Convention on the Prevention and Punishment of the Crime of Genocide

Commentary

von

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determining the required content of awareness on the part of the offender is a two-tiered task: First, the necessary *objects* of awareness need to be ascertained, i. e. the consequences that the perpetrator must have been aware of at the time of committing the genocidal acts. Second, the required *extent of likelihood* as to the realization of such consequences, as imagined by the perpetrator, must be determined.

109 Regarding the first step, at the outset, the perpetrator must have had some sort of imagining of the group's full or partial destruction. This mental image depicts a subjective *analogon* to the objective 'attack against any civilian population' as required by crimes against humanity. Although such a constructional discrepancy between these crimes may seem to run afoul of their historical kinship, it should be noted that the *de facto* gap is considerably narrowed by the fact that the offender's awareness of a group's impending destruction is ordinarily unprovable unless it can be inferred from a real-life development. In addition to foreseeing the group's destruction, the offender must also be aware that his act or acts play a contributive role thereto, as only this creates the required *nexus* to the crime of genocide and translates an ordinary offence into a crime of international concern. In sum, the cognitive element thus consists of two constituent parts, requiring the perpetrator to have a certain level of awareness that (a) the given scenario will lead to the full or partial destruction of a protected group, and that (b) the perpetrator's act has a *contributive effect* on the destructive goal.

110 As regards the extent of likelihood the offender must assume, currently three different standards can be gleaned from international criminal law.

111 A tacitly assumed low standard may well be behind the prevalent disinterest in the cognitive side of genocidal intent. It should be noted that the predominant view requires the individual acts committed to be motivated by the offender's goal of seeing the protected group destroyed.[455] On this premise, it would seem absurd for a perpetrator to act in pursuit of a destructive goal which he thinks is impossible to attain, or to the realisation of which he feels incapable of contributing.[456] On the other hand, from the perpetrator's perspective, a small chance that his acts may add to a campaign which could lead to the destruction of a group may be sufficient to motivate him to commit such acts. Consequently, a cognitive component which required nothing more than the assumption of a distant chance of contributing to the destruction of a group would be a cogent corollary of the volitional component of genocidal intent, and this may explain why judicial practice has, as yet, found it unnecessary to address the issue.

112 However, in light of Article 30 ICC-Statute[457] it seems overly bold to assume that such a tenuous awareness should be deemed sufficient. Pursuant to this provision, unless otherwise provided, the cognitive component ('knowledge') is an indispensible part of *mens rea* (Article 30 para. 1 ICC-Statute). In relation to consequences, 'knowledge' is defined as the awareness that a consequence *will* occur in the ordinary course of events (Article 30 para. 3 ICC-Statute). In other words, the *probable* occurrence of the consequence in the perpetrator's eyes would be the

[455] *Infra,* mn. 140.

[456] See also Kreß (MK, § 6 VStGB, mn. 78), according to whom a line must be drawn between irrational 'wishful thinking' of the perpetrator and relevant genocidal intent.

[457] *Supra,* fn. 417.

knowledge threshold for incurring criminal liability.[458] Accordingly, in terms of genocide, the perpetrator would at least have to be aware that a given development was *likely* to entail the full or partial destruction of a protected group, and that his acts would *probably* play a contributive part therein.[459]

