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ARTICLE

Beyond the Binary of Purpose and Knowledge: Humanitarianism and a Evidentiary Intervention into Genocidal Intent and the Evidentiary Impasse

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Abstract

The crime of genocide is uniquely characterised by the requirement of "intent to destroy", a term left undefined by the 1948 Genocide Convention. Following initial prosecution of genocides in the 1990s, international jurisprudence has entrenched a purpose-based approach to "intent to destroy", which requires that an individual perpetrator of genocide acts with a special or purposeful intent to bring about the destruction of a protected group. The purpose-based approach has undermined the core humanitarian goal of the Genocide Convention, being effective prevention and punishment of the crime of genocide. This is mainly due to the difficulty in proving an individual's purposeful genocidal intent and the legal evidentiary threshold that requires that a perpetrator's purposeful intent be "the only reasonable inference" from the totality of all available evidence. This article introduces a targeted evidentiary intervention. Recognising that international courts are unlikely to abandon the established purpose-based framework, this article proposes a recalibration of the judicial inferential process itself, where genocidal intent is derived based on the "most reasonable inference" rather than the sole reasonable inference. As such, it presents an immediate, and arguably practical pathway to align the purpose-based approach with the Genocide Convention's humanitarian mandate to prevent and punish genocide. While shifting the inferential threshold from the "sole" to the "most reasonable" inference raises related questions such as compatibility with the principle of legality and the rights of the accused, this article focuses strictly on navigating the doctrinal impasse surrounding the term "intent to destroy" in genocide, through the lens of punishment and prevention. The broader implications of transitioning from the "sole" to the "most reasonable" inference standard will form a necessary subject for subsequent, dedicated scholarship.

Keywords: intent to destroy; purpose-based approach; knowledge-based approach; prevention; punishment

I. INTRODUCTION

Genocide is a relatively modern word for an old crime (Beres, 1988, p.124). In 146 BC, approximately

150,000 Carthaginians were killed during a Roman invasion of the city of Carthage which has been described as the first genocide (Kiernan, 2004, p.27). In the early modern period, the exercise of power by dominant factions often manifested in the genocidal destruction of competing or subordinate communities. (Kiernan, 2014).

With many unspeakable cases of genocidal destruction in the early modern centuries, it was the 20th century which marked a significant period in the legal history of genocide. Genocides unfolded as a way toward the realization of political, religious and economic goals. For instance, in 1915, the Turkish Government in an attempt to create a homogenous Turkish State, orchestrated the killing of over 1 million Armenians (Moodrick-Even Khen, 2024, p.83; Akcam, 2012). In a similar light, Nazi Germany in the wake of World War II, championed the annihilation of millions of Jews (Hilberg, 2003).

Raphael Lemkin, moved by the atrocities of the Nazi Government during World War II coined the term "genocide" (Lemkin, 1944, p.79). In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was formally adopted. The Genocide Convention established state responsibility for genocide and imposed a positive obligation on states to punish and prevent genocide (Genocide Convention, 1948, art 1). As such, the Genocide Convention was "manifestly adopted for purely humanitarian and civilising purpose" (Fournet, 2006, p.101). It aimed to put an end to impunity, with a commitment by states to "never again" allow a genocide (Schiff, 2008, p.27).

Barely five decades after the 1948 Genocide Convention, the world was plagued by two genocides in Rwanda and the Former Yugoslavia, which led to the creation of two ad hoc Tribunals by the United Nations. The International Criminal Tribunal for Rwanda (ICTR) was set up to prosecute persons responsible for serious violations of international humanitarian law in Rwanda and neighbouring countries (Statute of the International Criminal Tribunal for Rwanda, 1994, art 1). Its sister Tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was tasked with prosecuting persons responsible for serious violations of international humanitarian law committed on the territory of the Former Yugoslavia (Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, art 1). These ad hoc Tribunals were followed by the putting in place of the International Criminal Court (ICC) in 2002, to prosecute individuals committing mass atrocities. (Rome Statute, 1998, art 1). More than two decades after the coming of the ICC, the crime of genocide remains relevant in contemporary society, with alleged cases of genocides in Myanmar, Ukraine and Gaza.

The ad hoc Tribunals, established to address the atrocities in Rwanda and the Former Yugoslavia, defined genocide as a crime uniquely marked by "special intent" (dolus specialis), whereby the perpetrator deliberately seeks the destruction of protected human groups (Akayesu Trial Chamber, 1998, para 523; Krstic Trial Chamber, 2001, para 550). "Special intent" has alternatively been referred to as "purpose-based" intent "specific intent", or "genocidal intent" (Ambos, 2009, p. 836; Jelisic Trial Chamber, 1999, para. 83, 86, 101).

This intent has been known to be difficult to proof and this difficult is especially associated with the evidentiary requirement that the perpetrator's purpose-based intent be the only reasonable inference from all available evidence (Akayesu Trial Chamber, 2001, para 523; Sands, 2022). Due to the difficulty in prosecuting perpetrators of genocide using purpose-based intent, the purpose-based approach has been held to be at odds with the humanitarian goal to prevent and punish genocide (Goldsmith, 2010, p. 244-245). This complexity with the purpose-based intent has influenced a paradigm shift to knowledge-based approaches, which foreground the genocide perpetrator's "knowledge" rather than their purpose (Goldsmith, 2010, p. 245-246). Yet, the knowledge-based approach is not without its own related complications.

