 2012, para 1170. (emphasis added).

[307] *Ibid.* para 1170.

[308] *Ibid.* para 1171. The term 'only reasonable inference' originates in the principle that "when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence". Prosecutor v. Vasiljević, Appeals Judgment, 25 February 2004, para 120; Prosecutor v. Krstić, Appeals Judgment, 19 April 2004, para 41; Prosecutor v. Popović et al., Appeals Judgment, 30 January 2015, para 517.

[309] Prosecutor v. Tolimir, Trial Judgment, 12 December 2012, para 1172.

[310] *Ibid.*

In like manner, it might be rather awkward for advocates of the purpose-based approach to see that an unambiguous finding of the purpose-based genocidal intent in the *Popović* et al. Trial Judgment (para 1179) serves only a supplementary role in finding Popović's genocidal intent. The para 1179 reads,

> Popović was not a marginal participant in the JCE to Murder. The evidence shows that he was entrenched in several aspects of the operation, and that *he participated with resolve*. He was ubiquitous in the Zvornik area, present at all but one of the major killing sites. His own words at the outset of the operation, telling Momir Nikolić that "*all the balija have to be killed*" […] are also evidence of his genocidal intent. Even after thousands had been executed and the large-scale killing was complete, *Popović remained determined*—he arrived at the Standard Barracks to arrange for the murder of the injured Bosnian Muslim men held at the hospital facilities there. The evidence supports the finding that *Popović aimed to spare no one amongst the Bosnian Muslims within his reach, not even a young boy*.[311]

The factual findings such as "he participated with resolve", "all the balija have to be killed", "Popović remained determined", and "Popović aimed to spare no one amongst the Bosnian Muslims within his reach, not even a young boy" appear to be clear findings of the purpose-based genocidal intent in that they manifests his 'conscious desire'. Yet, this paragraph is subordinate to the next paragraph in which the Trial Chamber sets forth the factors most "decisive" to the finding of Popović's individual genocidal intent. They are: (i) "the scale of the atrocities committed"[312]; (ii) "[t]he systematic, exclusive targeting of Bosnian Muslims"[313]; (iii) Popović's "vigorous participation in […] the organization of large-scale murders"[314]; and (iv) "the repetition by Popović of destructive and discriminatory acts".[315] It seems that these factors do not demonstrate the accused's state of mind, in particular, his 'desire in a broad sense' in a direct manner. Rather, they tend to concern the context of the genocidal campaign in which the accused participated. In short, in view of the *Tolimir* example and the *Popović* example, one might even postulate that the genocidal intent element is not supposed to be fully met by the purpose-based genocidal intent alone. Is it really so? Why do the Trial Chambers keep discussing the circumstantial evidence even after noticing proof of the purpose-based genocidal intent?[316]

2.6.3 From Individualistic Intent to Collective Intent

To sum up, in practice, the inherent dilemma of the purpose-based approach is its conceptual incompatibility with the prevalent and almost universal

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311 Prosecutor v. Popović et al., Trial Judgment, 10 June 2010, para 1179. (emphasis added). Note that "balija" is a term to call Bosnian Muslims in a derogatory way.

312 *Ibid.* para 1180.

313 *Ibid.*

314 *Ibid.*

315 *Ibid.*

316 *See also* Chap. 4, footnote 41 *infra*.

evidentiary practice of international trials dealing with genocide—i.e., the practice of *heavy and substantial* reliance on 'overall context' in finding the genocidal intent element. While the case law claims the purpose-based definition of genocidal intent doctrinally, it seems to deny it evidentiary. With regard to the genocidal intent element, it is indeed troubling to keep noticing the discrepancy between the theories and actual practices. The theoretical debate on the purpose-based and the knowledge-based understandings of genocidal intent seems to touch upon only a marginal aspect of the crime of genocide. In the *mens rea* framework on which I have relied,[317] it is the 'destructive consequence' that conceptually connects all those volitional elements and cognitive elements: did you have a 'desire in a broad sense' directed toward the 'destructive consequence'?; did you consciously permit the happening of the 'destructive consequence' in your mind?; did you have foresight of the 'destructive consequence' to a virtual/practice certainty? However, are you really sure that these are the valid questions? How do you define the 'destructive consequence'? Can you really distinguish the 'destructive consequence' with 'destructive or genocidal context/circumstance'? At this point, it is worthwhile to quote the following text from Carl-Friedrich Stuckenberg:

> The real issue are not whether conscious risk-taking forms part of *dolus* or not, or can be attributed to somebody's will or not, but whether acting despite the awareness of a small, medium-sized or substantial risk that a certain prohibited result will occur, or willful blindness thereof, deserve punishment for a particular crime under international law. This is a normative decision about blameworthiness and not a question what *dolus* 'is'. […] Purpose and awareness are not necessarily more blameworthy than reckless disregard which does not even take into consideration the effects one's action might have on other people. International criminal law theory, whether dealing with customary law or the Rome Statute, should therefore, in the interest of intellectual candour and methodological progress, address the critical value judgments openly and not hide them in a maze of confused terms and get caught in the traps of conceptualism. This is a lesson that can be learned from domestic laws.[318]

Because genocide is unique in that it has a character of criminal enterprise in which such major substantive notions of criminal law—i.e., conduct, consequence and circumstance—are all intermingled, we should be cautious in engaging in doctrinal discourse in relation to the crime of genocide.[319] Moreover, the fact that various conducts, consequences and circumstances all together constitute the content of genocidal intent further exacerbates the problem. Put otherwise, the concept of genocidal intent suffers from obesity: it has too much content within itself to be adequately perceived by the individualistic notion of genocidal intent. That is why

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317 *See* the chart on page 51 *supra*.

318 Stuckenberg 2014, p. 317.

319 As to the issue of 'genocide as a criminal enterprise', *see* Sect. 4.2 *infra*.

we see such complaints from the suspects of genocide that 'you infer my intent from the acts of others'.[320] Isn't it a time to let genocidal intent take some diet pills? By the way, do we really need genocidal intent?[321]

For a more precise understanding of genocidal intent, it is necessary to see this difficult notion from a different standpoint than the individualistic perspective. What is the essential quality of genocide? Philosopher Brook Jenkins Sadler says that singing duet, dancing tango and genocide are "intrinsically cooperative".[322] I think this remark does elucidate something we lawyers have too easily taken for granted in the midst of colorful substantive doctrines surrounding the catchphrase of individual criminal responsibility. In this connection, Emanuela Fronza was right when she pointed out that it is the feature of genocide being a "macro-criminal phenomenon" that caused the "major interpretative problems" related to genocidal intent.[323] George Fletcher also precisely points out:

> My point is to demonstrate that our conventional, liberal, individualistic ways of thinking about criminal liability simply do not account for the sentiments that actually shape the operative contours of international criminal law. The mind of the law may speak in the language of liberal individualism, but its heart lies in the disfavored ideas of collective action and collective guilty.[324]

Accordingly, in the following two chapters (Chaps. 3 and 4), I employ the collectivist approach to grasp what it really means the cryptic term 'genocidal intent'. In doing so, my attention is to be not only given to the genocidal intent element but also to the inner conceptual structure of the crime definition of genocide. Hence, I begin my discussion in Chap. 3 by looking into the two-layered structure of the crime of genocide—i.e., the 'conduct level' and the 'context level'.

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320 For more discussion on this complaints, *see* Sect. 4.1.2 *infra*.

321 Consider the following observation: "Strictly speaking, there is no 'subjective imputation' because all imputation, by its very nature, is objective. Subjective or mental elements are relevant only as indicators of the objective degree of a person's law-abidingness or lack thereof". Stuckenberg 2014, p. 311.

322 Sadler 2006, p. 127. In a similar vein, Jens David Ohlin observes: "Since fundamentally collective acts, like genocide, are only possible with deep collaboration among its members, a purely individualist account fails to explain the group-level dynamics among the individual members. Genocide is a case in point – it isn't just the aggregate of many individuals committing isolated acts of murder. […] Without mutual collaboration, the Rwandan genocide would never have occurred". Ohlin 2013b, footnote 24 through 26 and accompanying text.

323 Fronza 1999, p. 127.

324 Fletcher 2002, pp. 1525–1526.

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