113 Ultimately, however, a moderate cognitive element between these two standards seems preferable. This is suggested on closer inspection of Article 30 para. 2 ICC-Statute. If the perpetrator additionally needed to be aware of the *probable* realisation of a consequence ('is aware that it *will* occur') he *aims* to bring about ('means to cause that consequence'), the first alternative of the provision would be superfluous, since the second alternative would always be fulfilled. Likewise, there would be no reason for the inclusion of the alternative formulation ('or') in Article 30 para. 2 ICC-Statute. Correctly construed, therefore, the provision indicates that a lower extent of knowledge suffices whenever the perpetrator *means* to bring about an illicit consequence. However, the norm is silent as to the precise degree of such knowledge that is required. To fill this *lacuna*, recourse may be taken to international jurisprudence. As mentioned above, particularly in their earlier case law, the UN *ad hoc* tribunals recognized a standard similar to *dolus eventualis* as meeting the demands of *mens rea* under international criminal law, which imposes lesser requirements on the cognitive element. Accordingly, mere awareness of the risk that a particular consequence *may* occur was generally deemed sufficient to establish criminal responsibility.[460] From the present perspective, applying this standard to the cognitive component of genocidal intent would allow a balance to be struck between the conflicting issues at stake: On the one hand, if certain foresight or awareness of a substantial likelihood of destruction were to be required in order to punish a person for genocide, the genocidal campaign would likely have to have advanced to a point beyond rescue, which would clearly frustrate the Convention's preventive purpose. On the other hand, if the cognitive component were reduced to the imagining of distant possibilities, the wrong of the offence and the blameworthiness of the offender would be lesser than in most cases of crimes against humanity. This would hardly be consonant with the widely acknowledged role of genocide as the 'crime of crimes'.[461] Finally, the standard proposed here best captures the underlying idea of the ICC-Elements of Crimes. The Elements require, *inter alia*, that the genocidal act is committed 'in the context of a manifest pattern of similar conduct directed against [a protected] group.'[462] An introductory note to the Elements makes it plain that the term 'in the context of' would 'include the initial acts in an emerging pattern.'[463] In terms of the *mens rea* element, the

[458] In its first judgment, the ICC has recently corroborated this restrictive standard of knowledge *vis-à-vis* consequences (ICC Luganga, TC, 14 March 2012, para. 1011. Similarly: ICC Bemba, PTC, 15 June 2009, paras 360–9), even though the Pre-Trial Chamber had sympathized with a standard similar to *dolus eventualis* (ICC Lubanga, PTC, 29 January 2007, para. 352).

[459] A similar position was seemingly taken by the ICTY-Trial Chamber in Blagojević and Jokić, which held that '[i]t 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 [also?] be the aim of the underlying crime(s).' ICTY Blagojević and Jokić, TC, 17 January 2005, para. 656 (emphasis added).

[460] Werle, Int'l Criminal Law (2nd ed.), mn. 409.

[461] Similarly: Kreß, MK, § 6 VStGB, mn. 14.

[462] See *supra,* fn. 454.

[463] ICC-Elements of Crimes, Article 6, Introduction (a).

emergence of a genocidal pattern of acts would normally mark the point when the imagining of a marginal possibility of destruction transforms into the awareness of a realistic chance that a group may in fact ultimately be destroyed, in whole or in part. Probability or near certainty of destruction, however, could not yet be assumed by a perpetrator at that point in time.

Thus, it can be concluded that the cognitive element of genocidal intent presupposes the offender's awareness that (a) the given scenario implies a *realistic chance* of leading to the full or partial destruction of a protected group, and (b) that his act *may* have a contributive effect on the realisation of this destructive goal. **114**

cc. 'With' intent to destroy

The word 'with' denotes a link between the incriminated act and the destructive purpose, the exact content of which calls for clarification. In the context of timing, it sets out that it is sufficient and necessary for the required 'intent to destroy' to be present when the *actus reus* is carried out.[464] The destructive goal may thus materialize extemporaneously and does not require premeditation.[465] By the same token, prior or subsequent awareness of a genocidal campaign, and the act's potential as constituting a part thereof, is irrelevant. **115**

Secondly, the question arises if the goal of seeing the protected group destroyed (in whole or in part) must also be the perpetrator's *motivation* to carry out acts under Article II lit. (a)-(e). As this touches on the intricate role of motives within Article II, the issue shall be addressed below in the context of the term 'as such'.[466] **116**

dd. 'Purpose-based approach' vs. 'knowledge-based approach'