This article adds to the existing discourse on the "intent to destroy" impasse, by adopting a pragmatic approach to the issue, which moves beyond the sterile academic binary of "purpose versus knowledge". Rather than advocating for a theoretical shift to the knowledge-based approach which international courts have historically resisted, this article identifies the specific judicial puddle that leads to impunity for genocide, being the high evidentiary standard associated with proving purpose-based genocidal intent. By critiquing the ostensible legal foundations that underpin this high evidentiary threshold and the purpose-based intent, this article carves out a unique space to present a realistic evidentiary standard that does not supplant the purpose-based approach and is friendly to the humanitarian imperative to prevent and punish genocide. Section two critically evaluates the purpose-based approach, focusing on its effects on both the prevention and prosecution of genocide. This evaluation includes an exploration and critique of the ostensible legal foundations underpinning the said approach. The third section briefly examines how judicial inferences of special intent from circumstantial evidence further obfuscate the purpose-based approach. Section four examines and identifies the limitations of the competing academic knowledge-based approach to "intent to destroy".

Section five provides a concluding synthesis, evaluating both the purpose-based and knowledge-based approaches against the critical humanitarian benchmarks of prevention and punishment. While the knowledge-based approach demonstrates a potential for enhanced efficacy in the punishment of genocide, it is posited that this approach is unlikely to supplant the entrenched purpose-based approach. Accordingly, it is suggested that in continuing with the entrenched purpose-based approach, international courts in future dealings with the crime of genocide, should recalibrate the evidentiary threshold used in inferring the purpose-based intent of perpetrators of genocide. It is contended that one possible way of undertaking this re-evaluation is to convict genocidaires where their purpose-based intent is found to be the most reasonable inference from the totality of all evidence presented.

II. THE PURPOSE-BASED APPROACH TO "INTENT TO DESTROY" IN GENOCIDE

Katherine Goldsmith submits that the lack of a clear meaning of "intent to destroy" in genocide, has caused much controversy which has hindered the effectiveness of the fight against genocide (Goldsmith, 2010, p. 8). Goldsmith is correct to the extent that this controversy over the required threshold of intent for genocide, ensues mainly amongst academic commentators. International judicial bodies on the other hand, have adopted a clear and consistent interpretation of "intent to destroy" in genocide.

In the Prosecutor v Akayesu, the ICTR delivered the first ever conviction for genocide. "Intent to destroy" in genocide was approached as a "special intent" (dolus specialis) wherein the perpetrator "clearly" seeks to bring about the destruction of human groups (Akayesu Trial Judgment, para. 498, 518). This understanding of "intent to destroy" in Akayesu "expresses the volitional element in its most intensive form and is purpose-based" (Ambos, 2009, p. 838).

Influenced by the Akayesu decision, the ICTR subsequently followed the purpose-based approach to "intent to destroy" (Rutanganda Trial Chamber, 1999, para. 59 and 61; Bagilishema Appeal Chamber, 2001, para. 62; Musema Trial Chamber, 2000, para. 164). In the same vein, its sister Tribunal, the ICTY followed the purpose-based approach to genocidal intent. In the Prosecutor v Jelisic, the ICTY held that the perpetrator of genocide must "seek to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such" (Jelisic Appeal Chamber, 2001, para. 446). This position was reaffirmed in the Prosecutor v Blagojevic. According to the ICTY Trial chamber in Blagojevic, mere knowledge on the part of the perpetrator that his acts will "inevitably or likely" cause the annihilation of a protected group does not suffice as the appropriate *mens rea* for the crime of genocide. The destruction of the group in whole or in part, must be the perpetrator's ultimate goal

(Blagojevic Trial Chamber, 2005 para. 656). The Trial Chamber through this observation rejected a knowledge-based threshold on "intent to destroy", which will be discussed in section IV.

The knowledge-based threshold was also rejected by the Appeal Chamber in the Prosecutor v Krstic. Krstic was convicted as a principal perpetrator of genocide in Srebrenica based on his participation in the killing of Bosnian Muslims, and with knowledge that such would lead to the destruction of the Bosnian Muslim community in Srebrenica (Krstic Trial Chamber, 2001, para. 644). The Appeal Chamber reversed Krstic's conviction as a principal perpetrator of genocide, stating that knowledge alone on his part cannot "infer the existence of a genocidal intent" (Krstic Appeal Chamber, 2004, para. 135).

The ad hoc tribunals in Rwanda and the Former Yugoslavia barely provided room for an alternative interpretation of "intent to destroy" in genocide. In the Prosecutor v Sikirica, the ICTY unequivocally dismissed the prosecution's attempt to delve into theoretical debates on "intent to destroy" in genocide. The Sikirica Trial Chamber reaffirmed, with legal certainty, the degree of intent necessary for the crime of genocide (Sikirica Trial Chamber, 2001, para. 58-60). With the coming into force of the ICC in 2002, one may have expected that the arrival of the ICC would inject fresh dynamism into the hitherto established legal approach of the ad hoc Tribunals on "intent to destroy". However, the ICC walked in the footsteps of the ad hoc Tribunals. In its first dealing with the crime of genocide, it reiterated the purpose-based approach to "intent to destroy" in genocide (Al Bashir Pre-Trial Chamber 1, 2009, para. 139). So far, there have nevertheless been no genocide trials or convictions by the ICC, which would see a practical application of the purpose-based approach to genocidal intent.

Thus, the purpose-based approach to "intent to destroy" in genocide, has been far-fetched from dynamism. The firmly rooted understanding that individual perpetrators of genocide must have the underlying goal of achieving the destruction of a group, poses significant challenges in combating the crime of genocide.

The very notorious problem associated with the purpose-based approach lies with the difficulty in proving a perpetrator's special intent to bring about the destruction of a group in whole or in part. Lawrence LeBlanc points out that the authors of a genocidal plan would not necessarily be "thoroughly conscious of their intention. We would have to plumb the depths of their consciences" (Leblanc, 1991, p. 51). However, even if we plumb the depths of their consciousness, we still may not accurately elicit some special intent to destroy an entire human group. According to Kjell Anderson, the purpose-based intent entails a "certain grandiosity of intent that is probably rare; yet courts posit that such intent is ubiquitous and requisite among principal offenders." (Anderson, 2019, p. 125-127).

Even where such special intent happens to exist, a genocidal state is likely to erase any evidence of it. Cherif Bassiouni somewhat made this point by identifying that the conflict in the Former Yugoslavia and Cambodia had no paper trail of a specific intent to destroy and genocide could only be proven through the cumulative effect of the perpetrator's conduct (Bassiouni, 1993, p. 233).

This difficulty in proving genocidal intent must be construed alongside the fact that the Genocide Convention was drafted with fresh memories of the Holocaust where Hitler's unequivocal declarations of his intent to eradicate European Jews, stood as a chillingly explicit testament of his genocidal intention. (Holocaust Encyclopadia, 1939). The advent of genocide trials in the late 20th and early 21st centuries has ostensibly served as a deterrent to modern would-be perpetrators, highlighting the perilous consequences of explicitly articulating genocidal intent and thereby rendering the very notion of purpose-driven annihilation increasingly untenable. As one writer notes:

> Perpetrators of genocide are aware that admitting what they are doing could interfere with achieving their objective. They are therefore unlikely to admit what their intentions are and thus risking possible action against them (Goldsmith, 2015, p.242).

The prevailing purpose-based approach poses significant implications for the fight against genocide from a preventive and punitive angle. Preventively, the international community may rely on the special intent to destroy, to admit that a genocide is taking place, and thus take preventive action towards halting the perpetration of genocide. However, special intent to destroy as earlier discussed, is very difficult to prove, and there is always a collective denial of genocidal intent from perpetrators. As Gregory Stanton posits, denial is the "final stage that lasts throughout and always follows genocide" (Stanton, 1996).

States who perpetrate genocide as well as the international community of states, may rely on the special intent threshold to evade or avoid intervention on what might be in practice, a genocide. For example, the Rwandan genocide is widely acknowledged today but at the height of the atrocities in Rwanda in the late 1990s, no government would call it a genocide (Patrick, 2005, p. 416). This reticence to invoke the term "genocide" echoes into the 21st century, where a similar pattern of governmental caution has shrouded conflicts in Ukraine and Gaza. Dolus specialis requirement is often a bar to intervention for crimes that are genocidal, and this should not be the case (Goldsmith, 2015).

Punitively, the purpose-based approach might lead to inadequate criminal accountability for genocide. Perpetrators of genocide may escape principal liability for genocide, due to the challenges with proving purpose-based intent. By virtue of the purpose-based intent, perpetrators of genocidal acts who act in full knowledge that it will lead to the destruction of a protected group are in fact not guilty as principal perpetrators of genocide. In the Krstic case above, General Krstic was convicted by the ICTY Trial Chamber as a principal perpetrator of genocide, on the basis of his knowledge that killing military-aged Bosnian Muslim men in Srebrenica would lead to the annihilation of the entire Bosnian Muslim community in Srebrenica (Krstic Trial Chamber, 2001, para. 644). On Appeal, the Appeal Chamber determined that Krstic's knowledge alone as such, was inadequate to establish his own special intent to destroy. Consequently, the Appeal Chamber indirectly upholding the purpose-based approach, overturned Krstic's conviction for genocide and his criminal responsibility was reduced to that of aiding and abetting genocide (Krstic Appeal Chamber, 2004, para. 135-144).

While the purpose-based approach has undesirable implications for the prevention and punishment of the crime of genocide, it will not do justice to the present analysis, if the potential underpinnings of the purpose-based approach are not brought to light. The purpose-based approach lacks clear foundational support in the travaux préparatoires of the Genocide Convention, and even a plain reading of "intent to destroy" in the Genocide Convention does not lead to a purpose-based interpretation of "intent to destroy" (Goldsmith, 2015, p. 253; Greenawalt, 1999, p. 2265-2266). The inherent ambiguity of the term "intent to destroy" was in fact contemplated during the drafting of the Genocide Convention.

The delegate from the USSR had cautioned against the potential ambiguity in the wording "intent to destroy", arguing that it might afford perpetrators of genocide a loophole to evade responsibility by asserting they lacked the specific intent to destroy the targeted group. (Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633], 1948, p.96). Had this ambiguity been definitively addressed at the time, it might have obviated the contemporary controversies that now surround the interpretation of "intent to destroy" in genocide.