As opposed to the prevailing 'purpose-based approach' outlined above, an alternative viewpoint has gained considerable ground within academic writing in recent years, usually referred to as the 'knowledge-based approach'.[467] This concept proceeds from the fact that in nearly all real-life instances genocide requires collective activity in the form of a broad-scale campaign, as isolated perpetrators normally lack the means of bringing destruction to a sufficient part of a protected group and cannot, therefore, seriously be held to have acted with genocidal intent, irrespective of its precise requirements.[468] 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 **117**

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[464] On the simultaneity principle with respect to genocide, see: Behrens, in: Henham/Behrens (eds), The Criminal Law of Genocide, 125–40, 133, 134.

[465] Werle, Int'l Criminal Law (2nd ed.), mn. 754; ICTY Krstić, TC, 2 August 2001, para. 572. The Chamber gave the example of an armed force deciding to destroy a group during a military operation, although its primary objective was unrelated to the group's fate.

[466] *Infra,* mns 140-145.

[467] The approach is currently represented, *inter alia*, by the following authors: Greenawalt, ColumbiaLRevev 99 (1999), 2288–9; Goldsmith, GenocideSP 5 (2010), 245–6.; Kreß, IntCrimLRev 6 (2006), 461, 498; Kreß, JIntCrimJust 3 (2005) 562, 577; Kreß, MK, § 6 VStGB, mn. 78, 82–8; Ambos, IRRC 91 (2009), 854–8 (proposing a combined structure- and knowledge-based approach); van der Wilt, JIntCrimJust 4 (2006), 241–4; Vest, ZStW 113 (2001), 480–6; Vest, Genozid durch organisatorische Machtapparate (2002), 101, 107–10; Vest, JIntCrimJust 5 (2007), 781, 786–97; Bassiouni/Manikas, The Law of the ICTY, 572; Gil Gil, ZStW 112 (2000), 395; similarly: Schabas, Genocide in Int'l Law (2nd ed.), 242–3; 264.

[468] See: Kreß, MK, § 6 VStGB, mn. 78.

on the other a much larger number of interchangeable 'foot soldiers'[469], henchmen and followers who contribute to the execution of the plan. Of these two types of perpetrators, the argument runs, only the leading figures need to act purposefully,[470] whereas with regard to the others, a certain degree of knowledge is sufficient.[471]

118 Although it would go beyond the scope of the present commentary to deal with all of the aspects of the knowledge-based approach, its key points shall now be critically appraised. The approach is essentially predicated upon the premise that *lege artis* interpretation of the specific intent requirement does not compel a restrictive construction in terms of the purpose-based approach, and thus allows for a fresh and more suitable reconception.[472] This premise is, however, challengeable. As the Convention is set out in five equally authentic languages, its interpretation is governed by the precepts of Articles 33 paras 3 and 4 VCLT and must therefore begin by either refuting or verifying the rebuttable presumption that the terms circumscribing genocidal intent have the same meaning in each authentic text.[473] To this effect, *Greenawalt*[474] and *Ambos*[475] have conclusively demonstrated that in the respective domestic criminal law systems the English ('intent'), French ('*intention*') and Spanish ('*intención*') terms have been held to embrace cases of mere foresight of a particular consequence, as well as cases of desiring a certain result. While this may raise hopes for a common ordinary meaning conveniently amenable to the knowledge-based approach, the Russian and Chinese versions suggest otherwise.

119 As regards the Russian text, 'с намерением уничтожить' commonly means 'with the purpose/aim to destroy' and thus clearly demands goal-directed action on the part of the perpetrator. This finding is not compromised by any divergent connotations in Russian legal terminology, as the noun 'намерение' (aim) is not used as a technical term in Russian criminal law in relation to intent: In Article 25, the General Part of the Russian Criminal Code (RCC) discerns 'direct intent'

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[469] Ambos, IRRC 91 (2009), 833, 846.