There appears to be no clearly substantiated legal theory or foundation underpinning the purpose-based intent. However, it has been held that special or purpose-based intent makes the crime of genocide particularly grave and serves as the distinguishing factor between genocide and crimes against humanity (Jelisic Trial Chamber, 1999, para. 66, 79 and 82). Schabas also points out that dolus specialis is the appropriate intent for genocide as the "crime of crimes" and it is this intent that defines and distinguishes genocide from other crimes (Schabas, 2004, p. 38). The next two sub-sections examine these positions, rebuffing the position of genocide as the “crime of crimes”, and the position of special intent as the distinguishing element between genocide and crimes against humanity. In so doing, I present the purpose-based approach as being without any real legal underpinnings.

i. Genocide as the “crime of crimes”

The special intent approach which poses significant implications for combating genocide, ostensibly enjoys support from the view that genocide is the “crime of crimes”. Genocide has been perceived as the “crime of crimes” for which the highest level of evil and malicious intent should be presumed (Schabas, 2009, p. 269). The perception of genocide as the “crime of crimes” is popular in scholarly engagements on genocide (Kaul, 2010; Brannigan, 2013, p.25).

The Akayesu Trial Chamber referred to genocide as the “gravest crime” (Akayesu Trial Chamber, 1999, para.470) while the Kambanda Trial Chamber referred to genocide as the “crime of crimes” (Kambanda Trial Chamber, 1998, para. 16; See also Stakic Trial Chamber, 2003, para. 502). In Krstic, the Appeal Chamber referred to genocide as the “worst crime known to humankind”, stating that “[a]mongst the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium” (Krstic Appeal Chamber, 2004, para. 36, 134). One might wonder whether crimes against humanity, war crimes, and crimes of aggression do not deserve special condemnation and opprobrium?

While genocide is undeniably one of the grave offenses enshrined in the Rome Statute, it is not uniquely the gravest. In the Kayishema case, the Appeals Chamber, addressing the Trial Chamber’s characterization of genocide as the “crime of crimes”, clarified that there is no established hierarchy of international offenses under its Statute; rather, all enumerated crimes constitute “serious violations of international humanitarian law” capable of attracting the same sentence (Kayishema and Ruzindana, Appeal Chamber, 2001, para. 367). This reasoning has been followed in several other cases (Rutanganda Appeal Chamber, 2003, para. 590; Seromba Trial Chamber, 2006, para 381; Nahimana et al Appeal Chamber, 2007, para. 1060).

Apart from the selective appreciation of the crime of genocide as the gravest crime, there is hardly any substantial reasoning which suggests that genocide is more serious than other international crimes. As Akhavan points out, “despite some contrary views, the weight of judicial opinion does not deem genocide to be categorically more serious than either war crimes or crimes against humanity” (Akhavan, 2012, p. 59). However, it could be misleading to only follow the weight of judicial opinion. It is also important to look at international judicial practices to determine if genocide is implied to be categorically more serious than other crimes. To this end, courts’ sentencing practices do not seem to favour the view that genocide is the “crime of crimes”. Perpetrators of crimes against humanity and war crimes have been seen to receive heavy sentences, comparable to sentences received by perpetrators of genocide. For example, Stanislav Galic was sentenced to life imprisonment for crimes against humanity and violation of the laws of war (Galic Appeal Chamber, 2006). Charles Taylor was sentenced to 50 years imprisonment for aiding and abetting war crimes (Taylor Trial Chamber, 2013).

Crimes against humanity and war crimes can be equal to or even more serious than genocide. To make an overriding predetermination that genocide is the gravest international crime can be quite misleading. For example, can we decisively say that an intent to destroy a group of 5000 Muslims (which would amount to genocide) is more serious than a widespread and systematic attack which is intended to eliminate over 10million people comprising a civilian population? The severity of one international crime over another should be assessed on a case-by-case basis, paying attention to amongst other things, the resulting harm. Akhavan as such, questions how one category of crime can be said to be more serious than another, not minding the factual circumstances of each case (Akhavan, 2012, p. 19).

If genocide is not the "crime of crimes" and other international crimes can be as serious as genocide or even more serious, then the purpose-based intent, which is seemingly sustained by the perceived gravity of genocide as the "crime of crimes", does not stand.

ii. Purpose-based Intent as Distinguishing Genocide from Crimes Against Humanity

Another justification for the purpose-based intent also emanates from the viewpoint that it is this intent that distinguishes genocide from crimes against humanity (Schabas, 2004, p.38). In order words, the essence of the crime of genocide resides in the deliberate intent to destroy human groups and removing this intent would blur the line between genocide and crimes against humanity (Fournet, 2006, p. 86; Report of the International Law Commission on the Work of Its Forty-Eighth Session, 1996, p.87).

In discerning the distinction between genocide and crimes against humanity, this submission argues that emphasis should be placed on the teleological purpose inherent in each crime, rather than on the mens rea of the individual committing genocide. The essence of genocide lies in the protection of specific human groups from physio-biological destruction, while the category of crimes against humanity is designed to protect civilian populations in general. In Akayesu, this was the basis by which the ICTR distinguished genocide from crimes against humanity. The Trial Chamber stated that both crimes have different purposes and are never co-extensive (Akayesu Trial Chamber, 1998, para. 46).

Kress notes that the specificity of genocide consists in the collective goal to destroy a protected group and this goal significantly differs from the collective goal to attack any civilian population in the case of crimes against humanity (Kress, 2015, p. 576). He further demonstrates that the difference between genocide and crimes against humanity should not be based on special intent to destroy but the specificity of genocide must rather "reside in the nature of the systemic act" (Kress, 2005, p. 567). That is, it is not a perpetrator's individual purposeful genocidal intent that distinguishes genocide from crimes against humanity, but the specificity (distinctiveness) of the former lies in the collective genocidal campaign (Kress, 2005, p. 576).

Dolus specialis on its own has been argued not to be the unique element of the crime of genocide. Kim posits that genocide is not "a crime of mens rea" (Kim, 2015, p iii). He argues that special intent to destroy as adopted by international courts, has been the source of confusion and difficulties in applying the definition of the crime of genocide to actual cases of genocide (Kim, 2015, p. 2015). For Kim, genocide is a crime of "collective genocidal intent" that takes place at a context level (Kim, 2015, p. iii).

Thus, an individual's purposeful intent to destroy a group ought not to be the element that is relied upon to distinguish genocide from crimes against humanity. A critical point of contention emerges when one considers that if genocide's unique character is indeed derived from an individual's deliberate intent to eradicate a protected group, it presents a logical anomaly that this same distinctive intent, when targeted at a group not recognized under the legal definition of genocide, is instead prosecuted as a crime against humanity. The crime of genocide only protects national, ethnic, racial and religious groups and outside these groups, the crime does not apply even if there is a special intent to destroy. In such a situation, a genocidal enterprise would be prosecuted as a crime against humanity.

In sum, there is hardly any robust legal underpinnings which support the special intent approach. In continuing with the special intent approach, international courts have been ensnared in a puddle of their own making, jeopardising the prevention and punishment of the atrocity called genocide. In the absence of direct evidence to prove special intent, courts have often had to infer the special intent of the genocidaire from circumstantial evidence.

III. INFERRING SPECIAL OR PURPOSEFUL INTENT TO DESTROY

Due to the formidable challenge of proving dolus specialis without direct evidence (Akayesu 1998, para. 523), judicial bodies often rely on inferring genocidal intent from circumstantial indicators. This reliance on inferential reasoning further complicates the prosecution and penalisation of genocide, as argued in this section.

In the Akayesu, Kayeshema, Musema and Jelisic cases, the ICTR and ICTY set out similar factors for inferring the existence of a genocidal intent. These factors include:

1) 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;

2) The scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups;

3) The general political doctrine which gave rise to the acts;

4) The repetition of destructive and discriminatory acts as well as the perpetration of "acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group";

5) The use of derogatory language towards members of the targeted group;

6) The weapons employed and the extent of bodily injury, the methodical way of planning and the systematic manner of killing;

7) The existence of a genocidal plan (Akayesu Trial Chamber, 1998, para 523-524; Kayishema and Ruzindana Trial Chamber, 1999, para. 93; Musema Trial Chamber 2000, para 166; Jelisic Appeal Chamber, 1999, para 47).

These factors are based solely upon the courts' reasoning without any reference to perpetrator-based research. Anderson makes the case:

> [I]t is a sui generis judicial construction of perpetrator motivation… the court is implicitly arguing, through this evidentiary test, that this is how genocide perpetrators behave, and that individuals who lack these behaviours are not perpetrators, whether or not they commit the actus reus of genocide. (Anderson, 2019, p. 130).

However, courts have sometimes refused to enter a genocide conviction even when its enumerated indicators above, worked against the accused. In the Popovic et al case for instance, the Trial chamber in attempting to infer Nikolic's genocidal intent noted the existence of an organisational plan to commit genocide in Srebrenica and the perpetrator's active role in it. The Trial Chamber noted that the accused was determined to kill the victims and had knowledge of a genocidal plan or an overall genocidal context (Vujadin Popovic et al Trial Chamber II, 2010, para. 1405-1410). Yet, the Trial Chamber did not find the accused guilty of genocide because it was not satisfied that the accused personally had genocidal intent (Vujadin Popovic et al Trial Chamber II, 2010, para. 1405-1410).

The circumstantial indicators of genocidal intent have not been a rigid formula for fishing out a perpetrator's individual genocidal intent. Rather, the process of inference from circumstantial indicators has been shrouded with a lot of ambiguities. Inferring a high degree of individual volition aimed at the destruction of a group from circumstantial facts, can seldom produce certainty. As such, Greenawalt questions whether the practice of inferring genocidal intent from circumstantial evidence, makes dolus specialis relevant at the individual level (Greenawalt, 1999, p.2288). He posits that such a practice would lead courts to "squeeze ambiguous fact patterns into the specific intent paradigm" (Greenawalt, 1999, p.2281). The effect of this is that courts might be always inclined to acquit genocidaires for genocide. This claim will be further articulated by drawing from the facts in the Jelisic case.

i *Goran Jelisic*: Further exposing the impact of inferring special intent from circumstantial facts.