[470] While Vest (ZStW 113 (2001), 484) noted that *in extremis* a genocidal campaign would be conceivable where none of the individuals involved actually *seek* to destroy the victimized group, Kreß (JIntCrimJust 3 (2005), 562, 573–4; Kreß, MK, § 6 VStGB, mn. 82) rightly notes that such a scenario is of negligible importance in practice. See also Ambos (IRRC 91 (2009), 854–8) who inserts a third category, discerning top-/mid- and low-level perpetrators.

[471] Details are controversial. Some authors refrain from specifying the required extent of knowledge. (For instance, according to the pioneer of the knowledge-based approach Greenawalt (ColumbiaLRev 99 (1999), 2288) 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.' (Emphasis added). Similarly: Ambos, IRRC 91 (2009) 858.) Kreß (IntCrimLRev 6 (2006), 498) substantiates the knowledge-requirement, submitting that the genocidal act has to be committed 'with the *knowledge to further* thereby a campaign targeting members of a protected group with the *realistic goal* of destroying that group in whole or in part.' (Emphasis added). *Vest* (Genozid durch organisatorische Machtapparate (2002), 104–5; Vest, JIntCrimJust 5 (2007) 793) goes further and demands 'practically certain' foresight of the destruction to come.

[472] See: Kreß, JIntCrimJust 3 (2005), 562, 570.

[473] For the correct application of Article 33 VCLT see: Schiffbauer, Vorbeugende Selbstverteidigung, 291–4; Villiger, Commentary on the VCLT, Article 33 mn. 8–17; Papaux/Samson in: Corten/Klein, VCLTs Commentary Article 33, paras 72–92; Dörr in: Dörr/Schmalenbach, VCLT Commentary, Article 33 mns 33–9.

[474] Greenawalt, ColumbiaLRev 99 (1999), 2259, 2266–70.

[475] Ambos, IRRC 91 (2009), 833, 842–5.

(прямой умысел) and 'indirect intent' (косвенный умысел), with only the former requiring a volitional element, reflected by the term желание (wish, desire). Further, the word 'намерение' has not been incorporated into the domestic Russian provision on genocide in Article 357 RCC, which rather uses the passive participle 'Действия, направленные на' (Actions, *aimed/directed at*). Accordingly, Russian legal theory and jurisprudence do not attach specific legal implications to the term.[476] It therefore remains to conclude that – in accordance with its normal usage – the Russian wording does not allow for an interpretation other than the purpose-based approach.

The same holds true for the authentic Chinese version. In order to characterize **120** the specific intent-element, it employs the term 意图[477] (*yìtú*), *yì* meaning 'wish, urge', and *tú* for 'to plan, to design' if conceived as a verb, or for 'plan' or 'map' if taken to be a noun. Together, '*yìtú*' means 'goal-directed'/'aspiring for a goal'. This understanding concurs with the usage of 意图 (*yìtú*) in the criminal law context. Already exisiting in preceding criminal law regulations, the term was carried over into the current criminal code of the Republic of China (Taiwan) introduced in 1935, wherein it is employed to signify a specific intent-requirement which goes beyond the demands of general intent stipulated in Article 14 of the code. Circumscribing its precise content, academic commentaries equate the term with 意欲 (*yìyú*),[478] which stresses the element of desire or aspiration (欲 (*yú*) meaning 'desire', 'longing', 'appetite', 'wish'), 希望 (*xīwàng*)[479] which means 'to wish for', 'to desire', 'to hope', or目的 (*mùdi*),[480] which means 'goal', 'aim' or 'purpose'. The Criminal Code of the People's Republic of China understands 意图 (*yìtú*) in the same manner, though it does not employ the term frequently.[481] In this light, it seems safe to conclude that the Chinese wording does not extend to perpetrators who act without aspiring after the full or partial destruction of a group.