Goran Jelisic, an officer of the Bosnian Serb army was charged with committing genocide in Brcko. The Trial Chamber experienced difficulty in inferring his individual genocidal intent. The accused killed and used derogatory terms against Bosnian Muslims, referring to himself as the "Serbian Adolf" (Jelisic Trial Chamber, 1999, para. 102). The Trial Chamber did not find him guilty as a principal perpetrator of genocide, holding that he killed "arbitrarily" out of "personal motivation" and by reason of his "disturbed personality", rather than with intent to destroy (Jelisic Trial Chamber, 1999, para. 105-108).

Overturning the Trial Chamber's decision, the Appeal Chamber noted that Jelisic having killed out of personal motivation and by reason of his disturbed personality, was not enough to preclude the inference of his special intent to destroy (Jelisic Appeal Chamber, 2001, para. 70). The Appeal Chamber opined from the available circumstantial evidence that a reasonable chamber would have found beyond reasonable doubt that Jelisic deliberately intended to destroy the Bosnian Muslims in Brcko (Jelisic Appeal Chamber, 2001, para. 70-71; see further the partial dissenting opinion of Judge Wald, para.1).

The divergent decisions rendered by the Trial and Appeal Chambers in Jelisic highlight the inherent challenges in inferring individual dolus specialis from circumstantial evidence. Based on the same set of facts and circumstances, the esteemed judges of the Jelisic Trial and Appeal Chambers arrived at fundamentally different conclusions, underscoring the potential flaws associated with inferring special intent from circumstantial evidence.

Circumstantial facts can hardly reveal in absolute terms the individual perpetrator's own genocidal intent to destroy a group. Kress as such argues that an individual cannot realistically desire the destruction of a group to occur through his individual genocidal conduct (Kress, 2005, p.566).

Attempting to presume individual genocidal intent from circumstantial evidence would be shrouded with ambiguity, as argued by Greenawalt above. As a measure apparently aimed at attaining certainty of presumption, international judicial bodies have held that when inferring special intent from circumstantial evidence, such intent must be the only reasonable inference that can be drawn from the totality of circumstantial facts. (Nahimana et al Appeal Chamber, 2007, para. 524; Karadzic Trial Judgement, 2016, para. 2605; Tolimir Trial Judgement, 2012, para. 745; Bosnia v Serbia, Judgement, para. 373).

However, this approach presents yet another layer of ambiguity. Anderson incisively questions how genocidal intent can definitively be established as the sole reasonable inference, through presumptions drawn from circumstantial evidence. (Anderson, 2019, p.148). Presuming genocidal intent in this manner can devolve into a significantly subjective exercise, heavily dependent on the particular composition and approach of the Trial Chamber in question. This subjectivity, in turn, increases the likelihood of acquitting individuals who might be in fact guilty of genocide. As Goldsmith notes, in "requiring strict specific intent proven beyond a reasonable doubt as in a court of law", international courts would be "accommodating" the criminality of genocidaires (Goldsmith, 2010, p.253). The intricacies as such, of the purpose-based approach to "intent to destroy", have contributed to the rise of a knowledge-based understanding on "intent to destroy".

IV. KNOWLEDGE-BASED APPROACHES TO "INTENT TO DESTROY"

The inherent complexities of the purpose-based approach have spurred considerable debate within scholarly circles, resulting in a notable shift towards knowledge-based frameworks, as an alternative to the conventional purpose-based interpretation of "intent to destroy". This section delves into the value and limitations associated with the knowledge-based approaches.

The defining characteristic of the knowledge-based approach is its focus on the perpetrator's "knowledge", shifting the analytical emphasis from a purposeful intent to destroy a group, to an understanding of what the perpetrator "knew". The object of the knowledge has been seen to differ amongst proponents of the knowledge-based approach. According to Greenawalt, who is considered to be the leading proponent of the knowledge-based approach:

> [I]n defined situations, principal culpability for genocide should extend to those who may specifically lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions (Greenawalt, 1999, p. 2259).

In essence, Greenawalt proposes first, a knowledge-based approach based on "destructive consequences" and second, that subordinates should be convicted as principal perpetrators of genocide if they commit genocide while understanding the destructive consequences of their actions (Greenawalt, 1999, p. 2288).

Greenawalt's knowledge-based approach amounts to a "significant" expansion of the scope of principal culpability for genocide (Kim, 2015, p.30). Normally, subordinates can only be convicted for genocide if they share in the genocidal intent to destroy. If they do not share the genocidal intent of the principal perpetrators, they can be convicted for aiding and abetting genocide (Krstic Appeal Chamber, 2004, para 135).

Although Greenawalt's knowledge-based approach may lead to a wider scope of principal culpability for genocide as Kim contends, this expansion is not without merit. Given that subordinates frequently act as the direct agents of genocidal violence, holding them principally accountable under a knowledge-based theory could significantly enhance the punishment of the crime of genocide. (Goldsmith, 2015, p. 252; Ambos, 2009, p. 847).

Conversely, it is thought that convicting subordinates as principal perpetrators of genocide is harsh, because subordinates are only obedient executors (Kim, 2015, p. 47). It is herein however submitted that a characterization of subordinates as only "obedient executors" is untenable. In the context of a crime as egregious as genocide, the notion of "obedient executors" is fundamentally flawed. Subordinates or accessories are not any less blameworthy than those who mastermind the crime of genocide (Mathieu Ngudjolo Chui, Concurring Opinion of Judge Christine Van den Wyngaert Trial Chamber II, 2012, para. 24, 70).