The presumption of equal meaning according to Article 33 para. 3 VCLT thus **121** being rebutted, Article 33 para. 4 VCLT next calls for the removal of the given discrepancies by application of Articles 31 and 32 VCLT.

At the outset, considering the ordinary meaning of the authentic text versions, **122** some weight should be given to the fact that all five versions allow for an interpretation in accordance with the purpose-based approach, whereas it is the knowledge-based approach that it is not possible to harmonize with the Russian and the Chinese versions.

Moreover, the motive-requirement 'as such' can scarcely be explained on the **123** basis of the knowledge-based approach. Rightly construed, this element demands the destructive intent to be evoked only by such motives as are based on the group's national, ethnic, racial or religious features.[482] Apparently therefore, in terms of Article II, genocidal intent needs to be something the perpetrator can be *motivated*

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[476] See, for instance: Kochoi, Ugulovnoe pravo, 56.
[477] The version of 1948 and the revised version of 1952 used the traditional writing 意圖.
[478] Feng Jinxiang/凤锦祥. Xingfa xiangjie/刑法详解, 198.
[479] Guo Wei/郭卫. Xingfaxue zonglun/刑法学总论, 163.
[480] Chen Wenbin/陈文彬. Zhongguo xin xingfa zonglun/中国新刑法总论, 113.
[481] Examples are Article 243 (falsely implicating another person for the purpose of having him criminally investigated) and Article 305 (witnesses, experts or interpreters making false statements for the purpose of framing another person or to conceal evidence).
[482] *Infra,* mns 146-148.

into, something which is amenable to being aroused, engendered or provoked. Mere awareness or knowledge do not qualify as such. Wilful decisions and the setting of goals do.

124 Further guidance can be drawn from the ICC-Statute, which constitutes a relevant subsequent agreement pursuant to Article 31 para. 3 lit. (a) VCLT. Unlike the formulations contained in the other authentic versions of the Genocide Convention, the Chinese formulation of genocidal intent was rephrased during the drafting of the ICC-Statute and the conventional term 意图 (*yìtú*) was altered into 蓄意 (*xùyì*), combining the aforementioned 意 (*yì*) with 蓄 (*xù*), which means 'to store' or 'to accumulate' as well as 'to cultivate' or 'to grow'. The term does not appear in the criminal code of the People's Republic of China[483] and hence does not bear a specific statutory meaning. In ordinary language, however, it distinctly connotes an element of premeditation or deliberation and may be best translated as 'malice'. In any event, an understanding in terms of mere knowledge must be ruled out. Similarly, the Arab version of the ICC-Statute employs the verb قصد (*qaṣada*) which means 'to aim at', 'to move towards' or 'to direct one's efforts towards',[484] and can also not be translated as 'knowledge' or 'awareness'. Unlike commonly assumed,[485] therefore, the reformulation of the Chinese version and the freshly couched Arab wording demonstrate that the ICC-Statute did not altogether copy the definition of Article II, but in fact sent a signal that nothing short of *aiming* at a group's full or partial destruction shall be regarded as genocidal intent.

125 This finding is supported by the preparatory work of the Convention, which may be invoked as a supplementary means of interpretation pursuant to Article 32 VCLT. As expounded above,[486] the purpose-based approach was proposed by the Secretariat Draft and found wide approval in both the *Ad Hoc* Committee and the Sixth Committee. Even more conclusively, at the Sixth Committee stage an amendment similar in scope to the knowledge-based approach was taken to vote and rejected by a strong majority.[487] This alternative conception proposed that the draft passage 'acts *aimed at* the physical destruction' should not be construed as implying the perpetrator's *desire* to destroy. Instead, it should be considered an objective element, requiring the individual acts to *result* in the destruction of groups.[488] Although not clearly enunciated at the time, it seems reasonable to hold that the advocates of this view did not mean to install a causal connection in terms

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[483] The Criminal Code of the People's Republic distinguishes direct intent (直接故意 *zhijie gùyì*) and indirect intent (间接故意 *jianjie gùyì*), the former requiring, *inter alia*, the 'wish' or 'hope' for a dangerous result to occur. Article 14 reads: 'An intentional crime is a crime constituted as a result of clear knowledge that one's own act will cause socially dangerous consequences, and of hope for or indifference to the occurrence of those consequences. ....' Beyond this general standard of criminal intent, a small number of offences additionally require the perpetrator to aim at or seek for a goal ulterior to the completion of the *actus reus*, which is usually marked by the said term 目的 (*mùdi*). By way of example, the unauthorized production of firearms (Article 126 (1), (2)) and the smuggling of obscene publications (Article 152 (1)) may be adduced, which require the perpetrator to aim at the illegal sale of the guns or to seek for profit or dissemination of the said publications, respectively.

[484] For a valuable insight into etymology and meaning of قصد (*qaṣada*), see: Bravmann, Studies in Semitic Philology, 559–62; Wehr, Arabisches Wörterbuch, 1029.

[485] See: Schabas, Genocide in Int'l Law (2nd ed.), 5.

[486] *Supra,* mns 20-23.

[487] UN Doc. A/C.6/SR.73, 97.

[488] UN Doc. A/C.6/SR.73, 95–6 (Mr. Morozov, Soviet Union; Mr. Chaumont, France).

of the over-exclusionary 'but-for'-test, but rather sought to clarify that the individual act needed to have a *contributory* effect on the destructive result. Subjectively, *vis-à-vis* this linkage between individual act and destructive result, general intent was deemed sufficient.[489] On the basis of this conception, a person acting with mere awareness of contributing to a genocidal campaign would be criminally liable for genocide. This proposal may thus be regarded as an early variant of the knowledge-based approach, and its defeat by 36 votes to 11 in the Sixth Committee[490] strongly militates against any revival of such a conception in the current interpretation of Article II. Moreover, it should be noted that the authentic Chinese text version of 1948 underwent a meticulous revision process in 1952,[491] in the course of which Article II was largely rephrased but nevertheless retained the aforementioned term 意图 (*yìtú*), implying purpose-orientation. In response to the ensuing circulation of the revised text amongst member states no rejections were registered,[492] providing a further argument in favour of the purpose-based approach.

However weighty the aforementioned formal points may seem, the pivotal question remains if the interpretation proposed here is fully reconcilable with the Convention's purpose of effectively preventing and punishing genocide (Article I). The proponents of the competing stance emphasize this point particularly,[493] claiming that the purpose-based standard is insufficient to adequately cover the commonplace scenario of subordinate participants who – often in obedience to superior orders – knowingly participate in the execution of a genocidal policy without personally aiming at the destruction of the targeted group.[494] Upon closer inspection, however, concerns of this kind turn out to be unfounded, and *lacunae* within the Convention's scope of protection should not be assumed: While such subordinate participants would be *perpetrators* of genocide according to the knowledge-based approach, the purpose-based approach can only consider them as *accomplices* (assistants) to genocide, pursuant to Article III lit. (e) of the Convention.[495] This categorization bears two consequences: First, forms of derivative criminal liability (instigating or ordering genocide) of the superior may be ruled out for want of a principal offence. Conversely, the superior's conduct can also not be assumed to be a principal offence, for, even if acting purposefully, the superior would not personally carry out an act under Article II lit. (a)–(e). He would thus only be punishable as a perpetrator if the subordinate's action could be *attributed* to him. This shows that the practicability and persuasiveness of the purpose-based approach essentially hinges on the availability and applicability of functioning concepts of criminal attribution. On the level of international criminal law, the unfolding discourse on criminal participation has hitherto produced two