Hans Vest advances another version of the knowledge-based approach similar to that of Greenawalt but emphasizes that the knowledge-based approach must bear "practical certainty" (Vest, 2007, p. 781). Vest posits that the perpetrator is guilty of genocide if his knowledge of the consequences of the overall genocidal action reaches the level of "practical certainty" (Vest, 2007, p. 793). Therefore, Vest like Greenawalt, articulates a knowledge-based approach based on the perpetrator's knowledge of the destructive consequences of the genocidal action. It is not clear if Vest like Greenawalt makes a distinction between principal and subordinate perpetrators in the application of a knowledge-based standard.

Kim indicates that Vest's version of the knowledge-based approach seems not to differentiate between mid and high-level participants in the genocidal enterprise (Kim, 2015, p. 25). However, by proposing a two-fold intent structure, where special intent to destroy is only a broader attribute of the overall genocidal plan (Vest, 2007, p. 790), Vest appears to attribute special intent to destroy only to high-level perpetrators, meanwhile subordinates can be convicted as principal perpetrators if knowledge of the destructive consequences of their genocidal acts reaches the level of "practical certainty" (Vest, 2007, p. 781).

Ambos also propounds a knowledge-based approach that differentiates between high, mid and low-level perpetrators (Ambos, 2009, p. 846). However, the object of knowledge in Ambos's knowledge-based approach differs from that of Greenawalt and Vest. According to Ambos, special intent to destroy should only be applicable to top and mid-level perpetrators while for low-level perpetrators, knowledge of "the genocidal context" should suffice (Ambos, 2009, p. 847-848). In another piece, Ambos also contends that "knowledge of the destructive consequences" on the group (as proposed by Greenawalt) cannot be an objective reference point for the knowledge-based standard because it pertains to an uncertain presupposition that the destruction of the group might occur (Ambos, 2014, p.30, 32). It however seems possible for the perpetrator of genocide to have virtual or practical certainty that his acts might bring about the destruction of a protected group at least in part, if not in whole (Kim, 2015, p.39). Hallevy observes that future consequences can be an objective reference point of knowledge (Hallevy, 2014, p. 37-38).

Some proponents of the knowledge-based approach posit that dolus eventualis (recklessness) suffices as an appropriate reference point for knowledge. That is, it is sufficient for a perpetrator of genocide to know that the destruction of a group is a possible or probable consequence of his actions and proceeds anyway to disregard this risk. Kress argues that "intent to destroy" must be interpreted from a two-fold perspective: i) knowledge of a genocidal campaign geared towards the destruction of a protected group and ii) dolus eventualis with regards to the occurrence of at least the partial destruction of the protected group ((Kress, 2005, p.562, 577). In a similar vein, Otto Triffterer posits that dolus eventualis is sufficient for approaching "intent to destroy" in genocide (Triffterer, 2001, p. 405).

While an ambitious rival approach to the traditional purpose-based approach, the knowledge-based approach is not without its own weaknesses. An initial shortcoming of the knowledge-based approach is that the approach as articulated by various scholars lacks uniformity or coherence. Proponents of the knowledge-based approach have no uniform objective point of knowledge to ground the knowledge-based approach. For example, Greenawalt refers to knowledge of "destructive consequences" while Ambos grounds his knowledge-based approach on the perpetrator's knowledge of a "genocidal context" (Greenawalt, 1999, p. 2288; Ambos, 2009, p. 847-848).

Furthermore, knowledge-based approaches (such as that of Greenawalt and Ambos), that apply specifically to subordinates and low-level perpetrators, might have the effect where high level perpetrators are not convicted for genocide because their special intent cannot be proven, meanwhile their subordinates are convicted for genocide due to knowledge for example, of the destructive consequences of their actions on the group (Kim, 2015, p. 37, 54). As such, Kim describes the knowledge-based approach as having awkward and counter-intuitive results (Kim, 2015, p 10, 37).

Nevertheless, even the prevailing purpose-based approach has proven that it is possible to convict a subordinate as principal perpetrator of genocide, while the superior is not convicted for genocide. In the Popovic and Trbic cases, Trbic being the subordinate was convicted as a principal perpetrator of genocide (Trbic Court of Bosnia and Herzegovina, 2009, para. 827), while Nikolic who was Trbic's superior was convicted for aiding and abetting genocide (Vujadin Popovic et al Trial Chamber II, 2010, para. 2171) even though both were involved in the same genocidal plan. However, it is worth acknowledging that the trials of both perpetrators were severed and took place in different courts. This may have impacted the different findings reached on the criminal responsibility of Trbic and Nikolic.

In sum, it appears that the major common contributor to the formulation of knowledge-based approaches has been the evidentiary hurdles in establishing special intent. Greenawalt astutely contends that the rigorous demands of the special intent standard provide an avenue for defendants to elude genocidal liability, facilitated by their calculated distortion of ideological tenets and hierarchical frameworks (Greenawalt, 1999, p. 2294). When framing dolus eventualis as a cornerstone of the knowledge-based perspective, Triffterer and Kress have been cognizant of the difficulties in substantiating special intent. (Triffterer, 2001, p. 405-406; Kress, 2005, p.564).