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[489] UN Doc. A/C.6/SR.73, 96 (Mr. Chaumont, France).
[490] UN Doc. A/C.6/SR.73, 97.
[491] *Infra,* Article X mn. 10.
[492] Robinson, Genocide Convention, 117.
[493] Aside from this argument, an interesting number of points are brought forward by the proponents of the knowledge-based approach, which cannot be attended to in the present study.
[494] Kreß, JIntCrimJust 3 (2005), 562, 573–4; Greenawalt, ColumbiaLRev 99 (1999), 2279–82.
[495] Accordingly, this approach is also known as the 'complicity solution' (Kreß, JIntCrimJust 3 (2005), 573) or – with a slightly pejorative tone – 'complicity doctrine' (Greenawalt (ColumbiaLRev 99 (1999), 2282), who deems the utilization of complicity a means of circumventing the specific intent requirement).

approaches, (a) 'commission through another' as provided for in Article 25 para. 3 lit. (a) ICC-Statute, and (b) the concept of 'joint criminal enterprise' (JCE). As regards the former, the ICC, as the premier guardian and interpreter of the Statute, has thus far chosen to assess perpetratorship in accordance with the so-called 'control-of-the-crime-approach'.[496] Consequently, 'commission through another' can only be assumed where the superior in fact dominated the subordinates' acts, whether immediately or by virtue of a hierarchically structured machinery of power ('*Organisationsherrschaft*').[497] This may be a clear rule in cases involving stringent military hierarchies but could be hard to ascertain in other situations, for example the chaotic conditions of a civil war within a failed state. Where the required controlling influence cannot be established beyond doubt, a certain problem arises in the construction: The person behind the executor of the *actus reus*, even if possessing the required intent, would only qualify as an instigator, whose criminal liability calls for the existence of a principal offence. The executor of the material act, however, would not qualify as a principal offender for lack of genocidal intent. Thus, neither person could be prosecuted under Article II. Nevertheless, such *lacunae* should not be feared. First, masterminds, agitators and instigators of genocide still face liability for the inchoate crimes provided by Article III lit. (b)–(d) which do not require the completion of a principal offence. Second, on-site executors not sharing the genocidal intent would still be punishable for crimes against humanity, provided that the collective action is widespread or systematic in character. And third, in *Lubanga* the ICC Trial Chamber demonstrated a remarkably wide conception of *Organisationsherrschaft*, further diminishing the scope of unwarranted impunity.

127 Alternatively, the concept of joint criminal enterprise (JCE) as devised by the ICTY Appeals Chamber may be drawn upon, particularly the so-called 'basic' and 'systemic' forms (JCE I and JCE II, respectively).[498] JCE I presupposes, first, a group of persons who share a 'common plan, design or purpose' to commit a crime under international law, and second, a 'significant contribution' by each JCE-member to the jointly committed crime.[499] Accordingly, a group of masterminds and hate-mongers sharing a genocidal purpose would still be liable as joint offenders for the acts of the on-site executors, as these acts can be attributed to them as JCE-members, constituting their own 'significant contribution' to the joint crime of genocide. Within the ICTY's jurisprudence, ascribing a third

[496] ICC Lubanga, PTC, 29 January 2007, paras 330–4, 342–67; ICC Katanga and Chui, PTC, 30 September 2008, paras 480–539; ICC Lubanga, TC, 14 March 2012, paras 1003–5.

[497] For the doctrine of *Organisationsherrschaft* and its benefits within the realm of international criminal law, see: Ambos, Command responsibility, in: Nollkaemper/van der Wilt, System Criminality, 142–56.

[498] For an overview, see: Ambos, Treatise on International Criminal Law, 123–27; Werle, Int'l Criminal Law (2nd ed.), mns 455–64; Cryer/Friman/Robinson/Wilmshurst, An Introduction (2nd ed.), 367–74.

[499] Formerly having persistently held that any act 'in some way directed towards the furthering of the common plan' is sufficient, the Appeals Chamber in Brđanin (3 April 2007, para. 430) raised the threshold considerably, determining that anything short of a 'significant' contribution to the jointly committed crime shall not be considered in terms of JCE I.