While recognising evidentiary challenges with the prevailing special intent approach, the dolus eventualis standard adopted by Kress and Trifterer in their knowledge-based approaches, has also been criticised for its potential to radically alter the character of genocide as the gravest crime, and affect the distinction between genocide and crimes against humanity (Ambos, 2009, p. 849). The persuasiveness of this critique is nevertheless attenuated by the understanding that the designation of genocide as the "crime of crimes" is not universally valid, and individual dolus specialis does not in itself, provide a categorical distinction between genocide and crimes against humanity. Nonetheless, as a reference point for knowledge, the application of dolus eventualis risks casting an unduly wide net, potentially implicating an extensive array of individuals as principal actors in the commission of genocide. This might pose prosecutorial difficulties and weigh heavily on the often limited resources of the prosecution.

V. FINAL COMMENTS: THE WAY FORWARD FOR "INTENT TO DESTROY" IN GENOCIDE

From the totality of the aforementioned, it is manifest that the knowledge-based and purpose-based paradigms each grapple with their own set of inherent limitations. The emergence of these approaches stems from the interpretative opacity surrounding the concept of "intent to destroy" in genocide. The Genocide Convention and its travaux préparatoires do not clearly back the prevailing purpose-based approach which has been adopted by international judicial bodies (Goldsmith, 2015, p. 253; Greenawalt, 1999, p.2265-2266). While genocides can be often purposeful, it is hard to infer a sole perpetrator's intent as purposefully aiming towards the destruction of a group (Goldsmith, 2010, p. 246). The great difficulty with special intent therefore rests on evidentiary considerations.

In light of the ambiguity surrounding the meaning of "intent to destroy" in genocide, the inquiry into its precise implications should be pursued with dynamism, rather than treated as a matter definitively resolved by international jurisprudence. Any approach on "intent to destroy" in genocide should reflect the humanitarian purpose of the crime, which aims to put an end to impunity and prevent occurrences of genocides (Genocide Convention, 1948, preamble; Rome Statute, 1998, preamble).

In the interest of the punishment of genocide, the knowledge-based approaches generally prevails as a more desirable model. However, the tenability of the knowledge-based approach is significantly compromised by the lack of a uniform reference point for knowledge within such frameworks, as well as by other considerations earlier enumerated. It is also unlikely that the knowledge-based approach will override the prevailing purpose-based standard. There has been relatively no rigorous debate in case law on "intent to destroy", which weakens the potential for future consideration of this approach within international courts. Also, adopting a knowledge-based approach as a means of imputing principal culpability for genocide will significantly disrupt the reigning genocide jurisprudence which has been successively developed in international courts or tribunals.

While states may typically rely on proof of special intent to label a potential genocidal situation as genocide, this intent may not necessarily be a bar to the prevention of genocide. This is because states' intervention to prevent genocide does not in practice, wholly depend on proof of genocidal intent. The International Court of Justice (ICJ) may issue provisional measures of protection from genocide, if there are reasonable grounds to believe that a genocide is taking place (Gambia v Myanmar Request for the Indication of Provisional Measures, 2019). Thus, as far as states' intervention to prevent genocide is concerned, neither the knowledge nor purpose-based approach on "intent to destroy" would appear to pose a better model for genocide prevention. States' intervention to prevent genocide may in fact significantly depend on the political will to do so.

Concerning the punishment of genocide, the special intent standard has been seen as hard to infer, and the genocidaire's special intent must be the only reasonable inference from all circumstantial evidence. Approaching special intent as the only reasonable inference from the totality of circumstantial evidence is a standard too high and unrealistic to attain (Anderson, 2019, p. 148; Sands, 2022). Effective prosecution of genocide would require rethinking the only reasonable inference approach to a pragmatic evidentiary threshold, when deriving special intent from circumstantial evidence. In the pursuit of mitigating impunity for genocide, a transformative shift in the inferential process is required. This could be achieved by moving towards a standard where the genocidaire's purposeful intent emerges as the most reasonable inference derived from the evidentiary record. Such an approach offers a more efficacious mechanism for the punishment of genocide, though it necessitates rigorous scholarly inquiry into its broader implications for criminal law and the integrity of criminal trials.

Amidst contemporary allegations of genocide in Gaza, Myanmar and Ukraine and the possibility for future prosecutions, whether international courts will attempt to rethink the purpose-based approach and the legal evidentiary threshold for establishing purpose-based intent, is a matter yet to be seen. The understanding of genocide as the "crime of crimes" is not necessarily valid but assuming this is so, then it seems rather counterintuitive to adopt a very high evidentiary threshold that in turn fosters unaccountability for the so-called "crime of crimes". To wrap up, the novelty of this piece rests in its call for an evidentiary evolution, rather than a total doctrinal revolution from "purpose" to "knowledge". In convicting genocidaires where purpose-based intent arises as the most reasonable inference, rather than the "sole reasonable inference", this article asserts a more pragmatic and cogent solution to the systematic failure of genocide prosecutions. As such, the evidentiary threshold herein suggested is poised to better meet the humanitarian imperatives of the Genocide Convention, especially the effective punishment of the crime of genocide.

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